IN THE SUPREME COURT OF FLORIDA

RAYMOND JAMES FINANCIAL SERVICES, INC.,

Petitioner,

Case No. SC11-2513
Lower Case No. 2D10-2144
Circuit Court Case No. 07-0080-CA

-vs-

BARBARA J. PHILLIPS, *et al.*,

Respondents.
_____/

ANSWER BRIEF OF RESPONDENTS

On appeal from the District Court of Appeal, Second District of Florida

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PRELIMINARY STATEMENT

Respondents Barbara J. Phillips, as Trustee of the Barbara J. Phillips Trust, and as Guardian for Walter R. Phillips, Jennifer L. Phillips Individually and as Trustee of the Barbara J. Phillips Flite Trust, and Margaret K. Camp will be referred to herein as "Respondents." Petitioner Raymond James Financial Services, Inc. will be referred to herein as either "Raymond James" or "Petitioner."

Petitioner appeals to this Court from the Decision of the Second District Court of Appeal (the "District Court"), which, on November 13, 2011, certified to this Court the following question:

> **DOES SECTION 95.011, FLORIDA STATUTES, APPLY TO ARBITRATION WHEN THE PARTIES HAVE NOT EXPRESSLY INCLUDED A PROVISION IN THEIR ARBITRATION AGREEMENT STATING THAT IT IS APPLICABLE?**

I. STATEMENT OF THE CASE AND FACTS

Respondents are all former account holders with Raymond James, who lost a major part of their life savings by entrusting their investments to a Raymond James' employee and stock broker Richard Vandenberg ("Vandenberg"). Vandenberg was a registered representative of Raymond James and worked in Raymond James' Naples, Florida office where he served as the Branch Manager. (VI, T1, para. 7)

Ironically, this is the second time this Court has had the occasion to rule on arbitration law as a result of claims arising by reason of Vandenberg's conduct. In *Raymond James v. Saldukas*, 851 So.2d 853 (2003), this Court declined to compel arbitration of Vandenberg customer's claims, finding that Raymond James and Vandenberg waived their right to compel arbitration, even in the absence of any prejudice to the opposing party.

As in *Saldukas*, when Respondents opened their Raymond James accounts, they were required to sign written client agreements (VI, T1, Exhs. A, G, H[1]) which were prepared by Raymond James and which were non-negotiable. Those agreements contained language mandating that any customer disputes be submitted to an arbitration program sponsored by the very industry organization of which Raymond James was and is a member, the Financial Industry Regulatory Authority (" FINRA", previously known as the "NASD") (VI, T1, Exhs. G, H). Interestingly, the client agreements also contained clauses permitting any party to apply to court in the event Raymond James raised the issue of statutes of limitations in defense of the arbitration claims (VI, T1, Exh. H).

[1] References to Petitioner's Appendix follow the citation method employed in Petitioner's Initial Brief

Respondents filed arbitration claims with FINRA on or about November 29, 2005. (VI, T1, Para. 10, Exh. A). In their Statement of Claim, Respondents alleged that Vandenberg violated their trust by engaging in misconduct which severely depleted most of their life savings. (VI, T1, Para. 10). They also alleged that Vandenberg exercised strong influence and *de facto* control over their accounts (VI, T1, Para. 11) and that Vandenberg executed transactions in Respondents' accounts which were unsuitable, speculative and were otherwise inconsistent with Respondents' investment objectives, using a "one size fits all" approach to investing his clients' funds, regardless of the investment objectives and tolerance for risk of each customer. (VI, T1, Para. 11).

Respondents also alleged in their FINRA arbitration that Raymond James had a duty to properly supervise Vandenberg and Respondents' accounts and to require local and regional compliance officers to review Vandenberg's actions but failed to institute appropriate supervisory procedures and internal controls to prevent Vandenberg's misconduct. (VI, T1, Para. 12). They claimed that Vandenberg, as a "producing branch manager," who signed off on the Raymond James' new account form as both registered representative (the industry term for "stock broker") and branch manager, was, in effect, supervising himself, in violation of industry standards and in violation of their legal rights. (VI, T1, Para. 13).

