Law Offices Of
ALAN S. BRODHERSON
The Bar Building
36 West 44th Street, Suite 1412
New York, New York 10036

Facsimile
(212) 869-1091
Member, NY and DC Bar

Telephone
(212) 764-4044

E-Mail
alan@brodhersonlaw.com

April 3, 2008

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090

Re: File Number SR-FINRA-2007-021

Dear Ms. Morris:

I am writing to express my opposition to the proposed changes to Section 12504 of the FINRA Code of Arbitration Procedure for Customer Disputes (the "Code").

A. Pre-Hearing Motions To Dismiss Serve A Useful Purpose

For the last ten years, much of my practice has been devoted to the defense of broker-dealers and/or registered representatives who have been the subject of arbitration claims. In a number of those cases, I have had occasion to make pre-hearing motions to dismiss some, or all, of the claims pending therein.

Although only a limited number of those motions have been granted, none of those motions was ever found by a Panel to be frivolous. In some cases, even though the motions were denied, the motions were still useful in that they helped in some way either to limit or to better define the issues that would ultimately be presented to the Panel. Had I been unable to make the pre-hearing motions to dismiss in those cases, considerable additional expense would have been incurred by both the claimants and my clients.

For instance, in one of the cases in which my motion was granted, the claimant was a public customer who was acting pro se. The claimant alleged that a letter which had been sent to him by a member of my client's law department was defamatory. The allegedly defamatory letter was sent to him during the course of my client's investigation of a prior complaint by the claimant.

There were a number of reasons why the challenged remark, as a matter of law, was not defamatory. The Panel permitted both sides to brief the issue and, after a telephonic hearing, dismissed the case, in its entirety.

Had the proposed rule been in effect at the time, I would not have been able to move to dismiss the proceeding, and both the claimant and my client would have been forced to prepare for, and attend, hearings. At the close of the claimant's case, the Panel presumably would still have dismissed the claim, but only after both sides incurred thousands of dollars in additional fees and expenses. There is no valid purpose that I can see that would have required such an outcome.

Moreover, we should not forget that arbitrators are duty bound to apply the law to the facts at hand. It is true that it is not necessarily a basis to vacate an award in cases in which the Panel fails to do so, but that in no way changes the fact that arbitrators are sworn to do so. Hence, if an application of the law to the facts, as those facts are reflected in the pleadings, would ultimately require the dismissal of a proceeding, then there is no valid reason to deny a respondent the right to move to dismiss, on the grounds that the statute of limitations has run on a given claim, prior to a hearing on the merits.

There are numerous other occasions that I can think of where pre-hearing motions to dismiss served a legitimate purpose; the specific details of those cases are unimportant. The significant point, though, is that just as there may be some frivolous motions to dismiss, there are also frivolous claims, or claims that are otherwise without support in law. Denying a respondent the right to move to dismiss such claims, except in the limited instances which would still be permitted by the proposed rule, will burden all parties with unnecessary costs and expenses.

B. The Proposed Rule Will Largely Do Away With The Protections Of The Statute Of Limitations

Until this time, the NASD Staff has taken the position that statutes of limitations are applicable to claims pending in arbitration proceedings. Indeed, in the course materials used by the NASD Staff to train new arbitrators, the NASD Staff explains that in a case in which claims are clearly barred by the applicable statutes of limitations, it is appropriate for the Panel to dismiss such claims on a pre-hearing motion to dismiss.

Under the proposed rule, even stale claims which would immediately have been dismissed on a motion to dismiss, had they been filed in court, will proceed to a hearing. In such cases, respondents will be able to move to dismiss those stale claims only after the claimant has presented his or her case in chief. By that point in time, the respondent will have already incurred close to the same costs of defense as if the case had proceeded through the close of the respondent's case. While prevailing on the statute of limitations at that late point in the proceeding would still be welcomed, tens of thousands of dollars, if not more, will have been spent unnecessarily.

C. The Rule Change Is Not
Necessary For Investor Protection

I have read voluminous amounts of material that have been issued by FINRA in connection with the proposed rule change, and have also considered the arguments put forward by the claimants' bar in connection therewith. While I recognize that there have been instances in which pre-hearing motions to dismiss have been made in bad faith, I believe that the proposed rule is an over-reaction to a problem that can easily be resolved through other means.

FINRA begins by explaining in its submission that one of the reasons why it has chosen to propose the rule on dispositive motions is that these motions have become increasingly common in arbitration. But what FINRA ignores in its explanation is that there is a good reason why dispositive motions have become increasingly common in arbitration: the claimants' bar is increasingly filing stale claims, or claims that otherwise have no basis in law.

