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ADMITTED TO PRACTICE BEFORE THE
UNITED STATES SUPREME COURT
MEMBER FLORIDA BAR, NELA, PIABA

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October 5, 2006

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

Re: SR-NASD-2006-088

Dear Ms. Morris:

I am an attorney who has represented public investors in NASD arbitration cases for more than 15 years, and served as an NASD arbitrator for nearly that long. I am a member of the board of PIABA, and support PIABA's official comment regarding the above proposed rule regarding motions to dismiss. I write individually, however, to call your attention to additional problems with the new rule as proposed by the NASD which have not previously been mentioned in any other comment: What happens when the panel denies a motion to dismiss after a telephonic prehearing conference by a 2-1 decision in which one arbitrator writes a reasoned dissent?

This happened in one of my NASD arbitration cases earlier this year. The brokerage firm moved to dismiss my client's case based only upon written affidavits and excerpts of testimony in another case. The panel, in my view, "jumped the gun," and agreed to consider the motion to dismiss prior to the scheduled final evidentiary hearing, even though the proposed NASD rule allowing motions to dismiss in "extraordinary circumstances" had not yet been finally approved by the SEC. The panel set a special telephonic conference for "unlimited" oral argument on the motion to dismiss.

During the lengthy oral argument hearing, I argued that a critical witness who could possibly dispute the facts stated in the brokerage firm's affidavits was unavailable to my client because he could not be deposed or required to testify under oath at a prehearing telephonic conference. I also protested that documents which could help to explain my client's prior testimony were unavailable because the panel had not yet ruled upon my pending motion to compel. Nevertheless, the panel failed to summarily deny the motion, as it ought to have done under the existing rules, and instead took the question under advisement.

After many months of deliberation, during which time the panel refused to consider my outstanding motion to compel discovery, the panel finally issued a lengthy, detailed and scholarly order denying the motion to dismiss without prejudice, but with one panelist dissenting in a separate written opinion. A copy of this very unusual and perhaps unique NASD arbitration decision is attached hereto and incorporated herein by reference. The decision notes a number of important reasons why motions to dismiss are problematic in the context of NASD arbitration. Among others, the panel notes that extensive prehearing motion practice in SRO arbitrations could seriously impede retention and recruitment of panel members, because of the "countless hours" the panel had to devote to considering and ruling upon the motion to dismiss in this case. The panel left unstated the important consideration that under present NASD rules, analysts are not entitled to extra compensation for devoting such extraordinary extra time to a prehearing motion. But given the panel's description of its process, it is obvious that were the rules to grant such additional compensation to panelists in such cases, the ultimate cost to be borne by the parties would become outrageously exorbitant.

The panels prehearing order left my client facing a final arbitration hearing before a panel whose third member had already declared, in effect, that no possible testimony or evidence to be adduced at the final hearing would be adequate to persuade him to rule favorably to my client. Yet the NASD's arbitration rules lack a clear basis for removing such an arbitrator under these circumstances.

Fortunately, the arbitrator in question voluntarily recused himself. However, this incident shows what has already begun to happen in NASD arbitration merely because a proposed rule was published. The brokerage firms are beginning to file motions to dismiss in virtually every case, and frequently, arbitration panels are giving serious consideration to these motions, however weak they may be. Even when the ultimate result is favorable to the claimant, there can be huge and greatly prejudicial time and expense involved in fighting the motions. In the case just described, the case has been delayed for at least six months and probably a full year due to the mere fact that the panel even agreed to consider the motion. The claimant also incurred thousands of dollars in additional attorneys fees related to his counsel's efforts to contest the motion, and both parties are now faced with a "tainted" panel, two of whom have heard and rejected one side's arguments before the final evidentiary hearing has even begun. The third panelist will be forced to join a panel that has already "taken sides," and even written a detailed opinion as to their reasons.

