IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,872

HELEN MELAMED,

Petitioner,

vs.

MERRILL LYNCH PIERCE FENNER & SMITH, INC., and BRIAN SHEEN,

Respondents.
_____/

APPELLANT/PETITIONER'S INITIAL BRIEF ON THE MERITS

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I

PREFACE

The Appellant/Petitioner, HELEN MELAMED, was the Respondant in the District Court of Appeal, Fourth Judicial District, and is the Plaintiff in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. The Appellees/Respondents herein, MERRILL LYNCH PIERCE FENNER & SMITH, INC., and BRIAN SHEEN, were the Petitioners in the District Court and are the Defendants at the trial court level.

The Appellant/Petitioner has invoked this court's appeal jurisdiction pursuant to Florida Rule of Appellant Procedure 9.030(a)(A)(ii) and has, in an abundance of caution, sought review by certiorari. This Honorable Court has accepted jurisdiction. The decision to be reviewed is reported at 453 So2d 858. It is filed herewith as an appendix to this brief on the merits.

In this brief the parties will be referred to as they stand at the trial court level, i.e. Appellant/Petitioner will be referred to as Plaintiff and Appellees/Respondents will be referred to as Defendants.

This court has jurisdiction on the basis of appeal jurisdiction and, therefore, a record from the District Court will be forthcoming. However, with Appellant/Petitioner's brief on jurisdiction, a 250 page appendix was filed with sufficient copies for members of the court. Therefore, for ease of reference, Appellant/Petitioner will be referring to that appendix with the symbol (A). Appellant/Petitioner believes this will allow members of the court to look at one complete record contained in a single appendix. The record at the District Court level consisted of several appendixes submitted by different parties; there

was never a single index for all appendixes. Pertinent portions of all of those appendixes have been included in the appendix which has previously been filed with this court.

II

STATEMENT OF THE CASE AND FACTS

The District Court's order was the result of a petition for certiorari filed by both defendants. (A 251-282) The sole and exclusive argument for certiorari jurisdiction by the District Court was that the trial court's nine page order with five page appendix of October 19, 1983 (A 226-239) was in conflict with Merrill Lynch Pierce Fenner & Smith, Inc., et al., v. Melamed, 405 So2d 790 (1981, Fla. App. D4) (Melamed I) and Merrill Lynch Pierce Fenner & Smith, Inc., et al., v. Melamed, 425 So2d 127 (1982, Fla. App. D4) (Melamed II). Plaintiff drew issue with this assertion and the District Court's order sought to be reviewed - Melamed III 453 So2d 858 - does not find such conflict or otherwise assert the basis of its jurisdiction.

Suit was filed on February 4, 1981. (A 1-16) On April 17, 1981 an amended complaint was filed. (A 17-32) An answer on behalf of both defendants was filed May 12, 1981. (A 33-40)

Prior to the filing of the amended complaint, both defendants filed a motion to dismiss and a motion to compel arbitration. (A 41-46) Although the motion alluded to an alleged agreement to arbitrate, it was not attached in violation of Florida Rule of Civil Procedure 1.130 FSA. This motion and the motion filed subsequent to answering the amended complaint (A 47-53) both specifically acknowledged and stipulated that no arbitration should take place on the counts seeking recovery based upon violations of federal and Florida securities laws. Presumably defendants acknowledged this fact and stipulated to this fact because they recognized that Florida Statute §517.241(2) FSA prohibited arbitration of such claims and preserved the right to bring action in court on such claims. At no time did the defendants ask the

trial court or the appellate court to invalidate the statute. Nevertheless, in the opinion under review, the District Court held the statute invalid and unconstitutional without the benefit of briefing from any party. Id page 862. The District Court further acknwledged that its opinion was in direct conflict with the Third District Court of Appeal's opinion in Young v. Oppenheimer & Co., Inc., 434 So2d 369 (1983 Fla. App. D3). The Young opinion has since been affirmed as correct by this court in Oppenheimer & Co., Inc. v. Young, 456 So2d 1175 (Fla. 1984).

The motion to compel arbitration filed after answering the amended complaint (A 47-53) failed to attach the agreement relied upon but rather attached other documents. (A 49-53). On May 21, 1981, without leave of the trial court, the defendants filed a third motion to compel arbitration. Both motions stipulated that the defendants did not wish arbitration on the federal or Florida securities act counts of the amended complaint. (A 47-54) On May 22, 1981, a hearing was held on Defendants' motion to compel arbitration and the defendants offered no testimony to support their allegations of a voluntary agreement to arbitrate. This defect was specifically pointed out at the hearing. (A 62-99, see specifically A 79). The trial court denied the amended motion to compel arbitration on June 7, 1981. (A 100) This gave rise to Melamed I which reversed on the basis that the trial court should have considered the federal arbitration act and held that the act "supercedes inconsistent provisions of Florida law and the Florida arbitration code §682.01 to 682.22 Fla. Statutes (1979)." Melamed I, supra, page 791. The District Court did not deal with the defendants' failure to plead or prove the alleged arbitration agreement.

On remand the amended motion to compel arbitration was properly renoticed for hearing. (A 102-115) The defendants appeared through

attorney and announced that they were unprepared to proceed.

> MISS PHILLIPS: "The Plaintiff has noticed a continuation of our motion to compel arbitration which is very old.
>
> It is our position, from the outset, there is nothing else to do but to order this case to arbitration, and stay everything else, pursuant to the 4th DCA's position. We are not prepared to do anything else. . . ." (A 104)

The trial court again denied the motion to compel arbitration. (A 116) It should be pointed out that at this second hearing the defendants again offered no evidence or attempted to carry their burden of proving the authenticity of the alleged agreement. The trial court's order cited "various factors in Plaintiff's memo." (A 46-52) Melamed II quashed this second order on "procedural requirements" without reaching the legal issues passed upon by the trial court. Supra, page 128.

