

April 9, 2008

Ms. Nancy Morris
Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549

Re: Proposed Rule Change: SR-FINRA-2007-021
Amending Rules 12206 and 12504 of the Customer Code and Rules 13206
and 13504 of the Industry Code to Address Motions to Dismiss

Dear Ms. Morris:

I appreciate the opportunity to provide comments concerning the Proposed Rule referenced above.

As defense counsel for many years, I have represented industry clients in approximately 300 NASD arbitrations, more than 60 of which have been the defense of claims against clearing firm clients. Most of the claims – particularly most of the claims against clearing firm clients – did not go through the whole process of hearings and final awards. In many of the clearing firm cases, we were successful on motions to dismiss in advance of the hearing. Many of the successful motions were based upon well settled legal principles and incontestable facts: 1) NYSE Rule 382 which permits firms to allocate their responsibilities in written clearing agreements; 2) the terms of those agreements which usually allocate to the introducing firms all responsibilities for suitability, supervision of employees, etc., 3) the law that claims do not lie against clearing firms based on alleged breaches of duties which are exclusively within the

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responsibilities allocated to the introducing firms, and 4) the principle that where the law is clear and brought to the attention of panels, they should not disregard it.

Sometimes panels declined to grant our motions initially and deferred on them only to grant them later after discovery or at the hearing. In many other cases, claimants withdrew their claims (with or without prejudice) after we sent them our motion or even just a draft of it. In those cases where our motions to dismiss were denied and the cases went through discovery and hearings, we generally obtained dismissals at the end, but obviously after considerably more cost than if the motions had been granted. In defending these cases for clearing firm clients, we often found ourselves traveling to venues throughout the United States. Hearings are usually held where the introducing firm's customer resides. While the introducing firm may or may not have offices in that locale, the clearing firm generally did not. Thus, the cost of defense included the time and expense of the corporate representative, corporate witnesses and usually an expert joining us in whatever jurisdiction the claimants may have chosen. Those costs are on top of the costs of compliance with the Discovery Guide and other sometimes additional rounds of very burdensome tailored discovery demands.

It is because pre-hearing dismissal motions are such a vital tool to the efficient resolution of certain cases and of particular application to claims against clearing firms, that I strongly oppose the proposed rule in its present form. Pre-hearing motions – especially in the clearing firm context – are not frivolous and they are not dilatory tactics. They most often lead to efficient determinations which frequently weed out frivolous claims early on or at least limit and focus the issues for those cases which do proceed to hearings. They do not deprive claimants of

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vital evidentiary hearings at which material and disputed facts need to be resolved. They are instead the vehicles for a full and fair hearing of the dispositive issues which are very often not dependant on the resolution of contested or material facts. Rather than force a claimant *prove* the facts *alleged* – sometimes at great expense through the Q and A of many witnesses – these motions generally *assume* the truth of the facts alleged, and test the ultimate legal conclusions which determine the outcome as if the facts had all been proven.

Thus, while I applaud many of FINRA's stated objectives and endorse FINRA's condemnation of frivolous, duplicative and costly practices, as presently written, this Proposed Rule should not be approved.

I. General Comments

FINRA states that it wishes to balance the competing interests of a party's "right to a hearing in arbitration" verses the "limited circumstances" where it "would be unfair to require a party to proceed to a hearing." FINRA also wants to stamp out what it says is the intimidating and dilatory practice of filing frivolous and sometimes repetitive motions to dismiss.

We agree with these goals, but would encourage FINRA to go further and consider other rule changes to address them in a more balanced and generally applicable context. We believe that any actions by any party or the party's representative which are designed to increase costs or to derail the fair and efficient adjudication of the merits of claims should be forcefully deterred; not just inappropriate motions to dismiss and not just unprofessional tactics by some members of the defense bar. But, the Proposed Rule does not do this and it does not provide an appropriate balancing. Instead, it places an unfair burden on respondents – and only respondents – especially

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clearing firms, while providing claimants with a unjustified and truly inappropriate advantage of requiring firms to defend through the hearing stage claims that would be – and really should be – subject to dismissal (and which are most often dismissed at some stage). In discouraging motions, the Proposed Rule equates the right to “a hearing” with a right to an *evidentiary* hearing and, in doing so, hand-cuffs panels in how they may approach particular dispositive issues of law that can arise in any given case and how they may efficiently address cases where the core or material facts are not genuinely disputed. The Proposed Rule then goes too far in limiting to three the grounds upon which pre-hearing motions can be made even though other pure questions of law (such as *res judicata*, standing, statutes of limitation or a clear failure to assert a cognizable claim) may – and often do – warrant a pre-hearing disposition.

