

## Award

### NASD Regulation, Inc.

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In the Matter of the Arbitration Between

Name of Claimant

Joel Bernstein

96-01711

Name of Respondent

Doft & Co., Inc.

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### REPRESENTATION

For Joel Bernstein ("Claimant") appeared Hayward Pressman, Esq. and Diane Sammarco, Esq., of the law firm of Pressman & Associates and Robert Trien, Esq. of the law firm of Harvis & Trien, L.L.P. located in New York, New York.

For Doft & Co., Inc. ("Respondent") appeared Matthew Gluck, Esq. and Leticia Saucedo, Esq. of the law firm of Fried, Frank, Harris, Shriver, & Jacobson located in New York, New York.

### CASE INFORMATION

Claimant filed the Statement of Claim on April 18, 1996.

Claimant filed the Amended Statement of Claim on January 20, 1997.

Claimant signed the Uniform Submission Agreement on April 11, 1996.

Respondent filed the Statement of Answer on September 13, 1996.

Respondent filed an Amended Statement of Answer on March 27, 1997.

Respondent signed the Uniform Submission Agreement on September 13, 1996.

### HEARING INFORMATION

Pre-Hearing Conference:	September 2, 1997	One Session
	September 11, 1997	One Session
Hearing Dates:	March 26, 1997	Two Sessions
	March 27, 1997	Two Sessions
	November 30, 1998	Two Sessions
	December 4, 1998	One Session
	December 8, 1998	Two Sessions

December 10, 1998	Two Sessions
January 7, 1999	Two Sessions
February 5, 1999	Two Sessions
March 5, 1999	Two Sessions

The hearings were held at NASD Regulation, Inc., Office of Dispute Resolution ("NASD Regulation") located in New York, New York.

### CASE SUMMARY

Claimant alleged that he began his employment with Respondent in August of 1975. Claimant alleged that he entered into an employment agreement with Respondent which outlined his duties and method of compensation. According to the employment agreement, Claimant served a dual role while employed with the Respondent. Allegedly, Claimant was a broker and operated a securities trading account on behalf of the Respondent. It was alleged that for Claimant's broker services he was to be paid 45% of the gross commissions generated by Claimant for the firm and as compensation for handling the trading account Claimant was to receive 50% of the profits generated in the account. Claimant alleged that he initially received separate compensation payments for his services until Respondents changed the manner in which he was compensated and combined the payments. It was alleged that under the new payment system Claimant was paid the net profit between the accounts. Claimant alleged that, as a result, his payments varied immensely. In addition, Claimant alleged, that after investigation, he discovered that Respondent had unilaterally and retroactively changed the commission schedule upon which he was to be paid. Claimant alleged that not only did he not agree to the changes, but he was never notified in writing nor verbally. Claimant further alleged that after numerous requests, Respondent refused to provide a breakdown of the profits from the trading account. During this time, Claimant allegedly continued to work for Respondent without receiving a single payment. Claimant alleged that on September 10, 1995 he tendered his resignation and hired counsel to obtain his compensation. Upon receipt of an accounting from Respondents, Claimant alleged that fictitious sums were used to represent costs incurred by Claimant and offset any profit in the trading account.

Respondent denied the allegations of wrongdoing set forth in the Statement of Claim. Respondent maintained that at all times Claimant was aware of the modified and revised compensation system. Specifically, Respondent maintained that 1) on various occasions Claimant agreed to the changes; 2) changes in compensation were anticipated from the outset of employment because of the specific wording in the agreement; and 3) Claimant routinely received monthly checks for net commissions and as a result had the opportunity to question or dispute any paycheck at the time he was paid. Respondent denied any use of "fictitious sums" to offset profits in the trading account. Respondent asserted two affirmative defenses. First, the claims fail to state a claim upon which relief can be granted. Second, Claimant failed to mitigate any damages sustained. Respondent brought a counterclaim for premiums and employee

compensation concerning Claimant's health insurance coverage. Respondents maintained that they continued to pay the cost of Claimant's health insurance after he left Respondent's employ.

