IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CORPORATE SECURITIES
GROUP, INC.,

CASE NO. SC-00-931

Petitioner,

vs.

SHIRLEY LIND,

Respondent.

_____/

APPEAL FROM THE FOURTH DISTRICT
COURT OF APPEAL, FLORIDA
Case No. 4D99-1394

REPLY BRIEF OF PETITIONER

KIPNIS TESCHER LIPPMAN & VALINSKY
SUITE 610
100 NORTHEAST THIRD AVENUE
FORT LAUDERDALE, FLORIDA 33301
(954) 467-1964

Attorneys for Petitioner

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PRELIMINARY STATEMENT

For purposes of identification, Petitioner, Corporate Securities Group, Inc. shall be referred to as "Petitioner." Respondent, Shirley Lind shall be referred to as "Respondent". The Fourth District Court of Appeal, Florida shall be referred to as the “Appellate Court.” The 17th Judicial Circuit in and for Broward County, Florida shall be referred to as the “Trial Court” and the Honorable J. Leonard Fleet, Circuit Judge of the 17th Judicial Circuit in and for Broward County, Florida shall be referred to as the "Trial Judge."

References to relevant pleadings and documents contained in the Appellate Court Record shall be preceded by the designation “R” followed by the appropriate page number. References to relevant pleadings and documents contained in the Supplemental Appendix to Initial Brief of Petitioner shall be preceded by the designation “A” followed by the appropriate page number.

ARGUMENT

RESPONDENT HAS FAILED TO FULLY APPRECIATE THE SCOPE OF THE ARBITRATION CLAUSE AND HAS DISREGARDED THE PLAIN LANGUAGE OF SUCH CLAUSE WHICH DEMONSTRATES THE PARTIES INTENT THAT ARBITRATION IS THE SOLE AND EXCLUSIVE FORUM FOR DISPUTE RESOLUTION AND ALL MATTERS BETWEEN THE PARTIES SHALL BE ARBITRATED

Respondent's arguments, as set forth in her Answer Brief, emanate from her failure to fully appreciate the scope of the arbitration clause contained in the Customer Agreement at issue, and her disregard of the plain language contained in the arbitration clause which demonstrates: (i) the parties intent that all matters be submitted to arbitration; and (ii)that arbitration is the exclusive forum by which the parties are to seek redress for any and all claims.

As her first argument, Respondent boldly asserts that the language contained in the arbitration clause "falls short of a clear and unmistakable intent to arbitrate." Answer Brief at 5. However, in support thereof, Respondent cites to only a select portion of the arbitration clause. A review of the arbitration clause in its entirety conclusively establishes the parties' intent that all issues be submitted to arbitration. In addition to the language cited by Respondent, such clause further states that

> "Arbitration is final and binding on the parties. . . . The parties are waiving their right to seek remedies in court, including the right to jury trial. . . . This clause binds the undersigned to submit to arbitration all claims including those which could otherwise be

brought in a judicial forum and those which could be joined to other non-arbitrable claims."

Furthermore, Florida federal courts have found arbitration clauses containing less-inclusive language than that contained in the instant arbitration clause to have satisfied the "clear and unmistakable test." See Dean Witter Reynolds, Inc. v. Daily, 12 F. Supp. 2d 1319, 1322 (S.D. Fla. 1998); Singer v. Smith Barney Shearson, 926 F. Supp. 183, 187 (S.D. Fla. 1996).

As noted by the Public Investors Arbitration Bar Association ("PIABA") in its Amicus Curiae Brief filed in this action, under Florida law, arbitration is a favored means of dispute resolution, and when there is a doubt as to the scope of an arbitration agreement, the trend in Florida is to give the broadest possible interpretation to such clauses in order to avoid frustrating the purpose of arbitration. See PIABA's Amicus Curiae Brief at p. 19. Accordingly, a strong presumption of arbitrability should have been applied by the Appellate Court when reviewing the arbitration provision. Had this been done, such presumption, coupled with the all-encompassing language found in the arbitration clause, would have allowed the Appellate Court to reach just one conclusion - that the parties intended the arbitrators, and not the court, to decide arbitrability issues.

Respondent further states:

> Petitioner's suggestion that the trial court incorrectly is allowing this claim to proceed in court, despite the expiration of the applicable statute of limitations, has not been raised or ruled on below. It is inappropriate for an appellate court to direct the trial court how to rule on an issue not presented to it and ruled upon by it.

Answer Brief at 2. However, the explicit language contained in the Trial Court's Order Denying Motion to Compel Arbitration indicates that the Trial Court will allow Respondent to pursue its ineligible claims in court. The Order specifically stated that "[t]he Court believes that because the NASD's arbitration rules require that an action be brought within six years, that the Plaintiff need not arbitrate her claims against CSG and may proceed against CSG in the instant action. R. 6. (emphasis added).

