DRIGGERS, SCHULTZ & HERBST
A PROFESSIONAL CORPORATION
COUNSELORS AT LAW
2600 WEST BIG BEAVER ROAD
SUITE 550
TROY, MICHIGAN 48084

TELEPHONE (248) 649-6000
TELECOPIER (248) 649-6442

LAURENCE S. SCHULTZ
JAY A. HERBST
RICHARD B. TOMLINSON
DANIEL R. BOYNTON
JOSEPH W. THOMAS
RAYMOND J. STERLING
WILLIAM C. SCHAEFER
JAMES J. MAJERNIK
EDWARD S. TOTH
MARK E. MUELLER
CHRISTOPHER P. MANSUR
ELIZABETH M. MALONE
LAWRENCE J. POCHRON, JR
JACK E. GRAY, JR.

NATHAN B. DRIGGERS
(1929-1996)

OF COUNSEL
LAURA D. MASON
BARBARA D. URLAUB

September 25, 2006

VIA E-MAIL TO RULE-COMMENTS@SEC.GOV

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: SR-NASD-2006-088
Proposed NASD Rule 12504–Dispositive Motions

Dear Ms. Morris:

Please accept the following as my comments regarding the above-referenced NASD proposal concerning dispositive motions in arbitration.

First, let me emphasize that dispositive motions are a critical issue for investors in NASD arbitration. Historically, dispositive motions did not exist in arbitration. There is no reference to motions to dismiss or dispositive motions applicable to customer claims anywhere in the NASD Code of Arbitration Procedure. Nevertheless, in recent years, the NASD has allowed respondents to file dispositive motions; and from time to time, the motions have been granted by arbitrators. Although there are no supporting rules, the NASD has included reference to dispositive motions in its arbitrator training materials and has advised arbitrators that they should entertain and may grant these motions. The NASD also has made reference to these motions in its arbitrator scripts.

Over the years, I have made numerous objections to the NASD concerning its dispositive motion procedures. My position has been that these motions are not part of the Code of Arbitration Procedure and, therefore, cannot be part of the arbitration process. I am attaching a copy of my letter dated October 18, 2002, to Linda D. Fienberg, President of NASD Dispute Resolution, which elaborates on these concerns in detail.

Unfortunately, when the NASD drafted its Code Rewrite, rather than acknowledging that dispositive motions play no part in arbitration, the NASD included a rule allowing dispositive motions. See Proposed Code Rewrite as published by the SEC on June 23, 2005, in the *Federal Register*. The proposed dispositive motion rule in the Code Rewrite provided at Rule 12504 that such motions "are discouraged and may only be granted in extraordinary circumstances."

In June 2006 the NASD filed its 5th amendment to the Code Rewrite, and for the first time provided commentary which purported to interpret "extraordinary circumstances."

The June 2006 5th amendment received dozens of comment letters objecting to the NASD commentary, and I share those objections. As stated, I believe there is no place for dispositive motions in arbitration.

Now that the NASD has taken the position that dispositive motions are to be allowed, it is essential that the grounds upon which these motions may be granted be severely circumscribed in order to avoid undue prejudice to investors. Therefore, it must be absolutely clear that dispositive motions are to be discouraged and are allowed only under extraordinary circumstances. The NASD's proposed commentary which purported to describe "extraordinary circumstances" actually diluted the concept of "extraordinary" and would have encouraged rather than discouraged the filing of these motions.

Arbitrators cannot be given latitude in granting dispositive motions if they are to be granted at all. Arbitrators must be clearly instructed that these motions are to be allowed only in the rarest of circumstances.

Accordingly, I support the NASD's current proposal to the extent that it eliminates the commentary providing examples of extraordinary circumstances. I also request that the NASD not be allowed to provide further commentary suggesting examples of "extraordinary circumstances" because such commentary can only encourage these motions.

Recommendations to Amend the NASD Proposal

Even if the NASD proposal deleting the commentary is adopted, additional language is appropriate to assure that dispositive motions are effectively

discouraged. There are numerous reasons why these motions must be explicitly discouraged:

1. Involvement of Non-Lawyers

   Unlike court, it is not unusual for claimants in arbitration to represent themselves. Furthermore, unlike court, under NASD rules, non-lawyers are allowed to represent investors in arbitration. The imposition of rules allowing motions to dismiss to deprive claimants of a hearing forces these unrepresented claimants and non-lawyer representatives to address difficult legal issues for which they are unqualified. Clearly, allowing dispositive motions gives the industry, which is always represented by counsel, an unfair advantage over investors. Thus, many claimants may be deprived of a hearing simply because they are unable to effectively respond to the legal arguments raised in motions to dismiss.

