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VIA E-MAIL TO: rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary
U.S. SECURITIES AND EXCHANGE COMMISSION
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File Number 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 the Chair of the Securities Litigation Practice Group at the law firm of Neal, Gerber & Eisenberg LLP, and am a past Co-Chair of the Securities Litigation Committee of the American Bar Association's Section of Litigation. Together with members of my firm, I have represented members of the securities industry in both arbitration and judicial proceedings throughout the country for thirty years. I appreciate this opportunity to comment on the proposed rules regarding motions to dismiss submitted to the Commission by the Financial Industry Regulatory Authority, Inc. ("FINRA").

The proposed rules with respect to dispositive motions fall within three general categories. The first category of rules is designed to ensure and enhance full and fair consideration of motions to dismiss. *See* Proposed Rules 12504(a)(2)-(5), (a)(7), 13504(a)(2)-(5), (a)(7). The second category of rules is designed to regulate motion practice by shifting forum costs and, in those instances where a motion is frivolous or lacks a good factual basis, imposing mandatory sanctions. *See* Proposed Rules 12504(a)(9)-(11), 13504(a)(9)-(11). The third category of rules essentially restricts motions to dismiss that may be brought prior to the close of the Claimant's case to only those situations where the claim was previously settled or released, or where the person named was not "associated with" the accounts, securities or conduct at issue. *See* Proposed Rules 12504(a)(6), 13504(a)(6). It is this third category of rules that should not be adopted.

The adoption of the two initial categories of rules furthers fundamental fairness with respect to the regulation of motion practice and obviates any need for the severe restrictions imposed by the third category of rules. The enhanced fairness criteria, coupled with substantial sanctions for motions that are not justified, will promote the efficient resolution of motions to dismiss in a fair manner in arbitration. To impose severe limitations, like those contained in proposed Rules 12504(a)(6) and 13504(a)(6), on the types of motions that may be brought at the

outset of an arbitration will not only undercut the efficiency of arbitration but also flies in the face of recent decisions by the United States Supreme Court as well as fundamental public policy considerations.

I. Fundamental Fairness.

Numerous courts have recognized that an arbitration panel's consideration of a motion to dismiss based on the pleadings and oral argument constitutes a "full and fair hearing." *See, e.g., Vento v. Quick & Reilly, Inc.*, 128 Fed. Appx. 719, 722-23 (10th Cir. 2005) (finding that since NASD's procedural rules expressly provide that arbitrators shall be empowered to award any relief that would be available in a court of law, "[l]ogically this broad grant of authority would include the authority to dismiss facially deficient claims," and that Claimant was provided with a "'fundamentally fair arbitration proceeding'" in that he was provided with the opportunity to fully brief and argue the motion to dismiss); *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001) (fundamentally fair arbitration afforded by providing opportunity to fully brief and argue motion to dismiss).

Other decisions have recognized that permitting motions to dismiss meets the criteria of fundamental fairness and at the same time furthers arbitration's goals of efficient adjudication. *See, e.g., Warren v. Tacher*, 114 F. Supp. 2d 600 (W.D. Ky. 2000) ("Petitioners are not entitled to costly full-blown discovery when it would not change the outcome and the claim could be decided on a pre-hearing motion."); *Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248, 251 (S.D.N.Y. 1999) (upholding arbitrators' granting of motion to dismiss: arbitrators "need not compromise speed and efficiency, the very goals of arbitration"); *In re Arbitration Between Intercarbon Bermuda, Ltd. & Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 74 (S.D.N.Y. 1993) (holding that "[h]earings will not be required just to see whether real issues surface"); *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal. App. 4th 1096, 1105, 47 Cal. Rptr. 2d 650, 656 (1995) ("In a case where a legal issue or defense could possibly be resolved on undisputed facts, the purpose of the arbitration process would be defeated by precluding a summary judgment or summary adjudication motion and instead requiring a lengthy trial.").

I am not aware of any decision that has held that an arbitrator lacks the authority to hear a motion to dismiss or that such motions must be postponed until the close of the Claimant's case when it is clear, based upon the undisputed facts, that Claimant cannot assert a legally cognizable claim. No other arbitration forum of which I am aware imposes such a rule. In fact, both the American Arbitration Association Commercial Rules and those governing Judicial Arbitration and Mediation Services, Inc. ("JAMS") arbitrations permit arbitrators to hear pre-hearing motions. *See* AAA Commercial Arbitration Rule R-30(b); JAMS Comprehensive Arbitration Rule 18(a).

