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Via Electronic Mail

Nancy M. Morris
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
rule-comments@sec.gov

Re: File Number SR-FINRA-2007-021, SEC Release No. 34-57497

Dear Ms. Morris:

We write to comment on FINRA's proposed rule amendments, which unfairly restrict motions to dismiss in arbitration proceedings. The proposed amendments should not be adopted. As currently drafted, they fail to accomplish their stated purpose and are not reasonably tailored to address the perceived problem from which they arise. If adopted, these rule changes will create uncertainty, inequity and inefficiency and weaken the securities arbitration process.

Numerous commentators have submitted their views on these proposed rule changes. Many of them are experienced and esteemed claimants' attorneys, who have significant experience in the securities arbitration arena. But most of those commentators miss the point. The obligation of FINRA and the SEC is not to promote any particular agenda favored by certain groups of advocates but, instead, to create rules of arbitration procedure that enhance the effectiveness, efficiency and fairness of the system for all participants. These proposed rules fail to achieve this fundamental goal.

The suggested amendments were designed specifically to address complaints from claimants' counsel that respondent brokerage firms were filing dispositive motions "routinely and repetitively in an apparent effort to delay scheduled hearing sessions on the merits, increase investors' costs (typically claimants), and intimidate less sophisticated parties." SEC Release No. 34-57497, at 12. Those claims are highly exaggerated, at best. But, even

assuming that such concerns had any basis, the proposed rule changes are not reasonably designed to overcome the stated problem. Rather than addressing directly the claimed abusive motion practice, these suggested amendments overcompensate by seeking to prohibit virtually all motions to dismiss, regardless of their merits. Although FINRA's motives surely are to protect and improve the arbitration process, the rules currently proposed simply are not effective means toward that end. They should be rejected by the SEC.

1. Motions to Dismiss Are Appropriate and Necessary in Arbitration

The proposed amendments incorrectly suggest that motions to dismiss somehow are improper and should be barred in all but the most extraordinary circumstances. In fact, motions to dismiss serve an important purpose in refining and limiting deficient claims and focusing the issues actually in dispute. That is why all federal and state codes of civil procedure include some procedure for motions to dismiss to be presented and heard prior to a full evidentiary trial. There is no reason to eliminate from securities arbitrations this important procedural safeguard used effectively in every other legal system.

Many of the commentators have argued that arbitrators should have no authority at all to grant early motions to dismiss. That argument already has been rejected and ruled on by the courts. There simply is no reasonable doubt that arbitrators have the inherent authority to dismiss claims on the merits at any time, without the requirement to conduct a full evidentiary hearing on all issues of fact and law. See Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001) (arbitration panel has the authority to dismiss claims prior to a full evidentiary hearing); Warren v. Tacher, 114 F. Supp. 2d 600, 602-603 (W.D. Ky. 2000) (NASD arbitrators have authority to under the NASD Code to grant motions to dismiss); Prudential Sec., Inc. v. Dalton, 929 F. Supp. 1411, 1417 (N.D. Okla. 1996) (arbitrators "undoubtedly have authority to dismiss a claim"); see also Arbitration Between Griffin Indus., Inc. v. Petrojam, Ltd., 58 F. Supp. 2d 212, 219-20 (S.D.N.Y. 1999) (oral hearings are not required in arbitration and lack of such a hearing does not amount to a denial of fundamental fairness required to vacate an arbitration award).[1]

Nor is it true that motions to dismiss somehow represent mere "technical" legalities. Instead, such motions often point out inherent, fundamental deficiencies in a claim, which show that the claimant cannot recover under any interpretation of the known facts. While

[1] Many commentators also argue that because there should be no motions to dismiss at all in arbitration, then the proposed rules are an appropriate "compromise" between claimants and respondents. But a compromise supposedly recognizing and then severely restricting the inherent powers of the arbitrators, which claimants have no legitimate basis to challenge, is no real compromise.

these motions usually are framed in terms of governing legal principles, they also are dependent on some undisputed or indisputable facts. There is no evidence suggesting that panels have been prone to dismiss meritorious claims on pre-trial motions. Rather, motions to dismiss typically are granted only where it is clear that the claimants have no realistic hope of recovery at trial and it would be futile to subject the parties and FINRA to the costs and burdens of further hearings on the matter. It is these most deficient and meritless claims that the proposed rule changes will exempt from dismissal.

