SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Arbitration of Certain Controversies Between	:	**INDEX NO. 103188/07**
UBS Financial Services, Inc. and Karen A. Karrasch,	:	
And	:	
Marshal D. Gibson And NASD Dispute Resolution	:	
And	:	
The Attorney General of the State of New York	:	
Third Party Intervenor.	:	

AMICUS CURIAE BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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IDENTITY OF THE AMICUS CURIAE

The North American Securities Administrators Association, Inc. ("NASAA") is the nonprofit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. It has 67 members, including the state securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, it is the oldest international organization whose members are devoted to protecting investors from fraud and abuse in the offer and sale of securities.

The members of NASAA are the state securities agencies, including the Office of the New York Attorney General ("Attorney General"), that are responsible for regulating securities transactions and securities professionals under state law. These state securities agencies are charged with the fundamental mission of protecting investors, and their jurisdiction extends to a wide variety of investment products and financial services. Their principal activities include registering certain types of securities; licensing the firms and agents who offer and sell securities or provide investment advice; investigating violations of state law; and initiating enforcement actions where appropriate. By licensing the companies and individuals who interact with the investing public, and by continuously tracking the enforcement actions and arbitration claims filed against those professionals, state securities regulators protect investors from those who are unfit to serve in the industry.

NASAA supports the work of its members in many ways: coordinating multi-state enforcement actions, conducting training programs, publishing investor education materials, and representing the membership's position, as amicus curiae, in significant

cases involving financial services regulation. In its amicus briefs, NASAA addresses a wide variety of issues pertaining to securities regulation and investor protection.[1] Protecting the accuracy and integrity of broker licensing records through the proper application of Rule 2130 has assumed special significance for NASAA in expungement litigation. Recently, for example, NASAA filed an amicus brief in the matter of the *Application of Mary Ellen Kay against Loretta D. Abrams and the National Association of Securities Dealers*, Index No. 100235/07, (Hon. Edward H. Lehner) arguing, as in this case, that the court should deny a petition for confirmation of an expungement award where the procedural and substantive safeguards set forth in Rule 2130 have not been applied.

NASAA also plays a vital role in supporting the states' licensing and registration function for stockbrokers and their firms. To that end, NASAA and the National Association of Securities Dealers ("NASD")[2] developed a centralized system used by states and other regulators to process applications for securities industry licenses. This system, which is jointly administered by NASAA and NASD, is known as the Central Registration Depository ("CRD").

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[1] *See* NASAA's website to view this and other NASAA amicus curiae briefs, *available at* http://www.nasaa.org/issues___answers/enforcement___legal_activity/968.cfm.

[2] On July 27, 2007, the Securities and Exchange Commission approved certain changes to the by-laws of NASD facilitating the merger of NASD with the regulatory arm of the New York Stock Exchange. The merged entity has adopted the new name Financial Industry Regulatory Authority or "FINRA." However, in this brief, NASAA will continue to refer to the "NASD" for purposes of clarity, since the pleadings filed to date with the Court have all used "NASD."

As discussed in more detail below, the CRD system serves two vitally important functions. It provides state and federal regulators with a centralized mechanism through which licensing applications can be filed and processed electronically. The CRD system also enables members of the public to track the disciplinary history of industry participants after they obtain their licenses. For example, the information contained in the CRD enables potential investors to review the disciplinary history (including arbitration claims) and the licensing status of stockbrokers via the web or through contact with state securities regulators. The CRD thus helps investors protect themselves from members of the industry who may be unscrupulous.

INTEREST OF THE AMICUS CURIAE

NASAA and its members have a stake in the outcome of this case because the Court's disposition of the issues will have a significant impact on the ability of the Attorney General and other state securities regulators to carry out their statutory licensing responsibilities. At issue in this matter is when and under what circumstances customer complaint information can or cannot be expunged from the CRD. State regulators rely on the information in the CRD as they carry out their statutory duty to review license applications to determine if applicants meet the fitness requirements under state statutes. In addition, regulators and members of the investing public rely on information in the CRD regarding disciplinary proceedings and arbitration claims to ensure that only those who comply with the law may continue to do business with the public. Allowing information on the CRD system to become inaccurate through expungement, as threatened in this case, will undermine the ability of regulators to protect the public in the

licensing and registration process. By removing information regarding customer complaints, it will also hinder the ability of the public to protect itself when selecting a broker.

