To: The Investor Advisory Committee and the
Commissioners of the Securities and Exchange Commission

I am writing this letter as an individual investor with no connection to any group or organization representing or regulating investors or financial services companies. I feel I may have something to add to the discussion the Investor Advisory Committee is now holding. I'm normally hesitant to discuss subjects of this nature publicly, but I believe an exception is warranted in this situation for the following reasons:

1.) The committee has asked for comments from anyone so inclined.

2.) I continue to hold out hope that my particular situation will be addressed and rectified.

3.) Regardless of whether I receive the consideration I desire, perhaps I can prevent others from being subjected to the horrific treatment I have experienced.

4.) The way my situation has been handled so far by those who are charged with the task of protecting individual investors (specifically FINRA and the SEC) needs to be exposed so that as many people as possible, especially those who are going to be forced to arbitrate, know how the "system" as it exists today really handles the case of an "aggrieved" individual investor.

A few things stand out to me about the comments that have been submitted so far to the Investment Advisory Committee. First, given the millions of individual investors who look to the Financial Industry Regulatory Authority (FINRA) and to the Securities and

Exchange Commission (SEC) to protect their hard-earned savings and investments, there don't seem to be many comments in total. However, if I were a member of the Committee reading these comments, I wouldn't take that as a sign that nothing is wrong with the current system or that everyone is satisfied with the way this system works. Rather, I believe it should possibly be interpreted as a conclusion drawn on the part of individual investors that this is all for show and that nothing substantial in the way of real help through reform of the current system will come about.

Next, a number of the comments deal with issues that most individual investors aren't even aware they are affected by, such as issues of corporate governance, adequate disclosure of relevant information, target date funds, executive compensation, and the use of international accounting standards. In that same vein, the SEC these days seems to be preoccupied with matters that, while being both important and somewhat costly to individual investors, don't really resonate with them. Other than Ponzi schemes and outright theft which can lead to investors losing their entire life savings and which might make the nightly news, most of the efforts of the SEC lately seem to be focused on preventing large numbers of investors from being "nicked" for relatively small amounts of money when brought down to an individual basis. I'm speaking specifically of such things as front-running, insider trading, after-hours trading, and options back-dating. Any or all of these "small time" misdeeds can add up to a significant amount of money for the individual or firm committing them when that money is taken from thousands or millions of investors, and they need to be stopped. But to an individual investor, they can amount to no more than a "pin prick" of a loss.

On the other hand, if there is one thread that runs through the comments submitted by individual investors, or those who represent them, it seems to be the subject of arbitration from two perspectives:

1.) what a gross injustice it is that investors are forced to arbitrate rather than allowed to chose between arbitration and a court trial, and

2.) the unfairness of the arbitration process itself.

But even these complaints most often are expressed in generalities that don't really give someone in authority an accurate "feel" for how difficult it is for an individual investor to seek and obtain redress when he or she has been wronged by an employee or company regulated by FINRA and/or the SEC. That is where I hope this letter will make a difference. I am going to give the details of my journey through the "hell" of the arbitration process as conducted by FINRA and the regulatory system in place at the SEC. I have probably gone further with both entities than most aggrieved investors ever have. I want to make one thing perfectly clear from the start, I was never looking for sympathy but for justice, and so far justice has been denied by both FINRA and the SEC. While I will relate the specifics of my case and what I experienced, which may be completely different from what others have experienced, I believe much of what I will say about both the processes and the people I dealt with at FINRA and the SEC should be of interest to many individual investors. I hope it will serve as a reality check for those investors by letting them know just how unprotective and unresponsive the regulatory system is in case they ever have to turn to it for redress. I also hope to open the eyes of

the SEC, if it doesn't already know, as to just what kind of job FINRA is doing with regard to addressing the grievances of wronged investors. If the SEC believes it doesn't have to be concerned about the cases of individual investors because FINRA is adequately and fairly handling these cases, then it is most certainly operating under a false notion. Unfortunately for individual investors, that position or opinion held by the SEC stems from the fact that once there has been a ruling from a FINRA arbitration panel with regard to an individual investor's case, all other agencies, bodies, forums, etc. tend to adopt the position that even if an individual investor vociferously protests an adverse ruling, he must be declared wrong and the initial decision must be assumed to be right because surely the investor got a fair and thorough hearing the from the arbitration panel. However, in many cases (mine included) nothing could be further from the truth!

I will also give the names of many of the individuals I dealt with in both organizations. I think this gives much more credence to what I have to say than if I simply said "someone at FINRA…" or "an individual at the SEC…" Besides, these people should want to receive recognition for the job they have done. On the other hand, I will not be mentioning the firm, its subsidiaries, or the stock broker and lending officer involved. Finally, this letter is filled with many details, details which I believe should be brought to the attention of the Committee. If you are someone who can't tolerate a lot of details, I would turn around and go back right now if I were you. However, if you are not afraid to find out what can really happen to an individual investor who is forced to go through an arbitration hearing and if you are truly interested in "change" and "reform" and "doing the right thing" for investors, then I encourage you to proceed.

SUMMARY OF MY CASE

In summarizing what was done to me, I am going to leave out many of the details of what happened, but I believe anyone reading this will still come away with a good idea of what I experienced. In January of 1999, I had an account at the brokerage subsidiary of a very large, well-known, international financial services company. Whether through a misunderstanding or by intention, a "sister" subsidiary of the brokerage, which was a lender to small businesses, attached a faxed copy of my signature to a contract (specifically, a pledge agreement) which said I wanted to co-pledge my account at the brokerage for a loan the lending subsidiary wanted to make to a third party. The third party was a small business of which I owned a small percentage, but I had no role in the management of it. The other co-pledgor was also the managing partner of the small business. I was not aware that they had attached this signature page to the pledge agreement until February of 2002. I was never given a copy of the pledge agreement either before or after its "execution". It was drawn up by the lending subsidiary and was highly favorable to them and highly unfavorable to me. I was not even told it existed.

When presented with the pledge agreement by the lending subsidiary, the "sister" brokerage subsidiary apparently agreed to hold my account as pledged collateral for the loan. However, neither my broker nor anyone else at the brokerage thought to pick up the phone and call me to verify that I actually wanted to pledge my account. Perhaps that was because the broker, along with several other people at the brokerage, and the lending

officer received commissions both when the loan was originally made and every year there was an outstanding balance on the loan. So there was plenty of incentive to skip the verification and act as though I was in full agreement to do this. I can't think of a more selfish, heinous, despicable act a broker can commit with regard to a client than to allow the client's entire account, the fruit of a lifetime of hard work and savings, to be put at risk of complete loss for his own profit. This was not simply the unauthorized or unsuitable purchase of a few hundred shares of a stock that later tanked. If it was, I wouldn't have wasted everyone's time over the last few years. And this was not just the work of one or two people. At least a half dozen people signed off on the loan and pledge agreements, and there were others mentioned in the loan documents that had to have known about it. And yet no one thought to ask me if I really wanted to do it. And not only was my signature attached to this pledge agreement without my knowledge and agreement, certain pieces of confidential information about my account also had to have been revealed, which I can explain in more detail at a later date. I want to state as emphatically as I can that this was most definitely NOT a case in which I chose not to read the "risk" warnings involved in pledging my account as collateral nor was it a case in which I read the "risk" warnings but chose to ignore them or failed to try to understand them.

In late 2001, the brokerage allowed the other co-pledgor to remove funds (ie., collateral) from his account, even though such a withdrawal was prohibited by the pledge agreements. It was February of 2002 before I found out my signature had been attached to the pledge agreement without my knowledge and consent. But by then, the entire loan

amount had been borrowed, so there was no "going back". In July of 2002, when the stock market was in what was almost a free fall as a result of the bursting of the technology stock bubble and 9/11, the value of the two co-pledged accounts dipped below a minimum value the lender had stipulated in the co-pledge agreements that the two accounts had to stay above. I had to meet two margin calls within about two weeks totaling $68,000 in order to keep the lending subsidiary from instructing the brokerage to liquidate our accounts and pay off the loan.

After that, the other co-pledgor and I decided to sell all the stocks in our account and just keep cash in those accounts in order to maintain a stable value above the minimum required. However, that triggered a lot of capital gains taxes and accounting fees for me because I had held some of the stocks for almost 20 years. But what was especially galling was that we wouldn't have gone below the minimum amount in the first place if the brokerage had not allowed the other co-pledgor to remove funds from his account in the fall of 2001. Again, allowing the other co-pledgor to remove those funds was prohibited by the terms set forth in the pledge agreements.

The third party small business to whom the loan was made filed for Chapter 11 bankruptcy in December 2002. Subsequently, after months of making the loan payments myself, the other co-pledgor and I decided that the company would never be able to pay it off so we paid the loan off out of our two accounts in the summer of 2003. Because I had by far the larger account, especially after the brokerage allowed the other co-pledgor to remove funds from his account, I ended up paying off about 83% of the loan even though

I owned only about 18% of the company. So what once had been an account with a value of slightly over seven figures was reduced to about $26,000, which was what I was left with after everyone else, including the lender's attorneys, had been paid off in full. That is worth repeating: all I had left from an account that at one time had a value in seven figures was about $26,000. Now, I hope you can understand why I am still, to this day, livid about this. And I am not just angry about what the two subsidiaries of the financial services company did to me. I am extremely upset about how my case was handled by both FINRA (the NASD at the time) and the SEC. Both organizations went out their way to make it as costly, difficult and frustrating for me as they possibly could, which is what I hope to show in the rest of this letter.

FINRA (NASD) - DISPUTE RESOLUTION (DR)

1.) One of the more difficult, damaging, unfair and expensive aspects of my case was the fact that, even though both subsidiaries were owned by the same "mother" company, they were both apparently separate legal entities. But that was not the worst part. The worst part was that they were "governed by" or "answerable to" different legal or regulatory authorities. Because both subsidiaries played a major role in the loss of my account, I pursued restitution from both of them because I was told I couldn't pursue the "mother" company only. Specifically, I had to pursue the brokerage through FINRA and the lending subsidiary through the federal court system. This essentially doubled my legal expenses and at the same time weekend my case against each one because the "governing" body over one did not care what the other subsidiary had done to me.

FINRA had no jurisdiction over the lender, so it didn't care what part the lender had played in my loss. The federal court system cedes all jurisdiction over the brokerage to FINRA (except in certain special situations) so it had no interest in hearing what the brokerage had done to me. From a strategic standpoint, this made it possible for the attorneys for each subsidiary (who were the same people) to partially blame the other subsidiary for what had happened to me when they were defending one subsidiary in front of its "governing authority", knowing full well that there would be no harmful repercussions to the other "sister" subsidiary. This is all despite the fact that the two subsidiaries shared much with each other, such as information about my account balances and commissions when the loans were first made and later renewed. In other words, they acted in concert as one company to obligate, destroy and take my account, but were able to claim and take advantage of the fact that they were legally two separate entities. If it all sounds confusing and nightmarish, imagine being stuck in the middle of it and watching both subsidiaries "get off the hook" because of what I would call a "flaw" in the system. If more than one subsidiary of a financial services company plays a role in the loss of a client's account, they should all be able to be pursued in the same venue at the same time so that the entire story is known by those who sit in judgment.

2.) FINRA claims, and I along with probably most other individual investors believe, that one of its primary purposes is to establish and enforce rules and regulations that govern the behavior of brokers and brokerages towards the clients who entrust funds to them. However, in reality, I believe one of the primary roles FINRA sees itself playing is as "protector" of the financial industry and its individual members that it supposedly

regulates. After all, it is an "SRO", a Self-Regulatory Organization which means, in essence, the industry regulates itself. That is worth repeating: the industry regulates itself. How can an industry that has such an impact upon people's lives be allowed to regulate itself? What would be the level of public skepticism, and outrage, if the pharmaceutical industry was allowed to regulate itself? What about driver and worker safety issues if the American automobile industry, the American mining industry, and American industrial plants were able to set their own safety standards? The public wouldn't stand for it, and yet the industry that is entrusted with the fruit of many people's entire working lives – fruit that these people rely upon to help feed, clothe and educate their families and to hopefully sustain them throughout their retirement years – is allowed to set its own rules and enforce them as it sees fit. And yet there doesn't seem to be the least bit of concern or questioning as to whether this is the "right" way to handle such an important aspect of people's well-being.

In my particular case, when I (as every investor with a brokerage account has done) signed the account opening statement at the brokerage, I agreed, according to the fine print on the back of this statement, to be forced to take any dispute or disagreement that may arise between the brokerage and me to an arbitration hearing. However, shouldn't the "flip side" of that be that if I have an issue with by brokerage, I am entitled, or I have a right to, an arbitration hearing? I certainly believe so. And yet the attorneys who represented both the broker and the brokerage (again, the same individuals) tried every "trick" in the book to at first postpone indefinitely and then to dismiss my claim before a hearing was even held. FINRA touts on its website and in the press that arbitration is

much cheaper and much faster than a court proceeding would be. But in my case, I filed for an arbitration hearing in early January of 2004 and it was mid-December of 2005, almost two years later, before the hearing was finally held. And between those dates, I had to spend between $40,000 and $50,000 in legal fees just to make sure my case wasn't dismissed before I even had a hearing. How's that for "fast" and "inexpensive"? Just look at the documents I had to pay my attorney to either produce or answer during the course of those two years:

1.) Jan. 9, 2004 Statement of Claims

2.) March 5, 2004 Specific Denials and Defenses

3.) June 4, 2004 Motion of Respondents to Stay Arbitration Proceedings

4.) June 23, 2004 Memorandum in Response and Opposition to Respondent's Motion to Stay Arbitration Proceedings

5.) July 12, 2004 Respondents Reply Memorandum in Support of Motion to Stay

6,) Nov. 22, 2004 Responses and Objections of Respondents XXXXXXXXXXX and XXXXX, Inc. to Claimants First Request for Information and Documents

7.) Nov. 30, 2004 Respondent's Motion and Supporting Memorandum to Dismiss and, In the Interim, to Stay Claimant's Arbitration Proceeding

8.) Dec. 15, 2004 Claimant's Response to Respondent's Motion to Dismiss and, In the Interim, To Stay Claimant's Arbitration Proceeding

9.) Dec. 17, 2004 Motion to Compel Production

10.) Dec. 27, 2004 Respondent's Reply Memorandum in Support of Motion to Dismiss and, In the Interim, To Stay Claimant's Arbitration Proceeding

11.) Jan. 4, 2005 Memorandum of Respondents in Opposition to Claimant's Motion to Compel Production

12.) June 17, 2005 Claimant's Motion to Strike Response of Respondents and Grant Award to Claimant

13.) June 24, 2005 Claimant's Renewal of Discovery Requests

14.) June 25, 2005 Memorandum of Respondents XXXXXXXX and XXXXX, Inc. in Opposition to Claimant's Motion to Strike Response of Respondents and Grant Award to Claimant

15.) July 18, 2005 Motion for Summary Judgment and Supporting Memorandum of Respondents XXXXXXXXXXXXX and XXXXX, Inc.

