

96 CIV. 5313

_____)
 UNITED STATES OF AMERICA,)
)
 PLAINTIFF,)
)
 v.)
 ALEX. BROWN & SONS INC.;)
 BEAR, STEARNS & CO. INC.; CS)
 FIRST BOSTON CORP.; DEAN)
 WITTER REYNOLDS INC.;)
 DONALDSON, LUFKIN & JENRETTE)
 SECURITIES CORP.; FURMAN SELZ)
 LLC; GOLDMAN, SACHS & CO.;)
 HAMBRECHT & QUIST LLC; HERZOG,)
 HEINE, GEDULD, INC.; J.P.)
 MORGAN SECURITIES, INC.;)
 LEHMAN BROTHERS, INC.; MAYER)
 & SCHWEITZER, INC.; MERRILL)
 LYNCH, PIERCE, FENNER & SMITH,)
 INC.; MORGAN STANLEY & CO.,)
 INC.; NASH, WEISS & CO.; OLDE)
 DISCOUNT CORP.; PAINWEBBER)
 INC.; PIPER JAFFRAY INC.;)
 PRUDENTIAL SECURITIES INC.;)
 SALOMON BROTHERS INC.;)
 SHERWOOD SECURITIES CORP.;)
 SMITH BARNEY INC.; SPEAR)
 LEEDS & KELLOGG, LP; and)
 UBS SECURITIES LLC)
)
 DEFENDANTS.)
 _____)

Civil Action No.

STIPULATION AND ORDER

WHEREAS, plaintiff, United States of America, having filed its complaint on July 17, 1996, and plaintiff and defendants, by their respective attorneys, having agreed to the entry of this stipulation and order without trial or adjudication of any issue of fact or law herein and without this stipulation and order constituting any evidence against or an admission by any party

with respect to any such issue;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, Plaintiff and defendants hereby agree as follows:

I.

JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of and the parties to this action. Venue is proper in the Southern District of New York.

II.

DEFINITIONS

As used in this stipulation and order:

- A. "Any" means one or more.
- B. "Ask" or "offer" means the price quoted on Nasdaq at which a market maker offers to sell a specific quantity of a particular Nasdaq security.
- C. "Bid" means the price quoted on Nasdaq at which a market maker offers to buy a specific quantity of a particular Nasdaq security.
- D. "Dealer spread" means the difference between a market maker's bid and ask on Nasdaq for a particular Nasdaq security at any given time.
- E. "Defendant" means a defendant that has executed this stipulation and order.

F. "Effective date" means the date on which plaintiff and defendants have indicated their agreement by executing this stipulation and order.

G. "Inside spread" means the difference between the highest bid and the lowest ask on Nasdaq of all market makers for a particular Nasdaq security at any given time.

H. "Market maker" means a NASD member firm that qualifies as a market maker under Section 3(a)(38) of the Securities Exchange Act of 1934, as amended.

I. "NASD" means the National Association of Securities Dealers, Inc.

J. "Nasdaq" means the computerized stock quotation system operated by The Nasdaq Stock Market, Inc. that displays the quotes of market makers in Nasdaq securities.

K. "Nasdaq security" means any Nasdaq National Market System stock or any Nasdaq Small Cap Security stock quoted on Nasdaq, or, should these terms be changed or amended, any successor group of stocks quoted on Nasdaq.

L. "Or" means and/or.

M. "OTC desk" means any organizational element of a defendant engaged in market making, or its successor, that accounted for ten percent (10%) or more of such defendant's total market-making volume, measured in shares, in Nasdaq securities in the immediately preceding fiscal year;

N. "Person" means any individual, corporation, partnership, company, sole proprietorship, firm, or other legal

entity. "Other person" means a person who is not an officer, director, partner, employee, or agent of a defendant.

O. "Price" means the price at which a Nasdaq security is bought or sold.

P. "Quote increment" means the difference between a market maker's bid or ask on Nasdaq and that market maker's immediately preceding or immediately subsequent bid or ask on Nasdaq for a particular Nasdaq security.

Q. "Quote" means a bid or an ask on Nasdaq.

R. "Quoting convention" means any practice of quoting Nasdaq securities whereby stocks with a three-quarter (3/4) point or greater dealer spread are quoted on Nasdaq in even eighths and are updated in quarter-point (even eighth) quote increments.

S. "SEC" means the United States Securities and Exchange Commission.

T. "Trader hours" means the number derived by multiplying the number of traders and assistant traders on the OTC desk and any other persons actually engaged in making markets in Nasdaq securities on the OTC desk of a defendant by the number of hours Nasdaq operates per day.

