MARK A. TEPPER, P.A.

3109 Stirling Road, Suite 101
Fort Lauderdale, FL 33312
e-mail matepper@aol.com
(954) 961-0096
Fax: (954) 961-0990

July 14, 2005

Via E-mail and US Mail

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

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

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. My practice has been focused on representing customers with sales abuse claims in NASD arbitration since 1990. Before entering the private practice of law, I was an Assistant Attorney General in the Bureau of Investor Protection and Securities for the New York Attorney General for nearly eleven years.

As explained below, we believe the current rules, as well as the re-write, unfairly expose defrauded investors to the dismissal of their claims on the merits without a hearing. The following is a current example: I am representing claimants in a customer dispute before the NASD, involving allegations of fraudulent research. Respondent has moved to dismiss the customers' claim, as well as moved for summary judgment.

Respondent's motions are predicated on the current NASD Rule 10214, which states in relevant part that "[t]he arbitrator(s) shall be empowered to award any relief that would be available in court under the law" and cites to Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001) that the court has accepted Respondent's interpretation. See also Vento v. Quick & Reilly, 2005 WL 906585,*3 (10th Cir.)("Mr. Vento's primary objection, regarding the lack of authorization for a dismissal on the pleadings under Rule 10305, was explicitly rejected by this Court in Sheldon v. Vermonty . . .").

However, the Tenth Circuit did not explain how it reached this conclusion when NASD Rule 10214 applies only to statutory employment discrimination claims, not customer claims. NASD Rule 10210. Contrary to the NASD's description of a hearing on its website, which includes testimony and cross-examination, the Tenth Circuit believes that oral argument on a motion to dismiss on the pleadings constitutes a full hearing under NASD Rule 10303. Sheldon, 269 F.3d at 1207.

When I objected to the panel's consideration of such motions, **the Chairperson warned me to become familiar with federal and state civil practice rules or find someone who is.** What is the purpose of the NASD Code of Arbitration Procedure and the parties' submission agreements, if a panel can simply ignore the provisions of the NASD Code and apply federal and/or state civil practice rules to an NASD customer claim?[1] This type of abuse can only be prevented by a clarification in the re-write.

In our view, the clarification should specify that NASD Rules do not permit dismissal on the pleadings pursuant to federal or state civil practice rules and/or current NASD Rule 10214. NASD Rule 10314 contains the requirements for a statement of claim, not federal or state civil practice rules. NASD Rule 10303 requires an evidentiary hearing.

The NASD Code should be amended to specify that arbitrators may not apply federal or state civil practice rules to deny customers their right to a hearing and that a motion for dismissal of a customer claim based on the application of NASD Rule 10214 and federal or state civil practice rules is a "bad faith" motion. Since the record shows that some arbitrators and the Tenth Circuit believe that federal or state pleading requirements may be applied to dismiss customer claims with prejudice, clarification is prudent.

Furthermore, **the NASD Code should specifically ban motions for summary judgment by making the filing of a summary judgment motion evidence of bad faith**. Without depositions, interrogatories and requests for admissions, claimants cannot reasonably defend a motion for summary judgment.

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[1] The parties' written submission agreements states that the arbitration will be conducted in accordance with the NASD Code of Arbitration. NASD's re-write must make clear that the parties' submission agreement must be enforced.

Summary judgment, under the federal rules of civil procedure ("Fed. R. Civ. P."), provides for affidavits which may be opposed by depositions, interrogatories or further affidavits. Fed. R. Civ. P. 56. Rule 56 is inconsistent with NASD's 20 day exchange rule, 10321(c), as well as the purpose of arbitration – to provide a fast, fair and efficient resolution. As further explained below, summary judgment without adequate discovery and post-judgment review is a denial of due process.

CR 12504 is new. There is no dispositive motion rule in the current Code. 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. . . . "). If there is to be a dispositive motion rule, it needs to be modified to address the troubling issues that are raised by a dispositive motion practice in NASD arbitration.

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.

Even though motions to dismiss are allowed (though rarely granted) in court, there are many reasons why such motions need to be severely curtailed in arbitration. 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 fora with experienced decision makers; SRO arbitration is controlled by an organization in which respondents, and not claimants, are members.

The differences between arbitration and court thus explain the differences in procedure. The expedited nature of arbitration assures respondents that they will not be involved in lengthy proceedings (including depositions and motions) if a case is not dismissed early. Having agreed to arbitration, respondents must abide by the rules, which include not being able to obtain early dismissal. 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 must 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.

The rule must make clear that the motion must be denied whenever credibility is at issue, there are any factual issues in dispute, or whenever the panel must make factual findings against the non-moving party. The rule must also provide that the motion should be denied whenever a hearing is necessary to shed light on all the issues in the case or in the interest of justice. In addition, if the non-moving party asserts that it can cure any defect by filing an amended statement of claim, that party should be given the opportunity to do so.

A dispositive motion rule with those requirements would satisfy the desire to have some procedural mechanism for a party to avoid a hearing when there are no facts in dispute, and the interest of the non-moving party to put on the evidence supporting its claims or defenses.

If additional information would be helpful, we are available to cooperate.

Very truly yours,
Mark A. Tepper, P.A.

By:_____
MARK A. TEPPER
Attorney at Law

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