16.) Aug. 16, 2005 Claimant's Memorandum in Response and Objection to Respondent's Motion for Summary Judgment

17.) Sept. 9, 2005 Respondent's Reply Memorandum in Support of Motion for Summary Judgment

18.) Oct. 24, 2005 Subpoenas Issued by XXXXX to XXXXXXX , XXXXXXX XXXXXXXXXX (all of XXXXX, Inc.) and XXXXXXXXXX

19.) Nov. 3, 2005 Claimants Objections to Respondent's Appearance Subpoenas

These documents are just the ones I could put my hands on. There may have been others. And they represent the written correspondence that was filed. Quite a few of the expensive telephone conversations took place during the gaps in time between the written documents. (It's worth noting that everyone involved – attorneys for both sides and the arbitrators – were paid by the hour while working on my case, a substantial amount of which I had to pay.)

What also really upsets me, and what every investor forced to go to an arbitration hearing should take note of, is that the time and money spent trying to make sure your case doesn't get dismissed before you have even had a hearing is time and money taken

away from preparing for your hearing and developing your case. My attorney didn't want to start preparing (and billing me for the time) for a hearing before we found out we were even going to get to have one. When the panel finally announced that they would conduct the hearing, I believe there was one month or less to go before the hearing was to take place. So there were almost two years of attorney's fees and time wasted arguing that we were entitled to a hearing and less than one month to actually prepare for the hearing. Let me repeat that because it is an important point and I am still upset about what took place. Even though there were twenty-three months between the time I first filed for an arbitration hearing and when the hearing took place, twenty-two of those months were spent just arguing with the defense attorneys over whether I should even be allowed to have a hearing **and less than one month was available to prepare for the hearing**. It wasn't as though the hearing had been initially scheduled for 9 or 12 or 15 (or 23) months later and we had that long to prepare for it. It had been scheduled for **approximately one month** before it took place, and my attorney, like most attorneys, already had a full plate of cases he was handling. I am sure that taking as much time away from case preparation as possible is part of the overall strategy of the defense attorneys and I am sure that the extremely short time my attorney had to actually prepare for the hearing (about one month) affected the quality of the case we were able to put on. But it was either go with the hearing as scheduled or wait about another six months and run up more billings from my attorney and charges from the panel <u>and</u> potentially be subjected to more intentionally false and misleading accusations made by the attorneys for the defendants that would further poison the minds of the panel members.

This is just one illustration of how FINRA demonstrates what I feel is its bias against the individual investor who files for an arbitration hearing and in favor of the industry member it regulates. Also, in addition to the above mentioned strategy of allowing the plaintiff's attorneys as little time as possible to actually prepare for the hearing, I'm sure the attorneys for the defendants in these cases have one or more of the following intentions in mind when they employ these tactics:

1.) Force the plaintiff to spend so much on legal fees that he or she eventually runs out of money and has to give up.

2.) Cause the plaintiff to become so frustrated with all the delays that he or she gets disgusted and gives up.

3.) If one of the above two doesn't happen, then perhaps the attorneys for the defense can make enough misstatements about what happened in the case, or enough mischaracterizations of the plaintiff and his motives that the panel ends up totally confused about what really did take place and who was at fault <u>or</u> they end up consciously or subconsciously biased against the plaintiff because they are convinced he was at fault for what happened to himself and now he is just looking for some "deep pockets" from which to recover his losses.

FINRA should know by now what the intentions are for using these tactics by the attorneys for the defendants in these arbitration hearings. No plaintiff should be subjected to this sort of "persecution" and character assassination. The defendant's attorneys should be told to stop dragging it out and should be forced to proceed to the hearing as quickly as possible. And yet FINRA had no qualms about allowing it to happen in my case.

3.) Besides the damage done to me and my case by the delaying tactics outlined above, just as damaging were the tactics employed by counsel for the defendants when they refused to deliver documents, etc. that we asked for in our discovery requests. How can a plaintiff be expected to present a thorough and convincing argument if he or she is denied copies of the documents needed to make his or her case? My attorney and I were given all the standard "lawyerly" excuses that you would expect:

"too expensive to produce"

"too time consuming to produce"

"not relevant to the case"

"contains confidential or proprietary information"

"doesn't exist"

" not available in a form that can be easily reproduced"

I would have hoped and expected that any honest, fair and experienced panel of arbitrators would have heard all of this before and would have told counsel for the defense to quit stalling and produce what was asked for. I doubt that these kinds of shenanigans would have ever been allowed to take place in a court of law. However, the panel in my arbitration hearing, as best I can tell, didn't lift one finger in an effort to see that I received what I requested. I'm sure that the defense counsel knew how far they could go and how much they could get away with in a FINRA-sponsored arbitration hearing with arbitrators instead of in a courtroom with a judge, and took full advantage of it.

When a date of mid-December, 2005 was finally set, we received a pittance worth of documents about three weeks prior, only maybe one of which was something we asked for. Counsel for the defense again requested postponement of the hearing until mid-summer 2006 (a full two and one-half years after my initial filing for a hearing). My attorney and I briefly considered it, thinking we might be able to use the time to try to obtain more of the documents we had requested. However, we realized that this could also have been a ploy by the defense counsel to get more time to try to have the case dismissed and to further "poison" or confuse the minds of the panel members. We didn't want either to happen, so we insisted the hearing be held as scheduled.

As things turned out, what was even more infuriating was that some of the documents we asked for in our discovery request, but never received, were referenced or alluded to by the broker in his testimony during the hearing. So they existed but we were not allowed to see them in order to possibly use them as part of our presentation.

The whole point of this is to again illustrate that FINRA did little or nothing to see that I received what I needed to make my case (a fact that I will come back to in a minute) and I know that this severely hurt my chances. In light of the defense counsel's refusal to produce documents requested and the use of the delaying tactics that I spoke of a moment ago, I don't know how an arbitration panel can allow this to happen and then claim it conducts a fair and honest hearing process. Once again, no real court of law would ever have let this happen because no plaintiff in that venue would be forced to choose between

having his or her hearing held in a timely manner and receiving the discovery documents needed to present a convincing case.

4.) Another aspect of the arbitration process that I find extremely unfair is that the panel is made up of three members, one of whom has to be "from the industry". In my opinion, this gives the industry member (usually the defendant) a "leg up" in an arbitration hearing. It's like saying that of a twelve member jury in a criminal trial, four members have to be "friends or relatives" of the defendant because they know him the best. What is the logic behind this requirement? Aren't all the panel members supposed to know the rules and how the industry operates? If they don't, they shouldn't be arbitrators in the first place. On top of that, I would like to see the results of an independent audit of how the industry members on the panels have voted over the years. I'm sure this raw information is available and should be easy to collect. I would be shocked if it did not show a statistically significant bias in favor of the "regulated" defendants. FINRA likes to publish a lot of statistics about the arbitration process. I'll wager this is one that you will never see.

Assuming it is what I think it is, then with a three member panel, the defendant only has to get one of the other two (50%) to side with him in order to win. The plaintiff, if the statistics prove me right, has to get both of the other two to side with him, a 100% success rate. Does that sound fair?

But that is just the "surface" complaint about the arbitrators. If you think a little deeper, you realize what is really going on. The arbitrators probably rely upon the fees from their arbitration work for either their full income or to supplement any other income, such as retirement income. In either case, they have to stay busy working on arbitration cases if they want to maintain their needed or desired income level. It is my understanding that the way arbitrators are chosen for a hearing is that both sides are presented with a list of potential arbitrators from which they can either choose or eliminate arbitrators. I doubt that most attorneys who represent individual investors do enough arbitration work that they have had experience with a large number of different arbitrators so that they know how any particular arbitrator tends to vote. On the other hand, I would be shocked if most legal departments (or whatever they may be called) of large brokerages don't keep a list of individual arbitrators they have encountered in the past, and how they have voted. If these legal departments don't keep such a list, then I would argue that they are not doing their job! And it would not even surprise me if such lists are not exchanged amongst the legal departments of a number of brokerages.

So if an individual wants to keep working (and receiving income) as an arbitrator, he can't afford to side against the industry very often or he will end up on the "no" list of some or all the brokerages, which means he better look for another source of income. Lawyers for individual investors don't hold this sort of power over arbitrators because they probably haven't had experience with all that many. Thus, the way it turns out is that one arbitrator admits he is "from the industry" (with everything that implies), while in reality, the industry potentially "owns" <u>all</u> the arbitrators. That does not bode well for

most plaintiffs. This is akin to the recent situation in which the credit rating agencies felt under pressure to give AAA ratings to credit instruments sold by investment banks that they personally felt were less that AAA quality. If they didn't give this high a rating, not only would the investment banks probably go to another rating agency to try to get a higher rating on a particular issue this time, but the rating agencies felt that they might also lose future business the investment banks might have brought to them, all because they didn't "play ball".

5.) Before getting into the specifics of my arbitration hearing, I would like to bring up one other aspect of the arbitration process that I believe ends up hurting many plaintiffs. This aspect is illustrated by the following quotes from the "Arbitrator's Manual" (Exhibit 1) from page 1 of 18:

> "Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge only looks to the law, and the reason why arbitrators were appointed was that equity might prevail."
>
> - Domke on Aristotle

and from page 14 of 18

> "Arbitrators are not strictly bound by case precedent as statutory law. Rather, they re guided in their analysis by the underlying policies of the law and are given wide latitude in their interpretation of legal concepts."

So in addition to the allegedly "fast and inexpensive" features of arbitration that FINRA touts in order to justify forcing investors to arbitrate instead of allowing them to go to

court, it also sells arbitration by insinuating that plaintiffs may receive some sort of "break" from the arbitrators because they are allowed to be more "lenient" or "generous" or "understanding" or "favorable" than what a judge or jury could be that had to follow strict legal guidelines and precedence. But in my opinion, the fact that the arbitrators can be arbitrary can, and probably often does, work to the detriment of most individual investors as plaintiffs. Sure, if you have a case in which there is not clear-cut evidence of the guilt or innocence of a defendant and the plaintiff is relatively uneducated about investments and has a meager amount of assets either in absolute terms or relative to the loss he suffered, the arbitrator has the leeway to "help the guy out" by returning what the plaintiff can prove he lost. However, in the case of most plaintiffs, if you have ever owned a stock or bond (or can even spell those two words) or if you have a college or graduate degree, the counsel for the defense will, from the very start, loudly proclaim that you are a "sophisticated investor" and will make sure that label sticks with you throughout the entire arbitration process. I honestly believe that once they are subconsciously convinced the plaintiff is a "sophisticated investor" (and I have yet to see a precise definition of what is a "sophisticated investor"), the arbitrators end up using the discretion they are allowed to exercise to the detriment of the plaintiff, (especially if he has what some might consider to be a "significant" or "sizable" net worth) because if the plaintiff is "sophisticated", he should have known "all about" the financial instrument he purchased even though most clients of a brokerage, while perhaps extremely proficient in their own chosen professions, rely upon the broker and the analysts on the brokerage company's staff to have enough knowledge about what they are selling to determine whether a particular product is suitable for them or not. (Otherwise, why are they paying

the broker's higher commission charges? If investors are totally "on their own", then they might as well just switch their accounts to discount brokerages.) I believe the panel members may actually start to feel sorry for the defendant (the broker most of the time) and start making excuses for him, especially if this is the first time he has had an arbitration claim filed against him, and will attempt to find some way to justify rendering a ruling against the plaintiff and in favor of the defendant. After all, "it is the broker's first time", and "it's not like he killed his client or something", and "he really thought he was doing the right thing for his client", and "the client was sophisticated enough to know that this was a risky investment", and "the client still has substantial real and financial assets", and "the client is just trying to find some deep pockets from which to recoup his losses", so "let's give the broker a break and let him off this time." I would be willing to wager that this happens more often than anyone at FINRA would admit. How else can you explain the results in my case in which the broker received a commission (I would argue more like a bribe) when he agreed to hold my account as pledged collateral for a loan to a third party (ie., not me) without picking up the phone and calling me to verify that I really was in agreement to do this. At the same time, he had to have divulged confidential information about my account to both the lending subsidiary and the other co-pledgor. And all of that was apparently all right with FINRA. Also, I have a feeling that since this was his first arbitration claim and I believe he had a clean record up to that point, he was the one who ended up being "given a break" by the arbitrators.

But whichever side ends up being "given a break" or "cut some slack" by the arbitrators, I don't feel this is the right way to go about administering justice. This gives way too

much power to the arbitrators, who may have their own "agendas", as I mentioned previously when it comes to staying employed. When I hear parts of the quotes cited earlier like "the arbitrator keeps equity in view" and "(arbitrators) are given wide latitude in their interpretation of legal concepts", it concerns me, and I believe every plaintiff should be concerned. What it is saying is that if my friend and I both have the exact same transgression committed against us by the exact same broker at the exact same brokerage, the arbitration panel can rule in favor of him in his arbitration suit and against me in my arbitration suit for whatever reason they can justify in their own minds. That is the exact opposite of what I would call "fair". I would rather take my chances with a judge or jury who has to follow laws and guidelines and legal precedence. At least everybody knows what the rules are and that the case will be decided by those rules. That might even reduce the number of claims filed because then a plaintiff should know, after consulting with an attorney, whether or not he has a chance of winning his claim under those rules. But to allow the arbitrators to "education-adjust" or "wealth-adjust" or "experience-adjust" the rules depending upon the situation of each individual plaintiff (and of the broker) is too much power and discretion to place in their hands and can yield the opposite effect or outcome of what arbitration was supposedly originally thought to produce. I don't want to rely on the "charity" or "sympathy" of the arbitrators and I don't want to have to hope they are all "having a good day" or that they "like me better than they like the defendant" when they hear my case (nor do I want the arbitrators to conduct a fair and thorough hearing only when they are operating under the scrutiny of the print and televised press, such as the recent finding against Goldman Sachs in the Bayou Securities case). I just want an honest, fair and thorough hearing and analysis of what

was done to me, along with an explanation of how the decision was reached. Then I can accept and live with the outcome. That is the opposite of what I received. I would wager that Domke and Aristotle both would feel differently about arbitration if they had experienced the process I went through!

6.) As if all the pre-hearing antics weren't damaging enough to my case, the hearing itself was a complete sham. The worst (but not the only) thing that happened was the panel's decision, after a motion by only the counsel for the defense to release (ie., find not guilty) my broker after only one day of a scheduled three day hearing. How could that happen? Since when is a defendant ever released before his trial is even over and all the testimony has been heard? I'll wager every defense attorney would love to be able to pick a point in a trial at which he could ask the judge or jury to render a decision right then as to whether his client is guilty or innocent of the charges. I'm sure it would be before any further unfavorable testimony or evidence had been presented. It seems as though the panel was just waiting for a convenient time to find the broker not guilty. I was outraged, but my attorney told me that we had both better "hold our tongues" rather than strenuously object so that the panel didn't have a reason to penalize me for "misbehavior" on my part or my attorney's part. Besides, all parties at a hearing encouraged to keep the atmosphere "cordial", "respectful", "civil", and "cooperative. Just look at what the "Neutral Corner-August 2002" (Exhibit 2 page 3 or 17) has to has about attorneys (and presumably plaintiffs) who get too vociferous, to the point of exhibiting "disruptive behavior":

> "If counsel is the cause of serious disruptions or abuse, the panel cannot sanction counsel because an agreement to represent a party is not an agreement to submit to these arbitrator powers. However, the panel is not powerless to act under these circumstances. The panel can take any of the preceding actions against the party represented by the offending counsel. In other words, if the panel orders counsel to refrain from disruptive conduct, and conduct continues, it may hold the client responsible for counsel's demeanor and take appropriate actions against the client."