III.

APPLICABILITY

This stipulation and order applies to each defendant; to each of its executive officers, directors, partners, successors, and assigns, during the respective periods that they serve as

such; and to any agents or employees assigned to defendant's OTC desk, including supervisory employees, whose duties or responsibilities include market making in any Nasdaq security, during the respective periods that they serve as such; and applies to all other persons in active concert or participation with any of them who shall have received actual notice of this stipulation and order by personal service or otherwise.

IV.

PROHIBITED CONDUCT

A. Unless permitted to engage in activities by Section IV. B. of this stipulation and order, each defendant shall not, directly or through any trade association, in connection with the activities of its OTC desk in making markets in Nasdaq securities:

- (1) Agree with any other market maker to fix, raise, lower, or maintain quotes or prices for any Nasdaq security;
- (2) Agree with any other market maker to fix, increase, decrease, or maintain any dealer spread, inside spread, or the size of any quote increment (or any relationship between or among dealer spread, inside spread, or the size of any quote increment), for any Nasdaq security;
- (3) Agree with any other market maker to adhere to a quoting convention;
- (4) Agree with any other market maker to adhere to any understanding or agreement (other than an agreement on

- one or a series of related trades) requiring a market maker to trade at its quotes on Nasdaq in quantities of shares greater than either (1) the minimum size required by Nasdaq or NASD rules or (2) the size displayed or otherwise communicated by that market maker, whichever is greater;
- (5) Engage in any harassment or intimidation of any other market maker, whether in the form of written, electronic, telephonic, or oral communications, for decreasing its dealer spread or the inside spread in any Nasdaq security;
- (6) Engage in any harassment or intimidation of any other market maker, whether in the form of written, electronic, telephonic, or oral communications, for refusing to trade at its quoted prices in quantities of shares greater than either (1) the minimum size required by Nasdaq or NASD rules or (2) the size displayed or otherwise communicated by that market maker;
- (7) Engage in any harassment or intimidation of any other market maker, whether in the form of written, electronic, telephonic, or oral communications, for displaying a quantity of shares on Nasdaq in excess of the minimum size required by Nasdaq or NASD rules; and
- (8) Refuse, or threaten to refuse to trade, (or agree with or encourage any other market maker to refuse to trade)

with any market maker at defendant's published Nasdaq quotes in amounts up to the published quotation size because such market maker decreased its dealer spread, decreased the inside spread in any Nasdaq security, or refused to trade at its quoted prices in a quantity of shares greater than either (1) the minimum size required by Nasdaq or NASD rules or (2) the size displayed or otherwise communicated by that market maker.

B. Notwithstanding the provisions of Section IV.A.(1) - (8), any defendant shall be entitled to:

- (1) Set unilaterally its own bid and ask in any Nasdaq security, the prices at which it is willing to buy or sell any Nasdaq security, and the quantity of shares of any Nasdaq security that it is willing to buy or sell;
- (2) Set unilaterally its own dealer spread, quote increment, or quantity of shares for its quotations (or set any relationship between or among its dealer spread, inside spread, or the size of any quote increment) in any Nasdaq security;
- (3) Communicate its own bid or ask, or the price at or the quantity of shares in which it is willing to buy or sell any Nasdaq security to any person, for the purpose of exploring the possibility of a purchase or sale of that security, and to negotiate for or agree to such purchase or sale;

- (4) Communicate its own bid or ask, or the price at or the quantity of shares in which it is willing to buy or sell any Nasdaq security, to any person for the purpose of retaining such person as an agent or subagent for defendant or for a customer of defendant (or for the purpose of seeking to be retained as an agent or subagent), and to negotiate for or agree to such purchase or sale;
- (5) Engage in any conduct or activity authorized or required by the federal securities laws, including but not limited to the rules, regulations, or interpretations of the SEC, the NASD, or any other self-regulatory organization, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as amended;
- (6) Engage in any underwriting (or any syndicate for the underwriting) of securities to the extent permitted by the federal securities laws;
- (7) Act as Qualified Block Positioners as defined in SEC Rule 3b-8(c), promulgated under the Securities Exchange Act of 1934, as amended, to the extent permitted by the federal securities laws;
- (8) Except as provided in Sections IV.A.(5) - (8) of this stipulation and order, take any unilateral action or make any unilateral decision regarding the market makers with which it will trade and the terms on which

it will trade; and

- (9) Engage in conduct protected under the Noerr-Pennington doctrine.

