

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

---

**TANDARD INVESTMENT CHARTERED, INC.** On  
behalf of itself and all others similarly situated,

**S**

Plaintiff,

**: Case No.07-CV-2014 (SWK)**

v.

**NATIONAL ASSOCIATION OF SECURITIES  
DEALERS, INC. (a/k/a "NASD"); NYSE GROUP,  
INC.; MARY L. SCHAPIRO; RICHARD F. BRUE-  
CKNER and BARBARA Z. SWEENEY**

**: CLASS ACTION**

**: JURY TRIAL DEMANDED**

Defendants.

---

**AMENDED COMPLAINT**

**INTRODUCTION**

Plaintiff Standard Investment Chartered, Inc. ("Standard" or "Plaintiff"), for its Complaint against defendants National Association of Securities Dealers, Inc. ("NASD"), NYSE Group, Inc. ("NYSE"), Mary L. Schapiro, Richard F. Brueckner and Barbara Z. Sweeney, alleges upon information and belief and upon investigation of counsel as follows:

1. This is a Class Action brought against defendants that challenges chiefly defendants' failure to comply with Delaware state law in soliciting support among NASD members for the proposed NASD-NYSE regulatory consolidation ("the Transaction") described below. This Complaint does not challenge the wisdom of a consolidation of these two self-regulatory organizations ("SROs"), a transaction encouraged by the Securities & Exchange Commission ("SEC"); rather, it challenges the deceptive manner through which the Transaction is being foisted upon those members of NASD that are not also members of NYSE and its

essentially unfair terms and conditions which have harmed and will irreparably harm plaintiff and the members of the Class. Among other things, plaintiff seeks declaratory and injunctive relief to prevent a proposed plan to consolidate NASD and NYSE from becoming effective in the absence of a proxy statement that is fair, balanced, accurate, informative and complete as required by applicable law; to enjoin certain proposed by-law and other governance changes that would occur pursuant to the Transaction in the absence of a legal vote of the membership of NASD; and to recover damages on behalf of plaintiff and the members of the Class defined below.

2. The gravamen of this Complaint is that the terms of the consolidation represent a massive disenfranchisement of plaintiff and the members of the Class – those NASD members that are not also NYSE members – and that their consent thereto was obtained only through a "bum's rush" campaign by all defendants that included, *inter alia*, public relations ballyhoo, a one-sided, deceptive and conclusory proxy statement that failed to explain how critical choices were made by defendants, uniform cash payments and dues credits that appear to be little more than a monetary inducement to small NASD firms to exercise their votes under the "one firm, one vote" so as to create an apparent stampede in favor of the Transaction. In fact, The New York Times has directly asked "Is this a case of vote buying?" ("Let's Vote on Securities Rules. Oh, and Here's \$35,000," (NYT 11/29/06)).

3. Other aspects of the Transaction were particularly shabby as well. The proponents provided an abbreviated period of one month for NASD members to vote based upon material facts having been concealed (during the holiday season) and an undocumented threat of federal regulatory intervention unless the Transaction was approved.

4. It is particularly dangerous, disappointing, ironic and disingenuous that those responsible for self-regulating our nation's securities markets would employ such tactics, which include a proxy statement that could not possibly pass muster under the nation's securities laws and the disclosure requirements of the SEC's own rules (*see, e.g.* § 14(a) of the Securities Exchange Act of 1934 and Rule 14a-9 promulgated thereunder by the SEC and applicable Supreme Court precedent).

5. The defendants also violated Delaware Law in not presenting the NASD-NYSE contract itself (as opposed to merely the proposed changes in the by-laws) to the NASD Membership for a vote. Under applicable Delaware law, the Transaction itself had to be submitted to a membership vote, but this was not done.

6. Apparently to avoid a showdown over the controversial consolidation plan, the NASD has failed to schedule an annual meeting of members for the election of new Governors within the time required by Delaware law.

7. This action is brought on behalf of plaintiff and the Class, consisting of all members of record of NASD (other than those which were also concurrently members of NYSE) at the time of a Special Meeting of NASD Members held on January 19, 2007 ("Special Meeting"), as set forth in detail below.

### **JURISDICTION AND VENUE**

8. This Court has diversity jurisdiction over this action under 28 U.S.C. § 1332(d) because there is diversity of citizenship between at least one Class Member (the plaintiff) and each defendant, and the matter in controversy seeks damages in excess of \$5,000,000.

## **PARTIES**

9. Plaintiff Standard is a California corporation with its principal place of business in Tustin, Orange County, California. At the time of the Special Meeting and at all other times relevant, plaintiff was a member of NASD. Plaintiff is not and was not a member of NYSE.

10. Defendant NASD is a not-for-profit corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 1735 K Street, NW, Washington, D.C. 20006. Its regulatory activities are in part governed and supervised by the SEC. Notwithstanding the role of the SEC with respect to its regulatory activities, the internal and business affairs of NASD are conducted under and pursuant to applicable Delaware law.

11. The regulatory jurisdiction of the SEC is by no means exclusive. Not only is NASD itself and its governance a matter of Delaware state law, but federal governmental agencies (other than the SEC) have been involved in passing upon specified aspects of it and its operation. These include the Antitrust Division of the Department of Justice and/or the Federal Trade Commission with respect to whether, *inter alia*, the Transaction was not in violation of federal antitrust laws and governmental policy and the Internal Revenue Service with respect to whether there were tax implications which would cause intervention.