That is quite an intimidating statement (threat?), especially **when the panel doesn't have to give any explanation of its final decision in the case and there is no ability to appeal**. I didn't want to take a chance that I would give them a reason to rule against me by behaving in a manner they might find "disruptive". My attorney, just like I'm sure every plaintiff's attorney does, told me prior to the hearing that it was important for me to make sure I appeared to be a "nice person" and to appear deferential to the panel so as not to give the panel any reason to dislike me and then perhaps use that reason to vote against me. But the decision to let the broker go just wasn't right. From that point on, everyone was simply going through the motions at my hearing. I mean, why bother? They already found the broker not guilty and the brokerage's actions were so intertwined with the lending subsidiary that is was easy for the brokerage to "slip the noose" by planting the idea in the minds of the panel members that if anybody had wronged me it was the lending subsidiary, but the panel had no jurisdiction over the lending subsidiary. So it was no surprise when the panel came back after about 30 days with the verdict that the brokerage was also not guilty. What really is upsetting is that according to FINRA's website that describes the entire arbitration process, the panel was to take about 30 days after my hearing and ponder and discuss what they had heard in the arbitration hearing (Exhibit 3). But what was there to discuss and talk about if they had already found the

broker not guilty? Perhaps, if they had held off their decision, they may have started to piece together what had been done to me, giving them a clearer picture of the role the broker had played in it. After all, who knew more about how the brokerage allowed my account to be pledged for the 1999 loan than the broker? He was the primary person at the brokerage involved with my account. He was the "gatekeeper" with a duty to protect my account from, among other things, systemic loss, but who failed to contact me to see if I really wanted to re-pledge it. And finally, he was the person who received a commission ("bribe"?) when my signature page was attached to the 1999 Pledge Agreement, unbeknownst to me. I'm sure this is why the Arbitrator's Manual (Exhibit 1 page 13 of 18) specifically says, "Generally, arbitrators do not attempt to judge the dispute **until all the evidence is received**." Perhaps if they had given more thought to it as required by the Arbitration Manual and not been so quick to find the broker not guilty, they would have realized what a disservice the broker had done to me in order to line his own pockets. But that was not the way it happened in my case. Also, arbitrators are constantly warned against giving even the slightest appearance of being biased and against doing anything that would damage a party's case. And yet, how much more biased could an arbitration panel be and how much more damage could they do to my case than to prematurely release the broker as a defendant <u>before the hearing was even over</u>? Again, the Arbitrator's Manual (Exhibit 1) makes the following statements about "bias" and "actions" that damage a case"

1.) Page 1 "The key to an effective arbitration system is having capable, fair, and impartial arbitrators who hear and decide cases conscientiously …Arbitrators must be fair and impartial and must also appear to be fair and impartial. A careless remark or gesture may give parties the unwarranted impression that

they are not receiving justice. In arbitration, even more than in court, not only must justice be done, but justice must also be seen to be done."

2.) Page 2 of 18 "Aside from an actual conflict of interest, even an appearance of conflict might render a decision suspect. It cannot be emphasized enough that arbitrators must be free in fact and in appearance from all bias and prejudice...Clearly, it is in the best interests of the individual arbitrator and of the entire arbitration process that arbitrators "bend over backwards" to avoid any appearance of bias."

3.) Page 11of 18 "The arbitrators should strive to conduct themselves appropriately. **All parties should be given a fair opportunity to present their case.**"

How could FINRA ever claim I was given a "fair opportunity to present" my case when the panel declared the broker to be innocent and let him go early (in violation of its rules, which I will discuss in a minute) even though no one knew what could have been said during the following two days of the hearing? As I said before, what a sham!

But I wasn't about to let this large financial services company just skip off with most of my life savings, over 35 years of hard work, without a fight. And I didn't care how much of FINRA's annual budget the financial services company paid for. I first wrote a letter to my arbitration case administrator, Scott Carfello, in which I bitterly complained about how my case was handled from the time I first filed it in January of 2004 until the decision came back in January of 2006. Among other reasons, I specifically cited the release of the broker before the hearing was even over. I sent copies of my letter to Patrick Walsh, Linda Feinberg, and Barbara Brady all of FINRA, and to the Market Regulation Division of the SEC. I received a reply from Ms. Feinberg, President of Dispute Resolution for FINRA (Exhibit 4) in which she said she was sorry I was disappointed with the outcome, but there was nothing she could do. She also defended

the panel's decision to find the broker not guilty and release him before the hearing was even over by citing Rule 10305 of FINRA's Code of Arbitration Procedure (Exhibit 5). I read that Rule, and re-read it, and re-read it some more. Finally, I wrote her back and said I didn't see at all where Rule 10305 allowed the broker (defendant) to be released before a hearing was even over. I said it looked to me like Rule 10305 referred to the reasons a hearing could be ended early, which were either 1.) by the initial request from and the mutual consent of both parties ("joint request of all parties"), 2.) because the hearing was to be moved to a different venue, or 3.) as a sanction for willful misconduct. It said nothing about an individual defendant being released before the entire hearing was over, and the request to release the broker came only from the attorneys for the broker and the brokerage and not from them and us jointly. It seems to me to be a real "stretch" to find that Rule 10305 allowed the panel to release the broker after only one day of a scheduled three day hearing. If these three panel members were truly qualified to preside over a hearing, they should have known what the rule said. **It should not have been up to my attorney or me to make sure the panel members abide by their own rules or to make them aware that the rules exist and of what the rules really mean and don't mean.** In my case, I am convinced the rule didn't apply and my case was gravely damaged by their lack of understanding of Rule 10305 (assuming the panel members were even aware of the Rule), and their resulting actions.

One other comment Ms. Feinberg made in her first letter to me (Exhibit 4) was that "your attorney had the opportunity to present evidence, cross-examine witnesses and make arguments to the panel advocating your case." While that may appear to be true based

upon the simple fact that a hearing was held, I don't know how she could seriously make this statement given that one of my complaints was that we were never given most of the documents we requested during the discovery process. How much evidence was not able to be presented because we never received it from the brokerage (and the panel never forced the brokerage to turn it over to us)? How many potential witnesses were never questioned because their names were "hidden" within documents not given to us? How many arguments "advocating" or "supporting" my case went un-presented or unspoken because important and possibly incriminating documents never saw the light of day? And this doesn't even address the disadvantage at which we were placed when the broker was dismissed one day into a three day hearing. What was left undiscovered as a result of that action by the panel?

Ms. Feinberg wrote back (Exhibit 6) and said essentially that her previous letter had responded to my complaint about the broker being released early so she was not going to discuss it any further and please call her if I had any other questions.

Also as I mentioned on page 4 of this letter, another deeply troubling aspect of Ms. Feinberg's statement about the opportunity my attorney had was what it implied. Unfortunately for me, and I'm sure many other individual investors who have lost arbitration disputes over the years, the same sentiment was echoed over and over through the ensuing years by other people (as I will point out several more times throughout the balance of this letter) at other regulatory agencies. That sentiment, or opinion, is that if you have had an arbitration hearing, it had to have been fair, just, thorough, impartial and

any other word with which you want to whitewash it. The arbitration hearing is held up to be the "gold standard" of objectivity and fairness, and if you have been through one and lost, it must have been because you were wrong and the defendant was innocent of all charges because the arbitration panel couldn't possibly have erred. As I hope I have demonstrated thus far, the reality of the arbitration process is a far cry from the way it is presented to the outside world. However, it is considered by everyone involved in regulating the industry as flawless and foolproof. If you have had and arbitration and lost, there is no need to pursue the case any further. And if you complain, that is just sour grapes on your part or the whining of a loser because the panel is infallible and the process is fair. I am sure all these people have convinced themselves that there is simply no way the system could "get it wrong" or could be biased against the individual investor and in favor of the industry member.

7.) My next observation, or complaint, is one I am sure every plaintiff in an arbitration dispute has when he or she loses. If the arbitration panel rules against you, the panel members do not have to provide any explanation whatsoever of how they reached their decision. When there is a great deal at stake in an arbitration dispute, not to receive an explanation of an adverse decision is like pouring salt in an open wound. Alternatively, it is like being convicted of a crime and then given a life sentence without ever being told what you were charged with. I and every other investor who has lost an arbitration hearing have to live with the panel's decision for the rest of our lives and it may be a decision that will have a profound effect on how that life is lived. I believe <u>everyone</u> in my position would want to know why he or she lost. Is it too much to ask for an

explanation of how such an important decision was reached? In my case especially, the lack of an explanation, coupled with everything else FINRA allowed to happen, serves to fuel the suspicion that the panel, and FINRA itself, is biased in favor of the industry members it supposedly regulates. It is no wonder that so many investors and their advocates want to do away with forced arbitration hearings in favor of some sort of choice in venues.

With this in mind, after the adverse decision was rendered, I requested in writing that the panel provide me with a written explanation of their decision (Exhibit 7). This request was submitted in the summer of 2006. Of course, the attorneys for the defendant objected, saying that I was trying to re-open the case. I wrote back and said I acknowledged that the arbitration case was closed and could not be re-opened. I just felt that if the panel was going to let this large, wealthy financial services company steal most of my life savings, which was a seven figure amount, the least they could do was to tell me how they arrived at their decision. The panel wrote back and said they would not give me and explanation (Exhibit 8). End of discussion. The Arbitrator's Manual (Exhibit 1 page 15 of 18) says, "Under present law, an arbitrator is not required to give a reason for a decision." But what the Arbitrator's Manual does not say is that an arbitration panel is prohibited from giving an explanation of a decision. Thus, it is the arbitrators' choice, and in my case the arbitrators freely chose not to give me the reason(s) for their adverse ruling. To me, this just shows that the panel itself felt that the reasons for rejecting my case were tenuous at best and thus they were afraid of exposing these reasons publicly. I say this in light of what was written in the Case Summary

section of their original decision (Exhibit 9). I am not claiming that the "Case Summary" is in any way an explanation of the panel's decision. But I do believe it provides some insight into the panel's understanding of the facts of the case. It is clear from what was written that they obviously did not have a correct understanding of the facts of the case and this had to have played a crucial role in the formation of their decision. Unfortunately, it is only after they reach their decision that you find out about their (mis)understanding of the facts of the case from the "Case Summary" and their failure to investigate any serious charges. At that point it is too late for the plaintiff or his attorney to clarify the record and correct any misunderstandings. And there is no chance for any appeal.

To illustrate my point, in my case the panel acknowledged some very serious charges against the broker and the brokerage (Exhibit 9 page 2 of 6):

> "...Claimant alleged the Respondents fraudulently induced him to execute a new Security Agreement in January, 1999..."
>
> "Claimant asserted the Respondents violated the terms of the 1999 Security Agreement by allowing the other individual (ie., the other co-pledgor) to make withdrawals without prior permission and by not allowing Claimant to do the same..."

If true, as I claim they are, the first charge would have meant, among other things, that the contract (pledge agreement) wasn't even a valid contract to begin with. The second charge, which was that the brokerage allowed the withdrawal of pledged collateral by the

other co-pledgor (in violation of the pledge agreements), meant that, as I understand it, the pledge agreements would have been voided at that moment in time.

However, the acknowledgement of these charges was as far as the panel went. It appears as though they never did any serious investigation of them, which probably explains why they let the broker go one-third of the way through the arbitration hearing. This is why I should never have been forced to go before an arbitration panel in the first place. Either these guys weren't serious about finding out what happened or they didn't know what they were looking at when it was presented to them. Did they understand what the implications are when there is a prohibited and unauthorized release of pledged collateral? On top of that, if this had been a bank robbery for a seven figure amount, it would have been all over the local news outlets and the police, and perhaps a number of federal agencies, would have pursued the perpetrators until they were apprehended. But a FINRA arbitration panel let them walk away scot-free with my life savings without so much as a slap on the wrist. Then to complete the farce, the panel said the following (Exhibit 9 page 3 of 6):

> "The panel recommends the expungement of all reference to the above captioned arbitration from Respondent XXXXXXXXX 's registration records maintained by the NASD Central Registration Depository ("CRD")…"

In light of how the panel handled this entire arbitration, why would anyone with any brains ever attempt to rob a bank? The smart thief can become a stockbroker with a little effort and then gain access to perhaps millions of dollars in clients' accounts. If he is really smart and devious enough, he can concoct a scheme to get at that money <u>and never</u>

have to worry about facing a judge or jury! It may be years before he is caught and in the meantime, he can "squirrel away" money literally all over the world while living the "high life". If he is caught, the worst he may ever confront is a FINRA arbitration hearing, and in that case, the panel, while feigning neutrality and objectivity, may even essentially become part of his defense team! There is only a slight chance he will be found "guilty", using as one defense that it has been "too long ago" and he can't remember any details, and FINRA will "buy" that excuse even if there is "hard" evidence of his guilt. If he happens to be found guilty, he may only have to give back a percentage of what he took and he gets to keep the rest (which I will illustrate further in a minute)! If he is unfortunate enough to be sentenced to a few years "behind bars", he will get to do so in some cushy "country club" of a prison. Finally, the panel can recommend that any evidence of the arbitration proceeding can be expunged from the broker's record. This is about as close to the perfect crime as you can get! On the other hand, a stupid thief becomes a bank robber who may get away several thousand dollars, and will probably be caught within a few days if not hours. When he almost assuredly is found guilty and sentenced, he will end up doing "hard time" in a real prison. Let him try to say he doesn't remember!

Also, with respect to the panel's decision to deny my request for an explanation of their decision, if you read closely their reply (Exhibit 8 page 3) they actually said they were denying my request "to re-open the hearings". I did not request that they re-open the hearings. I simply asked for an explanation of their decision. I think they couched it in

those terms in order to justify their denial of my request, knowing that FINRA won't allow a hearing to be "re-opened".

One other comment the attorneys for the co-defendants made in their letter to the panel (not included as an exhibit but available for reading) encouraging it not to give me an explanation of its decision was that

> "If (the plaintiff) had an issue with the Arbitration Panel's decision rendered on January 9, 2006, the proper course would have been to file a timely motion challenging the Award."

I always find it quite humorous when someone tells you to "sue me" or that "you should have taken me to court" when they know full well that there is about a 99% chance a judge will throw the challenge out not because it doesn't have merit but because, in the special case of an arbitration decision, judges are for all practical purposes prohibited from re-hearing an arbitration dispute. In other words, there is no appeal allowed. FINRA explicitly says as much in the following excerpts from Exhibits 10 page 1 of 2:

> "...Most importantly, perhaps, is the fact that an arbitration award is final and binding, **subject to review by a court on a very limited basis**. Parties should recognize, too, that in choosing arbitration as a means of resolving a dispute, they generally give up their right to pursue the matter through the courts."

and Exhibit 11 page 5 of 7:

> "Decisions made in FINRA arbitrations are **final**. Arbitrators cannot reconsider their decisions, once issued, even if new evidence surfaces later. You may certainly challenge the outcome of an arbitration in a court of law, but these

cases are successful only under rare circumstances. The courts generally uphold arbitration decisions."

and Exhibit 12:

" - **10330**. Awards

(b.) Unless the applicable law directs otherwise, all awards rendered pursuant to this Code shall be **deemed final and not subject to review or appeal.**"

So it is easy to see that FINRA is trying to tell you that you can forget about having a judge do anything to change the decision in your arbitration case, regardless of how atrocious it is. He might do something in a situation where there may have been a procedural mistake, such as the panel doesn't allow a certain witness to testify or the panel doesn't allow certain evidence to be admitted. But no judge will go through all the testimony given and all the documents produced in an arbitration hearing to determine if the panel made the "right decision" consistent with this testimony and evidence.