Meanwhile, on September 14, 1982, Plaintiff filed her amendment to amended complaint asserting securities law and regulation violations pursuant to the securities act of 1933. (A 127-129) Motions to dismiss said pleading (a 130-132) were denied except that the Plaintiff was required to separate into a separate count one section of her 1933 securities act claim. (A 133) This the Plaintiff did. (A 135-136) Count XI was ultimately dismissed (A 240), but Count X has withstood two motions for summary judgment (A 241-242) and petitions for certiorari to the Fourth District Court of Appeal. (A 312-313). It should also be noted that Plaintiff's initial complaint contained a securities law count. (A 5-6) The Defendants stipulated that the federal securities law count was not subject to arbitration. (A 47) The initial securities law count was dismissed when the trial court determined that it appeared to be based (at least in part) on the 1934 act as to which

exclusive jurisdiction vests in the federal courts. (A 137-138) This amendment simply limited the federal securities claim to the 1933 securities' act.

Following the decision in Melamed II, the Defendants made no effort to proceed before the trial court in accordance with the District Court's mandate, and the Plaintiff noticed a hearing held August 18, 1983. (A 139) At the time of the hearing, Plaintiff immediately brought to the trial court's attention that the Melamed II opinion requested findings of fact and conclusions of law and that if the court found that Plaintiff had signed the agreement, an order articulating the trial court's conclusions on the legal issues was requested by the District Court. (A 145-146) Defendants' lead counsel then apologized for unpreparedness once again, explaining that he had been out of his office for three weeks. (A 148) This was followed with the assertion that he thought that the only issue to argue was the authenticity of the contract and that if that was proved, his client would be ultimately entitled to an order of arbitration despite the previously argued legal inpediments to such order. (A 205-206) The trial court refused to accept such excuses for unpreparedness. (A 206) At this point both Defendants through attorney Bennett Falk, lead counsel, admitted that because of the pending 1933 securities acts claims, Counts X and XI, the trial court could not order arbitration:

The court: "Right now I have a live thing.

Mr. Falk: I think the court is correct at this point. . . ." (A 218)

* * *

The court: "It appears to me as if that would be an impediment to referring it to arbitration.

Mr. Falk: Agreed." (A 219)

Following the hearing, the trial court accepted briefs of counsel and ultimately entered a 14 page order denying the amended motion to compel arbitration. (A 226-239)

It should be noted that at no time at the trial court level did either Defendant ask the trial court to sever the 1933 securites act count or the Florida securities act count and proceed with arbitration on the other counts. Indeed, that was never requested at the District Court level. The District Court's decision to do that came sua sponte.

The trial court's third order denying arbitration (A 226-229), resulted in the Melamed III decision which this court has now agreed to review.

POINT I

THE DISTRICT COURT ERRED IN HOLDING FLORIDA STATUTE 517.241(2) INVALID AND ORDERING ARBITRATION.

Melamed III's holding that the arbitration agreement was binding and enforceable under Florida law, (supra pages 861 and 862) was recognized by the Melamed court itself to be in direct conflict with Young v. Oppenheimer decided by the Third District. The Melamed III court further recognized that the federal securities law claim was not subject to arbitration. Melamed III, however, inconsistently held Florida Statute 517.241 FSA invalid and ordered arbitration on the Florida securities act claim.

This court, in Oppenheimer & Co., Inc. v. Young, supra, specifically approved as correct the Young vs. Oppenheimer & Co., Inc. decision. The Young court stated:

> "Because Florida law extends the same civil remedies to purchasers and sellers of securities in interstate commerce as the laws of the United States, an arbitration agreement which is unenforceable under United States law is also unenforceable in Florida."

This court similarly held in approving the Young decision:

> "It is clear from the above that the legislature intended that Florida securities laws be hand-in-glove with federal securities law, and that Florida purchasers of securities be granted the full range of civil remedies offered by both Florida and federal securities laws."
>
> * * *
>
> "Thus, we agree with the District Court that we should follow Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953) in holding that an arbitration agreement concerning disputes and securities is unenforceable. We are also influenced by the very practical consideration that holding otherwise would waste judicial resources. Normally, both federal and state causes of action based on security violations in interstate commerce may be heard in either federal or state courts. This is the most economical disposition available and serves both federal and state interests. The adoption of the rule that the state cause of action is subject to

arbitration, while the federal cause of action is not, would lead to an uneconomical bifurcation of proceedings." Id. page 1178

Melamed III relied upon Southland Corp. v. Keating, 104 S.Ct. 852, 79 L.Ed2d 1 (1984) which this court specifically distinguished as dealing with franchises and not securities and held inapplicable to this issue. Oppenheimer & Co., Inc. v. Young, supra, page 1179. See also Laquer v. Smith, Barney, Harris, Upham & Co., Inc., 446 So2d 1119 (1984 Fla. App. D3).

POINT II

THE DISTRICT COURT ERRED IN ORDERING ARBITRATION WHERE THE COMMON LAW CLAIMS INCLUDED CLAIMS FOR FRAUD AND PUNITIVE DAMAGES AND ARE TIED FACTUALLY TO NON-ARBITRABLE CLAIMS.