12. Defendants NYSE and NASD (as well as their officers and governors), like other stock exchanges, are susceptible to suit in United States District Courts as well as state courts.

13. This action is not a derivative one brought on behalf of NASD and/or all of its members. Indeed, it is a direct and representative action brought by plaintiff on behalf of itself and the members of the Class against NASD and the other defendants.

14. NASD is a self-regulatory agency ("SRO") which was established initially to regulate the conduct of brokers and dealers in securities, and to deal with customer disputes.

Ultimately it organized a profit-making marketplace for the trading of securities known as NASDAQ.

15. NASD is also a membership organization. It has approximately 5,100 members, of which only about 200 are also members of NYSE. NASD has traditionally operated in a populist, decentralized and democratic manner. This "way of life" is threatened by the Transaction.

16. NASD has a huge amount of assets. Its 2005 Annual Report reflects "Members' Equity" of \$1,611,254,000, most of which is a result of the sale of NASDAQ. According to The Wall Street Journal, NASD received approximately \$1.5 billion from the sale of the NASDAQ securities market (WSJ 12/15/05).

17. This huge pool of cash has been used as an asset to offset member fees and issue rebates. ("NASD Investment Fund Swells from Sale of NASDAQ Stock; It will Deploy Cash to Take on the NYSE, Observers Say") (Investment News 6/12/06). It is this cash pool of Members' Equity that is the cash source of the \$35,000 payment (NYT 11/27/06).

18. Defendant NYSE is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 11 Wall Street, New York, NY 10005. NYSE, through a subsidiary, NYSE Regulation, Inc., is an SRO which operates to regulate the conduct of its members and to deal with customer disputes. NYSE is the successor in interest to the New York Stock Exchange which, in March, 2006, was merged with Archipelago Holdings, Inc., a profit-making corporation. NYSE is now a publicly traded company, the securities of which trade on the New York Stock Exchange. Acting in concert with the other defendants, NYSE, many of its members and senior officers, solicited members of the NASD to vote in favor of the Transaction described herein. Further, NYSE, acting through

its officers and representatives, participated in the drafting of language which appeared in the NASD Proxy Statement at issue herein. Indeed, information on the Transaction appears on the NYSE website ([www.nyse.com/pdfs/TransactionFactSheet.pdf](http://www.nyse.com/pdfs/TransactionFactSheet.pdf)).

19. Defendant Mary L. Schapiro is an individual who is a citizen of the District of Columbia who serves as Chairman and CEO of NASD. Upon consummation of the transaction described below, Ms. Schapiro will become Chief Executive Officer of the combined entity. Ms. Schapiro has been actively involved in lobbying for and urging acceptance of the Transaction. By reason of their positions of trust, defendant Schapiro and each of the other individual defendants owed duties of candor, honesty, disclosure, fair dealing and loyalty to plaintiff and members of the Class in carrying out the business operations and governance of the NASD.

20. Defendant Richard F. Brueckner is an individual who is a citizen of the State of Virginia. He is the Presiding Governor of NASD's Board of Governors. Like Ms. Schapiro, he has been actively involved in promoting the transaction.

21. Defendant Barbara Z. Sweeney is an individual who is a citizen of the District of Columbia. She serves as NASD's Senior Vice President and Corporate Secretary. On information and belief, she, too, has been actively involved in promoting the Transaction.

#### **FACTUAL BACKGROUND**

22. On November 28, 2006, NASD and NYSE announced the Transaction — a plan to consolidate their member regulation operations into a combined organization that will be the sole U.S. private-sector provider of member firm regulation for securities firms doing business with the public. The combined organization would be responsible for all member firm regulation, arbitration and mediation, and all other current NASD responsibilities, including market regulation by contract for NASDAQ, the American Stock Exchange, and the

International Securities Exchange. In addition, the combined organization will be responsible for the professional training, testing and licensing of registered persons, and industry utilities, such as Trade Reporting Facilities and other over-the-counter operations. At the Closing of the Transaction, now estimated to take place on or after June 1, 2007, NASD will adopt a new corporate name. The newly-named entity is referred to herein as the "New SRO."

23. The Transaction requires NASD to amend its by-laws. That by-law change requires a *valid* vote by a majority of NASD membership. Defendants, for reasons set forth below, rushed to consummate the Transaction in order, in part, to avoid NASD's 2007 Annual Meeting of members and, more significantly, the wrath of members of the Class and the election of Governors. Each of the defendants solicited votes of NASD members in support of the Transaction pursuant to a proxy statement dated December 14, 2006 (the "Proxy Statement"). Defendants did not disseminate the Proxy Statement to NASD members until December 14, 2006, the day before the beginning of Chanukah and shortly before Christmas. They scheduled a vote on January 19, 2007, shortly following the Holiday season.

