IN THE SUPREME COURT OF THE STATE OF FLORIDA

CORPORATE SECURITIES GROUP, INC.,

Petitioner,

v. Case No. SC-00-931

SHIRLEY LIND,

Respondent.
_____/

AMICUS CURIAE BRIEF OF

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Public Investors Arbitration Bar Association ("PIABA") is a not-for-profit corporation, with more than 300 members from more than forty states, all of whom devote a significant portion of their practice to the arbitration of securities disputes, and all of whom represent public investors in arbitration. Collectively, PIABA members have represented tens of thousands of public investors in securities arbitrations around the country. PIABA's official mission is to promote the interests of public investors in securities arbitration by:

a) protecting public investors from abuses prevalent in the arbitration process;

b) making securities arbitration just and fair; and

c) creating a level playing field for public investors in securities arbitration.

PIABA seeks to advance the rights of public investors through a variety of activities, including the submission of briefs as amicus curiae. The United States Supreme Court and Federal Circuit Courts of Appeal have permitted PIABA to appear as amicus curiae in cases relating to the interpretation of the arbitration rules of the National Association of Securities Dealers, Inc. ("NASD"). PIABA publishes books and reports on securities arbitrations, conducts annual CLE programs for its members, and communicates with governmental and quasi-governmental agencies, such as the Securities and Exchange Commission and the NASD, on issues of interest to PIABA and public investors.

The present case involves the interpretation of NASD Rule 10304, which institutes a six-year time limit for seeking arbitration before the NASD. The parties

dispute whether courts or arbitrators should decide six-year issues under Rule 10304. This issue has been heavily litigated around the country by PIABA members, and it has been frequently litigated in Florida by PIABA members, both in federal and in state court. The issue has arisen in hundreds of NASD securities arbitrations in Florida. Consequently, PIABA members have a substantial interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

The overwhelming majority of courts in Florida and elsewhere have determined that time-bars, such as NASD Rule 10304 in this case, are interpreted by arbitrators, not courts. Firms and investors agree to arbitrate issues under Rule 10304 by their agreement to comply with NASD Rule 10324, which provides that arbitrators are empowered to interpret the applicability of all NASD arbitration rules, including Rule 10304. In addition, Rule 10304 is appropriately interpreted as a procedural condition *in* the arbitration, rather than a procedural bar *to* the arbitration. Treating the arbitration agreement as a whole in light of Rule 10324, it is implausible to suppose that the parties singled out Rule 10304 from the other rules in the NASD Code of Arbitration Procedure as not being within the power of arbitrators to resolve. This conclusion has special force here, because the parties agreed to arbitrate "any and all" disputes and agreed to waive their remedies in court. Any other conclusion would frustrate the purpose of arbitration for speedy and efficient dispute resolution, because parties would first be required to engage in time-consuming, costly, and merits-related litigation in court regarding their eligibility for arbitration, and then would be required in the arbitration to duplicate their presentation of the same evidence on the same merits-related issues.

In this case, however, the parties agree that their disputes are not eligible for arbitration under Rule 10304. Consequently, the brokerage firm has no basis to seek to compel arbitration, because this agreement supersedes the original arbitration agreement, and the firm has waived any right to enforce this agreement.

ARGUMENT

A. Factual and Legal Background.

This case involves a brokerage firm's attempt to use an arbitration agreement to bar as untimely a claim that was timely filed in court. As a condition for opening brokerage accounts, brokerage firms require investors, including the investor in this case, to sign agreements to arbitrate under the auspices of self-regulatory organizations ("SROs") such as the NASD and the New York Stock Exchange ("NYSE"). Unbeknownst to investors, including the investor in this case, however, the SRO arbitration rules uniformly contain a six-year time-bar which precludes investors from obtaining relief in arbitration if their disputes are more than six years old. According to the firms, this six-year rule can foreclose not only customer claims against them in arbitration but also customer claims against them in court that would otherwise be timely.

In this case, the factual record is sparse, but, according to the allegations in the complaint, it appears that, in 1990, Steven Blonde ("Blonde"), a broker for Petitioner Corporate Securities Group, Inc. ("Corporate Securities Group"), induced the elderly Respondent Shirley Lind ("Lind") to sell her legitimate financial investments and reinvest the proceeds in a corporation controlled by Blonde. (R2) To secure this investment, Blonde provided Lind with a mortgage deed on property which the corporation owned. (R3, 6-8) Blonde's corporation agreed to pay monthly interest to the investor and repay the principal amount in 1991. (R8) After several extensions, Blonde and Lind eventually agreed to extend the mortgage term until June 30, 1999. (R12) The last mortgage extension in the record is dated April 10, 1996. (R12) The investor apparently received interest payments for several years until Blonde's

corporation defaulted on its obligations. Lind alleges she then discovered that the property supposedly securing her mortgage was already lost to foreclosure and that her mortgage was never recorded in the county records. (R5)

She promptly filed suit in court on December 17, 1998. (R5) Her suit was plainly timely under Florida law, because the last renewal of the mortgage occurred in 1996, less than three years prior to the filing of the Amended Complaint in court, and the default, when the damages actually occurred, did not occur until some later point, apparently in 1997 or 1998. By filing her suit in 1998, Lind was well within the relevant four-year limitations period. § 95.11(3), Fla. Stat. (1997).[1]

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[1] The Eleventh Circuit's decision in FDIC v. Stahl, 89 F.3d 1510 (11th Cir. 1996), is directly on point on the timeliness issue. In Stahl, the Eleventh Circuit found that the FDIC's action on behalf of a bank against the bank's officials for negligently recommending the acceptance of risky loans as appropriate investments of the bank's resources did not accrue at the time the loans were made but instead accrued when the damages occurred after the loans went into default.

> In Florida, "[a] cause of action accrues when the last element constituting the cause of action occurs." Fla. Stat. § 95.031(1) (1995). Accordingly, under Florida's "last element" rule, actions for negligence do not accrue until the plaintiff suffers some type of damage. . . .
>
> The damage in this case did not occur until the loans at issue were not repaid . . . . Thus, we conclude the district court correctly determined that the statute did not begin to run on these claims until the loans failed.

Id. at 1522 (citations omitted). See also Penthouse North Ass'n v. Lombardi, 461 So. 2d 1350 (Fla. 1984) (Condominium association directors breached their fiduciary duty in 1966, but cause of action did not accrue until the damages materialized in 1981); Sheen v. Jenkins, 629 So. 2d 1033 (Fla. 4th DCA 1993) (The limitations period did not begin to run at the time of the initial improper recommendation and purchase of the equipment leasing limited partnership in 1982 but rather at the time the damages occurred in 1987-89.); Stokes v. Huggins Construction Co., 626 So. 2d 327 (Fla. 1st DCA 1993) (Although home owners received a letter from their builder, telling them that an excavation was negligent and was causing shifting soil, their cause of action did not accrue until their home later collapsed.)

Perhaps recognizing that its time-bar arguments had no chance in court, Corporate Securities Group chose to attempt to enforce its arbitration agreement with Lind and thereby obtain in arbitration the benefits of the NASD's six-year time-bar. Perhaps for the same reason, Lind sought to remain in court and therefore argued that, for purposes of the NASD's time-bar, the event or occurrence giving rise to the dispute was the initial liquidation in 1990 of Lind's legitimate investments in favor of a mortgage note which was never recorded. To avoid enforcement of the arbitration agreement against her, Lind eschewed any reliance on the 1996 renewal of the note, the later default in payment, or her discovery that the mortgage had never been recorded, as the relevant events that started the NASD's six-year clock running. According to Lind, because six years had elapsed from the 1990 events, the arbitrators no longer had jurisdiction and she could litigate her claims in court. The trial court agreed with Lind's position, and the Fourth District affirmed. Corporate Securities Group v. Lind, 753 So. 2d 151 (Fla. 4th DCA 2000).

This case is thus unique among the multitude of other cases that have litigated six-year issues under SRO arbitration rules. In these other cases, the *investor*, not the firm, seeks to arbitrate and argues that the *later* events, such as the default in payments and the discovery by the investor in this case, are the events commencing the six-year time period. Conversely, the brokerage firm typically seeks to avoid arbitration on the ground that the six-year period began to run from the *initial* purchase of the investment, not the later default, fraudulent concealment, or other wrongful event. In this respect, the legal position and factual circumstances underlying the present case are exactly opposite from those in every other case that has litigated this issue.

Nevertheless, the motive underlying the firm's actions in this case is identical to the motives of the brokerage firms in these other cases. In all instances, the firms seek to use a narrow interpretation of NASD and other SRO arbitration rules to bar claims even if they would be timely if filed in court. The firms thereby seek to deprive investors of substantive rights on the merits that they otherwise would have in court. PIABA strongly opposes this position of the brokerage industry. In a case involving NASD securities arbitration rules, the Court said that, "[b]y agreeing to arbitrate a . . . claim, a party does not forego . . . substantive rights . . .; it only submits to their resolution in an arbitral, rather than a judicial, forum." Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 229 (1987) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). Investors should not be deemed to have given up meritorious claims that would be timely in court, merely because they have signed an arbitration agreement with a six-year time bar.

In accordance with the overwhelming weight of authority in this country and contrary to the decisions in this case of the trial court and Fourth District, PIABA believes that arbitrators are empowered to decide whether and how to apply the six-year rule. Because securities arbitration rules are not intended to deprive investors of substantive rights, arbitrators are able to apply the same tolling and accrual principles that courts would apply to limitations arguments. If the arbitrators then determine that the disputes between the parties are not eligible for submission to arbitration, the disputes should return to court for further litigation. In this case, however, the parties have already agreed that the disputes between them are not eligible for submission to arbitration. This agreement supersedes the original arbitration agreement and allows the disputes between the parties to proceed in court

immediately. To this extent, PIABA agrees with the result of the decision below, albeit not with its reasoning.

B. The Overwhelming Majority of Courts, Both in Florida and Elsewhere, Have Determined that Time-Bars in General, and NASD Rule 10304 in Particular, Should be Interpreted by Arbitrators, Not Courts.