All of this goes to the very core of the difference between arbitration and litigation: judicial oversight to correct "mere error" is almost totally lacking in arbitration. In this instance, it was fortunate that two extraordinarily competent and dedicated panelists ultimately reached the correct result. However, based upon the nature of the NASD recruitment and training process, the 2-1 vote could easily have gone the other way, leaving my client with no possible avenue for relief. Courts have repeatedly held that even when panels rule based upon a clearly erroneous understanding of the law, their awards are not to be disturbed. In court, an erroneous interlocutory ruling can sometimes be corrected by an interlocutory appeal. If not, it can be corrected on final

appeal. In arbitration, there is no appeal. No court can vacate an award except on the extraordinarily narrow grounds set forth in the Arbitration Act.

When the Supreme Court approved SRO arbitration in the McMahon case back in 1988, it did so in the belief that arbitration offered a fair trade-off. But as my client's case demonstrates, just the possibility of a future rule allowing motions to dismiss in "extraordinary circumstances" has already been enough to open the floodgates. This year, I have faced motions to dismiss in virtually every case. The brokerage firms regard every case as one of "extraordinary circumstances." The mere pendency of the proposed rule has already caused brokerage firms and arbitration panels alike to adopt certain aspects of litigation process without the essential concomitant protections offered by court procedures and rights of appeal.

As the scholarly arbitration award clearly describes, NASD arbitrators are not well suited to properly consider and decide prehearing dispositive motions based upon any type of legal argument. If this proposed rule were actually to be approved by the SEC and adopted without at least the limited changes proposed in the official PIABA comment, the entire concept of SRO arbitration would soon become untenable. Drastic Congressional action would be required to protect the interests of the public investor against the abuses of the brokerage firm community and the clear reluctance of many panels to stop these abuses on their own accord.

Thank you for your anticipated careful consideration of these and other comments made by those of us who labor daily in the trenches of the securities arbitration process. Once again, I sincerely hope you will carefully read and consider the attached decision, since it presents an extraordinarily valuable and possibly unique view into the issue of deciding motions to dismiss from the perspective of a highly competent and dedicated panel itself.

Very Truly Yours,

James D. Keeney

James D. Keeney
JAMES D. KEENEY, P.A.

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September 12, 2006

James D. Keeney, Esq.
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100 Wallace Ave
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Subject: NASD Dispute Resolution Arbitration Number 05-01455
Joseph Tortoretti v. Bear Stearns & Company, Inc.

Dear Mr. Keeney:

The Panel reviewed all submissions in connection with Respondent's Motion to Dismiss dated March 28, 2006 and issued the enclosed ruling and Order dated September 8, 2006.

Please contact me should you have any questions.

Very truly yours,

Matthew Schwartz
Case Administrator

MS3:JLC:LC58I
idr:06/06
Enclosures

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NATIONAL ASSOCIATION OF SECURITIES DEALERS – DISPUTE RESOLUTION ("NASD-DR")

In the Matter of Arbitration between JOSEPH TORTORETTI, Claimant, vs. BEAR, STEARNS & CO., INC., Respondent.	NASD-DR Case #05-1455

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RULING AND ORDER OF THE ARBITRATION PANEL ("Panel") CONCERNING RESPONDENT'S MOTION TO DISMISS ("Order")

Introduction and Background. This Ruling and Order of the Arbitration Panel ("Panel") concerning Respondent's Motion to Dismiss ("Order") is respectfully submitted. As background, in its 2005 Motion to Dismiss and Reply (sometimes "Motion to Dismiss" or "Motion"), Respondent Bear, Stearns & Co., Inc. ("Respondent") urged this Panel to dismiss Claimant Joseph Tortoretti's ("Claimant's") claims in their entirety. Both then and throughout, including in his Opposition to the Motion to Dismiss, Claimant most vigorously opposed such Motion.

Very Brief Summary of Claimant's Statement of Claim. Claimant owned 137,200 shares of Intermedia Communications, Inc. ("Intermedia") stock ("stock") then-worth millions of dollars. This stock had then-received a dramatic increase in value, but later likewise experienced a dramatic decrease. Claimant's Statement of Claim, p. 6 asserted "at no time" did Respondent inform him of available hedging strategies; such strategies would have managed and limited possible portfolio and market risks concerning his substantial holdings in this stock. Claimant's Statement of Claim, p. 6 also alleged he would have utilized hedging strategies but-for Respondent's failure and/or refusal to "give( ) [him] suitable advice and recommend an appropriate strategy".

