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September 22, 2006

Jonathan G. Katz, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-9303

Re: File No. SR-NASD-2003-2006-088 – Proposed Rule Change Relating to Motions To Decide Claims Before a Hearing on the Merits

Dear Mr. Katz:

The Securities Arbitration and Consumer Clinic (SACC) in conjunction with the Office of Clinical Legal Education at Syracuse University College of Law is writing to convey its concern regarding the proposed rule change 12504 relating to Motions To Decide Claims Before a Hearing on the Merits.

There is currently no rule providing for dispositions of cases on papers except in small claims. While we appreciate that respondents have made such motions, there is no basis for them in the NASD rules. We are concerned that authorizing and legitimizing these motions will make them more, not less prevalent in the arbitration process.

The proposed rule change relating to Motions To Decide Claims Before a Hearing on the Merits will, for the first time, establish a procedure that may deprive a claimant of a hearing, the right to examine and cross-examine witnesses, and the right to present a case in person with all of the value and weight of a personal appeal for justice. It will shift the entire process away from the current process where panel members see and hear witnesses, study body language, tone of voice and demeanor, in the efforts to make a fair and just decision.

The whole idea of motion practice is incongruent with the arbitration process. Thus, we urge the SEC not to adopt the Proposed Rule 12504 for the following reasons.

First, and foremost, the adoption of this rule undermines the whole idea and purpose of arbitration. Arbitration was created to streamline the dispute resolution process. The proposed rule will increase costs and create delays in the process. Arbitration was designed to be faster and cheaper than litigation. This rule is another step

in making the NASD Arbitration process more like litigation. In doing so it undermines the rationale for having arbitration in the first place.

Second, the rule is vague and will be difficult to administer. There is no standard of proof required to grant the relief requested. Additionally, there is no definition of extraordinary circumstances, and the previous attempts to do so have been unsatisfactory.

Generally, arbitration panels do not include a lawyer and if one is included, that lawyer may not be versed in litigation or the statute of limitations. Panels generally consist of lay people and experts in the securities industry, not lawyers and judges. The NASD arbitration process makes no provision for counsel to assist the panel. It makes no provision for the absolute absence of legal skill on a panel. Motion practice in courts is targeted to Judges, not juries. Arbitrators are far more closely compared to juries.

Third, we believe the proposed rule raises concerns about the fundamental fairness of the NASD arbitration process. Courts have upheld binding arbitration agreements based upon the courts' belief that the arbitration process is fundamentally fair despite the limited process and limited right to appeal available to the parties. This is based, in part, on the arbitration's near guarantee that every claim will have a hearing on the merits by the arbitration panel. Those panels are trusted to be able to hear the evidence, weigh the credibility and use their common sense to reach a fair result.

This idea holds much less power when a panel of non-lawyers is dismissing claims without a hearing. In the judicial process, a trial court's dismissal of a claim pursuant to a motion to dismiss or upon summary judgment is reviewed de novo by an appellate court. A jury decision after a trial is given much greater deference. Since there is little basis for the appeal of arbitration panel's decision, it seems unfair to allow for dismissals without full evidentiary hearings.

As we noted above, the right to cross-examine a party, a witness, or an expert is lost. The right to be heard in a claimant's own voice would be replaced with affidavits drafted by lawyers. The inflection of voice, the tone of the word, the trembling of hands and other body language would be lost to the panel. Without an experienced judge to consider these issues, the claimant faces a risk of loss of substantial due process.

Because of the added costs and delay, claimants will be less able to find counsel to take these cases, thus depriving small investors of the use of counsel and perhaps any opportunity of recovery for a loss. At the same time, the rule makes the process more

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complicated, meaning that small investors will more likely need counsel in order to pursue their claim.

In order for dispositive motion practice to be fundamentally fair and comport with due process, the panel decisions to dismiss cases without an evidentiary hearing should be subject to de novo review; which of course would undermine the streamlined, yet binding nature of arbitration.

If the proposed rule is adopted, dispositive motions of this kind should require that independent *legal advice* be made available to the panels. The steps necessary to make the motion practice fair would complicate and bog down the arbitration process. Again, this undermines the entire concept of arbitration. This alone should preclude adoption of this rule in its current form.

Finally, should this rule be adopted, the NASD must take steps to ensure that these motions are truly "extraordinary." To reduce the number of frivolous defense motions, a filing fee for such a motion with a sliding scale tied to the size of the claim would serve as a chilling effect. Extraordinary circumstances should be defined by distinguishing it from ordinary defenses raised in any answer such as failure to mitigate, statute of limitations, laches, or failure to state a claim. The panel should be instructed to deny dispositive motions whenever there is a disputed issue of material fact and where credibility is an issue.

We urge the SEC to reject this new rule as incompatible with the concept of arbitration. Please do not hesitate to contact us if you have additional questions regarding these comments.

Sincerely,

/s Gary Pieples
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