

Award
NASD Dispute Resolution

In the Matter of the Arbitration Between:

R. Scott Taylor (Claimant) v. InterSecurities, Inc. and Herbert A. Pontzer (Respondents)

Case Number: 03-02619

Hearing Site: Cincinnati, Ohio

Nature of the Dispute: Associated Person vs. Member and Associated Person.

REPRESENTATION OF PARTIES

Claimant R. Scott Taylor ("Taylor") hereinafter referred to as "Claimant": Robert J. Hollingworth, Esq., Cors & Bassett, LLC, Cincinnati, OH.

Respondents InterSecurities, Inc. ("ISI") and Herbert A. Pontzer ("Pontzer") hereinafter collectively referred to as "Respondents": James F. Koehler, Esq., Gallagher, Sharp, Fulton & Norman, Cleveland, OH.

CASE INFORMATION

Statement of Claim filed on or about: April 2, 2003.

Claimant's Reply to Respondents' Counterclaim filed on or about: July 14, 2003.

Claimant signed the Uniform Submission Agreement: April 2, 2003.

Joint Statement of Answer and Counterclaim filed by Respondent on or about: July 1, 2003.

ISI signed the Uniform Submission Agreement: August 12, 2003.

Pontzer signed the Uniform Submission Agreement: August 13, 2003.

CASE SUMMARY

Claimant asserted against Respondents two interrelated claims: tortious interference with business opportunity and bad faith refusal to approve an application for registration in violation of the implied covenant of good faith and fair dealing required by NASD Regulations and the common law of Ohio.

The gravamen of Claimant's claims is that he had entered into a "succession plan" agreement with a third party whereby he and the third party would ultimately enter into a definitive contract by which he would acquire the third party's business upon the latter's retirement. As a condition precedent, Claimant was required to be registered with ISI. ISI's refusal to act favorably on Claimant's registration application resulted in these claims.

Respondents averred that ISI was without any duty, either in fact or in law, to approve Claimant's application and register him as an ISI representative. ISI further averred that its refusal to approve the registration application was within the discretion of Respondent Pontzer, its director of compliance, and that the refusal to approve Claimant's registration application was neither in bad faith nor with malice.

In addition, Respondents asserted a Counterclaim, averring that Claimant's claims were frivolous and in violation of Ohio Revised Code (R.C.) § 2323.51.

Unless specifically admitted in his Reply to Respondents' Counterclaim, Claimant denied the allegations made in the Counterclaim and asserted various affirmative defenses.

RELIEF REQUESTED

In his Statement of Claim, Claimant requested unspecified compensatory damages for loss of his prospective economic advantage; punitive damages; pre-judgment interest; affirmative injunctive relief requiring Respondents to approve his registration application; attorneys' fees and costs; and all other relief to which Claimant may be entitled.

In his Reply to Respondents' Counterclaim, Claimant requested that Respondents' Counterclaim be dismissed in its entirety, and that Claimant be awarded his costs, including reasonable attorneys' fees, and all such other relief to which Claimant may be legally entitled.

In their Answer and Counterclaim, Respondents requested dismissal of the Statement of Claim, compensatory damages, punitive damages, attorneys' fees and costs pursuant to R.C. §2323.51 in excess of \$25,000.00.

OTHER ISSUES CONSIDERED AND DECIDED

At the final pre-hearing conference, counsel for the parties stipulated, and it was ordered, that the hearing be bifurcated, with presentation and consideration of damages to be subject to a later further hearing, if warranted.

Upon conclusion of the hearing, the parties individually and each of their respective counsel and representatives acknowledged that they had been afforded full opportunity to present their cases, and that they had received a full and fair hearing of all issues in controversy.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, and the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are dismissed with prejudice.
2. Respondents' Counterclaim under Ohio's frivolous conduct statute R.C. § 2323.51, is dismissed with prejudice.
3. To the extent not specifically awarded or other wise provided for herein, or specifically agreed by the parties, all other claims and requests for relief by any party are denied with prejudice, and to the extent not otherwise agreed, the parties shall each bear their respective attorneys' fees and expenses, including preparation, travel, attendance, and any fees and expenses charged by their witnesses.