### **RELIEF REQUESTED**

Claimant requested, among other things:

1. Compensatory damages in the amount of \$1,064,791.22 plus interest for breach of contract and fraud or in the alternative, quantum meruit.
2. Compensatory damages in the amount of \$266,197.81 for statutory liquidated damages equal to twenty-five percent (25%) of the total amount of wages due.
3. Ordinary costs sustain by Claimant in connection with this matter to be established at hearing and the sum of \$50 as statutory costs.
4. Attorneys' fees incurred in connection with this matter; plus, pre-judgment interests on all damages awarded, costs, disbursement and filing fees.
5. That Respondent's counterclaim be dismissed in its entirety.

Respondent requested, among other things:

1. That the Statement of Claim be dismissed in its entirety.
2. Compensatory damages in the amount of \$18,915.37.
3. Costs, disbursements, and reasonable attorneys' fees incurred in connection with this matter.

### **OTHER ISSUES CONSIDERED & DECIDED**

Prior to the commencement of evidentiary hearings, by letter dated November 25, 1998, the parties settled all claims relating to 1) monies owed by Respondent to Claimant, including an accounting error made by Respondent; 2) an alleged reduction in Claimant's commission schedule; 3) alleged option transactions commissions due to Claimant; and 4) Respondent's counterclaims have been settled.

The parties also agreed to a bifurcated proceeding for Claimant's claims for his share of

the net profits of Respondent's trading account which he traded ("Trading Profits"). First, any liability and the method of quantifying it will be decided, followed, if necessary, by proceeding to quantify damages.

The Panel's Interim Order dated May 6, 1999 and Order of Production dated August 3, 1999 are incorporated into this Award and are attached as Exhibits A and B.

### **AWARD**

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

1. That Respondent is liable to Claimant and shall pay to Claimant the sum of \$75,476; plus interest thereon at the annual rate of 9% simple interest per annum from September 18, 1995 until the date the award is paid.
2. Each party shall bear its own counsel fees and expenses, except as Fees are specifically addressed below.
3. That claims not specifically addressed herein are denied in their entirety.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= \$ 250
Counter claim filing fee	= \$ 500

#### **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 event giving rise to the dispute. In this matter, the member firm is a party.

Member surcharge	= \$ 500
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#### **Adjournment Fees**

Adjournments requested during these proceedings:

March 3 - March 7, 1997, adjournment by Claimant	= \$1,000
May 27 - 30, 1997, adjournment by Respondent	= \$1,000

September 15 - 19, 1997, adjournment by Respondent	= \$1,000
November 10 - 12, 1997, adjournment by Respondent and Claimant	
Claimant assessed	= \$ 500
Respondent assessed	= \$ 500
March 25 - March 27, 1998, adjournment by Respondent	= \$1,000
September 9 -11, 1998, adjournment by Claimant	= \$1,000
January 22, 1999, adjournment by Claimant fee waived by Panel	= \$ 0

#### **Forum Fees and Assessments**

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

2 Pre-hearing sessions with a single arbitrator x \$300	= \$ 600
Pre-hearing conferences:	
September 2, 1997 1 session	
September 11, 1997 1 session	
17 Hearing sessions x \$1,000	= \$17,000
Hearing Dates:	
March 26, 1997 2 sessions	
March 27, 1997 2 sessions	
November 30, 1998 2 sessions	
December 4, 1998 1 session	
December 8, 1998 2 sessions	
December 10, 1998 2 sessions	
January 7, 1999 2 sessions	
February 5, 1999 2 sessions	
<u>March 5, 1999 2 sessions</u>	
Total Forum Fees	= \$17,600

1. The Panel has assessed \$8,800 of the forum fees to Claimant.
2. The Panel has assessed \$8,800 of the forum fees to Respondent.

