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Friday, May 06, 2005

Jonathan G, Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Dear Mr. Katz:

This is a request for rulemaking pursuant to Rule 192(a), SEC Rules of Practice.

As the Petitioner, I request that the SEC create a rule which would prevent the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE") (sometimes collectively referred to as the "SROs") from placing by contract any restriction on the use of either the paper copies or their database of arbitration awards and also preventing these organizations from requiring third party vendors to limit access to these awards, in their original form.

Prior to addressing the legal issues, it is important to note that efforts by the SROs to restrict public access to the original arbitration awards of panels appointed by these entities is simply bad policy.

In hearings held on March 17, 2005 before the House Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, Linda Fienberg, the President of NASD Dispute Resolution, stated:

> NASD strives continually to improve the transparency of the arbitration process for investors.
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> ***
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> Transparency is a cardinal value of the federal securities laws. Issuers of securities are required to make disclosure to prospective investors; publicly traded companies are required to make ongoing disclosure to shareholders; and broker-dealers are required to make disclosure to customers. ***NASD believes that transparency should be a hallmark of securities arbitration as well.***
>
> ***Unlike most arbitration programs, NASD makes its arbitration awards publicly available.*** In addition, during the arbitrator selection process, parties receive arbitrator disclosures and information on past awards rendered by that arbitrator to help them choose an unbiased panel and ensure their confidence in the process. Information on the awards is available free of charge on NASD's Web site. (Emphasis supplied).

Rather than placing restrictions on its paper copies and database of arbitration awards, the SRO's should encourage private parties to review and analyze these awards in all existing formats, extract all relevant information from them and make that information available in any commercially viable form to all interested parties. Anything less would not only be inconsistent with Ms. Fienberg's representations to Congress, but would serve to undermine investor confidence in the arbitration system itself.

I. The Awards Have No Copyright Protection

The unaltered reports of NASD and NYSE arbitration awards are merely a compilation of facts. As such, they may be freely copied without fear of liability under the Copyright Act.

As the Supreme Court stated in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991):

> "A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. In no event may copyright extend to the facts themselves." Id. at 350-51, 111 S. Ct. at 1290.

This holding is consistent with the many decisions holding that judicial opinions and similar works are in the public domain and not subject to protection under the copyright laws. See *17 U.S.C. 105* (1988) (stating that copyright protection is not available for any work of the United States government); *Banks v. Manchester, 128 U.S. 244, 253 (1888)* (holding judicial opinions are in public domain); *Wheaton v. Peters, 33 U.S. 591, 668 (1834)* (holding reporter cannot obtain copyright in Supreme Court decisions.

These materials are held to be in the public domain because all citizens are presumed to know the law, and therefore "justice requires" that all should have free access to these materials. *Nash v. Lathrop, 142 Mass. 29, 6 N.E. 559, 560 (1886).* See *Building Officials, 628 F.2d at 733.*

II. The NASD and NYSE Arbitration Awards Are in the Public Domain

The SEC is the agency principally responsible for the administration and enforcement of the federal securities laws and regulations. It has been entrusted under those laws with the comprehensive oversight of the SROs. As part of that function, the Commission reviews and approves all rules under which the SROs

conduct their arbitration systems, as well as any changes to those rules. Sec. Exch. Act Rel. No. 40109 (June 22, 1998), 1998 SEC Lexis 1223 at *26 n.53.

On August 12, 1993, SEC approved an amendment to Part III, Section 41 (f) of the Code of Arbitration Procedure (Code) making all NASD arbitration awards publicly available, without any restrictions whatever.

NASD Notice to Members Number 93-37 states:

> On January 18, 1993, the NASD's Board amended its Public Disclosure Program to make additional regulatory information on its members and associated persons available to the public. The Board's action will expand this program to include civil judgments and NASD arbitration decisions involving securities matters, pending regulatory actions, and criminal indictments and informations.

Rule 10330(e) of the NASD Code of Arbitration Procedure states:

> All awards and their contents shall be made publicly available.

The NASD currently provides copies of its awards database to a number of private organizations for commercial use. These organizations include: LEXIS, WestLaw, and the Securities Arbitration Commentator, which is hyperlinked to its web page.

Similarly, Rule 627(f) of the NYSE's Arbitration Rules provides:

> (f) The awards shall be made publicly available, provided however, that the name of the customer party to the arbitration will not be publicly available if he or she so requests in writing.