Thus, when investors talk about motions to dismiss being handled in a "fundamentally fair" fashion, there is ample judicial guidance as to what that means. Specifically, by affording a hearing and opportunity to be fully heard, arbitrators can decide whether or not based on the undisputed facts the motion should be granted or the hearing should go forward. If those undisputed facts demonstrate that there is no legally viable claim, then the case should be terminated at that point to avoid needless expenditure of time and resources. In fact, postponing the dismissal of meritless claims until the close of the Claimant's case, as contemplated by the proposed rules, will only result in greater costs and expert fees to the investor.

The proposed rules do include provisions that would further fundamental fairness beyond even what is required by the courts. For example, the proposed rules require that the parties must serve a written motion 60 days before a scheduled hearing and the other party would have 45 days to respond, thereby providing time for consideration by the Panel without imperiling any hearing date. *See* Proposed Rules 12504(a)(3), 13504(a)(3). The motion must be decided by the full panel at an in-person or telephonic pre-hearing conference, and any decision granting the motion must be unanimous and provide a written explanation, requirements more stringent than those which would govern the issuance of the final Award by the same arbitrators. *Cf.* Rules 12904(a), 13904(a) (providing for majority awards and not requiring explanation). The filing of non-meritorious motions, moreover, will be deterred by the provisions of the rule which shift forum costs to an unsuccessful movant and which, in those instances where a motion is deemed frivolous or lacks a good factual basis, impose mandatory sanctions. *See* Proposed Rules 12504(a)(9)-(11), 13504(a)(9)-(11)

Accordingly, the provisions of the proposed rules already surpass the "fundamental fairness" standards that courts have applied in permitting arbitrators to decide any motion to dismiss at any time. There is simply no sound reason to impose a heightened level of fundamental fairness and then only have it apply to two very narrow categories of motions to dismiss as contemplated by proposed Rules 12504(a)(6) and 13504(a)(6). With the heightened level of fairness and the provisions for sanctions, pre-hearing motions to dismiss where there is no legally cognizable claim based on the undisputed facts should be permitted in FINRA arbitrations, just as they are permitted in other arbitrations.

II. Motion Practice.

With respect to comments that the filing of motions to dismiss has been increasing in recent years, the nature of the claims filed over the past several years warranted increased motion practice. In particular, after the regulatory settlements involving research analysts were announced in 2003, thousands of claims were filed alleging conflicts of interests in research reports. The undisputed facts demonstrated that many of these investors never read the research reports, or never even had accounts at the brokerage firm they named as a respondent. Others asserted claims for lost profits based on their decision to hold stock or employee stock options as the price fell from all time highs, thereby diminishing unrealized gains, and the undisputed facts

demonstrated that they had no out-of-pocket loss even at the end of the day. Many admitted that they were unable to identify anything in the research reports that was misstated in any way.

These factual patterns raised legal issues far beyond and different from those raised in connection with the suitability, churning and unauthorized trading claims that are typically associated with retail accounts. In the midst of the filing of these claims, the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336 (2005), brought the concept of "loss causation" to the front and center of the legal landscape, and that decision especially applied to the research cases. Courts addressing these research claims followed *Dura* and other cases in granting motions to dismiss, finding that conflicts of interest standing alone did not state a claim. *See, e.g., Lentell v. Merrill Lynch & Co.,* 396 F.3d 161, 170 (2d Cir. 2005) (noting conflicts of interest "do not, standing alone, evidence fraud—let alone furnish a basis sufficiently particular to support a fraud complaint"); *In re Credit Suisse First Boston Corp. (Agilent Tech., Inc.) Analyst Reports Sec. Litig.,* 431 F.3d 36, 49 (1st Cir. 2005) (finding conflict of interest alone insufficient to establish claim absent allegations of actual falsity); *In re WorldCom, Inc. Sec. Litig.,* 456 F. Supp. 2d 508, 516 (S.D.N.Y. 2006) (dismissing investor claim for failure to connect supposedly conflicted analyst opinion with market losses). Accordingly, there was an increase in the number of motions to dismiss addressing these dispositive legal issues in this flood of new and different cases.

