BURNS & LEVINSON LLP

HARRY S. MILLER
(617) 345-3000
HMILLER@BURNSLEV.COM

125 SUMMER STREET BOSTON, MA 02110
T 617.345.3000 F 617.345.3299
WWW.BURNSLEV.COM

October 4, 2006

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

RE: SR-NASD-2006-088, Proposed NASD Rule 12504 - Despositive Motions

Dear Ms. Morris:

As an attorney with an active practice in securities arbitration, I am writing to express my strong opposition to the above-referenced NASD proposal to adopt rules providing for dispositive motions in arbitration. I have represented public investors in over one hundred cases filed against stock brokers and brokerage firms, and I can tell you without any question, the proposed rule would be perceived by investors as giving a distinct advantage to the securities industry respondents in arbitration cases. Beyond the public perception that this proposed rule would create a biased system where the cards are stacked against investors, as a matter of fact, and not just perception, the adoption of the proposed rule would actually give a very unfair advantage to brokerage firms in such cases, and therefore, it should be rejected.

Public investors believe that they are entitled to their "day in court," and that they will at the very least receive that opportunity to present their complaint at an arbitration hearing. Allowing brokerage firms to deprive investors of an opportunity to have their "day in court" through an arbitration hearing, after having already deprived them of their right to have a day in real court, and having deprived them of the right to full discovery as they would have been entitled to in court, would undermine public credibility in NASD arbitration as a fair and equitable system for dispute resolution.

Investors with complaints against their brokers or brokerage firms are already at a significant disadvantage in NASD arbitration because they do not have an opportunity to conduct full and comprehensive discovery in advance of the arbitration hearing, as they would if their case were being heard in court. They do not have an opportunity to submit interrogatories or take depositions in advance of the arbitration hearings, and therefore, the first opportunity to have all the evidence on the table typically does not occur until the midst of the arbitration hearings as a result of the testimony of witnesses. Giving the securities industry respondents the opportunity to have the case dismissed without a full hearing would be extremely unfair to public

customers as they would not even have had the opportunity to discover all of the relevant facts and present it to the panel in a meaningful manner.

It should be noted that in NASD arbitrations motions to dismiss are filed only by the respondents, and in NASD customer cases that means that the motions to dismiss are filed only by the brokers and brokerage firms to dismiss complaints filed by public customers. Therefore, the adoption of this rule would provide yet another weapon to the brokers and brokerage firms with which to eliminate customer complaints without having to ever respond in a judicial forum or even in an arbitration hearing. Adopting the proposed rule would be giving an unfair advantage to the securities industry respondents by giving them procedural advantages that would not be available in this manner if they were in court.

In my private legal practice in securities arbitration for over 15 years, I have never seen such rampant abuse of motion practice as recently through the use of motions to dismiss by the securities industry respondents. Such motions were rarely encountered in the earlier years of my practice, but they have now become a regular part of the respondents' standard operating procedure to the point where we now encounter a motion to dismiss in virtually every case. This adds significantly to the costs for claimants to pursue their cases, and is directly counter to the stated NASD objective of arbitration as an efficient and economical means of dispute resolution for the protection of public investors. Because of the widespread abuse of motions to dismiss by the securities industry, public investors now not only face more expensive costs of arbitration, but they also face lengthy delays adding many months to the arbitration process. As a result, arbitration hearings are now delayed for additional significant periods of time, with typical arbitration hearings not occurring for approximately a year and a half after the filing of the complaint, in what could hardly be considered an efficient system. SEC approval of a rule for motions to dismiss would only add further delays by formally allowing a process which is already being abused to the great harm of public investors.

Although the securities industry is filing motions to dismiss in virtually every case at this time, such motions are very rarely allowed. But the motion practice, besides making the process more expensive and causing more delays, all to the disadvantage of public investors, also results in an intimidation factor which discourages public investors from proceeding with what they had been led to believe is an efficient and economical dispute resolution process. Instead, the process takes on more and more of the trappings of protracted litigation, but without the balances provided by discovery and trained and qualified judges, which protect parties to litigation.