2. Arbitrators Do Not Have to Be Lawyers

   Under the NASD rules, arbitrators do not have to be lawyers. It is difficult, if not impossible, for non-lawyer arbitrators to evaluate legal issues presented in dispositive motions.

3. Even Where Lawyers Are Present on an Arbitration Panel, They Need Not Have Litigation Experience

   Dispositive motions may involve complex legal issues, both from a procedural and substantive standpoint. Even trained judges who have research clerks to assist them in their decision-making process and opinion writing often erroneously grant these motions, and their decisions are reversed on appeal. Lawyers on arbitration panels are not trained to address these difficult issues. They typically have little litigation experience. The assumption that lawyers without litigation experience can rule correctly and fairly on such motions is unrealistic.

4. Pleadings Showing Entitlement to Relief Are Not Required in Arbitration

   The Code of Arbitration Procedure merely requires that a statement of claim set forth "relevant facts" and "remedies." There is no requirement that a cause of action be pleaded. Thus, unlike the federal rules, a

statement of claim need not show a claimant is entitled to relief; it need only state relevant facts and remedies. Dismissal of a statement of claim for failure to make technical legal allegations is absolutely inappropriate under the arbitration rules.

5. The Absence of Depositions, Interrogatories, and Requests for Admissions Deprives the Claimants from Developing the Details to Establish the Elements of Their Claim

The prohibition of court-style discovery in arbitration prevents claimants from developing material elements of their claim prior to hearing. This limitation is balanced by the fact that investors are mandated an evidentiary hearing under the rules. Typically, dispositive motions in court proceedings are deferred until discovery is completed (including depositions, interrogatories, and requests for admissions) to assure the parties have had a fair opportunity to develop their case prior to being subject to the threat of dismissal.

The adoption of a broader dispositive motion practice in arbitration would require full discovery. This will dramatically increase the delay, burden, and expense attendant to arbitration. I am concerned that the proposed dispositive motion practice could be the beginning of a slippery slope which will require adoption of other court procedures and defeat the basic objectives of alternative dispute resolution to provide an economical, expeditious resolution of claims.

6. Arbitration Decisions Are Final and Binding – There Is No Appeal

In court, where dispositive motions are granted, denying the right to a trial, there is an absolute right of appeal. The appeal is heard by the appellate court on a *de novo* basis. This means that the appellate court considers the appeal with no presumption favoring either side. The prior ruling by the trial court on the dispositive motion has no significance. The appellate court considers the evidence and arguments as though they were made in the first instance at the appellate level, taking a "fresh look" at the issue. If an error of law can be shown, the judgment of dismissal is reversed and the case reinstated. Reversal of dismissals is not uncommon.

This is in contrast to arbitration where there is no appeal available from an arbitration award. The only recourse available to a person who may have been denied a hearing through a dispositive motion is to pursue an action to vacate the award. In actions to vacate, in contrast to the *de novo* review of the court system, there is a strong presumption favoring confirmation.

7. Arbitration Dismissals Will Not Be Vacated Even If They Are Erroneous

Courts have uniformly held that even where arbitrators commit an error of law in granting a dispositive motion, the arbitration award cannot be vacated.

There follow quotations from five often cited cases where courts have ruled that an erroneous grant of a motion to dismiss will not be vacated based on an error of law of the arbitrators.

