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VIA E-MAIL RULE-COMMENTS@SEC.GOV AND FIRST CLASS MAIL

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

Re: File No. 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:

Please accept this letter as a comment on the rule proposal referenced above. This letter is my personal comment only; I am using my law firm letterhead only for convenience.

I have been in the private practice of law for the 28 years since my graduation from the Law School at the University of Chicago. I am a Fellow of the American College of Trial Lawyers. Most of my work in securities arbitration has been on behalf of defendants, but over the years I have represented claimants in several cases, including individual account holders. However, my opposition to the proposed rule is based upon my 28 years of experience in litigation of all types, including arbitration. I write to oppose the portions of the proposed rule changes which in essence eliminate dispositive motions and would require almost all cases to proceed to a full evidentiary hearing. That portion of the proposed changes is unwise and represents a significant step backward.

The reasons I oppose the proposed rule revolve around four concepts, namely, trust, integrity, the rule of law, and cost (the litigation tax).

1. Trust.

FINRA trusts its arbitrators to decide cases to do justice under the law and facts as found by the arbitrators. My experience has been that almost without exception, FINRA (and formerly NASD) arbitrators have conducted themselves very, very well.

FINRA trusts its arbitrators because it selects them and trains them through a process which is designed to promote justice. The proposed rule would say to the citizens of the United States that "FINRA does not trust its own arbitrators," because it would remove from the arbitrators an important tool to terminate non-meritorious claims in a cost-effective manner.

My lengthy exposure to FINRA (formerly NASD) arbitration, which dates back to the 1980s, has impressed me with the dedication of the selected arbitrators to do what they believe is the right thing in fulfilling their role to dispense justice in a fair manner. For the SEC to adopt a rule for FINRA arbitration which says "we do not trust our own arbitrators" is completely at odds with what I have observed during my twenty-plus years of experience with this process. I saw nothing in the FINRA proposal suggesting any misconduct or even poor judgment or legal errors by arbitrators deciding dispositive motions.

2. Integrity.

Integrity is a basis of my objection to the proposed rules for some of the same reasons expressed in the preceding paragraphs. FINRA delegates to its vetted and qualified set of arbitrators the duty and responsibility to determine many claims within the securities industry. The implicit and explicit trust placed by FINRA and its arbitrators bespeaks of the recognized integrity that those persons possess. The proposed rule suggests that those arbitrators do not have that integrity. This is completely contrary to my own experience; I see nothing in the proposal that is counter to what I have perceived.

3. The Rule of Law.

This nation was founded based upon the rule of law, because the colonists who created what is now the United States of America were harmed by the authority of the British Crown, which imposed penalties and sanctions upon its populace based upon a whim of a ruler, not on the established rule of law. The United States of America, founded upon the rule of law, has spread the rule of law throughout parts of the world where it has not been. The rule of law is a foundational element of the United States of America. Motions to dismiss are in my experience primarily requests for the arbitrators to rule on a legal issue which would eliminate the expense, inconvenience, and

consumption of time involved in a full evidentiary hearing on all of the issues of the case. No reasonable basis exists to suggest that arbitrators are not competent to or have not applied the rule of law on motions to dismiss, whether those motions are filed to dismiss a claim or to dismiss an inappropriate affirmative defense. Under our American system of jurisprudence, when sympathy or perceived "fairness" might suggest that one party or the other is entitled to relief, if the law does not allow it, the law prevails. That is the essence of American jurisprudence, the pre-eminence of the rule of law.

This concept was well explicated during the confirmation hearings of now-Chief Justice John Roberts of the United States Supreme Court. At one point in his Senate testimony, now-Chief Justice Roberts was asked whether his legal career, which was spent mostly in the representation of business interests, might show that he was inclined to favor the "big guy" versus the "little guy" in deciding disputes before him. Mr. Roberts answered that whether or not the "big guy" or "little guy" should win was not determined by their respective positions as "big" or "little," but rather, by application of the rule of law. (The specific question spoke about interpretation of the Constitution, but the same principle applies in interpreting statutes or common law, as FINRA arbitrators are called upon to do.) The comments of now-Chief Justice Roberts apply with equal force to the fine arbitrators who serve FINRA—they are simply "calling the balls and strikes" before them, not favoring one side or the other. No justification exists to suspend operation of the rule of law by eliminating dispositive motions.

4. Cost (The Litigation Tax).

The legal costs of resolving disputes is the final point supporting my opposition to the proposed rule amendments now before the SEC. If a claim which is not meritorious under the law must nonetheless proceed to a full evidentiary hearing, valuable resources will be expended on both sides of the case, which need not have been expended. Society as a whole is much worse off by removing a valuable, cost-effective tool from the hands of the FINRA arbitrators, that is, a pre-hearing dismissal after briefing, a hearing in which oral argument is heard, and any other procedures the arbitrators might choose to employ.

My own experience is that FINRA arbitrators have given each party all of the chances they desire or request in submitting evidence or argument on motions to dismiss. Dismissal of a non-meritorious case before the hearing saves the parties resources and therefore society as a whole benefits.

The "litigation tax" imposed upon society is increased if arbitrators cannot eliminate claims which are not supported under the rule of law. The proposal made to eliminate one tool in the toolbox of FINRA arbitrators will necessarily impose greater costs on society and participants in the FINRA arbitration process (which I call the "legal

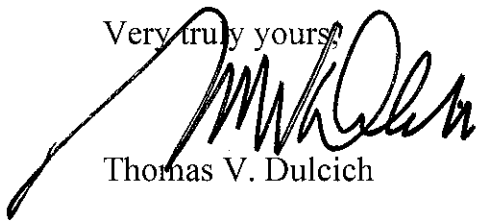
tax"), by requiring essentially all claims, whether legally meritorious or not, to proceed to the point of an evidentiary hearing on the merits. The time, trouble and expense to prepare for and attend a hearing, even if it is doomed under the applicable law to end at the conclusion of the claimant's case in chief, cannot be justified.

To some extent, my opposition to the rule is contrary to my own economic self-interest. If I am hired by a party to defend a claim and which turns out to be non-meritorious and subject to dismissal on legal grounds, my law firm earns fees only for the work done to achieve dismissal. If a dispositive motion is granted, those earned legal fees are necessarily less than those which would be earned by preparation for and participation in a full evidentiary hearing on all issues of the entire claim.

The costs associated with litigation are obvious to all. The United States Supreme Court recognized this in the recent case of *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1964-68, 167 L. Ed. 2d 929 (2007), in which the Court imposed a higher standard of pleading on persons making claims in federal court, in part because of the recognized significant burden and costs imposed upon parties resulting from litigation. Although one of the benefits of FINRA arbitration is the absence of depositions and formal discovery (the discovery being limited primarily to exchange of documents), the benefit of avoiding litigation costs imposed by meritless claims, as noted by the Supreme Court, remains true.

For all the reasons set forth above, I recommend that the SEC not adopt the proposed rule changes which would in essence eliminate dispositive motions prior to the holding of a full evidentiary hearing on all issues in the case. No sufficient cause has been provided to justify removal of this procedure. At a time when our society is moving forward to achieve efficiency and increase productivity in the pursuit of justice, this proposal represents a step backwards.

Very truly yours,



Thomas V. Dulcich

TVD:sms