As a result of the bull market that began in late 2003, and which only ended last year, the total number of new arbitration claims being filed each year has declined dramatically. According to FINRA statistics, the number of new matters being filed is down some 60% to 70% from its all-time high. Since the claimants' bar is no longer being presented with as many cases as it was in the past, it appears to have become more willing to bring stale claims. It is therefore no surprise that as the number of stale claims has proliferated, the number of motions to dismiss those stale claims on the grounds that they are time-barred has also increased.

Also, the claimant's bar has in recent years become more creative, and now often throws in claims that have no bearing whatsoever to securities disputes. One specific example with which I have had experience is the proliferation of claims brought pursuant to state consumer protection statutes.

In some states, the very same acts under which these claims purport to arise contain language which makes it quite clear that these statutes do not apply to the purchase or sale of securities. Since these statutes often have provisions which permit attorney's fees and punitive or exemplary damages, respondents have valid reasons to move to dismiss these claims at the earliest possible time. The FINRA proposal, though, fails to recognize that at least some of the increase in the filing of motions is the result of action such as this by the claimant's bar.

FINRA also explains that its main reason for proposing the new rule is that "FINRA believes that parties have the right to a hearing in arbitration." But on what basis has FINRA decided that its mandate to protect investors from unscrupulous practices includes providing investors with the unfettered right to proceed to a hearing on claims that would have been dismissed, if they had been filed in court?

I am aware of no statute which was enacted by Congress and signed by the President which states that investors have the right to proceed to arbitration on claims that, for one reason

or another, would be dismissed, had they been filed in court. I am similarly aware of no regulation adopted by the SEC that enshrines the right of customers to pursue such claims in arbitration. FINRA has, essentially, spun this "right to a hearing in arbitration" out of whole cloth.

When mandatory arbitration was adopted as an industry-wide practice, the purpose for doing so was to provide a less expensive, and more speedy, resolution to legal disputes. Adopting a rule that all parties have a right to proceed to arbitration, even on claims that would have been dismissed, had they been brought in court, would turn on its head the purpose of arbitration, in that it would actually delay the ultimate dismissal of the dispute, and would at the same time increase the cost to both sides.

Another reason posited by FINRA for the proposed rule is that respondents were filing such motions routinely and repetitively in an apparent effort to: delay scheduled hearing sessions on the merits; increase investors' costs; and intimidate less sophisticated parties. I absolutely agree that the making of a motion for such reasons is inappropriate, but there are other ways to address these concerns.

To address its concern about repetitive motions, FINRA could adopt a rule that prohibits the making of more than one dispositive motion prior to the substantive hearings. This would balance the legitimate needs of the respondents' bar to make motions in appropriate cases, while at the same time ensuring that repetitive motions were not made.

With respect to the concern that motion practice delays the scheduled hearings on the merits, FINRA could require that motions to dismiss be filed at the same time as the answer, or that they be made no more than 30 or 45 days after the filing of the answer. Such a rule would permit the Panel to hear and rule on the motion shortly after the Panel is appointed, and would in no way interfere with the scheduling of the hearings.

I also believe that the concern that these motions increase the costs to claimants is, in most cases, untrue.

First, most of the claimants' cases that are filed are cases in which the claimants are being represented on a contingency fee basis. In matters that are being handled on a contingency fee basis, the time required by claimants' counsel to prepare a response to a motion to dismiss, or to engage in oral argument on that motion, is not billed to the client.

Although it is true that additional hearing fees are incurred when a pre-hearing motion is made, FINRA could adopt a rule which requires that the hearing fees for a motion to dismiss be assessed against the maker of the motion.

Finally, to the extent that FINRA is concerned about the potential intimidation of less sophisticated parties, such a concern is valid, if at all, when a party is acting pro se. Panels can,

and should, be vigilant for any action by a respondent which appears to be an attempt to take advantage of a pro se litigant. If FINRA believes that this is a problem, then FINRA should adopt a rule that provides the Panel with additional powers to sanction a party when the Panel believes that the party has sought to intimidate a pro se litigant.

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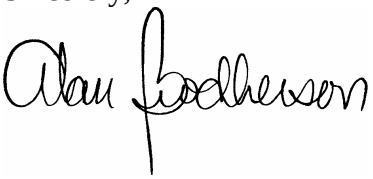
The simple truth is that litigants sometimes bring claims that, had they been filed in court, would have been dismissed on a motion to dismiss. There is no reason to deny a respondent in arbitration of the right to have those claims on a pre-hearing motion to dismiss.

Sincerely,



Alan S. Brodherson