Sheldon v. Vermonty, 269 F.3d 1202 (10th Cir. 2001) (We must give extreme deference to the determination of the arbitration panel for the standard of review of arbitral awards is among the narrowest known to law; ***errors in an arbitrator's factual findings or his interpretations of the law do not justify review or reversal***.); *Prudential Securities, Inc. v. Dalton*, 929 F. Supp. 1411 (N.D. Okla. 1996) (There is a presumption in the Federal Arbitration Act that arbitration awards will be confirmed; the limits of judicial review of an arbitration award are very narrow; courts must strive to uphold the arbitrator's award lest the efficiency of the arbitration process be lost; ***a court of equity will not set an award aside for error either in law or fact***.); *Max Marx Color & Chem. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248 (S.D.N.Y. 1999) (A party moving to vacate an arbitration award faces a high threshold; arbitration awards generally are accorded great deference; judicial review of arbitration awards is necessarily narrowly limited in order to avoid undermining the twin goals of arbitration: namely, settling disputes efficiently and avoiding long and expensive litigation. In order to overturn an award on the basis of manifest disregard of the law, ***one must show more than error or misunderstanding with respect to the law***.); *Warren v. Tacher*, 114 F. Supp. 2d 600 (W.D. Ky. 2000) (Arbitration awards may only be subject to limited judicial review; as long as the arbitrator is even arguably construing or applying the contract and

acting within the scope of his authority, ***even where the court is convinced he committed serious error*** does not suffice to overturn his decision.).

Allowing the securities industry to pursue dispositive motions in arbitration provides a potentially draconian procedure for investors. It allows the industry to completely subvert the arbitration process by denying a claimant a hearing without basic discovery and without an appeal even where the arbitrator's ruling is erroneous. There is no comparable pro-defense procedure in the legal system. For this reason alone, any dispositive motion rule must be severely restricted.

Proposal to Give Assurance that Only Extraordinary Matters Are Raised

On balance, allowing dispositive motions in arbitration is unfair to investors; and therefore, the NASD proposal must severely limit the use of these motions. I would therefore add the following language to the NASD's proposed Rule 12504(a):

DISPOSITIVE MOTIONS MAY ONLY BE GRANTED WHERE THE MOVING PARTY CAN ESTABLISH THAT THERE IS NO POSSIBILITY OF ESTABLISHING LIABILITY UNDER ANY FACTS OR CIRCUMSTANCES.

DISPOSITIVE MOTIONS MAY NOT BE GRANTED WHERE THERE ARE DISPUTED FACTS.

DISPOSITIVE MOTIONS MAY NOT BE GRANTED BASED UPON PLEADING ISSUES.

Proposal to Award Actual Attorneys' Fees and Costs to Claimants

The NASD has stated that it does not believe that the proposed rule change which will allow dispositive motions will result in any burden on competition. The NASD has ignored the burden which dispositive motions will place on investors. It is undisputed that dispositive motions are almost exclusively employed by the industry. Claimants pursuing claims in arbitration have been

routinely subject to dispositive motions which are lengthy and require substantial legal work to review, analyze, and defend. In addition, dispositive motions place a substantial burden on the arbitrators in considering and ruling upon them. It is therefore important to assure that the adoption of a rule allowing dispositive motions not only discourages their use but also provides economic protection for investors burdened by defending them. This may be achieved by providing that the party pursuing a dispositive motion which is denied is liable for attorneys' fees and costs. The NASD proposal allows for sanctions only if a motion is filed in bad faith; however, this alone does not protect investors from the abuse of the rule and the burden of responding to these motions. Assessing attorneys' fees for a motion which is denied also is particularly appropriate in view of the strict requirements of the rule expressly discouraging these motions. It also must be emphasized that the loss of a dispositive motion is a death penalty for an investor because of the absence of appeal; and therefore, substantial legal time is essential in defending these motions. Accordingly, the following proposal is made to amend the NASD rule:

A PANEL DENYING A DISPOSITIVE MOTION SHALL AWARD COSTS AND ACTUAL ATTORNEYS' FEES TO THE PARTY DEFENDING THE MOTION.

Proposal to Give Investors an Opportunity to Challenge Erroneously Granted Motions

As noted above, if a dispositive motion were granted in a court of law, an investor would have an absolute right to a *de novo* appeal before a court of appeals. In contrast, in arbitration there is no such appeal, even when legal errors are committed. In view of the fact that dispositive motions may be decided by non-lawyers and may be defended by investors who are not represented by attorneys, the danger for erroneously granted motions is obvious. Errors are inevitable even where the arbitrators are lawyers and both sides are represented by counsel.

