SUPREME COURT OF THE STATE OF FLORIDA

No. SC11-2513

RAYMOND JAMES FINANCIAL SERVICES, INC.,

Petitioner,

v.

BARBARA J. PHILLIPS, et al.,

Respondents.

On Discretionary Review from the Second District Court of Appeal of Florida
(Dist. Ct. App. Case No. 2D10-2144)

THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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I. IDENTITY AND INTERESTS OF SIFMA

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA").[1]

SIFMA has filed this Amicus Brief in support of the Petitioner because the decision of the Second District Court of Appeal ("Second District") raises issues of national importance to the securities industry and to all participants in arbitration. Specifically, as discussed in greater detail below, the decision contradicts the well-settled Florida and national policies in supporting arbitration, interferes with parties' contractual rights and expectations, eliminates the ability of parties in arbitration to assert not only statutes of limitations but also other statutory claims, remedies and defenses, and could lead to a wide range of unintended negative consequences including but not limited to a chilling effect on parties' willingness to agree to arbitrate in Florida.

[1] For more information, visit www.sifma.org.

The decision on appeal could have broad consequences both within Florida (where a substantial number of FINRA arbitration proceedings are brought) and throughout the country (where parties in other jurisdictions will likely cite this decision as purported persuasive authority to make new law).[2]

II. SUMMARY OF ARGUMENT

The Second District's decision, which held that the statutes of limitations set forth in Section 95.011, FLA. STAT. do not apply in arbitration unless the parties have included an express provision in their agreement referencing and agreeing to apply that specific statute, represents a substantial departure from the prevailing national and Florida policy supporting arbitration as an efficient means to resolve all manner of disputes. Specifically, although the well-settled law requires all doubts regarding arbitrability to be resolved in favor of arbitration, the decision below stood such policy on its head by construing the arbitration agreement against

[2] Arbitration agreements are frequently contained within securities account customer agreements, and the NASD (now known as the Financial Industry Regulatory Authority or "FINRA" after a 2007 merger) has also enacted rules that require its member firms to arbitrate a dispute at the customer's request. As a result, arbitration is the primary dispute resolution mechanism in the securities industry. Over ***74,400*** separate arbitrations have been filed with FINRA and its predecessor NASD since 2000. *See FINRA Summary Arbitration Statistics February 2012*, *available at* http://www.finra.org/ArbitrationMediation/About FINRADR/Statistics (statistics through February 2012). For over 30 years, arbitration has delivered a timely, cost-effective and fair means of dispute resolution in the securities industry. *See SIFMA White Paper on Arbitration in the Securities Industry* (October 2007), *available at* http://www.sifma.org/societies/ sifma-compliance-and-legal-society resources/.

its drafter -- Raymond James Financial Services, Inc. ("Raymond James") -- and narrowly construing the text of the statute of limitations at issue to preclude arbitration of such issues unless that particular statute is expressly referenced and incorporated in the agreement to arbitrate. The decision below reflects a hostility to arbitration that was put to rest in the controlling decisions of the United States Supreme Court. *See, e.g., Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Additionally, the decision on appeal would deprive arbitration parties of an important defense to time-barred claims. There is no valid basis to eliminate a party's substantive defenses (including the statutes of limitations) simply because that party has entered into a contractual agreement to arbitrate (in pursuit of a more efficient, expedient resolution of its disputes). Statutes of limitations have been routinely applied in arbitration in Florida and throughout the country. The rules and interpretive materials of various arbitral fora (including FINRA) reflect an expectation that statutes of limitation would be available in arbitration and decided by the arbitrators hearing disputes. The decision on appeal removes the statute of limitations defense from arbitration without justification, without warning and without regard to the immeasurable number of stale claims that could now be asserted in arbitration without regard to statutory time bars.

Finally, the Second District's decision interpretation that statutory references to "actions" or "proceedings" are inapplicable to arbitration has the potential to create substantial confusion and conflict regarding other statutory claims, remedies and defenses that may no longer be available in arbitration. Such an outcome would materially change the substantive rights of parties in arbitration and could have a chilling effect on parties' willingness to agree to arbitrate in Florida.