No finding of any violation of this stipulation and order may be made based solely on parallel conduct.

C. In order to ensure compliance with the provisions of Section IV.A. of the stipulation and order, each defendant shall:

- (1) Initiate and maintain an antitrust compliance program, which shall include designating, within ninety (90) days of the effective date hereof, an Antitrust Compliance Officer, who shall be responsible for establishing and maintaining an antitrust compliance program designed to provide reasonable assurance of compliance with this stipulation and order and with the federal antitrust laws by the defendant in its market making activities in Nasdaq securities on its OTC desk. The Antitrust Compliance Officer shall personally or through his designee:

- (a) Distribute, within thirty (30) days from the effective date hereof or from the date of designation of the Antitrust Compliance Officer, whichever is later, a copy of this stipulation and order to: (i) all members of the board of directors of the defendant (or if there is no board of directors, to such persons as have substantially equivalent responsibilities); and

- (ii) all employees and all officers of the defendant whose duties or responsibilities include market making in any Nasdaq security on Nasdaq;
- (b) Distribute within thirty (30) days of appointment or assignment a copy of this stipulation and order
- (i) to any person who becomes a member of the board of directors of the defendant (or if there is no board of directors, to such persons as have substantially equivalent responsibilities) and
- (ii) any employee or officer of the defendant whose duties or responsibilities include market making in any Nasdaq security on Nasdaq;
- (c) Brief semi-annually those persons designated in paragraphs (a)(ii) and (b)(ii) of this subsection on the meaning and requirements of the federal antitrust laws and this stipulation and order in connection with defendant's market making activities on its OTC desk in Nasdaq securities, and inform them that the Antitrust Compliance Officer or a designee of the Antitrust Compliance Officer is available to confer with them regarding compliance with such laws and with this stipulation and order;
- (d) Obtain from each person designated in paragraphs a(i) and b(i) of this subsection a one time certification that he or she: (i) has read and

agrees to abide by the terms of this stipulation and order; and (ii) has been advised and understands that a violation of this stipulation and order by such person may result in his or her being found in civil or criminal contempt of court;

- (e) Obtain from each person designated in paragraphs (a)(ii) and (b)(ii) of this subsection an annual written certification that he or she: (i) has read and agrees to abide by the terms of this stipulation and order; and (ii) has been advised and understands that a violation of this stipulation and order by such person may result in his or her being found in civil or criminal contempt of court; and
- (f) Maintain a record of persons to whom this stipulation and order has been distributed and from whom the certification required by paragraphs (d) and (e) of this subsection has been obtained.

- (2) Within forty-five (45) days of entry of this stipulation and order by the Court, each defendant is required to install a system or systems capable of monitoring and recording any conversation on the telephones on its OTC desk used by such defendant to make markets in Nasdaq securities.
- (3) The Antitrust Compliance Officer of each defendant

shall devise a methodology for complying with paragraphs 2, 3, and 4 of this Section. No tape recorded segment shall be shorter than fifteen (15) minutes. Within thirty (30) days of entry of this stipulation and order by the Court, the methodology proposed to be employed shall be submitted to the Antitrust Division for review and approval.

- (4) The Antitrust Compliance Officer, with such trained staff as necessary, shall record (and listen to) not less than three and one-half percent (3.5%) of the total number of trader hours of such defendant; provided, however, that in no case shall the total number of hours required to be recorded (and listened to) exceed seventy (70) hours per week. Persons whose conversations are subject to monitoring as provided by this paragraph (4) shall be told of the existence of the taping system but shall not be informed as to the times when their conversations will or might be monitored or recorded.
- (5) Upon discovery of a conversation which the Antitrust Compliance Officer of a defendant believes may violate this stipulation and order, the Antitrust Compliance Officer shall retain a tape of such conversation, and, shall within ten (10) business days, furnish such tape, and any explanation thereof to the Antitrust Division, in standard audio cassette format, or such other format

as may be acceptable to the Antitrust Division.

- (6) Tapes made pursuant to this stipulation and order shall be retained by each defendant for at least thirty (30) days from the date of recording, and may be recycled thereafter. Tapes made pursuant to this stipulation and order shall not be subject to civil process except for process issued by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as amended. Such tapes shall not be admissible in evidence in civil proceedings, except in actions, proceedings, investigations, or examinations commenced by the Antitrust Division, the SEC, the NASD, or any other self-regulatory organization, as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as amended.
- (7) The Antitrust Division may visit, during regular business hours, any defendant's facilities unannounced, and may, while there, from a location not observable by traders, monitor conversations required to be monitored and recorded pursuant to paragraphs (2) and (4) of this Section in real time in order to ensure compliance with this stipulation and order.
- (8) Upon request of the Antitrust Division, a defendant shall immediately identify all tape recordings made pursuant to this stipulation and order that are in its

possession or control, shall provide the Antitrust Division with the opportunity to listen to any tape recording made pursuant to this stipulation and order, and shall produce to the Antitrust Division such tapes as the Antitrust Division may request.