Respondent denied all such allegations, and asserted numerous defenses, including statute of limitations.

Some of the Subsequent Pleadings. Thereafter, on March 28, 2006, Respondent filed a Supplemental Memorandum in Further Support of Bear, Stearns & Co. Inc.'s Motion to Dismiss ("Supplemental Memorandum"), reaffirming its contentions that Claimant's claims must be dismissed. Respondent again asserted that, in essence, Claimant attended a February 14, 2000 meeting in NY at Respondent's office, and while at such meeting, received a presentation and also a document about "Hedging & Monetization Strategies on Intermedia Communications Inc. ('ICIX') Shares" ("Hedging Presentation"). Respondent further contends, despite its providing the Hedging Presentation, Claimant elected to continue to hold such stock, not "collaring" it. Attached to and in support of its Supplemental Memorandum were:

1. Exhibit A, a copy of an NYSE Arbitration Award in *Joseph Tortoretti* (Claimant herein) *v. Morgan Stanley DW, Inc.*, 2002-011106 (Nov. 10, 2005 – Tampa, FL) (a 5-day Hearing) (That NYSE Arbitration Panel dismissed all Claimant's claims; Claimant was then-represented by his Counsel herein);

2. Exhibit B, a copy of some of the testimony of Claimant in such NYSE Arbitration; and

3. Exhibit C, a copy of some of the testimony in such NYSE Arbitration of Bruce Jaeger, a Managing Director Principal – Structured Equity Products at Respondent, servicing the high net-worth client base (In such NYSE Arbitration, he was a subpoenaed-Witness).

Immediately thereafter filing such Supplemental Memorandum, Respondent also filed a supporting Affidavit from Mr. Jaeger.

Claimant's Reply to Supplemental Motion. On April 7, 2006, Claimant filed his Response to Bear, Stearn's Supplemental Memorandum in Further Support of its Motion to Dismiss ("Claimant's Response"). In Claimant's Response, Claimant submitted several arguments opposing the Panel's granting of Respondent's Motion to Dismiss, including:

1. Claimant needed to subpoena a Witness who, at the Hearing, would refute Bruce Jaeger's testimony of Respondent's recommending a "collar" at the February 14, 2000 NY meeting;

2. The "collar" illustration in the Hedging Presentation was prepared for another and also larger Intermedia Stockholder also in attendance at the meeting;

3. Claimant did not own enough Intermedia stock to meet Respondent's $5-million guideline for alternative "collar" strategies;

4. Respondent advised that another corporation might soon acquire Intermedia stock; and

5. Claimant's statement

> to the effect that (Claimant) did not want to hedge Intermedia on February 14, 2000 was ripped out of content. (Claimant) may have allowed himself to fall victim to a clever cross-examination that put words into his mouth at the end of a long series of questions regarding the issues in a different case.... Please see Claimant's Reply, unnumbered p. 4, item d.

In summary, Claimant countered Respondent's Supplemental Memorandum and the underlying Motion to Dismiss by asserting:

> [T]here is a factual dispute as to whether or not Mr. Jaeger or anyone else at (Respondent) ever recommended that (Claimant) could or should hedge or collar his Intermedia stock at Respondent. Id. at unnumbered p. 5.

Claimant asserts this to be a "serious factual dispute" mandating a Hearing where he "can subpoena witnesses", and their and the Parties' respective demeanor can be observed by the Panel. Id.

Additionally, Claimant cited and attached a recent NASD's SEC-filing stating "Generally, NASD believes that parties have the right to a hearing in arbitration". Id. Please see also Claimant's Response, attached Exhibit A, File No. SR-NASD-2003-158.

