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July 31, 2005

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: Arbitration Award – "Explained Decision"
SR-NASD-2005-032

Dear Mr. Katz:

On July 14, 2005, I commented upon the above referenced proposal. In essence, my position is that customer arbitration sponsored by NASD Dispute Resolution ("NASD") is unfair to the participants and that the "explained decision" proposal is only an attempt to mask its many problems.

This letter is written with respect to the comments submitted on July 28, 2005 by Mr. Stephen G. Sneeringer ("Sneeringer"), Senior Vice President & Counsel of A.G. Edwards, Inc. In essence, Sneeringer claims that NASD arbitration is "just and equitable," that critics have no basis for their criticisms, and the proposal was only brought forth in an attempt to rectify an incorrectly assumed "public perception" that NASD arbitration is other than "just and equitable." As set forth below, Sneeringer's claims are devoid of merit.

Sneeringer's comment is based upon the erroneous premise that, if those who claim that NASD arbitration is not "just and equitable" do not prove their case to his satisfaction, then, without need of any factual proof, one must conclude that NASD arbitration is "just and equitable." Sneeringer presented no fact to support the position that NASD arbitration is "just and equitable." He claims, without proof, that the "parties expressing these opinions (that NASD arbitration is other than just and equitable) rarely have direct experience in the arbitration process but rely on hearsay, which hearsay is normally from disaffected, losing parties in that process." Then, incongruously, he relied upon the double-hearsay of "several polls, government studies, and forum alternative projects,"

which he claims prove that participants in arbitration proceedings have consistently believed that the arbitration process "was just and equitable." He impliedly equates participants' alleged perceptions with reality. He ignored the NASD's "Securities Arbitration Reform --- Report of the Arbitration Policy Task Force" (1996), which severely criticized NASD arbitration and made constructive recommendations, which have been ignored by the NASD and sections of the "government studies," which are inconsistent with his conclusions.

Sneeringer failed to state his own "direct experience in the arbitration process," if any. On the contrary, the attention of the Securities and Exchange Commission ("SEC") is invited to Petition for Rulemaking (SEC File No. 4-502) (http://www.sec.gov/rules/petitions/petn4-502.pdf) and the many lengthy comments thereto (http://www.sec.gov/rules/petitions/4-502.shtml) with respect to the litany of facts, which demonstrate that NASD arbitration is neither just nor equitable. The authors of the criticisms have extensive backgrounds in securities litigation/arbitration and set forth many of their personal observations.

Sneeringer cited "polls, government studies and forum alternative projects." Each is seriously flawed, e.g., statistically biased, prepared by those with a vested interest in their findings. Further, he failed to reveal material information.

GAO (1992) (2000) Reports

> The General Accounting Office ("GAO") in 1992 issued a report titled *Securities Arbitration: How Investors Fair*, Rep. No. GAO/GGD – 92 – 74 (May 1992) that reviewed arbitration decisions over the period January 19, 1989 to June 1990 and found no evidence of a pro-industry bias. The GAO found no statistically significant difference between results in industry-sponsored arbitrations versus American Arbitration Association arbitrations noting that investors prevailed 59% of the time. The GAO again reviewed decisions during the period of 1992 through 1998 in its report, *Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards*, Rep. No. GAO/GGD – 00 – 115 (June 2000), and came to similar conclusions. (Underline emphasis added.)

The 1992 GAO Report was extremely critical of NASD arbitration. "GAO'S review of arbitration procedures showed that arbitration forums lacked internal controls to provide a reasonable level of assurance regarding either the independence of the arbitrators or their competence in arbitrating disputes." (p. 6) "However, the forums had no established formal standards to initially qualify individuals as arbitrators, did not

verify background information provided by prospective or existing arbitrators, and had no system to ensure that arbitrators were adequately trained to perform their functions fairly and appropriately." (p. 8)

The GAO did not determine whether NASD arbitration was "fair" or "equitable." "GAO'S review … did not directly address the fairness of the arbitration process. GAO did not attempt to subjectively evaluate the fairness of the decisions reached…." (p. 6) "GAO'S statistical analysis did not directly address the fairness of the arbitration process." (p. 7) "Statistical analysis of overall arbitration results indicated little about the fairness of individual cases." (p. 8) Further, the only way to determine whether the arbitration results would differ in different arbitration forums would be to try the same case before each forum --- an impossible task.