In response to the filing of Respondents' Statement of Claim, Raymond James filed a "Motion to Dismiss, Answer, Defenses to the Statement of Claim." (VI, T1, Para. 14). In its Motion to Dismiss, Raymond James claimed that Respondents' arbitration claims for negligence (including breach of fiduciary duty, failure of supervision, and unsuitability) and for statutory fraud under Chapter 517, Fla. Stat. were all barred by applicable statutes of limitations. (VI, T1, Para. 14; Exh. B).

Because Raymond James raised the issue of the timeliness of Respondents' arbitration claims, Respondents commenced this action in Collier County Circuit Court, asking the Court to rule on the issue as provided in Raymond James' account agreements. Thereafter, Petitioner served its Answer to Respondents' Complaint in which it stated:

> Wherefore, Defendant acknowledges that this court has jurisdiction to determine applicability of the respective statutes of limitation governing the causes of action raised by Claimants in the referenced statement of claim; Defendant requests a hearing on the statutes of limitations applicable to the cause of action raised by Plaintiffs in their arbitration claim. (VI, T3, Exh. A).

Thus, the parties agreed that the Courts of Florida have jurisdiction to determine the timeliness of the filing of Respondents' arbitration claims.

Ordinarily the defense of statute of limitations raised in an arbitration is reserved for the determination of the arbitration panel. *O'Keefe Architects, Inc. v. CED Construction Partners, Ltd.*, 944 So.2d 181 (Fla. 2006). In this case, however, the contract language contained in the client agreements expressly reserved that issue to court determination, at the election of either party. (VI, T1, Exh. H).

The client agreements in question contain a clause stating the following:

> Arbitration and Dispute Resolution: . . . The determination of whether any such claim was timely filed shall be by a court having jurisdiction, upon application by either party. (VI, T1, Exh. H).

Interestingly, the clause in question does not seek to import state or federal statutes of limitations into the contract terms, merely stating that the agreement itself does not "limit or waive the application of any relevant" statute of limitations. Therefore, Petitioner cannot claim that the parties agreed to import statutes of limitations which would be otherwise inapplicable.

On April 12, 2010, Circuit Court Judge Hayes issued his ruling to the effect that Florida's statutes of limitations do not apply in arbitration and issued an Order and Judgment to that effect. (VII, T11).

Raymond James then appealed to the District Court, which rendered its decision affirming the Lower Court's ruling on November 13, 2011. (VI, T18).

II. SUMMARY OF ARGUMENT

By contract, Respondents were compelled to submit their dispute with Raymond James to industry-sponsored arbitration, a system with its own period of prescription found in NASD Code of Arbitration Rule 10304. Raymond James had it within its power to draft its client agreements to specifically incorporate limitations periods applicable under Federal and/or State law to court cases into any arbitrations filed by its customers, but failed to do so.

By statute, and as interpreted by this Court, arbitrations are not "civil actions." Therefore, unless the Court determines that arbitrations are "proceedings" within the meaning of Chapter 95, the limitations periods contained therein do not apply to the arbitration brought by Respondents against Raymond James.

When other jurisdictions have considered the issue of whether an arbitration is an "action" for purposes of the statutes of limitations, those courts have consistently concluded that statutes of limitations, designed to avoid stale claims in court, have no applicability to arbitrations, in the absence of express statutory authority.

III. STANDARD OF REVIEW

In Florida there are three general categories of standards for appellate review for trial court and agency litigation: 1) "abuse of discretion" for discretionary rulings by the trial judge; 2) "competent substantial evidence" or "rational basis" (for reviewing a jury verdict) and "clearly erroneous" (for reviewing a trial judge's fact findings); and 3) "plenary" or "de novo" for rulings on questions of law. *D'Angelo v. Fitzmaurice*, 863 So. 2d 311 (Fla. 2003).

The standard of review to be applied by this Court is *de novo*, since the issue below was strictly one of law, that is, the applicability of Florida's statutes of limitations to Respondents' claims in arbitration. Under these circumstances, a *de novo* review is appropriate.