24. The Proxy Statement concealed material facts with respect to the Transaction, including, *inter alia*, how, how long and why it was negotiated. The Proxy Statement was not a neutral, complete, candid or even straightforward portrayal of the facts relevant to the Transaction. It would flunk virtually every test under modern proxy law. The one-sided Proxy Statement does not even purport to describe the "downsides" of the Transaction to plaintiff and members of the Class or provide any analysis or description of alternative transactions pursuant to which regulatory consolidation could take place that were more beneficial to NASD members who are members of the Class. Rather, the Proxy Statement was replete with conclusory, one-sided statements and was of little, if any, value in describing the true nature and consequences of

the Transaction and how it was harmful to affected NASD members' interests. The Transaction was announced in a press conference with the Chairman of the Securities and Exchange Commission, and the announcement was followed by a national tour akin to the road shows that investment banks employ to tout securities offerings. Defendants used the threat of immediate SEC intervention in the absence of approval of the Transaction as a club to secure approval.

25. The proponents, including the three individual defendants, strongly touted the Transaction as promoting efficiencies in the regulatory process, a principal reason for the SEC's support of consolidation. The Proxy Statement does not spell them out, quantify them or explain such "efficiencies." Since such efficiencies are the stated basis for, *inter alia*, the financial "benefits" of the Transaction to plaintiff and the members of the Class, such details were material facts which were omitted from the Proxy Statement. Equally important, the Proxy Statement does not explain why the Transaction, as proposed by defendants, is the best means of achieving their stated goals, *e.g.* consolidating the regulatory functions of the two SROs. Providing few details, the Proxy Statement indicates that the Transaction will make private-sector regulation more efficient and effective. Although the Transaction is designed to accomplish the establishment of a single SRO to serve as the sole U.S. private-sector provider of member firm regulation for securities firms doing business with the public, such a consolidation could have been effectuated by alternative means far more advantageous to plaintiff and the members of the Class.

26. The Transaction is designed by its proponents to offer member firms, according to such proponents, the following purported "benefits":

- In connection with the Transaction, a one-time special member payment will be made to members in the amount of \$35,000 per member;



- The Gross Income Assessment to members — a firm's annual dues to NASD — will be reduced by \$1,200 per year for five years, subject to annual Board approval;
- It is expected that the New SRO will benefit from economies of scale and will be able to reduce regulatory fees starting in the third year after the closing of the Transaction; and
- The new governance structure guarantees industry participation that ensures fair and balanced member representation on the Board.

27. Following the consummation of the Transaction, NASD's "one firm, one vote" rule will be replaced by a 23-person Board of Governors elected as follows:

Ten governors will be from inside the securities industry;

Small firms (1-150 registered representatives) elect three seats;

Mid-size firms (151-499 registered representatives) elect one seat;

Large firms (500+ registered representatives) elect three seats;

Three appointed industry seats: one each for NYSE floor members, independent dealers/insurance affiliates and investment company affiliates;

- Eleven governors will be appointed from outside the securities industry;
- The Chief Executive Officer will serve on the Board of Governors;

The Chief Executive Officer of NYSE Regulation, Inc. will serve on the Board of Governors for a three-year transitional period, after which such seat automatically will be terminated and the authorized number of members of the Board will be reduced by one.

28. A fundamental aspect of the Transaction requires that the NASD by-laws be amended to implement the new governance structure of the New SRO, which is heavily skewed toward the larger members firms, particularly those which are also NYSE members. Indeed, even the foregoing definition of "small firms" was selected by the defendants to favor larger firms against the interests of most members of the Class, which are truly "small firms" having far fewer than 150 registered representatives.

29. In fact, while the Transaction seems to have surface appeal, it is the consolidation of two entities with very different memberships and interests. Unlike the NYSE, the NASD has many truly small and medium sized firms. These firms operate under the "one firm, one vote" rule in electing NASD's Board of Governors, which governs or manages the NASD. Of the approximately 5,100 NASD members, only about 200 of the largest are members of the older NYSE.

30. The Transaction is unfair to NASD members which are members of the Class on both economic and governance grounds. As to governance, the Transaction is unfair to the extent that NASD members, despite the greater size of the membership of NASD as compared to NYSE, will have their influence over the New SRO substantially diluted, leaving control of it, *de facto*, in the hands of the member firms of the NYSE and the individual defendants who, in practical terms, will be in a position to control the appointment of the Governors from outside the securities industry and, thereby, dominate and control the New SRO.

31. On economic grounds, the 5,100 members of NASD have a huge stake in the assets of NASD, including the approximately \$1.5 billion from the sale of NASDAQ. According to some estimates, the per member allocation should have been \$135,000, or more. The only monetary benefits that will flow to NASD members will be a one-time payment of \$35,000 per member, regardless of size, term of membership or financial stake in NASD's assets, and a \$1,200 per year reduction in the gross assessment per year for five years regardless of size or term of membership. Collectively these are referred to as "the monetary inducements." The source of the cash payment is the NASD members' retained equity. The Proxy Statement does not highlight this key fact.