Amoung the reasons given by the trial court in the third order denying arbitration was reason number 3:

> "3) Claims for fraud and punitive damages should not be referred to arbitration under the federal arbitration act. Although claims of fraud by themselves, will not bar arbitration, where, as here, they are coupled with complex issues and proceedings and there are other parties not part of the arbitration proceeding (Brian Sheen) and the court has already assumed jurisdiction in a substantial sense, and there have been acts of waiver and estoppel on some of the issues, arbitration is not appropriate. Compare Merrill Lynch Pierce Fenner & Smith, Inc. v. Falowski, 425 So2d 129 (4 DCA 1982)." (A 232)

The District Court held that such claims were indeed arbitrable. Melamed II, supra, page 861. The cases cited by the District Court are totally inapplicable. Prima Paint Co. v. Flood & Conklin, 388 US 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) stands merely for the proposition that claims of fraud in the inducement are to be resolved by the arbitration panel. The claims involved herein are for fraudulent activity which took place after the contract was entered into and monies and securities placed with the Defendant were converted and sold off. In Merrill Lynch Pierce Fenner & Smith, Inc. v. Falowski, supra, the Fourth District specifically requested the trial court to resolve "whether Falowski's allegations of fraud are based upon events not specifically related to the opening of the accounts, or alternatively, whether the complaint should be construed to allege fraud in the inducement, as Merrill Lynch suggest?" Thus, Merrill Lynch Pierce Fenner & Smith, Inc., v. Falowski and Prima Paint Corportion v. Flood

& Conklin Manufacturing Company are totally consistent. Melamed III, however, is totally inconsistent with both decisions.

Bloomberg v. Berland, 678 F2d 1068 (11th Cir. 1982) does not support the contention that the trial court departed from established principals of law. In that action the parties had already voluntarily submitted to arbitration. The arbitration panel's decision was then reduced to judgment and confirmed by the State Court in New York. The pending federal action was then held to be res judicata. There was a fraud claim involved but the plaintiff had voluntarily submitted it to arbitration.

Post Tensioned Engineering Corp. v. Fairways Plaza Associates, 412 So2d 871 (1982 Fla. App. D3) and Sabates v. International Medical Centers, Inc., 450 So2d 514 (1984 Fla. App. D3) cited by the District Court did not even involve the federal arbitration act.

The District Court's citation to Merrill Lynch Pierce Fenner & Smith, Inc. v. Weswind Transportation, Inc., 442 So2d 414 (1983 Fla. App. D2) as support for its conclusion is hard to fathom in view of the fact that the cited decision sets forth on its very face that no fraud or punitive damage claim was involved therein. Id. page 415.

On the other hand the District Court's decision conflicts with established Florida judicial precedent. The District Court, without citation, impliedly seeks to overrule this court's controlling decision in Klosters Rederi A/S v. Arison Shipping Co., 280 So2d 678 (Fla. 1973), cert. den. 414 US 1131. This, of course, the District Court was in error in doing as it was bound to follow the controlling decisions of this court. Hoffman v. Jones, 280 So2d 431, 433-434 (Fla. 1973). In Klosters, this court held that not withstanding the existance of an agreement to arbitrate, the Third District Court of Appeal erred

in compelling arbitration in a complicated case founded upon allegations of fraud of breach of fiduciary duties. Under such circumstances it was determined that the courts are far better equipped to afford full and complete relief than an arbitration panel. The District Court was directed to proceed with adjudication and the Third District Court of Appeal was reversed for compelling arbitration. The Klosters decision has been followed and cited with approval by the Third District Court of Appeal and Shearson Hammill & Co., v. Vouis, 247 So2d 733 (1971 Fla. App. D3), cert. den. 253 So2d 444, as well as Young v. Oppenheimer, Inc., supra, page 371. The decision under review is directly contrary to these established Florida precedents.

Young v. Oppenheimer & Co., Inc. supra, is a two-pronged decision. As stated above, under Point I, the Young court held that the Florida securities act claims were not subject to arbitration and the Melamed III court expressly recognized this direct conflict with the decision in Young on this point. In addition, the second prong of the Young holding was that "arbitration of alleged fraud, misrepresentation and breach of fiduciary duties is not consisten with the policy and language of the Florida securities act" and will not be ordered. Id. page 371. The Young court stated with reference to the Vouis decision at page 371:

> "Today we reaffirm the conclusion, if not the rationale, of that decision."

In Oppenheimer & Co., Inc. v. Young, this court approved the Third District's opinion in Young v. Oppenheimer & Co., Inc. as completely correct on all issues.

In addition, innumerable federal authorities clearly hold that fraud and punitive damage claims tied factually to the federal securities

act claims are not subject to arbitration under the federal arbitration act. See Sawyer v. Raymond James & Associates, Inc. 642 F2d 791 (5th Cir. 1981). In Pierson v. Dean Witter Reynolds, Inc. 551 F.Supp. 497, 504 (DC Ill. 1982), the agreement, like that involved herein, agreed to utilize New York law in the arbitration proceeding. The Pierson court noted that New York law did not allow arbitrators to award punitive damages and the plaintiff, like Melamed, had such a claim. Under such circumstances the punitive damage claim was held non-arbitrable and was allowd to proceed in the judicial forum. Janmort Leasing, Inc. v. Econo Car International, Inc. 475 F.Supp. 1282, 1291 (DC NY 1979) clearly and simply held that anti-trust and punitive damage claims are non-arbitrable. Indeed the Melamed III decision appears inconsistent with the Fourth District's own decision in Merrill Lynch Pierce Fenner & Smith v.Falowski, supra.