Clearly, there is a well established public policy that arbitration awards issued by NASD and NYSE tribunals should be readily available to the public, without any

restrictions of any kind.

III. The SRO's May Not Restrict Access to their Awards

Initially, it is significant to note that the Securities Exchange Act of 1934 requires the SROs to "comply with . . . [their] own rules." *15 U.S.C. § 78s (g) (1).* By placing limitations on the use of their awards database, the SROs are violating *both* Federal law *and* fundamental public policy.

Since the awards have no copyright protection, the only basis for restricting access to the awards is the existence of limitations placed by the NASD and the NYSE on their web sites[1] that attempt to restrict the conditions under which awards obtained from those sites may be utilized. However, it is unlikely that a court would enforce these restrictions, as applied to arbitration awards, since they clearly offend public norms.

The Uniform Computer Information Transactions Act (UCITA) is helpful on this issue, even though it was adopted in only two states, Virginia and Maryland. Comment 37 ("license") of 102 ("Definitions") of the final draft of the UCITA states:

> "Whether the terms of a license are enforceable is determined under this Act and other applicable law, including copyright law. The requirements for an enforceable agreement must be met."

This language conditions restriction on use rights on whether that particular term is enforceable in the first place. The enforceability inquiry set forth in 105 ("Relation to Federal Law; Fundamental Public Policy; Transactions subject to other State Law"), which provides that:

[1] Assuming they could do so at all, without the approval of the SEC, which has never been granted.

> (b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by public policy against enforcement of the term.

The third Official Comment to 105 states that courts, in evaluating a claim that a term violates fundamental public policy, should consider various factors, including:

> [6] the nature of any express legislative or regulatory policies.

As set forth above, there is a clear regulatory policy in favor of full, complete and unrestricted access to the arbitration awards databases. A court should, therefore, refuse to enforce any contractual limitation that offends this public policy. For the same reason, the SEC should adopt a rule that prevents the SROs from giving copyright-like protection to these awards.

The legal support for carrying out these basic principles may currently be found in *section 2-302 of the Uniform Commercial Code* (U.C.C.) which permits Courts to refuse to enforce contractual limitations that conflict with public policy. U.C.C. 2-302 cmt.1 (1978); *Waters v. Min Ltd., 587 N.E.2d 231, 233 (Mass. 1992).*

In addition, efforts by the SRO's to grant copyright protection to their awards is prohibited by 17 U.S.C. § 301, which preempts state contract law. The SRO's cannot achieve by private agreement that which is denied to them under the copyright laws.

And finally, these efforts to restrict, regulate and impede access to their awards is barred by the Supremacy Clause of the Constitution of the United States, Article VI, clause 2.

IV. The Interest of Petitioner in this Petition

It is my intention, with the assistance of my colleague, Professor Edward S. O'Neal, to access a complete database of NASD and NYSE awards in order to do a comprehensive, objective analysis of them for the purpose of preparing a law review article.

In addition, it is also our intention to utilize the analysis we perform in connection with this significant undertaking to create a commercial web site where we would offer individualized reports and analysis of the arbitration system to securities lawyers and investors.

It is currently the position of the NASD that these arbitration awards are protected by copyright and that it has the right to license their use on such terms and conditions as it deems appropriate. The NASD will permit us to prepare a law review article, but only if we acknowledge its copyright interest in the awards.

Because of this position taken by the NASD, I have instituted a Complaint against it and against NASD Dispute Resolution, Inc., in the United States District Court for the Southern District of New York, seeking a Declaratory Judgment resolving these issues.

It is the position of the NYSE that it can preclude us from using both the database of its awards that is on its web site and the LEXIS database of awards for any purpose, even though we have permission of LEXIS to do so.[2] It has permitted us to physically go to its Reference Library in New York City and to make copies at the library at a cost of 17 cents per page.

V. Conclusion

It is clearly in the public interest for the SEC to adopt the rules proposed by this Petition. The SROs have no copyright interest in the actual, unimproved awards entered by the tribunals they administer. It is well established public policy that these awards should be made available to the public, freely and without restriction.

Anything less will undermine further the confidence of the investing public in the mandatory arbitration process.

Thank you for your consideration of this request.

Sincerely yours,

Daniel R. Solin

Daniel R. Solin

[2] The NASD has also refused to give us permission to use the LEXIS database of its awards.