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April 9, 2008

Via E-mail at rule-comments@sec.gov
Nancy M. Morris
Securities and Exchange Commission
450 Fifth Street NW
Washington, D.C. 20549-0609

Re: SR-FINRA-2007-021; Proposed Revisions to Rules 12206 and 12504

Dear Ms. Morris:

This is to comment on FINRA's proposed rule change regarding motions to dismiss in securities arbitrations. I have been representing both securities industry participants and customers in securities arbitrations since 1991. While for many years I mostly represented industry parties, I currently represent primarily customers. I have lectured and spoken often on the subject of securities claims by public investors and the FINRA arbitration process, and have been an NASD/FINRA arbitrator for many years.

I applaud FINRA's efforts to improve this aspect of securities arbitrations. The securities industry defense bar has long burdened claimants with motion after motion in a battle of attrition, making the arbitration process anything but quick or inexpensive. Making matters worse, whether or not there is any validity to the motion arbitration panels often assess the investor with half of the forum fees incurred on the motion.

The rule amendment does not go far enough: Motions to Dismiss do not belong in the FINRA arbitration system.

While there will be occasional cases filed with FINRA which, on their face, lack validity, Claimants' attorneys' self preservation limits those cases. Many if not most Claimants' cases are handled by attorneys on a contingent fee basis. Attorneys have no incentive to invest time in patently meritless claims. The defense bar, however, is paid hourly. It *does* have an incentive to file motions to dismiss even when weakly supported.

The vast majority of customer claims involve factual disputes between a public investor and his or her broker, which can only be resolved by the panel after an evidentiary hearing. The

benefit of weeding out an occasional frivolous case does not warrant the burden placed on FINRA and public investors by permitting Motions to Dismiss.

In structuring the system for adjudicating public customers' claims, it must be remembered that *arbitration is imposed upon the public investor by the brokerage firm through the use of pre-dispute arbitration clauses*. While I hear of "studies" purportedly showing that FINRA arbitration results are balanced, or that the participants consider the process fair, that has not been my experience. Customers consistently receive less from FINRA arbitration panels than they would be awarded by a judge, they rarely are awarded attorneys' fees to which they are entitled, and they are generally required to pay large amounts of forum fees even when they "win" at a hearing.

NASD/FINRA rules for years never even used the word "motions". The industry nevertheless imported, and continues to import, litigation techniques provided for by federal court rules—which have a highly developed set of standards for using Motions to Dismiss. The securities industry does not used Motions to Dismiss as they are designed to be used in traditional litigation—to test the sufficiency of a pleading. Rarely is a Respondent's motion to dismiss based on deficiencies in pleadings. Indeed, under FINRA's rules a statement of claim need only specify "the relevant facts and remedies requested."

In fact, nearly all motions filed by respondents in FINRA arbitrations are more like motions for summary judgment. But unlike in a judicial forum, for which motions for summary judgment are designed, in FINRA arbitrations claimants have limited discovery and very little ability to challenge Respondents' failures to produce relevant documents. For example, Morgan Stanley was able for years to conceal and withhold massive amounts of e-mails from claimants' attorneys in securities arbitrations without detection. It was only through court litigation, with its discovery tools and the control imposed by an experienced judge—none of which is available in FINRA arbitrations—that the discovery violations were discovered.

When a respondent makes a "motion to dismiss," the motion nearly always presents issues of fact. Yet the claimant lacks the usual discovery record which might be required to establish the need for an evidentiary hearing. This situation is magnified when panels, at the request of respondents, stay discovery until after the hearing on the motion to dismiss. Finally, there is neither a procedure for providing evidence in opposition to a motion to dismiss, nor an appeal mechanism if the motion is improperly granted.

Critically, the plaintiff in a court action has the chance to correct errors in the granting of a motion for summary judgment through an appeal. In arbitration, the victims even of obvious arbitrator error have no chance to correct it. An imprudently granted motion to dismiss is fatal to a public customer's ability to obtain any recourse.

The concept of a dispositive motion should have no role in the FINRA arbitration process.

The Proposed Rule Revisions are a Big Improvement.

Despite these concerns, I urge the SEC to accept the proposed rule revision. Clearly spelling out the grounds for a motion to dismiss hopefully will slow the flood of motions to claimants have been subjected. FINRA has built into the rule several provisions which may help to discourage weak or meritless motions:

- Perhaps most importantly the rule mandates that forum fees be assessed against respondent who unsuccessfully makes a motion to dismiss. This is absolutely critical.

- The panel is authorized to assess attorney's fees (or other sanctions) against a respondent who files a frivolous motion to dismiss. This should be strengthened: awards of claimant's attorneys fees should be *mandated* in such cases.

- The rule states that motions to dismiss are discouraged. This is also critical.

- Motions to dismiss cannot be filed with the Respondent's answer. This practice was abused by respondents.

- The oral hearing has to be recorded. This should provide some protection for purposes of a motion to vacate if a panel grossly errs in its handling of the motion.

- The reasons for granting a motion to dismiss would have to be provided in writing.

- Multiple filings of the same motion to dismiss would generally be prohibited. This should help deter one of the more abusive tactics used by Respondents' counsel.

- The panel would be prohibited from considering or acting upon a motion to dismiss not brought based on one of three enumerated grounds. By prohibiting even the consideration of such motions, hopefully when a panel errs in granting a motion to dismiss on an improper ground it will be obvious enough that a motion to vacate might have a change to succeed.

Delays in Amending the Rule. While they do not go far enough in proscribing inappropriate motions practice in FINRA arbitrations, the the proposed rule amendments are a big improvement. FINRA has been considering changes to the rules on dispositive motions for several years, during which time the motions keep coming. I would urge the Commission to act promptly on the pending amendment, so that its beneficial effects finally become available to public customers.

Thank you for considering these comments.

Very truly yours,

Carlson & Dennett, P.S.

Carl J. Carlson