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VIA EMAIL: Rule-Comments@SEC.gov

Mr. Jonathan G. Katz, Secretary
SECURITIES AND EXCHANGE COMMISSION
450 Fifth Street, NW
Washington, D.C. 20549-0609

Re: Arbitrator Compensation – Discovery-Related Motions
SR-NASD-2005-052

Dear Mr. Katz:

I. Introduction

Essentially, the proposed rule seeks to cure a symptom of the underlying problem while ignoring its causes. The proposed rule seeks "to provide payment to arbitrators for deciding discovery-related motions without a hearing." However, the underlying problem involves eliminating discovery disputes and/or resolving discovery disputes in an expeditious and fair manner.

Others problems are evident. NASD Dispute Resolution ("NASD") has systematically acted to deny the Securities and Exchange Commission ("SEC") valuable input from NASD arbitrators. The proposal is based upon suspect justifications, which the SEC has not challenged. The NASD failed to suggest more effective alternative solutions to the stated discovery-related problem.

II. My Background

From 1971 to 1973, I served as the Associate General Counsel and/or Compliance Director of Mitchum, Jones & Templeton, Inc., a regional New York Stock Exchange ("NYSE") Member Firm.

From 1973, I have been engaged in the private practice of law as a sole practitioner where substantially all representation dealt with financial/investment litigation. I have represented many individual investors and more than twenty (20) regional securities brokerage firms before arbitration panels and in

various state and federal courts in hundreds of securities industry related disputes. I no longer represent securities brokerage firms.

I was admitted to the NASD panel of arbitrators in 1976. Also, I have served on the panels of arbitrators of the American Arbitration Association, Pacific Stock Exchange, NYSE and Municipal Securities Rule Making Board. Further, I serve the Los Angeles civil courts and the Los Angeles County Bar Association as an arbitrator.

III. NASD's Purported Justifications for the Proposal Are Suspect

The sole stated justifications for the proposed rule are:

> In 2002, NASD Dispute Resolution conducted arbitrator focus groups across the country. One of the consistently raised concerns was the amount of time and effort invested by chairpersons in reviewing and deciding various discovery motions, especially in situations in which the motions are decided without a hearing (i.e., on the papers). Also, Dispute Resolution staff has found that the current lack of compensation for deciding such motions has made it more difficult to recruit current arbitrators to become chairpersons. Currently, arbitrators are not compensated for deciding discovery motions on the papers.

The stated justifications are suspect. NASD claims that it conducted "focus groups across the country," but provides no detail. The undersigned, having served as a NASD arbitrator since about 1976, had no knowledge of the alleged existence of the "focus groups" in 2002 until reading the request for comments on the SEC's website. How were arbitrators selected to attend the focus groups? How many attended? What were their backgrounds? How were the "focus groups" conducted? What cures to the underlying problem were suggested during the "focus groups"?

NASD states, "Dispute Resolution staff has found that the current lack of compensation for deciding such motions has made it more difficult to recruit current arbitrators to become chairpersons." What are the details to support those allegations? Did one staff member talk with one arbitrator? What was the degree of added difficulty? Were there other reasons that arbitrators have not desired to serve as Chairpersons? Did any claim that NASD training in the substantive law is so inadequate that prospective Chairpersons, who are not litigation attorneys, did not feel comfortable in such positions?

In allowing the proposal to go out for comment without added details, it appears that the SEC is willing to accept the NASD's claims without question.

IV. NASD Does Not Desire Input on the Proposed Rule from NASD Arbitrators

The NASD professes that "Transparency is a cardinal value of the federal securities laws. … NASD believes that transparency should be a hallmark of securities arbitration as well." (Testimony of Linda D. Fienberg, President, NASD Dispute Resolution Before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises Committee on Financial Services, United States House of Representatives, March 17, 2005) ("Fienberg Testimony") The reality is otherwise.

