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April 10, 2008

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-1090

Re: File No. SR-FINRA-2007-021

Dear Ms. Morris:

We are law professors who have written extensively about the securities arbitration process and have served as arbitrators at FINRA Dispute Resolution.

We previously have filed three comment letters addressing former versions of FINRA's proposal to restrict dispositive motions in arbitration.¹ Overall, we support the proposal because it strengthens the protection for investors against unwarranted yet routine and often tactical use of motions to dismiss filed by brokers and their firms. The proposed changes will restrict dispositive motions and thus provide investors with a full and fair opportunity to have their facially valid claims heard by arbitrators.

While we urge the SEC to approve the proposed rule and do not wish to delay the approval process, we remain concerned over three matters: (1) the lack of emphasis in the proposed rule's text on the extraordinary nature of the remedy; (2) the inclusion of the eligibility exception in the rule proposal; and (3) the potential for respondents to prolong the proceeding by filing a motion to dismiss at the close of claimant's case-in-chief. We address each of these concerns separately.

(1) *Emphasis on Extraordinary Circumstances*

In our previous comment letters, we contended that the rule should include explicit language instructing arbitrators that they should grant a dispositive motion without a hearing only in extraordinary circumstances. While we recognize that courts have interpreted the Federal Arbitration Act to permit a securities arbitration panel to dismiss claims before a live hearing,² courts insist that such dismissals occur only if the

¹ See Letters from Jill I. Gross and Barbara Black (July 14, 2005; June 6, 2006; and Sept. 21, 2006).

² See, e.g., *Wise v. Wachovia Securities LLC*, 450 F.3d 265 (7th Cir. 2006) (affirming denial of motion to vacate where arbitrators granted respondent's summary judgment motion and dismissed claimants' case following a telephonic hearing); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (arbitrators can grant pre-hearing motion to dismiss arbitration on the papers); *Tricome v. Success Trade Secs*, 2006 WL 1451502, *3 (E.D. Pa. May 25, 2006) (denying motion to vacate arbitrators' pre-hearing dismissal); *Allen v. RBC Dain Rauscher, Inc.*, 2006 WL 1303119 (W.D. Wash. May 9, 2006) (refusing to vacate

panel afforded the parties a fundamentally fair hearing – whether live or paper – of their claims.³ We doubt that the minimal requirement of a telephonic prehearing conference will be sufficient to satisfy this requirement in the majority of cases. Accordingly, arbitration panels should deny dispositive motions whenever (1) credibility is an issue; (2) there are disputed issues of material fact; or (3) the panel believes a hearing is necessary in the interests of justice.

Thus, we still contend that explicit language is necessary to expressly communicate the extraordinary nature of the remedy to the arbitrators. While we would prefer such language, absent such an amendment, we urge the forum to train its arbitrators accordingly.

(2) Eligibility Exception Should be Stricken

As we previously commented, we believe that FINRA should strike the exception for motions on the grounds of the eligibility rule, because the bases of those motions typically encompass disputed facts and questions of credibility. Therefore, FINRA should train its arbitrators that if there are any disputed facts, investors should have the right to a hearing, even on a motion to dismiss for failure to satisfy the eligibility rule.

(3) Motions to dismiss at the close of claimant's case-in-chief

We think it is important to remember that in securities arbitration there is no requirement that claimants file a complaint that sets forth a legal theory. Indeed, the defining characteristic of securities arbitration, in contrast to litigation, is that the arbitrators can resolve disputes on the basis of equitable principles and are not required

arbitrators' pre-hearing dismissal); *Sphere Drake Ins. Ltd. v. All American Life Ins. Co.*, 2004 WL 442640 (N.D. Ill. Mar. 8, 2004) (denying a motion to vacate arbitral award), *aff'd*, 103 Fed. Appx. 39 (7th Cir. 2004); *Warren v. Tacher*, 114 F. Supp.2d 600, 602-03 (W.D. Ky. 2000) (refusing to vacate arbitrators' pre-hearing dismissal); *Max Marx Color & Chemical Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp.2d 248, 250-51 (S.D.N.Y. 1999) (recognizing authority of NASD arbitrators to grant pre-hearing dismissal); *Reinglass v. Morgan Stanley Dean Witter, Inc.*, 2006 WL 802751 (Ohio Ct. App. Mar. 30, 2006) (refusing to vacate arbitration award granting prehearing dismissal in a prehearing conference); *1745 Wazee LLC v. Castle Builders Inc.*, 89 P.3d 422 (Colo. Ct. App. 2003) (denying motion to vacate arbitrator's decision).

³ See *Sherrock Bros. Inc. v. DaimlerChrysler Motors Co., LLC*, 2008 WL 63300 (3rd Cir. 2008) (affirming an arbitral award granting summary judgment motion on grounds of res judicata, collateral estoppel and waiver); Cf. *Sroka Family, LLC v. Prudential Secs., Inc.*, 176 Fed. Appx. 766 (9th Cir. 2006) (affirming district court's dismissal of petition to vacate securities arbitration award due to lack of subject matter jurisdiction because "a review of the fairness of arbitration proceedings does not involve a substantial question of federal law where petitioners were not denied adequate notice, a hearing on the evidence and an impartial decision by the arbitrator"); *Vento v. Quick & Reilly, Inc.*, 128 F. App'x 719 (10th Cir. 2005) (affirming arbitration panel's prehearing dismissal and holding that arbitration panel has full authority to grant a pre-hearing motion to dismiss so long as the dismissal does not deny a party fundamental fairness); *In re Toppin*, 342 B.R. 888 (Bankr. S.D. Fla. 2006) (holding that debtor was afforded a fundamentally fair opportunity to address the dischargeability of debts issue in arbitral hearing); *Patton v. J.P. Morgan Chase & Co., N.Y.L.J.* (Sup. Ct. N.Y. Co. Aug. 23, 2004) (confirming arbitration panel's award which granted a motion to dismiss without an evidentiary hearing); see also *Bowles Financial Group, Inc. v. Stifel, Nicolaus & Co., Inc.*, 22 F.3d 1010, 1012-13 (10th Cir. 1994) (gathering cases).

to apply technical legal requirements. Thus, while we understand that these rule changes are the product of compromise over an extended period of time with investors' advocates and industry representatives, we are concerned that an undesirable consequence may be that respondents will file, after the conclusion of claimants' case in chief, a motion to dismiss on the ground that claimant did not state a legally cognizable claim. To avoid this consequence that could be costly for investors, we urge the forum to educate arbitrators that the enactment of Proposed Rule 12504 should not serve as an invitation to respondents to routinely file motions to dismiss at the conclusion of the claimants' case-in-chief so as to prolong the hearing and multiply its costs.

We conclude by emphasizing that because securities arbitration is final and binding, subject to review by a court only on a limited basis, the SEC should strive to ensure the process is fair. By choosing arbitration, the parties generally give up their right to pursue the matter through the courts, making it even more critical for arbitrators to understand the principles they should apply when considering a motion to dismiss. Unlike motions to dismiss in trial court, dispositive motions in FINRA arbitration should only be granted in the most extraordinary circumstances. Overall, FINRA's rule proposal strikes the right balance between the parties' rights to a fair arbitration process and their rights to an efficient process not burdened by excessive, often abusive, motions to dismiss.

Thank you for the opportunity to make these comments.

Sincerely,

Jill Gross

Barbara Black

Teresa Milano, Student Intern