Investors must be given some protection from having their cases improperly dismissed. Since an appeal to a court of law is not allowed, it is appropriate that the Director of Arbitration be required to review all situations where dispositive motions have been granted. It is also appropriate that the arbitrators granting the motion be required to give a reasoned award that would

allow a reasonable review and determination as to whether error has been committed. Accordingly, the following proposal is submitted:

THE GRANT OF A DISPOSITIVE MOTION SHALL BE ACCOMPANIED BY A REASONED DECISION AND BE SUBJECT TO A *DE NOVO* REVIEW BY THE DIRECTOR OF ARBITRATION. ANY GRANT OF A DISPOSITIVE MOTION WHICH IS NOT ON ITS FACE IN COMPLIANCE WITH THE STANDARDS SET FORTH IN RULE 12504 SHALL BE REVERSED BY THE DIRECTOR OF ARBITRATION AND ACTUAL ATTORNEYS' FEES AND COSTS SHALL BE AWARDED.

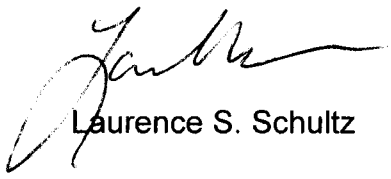
Additional Comments Responsive to NASD Questions

The NASD in its proposal has expressed concern that dispositive motions lack uniformity and has asked for input as to how uniformity may be achieved. In court, uniformity is achieved through legal precedent and allowing appeal and reversal when errors are made. This procedure does not exist in arbitration. Since there is no right to appeal from an erroneous arbitration award, requiring a reasoned decision where a dispositive motion is granted and requiring review of the decision by the Director of Arbitration will provide greater consistency with respect to granting dispositive motions.

The NASD also questions as to whether the proposed dispositive motion rule strikes an appropriate balance between claimants and respondents and asks whether the rule will tend to favor one party over the other. It must be noted that dispositive motions are almost the exclusive domain of the industry. Thus, any rule which allows dispositive motions must benefit the respondents to the detriment of claimants. The NASD's fundamental role is investor protection; and therefore, adopting a rule which is to the detriment of claimants is contrary to the NASD's commitment. It is therefore essential that any rule which allows dispositive motions be strictly circumscribed in order to protect claimants from being abused by the industry's use of the rule. It is for this reason that the rule must provide that dispositive motions are to be considered only in extremely limited circumstances and that claimants are entitled to costs and attorneys' fees when they are successful in defending these motions.

The NASD also asks whether additional guidance should be provided as to what constitutes "extraordinary circumstances." Again, as stated above, it is essential that dispositive motions be circumscribed in order to protect investors. Any additional guidance which may expand the principle of "extraordinary circumstances" is therefore inappropriate. For example, the NASD's previous proposal to include certain legal affirmative defenses as "extraordinary circumstances" was clearly improper on its face. Presumably, the objective in allowing dispositive motions is to provide the industry an opportunity to obtain dismissal of claims only in those situations where there is absolutely no possibility of establishing liability under any facts or circumstances. This, then, should be the applicable standard.

Very truly yours,



Laurence S. Schultz

LSS/ch
Enclosure

DRIGGERS, SCHULTZ & HERBST
A PROFESSIONAL CORPORATION
COUNSELORS AT LAW
2600 WEST BIG BEAVER ROAD
SUITE 550
TROY, MICHIGAN 48084

TELEPHONE (248) 649-6000
TELECOPIER (248) 649-6442

LAURENCE S. SCHULTZ
JAY A. HERBST
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ELIZABETH M. MALONE
LAWRENCE J. POCHRON, JR.
JACK E. GRAY, JR.

NATHAN B. DRIGGERS
(1929-1996)

OF COUNSEL
LAURA D. MASON

October 18, 2002

Ms. Linda D. Fienberg
President, Dispute Resolution
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006

Re: Impropriety of Motions to Dismiss in Arbitration

Dear Ms. Fienberg:

On Saturday, October 5, 2002, at the PIABA conference in Colorado Springs, I made a presentation regarding motions to dismiss which are being filed by the securities industry in arbitration proceedings. I understand due to other commitments you were not able to be present. I am therefore providing you with an analysis showing why motions to dismiss should not be allowed in NASDR arbitration. I would appreciate your comments.

The Evidentiary Hearing Is the Heart of Arbitration

The importance of an evidentiary hearing to the arbitration process cannot be overemphasized. Arbitration, which is imposed upon investors through predispute arbitration agreements, eliminates the formal structure, rules, and procedures of court litigation which assure investors due process. These court procedures (which add significantly to the cost and delay of dispute resolution) are bypassed in arbitration in favor of resolving claims in a prompt, economical, and informal evidentiary hearing pursuant to Rule 10303 of the NASD Code of Arbitration Procedure. For example, NASD arbitration rules do not provide for motion practice, they severely limit discovery, and they do not allow appeals from erroneous decisions.