Realizing that such a ruling would allow Respondent to avoid its contractual promise to arbitrate all matters, the Petitioner requested that in the event that the Appellate Court determines that the arbitrability issue is for the court to decide, that the Trial Court be instructed to follow the directive set forth in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381 (11th Cir. 1995) and, accordingly, only examine the claims to determine if more than six years have elapsed from the event giving rise to the claim, and to instruct the Trial Judge to send any remaining viable claims to arbitration. However, in its opinion, the Appellate Court never addressed the Trial Judge's

ruling that Respondent could proceed in court, and failed to provide any instruction as to how the Trial Judge should proceed. A1-3. Petitioner filed a Motion for Rehearing or Clarification and asked the Appellate Court to clarify this issue, but such motion was denied. Accordingly, the Appellate Court's failure to address this issue inferentially denotes its approval of the Trial Judge's ruling and will allow Respondent to proceed in state court despite the clear intent of the arbitration agreement.

PETITIONER'S ACTIONS DO NOT CONSTITUTE A WAVIER OF ITS RIGHT TO COMPEL ARBITRATION

For the most part, PIABA's position - that the Appellate Court erred in holding that the court, and not the arbitrators, should decide the arbitrability issue - is in accord with Petitioner's position. Pages 1 through 47 of PIABA's 50 page brief sets forth in string cite detail why the Appellate Court erred in ruling that the court, and not the arbitrators, should decide arbitrability issues. However, PIABA diverges from Petitioner's position in the last three pages of its brief where PIABA maintains that Respondent should now be allowed to proceed in court since her claims are ineligible for arbitration.

In support of this position, PIABA erroneously contends that Petitioner waived its right to compel arbitration in responding to Respondent's contention that she should be allowed to proceed in court with her claims. See PIABA's Amicus Curiae Brief at p.

48-49. In support thereof, PIABA cites to several cases which stand for the proposition that parties, by virtue of their actions, can waive their right to enforce arbitration agreements. See S&H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990); Klosters Rederi A/S v. Arison Shipping Co., 280 So. 2d 678, 681 (Fla. 1973); Luckie v. Smith Barney, Harris Upham & Co., 999 F.2d 509, 513 (11th Cir. 1993). This rule of law is undisputed. However it is equally well-established that filing a motion to compel arbitration and participating in litigation to the extent necessary to preserve a party's right to arbitrate does not rise to the level of a waiver. Gale Group, Inc. v. Westinghouse Elec. Corp., 683 So. 2d 661, 663 (Fla. 5th DCA 1996). See also Monsour v. Balk, 705 So. 2d 968, 970 (Fla. 2d DCA 1998) (holding that arbitration right is not waived by filing a motion to dismiss or a motion to set aside judgment); Duckworth v. Plant, 697 So. 2d 1257, 1259 (Fla. 5th DCA 1997) (filing of a motion to dismiss and simultaneous raising of other grounds did not constitute waiver of right to arbitrate).

The facts presented in each of the cases cited by PIABA are clearly distinguishable from the actions of Petitioner and would not support PIABA's position that Petitioner has waived its right in this instance.

In S&H Contractors, plaintiff filed a complaint for breach of contract and, in response, defendant filed a motion to dismiss. 906 F.2d at 1508. During the next several months, and before the court ruled on the motion to dismiss, plaintiff engaged in fairly extensive pretrial discovery. Id. at 1509. Plaintiff then demanded that the dispute be arbitrated before the American Arbitration Association. Id. Defendant sought to enjoin the arbitration claiming that plaintiff waived its right to demand arbitration. Id. The Court held that plaintiffs invoking the litigation machinery prior to demanding arbitration and then waiting eight months before demanding arbitration, had prejudiced the defendant. Id. at 1514. The Court further held that such action was inconsistent with plaintiff's arbitration right and, accordingly, plaintiff had waived its right to arbitrate. 906 F.2d at 1514.

In Klosters Rederi, the defendant was served with a complaint, and in response, filed a petition to compel arbitration which was subsequently denied. 280 So. 2d at 679. The defendant appealed, but while awaiting perfection of the appeal, filed a counterclaim in the court action against the plaintiff and other third parties who were not signators to the arbitration agreement. Id. at 680. The Court held that such conduct was inconsistent with his demand for arbitration and

constituted a waiver of any contractual right to arbitrate. Id. at 681.

