

**Award**  
**NASD Dispute Resolution, Inc.**

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In the Matter of the Arbitration Between

**Names of Claimants**

David E. Graham, Jr.  
Elizabeth Graham

Case No. 99-04805

**Names of Respondents**

Coleman & Company Securities, Inc.  
Andrew J. Fernholz  
Dalton Kent Securities Group, Inc.

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**REPRESENTATION OF PARTIES**

For David E. Graham, Jr. and Elizabeth Graham, hereinafter collectively referred to as "Claimants": Roger W. Van Deusen, Esq., Chattman, Gaines & Stern, P.A., Cleveland, Ohio.

For Coleman & Company Securities, Inc. ("Coleman"): Michael H. Ference, Esq., Sichenzia, Ross & Friedman, LLP, New York, New York.

For Andrew J. Fernholz ("Fernholz"): M. David Sayid, Esq., Sayid & Associates, LLP, New York, New York. On or about August 17, 2000, M. David Sayid withdrew as counsel for Respondent Fernholz, and thereafter Respondent Fernholz appeared pro se.

Dalton Kent Securities Group, Inc. ("Dalton Kent"): Andrew J. Levander, Esq., David S. Hoffner, Esq. and Eugene E. Ingoglia, Esq., Swidler, Berlin, Shereff & Friedman, LLP, New York, New York.

**CASE INFORMATION**

Statement of Claim filed on or about: October 25, 1999.

Claimants signed the Uniform Submission Agreement on: October 13, 1999.

Statement of Answer, Motion to Dismiss the Statement of Claim, and Cross Claim, filed by Respondent Coleman on or about: January 6, 2000.

Respondent Coleman did not file an executed Uniform Submission Agreement.

Statement of Answer filed by Respondent Fernholz on or about: February 8, 2000.

Respondent Fernholz signed the Uniform Submission Agreement on: March 8, 2000.

Statement of Answer filed by Respondent Dalton Kent on or about: January 11, 2000.

Respondent Dalton Kent signed the Uniform Submission Agreement on: January 7, 2000.

### CASE SUMMARY

Claimants asserted the following causes of action: 1) breach of contract; 2) fraud; 3) failure to supervise; and 4) conversion. The causes of action relate to day trading of unspecified securities, the misappropriation of Claimants' investments and funds, and the transfer of Claimants' investments and funds from Respondent Dalton Kent to Respondent Coleman.

Unless specifically admitted in his Answer, Respondent Fernholz denied the allegations made in the Statement of Claim and asserted the following defenses: 1) Respondent Fernholz did not violate a written contract, statute, law, rule, or regulation, in connection with the allegations set forth in the Statement of Claim; 2) Claimant David Graham assumed the risk of his transactions; 3) Claimant David Graham authorized the purchase and sale of all securities maintained with Respondents; 4) Claimant David Graham had or should have had full knowledge of all material facts concerning his securities accounts maintained with Respondents; 5) Claimants failed to state a claim upon which relief may be granted; 6) Claimants waived all claims for relief against Respondents; 7) Claimants are estopped from asserting their claims set forth in the Statement of Claim; 8) Claimants ratified and approved each transaction at issue; 9) Claimants are barred by their contributory fault, comparative fault, recklessness, and failure to exercise due diligence; 10) Claimant could not have reasonably relied upon any alleged representations set forth in the Statement of Claim; 11) Claimants failed to mitigate their damages; 12) Claimants assumed the risks of their investments; and 13) Claimants are barred from recovery by the doctrine of unclean hands.

Unless specifically admitted in its Answer, Respondent Dalton Kent denied the allegations made in the Statement of Claim and asserted the following defenses: 1) Claimants failed to state a claim upon which relief may be granted; 2) Respondent Dalton Kent did not cause damages to Claimants; 3) Claimants' losses or damages were caused or contributed to by Claimants' recklessness and general lack of due care; 4) Claimants' damages, if any, were caused by market conditions or other independent forces over which Respondent Dalton Kent had no control and for which it cannot be held liable; 5) Claimants are barred from recovery by the doctrines of estoppel, waiver, laches, and ratification; 6) Claimants failed to timely object to the transactions at issue; 7) Claimants failed to mitigate their damages; 8) Respondent Dalton Kent acted in good faith in discharging its obligations, if any, to Claimants; 9) Respondent Dalton Kent exercised at least that degree of care, diligence and skill required of it under the circumstances; and 10) Respondent Dalton Kent is not liable for any damages to Claimants resulting from Respondent Fernholz's alleged conduct.

Unless specifically admitted in its Answer, Respondent Coleman denied the allegations made in the Statement of Claim and asserted the following defenses: 1) Claimants failed to plead their claims with particularity; 2) Claimants failed to state a claim upon which relief may be granted; 3) Claimants' damages, if any, are speculative, remote and unsupported by competent evidence; 4) Claimants are barred from recovery by the doctrine of laches; and 5) Claimants failed to mitigate their damages and are thereby barred from recovery.