- (9) The Antitrust Division may receive complaints or referrals concerning asserted possible violations of the stipulation and order and may, based upon such complaints or referrals, or for the purpose of monitoring or enforcing compliance with the stipulation and order, require the Antitrust Compliance Officer (a) to use the system or systems required by Section IV.C.(2) of this stipulation and order to tape the conversations of a particular person or group of persons on its OTC desk for any period of time and (b) not to give notice of such recordation to such person(s). Such requests to tape shall be subject to the time limitations set forth in paragraph (4) of this subsection.
- (10) Each Antitrust Compliance Officer shall (in addition to making reports of violations within ten (10) business days) report quarterly to the Antitrust Division concerning activities undertaken to ensure the defendant's compliance with the stipulation and order and, specifically, the requirements of paragraphs (2)-(9) of this Section. Such reports shall detail the

precise times when conversations were monitored by the Antitrust Compliance Officer pursuant to the requirements of this stipulation and order and the name of each person employed by the defendant whose conversations were recorded during such times.

V.

CERTIFICATIONS

Each defendant shall certify in the form attached hereto:

A. Within ninety (90) days from the effective date of this stipulation and order, that the defendant has designated an Antitrust Compliance Officer, specifying his or her name, business address, and telephone number;

B. Within forty-five (45) days from the entry of the stipulation and order by the Court, that the defendant has complied with the requirements of Sections IV.C.(1)(a) and (b); and

C. For five (5) years after entry of this stipulation and order by the Court, within thirty (30) days of the anniversary of its entry, each defendant shall certify annually (i) whether defendant has complied with the provisions of Sections IV.A. and IV.C. of this stipulation and order; and (ii) whether defendant has made changes in its organizational structure likely to have a significant effect on its compliance with this stipulation and order.

VI.

PLAINTIFF'S ACCESS

A. For the sole purpose of determining or securing compliance with this stipulation and order, and subject to any legally recognized privilege or work product protection, from time to time duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant at its principal office, be permitted:

- (1) Access during office hours of such defendant, which may have counsel present, to inspect and copy (or to require defendants to produce copies of) all records and documents, excluding individual customer records, in the possession or under the control of such defendant, and which relate to compliance with this stipulation and order; and
- (2) Subject to the reasonable convenience of such defendant and without restraint or interference from the defendant, to interview officers, employees, or agents of such defendant, each of whom may have counsel present, regarding compliance with this stipulation and order.

B. Upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division made to any defendant, such defendant shall prepare and submit

such written reports, under oath if requested, relating to defendant's compliance with this stipulation and order as may be requested.

C. No information, tape recordings, or documents obtained by the means provided in Sections IV, V, and VI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, or the SEC, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this stipulation and order, or as otherwise required by law.

D. If at the time information, tape recordings, or documents are furnished by any defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure and said defendant marks each page of such material, "Subject to Claim of Protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) days notice shall be given by plaintiff to such defendant at its Office of General Counsel prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which that defendant is not a party.

E. Defendants may claim (which claim plaintiff shall honor to the extent legally permissible) protection from public disclosure, under the Freedom of Information Act, 5 U.S.C. § 552,

or any other applicable law or regulation, for any material submitted to the Antitrust Division under this stipulation and order.

VII.

RESCISSION BY PLAINTIFF

The parties agree that the Court may enter this stipulation and order, upon motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, and without further notice to any party or other proceedings, provided that plaintiff has not notified the parties and the Court that it wishes to rescind its agreement to entry of the stipulation and order. Plaintiff may rescind its agreement to entry of the stipulation and order at any time before entry of the stipulation and order by the Court by serving notice thereof on the defendants and by filing that notice with the Court. In the event plaintiff rescinds its agreement to entry of the stipulation and order, the stipulation and order shall be of no effect whatever, and the agreement among the parties shall be without prejudice to any party in this or any other proceeding.

VIII.

