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April 9, 2008

VIA FEDERAL EXPRESS

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0609

Re: **SR-FINRA-2007-021**
Comment re Proposed Rules for Dispositive Motions in FINRA Arbitrations

Dear Ms. Morris:

This letter is submitted pursuant to the opportunity extended in SEC Release 34-57497 to comment on proposed amendments to FINRA Rules 12206 and 12504 in regard to motions to dismiss. We have been privileged to represent member firms and the financial industry along with their employees both in court and in FINRA (previously NASD and NYSE) arbitration proceedings for many years. Over the last two decades, the arbitration auspices of the NYSE and NASD have become the primary – but far from exclusive – forum for the resolution of investor claims.

We believe the amendments as presently proposed are ill-founded, and will invariably result in serious inequity and an improper "unleveling" of the playing field with a result the seriousness of which cannot be overemphasized.

THE PREMISE OF THE RULE

A primary motivating factor for the rule is the assertion that motions to dismiss are being made by some parties with increasing frequency, sometimes repetitively, and with little chance for substantive success, seemingly only to impede the arbitral process. In our thirty-five years of representing the financial community and in our service as arbitrators, we have never once witnessed that phenomenon. And while we cannot speak for the experience of others, any remedy should deal with the abusers, not the process.

Restricting the right to bring such motions, virtually to the point of banishment, is without doubt overkill. It is tantamount to banning automobiles on a turnpike because some drivers on some occasions exceed the speed limit. FINRA and its arbitrators have the express and inherent authority to deal with abusive behavior ***when and if it occurs*** in a given arbitration proceeding. There is no need to limit all motions to dismiss merely because of anecdotal reports that the opportunity to bring such motions has been abused.

We also note in the commentary supporting the amendments conflicting experience. One commentator decries the declining win/loss ratio which the writer attributes to the rise in number and to the granting of dispositive motions. Yet another commentator says such motions are generally denied, and thus were brought only to increase costs and delay hearings. Obviously motions that are granted by a panel are not "abusive." Meritorious dispositive motions should not be banned or circumscribed; truly frivolous ones should be dealt with appropriately.

It is clear that some portion of the claimant's bar seeks to deny respondents any opportunity to achieve dismissal of worthless claims in a summary or at least accelerated procedure. This is due to the obvious tactical advantages that result when a hearing is forced in every occasion. The opportunity for a sympathetic performance that might prevail over logic and what the law requires may be attractive to some, but it is totally inconsistent with principled concepts of procedural fairness ***to all parties***. Equally obvious, but even more pernicious, is the resulting ***automatic infliction***, no matter how unmeritorious the claims, ***of a minimum settlement value*** – often well into five or six figures. This is because respondents will be required to incur the significant costs of attorneys' fees, distant travel and lodging, lost income, and the lost services of valuable employees that will be required for days and days of hearings, all involving a case that logically and justifiably will be dismissed at the end of days or weeks of hearings, even though the case would likely have been dismissed upon a properly lodged, opposed, and argued motion months before. The amendment's creation of significant "settlement value," in every instance, and with no relation whatsoever to merit, serves no valid

purpose. The amendments' most assured result will be a tidal wave of meritless claims filed only to extort the necessary defense costs from respondents.

The suggestion that such motions late in the process are made to disrupt scheduled hearing dates must be considered in light of the claimant bar's frequent argument that all discovery should occur first.[1] When discovery deadlines generously run to within only weeks or a month or two of the hearing dates, this forces the dispositive motion to be made in that very brief window.

Similarly, claims that motions are later renewed when they were denied earlier is not per se indicia of "abusive". Claimants counsel frequently argue an earlier motion is "premature," all but inviting its renewal later in the proceeding.

The amendments' strong preference that motions generally be made only after the claimants' case presentation creates great difficulties, both in logic and in expense. Firstly, the purpose of a dispositive motion is to forego and to avoid the substantial expense of defense preparation and attending the hearing. To make the motion only after days or weeks of claimants' case presentation all but nullifies the dismissal motion's most important objective. Not only are all defense costs incurred and imbedded before the motion is made, respondents still must incur the entire cost of case preparation and must be fully prepared to proceed if the motion is not granted. Nothing has been saved in such cases.

Secondly, and as Professor Seth Lipner's commentary noted, the insertion of a motion to dismiss between the claimants' case and the respondent's case presentation also renders the accurate scheduling of hearing dates all but impossible. When five consecutive days are initially set aside, and claimant rests late on Wednesday afternoon, any serious presentation and deliberations concerning a well-founded dispositive motion

[1] This argument may at time have merit, but generally does not, for the reasons and examples discussed later herein.

consumes most, if not all, of the remaining scheduled time that was originally anticipated for respondent's case presentation.