IV. ARGUMENT

A. FLORIDA'S STATUTES OF LIMITATION APPLY TO "ACTIONS" ONLY, NOT ARBITRATIONS

1. Florida's statutes of limitations govern "actions."

Limitation periods are creatures of Florida statutory law and are subject to the time-honored interpretation of legislative intent and statutory construction. "It is a fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided." *State v. Webb*, 398 So.2d 820, 824 (Fla. 1981). Guiding principles of statutory construction must be applied to determine whether

Florida's statutes of limitations, as found in Chapter 95, Fla. Stat., but not incorporated into the parties' arbitration agreement, can serve as a bar to Respondents' arbitration claims.

In its "Motion to Dismiss, Answer, Defenses to the Statement of Claim." (II R 55-77). Raymond James raised the following Florida statutes of limitations defenses to Respondents' arbitration claims:

> Respondents' claims for negligence and breach of fiduciary duty are subject to Florida's four (4) year statute of limitations, running from the date of purchase in Respondents' investment accounts.
>
> Respondents' statutory fraud claims pursuant to Florida Securities Act 517 are subject to a two year statute of limitations, commencing when the facts giving rise to the cause of action are discovered or should have been discovered with the exercise of due diligence.

Florida's four-year statute of limitations for negligence claims is found in Section 95.11(3)(a) Fla. Stat. which provides:

> 95.11. Limitations other than for the recovery of real property.--**Actions** other than for recovery of real property shall be commenced as follows:
> . . .
> (3) WITHIN FOUR YEARS.--
> (a) **An action** founded on negligence.
> (Emphasis supplied)

Florida's two-year statute of limitations for claims under Chapter 517 Fl. Stat. is found in Section 95.11(4)(e) Fla.Stat. According to that statute, claims that must be brought within two years include:

> (e) **An action** founded upon a violation of any provision of chapter 517, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, but not more than 5 years from the date such violation occurred. (Emphasis supplied)

As can be readily seen, a determination as to whether Florida's statutes of limitation apply to arbitrations depends upon the meaning of the term "action" in the various limitations statutes.

Under Florida law, "action" has a distinct and unique meaning: "There shall be one form of action to be known as '*civil action*." Fla. R. Civ. P. 1.040 (2006). This definition obviously excludes arbitrations. Similarly, Chapter 95, Section 95.011, Fla. Stat. (2006) reads as follows:

> Applicability. - A civil action or proceeding, called "action" in this chapter, including one brought by the state, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other

> governmental authority, shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere.

While Petitioner asserts that Chapter 95 unambiguously includes arbitrations within its ambit, Respondents assert the opposite, that arbitrations are unambiguously *excluded* from the definition of those actions or proceedings to which Chapter 95 applies. That is because the Florida Legislature, when it enacted Chapter 95 in 1974, *never even considered* extending the applicability of Florida's statutes of limitations to arbitrations.

This "applicability" section became effective in 1974 after being proposed by the Florida Law Revision Council in 1972. Thomas E. Bevis, Florida Law Revision Council, Project on Statutes of Limitation: Some Policy Considerations (Apr. 8, 1972) (unpublished report held by Florida State Archives). The Florida Law Revision Council (the "Council") was created by statute in 1967. Its mandated responsibilities included examining Florida statutes and recommending reforms and changes in the law. Fla. Stat. Sections 13.90-13.996 (2009). The 1972 proposal, according to the findings of the Council, was based on perceived public policy considerations. The stated objectives were to create more uniformity, increasing

the ability of attorneys to predict results in different factual situations, adjust the prescribed periods to reflect present realities rather than historical ones, and simplify this area of law by stating the underlying principles applicable to all statutes of limitations. In its findings, the Council proposed to the Legislature that statutes of limitations should be applicable to equitable actions as well as actions at law. Bevis at 1.

In the CS/HB 895-Section Summary regarding Section 95.011,the Council stated, "This section declares that a *civil action* shall be barred unless begun within the time prescribed in this chapter (or a different time if prescribed elsewhere in the Florida Statutes), and specifically includes within this language *an action* brought by the state, a public officer or political subdivision of the state." Bevins, Section Summary (emphasis supplied). It is clear that the Council believed it desirable to simplify the application of the statutes of limitations by making them applicable to both *civil actions* at law and *civil actions* in equity in order to achieve more uniform application in civil lawsuits.