Respondent Coleman asserted a cause of action for indemnification in its cross claim against

Respondent Fernholz for any liability found by the Panel as to Respondent Coleman. Respondent Coleman alleged that any wrongdoing by Respondent Fernholz was inconsistent with the internal policies of Respondent Coleman and constituted a breach of his fiduciary relationship with Respondent Coleman.

### **RELIEF REQUESTED**

Claimants requested: 1) compensatory damages in the amount of \$737,585.75; and 2) punitive damages.

Respondent Fernholz requested: 1) dismissal of the Statement of claim; 2) costs; 3) attorneys' fees in an amount not less than \$15,000.00; and 4) such other relief the undersigned arbitrators (the "Panel") deemed just and proper.

Respondent Dalton Kent requested: 1) dismissal of the Statement of Claim; 2) costs; 3) attorneys' fees; 4) an order prohibiting Respondent Fernholz from asserting a claim for indemnification; and 5) such other relief the Panel deemed just and proper.

Respondent Coleman requested: 1) dismissal of the Statement of claim; 2) indemnification; 3) costs; 4) attorneys' fees; 5) an order prohibiting Respondent Fernholz from asserting a claim for indemnification; and 6) such other relief the Panel deemed just and proper.

### **OTHER ISSUES CONSIDERED AND DECIDED**

Respondent Coleman did not file with NASD Dispute Resolution, Inc. a properly executed submission to arbitration but is required to submit to arbitration pursuant to the Code and, having answered the claim, is bound by the determination of the Panel on all issues submitted.

On or about January 6, 2000, Respondent Coleman filed its Motion to Dismiss wherein Respondent Coleman requested dismissal of the Statement of Claim. On or about June 23, 2000, Claimants filed their Memorandum in Opposition to Respondent Coleman's Motion to Dismiss. On July 12, 2000, the Panel conducted a telephonic pre-hearing conference on the motion to dismiss, and the Panel denied the motion to dismiss.

On or about June 14, 2000, Respondent Coleman submitted, without consent of the Panel, its Counterclaim against Claimants. In accordance with Rule 10328 of the NASD Code of Arbitration Procedure, the Panel did not deem the Counterclaim filed, and therefore the Panel made no determination with respect to the Counterclaim.

On or about September 8, 2000, Respondent Dalton Kent filed its Memorandum of Law in Support of its Motion for Summary Judgment. Respondent Dalton Kent moved for summary judgment on the Statement of Claim and dismissal of the Statement of Claim as to Respondent Dalton Kent. On or about September 20, 2000, Claimants filed their Memorandum of Law in Opposition to Respondent Dalton Kent's Motion for Summary

Judgment. Thereafter, Respondent Dalton Kent filed its Reply Memorandum in Further Support of its Motion for Summary Judgment. On October 6, 2000, the Panel conducted a telephonic pre-hearing conference on the motion for summary judgment, and the Panel denied the motion for summary judgment.

On or about October 6, 2000, Respondent Coleman filed its Renewed Motion to Dismiss wherein Respondent Coleman requested dismissal of the Statement of Claim. On or about October 13, 2000, Claimants filed their Memorandum in Opposition to Respondent Coleman's Renewed Motion to Dismiss. On October 20, 2000, the Panel conducted a telephonic pre-hearing conference on the renewed motion to dismiss. The Panel ordered the parties to notify NASD Dispute Resolution, Inc. in writing no later than October 30, 2000 of their need to present oral argument on the joint motion. NASD Dispute Resolution, Inc. did not receive a request for oral argument. On October 31, 2000, the Panel granted the renewed motion to dismiss.

On or about October 18, 2000, Claimants and Respondent Dalton Kent filed their joint motion for an order of the Panel to: 1) permit the dismissal, without prejudice, of all claims as to Respondent Fernholz; and 2) enter a settlement bar to prohibit any claim of contribution or indemnification by Respondent Fernholz against Respondents Dalton Kent and Coleman. On October 20, 2000, the Panel conducted a telephonic pre-hearing conference on the joint motion. The Panel ordered the parties to notify NASD Dispute Resolution, Inc. in writing no later than October 30, 2000 of their need to present oral argument on the joint motion. NASD Dispute Resolution, Inc. did not receive a request for oral argument. On October 31, 2000, the Panel granted the joint motion to dismiss wherein the Panel permitted the dismissal, without prejudice, of all claims as to Respondent Fernholz and ordered a settlement bar to prohibit any claim of indemnification or contribution by Respondent Fernholz against Respondents Dalton Kent and Coleman.

On or about November 21, 2000, Claimants notified NASD Dispute Resolution, Inc. that Claimants, Respondent Dalton Kent and Respondent Coleman had reached a settlement.

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 settlement of the parties, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. All claims as to Respondents Coleman and Dalton Kent are dismissed with prejudice.
2. All claims as to Respondent Fernholz are dismissed without prejudice.
3. Respondent Fernholz is barred from asserting a claim of indemnification or contribution against Respondents Dalton Kent and Coleman.

All other requests for relief not specifically addressed herein are denied.

