

**Award
NASD Dispute Resolution**

In the Matter of the Arbitration Between:

Name of the Claimants

Roger and Mary Candace Brush,
Floyd and Sabra Adams, Robert and
Sandra Bryans, Lance and Sharon Holmer,
Ray Ridgley, Harold and Carolyn Sloan, and
Clifford Schiller and Peggy Schiller, Michael
And Rena Gower, John Paul and Shirley Jones,
Kenneth and Deborah Valle, and Charles and
Judy Schiller

Case Number: 03-02100

Name of the Respondent

Merrill Lynch Pierce Fenner & Smith, Inc.

Hearing Site: Indianapolis, Indiana

NATURE OF DISPUTE

Customers vs. Member Firm

REPRESENTATION OF PARTIES

David L. McGee, Esq. and Peter Mougey, Esq. of the law firm Beggs & Lane, located in Pensacola, Florida represented Claimants, Roger and Mary Candace Brush ("Brush"), Floyd and Sabra Adams ("Adams"), Robert and Sandra Bryans ("Bryans"), Lance and Sharon Holmer ("Holmer"), Ray Ridgley ("Ridgley"), Harold and Carolyn Sloan ("Sloan"), and Clifford Schiller and Peggy Schiller, Michael and Rena Gower ("Gower"), John Paul and Shirley Jones ("Jones"), Kenneth and Deborah Valle ("Valle"), and Charles and Judy Schiller, hereinafter collectively referred to as "Claimants."

James L. Petersen, Esq. and Philip Whistler, Esq. of the law firm Ice Miller, located in Indianapolis, Indiana, along with co-counsel, Peter S. Fruin, Esq. of the law firm Maynard, Cooper & Gale, P.C. located in Birmingham, Alabama represented the Respondent, Merrill Lynch Pierce Fenner & Smith, Inc. ("Merrill Lynch"), hereinafter referred to as "Respondent."

CASE INFORMATION

The Statement of Claim was filed on or about March 21, 2003. Claimants Brush jointly signed the Uniform Submission Agreement on January 19, 2003; Adams jointly signed the Uniform Submission Agreement on January 20, 2003; Sandra G. Bryans signed the Uniform Submission Agreement on January 22, 2003; Robert G. Bryans signed an undated Uniform Submission Agreement; Lance Holmer signed an undated Uniform Submission Agreement; Sharon Holmer signed an undated Uniform Submission Agreement; Ridgley signed an undated Uniform Submission Agreement; Sloan jointly signed the Uniform Submission Agreement on December 21, 2003; Clifford and Peggy Schiller jointly signed a Uniform Submission Agreement on January 21, 2003; Gower jointly signed an undated Uniform Submission Agreement; John Paul

Jones signed the Uniform Submission Agreement on January 22, 2003; Shirley L. Jones signed the Uniform Submission Agreement on January 22, 2003; Valle jointly signed the Uniform Submission Agreement on February 12, 2003 and March 3, 2003; and Charles and Judy Schiller signed an undated Uniform Submission Agreement.

Respondent Merrill Lynch filed a Statement of Answer on July 10, 2003 and an Amended Answer on August 6, 2003. Respondent Merrill Lynch signed the Uniform Submission Agreement on May 1, 2003.

Claimants filed a Motion to Amend Statement of Claim and Amended Statement of Claim on December 2, 2003. Respondent Merrill Lynch filed its Response on December 22, 2003 and Claimants filed a Reply on January 16, 2004.

Respondent filed a Motion to Sever Claims on November 26, 2003. Claimants filed a Response on December 22, 2003 and Respondent filed a Reply on December 31, 2003.