Importantly, the word "proceeding" appears nowhere in the Council's recommendations. Nor did the Council recommend that statutes of limitations apply to arbitrations, despite the fact that the Florida Code of Arbitration was enacted in 1957. In fact, the term "arbitration" is not found anywhere in the report

of the Council. The District Court recognized that where a statute is clear and unambiguous, there is no need to resort to statutory interpretation and construction, citing *Holley v. Auld*, 450 So.2d 217, 219 (Fla. 1984). However, the Court went further in its analysis, concluding that the statute was not clear and unambiguous because the terms "civil action" or "proceeding" were not defined by the statute. Respondents urge this Court to conclude that the terms "civil action" or "proceeding" are certainly clear and unambiguous so as to *exclude* arbitrations, in that nowhere in Florida's vast statutory framework have those terms been interpreted by the Legislature or the Courts to *include* arbitrations. Neither Petitioner nor the amicus brief proponents supporting Petitioner's position can point to a single instance where the Legislature *included* arbitrations in any definition of civil actions or proceedings. Therefore, it is only wishful thinking on Petitioner's part that the Legislature may have intended to include arbitrations within the ambit of Chapter 95.

Therefore, no further inquiry was necessary by the District Court. Yet that Court chose to invoke the use of dictionary definitions as an aide in statutory construction. In other words, the fact that the specific statutory language did not include arbitrations and the dictionary definitions did not mention arbitration does not make the terms civil action or proceeding any less clear or suggest that

principles of statutory construction were needed to interpret an unambiguous statute. Simply looking at the legislative history would have sufficed and would have instructed that the Legislature never even considered applying statutes of limitations to arbitrations.

This Court, in *Knowles v. Beverly Enterprises-Florida*, 898 So.2d 1 (Fla., 2004) stated as follows:

> In determining [statutory] intent, we have explained that "we look first to the statute's plain meaning." *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So.2d 898, 900 (Fla.1996). Normally, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984) (quoting *A.R. Douglass, Inc., v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (1931)).

While Petitioners and the various *amici* seek to have this Court validate their expectation that arbitrations *are* subject to this State's statutes of limitation, the law of this state is well settled that courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications." *Holly*, 450 So.2d at 219. However laudable the objectives of alternative dispute resolution (even that imposed, as here, by contracts of adhesion), simply wishing for statutes of

limitations to apply to arbitration does not create a power in this Court to *extend* the reach of Chapter 95 to contractual dispute resolution fora not intended by the Legislature.

Indeed, all the arguments advanced by Petitioner and its supporters suggest that parties to arbitration assume that which is not so, ignoring the fact that arbitration agreements are bi-lateral agreements. It just as easily can be stated that consumers tied to arbitration adhesion contracts have *no expectation* that Florida's statutes of limitations do apply in arbitration. That is, of course, unless the drafter of the agreement decides to disclose that fact to the other side by express language.

2. This Court has concluded that arbitrations are not "actions."

When this Court has had the opportunity to consider the issue of legislative intent with respect to arbitrations, this Court concluded that the term "civil action" *does not* include arbitrations and therefore, the successful claimants in a securities arbitration claim against a stock broker did not have to split the punitive damages award with the State under Section 768.73, which at the time required that punitive damage awards be split between the victims and the State of Florida. *Miele v. Prudential-Bache Securities, Inc.*, 656 So.2d 470, 472 (Fla. 1995).

In *Miele*, this Court cited to Black's Law Dictionary definition of an "action," stating:

> Term in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law. The legal and formal demand of one's right from another person or party made and insisted on in a court of justice. An ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. It includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court. Black's Law Dictionary 26 (5th ed. 1979).
>
> *Miele*, 656 So.2d at n.4.

This Court concluded: "[W]e find that the dictionary definitions support the Mieles' position that "civil action" does not include arbitration proceedings." Id. The Court went on to state that, "In light of arbitration's status as an 'alternative to the court system,' we cannot assume that the same legislative objectives underlying section 768.73 are applicable to arbitration proceedings. If the legislature determines that arbitration proceedings should be subjected to the same punitive damage limitations as court actions, then it can so indicate." Id.