In recent years, the securities industry has with some success adopted a practice of filing arbitration motions to dismiss (and motions for summary judgment),

seeking to apply a portion of the Federal Rules of Civil Procedure to arbitration for the purpose of dismissing claims without an evidentiary hearing.

I understand that NASDR is considering a proposal to adopt an amendment to the Code of Arbitration Procedure, formally allowing motions to dismiss on statute of limitations issues, and thereby endorsing the industry's position that dispositive motions are appropriate to deprive claimants of an evidentiary hearing in arbitration. Listed below are several reasons that the position of the securities industry and NASDR represents an abuse, and indeed a subversion, of the arbitration process, seriously prejudicing the rights of the investing public.

1. *The Code of Arbitration Procedure Contains No Rules for Dispositive Motions*

   The Code of Arbitration Procedure relating to customer arbitrations contains the word "motion" only in the context of references to court-related motions. There is no suggestion in the Code that motions to dismiss may be filed in a customer arbitration. As noted above, Rule 10303 of the Code mandates an evidentiary hearing. Predispute arbitration agreements and the uniform submission agreements bind both the investor and the industry firm to arbitrate in accordance with these rules.

   Notwithstanding the absence of any reference to motion practice and the presence of a rule specifically mandating an evidentiary hearing, as well as the agreement of the parties to abide by the rules, NASDR has, in the administration of customer arbitrations, accepted the industry's position that dispositive motions are available in arbitration. Claimants are required to respond to these motions, and NASDR schedules pre-hearing conferences at which arbitrators are instructed to rule on these motions. Thus, NASDR has ignored its own arbitration rules and has provided the industry a shortcut procedure to defeat investor claims without an evidentiary hearing.

2. *Involvement of Non-Attorneys*

   Unlike court, it is not unusual for claimants in arbitration to represent themselves. Furthermore, unlike court, under NASD rules, non-attorneys are allowed to represent investors in arbitration. The imposition of federal-style rules for motions to dismiss to deprive claimants of hearings, forces these unrepresented claimants and non-attorney representatives to address complex legal issues for which they are unqualified. Clearly, NASDR is giving the industry, which is always represented by counsel, an unfair advantage over investors in allowing these motions. Many claimants

may be deprived of a hearing simply because they are unable to effectively respond to the legal arguments raised by the securities industry.

3. *Arbitrators Do Not Have to Be Lawyers*

With the list selection process, it is common to have arbitration panels with no attorneys on the panel. It is patently unreasonable to assume that non-lawyers will have any conception or understanding as to the legal issues relating to dispositive motions in arbitration. To allow the securities industry to pursue dispositive motions under these circumstances for the purpose of depriving a claimant of a hearing is fundamentally unfair to investors.

4. *Even Where Lawyers Are Present on an Arbitration Panel, They Are Typically Business Lawyers Who Have No Litigation Experience*

Dispositive motions involve complex legal issues, both from a procedural and substantive standpoint. Even trained judges who have research clerks to assist them in their decision-making process and opinion writing, often erroneously grant these motions and their decisions are reversed on appeal. Lawyers on arbitration panels are not trained to address these difficult issues. They are typically business lawyers with no litigation experience. NASDR's assumption that lawyers with no litigation experience can rule correctly and fairly on such motions is an unrealistic position.

5. *Pleadings Showing Entitlement to Relief Are Not Required in Arbitration*

Rule 10314 of the Code of Arbitration Procedure merely requires that a statement of claim set forth "relevant facts" and "remedies." There is no requirement that causes of action be pleaded.[1] This very liberal approach to the contents of a statement of claim provides broad pleading flexibility to claimants in arbitration. Thus, unlike the federal rules, a statement of claim need not show a claimant is entitled to relief; it need only state relevant facts and remedies. The claim may be established at the hearing. Imposition of a dispositive motion procedure for failure to state a claim ignores the Rule 10314 pleading latitude provided to claimants.

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[1]In contrast, Rule 8(a) of the Federal Rules of Civil Procedure requires a statement of claim "showing that the pleader is entitled to relief."