32. For some small firms, the monetary inducements provided a strong financial incentive to vote "yes" on the proposed consolidation. This was so especially in light of the misleading explanation by the Transaction's proponents that, with respect to the "special member payment" of \$35,000 payable on the closing of the Transaction, "[a] larger payment is not possible" because a higher payment could "seriously jeopardize" NASD's status as a tax-exempt organization. This deceptive statement completely obscures that the source of the payment is Members' Equity. The New York Times has openly questioned, "Is this a case of vote buying?" ("Let's Vote on Securities Rules. Oh, and Here's \$35,000") (NYT 11/29/06). Similarly, the \$1,200 per year flat assessment "is the minimum annual gross assessment charge." That is a meaningful financial incentive for small firms. The Proxy Statement does not:

- \* provide any opinion of tax counsel supporting the proponents' statements about the tax impact of alternative courses;

- \* provide any "fairness opinion" supporting the fairness of the transaction to NASD members;

- \* explain how the proponents arrived at the \$35,000 figure, except to make the claim that the payment to be made at closing will be funded by the "expected" value of the incremental cash flows that will purportedly be produced by the Transaction;

- \* explain how the total payments of approximately \$175 million to NASD members will be financed or that it is coming from the members' own equity;

- \* explain why the payment to NASD members is a flat payment;

- \* explain why it is being paid at Closing when it represents cost savings that will purportedly be achieved over five years;

\* explain what, if any, consequences will result if the expected cost savings are not achieved;

\* explain why the \$1,200 per year payment was set at a number that exactly equals the annual gross assessment that approximately 2,400 NASD members pay;

\* explain what will become of the NASD members' interest in NASD's equity; or

\* explain whether alternatives for distributing that equity were considered, evaluated or discussed by or among the defendants.

33. The terms and conditions of the Transaction were assembled behind closed doors and were largely dictated by large securities brokerage firms which are members of both NYSE and the NASD with very little or no participation by NASD rank-and-file members. The SEC played no role in determining or approving the terms and conditions of the Transaction. The terms and conditions are manifestly unfair to those members of NASD which are not also members of NYSE. Indeed, before negotiating the Transaction and despite the requirements of applicable Delaware law, defendants specifically avoided or were negligent in not seeking opinions as to the fairness of the Transaction to the members of NASD, either from a financial point of view or otherwise. Additionally, defendants Schapiro, Brueckner and Sweeney, in negotiating such terms and conditions, essentially sacrificed the interests of those whom they were obligated to protect, i.e., plaintiff and the members of the Class.

34. Despite the apparent manifest unfairness of the terms and conditions of the Transaction to NASD members who are members of the Class herein, NASD, acting through various of its member firms including, upon information and belief, Goldman Sachs, Pershing, ING and Sterne Agee, used the implied threat of withdrawal of business opportunities and other benefits to pressure NASD member firms which were economically dependent upon the NYSE

member firms to vote at or before the Special Meeting in favor of the Transaction even though a vote in favor of the Transaction was not in most NASD members' best interests.

35. In particular, had there been a fair allocation of the assets of NASD to plaintiff and the members of the Class, the per member allocation would and should have been approximately \$135,000 each as compared to the \$35,000 that will be received by them upon the consummation of the Transaction. Further, the Transaction is unfair to the extent that NASD members, despite the greater size of the membership of NASD as compared to NYSE, will have their influence over the New SRO substantially diluted, leaving control of it, *de facto*, in the hands of the member firms of the NYSE and the individual defendants. Instead of voting on all directors, NASD members will vote for only three of 23 directors, depending on their size. Further, defendants have defined "small firms" to include many that would objectively be regarded as "large," all of which was engineered by defendants to favor the larger member firms.

36. In order to obtain approval from the membership of the NASD, defendants caused to be issued and disseminated the Proxy Statement with respect to the voting upon the Transaction, which voting by NASD members was to and did take place at the Special Meeting.

37. Under Delaware law, membership approval of the Transaction, in addition to the by-law changes, was required. Yet in their rush to consummate the transaction, the defendants did not do this. Similarly, defendants intentionally did not include as part of the Proxy Statement the actual agreement between NASD and NYSE, which they were legally obligated to do under applicable Delaware law.

## **THE PROXY STATEMENT**

38. The Proxy Statement was prepared jointly by NASD and NYSE and was disseminated to NASD member firms with a cover letter signed by defendants Schapiro and Brueckner and a formal Notice of the Special Meeting signed by defendant Sweeney.

39. With respect to the "special member payment" and other terms and conditions of the Transaction, the Proxy Statement represented at page 4:

The consolidation will reduce the costs of regulation. In connection with the Transaction, a one-time special member payment will be made to NASD members. The special member payment will be \$35,000 per NASD member. In addition, we will discount the annual gross income assessment to members for a period of five years, subject to annual Board approval. Each firm would receive a discount of \$1,200 per year, which is the minimum annual gross income assessment charge and the total amount of the annual gross income assessment that approximately 2,400 member firms pay. As a result of this discount, the approximately 2,400 member firms currently paying the minimum would pay no gross income assessments charge over the five-year period. It is expected that we will benefit from economies of scale and will be able to reduce regulatory fees starting in the third year after the closing of the Transaction.

Firms that today are regulated by both NASD and NYSE Regulation will benefit from the elimination of the current duplication of regulatory review of these firms. The Transaction will further benefit all NASD members as it will streamline the broker-dealer regulatory system, combine technologies, and establish organization — all of which will serve to enhance oversight of U.S. securities firms and help ensure investor protection. Moreover, we are committed to reducing regulatory costs and burdens for firms of all sizes through greater regulatory efficiency.