Essentially, the NASD maintains a policy of suppressing arbitrator input to the SEC. In the section entitled, "Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others," the NASD stated, "Written comments were neither solicited nor received." Further, the NASD has the means to inform each of its arbitrators of the existence of the proposed rule, the right to comment and details of how to comment. The NASD gathers arbitrator email addresses and uses them, from time to time, for mass communications with its arbitrators. However, the NASD failed and, thus, effectively refused to inform its arbitrators of the opportunity to comment upon the above referenced proposed rule other than by posting it on an obscure section of its website.

V. Alternative Solutions to the Underlying Problem

A. Explicitly Authorize Monetary Sanctions against Attorneys

The Discovery Guideline states, "VIII Sanctions. The arbitration panel should issue sanctions if any party fails to produce documents or information required by a written order, unless the panel finds that there is 'substantial justification' for the failure to produce the document or information."

The NASD could propose a rule requiring that monetary sanctions be assessed directly against attorneys representing the parties with respect to discovery motions, which are brought or defended without substantial justification, whether or not an order, written or oral, had already been issued.

B. Base Compensation of the Amount of Arbitrator Effort

By setting a flat amount of compensation to arbitrators for resolving discovery disputes, the proposal treats all discovery motions as if they involve the same complexity and the same amount of effort to resolve. However, some require more time and effort than others. The arbitrator compensation to resolve discovery disputes, as the compensation during hearings, should be based upon units of time, e.g., $200 for every

three hours of effort. Potentially large mandatory sanctions against attorneys would provide substantial incentive to attorneys to resolve discovery disputes without the necessity of a formal motion.

C. Permit Only Litigation Attorneys to Serve as Chairpersons

Attorneys with litigation experience, as opposed to non-attorneys or attorneys without litigation experience, could expeditiously resolve discovery disputes. In her recent testimony before Congress, Ms. Fienberg tacitly recognized that discovery problems involve matters of arbitrator competence and not compensation, by stating:

> We are currently working on two additional initiatives to improve the discovery process. The first is the creation of a voluntary pilot program for the use of a special roster of trained Discovery Arbitrators, who would review and resolve discovery issues expeditiously. The second is an updating of the existing Discovery Guide Lists, which identify documents that each party should produce in an NASD arbitration.

(Fienberg Testimony, p. 7.)

1. NASD Requires that Intra-Industry Disputes Be Heard Before Arbitrators Who Have Extensive Knowledge of Applicable Law

The NASD recognizes that knowledge of the law is important and is willing and able to employ very competent arbitrators in intra-industry disputes, but not in customer oriented disputes.

Parties receive some assurance that arbitrators are knowledgeable of applicable law only in disputes among NASD members or NASD members and their employees. In those matters, arbitrators are required to have "substantial familiarity with employment law," "ten or more years legal experience" or "experience litigating" and apply a "legal standard." (NASD Code of Arbitration Procedure, Rule 10335.)

The NASD should have the same concern for the correct application of the law and the competence of arbitrators in customer disputes as it does in intra-industry disputes. Parties to customer disputes should not be treated as second class citizens.

D. Improve Quality of Rulings

Uniform and informed discovery dispute rulings would cause a decline in discovery motions. The NASD permits non-attorneys and non-litigation attorneys to serve as Chairpersons. There is no assurance that their discovery rulings are based upon any standards. Thus, the parties are inclined to gamble on receiving an ill-advised ruling, which manifestly disregards the law, but is in their favor. The NASD should train its arbitrators in applicable substantive law and evaluate those arbitrators. In so doing, discovery disputes would be kept to a minimum.

1. GAO Report (1992) Recommended Arbitrator Training

Congress requested that the GAO study the arbitrator education process. ["In response to the concerns of industry members and individual investors, the Chairmen of the House Committee on Energy and Commerce and its Subcommittee on Telecommunications and Finance, and the Chairman and four members of the Senate Committee on Banking, Housing, and Urban Affairs requested that we examine arbitration practices in the securities industry. As agreed with the Committees and Subcommittee, we examined issues related to … the selection and training of arbitrators." Securities Arbitration --- How Investors Fare, United States General Accounting Office, Report to Congressional Requestors, May 1992, GAO/GGD-92-74 ("GAO Report"), p. 21.]