Panel Review. Oral Arguments. Along with all the above-mentioned documents, the Panel thoroughly reviewed and analyzed the File herein *in toto*, including all attachments. For the sake of brevity, other pleadings and documents may not be referenced in this Order; however, the Parties and their respective Counsel can rest assured all of such were indeed read and studied by the Panel. Also, due to the importance of the pending Motion to Dismiss, the Panel scheduled and held Oral Arguments concerning it, also allowing Counsel an unlimited amount of time to respectfully-submit argument, rebuttal, etc.

Brief Summary of the Panel's Arbitral and Legal Analysis. To the majority of this Panel ("Majority"), summary judgment is appropriate only if and when there is **no** genuine

issue of **any** material fact, and the moving party is entitled to judgment as a matter of law. See generally FRCP 56 (c). Material facts are those facts identified by the controlling law as the essential elements of the claims asserted by the Parties. Thus, the materiality of a fact depends on whether the existence of that fact could cause a reasonable arbitrator to reach a different outcome. Anderson v. Liberty Lobby, Inc., 477 US 242, 248 (1986); Cox v. County of Prince William, 249 F.2d 295, 299 (4th Cir. 2001). A genuine issue of material fact exists if the evidence is sufficient for a reasonable arbitrator to find in favor of the non-moving party. Anderson, 477 at 248. Inferences reasonably to be drawn are to be made in the light most favorable to the non-moving party. See FRCP 56 (e). Summary judgment requires a determination of the sufficiency of the evidence, not a weighing of the evidence. Anderson, 477 US at 249.

Applicable NASD-DR Rules. As urged by Claimant's Counsel in his Response, unnumbered p. 5, last ¶, as a general rule, NASD-DR parties have a right to an NASD-DR arbitration hearing. However, such is not an absolute right. As urged by Respondent's Counsel, in its Supplemental Memorandum, p. 3, ¶1, 1st sentences, the Panel has authority to pre-hearing grant a dismissal, so long as fundamental fairness and due process are observed; however, a pre-hearing dismissal would require extraordinary circumstances. These extraordinary-circumstance exceptions to the general rule are strongly disfavored by the Panel, due, in part, to there being a more abbreviated discovery-process in NASD-DR arbitrations than Federal and State

processes usually offer. Further, a "battle of paper" (extensive and costly motion-practice) has the potential of totally defeating the advantages of arbitration.

In such regard, the Panel takes arbitral notice of very recently NASD-proposed SR-NASD-2006-088 (July 21, 2006). Such NASD SEC-filing shares "substantial controversy" was engendered as to what constitutes "extraordinary circumstances" (SR-NASD-2006-088 at p. 7), and further that NASD was "unable to obtain a consensus among its constituents as to what constitutes 'extraordinary circumstances' ". (Id. at p. 8). While the foregoing cited NASD SEC-filing is not specifically applicable herein, the Panel cites such to illustrate that pre-hearing motions to dismiss, and the extraordinary-circumstance exception to the general rule, are areas of "substantial controversy" and also areas about which reasonable minds could disagree.

At this juncture, considering all the facts and circumstances, and after conferring all benefit of doubt and inferences to Claimant, the issue is not whether Claimant's case is weak or strong; rather, the issue is whether Claimant has a case upon which relief might possibly be granted.

* Theories of Liability and Defenses. In an arbitration, a claimant is permitted to modify, amend, etc. his theories of liability without losing his case entirely for having so done. Additionally, in SRO arbitrations, loss-causation issues sometimes involve alleged commission(s)/omission(s) by more than one party, and further, loss-causation issues

sometimes include principles of contributory/comparative negligence, equity, and so forth.

Due-Process Opportunity(ies). The Majority's denying of the pending Motion allows Claimant the opportunity(ies) to fully state his contentions "on the record", including the opportunity to subpoena and present the purported full testimony of the unnamed and unknown-to-the-Panel Witness who would allegedly refute Mr. Jaeger's testimony in part or *in toto*.