The present appeal involves the interpretation of Rule 10304[2] of the NASD Code of Arbitration Procedure, which provides as follows:

> **10304. Time Limitation Upon Submission**
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> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

The issue in this appeal is whether the courts or the arbitrators interpret this rule. A substantial majority of courts agree with Petitioner Corporate Securities Group that arbitrators, not courts, should interpret the rule.[3] Only a few jurisdictions,

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[2] Rule 10304 was formerly numbered as Section 15 of the NASD Code of Arbitration Procedure, and older cases cited in this brief refer to the rule as Section 15. See, e.g., Mid-State Sec. Corp. v. Edwards, 706 A.2d 773, 775 (N.J. Super. Ct. App. Div. 1998). The language in Rule 10304 also appears in the arbitration rules of other self-regulatory organizations, such as Rule 603 of the New York Stock Exchange ("NYSE"). See PaineWebber Inc. v. Hofmann, 984 F.2d 1372, 1378 (3d Cir. 1993) ("The language of Rule 603 is, in all relevant parts, identical to the language of § 15 of the NASD Code").

In the present case, the arbitration agreement between the parties provided a choice of either NYSE or NASD arbitration. (R21) The record does not reflect how this choice between NASD and NYSE rules was made or who made it, but the trial court order indicates that the NASD arbitration forum was chosen. (R24)

[3] See FSC Sec. Corp. v. Freel, 14 F.3d 1310 (8th Cir. 1994); O'Neel v. NASD, Inc., 667 F.2d 804 (9th Cir. 1982); PaineWebber Inc. v. Bybyk, 81 F.3d 1193 (2d Cir. 1996); PaineWebber Inc. v. Elahi, 87 F.3d 589 (1st Cir. 1996); Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750 (5th Cir. 1995); Bayley v. Fox, 671 N.E.2d 133

including the Eleventh Circuit in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381 (11th Cir. 1995), have agreed with Respondent Lind and the Fourth District below that courts decide this issue.[4] The Eleventh Circuit's decision in Cohen overruled several federal district court decisions in Florida which had reached contrary conclusions.[5] Not surprisingly, because Cohen opened the federal courtroom doors to litigation of issues that formerly had been arbitrated, the Eleventh Circuit and Florida federal district courts have since been called upon to resolve six-

(Ind. Ct. App. 1996); Gaines v. Financial Planning Consultants, Inc., 857 S.W.2d 430, 432 (Mo. Ct. App. 1993); Kennedy, Cabot & Co. v. NASD, Inc., 41 Cal. App. 4th 1167 (1996); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Havird, 518 S.E.2d 48 (S.C. Ct. App. 1999); Mid-State Sec. Corp. v. Edwards, 706 A.2d 773 (N.J. Super. Ct. App. Div. 1998); Shahan v. Staley, 932 P.2d 1345 (Ariz. Ct. App. 1996); Smith Barney, Inc. v. Bardolph, 509 S.E.2d 255 (N.C. Ct. App. 1998); Smith Barney, Inc. v. Keeney, 570 N.W.2d 75 (Iowa 1997); Smith Barney, Inc. v. Painters Local Union No. 109 Pension Fund, 579 N.W.2d 518 (Neb. 1998); Smith Barney Shearson, Inc. v. Sacharow, 689 N.E.2d 884 (N.Y. 1997); Weston Sec. Corp. v. Aykanian, 703 N.E.2d 1185 (Mass. App. Ct. 1998).

[4] See Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 78 F.3d 474 (10th Cir. 1996); Edward D. Jones & Co. v. Sorrells, 957 F.2d 509 (7th Cir. 1992); Osler v. Ware, 114 F.3d 91 (6th Cir. 1997); Paine Webber v. Hoffman, 984 F.2d 1372 (3d Cir. 1993).

[5] See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Gregg, 1993 WL 616691 (M.D. Fla. Dec. 8, 1993); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 1993 WL 593998 (S.D. Fla. Sept. 24, 1993).

year issues in a dozen or more reported cases[6] and undoubtedly numerous other unreported decisions.

The substantial majority view that arbitrators should interpret NASD Rule 10304 mirrors the substantial majority view of courts regarding the enforcement of arbitration time-bars in general. The First Circuit in Local 285 v. Nonotuck Resource Assoc., 64 F.3d 735, 739, 741 (1st Cir. 1995), in accordance with a long history of federal cases, found that time limitations within an arbitration agreement are properly interpreted by arbitrators, not by courts.

> Thirty years of Supreme Court and federal circuit court precedent have established that issues concerning the timeliness of a filed grievance are "classic" procedural questions to be decided by an arbitrator . . . .
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> . . . See, e.g., Denhardt v. Trailways, Inc., 767 F.2d 687, 689 (10th Cir. 1985) (dispute as to employer's compliance with time limit for conducting a hearing is a procedural matter for arbitrator); Beer Sales Drivers, Local 744 v. Metropolitan Distribs., Inc., 763 F.2d 300, 302-003 (7th Cir. 1985) (union's alleged failure to submit its members' grievances within time limitation specified in agreement is an issue of procedural arbitrability for arbitrator); Nursing Home & Hosp. Union 434 v. Sky Vue Terrace, Inc., 759 F.2d 1094, 1097 (3d Cir. 1985) ("the law is clear that matters of procedural arbitrability, such as time limits, are to be left for the arbitrator"); Automotive, Petroleum & Allied Indus. Employees Union, Local 618 v. Town & Country Ford, Inc., 709 F.2d 509 (8th Cir. 1983) (whether grievance was barred from arbitration due to union's alleged failure to submit complaint to employer within five

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[6] See, e.g., Dean Witter Reynolds, Inc. v. Fleury, 138 F.3d 1339 (11th Cir. 1998); Kidder, Peabody & Co. v. Brandt, 131 F.3d 1001 (11th Cir. 1997); Sewell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 94 F.3d 1514 (11th Cir. 1996); Dean Witter Reynolds, Inc. v. Daily, 12 F. Supp. 2d 1319 (S.D. Fla. 1998); Equity Sec. Trading Co. v. Gillan, 11 Fla. L. Weekly Fed. D35, 1997 WL 391794 (M.D. Fla. June 23, 1997); Prudential Sec., Inc. v. Kucinski, 947 F. Supp. 462 (M.D. Fla. 1996); Raymond James & Assoc. v. NASD, Inc., 844 F. Supp. 1504 (M.D. Fla. 1994); Singer v. Smith Barney Shearson, Inc., 926 F. Supp. 183 (S.D. Fla. 1996); Smith Barney, Inc. v. Scanlon, 180 F.R.D. 444 (S.D. Fla. 1998); Tuordo v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 1996 WL 942866 (M.D. Fla. Dec. 17, 1996), aff'd 146 F.3d 870 (11th Circ. 1998).

days from notice of discharge, as required by agreement, is question of procedural arbitrability for arbitrator); Hospital & Inst. Workers Union Local 250 v. Marshal Hale Memorial Hosp., 647 F.2d 38, 40-41 (9th Cir. 1981) (alleged non-compliance with timing requirements of a multiple step procedure is a question for the arbitrator); United Rubber, Cork, Linoleum & Plastic Workers v. Interco, Inc., 415 F.2d 1208, 1210 (8th Cir. 1969) (arbitration order despite union's failure to file arbitration within 90 days).

Before it reversed course in Cohen, the Eleventh Circuit had also adhered to this majority view. For example, in Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1027 (11th Cir. 1982), the Court cited Conticommodity Services, Inc. v. Philipp & Lion, 613 F.2d 1222 (2d Cir. 1980), with approval and held "that procedural questions such as the timeliness of a request for arbitration under the arbitration agreement are to be resolved by the arbitrator unless the contract expressly provides for resolution by the district court." In Drummond Coal Co. v. United Mine Workers of Am., 748 F.2d 1495 (11th Cir. 1984), and Shopmen's Local 539 of the Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers v. Mosher Steel Co., 796 F.2d 1361 (11th Cir. 1986), the Court likewise held that courts could not second-guess arbitrators' interpretations of time-bars within arbitration agreements and that an arbitrator's interpretation of the agreement was final and binding on the parties. 796 F.2d at 1365.

In accordance with these authorities, Judge Stanley Marcus (now a judge on the Eleventh Circuit), was undoubtedly greatly surprised when the Court reversed his decision in Cohen, after he thought he was relying on Belke, Conticommodity, and similar cases. Judge Marcus said regarding Rule 10304 "that any limitations defense -- whether stemming from the arbitration agreement, arbitration association rule, or state statute -- is an issue to be addressed by the arbitrators." Merrill Lynch, Pierce,

Fenner & Smith, Inc. v. Cohen, 1993 WL 593998, at *3 (S.D. Fla. Sept. 24, 1993) (quoting Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 121 (2d Cir. 1991)).