The GAO Report partially responded to the Congressional request, which dealt with "training." The GAO Report dealt with training in the "arbitration process," i.e., procedure as opposed to substantive issues, e.g., applicable law. ["Recommendations to SEC. GAO recommends that the Chairman, SEC, require SROS that administer arbitration forums to … establish a system to ensure these arbitrators are adequately trained…." GAO Report, p. 61.]

The SEC commented to the GAO that the NASD should expand arbitrator training and evaluation efforts. ["Nevertheless, while the SROs should expand their training efforts, the Staff does not believe that a prescription of specified courses should, or could, become an acceptable substitute for careful, varied evaluation by the arbitration departments to assure the independence and capability of arbitrators." GAO Report, p. 102.] Subsequently, the NASD eliminated its training program related to applicable law and informally advises panelists to ignore applicable securities under threat of being recused from serving as an arbitrator on the ground of bias.

2. Ruder Task Force Report (1996) Recommended that the NASD Implement a Program to Train Arbitrators in Substantive Law

The "Securities Arbitration Reform --- Report of the Arbitration Policy Task Force to the Board of Governors National Association of Securities Dealers, Inc." (January 1996) ("Ruder Task Force Report") recommended that the NASD improve arbitrator training as to applicable law and implement an effective evaluation procedure concerning arbitrator competence. The Ruder Task Force Report stated, in part:

> Many securities arbitration participants expressed concerns about the selection, quality, and training of arbitrators. .... Commentators also complained about the quality and training of the arbitrators. They felt that the arbitrators lacked sufficient expertise in the relevant substantive law…
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> ….
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> The two characteristics for which arbitrators received the lowest ratings in both the 1993 and 1994 surveys were "ability to cope with complex material" and "ability to analyze problems and identify key issues."
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> ….
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> We recommend that the scope and frequency of arbitrator training be expanded even further. In particular, we believe that there should be a continuing education requirement beyond the introductory session presently required of new arbitrators. Appropriate programs should be available for all levels of experience, emphasizing … relevant areas of substantive law.
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> ….
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> The training requirements should be applied flexibly based upon an arbitrator's demonstrated knowledge of relevant substantive law.... The requirements should be structured, however, to ensure that arbitrators remain current with important new developments in … and relevant law. (Emphasis added.)

Ms. Linda D. Fienberg, Esquire, was the "Task Force Reporter" of Ruder Task Force Report. Subsequently, she became President of NASD Dispute Resolution. The NASD has not implemented the aforesaid recommendations.

Since, 1993, the NASD has ceased offering training in applicable law. However, in 2004, the NASD sought authority from the SEC to charge arbitrators additional training fees to provide a "two-hour … session… on … videotaped training on civility."

(SR-NASD-2004-001) The NASD did propose a rule concerning "arbitrator web literacy," but that was withdrawn. (SR-NASD-2004-122)

3. NASD Prefers That Customer Disputes Be Heard Before Arbitrators Who Have Little or No Knowledge of Applicable Law

a. Cessation of Arbitrator Educational Forums

In 1993, the NASD ceased educating arbitrators as to applicable law. Prior to 1993, the NASD (Los Angeles Region) would conduct Arbitrator Educational Forums. All members of the arbitration panel were invited (without charge) to the Arbitrator Educational Forums, which were held in grand ballrooms of local hotels. Speakers presented topics of current interest, including applicable law, and the sessions were opened to questions from all present.

b. Rules Provide Little or No Guidance

The Manual and the NASD Code of Arbitration Procedure provide little or no guidance to arbitrators as to how to learn and/or deal with applicable law.

The NASD informs arbitrators that they are viewed by the parties "much as a judge would be viewed in a court of law." (Manual, p. 3.) However, it further informs arbitrators that they are not really required to follow the law in rendering their decisions. ["Deliberations. … Arbitrators are not strictly bound by case precedent or statutory law. Rather, they are guided in their analysis by the underlying policies of the law and are given wide latitude in their interpretation of legal concepts. The NASD offers no guideline to determine what "the underlying policies of the law" are or how and in what manner to recognize or interpret a "legal concept."