The Court will benefit from NASAA's input because of the association's intimate knowledge of the CRD licensing system and the expungement process. NASAA played a significant role in developing the CRD system and it continues to administer the system in conjunction with NASD. Furthermore, NASAA was actively involved in the deliberations that gave rise to NASD Rule 2130 ("Rule 2130"), the rule that sets forth the standard for granting and confirming requests for expungement of customer complaint information.

Additionally, NASAA has significant experience in the application of the rule. As part of the implementation of Rule 2130, NASAA and the NASD have established a procedure for notifying state regulators when a stockbroker seeks to expunge customer complaint information from his or her CRD record. Whenever NASD receives notice of an expungement request under Rule 2130, it notifies NASAA and NASAA in turn forwards the materials to the states in which the stockbroker is registered. In its formal order approving Rule 2130, the SEC expressly acknowledged the value of notifying states and affording them an opportunity to intervene, to help ensure that "investor protection or regulatory issues can be adequately addressed in expungement cases. *See* 68 Fed. Reg. 74,667, at 74,671 fn. 30. Since implementation of this notification process in 2004, NASAA has received and reviewed over 450 expungement matters.

NASAA's participation as amicus will assist the Court by providing the history of the rule and an insight into its underlying remedial purpose. That history makes clear that Rule 2130 was intended as a safeguard against abuses of the expungement process and to insure that it was only recommended in those instances where expungement is warranted.

SUMMARY OF NASAA'S ARGUMENT

Rule 2130 was drafted and adopted with the intent of narrowing the circumstances under which expungements could be awarded and to ensure that reportable customer complaints were not bargained away through the settlement process. Arbitration panels may recommend expungement relief only when the procedural requirements and substantive standards of Rule 2130 have been satisfied and not simply when a stockbroker prevails or when a complainant acquiesces in the expungement due to a settlement agreement. Further, courts should conduct a meaningful review of such recommendations to ensure that the arbitrators have complied with both the letter and the intent of the rule. This robust approach is consistent with the purposes of the rule and sound public policy for the protection of investors. With respect to the merits in this matter, the petition seeks confirmation of an award that does not comply with Rule 2130 on substantive grounds. Accordingly, the award is irrational and contrary to public policy, and in issuing such an award the arbitrator exceeded his powers. Therefore, the Court should deny confirmation and should vacate the award as provided in N.Y. C.P.L.R. § 7511.

SUMMARY OF THE UNDERLYING ARBITRATION

On February 2, 2006, Marshal D. Gibson ("Gibson") initiated an arbitration proceeding against Karen Karrasch ("Karrasch") and UBS Financial Services, Inc., ("UBS") by filing a Statement of Claim ("Claim") with the National Association of Securities Dealers Dispute Resolution office ("NASD DR"). In his Claim, Gibson alleged that Karrasch, the stockbroker responsible for managing his discretionary account, engaged in misconduct that resulted in a loss of $16,475. Gibson alleged that Karrasch and UBS committed common law breach of contract, negligence, failure to supervise, misrepresentation, omission of material facts and suitability violations.

Karrasch and UBS denied the allegations against them. The transaction in question involved the purchase of a long-term Delta Bond with a maturity date of twenty years. After Karrasch purchased the bond, Gibson was concerned and called to discuss it. Karrasch asserted that she explained to Gibson the unique classification of the bond and that she was seeking to achieve capital appreciation from the discounted purchase price.

Gibson's claims were arbitrated. After two hearing sessions, the arbitrator ruled against Gibson and recommended expungement of the Gibson complaint from Karrasch's CRD record, finding that the claims were "factually impossible or clearly erroneous." *See* Award, Case No. 06-00520, Brady Aff. Ex. 1 at 2.