Whether or not the federal arbitration act would preempt state law where inconsistencies arise, it is apparent from both the federal authorities and the state authorities that the act was intended to be read consistently with state objectives. It is, indeed, questionable as to whether a federal court would enforce an arbitration clause with respect to future disputes were state law prohibits such an agreement. If Florida law would prohibit enforcement of such clauses, it would appear that the federal court would similarly not enforce it. Christiansen v. Farmers Insurance Exchange, 540 F2d 472, 476 (10th Cir. 1976) See also Ex Parte Alabama Oxygen Company, Inc. 433 So2d 1161 (Ala. 1983) wherein it was held that the federal arbitration act could not be constitutionally applied to preempt the State's policy against the election of out of state law. The State of Florida has consistently demonstrated the public policy that agreements to arbitrate

future controversies are unenforceable. Wickes Corp., v. Industrial Finance Corp., 492 F2d 1173 (5th Cir. 1974). Furthermore, the agreement involved herein provides that it is to be governed by the laws of the State of New York. In Knight v. H. S. Equities, Inc., 280 So2d 456, 459 (1973 Fla. App. D4), it was held:

> "As was heretofore noted, the customer's agreement contained a specific stipulation that the laws of the State of New York shall govern the enforcement of the agreement. Such a proviso, we feel, falls within the emphasized language appearing in Section 682.02(supra) rendering arbitration provisions unenforceable in Florida. Where it is stipulated that an agreement to arbitrate and its enforcement are governed by the laws of another state, such agreement does not comply with Chapter 682 and is not specifically enforceable in this State."

See also Miller v. A. A. A. Con Auto Transport, Inc., 434 F.Supp. 40 (DC Fla. 1977).

Similarly, in Damora v. Stresscon International, Inc., 324 So2d 80 (Fla. 1975), this court held that a contractual provision that parties to a contract would arbitrate future disputes in another jurisdiction and under another jurisdiction's laws constituted a failure to incorporate the Florida Arbitration Code and, indeed, a rejection of the Florida Arbitration Code and, thus, the agreement was voidable at the instance of either party and could not be used as a bar to an action by either party in a court of competent jurisdiction. See also Romar Transports Ltd., Inc. vs. Iron and Steel Company of Trinidad and Tobago, Ltd., 386 So2d 572 (1980 Fla. App. D4).

In the instant case the trial court specifically found that the fraud and punitive damage claims were such that arbitration could not be ordered. (A 232) Yet the Melamed III court, in total inconsistency with the Falowski court, and in conflict with Klosters, Vouis, and

Young ordered arbitration. The decision of the Fourth District Court of Appeal is out of tune with established judicial precedent, is completely erroeneous, and should be reversed.

POINT III

THE DISTRICT COURT ERRED IN ORDERING ARBITRATION ON THE CAIMS AGAINST BRIAN SHEEN.

The arbitration agreement is very specific. It is a form agreement obviously drawn by Merrill Lynch and any ambiguities must be read against the Defendants. The contract involves only "any controversy between us". The "us" pronoun obviously refers to the signators to the contract of which Brian Sheen admittedly was not one. In holding that the contract "is broad enough to include persons within the respondeat superior doctrine" the District Court clearly erred. Melamed III, supra, page 860. The District Court's reliance upon Vic Potamkin Chevrolet, Inc. v. Bloom, 386 So2d 286 (1980 Fla. App. D3); Paine Webber Jackson & Curtis, Inc. v. McNeal, 239 S.E.2d 401 (Ga. App. D2 1977) and Berman v. Dean Witter & Company, Inc., 44 Cal. App. 3rd 999, 199 Cal. Rptr. 130 (Ct. App. 1975) is clearly misplaced. Indeed 2 of the 3 decisions are out of state decisions and the Circuit Court's opinion could hardly be held to be a departure from established Florida principles of law based upon those authorities. The Vic Potamkin decision is an anomaly in Florida law and is the only Florida case to extend the contractual duty to arbitrate beyond the signators to the contract under the respondeat superior doctrine. Furthermore, the language of the agreement in Vic Potamkin was such that the parties agreed to arbitrate "any controversy or claim arising out of, or relating to this agreement". Id. page 288. The Merrill Lynch contract provided that the parties agreed to arbitrate only "any controversy between us".

Berman v. Dean Witter & Company, Inc., supra, involved a wife, joined by her husband, who sued a brokerage house. The wife was a

party to the agreement to arbitrate and the husband acted merely as an agent for his wife for whose account he entered into the transactions. Therefore, the arbitration agreement was held binding as to both. It must be remembered, however, that the claim was really brought on behalf of the wife who was a signator to the contract. There was absolutely no discussion in the Berman case regarding whether an employee of a brokerage house could be compelled to arbitrate or whether he would have the right to compel others to arbitrate claims against him when he was not a party to the agreement.

Paine Webber Jackson & Cutris, Inc. v. McNeal, supra, is actually a decision which supports plaintiff's position that no arbitration can be ordered as to any defendant on any claim as long as a 1933 securities act count remains pending. That, in fact, was the holding in Paine Webber, supra page 404. Although the Georgia court did allow an account representative to rely on a broker's agreement to arbitrate if it were ultimately found that the broker was entitled to arbitrate, it did so while at the same time recognizing that there was a split of authority on this issue and cited to the decision of the United States District Court for the Northern District of Georgia in Isbell v. Paine Webber Jackson & Curtis, Inc., et al.

A case on point is Interocean Shipping Company v. National Shipping & Trucking Corp., 462 F.2d 673 (2d Cir. 1972). There it was held that one who acted merely as an agent for a disclosed principle is not a party to an agreement to arbitrate. Such was precisely Brian Sheen's status. Since he was never a party to the agreement he was never entitled to be included in the "us" referred to in the agreement and the trial court was emminently correct in so holding.