Wealth Should Not Be a Factor. Furthermore, whether Claimant is a "rich investor" is not relevant to the pending Motion. (Similarly, and likewise, whether Respondent is a "rich [brokerage firm]" is not relevant, either.) Justice, fairness, and due process apply to all, be they Claimant or Respondent, be they King Midas or someone poorer than the proverbial churchmouse – in fact, poorer than a mouse who never went to church.

Prior NYSE Arbitration. Testimony upon which the Dissent so heavily relies occurred in a different forum (a NYSE arbitration), with a different respondent, before a different panel, without any Panel Member's being then-present to observe and make credibility assessments and determinations; yet, ostensibly, the Dissent makes such assessments and determinations now. Further, the Majority fully understands how, and has seen, Witnesses make inadvertent mistakes in their respective testimony, especially concerning collateral/impeachment matters, particularly after being "on the stand" for a while and possibly getting tired. As the mistaken testimony involved a collateral/

impeachment matter, that attorney had to then make a strategic trial-decision "on the spot" whether to conduct examination/re-examination on such matter, and sometimes, for (a) *bona fide* reason(s), the attorney elected not to so examine/re-examine.

In Arbitration, Not a Courthouse. This is a NASD-DR Arbitration, not a judicial matter pending in a courthouse. Extensive pre-Hearing motion-practice, including motions to dismiss, for summary judgment, for partial summary judgment, etc., is often ill-suited to an arbitral process. The Majority truly understands zealous and aggressive client-advocacy and representation; however, extensive motion-practice often denies parties the benefits of the bargain, thus eradicating the many benefits arbitration offers over a judicial, courthouse process. Exhibits B and C to pending Motion are transcribed testimony from a prior NYSE arbitration; such transcription is ostensibly not cost-free. Before discovery has concluded and when defending against a motion to dismiss, parties, including some *Pro Se's*, might be unable to afford such transcription.

One of the Many Potential Negative Effects of Extensive Pre-Hearing Motion-Practice in Arbitration. As reflected in NASD-proposed SR-NASD 2006-088 (July 21, 2006), there are many potential negative effects of extensive pre-Hearing motion-practice in NASD-DR arbitrations, and rather than repeating all of such, for the sake of brevity, the Majority refers you to that document and the underlying comments received. Countless Stakeholders in the respective SRO's' (plural) arbitral process bemoan how arbitrations are becoming ever-more like judicial court cases. This trend is troubling because, among other reasons, many arbitrators do not possess, nor have access to, helpful, if

not necessary: staff; equipment; software, especially word-processing; law libraries to readily obtain copies of persuasive authorities (a) party(ies) might cite; file-storage; etc. As many Panel Members serve due to their respective senses of civic duty, extensive pre-Hearing motion-practice in SRO arbitrations could seriously impede retention and recruitment of Panel Members. This Panel has devoted countless hours to: the pending Motion and briefs, including performing extensive File-review and analysis; related Oral Arguments; subsequent Panel debate and deliberation; the Chairperson's drafting and revising 43 pages (yes, you read that number correctly – 43 pages) to submit to the Panel; and so forth - - consuming in total many more Arbitrator-hours pre-Hearing than would reasonably be anticipated in any SRO Arbitration. This Panel devoted and expended those countless hours, because it was our duty and also was necessary in rendering our professional services, i.e., was the kind of thoughtful, thorough, and intense Panel-decisionmaking we would want if we were a party herein.

"Slippery-Slope". In summary, the Majority believes if the Dissent were to be adopted, it would be not only incorrect, especially at this point in the Arbitration, but also would help cause, if not actively encourage, extensive pre-Hearing motion-practice in future SRO arbitrations. The course of action urged by the Dissent for the Panel to take at this juncture in the Arbitration would constitute indeed a "slippery-slope" herein and also for future SRO arbitrations - - all the resulting and attendant increased costs, delays, etc. without the corresponding due-process protections for the Parties (plural) herein. It is most important for Panel Members not only to reach the correct answer,

but also to reach such answer at the correct juncture, too. Due to these and all the foregoing cited reasons, the Majority must respectfully disagree with the Dissent.