In Luckie, plaintiffs sought to compel arbitration of their dispute before the American Arbitration Association arguing that pursuant to Article VIII, Section 2 of the American Stock Exchange (AMEX) Constitution (which in certain instances permits a party to arbitrate before the American Arbitration Association) (the "AMEX Window") they were entitled to proceed in this forum. 999 F.2d at 510. However, defendant argued that this agreement had been superceded by a subsequent agreement executed by the parties and that they could not be compelled to arbitrate before the American Arbitration Association. Id. at 512. The court held that the arbitration provision of the AMEX Window could be superseded by a more specific customer agreement between the parties. Id. at 513. (emphasis added).

Each of these cases involved significant action by a party (e.g. invoking litigation machinery, delay in seeking arbitration or entering a subsequent contract modifying the arbitral forum)which resulted in waiver of its arbitration right. Petitioner's only participation in the lawsuit was to file a Motion to Compel Arbitration.

Petitioner sought to compel Respondent to arbitrate its claims and in response to Respondent's Complaint, filed a Motion to Compel Arbitration. R16-17. At the hearing on the Motion to

Compel Arbitration, Respondent asserted that her claims were ineligible for arbitration, and because of this, she should be allowed to litigate her dispute before the Trial Court. R24. In response, Petitioner noted that Respondent had six years within which to bring her claim but having failed to do so, she was now barred from proceeding in any forum. R24. However, Petitioner maintained that the Trial Court should only determine whether a valid agreement to arbitrate exists and thereafter the arbitrators should determine the timeliness issue. R24.

Clearly, responding to a claim raised by the opposing party at such motion hearing does not rise to the level of activity contemplated by the courts when setting forth this principal of law.

RESPONDENT IS PRECLUDED FROM ATTEMPTING TO LITIGATE CLAIMS WHICH ARE INELIGIBLE FOR ARBITRATION AS THE ARBITRATION AGREEMENT DEMANDS THE ARBITRATION OF ALL CLAIMS ARISING BETWEEN THE PARTIES AND DOES NOT PROVIDE FOR DEVIATION IN ANY INSTANCE

PIABA suggests that this Court should disregard existing Florida case law as well as the rule of law announced in the majority of cases presented with this issue which have held that claims ineligible for arbitration cannot be brought in a judicial forum, and instead follow the decision of three cases which never directly addressed this issue. See Prudential Sec. v. LaPlant, 829 F. Supp. 1239 (D. Kan. 1993); Prudential Sec. v. Moneymaker, No. CIV-93-179, 1994 WL 637396 (W.D. Okla. Jul. 14, 1994); Smith

Barney Harris Upham & Co. v. Pierre, No. 92 C 5735, 1994 WL 11600 (N.D. Ill. Jan. 4, 1994).

In each of these cases cited by PIABA, the courts were not called upon to determine whether ineligible arbitral claims could be litigated in the presence of a broad arbitration agreement calling for the arbitration of all claims. Rather, it appears that each court was proceeding under the assumption that such claims could be brought. Thus, it is unclear whether the courts would have still held that such claims could be litigated if faced with an arbitration provision calling for the arbitration of all claims.

In LaPlant, plaintiff filed an action in federal district court to stay an arbitration proceeding alleging that the claims raised were not eligible for arbitration. 829 F. Supp. 1239, 1240-41 (D. Kan. 1993). Both parties filed motions for summary judgment. Id. at 1241. Without any discussion as to why, the district court held that claims occurring more than six years before filing the arbitration were not eligible for arbitration, but could proceed in court. Id. at 1244.

As noted by the District Court for the Western District of Pennsylvania in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shelapinsky, when discussing LaPlant:

> [T]he provisions of the agreement [to arbitrate] were not discussed and the text of the agreement cannot be found in the opinion. We can only speculate that the agreement did not provide that claims not subject to arbitration could be

> litigated. From our reading of LaPlant, the issue of whether claims that were ineligible for arbitration could be brought in federal district court was never decided. Rather, it was assumed that the claims could proceed.

No. 93-1553, 1994 WL 397123 at *4 (W.D. Pa. Mar. 10, 1994); See also Calabria v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 855 F. Supp. 172, 176 (N.D. Tex. 1994)(declining to follow LaPlant since it concludes that claims ineligible for arbitration can be litigated without any discussion); Conroy v. Merrill Lynch, Pierce, Fenner & Smith Inc., 899 F. Supp. 1471, 1476 (W.D. N.C. 1995) (noting that LaPlant does not directly address the issue of whether claims ineligible for arbitration can still be litigated).

Likewise, in both Moneymaker and St. Pierre, the courts in ruling that certain claims were ineligible for arbitration, noted that the parties could proceed in court without any discussion as to whether the arbitration agreement at issue precluded such action. Moneymaker, No. CIV-93-179, 1994 WL 637396 at *2(W.D. Okla. Jul. 14, 1994); St. Pierre, No. 92 C 5735, 1994 WL 11600 at *4 (N.D. Ill. Jan. 4, 1994).