Similarly in Simpson v. Robinson, 376 So2d 415 (1979 Fla. App. D1) it was held that defendants were parties to an arbitration agreement only because they had signed both in their capacities as corporate officers and individuals. Having done so, this "reveals an intention to be bound individually." Id. page 416. Of course, in the instant case Brian Sheen signed in neither capacity. Indeed, at the time of the filing of the initial motions and up until the time of the hearing on August 18, 1983 no one on behalf of Merrill Lynch had ever signed the agreement. See the unsigned agreement attached to the motion. (A 59)

In Karlen v. Gulf & Western Industries, Inc. 336 So2d 461 (1976 Fla. App. D3) it was held that an arbitration provision between a plaintiff and one corporate defendant was a personal covenant between the two parties only and could not bind the successor corporation who had not assumed the arbitration agreement by a written undertaking.

The cases interpreting the federal arbitration act similarly teach that in order to invoke the provisions of a contract requiring arbitration, the parties seeking to invoke the provision must have entered into the contract and been a party thereto. Supak & Sons Mfg., Co. v. Pervel Industries, Inc. 593 F.2d 135 (4th Cir. 1979); Moruzzi v. Dynamics Corporation of America, 443 F.Supp. 332 (DC NY 1977); Janmort Leasing, Inc. v. Econo Car International, Inc. supra. Janmort specifically teaches that they must be "parties to contractual schemes for arbitration." And that there must be a written agreement "which manifests a mutual interest to arbitrate. . . ." Id. page 1289. (Emphasis supplied) See also Aetna Casualty & Surety Company v. U.S., 655 F.2d 1047 (C.Cl. 1981).

POINT IV

THE DISTRICT COURT SUBSTITUTED ITS VIEW OF THE FACTS FOR THAT OF THE TRIAL COURT AND ERRED IN HOLDING THAT THE RIGHT TO SEEK ARBITRATION HAD NOT BEEN WAIVED.

The trial court found that it was not until after the third hearing on the issue of arbitration on August 18, 1983 (nearly 3 years after suit was filed) that the defendants started "raising issues and presenting case citations to this court for the first time." (A 230) The trial court gave specific examples and discussed the matter at some length:

> As only one example, plaintiff has consistently maintained and announced that defendants have conceded that Chapter 517 cases are not arbitrable. Now, for the first time, defendants claim their earlier concession was in error.
>
> Such belated presentation does not change the law of the case. Piecemeal presentation of issues such as this to the trial court do little to assist the court in making efficient and effective disposition of a controversy. In relation to arbitration matters, this procedure is particularly offensive because it is inimicable to the purposes of arbitration as set out in MA-II:
>
> > 'Speedy resolution of disputes is the raison d'etre of arbitration. Once parties agree to arbitrate, it is essential that they have an easy and quick means to enforce their agreement to arbitrate.' [Cited by footnote by the trial court to the Melamed II decision.]
>
> In addition to their newly adopted position regarding Chapter 517 cases, defendants have presented arguments and citations on these issues to the court for the first time. As only one example, defendants present the case of Vic Potamkin Chevrolet, Inc. v. Bloom, 386 So2d 286 (3 DCA 1980). There are many others. Defendants contend that plaintiff was put on notice of this citation because it was mentioned in defendants' brief in MA-I. This argument misses the point. As relates to questions of waiver, estoppel and law of the case, pertinent arguments and citations should be presented to the court, not counsel, in a timely manner. The purpose of presenting citations to counsel is to insure that both parties have a full opportunity to present their respective positions to the court to assist the court in disposing of the case.

> If defendants were aware that Potamkin was pertinent to the disposition of this case, that is even more reason why they are expected to present it to the court if they wished the court to rely on it." (A 230-231)

The Melamed III court attempted to avoid the Circuit Court's specific findings relative to acts of waiver and estoppel by asserting that at one of the early hearings defense counsel made a comment which plaintiff's counsel should have picked up to the effect that despite pleadings to the contrary, defendants indeed wanted the Chapter 517 count submitted to arbitration. The District Court does not mention that subsequent to that comment the defendants filed new motions for arbitration and amended motions for arbitration in which they consistently stated and stipulated that they did not wish arbitration on any of the federal or Florida securities act counts.

Secondly the Melamed III court asserts:

> "Moreover, in its answer to Melamed's second amended complaint, Merrill Lynch raised arbitration as an affirmative defense without specifying the counts to which it referred." Id. page 862.

Frankly, plaintiff does not know to what the District Court is referring. Plaintiff has never filed a second amended complaint and, of course, defendants have never had occassion to file an answer to such a pleading. What the opinion may be referring to is that Merrill Lynch did ask for arbitration on the Chapter 517 count four days after the hearing of August 18, 1983. (See Defendants' supplemental motion included in the appendix to this brief. This document was not in the original appendix filed with the brief on jurisdiction but was in Defendants' appendix before the District Court.) This motion came nearly three years after suit was filed and if it is to be interpreted as the District Court suggests then it is clearly a 180 degree turnabout in position 3 years into the litigation progress. Even more importantly,

this "supplemented motion" was filed by defendant Merrill Lynch. At no time did Brian Sheen ever alter his position or adopt the motion.