ARBITRATORS' DECISION

I. Factual Findings

Claimant Taylor is a 32-year-old resident of Blue Ash, Ohio, who holds a Bachelor's Degree in business from Indiana University and a Juris Doctor Degree from Cleveland Marshall School of Law. Taylor has been admitted to practice law in Ohio, however his license and privileges are suspended pending his compliance with the Ohio Supreme Court's continuing legal education requirements. Taylor has also acquired his series 7, 24 and 66 licenses from the NASD, and is qualified to conduct compliance audits consistent with ISI's internal policies and proceedings, and with the requirements of the Securities and Exchange Commission and the NASD.

In the fall of 1999, Taylor was engaged by ISI as an independent contractor to undertake branch office compliance audits in its Midwest Region.

In the spring of 2000, Taylor was offered regular employment by ISI to continue his auditing work as Regional Compliance Manager, Midwest. During his tenure as an independent contractor, and later as an employee, Taylor was subject to the supervision and direction of Respondent Pontzer, who was ISI's Vice President of Compliance. Pontzer testified that Taylor performed his compliance audit responsibilities in a satisfactory manner and without any corrective or disciplinary action. To enhance Taylor's usefulness, Pontzer authorized Taylor to become registered with ISI to enable him to exercise supervisory and training functions during his audit undertakings. Taylor's registration was approved in mid-October, 2000.

Not long after Taylor's registration was approved, he voluntarily, and unexpectedly,

resigned his position as Regional Compliance Manager, Midwest to accept a "lucrative" opportunity offered by an ISI affiliate, Callahan & Associates, where he was to supervise compliance and recruit employees. Taylor's move to Callahan occurred in mid-November, 2000. At the time he resigned his position as ISI's Regional Compliance Manager, Midwest, Taylor's assigned responsibilities included numerous field audits, which needed to have been completed by year's end. As a result of Taylor's resignation, Pontzer was under pressure to engage independent auditors at substantial expense to undertake and complete the audits left undone by Taylor.

In March 2001, Taylor's application to participate as a registered principal of ISI in its Medallion Stamp Signature Guarantee Program was approved, thereby enhancing his value to Callahan & Associates.

Eventually Taylor became dissatisfied with his Callahan affiliation, and became interested in associating with Bruce Ullrich, another ISI affiliate, doing business in Richmond, Indiana as PW Financial Services. Rather than requesting ISI to transfer his registration from Callahan & Associates to PW Financial Services, Taylor followed Ullrich's advice, and without prior discussion, notification or warning to ISI or to Pontzer, tendered his resignation to "ISI Licensing" on August 14, 2001. By his letter, Taylor resigned immediately as a registered principal of ISI, and severed his relationship with Callahan & Associates.

Upon receipt of Taylor's resignation, ISI filed with the NASD Central Registration Depository, the mandatory Form U-5 (UNIFORM TERMINATION NOTICE FOR SECURITIES INDUSTRY REGISTRATION), reporting his voluntary termination effective August 14, 2001.

In furtherance of the advice Taylor had received from Ullrich, on August 28, 2001, he completed and submitted to ISI a new Form U-4 (UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER), whereby he sought approval to become registered, and commence, a new affiliation with Ullrich's office, PW Financial Services in Richmond, Indiana. Contemporaneously, Taylor sought ISI's approval for three outside business activities consisting of: (1) the practice of law in estate planning, immigration and probate matters; (2) residential mortgage brokerage services; and (3) the sale of non-registered insurance products.

ISI never approved nor signed the documentation to approve Taylor's requested registration, referred to frequently during the hearing as "re-registration", and no written notification of approval was ever generated or communicated to Taylor. There was no testimony that any authorized representative of ISI expressly communicated to Taylor that his application had been approved.