Since none of the cases cited by PIABA address this issue, they cannot be dispositive in this instance. The only cases to have dealt with this exact issue have concluded that the proper forum for disposition is arbitration. See Kramer v. Smith Barney, 80 F.3d 1080, 1086 (5th Cir. 1996) (holding that "it would be bizarre to interpret the agreement [to arbitrate all

claims] to exempt stale claims from arbitration"); Tourdo v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 93-484-CIV-T-24(C), 1996 WL 942866 at *2(M.D. Fla. Dec. 17, 1996), *aff'd*, 146 F.3d 870 (11th Cir. 1998) (holding that in light of the client agreement signed by the plaintiff and case law, arbitration was the plaintiff's exclusive remedy); Saunderson v. Goldberg & Co., 899 F. Supp. 177, 180 (S.D. NY 1995) (holding that a party was precluded from litigating claims which were ineligible for arbitration and noting that "there was simply no language in the Customer Agreement which states that [the party] may seek relief in federal court once it has been determined that her success through arbitration is unlikely"); Conroy v. Merrill Lynch, Pierce, Fenner & Smith Inc., 899 F. Supp. 1471, 1476 (W.D. N.C. 1995) (holding that an arbitration agreement which provided for arbitration of all claims and stated that the parties waived their right to seek remedies in court simply did not provide an alternative forum for the parties to resolve disputes under any contingent circumstances and the court had no choice but to enforce the agreement); Calabria v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 855 F. Supp. 172, 176 (N.D. Tex. 1994) (holding that a party was precluded from arbitrating claims which she failed to submit within six years and, since she agreed to submit all claims to arbitration, she could also not litigate such stale claims); Merrill Lynch, Pierce, Fenner & Smith, Inc. v.

Shelapinsky, No. 93-1553, 1994 WL 397123 at *5 (W.D. Pa. Mar. 10, 1994) (holding that a party could not attempt to litigate claims which were ineligible for arbitration); Piccolo v. Faragalli, No. 93-2758, 1993 WL 331933 at *2 (E.D. Pa. Aug. 24, 1993) (holding that "[t]here is simply no language in the client's agreement which states that plaintiff may seek relief in federal district court once it has been determined that his claims are not eligible for arbitration"); Castellano v. Prudential-Bache Sec., Inc., No. 90 CIV. 1287 (WCC), 1990 WL 87575 at *3 (S.D. N.Y. Jun. 19, 1990) (holding that now that a party's arbitration claims have been dismissed, he may not procure a second forum to entertain his claim). See also Bakk v. Principal Fin. Sec., Inc., 892 F. Supp. 1206, 1209 (D. Minn. 1995) (stating its approval of the reasoning set forth by the various courts which have held that claims ineligible for arbitration may not now be litigated).

To allow Respondent to now proceed in court would frustrate the parties' clearly articulated preference for arbitration. Furthermore, such a ruling would have the effect of allowing a party to avoid its contractual obligations to arbitrate by waiting six years and one day and then seeking redress in court. See Piccolo v. Faragalli, No. 93-2758, 1993 WL 331933 at *2(E.D. Pa. 1993).

CONCLUSION

For the foregoing reasons, Petitioner Corporate Securities Group, Inc. respectfully requests that this Court: (a) find that the broad and all-encompassing language of the Customer Agreement is clear and unmistakable evidence of the parties intent to have the arbitration panel decide arbitrability issues; (b) alternatively, if such language is not deemed clear and unmistakable evidence of the parties intent, hold that the agreement provides for arbitration as the exclusive forum and instruct the Trial Judge to examine the claims to determine if any are still viable and allow only those claims to proceed in arbitration; and (c) review the direct conflict existing between the appellate courts of Florida and provide directive as to whether the arbitration panel or the courts are to decide arbitrability issues.

_____
HOWARD A. TESCHER
Florida Bar No. 0509183

_____
PATRICIA FOX-BUTLER
Florida Bar No. 118613

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this _____ day of December, 2000 upon: Thomas Esq., 1901 West Cypress Creek Road, Suite 415, Fort Lauderdale, Florida 33309; Leonard Bloom, Esq., 200 South Biscayne Boulevard, Suite 4750, Miami, Florida 33131 and Stephen Krosschell, Esq., Goodman & Nekvasil, P.A., 14020 Roosevelt Blvd., Suite 808, P.O. Box 17709, Clearwater, FL 33762.

_____
PATRICIA FOX-BUTLER

ATTESTATION

In order to comply with the font requirements of Fla. R. App. P. 9.210(a)(2), the undersigned hereby certifies that the size and style of the type used in the preparation of this brief was 12 point Courier New, as recommended by the Court.

_____
PATRICIA FOX-BUTLER