As a result of the By-Law amendments, members will no longer have the ability to vote for all Board candidates in elections, but will have an opportunity to vote on designated seats on the Board. Specifically, firms will vote for industry nominees that are similar in size to their own firm. This means that small firms and large firms will vote for candidates running for the seats reserved for their firm size and the mid-sized firms will likewise vote for the mid-sized firm seat. All other Board seats will be appointed. All members will continue to have the ability to vote on any future By-Law amendments, as well as district elections. In addition, the New SRO will continue NASD's current practice of subject-matter expert standing committees and NASD's current notice and comment process for rule-making.

To further encourage small firm input and participation, NASD has enhanced the existing Small Firm Advisory Board by making half of the seats elected. The Small Firm Advisory Board will continue to review New SRO rules and make recommendations to the Board of Governors."

40. The Proxy Statement was accompanied by a form of proxy as well as instructions for the various means by which NASD members could vote upon the proposed Transaction.

41. The Proxy Statement, with the explicit knowledge of defendants and their respective legal counsel and advisors, was intended to and did deceive a majority of the members of NASD into believing that the Transaction was beneficial to them. Ultimately, due to the deceptive nature of the Proxy Statement as provided herein, together with the pressures put upon many of the smaller firms which are members of NASD by NYSE member firms, the Transaction was approved by what NASD claims was "a majority of a quorum" at the Special Meeting.

42. The Proxy Statement was skewed, implying that the "special member payment" of \$35,000 was the maximum amount payable to NASD members due to NASD's status as a not-for-profit corporation and, in any event, because it and the other terms and conditions of the Transaction were purportedly fair to NASD members.

43. In fact, the Proxy Statement was materially deficient because, despite the explicit knowledge of the defendants, it:

- a. failed to disclose that, in fact, defendants did not seek, in advance of negotiating the economic terms of the Transaction, an independent valuation of the NASD membership interests to be given up which, in the aggregate, were worth more than \$1.6 billion;
- b. failed to disclose that, in fact, the defendants did not seek, in advance of negotiating the governance and other terms and conditions of the Transaction, an independent valuation of the NASD membership rights to be given up, particularly by smaller firms;

- c. failed to provide a complete or even consistent history of the negotiations or provide all the reasons for acceptance of the transaction;
- d. failed to disclose that defendants elected not to include in the Proxy Statement opinions of taxation experts as to the propriety of paying NASD members more than \$35,000 per membership or the views of the Internal Revenue Service with respect thereto because such opinions and views were, at best, ambiguous and not supportive of the statement in the Proxy Statement that appears at p. 7 in purported response to the question:

"Can NASD increase the amount of the \$35,000 one-time special member payment?" And the answer:

"A larger payment is not possible. NASD is a tax-exempt organization and therefore is limited by tax laws regarding size and source of payments it can make to its members. The special member payment of \$35,000 per NASD member, or approximately \$175.0 million in the aggregate, will be funded by—and therefore limited by—the expected value of the incremental cash flows that will be produced by the consolidation transaction. If the special member payment was higher, it could seriously jeopardize NASD's status as a tax-exempt organization, which would result in significantly higher fees for firms."

- e. failed to explain that the \$35,000 payment comes from Members' Equity;
- f. failed to disclose what the tax impact on NASD and its members would be if the NASD intentionally changed its status as a tax-exempt organization or otherwise lost it;
- g. failed to disclose that defendants decided not to consider alternative transactions including, *inter alia*, one in which NASD would have given up its tax-exempt status, one which would otherwise have generated more than \$35,000 per NASD member or one which would have transferred all of NASD's regulatory functions to the New SRO without collapsing NASD;
- h. failed to disclose that and the extent to which, prior to the issuance of the Proxy Statement, NYSE member firms and NASD personnel were applying undue pressure to NASD member firms to approve the Transaction at or in connection with the Special Meeting, notwithstanding the fact that the Transaction would negatively impact NASD member firms not members of NYSE;
- i. failed to disclose that NASD members' loss of rights to vote for all directors of the New SRO's Board of Directors was likely to have a negative impact upon the proclaimed long-term economics of the Transaction including, *inter*



*alia*, whether the elimination of the \$1,200 annual fee or any other fee payable by NASD members beyond three years would be continued;

*J* failed to disclose the NASD's belief that the Transaction benefited large firms at the expense of small ones; and

k. failed to disclose that a membership vote was required on the Transaction itself.

44. As a result of the false and misleading Proxy Statement as described herein and the other actions taken by all defendants, the suffrage rights of plaintiff and the members of the Class have been damaged.

#### **VIOLATIONS OF DELAWARE CORPORATE LAW**

45. Pursuant to Section 211 of the Delaware General Corporation Law, if the Annual Meeting for election of Governors of the NASD is not held on the date designated therefore (i.e. within 13 months from the last Annual Meeting in 2006) or action by written consent of the members to elect Governors in lieu of an Annual Meeting has not been taken, the Governors shall cause the meeting to be held as soon as is convenient. NASD's Governors have taken no such action.

46. Upon information and belief, the individual defendants caused the 2007 Annual Meeting of NASD to be put off in favor of the Transaction in the hope that the sitting Governors would not have to face re-election as well as the wrath of the members of the Class.

