Law Offices of
LES GREENBERG
10732 Farragut Drive
Culver City, California 90230-4105
Tele. & Fax. (310) 838-8105
E-Mail: LGreenberg@LGEsquire.com
www.LGEsquire.com

April 20, 2005

VIA EMAIL: Rule-Comments@Sec.Gov

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: NYSE Failure to Appear or Produce Documents in Arbitration
File No. SR-NYSE-2005-18

Dear Ms. Morris:

I. Introduction

In substance, I support the proposed rule "That Failure to Appear or Produce Documents in Arbitration May Be Deemed Conduct Inconsistent with Just and Equitable Principles of Trade" ("Proposed Rule"). However, the request of the New York Stock Exchange ("NYSE") for the Proposed Rule exposes the fact that NYSE securities arbitrators are not sufficiently competent to rule on discovery disputes and/or do not have the moral conviction to use their existing powers, e.g., the power to impose monetary, issue and/or case determining sanctions. Further, if sufficient monetary sanctions were assessed against offending attorneys, the problem would rapidly diminish or disappear.

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 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/arbitration. 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 I no longer represent securities brokerage firms.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 National Association of Securities Dealers ("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. Competently Implemented Existing Procedures Are Sufficient

The Proposed Rule does not state whether or why existing procedures are not adequate to deal with the problem of discovery abuse. It vaguely states, "The specific authority to bring a disciplinary action under NYSE 476(a)(6) should improve the efficacy of the arbitration process by facilitating the Exchange's ability to ensure more fully and forcefully the cooperation of a responsible party who is a party to an arbitration proceeding."

The request for the Proposed Rule is a tacit admission by the NYSE that its arbitrators are not capable of effectively framing and/or enforcing discovery rulings. NYSE arbitrators currently have authority to resolve discovery disputes. "Upon the written request of a party whose information request is unsatisfied, the matter will be referred by the Director of Arbitration to either a pre-hearing conference under paragraph (d) of this section or to a selected arbitrator under paragraph (e) of this section." NYSE Rule 619(b)(4). NYSE arbitrators currently have authority to enforce their discovery rulings. "The arbitrators may dismiss a claim, defense or proceeding with prejudice as a sanction for willful and intentional failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective." NYSE Rule 604(b).

The Proposed Rule would not be necessary if NYSE arbitrators would assess monetary sanctions against offending attorneys. Offending attorneys would be responsive to the imposition of personal monetary sanctions much more than sanctions assessed against their clients and/or their firms.

IV. Other, More Serious, Problem

There is the more fundamental issue of arbitrator conflict of interest. Parties to arbitrations and/or their legal counsels are involved in the arbitrator selection process. NYSE Rule 607(c). From a practical standpoint, a securities arbitrator may be reluctant to impose effective discovery sanctions if he/she wishes to render future service on the NYSE panel of arbitrators.

V. Inadequate Specific Provisions of Proposed Rule

The Background Statement states, "Arbitrators may, in the decision rendered by the panel, refer to the NYSE Enforcement Division a failure to cooperate in the voluntary exchange of documents and information by a responding party." Thus, the Proposed Rule would provide discretion to the same arbitrators, who the NYSE admits are not capable and/or have conflicts on interest, for making a disciplinary reference. A mandatory reference to the NYSE Enforcement Division of all contested discovery orders and creation of an associated data base would allow the NYSE Enforcement Division a much better opportunity to detect patterns of discovery abuse.

The Proposed Rule specifies that the disciplinary reference, if any, shall be set forth in the "decision," i.e., after the final award has been rendered. Thus, there would be no mechanism to compensate the non-offending party for the damage done by the discovery abuse.

VI. Conclusion

NYSE Rules currently provide an effective means to cure arbitration discovery abuse. The request for the Proposed Rule reveals some of the inadequacies of the securities arbitration process, e.g., arbitrators who are incapability and/or, due to conflicts of interest, unwilling to implement truly effective orders to cure discovery abuse. There is no doubt that a few substantial monetary sanctions against offending attorneys, who play "hide-the-ball," would eliminate the problem. It is not a matter of new rules, but the competence and moral character of securities arbitrators to implement existing rules.

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

Very truly yours,

Les Greenberg

LES GREENBERG

LG:ms