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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:

Pursuant to SEC Release 34-57497 I wish to comment on proposed amendments to FINRA Rules 12206 and 12504 in regard to motions to dismiss. I 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. I am a former member of the NAMC and former Deputy General Counsel at PaineWebber.

We believe the amendment as presently proposed is unfair, overly broad and will result in further "unleveling" of the playing field and unnecessary cost to the industry and to Claimants. We oppose their approval.

THE PREMISES OF THE RULE ARE ERRENOUS

The assumption that motions to dismiss are being made by some parties with increasing frequency, sometimes repetitively, and with little chance for substantive

success, has not been quantified or established. Any remedy should deal with actual abusers, not the process. Moreover, even denied motions may serve valid purposes for all parties, narrowing issues, educating the Panel, evaluating settlement value and focusing on disputed areas. None of this has been considered.

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 asserts that such motions are generally denied, and thus were brought only to increase costs and delay hearings. Motions that are granted by a panel are not “abusive”. Meritorious dispositive motions should not be barred. Baseless motions can be dealt with appropriately.

It is clear that some portion of the claimant’s bar seeks to deny respondents any opportunity to achieve early dismissal of bogus claims. This is due to the obvious tactical advantages to extort settlements that result when an expensive hearing is forced on every occasion. 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 requirement that almost all motions be made only after the claimants' case presentation creates great difficulties, both in logic and in expense. 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.

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

FINRA representatives have stated that a guaranteed hearing is a "fair" trade-off for claimants' loss of the right to a jury trial. This contention is flawed. 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 recovery (failure to state a claim).¹ These are just a few instances where all courts throughout this country invariably permit a defendant to bring an appropriate motion to demonstrate to a court why a trial on the issues is appropriate, unwarranted and perhaps even unjust. There is no valid reason for these procedural safeguards to be denied in arbitrations generally, much less only in FINRA arbitrations. Every federal court addressing this issue has approved dispositive motions

¹ The amendment would allow a dispositive motion based upon a signed release, but not a prior judgment or even a prior arbitration award.

in FINRA arbitrations. Only FINRA staff, lobbied by the claimants' bar, is troubled by dispositive arbitration motions.

THE PROPOSED RULE EXCEPTIONS ARE FAR TOO NARROW

1. The proposed rule bars motions by clearing firms to dismiss based upon their limited role under FINRA's own rules. Every claimant can now name a clearing firm, cause it to pay fees and surcharges and extort a settlement based on the elimination of motions to dismiss by clearing firms. Many if not most such motions have, up until now, been granted.
2. Statute of Limitations motions are barred. Given short blue sky statutes (one or two years), defamation (one year) etc., such motions should not be eliminated. If eligibility motions are permitted, why not statute of limitations?
3. On-line firms would be unable to move to dismiss, even though they provide no advice and make no recommendations.
4. Prior releases, res judicata and ratification claims are barred. What if a client signs a letter authorizing a trade and states it is unsolicited? Why can't a firm at least move to dismiss? What if an investor signs a letter regarding an outside investment absolving the firm from responsibility? What if a firm reasonably relied on a no-action letter? What if a client made money but has an erroneous profit and loss analysis? Must all these cases go to hearing?

**CLAIMANTS' TOO, ARE DISADVANTAGED
BY THE PROPOSED RULE**

If a motion to dismiss is appropriately granted, at least claimant saves time, expectations, forum fees, cost of experts and their disbursements. If it is denied, it may help lead to a settlement or a FINRA mediation. These are benefits that should not be, but have been ignored by FINRA and claimants.

WHY UNANIMOUS?

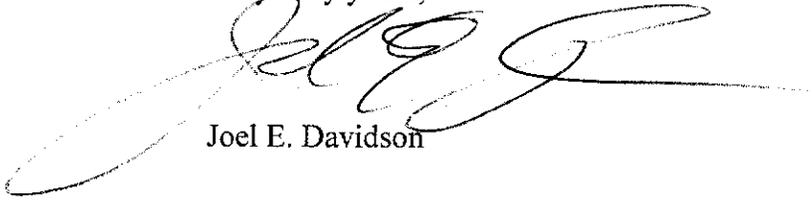
The amendment requires a dispositive motion to be denied unless the panel unanimously grants it. No rationale is proffered for this "supermajority" requirement, and we can think of none. If an ultimate final award may be effected by two votes out of three, there is no principled reason why an earlier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

Another issue is the lack of 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.

CONCLUSION

FINRA repeatedly represents that its arbitrations are fair. If should, therefore, not succumb to unfair efforts by some to make the process unfair. This rule is poorly conceived and unfair. It should be withdrawn. We also have relied upon and join in the comments of Matt Farley of Drinker Biddle in opposition to the rule.

Very truly yours,


Joel E. Davidson

JED/mv