I adopt Mr. Willner's comments as mine, and add that Motions to Dismiss in arbitration should be banned altogether. Lest we forget, the NASD's mission statement says that it and its rules are for the protection of investors--NOT! The NASD Rules were literally designed so that John Q. Investor could file a gripe and walk into a hearing room with his shoe box full of documents, present his case, get a fair hearing, and get justice.
NASD arbitration is moving towards (and essentially is) an adversarial system that requires legal representation on both sides, but the arbitrators do not have the ability or the training to be judges---because they aren't.

The Rule changes should include one that allows the Claimant to choose whether to arbitrate or file in court. If the system was fair, most Claimants would continue to choose arbitration.

T Michael,

Chief, cook and bottle washer of T. Michael Kennedy, P.C., a small tribe of warriors dedicated to the pursuit of justice through trials for over a fifth of a century.

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-----Original Message-----
From: piaba-list@mail.piaba.org [mailto:piaba-list@mail.piaba.org] On Behalf Of Michael J. Willner
Sent: Tuesday, October 03, 2006 11:00 AM
To: rule-comments@sec.gov
Subject: RE: [Piaba-list] SR-NASD-2006-088

Please accept this as my comment. I have represent customers in SRO arbitrations for more than 10 years. I have been at the bar since 1988 and have represented defendants and plaintiffs in arbitrations in many different venues, including NYSE, NASD, AAA, CPR sponsored arbitrations and arbitrations in both state and federal courts.

Before any rule change is adopted that endorses motions to dismiss in any way, there should be a study of SRO motion to dismiss practice in 2006. Any rule change should balance the purported needs for prompt dismissal of facially infirm customer cases against the harm caused by the added burdens and expenses of frivolous dispositive motion practice. Any careful review of the current situation will demonstrate that the unfair burden and expense of frivolous and abusive motions to dismiss far outweighs the extremely few times that panels correctly have granted pre-hearing dismissal of facially defective claims. A thoughtful review of the reality of current SRO arbitration will reveal that the basic bargain of a prompt, efficient and cost-

effective forum has been compromised by abusive motions to dismiss strategies.

Here is what is going on out there and needs to be stopped: 1) respondents file motions to dismiss in a substantial percentage of SRO cases, perhaps approaching 50% and in any event far out of proportion to the narrow circumstance in which such a motion might be appropriate; 2) respondents lose a very high percentage of motions to dismiss, but the practice itself adds substantial costs and delays and often is timed to delay evidentiary hearings and provide respondents with an opportunity to argue their closing points in advance of the opening arguments of the claimant; 3) among the low % of cases where motions to dismiss have been granted, many of the rulings are flatly improper as they have credited the contrary and disputed factual assertions of respondents without giving the claimant a factual hearing to demonstrate that they are telling to truth and respondents' account of the facts are wrong; 4) more than 90% of the arguments made in filed motions to dismiss are premised on the panel's acceptance of Respondents' contrary factual allegations - at best these are mislabeled summary judgment motions that are wholly improper in arbitration because of the limited discovery and incomplete pre-hearing factual record; 5) motions to dismiss virtually never identify the proper pro-claimant record (acceptance of the allegations of the statement of claim) and standard of review or present any arguments from that standard or record.

In sum, the current state of abusive motion to dismiss practice has been grossly unfair to customers in SRO arbitrations. The harm done by not flatly banning motion to dismiss has been substantial. A complete ban on motions to dismiss should be adopted. If motions to dismiss are to be permitted at all, any new rule should make clear that the proper standards for consideration of any such motion is:

* the motion should be filed within 30 days of the service of the statement of claim and prior to any answer or other factual recital of the contrary factual assertions of the defense;

* the panel must accept as true all factual allegations set forth in the statement of claim;

* all reasonable inferences from these allegations must be construed in the light most favorable to customer;

* the panel must not be permitted to assay the weight of the evidence which might be offered in support of a claim; and

* pre-hearing dismissal should be considered only where it appears beyond all doubt that the customer can prove no set of facts in support of his claim that would entitle him to relief.

The rule should provide for further customer protections such as:

* if a motion to dismiss is filed that does not argue from the narrow standards for a proper motion to dismiss set forth in the rule, respondents should be charged with all related costs; and

* the rule should provide that where respondents' arguments fail

to accept the allegations of the statement of claim as true, the panel should also award attorneys fees against the respondent.

Respectfully submitted,

Michael J. Willner

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