By hearing the motion to dismiss up front, these critical legal issues became sharply focused for all parties and the Panel. Even in those instances where the motion was denied, it afforded the Claimant an ample opportunity to attempt to cure the defects in his or her claims, narrowed the issues, and resulted in more efficient presentation and consideration of evidence at the hearing that followed by better placing the evidence into the context of the critical legal issues as it was being presented.

Our firm's practice has always been to file such motions only when they were justified based on controlling law and the undisputed facts. To the extent that there are concerns regarding the filing of motions that do not have a good faith basis by certain practitioners, the proposed rules fully address this by mandating that forum fees be assessed against a moving party that does not prevail as well as mandating that reasonable costs and attorney's fees be assessed against that party if the panel decides the motion is frivolous. The proposed rules further permit the panel to enter a whole array of additional sanctions under Rule 13212 if it determines that a party filed a motion in bad faith. Moreover, the proposed rules also prohibit a party from re-filing a denied motion unless specifically permitted by the panel. Thus, there would be substantial penalties for filing a baseless motion under these rules.

No objective evidence has been cited to demonstrate the extent of any abuse with respect to the filing of motions to dismiss; to the extent it does exist, however, these powerful remedies should be more than sufficient to fully curtail it, and unfortunately could be misused by some to file baseless motions for sanctions in an attempt to unfairly prejudice their adversary. Indeed,

these provisions are both powerful and one-sided in their application. No similar express provisions have been added to address those Claimants who file frivolous claims or take frivolous positions, and yet I have witnessed many instances over the past thirty years where Claimants have asserted claims in arbitration that clearly would be dismissed at the outset in court. In fact, in certain instances Claimants have chosen to file in arbitration, even though not required to do so, in order to avoid judicial scrutiny of their claim.

III. Grounds for Pre-Hearing Dismissal.

The portion of the proposed rules that cannot be justified is that which severely limits the grounds for any motion to dismiss prior to the close of the Claimant's case in chief to those relatively rare instances where: (a) the non-moving party released the claim by a signed settlement agreement and/or written release or (b) the moving party was not associated with the accounts, securities, or conduct at issue. *See* Proposed Rules 12504(6), 13504(6).

There is no reason to restrict the bases for pre-hearing motions to dismiss, especially in light of the other provisions of the proposed rules which enhance the procedures for fully and fairly considering these motions and the sanctions for filing baseless motions. In fact, persons asserting such claims as those covered under these two limited circumstances under the proposed rules, in all likelihood, would be subject to sanctions if they brought those claims in court. To provide that these are the only two bases for dispositive motions to dismiss in advance of the hearing flies in the face of recent decisions by the United States Supreme Court as well as fundamental public policy considerations.

On May 21, 2007, the Supreme Court reexamined how motions to dismiss had been addressed by courts throughout the country for the past fifty years. *See Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955 (2007). The Court concluded that certain judges had inappropriately seized upon certain language in its 1957 decision in *Conley v. Gibson*, 355 U.S. 41 (1957), that a motion to dismiss should not be granted unless "no set of facts" could support the asserted claim. By doing so, time, money, and resources, especially in connection with discovery, had been wasted by allowing the claims to go beyond the very early stages of the litigation process. As the Court noted, to allow these claims to proceed would allow a plaintiff with a "largely groundless claim" to "take up the time of a number of other people with the right to do so representing an *in terrorem* increment of the settlement value." 127 S. Ct. at 1955. Accordingly, the Court found in very harsh language that the "no set of facts" language in *Conley* had "earned its retirement" and is "best forgotten as an incomplete, negative gloss on an accepted pleading statement." *Id.* at 1955. Instead, the Supreme Court found that the proper standard that should be applied to decide a motion to dismiss is that the plaintiff is entitled to have those facts that he or she alleges presumed to be true but those facts must have "nudged their claims across the line from conceivable to plausible." *Id.* at 1974.

In stark contrast to this recent Supreme Court pronouncement, the proposed FINRA rules would allow virtually every claim, including those that are not only implausible but also those with no conceivable legal basis, to go at least through Claimant's case in chief. This is directly contrary to the conclusions of the Supreme Court upon its examination of fifty years of jurisprudence in *Twombly*. Moreover, all of the concerns articulated by the Supreme Court with respect to wasted resources, discovery expenses, and improper settlement leverage would be implicated if the FINRA proposal was adopted.