Finally, the District Court asserts that "mere delay in assertion of one's right to arbitrate does not constitute waiver unless the delay has given the party seeking arbitration an undue advantage or has resulted in prejudice to another." Melamed III, supra, page 863. The trial court clearly utilized common sense and found that the 3 year delay occasioned by failure to be prepared and failure to cite pertinent case citations at the trial court level as well as the taking of inconsistent positions for 3 years, did, in fact, prejudice the Plaintiff. The trial court stated:

> "Where, as here, counsel waits until 2 appeals have gone by to present pertinent case citations to the court, which citations should have been presented before the decision in either or both previous hearings before this court, such delay and piecemeal presentation of the issue, serve only to drag out indefinitely the resolution of the issue of arbitration. Since the very purpose of arbitration is not to give one side or the other a special benefit, but to provide speedy and effective disposition of the dispute, such actions, being contrary to the spirit and letter of the arbitration law, amount to waiver and estoppel." (A 233-234)

Earlier in the order the trial court specifically also pointed out that it had "assumed jurisdiction in a substantial sense". (A 232) The District Court's conclusion that the 3 year delay occasioned by the Defendants' delaying tactics caused no prejudice to the Plaintiff, ignores the facts and conflicts with previously established case law. Indeed, in the case sub judice the Defendants have agreed that the trial court could proceed with the replevin count and even entered into a stipulation which necessarily conceded the trial court's jurisdiction. (A 314)

In Klosters Rederi A/S v. Arison Shipping Company, supra, page 681 (Fla. 1973) cert. den. 414 U.s. 1131, this court stated:

"A party's contract right may be waived by actively participating in a lawsuit or taking action inconsistent with that right. Ojus Industries, Inc. v. Mann, Fla. App. 1969, 221 So2d 780; Cornell & Company, Inc. v. Barber & Ross Company (1966), 123 U.S. App. DC 378, 360 F.2d 512."

In Bickerstaff v. Frazier, 232 So2d 190, 191 (1970 Fla. App. D1), it was held that the waiting of merely 2 months to file a demand for arbitration after suit was filed could be held by the trial court to constitute a waiver of the right to demand arbitration and a trial court's decision in this regard could not be held to consititute an abuse of discretion so as to support reversal.

In Lyons v. Krathen, 368 So2d 906 (1979 Fla. App. D3), the rule was again followed. There a 9 month delay in promptly seeking and proceeding on a demand for arbitration was held to constitute a waiver of the right.

In Lapidus v. Arlen Beach Condominium Association, Inc., 394 So2d 1102 (1981 Fla. App. D3), it was held that by accepting the judicial forum defendant had waived the right with respect to arbitration.

In Hansen v. Dean Witter Reynolds, Inc., 408 So2d 658 (1982 Fla. App. D3), cert. den. 417 So2d 328, it was held that the filing of an answer without demanding arbitration "even though they asserted Hansen's failure to arbitrate as an affirmative defense" constituted a waiver of the right to seek arbitration.

In Marthame Sanders & Co. v. 400 West Madison Corp., 401 So2d 1145 (1981 Fla. App. D4), a writ of certiorari was issued because the trial court ordered arbitration on a motion filed subsequent to an answer. The District Court held that by ordering arbitration the trial court had violated established principals of Florida law and cited to King v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc., 352 So2d 1235 (1978 Fla. App. D4) for the proposition that the filing of an answer prior to moving for arbitration is a repudiation and

waiver of the right to seek arbitration. In the instant action, the Defendants, for 30 months, specifically took the position that the Court should not order arbitration with reference to the Chapter 517 claim and then 4 days after the last hearing before the trial court, changed their position. See also R. W. Roberts Construction Co., Inc v. Masters & Co., Inc., 403 So2d 1114 (1981 Fla. App. D5) and Winter v. Arvida Corp., 404 So2d 829, 830 (1981 Fla. App. D3) wherein the court cited to Ojus Industries, Inc. v. Mann, supra, page 782 for the proposition that "waiver in this connection does not depend on timing to compel arbitration (were not unreasonably delayed), but rather on the prior taking of an inconsistent position by the party moving therefore."

The Defendants herein accepted the judicial forum on the replevin count, the Chapter 517 Florida Securities Act count, and stipulated that the federal securities act count constituted an impediment to arbitration on any of the issues. Although the District Court cited by footnote to the trial court's holding that it had assumed jurisdiction in a substantial sense and that there had been acts of waiver and estoppel by Merrill Lynch, the District Court simply ignored the well established substative law of Florida dealing with waiver and estoppel. The District Court's Melamed III decision places the burden upon the Plaintiff to show that the Plaintiff has suffered prejudice by the Defendants' delaying tactics. Such burden has never heretofore been placed on a party seeking waiver as a result of delay and affirmative statements of position in pleadings. The District Court citation to Graham Contracting, Inc. v. Flagler County, 444 So2d 971 (1983 Fla. App. D5) does not resolve this conflict. Graham

involved merely a 4 month delay between the filing of the case and the motion for arbitration. Furthermore, Graham did not involve an affirmative pleading change. The Graham court specifically distinguished Lyons v. Krathen, supra, and Bickerstaff v. Frazier, supra, on the basis of the length of time and not on the basis of any failure to show prejudice. The Graham court did hold for the first time in Florida jurisprudence that a waiver of the right to arbitrate should not be implied from mere inaction unless the delay has given one party an undue advantage or resulted in prejudice to the other. Supra, page 972. Unlike Graham, Melamed III, involved specific written stipulations filed with the court submitting to the court's jurisdiction. Were the Melamed III decision to be adopted as a correct statement of the law of Florida, then any party might submit itself to the judicial forum for months or even years on end, assess for itself how the litigation is proceeding while continuing to delay and obfuscate, and then simply change its position and demand arbitration. It may then assert that "no prejudice" has been occasioned to its adversary. The burden of showing "prejudice" exclusive of the time delays is an intolerable burden and not heretofore required in Florida law. Indeed, since this element was never heretofore required of Plaintiff, she never was afforded the opportunity to put forth evidence of same at the trial court level. The decision of the District Court on this point of law is both unfair and completely at odds with established precedent.