47. Inasmuch as there has been a failure to hold NASD's 2007 Annual Meeting on or before March 2, 2007, or to take action by written consent to elect Governors in lieu of the 2007 Annual Meeting for a period of 30 days after the date designated for the Annual Meeting, or if no date has been designated, for a period of 13 months after the latest to occur of the organization of the corporation, its last Annual Meeting (i.e. February 3, 2006) or the last action by written

consent to elect Governors in lieu of NASD's Annual Meeting, either this Court or the Delaware Court of Chancery may summarily order a meeting to be held upon the application of, *inter alia*, any member of NASD. The members of NASD represented at such meeting, either in person or by proxy, and entitled to vote thereat, shall constitute a quorum for the purpose of such meeting, notwithstanding any provision of the certificate of incorporation or bylaws to the contrary.

Either this Court or the Delaware Court of Chancery may issue such orders as may be appropriate, including, without limitation, orders designating the time and place of such meeting, the record date for determination of NASD members entitled to vote, and the form of notice of such meeting.

48. Under Delaware law, the vote of the membership is required not only with respect to amendments to by-laws, but also on the consolidation agreement itself Defendants failed to submit the Transaction for such a vote.

### **CLASS ACTION ALLEGATIONS**

49. Plaintiff brings this action on its own behalf and as a Class Action under F.R.C.P. 23(b)(2) and (b)(3) on behalf of the members of the Class as defined below.

50. The Class consists of all persons who were members of the NASD and entitled to vote at the Special Meeting; excluding those members which were also concurrently members of NYSE. The definition of the Class is subject to amendment following discovery with respect thereto.

### **Numerosity**

51. The members of the Class are so numerous that joinder of all members is impractical. While the exact number of members of the Class is unknown to plaintiff at this time, it appears that the Class includes approximately 4,900 persons or entities.

### **Typicality**

52. Plaintiff's claims are typical of absent Class members' claims. Plaintiff and the members of the Class will be irreparably damaged if the Transaction is consummated and have sustained and will sustain damages in an identical manner. Further, their claims arise from the same factual background and legal theories.

### **Adequacy of Representation**

53. Plaintiff will fairly and adequately protect the interests of absent members of the Class and has retained counsel competent and experienced in litigating complex litigation such as this case. Plaintiff's interests are coincident with, and not antagonistic to, the interests of absent members of the Class because, by proving its individual claims, plaintiff will necessarily prove defendants' liability as to the respective Class members' claims. Plaintiff is also cognizant of, and determined to, faithfully discharge its fiduciary duties to the absent members of the Class.

### **Superiority**

54. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation effectively makes it impossible for members of the Class to seek redress individually for the wrongs complained of herein.

### **Manageability**

55. There are no unusual difficulties likely to be encountered in the management of this action as a Class Action that could not be managed by this Court. The advantages of maintaining the action as a Class Action far outweigh the expense and waste of judicial effort that would result in hundreds or thousands of separate adjudications of these issues for each member of the Class.

56. Class treatment further insures uniformity and consistency in results and will provide optimum compensation for members of the Class for their injuries and protects them from the irreparable harm that will befall members of the Class if the Transaction is consummated.

**Universally Applicable Conduct**

57. Relief concerning plaintiff's rights under the laws herein alleged and with respect to the Class would be proper. Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with regard to members of the Class as a whole and certification of the Class under Rule 23(b)(2) proper.

**Predominance and Commonality**

58. The questions of law and fact common to the claims of each member of the Class overwhelmingly predominate over any questions of law or fact affecting only individual members thereof. Questions of law and fact common to the Class include, but are not necessarily limited to, the following:

- (a) Whether defendants disseminated a false and misleading Proxy Statement to NASD members to fraudulently or negligently induce them to vote in favor of the Transaction and whether, in connection therewith, plaintiff and the members of the Class have already been damaged;
- (b) Whether plaintiff and the members of the Class have been and/or will be injured further if the Transaction is consummated; and
- (c) What is the measure of the economic and non-economic damages that will be sustained by plaintiff and the members of the Class if the Transaction is consummated?

**COUNT I**

**BREACH OF DUTIES OF CANDOR, HONESTY, DISCLOSURE,  
FAIR DEALING AND LOYALTY**

59. Plaintiff repeats and realleges each and every allegation set forth above as though stated more fully herein.

60. The defendants to this Count are defendants Schapiro, Brueckner and Sweeney, each of whom, by virtue of their senior positions as executives and/or Governors of NASD, owes fiduciary duties to plaintiff and members of the Class. Such duties include, *inter alia*, the duties of loyalty, honesty and candor.

61. Delaware law requires defendants to disclose all material facts that would have a significant impact on the membership vote. Their issuance and dissemination of the Proxy Statement to plaintiff and the members of the Class did not satisfy such obligation.

62. By causing the terms and conditions of the Transaction to be negotiated as they were, and actively participating in such negotiations as the purported representatives of all the members of NASD, the individual defendants breached their duties owed to plaintiff and the members of the Class. By acting as they did, they were more interested in negotiating the Transaction, which, if consummated, will yield to them important employment and financial benefits from the New SRO at the expense of the interests of the members of the Class herein.

63. By participating in the drafting and the dissemination of the Proxy Statement, which they knew or should have known was materially deceptive, they breached their duties owed to plaintiff and members of the Class including, *inter alia*, the duty of candor.