Thorough and Reasoned Order, and Dissent. Because the Panel desired a thorough and reasoned Order, and Dissent, the Chairperson had to prepare both. While admittedly a most awkward situation, this was necessary, as the Chairperson is the only Panel Member with the helpful/necessary and available secretarial staff, equipment, software (including word-processing capabilities), etc., much less having all of such timely and readily available, and also available at no additional cost ($0) to the Parties. The Chairperson prepared in draft and then edited and revised 43 total pages of documents; these drafts were thereafter submitted to the Panel Members for review and consideration, and possible approval. To expedite matters, the Chairperson even offered to send such drafts via overnight-delivery and to personally absorb such related costs, i.e., no cost ($0) to the Parties. The Chairperson also shared with the Dissent of the Chairperson's willingness to timely and faithfully make any additions, deletions, and other corrections and changes he might wish, and to thereafter submit the edited and revised re-draft back to him for further review and analysis, and possible approval.

Panel Ruling and Order. Exercising caution, and of course always desiring to assure fundamental fairness and due process, the Panel thus:

1. DENIES the pending Motion to Dismiss, which Motion Respondent of course may resubmit and/or re-motion at a later time, if it so wishes; and

2. ORDERS this matter to proceed to Hearing as previously scheduled.

Signed this 8 day of Sept, 2006

For the Arbitration Panel ("Panel") by:

James Boyer

James Boyer

Kitty Grubb

Kitty Grubb, Chairperson

C: NASD PRO ORDER #2 in Tortoretti

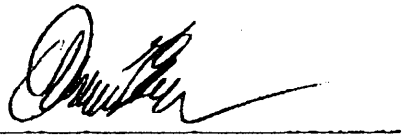
Dissent. I must respectfully disagree with the Majority and issue this Dissent.

Prior Arbitration Proceeding Against Another Brokerage. As noted previously, Claimant filed NYSE Arbitration #2002-011106 against Morgan Stanley, the brokerage receiving his accounts after he left Respondent. At that Arbitration Hearing, there was a court reporter taking transcription of testimony, some of which testimony was cited in the Parties' (plural) pleadings and also attached to Respondent's Supplemental Memorandum. In that NYSE Arbitration, Claimant admitted attending a Valentines' Day meeting at Respondent's headquarters in NY. Please see Respondent's Supplemental Memorandum, Exhibit B, at p. 808, l. 19-23; 941, l. 23 - 942, l. 8. Respondent contends, and the attached Exhibit-B excerpt appears to confirm, that advice was given concerning hedging and monetization strategies for stock. Id. at p. 926, l. 18-23; p. 931, l. 4 - 932, l. 4. Claimant did not wish to "collar" his Intermedia stock because, based on the possible acquisition thereof by another corporation, and/or for other reasons, he believed the stock was going to go higher in value. Id. at p. 814, l. 4-8; p. 817, l. 17-22; and p. 941, l. 23 - 942, l. 8. In such regard, Claimant had "no interest in collaring Intermedia". Id. at p. 811, l. 5-11; p. 813, l. 21 - 814, l. 8; and 941, l. 23 – 942, l. 8.

Extraordinary Circumstances Exist. The Panel has given considerable thought and review to this Arbitration's facts and circumstances, and to whether the

extraordinary-circumstance exception to NASD-DR's general rule has been met, i.e., whether the Panel has the authority, and whether the general-rule exception is applicable, to pre-hearing grant such Motion. Due to this Arbitration's presenting **very rare** facts and circumstances, including, but not limited to, Respondent's presenting sworn, transcribed testimony of Claimant; with Claimant's having been represented then and now by knowledgeable Counsel - in fact, represented by the same Counsel in both Arbitrations; with Claimant's having had an opportunity to rebut and/or explain such testimony in the NYSE Arbitration Hearing; with Claimant's being given full and fair opportunity to rebut and/or explain such testimony herein; and Counsel's being allowed unlimited time in Oral Arguments, I would thus grant the pending Motion to Dismiss, and accordingly dismiss Claimant's Arbitration.

Dissent



Thomas Moore