October 5, 2006

This E Mail Message is directed to:
Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington DC 20549-1090

From:
Jorge A. Lopez, Esquire
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Re: File No. SR-NASD 2006-088
Proposed NASD Rule 12504-Dispositive Motions

Dear Secretary Morris:

I appreciate this opportunity to briefly share with you my thoughts and provide comments on the above referenced proposed rule relating to motions to dismiss in arbitration. I enjoy the privilege of representing investors that have been the victims of negligence, breaches of fiduciary duty and outright fraud by members of the securities industry. When the securities industry began to include pre dispute arbitration clauses in its agreements with its customers, it did so because, supposedly, arbitration would be an efficient and fair manner in which to decide disputes between members of the securities industry and its customers. It was not intended to sacrifice fairness. Most customers have no idea that they give up the right to have their day in court before a judge and jury of their pee rs when they establish accounts with securities firms.

The adoption of the proposed 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 a procedural advantage. Despite having successfully fought to avoid the litigation of disputes with its customers, the securities industry continues to attempt to selectively import the elements of that forum when it so chooses to benefit itself. Allowing procedural motions in what is supposed to be a simplified dispute resolution procedure is, at best, sheer hypocrisy on the part of any brokerage firm who seeks to do so.

An arbitration panel deciding a pre-hearing dismissal motion would have to do so on the basis of an inadequate body of written evidence and on the basis of a complete absence of

testimonial evidence. A fair decision is not possible in that kind of evidentiary vacuum. The Code of Arbitration Procedure makes up for these problems by guaranteeing a hearing to every customer who wants one.

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 available to them 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.

Dismissal of a party's claims without a full and final evidentiary hearing on the merits of those claims is in all but the most extreme cases contrary to the intent and purpose of the Rules. Arbitrators should ordinarily conduct a full evidentiary hearing concerning the merits of a party's claim. That hearing should include, and the Arbitrators should duly consider, all relevant and probative matters as to a party's claims. My view is that motions to dismiss in NASD arbitration should be considered only after the evidentiary hearing for the simple reason that it is only then that the panel has heard a complete presentation of the facts and heard from the witnesses whose credibility is always at issue.

If NASD arbitration is going to move towards the denial of a Claimant's right to a full evidentairy hearing, then it is time to examine the fairness and enforceability of the Respondents' arbitration clauses.

Thank you for considering my comments.

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