III. ARGUMENT

A) THE DECISION BELOW CONFLICTS WITH NATIONAL AND STATE PUBLIC POLICY IN FAVOR OF ARBITRATION

1) LAW AND POLICY DICTATE THAT ALL DOUBTS ARE RESOLVED IN FAVOR OF ARBITRATION

The United States Supreme Court and Florida courts have established a clear policy in support of arbitration as a means of dispute resolution. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983) ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); *BallenIsles Country Club, Inc. v. Dexter Realty*, 24 So. 3d 649, 652 (Fla. 4th DCA 2009) ("Arbitration is a preferred method of dispute resolution…").[3]

[3] Florida courts have held that arbitrability issues arising out securities brokerage contracts involve interstate commerce and are therefore governed by the Federal Arbitration Act, 9 U.S.C. § 1 et. seq. (the "FAA"), and related federal law. *See, e.g., Qubty v. Nagda*, 817 So. 2d 952, 955-956 (Fla. 5th DCA 2002) ("Brokerage contracts concerning the sale of securities have been consistently treated as contracts involving interstate commerce."); *Merrill Lynch Pierce, Fenner & Smith*

In connection with this policy, the well-settled law holds that all doubts regarding arbitrability of a dispute shall be resolved in favor of arbitration. *See AT&T Techs., Inc. v. Communication Workers of Am.*, 475 U.S. 643, 650 (1986); *Moses H. Cone.*, 460 U.S. at 24-25 (1983). Following the clear lead of the United States Supreme Court, Florida courts have applied the same strong presumption in favor of arbitration in cases arising under the Florida Arbitration Code. *See BallenIsles*, 24 So.3d at 652 ("any doubt regarding the scope of an arbitration clause should be resolved in favor of arbitration"); *Morales v. Perez,* 952 So. 2d 605, 607 (Fla. 3d DCA 2007) ("[W]e are mindful of the policy favoring arbitration and recognize that any doubts concerning the scope of arbitration should be resolved in favor of arbitration."); *Qubty*, 817 So. 2d at 956 ("All doubts regarding the scope of an arbitration agreement, as well as any questions about waiver, should be construed in favor of arbitration rather than against it.").

The United States Supreme Court has explained how the strong policy in favor of arbitration mandated an expansive interpretation of arbitration agreements:

> Where the contract contains an arbitration clause, there is 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. Doubts should be resolved in favor of coverage.

Inc. v. Melamed, 405 So. 2d 790, 793 (Fla. 4th DCA 1981) ("We hold that the Federal Arbitration Act is a national substantive law that supplants inconsistent state laws and that Florida courts are bound by the Act.").

AT&T, 475 U.S. at 650 (citations omitted).

Contrary to this rule, the Second District applied the exact opposite presumption. Indeed, the court held that because Raymond James had drafted the arbitration provision at issue, that all doubts regarding arbitrability of the statutes of limitation were to be construed against Raymond James as the drafter of the provision. 2011 WL 5555691, *6 (November 16, 2011) ("[T]he language of the Raymond James agreement appears to us to be a 'one-size-fits-all' clause suitable for use nationwide [which did not expressly reference Florida statutes of limitation]. To whatever extent it may be viewed as ambiguous, any doubts are properly resolved against the drafter.").

Specifically, when considering whether the parties had agreed to arbitrate statute of limitations issues, the Second District manufactured a new requirement that the specific state statute of limitations must be expressly referenced and incorporated in the parties' arbitration agreement. The Second District cited no direct authority for this new rule, other than a Washington state court decision that considered and applied substantively different law to a textually different statute.[4]

[4] The Second District cited to, and apparently relied upon, a decision from the Washington State Supreme Court, *Broom v. Morgan Stanley*, 2010 WL 2853917 (Wash. July 22, 2010), to suggest that statutes of limitations should not apply in arbitration and that such a rule would not be against public policy. *See* 2011 WL 5555691, *6. Although the *Broom* decision turned on completely different statutory text (which did not reference a "proceeding") and different Washington State precedent, it should be noted that the Washington legislature has already

The court reached this conclusion even though the Parties' arbitration agreement expressly stated that "[n]othing in this agreement shall be deemed to limit or waive the application of any relevant state or federal statute of limitation, repose or other time bar." 2011 WL 5555691, *1. Moreover, the Second District's holding is in apparent conflict with this Court's prior ruling in *O'Keefe Architects, Inc. v. CED Construction Partners, Ltd.*, 944 So. 2d 181, 188 (Fla. 2006), which held that "a broad agreement to arbitrate, such as the one at issue in this case, includes the determination of statute of limitations defenses." The Second District's holding flies in the face of *O'Keefe* and the controlling precedent mandating that all doubts be resolved in favor of arbitration and should be reversed.

