TIMOTHY A. CANNING

ATTORNEY AT LAW

STEWART SCHOOL BUILDING
1125 16TH STREET, SUITE 204
ARCATA, CALIFORNIA 95521

MAILING ADDRESS
P.O. BOX 4201
ARCATA, CALIFORNIA 95518

TELEPHONE: (707) 822-1620
FACSIMILE: (707) 760-3523
E-MAIL: tc@tclaws.com
Website: www.tclaws.com

September 21, 2006

Via email only

Jonathan G. Katz, Secretary
Securities and Exchange Commission
100 F Street, NE.
Washington, DC 20549–9303.

Re: SR-NASD-2006-088

Dear Mr. Secretary:

I am an attorney licensed to practice law in California and Wisconsin. Since 1994, the vast majority of my practice has been and continues to be representing investors in arbitrations pending at the NASD, the Pacific Exchange and the New York Stock Exchange, as well as in related litigation. I also represent individual brokers in claims against brokerage firms, and in regulatory matters.

The NASD's proposed rule regarding motions to dismiss should not be approved in its current form. As a general matter, evidentiary-based motions to dismiss should not be permitted in arbitration except in extremely rare circumstances. The NASD's current proposal does not adequately caution arbitrators to protect the opposing party's right to an evidentiary hearing.

In addition to the proposed language submitted by PIABA in its comment on this rule, the NASD should also adopt the following principles in an explanatory comment and train its arbitrators accordingly.

*Parties do not have a right to have their cases decided by way of a motion, unless all parties agree to it. Arbitrators should **deny** a dispositive motion in any one of these circumstances (among others):*

(1) the only proof of a material fact offered in support of the motion is an affidavit or declaration made by an individual who was the sole witness to that fact;

(2) where a material fact is an individual's state of mind, and that fact is sought to be established solely by the individual's affidavit or declaration;

SAN FRANCISCO BAY AREA OFFICE
Two Commercial Blvd., Suite 203, Novato, California 94949 Telephone: (415) 382-7899 Facsimile: (415) 382-9421

(3) there is a reasonable possibility that further discovery may disclose additional material evidence that might defeat the motion;

(4) there is a reasonable possibility that there may be material evidence that cannot be obtained through the limited discovery available in arbitration, but that can be presented at the evidentiary hearing (such as by subpoena or an order to produce directed to a person or entity not a party to the arbitration);

(5) granting the motion would not resolve the entire case (i.e., there still would be an evidentiary hearing); or

(6) the arbitrators believe that principles of justice, equity and fairness suggest that an evidentiary hearing is appropriate.

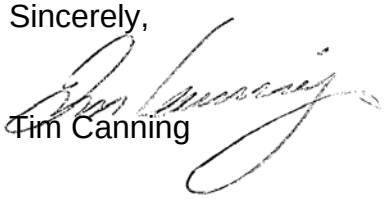
Arbitrators should also keep in mind that the party making the motion has the burden of proving that the motion should be granted. The motion should be denied unless the moving party proves its case. The party opposing the motion does not have to prove his or her case, in response to such a motion. Instead, if the opposing party raises even just a reasonable question as to whether the moving party proved its case, then the motion should be denied.

Arbitrators should also keep in mind that in court proceedings, most judges have substantial experience or training in reviewing and deciding dispositive motions. Judges often have research attorneys or staff to advise them on the applicable law. Arbitrators do not have access to those resources; and many arbitrators do not have formal legal training. Further, in court, a judge's decision to grant a dispositive motion is typically subject to extensive review by a court of appeal; in arbitration, the parties are not able to seek review of the arbitrators' decision, in most circumstances.

Recitation of the foregoing principles would emphasize to arbitrators that motions to dismiss should be rarely granted, instead of listing situations in which motions could be granted.

Thank you for your consideration of this comment.

Sincerely,



Tim Canning