CASE SUMMARY

Claimant asserted the following causes of action: breach of fiduciary duty, violation of Blue Sky Laws, negligence, failure to supervise, fraud and misrepresentations. The causes of action relate to Claimants' Marathon Oil Refinery thrift plans, which were rolled over to Merrill Lynch and invested in various stocks, bonds and equity mutual funds, including but not limited to, shares in AIM Value Fund; Alliance Premier Growth Fund; Davis New York Venture fund; Fidelity Advisor Overseas Fund; Janus Twenty Fund; Merrill Lynch Pacific Fund; Robertson Stephens Emerging Growth Fund; Oracle; Wells Fargo; Time Warner; Sun Microsystems; Pfizer; Citigroup; McDonald; AT&T and Enron. Claimants asserted that Merrill Lynch encouraged them to take early retirement, take a lump-sum payout for their pension and forward their portfolio to Merrill Lynch Financial Advisors ("MFA"). Claimants further asserted that their accounts were invested in disproportionate equities with MFA and were unsuitable to their investment needs and objectives.

Unless specifically admitted in its Answer and Amended Answer, Respondent Merrill Lynch denied the allegations made in the Statement of Claim and asserted the following defenses: waiver, laches and estoppel; failure to mitigate; comparative fault; ratification; *In Pari Delicto*, which bars a Claimant from maintaining a claim if Claimant bears equal fault; and assumption of risk; and statute of limitations.

RELIEF REQUESTED

Claimants requested compensatory damages in the amount of \$4,200,000.00, an unspecified amount for punitive damages, interest, attorneys' fees, costs and other damages, as Panel deems appropriate.

Respondent Merrill Lynch requested denial and dismissal of all claims in their entirety.

OTHER ISSUES CONSIDERED AND DECIDED

After reviewing Claimants Motion to Amend Statement of Claim, Respondent's Motion to Sever, along with responses submitted for consideration, and having heard arguments by both parties on March 24, 2004, the Panel denied both Motions.

At the hearing on October 26, 2004, Respondent Merrill Lynch moved for Directed Verdict on October 26, 2004. After considering the parties' arguments, the Panel denied Respondent's motion.

In rendering a decision, the Panel specifically finds the following:

The Panel has considered the arguments from Claimants and Respondent and all the testimony made over a two-month period. The Panel has come to the conclusion that any mistakes made by the brokers in these cases are largely ones of misfeasance, not malfeasance. The various Claimants all expressed confidence in the brokers until they lost a significant amount of money, and sometimes even after that. The act notes and actions of Jason Murdock (Shawn Sorrells was never called as a witness) indicate a concern and service at least commensurate with his duties. The problems, which we'll outline below, are not with the brokers but rather with Merrill Lynch's oversight and training. No one seems to have monitored these young and relatively inexperienced brokers, who needed monitoring even during a raging bull market, much less the significant bear market that followed.

Broker culpability

The brokers in this case did not select securities from the universe of investments available. Rather, they selected them from a list of investments selected by the "leader" of the Gundy-Murdock Group. Considerable energy was expended during the hearing on the question of using either standard deviation or beta as tools in choosing and explaining choices of securities. As aids to brokers in choosing stocks, both standard deviation and beta are helpful, but as aids in explaining to unsophisticated clients which stocks were chosen, they are very likely useless. Nor did the Panel find that the brokers were fiduciaries in nondiscretionary accounts, which all but a handful of MFA accounts were.

Suitability

Suitability goes to the heart of the Claimants' case, and the Panel was of the general opinion that these accounts were somewhat aggressive for retirement accounts, though not necessarily for accounts of non-retired clients during a strong bull market. For that reason, the Panel made a wide separation between Claimants retiring and those who were not. In the period starting in the spring of 2000, virtually everyone in the market lost money, and very often a lot of money. Fluctuations in the market, even wide fluctuations seen with the fall in the NASDAQ, are normal in the market. For that reason, retirement accounts must, of their nature, be more conservatively invested.

Retirement, retirement accounts, inducing to retire, 72(t)s

The Panel did not find that Claimants were induced to retire by the brokers. Indeed, Jason Murdock worked pro-bono for several of the Claimants, sometimes for years, as an advisor prior to their retirement. All the retired Claimants appreciated the opportunities afforded by their work at Marathon, and all, without exception, were interested in retiring at a relatively young age.