#### **Administrative Costs**

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

1. Claimant received tape duplications for a total amount of \$195
2. Respondent received tape duplication for a total amount of \$225 and has paid \$150

**Fee Summary**

1. Claimant is assessed the following fees:

Initial Filing Fee	= \$ 500
Adjournment Fee	= \$ 2,500
Forum Fees	= \$ 8,800
<u>Administrative Costs</u>	<u>= \$ 195</u>
Total Fees	= \$11,995
<u>Less payments</u>	<u>= \$ 1,250</u>
Balance Due NASD Regulation, Inc.	= \$10,745

2. Respondent is assessed the following fees:

Filing Fee	= \$ 500
Member Surcharge	= \$ 500
Adjournment Fee	= \$ 3,500
Forum Fees	= \$ 8,800
<u>Administrative Costs</u>	<u>= \$ 225</u>
Total Fees	= \$13,525
<u>Less payments</u>	<u>= \$ 4,250</u>
Balance Due NASD Regulation, Inc.	= \$ 9,275

All balances are due and payable to NASD Regulation, Inc.

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.

*W E S. Browning*

William E.S. Browning, Chairman  
Public Arbitrator

*12/28/1999*  
Signature Date

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.

\_\_\_\_\_  
Joseph J. Cassidy, Panelist  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

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.

\_\_\_\_\_  
Theresa Y. Hu, Panelist  
Industry Arbitrator

\_\_\_\_\_  
Signature Date

*January 1, 2000*  
Date Award Served by NASD Regulation, Inc.

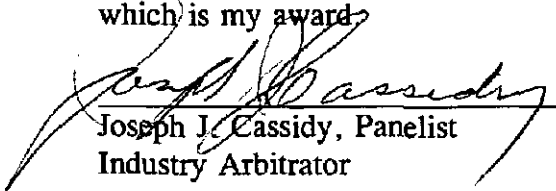
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William E.S. Browning, Chairman  
Public Arbitrator

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Signature Date

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Industry Arbitrator

12/23/99  
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Signature Date

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Theresa Y. Hu, Panelist  
Industry Arbitrator

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William E.S. Browning, Chairman  
Public Arbitrator

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Signature Date

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Theresa Y. Hu, Panelist  
Industry Arbitrator

1/8/2000  
\_\_\_\_\_  
Signature Date

January 1, 2000  
Date Award Served by NASD Regulation, Inc.

INTERIM ORDER

NASD Regulation, Inc.

Exhibit A

to

Award

Case No. 96-01711

In the Matter of the Arbitration Between

Name of Claimant

Joel Bernstein

96-01711

Name of Respondent

Doft & Co., Inc.

REPRESENTATION

For Joel Bernstein ("Claimant") appeared Hayward Pressman, Esq. and Diane Sammarco, Esq., of the law firm of Pressman & Associates and Robert Trien, Esq. of the law firm of Harvis & Trien, L.L.P. located in New York, New York.

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The hearings were held at NASD Regulation, Inc., Office of Dispute Resolution ("NASD Regulation") located in New York, New York.

### CASE SUMMARY

Claimant alleged that he began his employment with Respondent in August of 1975. Claimant alleged that he entered into an employment agreement with Respondent which outlined his duties and method of compensation. According to the employment agreement, Claimant served a dual role while employed with the Respondent. Allegedly, Claimant was a broker and operated a securities trading account on behalf of the Respondent. It was alleged that for Claimant's broker services he was to be paid 45% of the gross commissions generated by Claimant for the firm and as compensation for handling the trading account Claimant was to receive 50% of the profits generated in the account. Claimant alleged that he initially received separate compensation payments for his services until Respondents changed the manner in which he was compensated and combined the payments. It was alleged that under the new payment system Claimant was paid the net profit between the accounts. Claimant alleged that, as a result, his payments varied immensely. In addition, Claimant alleged, that after investigation, he discovered that Respondent had unilaterally and retroactively changed the commission schedule upon which he was to be paid. Claimant alleged that not only did he not agree to the changes, but he was never notified in writing nor verbally. Claimant further alleged that after numerous requests, Respondent refused to provide a breakdown of the profits from the trading account. During this time, Claimant allegedly continued to work for Respondent without receiving a single payment. Claimant alleged that on September 10, 1995 he tendered his resignation and hired counsel to obtain his compensation. Upon receipt of an accounting from Respondents, Claimant alleged that fictitious sums were used to represent costs incurred by Claimant and offset any profit in the trading account.