### **FEES**

Pursuant to the NASD Code of Arbitration Procedure (the "Code"), the following fees are assessed:

#### **Filing Fees**

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

Initial claim filing fee	= \$ 375.00
Cross claim filing fee	= \$1,250.00

#### **Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter, the member firms are parties.

Member surcharge	= \$2,000.00
Pre-hearing process fee	= \$ 600.00
Hearing process fee	= \$3,500.00

#### **Adjournment Fees**

Adjournments requested during these proceedings:

November 1, 2 and 3, 2000, adjournment request by Respondent Dalton Kent (Adjournment fee waived by Panel)	= \$0.00
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#### **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:

Four (4) Pre-hearing sessions with Panel x \$1,200.00	= \$4,800.00
Pre-hearing conferences:	
June 15, 2000	1 session
July 12, 2000	1 session
October 6, 2000	1 session
October 20, 2000	1 session

Total Forum Fees	= \$4,800.00
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The Panel has assessed \$2,400.00 of the forum fees jointly and severally to Claimants.  
The Panel has assessed \$2,400.00 of the forum fees jointly and severally to Respondents Coleman, Fernholz and Dalton Kent.

### 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.

There were no administrative costs incurred during these proceedings.

### Fee Summary

Claimants be and hereby are jointly and severally liable for:

Initial Filing Fee	= \$ 375.00	
Forum Fees	= \$2,400.00	
Total Fees	= \$2,775.00	
<u>Less payments</u>	<u>= \$1,575.00</u>	
Balance Due NASD Dispute Resolution, Inc.		= \$1,200.00

Respondent Coleman be and hereby is solely liable for:

Cross Claim Filing Fee	= \$1,250.00	
Member Fees	= \$6,100.00	
Total Fees	= \$7,350.00	
<u>Less payments</u>	<u>= \$1,733.36</u>	
Balance Due NASD Dispute Resolution, Inc.		= \$5,616.64

Respondent Dalton Kent be and hereby is solely liable for:

Member Fees	= \$6,100.00	
Total Fees	= \$6,100.00	
<u>Less payments</u>	<u>= \$6,100.00</u>	
Balance Due NASD Dispute Resolution, Inc.		= \$0.00

Respondents Dalton Kent, Coleman and Fernholz be and hereby are jointly and severally liable for:

Forum Fees	= \$2,400.00	
Total Fees	= \$2,400.00	
<u>Less payments</u>	<u>= \$ 500.00</u>	
Balance Due NASD Dispute Resolution, Inc.		= \$1,900.00

All balances are payable to NASD Dispute Resolution, Inc. and are due immediately upon receipt of the Award by the parties.

### Concurring Arbitrators' Signatures

/s/  
Wayne Parker

Signature Date

Public Arbitrator, Presiding Chair

/s/  
Arne Hovdesven, Esq.  
Public Arbitrator

                      
Signature Date

/s/  
Edward R. Hipp, III  
Industry Arbitrator

                      
Signature Date

April 3, 2001  
Date of Service (For NASD-DR office use only)

**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.

There were no administrative costs incurred during these proceedings.

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Balance Due NASD Dispute Resolution, Inc.		= \$1,200.00

Respondent Coleman be and hereby is solely liable for:

Cross Claim Filing Fee	= \$1,250.00	
Member Fees	= \$6,100.00	
Total Fees	= \$7,350.00	
<u>Less payments</u>	<u>= \$1,733.36</u>	
Balance Due NASD Dispute Resolution, Inc.		= \$5,616.64

Respondent Dalton Kent be and hereby is solely liable for:

Member Fees	= \$6,100.00	
Total Fees	= \$6,100.00	
<u>Less payments</u>	<u>= \$6,100.00</u>	
Balance Due NASD Dispute Resolution, Inc.		= \$0.00

Respondents Dalton Kent, Coleman and Fernholz be and hereby are jointly and severally liable for:

Forum Fees	= \$2,400.00	
Total Fees	= \$2,400.00	
<u>Less payments</u>	<u>= \$ 500.00</u>	
Balance Due NASD Dispute Resolution, Inc.		= \$1,900.00

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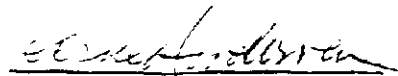
**Concurring Arbitrators' Signatures**

  
Wayne Parker

  
Signature Date



Public Arbitrator, Presiding Chair



Arne Hovdesven, Esq.  
Public Arbitrator

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Signature Date

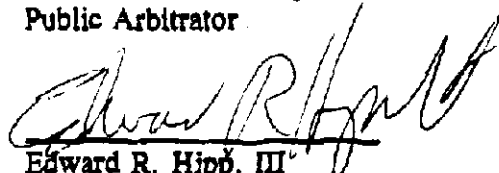
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Edward R. Hipp, III  
Industry Arbitrator

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Signature Date

\_\_\_\_\_  
Date of Service (For NASD-DR office use only)

Public Arbitrator, Presiding Chair

Arne Hovdesven, Esq.  
Public Arbitrator

  
Edward R. Hipp, III  
Industry Arbitrator

Signature Date

3-22-01  
Signature Date

Date of Service (For NASD-DR office use only)