6. *The Absence of Depositions, Interrogatories, and Requests for Admissions Deprives the Claimants from Developing the Details to Establish the Elements of Their Claim*

The prohibition of court-style discovery in arbitration prevents claimants from developing material elements of their claim prior to hearing. This limitation is balanced by the fact that investors are mandated an evidentiary hearing on their claims pursuant to Rule 10303. Typically, dispositive motions in court proceedings relating to factual matters are deferred until discovery is completed (including depositions, interrogatories, and requests for admissions) to assure the parties have had a fair opportunity to develop their case prior to being subject to the threat of dismissal.

If dispositive motion practice is adopted in arbitration, fairness requires that the Code of Arbitration Procedure be amended to allow depositions, interrogatories, and requests for admissions prior to the granting of dispositive motions. This will dramatically increase the delay, burden, and expense attendant to arbitration. Thus, incorporating the court-style dispositive motion practice in arbitration is the beginning of a slippery slope which will require adoption of other court procedures and defeat the basic objectives of alternative dispute resolution.

7. *Arbitration Decisions Are Final and Binding–There Is No Appeal*

In court, when dispositive motions are granted denying the right to a trial, there is an absolute right of appeal. The appeal typically is heard by the appellate court on a *de novo* basis. This means that the appellate court considers the appeal with no presumptions favoring either side. The prior ruling by the trial court on the dispositive motion has no significance. The appellate court considers the evidence and arguments as though they were made in the first instance at the appellate level, taking a "fresh look" at the issue. If an error of law can be shown, the judgment of dismissal is reversed and the case reinstated. Reversal of dismissals is not uncommon.

The appellate procedure which protects the right to a court trial is to be contrasted with arbitration, where there is ***no appeal*** available from an arbitration award. The only recourse available to a person who may have been denied a hearing through a dispositive motion, is to pursue an action to vacate the award. In actions to vacate, in contrast to the *de novo* review in the court system, there is a strong presumption favoring confirmation. ***Courts have uniformly held that even where arbitrators commit an***

error of law in granting a dispositive motion denying a hearing, the arbitration award cannot be vacated.

There follow quotations from five often cited cases where courts have ruled that an erroneous grant of a motion to dismiss will not be vacated based on an error of law of the arbitrators.

Sheldon v. Vermonty, 269 F.3d 1202 (10th Cir. 2001) (We must give extreme deference to the determination of the arbitration panel for the standard of review of arbitral awards is among the narrowest known to law; ***errors in an arbitrator's factual findings or his interpretations of the law do not justify review or reversal.***); *Prudential Securities, Inc. v. Dalton*, 929 F. Supp. 1411 (N.D. Okla. 1996) (There is a presumption in the Federal Arbitration Act that arbitration awards will be confirmed; the limits of judicial review of an arbitration award are very narrow; courts must strive to uphold the arbitrator's award lest the efficiency of the arbitration process be lost; ***a court of equity will not set an award aside for error either in law or fact.***); *Max Marx Color & Chem. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248 (S.D.N.Y. 1999) (A party moving to vacate an arbitration award faces a high threshold; arbitration awards generally are accorded great deference; judicial review of arbitration awards is necessarily narrowly limited in order to avoid undermining the twin goals of arbitration: namely, settling disputes efficiently and avoiding long and expensive litigation. In order to overturn an award on the basis of manifest disregard of the law, ***one must show more than error or misunderstanding with respect to the law.***); *Warren v. Tacher*, 114 F. Supp. 2d 600 (W.D. Ky. 2000) (Arbitration awards may only be subject to limited judicial review; as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, ***even where the court is convinced he committed serious error*** does not suffice to overturn his decision.).

Thus, allowing the securities industry to pursue motions to dismiss in arbitration presents a draconian procedure. It allows the industry to completely subvert the arbitration process by denying a claimant a hearing without appeal even where the arbitrator's ruling is erroneous. There is no comparable procedure in the legal system.