Respondent denied the allegations of wrongdoing set forth in the Statement of Claim. Respondent maintained that at all times Claimant was aware of the modified and revised compensation system. Specifically, Respondent maintained that 1) on various occasions Claimant agreed to the changes; 2) changes in compensation were anticipated from the outset of employment because of the specific wording in the agreement; and 3) Claimant routinely received monthly checks for net commissions and as a result had the opportunity to question or dispute any paycheck at the time he was paid. Respondent denied any use of "fictitious sums" to offset profits in the trading account. Respondent asserted two affirmative defenses. First, the claims fail to state a claim upon which relief can be granted. Second, Claimant failed to mitigate any damages sustained. Respondent brought a counterclaim for premiums and employee

compensation concerning Claimant's health insurance coverage. Respondents maintained that they continued to pay the cost of Claimant's health insurance after he left Respondent's employ.

### **RELIEF REQUESTED**

Claimant requested, among other things:

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3. Ordinary costs sustain by Claimant in connection with this matter to be established at hearing and the sum of \$50 as statutory costs.
4. Attorneys' fees incurred in connection with this matter; plus, pre-judgment interests on all damages awarded, costs, disbursement and filing fees.
5. That Respondent's counterclaim be dismissed in its entirety.

Respondent requested, among other things:

1. That the Statement of Claim be dismissed in its entirety.
2. Compensatory damages in the amount of \$18,915.37.
3. Costs, disbursements, and reasonable attorneys' fees incurred in connection with this matter.

### **OTHER ISSUES CONSIDERED & DECIDED**

Prior to the commencement of evidentiary hearings, by letter dated November 25, 1998, the parties settled all claims relating to 1) monies owed by Respondent to Claimant, including an accounting error made by Respondent; 2) an alleged reduction in Claimant's commission schedule; 3) alleged option transactions commissions due to Claimant; and 4) Respondent's counterclaims have been settled.

The parties also agreed to a bifurcated proceeding for Claimant's claims for his share of

the net profits of Respondent's trading account which he traded ("Trading Profits"). First, any liability and the method of quantifying it will be decided, followed, if necessary, by proceeding to quantify damages.

The panel's decision on the issues presented at the hearing dates, mentioned above, shall be incorporated into an Award at the conclusion of this matter.

Based on the panel's consideration of the pleadings, the testimony, and the evidence presented at the hearing that **IT IS HEREBY ORDERED:**

That Claimant's claim for Trading Profits is denied except that Claimant is awarded Trading Profits, if any, which would be created through reversal of a possible overstatement of interest and omission of income during the full period of Claimant's on premises employment.

That interest and profit should be recalculated for the on premises employment period to see if any additional Trading Profits are created, using, inter alia, the following criteria:

1. Changes in interest charges shall be applied only to long positions in the account and shall be applied to the cost of such positions;
2. There shall be no retroactive application, prior to its implementation, of weekend/holiday interest; and
3. During the Bear Stearns clearing period, the interest shall be the actual interest charged by Bear Stearns on the long positions in the account.

That with respect to short market value credits:

1. During the Bear Stearns clearing period the short market value credits allowed by Bear Stearns shall be allowed as income; and
2. During the Respondents self clearing period no short market value credits shall be allowed.