Karrasch then filed her petition to confirm the arbitrator's recommendation in this Court. Karrasch named the NASD as a respondent pursuant to Rule 2130, and in accordance with the agreement reached between NASD and NASAA, NASD notified NASAA of service of the petition. Since Karrasch is registered in New York, and since

the Attorney General is New York's representative to NASAA, NASAA notified the Attorney General's office of Karrasch's filing.

ARGUMENT[3]

I. RULE 2130 CONSTITUTES A SET OF PROCEDURAL AND SUBSTANTIVE STANDARDS THAT ARBITRATORS MUST FOLLOW WHEN CONSIDERING EXPUNGEMENT REQUESTS, AND COURTS SHOULD VACATE AN EXPUNGEMENT AWARD WHERE AN ARBITRATOR HAS FAILED TO PROPERLY APPLY THE RULE.

Rule 2130 was promulgated to allow NASD and state regulators to challenge expungement awards that might impair the integrity of the CRD, and to ensure the maintenance of essential information on CRD for use by regulators and investors. *See* NASD Rule Filing SR-NASD-2002-168, Nov. 18, 2002, Brady Aff. Ex. 2 at 7. And, it was drafted to address the SEC's serious concern that valuable information about customer complaints was being bargained away through negotiated settlements. 68 Fed. Reg. 74,667, 74,672 (Dec. 24, 2003). Whenever an arbitrator has failed to apply the procedural and substantive standards in Rule 2130 correctly, that arbitrator has exceeded his or her authority. On that basis, the resulting award can and should be vacated under N.Y. C.P.L.R. § 7511.

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[3] The Securities Industry and Financial Markets Association ('SIFMA"), has raised the issue of preemption in its amicus brief filed with the Court by arguing that some of the Attorney General's arguments conflict with Rule 2130. NASAA has not addressed these issues because it believes that the matter before the Court can be resolved without resort to the constitutional doctrine of preemption. However, NASAA's silence on the preemption issue is not intended to signify agreement with the position advanced by SIFMA or other parties.

A. The History of Rule 2130 Reveals that it Was Intended to Bind Arbitrators to Certain Procedural and Substantive Standards in the Expungement Process.

The issue of removing information from the CRD has been a matter of concern to state securities regulators for many years. Rule 2130 represents at least a partial solution to those concerns. Rule 2130 was approved by the SEC and formally became a part of the NASD rule book in April 2004. *See* NASD Notice to Members 04-16 (March 2004), ("NTM 04-16") Brady Aff. Ex. 3 at 211. NASAA was involved in discussions with NASD as the rule was being drafted, as were other parties such as the Securities Industry Association.[4] Ultimately, NASD was the principal drafter of this rule and it was adopted as a conduct rule applicable to NASD members. To understand what the rule was intended to accomplish, and its role in serving the interest of regulators, investors, and stockbrokers, a review of the history of the rule is helpful.

From the inception of the CRD, NASD routinely expunged customer dispute information based on awards issued by arbitration panels without judicial confirmation. NASAA, however, objected to the expungement of customer dispute information based solely on an award from an arbitration panel. NASAA's concerns were grounded in large part on the fact that arbitration panels do not and should not have the authority to enter awards that result in the destruction of state records. NASAA was also concerned that expungements were being used improperly to conceal broker misconduct. In response to these concerns, NASD and NASAA agreed in 1999 on a moratorium on all arbitrator-

[4] The Securities Industry Association merged with the Bond Market Association in 2006 to form SIFMA, the Securities Industry and Financial Markets Association.

ordered expungements issued in disputes between public customers and stockbrokers. NASD, however, continued to effectuate court-ordered expungements.

In July 1999, NASD, as part of its rulemaking process, published Notice to Members 99-54 ("NTM 99-54"). In NTM 99-54, NASD solicited comments on four proposals that would allow the expungement of some information from the CRD while at the same time complying with applicable state record laws. The four proposals were as follows: (1) information ordered expunged would remain on CRD but would not be disclosed through NASD's public disclosure program; (2) NASD would stamp a legend on the information that had been ordered expunged noting it as such; (3) NASD would provide copies of the expunged information to state regulators in an alternative media format; or, (4) NASD would establish standards that would have to be satisfied before NASD would execute an award of expungement. *See* NTM 99-54 (July 1999), Brady Aff. Ex. 4, at 353.