JURISDICTION RETAINED

Jurisdiction shall be retained by the Court to enable any of the parties to this stipulation and order to apply to the Court

at any time for such further orders and directions as may be necessary or appropriate for the construction or implementation of this stipulation and order, for the enforcement or modification of any of its provisions, or for punishment by contempt.

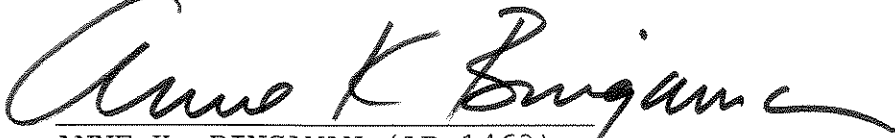
IX.

EXPIRATION OF STIPULATION AND ORDER

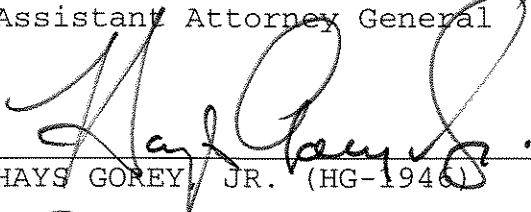
This stipulation and order shall expire ten (10) years from its date of entry by the Court, except that (a) Section IV.C.(2) - (10) shall expire five (5) years from the date of entry of this stipulation and order by the Court, except that the Antitrust Division may, after two (2) years, in its sole discretion, notify in writing any defendant that it shall no longer be subject to

Section IV.C.(2) - (10); and (b) Section VI.C., D., and E. shall not expire.

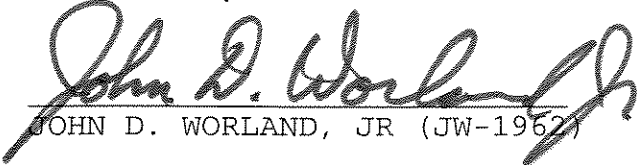
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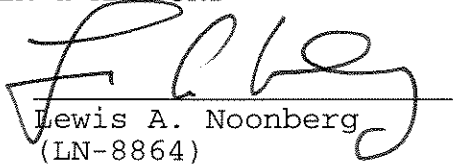
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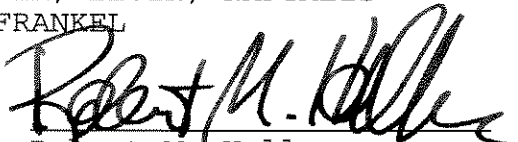

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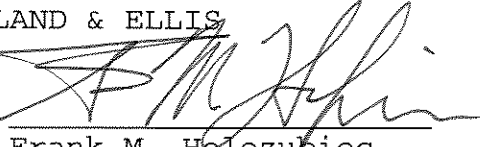

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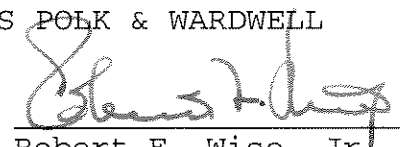

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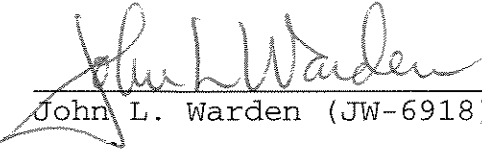

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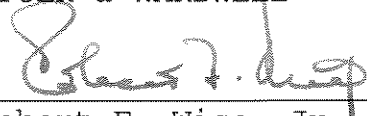

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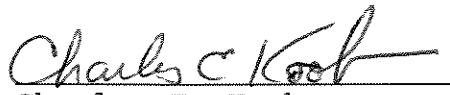

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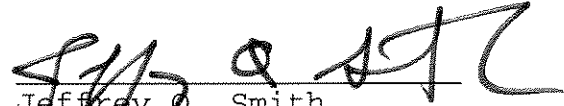

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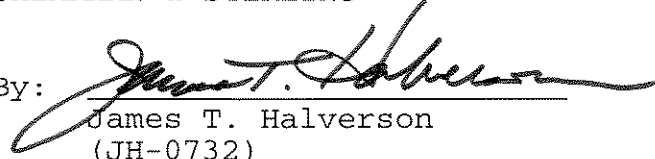

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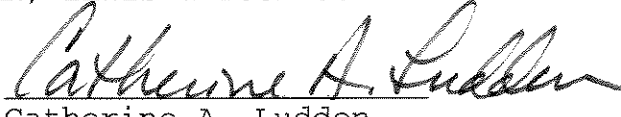