That during the self clearing period the interest rate charged shall be the lowest of a) the rate actually charged by Respondent to the account, b) 115% of the prevailing broker call rate, and c) for any month the rate charged by any outside lending source to Respondent for which any securities in any Respondent account were pledged.

That if the foregoing computations create additional Trading Profit payable to Claimant - on a 50% share basis- it shall be reduced, but to not less than zero, by \$15,123.50.

That Respondent's counterclaim has been settled as mentioned above and the amount thereof shall not affect the computation of Trading Profit described above.

That if the foregoing calculations result in additional Trading Profits due Claimant, interest thereon shall be added at the annual rate of 9% from September 18, 1995 to the date of judgment on the award.

**IT IS FURTHER ORDERED** that prior to June 30, 1999:

1. The parties shall submit a monetized award on the interest and short market value claim for confirmation; or
2. Either party may request the NASD to schedule additional hearings on the computation of damages on such claims.

Failure of either to occur will result in the Panel issuing an Award in favor of Respondent on the interest and short market value issue and incorporating the Panel's other findings noted above into the Award.

#### OTHER COSTS

The Panel determined that the postponement fees shall be assessed as follows:

Claimant shall pay the postponement fee of \$1,000 for each of the following sets of hearing dates that were postponed: March 3 through March 7, 1997 and September 9 through September 11, 1998. The Panel waived the postponement fee for Claimant's adjournment of the January 22, 1999 hearing date.

Respondent shall pay the postponement fee of \$1,000 for each of the following sets of hearing dates that were postponed: May 27 through May 30, 1997; September 15 through September 19, 1997; and, March 25, 1998 through March 27, 1998.

The parties agreed to equally share the postponement fee for adjourning the November 10 through November 12, 1997 hearing dates; so that Claimant and Respondent will each bear \$500 as their share of the postponement fee.

Claimant has incurred \$2,500 in postponement fees which he shall pay.

Respondent has incurred \$3,500 in postponement fees which it is entitled to offset with its postponement fees of \$3,000 that it previously paid so that Respondent owes \$500 in postponement fees.

Claimant owes \$195 in administrative costs for tape duplication.

Respondent incurred administrative costs for tape duplication in the amount of \$225 of which it has paid \$150 so that Respondent owes \$75 for tape duplication.

Total Other Costs owed by Claimant is \$2,695.

Total Other Costs owed by Respondent is \$575.

### INTERIM FORUM FEES

Pursuant to Rule 10205(c) of the Code of Arbitration Procedure, the Panel determined the interim forum fees as set forth below:

The arbitrators have assessed the following forum fees:

2 Pre-Hearing Conferences	x	\$300.00	\$600.00
17 Hearing Sessions	x	\$1,000.00	\$17,000.00
Total Forum Fees			\$17,600.00

Claimant has been assessed \$8,800.00 representing one half of the total forum fees assessed. Claimant previously deposited \$750 as a hearing session deposit which he is entitled to apply toward his interim forum fees. Claimant, therefore, owes interim forum fees in the amount of \$8,050.00.

Respondent has been assessed \$8,800.00 representing one half of the interim forum fees assessed. Respondent is entitled to offset this amount with its hearing session deposit of \$600 previously deposited so that the amount owed as interim forum fees from Respondent is \$8,200.

All fees are payable to the NASD Regulation, Inc. Office of Dispute Resolution

**ARBITRATORS' SIGNATURES**

*W.E.S. Browning*

William E.S. Browning, Chairman  
Public Arbitrator

*4/30/99*

Date Signed

Joseph J. Cassidy, Panelist  
Industry Arbitrator

Date Signed

Theresa Y. Hu, Panelist  
Industry Arbitrator

Date Signed

Date Interim Order served by NASD Regulation, Inc.