Additionally, the presumption in favor of arbitration applies not only to contractual interpretation, but also to any ancillary issues of arbitrability. *Moses H. Cone*, 460 U.S. at 24-5 ("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

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taken prompt action to cure the effects of that decision by introducing a Bill to amend the arbitration code and to expressly provide that "[a] claim sought to be arbitrated is subject to the same limitation of time for the commencement of actions as if the claim had been asserted in court." H. 2449, 62d Leg., 2012 Reg. Sess. (Wash. 2012). This Bill has already been passed by a unanimous vote of 97 yeas, 0 nays in the Washington State House of Representatives and is currently awaiting a state Senate vote. *See* http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2449&year=2 011.

arbitrability."). In its decision, the Second District conceded that "action" and "proceeding" as used in Section 95.011, FLA. STAT., "do not convey a clear and definite meaning." 2011 WL 5555691, *3. Indeed, there is no basis to conclude that such terms would clearly exclude arbitration proceedings, and the definition the court below cited for a "proceeding" appears to logically encompass an arbitration.[5] Notwithstanding the Second District's finding of ambiguity, however, the court improperly applied standard statutory construction without regard to the well-established rule that requires ambiguities to be resolved in favor of arbitration. To the extent that the Second District's opinion turned on the interpretation of the terms "action" and "proceeding," the court erroneously construed these terms to exclude arbitration in violation of the presumption in favor of arbitrability.

2) COURTS THROUGHOUT THE COUNTRY AND FLORIDA HAVE HELD THAT ARBITRATORS ARE CAPABLE AND EMPOWERED TO DECIDE ALL ISSUES

The presumptions in favor of arbitration are buttressed by the recognition -- set forth in numerous decisions analyzing arbitration -- that arbitrators are fully capable and empowered to resolve even the most complex issues and disputes. Indeed, the United States Supreme Court has repeatedly rejected arguments that

[5] *See* 2011 WL 5555691, *3 (Black's Law Dictionary…. defines "proceeding" as "[a]ny procedural means for seeking redress from a tribunal or agency," "[t]he business conducted by a court or other official body," and "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.").

certain complex statutory claims or issues are not appropriate for arbitration. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). Moreover, the country's highest courts have shown confidence in arbitrators even where there is no mechanism for any legal review of their decisions. *See Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396 (2008).

In briefing before the Second District, an amicus curiae brief was filed in support of Respondents by an association of securities claimants' attorneys -- the Public Investor Arbitration Bar Association ("PIABA") -- which claimed that arbitrators are "[p]articularly [u]nsuited" to apply statutes of limitation because they cannot obtain adequate discovery and they do not necessarily receive legal training. *See* PIABA Amicus Brief, at 14-16 [filed with the Second District on August 5, 2010]. Importantly, the United States Supreme Court has already rejected such arguments. *See, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S.Ct. 1456 (2009).

Specifically, in *14 Penn Plaza*, the United States Supreme Court addressed similar arguments that "factfinding process in arbitration is not equivalent to judicial factfinding and the informality of arbitral procedure... makes arbitration a less appropriate forum for final resolution of" statutory issues. 556 U.S. 247, 268

129 S.Ct. 1456, 1471 (citing *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974)) (internal quotations omitted). Moreover, the Court addressed questions regarding the "the competence of arbitrators to decide federal statutory claims." *Id.*

The Court succinctly advised that "[t]hese misconceptions have been corrected." *Id.* (citing *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220, 232, 107 S.Ct. 2332 (1987) (holding that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision" and "there is no reason to assume at the outset that arbitrators will not follow the law"); *Mitsubishi Motors Corp.*, 473 U.S., at 634, 105 S.Ct. 3346 ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators")). As such, the notion that arbitrators are not qualified or prepared to decide statute of limitations issues is unfounded and unsupportable.