Taylor testified that his application must have been approved because for several weeks thereafter he was able to access ISI's and its affiliated entities' secure web sites using his

former access code and a password he could not recall. In addition, Taylor testified that he was credited with certain commissions to which he would not have been entitled were his re-registration application to have been denied.

Taylor was the only witness whose testimony sought to support the conclusion that the refusal to approve his re-registration was the result of Pontzer's hatred, malice, ill will or revenge. Taylor testified about beliefs he held, but offered no independent testimony or documentary evidence to corroborate his conclusions about Pontzer.

Pontzer was employed with ISI as Vice President of Compliance from February 1998 to late November 2003. His responsibilities, in brief, were to enforce compliance with the securities laws and the regulations of the NASD and other self-regulatory organizations having authority over ISI's activities. Previously, Pontzer had been a corporate financial analyst with NASD since 1983.

Pontzer's compliance responsibility extended over more than 2,200 field representatives among 130 branch offices that were designated Offices of Supervisory Jurisdiction. Pontzer was responsible for initially engaging Taylor as an independent contractor, and had done so largely because Taylor had come highly recommended by a former supervisor named Joni Dunn.

Pontzer testified that he felt remorse that having initially hired Taylor, he would not "re-hire" or "re-register" him following Taylor's abrupt resignation in August 2001. Among other reasons, he considered Taylor's disclosures to be inaccurate; he considered Taylor's employment history to be characterized by short term commitments; and notwithstanding Taylor's previously satisfactory performance, he had concerns that Taylor's outside business activities could be difficult, if not impossible, to monitor and oversee.

Pontzer testified that although ISI had a process whereby a committee on which he served could review the rejection of a candidate's registration application, by and large his decision was binding on ISI's Licensing Department, and was for all intents and purposes, final.

Pontzer testified that ISI had certain registration guidelines, but that in addition there were two factors affecting Taylor's re-registration application that remained of paramount importance to him. First, his decision on a pending registration application was discretionary. Second, and more importantly, ISI had no relationship whatsoever with Taylor following his resignation, and therefore had no duty toward Taylor except the duty not to discriminate against him for reasons that were inapplicable.

Pontzer also testified, without refute, that at the time he decided to deny Taylor's re-registration application, he had no knowledge of the "Succession Plan" agreement Taylor and Ullrich had entered into. The only knowledge he had, which was self-evident from Taylor's re-registration application, was Taylor's desire to become affiliated with PW

Financial Services.

Pontzer expressly denied having rejected Taylor's re-registration application as the result of any ill will, malice, hatred, revenge or retaliatory motive. His testimony was that his decision was premised on relevant business considerations, including but not limited to: inaccuracies in Taylor's employment disclosures; a protracted NASD investigation which he felt was not likely to have been due to Taylor's tardiness; Taylor's employment history of short term commitments; Taylor's abrupt abandonment of his compliance audit responsibilities at the end of the year; concerns that Taylor's outside business activities could be difficult, if not impossible, to monitor and oversee; and that assertions of liability against ISI arising from those outside business activities was an undesirable risk.

The following analysis and discussion determines the issues presented.

II. Determination of the Tortious Interference Issue

In Ohio, it has been held that, "The torts of interference with business relationships and contract rights generally occur when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." (Citations omitted.) *A & B - Abell Elevator Company, Inc. v. Columbus/Central Ohio Building & Construction Trades Council* (1995), 73 Ohio St.3d 1; 651 N.E.2d 1283. See also, *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415; 650 N.E.2d 863, setting forth the elements of tortious interference with contract as: (1) existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional procurement of the contract's breach; (4) lack of justification also described as privilege; and (5) resulting damages.

Once a qualified privilege is found to exist by virtue of the relationship of the parties, the proponent is required to establish by the greater standard of clear and convincing evidence, that the tortfeasor's conduct evidences actual malice. *Smith v. Ameriflora 1992, Inc.* (1994), 96 Ohio App.3d 179, 187; 644 N.E. 2d 1038, 143; certiorari denied (1994), 71 Ohio St.3d 1427; 642 N.E. 2d 635. (Underlining supplied.)