FINRA (NASD) – MEMBER REGULATION (MR)

After realizing that those in charge of the FINRA-DR were not going to do anything to correct the injustices that were done to me by the broker, the brokerage and the arbitration panel who handled and heard my case, I decided to look to see if there was an

alternative offered by FINRA that might provide another forum to which I could take my case. After looking at FINRA's website, I came across something called the Member Regulation Division. Upon reading the description of what their mission and operating philosophies are (Exhibit 13), I was very encouraged because I thought I had finally found someone at FINRA with the "guts and determination" to do the right thing, based upon some of the following statements they made:

> "Vigorous, fair and effective enforcement of federal securities laws and regulations is at the very heart of NASD's (FINRA's) mission. Federal law gives NASD authority to discipline securities firms and individuals in the securities industry who violate the rules. We can fine, suspend or even expel them from the industry."
>
> "At NASD, we don't simply wait for violations to occur. We are committed to looking ahead, trying to foresee and prevent problems before they can harm investors."

These sounded like people who operated under a different set of rules, and a different mandate, that would enable them to "right a wrong" once they saw the injustice that was done to me by the way in which the brokerage handled my account and the way my case was handled by FINRA-DR. They also encouraged an individual investor who had a complaint to go to their Investor Complaint Center and submit a complaint on line. I did this on June 1, 2006 (Exhibit 14). A complainant is only allowed a relatively few words to explain what happened to him, but I felt that that was probably because they wanted only a bit of information now and would ask for more details later. Later that same day, I received a "form email", as I call it, back from FINRA thanking me for submitting my complaint (see beginning of Exhibit 14).

I was totally wrong about their willingness to be "tough" and "aggressive". On June 12, 2006, I received a from letter from FINRA (Exhibit 15) using what I would best describe as a "lame" excuse that they couldn't undertake an investigation into my complaint "due to the significant amount of time that had elapsed since the occurrence of those events outlined in your correspondence". The fact that it came back twelve days later with no questions asked or no backup documentation requested, says to me that this was just a "canned", "knee-jerk" reply to a serious complaint and that no one at FINRA-MR gave it even a moment of serious consideration. On top of that, no one even had the courage to sign it nor did it say who made the decision not to investigate my complaint. So besides using the weakest of excuses, whoever wrote it hid behind the anonymity of an unsigned form letter.

What an outrage! All the "tough" talk and this was the best they could come up with? To me, it is just one more indication that an SRO is incapable of meting out justice to members of the industry it regulates, but I've already expressed my feelings on that point.

I scoured the MR section of the website and could <u>not</u> find mentioned anywhere a limit on the amount of time an individual had to file a complaint with the MR after they found their broker or brokerage had done something to them. I also looked all over the MR section of the website for a phone number to call and finally found one. I called it and actually got to talk to an attorney who must have accidentally picked the phone up. She said FINRA-MR had a two-year time limit from the time an alleged action took place when deciding whether or not to investigate a complaint. I told her I didn't think that was

fair, but she offered no alternative. She also indicated, as I complained about earlier, that they would generally not investigate a complaint once an arbitration hearing has been held. Here we go again! I thanked her and we ended the phone call.

But I wasn't about to let such a weak excuse get by without a response, so I set about composing a letter to Mr. Robert Errico, Executive Vice-President of Member Regulation, with copies also sent to Mary Shapiro, Robert Glauber and Todd Salzman.

In my seven page letter of July 22, 2006 to Mr. Errico, I bitterly complained about FINRA-MR's rejection of my request for an investigation. Among a number of points I brought up were the following:

A. Nowhere is it mentioned on their website that there is a two-year time limit. It is a cruel joke if a wronged investor doesn't know how long he has to file a complaint, so he ends up taking a little longer that two years. He only then finds out he has waited too long and there is nothing the MR will do about it for that reason only.

B. I also questioned whether the two year time limit was simply a self-selected or self-imposed time limit. In other words, were they really held to two years <u>by law</u>, or was that just a "policy". And if it was just a "policy", could it be waived under certain extenuating circumstances, such as I believed my case exhibited.

C. I also pointed out that FINRA-DR had a <u>six year</u> time limit from when an act took place until a request for arbitration could be filed. If six years was good enough for them, why wasn't it good enough for MR?

D. I didn't think it was right that the brokerage and the broker should be "given credit" first for hiding from me the fact that they had allowed my account to be pledged without saying a word to me. That happened in January of 1999. It was February of 2002 before I found out that the signature page I had signed on January 14, 1999 had been attached to the new 1999 Pledge Agreement, the entire copy of which I had never been given. Second, I didn't think the

brokerage should be "given credit" for drawing out my arbitration for almost two years. Both of these facts added a significant amount of time to the delay in filing my complaint with MR.

E. Finally, I thought that FINRA-MR should look at other factors that are much more important than how long ago the acts took place, such as the severity of the losses (ie., the magnitude and/or the percent of the victim's overall assets), the rules that were violated by the broker, and the benefits that the broker and the brokerage pocketed by committing these acts.

Sometime shortly after I sent this letter to Mr. Errico, I received a phone call from Mr. David Troutner, Deputy Director of Member Regulation. In the phone call, Mr. Troutner very succinctly said that he was sorry for what had happened to me but that there was nothing Member Regulation could or would do for me. I asked him how they could refuse to at least sit down with me and let me show them the hard written proof of what had been done to me, especially in light of the way FINRA-DR had handled my case. I told him without at least doing that, there was no way they could make an informed decision about whether or not the brokerage and the broker were guilty of committing a terrible series of acts against me. He basically said at that point that that was all he could tell me. However, I want to make note of the fact that he did say I should probably **go to the SEC because the SEC had jurisdiction over both the brokerage and the lending subsidiary.**

Not to be dismissed empty-handed, I asked for his boss's name and phone number because I thought I might try to speak with him. Mr. Troutner gave me the name and phone number of Mr. Daniel Sibears, who, I believe, is currently the Executive Vice-President of Member Regulation Programs. This began a series of phone calls between Mr. Sibears and me in the late summer of 2006. I don't know whether it was to placate

my anger or hopefully discourage me from going further by requiring some work from me, but in early September of 2006, Mr. Sibears finally told me to write Mr. Troutner a letter describing what had happened to me. I told him I would be happy to do so, but that it would take me a little while to compose it and it would probably not contain every last detail about what was done to me.

I knew it would be an uphill battle trying to convince them of the guilt of the brokerage and the broker because the actions of those two and the lending subsidiary were so intertwined and because FINRA did not regulate the lending subsidiary, so I had to compose the letter with that in mind. What a disadvantage! Anyway, I sent the 24 page letter of October 5, 2006 to Mr. Troutner for him and Mr. Sibears to read.

After giving some brief background information as to how my account had become pledged for the 1999 loan from the lending subsidiary to the small company I owned a minority part of, I focused on the role my broker played in the re-pledging of my account. More specifically, I pointed out and asked how my broker could just take the lending sub's word for it that I wanted to re-pledge my account for this new loan, without verifying anything with me. My broker was indeed the "gatekeeper" to my account and had, I believe, a fiduciary responsibility to keep anyone, even a representative of a "sister" subsidiary, from just walking into his office and walking out with my account as pledged collateral for a loan the lending sub wanted to make to a third party. Also, I again pointed out how the actions (or lack thereof) violated several of he examples of "Prohibited Conduct" FINRA has listed on its website (Exhibit 16 page 1 and 2).

After that I pointed out that this was more than just a "rogue" broker acting alone that caused this. I showed through several exhibits that there was clearly a systemic failure at both the brokerage and the lending subsidiary that allowed this transgression to make it past a number of people who should have questioned whether I really had been given the entire 1999 Pledge Agreement and had agreed to it before they attached my signature to it. The rest of the letter listed a number of points, such as violations of contracts, rules, or laws on the part of the brokerage and the lending sub, and decisions made or actions taken either individually by the brokerage or by the lending sub or in concert that harmed me. I ended by asking a series of questions about information Mr. Troutner, or anyone else at FINRA (or anyone reading this letter), would have wanted to receive that I did not receive, but adamantly insist I should have, before my account was re-pledged without my knowledge and specific consent.

I believe I may have had one or two other phone conversations with either Mr. Troutner or Mr. Sibears after I sent the letter. Then around Thanksgiving of 2006, I received a phone call from Mr. Troutner saying he and Mr. Sibears agreed to send my case on to the Enforcement Division and ask them to decide (again) whether to take a more thorough look into it and determine whether an investigation should be opened. My fear was that they were just saying this to "get me off their backs" or to "shut me up" and that they weren't really considering opening an investigation. Several months went by. Finally, around the end of February, I called Mr. Troutner and he said I should be receiving a response shortly. I didn't like the sound of that reply and sure enough, I received a letter

dated March 13, 2007 (Exhibit 17) from Mr. Troutner. It said that after a "thorough review and reconsideration by the Departments of Member Regulation and Enforcement, NASD has determined not to further investigate this matter." Naturally, I was extremely disappointed but not surprised by this decision. Once again, like a broken record, I will state that this illustrates the inherent bias FINRA has against investors who lodge complaints and in favor of the members it "regulates". Look at the excuses they used:

1.)

"...the activity occurred from four to ten years ago."

So what! This was the same excuse that had used in their June 2006 letter (Exhibit 15) when they initially turned me down. The FINRA-DR uses a time limit of <u>six</u> years from the date the transgressions were committed. Why can't the FINRA-MR use the same number of years? Also, the brokerage and the lending sub hid these transgressions from me for several years after they committed them. It wasn't as though these transgressions showed up on my next monthly account statement after they were committed <u>and then</u> several years lapsed before I did anything. It was only when I started asking questions that the lending sub produced the documents that showed what both the brokerage and the lending sub had done to me. Then the brokerage filed a number of motions in my case in a effort to delay it and hopefully get me to give up and drop it. So it was a couple of more years before I even had my hearing. Why should the brokerage be allowed to benefit from their deceitful

and delaying tactics? Besides that, my FINRA-DR arbitration hearing was just held in December of 2005, a little over a year from the date of Mr. Troutner's letter (Exhibit 17) and only six months prior to the filing of my initial complaint (Exhibit 14) with the FINRA-MR. A lot of details and information should still have been fresh in people's minds. Finally, from FINRA-MR's own website (Exhibit 18), it states that

> "Certain regulatory incidents **are not relevant** to the determination of sanctions. **Arbitration proceedings**, whether pending, settled, **or litigated to conclusion**, are not "disciplinary" actions. Similarly, pending investigations or the existence of ongoing regulatory proceedings prior to a final decision are not relevant."

In other words, it looks as though they can look into a situation at any time they want, regardless of when it took place, **even if there has already been an arbitration hearing**! And not only are they allowed to look into a complaint at any time, they are also allowed to "...order restitution and/or rescission", as the following quote from page 2 of 3 of Exhibit 18 says:

> "**Where appropriate to remediate misconduct, Adjudicators should order restitution and/or rescission.** Restitution is a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer loss. Adjudicators may determine that restitution is an appropriate sanction where necessary to remediate misconduct. Adjudicators may order restitution when an identifiable person, member firm, or other party has suffered a quantifiable loss as a result of a respondent's (defendant's) misconduct, **particularly where the respondent has benefitted from the misconduct**."
>
> (Perhaps benefits such as commissions? Confiscation of a client's account to repay loan losses? Client's forced payment of a brokerage's legal bills?)

2.)

"NASD lacks jurisdiction over key witnesses involved in the activity."

Another copout! There was plenty to discuss with witnesses that they did have jurisdiction over. They just didn't want to believe that an industry member heretofore in good standing could commit such an unseemly act. Also, I am sure they didn't want to appear to be second guessing a decision from their "sister" DR division. This would undermine the supposed integrity and desired finality of the arbitration process. But their own words also provide the biggest and most glaring condemnation I have seen yet of FINRA's desire to maintain complete and total control over the arbitration process. As such, it illustrates why there needs to be another body an investor can turn to when he has been wronged. FINRA's position with regard to my case was that they couldn't look into it because the

"NASD lacks jurisdiction over key witnesses involved in the activity…"

In other words, **FINRA-DR or MR shouldn't have been looking at my case to begin with and I shouldn't have been forced to go to them with, almost by definition, a defective or ineffective case against just one perpetrator, the brokerage, when there were multiple perpetrators all of whom played a part in the loss of my life savings. If FINRA had no jurisdiction over the other perpetrators, which meant I couldn't even bring up how they all**

worked together to "steal" my account, then, in my opinion, I couldn't mount as effective a case as I would have been able to in another venue, such as a court of law.

If FINRA-MR admits that it can't prosecute a good and effective case because there are perpetrators involved some of whom it regulates and some it doesn't regulate, then why was I forced to go to them and **where is an aggrieved investor to turn**? FINRA, almost by law, or at least by self-determination and its own admission, can't help. But I am not simply posing a rhetorical question. Very recently, while combing through the SEC's website (and I am getting a little ahead of myself here by talking about the SEC), I found the following excerpt from the SEC's Division of Enforcement ENFORCEMENT MANUAL (Exhibit 19 page 19):

> **2.2.2.5 Referrals from Self-Regulatory Organizations**
>
> The Basics of Receiving Referrals from Self-Regulatory Organizations:
>
> "...If the SRO discovers potentially violative conduct and believes that it has jurisdiction, it will conduct its own investigation. **If the SRO determines that it does not have jurisdiction, it will refer the potential violations to the SEC** via the Market Surveillance Referral System. OMS reviews all SRO referrals and in consultation with senior staff in Enforcement opens MUIs (Matters Under Inquiry) and distributes the cases to the appropriate staff in the regional or home offices."

So if FINRA-MR truly believed it didn't have jurisdiction over a party listed in my complaint, then rather than simply use that as an excuse to drop my

case and refuse to do anything about it, it should have automatically passed it on to the SEC. Was this done? I doubt it. If it was, then that is something I most definitely should have been informed of, but I never heard one word from anyone. So again, I doubt that it was passed on to the SEC as it was supposed to have been.

3.)

"...an assessment of the evidence does not support a prima facie case of rule violations by the securities firm or its associated persons"

This excuse was almost insulting. They took what was about a 100 word initial summary of my complaint and then a separate letter I had written to Mr. Troutner and Mr. Sibears which didn't even discuss everything that was done to me <u>or</u> argue every point I could have made, and then determined from those two documents that I didn't do a good enough job showing that there were any rules violations. I think the key words were "prima facie". They essentially were saying, in my opinion, that from what they had seen <u>so far</u>, there were no rules violations, even in light of all the claims about what was done to me that I recited earlier. On top of that, they hadn't seen <u>everything</u>! Nor had they heard every argument! They basically said I didn't have a case <u>before I was allowed to make my case</u>. What a fair and just program they run! While I ultimately hoped they would open an investigation, my initial request was to let me sit down with them and show them the hard, written evidence I had and then listen

> to my arguments. That's all I wanted. Then, if I made a good enough argument to open an investigation, they could do so. Then, if they found rules violations, they could take action. But instead, they jumped right to the conclusion that they hadn't seen any evidence of a rules violation before I could show them the evidence of rules violations and therefore there was no need to open an investigation.