Florida state courts have also uniformly agreed that time-bars in arbitration agreements are for arbitrators, not courts, to decide. See Piercy v. School Board of Washington County, 576 So. 2d 806, 808 (Fla. 1st DCA 1991) ("[T]he question of whether a procedural prerequisite was satisfied, such as timeliness of appellant's request for the initial meeting . . ., is an issue to be decided by the arbitrator."); Graham Contracting, Inc. v. Flagler County, 444 So. 2d 971, 972 (Fla. 5th DCA 1983) ("[T]he third and fourth district courts of appeal have adopted the view that the issue of whether a demand for arbitration is timely according to the meaning of the contract is a question to be decided in arbitration."); Public Health Trust of Dade County v. M.R. Harrison Constr. Corp., 415 So. 2d 756, 757 (Fla. 3d DCA 1982) ("[T]he question of whether [a] demand for arbitration was untimely is to be decided in arbitration, not by a court."); Rinker Portland Cement Corp. v. Seidel, 414 So. 2d 629, 630 (Fla. 3d DCA 1982) ("[W]hether the demand was timely within the meaning of the contract provision is a matter for the arbitrator to resolve.").[7]

Until the decision presently under review, Florida courts had uniformly applied this principle to NASD Rule 10304 and found that it should be interpreted by arbitrators, not by courts. Barnet Sec., Inc. v. Faerber, 648 So. 2d 265 (Fla. 2d DCA 1995); J.W. Charles Sec., Inc. v. Nobel, 702 So. 2d 235 (Fla. 4th DCA 1997); Tetzlaff

[7] Public Health Trust and Rinker Portland Cement Corp. distinguished earlier cases in which courts had decided timeliness, because, in these cases, the question whether courts or arbitrators would decide timeliness was not raised.

v. Raymond James & Assoc., Inc., 649 So. 2d 289 (Fla. 4th DCA 1995); Wylie v. Investment Management and Research Inc., 629 So. 2d 898 (Fla. 4th DCA 1993).[8]

Florida courts have generally applied the same principle to statutes of limitation, holding that these time-bars are also for the arbitrators to decide. For example, in Pembroke Industrial Park Partnership v. Jazayri Constr., Inc., 682 So. 2d 226, 227 (Fla. 3d DCA 1996), which involved both a statute of limitation and a contract time-bar, the Third District held broadly that "the issue of whether the demand for arbitration was timely is a question of fact for the arbitrator to decide, not the trial court." Accord Marschel v. Dean Witter Reynolds, Inc., 609 So. 2d 718, 721 (Fla. 2d DCA 1992) ("[T]he statute of limitations and repose defenses raised by Dean Witter should be determined by the arbitrators."); Dean Witter Reynolds, Inc. v. Clarke, 617 So. 2d 402 (Fla. 3d DCA 1993) (same); Stinson-Head, Inc. v. City of Sanibel, 661 So. 2d 119, 121 (Fla. 2d DCA 1995) ("[T]he arbitrator must decide whether Sanibel's claim is timely.); Victor v. Dean Witter Reynolds, Inc., 606 So. 2d 681, 684 (Fla. 5th DCA 1992) ("Federal courts hold . . . that where the Federal Arbitration Act applies, *any* limitations defense -- whether stemming from the

[8] Recently, in Russell v. A.G. Edwards & Son, Inc., 25 Fla. L. Weekly D2435 (Fla. 2d DCA Oct. 13, 2000), the Second District said that the trial court had improperly granted summary judgment on whether a claim was untimely under Rule 10304, because "the record reflects a dispute as to when the events giving rise to [the investor's] claims arose." Id. at D2437. The Second District here *sua sponte* substituted this decision for an earlier decision in which it had relied on Barnet Sec., Inc. v. Faerber to find that the interpretation of Rule 10304 was "for the arbitrator, and not the courts, to determine." Russell v. A.G. Edwards & Son, Inc., 25 Fla. L. Weekly D2209, D2211 (Fla. 2d DCA Sept. 13, 2000). The Second District did not explain the reason for this change in language, but it also did not recede from Faerber, and its current position on this issue is now unclear.

arbitration agreement, arbitration association rules or state statute -- should be determined by the arbitrator.").

In two cases, the Fourth District has held or stated that limitations defenses should be determined by courts, not arbitrators. Anstis Ornstein Assoc., Architects and Planners, Inc. v. Palm Beach County, 554 So. 2d 18 (Fla. 4th DCA 1989); Vernon v. Shearson, Lehman Bros., 587 So. 2d 1169 (Fla. 4th DCA 1991). The Fourth District, however, has since explained that its statement in Vernon was dictum and went "farther than was necessary." Wylie v. Investment Management and Research, Inc., 629 So. 2d 898, 901 (Fla. 4th DCA 1993). Vernon involved the timeliness of a filing of a claim in probate. Wylie explained that, although an arbitration agreement was still valid in such circumstances and required arbitration, this agreement did not supersede the requirement to at least file the claim properly in probate court. Wylie receded from Vernon to the extent Vernon's dicta extended beyond the probate context. Id. at 902. See also Victor, 606 So. 2d at 684 (distinguishing Vernon on the ground that an "arbitration agreement . . . should not affect the state court's power to enforce the provisions of its probate code"). Because the present case does not involve probate, Vernon is not on point here.

Anstis Ornstein is distinguishable because it was decided under Florida law. In addition, it was a one-sentence opinion issued over a dissent by Justice Anstead, who said that the "arbitration clause in question is a broad and comprehensive one covering all disputes between the parties." Id. at 19. (Anstead, J., dissenting). Justice Anstead could "see no reason why the arbitrators cannot properly resolve any dispute between the parties as to compliance with" a clause in the agreement

providing "that the claim for arbitration must be filed within a reasonable time, not to exceed the applicable legal limitation period." Id.

The Fourth District itself, in Wylie, refused to follow Anstis Ornstein in cases involving federal law, rather than Florida law, 629 So. 2d at 902, as did the Fifth District in Victor. 606 So. 2d at 683 n.4. The Second District in Stinson-Head agreed with Justice Anstead's dissent and certified conflict with Anstis Ornstein under Florida law. 661 So. 2d at 121. Anstis Ornstein also contradicts the Third District's decision in Pembroke Industrial Park Partnership, that a statute of limitations defense "is a question of fact for the arbitrator to decide, not the trial court." 682 So. 2d at 227. Thus, Anstis Ornstein is certainly not valid under federal law, and it is also not valid under Florida law, at least in the Second and Third Districts, and probably in the Fourth District as well.

In sum, the overwhelming weight of authority, both in Florida and nationwide, is that, if an arbitration agreement calls for arbitration of the underlying substance of the disputes between the parties, then time-bars in general, and NASD Rule 10304 in particular, which relate to those disputes, are matters for the arbitrators, not courts, to decide.

C. The Fourth District's Reasoning Failed to Apply Controlling Federal and Florida Law.

1. Under Federal and Florida Law, Arbitrators Decide Arbitrability Issues if the Parties have Clearly Agreed to Allow the Arbitrators to Decide these Issues. Otherwise, Courts Decide These Issues, but Disputes are Presumed to be Arbitrable, and all Doubts About the Scope of an Arbitration Agreement Must be Resolved in Favor of Arbitration.

The overwhelming weight of authority that time-bars in arbitration agreements should be decided by arbitrators, not courts, follows from well-settled principles of federal law. Federal law controls this proceeding, because the disputes between the parties involve investments, which necessarily affect interstate commerce. Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 266, 273-74 (1995) (expansively construing Federal Arbitration Act to extend broadly to the full reach of the Commerce Clause). The Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") preempts inconsistent state law in cases involving interstate commerce.

> In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.

Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Westwind Transportation, Inc., 442 So. 2d 414, 417 (Fla. 2d DCA 1983) ("As option trading is an area of interstate commerce, the provisions of the Federal Arbitration Act . . . apply and preempt the provisions of the Florida Arbitration Code, chapter 682, Florida Statutes (1981).").

Under federal law, when courts determine the arbitrability of a controversy, the first question is whether the parties agreed to allow the arbitrators to decide whether the dispute is arbitrable. Federal courts generally presume that the parties did not agree "to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (quotation marks and brackets omitted).

If the court concludes that parties did not agree to arbitrate arbitrability, the second question is whether the court can interpret the scope of the arbitration

agreement to extend to the particular dispute. For this question, courts make the opposite assumption and presume that the dispute is arbitrable.

> "[T]he law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' -- for in respect to this latter question the law reverses the presumption.

First Options, 514 U.S. at 944-45.

When courts apply this presumption that disputes between the parties are within the scope of a valid arbitration agreement, the intentions of the parties control, "but those intentions are generously construed as to issues of arbitrability." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). The Supreme Court employs both a subjective and an objective standard to apply the presumed intent of the parties regarding the scope of an arbitration agreement. Subjectively, the Court has said that reviewing courts must resolve all doubts regarding the scope of an arbitration agreement in favor of arbitration.

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, **delay**, or a like defense to arbitrability.

Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (emphasis added). Objectively, the Court requires lower courts to compel arbitration unless, with positive assurance, courts can say that the agreement is not susceptible to an interpretation which would allow arbitration.

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an

> interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986) (quotation marks and brackets omitted).

As the Third Circuit said in Schulte v. Prudential Ins. Co. of Am., 133 F.3d 225, 231, 234 (3d Cir. 1998), when it applied these arbitrability presumptions to NASD Rule 10101:

> An inquiry into the scope of an arbitration clause must necessarily begin with the presumption that arbitration applies. . . . [T]his court must operate under a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.
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> . . . Because this court cannot say with certainty what is meant by "intrinsically insurance" claims [under NASD arbitration rules], . . . our mandate is clear: our presumption in favor of arbitration applies and doubts in construction are resolved against the resisting parties.

The Tenth Circuit has made similar statements about arbitrability under NASD rules.

> Other courts that have sought to interpret these [NASD arbitration] provisions have recognized the ambiguity and unclarity presented although they have resolved the ambiguities in different ways. However, to acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved *in favor* of arbitrability.

Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793, 798 (10th Cir. 1995) (citations omitted).

This presumption of arbitrability is specially appropriate when, as in this case, the agreement between the parties broadly calls for arbitration of "[a]ny and all controversies." (R21)

> [A] presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences . . ." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think

> only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

AT&T Tech., 475 U.S. at 650 (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960)).

Although the FAA controls this proceeding, this Court need not be concerned with any conflict between Florida and federal law, because Florida follows the same principles. Under Florida law, "[a]rbitration is a favored means of dispute resolution and courts should resolve doubts concerning the scope of such agreements in favor of arbitration. . . . The trend is to liberally construe an arbitrator's authority if the arbitration clause is sufficiently broad." Stinson-Head, Inc. v. City of Sanibel, 661 So. 2d 119, 120 (Fla. 2d DCA 1995) (citation omitted). See also Regency Group, Inc. v. McDanniels, 647 So. 2d 192, 193 (Fla. 1st DCA 1994) ("[D]oubts about the scope of the agreement should be resolved in favor of arbitration."); Royal Carribean Cruises, Ltd. v. Universal Employment Agency, 664 So. 2d 1107, 1108 (Fla. 3d DCA 1995) ("[A]rbitration clauses . . . are to be given the broadest possible interpretation to accomplish the salutary purpose of resolving controversies out of court.").