B) STATUTES OF LIMITATIONS SERVE A VITAL FUNCTION THAT IS EQUALLY IMPORTANT IN ARBITRATION

A cornerstone of the arbitration process is that participants are provided an equal opportunity to pursue the substantive claims and defenses that are available in court. While procedural differences may exist between court and arbitration -- such as pleading standards or administrative conditions precedent -- substantive

rights should be preserved.[6] The viability of the system would be severely undermined if one set of parties in arbitration was suddenly and unexpectedly deprived of a meaningful defense -- in this case, the statutes of limitation.

As explained by the United States Supreme Court:

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," 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***."
>
> These enactments are statutes of repose, and although affording plaintiffs what the legislature deems a reasonable time to present their claims, ***they 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.

United States v. Kubrick, 444 U.S. 111, 117 (1979) (emphasis added) (internal citations omitted); *see also Nardone v. Reynolds*, 333 So. 2d 25, 36-37 (Fla. 1976) ("The statutes are predicated on the reasonable and fair assumption that valid claims . . . are not usually left to gather dust or remain dormant for long periods of time.") (citations omitted).

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[6] Courts in Florida and throughout the country have held that a statute of limitations provides a substantive right to a defendant. *See, e.g., Batista v. Publix Supermarkets, Inc.*, 993 So. 2d 570, 571 (Fla. 1st DCA Oct. 22, 2008); *Springman v. AIG Marketing, Inc.*, 523 F.3d 685, 688 (7th Cir. 2008) ("The statute of limitations, however, is a substantive defense"); *In re: Enterprise Mortg. Acceptance Co. LLC Sec. Litig.*, 391 F.3d 401, 409-10 (2d Cir. 2004); *Kopalchick v. Catholic Diocese of Richmond*, 645 S.E.2d 439, 441(Va. 2007).

Statutes of limitation are frequently asserted in arbitration, and courts have routinely held that, absent an explicit agreement otherwise, arbitrators are empowered to determine statute of limitations issues.[7]

The success of arbitration is dependent on the (correct) assumption that a party's substantive rights in arbitration -- including defenses based on statutes of limitation -- are the same as he or she would have in court. The Second District's decision would permit parties with undeniably stale claims to avoid any time bar simply by filing in arbitration, thus resurrecting an immeasurable number of previously time-barred claims. There is no legal authority or rationale -- and nothing in the Parties' contract or the FINRA Rules -- that could support the loss of such a potentially case-dispositive defense simply because the Parties have chosen to resolve their dispute in arbitration rather than court.

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[7] *See, e.g., Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004) (arbitrators are empowered, absent an agreement to the contrary, to resolve disputes over statute of limitations); *Victor v. Dean Witter Reynolds, Inc.*, 606 So. 2d 681, 684-86 (Fla. 5th DCA 1992) (same); *Painewebber, Inc. v. Hall*, 1993 WL 390519 *2 (Fla. Cir. Ct. Apr. 28, 1993) (under the FAA, the determination of all time-bar defenses -- including statute of limitations -- is to be made by arbitrators, not courts); *Hasbro v. Amron*, 419 F. Supp. 2d 678, 689 (E.D. Pa. 2006) (vacating an award based on arbitrators failure to apply statute of limitations); *Burdette v. FSC Securities Corp.*, 1993 WL 593997 (W.D. Tenn. Dec. 15, 1993) (confirming NASD arbitration award that dismissed claims based solely on the statute of limitations); *Davis v. Skarnulis*, 827 F.Supp. 1305, 1308 (E.D. Mich. 1993) (determinations of state and federal statutes of limitations are within the jurisdiction of the arbitrators); *Kennedy, Cabot & Co. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 49 Cal. Rptr. 2d 66, 72 (Cal. 1996) (same); *Barton v. Horowitz*, 2001 WL 35710605 *3 (D. Colo. Mar. 31, 2001) (same); *Kidder, Peabody & Co., Inc. v. Greenblatt*, 1999 WL 672661 *4 (E.D. Pa. Aug. 25, 1999) (same).