I was extremely unhappy with this response, so I called Mr. Troutner. He said he was basically just the messenger and the letter pretty much said everything FINRA-MR had to say about my situation. I asked him how FINRA-MR could declare that it was all right for my broker to accept the word of a colleague (the lending subsidiary) that I wanted to re-pledge my account, and then go ahead and set it up as pledged collateral and not say a word to me or try to verify it with me (not to mention the fact that my broker had received a commission when he set it up as pledged collateral). Mr. Troutner verbally told me that it was the Enforcement Division's opinion that it was all right for the broker to assume I had wanted to re-pledge my account since I had pledged it once before (even though that pledge agreement had completely different terms and was no longer in effect anyway). Obviously, I told him I didn't agree, that I didn't think a broker could do anything to or with a client's account without the full knowledge and consent of the client, and that I thought what the broker had done had violated several of the rules of Prohibited Conduct (Exhibit 16). The only thing he said again was that maybe I should take my case to the SEC. I thanked him and said goodbye.

FINRA (NASD) – OMBUDSMAN

Not wanting to rely solely on the FINRA-MR division to decide to investigate my case, in late 2006 I contacted the FINRA-Ombudsman office to see if they would intercede with FINRA-MR on my behalf and try to convince MR to at least sit down with me and let me show them what documents I had that supported my case. When I found their section of the website (Exhibit 20), they sounded like they were I the perfect position to help me. Their stated purpose seemed to be to intercede with the various divisions of FINRA on behalf of investors when those investors weren't getting anywhere with FINRA on their own. In their own words from pages 1 of 4 and 3 of 4, their purpose was to act "as an alternate channel of communication to management" and to be a "designated neutral". Other of their purposes were "identifying actions and policies that ensure established policies and procedures are functioning properly and equitably", and "taking objective action to resolve matters that fall outside the established forums and procedures." I called and made arrangements to have a conference call with Ms. Maryanne Miller and Mr. Bernard Thompson, both of whom worked in the FINRA-Ombudsman's office. Their initial response to my phone call was less than receptive. I told those two all I was asking them to do was to go to FINRA-MR and ask them to please sit down with me and let me show them exactly what was done to me by the brokerage. I told them I thought I had an excellent case for investigation of the part of FINRA-MR, and if they would just give me the opportunity I felt I could convince them to look into my situation, which might help not only me but possibly other investors who may be caught in the same situation in the future. After pleading with these two for quite

a while, almost to the point of begging, they finally agreed to look into my situation and, I thought, approach FINRA-MR about meeting with me. I ended the phone conversation feeling very encouraged.

After receiving Mr. Troutner's letter (Exhibit 17) (which essentially closed the door on my efforts to directly convince FINRA-MR to review my case), I called the two employees of the Ombudsman's office back to see if they had agreed to go the MR on my behalf. This time it seemed as though the willingness to help that Ms. Miller had exhibited at the end of our previous conversation had dissipated. She told me she looked my file over and thought that Member Regulation (MR) and the Enforcement Division (ED) had done everything properly or everything they were supposed to do when trying to determine whether to prosecute a case against a broker or brokerage, and that they had both come to the same conclusion, which was that I did not have a "provable" case. Then she said that now a third pair of eyes (hers) had taken a look at my file and had come to the same conclusion. I told her there was no doubt in my mind that neither MR nor ED understood both what had happened to me <u>and</u> what the broker's and the brokerage's roles were in what had happened to me. That was obvious from many of the comments they made and the excuses they gave in defense of the broker and the brokerage. That was why I wanted to have a face to face meeting with someone from Enforcement so that I could show them the paperwork that illustrated what I was talking about because I was apparently not getting my point across during long-distance telephone conversations. I told her I had no idea what kind of job Dave Troutner was doing "making" my case to Enforcement and that I thought only I could do a proper job of pleading my case to

Enforcement. But Ms. Miller refused to go back to Enforcement, if I understood her correctly, and ask them to meet with me. She said they had already gone through all the proper procedures and had made their decision.

The only other comment I will make is about Ms. Miller's statement that she was the "third pair of eyes" to look at my file and conclude that I didn't have a provable case. First of all, I didn't ask her to look at my file and determine whether I had a case or not. Is the Ombudsman even trained to do that? I thought they were a "designated neutral" who acted as a "direct line to management". I didn't know their role was to render an opinion as to whether an individual has a "provable" case or not. That doesn't sound very "neutral" to me.

I realize it was a long shot going to the FINRA-Ombudsman in the first place, but I didn't think it was asking too much to have them at least attempt to convince FINRA-MR or FINRA-ED to sit down with me. After all, that is their job isn't it? Aren't they supposed to intercede on behalf of investors who have legitimate complaints but are getting nowhere with FINRA itself? I don't think I was asking too much. If I didn't have a case that qualified for help, I can't imagine who would. But the change in her tone and in her willingness to help between the end of our first conversation and our second conversation was quite stark. She was determined to end my whole attempt at having someone meet with me right then.

FINRA – CONCLUSION

In summation, I hope I have illustrated why I hold the opinion that even though FINRA claims that one of its primary functions is to protect the individual investor from "abuse" at the hands of the financial industry, in reality it functions as more of a fortress around the industry protecting it from what would otherwise potentially be a more impartial and objective alternative disciplinary system if the arbitration process was either not mandatory or if it was taken away from FINRA and hosted by another group or organization. FINRA at best is a rule-maker, but it is not a good enforcer or disciplinarian. Oh sure, it may occasionally fine or sanction a company for egregious behavior that is obviously warranted. And it may suspend or bar a broker who is a "bad apple" in order to make it look as though it is policing the industry. Every group or organization wants to get rid of the "bad apples" among its members that give the rest of the organization a "bad name" or a "black eye". The medical profession will occasionally get rid of a "bad" doctor and the legal profession will expel a "bad" lawyer. So the brokerage industry tries to maintain its "clean" image in the eye of the public by showing a "bad" broker the door once in a while. But the real test of how fair and impartial a regulatory body is (especially a Self Regulatory Organization) is how it treats the general public (investors in this case) when they are harmed by a member who, up to a certain point in time, has been in good standing. Does it recognize the wrong that was done to the investor and mandate restitution of his losses, even if the reputation of the broker is tarnished, or does it force the investor through a tortuous obstacle course in an effort to regain his losses while showing sympathy and deference to the broker by

handling him "with kid gloves"? I'm sure I am not the only investor who has come before FINRA seeking redress and walked away empty-handed who believes that the latter of the two scenarios is the more common approach FINRA takes. And even on occasion when FINRA does find in favor of the investor, there is still the whole other issue of how much of the investor's losses FINRA will force the broker or brokerage to reimburse. That is an entirely separate issue where FINRA can literally "short-change" the aggrieved investor by allowing him to win the battle (rule in his favor) but lose the war (award him only a small fraction of his losses). This is the best of both worlds for FINRA. They can pad their statistics that show how often investors win arbitration suits and at the same time only force the defendant to pay a relatively small amount of money, while getting to keep the rest. A spokesman for Morgan Keegan & Co recently said it best (almost to the point of taunting the plaintiff) in Exhibit 21 after the company lost an arbitration hearing and had to pay a plaintiff a judgment of $2.5 million, which wasn't close to the $12 million the plaintiff claimed he lost:

> "A Morgan Keegan spokesman said the firm "disagrees with the finding of the arbitration panel." He added that "it's important to point out" that Mr. Stein (the plaintiff) and his companies were awarded just a fraction of the damages sought in the proceeding."

It seems as though the brokerage industry members can almost always count on a break in one form or another from FINRA.

But just in case I still haven't done enough to convince whoever is reading this letter of FINRA's bias against individual investors as complainants and in favor of the industry

members, let me cite one more example. As I alluded to once or twice earlier, when an aggrieved investor has lost an arbitration hearing, he has the following options for an appeal:

That's right. None. Nada. Zip. Zilch. End of story. You lost, now go away!

On the other hand, if I understand it correctly, through a process called Adjudication, a broker who has had disciplinary action recommend against him either by an arbitration hearing panel or as the result of an investigation into an Investor Complaint filed with the FINRA Market Regulation Division, can as outlined in Exhibit 22:

1.) file for a hearing before a Hearing Panel made up of a professional hearing officer and two industry representatives.

2.) If the Hearing Panel decides against him, the broker can appeal the decision to the National Adjudicatory Council (NAC).

3.) If the NAC decides against him, FINRA's Board of Governors can decide to review the NAC's decision.

4.) If the Board of Governors decides against him, the broker can appeal to the SEC.

5.) If the SEC decides against him, the broker then gets to take his appeal to federal court!

So to summarize, an individual investor who may have had his entire life savings stolen by a broker or brokerage is forced to go through an arbitration process in which the defendant can stall, and object, and file motions and ask for dismissal as often as he wants without repercussions from the arbitration panel. The aggrieved investor can be denied access to documents from the defendant that are crucial in proving his case because the hearing panel won't force the defendant to turn them over. He has to have a hearing before a panel that is admittedly stacked with one arbitrator who is an industry member, but is in reality composed of three arbitrators who are industry "members"

because the industry essentially "owns" the arbitrators by virtue of the fact that they can decide which ones work on a regular basis and which ones don't by objecting to the ones they don't want (probably based upon previous rulings against industry members). The panel doesn't have to follow any guidelines, or laws, or rules, or precedents from past decisions in making its decision, which exposes the plaintiff-investor to the whim of the panel. The panel can apparently decide to let one or more (or all) of the defendants go before the hearing is even over and all the testimony has been given, all the evidence has been shown and analyzed, all the questions have been asked and answered, and all the witnesses have been heard from. Then the panel can render its decision without having to give one shred of an explanation as to how it arrived at that decision. AND THERE IS NO ABILITY TO APPEAL!

On the other hand, a broker who is not happy with the recommendation that disciplinary action be taken against him has access to a number of opportunities to appeal that decision and have it reversed. The disparity between the manner in which the plaintiff-investor and the defendant-broker are treated by FINRA seem glaringly unfair.

But the "kid gloves" treatment of the industry member doesn't stop with the access to an appellate process not allowed to an aggrieved investor. Just look at what Adjudication section of FINRA's website (Exhibit 22) goes on to say:

> "At the hearing, the parties present evidence for the Hearing Panel to evaluate in determining whether a firm or individual has engaged in conduct that violates FINRA rules, the federal securities laws, or SEC regulations. The Hearing Panel also considers previous court, SEC, and FINRA's National Adjudicatory Council

(NAC) decisions to determine whether violations occurred. The Hearing Panel uses the FINRA Sanction Guidelines to determine appropriate sanctions…"

In other words, the Hearing Panel uses a concrete, well-known and accepted set of guidelines to determine the guilt or innocence of the broker or brokerage. Everybody is judged by the same set of rules. Supposedly, no rules are "bent" or "adjusted" for whatever reason the Panel may, at its own discretion or whim, see fit to do. Domke or Aristotle may not like it, but it is certainly a much more transparent way of deciding whether a broker or brokerage is innocent or guilty of the charges and if guilty, what the punishment ("sanctions") should be. If only the arbitration hearing panels had to abide by such clear-cut guidelines! I believe more investors would then feel both more confident that they would receive a fair hearing in an arbitration and more comfortable with and accepting of the outcome.

Finally, after stating that "The Hearing Panel uses the FINRA Sanction Guidelines to determine appropriate sanctions…", the Adjudication section of the FINRA website (Exhibit 22) states that the Hearing Panel

"…issues a written decision explaining the reasons for its ruling."

If only the plaintiff-investor was given the same treatment after his arbitration hearing! This again points out the disparity in how FINRA treats industry members versus how it treats ordinary aggrieved investors. If the broker or brokerage feels the Hearing Panel issued the wrong decision, they can take the written explanation on to the next level of

the appellate process and use the Panel's own explanation and reasoning to show why the Panel arrived at the wrong decision.

I acknowledge that a plaintiff-investor can receive a written explanation from an arbitration panel, but for some reason it is only given if he requests it before the arbitration hearing takes place. What is the reason for that silly rule? Does the panel pay more attention to what is said in the hearing if it knows it has to give an explanation of its decision at the end? Does it feel more pressure to be fair? Does it put more pressure on the defendant and his counsel to stop throwing up roadblocks to the progress of the arbitration process, like filing motions to dismiss or refusing to provide documents asked for in discovery requests? Does it perhaps try to adhere more closely to what it feels the outcome would be of a real trial in a court of law, rather than "adjust" its decision for some arbitrary and opaque reasons? I think all these questions point to the conclusion that a written explanation of a hearing panel's decision ought to be automatic in an arbitration. I think if I had received one after my hearing, it would have been obvious how out of touch, unfair, biased and misguided the arbitration panel was that heard my case.

SECURITIES AND EXCHANGE COMMISSION

When I mentioned earlier in this letter on page 26 that I sent a letter to Mr. Carfello, my case administrator during the FINRA arbitration process, I mentioned that I also sent copies of the letter to several other people at FINRA and to the Securities and Exchange Commission. My intention at that time was to just make the SEC aware that I had sent a complaint to FINRA, part of which was about FINRA itself. On May 4, 2006, I received an email from a Mr. Steven G. Johnson, Special Counsel at the SEC (Exhibit 23). This email essentially copied an email Mr. Johnson claimed he had sent to me on April 6, 2006 after I had sent the SEC a copy of my letter to Mr. Carfello. I called the SEC in early May of 2006 to verify that they had received this copy. It was after that phone call that I received the email shown in Exhibit 23. It was essentially what I would call a "form email", much like a form letter, in which Mr. Johnson thanked me for my letter and basically said the SEC would add my complaint to their database where they keep track of troubling issues, firms, brokers, etc. Even though I hadn't asked them to do anything at that point, they went ahead and said they wouldn't do anything anyway. The email said nothing about my complaint itself, when or whether the SEC was even going to look at it, and when I could expect to hear back from them. The best way I could summarize the SEC's response to my initial complaint was "Congratulations and welcome! You are now part of our database. If we get a few thousand more people like yourself, we may (or may not) do anything about it. But either way, you will never know whether we do or don't". I didn't respond to this reply at that time because I was primarily focused on trying to convince FINRA-MR to take a look at my case.

I also mentioned earlier on page 37 that when I received the FINRA-MR's response to my Investor Complaint, I wrote a letter on July 20, 2006 to Mr. Robert Errico in which I questioned the FINRA-MR's refusal to look at my case, especially the two-year time limit excuse. At that same time, I also sent a letter to the office of U.S. Sen. Jim Bunning, member of the Senate Finance Committee and the Senate Banking Committee, in which I complained to him about the FINRA-MR's response to my Investor Complaint. His office forwarded my letter to the SEC on August 1, 2006 (Exhibit 24), along with a request for them to respond to me. On or about August 19, 2006, I received a letter from Sen. Bunning's office (also in Exhibit 24) saying that (the same) Mr. Steven Johnson with the SEC would be following up Sen. Bunning's letter with a call to me explaining the "differences between the legalities of the statute of limitations and the rules and regulations for arbitration." (I really didn't want an explanation or care what the reason for these differences was. I just wanted FINRA-MR to hear my case.) Mr. Johnson called and left a message on my home phone that briefly explained his understanding of what rules FINRA-MR used to decide how old a case can be before it is too old to pursue. He invited me to call back if I wanted to talk to him further.