If implemented as drafted, these limitations and exacting standards will delay dismissal of frivolous and meritless claims and unnecessarily increase the costs of resolving such claims. This concern is sharpened where, in the clearing firm context, claimants often name the clearing firm simply because it cleared the trades (“its name is on the statements”), without any substantive factual allegations that the clearing firm actually engaged in any alleged misconduct itself. Indeed, the fallout caused by the Proposed Rule against meritorious motions has already begun.¹

¹ Since FINRA’s publication of the proposed rule, I have had several arguments in which adversaries have represented the proposal to be the operative standard and at least one panel member state that she understood that she was obliged to follow it.

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II. Motions To Dismiss Are Not Substitutes for Evidentiary Hearings and Are Appropriate Where No Evidentiary Hearing Is Needed

At the outset, it must be recognized that motions to dismiss – like motions for summary judgment – are not substitutes for evidentiary hearings and they do not take away from any party’s “right to be heard.” To the contrary, as the United States Supreme Court has held, dispositive motion practice is actually designed to enhance “the just, speedy and inexpensive determination of every action.” *See, Celotex Corp. v. Cartrett*, 417 U.S. 317 (1986).² Motions to dismiss are generally filed with the assumption that all of the material factual allegations of the Claim are true or that the core or material facts are incontestable and assess whether, because of some controlling issue of law, the claims fail as against the movant. Hearing the question of whether the *law* bars a claim does not deprive a claimant of an “opportunity” to *prove the facts* of his claim. To the contrary, it deems them all proven or shows them to be incontestable and gets right to the heart of a potentially dispositive legal issue. For that reason, there is no purpose served in filing an Answer to the claim or in conducting (what is now rather substantial and mandatory) discovery, much less requiring that Claimant’s “case in chief” be heard before considering the issues raised by a dismissal motion.³

² *See also* this author’s articles “The Case for Dismissing the Case: Why Dispositive Pre-hearing Motions Should Remain An Integral Part of the Arbitral Process, PLI Securities Arbitration (2007); and Pre Hearing Motions to Dismiss Securities Arbitration Claims, PLI Securities Arbitration (1999), hereafter referred to respectively as the “2007 PLI Article” and the “1999 PLI Article.”

³ We do not suggest that Statements of Claim must be assessed under any rigorous pleading requirements which might apply in state or federal courts or that claims must be dismissed if they fail to measure up to the particularity requirements of rules 9 or 12 of the Federal Rules of Civil Procedure. Nor do we suggest that Rule 56 (summary judgment) standards should apply *per se*. Rather, we believe that claimants’ opposing dismissal motions should have the leeway which the FINRA forum allows to their pleading and the right to present matters in opposition to the motion which may go beyond the four corners of the Claim. However, we also believe that where there has been a fundamentally fair opportunity to oppose the motion and it appears from the controlling law and/or uncontested or

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History has also shown that arbitration panels have the power, the flexibility and the proper arbitral skills to decipher when some pre-hearing motions should be granted and to deny others when they believe it appropriate to do so. Although neither the new FINRA Arbitration Code nor its predecessor specifically provided for motions to dismiss, panels were neither insensitive to the parties' rights, nor constrained to conduct useless but costly evidentiary hearings when none were needed.

Even without a specific rule, panels already require that the party opposing the motion receive "fundamental fairness" through an opportunity to be heard. Indeed, every panel before which I have ever presented a dismissal motion has permitted (if not *sua sponte* invited and scheduled) the submission of written briefs or other opposition and also asked the parties if they wished to have oral argument (telephonically or in person). Moreover, every court decision (reported and unreported) our research has found on this subject has held that arbitrators have the power to hear and grant pre-hearing dismissal motions so long as the opponent is afforded a fundamentally fair opportunity to be heard *on the motion*. See e.g., *Sheldon v. Vermonty*, 269 F.2d 1202, 1206 (10th Cir. 2001) (upholding confirmation of award based upon a pre-hearing dismissal) ("Although NASD's procedural rules do not specifically address whether an arbitration panel has the authority to dismiss facially deficient claims with prejudice based solely on the pleadings, there is no express prohibition against such a procedure. In addition, NASD's procedural rules expressly provide that '[t]he arbitrator(s) shall be empowered to award any relief that would be available in a court of law.' Logically, this broad grant of authority should

incontestable material facts that a valid claim does not lie, the panel must be free to dismiss the claim in advance of a hearing.