C) FINRA RULEMAKING HISTORY REFLECTS AN EXPECTATION THAT STATUTES OF LIMITATION WOULD APPLY IN ARBITRATION

Contrary to the suggestion in the Second District's opinion (and the briefs filed with the Second District), the FINRA rules and rule guidance reflects that parties often invoke statutes of limitation in FINRA arbitration. Indeed, statutes of limitation are frequently asserted in arbitration when substantial time has passed since the transactions or occurrences giving rise to the claims, and they often lead to dismissals of claims.[8]

[8] FINRA and NASD arbitration panels have frequently dismissed untimely arbitration proceedings based on statutes of limitations. *See, e.g., Morgan Stanley & Co. Inc. v. Jackson*, 2012 FINRA Arb. LEXIS 241 (March 13, 2012); 2010 FINRA Arb. LEXIS 1219 (November 22, 2010); *Healthright Partners, LP v. Lincoln Financial Advisors Corp.*, 2010 FINRA Arb. LEXIS 1067 (September 27, 2010) (dismissal on Utah Securities claims only); *Williamson v. Wachovia Securities, LLC,* 2009 FINRA Arb. LEXIS 797 (September 3, 2009); *Strayer v. Prudential Equity Group, LLC,* 2009 FINRA Arb. LEXIS 181 (March 5, 2009); *Macis v. Metropolitan Life Insurance Co.,* 2008 NASD Arb. LEXIS 1012 (December 12, 2008) (dismissal on defamation claim only); *Burdette v. INVEST Financial Corp.*, 2008 NASD Arb. LEXIS 532 (July 10, 2008); *Shah and Shah v. Merrill Lynch, Fenner & Smith,* 2008 NASD Arb. LEXIS 528 (June 30, 2008); *Busse v. D.A. Davidson & Co.,* 2008 NASD Arb. LEXIS 501 (June 19, 2008); *Bonebrak v. Capital Growth Financial, LLC,* 2008 NASD Arb. LEXIS 412 (May 20, 2008) (dismissal granted with respect to one party); *Rogers v. Summit Brokerage Services, Inc.,* 2008 NASD Arb. LEXIS 265 (April 2, 2008); *Bruno v. AXA Advisors,* 2008 NASD Arb. LEXIS 250 (March 18, 2008); *Winberg v. Charles Schwab & Co., Inc.*, 2008 NASD Arb. LEXIS 175 (February 29, 2008) (dismissal granted with respect to one party); *Schwartz v. Banc of America,* 2008 NASD Arb. LEXIS 146 (February 19, 2008); *Honea v. Raymond James Financial Servs.,* 2008 NASD Arb. LEXIS 6 (January 3, 2008); *Heussner v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 2007 NASD Arb. LEXIS 1279 (December 17, 2007); *Snyder v. A.G. Edwards & Sons,* 2007 NASD Arb. LEXIS 1074 (October

As reflected in the PIABA Brief filed with the Second District, the NASD historically had an eligibility rule (in the nature of a statute of repose) that expressly referenced statutes of limitation and contemplated their application in arbitration. NASD Rule 10304 expressly stated that the NASD's six-year eligibility rule "shall not extend applicable statutes of limitations," which supports the notion that this eligibility rule and the statutes of limitation were not substitutes for one another, and both were applicable in arbitration.

NASD Rule 10304 was succeeded by FINRA Rule 12206 in April 2007. Notably, in connection with the rulemaking process, FINRA published a response to third party commentary on proposed Rule 12206 and expressly addressed the viability of statutes of limitations defenses in arbitration. Specifically, when Rule 12206 and related rules were adopted (subsequently permitting motions to dismiss in FINRA arbitration only if they were based on one of three specific grounds -- six-year eligibility, prior settlement, or a party's lack of any involvement in the alleged wrongdoing), FINRA provided explanation and guidance as follows:

> Twenty-nine commenters, who oppose the proposal, argue that the three exceptions for prehearing motions to dismiss are too narrow and exclude certain situations in which such motions

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22, 2007) (dismissal granted with respect to one count); *Efron v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2007 NASD Arb. LEXIS 978 (October 3, 2007); *Oakes v. UBS PaineWebber,* 2007 NASD Arb. LEXIS 963 (September 28, 2007); *Ashton v. Morgan Stanley Dean Witter,* 2007 NASD Arb. LEXIS 964 (September 24, 2007); *Vasquez v. Chase Investment Servs Corp.*, 2007 NASD Arb. LEXIS 847 (August 17, 2007).

