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December 20, 2002

Denver County Court Judicial Performance Commission
City and County Building
1437 Bannock St. Room 108
Denver, CO 80202

Re: *xxxxx v. NASD Regulation, Inc.*
Case Number SC83651; Small Claims Division

Dear Denver County Court Judicial Performance Commission:

In response to your letter dated December 16th, 2002, I'm including this letter as a *Statement of Facts*. Moreover, I'm requesting you obtain a copy of my case file since the contents will prove my complaint against Magistrate Tomsick.

From you letter, my complaint against Magistrate Tomsick falls under the following categories: 1) Committed acts of misconduct in office 2) Willfully and persistently failed to perform duties 4) Demonstrated conduct prejudicial to the administration of justice.

1) *Committed acts of misconduct in office*

First of all, Magistrate Tomsick was not assigned to the case for trial. This is a fact since I was not given adequate notice of the case being dismissed I was at the courthouse to plead my small claims case on November 13th, 2002. Due to my case not being listed, I talked to the one of the clerks and they informed me that the case was dismissed. In addition, I asked to see the judge or magistrate who made the decision and I was informed that Magistrate Tomsick made the decision and that she was not present in the courthouse. I was then given the case file to view. If she was not assigned the case, why did she make the decision to dismiss the case?

Secondly, you'll see from the case file, that she made statements about the case that she could have only known if she had either talked to me or the defendants before the case and I'll guarantee you she never talked to me before the case. Moreover, in the case file, you'll see that a copy of the dismissal was faxed to the defendants. How could have the courts had the attorney name and fax number unless a) the attorney contacted the courts b) the courts contacted the attorney?

2) *Willfully and persistently failed to perform duties*

As you can see in the case file, On December 4th, 2002, Magistrate Tomsick dismissed my case without prejudice that is in defiance of Colorado Rules of Civil Procedures Chapter 5 Rule 41 that states:

It is error to dismiss where plaintiffs are seeking to proceed. **Where no party has sought a dismissal, plaintiffs are seeking to proceed**, no hearing is had on the question of justifiable cause for dismissal and no findings of wilful default are made by the court, it is error for a trial court to dismiss the action. *Levine v. Colorado Transp. Co.*, 163 Colo. 215, 429 P.2d 274 (1967); *Maxwell v. W.K.A. Inc.*, 728 P.2d 321 (Colo. App. 1986). [Emphasis added]

As you can from the case file, there isn't any record of the defendants formally seeking a dismissal.

Furthermore, on November 11th, 2002, Magistrate Tomsick dismissed my case with prejudice. Once again, Magistrate Tomsick failed to follow Colorado Rules of County Civil Procedures Chapter 25 Rule 341 that states:

Actions not prosecuted or brought to trial with due diligence may, upon notice, be **dismissed without prejudice**... As affirmed in *Empiregas, Inc., of Pueblo v. County Court*, 715 P.2d 937 (Colo. App. 1985). [Emphasis added]

In addition, the only reason for dismissal with prejudice would be if I failed to follow Colorado Rules of Civil Procedure pertaining to the administrative part of my case (e.g., properly served, properly filed, didn't pay fees, etc.). Per the case file, you'll see that none of this pertains since I strictly followed Colorado Rules of Civil Procedure.

4) *Demonstrated conduct prejudicial to the administration of justice*

As you can see from the information contained in headings 1) and 2) that Magistrate Tomsick performed acts that were prejudicial to the administration of justice since the defendant was allowed due process where as me the plaintiff was not. Moreover, I can longer pursue any action due to her actions of dismissing my case with prejudice which is a complete abuse of her powers.

Please don't come back to me and say you don't have the authority to rule on a decision since you could basically rule anything a judge or magistrate does as a decision on their part. The only decision here is she decided to unlawfully not follow the law as outlined in the Colorado Rules of Civil Procedure.

I have always been told that the courts are to be fair and impartial. Evidently, with Magistrate Tomsick in the position of power, your courts are not fair and impartial. If she cannot follow the law or be fair and impartial, I suggest you replace her with someone who can follow the law and be fair and impartial.

If you come back to me and say she followed the law, I'm requesting you provide the rule number from the Colorado Rules of Civil Procedure and/or the points and authorities with citation number.

Regards,

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