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November 26, 2001

JAN 22 2002

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

**Re: Motions for Summary Disposition and Motions to Dismiss
in NASD Arbitration**

Dear Linda:

I have previously forwarded you five copies of Motions to Dismiss which I have received in various NASD arbitrations. Enclosed are two additional Motions received within the past several days.

Based upon my reading of the plain language of Rule 10303, my clients are entitled to a hearing. There is no procedure to use Motions for Summary Judgment and Motions to Dismiss to address substantive legal and factual issues in arbitration.

I again request intervention by your office to address the industry's abusive motion practice which is designed to undermine arbitration proceedings.

The danger of allowing these improper motions to be routinely filed is demonstrated by the spurious ruling of the Tenth Circuit Court of Appeals in *Sheldon v. Vermonty* where a customer complaint was dismissed without an evidentiary hearing. *Sheldon* cites two equally flawed district court decisions. The industry is correct that if you throw enough mud on the wall, it is inevitable that occasional bits and pieces will stick.

Sheldon demonstrates the strained reasoning used to support these motions. Unable to identify any authority for motions to dismiss in the Code, the court embarrassingly relied on the broad authority given panels under Rule 10214,

Ms. Linda D. Fienberg
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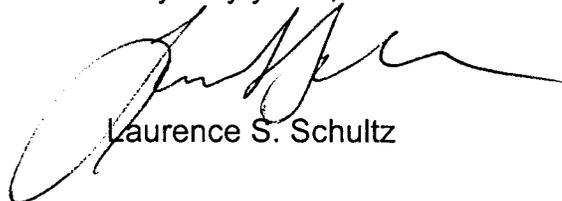
which applies only to industry and clearing disputes involving discrimination (see Rule 10210 and NASD Notice to Members 99-96).

The industry is already citing the *Sheldon* decision as authority to avoid their customer hearing obligations under the NASD rules. See Motion to Dismiss in *Posner v. Raymond James & Associates, Inc.*, enclosed.

It is important to note that an arbitration panel's grant of a motion to dismiss, although improper under the NASD rules, may be impossible to overturn because of the limited review of arbitration decisions on appeal. For example, it has been held that granting a motion to dismiss which may be in violation of NASD rules is not reversible as manifest disregard of the law because the NASD rules are not law. See *Max Marx Color & Chem. Employees' Profit v. Barnes*, 37 F. Supp. 2d 248, 253 (S.D.N.Y. 1999).

The securities industry has imposed arbitration on the public. It cannot be allowed to undermine and ignore the very rules which govern its own arbitration proceedings. In the interest of investor protection, NASDR must act promptly to preserve the integrity of the arbitration process.

Very truly yours,



Laurence S. Schultz

LSS/ch
Enclosures

cc: George Friedman
John C. Barlow
Hon. John D. Dingell ✓
Harvey L. Pitt

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LAURA D. MASON

December 6, 2001

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

Re: Motions for Summary Judgment and Motions to Dismiss
in NASD Arbitration

Dear Linda:

The silence of your office on the motion to dismiss issue is very disturbing. I must question how NASD Regulation, which is charged with investor protection, can sit idly by while the brokerage industry flouts the most fundamental principle in the NASD Code of Arbitration Procedure – the right to hearing.

Due to a combination of the reluctance of courts to overturn arbitration decisions and the ability of industry attorneys to obfuscate, several courts have refused to reverse arbitrator decisions denying hearings. These federal decisions are receiving more and more publicity. Enclosed is a full-page analysis of *Sheldon v. Vermonty*, published as the lead story in *BNA Inc. Securities Regulation and Law Report*, Vol. 33, No. 43 (Nov. 5, 2001). As I have previously advised you, *Sheldon v. Vermonty* relies on NASD Rule 10214, which has no application to a customer claim and is therefore clearly wrongly decided.

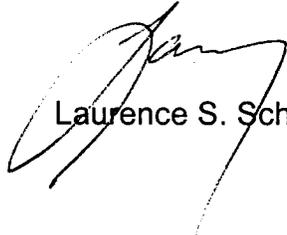
NASDR cannot expect its arbitrators to understand the subtleties of this issue if the Tenth Circuit Court of Appeals doesn't get it.

It is incumbent upon your office to take action. The industry has imposed arbitration on investors and has established the rules of the game through the NASD Code of Arbitration Procedure. You cannot passively allow the industry to subvert the very rules which they and NASDR impose on investors.

Ms. Linda D. Fienberg
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In the absence of affirmative action by your office, you can expect these decisions to proliferate, undermining the investor arbitration process which you have pledged to protect.

Very truly yours,



Laurence S. Schultz

LSS/ch
Enclosure

cc: George Friedman
John C. Barlow
Hon. John D. Dingell ✓
Harvey L. Pitt
Ruth Simon