Certainly, Respondents believe this Court got it right in *Miele.* Yet, Petitioner seeks to distinguish the ruling from this case, in that the term "proceeding" was not before the Court in *Miele*. For its part, the District Court apparently agreed to extend its analysis of statutory construction to the term

"proceeding," finding that the Circuit Court "incorrectly relied on the *Miele* decision when it stated that *Miele* determined that arbitrations are not "proceedings."

Nevertheless, this Court was clearly mindful of the distinction between lawsuits and arbitrations when it stated, "civil action" does not include arbitration proceedings" and concluded that "we cannot assume that the same legislative objectives underlying section 768.73 are applicable to arbitration proceedings." Similarly here, in light of the substantial differences between arbitration and court cases, there is no reason to assume that the same legislative objectives underlying Chapter 95 are applicable to arbitration proceedings.

3. The legislature has never acted to change Chapter 95 or evinced an intention to include arbitrations in the term "civil actions."

If Florida's legislature had wanted to limit arbitration claims by the application of Section 95.11(4)(e) or 95.11(3)(a), it would have been a simple matter to have the statutes read, "actions *or arbitration claims* shall be commenced ... "

Similarly, the Legislature could have written Section 95.011 to read, "Applicability.- A civil action or proceeding or arbitration, called 'action' in this chapter ... " Petitioner simply wishes this Court to insert language in statutes not

inserted by the Legislature, under the guise of "legislative intent." Such an intent could have and would have been easily expressed by language easily understood to all. In fact, the term "arbitration" is nowhere to be found in Chapter 95.

Petitioner mistakenly asserts that the legislature *has* expressed legislative intent to redefine "actions" to include "arbitrations" by amending section 768.73, citing the Fifth District Court of Appeal decision in *Martin Daytona v. Strickland Const. Serv*., 941 So.2d 1220 (Fla. App. 2006). In that case, the Court reviewed the statute in question in the *Miele* case and concluded that the legislative change in the punitive damages statute (Sec. 768.73) enacted in 1999, supported the view that the Legislature intended that arbitrations should be considered to be "civil actions within the meaning of section 768.83." Thus, the Court concluded, "We believe the enactment of section 768.737, in light of the decision in *Miele,* militates in favor of the view that the term 'actions of a civil nature' in Rule 1.010 includes motions for fees and costs filed in the circuit court that are based on awards emanating from arbitration proceedings." *Id*. at 1225.

Of course, in *Martin Dayton,* the court was dealing with the term "actions of a civil nature," not "civil actions or proceedings" or "actions." Further, Respondents have found no case law citing the *Martin Daytona* case with approval.

When the Legislature enacted its amendment to Chapter 768, it established a new Section 768.737 which reads as follows:

> Punitive damages; application in arbitration. Where punitive damages are available as a remedy in an arbitration proceeding, ss. 768.72, 768.725, and 768.73 apply. When an award of punitive damages is made in an arbitration proceeding, the arbitrator who renders the award must issue a written opinion setting forth the conduct which gave rise to the award and how the arbitrator applied the standards in s. 768.72 to such conduct.

It is worthy of note that this statutory language makes no reference whatsoever to the definition of "civil action" and the Legislature gave no evidence of an intention to change the meaning of that term for all purposes, or even for the limited purpose of defining "civil actions" to include arbitrations in which punitive damages were awarded. Instead, all the Legislature did was to recognize that it had previously neglected to require that arbitration awards of punitive damages should also be subject to that statute. Similarly, the Legislature could have, but did not, include arbitrations in its definition of actions or proceedings as to which Chapter 95 would apply, or, for that matter, any other statute.

In his October 2007 article in the Florida Bar Journal, "When Do Statutes of Limitations Apply in Arbitration," author, David Weintraub, specifically references

the *Martin Daytona* decision and concludes that "the Martin Daytona court's reasoning is flawed." According to Mr. Weintraub:

> First, if the legislature had intended an across the board desire that the phrase "actions" include arbitrations, a simple definition could have been adopted. It was not. Instead, the legislature enacted a narrow statute limited to one issue-the pleading and availability of punitive damages claims. Second, by suggesting that the Florida Rules of Civil Procedure apply to arbitrations, Pandora's box is effectively opened.