POINT V

THE DISTRICT COURT ERRED IN ORDERING A SEVERANCE AND STAY OF PORTIONS OF THE LITIGATION PENDING ARBITRATION.

The District Court recognized that the claim under the federal securities act of 1933 was non-arbitrable. It is also respectfully submitted that based upon the arguments heretofore advanced that the common law claims for fraud and punitive damages are also non-arbitrable and that, therefore, the entire case should proceed in the judicial forum. Moreover, regardless of the extent to which certain claims are or are not arbitrable standing alone, based upon this court's decision and statements relative to judical economy in Oppenheimer & Company, Inc. v. Young, supra, page 1178, as well as the federal court decisions heretofore cited, the District Court was clearly acting erroneously in piecemealing this litigation.

Indeed, it should be pointed out that the District Court misstated the position of the Defendants when it said:

> "Merrill Lynch concedes the non-arbitrability of the claim, but argues that its pendency is no bar to arbitration on the other counts." Melamed III, supra, page 816.

A review of the Defendants' position at the trial court level, as stated to the trial judge at the time of the hearing on August 18, 1983, was that as long as the 1933 securities act count remained pending, the trial court faced an impediment to referring any portion of the case to arbitration. (A 219) In their petition before the District Court, the Defendants argued that after nearly three years of dealing with the issue of arbitration, the trial court should have delayed the ruling on the motion to compel arbitration even further until it "explicitly addressed the validity of these claims". (A 277) The Defendants did not explain how the trial court should have

"explicitly addressed" the 1933 securities act claims before ruling on the motion for arbitration. Presumably, they were talking about a ruling on a motion for summary judgment. But that argument was never properly addressed at the trial court level. No motion for continuance was ever made based upon such an assertion. Florida Rule of Civil Procedure 1.460 requires that all motions for continuance be made in writing. Not only did Defendants never move for continuance on that basis; but they, in fact, proceeded to the hearing and argued to the trial court that if the trial court found that, in fact, the agreement had been entered into, all that was left for the trial court to do was to compel arbitration. (A 205-206) It is axiomatic that the failure to move for a continuance at the trial court level prohibits an argument relative to same at the appellate court level. Ward v. Ward, 364 So2d 815 (1978 Fla. App. D3); Fuller v. Rinebolt, 382 So2d 1239 (1980 Fla. App. D4). The argument was advanced to the District Court that the trial court decided the arbitration issue "prematurely" after nearly three years of litigation on the issue. Yet it was the Defendants who chose not to call up their motions to dismiss Count XI because, by dragging their feet in this regard, the Defendants could delay bringing the case to issue. At any rate, Count X, the 1933 securities act count, has, withstood motions for summary judgment (A 241-242), and has withstood petitions for certiorari to the District Court. (A 321-313) Clearly, the 1933 securities act count is "a live thing". Just as clearly, the Defendants never argued at the District Court level or at the trial court level that the 1933 securities act claim presented "no bar to arbitration on the other Counts." Rather, they conceded that as long as it was "a live thing" it did, in fact,

present such an impediment.

The District Court's decision to sever the 1933 securities act count when no such relief was ever requested directly conflicts with this court's holding in Bould v. Touchette, 349 So2d 1181 (Fla. 1977) as well as its long progeny of decisions in the District Courts. The rule announced by this court in Bould was that a party could not be heard to complain on appeal regarding the adoption of a position stipulated by him as correct at the trial court level. Id. page 1186. Although the Bould decision dealt with a complaint regarding an element of damages which could have been complained of at the trial court level and was not, the rule has been established in Florida law to apply to all aspects of litigation and to require that a party assert his position at the trial court level. If not complained of there, then a party is deemed to have waived any complaint before the appellant court. See also Savoca v. Sherry Frontenac Hotel, 346 So2d 1207 (1977, Fla. App. D3); Public Health Trust of Dade County v. O'Neal, 348 So2d 377 (1977, Fla. App. D3); Sonson v. Nelson, 357 So2d 747 (1978, Fla. App. D3); Ten Associates, et al. v. McCutchen, 398 So2d 860 (1981 Fla. App. D3); Davis, Inc. and INA v. City of Miami, 400 So2d 536 (1981 Fla. App. D3); Leisure Group, Inc. v. Williams, 351 So2d 374 (1977 Fla. App. D2); Diaz v. Rodriguez, 384 So2d 906 (1980 Fla. App. D3); Winstead & Faircloth v. Adams, 363 So2d 807 (1978 Fla. App. D1).

By granting the Defendants relief which was not only not requested at the trial court level but which was actually stipulated away, and never requested at the District Court level, the District Court has created direct and irreconcilable conflict with the above

enumerated decisions and is out of tune with the established Florida decisional law.

Even more importantly, the Defendants' concession to the trial court is a correct statement of the law. The District Court's decision to piecemeal the action is incorrect under Oppenheimer & Co., Inc. v. Young, supra page 1178, Sawyer vs. Raymond James & Associates, Inc., 642 F.2d 791 (5th Cir. 1981); Miley v. Oppenheimer, 637 F2d 318, 336 (5th Cir. 1981); and Raiford, et al. v. Buslease, Inc., et al., Case Nos: 83-8364, 84-8156 and 84-8157 decided November 9, 1984, 1984 CCH page 91,831 (11th Cir. Nov. 9, 1984).