One month after deciding *Twombly*, the Supreme Court in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007), reinforced and further heightened the standards that should be applied to asserting a securities fraud claim under the Private Securities Litigation Reform Act in deciding whether a motion to dismiss should be granted. The Supreme Court found that not only did enough facts have to be alleged to make it appear to be a "plausible" claim, but that a reasonable person would have to deem the inference of scienter based on those facts cogent and at least as compelling as any opposing inference one could draw from those same facts. *See id.* at 2510.

So while the United States Supreme Court is focused upon heightening the standards that must be met before a complaint can proceed at all in response to a motion to dismiss, the proposed FINRA rules would allow virtually every claim to proceed to an evidentiary hearing, including a claim where, even if every fact is assumed to be true, the complaint fails to assert any legally cognizable claim.

There is simply no sound reason that arbitrators should be prohibited from deciding motions to dismiss on any basis prior to hearing provided that, based upon the undisputed facts, no legally cognizable claim can be asserted, especially given the procedural fairness and sanction provisions contemplated by the new rules. In fact, the Ruder Report on arbitration specifically proposed that "the arbitrators consider dispositive motions to dismiss as early as practicable in the process, as frequently is done in civil litigation," which would be "well before a hearing on the merits in many cases." REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., [1995-1996 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,735 at 97,443 (Jan. 3, 1996).

There is no justification to depart from that practice and have FINRA be the only dispute resolution forum where pre-hearing motions to dismiss for failure to state a legally cognizable claim based upon undisputed facts are prohibited. When no legally cognizable claim can be asserted based on the undisputed facts, there is simply no reason to delay raising that issue until the close of the Claimant's case. It is simply not possible to contemplate all of the reasons a particular claim may be barred, but the elimination of pre-hearing motions to dismiss on the following grounds, which do arise with some frequency, will in particular have a detrimental effect and be contrary to strong public policy.

A. Statutes of Limitation

The Supreme Court has recognized that statutes of limitation promote "just determinations" of claims and "are not simply technicalities. *See Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980); *Wilson v. Garcia* , 471 U.S. 261, 271 (1985). Statutes of limitation:

> are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944); *see also Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 136 (1938) (holding statutes of limitation are designed to protect against "stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time").

Because statute of limitations apply to claims in arbitration just as they would in state and federal court, pre-hearing motions to dismiss based upon all applicable statutes of limitation should be permitted. In fact, the Code expressly provides that the six-year eligibility rule does not extend the applicable statutes of limitation. *See* NASD Rules 12206(c), 13206(c).

Indeed, arbitration panels have dismissed claims that are time-barred under applicable statutes of limitation without an evidentiary hearing in numerous instances and have clearly indicated that a full and fair hearing was provided. *See, e.g., Hughes v. Morgan Stanley DW, Inc.*, No. 07-02249, 2008 WL 239034 (FINRA Jan. 17, 2008) (granting motion to dismiss based on applicable statute of limitations after review of pleadings and oral argument at pre-hearing conference); *O'Donnell v. Securities Servs. Network, Inc.*, No. 06-00589, 2007 WL 1470610 (NASD Apr. 25, 2007) (granting motion to dismiss based on applicable statute of limitations after review of pleadings and oral argument at pre-hearing conference); *Allen v. Morgan Stanley DW Inc.*, No. 05-04352, 2006 WL 355069, at *2 (NASD Jan. 30, 2006) ("The Panel was unpersuaded by counsel for Claimant's argument that the Panel lacked authority to dismiss claims that have been brought beyond the applicable statute of limitations. The Panel unanimously concluded that each and every one of Claimant's claims is time barred by the statute of limitations applicable to it"); *Kuntz v. Merrill, Lynch, Pierce, Fenner & Smith Inc.*, No. 05-04162, 2006 WL 954124 (NASD Mar. 2, 2006) (granting motion to dismiss based on applicable statute of limitations after review of pleadings and oral argument at pre-hearing conference); *Show v. Morgan*, No. 01-01514, 2002 WL 31737326 (NASD Nov. 12, 2002) (granting motion to dismiss based on applicable statutes of limitations following review of pleadings); *Bancstar v. First St. Louis Sec., Inc.*, No. 96-05268, 1998 WL 190234 (NASD Feb. 19, 1998) ("After reviewing the Motion to Dismiss Statement of Claim based on the Statute of

Limitations, the Claimant's Response to the Motion and oral argument made during a telephone conference ... before the entire panel, it is the unanimous decision of the panel to Grant the Respondent's Motion and Order the Claim dismissed based on the Statute of Limitations.").