The Panel's first unanimous conclusion is that at the time of the alleged wrongdoing, there was no relationship between Taylor and ISI or its managerial employees. Moreover, ISI had no duty to re-employ Taylor, to re-establish a contract with him, or to accept his application for registration. While ISI is bound by state and federal law not to have unlawfully discriminated against Taylor, those protections were never at issue, and are therefore not considered. Having no duty toward Taylor, ISI's determination to reject his application for re-registration breached no duty owed him.

The Panel's second unanimous conclusion is that ISI's determination to reject Taylor's application for re-registration cannot constitute interference with Taylor's anticipated business relationship with PW Financial Services because the rejection was not an

intentional procurement of the breach of Taylor's agreement with Ullrich. In fact, Ullrich never breached the agreement. Instead, Taylor and Ullrich themselves made Taylor's registration with ISI a condition precedent to performance of their contract. Both Taylor and Ullrich testified neither ever gave a thought to the possibility that Taylor's application for registration might not be approved. Taylor and Ullrich cannot by their agreement alone place ISI into a position of having to approve their relationship or incur liability for exercising its discretion not to. ISI has an absolute right to decide whom it will contract with. The exercise of that freedom cannot as a matter of law constitute the tort of interference with a contractual relationship.

The Panel's third unanimous conclusion is that ISI, and Pontzer by virtue of his position as Vice President of Compliance, enjoyed absolute discretion to determine for itself, with whom it will enter into business relationships. The only restriction on ISI's employment decisions is compliance with state and federal law prohibiting unlawful discrimination, and such issues are not present here.

The Panel's fourth unanimous conclusion is that no employee of ISI ever communicated information to any outside party in a manner that would induce or otherwise purposely cause them not to enter into, or continue a business relationship, or not to perform a contract, with Taylor. Ullrich was not brought to abandon his agreement with Taylor. Rather, the two of them, acting without the assistance of experienced legal counsel, had agreed upon a condition precedent—Taylor's re-registration with ISI—over which neither of them had control. Failure of that condition was not tortious interference; it was merely ISI's refusal to create a new relationship with Taylor, as to which it had absolute discretion.

Even assuming that a communication occurred between ISI and Ullrich on the subject of Taylor's registration and affiliation, such communication would have been qualified. To have met his burden, Taylor would then have had to establish the element of actual malice, *i.e.*, knowledge that the statements made were false or with reckless disregard as to their truth or falsity. *A & B - Abell Elevator Company, Inc., supra*. While the absence of any such communication makes the point moot, the Panel finds the record to be devoid of evidence of actual malice.

III. Determination of the Fair Dealing and Good Faith Issues

The second basis for relief asserted by Taylor is his allegation that Respondents failed to deal fairly with him, or in good faith. Taylor posits two arguments.

Taylor's first argument relies on the general maxim that all parties to a contract have an implied duty of good faith and fair dealing, citing *Criner v. Urologic Physicians & Surgeons, Inc.* (Dec. 15, 2000), Greene App. No. 2000-CA-5816, unreported; 2000 Ohio App. LEXIS 5816. The Panel notes that while the Second District Court of Appeals discussed this concept in *Criner*, it is clearly not its holding. The decision in *Criner*

merely makes reference to a Univ. of Cincinnati Law Review article which itself points out that California, Massachusetts and Montana have been the only states to incorporate this doctrine into their body of employment law. The *Criner* opinion actually points out that, "Ohio courts have not yet gone that far."