After reviewing the comments on the various proposals in NTM 99-54, NASD issued Notice to Members 01-65 ("NTM 01-65") announcing that it would pursue the fourth approach: establishing certain criteria that must be met and procedures that must be followed before NASD would expunge information from the CRD. *See* NTM 01-65 (Oct. 2001), Brady Aff. Ex. 5. NASD acknowledged that in crafting this approach it was attempting to balance the interests of regulators in retaining customer dispute information, the interests of stockbrokers in protecting their reputations, and the interests of investors in having access to information about brokers with whom they do business. NASD affirmed that expungement is extraordinary relief that should only be granted in

limited circumstances and then only after a determination that the matter satisfied at least one of three specific criteria. *Id.* at 566. In NTM 01-65 NASD discussed the various bases it believed warranted the extraordinary relief of expunging information from the CRD. The first of the categories included a finding that "factual impossibility or clear error exists." *Id.* at 565. According to the NTM such finding would fit situations where the "associated person named in the proceeding did not work for the firm, or worked in a different office, and was named in error." *Id.* This standard was formally adopted in Rule 2130(b)(1)(A) which reads as follows: the claim, allegation or information is factually impossible or clearly erroneous.

NASAA submitted a comment letter to NASD in response to NTM 01-65. *See* NASAA Comment Letter to the NASD, Brady Aff. Ex. 6. While generally supportive of the proposal, NASAA's comment letter was unequivocal in its view that expungement should only be available through a court order and only under very limited circumstances.[5]

Following the issuance of NTM 01-65, NASD filed a rule proposal with the SEC seeking to formally adopt a rule governing expungement. The proposal was published by the SEC for comment and NASAA again offered its views. In its comment letter to the SEC, NASAA suggested that the rule could have been drafted more clearly in order to

[5] In NASAA's comment letter to NASD on this issue, NASAA wrote that "Both sound public policy and the delegation doctrine demand that alteration of state public records requires an order by a court of competent jurisdiction based on law, not a non-judicial NASD arbitration panel's declaration." *See* NASAA Comment Letter to the NASD, Brady Aff. Ex. 6, at 4. NASAA has been consistent in its position that arbitration panels lack the authority to issue a directive expunging state records.

accomplish the purpose of the rule as described in NTM 01-65, but generally endorsed the effort to improve the expungement process. *See* NASAA Comment Letter to the SEC, Brady Aff. Ex. 7.

At the conclusion of the comment period, the SEC approved proposed Rule 2130 in Release No. 34-48933, 68 Fed. Reg. 74,667 (Dec. 24, 2003). In approving the rule, the SEC found that it was "a clear improvement over the [then] current system for the expungement of information from the CRD system" and that it should "ensure that investors and regulators have access to more accurate information through the CRD system." The SEC further observed that the rule addressed "serious concern[s] that valuable information is being expunged from the CRD system *through arbitration settlements that include negotiated expungement instructions*." *Id.* at 74,671 – 672 (emphasis added). The SEC concluded that the rule would accomplish this by ensuring that "only information that is not valuable to regulators and investors is expunged from the CRD System." *Id.* at 74,672.

The SEC noted that states would be able to petition the courts in expungement matters should any state be concerned that NASD had not adequately considered relevant regulatory or investor protection issues. *Id.* at 74,671. According to the SEC, an improper expungement would adversely affect "the integrity of the CRD system, and regulatory requirements." *Id.* In order for CRD to be an effective regulatory tool, the SEC noted, it is important that "regulators be able to examine the entirety of a registered person's record, *with the limited exceptions as proposed*." *Id.* at 74,670 (emphasis added). The SEC found that Rule 2130 is consistent with the Exchange Act's goal "to

protect investors and the public interest." *Id.* at 74,671. The SEC also responded specifically to concerns raised during the comment period that stockbrokers were misusing expungement in the context of settled cases by "buying" clean CRD records. On this issue, the SEC observed that NASD had amended the proposed rule by requiring an "*affirmative* finding" – not merely a "finding" – that at lease one of the expungement criteria were present. *Id.* (emphasis added). In the SEC's view, this toughening of the rule would greatly reduce the "ability of members and associated persons to 'buy clean records.'" *Id.*