All of these decisions reflect the full and fair consideration that Panels have given to statute of limitations issues, and there is simply no sound reason why a Panel should be precluded from reaching that issue until the close of the Claimant's case. In fact, both courts and arbitration panels have recognized that a dismissal on limitations grounds based on the pleadings and oral argument satisfies the requirement of a "full and fair hearing." *See, e.g., Phillips v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, No. 3:06cv100 (AHN), 2006 WL 3746692, at *5 (D. Conn. Dec. 15, 2006) (confirming arbitration award granting motion to dismiss pursuant to statute of limitations based on pleadings and oral argument); *Fortier v. Morgan Stanley DW, Inc.*, No. C06-3715 SC, 2006 WL 3020926, at *3-4 (N.D. Cal. Oct. 23, 2006) (where arbitration panel dismissed claims pursuant to statute of limitations based on pleadings and oral argument, the court rejected plaintiffs' argument "that the Panel should have allowed a full hearing on their substantive claims" and held that "the hearing and procedures that the Panel employed to decide Plaintiffs' claims were sufficient"); *The Richard Dale Relyea Ltd. Partnership. v. Pershing LLC*, No. CIV A H-05-01749, 2006 WL 696564, at *4 (S.D. Tex. Mar. 14, 2006) (confirming arbitration award dismissing claims based on statute of limitations grounds after an hour-long telephonic conference); *see also McGinnis v. UBS Fin. Servs., Inc.*, No. 06-04621, 2007 WL 3022838 (FINRA Oct. 5, 2007) ("Under the facts presented in this case, the Panel finds that ... an evidentiary hearing would be a futile exercise, as there are no facts that could be proven in it to defeat the limitations defense."). Indeed, in *McGinnis*, the Panel expressly noted that "all parties filed lengthy, well-researched briefs which the Panel has carefully considered, and were given the opportunity in the telephonic hearing before the Panel on September 27, 2007, to bring any matters to the attention of the Panel bearing upon the issues presented in the Motion to Dismiss, including the issue of whether an evidentiary hearing is required." *McGinnis,* 2007 WL 3022838, at *3. Based on this consideration, the Panel found that "Claimant has been given a full and fair hearing that satisfies the purposes of Rule 10303(a) and meets due process requirements." *Id.*

Requiring a full-blown evidentiary hearing, at least through the Claimant's case in chief, with respect to stale claims that are barred by the applicable statute of limitations would run counter to arbitration goals of fairness and efficiency as well as strong public policy repeatedly recognized by the United States Supreme Court. Witnesses with stale memories would have to be prepared and testify at least through the Claimant's case in chief before the case could be dismissed under the proposed Rules in direct contravention of the public policy behind the rule. Accordingly, pre-hearing dismissals based upon statutes of limitations should be permitted to avoid undercutting the very same public policy they are intended to promote.

B. Defamation/Absolute Privilege

Every time a registered person leaves the employment of a firm, the firm must file a Form U-5 with its regulators describing the reasons the person left the firm's employment, as well as indicating whether that person was under investigation for certain conduct. These disclosures give rise to defamation claims from time to time.

After many years of litigation, the highest court in New York recently found that the Form U-5 disclosures are subject to an absolute privilege, thereby barring defamation claims. *See Rosenberg v. MetLife, Inc.,* 8 N.Y.3d 359, 866 N.E.2d 439 (2007). The basis for that decision was the strong public policy to ensure that employers report any potential misconduct for the benefit of the investing public without being subject to defamation claims by the subject employee.

As the Court in *Rosenberg* explained:

> The public interests implicated by the filing of Forms U-5 are significant. The form is designed to alert the NASD to potential misconduct and, in turn, enable the NASD to investigate, sanction and deter misconduct by its registered representatives. The NASD's actions ultimately inure to the benefit of the general investing public, which faces the potential for substantial harm if exposed to unethical brokers. Accurate and forthright responses on the Form U-5 are critical to achieving these objectives.
>
> The Form U-5's compulsory nature and its role in the NASD's quasi-judicial process, together with the protection of public interests, lead us to conclude that statements made by an employer on the form should be subject to an absolute privilege. Analogously, close to 40 years ago in *Wiener* we determined that complaints involving attorneys should be accorded an absolute privilege because of "the necessity of maintaining the high standards of our bar." The regulation of registered brokers in the securities industry is of no less importance.