In Ohio, the law is clear that there is no duty of good faith and fair dealing within an employment-at-will relationship. *Pyle v. Ledex, Inc.* (1988), 49 Ohio App.3d 139 (motion to certify overruled at 38 Ohio St.3d 717), 551 N.E.2d 205. See, also *Phung v. Waste Management, Inc.* (1986), 23 Ohio St.3d 100; *Kahn v. St. John & West Shore Hosp.* (1989), 50 Ohio App.3d 23; *Tressner v. Pepsi-Cola Bottling Co. of Columbus* (Aug. 27, 1992), Franklin App. No. 91AP-1093, unreported; and *Edelman v. Franklin Iron & Metal Corp.* (1993), 87 Ohio App.3d 406. And an at-will employment termination may occur even in gross or reckless disregard of the employee's rights. *Brzowski v. Stouffer Hotel Co.* (1989), 64 Ohio App.3d 540. Notwithstanding this analysis, Taylor's first argument must fail simply because *there was no employment or other contractual relationship* between him and ISI following his unequivocal resignation.

Taylor's second argument relies on General Provision § 0113 (Interpretation) of the NASD Rules of the Association:

The Rules shall be interpreted in such manner as will aid in effectuating the purposes and business of the Association, and so as to require that all practices in connection with the investment banking and securities business shall be just, reasonable and not unfairly discriminatory.

Pursuant to § 0115 of the same General Provisions, the Rules are made applicable to all members and persons associated with a member, and persons associated with a member shall have the same duties and obligations as a member under the Rules.

The Panel finds the General Provisions to be guidelines for the professional conduct of members and associated persons, and do not give rise to a private cause of action in favor of a member or an associated person whose sense of reasonableness, justice, and fairness may be offended by a perceived violation. See, *Byrley v. Nationwide Life Ins. Co.* (1994), 94 Ohio App.3d 117; 640 N.E.2d 187 and *Emmons v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (S.D. Ohio, 1982), 532 F. Supp. 480.

For these reasons, Taylor failed to establish the elements necessary to prevail.

IV. Determination of the Frivolous Conduct Issue

Respondents' counterclaim is based on Ohio's frivolous conduct statute, R.C. § 2323.51. To the extent applicable in civil actions, "frivolous conduct" is the conduct of a party to a civil action that: (1) obviously serves merely to harass or maliciously injure another party

or is for another improper purpose such as a needless increase in the cost of litigation; (2) is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law; or (3) asserts allegations or other factual contentions which have no evidentiary support.

The Panel unanimously determines that Respondents' counterclaim must be dismissed based on the following findings.

During his tenure as an independent contractor, and later as an employee of ISI, Taylor had incurred no disciplinary actions or criticism from Pontzer or other ISI management. While ISI suggested that Taylor's personal and professional background was unsuitable for re-registration, no evidence of undisclosed criminal conduct, statutory disqualification or actionable conduct was established.

Having received no criticism, and having been subjected to no disciplinary actions during his tenure, Taylor could reasonably have concluded that his application for re-registration, which already had been endorsed by OSJ Skip Olsen and Bruce Ullrich, would have received routine approval. Taylor could reasonably have concluded that Pontzer would follow the recommendations of Ullrich and Olsen but did not do so due to some personal animus rather than for legitimate business reasons.

The evidence established that Taylor had exercised two absolute rights, either of which could reasonably have generated a retaliatory response from Pontzer.

The first was that Taylor correctly declined to allow review of the attorney-client files generated by his approved outside business activity. Taylor was obligated to maintain his clients' privilege, but in doing so necessarily frustrated Pontzer's obligation to supervise the activities of registered representatives for compliance with ISI's rules and industry regulations.

The second was that Taylor abruptly resigned from ISI knowing that his sudden departure would leave Pontzer hard-pressed to have necessary field compliance audits completed before 2001 year-end. Taylor clearly had the right to terminate his at-will employment at any time, with or without cause, and for any reason. Again, his doing so directly frustrated Pontzer's obligation to complete the audit schedule by year's end.

The Panel determines that while these considerations provided Pontzer legitimate business reasons to deny Taylor's re-registration application, Taylor's subjective belief that Pontzer's decision was motivated by actual malice under Ohio law was not without some evidentiary support. The Panel also determines that Taylor's claims were not asserted merely to harass or maliciously injure Pontzer or ISI.