After the SEC approved the rule, NASD NTM 04-16, mentioned above, which explained the process by which stockbrokers were to proceed on expungement requests and further explained NASD's intent to notify the states of such requests. *See* NTM 04-16 (March 2004), Brady, Aff. Ex. 3 at 214. The notice cautioned that even if arbitrators dismissed a customer's claim, the panel still should consider whether or not to grant relief on one or more of the grounds in the rule. This is consistent with earlier pronouncements by NASD that dismissal of a claim is not in and of itself a reason to order expungement of the claim. *See* Rule Filing, SR-NASD-2002-168, Amendment No. 2, Sept. 11, 2003, Brady Aff. Ex. 8 at 2. Even if the parties settle their dispute, counsels the notice, the arbitrators must still make an affirmative finding and may require the submission of documents or an evidentiary hearing. *See* NASD NTM 04-16 (March 2004), Brady Aff. Ex. 3 at 214.

Thus, while formulating the rule, NASD considered several approaches, but ultimately settled on a framework that established strict procedures and standards for

arbitrators to follow in recommending expungement. Such an approach reflects the fact that removing information from a system designed to provide regulators and the public with a complete picture of a stockbroker's complaint history is an extraordinary remedy. In the words of NASD, "Expungement relief is extraordinary relief that should be granted in limited circumstances only after a determination by an independent adjudicator that the matter in question meets at least one of the criteria established for expungement." *See* NTM 01-65, (Oct. 2001), Brady Aff. Ex. 5 at 566.

This theme of establishing standards for expungement is constant throughout the rule filings and proposing releases. As noted by the NASD in its original filing with the SEC, specific information should be removed from the CRD but only after "certain criteria have been met and certain protocols are followed." *See* NASD Rule Filing SR-NASD-2002-168, Nov. 18, 2002, Brady Aff. Ex. 2, at 9. Throughout the expungement debate and the rule-making process, the NASD has adhered to the view that there should be "parameters for arbitrator-ordered expungements to ensure that investor protection is not compromised and to give some indication of the arbitrators' reasons for granting such relief." *See* NASD NTM 99-54 (July 1999), Brady Aff. Ex.4 at 353.

B. The Proper Application of Rule 2130 Requires a Factual Record and an Affirmative Finding, Supported by the Record, that at Least One of Three Grounds for Expungement Is Present.

Rule 2130 requires that before expungement may be recommended or confirmed, the arbitration award must contain an affirmative finding of the presence of one or more of the three standards listed in the rule. It is axiomatic that an affirmative finding must be based on something more than the pleadings or one-sided arguments and that there must

be a sufficient factual record in the arbitration proceeding to support the finding. In other words, arbitrators are constrained not only by the standards established in the rule but also by the nature of the remedy itself to grant expungement relief only after fully considering all evidence and arguments both in favor of and in opposition to the expungement, and only after articulating an affirmative finding that allows for meaningful review.

At least one New York Court has squarely agreed with this approach. Justice Devlin of the Erie County Supreme Court was asked to confirm an arbitration award, obtained as the result of a settlement, recommending that the customer dispute be expunged from the CRD. *Sage, Rutty & Co., Inc. v. Salzberg et al.*, 2007-01942 (N.Y. Sup. Ct. May 30, 2007). In refusing to confirm the award and in remanding the matter back to the arbitration panel, Justice Devlin wrote that there were "no facts before the Court necessary to make a reasonable determination that one of the standards for expungement in Rule 2130 was met." Without this, the court could not fulfill its responsibility under Rule 2130. *Id.* at 5.

Even when a hearing has been conducted and an affirmative finding has been made, courts must also ensure that the finding is supported by the facts of the case. This substantive standard complements the procedural requirements of Rule 2130 and helps to ensure that expungement is only granted when it is warranted under the rule.

