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April 9, 2008

BY EMAIL TO: rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-7553

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 writing as Chair of GrayRobinson's Securities Litigation Department to comment on the above-referenced rule proposals. As you know, the securities industry has used arbitration as a means to resolve disputes between investors and member firms for more than 100 years. As other industries followed suit, a strong national policy emerged favoring arbitration as a faster and less costly method of dispute resolution. Implicit in this national policy is the belief that well-trained arbitrators are eminently qualified to handle and resolve investment-related disputes.

Currently, FINRA's Arbitration Code contains no rule dealing specifically with dismissal motions. Instead, as with every other aspect of a dispute's merits, it remains within the broad and exclusive province of the arbitrators to determine whether a pre-hearing dismissal is well taken or whether the motion should be denied. In most such cases, arbitrators deny dispositive motions and permit cases to proceed to final evidentiary hearings. Moreover, if the dispositive motion is deemed duplicative or abusive, arbitrators undeniably have the power under the current Arbitration Code to sanction the moving party. Therefore , FINRA's proposed new motion to dismiss rules appear completely unnecessary. Moreover, FINRA's attempt to dictate the **only** circumstances under which an arbitrator may even consider a pre-hearing dismissal motion seems to undermine the fundamental trust placed in arbitrators to decide cases properly and in a prompt, expeditious manner.

Put simply, this author believes that securities arbitrators are readily capable of resolving investor-related disputes, and should be trusted to determine whether a pre-hearing dismissal motion is well-taken or abusive and worthy of sanctions. Furthermore, in those cases where the asserted claims are so obviously time barred, frivolous, or otherwise worthy of immediate dismissal, respondent firms should retain the right and opportunity to obtain a preliminary

dismissal of the case without having to incur the considerable expense, inconvenience, and hardship associated with intrusive discovery at a bull-blown evidentiary hearing.

Nevertheless, FINRA is seeking to essentially eliminate all pre-hearing dismissal motions based on allegations by investor attorneys that respondent firms "routinely and repetitively" file dismissal motions to delay hearings, increase investor's costs, and intimidate less sophisticated parties. In my considerable arbitration experience, however, these alleged problems are neither pervasive nor sufficient to warrant the blanket elimination of pre-hearing dispositive motions in arbitration proceedings.

First and foremost, I have participated in literally hundreds of securities arbitrations over the past twenty years and can say with reasonable certainty that I filed and pursued dispositive pre-hearing dismissal motions in less than **one percent** of those cases. Moreover, on those rare occasions in which I did file a pre-hearing dismissal motion, I did so not to gain some type of actual or perceived procedural advantage, but instead because the asserted claims were either time barred, ineligible for arbitration, factually impossible, or barred by some other well-settled legal concept such as *res judicada* or collateral estoppel. Although only a few of these motions were actually granted by the panel, it was obvious to all the participants that not one of the dismissal motions was duplicative, abusive, or filed to delay the ultimate resolution of the case.

Quite candidly, I am struggling to understand how a **pre**-hearing dismissal motion could possibly delay the resolution of a case, as suggested in the comments to FINRA's rule proposals. To the contrary, a determination by arbitrators that facially deficient claims should be dismissed prior to the final evidentiary hearings can only expedite (as opposed to delay) the resolution of those claims. Furthermore, in virtually every arbitration case in which I have been involved, the arbitrators - often at the parties' request - establish schedules and deadlines during the initial pre-hearing conference for the filing and resolution of dispositive motions. In other words, during the initial pre-hearing conference, arbitrators typically establish a deadline before which all dispositive motions must be filed and, in every case, those deadlines fall well before (and therefore have no impact on) the final arbitration hearings.

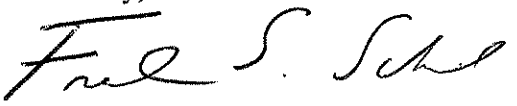
Turning to the issue of investor costs, I fail to see how the filing of a potentially dispositive dismissal motion in any way increases or even impacts the cost of arbitration to investors. In my experience, investors retain counsel on a contingency fee basis. Therefore, the "cost" (in terms of attorneys' fees) to an investor is unaffected by the extent and amount of motions, hearings, or other pre-hearing matters involved in a particular case. Furthermore, if an arbitration panel determines that a particular pre-hearing motion (whether a dispositive dismissal motion or some other discovery-based motion) was not well taken, the arbitrators already possess the power and authority to assess the costs of that hearing to the party filing that motion.

Finally, on the intimidation issue, I fail to see how a meritorious dismissal motion could possibly intimidate a party represented by counsel. Perhaps, if the claimant is pro-se, a dismissal motion might seem heavy-handed or otherwise potentially intimidating. However, in those

instances, arbitrators can and typically do bend over backwards to insure that the pro-se party receives a full and fair opportunity to present their case in opposition to the motion. In the vast majority of cases, however, both sides are represented by counsel and, just as a meritless Statement of Claim is not likely to intimidate a Respondent's attorney, a meritless dismissal motion is equally unlikely to intimidate a competent Claimant's attorney.

In summary, I know from personal experience that dispositive pre-hearing dismissal motions are not "routinely and repetitively" filed, and on those rare occasions in which they are filed and pursued, such motions neither delay the case's resolution, increase investor's costs, nor intimidate the opposing parties. Consequently, the above-referenced rule proposals are, in this author's opinion, based on illusory concerns that in no way justify the wholesale elimination of pre-hearing dismissal motions in every arbitration case. Furthermore, the referenced rule proposals are completely one-sided in that they eliminate a Respondent's ability to obtain a preliminary dismissal of facially deficient claims without providing a corresponding rule or mechanism to deter or prevent a Claimant from filing a deficient or frivolous claim. Finally, the referenced rule proposals completely undermine the foundational trust placed in arbitrators to properly, efficiently, and fairly resolve disputes. For all of these reasons, I urge the Commission to reject the above-referenced rule proposals and thank you for allowing me the opportunity to express my concerns regarding this important issue.

Sincerely,



Frederick S. Schrils

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