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

Re: SR-NASD-2006-088
Proposed NASD Rule 12504–Dispositive Motions

Dear Ms. Morris:

I represent investors in NASD arbitrations exclusively. I started doing this work in 2003 and have handled over 100 cases in that time period. Prior to undertaking this practice, I served as Utah Attorney General for eight years.

My view is that motions to dismiss in NASD arbitration should be considered only after the evidentiary hearing for the simple reason that it is only then that the panel has heard a complete presentation of the facts and heard from the witnesses whose credibility is always at issue. There is simply no reason to dismiss any part of a claim prior to the hearing. The Respondent loses nothing from this approach: it has a full opportunity at hearing to argue any defense it has. In contrast, the Claimant loses a great deal if part or all of the claim is prematurely discarded before it has the right to present evidence and witnesses.

What is the harm to Respondent of the panel hearing the whole claim and all the defenses in the context of the evidence? The argument Respondents make that it would be unfair to require them to appear at a hearing when there is no possibility of the claimant prevailing is illogical. Claimants have no motivation to endure the cost and risk of presenting a hopeless claim. The proposed rule allowing motions to dismiss is a solution looking for a problem.

Requiring the parties to appear at hearing is not a burden: it is the promise of NASD arbitration. The Claimant may win or lose, but the hearing is a right which should not be diminished in any way. After all, Claimants gave up a great deal for that right: a sworn and legally trained judge, a jury, depositions, and the right to appeal. If NASD arbitration is going to infringe on the right to a hearing, then it is time to examine the fairness and enforceability of the Respondents' arbitration clauses. Respondents force those clauses on customers who have no choice. At some point, the NASD must take responsibility for that inequity and make the promise of a hearing on all claims a reality. The time to do that is now, with the proposed Rule.

The Rule and comment should state: "The parties' entitlement to a hearing on all claims and defenses is a right in NASD arbitration and may not be abridged by motions acceptable in court litigation such as motions based on statutory time limits, pleading sufficiency, and what a party argues are undisputed facts prior to an evidentiary hearing. By contrast, if the Respondent can demonstrate fraud in the Statement of Claim in naming the wrong Respondent or that the claim has already been resolved by settlement, the arbitrators may consider such motions because those instances are examples of extraordinary circumstances where it may be unfair to require the named Respondent to appear at hearing."

Thank you for your consideration.

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