The phase "investors prevailed" is meaningless without further information. It is common knowledge that the word "prevailed" only deals with a recovery without consideration of the amount of the claim and/or the costs incurred in securing the recovery. Thus, both a recovery of $.01 on each claimed dollar of damages at NASD would be counted as the same as a recovery of $1.00 on each claimed dollar in an AAA forum.

The 2000 GAO Report dealt with "unpaid awards," but specifically stated, "GAO could not reach conclusions about the fairness of the arbitration process from case outcome statistics." (p. 4.) Sneeringer referred to "similar conclusions," but failed to state what they allegedly were.

Tidwell Report

> December 1, 1997 to April 1, 1999 were reviewed in 1999. The vast majority strongly agreed that their cases were handled fairly and without bias. In fact, more claimants than respondents felt that their cases were handled justly and equitably. *See* Gary Tidwell, Kevin Foster & Michael Hummel, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrators* 3 (1999). (Underlined emphasis added.)

The credibility of this report is suspect for several reasons. (1) It was prepared by a person employed by the NASD, who was, in reality, performing a self-critical analysis. (2) The sample was not representative as 90% of the possible evaluators declined to respond. (3) Those who did respond were biased as they knew the results of the arbitration hearing in which they participated. (4) The report erroneously assumed that only two parties were involved in each hearing, which enhanced the evaluator response

rate. (5) There was no survey of parties who settled their case before hearing, which is the situation in the vast majority of cases.

Perino Report (2002)

> The Securities Industry Conference on Arbitration ("SICA") compiles data on arbitration outcomes. Reviewing this data yields no evidence indicating that one party is favored in arbitration. In fact, the award results have remained surprisingly consistent over 20-plus years notwithstanding the numerous changes that have been made to the definitions of who is a "public arbitrator" versus a "non-public or industry arbitrator." Most of these changes were again made to assuage negative "perceptions" of self-regulatory organization ("SRO") arbitrations. ***See*** Michael A. Perino's Recommendation Two in his ***Report to the Securities and Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations*** (November 4, 2002) ("Perino Report"). Dr. Perino noted that the change to the arbitration selection process was to answer "critics" even though there was "little if any evidence" that the pre-1998 selection system utilizing appointment rather than list selection "caused arbitrators to render pro-industry decisions." ***Id.*** at 20.
>
> …..
> In 2002, Dr. Perino was asked to evaluate conflict disclosure rules of the NASD and NYSE arbitration codes. In the Perino Report, Dr. Perino came to many of the same conclusions as the prior studies, programs, and analyses mentioned above. He concluded that the benefits of the California Ethics Standards would be few and the problems that they could generate may be several. ***Id.*** Dr. Perino also concluded that there was little evidence indicating that SRO arbitrations were unjust, inequitable, or unfair. ***Id.*** (Underlined emphasis added.)

Perino was not an impartial evaluator. The SEC engaged his services. The SEC had previously taken its position against California disclosure requirements. Perino knew the results that would assist the SEC. (If the SEC already conducted sufficient research to determine its position, why did expend additional taxpayer funds?)

In early 2005, Perino revealed a client list by stating, "EXPERT ENGAGEMENTS AND CONSULTANCIES: U.S. Securities and Exchange Commission; New York Stock Exchange; Morgan Stanley Dean Witter; UBS PaineWebber, Inc.; U.S. Bancorp Piper Jaffray; National Union Fire Insurance Company … New York Life Insurance Co. … BankAmerica Corporation" (Is Securities Arbitration Fair for Investors? Written Testimony of Professor Michael A. Perino St. John's

University School of Law Before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services United States House of Representatives March 17, 2005) At the time of the report, Perino did not disclose: his total compensation, all sources thereof and nature for his efforts in preparing the Report; whether the securities industry provided him with office support; whether his efforts had ever been engaged by the securities industry and, if so, details thereof; whether he reasonably anticipated future engagements by anyone in the securities industry.

