IN THE SUPREME COURT OF FLORIDA

RAYMOND JAMES FINANCIAL SERVICES, INC.,

Petitioner,

v.

BARBARA J. PHILLIPS, et al.

Respondents.
_____/

Case No.: SC11-2513

L.T. Case No. 2D10-2144

BRIEF OF AMICUS CURIAE FLORIDA ASSOCIATION OF REALTORS d/b/a/ FLORIDA REALTORS® IN SUPPORT OF PETITIONER RAYMOND JAMES FINANCIAL SERVICES, INC.

MATTHEW J. CONIGLIARO
Florida Bar No. 63525
CARLTON FIELDS, P.A.
200 Central Avenue, Suite 2300
St. Petersburg, FL 33701
Telephone: (727) 821-7000
Facsimile: (727) 822-3768

LEAH A. SEVI
Florida Bar No. 87283
CARLTON FIELDS, P.A.
215 South Monroe Street, Suite 500
Tallahassee, FL 32301
Telephone: (850) 224-1585
Facsimile: (850) 222-0398

ATTORNEYS FOR AMICUS CURIAE
FLORIDA ASSOCIATION OF REALTORS®

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

STATEMENT OF IDENTITY AND INTEREST

Florida Association of Realtors d/b/a Florida Realtors (hereafter "Florida Realtors®") files this brief to demonstrate error in the Second District's decision and to help inform the Court of the wide range of persons whose interests are at stake in this case. As explained below, millions of completed Florida real estate transactions involve agreements that require arbitration of disputes but do not expressly incorporate Florida's statutes of limitations. Sellers, buyers, and real estate licensees who used such arbitration provisions risk having their rights fundamentally altered through retroactive application of the decision below.

Florida Realtors® is a trade association with over 100,000 members. Members' businesses vary from small to large, with the average real estate licensee currently participating in only four transactions per year. For its members' convenience, Florida Realtors® makes available numerous form agreements that may be used in a variety of residential and commercial real estate transactions and which contain arbitration provisions that do not expressly include Florida's statute of limitations. In 2011 alone, members utilized such forms over 270,000 times.

Based on our experience, we estimate that, in the last decade alone, millions of Floridians engaged in real estate transactions using agreements that require disputes to be arbitrated but do not mention Florida's statutes of limitations. Given

the potential detriment to its members and their clients, Florida Realtors® has a direct and significant interest in this Court's decision.

SUMMARY OF ARGUMENT

If permitted to stand, the Second District's decision may have disastrous consequences. Within the context of real estate sales alone, millions of Floridians could be required to arbitrate stale claims because they entered agreements requiring disputes to be arbitrated without expressly incorporating Florida's statutes of limitations. No party to an existing agreement, however, should be required to arbitrate stale claims if the parties did not intend to do so.

Additionally, the Second District's decision destroys the simplicity that should accompany arbitration agreements. If fundamental Florida laws such as the statutes of limitations do not apply in arbitration unless the parties expressly agree otherwise, then agreeing to arbitrate is no longer a matter of two persons simply agreeing they will arbitrate their disputes. Going forward, everyone will need counsel to discern which portions of Florida law automatically apply in arbitration and which portions apply only if additionally agreed upon. Arbitration will cease being an efficient, cost-effective means of keeping disputes out of court.

Finally, and perhaps most importantly, the Second District's decision conflicts with the Federal Arbitration Act. Under federal law, arbitration alters only the forum and procedures for resolving disputes, and agreeing to arbitrate

cannot automatically deprive parties of substantive rights they would be able to assert if their disputes were heard in court. Absent contractual intent to the contrary, federal law requires that parties be permitted to resolve by arbitration the substantive rights the parties would litigate in court. This Court should not approve an interpretation of Florida law that will not stand under federal law.

For these reasons, as well as those addressed in Petitioner's initial brief, the Second District's decision should be quashed.

ARGUMENT

The Second District's decision thwarts arbitration. It allows parties to bring stale claims, complicates agreeing to arbitrate, increases the likelihood of future litigation, and reaches a result that is unlawful under the Federal Arbitration Act. This Court should quash the decision below and enter a decision consistent with the strong federal and state policies that favor arbitration and require arbitration of all substantive issues the parties would litigate in court.

I. THE SECOND DISTRICT'S DECISION MAY SUBJECT MILLIONS OF PARTIES WITH EXISTING AGREEMENTS TO ARBITRATION WITHOUT LIMITATIONS PERIODS.