2. The Fourth District Misinterpreted First Options and Failed to Apply the Controlling Black Letter Law that, When an Arbitration Agreement Exists, Arbitration is Required Unless the Court Can Say With Positive Assurance that the Agreement is Not Susceptible to an Interpretation Which Would Allow Arbitration.

In the decision below, the Fourth District held that First Options of Chicago v. Kaplan, 514 U.S. 938 (1995), ruled for the first time that courts generally decide whether a dispute was arbitrable. According to the Fourth District, First Options had therefore overruled the Fourth District's prior decision in Wylie v. Investment Management and Research Inc., 629 So. 2d 898 (Fla. 4th DA 1993), that arbitrators,

not courts, should decide six-year issues under NASD Rule 10304. The Fourth District here seriously misinterpreted First Options.

In the first place, the Supreme Court would be greatly surprised to learn that its holding in First Options that courts usually decide arbitrability issues was a new principle of law. Already in 1986, the Court had said that the "principles necessary to decide this case are not new . . . [and] were set out by this Court over 25 years ago . . . ." AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 648 (1986). According to the Court in 1986, one of these long-established principles was "that the question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." Id. at 649. Consequently, the Fourth District was plainly wrong to say that First Options announced a new principle of law on this point.

Furthermore, the Fourth District erred by wholly failing to consider the second question which courts must answer when deciding whether a particular dispute is arbitrable -- whether the dispute is within the *scope* of the arbitration agreement. Even assuming *arguendo* that no exception exists which would allow arbitrators in this case to resolve arbitrability issues, First Options requires courts, after they have determined that a valid arbitration agreement exists, to proceed to the next step and decide whether the particular dispute is within the scope of the agreement. For this step, First Options requires courts to *presume* that the dispute is within the scope of the agreement and therefore arbitrable.

While the Fourth District below recited this presumption in its opinion, the court completely failed to apply it. This was plain error.[9] Courts which faithfully follow First Options recognize that they are not contradicting First Options but instead are complying with it when they determine that six-year issues under Rule 10304 are arbitrable. "[T]he court is not abdicating its threshold responsibility to decide (except in limited cases) the fundamental question of arbitrability. This court has decided that the [NASD Rule 10304] timeliness issues raised by the plaintiffs *are* arbitrable." Dean Witter Reynolds, Inc. v. Iverson, 913 F. Supp. 47, 50 (D. Mass. 1996).

First Options did not involve the *scope* of an arbitration agreement but rather whether a binding arbitration agreement even existed. In First Options, the investors' wholly owned investment company signed an arbitration agreement, but the investors themselves did not, and the issue was whether the investors were bound by the agreement they had not signed. 514 U.S. at 940-41. For this issue, the Court appropriately applied no presumption of arbitrability, because the investors successfully argued that an arbitration agreement as to them did not even exist. These facts in First Options are therefore wholly different from the present case, in which both parties signed the same arbitration agreement, and the only issue is whether this agreement extends to the particular disputes raised by the investor. As such, this issue is one of *scope* to which the Fourth District erred by failing to apply a strong presumption of arbitrability.

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[9] The Eleventh Circuit in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381 (11th Cir. 1995), made this identical error, as did almost all of the courts that agree with Cohen. See cases cited in footnote 5 above.

On this point, this Court should follow the Supreme Court of Ohio's decision in Council of Smaller Enterprises v. Gates, McDonald & Co., 80 Ohio St. 3d 661, 666-67, 687 N.E. 2d 1352, 1356-57 (1998) (citations omitted), which determined in similar circumstances that the arbitrators, not the courts, should decide whether a party had complied with a 90-day time limitation in an arbitration agreement.

> The key factor in First Options that distinguishes it from this case is that in First Options, the parties resisting arbitration had not personally signed the document containing the arbitration clause. The Supreme Court contrasted this situation before it with a situation in which the parties to a valid arbitration clause have a contract providing for arbitration of some issues, and a party resists arbitration of an issue on the assertion that the contract does not require arbitration of that particular issue. The presumption in favor of arbitrability applies in the latter situation, which is also present in the case sub judice.
>
> In the First Options situation, on the other hand, the presumption is against arbitrability because there is serious doubt that the party resisting arbitration has empowered the arbitrators to decide anything, including the arbitrator's own scope of authority. The court in that instance is simply considering an aspect of the most fundamental question of all arbitration cases -- . . . that no party can be required to submit to arbitration when that party has not agreed to do so. The First Options conclusion regarding when a presumption against arbitrability applies is inapplicable to this case. [The party] does not claim that the arbitration clause is invalid, and so accepts that the underlying fee dispute is arbitrable, but rather claims that the ninety-day "condition precedent" to arbitration was not complied with and thus arbitration is unavailable. . . . The presumption in favor of arbitrability applies in this case, so that the trial court should have ordered that the disagreement over the ninety-day demand provision be submitted to arbitration unless it could be determined with "positive assurance" that the dispute was not susceptible of arbitration.

These comments by the Ohio Supreme Court are exactly applicable in the case at hand and require this Court to reject the Fourth District's reasoning below, as well as the reasoning of both of the parties in this case.

D. The Parties Agreed that the NASD Arbitrators Could Interpret NASD Rule 10304.

Both the Fourth District below and the parties have agreed that the issue in this case is whether the parties agreed to allow the NASD arbitrators to decide arbitrability under NASD arbitration rules. According to the Fourth District, the brokerage firm "failed to demonstrate that the parties 'clearly and unmistakably evidenced' an agreement to have arbitrators rather than a court decide the arbitrability . . . issue." Corporate Securities Group v. Lind, 753 So. 2d 151, 153 (Fla. 4th DCA 2000). PIABA disagrees with this characterization of the issue, which ignores the critical question whether six-year issues are within the *scope* of the arbitration agreement that plainly exists. Even assuming *arguendo* that the Fourth District correctly characterized the issue, however, the Fourth District still reached an incorrect conclusion.

Rule 10324 of the NASD Code of Arbitration Procedure expressly provides that the NASD arbitrators are empowered to interpret the other rules in the NASD Code, including Rule 10304. Rule 10324 (formerly known as Section 35 of the NASD Code) provides as follows:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any rulings by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Havird, 518 S.E. 2d 48, 50 (S.C. Ct. App. 1999) (quoting National Association of Securities Dealers, Inc. Code of Arbitration Procedure, NASD Manual & Notices to Members ¶ 10324 (1998)).

State and federal courts have repeatedly decided that, pursuant to Rule 10324, the parties agreed to arbitrate arbitrability issues under Rule 10304. For example, according to the Second Circuit, parties who agree to arbitrate under NASD rules

have agreed through Rule 10324 to arbitrate arbitrability issues relating to the interpretation of NASD rules.

> [T]he parties intended to arbitrate the issue of arbitrability, because the NASD Code itself grants to the arbitrators the power to interpret and apply [Rule 10304]. [Rule 10324] of the NASD Code provides as follows:
>
> > The arbitrators shall be empowered to interpret and determine the applicability of *all provisions* under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s).
>
> Nothing in the NASD Code removes [Rule 10304] from the ambit of [Rule 10324]. As the Eighth Circuit recently held after examining a client agreement that expressly incorporated the NASD Code:
>
> > [T]he parties' adoption of this provision [Rule 10324] is a "clear and unmistakable" expression of their intent to leave the question of arbitrability to the arbitrators. In no uncertain terms, [Rule 10324] commits interpretation of all provisions of the NASD Code to the arbitrators. Reading the NASD Code . . . as a whole, we see no reason not to apply [Rule 10324] to the arbitrators' decision regarding the application of [Rule 10304].
>
> FSC Securities Corp. v. Freel, 14 F.3d 1310, 1312-13 (8th Cir. 1994). . . . We agree. The language of the Code itself commits all issues, including issues of arbitrability . . ., to the arbitrators.

PaineWebber, Inc. v. Bybyk, 81 F.3d 1193, 1202 (2d Cir. 1996) (citations omitted).

The New York Court of Appeals has likewise held:

> Courts have interpreted the incorporation of [Rule 10324] . . . as a clear and unmistakable expression of . . . intent to leave the question of arbitrability to the arbitrators. . . . [T]he language of the NASD Code itself commits all issues, including issues of arbitrability . . ., to the arbitrators.

Smith Barney Shearson Inc. v. Sacharow, 91 N.Y.2d 39, 47, 689 N.E.2d 884, 888 (1997) (citations, brackets, and quotation marks omitted).

The Iowa Supreme Court has found that Rule 10324 requires the arbitrators, not the courts, to determine the applicability of the NASD arbitration provisions.

> [Rule 10324] of [the NASD Code] clearly and unambiguously commits the interpretation and application of all of its provisions to the arbitrator. Nothing in the contract language provides a basis for excepting [a specific section] of the NASD code from that directive.

Smith Barney, Inc. v. Keeney, 570 N.W.2d 75, 78 (Iowa 1997).

In Weston Sec. Corp. v. Aykanian 46 Mass. App. Ct. 72, 79, 703 N.E.2d 1185, 1191 (1998), the court held as follows:

> The text of [Rule 10324] points directly in favor of the arbitrator deciding arbitrability in the first instance. That section empowers the arbitrators to "interpret *and* determine the applicability of all provisions under this Code . . ." (emphasis added). "Applicability" has to do with "the quality or state of being applicable." Webster's Third New Int'l Dictionary 105 (1993). Thus, the arbitrator is empowered to determine whether the NASD's code -- the arbitrable process -- is applicable to the facts before him. Under the NASD's code, it is the arbitrator -- not the court -- who first determines whether the code can be applied to the claims asserted.

Many other courts have reached the same conclusion.[10]

Because the parties agreed through Rule 10324 to allow the NASD arbitrators to decide arbitrability, the Fourth District below was incorrect that courts should decide this issue.