The Panel believes that the aids Merrill Lynch offered in the form of Retirement Builders and Financial Foundation Reports were, at minimum, less than helpful in aiding clients in their decisions. Retirement Builders allowed brokers to play the "what if" game that computers encourage, plugging in return-on-investment numbers until the right number, the one that would allow for retirement based on the assets at hand, could be obtained. But most often this was a high historical number, like 12 percent, and straight-line calculations based on such a number are inherently risky, since dips in the market always take place and could well take place early in retirement, leaving not enough principal to complete the program. The brokers did not have the training or experience to recognize that the resulting withdrawals were unsustainable.

All the clients retiring would need to pull money from their account to live on during retirement, and since they had not reached 59½ years old, each was required to withdraw funds under the 72(t) provisions. The maximum allowable 72(t) withdrawal calculations were made by an independent accountant. Although the maximum withdrawal was, in each instance greater than that which the client wished to withdraw, the brokers set the withdrawal amount at the maximum. The excessive withdrawals, the Panel believes, set the accounts on a course to fail. The Retirement Builders and the Financial Foundation Reports were calculated based on withdrawal figures that ended up, in all cases, being less than what the clients actually withdrew from their 72(t)s, further depleting their principal. The Panel found that Merrill Lynch should have designed these tools to include warnings to the brokers and clients that the plans they formulated for retirement were likely not sustainable. Obviously, given the need for a sustained growth in the accounts at a historically optimistic level, withdrawing more than the agreed-upon amount is a formula for disaster.

Miscellaneous: MFA Accounts; A, B, and C shares

Likewise, Merrill Lynch should have mechanisms in place for red-flagging large purchases of B or C shares of mutual funds. That such purchases went unnoticed, the Panel believes, is another indication of the lack of supervision to which these accounts were subject. It is reasonable to assume, as respondents averred, that clients may well have chosen B or C shares instead of A shares because they did not wish up-front commissions to be paid, but such clients need to be apprised of the discounts available to them with large purchases and warned that in the long range, which is the typical range in retirement accounts, A shares are more cost-effective for clients.

Apparently, clients were told that in order to have the maximum flexibility in the selection of managers for their MFA accounts, the questionnaire would have to be answered to reflect that the client wished an aggressive account, rather than to reflect the client's true risk tolerance. Whether this is deception or self-deception is perhaps beside the point. It is inherently wrong for a broker to have to lie to the firm or to his clients in order to come up with a preordained result, irrespective of the clients' background and place in life.

Summary

For the reasons stated above, the Panel found that Merrill Lynch failed to supervise and train their brokers properly and had created poor and sometimes deceptive tools for clients to adjudge important decisions in whether to retire, how aggressive their accounts should be, and other matters.

The parties 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, 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. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Roger and Mary Candace Brush, the sum of \$18,361.00 as compensatory damages.
2. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Roger and Mary Candace Brush, the sum of \$50,000.00 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Brush.
3. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Floyd and Sabra Adams, the sum of \$33,044.00 as compensatory damages.
4. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Adams the sum of \$50,000.00 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Adams.
5. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Robert and Sandra Bryans, the sum of \$10,443.00 as compensatory damages.
6. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Bryans the sum of \$50,000.00 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to

Claimants Bryans.

7. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimant, Ray Ridgley, the sum of \$48,566.00 as compensatory damages.
8. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimant Ridgley the sum of \$50,000.00 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimant Ridgley.
9. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Harold and Carolyn Sloan, the sum of \$26,032.00 as compensatory damages.
10. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Sloan the sum of \$50,000.00 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Sloan.
11. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Clifford and Peggy Schiller, the sum of \$32,786.00 as compensatory damages.
12. Respondent, Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay the sum of \$50,000.00 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Clifford and Peggy Schiller.
13. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Michael and Rena Gower, the sum of \$28,291.00 as compensatory damages.
14. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Gower the sum of \$50,000.00 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Gower.
15. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Kenneth and Deborah Valle, the sum of \$36,093.00 as compensatory damages.
16. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants Valle the sum of \$50,000.00 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants Valle.
17. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Charles and Judy Schiller, the sum of \$16,264.00 as compensatory damages.

18. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Charles and Judy Schiller, the sum of \$50,000.00 as punitive damages. In deciding to award punitive damages, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of punitive damages to Claimants, Charles and Judy Schiller.
19. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Brush, Adams, Bryans, Holmer, Ridgley, Sloan, Clifford and Peggy Schiller, Gower, Jones, Valle and Charles and Judy Schiller, the sum of \$304,491.00 in attorneys' fees. In deciding to award attorneys' fees, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of attorneys' fees to Claimants.
20. Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is solely liable for and shall pay to Claimants, Brush, Adams, Bryans, Holmer, Ridgley, Sloan, Clifford and Peggy Schiller, Gower, Jones, Valle and Charles and Judy Schiller, the sum of \$67,348.00 in costs. In deciding to award costs, the Panel considered the pleadings filed by counsel, as well as the arguments presented on behalf of the parties, and determined that authority existed for an award of costs to Claimants.
21. Except as specified herein, parties shall bear all other costs, including all other attorneys' fees.
22. Any and all relief not specifically addressed herein, including interest and any punitive damages, are denied.

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 = \$ 600.00

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, Merrill Lynch Pierce Fenner & Smith, Inc. is a party and is assessed the following fees:

Member surcharge	= \$ 2,800.00
Pre-hearing process fee	= \$ 750.00
<u>Hearing process fee</u>	<u>= \$ 5,000.00</u>
Total fees	= \$ 8,550.00

Adjournment Fees

Adjournments granted during these proceedings for which fees were assessed: None.

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 conferences: August 27, 2004 1 session

Two (2) Pre-hearing sessions with Panel @ \$1,200.00 = \$ 2,400.00
Pre-hearing conferences: November 5, 2003 1 session
March 24, 2004 1 session

Forty-eight (48) Hearing sessions @ \$1,200.00 = \$57,600.00
Hearing Dates: September 7, 2004 1 session
September 8, 2004 2 sessions
September 9, 2004 2 sessions
September 10, 2004 2 sessions
September 13, 2004 2 sessions
October 5, 2004 2 sessions
October 6, 2004 2 sessions
October 7, 2004 2 sessions
October 8, 2004 2 sessions
October 11, 2004 3 sessions
October 12, 2004 2 sessions
October 13, 2004 2 sessions
October 14, 2004 3 sessions
October 15, 2004 2 sessions
October 18, 2004 2 sessions
October 19, 2004 2 sessions
October 20, 2004 2 sessions
October 25, 2004 3 sessions
October 26, 2004 2 sessions
October 27, 2004 2 sessions
October 28, 2004 2 sessions
October 29, 2004 2 sessions
October 30, 2004 1 session
November 1, 2004 1 session

Total Forum Fees = \$60,450.00

The Panel assessed 100% of the total forum fees in the amount of \$60,450.00 solely to Respondent Merrill Lynch Pierce Fenner & Smith, Inc.

SEE SUMMARY

1. Claimants Brush, Adams, Bryans, Holmer, Ridgley, Sloan, Clifford and Peggy Schiller, Gower, Jones, Valle and Charles and Judy Schiller, are jointly liable for:

Initial Filing Fee	= \$ 600.00
<u>Less payments</u>	<u>= \$ 1,800.00</u>
Refund Due from NASD Dispute Resolution	= \$ 1,200.00

2. Respondent Merrill Lynch is solely liable for:

Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	<u>= \$60,450.00</u>
Total Fees	= \$69,000.00
<u>Less payments</u>	<u>= \$13,550.00</u>
Balance Due NASD Dispute Resolution	= \$55,450.00

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

ARBITRATION PANEL

Bruce M. Fingerhut	-	Public Arbitrator, Presiding Chairperson
Richard H. Potter	-	Public Arbitrator
Charles W. Turner	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

 Bruce M. Fingerhut
 Public Arbitrator, Presiding Chairperson

12/10/04
 Signature Date

 Richard H. Potter
 Public Arbitrator

12/10/04
 Signature Date

 Charles W. Turner
 Non-Public Arbitrator

12/15/04
 Signature Date

12/10/04
 Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution
Arbitration No. 03-02100
Award Page 8

