DANIEL R. SOLIN
ATTORNEY AT LAW

TIERNEY BUILDING
66 WEST STREET
PITTSFIELD, MA 01201
TEL: (413) 443-7800
FAX: (413) 443-9605

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.
>
> ***
>
> 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.

MEMORANDUM

May 10, 2005

TO: Annette Nazareth, Director
Division of Market Regulation

FROM: Linda Cullen
Office of the Secretary

RE: Rulemaking Petition by Daniel R. Solin, Esq.
File No. 4-501

Attached is a copy of the above-noted rulemaking petition concerning an amendment to rulemaking under the Securities Exchange Act of 1934 that would prevent the National Association of Securities Dealers, Inc. and the New York Stock Exchange 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.

We are placing a copy of the rulemaking petition on the Commission's Internet Web site, and it will also be available from the Public Reference Room.

Attachment

cc: Janice Mitnick
Caite McGuire

00542

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE SECRETARY

May 10, 2005

Daniel R. Solin, Esq.
Tierney Building
66 West Street
Pittsfield, MA 01201

Re: Rulemaking Petition File No. 4-501

Dear Mr. Solin:

This letter acknowledges receipt by this office on May 9, 2005 of your petition of May 6, 2005 asking the Commission to conduct rulemaking under the Securities Exchange Act of 1934 that would prevent the National Association of Securities Dealers, Inc. and the New York Stock Exchange 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.

The petition has been assigned the above-noted file number and has been referred to the appropriate office of the Commission. This office will notify you of any pertinent action taken by the Commission.

Very truly yours,

Jonathan G. Katz
Secretary

00543

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
MARKET REGULATION

February 23, 2006

Daniel R. Solin, Esq.
Tierney Building
66 West Street
Pittsfield, MA 01201

Dear Mr. Solin:

Your May 6, 2005 petition for Commission rulemaking has been referred to the Division of Market Regulation for review. In your petition, you request that the Commission adopt a rule that would prevent the National Association of Securities Dealers, Inc. ("NASD") and the New York Stock Exchange, Inc. ("NYSE") from placing or requiring third party vendors to place any contractual restrictions on the use of paper copies or databases of arbitration awards. It is our understanding that you are seeking to gain access to this information for both academic and commercial purposes. As you indicated in your letters dated April 22, 2005, May 5, 2005, and May 29, 2005, you have made efforts to contact NASD and the NYSE directly in order to obtain unrestricted access to their respective databases of arbitration award information. In addition, we understand that you commenced litigation against NASD in U.S. District Court on this matter, and that the case was recently dismissed.

After carefully reviewing the various issues you have raised in your petition and letters, the Staff finds no basis upon which to recommend to the Commission that it commence rulemaking in this area. In your petition, you assert that arbitration awards are not entitled to federal copyright protection. The Commission has no authority to interpret or enforce federal copyright laws. While we fully support NASD and the NYSE making information regarding arbitrations and arbitration awards available to the public as a matter of public policy, we express no view on the way in which that information should be made available to persons who wish to use the information commercially.

We appreciate your raising interesting issues with us regarding arbitration awards and thank you for your correspondence.

Sincerely,

Catherine McGuire
Chief Counsel

DANIEL R. SOLIN

ATTORNEY AT LAW

TIERNEY BUILDING
66 WEST STREET
PITTSFIELD, MA 01201
TEL: (413) 443-7800
FAX: (413) 443-9605

Sunday, March 26, 2006

Catherine McGuire, Esq.
Division of Market Regulation
Securities and Exchange Commission
Washington, DC 20549

Dear Ms. McGuire:

I was disappointed in the anti-consumer response set forth in your February 23, 2006 letter to me.

The only reason for the NASD to refuse open access to the decisions of its arbitration tribunals is its concern that such access will confirm the following views of William Francis Galvin, the Secretary of the Commonwealth of Massachusetts, in his testimony before the U.S. House Subcommittee on Capital Markets, held March 17, 2005:

> The term "arbitration" as it is used in these proceedings is a misnomer. Most often, this process is not about two evenly matched parties to a dispute seeking the middle ground and a resolution to their conflict from knowledge, independence and unbiased fact finders, rather what we have in America today is an industry sponsored damage containment and control program masquerading as a juridical proceeding.

Releasing these decisions without restrictions to the public has nothing to do with copyright laws and nothing to do with the decision of United States District Court in my case, which merely held that it did not have standing to issue the Declaratory Relief sought in my complaint.

It has everything to do with a process that many of us believe is tainted, biased, unfair and in dire need of reform.

It is interesting that the NYSE, albeit reluctantly, released its decisions to me without any bogus claim of "copyright protection" and without restrictions. The NASD apparently believes it has more to hide.

The SEC should not be complicit in this obvious ploy to keep the prying eyes of the press and others from access to its arbitration decisions. This was an opportunity for the SEC to demonstrate its impartiality and concern for the investing public.

DANIEL R. SOLIN
ATTORNEY AT LAW

Instead, you inexplicably state that "we fully support the NASD and the NYSE making information regarding arbitrations and arbitration awards available to the public as a matter of public policy..." You fail to note, however, that the NASD places such restrictions on the use of this information, limiting it to personal use, that any comprehensive analysis of the process is seriously hampered. Indeed, but for my lawsuit, the NASD would have refused access to its awards even for the purpose of our publishing an academic article about the process.

It is a sad state of affairs that the SEC applauds and encourages this conduct, much less that it does nothing to put a stop to it.

Sincerely yours,
Daniel R. Solin

00552