64. As a result of the individual defendants' breaches of duty to them, plaintiff and members of the Class have already been damaged, will be irreparably harmed and will be

otherwise damaged in an amount which cannot presently be calculated if the Transaction is consummated.

## **COUNT II**

### **NEGLIGENT MISREPRESENTATION**

65. Plaintiff repeats and realleges each and every allegation set forth above as though stated more fully herein.

66. All defendants are defendants to this Count.

67. As indicated above, the Proxy Statement misrepresented material facts with respect to the Transaction and omitted other material facts that should have been disclosed in connection therewith.

68. In participating in the drafting and ultimately disseminating the Proxy Statement, each of the defendants negligently caused statements to be made therein which they knew or should have known would negatively impact NASD's corporate suffrage process and mislead members of the Class with respect to, *inter alia*, the Transaction and the circumstances surrounding its negotiation.

69. As a direct consequence of defendants' negligent misrepresentations of material facts in the Proxy Statement and omission of material facts therefrom, plaintiff and members of the Class have already been injured, will be irreparably harmed and will be otherwise damaged in an amount which cannot presently be calculated if the Transaction is consummated.

### **COUNT III**

#### **UNJUST ENRICHMENT**

70. Plaintiff repeats and realleges each and every allegation set forth above as though stated more fully herein.

71. NYSE and the individual defendants are defendants to this Count.

72. If the Transaction is consummated, the defendants to this Count will be unjustly enriched at the expense of plaintiff and members of the Class. In the case of NYSE, upon the consummation of the Transaction, it and its members will inherit a substantial pool of assets and other tangible and intangible benefits not capable of being presently calculated, for which benefits it will not have paid to plaintiff or members of the Class fair consideration.

73. If the Transaction is consummated, defendants Schapiro, Brueckner and Sweeney will receive employment and other benefits beyond those to which they are entitled in their present roles with NASD. None of these additional benefits will have been earned by them but were and are, nevertheless, an important factor in the carrying out the roles that they did in connection with the Transaction.

74. Defendants voluntarily are accepting these benefits that are being conferred upon them involuntarily by plaintiff and the members of the Class and will be retaining such benefits unjustly should the Transaction be consummated.

75. Plaintiff and the members of the Class are entitled to damages as a result of the defendants' unjust enrichment, including the disgorgement of all monies unlawfully accepted and to be accepted and retained following consummation of the Transaction by defendants from New SRO and from plaintiff and the members of the Class, as well as the earnings thereupon.

COUNT IV

**DENIAL OF RIGHTS UNDER DELAWARE CORPORATE LAW**

76. Plaintiff repeats and realleges each and every allegation set forth above as though stated more fully herein.

77. As discussed above, and as relevant here, Section 211 of the Delaware General Corporation Law, requires the election of Governors of the NASD within 13 months from the last Annual Meeting, which was held on February 3, 2006. The Governors are required to cause the meeting to be held on or before March 3, 2007. NASD's Governors have taken no such action.

78. Upon information and belief, the individual defendants caused the 2007 Annual Meeting of NASD to be put off in favor of the Transaction in the hope that sitting Governors would not have to face a contested re-election and face the wrath of the members of the Class.

79. Inasmuch as there has been a failure to hold NASD's 2007 Annual Meeting and it has been over 13 months since the last Annual Meeting (i.e., February 3, 2006), either this Court or the Delaware Court of Chancery may summarily order a meeting to be held upon the application of, *inter alia*, any member of NASD. The members of NASD represented at such meeting, either in person or by proxy, and entitled to vote thereat, shall constitute a quorum for the purpose of such meeting, notwithstanding any provision of the certificate of incorporation or bylaws to the contrary. Either this Court or the Delaware Court of Chancery may issue such orders as may be appropriate, including, without limitation, orders designating the time and place of such meeting, the record date for determination of NASD members entitled to vote, and the form of notice of such meeting. Plaintiff requests that the Court compel such a meeting and vote.



80. By this Count, plaintiff hereby makes application for such Order or Orders.

81. Plaintiff and members of the Class are entitled to have the Court Order NASD to schedule its Annual Meeting as soon as practicable and to Order a new election of Governors after affording members of the Class to nominate a slate of prospective Governors.

#### **COUNT V**

#### **CONVERSION/TAKING**

82. Plaintiff repeats and realleges each and every allegation set forth above as though stated more fully herein.

83. All Defendants have improperly converted the Class members' assets and/or Members' Equity for the use of the New SRO and NYSE without validly obtaining their consent.

84. Alternatively, if defendants are regarded as governmental actors (which plaintiff believes not to be the case), if the Transaction is consummated, then defendants will have "taken" the Members' Equity of the plaintiff and the Class without adequate compensation and without due process of law. As such, plaintiff and the members of the Class will have been damaged in an amount which cannot presently be determined.

#### **COUNT VI**

#### **SUBSTANTIAL DIMINUTION OF VALUE IN MEMBERSHIP, WITH IMMINENT**

#### **COMPLETION OF SUCH DIMINUTION**

85. Plaintiff repeats and realleges each and every allegation set forth above as though stated fully herein.

86. All defendants are defendants to this Count.

87. The NASD is organized pursuant to Delaware law as a membership corporation to provide the services of regulation to plaintiff and members of the Class, without which each of

these members would lack access to the business opportunities of its field. Plaintiff and members of the Class must pay for their NASD services by dues which are substantially offset for them by the revenues from the NASD's "Member's Equity," which, as previously alleged, is in excess of \$1.5 billion.