SEE SUMMARY

1. Claimants Brush, Adams, Bryans, Holmer, Ridgley, Sloan, Clifford and Peggy Schiller, Gower, Jones, Valle and Charles and Judy Schiller, are jointly liable for:

Initial Filing Fee	= \$ 600.00
Less payments	= \$ 1,800.00
Refund Due from NASD Dispute Resolution	= \$ 1,200.00

2. Respondent Merrill Lynch is solely liable for:

Member Fees	= \$ 8,550.00
Equim Fees	= 888,450.00
Total Fees	= \$89,000.00
Less payments	= \$13,550.00
Balance Due NASD Dispute Resolution	= \$55,450.00

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ARBITRATION PANEL

- Bruce M. Fingerhut - Public Arbitrator, Presiding Chairperson
- Richard H. Potter - Public Arbitrator
- Charles W. Turner - Non-Public Arbitrator

Concurring Arbitrators' Signatures

Bruce M. Fingerhut
Bruce M. Fingerhut
Public Arbitrator, Presiding Chairperson

10 Dec 2004
Signature Date

Richard H. Potter
Richard H. Potter
Public Arbitrator

Signature Date

Charles W. Turner
Charles W. Turner
Non-Public Arbitrator

Signature Date

Date of Service (For NASD Dispute Resolution office use only)

FEE SUMMARY

1. Claimants Brush, Adams, Bryans, Holmer, Ridgley, Sloan, Clifford and Peggy Schiller, Gower, Jones, Valle and Charles and Judy Schiller, are jointly liable for:

Initial Filing Fee	= \$ 600.00
<u>Less payments</u>	<u>= \$ 1,800.00</u>
Refund Due from NASD Dispute Resolution	= \$ 1,200.00

2. Respondent Merrill Lynch is solely liable for:

Member Fees	= \$ 8,550.00
<u>Forum Fees</u>	<u>= \$60,450.00</u>
Total Fees	= \$69,000.00
<u>Less payments</u>	<u>= \$13,550.00</u>
Balance Due NASD Dispute Resolution	= \$55,450.00

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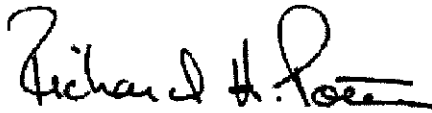
ARBITRATION PANEL

Bruce M. Fingerhut	-	Public Arbitrator, Presiding Chairperson
Richard H. Potter	-	Public Arbitrator
Charles W. Turner	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

Bruce M. Fingerhut
Public Arbitrator, Presiding Chairperson

Signature Date



Richard H. Potter
Public Arbitrator

12.10.2004
Signature Date

Charles W. Turner
Non-Public Arbitrator

Signature Date

Date of Service (For NASD Dispute Resolution office use only)

NASD Dispute Resolution
 Arbitration No. 03-02100
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FEE SUMMARY

1. Claimants Brush, Adams, Bryans, Holmer, Ridgley, Sloan, Clifford and Peggy Schiller, Gower, Jones, Valle and Charles and Judy Schiller, are jointly liable for:

Initial Filing Fee	= \$ 800.00
Less payments	= \$ 1,800.00
Refund Due from NASD Dispute Resolution	= \$ 1,200.00

2. Respondent Merrill Lynch is solely liable for:

Member Fees	= \$ 8,550.00
Forum Fees	= \$60,450.00
Total Fees	= \$69,000.00
Less payments	= \$13,550.00
Balance Due NASD Dispute Resolution	= \$55,450.00

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ARBITRATION PANEL

Bruce M. Fingerhut	-	Public Arbitrator, Presiding Chairperson
Richard H. Potter	-	Public Arbitrator
Charles W. Turner	-	Non-Public Arbitrator

Concurring Arbitrators' Signatures

 Bruce M. Fingerhut
 Public Arbitrator, Presiding Chairperson

 12/10/04
 Signature Date

 Richard H. Potter
 Public Arbitrator

 12/10/04
 Signature Date

Charles W. Turner

 Charles W. Turner
 Non-Public Arbitrator

 12/15/04
 Signature Date

 Date of Service (For NASD Dispute Resolution office use only)