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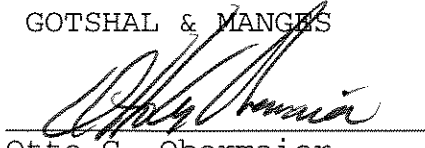

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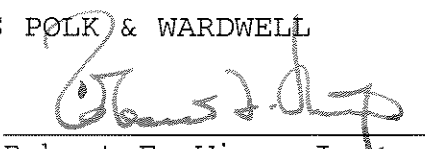

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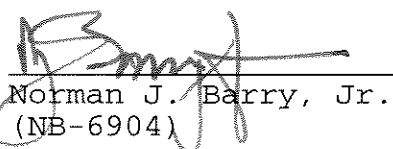

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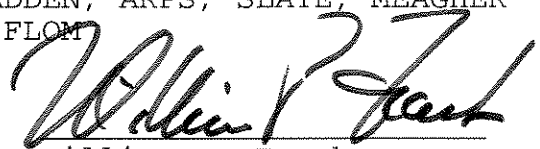

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The Court having reviewed the Complaint and other filings by the United States, having found that this Court has jurisdiction over the parties to this stipulation and order, having heard and considered the respective positions of the United States and the defendants [at a hearing on _____, 1996,] and having concluded that entry of this stipulation and order is in the public interest, it is hereby ORDERED:

THAT the parties comply with the terms of this stipulation and order;

THAT the Complaint of the United States is dismissed with prejudice;

THAT the Court retains jurisdiction to enable any of the parties to this stipulation and order to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or implementation of this stipulation and order, for the enforcement or modification of any of its provisions, or for punishment by contempt.

SO ORDERED this _____ day of _____, 1996.

UNITED STATES DISTRICT JUDGE

**CERTIFICATION FORM
(ATTACHMENT TO STIPULATION AND ORDER)**

On behalf of [Name of Defendant], I [Name] hereby certify in accordance with Section V of the Stipulation and Order, dated _____, in [caption of case] that:

(Check All Applicable Certifications):

- () [Name of Defendant] has designated an Antitrust Compliance Officer, whose name, business address, and telephone numbers are:

Name: _____

Address: _____

Telephone No.: _____

- () [Name of Defendant], under the supervision of its Antitrust Compliance Officer, has distributed copies of the Stipulation and Order to all persons designated in Sections IV.C.(1)(a) and (b) of the Stipulation and Order.

- () [Name of Defendant], under the supervision of its Antitrust Compliance Officer, has:

- (a) Initiated and maintained an antitrust compliance program, as provided for in Section IV.C.(1) of the Stipulation and Order;
- (b) Briefed semi-annually those persons designated in Sections IV.C.(1)(a)(ii) and b(ii) of the Stipulation and Order on the meaning and requirements of the federal antitrust laws and the Stipulation and Order in connection with its market making activities in Nasdaq securities on Nasdaq;
- (c) Obtained the certifications identified in Sections IV.C.(1)(d) and (e) of the Stipulation and Order and maintained a record thereof;

- (d) Established monitoring and recording system or systems (Section IV.C.(2) of the Stipulation and Order), obtained the approval of the Antitrust Division of the relevant methodology (Section IV.C.(3) of the Stipulation and Order), and recorded (and listened to), in accordance with the approved methodology, not less than the lesser of three and one-half percent (3.5%) of the total number of trader hours or seventy (70) hours per week (Sections IV.C.(2) and (4) of the Stipulation and Order);
- (e) Retained and provided to the Antitrust Division any tape called for by Section IV.C.(5) of the Stipulation and Order;
- (f) Complied with the requests, if any, of the Antitrust Division pursuant to Sections IV.C.(8) and (9) of the Stipulation and Order; and
- (g) Made quarterly reports to the Antitrust Division concerning activities undertaken to ensure compliance with the Stipulation and Order, as provided for by Section IV.C.(10).

Based upon the foregoing, the representations of market makers employed on the OTC desk and their immediate supervisors, and such other procedures as have been established to provide reasonable assurance of compliance with Sections IV.A. and IV.C. of the Stipulation and Order, I have no reasonable cause to believe that, during the year ended _____, 199_, [Name of Defendant] has failed to comply with Sections IV.A. and IV.C. of the Stipulation and Order, [except to the extent previously reported to the Antitrust Division in reports, dated _____]. In addition, I am aware of no change in [Name of Defendant's] organization structure likely to have a significant effect on its compliance with this Stipulation and Order, [except for _____].

Antitrust Compliance Officer
[Name of Defendant]

[Date], 199_