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[10] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Havird, 518 S.E.2d 48, 50 (S.C. 1999) ("Rule 10324 . . . clearly and unambiguously prescribes that the arbitrator is to decide the applicability of the provisions of the NASD Code."); Mid-State Sec. Corp. v. Edwards, 309 N.J. Super. 73, 79, 706 A.2d 773, 776 (1998); Shahan v. Staley, 188 Ariz. 74, 932 P.2d 1345, 1348 (Ariz. Ct. App. 1996) ("In no uncertain terms, [Rule 10324] commits interpretation of all provisions of the NASD Code to the arbitrators."); Smith Barney, Inc. v. Bardolph, 509 S.E.2d 255, 259 (N.C. Ct. App. 1998) ("The parties' adoption of Section 10324 is a clear and unmistakable expression of their intent to leave the question of arbitrability to the arbitrators. In no uncertain terms, Section 10324 commits interpretation of all provisions of the NASD Code to the arbitrators."); Smith Barney, Inc. v. Painters Local Union No. 109 Pension Fund, 254 Neb. 758, 770, 579 N.W. 2d 518, 526 (Neb. 1998) ("[T]he entire client agreement, viewed as a whole, . . . means considering [Rule 10324] of the code in conjunction with [Rule 10101] . . . and . . . time-bar issues are therefore arbitrable."). See also Kennedy, Cabot & Co. v. NASD, Inc., 41 Cal. App. 4th 1167, 1172, 49 Cal. Rep. 2d 66, 68 (1996).

E. Procedural Issues, Such as Time-Bars in Arbitration Agreements, Are for the Arbitrators, Not the Courts, to Decide.

If this Court determines that Rule 10324 does not control and that the parties did not agree through Rule 10324 to allow NASD arbitrators to decide whether disputes are arbitrable under NASD arbitration rules, the question then becomes whether the courts can determine that the disputes between the parties in this case are within the scope of the arbitration agreement which unquestionably exists. As previously stated, when the issue is one of scope, courts must presume that disputes are arbitrable and must resolve all doubts in favor of arbitration. A court must compel arbitration, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT&T Tech., 475 U.S. at 650. Moreover, when, as in this case, the arbitration agreement broadly calls for arbitration of "[a]ny and all controversies," (R21) "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Id.

In this case, this Court certainly cannot say "with positive assurance" that the arbitration agreement between the parties is not susceptible to a construction which would allow arbitration of the parties' disputes. One reasonable construction of NASD Rule 10304 is that it is merely a procedural condition or condition precedent in the arbitration, which arbitrators should address at some point in the arbitration process before permitting further arbitration to proceed. It is not a substantive bar to the filing of any arbitration claim at all. In John Wylie & Sons v. Livingston, 376 U.S. 543, 556 n.11 (1964), the Court considered an agreement requiring the arbitration demand to "be filed . . . within four (4) weeks after [the grievance's]

occurrence or latest existence." The Court found that compliance with this time-bar was a "procedural" question to be resolved by the arbitrators, not the courts.

In John Wylie, the Court agreed that, in general, whether a party is "bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." Id. at 547 (citation omitted). Consequently, in accordance with this judicial function to decide arbitrability, the Court resolved all doubts in favor of arbitration and found a construction of the agreement which would allow arbitration of the procedural timeliness issue.

> It would be a curious rule which required that intertwined issues of "substance" and "procedure" growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.
>
> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. . . . Reservation of "procedural" issues for the courts would . . . not only create the difficult task of separating related issues, but would also produce frequent duplication of effort.
>
> In addition, the opportunities for deliberate delay and the possibility of well-intentioned but no less serious delay created by separation of the "procedural" and "substantive" elements of a dispute are clear. . . . As this case, . . . not yet committed to arbitration, well illustrates, such delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) . . . .
>
> No justification for such a generally undesirable result is to be found in a presumed intention of the parties. Refusal to order arbitration of subjects which the parties have not agreed to arbitrate does not entail the fractionating of disputes about subjects which the parties do wish to have submitted. Although a party may resist arbitration once a grievance has arisen, . . . we think it best accords with the usual purposes of an arbitration clause . . . to regard procedural disagreements

> not as separate disputes but as aspects of the dispute which called the grievance procedures into play.

Id. at 558-60.

The timeliness issue considered in John Wylie is not distinguishable from the timeliness issue in the present case. As in John Wylie, the disputes between the parties in the present case are clearly arbitrable on the merits, and the only remaining question is whether these disputes were timely raised. As in John Wylie, the "procedural" and "substantive" issues are intertwined, and timeliness is merely a procedural question arising out of the substantive issues which the arbitrators should decide. It is not a substantive bar to the filing of the claim.

The First Circuit has said in similar circumstances:

> There is no principled distinction between the timing issues deemed procedural in John Wylie and the timing issue in this case. Both are "conditions precedent" to arbitration; but the fact that something is a condition precedent to arbitration does not make it any less a "'procedural' question[] which grow[s] out of the dispute and bear[s] on its final disposition . . . ." The dispute in this case concerns whether [the employee] was fired without just cause -- a cause of action clearly covered by the arbitration clause contained in the agreement. The Company's timeliness defense is merely a procedural question arising out of that dispute.

Local 285 v. Nonotuck Resource Assoc., 64 F.3d 735, 740 (1st Cir. 1995).

Courts sometimes characterize time-bars within an arbitration agreement as conditions precedent, while other courts use phrases such as procedural conditions, procedural stipulations, or similar terminology. See County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 409 N.E.2d 951, 954-55 (1980) (treating time-bars in arbitration agreements as "procedural stipulations" or "conditions in arbitration" to be resolved by the arbitrators, but noting that they could be "referred to indiscriminately as 'conditions precedent' to arbitration"). Whatever the terminology,

the overwhelming majority view is that procedural time-bars within an arbitration agreement are for the arbitrators, not the courts, to decide. Section 6(c) of the Revised Uniform Arbitration Act, adopted in August 2000, states that arbitrators "shall decide whether a condition precedent to arbitrability has been fulfilled." According to the draft comment for Section 6(c), it is "intended to incorporate the holdings of the vast majority of state courts and the law that has developed under the FAA that . . . issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."[11]

Courts have expressly applied to NASD Rule 10304 this principle that time-bars within arbitration agreements are procedural conditions for arbitrators to interpret. For example, the Fifth Circuit in Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750, 754 (5th Cir. 1995), held that "time bars are . . . part of the procedural requirements to arbitration and, as such, they are the decision of the arbitrator. We hold, therefore, that the timeliness issues raised in this case [relating to NASD Rule 10304] are issues of procedural arbitrability and must be decided by the arbitrator." In PaineWebber Inc. v. Elahi, 87 F.3d 589, 601 (1st Cir. 1996), the First Circuit likewise said that Rule 10304 "is part of the NASD Code of Arbitration Procedure, thus one would assume it is intended to be applied by the NASD itself to control its own procedures, rather than a rule that is somehow 'off-limits' for arbitrators to apply." In Gaines v. Financial Planning Consultants, Inc., 857 S.W. 2d 430, 432 (Mo.

[11] The language of Section 6 is final, and the language of the draft comment is expected to be final shortly after the filing of this brief. Section 6 and the draft comment are presently available on the Internet at www.law.4penn.edu/bll/ulc/ulc.htm#uaa.

Ct. App. 1993), the court agreed with other courts that Rule 10304 "is a procedural provision to be interpreted by the arbitrators rather than a substantive limitation on arbitrability to be interpreted by the court."

Florida courts have also adopted this distinction between procedure and substance. The Fourth District itself had previously found that Rule 10304 is "entitled 'Time Limitation on Submission,' thereby suggesting a procedural cast rather than a clear border on the agreed scope of arbitration. The Supreme Court has certainly held that procedural questions arising from an arbitrable controversy are for the arbitrators to decide." Wylie v. Investment Management and Research, Inc., 629 So. 2d 898, 901 (Fla. 4th DCA 1993).

In Public Health Trust of Dade County v. M.R. Harrison Constr. Corp., 415 So. 2d 756, 757 (Fla. 3d DCA 1982), the Third District cited the New York decision in County of Rockland with approval and agreed that "procedural stipulations that the parties may have laid down to be observed in the conduct of the arbitration proceeding itself -- conditions in arbitration, e.g., limitations of time within which the demand for arbitration must be made, . . . are for resolution by the arbitrator as incidental to the conduct of the arbitration proceeding." See also Piercy v. School Board of Washington County, 576 So. 2d 806, 808 (Fla. 1st DCA 1991) ("[T]he question of whether a procedural prerequisite was satisfied, such as timeliness of appellant's request . . ., is an issue to be decided by the arbitrator"); Executive Life Ins. Co. v. John Hammer & Assoc., 569 So. 2d 855, 857 (Fla. 2d DCA 1990) ("[I]f indeed this clause is a condition precedent, the issue of whether the condition was satisfied is a question for the arbitrator.").

NASD Rule 10304 can be interpreted as a procedural condition to be resolved by the arbitrators after the arbitration claim is filed, rather than a substantive bar to the filing of the claim in the first place. As such, Rule 10304 is merely one procedural rule among the many other procedural rules in the NASD Code of Arbitration Procedure for the arbitrators to interpret. This interpretation of Rule 10304 as a procedural condition *in* the arbitration, rather than a substantive bar *to* the arbitration, is at least reasonable and has been adopted by numerous courts. This Court cannot say with "positive assurance that [Rule 10304] is not susceptible [to this] interpretation." AT&T Tech., 475 U.S. at 650. Under governing federal law, this Court must adopt that interpretation and conclude that Rule 10304 is properly interpreted by the arbitrators.

F. The Arbitration Agreement Broadly Calls for Arbitration of All Issues, Including Timeliness Issues, and the Specific Language of Rule 10304 Does not Reserve Timeliness Issues for the Courts.

1. Viewing the Arbitration Agreement as a Whole and Applying a Presumption in Favor of Arbitration, This Court Must Conclude That Timeliness Issues are Within the Scope of the Arbitration Agreement.

In Mastrobuono v Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995), the Court considered a brokerage firm's arbitration agreement calling for arbitration under NASD rules and held that the agreement must be interpreted according to a "cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other." Accord Lambert v. Berkeley South Condominium Ass'n, 680 So. 2d 588, 590 (Fla. 4th DCA 1996) ("In reviewing a document, a court must consider the document as a whole, rather than attempting to isolate certain portions of it.").