Id. at 367-68, 866 N.E.2d at 444-45 (citation omitted).

The proposed rules totally undercut this strong public policy by subjecting every employer to the substantial expenses of defending an evidentiary hearing at least through the employee's case in chief notwithstanding the fact that, at least under New York law, the claim is barred as a matter of law based on strong public policy. The evidentiary hearing would not only be a total waste of resources—particularly since defamation claims generally tend to be more

fact intensive proceedings than investor claims—but would subject employers to defending the same claims that are barred for strong public policy reasons.

Thus, once again the proposed rule, insofar as it limits the bases for pre-hearing motions, violates another strong public policy when applied to defamation claims.

C. Res Judicata

The United States Supreme Court has recognized that the doctrine of res judicata is also one based upon strong public policy:

> This court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ."

Federated Dep't Stores v. Moitie, 452 U.S. 394, 401 (1981).

Claimants from time to time have utilized arbitration as a means to seek additional recovery when they have already sought recovery in another forum or even in another arbitration involving the same matter. To allow such claims to proceed to the close of Claimant's case under these circumstances cannot be justified on any basis and once again runs afoul of clear public policy.

D. Senior Executives/Clearing Firms

Certain Claimant's counsel have made it a practice to name senior executives as respondents even though these persons had no direct involvement in the conduct at issue.

The proposed Rules only allow pre-hearing dismissal of a person not "associated with" the conduct at issue. *See* Proposed Rules 12504(6)(B), 13504(6)(B). That should be clarified to make clear that motions are permitted by any person against whom there are no factual allegations of misconduct directly involving the Claimant or the Claimant's accounts. Otherwise, there will be needless litigation over what "associated with" means coupled with the threat of sanctions against those who attempt to clarify it.

Moreover, clearing firms may be named as respondents solely based on their affiliation with an introducing firm, even though there is no legal duty owed between the clearing firm and the Claimant. Where there is no independent conduct alleged against the affiliated party such as a senior executive or clearing firm, such nominal parties should be subject to dismissal without having to endure the time and expense of a full-blown evidentiary hearing through the Claimant's case in chief. Like senior executives, these clearing firm entities should not have been named in the first place and postponing any ability to dismiss them prior to the close of the Claimant's case only further rewards such abusive tactics. *See Warren*, 114 F. Supp. 2d at 603 (rejecting motion to vacate award granting clearing firm's motion to dismiss: "[C]learing firms are generally not responsible to customers for the actions of an introducing broker and do not owe fiduciary duties to the customer, and courts have confirmed pre-hearing dismissals on these grounds.").

* * * * *

The provisions of the proposed rules designed to enhance a full and fair hearing on motions to dismiss as well as providing sanctions with respect to baseless motions to dismiss will ensure the appropriate utilization of pre-hearing motions to dismiss. Given these provisions, there is simply no sound reason to limit pre-hearing dispositive motions to the two narrow grounds set forth in proposed Rules 12504(a)(6) and 13504(a)(6). As set forth above, by doing so and making FINRA the only dispute resolution forum with such limitations, these proposed Rules would not only undercut the fairness and efficiency arbitration is intended to provide to all parties, but also would run contrary to recent decisions of the United States Supreme Court as well as strong public policy considerations.

Accordingly, pre-hearing motions to dismiss should be permitted in arbitration where: (1) claims fail to state a legally cognizable cause of action based upon undisputed facts; (2) the applicable statute of limitations has run; (3) where there is an absolute privilege with respect to a claim like defamation; (4) the claim is barred by res judicata, or (5) the claim names parties based solely upon affiliation without any factual allegations regarding their own improper conduct relating to the Claimant or the Claimant's accounts. Therefore, proposed Rules 12504 and 13504 should be revised to add these additional circumstances in which the use of dispositive pre-hearing motions is appropriate and consistent with the goals of efficiency and fairness. Thus, proposed Rules 12504(a)(6) and 13504(a)(6) should not be adopted in their present form.

Thank you for your consideration.

Respectfully,

H. Nicholas Berberian

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