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include the authority to dismiss facially deficient claims with prejudice...”). *Tricome v. Success Trade Secs.*, No. 05-4746, 2006 U.S. Dist. LEXIS 33412 (E.D. Pa. May 25, 2006) (confirming award of dismissal based upon telephonic argument on motion); *Wise v. Wachovia Secs.*, No. 04 C 7438, 2005 U.S. Dist. LEXIS 13630 (N.D. Ill May 4, 2005), *aff’d*, 2006 U.S. App. LEXIS 13929 (7th Cir. June 7, 2006), (affirming the confirmation of an award where the panel had granted respondent’s motion for summary judgment based upon affidavits and telephone argument); *Miller v. National Financial f/k/a Seagal v. Cordtlandt*, NASD # 96-00706 (Cal. Sup. Ct. July 29, 1999) (pre-hearing dismissal granted in favor of clearing firm and confirmed in Order holding “The National Association of Securities Dealers, Inc. arbitration panel has the authority to grant a motion to dismiss and the arbitrators did not exceed their powers by dismissing the Statement of Claim in the underlying arbitration”).

In *Sheldon v. Vermonty*, *supra*, the Tenth Circuit confirmed an arbitration panel’s dismissal of a pre-hearing motion to dismiss with prejudice based solely on the parties’ pleadings, and held that the investor was provided with a fundamentally fair arbitration hearing since it had an opportunity to brief and argue the motion to dismiss. The court explained:

We...find that [the claimant] was provided with a fundamentally fair arbitration proceeding in that he was provided with the opportunity to fully brief and argue the motions to dismiss, and there is no indication that the arbitration panel engaged in any misconduct in conducting the arbitration proceeding. As we have previously recognized, “a fundamentally fair [arbitration] hearing requires only notice, opportunity to be heard and to present *relevant and material evidence* and argument before the decision makers...” In other words, if a party’s claims are facially deficient and the party therefore has no relevant or material evidence to present at an evidentiary hearing, the arbitration panel has full

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authority to dismiss the claims without permitting discovery or holding an evidentiary hearing.

269 F. 3d at 1207 (citations omitted) (emphasis in original). See also *Intercarbon Bermuda Ltd. v. Caltex Trading and Transport Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993) (arbitrators' Award confirmed where arbitrator based his decision on the documentary evidence and granted summary judgment); *Patton v. J.P. Morgan Chase & Co.*, 232 N.Y.L.J. 37 (Sup. Ct. N.Y. County 2004) (affirming award granting motion to dismiss without an evidentiary hearing); *Goldman, Sachs & Co. v. Patel*, 222 N.Y.L.J. 35, 11-12 (Sup. Ct. N.Y. County 1999) (award embodying pre-hearing dismissal of claims confirmed by the court, with court holding "the NASD panel has the power to decide a motion to dismiss a claim on legal grounds, without holding an evidentiary hearing"); *Gildston v. Fidelity Investments*, NASD #95-05993 (Oct. 1996), Index No. 12113/96 (Sup. Ct. N.Y. County) (wherein the court, without opinion, confirmed an NASD Arbitration Award which had dismissed a claim on a pre-hearing motion); *Schlessinger v. Rosenfeld, Meyer & Susman*, 40 Cal App. 4th 1096, 1104, 47 Cal. Rptr. 2d 650 (1995) (affirming confirmation of an arbitration award made as a summary judgment holding absent specific procedural provisions for such motions: "the arbitrator had implicit authority to Rule on such motions").

Some of these courts have also gone on to explain – which the proposed FINRA rule does not seem to appreciate – that the fundamental "right to be heard" on a claim does not always mean a right to present facts, to call witnesses, to cross examine or to present exhibits. There is no right "to costly full blown discovery [which] would not change the outcome and the claim could be decided on a pre-hearing motion." *Warren v. Tacher*, 114 F. Supp. 600, 602 (W.D. Ky.

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2000) (confirming NASD award granting pre-hearing dismissal of claims against clearing firm).

Nor should there be such a right. To require such not only tramples on the respondents' rights and all sense of balance in the process, but it intrudes on the inherent power of the arbitrators to determine, in a given case, what "facts" they may (or may not) need to hear in order to decide the controversy before them.