I called back and it became readily apparent that he wasn't going to do anything to help me. For one thing, he used the same "company line" excuse about not being able to overturn an arbitration panel's decision. I asked him if I could speak with someone higher in authority about my case because I really thought it was important that the SEC know in no uncertain terms the devastation caused by the broker and the brokerage <u>and</u>

the unfair way in which my case was handled by FINRA-DR. I thought perhaps a personal plea would mean more and perhaps that would lead to some action on the part of the SEC as a result of my phone call that might occur well before any action that they might take on their own in the normal course of following up on a complaint. He gave me the name of Mr. Jack Hardy who I believe was Mr. Johnson's immediate supervisor. I called Mr. Hardy in late August of 2006. At first, just like Mr. Johnson had done, he sounded as though he was just going to brush me aside with the usual "company line" about how the SEC couldn't do anything for me if I had already had an arbitration hearing (the dreaded "arbitration hearing" excuse once again). However, after pleading with him, he finally told me to send him a letter explaining my complaints about the brokerage, the lending subsidiary, and FINRA. One thing I remember his saying in particular was that if my problems with the brokerage and the lending subsidiary had been caused by the actions of a "rogue" broker, the SEC would be less likely to consent to looking into my case than if my problems had been the result of a "systemic breakdown" on the part of the organizations themselves. I told him I most certainly believed there were a number of "systemic breakdowns" involved in the loss of my account and I would point them out in my letter to him.

I sent the 23 page letter to Mr. Hardy on September 22, 2006. It was very similar to the letter I had sent to Mr. Dan Sibears at FINRA-MR at about the same time. Basically, it described what was done to me by both the brokerage and the lending subsidiary. I ended it by asking Mr. Hardy how he would like to have been treated if he were in my

shoes and if he would have wanted the information that was withheld from me by the brokerage and the lending subsidiary.

About one month went by and I hadn't heard anything from Mr. Hardy, so I called him. At first, I was not sure he remembered me but after I described my situation, he said he did remember and he said he thought Mr. Steven Johnson had sent a reply to me. I told him I hadn't received anything from Mr. Johnson. He then forwarded to me a copy of the email Mr. Johnson had supposedly sent to me on September 28, 2006, but that I had never received (Exhibit 25). They could only have had my letter (dated September 22, 2006) for a few days after I had sent I sent it before Mr. Johnson sent the September 28 email. It made me wonder if they had even read my letter. Then after I read the email itself, I became even more discouraged and frustrated because it was the same sort of "form email" that I had received back in May of 2006 from Mr. Johnson. Again, they thanked me for sending my letter and then said they couldn't tell me anything about whether they would even conduct an investigation or not because all investigations are conducted on a confidential basis. I'll have more to say about that policy in a minute. Anyway, after spending a lot of time and energy on a number of nights and weekends composing the letter to Mr. Hardy, I felt more than a little insulted that the only reply I received once again was basically the "party line". I called Mr. Johnson about a week later to express my frustration. He said he understood but there was nothing he could do about it because that was the policy of the SEC. He said again that the SEC would not overturn a FINRA arbitration decision. I told him I understood that, but that the results of an arbitration apparently can't keep FINRA-MR from carrying out its own investigation

if it wanted to (Exhibit 18 page 1 of 3), and perhaps the SEC could "encourage" FINRA to open an investigation. Alternatively, the SEC had jurisdiction over both the brokerage and the lending subsidiary and both of them were complicit in the loss of my account so I thought the door was wide open if the SEC wanted to conduct its own investigation of one or both, especially given that the lending subsidiary was not even a party to my arbitration. I also thought the SEC could decide to do its own investigation regardless of what the outcome of my FINRA arbitration had been. We said goodbye and ended the phone call.

After that conversation, I didn't consider contacting the SEC again until I received my March 13, 2007 letter from Mr. Troutner of FINRA-MR (Exhibit 17) in which he said that the FINRA-ED decided not to investigate my case. At that point, I decided I really needed to contact the SEC again because it was obvious to me that FINRA was going to "circle the wagons" around an industry member, and that if there was any entity that could break through that circle, it was the SEC. However, I was also hesitant to contact the same people who had been assigned to my case from the beginning, ie., Mr. Steven Johnson and his superior Mr. Jack Hardy because I knew I would just receive the same "form email" and the same answers to my questions and pleas for help.

Therefore, I decided to go right to the top, so I wrote a 12 page letter dated May 8, 2007 to the Chairman of the SEC, Mr. Christopher Cox. I knew it was a very long shot that he would even read it or have someone on his staff read it, but at this point I was about out of options. Besides, I thought once he read it (if he read it), if he had any sense of fair

play about him he would agree with me, and then perhaps my letter, and my case, might receive some sort of priority or be put on some sort of expedited track because of it age.

In my letter to Chairman Cox, I summarized what had happed to me in the FINRA arbitration hearing fiasco, along with FINRA-MR's decision not to investigate my case, and finally the FINRA Ombudsman's decision not to approach FINRA-MR about sitting down with me and looking at the documents I could show them that illustrated my points. I basically pleaded with him not to let my case be "thrown out" or "put on the back burner". I even said that I understood that the SEC had "bigger fish to fry" and that some of the transgressions they were pursuing affect a large number of investors and need to be dealt with sooner rather than later. But I also told him that if a brokerage and an affiliated "sister" company can work together to put a client's account at risk of loss, and then ultimately take that account away from the client and put the proceeds in their own pockets, and this is all right with FINRA, then there must be some more basic or fundamental flaws that exist in the present system as it stands today that need to be dealt with in an expeditious manner also. Finally, I made a number of observations and suggestions about changes or improvements that I believe should be made, or at least considered and debated, in the present system.

I received a letter in reply dated May 23, 2007. This time it was not from Mr. Steven Johnson as before but from his supervisor, Mr. Jack Hardy, the Branch Chief (Exhibit 26). As you can see, the letter was quite short and said just about what I was afraid it would say. In it, he said he was asked to respond to my letter to Chairman Cox. His

rather succinct response was essentially that I needed to go back and re-read the response I had received from Mr. Johnson the previous fall in his email to me (Exhibit 25). He ended by saying I could contact him (Mr. Johnson) if I had any comments or questions. That was exactly what I was afraid would happen if my letter was forwarded to Mr. Johnson or Mr. Hardy. Why bother!

However, I did bother and in July of 2007, I called Mr. Hardy again, knowing what his answer would probably be, but hoping maybe I would get a break and he would tell me something about my case. He vaguely remembered who I was, and asked me to write another letter to him describing what my complaint was. At first, I was extremely hesitant to spend the time because I felt I already knew what the answer would be and I was beginning to get more than a subtle feeling that I was being treated like some sort of circus animal being made to jump through hoops just for Mr. Hardy's and the SEC's entertainment. Why did he need another letter? Why couldn't he just re-read the ones I had already sent? But at this point, I felt rather than "get nasty" with him, which would probably end all chances I had, I would comply with his request. So I wrote a 16 page letter and sent it on July 14, 2007. Again, this took a great deal of time and effort at nights and on weekends, but if I could convince him or someone of my sincerity and determination, perhaps it would be worth it. I have yet to receive a reply from Mr. Hardy or anyone else at the SEC to that letter.

Other than maybe one or two phone calls to Mr. Johnson to see if he could tell me anything at all about my complaint and/or my second letter to Mr. Hardy, I made no

attempt to contact anyone at the SEC for the rest of 2007 and most of 2008, as I was pursuing other avenues for seeking redress. Finally, in November of 2008, I mustered the time and energy to write and send a 35 page letter to Senator Mitch McConnell, the Senate minority leader, which described what had originally been done to me by my broker and brokerage and how my case had been handled so far by both FINRA and the SEC. He wrote back and acknowledged having received my letter and said that he had asked the SEC to respond to it (Exhibit 27). Once the SEC responded to him, he wrote to me (Exhibit 28) and said that the SEC had refused to grant my request to meet with me and that they were prohibited by their own policy from telling me anything about the status of my complaint. At least I was in good company!

Also, in early January of 2009, I wrote about a five page letter to Rep. Paul E. Kanjorski who, I believe, at the time was holding hearings in the House about the financial system and regulatory reform. One of Rep. Kanjorski's staff members verbally thanked me for my input and said he would pass my concerns on to Rep. Kanjorski but that was all he could do at the time.

After failing to make any progress with those two attempts, in February of 2009 I thought I would contact the Chicago regional office of the SEC on the theory that perhaps focusing my efforts somewhere outside of the insular Washington D.C. office might give me an opportunity to get someone's attention and help. Besides, Chicago was the region of the SEC in which I lived anyway. I was able to reach a Pauline Velkin in Investor Assistance at the Chicago office of the SEC. I explained to her most of what had

happened to me and my efforts to seek redress after that. However, as expected, she "reminded" me of the fact that I had had an arbitration hearing. She ended the conversation saying she would check with the D.C. office (Mr. Steven Johnson in particular) and see what she could find out about my case. I called her back a couple of weeks later. She was polite and sympathetic, but she was not receptive to the idea of helping me. She cited everything I had heard before about not being able to tell me anything about the status of an investigation, if there even was one. Her primary reason for not helping was that she said the SEC rarely gets involved in the complaints of individual investors, unless there is something about the complaint that makes them think a larger group of investors may also be getting hurt. That was the first time I had heard that from anyone at the SEC. I couldn't understand how that position could co-exist with the fact that the SEC maintains an investor complaint page on their website. One other point in particular I remember her making as an explanation of the SEC's "secrecy" about their investigations was that if word of an investigation got out, it might affect the accused company's stock price. Imagine that! An individual can lose some or all of their life savings and all the SEC is worried about is the perpetrator's stock price, as though one individual's complaint can bring down a multi-billion dollar financial services company. I'll have a little more to say about that in a minute, but suffice it to say that I was totally disgusted with the SEC at that point in time.

After that, it wasn't until September of 2009 that I made contact with the SEC again. Out of habit or a penchant for torture, I called Mr. Johnson again to see if he could tell me if there were any developments in my case at all. He pretty much said that if I hadn't heard

anything by now, my case probably wasn't going to be investigated. While I appreciated his candor and the finality of his assessment of things, I was also aggravated by the thought that this is no way an individual should be informed of the SEC's decision about whether to investigate his complaint or not. I had been severely damaged by organizations and people the SEC regulates or oversees and yet the SEC acted like it could care less. It was like my case had been given even less than a pauper's burial. No fanfare. No questions asked or answered. Just ignore it long enough and it will disappear and we'll pretend like it never existed!

And yet I kept reading in the press how the "new" and re-energized" SEC under Mary Shapiro and Robert Khuzami was going to really get aggressive and go after the "bad guys" and bring them to justice, especially after the Madoff failure. With that in mind, I thought I would make a "run" directly at the SEC Enforcement Division in Washington, D.C. and see if maybe I could convince them to "get aggressive" about my case. I dug around the SEC's website and found a phone number for the Enforcement Division. On the afternoon of September 15, 2009 I cold-called the number I found and a Mr. Sam Bezek, who was an attorney in the Enforcement Division, picked up the phone, probably without thinking or looking at his caller-ID. I asked if I could have a minute of his time and he graciously agreed to listen to my story for about 45 minutes. At the end, he told me if I would write him a letter detailing what I had told him in the phone call, he would see if there was something he could do for me. The last thing I wanted to do was write another letter, but this was the most encouraging anyone at the SEC had been in over three years of contacting them, so I agreed to do it. However, I told him it would have to

be worked on at nights and on weekends and therefore would probably take me a little while to get together. He said he understood.

I started on the letter right away, but because you never know if one little detail or comment can make a difference when someone is deciding whether to dedicate resources to your case, I wanted to include as many details as possible. Also, I wanted to illustrate much of what I was saying with quite a few exhibits. I finally mailed the 77 page letter to him just after Thanksgiving of 2009. I called him and left a voice mail telling him it was coming and to be watching for it. I didn't hear anything for most of December 2009, which I hoped was a good sign because maybe he was slowly "digesting" everything I had to say. Right before Christmas, I called him again and again, I could only leave a voicemail asking him to please contact me and let me know how he was coming along with my letter. After the first of the year, I started trying a little more earnestly to reach Mr. Bezek. I finally talked to a live person who told me Mr. Bezek had left the SEC back in the fall of 2009. I was pretty dejected about that, as you could probably imagine. I made several phone calls in January of 2010 trying to see if the letter had been passed on to someone, but no one seemed to know what happened to it.

Finally, on the afternoon of January 20, 2010, a Merritt Gardner and Elana Kleineman (the spellings may be wrong) of, I believe, the SEC Enforcement Division, called me while I was at work. They said they had my letter and they had some questions they wanted to ask me. Being at work made it an awkward situation on top of being totally

taken by surprise with the phone call. They told me if I thought I should have an attorney with me while I answered their questions, I should feel free to get one. But where am I going to get an attorney on a Wednesday afternoon? Besides, it would probably cost several thousand dollars just to bring an attorney even halfway up to speed. And since this was the most interest anyone at the SEC had shown in my case ever, I didn't want to waste the opportunity to perhaps move it forward, so I declined their suggestion that I might want to hire an attorney just to listen in on a few questions they wanted to ask me. They asked me to describe what had happened and asked me a few questions. That was it. I hope that wasn't considered an SEC Enforcement Division "investigation"!

I called Ms. Gardner back a few weeks later and asked her if she knew whether someone had read my letter to Mr. Bezek yet or not. She resorted to the well-worn reply that she couldn't tell me anything about my case or whether the SEC was going to look into it, or whether anyone had read my letter. Then she went on to say the one thing I was really hoping she wouldn't say, which was "well you know, you did have an arbitration hearing." So there it was again. My arbitration hearing, such as it was, was cited as "proof" that I had already had one opportunity to make my case. Of course everyone who hears that I had an arbitration hearing just assumes it was fair and thorough, and if I lost, that must have been because I was wrong. To think that our country's regulatory system, even at its highest levels, was "hanging its hat" on that circus of an arbitration hearing was extremely deflating and discouraging. I haven't heard anything from the SEC since then, which I am sure is not a good sign.

How can the SEC get away with this? If any other department, agency, commission, or whatever, of the federal government responded repeatedly to legitimate complaints of U.S. citizens in this manner, there would probably be congressional hearings if not dismissals of personnel. Let me take a minute to examine the reasons (excuses?) the SEC has used so far in my case. They come from both its correspondence and from conversations I have had with SEC personnel:

1.)

"Please be aware that the SEC…cannot overturn or change an arbitrator's decision."

I never asked the SEC to either overturn or change the arbitration panel's decision. I acknowledge that they can't do that. I have been asking the SEC to conduct <u>its own</u> investigation <u>or</u> at least compel FINRA-MR to open an investigation which, as I cited earlier, FINRA-MR is apparently allowed to do even if there has already been an arbitration hearing. I am under the impression that the SEC has the authority to do one or the other or both. The SEC itself might even be in the best position to conduct an investigation since they have regulatory authority over <u>both</u> the brokerage sub and the lending sub. FINRA-MR used as an excuse for not opening an investigation that they did not have regulatory authority over the lending sub. <u>But since the lending sub wasn't even a subject of my arbitration, the SEC didn't even have to worry about whether they would be asked to "overturn or change an arbitrator's decision"</u> when it came to investigating the lending subsidiary itself. I know the SEC does not want to become the "de facto" court of appeals for those who lose an arbitration decision, but there ought to be criteria

that allow for exceptions for certain unusual or intricate cases which a "normal" arbitration panel may not be equipped or knowledgeable enough to handle. Such criteria might be dollar amount, a systemic failure at several levels of a brokerage (especially when it involves the compliance department) that led to the loss of a client's entire account, or perhaps when multiple parties are involved as perpetrators, some of which are regulated by FINRA and some aren't. At least this might prevent the regulated party from getting away with blaming the non-regulated party, as happened in my case.