The Iowa Supreme Court adopted this principle when it interpreted Rule 10304 in the context of the entire NASD Code of Arbitration Procedure.

> Under our rules for contract interpretation, the intent of the parties controls, and unless there is an ambiguity, that intent is determined by what the contract itself says. A contract is to be interpreted as a whole, and it is assumed in the first instance that no part of it is superfluous. The interpretation that gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation that leaves a portion of the agreement of no effect.

Smith Barney, Inc. v. Keeney, 570 N.W. 2d 75, 78 (Iowa 1997) (citations omitted). The Iowa Supreme Court looked to NASD Rule 10324 in conjunction with Rule 10304 and found that, applying ordinary principles of contract construction and treating the NASD Code of Arbitration Procedure as a whole, the two provisions were best harmonized by treating six-year issues under NASD Rule 10304 as within the scope of the arbitration obligation. Id.

The NASD Code of Arbitration Procedure includes numerous procedural rules. When parties have an agreement calling for arbitration of the merits of their disputes under NASD rules, they must be presumed to have agreed that the arbitrators would interpret all of the NASD's procedural rules that applied to the arbitration. Supposing that the parties would single out Rule 10304 as a rule to be interpreted in the first instance by courts is implausible. "[W]here the parties have clearly agreed to arbitrate the subject of the underlying dispute between them, as the parties have here, it is unlikely that they intended other issues related to the dispute, such as the timeliness of the submission of the claim, to affect the 'arbitrability' of the dispute." PaineWebber Inc. v. Elahi, 87 F.3d 596, 600 (1st Cir. 1996).

> Many a mandatory procedural rule could be called an "arbitrability" rule if the failure to comply prevented arbitration on the merits. For example, one might say that, by incorporating the NASD's rules, the

> parties agreed to arbitrate only those disputes for which the arbitrator's fee has been paid; questions relating to the fee could be called "arbitrability" issues. It would be illogical, though, to conclude that the court, not the arbitrator, must determine if the proper fee was paid.

Id. at 596.

According to Elahi, supposing that the parties wanted court resolution of these issues "is particularly unlikely where the arbitration clause is as broad as it is in this case." Id. Here, the parties agreed to arbitrate "[a]ny and all controversies." (R21) Under these circumstances, "only the most forceful evidence of a purpose to exclude [six-year issues] from arbitration can prevail." AT&T Tech., 475 U.S. at 650. No such forceful evidence is present in the arbitration agreement below, and, indeed, the most forceful evidence is that, through Rule 10324, the parties expressly empowered NASD arbitrators to decide these issues.

As the Second Circuit has said on this point:

> The meaning of the [arbitration agreement] is plain indeed: Any and all controversies are to be determined by arbitration. The wording is inclusive, categorical, unconditional and unlimited. The words "any and all" are elastic enough to encompass disputes over whether a claim is timely and whether a claim is within the scope of arbitration.

PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1199 (2d Cir. 1996). See also Smith Barney Shearson Inc. v. Sacharow, 91 N.Y. 2d 39, 46, 689 N.E. 2d 884, 887 (1997) (quoting this language from Bybyk with approval); Singer v. Smith Barney Shearson, 926 F. Supp. 183, 187 (S.D. Fla. 1996) (Agreement to arbitrate "any controversy" was a "clear and unmistakable expression by the parties of their intent to submit all of their disputes to arbitration, including those regarding eligibility for arbitration" under Rule 10304.).

The Court considered this issue in International Union of Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491(1972), in which the arbitration agreement was broad, but the party opposing arbitration nevertheless argued that the court should determine whether arbitration claims were time-barred by the laches doctrine.

> [W]e find that the parties did in fact agree to arbitrate the issue of laches here. . . . [T]he company was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause. That clause applies to "any difference," whatever it may be . . . [W]e must conclude that the parties meant what they said -- that "any difference" which would include the issue of laches raised by Respondent at trial, should be referred to the arbitrator for decision. The District Court ignored the plain meaning of the clause in deciding that issue.

To similar effect are the agreements between the parties in this case that arbitration would be "final and binding," that the parties were "waiving their right to seek remedies in court," and that the agreement encompassed "all claims . . . which could otherwise be brought in a judicial form." (R21) The Second Circuit found in Bybyk that an agreement to waive the right to seek remedies in court was, "at the very least, . . . a missed opportunity for a draftsman seeking to" provide an exception to the agreement to arbitrate any and all controversies. 81 F.3d at 1199. "Put another way, no draftsman seeking a six-year limitation on the scope of arbitrability would craft this language to accomplish that objective." Id. at 1200.

In addition, the arbitration agreement in this case calls for arbitration before either the NASD or the NYSE, at the election of the investor. (R21) The First Circuit in Elahi found that this choice of arbitral fora was another reason to doubt that the parties intended to reserve six-year issues for the courts.

> [T]he NASD rules only come into play after the NASD has been chosen as the arbitral forum. Although the other potential forums specified in the parties' arbitration clause appear to have a nearly identical six-year

> time bar, they might, in theory, have very different time-bar rules, with different time periods, or different language . . . . If other forums did have differently phrased rules, the question whether timeliness presented an "arbitrability" issue would depend on which of the potential arbitral forums was chosen. If the parties intended to make a time bar a threshold issue for judicial, rather than arbitral, determination, it seems unlikely that they would do so through such potentially unreliable means.

87 F.3d at 601. Thus, considering the NASD Code of Arbitration Procedure as a whole, this Court must conclude that six-year issues are generally for the arbitrators, not the courts, to decide.

2. Rule 10304 is Best Interpreted as Providing a Means for NASD Arbitrators to End the Arbitration, Not As a Bar Which Precludes the Arbitration From Starting.

The specific language of NASD Rule 10304 does not contradict the conclusion that six-year issues are for the arbitrators. Rule 10304 provides as follows:

> No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.

The arguments of those who believe that six-year issues are for courts to decide are based entirely here on the words "eligible for submission." According to proponents of this minority view, these words "can reasonably be read in only one way -- as a substantive limit on the claims that the parties have contracted to submit to arbitration." PaineWebber Inc. v. Hofmann, 984 F.2d 1372, 1379 (3d Cir. 1993). Contrary to Hofmann, however, and as previously explained in this brief, numerous courts have "reasonably" interpreted these words another way as allowing arbitration of six-year issues. Under the governing law, when two reasonable interpretations of an arbitration agreement exist, courts must choose the interpretation which allows arbitration.

The words "eligible for submission" do not necessarily mean "eligible for filing," as the courts in the minority on this point hold. In ordinary legal parlance, "submission" commonly means submission of the cause to the finder of fact *after* the presentation of evidence and instructions on the law, as in submission of a case to the jury when the trial is concluded. See, e.g., Nodar v. Galbreath, 803, 811 n.6 (Fla. 1984) ("Upon *submission* to the jury of the question of whether the statements were assertions of fact or expressions of opinion, the jury found them to be statements of fact."). Similarly, in appellate courts, cases are commonly deemed taken under "submission" *after* oral arguments, not at the time the notice of appeal is filed. The First Circuit recognized this ambiguity when it explained that "submission" might merely "mean submission for full adjudication of the merits, rather than submission for preliminary determinations, such as whether the claim is time-barred, or whether the appropriate fee was paid, or whether the claim was submitted on the proper forms." Elahi, 87 F.3d at 600.

If the word "submission" in Rule 10304 merely refers to the point in time when the arbitrators take the case under "submission," *after* the parties' claims are filed, *after* all preliminary disputes are resolved, *after* the evidence is presented at the final hearing, and *after* the closing arguments of the parties, then Rule 10304 is merely one of the many possible reasons why the arbitrators might ultimately conclude not to grant relief in favor of the claimant, just as they might similarly decide not to grant relief if a party defaulted, did not comply with discovery orders, was collaterally estopped, or failed to pay the requisite arbitration fees. Under this interpretation, Rule 10304 is not a substantive bar *to* the filing of the arbitration but instead merely a procedural condition *in* the arbitration which a claimant must satisfy before

obtaining an award, like numerous other procedural conditions. Consequently, six-year issues are within the scope of the arbitration agreement because, properly understood, Rule 10304 does not bar arbitrations from beginning and is only a reason for arbitrators to end an arbitration after it starts.

Numerous courts have concluded that, interpreting the arbitration agreement as a whole, six-year issues under Rule 10304 are for the arbitrators, not the courts, to decide. Because numerous courts have adopted this construction of the relevant language, this Court cannot say "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT&T Tech., 475 U.S. at 650. This Court must conclude, applying a presumption of arbitrability, that six-year issues are within the scope of the arbitration agreement.

G. The Fourth District's Decision Will Frustrate the Purpose of NASD Arbitration and Improperly Require Courts to Make Merits-Related Decisions on the Events that Start the Rule 10304 Clock.

1. Requiring Courts Rather than Arbitrators to Resolve Six-Year Issues Under Rule 10304 Would Improperly Intrude on the Arbitrators' Decisions on the Merits and Would Defeat the Purpose of Arbitration to Provide a Speedy and Inexpensive Alternative to Litigation.

John Wylie determined that arbitrators rather than courts should decide procedural issues, such as time-bars in arbitration agreements, in large part because John Wylie concluded that these procedural issues would often be inextricably bound in the merits of the parties' disputes.

> Doubts whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration. In this case, one's view of the Union's responses to Wylie's "procedural" arguments

> depends to a large extent on how one answers questions bearing on the basic issue . . . .

John Wylie, 376 U.S. at 557.

John Wylie's reluctance to require courts to resolve procedural issues which intertwine with substantive merits issues stemmed from a black letter principle of arbitration law -- that arbitrators, not courts, should resolve the merits of the parties' disputes.

> [I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. . . . "The courts, therefore, have no business weighing the merits of the grievance . . . . The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious."

AT&T Tech., 475 U.S. at 649-50 (citation omitted).