THERE IS NO MORE "RIGHT" TO AN ARBITRATION HEARING THAN THERE IS A "RIGHT" TO A TRIAL

Neither "right" is absolute, although both are undeniably cherished in our culture and in our jurisprudence. But there is no "right to trial" with regard to cases that are time-barred (statutes of limitation), that have already been heard in another forum (res judicata, collateral estoppel), that have already been amicably resolved (settled, with releases exchanged), where the allegations cannot be proved or can be disproved (summary judgment) or where the allegations simply do not add up to an entitlement to any long standing recovery (failure to state a claim).[2] These are just but a few instances where jurisprudence and all court procedures *throughout this country* invariably permit a defendant to bring an appropriate motion to demonstrate to a court why a trial on the issues is inappropriate, unwarranted and perhaps even unjust. *There is no principled reason for these procedural safeguards to be denied in arbitrations generally, much less only in FINRA arbitrations.*

We recall the decades-old argument of the claimants' bar (as wrong then, as it is now) was that claimants were somehow "denied rights" – either substantive or procedural – in arbitration which they argued they would have possessed were they in court. Yet, those same voices now propose that respondents – the member firms, their employees – should have *less procedural safeguards and rights in arbitration* than they would most assuredly have in a court of law. There is no small irony here.

[2] We note the anomaly that the amendment would allow a dispositive motion based upon a signed release, but not a prior judgment or even a prior arbitration award.

NATURE OF RESPONDENT

The most egregious aspect of the amendments is the preclusion of such motions unless the moving party was "not associated" with the account, trades, or conduct. The term "associated" can be a very large umbrella. While we agree with many commentators that most disputes are factual – literally "who said what" – many are not. A good number of current claims assert as their premise novel and even long rejected legal theories, and posit "duties" which the law does not impose. The amendments as written would preclude motions by clearing firms (which lack sales practice and suitability responsibilities as a matter of law and regulation) and internet-based "on-line" brokerage firms (where customers self-execute trades without any "sales practice" activity on the firm's part). To deny any opportunity to lodge motions to dismiss in these cases is simply wrong.

Routine claims of suitability and "failures to supervise" against clearing firms (in regard to trades they did not solicit and with no legal obligation or practical ability to regulate introducing firms' personnel) are viable candidates for early dismissal on dispositive motions. On-line firms have no duty to monitor their customers' investment wisdom or to intercede with advice that they expressly do not offer. Account documentation for both types of firms routinely include ***customer acknowledgment and agreement*** in regard to the firm's limited roles and lack of responsibility. No valid principle is served by allowing later claims to proceed to a full blown hearing where those claims fly in the face of both the written disclaimers which the claimants acknowledged, as well as volumes of established law.

We also believe that other firms, including "full-service" firms – as well as their employees – should not be denied the opportunity to make such motions when the circumstances warrant. By way of example, a newly installed branch manager, on the job all of thirty days, but named in an arbitration challenging the preceding five years of investments, may well want to demonstrate to the panel in an early motion why the

allegations of "poor supervision" on his part are lacking in fact and/or that any resulting damages occurred before he was there, or both. What purpose is served requiring her or him to attend weeks of hearings, covering years of events all prior to his or her arrival?

WHY UNANIMOUS?

The amendment requires a dispositive motion to be denied unless the panel unanimously grants it. No rationale is proffered for this "supermajority" requirement, and we can think of none. If an ultimate final award may be effected by two votes out of three, there is no principled reason why an earlier disposition – upon a careful review of the facts and applicable law – could be reached by the same vote.

Another irony: what is the rational basis to assess all the forum fees associated with the dismissal motion against the losing party when the two of the three arbitrators agreed that dismissal was warranted?

COURT RULINGS HAVE WITHOUT EXCEPTION UPHELD THE RIGHT OF PANELS TO RENDER AWARDS WITHOUT A FORMAL HEARING

For over three decades, the rights of arbitration panels to render awards, in whole or in part, premised upon affidavits, legal arguments and other "pre-hearing" submissions have been sustained by courts across the country. Many of those decisions expressly state that there is no "right to a hearing" when the issues can be disposed of on a far more economical and less time-consuming basis. All that is required is that the losing party have had an appropriate opportunity to address the arguments made in support of an award dismissing the claims.

These decisions are not limited to securities arbitrations, but include the decisions of the American Arbitration Association, other industries' forums, and even personalized arbitration arrangements specifically created by contracts that contain arbitrator selection criteria and procedures. There is no principled reason why only FINRA arbitrations

should have procedures that clearly limit the right to bring such motions to dismiss, or to condition their timing to only after a respondent has incurred the considerable expenses of participation that such motions are – by their very nature – designed to avoid.

CONCLUSION

In an effort to address the narrow concern of abuses of motion practice, the proposed amendments essentially eliminate dispositive motions which – in FINRA arbitrations as well as in all other forums – have played an important role in pruning out early meritless cases (whose only value is found in the cost to process them) from cases that truly warrant resolution by a full hearing. The proposed cure does not target the alleged abuses of motion practice, but impacts every respondent in every case with extended and substantial defense costs. The amendments preclude prosecution of a well reasoned, well founded attempt to demonstrate why a party should not be required to remain in the case. That right exists in every court and in every arbitral forum today. There is no reason why respondents in FINRA arbitrations should be denied that right in the future.

Respectfully submitted,

Matthew Farley

MF/gs