Also, this statement once again seems to be pointing to the almighty arbitration hearing as the "gold standard" of a fair, thorough, and honest investigation into an investor's grievances. The implication is that the arbitration panel is infallible and the results are written on stone tablets and are untouchable after that. Once again, people at both FINRA and the SEC repeatedly pointed to the fact that I had had an arbitration hearing as a reason not to look into my complaint. It's almost as though they are saying "You had your one allotted chance. You lost. Now, go away!" As I hope I have conveyed in this letter, the arbitration process is far, far from perfect and there needs to be either or both an alternative process and/or an appeal process.

But what is really surprising about what is apparently the SEC's position that once you have had an arbitration hearing there is nothing the SEC can, should or is allowed to do is that that position seems to be in conflict with what I found in the SEC's Division of Enforcement Enforcement Manual on page 118 (Exhibit 19):

5.6.2 Informal Referrals to Self-Regulatory Organizations

Basics:

In the course of conducting an inquiry or investigation, the staff may determine that it would be appropriate to refer the matter, or certain conduct, informally to one or more SROs. In particular, if an inquiry or investigation concerns matters over which SROs have enforcement authority (eg., financial industry standards, rules and requirements related to securities trading and brokerage), staff should evaluate whether to contact SRO about the matter in lieu of, **or in addition to**, an SEC Enforcement investigation. Because SROs may impose disciplinary or **remedial** sanctions against their members or associated individuals, **staff should make an effort to apprise the SRO about conduct that may violate the rules of the SRO**...

If there is a matter or conduct that appears to warrant an informal referral, staff generally should follow the procedures below...

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- After an informal referral to an SRO is made, staff should maintain periodic communication with the SRO concerning the status of the SRO inquiry or investigation **and periodically assess whether any or additional SEC Enforcement measures should be taken**.

So there you have it in black and white. The SEC is most certainly allowed to conduct its own investigation even if FINRA is looking into whether to "impose disciplinary or remedial action against their own members." I could find absolutely nothing in the SEC Enforcement Manual that said the SEC was prohibited from conducting an investigation if FINRA was at any stage of an arbitration hearing, that is pre-hearing, in the middle of the hearing process, or post-hearing. That might be its "practice" or "informal policy",

but there is apparently no rule against it. As a matter of fact, after skimming the Enforcement Manual, I couldn't even find mention of the words "arbitration hearing". So apparently, the SEC can conduct its own investigation even if FINRA is conducting one at the same time or even if FINRA has already concluded an arbitration hearing. On top of that, even if FINRA has concluded an investigation or arbitration hearing after which it may or may not have taken any action against its regulated member, the SEC is allowed to take "additional SEC Enforcement measures."

So to summarize, once an individual has had an arbitration hearing, regardless of how faulty, biased and contrived it was, everyone else at FINRA and the SEC is allowed to point to the fact that you "had your arbitration hearing" and therefore your case it now not allowed any further consideration by anyone at either organization. Because they all feel the "proper procedures" have been followed and the "proper channels" have been gone through, these people at both FINRA and the SEC can now utter one of the following refrains with a clean, guilt-free conscience:

> "Since you've had an arbitration hearing, there is nothing…"
>
> "My hands are tied…"
>
> "If it was up to me…"
>
> "The rules won't allow me to…"
>
> "I can understand how frustrating it is, but…"
>
> "Maybe you should try contacting…"
>
> "You should contact your attorney and ask him if…"

"This does not fall under our…"

"I'm sorry. I'm just the messenger…"

"I know it doesn't seem fair, but…"

"I can sympathize with you, but…"

It really seems to me that rather than being there to help protect the individual investor, all the laws, rules, policies, regulations, etc. (especially with regard to an arbitration hearing) are there to give "cover" to those whose propensity it is not to act or to act only in defense of the industry they supposedly regulate.

However, I suggest that the people working for both FINRA and the SEC go back and read the rules governing their respective organizations. If they did so, they would find:

A.) that the SEC can make contact with an SRO if a matter it is investigating involves an entity over which the SRO has enforcement authority,

B.) that, as I showed a minute ago, the SEC can conduct its own investigation at the same time FINRA is conducting one, and there is apparently no restriction (that I could find) with regard to the status of an arbitration hearing,

C.) that FINRA-MR can, according to its own rules, conduct an investigation regardless of whether there has been an arbitration hearing or not, and if there has been one, regardless of what its outcome was,

D.) that if FINRA encounters a situation that involves an entity it does not have regulatory authority over, it is supposed to refer the situation to the SEC,

E.) that FINRA's own website encourages individuals who have filed a complaint with FINRA to also file one with the SEC (and provides a link to the SEC website). (I will have more to say about this in a minute.)

In other words, instead of looking for reasons and making excuses for not helping an individual aggrieved investor, those who work at FINRA and the SEC ought to be trying to find ways they can help such an individual (as they all claim they are supposed to do), and those "ways" appear to already be contained right within their own rules.

2.)

> "We also cannot provide you with updates on the status of your complaint or your request for an investigation. The SEC generally conducts investigations confidentially for two main reasons. First, we can conduct investigations more effectively if they are not announced publicly. For instance, important documents and evidence can be destroyed quickly if people hear of an investigation..."

The SEC must have an even lower opinion and level of trust of brokerage firms than I do! If you assume that documents may be destroyed once word of a possible investigation gets out, then the entire system of rules established by FINRA, the SEC and others that pertain to the observance of securities laws, to the treatment of clients, and to document retention, in addition to the entire idea of having compliance departments within brokerages, must be a fiction or a charade for the purpose of misleading investors into believing that their accounts are safe because these is some sort of "policing" of a brokerage from both within and without. Come on! Brokerage employees know what the penalties are for destroying documents. They can probably be equal to or even more severe than the penalties for the infractions they are trying to cover up!

On top of that, it makes no sense to me as to how the SEC can even conduct an investigation without ever talking to the "victim" or to the "perpetrator". How can they conduct a real, thorough investigation, or even decide if the complaint warrants an investigation, if they don't ask questions and seek documents from all parties? To me, it seems like they have set up the perfect "Catch 22", that is, they can't initiate an investigation without asking for certain documents that contain the evidence that proves an investigation is warranted, but they can't ask for the documents that contain the evidence because they are afraid if word of a possible investigation "gets out", the documents will be destroyed. In other words, an investigation never gets initiated because crucial documents are never obtained by the SEC because the SEC can't ask for them out of fear they will be destroyed or because they are destroyed when the SEC does ask for them! How does the SEC ever expect to obtain documents it needs in order to determine whether an investigation should be initiated?

As a matter of fact, it is probably a more likely scenario that documents will be discarded or shredded in the normal course of a business's house cleaning unless an investigation is announced and those documents are requested!

3.)

> "...Second, we keep our investigations confidential to protect the reputations of companies and individuals if we find no wrongdoing or decide we cannot bring a successful action against them."

Who is the SEC concerned about protecting? Come on, I'm talking about a major international financial services company. The SEC is concerned about protecting that company's reputation? I'm sure that on almost every business day of the year in this country, this financial services company has someone who is either in a deposition, in a court room (or before a congressional committee) giving testimony, gathering information in response to a discovery request, or in an arbitration hearing. And that doesn't even take into account the number of articles and/or references printed concerning that company, both positive and negative, that appear in the business press on an almost daily basis. So to be concerned that that company's reputation may be "tarnished" because word of a possible investigation into an investor's complaint may get out seems ludicrous to me. First, who is going to care or pay attention to it if it does leak out, and second, how might it leak out? If I think it might damage my chances of winning, I'm certainly not going to say anything, not to mention the fact that my particular case would be of little interest to the national business press anyway. So is it the SEC's own staff that leaks word of the investigation? It sounds like they have an internal control problem that, instead of finding a way to fix it the "leak", they have chosen to conveniently use it as an excuse not to conduct a hearing requested by an aggrieved investor. Just as in the case of FINRA-MR, it seems more like a workload reduction mechanism. Is that the way a federal agency or department is supposed to respond to a citizen's legitimate request for help?

So the bottom line is, the SEC seems more concerned about the potential damage to the reputations of both the financial services company, whose compliance systems were

either non-existent or malfunctioning, if they even existed at all at that time, and of my broker who was the gatekeeper to my account and who stepped aside and let it be pledged for a loan that I never agreed to do, while at the same time lining his own pockets with commission money. How misplaced can the SEC's concern get? The real concern on the SEC's part should be about the individual investor who has actually lost most of his or her life savings, savings that were accumulated over a lifetime of hard work.

4.)

"The SEC can't represent an individual complainant…"

I'm not asking the SEC to represent me. I'm asking the SEC to investigate my complaint. If it feels a full-blown investigation is warranted and I need to be "represented", I will hire my own legal counsel. FINRA's own website not only provides an aggrieved investor a means by which to file a complaint with FINRA, but also provides a link to the SEC website whereby an individual can also file a complaint with the SEC, as the following excerpt from Exhibit 29 shows:

> "**In addition to initiating an arbitration**, investors may file their complaints with the appropriate regulatory authorities, **such as the Securities and Exchange Commission (SEC)**, state securities commissions, or one of the SRO's listed in the Services Directory, when they believe there has been fraud or that other investors may be at risk. **The regulatory agencies may then investigate the complaint and, if warranted, censure, fine, or suspend a wrongdoer**…"

So taking a complaint to the SEC, along with filing for an arbitration with FINRA, is at least suggested, if not encouraged, by FINRA. Why would FINRA even mention it if the

SEC hadn't approved it or agreed to it? How can both FINRA's website and the SEC's website invite and encourage aggrieved investors to file complaints either electronically or in writing and then turn around and use as a reason not to follow up on those complaints the excuse that by investigating them they would be "representing" the individual complainant, which they are not allowed to do? That just doesn't make much sense.

5.)

"The SEC cannot recoup the money you lost."

In my opinion, this response or excuse not to investigate appears to be not only wrong, but designed to discourage aggrieved investors from filing complaints so that some investors will stop pursuing their complaints at that point and the SEC will only have to deal with those investors who are persistent enough. If an investor has lost money, there is only one reason he would file a complaint and that would be to hopefully get his money back. Sure, he would like to see the company or individual who caused him to lose the money be disciplined. However, that is secondary to having his funds returned or reimbursed. So again, why does the SEC bother to invite aggrieved investors to file a complaint if it is only going to later tell them that it can't do anything to get their money back?

More to the point, it appears as though the SEC has the authority to both fine securities laws violators and to recoup and return money to investors, as Exhibits 30 and 31 show.

Again, there seems to be a contradiction between what the SEC tells individuals and what its own website says. What's going on?

6.) One reason or excuse I have not heard anyone at the SEC use nor have I seen it in writing on the SEC's website is that there is a statute of limitations that prevents the SEC from investigating a claim. Perhaps it is just by coincidence that no one has brought it up or perhaps it is buried so deeply on the website that I simply never came across it. But sort of in corroboration of my statement, I occasionally read articles in the business press about cases that the SEC is working on that go back at least as far, if not further, than my case. So maybe the SEC has the ability to go back as far as it needs to in order to right an injustice.

7.) Finally, it doesn't seem to me that the SEC can use as an excuse for not pursuing a case the fact that there is a lack of resources, which necessitates only going after cases that give them the "biggest bang for their buck." As Exhibit 32 shows, the SEC spent the resources to go after a couple of former accounting firm employees (note that neither one worked for a brokerage and therefore did not fall under FINRA's jurisdiction, but apparently did fall under the SEC's jurisdiction, just as the lending subsidiary did in my case), one of whom made illegal trading profits of $24,000. He had to disgorge those ill-gotten gains and pay a fine of $24,000. The other individual had to pay a fine of $20,000. So the SEC expended the resources to pursue a total of $68,000 in illegal profits and fines. I lost an amount in seven figures and yet I can't get the SEC to even give me the time of day!

SEC – CONCLUSION

At this point, I want to reiterate that my primary reason for writing this letter was to hopefully obtain help from someone in getting my particular case investigated by the SEC. I still believe the SEC has the authority and the ability to do something, not to mention the fact that it should be utterly ashamed of the way it has handled my case this far.

A secondary reason for writing this letter was take the opportunity to address the Investors Advisory Committee and thereby let as many people as possible in authority and in a position to do something know what it is really like for an individual to try to deal with and be heard by both FINRA and the SEC. I hope I have opened a few eyes along the way.

I would like to take the last few minutes of your time to make a few recommendations and comments based upon my experiences through this whole process. Some of these may have already been made by others, some may be out of the question to put into effect, and some may seem simply irrelevant.

1.) FINRA

I think without a doubt, something should be done about FINRA's insistence upon maintaining a stranglehold over the arbitration process. Let me offer some alternatives:

A. My first choice would be to let individual aggrieved investors have the choice of going to court or having an arbitration hearing. I think investors would feel like they got the fairest hearing they could get that way.

B. If this can't be done, then I would like to see the arbitration process taken away from FINRA and given to another group or organization to conduct in which case there would be less potential for biased rulings. I simply don't believe FINRA is capable of conducting a fair, thorough, and unbiased arbitration hearing. Just look as my case. As I cited earlier, but it's worth repeating here, in Exhibit 1, FINRA acknowledges that need not just for impartiality, but also for the need to appear to be impartial:

> From page 1: "The key to an effective arbitration system is having capable, fair, and impartial arbitrators who hear and decide cases conscientiously… Arbitrators must be and impartial **and must appear to be fair and impartial.**"

> From page 3: "Aside from an actual conflict of interest, even an appearance of a conflict might render a decision suspect. It cannot be emphasized enough that arbitrators must be free in fact **and in appearance from all bias and prejudice.**"

It is obvious from my case that FINRA long ago abandoned the goal of not only being unbiased, but also appearing to be unbiased. Just look at what happened to me. By filing all sorts of motions and objections, the defendant was allowed

by FINRA to delay my hearing for almost two years, and in the process increase my legal expenses by tens of thousands of dollars, probably in an attempt to discourage me to the point of giving up or to cause me to run out of money. FINRA did nothing to force the defendant to turn over the documents we requested for our discovery. It released (ie., found not guilty) one of the co-defendants (the broker) before the arbitration hearing was even over, apparently against its own rules. It refused to give an explanation of its decision. It's Enforcement Division refused to investigate my case when it clearly had the authority to do so, and I believe all the reasons it needed to do so. Finally, it treats its own regulated members much, much better than an individual aggrieved investor. A broker, or brokerage, found guilty of wrongdoing has a number of opportunities to appeal that decision, even being allowed to go all the way to federal court. Along the way, decisions at any of these appellate levels must be based upon previous court, SEC, and FINRA's NAC decisions to determine whether violations have occurred. The initial hearing panel is made up of individuals from both the industry and non-industry representatives. And last, a decision at any level must be in writing and must be accompanied by an explanation of that decision.

