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VIA E-MAIL: Rule-comment@sec.gov
AND FIRST CLASS MAIL

Jonathon G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street
Washington DC 20549-0609

Re: File No. SR-NASD 2003-158
Reorganization and Revisions to NASD Rules Relating to Customer Disputes, SEC Release No. 34-51856

Comment on Rule 12504, Motions to Decide Claims Before a Hearing on the Merits

Dear Mr. Katz:

Our firm appreciates the opportunity to comment on the re-write of the NASD Code of Arbitration Procedure as it affects customer-industry disputes. I was a staff attorney with the Securities and Exchange Commission, Division of Corporation Finance, in Washington, D.C. from 1986 - 1988. I earned a Master of Laws degree (LL.M.) in Securities Regulation from Georgetown in 1987. I have served as an Arbitrator on NASD cases since about 1991. I have been a lawyer for 23 years. Part of my practice involves the representation of public customers in arbitration cases, though substantially more of my work is in business and investment fraud litigation in federal and state courts. Also, I have represented stockbrokers and investment advisors in NASD, NYSE, SEC or state securities administrative proceedings. My first securities arbitration case was in 1988.

In the 1980s, the securities industry claimed that arbitration was better than court because it was less expensive and time-consuming. Over the past 17 years, I have seen the securities industry and their law firms turn arbitration proceedings into a long drawn out, motions intensive, litigation war. Arbitrations are more time-consuming and expensive than if we litigated and tried the same cases in court. The securities industry uses the same

defensive procedures as we would find in court. Because arbitration has become so expensive and time-consuming, I am unable to represent clients who have been genuinely injured but whose financial losses are not high enough to make it worthwhile to pursue their claims given the economics of litigation in arbitration. Of course, this is the desired effect of the securities industry in its effort to make arbitration as contentious as court.

The current rules, as well as the re-write, unfairly expose customers to the dismissal of their claims on the merits without a hearing. The securities industry and their law firms routinely file motions to dismiss because they have nothing to lose – because most arbitration panels are not as sophisticated as a seasoned judge or other judicial officer, and the industry figures, "why not try." The industry uses the practice of filing motions to dismiss to make the litigation process more expensive, to wear down opposing counsel, and to flush out testimony from claimants via affidavits or declarations in advance of a hearing.

NASD Rule 10314 contains the requirements for a statement of claim. The statement of claim is not required to meet federal or state civil practice pleading rules. NASD Rule 10303 requires an evidentiary hearing. Motions to dismiss and motions for summary judgment are meant to deny customers the opportunity to have an evidentiary hearing. Without depositions, interrogatories and requests for admissions, claimants cannot reasonably defend against a motion for summary judgment. Also, many documents from the securities firms are withheld and not exchanged until 20 days before the hearing (NASD Rule 10321(c)). It is unfair to claimants to subject them to a motion for summary judgment when the securities firms have not turned over all of their documents, many of which are damaging to their defense.

We strongly believe, as does the Virginia Supreme Court, that motions to dismiss have no place in arbitration. *Bates v. McQueen*, No. 04228 (Va. S.Ct. June 9, 2005) ("the failure to conduct 'the hearing' . . . was tantamount to no arbitration. . . . a hearing is a fundamental part of the arbitration process. . . . ").

The CR 12504 limitation that motions to decide claims before a hearing on the merits may only be granted in "extraordinary circumstances" is fatally flawed since it does not specifically define what is an "extraordinary circumstance." The absence of a definition in the proposed rule will promote abusive litigation tactics, rather than limit dismissal without hearing.

CR 12504 is in effect a summary judgment rule, and summary judgment and arbitration form an imperfect union. Important procedural protections underlying summary judgment motions simply are not available in arbitration. The non-moving party cannot take a deposition and has limited powers to obtain other information more readily available in court. Under the CR as written, a respondent can submit supporting affidavits from a broker, branch office manager, and compliance director, and the moving party has little if any opportunity to challenge the 'uncontradicted' statements before the hearing. A dispositive motion rule has to recognize the limitations that non-moving parties face in

responding to the motions, and that the only way to test a respondent's position (absent the discovery safeguards available in court litigation) is through testimony at a hearing.

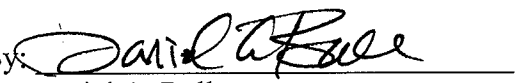
Dispositive motions should be restricted in arbitration for many reasons. First, arbitrators are not judges, and are often not in a position to make the kind of exacting legal determinations required to decide a motion to dismiss. Second, arbitrators have more flexibility than courts in adhering to the strictest rules of law, making technical dismissals inappropriate. Third, arbitration pleadings are less formal than court proceedings, making dismissal based on pleadings subject to interpretation and guesswork. Fourth, arbitrators do not write reasons for their awards. Fifth, unlike court, there is little judicial review of arbitrator decisions. Such review (of court decisions) is important because it insures against legal mistakes. Sixth, the testimonial hearing requirement is the essence of arbitration, which is not an overly legalistic procedure for resolving disputes. Finally, courts are independent, government-policed forums with experienced decision makers; SRO arbitration is controlled by an organization in which respondents, and not claimants, are members.

Arbitration is supposed to be an expedited procedure. If the securities firms are going to require customers to arbitrate, they have to give up the opportunity to obtain an early dismissal without an evidentiary hearing. *DeSapio v. Kohlmeyer*, 35 N.Y.2d 402, 406 (1974)("If [respondents] wish the procedures available for their protection in a court of law, they ought not to provide for the arbitration of the dispute"[in their customer agreements]).

In light of these observations, if a dispositive motion rule is to be introduced into the Code, it should specify that all factual allegations made by the non-moving party are to be taken as true for the purposes of the motion. Unlike court summary judgment, the decision makers cannot be allowed to weigh the evidence against the allegations and find that affidavits or other evidence remove issues of fact raised in the pleadings. CR 12504 also should state, "Arbitrators should not dismiss a claim without a full evidentiary hearing where a material question of fact exists."

Sincerely,

SELZER, GURVITCH, RABIN &
OBECNY, CHTD.

By: 
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