Perino recognized that, if the California arbitrator disclosure rules were applied to the NASD or NYSE, a securities industry representative would not be permitted to serve on any NASD or NYSE sponsored arbitration panel in California. That was the heart of the matter. It would have been very unlikely for the Perino's Report to contradicted his client's publicly stated position.

SICA Pilot Program

> In January 2000, SICA commenced a 2-year pilot program permitting public customers to elect to arbitrate their claims in selected non-SRO forums. This program was undertaken voluntarily by the industry in response to contentions that, given the negative "perceptions" of SRO arbitrations, public customers would select non-industry forums if given the opportunity. This contention proved to be resoundingly incorrect. Notwithstanding the hundreds of cases eligible for the program, only eight were submitted. SICA found that lower cost, familiarity with procedures, and fear of delays caused public customers to pick SRO arbitration, notwithstanding this alleged negative "perception." ***See*** SICA ***Final Report*** ***Securities Industry Conference on Arbitration Pilot Program for Non-SRO Sponsored Arbitration Alternative*** (2002). (Underlined emphasis added.)

A closer look at the program was most revealing. However, an attempt to locate a copy of the Final Report, using internet search engines, was unsuccessful. The following was found during an internet search.

SICA final report

From: Pittson, Cynthia (*CPittson@law.pace.edu*)
Date: 06/20/03

- **…**

> We've been trying to track down this report for 2 weeks: Final Report of the Securities Industry Conference on Arbitration Pilot Program for Non-SRO Sponsored Arbitration Alternatives (2002). We've tried web sites and various contacts listed in the 11th SICA report, issued in 2001 (including NASD, NYSE, SICA, SIA, JAMS, and the American Arbitration Assn.) but have been unsuccessful so far.
> Does anyone know of another contact or lead we could try?
> Thank you.
> Cynthia Pittson
> Head of Reference Services

Sneeringer published a paper in the Securities Arbitration Commentator entitled, "Securities Industry Pilot Program," which described the project. He stated,

> Participation by the securities industry is voluntary. … The firms participating, the number of cases that will go to decision and the arbitration forums are: Merrill Lynch 15 JAMS; MS Dean Witter 15 JAMS; Paine Webber 15 JAMS; Prudential Secs. 15 JAMS; Smith Barney 15 JAMS; A.G. Edwards 15 JAMS/AAA; Raymond James 10 JAMS/AAA. … [T]he firm will advise if the case is not eligible to participate in the pilot program…. [A]n arbitration panel of three people is required…. At least one of the arbitrators must have current or past direct involvement in the securities industry of three to five years. … JAMS requires $25,000 in dispute and the AAA requires $100,000, before the case will qualify for three arbitrators. … [T]he program's purpose is to evaluate non-industry forums… Mr. Sneeringer was a participant in formulating the Program which is the subject of this article. (Underlined emphasis added.)

From aforesaid available information, one can readily determine that the "Securities Industry Pilot Program" was sham perpetrated upon the investing public. It is obvious why only statistically insignificant eight (8) items of data were available and the Final Report remains so unavailable.

It would be impossible to "evaluate non-industry forums" when requiring those forums to cause an otherwise not required securities industry arbitrator to serve on each panel. Further, it is highly unlikely that a customer would expose him/herself to the potential expense of three retired judges, who charge on an hourly basis, in a JAMS forum or exorbitant AAA fees. The only securities brokerage firms that volunteered for the project could well afford any such potential expense.

A realistic means to "evaluate non-industry forums" would have been to assure public customers of no greater expense than that which would be incurred during NASD arbitrations and not to require an arbitrator/panelist with "direct involvement in the securities industry of three to five years."

Further, since "Mr. Sneeringer was a participant in formulating the Program," a fact not disclosed in the comment, he would be hard-pressed to criticize the results of his own ideas.

Thus, one can readily recognize that the comment failed to present factual support for the proposition that NASD arbitration is "fair and equitable," utilized double "hearsay" sources after falsely accusing others of using "hearsay" and relied upon obviously biased reports or studies while ignoring reports or material portions of reports expressing inconsistent views.

Please communicate with the undersigned in the event that further information is required.

Very truly yours,

LES GREENBERG

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