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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: Petition for Rulemaking 4-502
Supplemental Information

Dear Mr. Katz:

The following information was learned after submitting the above referenced Petition for Rulemaking (5/13/05) to the Securities and Exchange Commission ("SEC"). It is further evidence that NASD Dispute Resolution ("NASD") encourages arbitrators to disregard the law in the arbitration decision-making process.

III. NASD Resists the Use of Applicable Law by Arbitrators in Customer Disputes

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

5. Published NASD Policy to Discourage Arbitrator Knowledge or Use of Applicable Law

In its April 2005 publication of the *Neutral Corner*, the NASD set forth its policy as to whether arbitrators are permitted to employ their knowledge of the law in the decision-making process. It stated,

> **Question and Answer: Understanding and Applying the Law in a Case**
> **Question:** What should an arbitrator do when additional information is needed to understand the law presented in a case?

> **Answer:** Although most arbitration claims present questions of fact that the panel will be able to decide on the proffered evidence, some parties may rely on a specific law or statute. Generally, the party who raised a legal issue will offer the panel a brief that sets forth the law or statute along with an explanation of how it applies to the facts of the case. However, arbitrators may also encourage the party to present the issue orally. In addition, arbitrators may request that parties submit a brief on any issue if the arbitrators believe it would assist them in deciding the case. In any of these situations, the opposing party or parties should be allowed to respond.
>
> *Arbitrators are reminded that they are not to engage in any outside legal research, nor should they ask NASD staff to conduct legal research for the arbitrators. The panel must rely on the parties to provide the research in support of their respective positions.*
>
> Arbitrators are not 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. If, however, an arbitrator manifestly disregards the law, a court may vacate an award. (See The Arbitrator's Manual). (Emphasis in original.)

The purported "Answer" demonstrates that NASD's disdain for use of the law in the decision-making process.

In essence, the NASD has informed arbitrators to ignore the law in their decision-making process. Attorneys and others familiar with the law been doing "outside legal research" throughout their careers to reach their current state of knowledge of the law. The vague phrase "outside legal research" dictates that attorneys and others familiar with the law (securities and otherwise) would be required to wipe their memory banks clean before entering the hearing room or ruling upon any pre-hearing motions.

The NASD informs arbitrators that they are viewed by the parties "much as a judge would be viewed in a court of law." (The Arbitrator's Manual, p. 3.) The NASD does not inform the parties that, inconsistent with the parties' reasonable expectations, the NASD instructs its arbitrators that they "are not bound by case precedent or statutory law."

Essentially, the NASD has abandoned all standards in the decision-making process. The NASD does not state how an arbitrator is to learn what "the underlying policies of the law" are in order to do an "analysis." Nor, does it state how an arbitrator is to learn: (1) what the "legal concepts" are; (2) how an arbitrator supposed to "interpret"

the law; or (3) how wide is the "latitude in their interpretation." One might reasonably conclude that the NASD informs arbitrators to "encourage the party to present the issue (of law) orally" so that there will be no easily accessible record on appeal. Further, arbitrators are not required to read any brief that is submitted by the parties.

The NASD informs arbitrators that they can ignore the law and, further, are not even taught what the law is, but they are not informed how, with that total lack of knowledge, how an arbitrator would know whether or not he/she "manifestly disregards the law."

This latest NASD pronouncement constitutes a Catch-22. In disputes among NASD members or NASD members and their employees, 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 Rule 10355.) Thus, those arbitrators should be disqualified as they are required to already have done "outside legal research" to qualify.

The *Neutral Corner* does not specify the ramifications to attorneys and others familiar with the law who decline to leave their knowledge of the law outside the hearing room. An example in the Petition shows that it is the NASD's policy to instruct such persons to invite and grant a motion for recusal on the grounds of bias.

The NASD expects arbitrators to treat a statement in the *Neutral Corner* as official NASD policy. The NASD is discretely attempting to promulgate a very substantial policy of informing arbitrators to ignore the law, which is inconsistent with the purposes of the federal securities law and the NASD's publicly available literature. The SEC has not granted such authorization to the NASD. It is inconceivable that the NASD would formally/publicly seek approval, in substance, to require arbitrators to ignore the law in the decision-making process or that the SEC would grant such permission.

Please communicate with me in the event that further information is desired.

Very truly yours,

LES GREENBERG

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