Millions of Floridians have executed contracts requiring that disputes over real estate matters be arbitrated. However, under the Second District's decision, unless those agreements expressly incorporate Florida's statutes of limitations—

which no one knew to do—the parties could wind up being required to arbitrate claims that have long been stale under Florida law.

Statutes of limitations are "found and approved in all systems of enlightened jurisprudence." *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). They "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *Kubrick*, 444 U.S. at 117; *accord Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075 (Fla. 2001) (describing statutes of limitations as "afford[ing] parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage"). Time bars "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Kubrick*, 444 U.S. at 117 (1979); *Morsani*, 790 So. 2d at 1075 (Fla. 2001).

Stale arbitration claims present the same problems as stale litigation claims, and no legitimate policy reason supports applying limitations periods to court claims but not arbitration claims. Arbitration cannot be a more efficient, simpler means of resolving disputes if disputes can be brought in perpetuity.

The Second District may not have fully appreciated the impact of its decision because of the circumstances of this particular case. The arbitration agreements in this case required disputes to be submitted to the National Association of Securities Dealers (the "NASD"), and the NASD rules provide for a six-year period during which claims are eligible to be submitted to arbitration. (Opinion, at 2). If a party wishes to bring a claim beyond the NASD's six-year window, the claim must be brought in court, where, under the Second District's decision, a statute of limitations defense could be raised. The Second District specifically noted the NASD's "time limit" in its opinion. (*Id.*).

The NASD rules, however, apply only to securities-related arbitrations. Other industries use other rules or no rules in particular. Florida Realtors® forms, for example, provide for arbitration under the commonly utilized rules of the American Arbitration Association (the "AAA"). The AAA's rules do not contain a time limit for submitting claims. Nor do the rules of other popular arbitration organizations, such as the Judicial Arbitrations and Mediation Services, the World Intellectual Property Organization, the International Chamber of Commerce, or the United Nations Commission on International Trade Law.

Indeed, amicus curiae counsel have not identified any arbitration rules that contain a provision similar to the NASD's six-year eligibility provision. As a result, if the Second District's decision is allowed to stand, parties that signed

arbitration agreements outside the securities law context may have unwittingly exposed themselves to stale claims.

Florida Realtors® estimates that, in 2011 alone, hundreds of thousands of Florida real estate transactions involved agreements that required arbitration but did not expressly incorporate Florida's statutes of limitations or otherwise provide a limitations period. These agreements address disputes not only between brokers and their clients but also between buyers and sellers of real property.

The individuals, families, and small businesses who entered such agreements agreed to arbitrate their disputes but certainly did not intend to abandon the limitations periods provided by Florida law. No buyer, seller, or broker intended to remain subject to claims brought years—perhaps even decades—after the applicable Florida statute of limitations expired. Yet, despite its inconsistency with a principle followed by all "enlightened" societies, the Second District's decision threatens that very result. To protect the intentions of the millions of persons who entered such agreements, the Second District's decision should be quashed.

II. THE SECOND DISTRICT'S DECISION DEFEATS THE SIMPLICITY THAT SHOULD SURROUND ENTERING ARBITRATION AGREEMENTS.

Arbitration is meant to be simple and speedy and to keep the parties out of court. "An arbitration agreement constitutes a prospective choice of forum which 'trades the procedures and opportunity for review of the courtroom for the

simplicity, informality, and expedition of arbitration.'" *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 403 (Fla. 2005) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth Inc.*, 473 U.S. 614, 628 (1985)). The "prime objective" of arbitration is "to achieve streamlined proceedings and expeditious results." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008).

The foregoing policy reasons make arbitration an important and favored means of dispute resolution. *See, e.g., Bill Heard Chevrolet Corp., Orlando v. Wilson*, 877 So. 2d 15, 18 (Fla. 5th DCA 2004) ("Public policy favors arbitration as an efficient means of settling disputes, because it avoids the delays and expenses of litigation."). The Second District, in focusing on the definitions of "civil action" and "proceeding," apparently lost sight of this larger picture.

Individuals can enter arbitration agreements easily, without sophisticated legal guidance. Section 682.02, Florida Statutes, provides, "Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof." A basic sentence or two can achieve this result.

Accordingly, basic arbitration clauses can be found in contracts relating to all manner of common events, from home sales and other purchases to everyday

services and entertainment activities. These contracts routinely make no mention of limitations periods.