III. Clearing Firm Cases In Particular Are Often Appropriate For Dispositive Motions

While there are a number of legal issues which can ripen into appropriate pre-hearing dismissal motions in a given case, the law regarding the liability of clearing firms is among the most common.⁴

Over the years I have had many panels grant pre-hearing motions to dismiss claims against our clearing firm clients. I have never had a panel suggest that our pre-hearing dismissal applications were frivolous. *Miller v. National Financial* (NASD #96-00706) (confirmed by Superior Court of California, San Francisco July 29, 1999); *Lawrence and Patricia Taylor v. Pershing* (NASD #06-00914) (March 2007); *Inversiones Interven Ltd. v. National Financial* (NASD 05-06544) (July 2006) *Ray v. Sun Trust Securities* (NASD 03-07628) (June 2004); *Hoffman v. Fereydoune* (NASD 04-04302) (October 2005); *Voigtlander v. Wilson* (NASD 03-5994) (June 2004); *Shandy v. Cambridge Way* (NASD 02-02280) (January 2003) *Lupo v. Schroder* (NASD 99-01364) (July 2001); *Chafin v. Securities America* (NASD 99-04423)

⁴ Accurate reporting of the statistics on successful motions to dismiss is somewhat difficult because many times the ruling will be in the form of a letter and the case may continue against other parties. Sometimes the Award with respect to those other parties will reference the ruling on the motion, but if, as often happens, if the balance of the case settles, there may be no report of the ruling on the motion. However, from our research, it does appear that with the possible exception of eligibility defenses, motions by clearing firms account for the largest portion of successful motions. See e.g. 1999 PLI Article and awards collected in its Appendix.

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(August 2000) and *Beitner v. Herzog Heine Geduld* (NASD 96-04576) (Feb 1998) are just some examples of cases where panels have granted our pre-hearing motions to dismiss.⁵ In all of the cases, the Claimants had full and fair opportunities to present opposition, to submit briefs and to argue. In all of the cases, there were legal issues which we urged precluded the claims even if the panels accepted the Claimants' factual allegations as true. In all of the cases, there would have been substantial discovery followed by hearing time and costs if the motions were not considered until after the Claimants' cases in chief. The hearings in just these cases spanned locales in California, New York, Florida and Utah. Yet, all of these hearings (and all discovery leading up to them) would have been wasteful if the panels were required, as the Proposed Rule provides, to wait until the end of the Claimants' cases to hear and decide the dispositive legal issue.

⁵ When not dismissed pre-hearing, claims against clearing firms are often dismissed prior to the conclusion of the hearing. See, e.g., *Razouvaev v. Schroder, Wertheim & Co., Inc.*, NASD #96-04398 (Dec. 1997); *Pavlik v. Nationwide Sec. Corp.*, NASD #96-02786 (Sept. 1997) (clearing firm's motion to dismiss unauthorized trading, fraud and other claims denied without prejudice prior to the hearing and then granted during the course of the hearing and prior to its close); *Trenary v. City Sec. Inc.*, NASD #93,02771 (Aug. 1994) (clearing firm's motion to dismiss claims of fraud, RICO and negligence granted on motion during the hearing); *Robinson v. Rauscher Pierce Refsnes, Inc.*, NASD #92-00528 (Sept. 1993); *Sanchez v. Wall Street Clearing Co.*, NASD # 89-03077 (May 1991) (clearing firm's motion to dismiss claims of negligence, fraud and unauthorized trading granted prior to the commencement of testimony); *Goldberg v. Hopkins*, NASD #90-01612 (Feb. 1991) (clearing firm's motion to dismiss claims of misrepresentation and unauthorized trading granted at the hearing; and *Brom v. Creative Sec. Corp.*, NASD #87-00335 (Aug. 1989) (clearing firm's motion to dismiss claims of suitability and misrepresentation granted on the second day of the hearing). Of course, panels have also granted pre-hearing motions to dismiss on issues other than clearing firm liability. See, e.g., *Andrews v. Morgan Stanley DW Inc.*, 2006 NASD Arb. LEXIS 1882 (Dec. 20, 2006); *Henderson v. Jones*, 2005 NASD Arb. LEXIS 2377 (Oct. 7, 2005); *Brown v. Morgan Stanley Dean Witter, Inc.*, 2005 NASD Arb. LEXIS 1829 (July 26, 2005); *Dellorso v. Goodman*, 2003 NASD Arb. LEXIS 1815 (Oct. 21, 2003); *Corey v. Morgan Stanley DW Inc.*, 2003 NASD Arb. LEXIS 1697 (Sept. 22, 2003); *Tatano v. Goodman*, 2003 NASD Arb. LEXIS 1559 (Sept. 8, 2003); *Show v. Morgan*, 2002 NASD Arb. LEXIS 1101 (Nov. 12, 2002); *Holmen v. Gruntal & Co.*, 2000 NASD Arb. LEXIS 1217 (October 12, 2000); *Faulkner v. Taggart*, 2000 NASD Arb. LEXIS 1252 (Oct. 6, 2000); *Glazer v. First Union Brokerage Servs. Inc.*, 2000 NASD Arb. LEXIS 551 (June 7, 2000); *Worth v. The Equitable Life Assurance Soc'y of the United States*, 2000 NASD Arb. LEXIS 568 (June 1, 2000).

