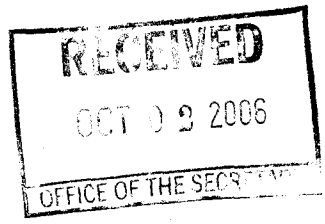
NELA Advocates for Employee Rights SM
National Employment Lawyers Association



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Please Respond To
NELA's National Office

September 26, 2006

Nancy Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SR-NASD 2006-088

Dear Ms. Morris:

The National Employment Lawyers Association submits the following comments in regard to NASD proposed rule SR-NASD 2006-088.

The National Employment Lawyers Association is comprised of approximately 3000 lawyers throughout the country who represent employees in all forms of employment matters including discrimination, compensation, whistleblower and breach of contract cases. Our members have extensive experience representing securities industry employees in NASD arbitrations.

Over the past few years we have had on going discussions with members of the NASD staff addressing our concerns about the proliferation of prehearing motions seeking to have cases thrown out without a hearing. We have encountered motions to dismiss, motions for summary judgment and various other forms of prehearing in limine motions which seek to terminate the proceedings without a hearing. We have steadfastly asserted that these motions are inappropriate in NASD arbitrations for several reasons.

First, NASD arbitration is not a "legal proceeding." Arbitration in that forum, we are instructed, is a less formal process not governed by dry principles of law. The arbitrators are specifically instructed that they are not bound by statutory law or case precedent. Rules of evidence are not followed. And, in most cases, panels include non-lawyers who do not have the ability to read, research and evaluate case law. Pretrial motions to dismiss are unquestionably legal motions based on technical legal standards.

Second, discovery is drastically and we believe inappropriately limited in employment cases. Depositions are not permitted except in the rarest of circumstances, despite case law around the country suggesting that such a practice is not legal in employment cases. In

employment cases, attorneys for employees are not generally allowed to contact current employees to gather informal statements necessary to prepare a case or to respond to such pretrial efforts to dismiss. There are no formal pleading requirements to measure most legal challenges against. Prehearing dispositive motions are a boon to the party with greater access to witnesses and documents and place a party with the burden of proof at a significant disadvantage.

Third, even in situations that some may deem "extraordinary" such as possible statute of limitations issues, there are often equitable tolling concepts that are available to relieve a party of a harsh application of dry law. And deciding cases based on declarations deprives a party of the right of cross examination and the opportunity to impeach the credibility of witnesses.

Fourth, and most significantly, is that experience in other arbitration contexts has shown that these motions are filed more frequently against unrepresented parties. It is very obvious that there is little downside to filing the motions routinely hoping that the case will get dismissed. It is enormously burdensome to respond to pretrial dispositive motions. These kinds of motions represent the very worst features of litigation. They are expensive, time consuming and clearly favor the defendant.

Fifth, the SEC has a special responsibility to protect customers and employees against this kind of overreaching. It would be one thing if sophisticated parties voluntarily selected arbitration and had a choice of fora so that they could decide whether to use a system that both limited discovery and permitted pretrial motions to dismiss. But that is not the case here. Customers and employees have no real choice. The NASD stands alone among the nation's major arbitration providers in refusing to fully endorse and comply with the Due Process Protocol by not allowing depositions. The NASD still insists on using non-lawyer, industry representatives on employment panels. It is simply inappropriate to make the system mandatory and to permit this kind of defense advantage in addition to all of the other industry advantages already built into the system.

We believe that a better rule would guarantee every claimant a hearing as was the original intent of and standard justification for industry arbitration. Dispositive motions should only be allowed with the consent of both parties. To the extent that no one benefits from a futile hearing we can foresee many different scenarios where both parties would benefit from having certain legal matters resolved in advance.

Thank you very much for your consideration.

Very truly yours,

Cliff Palefsky
Co-Chair ADR Committee
National Employment Lawyers Association