There is evidence that the number of motions to dismiss filed in FINRA arbitrations has increased in recent years. But there is no reason to believe that the increased use of such motions means they are generally abusive or otherwise without basis. Instead, the increased use of such motions is likely a result of the changing nature of the cases filed by claimants during this time. In particular, the explosion of research-related cases, which were filed by the thousands (often on behalf of claimants who never actually received or relied on the research in question), and important legal developments on threshold issues such as loss causation, are the primary drivers for the increased usage of motions to dismiss in arbitration.

Nor are motions to dismiss necessarily unjustified, even if they are initially denied by the arbitrators. Most arbitrators seem predisposed to deny pre-trial motions to dismiss, even when they have merit, out of a desire to give the claimant her "day in court." But even then, the filing of a motion to dismiss may serve to identify the key issues; educate the arbitrators on important legal or factual requirements of the claim; and focus discovery or the evidence on the actual issues in dispute. In many cases, a motion to dismiss denied early in the case will eventually be granted later by the arbitrators, based on further review of the alleged claims. Indeed, the fact that dispositive motions are not routinely granted by FINRA panels indicates that arbitrators already are sufficiently sensitive to the investors' belief that they should be permitted the opportunity to present their case through a full evidentiary hearing.

Thus, the primary effect of these proposed rule changes will be to exempt the weakest claims from a timely dismissal, which otherwise would have been appropriately granted. That will only expand the time, energy and money required by the parties and FINRA to adjudicate flawed claims, and presumably increase for claimants the pre-hearing settlement value of cases that otherwise would not warrant a full evidentiary hearing. There is no efficiency or fairness gained by such a process. Instead, it would serve merely to undermine the effectiveness and integrity of the arbitration process.

2. Any Abusive Motion Practice Should Be Addressed Directly

The proposed rule changes also should be rejected because they are not reasonably tailored to accomplish their stated purpose of reducing abusive motion practice. The rules instead go too far by banning virtually all motions to dismiss in an effort to deter the filing of some supposedly frivolous motions. In particular, the suggested amendments are designed to prohibit such practices only with respect to respondents' motions to dismiss. But if the goal is to deter abusive motions practice, then FINRA could do so much more effectively by adopting broader rules more appropriately designed for that purpose.

Indeed, there is no reason to limit such efforts only to motions to dismiss or only to motions filed by respondents. Many other types of motions are subject to abuse by claimants as well. Recent years have shown increased uses of motion practice in all areas of arbitration procedure. Some of those motions cause undue delays, costs and complications that are inconsistent with the fundamental goals of the arbitration process. Such abusive motion practices also deserve attention, but simply are ignored by the current proposed rules.

FINRA's goal of discouraging abusive motions is entirely appropriate and should be applauded by all participants in the arbitration process. But that purpose cannot be served effectively by these proposed rules, which selectively target only respondents' motions to dismiss. Instead, new rules should be proposed that properly address the broader proliferation of unreasonable motion practice in arbitration and prohibit such misconduct equally, without regard to which party is the proponent of the motion.

For example, the proposed amendments include several provisions that easily could be adopted as part of a new proposed rule, which would more appropriately and equally address all abusive motions practice, such as:

- requiring an arbitration panel to assess hearing fees against the moving party if the moving party does not prevail on its motion;
- permitting an arbitration panel to award reasonable costs and attorneys' fees against the moving party if that party filed the motion in bad faith; and
- permitting an arbitration panel to impose sanctions against a party who files a motion in bad faith.

There is no reason why such requirements could not be included in a more general abusive motions rule, which would be much more effective in serving the interests and needs of all participants in the arbitration process. This approach would enhance the efficiency and fairness of the system, without unfairly targeting only certain types of motions or promoting the narrow interests of one advocacy group.

FINRA and the SEC share the responsibility to protect the fairness and effectiveness of the securities arbitration process. The goal of reducing abusive motion practices is important and appropriate. It should be pursued vigorously by all participants in the system. But these proposed rule changes are not designed to further this goal nor fairly constructed to improve the arbitration process. The proposed amendments should be rejected, and replaced with other rule changes that will effectively promote the efficiency and integrity of the arbitration process.

Very truly yours,

Ben Rogers/by JES w/express permission

Brett A. Rogers

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