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With due respect to FINRA's efforts and its concerns about frivolous motions, it is no solace to suggest that these meritorious clearing firm cases are the exceptions – FINRA's proposal does not allow for such exceptions.⁶

I am currently working on several cases which illustrate the continuing need to permit these motions. One case involves an investor who filed a claim against his introducing broker and three of its principals complaining of unsuitable transactions. After the introducing broker filed for bankruptcy, the Claimant amended his claim. He did not change any of the substantive allegations, except to add my clearing firm client and three of its employees as respondents. The Claim alleges that the introducing firm's employees induced the Claimant to purchase unsuitable securities, engaged in unauthorized trading and that all respondents – including the clearing firm – “failed to supervise,” or failed to “review trading activities,” in allowing the trades.

Before making a motion to dismiss, we sent the clearing agreement to Claimant's counsel and outlined our position that the pertinent duties allegedly breached were all duties of the introducing firm, not those of our client the clearing firm. Only when we were ignored, did we serve our motion. At the ensuing IPHC, when the panel turned to scheduling a hearing on the motion, the Claimant argued that the motion should not be heard until after discovery – but Claimant had not even asked for any discovery (nor had the Claimant responded to the discovery requested of him although his response was long overdue). When ultimately directed to respond to the motion, the Claimant cited the panel to FINRA's instant proposal and contacted me to

⁶ It is also no solace to suggest – as some have already – that clearing firms can make a colorable argument that text in the proposal would allow for motions by clearing firms. There is no reason to have the additional hurdle or to have any doubt about whether these motions can be made especially when the tenor of the rule is full of “discouragement” and where costs and sanctions can be imposed so easily upon the movant.

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make a settlement demand – openly suggesting to me that it is better for my client to pay the settlement than to suffer the costs of discovery and then an out of town hearing. The claimant is not pro se. He is represented by counsel.

In another recent matter, the Claimant was an employee of an introducing broker which went out of business. The Claimant sought payment of commissions allegedly owed and filed an arbitration claim against the defunct introducing firm and also the clearing firm for failure to pay him certain commissions. The clearing firm moved to dismiss the claim pre-answer because it never employed the Claimant and had no agreement with him to pay any commissions. In opposing the motion, Claimant provided little response about why the clearing firm should be obliged to pay, but, citing the FINRA release about the Proposed Rule, urged that the Panel sanction the clearing firm for making the motion. In this case, the panel did grant the dismissal.

In another case, the Claimants assert that their broker put them in unsuitable investments, but they continued to invest with him as he moved from introducing firms A, then firm B, then C and finally to firm D. Although the Claimants allege that they lost \$1 million, they admit that their investments were down to about \$50,000 before they even opened an account at firm D. The four clearing firms for each of the firms were also named as respondents. My client is alleged to be liable for the \$1 million – and the only allegation against my client is that it “cleared” for firm D. I submit that, if true, no claim lies for that and a pre-hearing motion is most appropriate – (and here it is not even true - my client in fact did not even clear for that firm).

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And in yet another pending case, I represent a clearing firm against a suitability claim which I believe is barred by the statute of limitations. I have argued that a \$20 million loss over two months should put an individual investor on "inquiry notice" that the account was not invested in a "conservative" manner and start the running of the statute of limitations. I do not believe that the panel should be precluded from reaching that potentially dispositive issue until after exhaustive discovery and extended hearings in a distant forum.

Under the Proposed Rule, each of these cases would have to go through discovery and then hearings of claimants' cases, only then to likely be dismissed on the very same grounds that were set forth in the pre-hearing motions.

Clearly, motions to dismiss cases such as these are not frivolous or dilatory. Typically, in cases like these, it is the Claimant which fails to appreciate the limited duties of clearing firms or, if familiar with them, is simply casting a wide net hoping to hold up a "deep pocket." Yet, all too often these claims are filed by counsel who have considerable experience or who at least advertise that such claims are among their specialty. But regardless of why a meritless claim is made, the respondents should not be made to endure the costs of discovery and a hearing where they will serve no useful purpose and where it should not impact on the ultimate determination of the merits.