Many courts have determined that requiring courts to decide timeliness issues would improperly embroil the courts in the merits of the disputes which the parties had agreed to arbitrate. For example, in Stinson-Head, Inc. v. City of Sanibel, 661 So. 2d 119, 121 (Fla. 2d DCA 1995), the Second District refused to require court decisions on timeliness issues, because these decisions would interfere with the arbitration process and defeat its purpose.

> As shown by Stinson-Head's contention that Sanibel's claims are in fact barred by the statute of limitations, this issue is very fact-oriented and will require an evidentiary hearing. When the evidence is repeated at a subsequent arbitration if the claim is found timely, the parties would be duplicating their efforts, thus increasing the costs and defeating one of the goals of arbitration. If we adopted Stinson-Head's position, a party could first litigate its defenses before a trial court. Only after losing would it be required to abide by its contractual obligation to submit the claims to arbitration. This approach is illogical and would defeat a valid arbitration agreement. Further, we find no legislative authority mandating such a bifurcated procedure.

The Fifth District in Victor v. Dean Witter Reynolds, Inc., 606 So. 2d 681, 683-84 n.5 (Fla. 5th DCA 1992), reached the same conclusion.

> [T[he statute of limitations issue is intimately bound up with the same facts that underlie the claim itself. Who said what to whom? Who knew what and when? Who did what and when? This issue seems perfectly suited for arbitration. Why have a trial in court on the issue and then duplicate the same factual presentation on liability in arbitration?

Judge Marcus likewise concluded that Rule 10304 issues should be arbitrated, because they were inevitably entwined with the merits of the parties' disputes.

> Were we to accept Plaintiff's position that [Rule 10304] defines the subject matter jurisdiction of the arbitration panel, . . . we would examine the question of the timeliness of the [investors'] claims . . . . To do this, the parties would be required to litigate, and this Court would be required to engage in a detailed examination of, the merits of the claim, since the [investors'] allegations of fraud are precisely the grounds they assert for tolling the limitations period. The ensuing costs and delay would run counter to the very purpose of arbitration.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 1993 WL 593998, at *4 (S.D. Fla. Sept. 24, 1993), rev'd, 62 F.3d 381 (11th Cir. 1995).

In Cohen, the Eleventh Circuit adopted a contrary position and held that six-year issues should be resolved by courts, not arbitrators. The Eleventh Circuit, however, now openly admits that a court's task in determining arbitrability under Rule 10304 will be difficult and time-consuming.

> We recognize that the district court's task on remand may not be a simple one. To determine whether defendants' . . . claims are eligible for arbitration, the court must go beyond the allegations of the complaint and examine the evidence the parties offer, if any. . . . [I]t might be necessary for the court to hold a "mini-trial" to identify the last occurrence or event necessary to make the defendants' . . . claims viable."

Kidder, Peabody & Co. v. Brandt, 131 F.3d 1001, 1005 (11th Cir. 1997).

Since Cohen, numerous cases have been filed in Florida federal courts seeking court resolution of six-year issues. Although Brandt optimistically suggests that these cases will only require "mini-trials," these cases in reality often lead to full-scale litigation, in which the brokerage firm seeks expansive discovery from the investors, and the federal courts expansively require filing of affidavits, documentary evidence, legal memoranda, and briefs which explain exactly why a particular dispute is or is not eligible for arbitration under Rule 10304. This lengthy court litigation wholly frustrates the purpose of arbitration in Florida to provide "an efficient means of settling disputes . . . [which] avoids the delays and expenses of litigation." KFC Nat'l Management Co. v. Beauregard, 739 So. 2d 630, 631 (Fla. 5th DCA 1999). Parties will have little reason to agree to arbitration, if they must frequently engage in lengthy litigation in court on most or all of the relevant factual issues, merely to be allowed to duplicate the same legal arguments and factual presentation later in arbitration.

The delay and expense attendant on courts' resolution of six-year issues contradicts not only the purpose of arbitration but also the purpose of the Securities and Exchange Commission ("SEC") in approving the NASD's arbitration rules. The SEC "ensure[s] the adequacy of the arbitration procedures employed by the [NASD]. No proposed rule change may take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act." Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 233 (1987). See also Burns v. New York Life Ins. Co., 202 F.3d 616, 620 (2d Cir. 2000) ("[T]he SEC reviews and approves all NASD [arbitration] rules and by-laws before they become effective."). The SEC cannot approve NASD arbitration rules, including NASD Rule 10304, unless they are

"designed . . . to protect investors and the public interest; and are not designed to permit unfair discrimination." 15 U.S.C. § 78o-3(b)(6).

In accordance with this statutory mandate, the SEC approved the NASD arbitration rules to provide an efficient and inexpensive method for the investing public to resolve disputes with brokerage firms. It is inconceivable that the NASD, when it promulgated Rule 10304, and the SEC, when it approved the rule, intended or contemplated that parties would tediously and expensively litigate timeliness issues in court for months or years, merely to be allowed to proceed in arbitration, when the hallmarks of arbitration are its speed and lack of expense. No reviewing court can ascribe such an irrational purpose to the SEC and the NASD, given their combined statutory and regulatory mandate "to protect investors and the public interest."

2. Litigation in Court of Six-Year Issues is Usually Lengthy, Costly and Merits-Related, Because Courts Must Determine Whether Later Factual Events -- Such as Discovery by the Investor or Active Concealment by the Firm -- are Arbitrable.

Court litigation of six-year issues is time-consuming and expensive and usually requires resolution of merits-related issues, because courts agree that the events starting the Rule 10304 clock are not necessarily early events, such as the initial purchase of a security, but instead frequently are later events in the investment process. For example, in many cases, the "occurrence or event giving rise to the . . . dispute, claim or controversy" could be the investors' discovery of the firm's earlier misdeed, as both the NASD and some courts have determined.

> The "occurrence or event" triggering the claim could be the date of purchase; it could just as plausibly be some other occurrence or event. Requiring courts to determine the point at which the six-year time

> limitation commenced would not only entangle courts in the merits of arbitrated disputes, but would provide an opportunity for delay and duplication of effort. . . .
>
> Defendants have submitted a . . . letter . . ., stating the NASD takes precisely that view of [Rule 10304]. The letter states in relevant part:
>
> > It has been determined that the purchase date is not the event or occurrence that gave rise to this dispute. . . . [Rule 10304] does not refer specifically to the purchase date as the time that the six year limitation begins to run. Therefore, **it is equally appropriate that the discovery by the claimant be treated as the occurrence or event giving rise to the dispute.**

FSC Sec. Corp. v. Freel, 811 F. Supp. 439, 444 & n.6 (D. Minn. 1993), aff'd 14 F.3d 1310 (8th Cir. 1994) (emphasis added).

> Thus, in at least three cases, the current Director of Arbitration of the NASD, deciding threshold issues similar to those decided by the court, has ruled the "purchase date was not the event or occurrence that gave rise" to the dispute. . . . In a letter dated October 28, 1991, the Director stated: . . . [I]t is equally appropriate that the discovery by the claimant be treated as the occurrence or event giving rise to the dispute.
> . . .
> This case involves allegations of fraud and self-dealing . . . which make inappropriate the selection of the investment purchase date as a starting point for computing the six-year eligibility period, rather than the date of discovery of the fraud. . . .

Goldberg v. Parker, 1995 WL 396568 at *4 (N.Y. Sup. Ct. April 12, 1995), aff'd, 634 N.Y.S. 2d 81 (App. Div. 1995).

Some courts have held that discovery cannot be an event or occurrence for purposes of Rule 10304. See, e.g., PaineWebber Inc. v. Hofmann, 984 F.2d 1372, 1381 (3d Cir. 1993). Hofmann, and cases like it, however, merely announce this holding without any significant supporting argument, and this holding finds no support in the actual text of Rule 10304. Significantly, Rule 10304 does not refer to events giving rise to a "cause of action," which in some jurisdictions can accrue prior to discovery, but instead refers to events giving rise to a "dispute" or "controversy."

"Dispute" is defined as a "debate, controversy, or difference of opinion . . . a wrangling argument; quarrel," while "controversy" refers to a "prolonged public dispute, debate, or contention; . . . strife, or argument." Random House Webster's Unabridged Dictionary 443, 569 (2d ed. 1998). Plainly, "a wrangling argument," "quarrel," "prolonged public dispute," or "strife" does not exist when one side of the alleged "wrangling argument" or "prolonged public dispute" does not know about it. The most natural reading of Rule 10304 is that an investor's discovery of the wrong gives rise to the dispute or controversy, because a dispute or controversy by definition does not exist before that time.

Other types of post-purchase events besides discovery can also constitute arbitrable occurrences under Rule 10304. For example, the Third Circuit in Hofmann did find that active concealment or similar acts of wrongdoing could constitute arbitrable events under Rule 10304.

> As an example of how this analysis would work, consider Hofmann's claim that PaineWebber actively concealed Faragalli's wrongdoing. . . . [T]his can also be viewed as an independent cause of action based on a duty owed by PaineWebber to its customers to inform them of a broker's wrongdoing or of the unsuitably speculative nature of their investments. . . . In this type of situation, the court must assume for the purposes of determining arbitrability that such a duty is owed.

984 F.2d at 1381. See also Merrill Lynch, Pierce, Fenner & Smith v. Cohen, 622 F.3d 381, 385 (11th Cir. 1995) ("If the [investors] prove that Merrill Lynch reported false values for their investments through bogus statements, then Merrill Lynch's act of sending the false statements, rather than the initial purchase of the investments, may be the occurrence or event giving rise to their claims."); Osler v. Ware, 114 F.3d 91, 93 (6th Cir. 1997) ("Although counsel for [the stockbroker] contended . . . that the only relevant date for determining whether a claim is time-barred is when the initial

investment was made, this theory does not comport with either the 'occurrence or event' language contained in [Rule 10304] or the case law that has developed thereunder.").

The Fifth Circuit has also found that post-purchase wrongdoing can be the subject of NASD arbitration even if the original purchase occurred more than six years prior to the filing of the claim in arbitration. The Fifth Circuit refused to accept the firm's contention "that the last act was the last purchase by each customer."

