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Via E-mail rule-comments@sec.gov

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Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F. Street NE
Washington, D.C. 20549-7533

Re: **SR-FINRA-2007-021**
Proposal amending Rules 12206 and 12504 of the NASD Customer Code, and Rules 13206 and 13504 of the NASD Industry Code, to address motions to dismiss

Dear Ms. Morris:

I am writing to comment on the above-referenced rule proposal (the "Proposal") submitted to the Commission by Financial Industry Regulatory Authority Dispute Resolution ("FINRA").

I am an attorney who has represented clients for more than 20 years before arbitration panels of the National Association of Securities Dealers, Inc., the New York Stock Exchange, Inc., the American Stock Exchange and the Pacific Stock Exchange, among others. Based on my experience, I urge you to maintain and strengthen the right of parties to obtain the prompt dismissal of legally deficient claims prior to an evidentiary hearing.

I have seen many examples in my career where actions have been initiated and maintained in arbitration that would most certainly have been dismissed at the early stages of a court proceeding due to the failure of the complaint to state a viable claim. Such actions waste enormous time and resources of the parties, the arbitrators and the arbitration administrative staff.

Examples of such instances from my own experience include:

- An action brought by a claimant who contended that she had lost \$500,000 when her monthly statements actually reflected that she had made a significant return on her investment and had simply spent all of the proceeds.
- Numerous cases where the complaint revealed on its face that action had not been initiated within the applicable statute(s) of limitations.

I recognize that the goal of efficiently resolving actions that are meritless on their face must be balanced against the objectives of deterring allegedly abusive motion practices and assuring that legitimate claims receive a timely evidentiary hearing. As currently drafted, however, proposed Rules 12504(a)(6) and 13504(a)(6), which address “motions to dismiss prior to conclusion of case in chief,” are unduly narrow and improperly prohibit panels from considering prehearing dispositive motions except under two extremely narrow circumstances.¹

The virtual elimination of prehearing dispositive motions is unjustified and is unnecessary in light of other proposed amendments to Rules 12504(a) and 13504(a) which fully address concerns regarding allegedly abusive motion practices. Moreover, these amendments *require* panels to assess forum fees against the losing party upon the denial of a motion and to award attorney’s fees to the opposing party when the panel deems the motion frivolous, and further permit panels to award sanctions against parties who file such motions in bad faith.

To the extent they limit the substantive grounds for pre-hearing dispositive motions under circumstances where such motions are entirely appropriate, I respectfully oppose adoption of Rules 12504(a)(6) and 13504(a)(6) for the following reasons:

1. Pre-hearing dispositive motions serve an important goal of arbitration, namely, the efficient resolution of disputes. Where a sound basis for a dispositive motion exists, so long as each party receives a sufficient opportunity to be heard and there are no disputed fact issues that require holding a full evidentiary hearing, the moving party that meets its burden of proof should be entitled to a dismissal of legally deficient claims against it, thereby relieving all parties of the burden and expense of preparing for and attending a full evidentiary hearing.
2. Prior governmental and regulatory analyses of securities arbitration endorse the use of prehearing dispositive motions. Numerous courts have similarly acknowledged arbitrators’ authority to adjudicate legal issues prior to an evidentiary hearing. The Proposal represents an unjustifiable shift in arbitration policy which lacks prior legal, regulatory or governmental support.
3. The concerns advanced in support of the Proposal regarding abusive motion practices are appropriately addressed by other proposed amendments which would prohibit a party from refiling a denied motion and provide for cost and fee shifting, and sanction mechanisms. These new rules, if adopted, will deter parties from filing dispositive motions for an improper purpose.
4. The additional stated concern that dispositive motions increase the cost of, or delay, arbitrations is unsupported. Many counsel who represent claimants do so on a contingency fee basis. These claimants pay nothing or, at most, *de*

¹ Under proposed rules 12504(a)(6) and 13504(a)(6), the “panel cannot consider or act upon a motion to dismiss a party or claim . . . unless the panel determines that: (A) the party previously released the claim(s) in dispute by a signed settlement agreement and/or release; or (B) the party was not associated with the account(s), security(ies) or conduct at issue.”



minimis fees to their counsel to oppose prehearing dispositive motions. Moreover, if granted, dispositive motions relieve both sides of the expenses associated with an evidentiary hearing. Additionally, concerns regarding delays arising from prehearing dispositive motions can be addressed by a rule amendment mandating that such motions shall not extend the date of the final evidentiary hearing.

5. The only conceivable rationale for preventing arbitration panels from considering most prehearing dispositive motions would be data demonstrating that arbitrators have acted improperly in granting such motions. Yet, no data has been presented to support this. Nor has any data been presented demonstrating that arbitrators are incapable of properly deciding such motions.
6. The Proposal's prohibition of all but two narrow grounds for prehearing dispositive motions is unnecessarily overbroad and would eliminate entirely appropriate grounds for such motions, most notably, motions based on statutes of limitations. The Proposal would also prohibit panels from granting early motions to dismiss senior executives of respondent firms who have no personal knowledge of the claim and who are named as respondents for improper purposes. The Proposal would similarly prevent panels from dismissing claims prior to an evidentiary hearing based on such fundamental legal doctrines as *res judicata* and legal impossibility.
7. Finally, the Proposal is one-sided. While removing a respondent's ability to obtain prehearing dismissals of demonstrably deficient claims, the Proposal contains no corresponding rule to deter or prevent a claimant from filing such claims. Thus, the Proposal may encourage the filing of legally deficient, frivolous, harassing, or stale claims because panels will be powerless to dismiss them until the conclusion of the claimant's case-in-chief.

For the reasons summarized above, I respectfully oppose adoption of those portions of the Proposal that limit the substantive grounds for pre-hearing dispositive motions (*i.e.* Rules 12504(a)(6) and 13504(a)(6)).

Thank you for your consideration of my views on this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Michael A. Thurman', with a long horizontal flourish extending to the right.

Michael Thurman
Partner