All of this goes way beyond simply not giving the appearance of bias. It represents a real "slap in the face" to an aggrieved individual investor who is told he or she can't have any of the same treatment a regulated member of the industry receives. Therefore, I believe FINRA should no longer be allowed to

conduct the arbitration hearings. It has become too close to the industry it regulates. A more independent organization should be placed in charge of the arbitration process. Let FINRA continue to make the rules and set the standards its members must abide by, and let it discipline its own members when they break the rules or violate the standards. But when it comes to aggrieved investors, let someone else determine whether those investors were wronged by a FINRA member. It would be the same as when someone has been a victim of police misbehavior. I have the upmost respect for the police and the job they do, but if I were a victim of police brutality or if the police violated one of my civil rights, I would not want to seek redress before a panel made up of police department officials. That is why the police don't run the court system. The validity of grievances against the police and the punishment for acts found to be in violation of the law are determined in a court of law through a trial conducted by a separate judicial system.

C. If the arbitration process can't be removed from FINRA and the choice of having a courtroom hearing is not acceptable, then I would like to see an appeal process set up and conducted by an organization independent of FINRA. I don't believe everyone who loses an arbitration hearing will automatically appeal because of the legal expense of going forward. Hopefully, their attorneys will give them an honest assessment of their chances of winning an appeal, based upon what came out in the original arbitration hearing. That should cut down significantly on the number of cases being appealed. On the other hand,

it gives an aggrieved investor who believes he was not treated fairly by the arbitration panel the chance to show why to a person or persons totally independent of FINRA.

2.) THE SEC AND GUIDANCE FOR INDIVIDUAL INVESTORS

The SEC is currently looking at a number of ideas about ways to better educate and inform investors about investments they are considering purchasing or already own. I am more than a little skeptical about how well these will work and I fear they may even do more harm than good.

A. I think the SEC is misleading itself if it thinks a way for investors to become more educated about investments is for the SEC to produce educational materials on investments. First of all, FINRA already has a whole section of their website dedicated to this subject. I don't know what the SEC could add to what FINRA already has offered. Also, with literally thousands of books and magazines offering investment advice, quite a few financial advisory websites, courses and seminars offered by local universities, and many adult education classes available in most larger cities, there is plenty of opportunity right now for individuals to educate themselves about investment options and opportunities. There is probably very little the SEC can add that is new or all that different, so why bother to essentially duplicate what is already available? But if it allows

those at the SEC to feel good because they have done something, whether it is all that helpful or not, then by all means go ahead!

B. There is currently much talk focused on issues dealing with such ideas as "transparency", "disclosure", and "say on pay". The idea is to make investors more informed so they can better understand how a company they are considering investing in operates and makes money and how that company incentivizes its management. There are a few good ideas that have been proposed, such as making managers' and the board of directors' total compensation package consist of a greater portion of equity in the firm. That idea is designed of course to make management and the board of directors take on a longer-term focus that is aligned with investors' goals of an increase in value of their investment over the long term. This is probably a good idea and should benefit shareholders much more than just giving shareholders the ability to cut management's compensation based upon a single year's performance. That ability would lead to nothing but an emphasis on short-term (quarterly or annual) earnings and stock performance while possibly sacrificing the long-term health of the company. However, beyond that sort of compensation issue, I'm not sure just how much more influence individual shareholders want or even should have over how the company is managed. Most shareholders, I believe, are simply "along for the ride". Whether they hold the stock for only a year to two or choose to hold on for a much longer time period, their ultimate goal is just to sell at a higher price than they paid for it in order to fund something like a college

education, a new home, or their retirement. Once these goals are reached, if not long before that point, they are out of that stock. I, and I am sure most individual stockholders would say the same thing, don't want to run General Electric, or IBM, or Proctor and Gamble. It would be terribly presumptuous of me, and probably a huge mistake, to think that I should have a say in management's long-range planning, marketing initiatives, or production strategy. All I am doing is hoping for (and betting that) management will make the right decisions that help me achieve my goals.

So before the SEC "chokes" investors with a huge amount of information in the name of "transparency" and "disclosure", it needs to ask itself just how much information individual investors can and want to "digest". While the information should be produced and made available, it should be geared towards those who are both "in it for the long haul" and can actually influence management through face-to-face discussions and question and answer sessions. More specifically, these people would be members of the board of directors, larger and long-term shareholders such as mutual funds, and analysts covering a particular industry.

The one thing that concerns me the about the SEC's drive for "transparency" and "disclosure" is that if the SEC makes companies produce too much information for individual shareholders, not only will most of it go unread (and thus be a huge waste of money), but there is also the potential that it could be used as a

"club" with which to beat individual investors over the head. Let me illustrate what I am getting at with the following hypothetical scenario of an arbitration hearing (and believe me, having been through one, this is not all that hypothetical).

Seasoned Defense Attorney (SDA) (After 35 years of doing this, skilled at eviscerating marginally knowledgeable first-time, and hopefully only-time, complainants):

"Mr. Individual Investor, before you purchased it, what did you do to educate yourself about this investment that you lost money in?"

Individual Investor (II) (who is scared to death because he has never been cross-examined before, not to mention that he feels the pressure from so much riding on his answers):

"I, I, I didn't really do anything, sir. My broker said he thought it would be a good investment for me to put my kids college money in."

SDA:

"Mr. Individual Investor, is your broker your momma?"

II:

"No sir, he is not."

SDA:

"Then what makes you think your broker has any responsibility for how an investment <u>you told him to buy</u> turns out?"

II:

"But I only bought it after he recommended it to me."

SDA:

"Look, your broker's responsibility to you ends when you take possession of an investment and your money is in the brokerage's bank account. He found it for you. YOU told him to go ahead and buy it!

And by the way, did you read up on this investment? Did you read any of the abundance of information that was made available to you by the company, such as the annual report and all the quarterly SEC filings?"

II:

"No sir. You see, I work between 45 and 60 hours a week and sometimes on the weekends. I barely get home in time to read my kids a bedtime story, tuck them in and kiss them goodnight. Then I am off to work in the morning just as they are starting to get up. And my weekends are full of chores around the house. Occasionally, I get to go to a ball game or a school function. And then it's Monday and I start all over again.

So to answer your question, no I didn't read any of these reports you mentioned."

SDA:

"Mr. Individual Investor, do you know that if you had been faithfully reading each quarter's Form 10-Q, you would have known that this company was transferring massive amounts of debt onto the books of off-shore subsidiaries? And did you know that if you had meticulously read the 183 page annual report and tied together the numbers given in footnotes 23, 47, and 61, you most certainly would have come to the conclusion that this company was, for all intents and purposes, bankrupt?"

II:

"But, but…"

SDA:

"Quite making excuses and stop your whining, you whimpering, sniveling, cowering little SOPHISTICATED investor! Everything you said is irrelevant.

Let the record show that the plaintiff REFUSED to educate himself by reading any of the staggering number of reports required by our benevolent regulator-on-high, the venerable Securities and Exchange Commission, to be produced by every corporation, including the one you invested in!"

II:

"But, but…"

Three Member Arbitration Hearing Panel (after 60 seconds of deliberation, punctuated by a wink and a nod amongst themselves and the defense attorney):

"We find the defendant not guilty of the charges, and we know why but we're not telling! Case dismissed! Now let's go have dinner on the plaintiff. You can look for the bill for our services in the mail next week. Just work a little more overtime and you should have it paid off in a couple of years!"

In my opinion, the only way to help the individual investor is to give more information to large, long-term institutional investors and (independent?) analysts who hopefully individual investors can trust to watch out for the good of them all <u>and</u> to place more of a fiduciary duty upon the broker and brokerage firm with regard to the products they "pitch" to individual investors. I'll be the very first to say that individuals should not own individual stocks if they don't have the time to monitor them <u>and</u> they should not be in the stock market <u>at all</u> if they can't afford to lose at least a portion of what they invest. But, by the same token, brokers and brokerages should have a greater (fiduciary?) responsibility for what investments they encourage or recommend to individual investors. Right now, they probably have less accountability for the performance of the product they sell than a used –car salesman does. I say the following with half tongue in cheek, but if anything, rather than give the individual investor more information that he doesn't

know how to use or interpret, the SEC should perhaps go in the opposite direction by prohibiting individual investors from owning individual stocks (or perhaps any equity-type investment with equity-type risk) until or unless they have demonstrated a certain level or understanding about investments and investment risk. Just like some people shouldn't own guns, or have a driver's license, or be able to hold certain jobs that require a degree of skill or intelligence that not everyone possesses, some people shouldn't own stocks until they have demonstrated that they know exactly what they are buying and what risks they are taking.

C. One other action the SEC should not take is allowing analysts at investment banks to conspire, I mean converse, with the investment bankers at those firms. Exhibit 33 discusses the SEC's joint request with several investment banking firms to U.S. District Judge William H. Pauley III to allow just such communications to take place. The SEC can't be serious can it? Where did that idea come from? I certainly didn't see any report on it or discussions about it on the SEC's website, at least not where it could easily be found and commented upon. Was this something cooked up in a back room? This was the sort of collaboration that lead to the tech stock bubble in the late 1990's and early 2000's. Individual investors lost a tremendous amount of money by buying stocks sold by brokerages that had been recommended by analysts who privately thought they were no more than "garbage". Not only did individual investors lose faith in the stock market as a result of losing such enormous amounts of money on those tech stocks, but they subsequently made investment

decisions that in some perhaps small and unquantifiable way lead to the bust we are currently experiencing in the real estate sector. I personally can't tell you how many people I, and others I know, heard say something like the following after the tech stock fiasco:

> "I don't trust the stock market any more and it's not going to come back for years anyway. I'm going to put my money into something that is tangible, that will at least hold its value if not appreciate, and that will help me recoup some of the heavy losses I took on tech stocks. I'm going to invest in REAL ESTATE!"

Of course, we all know what happened to those who tried to buy and quickly re-sell real estate in the last couple of years. So all those fleeing the stock market and looking for somewhere to put what money they had left after tech stocks finally exploded helped to inflate the real estate bubble that developed. Once that bubble exploded also, they became "burn victims" for the second time. To various degrees, a lot of the fuel for both of these "bombs" came about as a result of the "cozy" relationships analysts had with investment bankers. And now the SEC is trying to let it all happen again? How can anyone at the SEC even look themselves in the mirror after partaking in such a request?

3.) THE SEC AND ITS RESPONSE TO INDIVIDUAL INVESTORS

Finally, I would like to address how the SEC treats the complaints filed by individual aggrieved investors. The best way I can describe it is that it treats them like third-class citizens, people to be avoided or ignored if possible. If someone is persistent enough or if the SEC is absolutely forced to through some other mechanism, it might consent to speak with them. By that I mean, ask them a few questions, act like you're interested in and concerned about what they have to say, but in the end tell them how sorry you are that you won't be able to divulge anything about what happens to their complaint and then cite some self-imposed statutory reasons why not. Of course, one of these reasons is that you absolutely must protect the reputation of the person or firm the aggrieved investor complained about.

Does the SEC have a clue why people take the time to file a complaint? Sure, sometimes it may be about a technical matter, or perhaps the individual is suspicious about the behavior of or information provided by an individual or a firm. But I am sure there are quite a few complaints filed by individuals who have lost significant (for them) amounts of money. Does the SEC realize that when someone files a complaint about money they have lost, that person's financial well-being may literally be hanging in the balance? If someone has had stolen some or, as in my case, almost all of his life savings by a broker or brokerage, his life may have been changed drastically, if not devastated. He may need almost immediate help, and therefore some sort of relatively quick resolution to his predicament. People have lives to lead, dependants to support, financial obligations to

meet, or maybe a retirement to fund, and yet the SEC wants to be able to drag its feet for what could literally be an eternity and leave the aggrieved investor to live his life with his diminished resources as best he can. First, the SEC tells the individual to file an arbitration claim with FINRA which means spending more of his already-diminished funds on an attorney, regardless of the specific circumstances involved. If the individual goes through the tortuous process that FINRA makes him endure and loses, and then turns to the SEC for help, the SEC essentially washes its hands of the case. It tells the individual to describe what happened to him in the complaint, but then it tells him the SEC will not be able to give him any information about his complaint from that day forward. So the individual aggrieved investor is left, as the saying goes, "slowly twisting in the wind." Finally, if enough time elapses and the individual becomes so frustrated he is at the end of his rope, he might call the Special Counsel assigned to his case in order to ascertain the status of it. At that point, he may find out through the "back door" about the disposition of his case as I did when I was told "Well, if you haven't heard anything by now, I guess they must have decided not to investigate your complaint."

On the other hand, if there is a large group of individual aggrieved investors (Madoff or Sandford) and their situation has made headlines in the newspapers and been featured on national television newscasts and special reports, the SEC is more than eager to slide down the pole, jump in the truck, and come to their aid, all of course under the glare of TV lights and in front of reporters carrying microphones and cameras.

The disparity between the ways the two situations are handled is appalling. What did the "fine print" on the backside of the Madoff victims' account-opening statements say? Why weren't they told to wait in line for a FINRA arbitration hearing like everyone else who has a dispute with their financial services company? And can you imagine what the reaction would have been on both television and in the press if all the Madoff investors would have received the same email I did from the SEC which said the following:

> "Thank you for your letter and for taking the time to alert us to your concerns. We will carefully consider your request for an investigation. But at this point in time, **our office can do nothing further to help you**. This is because the SEC generally conducts…"

That is the reply I received, and yet in my case, the lending subsidiary attached my faxed signature to a contract (pledge agreement) it had never given to me and the brokerage agreed to set up my account as pledged collateral for a loan without even bothering to contact me to see if I was in agreement to do it, while at the same time a number of people at both subsidiaries were pocketing commissions. Not even Bernie Madoff was initially that brazen and corrupt! I acknowledge that buying stocks is a gamble in which you risk losing some, or perhaps even all, of what you invest. However, the simple act of opening an account at a brokerage and transferring stocks into it should not carry any risk at all. I opened an account at the brokerage in question in August of 1997, and by August of 2003 the brokerage was putting all but about $26,000 of what I had in that account into its own pockets! And yet everything that was done to me was apparently all right with both FINRA and the SEC. My fellow investors, I wouldn't sleep too well tonight if I

were you, knowing who is supposedly watching over the integrity of the entire financial services industry!

So in summation, the individual investor who has no access to the media is forced into the shadows and treated almost as though he doesn't exist. On the other hand, a large group of wealthy aggrieved investors whose plight makes the national news is pushed to the front of the line and given immediate and full-throttle attention. This is simply not fair and not right. What is the difference between the plight of one individual and a group of individuals? What is the "magic number", the cutoff number at which the SEC no longer cares what happened to you? Twenty-five individuals? Ten individuals? Five individuals? One individual? In my opinion, the SEC simply cannot be allowed to act as cavalierly aloof and indifferent as it has in my case and it cannot be allowed to pursue only cases involving the wealthy and the well-connected. If it does not know this already, the SEC must be made to realize that it is in the unique position of being the best, and in some cases such as mine, possibly the only hope an individual has to get his life back in order. And it must do this by first acknowledging that justice is meant not only for the large and the loud, but also for the single and the silent.

Thank you for your time.

D. T. Freibert