This unfairness is compounded when we also consider the now mandatory Discovery Guide presumed applicable in all cases even though in many clearing firm cases the "List Items" required to be produced by all respondents have no relationship to the limited duties of clearing firms. The Discovery Lists do not distinguish between the requests to the introducing and the

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clearing firms and the cost of responding can be significant (again with an enormous risk for non-compliance).

Just as FINRA urges that dispositive motions should not be means to delay arbitration proceedings; the “right to arbitration” or the “right to be heard” should not include the “right” to postpone the adjudication of the dispositive legal issues. Indeed, adherence to the Discovery Guide requirements in a non-motion environment would directly contradict the holding of the federal court in *Warren v. Tacher*, and give claimants “costly full blown discovery” [even though it] would not change the outcome and the claim could be decided on a pre hearing motion.”

IV. The Scope of Permissible Motions Under The Proposed Rule Is Too Narrow

One of our most serious objections to the Proposed Rule is its unduly narrow scope of the types of pre-hearing dismissal motions which would be allowed.⁷ For example, if a claimant lost an arbitration hearing and later sought to reassert the same claims, the Proposed Rule would not permit a pre-hearing motion to dismiss on res judicata grounds until after the close of the claimant’s direct case at an evidentiary hearing.⁸ Likewise even potentially iron clad defenses of statutes of limitation; absolute privilege (in U-5 defamation cases); lack of standing; lack of a private right of action (*e.g.* claims of margin violations) and the like are beyond the limited

⁷ The limited ground of a written release is actually illustrative of the imbalance in the Proposed Rule. If a majority of the panel found that a Claimant had executed a written release, but the third member while agreeing that the Claimant orally agreed to release the claim but felt that the writing was deficient in some respect, a pre-hearing dismissal motion would nonetheless have to be denied for lack of unanimity and costs would have to be assessed against the movant. But, if the panel unanimously found that a claim had been filed despite a prior written release and thereupon did dismiss the claim, the panel would *not* be obliged to assess the costs of the motion against the claimant and would *not* have available to it a specific rule on which to impose a sanction of attorneys’ fees against the Claimant.

⁸ Those who might believe such a scenario purely theoretical should read *Epstein v. Fidelity*, 239 A.D.2d 342 (2d Dep’t 1997) where, after prevailing at an NASD arbitration, we had to obtain a court order barring a second hearing of the same claim.

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grounds allowed under the Proposed Rule. So too are motions to dismiss by individuals – be they CEOs or Chairman – often named as respondents, because of little more than the fact that their name appears on the respondents’ web page.

For our purposes however, the most relevant omission is that the Proposed Rule does not permit for a motion to dismiss a claim as legally deficient. Whether called “failure to state a claim” or something else, the typical defense motions by clearing firms are not technical pleading traps. Rather, they most often point out that the core of the claim goes to the duties of the introducing firm and that the clearing firm did not have the duties which the claim asserts were breached. That is a basic proposition which often decides the case. Where the law is shown to be clear – as it is in this area – to preclude such motions to dismiss is to encourage adjudications which are contrary to the law and to require hearings in all cases, even when the Panel may agree that they serve no legitimate or meaningful purposes which might affect the outcome.

V. Generally Discouraging Motions to Dismiss in Arbitrations Is Unfair and Unwarranted

Generally discouraging motions to dismiss prior to the conclusion of a party’s case in chief is simply unwarranted. It fails to promote either efficiency or fairness and virtually assures that all cases will go to costly full blown discovery and hearing regardless of how the particular Panel would like to hear the governing issues. Yet, the principal reason to file a motion to dismiss is to prevent meritless and frivolous claims from proceeding and to achieve a cost *saving* result through a disposition which does not need an evidentiary hearing or discovery because the motion assumes the truth of the factual allegations of the Claim. Thus, stating at the outset of the

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Proposed Rule that dispositive motions are discouraged is an overstatement and sets a tone that counters the objectives of speed, efficiency and cost savings. That policy pronouncement will surely taint (and in my experience already have) arbitrators' willingness to consider and grant motions to dismiss. Indeed, we have already seen it being cited to Panels as basically the sole reason to deny motions. Such discouragement just provides claimants with an unfair leverage of holding the respondents hostage until after the claimant's case in chief is presented – while claimants and their counsel are not exposed to any real risk of costs or sanctions if the claims are shown to be frivolous or barred by some pure issue of law.