> would be appropriate. These commenters suggest that FINRA expand the proposed rule to include the following exceptions: clearing brokers, senior executives, ***statutes of limitation***; and legal impossibility exceptions, such as defamation for statements made on required forms (which some courts have held are protected by an absolute privilege) and the doctrine of *res judicata.*…
>
> FINRA has considered these comments, and concluded that expanding the exceptions to the rule would negate its intent, which is to have clear, easily definable standards that do not involve fact-intensive issues. FINRA believes that the suggested additional exceptions would require fact-based determinations and, thus, would be inappropriate for dismissal before claimants have presented their case. Although these exceptions would be inappropriate for prehearing dismissal, ***FINRA notes that a party would be permitted to file a motion addressing these issues at the conclusion of claimant's case-in-chief.***

http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p116990.pdf (at 4-5) (emphasis added).

Accordingly, FINRA expressly stated that motions to dismiss based on statutes of limitations ***can be*** presented under the FINRA rules -- just not until after the claimant rests his or her case-in-chief. Any contrary argument based on the FINRA rulemaking history is simply baseless.

Notwithstanding this history, the PIABA Brief filed with the Second District claimed that "statutes of limitations are not ordinarily applicable in securities arbitrations." PIABA Amicus Brief, at 12 [filed with the Second District on August 5, 2010]. This assertion is unsupportable and wrong. PIABA attempted to support

the statement by selectively and misleadingly quoting a 1996 report from an NASD task force on arbitration, entitled "National Association of Securities Dealers, Inc., Securities Arbitration Reform" (1996) (commonly referred to as the "Ruder Report"). [Id.] PIABA's claim that the Ruder Report recommended that "NASD replace the six year eligibility rule and begin applying statutes of limitations on a trial basis" is in conflict with the actual text of the Ruder Report and the actual practice in NASD and FINRA arbitration.

In fact, the Ruder Report's recommendation was to suspend the application of the six-year eligibility rule (which had been a source of considerable ancillary court litigation) and instead adopt ***new procedures for dispositive motions*** on statutes of limitations issues. *See* Ruder Report at 28. Specifically, the Ruder Report stated:

> In place of the eligibility rule, the NASD should institute procedures to provide ***early resolution*** of statute of limitation issues in arbitration. Specifically, the NASD should codify procedures to permit parties to move to dismiss claims or counterclaims on statutes of limitations grounds ***prior to the merits hearing***. (emphasis added)

With this recommendation, the Ruder Report was not recommending a change to make statutes of limitations suddenly inapplicable in arbitration (as PIABA suggested), but rather was recommending that new procedural rules be enacted to make it easier for respondents to obtain summary dismissals of time-

barred claims based on statutes of limitations.[9] Such new procedures were necessary because NASD did not have codified procedures for motions to dismiss at that time (and PIABA members and others had previously argued that motions to dismiss were not permitted in arbitration).

In making its recommendations, the Ruder Report carefully noted that its proposals did not change the fact that arbitrators are generally bound by all applicable statutes and common law, including statutes of limitations, and the proposed new procedures simply "heightened" the (pre-existing) significance of statutes of limitations:

> We are recommending this amendment to the NASD Code to emphasize the ***heightened significance*** of a statute of limitation decisions as a result of the suspension of the eligibility rule. Although we recognize that arbitration generally is considered to be an equitable forum, we believe that arbitrators should consider applicable statutory and common law with respect to all matters as to which they must make decisions in the arbitral forum, not just statute of limitations issues. (emphasis added)

PIABA's only other purported authority in briefing before the Second District to suggest that the securities industry has long recognized that statutes of limitation do not apply in arbitration was a selective quotation of the testimony of

[9] The Ruder Report made clear that the arbitrators previously had the power to apply statutes of limitations and its new procedures would not undermine the arbitrators' ability to decide how best to resolve such issues. *See* Ruder Report at 29 ("The arbitrators must ***maintain*** the discretion to determine the fairest and most efficient means to decide statute of limitations and other dispositive motions.") (emphasis added).

Marc E. Liackritz to Congress in 2005. *See* PIABA Brief at 13. In fact, nothing in Mr. Liackritz's testimony states that statutes of limitation do not apply in arbitration. *See* http://www.sifma.org/legislative/testimony/archives/Lackritz3-17-05.html. PIABA's brief selectively quotes and mischaracterizes Mr. Lackritz's testimony, which merely states that due to less stringent rules in arbitration, cases that are routinely dismissed in court are "more likely" to go to a final hearing in arbitration.[10] The mere fact that more cases are dismissed in court (where litigants are subject to more stringent pleading standards and strictly enforced dispositive motion practice) does not remotely mean that defenses such as statutes of limitation do not apply and cannot be used as the basis for dismissal or denial of claims in arbitration.