C. An Arbitrator Who Fails to Properly Apply Rule 2130 Has Exceeded His or Her Power Within the Meaning of N.Y. C.P.L.R. Section 7511, and Any Resulting Award Can and Should Be Vacated.

Under N.Y. C.P.L.R. § 7511(b)(1)(iii), an arbitration award "shall be vacated" if the arbitrator "exceeded his power." Under the case law, arbitrators may be deemed to have exceeded their powers in a variety of circumstances. Included among them are: (1) the arbitrator has exceeded a specifically enumerated limitation on his authority; (2) the decision is irrational: or (3) the award is violative of a strong public policy. *Matter of Silverman (Benmor Coats)*, 61 N.Y.2d 299, 308 (N.Y. 1984). The arbitrator will be deemed to have "exceeded his power" within the meaning of N.Y. C.P.L.R. §7511(b)(1)(iii) when one of these three circumstances is shown. *Cf. Rochester City School Dist. v. Rochester Teachers' Ass'n.*, 362 N.E.2d 977, 981 (N.Y. 1977) (if arbitrator's award is completely irrational, "it may be said that he exceeded his power").

When applying these tests, the court's function is not "simply to rubber-stamp the award." *Carty v. Nationwide Ins. Co.*, 149 A.D. 2d 328, 329 (N.Y. App. Div. 1989); *Unger v. Unger*, 547 N.Y.S.2d 529, 531 (N.Y. App. Div. 1989) (observing that while a court may appear to have limited discretion in denying or confirming an arbitration award, it is not utterly powerless); *Stalinsky v. Pyramid Electrical Co.*, 160 N.E.2d 78 (N.Y. 1959) (on a motion to confirm an award, the court does not sit as an administrative rubber stamp over an arbitrator's determination, but rather as a court of equity applying equitable principles and enjoys a certain latitude of discretion). In general, the power of the arbitrator to fashion a remedy is not without limits. *Rochester City School Dist. v. Rochester Teachers' Ass'n.*, 41 N.Y.2d 578, 582 (N.Y. 1977). And in this case, Rule

2130 has expressly circumscribed the authority of an arbitrator to grant expungement relief by imposing rigorous standards and by requiring a court order to confirm any expungement award. Therefore, in order to ensure that expungement relief is appropriate and granted only in extraordinary matters courts should conduct meaningful reviews of the recommendations from arbitrators before confirming expungement.

II. THE COURT SHOULD DENY KARRASCH'S PETITION TO CONFIRM THE ARBITRATOR'S RECOMMENDATION OF EXPUNGEMENT BECAUSE THE RECOMMENDATION WAS NOT MADE IN COMPLIANCE WITH THE PROCEDURAL AND SUBSTANTIVE REQUIREMENTS IN RULE 2130.

The arbitrator's expungement recommendation in this case was improper under the standards set forth in Rule 2130. First, the arbitrator failed to identify the basis for his finding that the claim was factually impossible or clearly erroneous. Second, the arbitrator's finding is irrational given the undisputed facts in the case. Third, from a policy perspective, this case does not warrant the exceptional remedy of expungement. Deleting this arbitration claim from Karrasch's CRD record will violate the important policies favoring regulatory disclosure and investor protection that underlie the CRD system. The award should be vacated.

A. The Award Fails to Indicate What Evidence The Arbitrator Considered in Recommending Expungement and Simply Makes a Conclusory Finding.

Rule 2130 requires an affirmative finding by an arbitrator that the case satisfies at least one of the tests listed in the rule before an arbitrator can recommend expungement. In this case, the arbitrator invoked the language of 2130(b)(1)(A) in recommending expungement. However, there is no indication of any kind as to the evidence the

arbitrator relied on to reach this finding. If the requirement of an "affirmative finding" is to mean anything then it must, at a minimum, require an arbitrator to explain, even if briefly, what facts he or she is relying on in order to make the requisite finding.