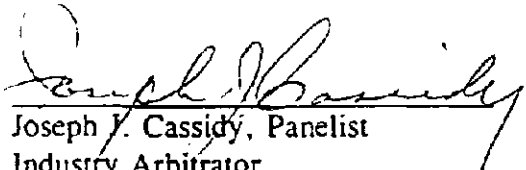
*May 6, 1999*



ARBITRATORS' SIGNATURES

\_\_\_\_\_  
William E.S. Browning, Chairman  
Public Arbitrator

\_\_\_\_\_  
Date Signed

  
\_\_\_\_\_  
Joseph J. Cassidy, Panelist  
Industry Arbitrator

4/29/99  
\_\_\_\_\_  
Date Signed

\_\_\_\_\_  
Theresa Y. Hu, Panelist  
Industry Arbitrator

\_\_\_\_\_  
Date Signed

Date Interim Order served by NASD Regulation, Inc.

May 6, 1999

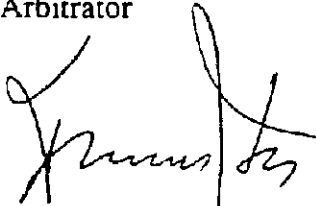
ARBITRATORS' SIGNATURES

\_\_\_\_\_  
William E.S. Browning, Chairman  
Public Arbitrator

\_\_\_\_\_  
Date Signed

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Joseph J. Cassidy, Panelist  
Industry Arbitrator

\_\_\_\_\_  
Date Signed



\_\_\_\_\_  
Theresa Y. Hu, Panelist  
Industry Arbitrator

\_\_\_\_\_  
5/10/99  
Date Signed

Date Interim Order served by NASD Regulation, Inc.

May 6, 1999.

# Exhibit B

NASD Regulation, Inc. Office of Dispute Resolution

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In the Matter of the Arbitration Between

Joel Bernstein

Claimant

vs.

Doft & Co., Inc.

Respondent

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ORDER  
OF  
PRODUCTION

## ORDER OF PRODUCTION

TO: Joel Bernstein  
c/o Robert M. Trien, Esq.  
750 Lexington Ave. Ste. 600  
New York, NY 10022

and

Doft & Co., Inc.  
c/o Matthew Gluck, Esq.  
Fried, Frank, Harris, Shriver & Jacobson  
One New York Plaza  
New York, NY 10004-1980

The Panel has reviewed the correspondence of the parties dated June 25, June 29 and July 26, 1999. The Panel hereby directs as follows:

1. The Respondent will prepare a memorandum covering the Bear Stearns period making the computations prescribed in the Interim Order.
2. For Respondent's self clearing period, Respondent will prepare a memorandum showing:

- (i) The amount of interest charged; and
- (ii) How it was computed and, if not known, so state.

Referring to the computation reference points ( a ) through ( c ) in the Interim Order, Respondent shall note which point has been used. If point ( c ) is unavailable, point ( b ) which is a published point, shall be used. Point ( a ) should be known if the positions and interest are known.

3. If for any period, positions and interest are unknown, Respondent should so state and the Panel will consider any inferences and consequences to be drawn from the absence of information.

4. Respondent's memoranda shall cite its sources and make such sources, appropriately organized and indexed by subject and identified time period, available to Claimant.

Respondent should submit the above results to Claimant and the NASD Regulation, Inc. by Friday, September 17, 1999. Such submissions may contain a precise computation of Trading Profits, or demonstrating the absence thereof, in accordance with the Interim Order and this Response. Claimant may respond prior to Friday, October 1, 1999. The parties should then submit any requests for additional guidance or proceedings prior to Friday, October 8, 1999.

Based on the foregoing, the Panel will then consider further guidance, proceedings or the issuance of a Final Award.

William E.S. Browning / *WES*  
William E.S. Browning, Esq.

On behalf of the Presiding Arbitrators  
(Shari L. Sturm, NASD Regulation, Inc.  
Senior Attorney signing for Chairman Browning  
at his verbal directive)

Date Ordered Signed: August 3, 1999