88. By the defendants' actions to date, the NASD's "Member's Equity" has declined in value.

89. Plaintiff and others Class Members have been and will be damaged in that they have not and will not receive their fair portion of the value of "Member's Equity" and have been and will be prevented from maximizing the value of the "Member's Equity" in the NASD if the Transaction is allowed to become effective.

90. The completion of the Transaction, and with it, the completion of the substantial diminution of value of the "Member's Equity" to plaintiff and members of the Class, is imminent.

## **COUNT VII**

### **DEPRIVATION OF VOTING MEMBERSHIP**

91. Plaintiff repeats and realleges each and every allegation set forth above as though stated fully herein.

92. All defendants are defendants to this Count.

93. The NASD is organized pursuant to Delaware law as a membership corporation. Its emphatically democratic "one member, one vote" organization represents much more than simply the governance style of a not-for-profit business, which might add or change voting classes of stock without materially altering its not-for-profit purpose. Rather, the NASD came into existence from the willingness of a previously unorganized community of predominantly

small businesses to govern its own affairs, and not cede the control of that community to the very different firms which control the NYSE. From its outset, the NASD remained organized and operated along democratic lines with the encouragement of the Congress. This effectively amounted to a democratic way of life for the NASD community, allowing it to pioneer countless innovations, from no-minimum commissions to the electronic trading exchange. The presence of public members on the NASD Board has not altered the within-the-industry balance that the NASD has remained a democratic organization in which the predominantly small businesses could continue to govern its affairs without dominance by an otherwise unstoppable NYSE-centered oligarchy.

94. Under Delaware law, defendants' duty of candor in any proxy solicitation about a major corporate transaction or change in control was heightened by this Transaction's effect in substantially depriving plaintiff and the members of the Class of their "one member, one vote" voting participation in electing governing members of the Board of Governors.

95. Plaintiff and other Class Members have been and will be damaged in that they have been substantially diluted in their ability to control the future direction of the NASD.

96. By reason of the foregoing, Plaintiff and each Class Member will suffer irreparable injury absent injunctive relief.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff demands judgment against the defendants as follows:

- a. certifying this action as a Class Action, with plaintiff and its counsel as the representatives of the Class;
- b. declaring pursuant to 28 U.S.C. § 2201 that the Proxy Statement and solicitation did not comply with Delaware law;
- c. ordering an accounting of the plaintiff and Class members' "Members' Equity;"

- d. enjoining defendants from consummating the Transaction;
- e. declaring the actions of defendants illegal and otherwise violative of the rights of plaintiff and the members of the Class;
- f. ordering the holding of NASD's 2007 Annual Meeting of members as soon as practicable and, in connection therewith, affording the members of the Class the opportunity to propose a slate of nominees for the open governorships of NASD;
- g. enjoining defendants from effectively disenfranchising members of the Class from the corporate governance of New SRO following the consummation of the Transaction, should the Court permit it to proceed;
- h. ordering the preparation of a proxy statement which fully and adequately discloses all material facts and which provides for a new special meeting of members of NASD to be held under supervision of the Court;
- i. awarding to plaintiff and the members of the Class compensatory and punitive damages as appropriate;
- J. requiring defendants to account for their unjust enrichment and requiring them to pay over the amount thereof to plaintiff and the members of the Class together with the earnings thereupon;
- k. awarding plaintiff its costs of suit, including reasonable attorneys' and experts' fees; and
- l. such other and further relief as is just and proper.

#### **JURY TRIAL DEMAND**

Plaintiff hereby demands a trial by jury on all Counts so triable.

CUNEO GILBERT & LADUCA, LLC

0" .. 1· 10<sup>v</sup> '6

Jonathan W. Cuneo (JC 1112)  
Charles Tiefer, Law Prof., Univ.  
of Baltimore R. Brent Walton  
Matthew Wiener  
William H. Anderson  
507 C Street, NE  
Washington, DC 20002  
(202) 789-3960 (phone)  
(202) 789-1813 (fax)

And

Rockefeller Center  
620 Fifth Ave. – 6<sup>th</sup> Floor  
New York, NY 10020  
Attorneys for Plaintiff and the Class

AND

GREENFIELD & GOODMAN, LLC  
Richard D. Greenfield (RG 4046)  
(A Member of the Bar of this Court)  
7426 Tour Drive  
Easton, MD 21601  
(410) 745-4149 (phone)  
(410) 745-4158 (fax)

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of April, 2007, I caused to be served this Amended Complaint upon the following persons by email:

F. Joseph Warin, Esquire  
Gibson Dunn & Crutcher LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036

VIA EMAIL: [FWaringgibsondunn.com](mailto:FWaringgibsondunn.com)

Douglas W. Henkin, Esquire  
Milbank Tweed Hadley & McCloy  
One Chase Manhattan Plaza  
New York, NY 10005-1413

VIA EMAIL: [dhenkin@milbank.com](mailto:dhenkin@milbank.com)

  
William H. Anderson