As discussed above, the rule as initially proposed simply contained the requirement of a finding. That was changed to the more stringent standard of an "affirmative finding." 68 Fed. Reg. 74,671. A conclusory statement mimicking one of the standards in the rule is not an "affirmative finding" within the meaning of Rule 2130 and impedes the Court in conducting a meaningful review. In the words of Justice Devlin, "there is nothing in the award which the Court can rely upon in order to fulfill its responsibility under Rule 2130." *Sage, Rutty & Co., Inc. v. Salzberg, et al.*, No. 2007-01942 (N.Y. Sup. Ct. May 30, 2007); *see also Shereff v. Tax Commission of the City of New York*, 42 A.D.2d 593 (N.Y. App. Div. 1973) (affirmative finding of fact must be made in order to assure that there can be a meaningful appellate review).

B. The Arbitrator's Decision That the Claim, Allegation, or Information Is Factually Impossible or Clearly Erroneous Is Irrational.

The arbitrator in the instant matter found that the claims brought against Karrash were "factually impossible or clearly erroneous" pursuant to Rule 2130(b)(1)(A) *See* Award, Case No. 06-00520, Brady Aff. Ex. 1 at 2. This finding is irrational. As noted above, the administrative history of Rule 2130 provides guidance as to the meaning of "factually impossible or clearly erroneous." This standard was intended to apply to those circumstances where the stockbroker "named in the proceeding did not work for the firm, or worked in a different office, and was named in error." *See* NASD NTM 01-65 (Oct.

2001), Brady Aff. Ex. 5 at 565.[6]

Given this meaning, the "factually impossible or clearly erroneous" standard cannot possibly apply in this case. There is no question that Karrasch worked for UBS during the relevant time period and that she played a central role in the management of the account. *See* Joint Answer of Respondents UBS Financial Services, Inc., and Karen Karrasch, Case No. 06-00520, Brady Aff. Ex. 9 at 3. Moreover, Karrasch has never denied that she purchased the security that was the subject of the claim against her. In short, Karrasch could not have been named in error. Such facts contradict the notion that the claims were "factually impossible" or "clearly erroneous" within the meaning of the rule. Therefore, the arbitrator's award is irrational.

Even if the administrative history is ignored and a more literal interpretation of the standard in 2130(b)(1)(A) is applied, the arbitrator's finding appears to be wrong. It is difficult to see how Gibson's claim could be deemed "clearly erroneous or factually impossible" under the record developed in the case. Gibson's defeat evidently turned on close facts and nuances of credibility, and not on any gross error or impossibility. Rule 2130 was never intended to afford expungement simply because a broker prevailed in arbitration. Absent the kinds of egregious mistake or unfairness embodied in the three prongs of the rule, the drafters believed that regulators and members of the investing public were best served by disclosure of all arbitrations, including those in which the

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[6] Rule 2130(b)(1)(A) may be interpreted to overlap to some extent with Rule 2130(b)(1)(B). The latter test captures situations where the broker was simply not involved in the underlying events giving rise to the complaint. Rule 2130(b)(1)(A) might be applicable to such situations, but it would also cover claims deemed "factually impossible" for a variety of other reasons as well.

broker prevailed. Under any reading of the rule, the arbitrator's finding in this case was unfounded and irrational.

C. This Case Does Not Warrant the Extraordinary Remedy of Expungement.

Expungement of information from the CRD is an extraordinary remedy and not appropriate in all circumstances. Further, as acknowledged by NASD, expungement should only be used when the expunged information "has no meaningful regulatory value." *See* NASD Rule Filing SR-NASD-2002-168 Amendment No. 2, Sept. 11, 2003, Brady Aff. Ex. 8 at 8. Merely prevailing in an arbitration is not reason itself to justify expungement. *Id.* at 2.

In this matter, a client brought a claim against a securities professional and made serious allegations about the handling of his account. The claims were significant enough to warrant a full day of hearings by the arbitrator and only after this hearing on the merits did the arbitrator decide to dismiss the allegations. In light of these facts, and Karrasch's admitted role in the events giving rise to Gibson's claim, Gibson's claim against Karrasch has both regulatory and investor protection value. Therefore, the extraordinary remedy of expungement is not justified.

CONCLUSION

In conclusion, NASAA urges this Court to deny Karrasch's petition and vacate the arbitrator's award as irrational and beyond the arbitrator's authority.

Dated: Washington, DC
September 4, 2007

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