Simply put, PIABA's authority to suggest that statutes of limitation were not applicable in arbitration -- the Ruder Report and Mr. Lackritz's testimony -- do not support that proposition, nor Respondents in this appeal. To the contrary, the

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[10] The relevant testimony (without PIABA's use of ellipses) is as follows:

> In addition to the efficiency and fairness benefits described above, parties who utilize arbitration are ***far more likely*** to have their claims aired in a full hearing, and decided on the merits, rather than won or lost on technicalities. This is in sharp contrast to court proceedings, where ***a significant percentage of claims are dismissed on pre-hearing motions to dismiss or for summary judgment***. Many of these dismissals are on what may be described as technical, or procedural, grounds. This includes dismissals for pleading failures, jurisdictional deficiencies, and statutes of limitations bars.

http://www.sifma.org/legislative/testimony/archives/Lackritz3-17-05.html at 4 (emphasis added).

FINRA rules, relevant arbitration awards and rulemaking history reflect that statutes of limitation have historically been applicable in arbitration.

D) THE BELOW DECISION'S NARROW INTERPRETATION OF STATUTORY REFERENCES TO "ACTIONS" AND "PROCEEDINGS" WILL CREATE CONFUSION AND FORECLOSE ARBITRATION OF OTHER STATUTORY CLAIMS, REMEDIES AND DEFENSES

The Second District's decision could also result in serious unintended consequences for arbitration proceedings involving other statutory provisions relating to claims, remedies or defenses available in "actions" or "proceedings." For example, if Section 95.011, FLA. STAT., does not apply to arbitrations, it would follow that other statutes such as Section 517.211, which expressly states the remedies available in "an action" for violations of Florida's Blue Sky laws and provides a right to prevailing party attorney's fees in "any action brought under this section," would likewise be inapplicable and unavailable in arbitration. *See* Section 517.211(6), FLA. STAT.

This Court has made clear that a party who prevails in arbitration on a claim under Chapter 517 has a right to recover attorney's fees under Section 517.211(6). *See Moser v. Barron Chase Secs.*, 783 So. 2d 231, 236 (Fla. 2001) ("[T]he arbitrators' arbitrary action in failing to indicate the basis of an award would effectively deprive Moser of not just a 'meaningful, full, and fair hearing,' but of any hearing at all on the denial of a property interest in attorney's fees expressly

provided for by section 517.211(6).”). The *Moser* decision cannot be reconciled with the Second District’s decision on appeal. If arbitration parties have a protected property interest in an attorney fee claim under Section 517.211(6) (which is predicated on the filing of an “action”), then the party confronted with such a claim must have a protected right in a statute of limitations defense that is similarly applicable to any “action” or “proceeding” brought under that statute.

If the Second District’s decision were left to stand, there would be substantial doubt over the viability and availability of a wide number of statutory claims, remedies and defenses that are based on statutes that refer to “actions” or “proceedings.”[11] As a result, this decision could deter parties from seeking arbitration in Florida due to the fact that important substantive claims, remedies or defenses will not be available.

IV. CONCLUSION

For the reasons set forth above, the Second District Court of Appeals decision is in direct conflict with the controlling law and strong public policy in favor of arbitration and the enforcement of statutes of limitation in private disputes, and the decision should be reversed on appeal.

[11] While not exhaustive, such claims based on statutes providing for the filing of “actions” include claims under the Adult Protective Services Act (Section 415.1111, FLA. STAT., authorizing the filing of an “action”), Deceptive and Unfair Trade Practices Act (Section 501.211, FLA. STAT., authorizing an “action” for damages), and numerous other potential claims under Florida Statutes.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2012, I caused to be served by federal express overnight mail the foregoing **SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S AMENDED MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER** on the following at the offices listed below:

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that the font used in this Amended Motion for Leave to File Amicus Curiae Brief in Support of Petitioner is Times New Roman 14-point font.

/s/ Bradford D. Kaufman
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