8. *Potential Difficult Legal Issues in Considering a Motion to Dismiss on Statutes of Limitations*

You have indicated that NASDR may propose to amend the Code of Arbitration Procedure, authorizing the industry to file dispositive motions with respect to statutes of limitations. The unfairness of such a rule to investors extends well beyond the lack of qualified representation, lack of qualified arbitrators, absence of discovery, and lack of right to appeal. The presence of difficult legal and factual issues inherent in such motions relating to statutes of limitations will inevitably lead to many erroneous decisions. These issues may include some of the following:

a. When does a cause of action accrue for purposes of causing a limitations period to run? Is it when the wrongful transaction occurs, even though no damages result, or is it when the damages are sustained? If the damages must be sustained, does an unrealized loss establish damages for purposes of accrual, or does the loss have to be realized? What is the relevance of whether or not the investors are aware of the wrongful act? What is the relevance of whether the investor is aware of the losses?

b. With respect to the awareness of the investor, what constitutes knowledge? Is constructive knowledge to be implied? If so, what establishes constructive knowledge?

c. Does a fiduciary relationship exist between the parties, and if so, does a fiduciary relationship prevent the running of the statute of limitations? If so, does the statute of limitations only run when the fiduciary relationship terminates, regardless of whether the investor has knowledge of the claim?

d. What is the impact of concealment of the claim by the broker? If concealment tolls the statute of limitations, is an overt act required? Is it required to show that the broker intended to conceal the existence of the claim? Is reliance by the investor required?

e. What is the effect of state laws which indicate that statutes of limitations apply to actions in court? Can the arbitrators apply a statute of limitations to arbitration proceedings in such jurisdictions? Does the concept of laches apply?

f. Does a continuing wrong such as churning extend the statute of limitations?

g. Does incapacity, military service, or absence from the jurisdiction toll the statute?

h. Does pendency of a related claim toll the statute?

i. If any of the foregoing issues is present, how does an investor establish the relevant facts without depositions and interrogatories?

j. Do the equitable powers of the arbitrators give them any discretion in applying a limitations period?

These are only some of the issues which demonstrate the difficulty of an arbitration panel making statute of limitations determinations denying an investor a hearing.

These are not simple issues. Appellate decisions reflect many erroneous rulings by trial courts on these and similar issues which resulted in reversals of lower court dismissals. As stated above, investors in arbitration will have no appeal.

9. *The Position of the New York Stock Exchange*

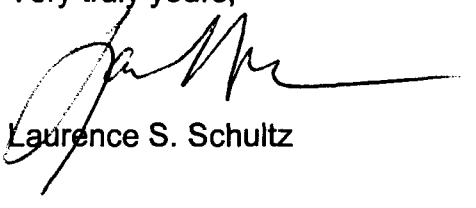
The position of the New York Stock Exchange is instructive. I understand that, consistent with its arbitration rules, the arbitration division of the New York Stock Exchange does not acknowledge a procedure for hearing motions to dismiss to deprive a claimant of a hearing. Although such motions are filed with the NYSE (as they are with NASDR), the NYSE does not schedule a separate hearing on the motion. If the motions are to be addressed, it typically is done at the evidentiary hearing at the conclusion of claimant's proofs. Thus, unlike NASDR, the NYSE has not created an *ad hoc* procedure in response to industry efforts to deny investors an arbitration hearing. It appears rather anomalous that the two principle SRO's in this country should have fundamentally different procedures and that NASDR procedures should give the industry a significant advantage over the investor which is not recognized by the NYSE. One can only speculate why NASDR should favor the industry and compromise investor protection on this critical issue.

I strongly urge that you reconsider this proposal and weigh the detriment to the arbitration process and the prejudice to investors against the benefits to the securities industry. Investor protection is a fundamental responsibility of NASDR.

This proposal is not in the interest of investor protection. It is an unfair, unnecessary, and unreasonable concession to the securities industry.

Rather than adopt a rule which sanctions this unfair procedure, I would suggest NASDR consider an amendment to the Code which specifically confirms that dispositive motions are not available in arbitration, consistent with the current language of the Code and the practice of the NYSE. While this may result in the industry having to participate in hearings they believe are subject to dismissal, this burden of defense is more than offset by the existing advantage achieved by the industry by denying investors access to the courts. The industry cannot have it both ways. If the securities industry is to compel investors into arbitration and deny them the essential protections of the court system, including discovery, a jury trial, and the right to appeal, it cannot demand court-style motion procedures to deny investors an arbitration hearing.

Very truly yours,



LSS/ch

Laurence S. Schultz

cc: Hon. John D. Dingell
Harvey L. Pitt
Robert S. Clemente