MALECKI LAW

JENICE L. MALECKI
ASSOCIATE
JULIE K. MATHEW
OF COUNSEL
STEPHEN T. FURNARI
GREGORY LEVINE

11 BROADWAY, SUITE 715
NEW YORK, NEW YORK 10004
(212) 943-1233 TELEPHONE
(212) 943-1238 FACSIMILE
WWW.ABOUTSECURITIESLAW.COM

Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: File No. SR-FINRA-2007-021
Proposed NASD Rule 12504-Dispositive Motions

Dear Members of the Commission:

I am an attorney in New York principally engaged in the practice of arbitration before FINRA, AAA and the NFA. I am also a FINRA arbitrator, and a member and director of many industry associations. My career exclusively and narrowly focuses for over 17 years in this area.

As a member of PIABA, I support the position of PIABA relating to the above rule; however, provide the following additional experiences and observations.

A. Motions are Displaced in Arbitration

I strongly disfavor motions to dismiss because they are heavily dependent on technical legal arguments, rather than factual or equitable arguments, and arbitrators are neither bound to follow the law or explain their decisions. Most arbitrators are not trained judges, lawyers or otherwise legally knowledgeable and there is also no opportunity to appeal for mistake of law.

Public customers in dealing with every broker/dealer in the industry - without exception - have no choice but to arbitrate their disputes in a self-regulated industry forum created, maintained and paid-for by the industry. Public customers have no right to go to third party arbitration forums and now only have one choice FINRA, and cannot even select between the NASD and NYSE, the latter of which never permitted dispositive motions prior to a hearing on the merits. That choice is now gone.

The benefit of arbitration to customers is supposed to include the absence of technical defenses and the ability to get a claim heard on the merits and after testimony on the basis of whether the client's treatment by the firm comported with standards of fairness and equity. By law in most jurisdictions, and even historically in New York – a notoriously tough state by all standards, parties to voluntary arbitration may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations. Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 362 (S.D.N.Y. 1957). That benefit should not be taken away from investors.

Granting changes to the code that would sanction dispositive motions, such as this, would exceed the powers of the arbitrators under the Federal Arbitration Act, 9 U.S.C. Sec. 10 (a) (4), unless the parties agreed to have their fate decided by motion. Moreover, it is a counter-intuitive to the expeditious nature of arbitration to add significant motion practice, as a decision incorporating a dismissal prior to a hearing may be vacated. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987)(Award set aside "[w]here the arbitrators were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy.").

Motion practice is contrary to the expeditious aspirations and fairness requirements of the Arbitration Rules and the Federal Arbitration Act. In Shearson/American Express Inc. et al.v. McMahon et al., 482 U.S. 220, 233-234 (1987) ("Shearson"), the foundation for securities arbitration, the Court made two important points:

> In short, the Commission has broad authority to oversee and to [482 U.S. 220, 234] regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights.

The Federal Arbitration Act is not served when the investor is powerless and has no right to go to independent third party arbitration forums with alternative selection methods created by non-industry, neutral arbitration forms. It is shameful, however, when public customers and their advocates who have and are participating in an existing system with no meaningful choice but to have their claims heard in that system are shut out from giving input into important changes to it.

B. If Motions to Dismiss are Permitted, This Rule Should be Passed & Stringently Implemented

Despite my strong feelings against motions to dismiss generally, if we are regrettably forced into a system where motions are permitted, the current rule addresses the abuses of such motion practices, i.e., the frequent frivolity of such motions that are filed. I have experienced an enormous frequency of frivolous motions over the past few years and I believe that this new rule would help level the proverbial playing field, if arbitrators are properly trained and required to follow its mandates, which will take significant policing by FINRA and the SEC.

Thank you for your consideration.

Very truly yours,

Jenice L. Malecki