The NASD will not advise arbitrators of the applicable law. ["Function of the Arbitration Staff. The Director will assign a staff member to every case. The responsibility of the staff is to advise the panel concerning arbitration procedures. The staff members are not advocates, nor do they research legal issues. Staff members are on call and may be present to see that the sessions run smoothly and all rules are properly observed." Manual, p. 25.]

Many arbitrators lumber under the erroneous assumptions that they are forbidden from doing independent legal research and that they may not consider any legal authority unless it is presented by the parties. Arbitrators are only advised that they may read a rule referred to by a party. ["Before the hearing. … Arbitrators should not make

independent factual investigations. Nothing, however, prohibits an arbitrator from reading the text of a rule referred to in a party's pleading (e.g., if the complaint charges a violation of a suitability rule, the arbitrator may read the rule)." Manual, p. 21.] Arbitrators are impliedly restricted from conducting independent legal research. In at least one instance, an NASD Regional Director reprimanded an arbitrator for trying to educate co-panelists and legal counsel as to applicable case law.

c. The NASD Has Been Unresponsive to Requests for Arbitrator Training in Applicable Law

In 1992 through 1993, I attempted to encourage the NASD to cease the practice of frequent use of certain arbitrators and to educate arbitrators as to applicable law. The NASD, in substance, stonewalled both efforts. Details of my efforts are set for in my public comments dated February 10, 2005 to SR-NASD-2004-164.

d. Unpublished NASD Policy to Discourage Arbitrator Knowledge or Use of Applicable Law

NASD arbitrators have uniformly revealed their misunderstanding that they are forbidden to employ legal authority not cited by the parties in their decision making process. They gathered that misinformation from non-publicly available "training materials" used in their NASD introductory training sessions.

The NASD policy requires that an arbitrator's extensive knowledge of securities law and requests for full disclosure to co-panelists and the parties be considered as bias, when it should be considered as a demonstration of competence. An NASD Regional Director recently attempted to dissuade an arbitrator, who is well-versed in securities law and experienced in securities litigation/arbitration, from informing co-panelists and attorneys for the parties of applicable case law. (The relevant legal opinion describes the decision making process/criteria without specifying whether the ultimate decision was in favor of the plaintiffs or defendants.) The arbitrator desired to learn the attorneys' opinions as to whether the case law was applicable to the matter and, if so, how it was applicable. The co-panelists refused to consider the law (as they believed that such would be a violation of some unspecified rule as the parties did not supply the legal authority) and/or allow its disclosure to the parties. The NASD Regional Director solicited a promise from the arbitrator not to employ that law in the decision-making process. When the arbitrator refused to disregard the law, the NASD Regional Director suggested that the arbitrator invite and grant a party's motion for recusal based on grounds of bias. After the motion was granted, the two remaining arbitrators granted a motion to strike from the record all questions asked by the recused arbitrator and all answers thereto.

The NASD's aforesaid secret policy has engendered a systemic manifest disregard of the law in the arbitration decision-making process. Officers of the court, including employees of the NASD, should not encourage, permit or condone such manifest disregard of the law.

e. NASD Has Caused Its Arbitrators to Create Their Own Rules to Decide Cases

Since February 2005, I have communicated with more than 1,000 NASD arbitrators via email while seeking information as to their opinions/experiences with the NASD arbitration process. The communications indicated that: (a) some arbitrators have no use for the law ("Since 1996 I have been selected to serve on 65 cases (15 are still active). 19 have gone to hearing. In addition I have been Chairman of 28 of these cases. … Although we receive from both parties, reams of papers with case law, not once in any case during a hearing or during any deliberations has any one referred to them. … All we look for are the facts. … We do not need case law. Simply, does one plus one equal two. That's what we try to determine."); (b) some recognize that they lack legal skills ("I don't have the legal background to review legal documentation and fully understand it and how it does (not) apply to a case at hand. Come to think of it, perhaps I have just stumbled into your original complaint - that the non-lawyers involved in arbitration don't have the legal background to fully understand, and thereby apply the law."); (c) some take an ambiguous "fair and equitable" approach; (d) some believe that the principle of "contributory negligence" should be applied to all issues; and, (e) some arbitrators just try to look fair ("I generally agree that the training is more on how to look fair and do not talk to the parties in the rest room, than how to approach decision making, balance conflicting stories, apply the law, which law to apply, authority of SEC, NASD, Exchange Rules and state law, etc.").