> The defendants, however, allege that [the firm] continued to act fraudulently after the last purchases were made and within six years of the filing of the arbitration complaint. . . . [The customers] argue that the time bar should be tolled since [the firm] engaged in fraudulent conduct which prevented the defendants from learning several important facts until after the six-year post-purchase date. Thus, there is substantial controversy over whether the time bars will act to bar the causes of action asserted by the defendants. This Court cannot . . . prevent arbitration.

Smith Barney Shearson v. Boone, 47 F.3d 750, 754 (5th Cir. 1995).

Likewise, the court in Prudential Sec. v. Moneymaker, 1994 WL 637396 at *2 (W.D. Okla. July 14, 1994), found that a brokerage firm's wrongdoing occurring after the purchase was properly considered for arbitration under Rule 10304.

> [Prudential] has listed several limited partnership interests purchased by certain [claimants] more than six years prior to the NASD filing which are arguably ineligible for arbitration and on which it seeks summary judgment. However, [claimants' claims] are not limited to purchase or sale related claims, but allegedly include claims based on ongoing systemic mismanagement, diversion of funds, misrepresentations, conflict of interest and self-dealing. . . .
>
> [Claimants'] claims which are based on purchases, mismanagement, diversion of funds, misrepresentations, conflict of interest or self-dealing which actually occurred within the six years prior to the NASD filing will proceed to arbitration.

The Eleventh Circuit has observed for investments which have a latent defect not immediately causing damages that strict application of a six-year rule could "render some claims ineligible for arbitration before they even come into existence." Kidder, Peabody & Co. v. Brandt, 131 F.3d 1001, 1004 (11th Cir. 1997). The Eleventh Circuit concluded in such cases that the event or occurrence giving rise to the dispute for purposes of Rule 10304 would be the final injury or damages, not the initial purchase. Id. Another post-purchase event could be investment advice to retain a security which the investor already owned, such as the investment advice in this case to renew the mortgage notes. See J.E. Liss & Co. v. Levin, 201 F.3d 848, 852 (7th Cir. 2000) ("The allegation [for purposes of NASD Rule 10304] is of an independent fraud designed . . . to dissuade [the investor] from selling his investment."). In this connection, the Florida legislature has prohibited fraud not only in connection with the sale or purchase of securities but also in "connection with the rendering of *any* investment advice." § 517.301(1)(a), Fla. Stat. (1999).

Thus, contrary to the brokerage firms' position that Rule 10304 runs from the date of purchase, post-purchase events are in most cases potentially eligible for submission to arbitration under Rule 10304. If the Fourth District's decision below is upheld, then state courts in Florida will routinely be required to engage in costly and time-consuming litigation over the exact event which caused the six-year period to start running. This Court should avoid this consequence and reject the Fourth District's reasoning, which would necessarily vitiate the purpose of arbitration.

3. Although the Parties in this Case have Agreed That Their Disputes Were Not Eligible for Arbitration Under Rule 10304, This Issue Would Usually be Disputed and Require Costly and Expensive Litigation.

The present case is unique, because the parties agree that the events or occurrence giving rise to the disputes or controversies between them were the initial liquidation of the investments in 1990 and the failure to record a mortgage on the property that secured Lind's invested funds, not the later renewals of the mortgage notes and the ensuing default. In a more typical case, however, the parties would disagree on this point. The typical investor would argue that the later events were the occurrences giving rise to the dispute for purposes of Rule 10304. The investor would emphasize the default and argue, citing Brandt, that a controversy does not arise under Rule 10304 until damages have occurred. Similarly, the investor would argue that the renewal of the mortgage in 1996 and the fraudulent acts of concealment and failures to disclose, when the broker never told the investor that her funds were not in fact secured by the property, were operative events under Rule 10304. Moreover, the investor would argue that the broker's fraudulent concealment tolled the running of the six-year period and that the firm was equitably estopped from asserting a time-bar, because it had concealed from the investor the basis for her claim.

If this were a typical case, and this Court ruled that the trial court, not the arbitrators, must decide whether the claims below were timely under Rule 10304, then the trial court would inevitably be ruling on the merits of the parties' claims as it determined which claims were eligible for arbitration. The lower tribunal would likely be called upon to determine who said what to whom, what the damages were, when the damages occurred, what the intent of the parties was in renewing the mortgage, and numerous other merits-related questions. Inevitably in such cases, the parties would frequently seek substantial discovery from each other, file affidavits

and other documentary evidence, and might be required to present their evidence to the court at an evidentiary hearing.

All of these events would occur merely to allow the arbitration to proceed, and, if the arbitration did proceed, the parties would present the same evidence again to the arbitrators on most or all of the same points. Moreover, the court's ruling would in most cases have consequences for the arbitrators' decisions on the merits, because the arbitrators would believe themselves bound by the court's ruling to the extent it related to the merits. Requiring this lengthy court procedure merely to be allowed to continue an arbitration would totally frustrate the purpose of arbitration to provide a speedy and inexpensive alternative to litigation.

For these reasons, to preserve the purpose of arbitration and to reserve merits issues for the arbitrators, this Court should rule that questions relating to the scope of Rule 10304 are for the arbitrators, not the courts to decide.

H. Because the Parties Have Agreed that their Disputes are not Eligible for a Submission to Arbitration Under Rule 10304, this Court can Accept this Agreement and Require the Parties to Proceed in Court.

As the previous arguments in this brief illustrate, PIABA disagrees with most of the reasoning of the Fourth District in its decision below. PIABA, however, does agree with the result of the decision. Both parties agree that the events or occurrences giving rise to their disputes were the events occurring in 1990, when a stockbroker sold Lind's legitimate investment and used the proceeds for an investment in the broker's own company, without recording the promised mortgage to secure the investment. Because the parties agree that these are the events or occurrences giving rise to their disputes, the parties necessarily further agree that their disputes are not

eligible for submission to arbitration under Rule 10304. The trial court was certainly entitled to accept this agreement between the parties and require them to proceed in court, because the new agreement had effectively superseded the parties' prior agreement to arbitrate. The Fourth District could and should have affirmed the trial court's decision on this basis, because the parties' arbitration agreement was nullified by their courtroom actions.

Through their actions and statements in court, parties can waive their right to enforce arbitration agreements. S&H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990) ("A party has waived its right to arbitrate if 'under the totality of the circumstances, the . . . party has acted inconsistently with the arbitration right.'"); Klosters Rederi A/S v. Arison Shipping Co., 280 So. 2d 678, 681 (Fla. 1973) ("A party's [arbitration] contract right may be waived by . . . taking action [in court] inconsistent with that right."). Similarly, parties can by agreement supersede prior arbitration agreements. Luckie v. Smith Barney, Harris Upham & Co., 999 F.2d 509, 513 (11th Cir. 1993) ("An "arbitration provision . . . may be superseded by a more specific customer agreement between the parties . . . .").

Here, Corporate Securities Group has told the Florida courts, including this Court, that the disputes between the parties are not eligible for submission to arbitration under NASD Rules. Lind agrees with this conclusion. Corporate Securities Group has never affirmatively said that the disputes between the parties are in fact eligible for submission to arbitration under Rule 10304. For Corporate Securities Group successfully to compel arbitration, it must at least affirm that the parties' disputes are eligible for submission to arbitration. Having failed to make any such affirmation, Corporate Securities Group is not entitled to seek to compel

arbitration. It has by its own statements in court, waived any right to arbitration, and the parties have by agreement superseded their original arbitration agreement.

Any other conclusion would require the parties to proceed uselessly to arbitration, where they would agree that their disputes are not eligible for submission to arbitration, and the arbitrators would likely decide to end the arbitration without a decision on the merits. The parties would then return to court to conclude the litigation interrupted by the order compelling arbitration. No useful purpose would be served by halting the litigation below, while the parties obtained a decision from the arbitrators to end the arbitration.

This Court certainly should reject Corporate Securities Group's argument that, if the arbitrators dismiss the arbitration in reliance on the parties' stipulation that their disputes are not eligible for submission to arbitration, no further court proceedings could occur. Accepting this argument would mean that Lind's complaint, which was legitimately and timely filed in court, would nevertheless be barred both in court and in arbitration by an arbitration rule which Lind had not even seen at the time she signed the arbitration agreement. Her claim, which did not arise until the broker's corporation defaulted on its mortgage obligation shortly before she filed her complaint in court, would then be barred even before it existed. This Court cannot and should not accept this unjust result.

Courts have determined that, when a dispute is not eligible for submission to arbitration under Rule 10304, the parties can then proceed in court. See Prudential Sec. Inc. v. LaPlant, 829 F. Supp. 1239, 1244 (D. Kan. 1993) ("The court finds that any . . . claims, which are based on events which actually occurred more than six years before the filing date, are subject to litigation in this court."); Smith Barney,

Harris Upham & Co. v. St. Pierre, 1994 WL 11600, at *5 (N.D. Ill. Jan. 4, 1994) (Time-barred claims under Rule 10304 can proceed in court.); Prudential Sec. v. Moneymaker, 1994 WL 637396 at *2 (W.D. Okla. July 14, 1994) (Investors could file a counterclaim in court for those claims that had occurred more than six years before the NASD filing.). The same conclusion applies here.

Because the parties have stipulated and agreed by their statements in court that the disputes between them are not eligible for submission to arbitration under NASD rules, the trial court could properly accept this stipulated agreement, and the Fourth District should have affirmed on that basis.

CONCLUSION

For the reasons stated, this Court should reject the reasoning of the court below but affirm the result.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas D. Lardin, Esq., 1901 West Cypress Creek Road, Suite 415, Fort Lauderdale, FL 33309, Howard A. Tescher, Esq., 100 NE Third Avenue, Suite 610, Fort Lauderdale, FL 33301, and Leonard Bloom, Esq., 200 South Biscayne Boulevard, Suite 4750, Miami, Florida 33131, on this 11th day of December, 2000.

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CERTIFICATION

Undersigned counsel certifies that this Brief was printed in 14 point Times New Roman.