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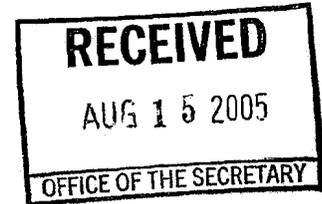
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August 10, 2005

Jonathan G. Katz
Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549-9303



Re: File No. SR-NASD-2005-023

Dear Mr. Katz:

This is submitted as an objection to the changes proposed by NASD Dispute Resolution, Inc. ("NASD-DR") with respect to amending Rule 10316 and adopting Rule 10408 of the Code of Arbitration Procedure. I am an NASD-DR arbitrator and arbitration consultant. It is in the latter capacity that I am filing this objection.

My background: forty years as an investment professional (securities analyst and independent, fee-only investment adviser); the past seven years as a public arbitrator for NASD-DR; 14 years as an arbitration consultant; education and training includes CFA, MBA in Finance (Investments), BA in Economics. I have also prepared arbitration claims for several clients and acted as an expert in securities arbitration.

Securities arbitration is supposed to be a simple, inexpensive alternative to litigation. In its online "Tour of the Dispute Resolution Process," NASD-DR states that arbitration is a *non-judicial* process. Why then do NASD-DR officials want to *require* that only licensed lawyers be allowed to represent claimants? These officials claim that this proposal will protect the public by ensuring that a party's representative will have a minimum level of skill and training to provide effective representation. Well, I have observed many such attorneys in action, and more than a few do not understand the arbitration process and/or are neophytes in terms of their knowledge of investments. Their purported expertise is illusory.

Chairman Cox recently stated that the Commission is dedicated to the protection of the small investor. Let's examine what is likely to happen if the proposed changes are approved. First, if the "little guy" wants to hire a lawyer on a contingency basis for his small arbitration claim, he will find that it will be next to impossible. According to *The Wall Street Journal* (see attachment), "people with claims of less than \$100,000 can't retain a private lawyer on a contingency-fee basis because the lawyer's cut of the award would be too small." Some firms' minimum is \$250,000. (NB: the article is about law clinics, but mentions only three states in which these services are available.)

If the investor with a small claim is willing and able to retain an attorney who bills at an hourly rate, he may be able to do so. Unfortunately, the arbitration process has become so complex and time-consuming that the cost of pursuing a claim with the help of a lawyer is often uneconomic. A recent case in which I was involved is instructive. Claimants asked for compensatory damages of roughly \$30,000 plus interest. They had been billed about \$30,000 by their attorneys prior to the hearings. They "won." They were awarded roughly \$5,000, from which they had to pay their share of the forum fees, the filing fee, and substantial expenses for lodging and travel to the hearings. (These amounts have been adjusted to avoid identification of the case, but the order of magnitude and the relative amounts are consistent with a specific NASD-DR case.)

Now let's look at a theoretical example of what would happen if this proposal of NASD-DR is approved. A 90-year-old investor of limited means lost \$30,000 in the stock market; he blames his broker for recommending unsuitable investments. Under the changes proposed by NASD-DR, he may represent himself in arbitration [how kind of them!]. His adversary, of course, is an experienced securities arbitration attorney. The claimant wants his son, a corporate lawyer, to represent him. NO, says NASD-DR, that is not permissible because his son is not an appropriately licensed attorney. Is that fair?

I assume that one of the reasons for this proposal is that non-attorney representatives create problems for NASD-DR officials and staff. I hereby confess that I am one of those persons. In a case last year in which I represented the claimants, the outside attorneys for a major brokerage house filed some 20 briefs and motions. I wrote to NASD-DR's Director of Arbitration, objecting to these filings as being not in accordance with the supposed simple and inexpensive process proclaimed by NASD-DR. While all of their employees were polite and responsive, my objections were not accepted. The case was settled for a reasonable amount. However, since this claim boiled down to loss of about \$50,000, it was not one that a typical lawyer would take on. Given the voluminous filings of the respondents, the claimants would have been overwhelmed had they attempted to represent themselves.

I hasten to point out that NASD-DR's Regional Director and staff here in Washington have always been polite and competent in my many contacts with them. Some of those in New York City, sad to say, simply don't measure up.

NASD-DR has long promoted its ideal: arbitration is about fairness and equity. It prominently displays on its website this quote: "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 looks only to the law, and the reason why arbitrators were appointed was that equity might prevail" – Domke on Aristotle.

Well, which is it? Is securities arbitration about fairness for the small investor, or is it about the convenience of NASD-DR officials and the remuneration of lawyers representing claimants? Another key fact to keep in mind: NASD-DR receives a major part of its funding from the securities industry. They also require that one of a three-member arbitration panel must be from that industry. Is that fair?

On August 5, 2005, *The Wall Street Journal* reported these comments by Chairman Cox: "We [the SEC] are the investors' advocate. ... anyone who tries to take advantage of the investing public will find themselves a powerful adversary in the SEC."

In the matter of this proposal, will the SEC side with the lawyers and NASD-DR officials, or will it truly be the investors' advocate?

I hereby strongly recommend that the SEC reject **SR-NASD-2005-023**

Yours truly,



Joseph O'Donnell

Attachment



April 20, 2005

MONEY

Arbitration Clinics Offer Service for Small Investors

By COLLEEN DEBAISE
DOW JONES NEWSWIRES
April 20, 2005; Page D2

Small investors who wish to pursue a claim against their brokers can turn to an increasing number of securities-arbitration clinics for help.

Law schools in New York, California and Pennsylvania are home to the clinics, where students under the guidance of professors help investors -- typically with \$100,000 or less at stake -- to resolve claims of broker misconduct. This month, the NASD Investor Education Foundation announced a \$120,000 grant to begin a clinic at Northwestern University in Chicago.

"A small investor has limited means to seek redress when something has gone wrong with an investment," says Thomas F. Geraghty, director of Northwestern's Bluhm Legal Clinic, where the Investor Protection Center will open in the fall.

Often, people with claims of less than \$100,000 can't retain a private lawyer on a contingency-fee basis, because the lawyer's cut of the award would be too small. In New York, some firms won't take on a client unless the claim is at least \$250,000, lawyers say. At the same time, many individuals have depleted their savings and can't afford to hire a lawyer at an hourly rate.

The clinics provide free legal service, although investors typically have to pay filing and hearing fees in the arbitration, which is mandatory in most brokerage disputes.

"Securities arbitration has grown by leaps and bounds in the last few years," says Romaine Gardner, director of the securities arbitration clinic at Fordham University in New York that opened in 1998. "A vast majority of our clients are elderly people who went to their brokers with retirement funds and lost a good deal of them."

The number of individual complaints filed against brokers or brokerage houses with the National Association of Securities Dealers, which handles the majority of cases filed, hit a record of 8,945 in 2003 following the burst of the Internet bubble. While cases have leveled off since then, lawyers at the clinics say they now are seeing complaints from the more recent mutual-fund scandal.

"We get phone calls all day long," says Lydie N. Pierre-Louis, director of the 10-month-old securities arbitration clinic at St. John's University in New York. Individuals often complain they were improperly sold Class B shares of mutual funds, or were unsuitably invested in a hedge fund. Some say they were victims of foreign-currency boiler rooms.

The first clinic opened at Pace University in 1997, after former Securities and Exchange Commission Chairman Arthur Levitt called on law schools to assist victimized small investors. Fordham and Brooklyn Law School opened their clinics the following year. The new Northwestern facility brings the number of clinics to 12.