It is obvious that the NASD's failure to educate arbitrators as to applicable law is having a negative impact upon the quality of justice available in arbitration proceedings. This should be most concerting as the NASD has substantially increased the number of arbitrators since 1993, when it ceased providing education in substantive law.

4. NASD Needs an Effective Means to Evaluate Arbitrator Competence

The Ruder Task Force Report (1996) recommended that the NASD implement an effective means to assess the competence of its arbitrators. The NASD has failed and, thus, refused to do so. Information in Report to the Securities Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities

Arbitrations, Nov. 4, 2002, by Michael A. Perino ("Perino Report") confirms that the NASD's attempts are in need of vast improvement.

a. The Ruder Task Force Report Recommended that the NASD Implement an Effective Arbitrator Evaluation Procedure

The Ruder Task Force Report recommended that the NASD implement an effective evaluation procedure concerning arbitrator competence. The Ruder Task Force Report stated, in part:

> Many securities arbitration participants expressed concerns about the selection, quality, and training of arbitrators. ....
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> [T]he information garnered from these various evaluations (provided by the parties and their legal counsel) is very limited. As a result, the NASD is missing an important element of feedback about the quality of individual arbitrators…. This lack of information limits the NASD's ability to address specific concerns about individual arbitrators and to make improvements to the process based on participant concerns.
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> ….
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> Evaluations of arbitrators by participants in the arbitration process are a vital source of information. They are used by the NASD staff to develop training programs, counsel arbitrators about deficiencies or problems, and to determine if certain arbitrators should continue to be selected.
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> ….
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> [W]e reluctantly recommend that arbitrators should be required to evaluate the co-panelists before they are asked to serve again and before they receive their honoraria for their participation in the case.

The NASD has not implemented the aforesaid recommendations.

b. NASD Has No Effective Arbitrator Evaluation Procedure

The NASD is essentially flying blind as to the quality and competence of its arbitrators. Until the mid-1990s, NASD Staff would attend each arbitration hearing session. Thereafter, Staff has little contact with arbitrators and does not attend hearing sessions. However, I have informed the NASD of the attitudes of various NASD arbitrators (without disclosing the identities of the arbitrators), which has been caused by the NASD's lack of arbitrator training and effective evaluation.

i. NASD Procedure Discourages Use of "Peer Evaluation" Questionnaire

The NASD has engendered a "why bother" attitude among its arbitrators. The NASD employs a "Peer Evaluation" questionnaire "as an essential part of the NASD Dispute Resolution's continuing effort to ensure that arbitrators are qualified." However, few people want to be and/or want to be considered as informants. Even so, the NASD discourages use of the forms. It does not even acknowledge receipt when such form is submitted. It does not inform complainants as to what occurs, if anything, to the perpetrator. The NASD does not publish information as to the supposed effectiveness of its Peer Evaluation process, e.g. number of questionnaires submitted; types of complaints; and, actions, if any, taken by the NASD in response to complaints.

The NASD provides no guideline as to whether an arbitrator should use the Peer Evaluation form to report very revealing specific comments or actions by co-panelists.

ii. SEC Study Found that Few Bother to Submit "Peer Review" Questionnaire

The latest publicly available report on evaluations provided by parties to an arbitration stated, "[F]ew arbitration participants completed the surveys …. The evaluation response rate was only between 10% to 20%. … [T]hese responses may reflect selection bias problems … [I]t is … possible that individuals that … achieved favorable outcomes were more likely to complete the surveys." (Perino Report, p. 34.)

VI. Conclusion

Adoption of the proposed rule, in its current form, would add to the parties' costs, but would not improve the quality of the product. There are many more effective means to eliminate discovery disputes and/or resolve discovery disputes in an expeditious and fair manner.

Please communicate with the undersigned should the SEC seek additional information on the aforesaid matters.

Very truly yours,

LES GREENBERG

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