In other words, it is inconceivable that the Florida Legislature intended that the Florida Rules of Civil Procedure would apply to all arbitrations held in the State of Florida when it amended Section 768.63 in 1999 to make the punitive damages splitting statute applicable to arbitration awards. Indeed, in light of the holding in the *Miele* case ("If the legislature determines that arbitration proceedings should be subjected to the same punitive damage limitations as court actions, then it can so indicate."), the Legislature's acceptance of this Court's instructive language to amend Section 768.63 is not surprising. The interpretation of that legislative enactment by the Courts to completely incorporate arbitrations into the structure of court litigation under the Florida Rules of Civil Procedure is quite another matter.

For the foregoing reasons, Respondents submit that the District Court' interpretation of Chapter 95 is correct and that this Court should refrain from

rewriting Chapter 95 in such a manner as to provide defenses to arbitration respondents which they could have, but chose not to include in their contracts.

4. Nor do arbitrations fall within the ambit of the term "proceedings."

The District Court properly concluded that the term "proceeding," as used in Chapter 95, means "a court proceeding and not arbitration" and that Petitioner's suggestion that the phrase "or proceeding" *means* arbitration is a "strained reading of the statute." Respondents assert Petitioner's position is merely wishful thinking.

Petitioner would have this Court conclude that while arbitrations are not "civil actions," somehow they fall within the definition of "proceedings" as that term is used in Chapter 95. This assertion, however, is unfounded, since arbitrations, by their very nature, are fundamentally different from judicial proceedings, and, as the District Court observed, the term proceeding did not even appear in prior versions of the state's statutes of limitations, with one inapplicable exception, until 1974. To give credence to Petitioner's argument, one would thus have to conclude that prior to 1974, Florida's statutes of limitations did not apply to arbitrations (since the term "proceedings" was not on the radar screen) but that, starting in 1974, the addition of that term to Chapter 95.011 was meant to include arbitrations within the statute's ambit. The problem with that construct is that there

is nothing to support it, in the legislative history or otherwise. Therefore, the District Court rightly turned to case law to interpret the term "proceedings" and concluded "[W]e do not find the word 'proceeding' indicative of a legislative intent to apply Florida's statutes of limitations to arbitration; thus, the trial court's decision was proper." (V2 T18)

Respondents submit, and the District Court found, that the term "proceeding" under Florida law is intended to be a "court proceeding." Petitioner disputes that finding on the premise that the use of the term "proceeding" in Chapter 95 evidences an intent by the Legislature to include *arbitration* proceedings specifically, noting that Florida's Arbitration Code uses the term "arbitration proceedings." Petitioner also asserts that the term "proceedings" would be rendered surplusage if Petitioner's interpretation were to be rejected. (Petitioner's Initial Brief, pp. 21-24) Both these postulates fail under scrutiny.

Even where administrative type proceedings are deemed subject to statutes of limitations, those types of proceedings do not include arbitrations. Indeed, Chapter 95.011 specifically refers to some types of administrative proceedings "including one brought by the state, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other governmental authority," but not others.

In construing a statute, a Court is required to give effect to "every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage" *American Home Assur. Co. v. Plaza Materials Corp*., 908 So.2d 360, 366, 2005, cited with approval by this Court in *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 2007. Therefore, the use of the phrase "including one brought by the state, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other governmental authority" immediately following the word "proceeding" suggests that the Legislature did not consider arbitrations to be in the nature of those enumerated proceedings. It is fair to infer, therefore, that the Legislature intended to exclude arbitrations from the definition of "proceedings."

The cases of *Le Credit Lyonnais, S.A. v. Nadd*, 741 So.2d 1165 (Fla. 5th DCA 1999) and *Muka v. Horizon Financial Corp*., 766 So.2d 239, 241, Fla. 4th DCA 2000, both involved "proceedings" which were analogous to court proceedings, the registration of foreign money judgments. In these cases, the issue was whether the registration of a foreign judgment pursuant to Uniform Foreign Money Judgments Recognition Act constituted a "proceeding" within the definition of the term "civil actions or proceedings" under Chapter 95. Obviously, these cases did not involve

arbitrations, rather, these cases were "proceedings" authorized by statute, and, therefore, would more readily fall within the ambit of statutes of limitations. Thus, the term "proceedings" as found in Chapter 95 does have a meaning and application to court or certain administrative proceedings, but not to arbitrations, and is not mere surplusage.