For instance, the forms Florida Realtors® supplies its members provide for arbitration in simple terms. One form states: "Any unresolveable dispute between Buyer and Broker will be mediated. If a settlement is not reached in mediation, the matter will be submitted to binding arbitration in accordance with the rules of the American Arbitration Association or other mutually agreeable arbitrator." Other forms contain similar language along with the statement, "This Contract will be construed under Florida law." Those provisions alone suffice to move any disputes to arbitration.

Before the Second District's decision, real estate licensees and others could employ simple arbitration clauses with confidence that all of Florida substantive law would apply within the arbitration proceeding. The agreement merely moved a dispute's resolution from the public, expensive, and time-consuming judicial forum to a far more private, economical, and expeditious alternative forum. The parties could then add more detail if they felt it necessary to specify the treatment of particular claims. However, under the Second District's decision, the simple arbitration clause will still move disputes to arbitration but offers no assurance that all of Florida's substantive law will apply in that proceeding.

If a simple arbitration clause does not necessarily include all substantive rights the parties would have in court, then reaching an effective arbitration agreement becomes a more costly process. Parties will need to examine every potentially relevant statute to determine whether it must be expressly incorporated into the parties' agreement. A statement that the parties do not intend to "limit or waive the application of any relevant state or federal [substantive statute]," as the agreements in this case stated, will not overcome the problem because, under the Second District's decision, it is not an affirmative incorporation. (Opinion, at 4 (quoting RJFS's agreements)).

To understand exactly what they are agreeing to arbitrate, and what substantive claims or defenses they will be abandoning by moving their dispute from the courts to arbitration, unsophisticated parties will need to hire an attorney to research these issues. The ability to agree to arbitrate disputes by a simple arbitration clause will have been lost.

Additionally, as this case itself demonstrates, once Florida courts begin to hold that some statutory rights can be interpreted not to apply in arbitration, additional litigation is inevitable. Countless Florida statutes reference "actions" or "proceedings." Is the judiciary going to examine all of them to determine which ones apply in arbitration and which do not? Such litigation is contrary to the basic

notion that arbitration should be efficient and inexpensive. The Second District's decision represents both bad policy and bad law.

III. THE SECOND DISTRICT'S INTERPRETATION OF SECTION 95.011 MAKES THAT LAW INVALID UNDER THE FEDERAL ARBITRATION ACT.

The Federal Arbitration Act (the "FAA") utilizes Congress's full authority under the Commerce Clause and applies to all arbitration agreements that touch upon interstate commerce. 9 U.S.C. § 1, *et seq.*; *O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd.*, 944 So. 2d 181, 184 (Fla. 2006) (citing *Musnick v. King Motor Co.*, 325 F.3d 1255, 1258 n.2 (11th Cir. 2003)). Because countless arbitration agreements trigger federal law by touching upon interstate commerce, including the underlying agreement in this case, this Court should not interpret section 95.011 in a manner that renders it invalid under the FAA. The Second District's interpretation of section 95.011 squarely conflicts with federal law.

The FAA represents a national policy favoring arbitration. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) ("We have described [the FAA] as reflecting both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract'") (internal citations omitted). Consistent with that policy, the United States Supreme Court has held that an agreement to arbitrate is intended to change only the dispute resolution forum, and not the substantive rights available to the parties. *Mitsubishi Motors*

Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). Even if an agreement does not expressly state that claims arising under a particular statute will be subject to arbitration, a party does not forego the substantive rights of that statute. *Id.* at 625, 628. Rather, the party "only submits to their resolution in an arbitral, rather than a judicial, forum" and "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 628; *accord Preston v. Ferrer*, 552 U.S. 346, 359 (2008).

Because agreeing to arbitration changes only the forum where a dispute is resolved, *the FAA preempts* "the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to arbitrate." *Perry v. Thomas*, 482 U.S. 483, 489 (1987). Thus, unless the parties agree otherwise, federal law *requires* that arbitration encompass the entire dispute the parties would litigate in court. The United States Supreme Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), confirms this point.

In *Mastrobuono*, the parties entered an agreement containing provisions that required arbitration and the application of New York law. Directly analogous to the Second District's interpretation of section 95.011 as providing limitations periods in judicial proceedings but not arbitration proceedings, the New York judiciary had interpreted New York law to provide that only courts, and not arbitrators, could award punitive damages. The parties proceeded to arbitration,

and the arbitration panel awarded punitive damages despite the state law restriction. The United States Supreme Court considered whether the arbitration panel could do so or whether New York law prevented the panel from resolving a punitive damages issue that would have been litigated had the parties proceeded in court. The Supreme Court affirmed the punitive damages award and refused to give effect to the state law restriction that effectively made the right to punitive damages a right that could not be resolved in arbitration.