In those extremely rare instances where the arbitrators rule in favor of a motion to dismiss, this too can work a great injustice against public investors. The one instance in which I have seen a motion to dismiss allowed, there is no question that such a motion would not have been allowed in court, the motion was premature, and it was argued by the brokerage firm on impermissible grounds which would not have been recognized in court. However, the defrauded

investors in that case now have no recourse since the decision on the motion to dismiss was not accompanied by any reasoned opinion or explanation, and it is not subject to review or appeal. The arbitrators who rendered that decision did not have the training or expertise of a judge to understand the proper grounds in court for a motion to dismiss, or when procedurally such a motion is proper to consider, and they allowed the securities industry abuse of this procedure to work an irreparable harm on the unfortunate defrauded investors. The NASD arbitration system failed the claimants in that case because of the use of a procedure that has no place in arbitration and which should be prohibited in arbitration, and the proposed rule rather than remedying such a situation would create more opportunities for abuse.

Plaintiffs in court contend with motions to dismiss in the context of standards and procedures that have clearly developed rules which are well understood by both sides and by the judge. In the event that there is an error in the allowance for a motion to dismiss in court, there is a clear standard for review and an appellate procedure for addressing such circumstances. NASD arbitration offers none of those protections to a public investor, and therefore the use of motions to dismiss can only serve to render the NASD arbitration system unfair to public investors, even beyond the point where it is already perceived to be biased in favor of the securities industry.

A cost benefit analysis should be considered in connection with a review of the proposed rule. The negatives of the proposed rule include the following: 1) the very significant costs and delays which the adoption of the proposed rule would force public investors to incur; 2) the procedural disadvantage which public investors would face in contending with such a rule absent full discovery; 3) the tremendous risk of injustice as a result of improperly granted unfavorable rulings which would terminate potentially meritorious complaints prematurely; and 4) the public perception of a biased system where the cards are stacked in favor of the securities industry and where aggrieved investors would not even have an opportunity to present their complaint for consideration at a hearing. Compared to the cost to the industry of having to proceed to a brief arbitration hearing on the merits in those extremely rare cases which might have been dismissed, there is no question that equity demands that the proposed rule be rejected entirely. The better rule which should be adopted would provide simply that motions to dismiss are not permitted in NASD arbitration.

If there is to be any exception to a general rule prohibiting motions to dismiss in arbitration, perhaps such a rule could be limited to solely for one reason: lack of eligibility for arbitration under the rules. But even such a strictly limited provision for motions to dismiss should still require a hearing on that motion before the full panel, with the rule including a clearly stated presumption that investors are entitled to a full hearing of their complaint unless the respondents are able to prove conclusively that the complaint is not eligible for arbitration.

In the event that a rule allowing for motions to dismiss is to be adopted, the rule should provide standards similar to court rules and safeguards for public investors in keeping with the stated purpose of NASD arbitration, including standards for the consideration of such a motion as follows:

A. The arbitrators must accept as true all factual allegations set forth in the Statement of Claim;

B. The panel may not consider any alleged facts raised by respondents which are in dispute;

C. All reasonable inferences from the allegations of the Statement of Claim must be construed in a light most favorable to the claimant; and

D. A clear statement that motions to dismiss are looked upon with disfavor and should only be granted in extremely rare and extraordinary circumstances 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 any relief.

Any such rule should also provide customer protections against the abuse of such rules by including the following as well:

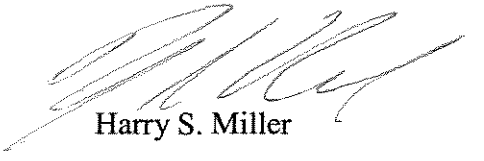
1. Any motion to dismiss that does not limit itself to the above narrow standards must be rejected on its face with all expenses being charged against the party filing such an improper motion;

2. The arbitrators must award attorneys fees against the respondent in connection with all motions to dismiss in which respondent's arguments fail to accept the allegations of the Statement of Claim as true; and

3. Attorneys' fees should automatically be assessed against any party filing a motion to dismiss where the motion to dismiss is not allowed.

However, even if carefully crafted as above suggested, motions to dismiss in arbitration present more opportunities for abuse and raise far more problems with a process which is already subject to serious criticism from public investors who have any experience with the system. Therefore, in order to properly protect the public, the SEC should reject the proposed NASD rule, and instead should consider a rule which provides simply that motions to dismiss are not allowed in arbitration.

Yours truly,



Harry S. Miller

hsm:jr

01061728