VI. The Timing and Structure of the Motion

First, the Proposed Rule requires a party who is going to make a motion to dismiss to do so in writing. We agree with that, but the Proposed Rule's requirement that an Answer be filed first is unnecessary and, at least in some cases, inappropriate. Sometimes a Claim may run on at great length and contain voluminous documents as exhibits. It may require exhaustive and costly investigative efforts in order to respond to the allegations accurately and with particularity. Yet, the legal issue may be clear, very narrow and dispositive such as a statute of limitations or a respondeat superior principle. It is unfair to have to spend the time and money to Answer a statement of claim that is devoid of legal merit. Respondents seeking early dismissal of unfounded claims should not - at least not in all cases - be burdened with pleading in response to a statement of claim where a motion to dismiss will entirely resolve the claims alleged against the particular party. At the very minimum, it should suffice if there is simply a provision that,

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absent good cause, consent or a Panel's directive, the filing of a dismissal motion does not, by itself, excuse or extend one's time to serve an Answer.

VII. Requirements of Full Panel Consideration and Unanimous Decisions

The Proposed Rule provides that motions to dismiss will be decided by a full panel of arbitrators. That is it should be. Equally, providing the non-moving party with a pre-hearing conference (either telephonically or in-person) before the panel rules on the motion to dismiss supplies an additional safeguard to ensure a full and fair hearing on the motion. Indeed, we believe that the rule should expressly permit the filing of a written response and allow a reply as well.

However, the requirement that to grant a motion to dismiss, the decision by the arbitration panel must be *unanimous* is unnecessary and unfair. Decisions by the panel after a full hearing need not be unanimous. To require unanimity for a motion to dismiss to be granted provides the non-moving party – which should have the burden of proof on its claims – with an inequitable advantage that their claim will survive a motion not because the claim has merit, but just because there was a lack of unanimity. Since the denial of a motion to dismiss would not require that the Panel provide a written explanation, it gives any one arbitrator a secret veto right. Requiring a unanimous decision to grant a motion to dismiss does not advance the goal of giving a claimant a “day in court”, but just alters the balance of the process against the moving party. FINRA explains that because such decisions are “an integral part of the arbitration process, all panel members should agree to dismiss the claim, otherwise the case should continue,” but FINRA's justification is unpersuasive. Just as an Award is also an “integral” part of the process,

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there is no reasonable basis to require that a decision on a motion to be unanimous when no such heightened requirement is applied to a final Award by an arbitration panel after a hearing.

VIII. Refilings Should Require Leave of the Panel

The Proposed Rule mandates that where a party has filed a motion to dismiss and the motion has been denied, the party must specifically seek and obtain panel permission to re-file a denied motion. We do not have any substantial disagreement with this. In fact, we have seen many panels grant leave in an initial ruling by denying or deferring a motion to dismiss “without prejudice to renewal after discovery is complete” or upon some other event. Clearly, just refileing the same motion after its denial would appear both futile and an invitation to feel the ire of a panel. But, if because of something learned in discovery or because of some material and dispositive facts which have otherwise come to light, or because of a change in the law, there is a legitimate reason to revisit the issue of a pre-hearing dismissal, it does not appear unreasonable to require leave of the Panel to submit it. Such a requirement appears comparable to the practice in many jurisdictions for motions for leave to “rehear” or “reargue” in the courts.

IX. The Rule Should Not Require an Award of Costs with a Failed Motions to Dismiss

The Proposed Rule mandates an award of costs against the moving party where the motion to dismiss is unsuccessful. This again is one sided and unfair. There is no provision that when dismissal motions are granted, the Claimant *must* pay the costs and we do not suggest that there should be. In both cases – just as in the assessment of costs which takes place at the end of a hearing - there are too many variables. The issue of assessment of costs should remain in the panel’s discretion, for it is they who can best consider all the submissions and what impact they

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had on the process. If, for example, the motion is denied because of a lack of unanimity of the panel or because the claimant's reply offers a legitimate basis to proceed which may not have been alleged in the Claim, the movant should not automatically suffer a penalty for having sought the relief in the first instance. Similarly, sometimes a panel may deny a motion in whole or in part, but then narrow the claims or proceedings which follow. In sum, flexibility on the assessment of costs is needed and this provision does not permit for it.

X. The Rule Should Not Require an Award of Costs and Attorneys' Fees if a Motion is Deemed Frivolous

This component is again one-sided and unfair. It is also intimidating and will likely deter parties from filing meritorious motions to dismiss for fear of incurring sanctions and costs on a denial. It will also spawn more motion practice and court litigation over the sanctions themselves. FINRA suggests that this proposed change will deter parties from filing frivolous motions, but, if the goal is truly to deter frivolous conduct, then dismissal motions should not be singled out. Rather there should be a *general* Rule provision applicable to all parties and all frivolous conduct. There is no basis to require a one-sided sanction, where claimants who file frivolous claims against the industry are not similarly penalized or at risk.