The Supreme Court explained that "if contracting parties agree to include [certain matters] within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms *even if a rule of state law would otherwise exclude such claims from arbitration*." *Id.* at 58 (emphasis added). Thus, as long as the agreement does not express an intent to exclude a substantive matter from arbitration, the FAA preempts any state law—decisional or statutory—that would bar the parties from arbitrating the issue. *Id.* at 59. The Supreme Court determined that nothing in the parties' agreement in *Mastrobuono* expressed an intent to limit the arbitrators' power to resolve a punitive damages claim.

Mastrobuono controls here. *Just as New York law could not give parties a substantive right to punitive damages that could be litigated in court but not in arbitration, Florida law cannot give parties a substantive right to a time limitation on claims but allow that right to be exercised only in court and not in arbitration.*

Florida simply lacks that authority, which would eviscerate arbitration's existence as a bona fide alternative forum for dispute resolution. As the Supreme Court recently reaffirmed, "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility*, 131 S. Ct. at 1747.

The Second District overlooked that, by agreeing to arbitrate a dispute that has a connection to interstate commerce, and as a matter of controlling federal law, the parties have merely moved the substantive dispute they would have litigated in court to a different forum. Florida law cannot require a person to elect arbitration only at the cost of abandoning substantive rights that would be available in court.

In sum, a Florida statute that *clearly* sets forth time limitations periods that apply to court actions but not to arbitration actions would be invalid under the Supremacy Clause and the FAA with respect to any arbitration agreement that touches upon interstate commerce. The statute at issue here is not so clear, but the Second District's interpretation has the same effect. Even the possibility such an interpretation would be invalid under the FAA is a compelling reason not to interpret the statute as the Second District did below. Florida's statutory law should not be interpreted in a manner that conflicts, or could conflict, with federal law. *See Franklin v. State*, 887 So. 2d 1063, 1073 (Fla. 2004) (holding statutes should be interpreted "to avoid unconstitutionality and to remove grave doubts on

that score") (quoting *State ex rel. Flink v. Canova*, 94 So. 2d 181, 184-85 (Fla. 1957)); *Hiers v. Mitchell*, 116 So. 81, 84 (Fla. 1928) (applying to state and federal constitutions the rule that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter").

CONCLUSION

The Second District's decision below exposes an extraordinary number of persons to stale claims and contravenes the policies making it simple to invoke arbitration as an alternative method of dispute resolution. The Second District's decision also renders section 95.011 invalid under federal law. For these reasons, in addition to the reasons set forth in Petitioner's initial brief and the briefs of other amici supporting Petitioner, this Court should quash the Second District's decision.

Respectfully submitted,

MATTHEW J. CONIGLIARO
Florida Bar No. 63525
CARLTON FIELDS, P.A.
200 Central Avenue, Suite 2300
St. Petersburg, FL 33701
Telephone: (727) 821-7000
Facsimile: (727) 822-3768

LEAH A. SEVI
Florida Bar No. 87283

CARLTON FIELDS, P.A.
215 South Monroe Street, Suite 500
Tallahassee, FL 32301
Telephone: (850) 224-1585
Facsimile: (850) 222-0398

Attorneys for Amicus Curiae Florida Association of Realtors d/b/a Florida Realtors®

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 25, 2012, a copy of the foregoing has been furnished by U.S. Mail to:

George L. Guerra
Dominique E. Heller
Wiand Guerra King, P.L.
3000 Bayport Drive, Suite 600
Tampa, FL 33607
Attorneys for Petitioner

Hala Sandridge
Fowler White Boggs, P.A.
P.O. Box 1438
Tampa, FL 33601
Attorney for Petitioner

Robert J. Pearl
The Pearl Law Firm, P.A.
7400 Tamiami Trail N., Suite 101
Naples, FL 34108
Attorney for Respondents

Bradford D. Kaufman
Joseph C. Coates, III
Jason Michael Fedo
Greenberg Traurig, LLP
777 South Flagler Drive, Suite 300 East
West Palm Beach, FL 33401
Attorneys for the Securities Industry and Financial Markets Association

By: _____
MATTHEW J. CONIGLIARO
Florida Bar No. 63525

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 14-point Times New Roman double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

By: _____
MATTHEW J. CONIGLIARO
Florida Bar No. 63525