For the foregoing reasons, the Panel unanimously determines that the frivolous conduct

counterclaim is properly dismissed with prejudice.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$250.00
Counterclaim filing fee	= \$500.00

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, InterSecurities, Inc. is a party.

Member surcharge	= \$1,500.00
Pre-hearing process fee	= \$ 750.00
Hearing process fee	= \$2,200.00

Forum Fees and Assessments

The Panel has assessed forum fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) Pre-hearing session with a single arbitrator @ \$450.00	= \$ 450.00
Pre-hearing conference: April 6, 2004 1 session	

One (1) Pre-hearing session with Panel @ \$1,000.00	= \$1,000.00
Pre-hearing conference: December 5, 2003 1 session	

Eight (8) Hearing sessions @ \$1,000.00	= \$8,000.00
Hearing Dates: April 21, 2004 3 sessions	
April 22, 2004 3 sessions	
April 23, 2004 2 sessions	

Total Forum Fees	= \$9,450.00
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1. The Panel has assessed \$4,725.00 of the forum fees against Claimant.
2. The Panel has assessed \$4,725.00 of the forum fees against jointly and severally against Respondents.

Fee Summary

1. Claimant is solely liable for:

Initial Filing Fee	= \$ 250.00
Forum Fees	= \$4,725.00
Total Fees	= \$4,975.00
<u>Less payments</u>	= \$1,500.00
Balance Due NASD Dispute Resolution	= \$3,475.00

2. Respondent ISI is solely liable for:

Member Fees	= \$4,450.00
Total Fees	= \$4,450.00
<u>Less payments</u>	= \$4,450.00
Balance Due NASD Dispute Resolution	= \$ 0.00

3. Respondents are jointly and severally liable for:

Counterclaim Filing Fee	= \$ 500.00
Forum Fees	= \$4,725.00
Total Fees	= \$5,225.00
<u>Less payments</u>	= \$1,500.00
Balance Due NASD Dispute Resolution	= \$3,725.00

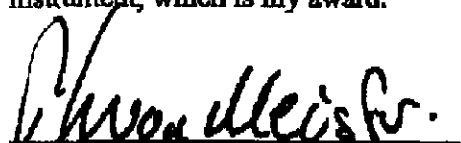
All balances are payable to NASD Dispute Resolution and are due upon receipt pursuant to Rule 10330(g) of the Code.

ARBITRATION PANEL

Peter F. von Meister, Esq.	-	Public Arbitrator, Presiding Chair
Lisa Shusterman	-	Public Arbitrator
John B. Glueckert	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.



Peter F. von Meister, Esq.
Public Arbitrator, Presiding Chairperson

05.17.04
Signature Date

Lisa Shusterman
Public Arbitrator

Signature Date

John B. Glueckert
Non-Public Arbitrator

Signature Date

May 17, 2004

Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Peter F. von Meister, Esq.	-	Public Arbitrator, Presiding Chair
Lisa Shusterman	-	Public Arbitrator
John B. Glueckert	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Peter F. von Meister, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Lisa Shusterman
Public Arbitrator

5.14.04
Signature Date

John B. Glueckert
Non Public Arbitrator

Signature Date

May 17, 2004
Date of Service (For NASD Dispute Resolution use only)

ARBITRATION PANEL

Peter F. von Meister, Esq.	-	Public Arbitrator, Presiding Chair
Lisa Shusterman	-	Public Arbitrator
John B. Glueckert	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

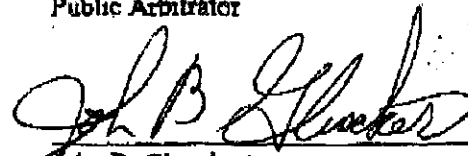
I, the undersigned arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Peter F. von Meister, Esq.
Public Arbitrator, Presiding Chairperson

Signature Date

Lisa Shusterman
Public Arbitrator

Signature Date



John B. Glueckert
Non-Public Arbitrator

5/14/04

Signature Date

May 17, 2004

Date of Service (For NASD Dispute Resolution use only)