If FINRA is going to promote a fair and efficient process for securities arbitrations, that process needs to be not just *perceived* as a fair forum for dispute resolution, but it first needs to *be* a fair and balanced forum. That requires that the rules for the process be evenhanded.

Ms. Nancy Morris

April 9, 2008

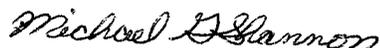
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Conclusion

As we do agree with some of FINRA's objectives and parts of its proposal, we have drafted the attached suggested modified proposed rule. We believe that this version is more balanced and would better achieve the legitimate objectives of the proposal while preserving the efficiencies of motions to dismiss in clearly appropriate cases.

We sincerely appreciate the opportunity to provide you with these comments and remain available to respond to any questions about our position.

Very truly yours,



Michael G. Shannon

Motions to Dismiss – Suggested Revisions for Rule 12504**a) Motions to Dismiss Prior to Conclusion of Case in Chief**

(1) Motions to dismiss a claim prior to the conclusion of a party's case in chief must be made in writing and, unless the movant presents good cause, the parties consent or the Panel or Chairperson shall have permitted otherwise, the making of a motion to dismiss shall not postpone the movant's time to serve its answer or other responsive pleading.

(2) Motions to dismiss may be contained in the same document as the party's Answer or responsive pleading.

(3) Where a motion to dismiss is made prior to an initial pre-hearing conference, the scheduling of the hearing of the motion shall take place at the IPHC and the non-movant shall not be required to respond to the motion prior thereto. In scheduling the hearing of the motion, the panel (i) must permit the non-movant at least 15 business days for the service of a written response and (ii) must provide an opportunity for the movant and non-movant to present oral argument after all papers have been received. The panel may direct that any oral argument be telephonic, may permit the movant to submit reply papers after receipt of the non-movant's opposition and may allow further submissions following oral argument. Unless the parties agree or the panel directs otherwise or the scheduling has been set at an IPHC, any subsequent motions under this rule must be served at least 60 days before a scheduled hearing and the on-movant shall have 30 days to respond to the motion.

(4) Motions under the rule will be decided by the full panel.

(5) The panel may not grant a motion under this rule unless an in person or telephonic hearing on the motion is held or is waived by the non-moving party. The hearing or argument shall be recorded as set forth in Rule 12606 and the record shall be made available to the parties. Where a motion to dismiss is granted, the order or ruling shall state whether oral argument was had and, if not, shall state whether it was waived.

(6) The panel may not grant a motion to dismiss a party or claim or part thereof unless the panel determines that even if the material factual allegations of the claims which is the subject motion are accepted as true for purposes of the motion, the claim is not legally cognizable, is invalid or is otherwise without merit or precluded because of a dispositive issue of law or because of dispositive material facts neither of which require an evidentiary hearing or a decision thereon. These shall include such dispositive issues as res judicata, settlement, release, statute of limitations, eligibility, lack of standing, limited duties of a party (such as a clearing firm), failure to allege facts necessary to the basic elements central to a viable claim, or where the undisputed facts establish that the movant was not associated with or personally involved in the account(s), securities or conduct upon which the claim is based.

(7) The panel's ruling on a motion may be by majority vote and must be in writing. The panel in its discretion may provide a written explanation of its ruling and if requested to do so in advance and in writing by either the movant or non-movant, must do so.

(8) If a panel denies a motion under the rule, the movant may not refile a dismissal motion on the same grounds unless it includes facts or legal issues not previously available when the initial motion was filed and only then upon leave of the panel or Chairman of the panel. Request for such leave shall be in writing and on notice to all parties. A panel may also defer rulings on motions for later decision and/or deny motions with the right to represent them at a later stage. Refiling a denied motion to dismiss without leave of the panel shall be grounds upon which a panel may assess costs and sanctions against the movant.

b) Motions to Dismiss After Conclusion of Case in Chief

A motion to dismiss after the conclusion of a party's case in chief is not subject to the procedures set forth in subparagraph (a).

Separate Sanction Rule

If a panel determines that a party has made any frivolous filings or arguments in any pleading, brief, motion or other presentment (including motions to dismiss and any responses thereto) or has engaged in other conduct personally or through the party's counsel or representative and finds that the actions were intended to and did mislead or delay or increase the costs of the process, the panel may assess appropriate sanctions and costs – including forum fees and reasonable attorneys' fees upon that party and/or its counsel.