The federal appellate authorities are consistent with this Court's rejection of piecemealing. In Sawyer v. Raymond James & Associates, Inc., supra, actions against a brokerage house were filed in the United States District Court for the Southern District of Florida. "All of them alleged common violations of the federal securities laws, the rules and regulations of the New York Stock Exchange and the National Association of Securities Dealers, and common law fraud, fiduciary responsibility, and negligence." Id. page 792. The Defendants filed a motion to stay proceedings and compel arbitration based upon a customer service agreement with language virtually identical to that involved herein. The District Court denied the motion and on appeal the denial was affirmed. At page 793 the Fifth Circuit stated:

> "Here the plaintiffs have presented the court with a single recertation of fact, revealing an emphasis upon the element of scienter, see Ernst and Ernst v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed2d 668 (1976), giving rise to numerous federal and common law claims. The gravamen of the complaints is that Raymond James acted intentionally, through misrepresentations to defraud the plaintiffs by entering into a course

> of undisclosed and unjustifiable, high risk, uncovered stock option transactions. It is this unitary course of conduct that is the common source of each of the alleged claims. Those claims sounding in federal securities law are the very core of the action; the other claims, while of independent significance, are inextricably tied to the federal allegations supporting the securities claims, and, indeed, could not stand absent those factual contentions . . . An arbitrator attempting to resolve these non-federal claims would certainly be 'impelled to review the same facts'. Tandy, 543 F2d at 543, a District Court would review to resolve the same federal securities claims. Thus, the District Court was correct in viewing severance and arbitration as impractical an inappropriate."

In Miley v. Oppenheimer, supra, the Fifth Circuit affirmed a refusal to order arbitration. Miley involved claims under the federal securities act, common law, and Texas Statutory law. The complaint in Miley is almost identical to the one herein. The Miley court stated:

> "In a churning case like the one at bar, an arbitrator passing on the breach of fiduciary duty claim, either while the federal trial is stayed or simultaneously with the trial on the federal securities claim, could essentially rob the federal court of its exclusive jurisdiction. An arbitrator's judgment, for example, that a fiduciary duty existed between the investment company and the client but that there was no breach of duty because the account was managed properly and in the best interest of the clients, would completely resolve the disputed issues at the core of the federal case. It is worth repeating that the ultimate issues in a federal securities churning case - (1) whether an account was excessively traded in light of the objectives of the investor; (2) whether the investment controlled the account; and (3) whether the excessive trading was willful and recklessly undertaken - must be decided for the first time by the federal forum and not by an arbitrator ruling on pendent state claims. Therefore, it was not error for Judge Mahon to refuse to stay the federal trial or to allow the federal trial and the arbitration to proceed simultaneously.
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> * * *
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> The plaintiff has suffered a single legal wrong, for which there are several alternate routes of recovery. A judgment can be entered only upon one of the alternate grounds. Siedman v. Merrill Lynch Pierce Fenner & Smith, Inc., 465 F.Supp. 1233, 1239 (S.D. N.Y. 1979). Although a jury will have already concluded that the broker violated federal law to the detrament of the investor, the investor could be forced

> to endure a long and protracted arbitration procedure before his judgment could be entered and collected."

In Raiford vs. Buslease, Inc., supra, a brokerage firm requested a stay of judicial proceedings on state claims pending arbitration. The Eleventh Circuit held that because the state claims were factually "intertwined" with the non-arbitrable federal securities act claim, the stay was properly rejected at the trial court level. The Raiford court stated:

> "In Wilco v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed2d 168, (1953), the Supreme Court ruled that an agreement to arbitrate claims arising under the securities act of 1933 is invalid.
>
> * * *
>
> The doctrine of intertwining has developed in this circuit exclusively in regard to the first of these alternatives. [citations omitted] It is a judicially created exception to the command of Section 3 of the Arbitration Act that the court, on application of a party, shall 'stay the trial of the action until [the agreed to] arbitration has been had . . . .' It holds that 'when it is impractical, if not impossible, to separate non-arbitrable federal securities law claims from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over the federal securities act claims.' [citations omitted]
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> * * *
>
> We conclude, therefore, that, the intertwining doctrine extends to motions to stay nonfederal proceedings."

The Melamed III court acknowledged that the federal and commonlaw claims were factually dependent upon one another. Melamed III, supra, page 861. The District Court's reference to Sabates v. Internatinal Medical Centers, Inc., supra, provides absolutely no foundation for the District Court's decision to stay factually dependent claims. Sabates was not even a securities case. It involved the Florida civil theft statute. The District Court's reference to

Sibley v. Tandy Corporation, 543 F2d 540 (5th Cir. 1976), cert. den. 434 U.S. 824, 98 S.Ct. 71, 54 L.Ed2d 82 (1977) is highly misplaced. The Sibley court ordered arbitration because the arbitrable and non-arbitrable claims "were not 'intertwined' in the legal sense." Id. page 543. Sibley specifically distinguished Shapiro v. Jaslow, 320 F.Supp. 598 (SD NY 1970) which denied arbitration because, "the two claims in Shapiro were not factually severable. An arbitrator making a decision on the common law claims would have been impelled to review the same facts needed to establish the plaintiff's securities law claim." Id. The Sibley decision and the previously cited decisions clearly stand for the rule that if the non-arbitrable and arbitrable claims are "not factually severable" then arbitration must be denied in toto. See also Sawyer vs. Raymond James & Associates, Inc., supra. Sibley stands for just the opposite result reached in Melamed III.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the District Court's opinion under review is erroneous and should be reversed. The motion to compel arbitration was properly denied.

Respectfully submitted,

F. KENDALL SLINKMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellant/ Petitioner's Initial Brief on the Merits has been furnished by mail this 28th day of December, 1984 to BENNETT FALK, ESQ., 2020 One Biscayne Tower, Two So. Biscayne Blvd., Miami, Florida 33131; and to MICHAEL EASLEY, ESQ., 800 Forum III, 1675 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401.

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