The Court can readily envisage multiple uses for the term "proceedings" which differ from "arbitration proceedings" and which could not conceivably have been intended for inclusion in Chapter 95. For example, there are legislative *proceedings*, school board *proceedings*, union grievance *proceedings*, homeowner's association *proceedings*, attorney discipline *proceedings*, student disciplinary *proceedings*, construction licensing *proceedings* and countless other types of proceedings which, by Petitioner's account, should all be incorporated into Chapter 95 in light of Petitioner's attempt to define the term "proceedings" beyond all logic.

The District Court also pointed to its interpretation of the term "proceeding" as being consistent with case law from other jurisdictions, citing to *Mellen v. Knotts*, 119 N.E.2d 20, 23 (Ind. App. 1954), *Queens-Nassau Transit Lines v. Maltbie*, 51 N.Y.S. 2d 841, 845 (N.Y. App. Div. 1944) and *Lane Cnty. v. Bristow*, 17 3P.2d 954,959 (Or. 1946). Petitioner has made no effort to distinguish these holdings in

its Initial Brief. Finally, the District Court's conclusion that the term "proceeding" is consonant with the concept of a "court proceeding" is supported by the First District Court of Appeal decision in *Castellon v. RC Aluminum Industries, Inc.*, 40 So.3d 39 (Fla. 1st DCA 2010). The District Court here utilized the Black's Law Dictionary definition of proceeding to be "[a]ny procedural means for seeking redress from a tribunal or agency, "the business conducted by a court or other official body," and "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." (V2 T18) Similarly, the Court in *Castellon* adopted the same definition found in the Seventh Edition of Black's Law Dictionary that "a 'proceeding' is defined as '[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement in the entry of judgment.'"

In fact, Black's Law Dictionary includes a definition of the term "arbitration" which fails to incorporate any reference to proceedings. According to the treatise, "arbitration" means, "A method of dispute resolution involving one or more neutral third parties who are [usually] agreed to by the disputing parties and whose decision is binding." The treatise then further defines specific types of arbitrations, including "adjudicative claims arbitration" which term is defined to mean, "Arbitration designed to resolve matters [usually] handled by courts, such as a tort

claim *in contrast to arbitration of labor issues, international trade and other fields traditionally associated with arbitration*." (Emphasis supplied). It is worthy of note that Petitioner makes no effort to distinguish between "arbitration" and "adjudicative claims arbitration" in its efforts to convince this Court that the term "proceedings" includes "arbitrations."

Petitioner's urging to the contrary notwithstanding, a consideration of the consequences of expanding the term "proceedings" to include arbitrations must be squarely faced. As suggested by Mr. Weintraub in his Florida Bar Journal article, such an interpretation opens a "Pandora's Box." For example, Florida's Evidence Code, which defines its reach to include "civil actions and all other proceedings pending on or brought after October 1, 1981" would henceforth be applicable to all arbitrations in this State. Perforce, Florida Rules of Civil Procedure would also be applicable to arbitrations if they are to be considered "proceedings" for all purposes. See FL. STAT. 90.103(2). The litigation which would ensue from a determination by this Court to conclude "arbitrations" are "proceedings" wherever the Legislature used the latter term, would clog the courts and create uncertainty over the rights of parties to arbitrations for years to come.

Conversely, were this Court to affirm the District Court ruling, the available remedy to those supporting a broad adoption of arbitration as a means of alternative

dispute resolution would be to petition the legislature, as has been done recently in the State of Washington (in light of the *Broom* decision in that State, discussed *infra*), to amend the statute of limitations found in Chapter 95 to include arbitrations, or alternatively, to provide for the applicability of state statutes of limitation by express language in the arbitration agreements between the parties.

The decision of the District Court correctly recognized the difference between arbitrations and lawsuits. For example, under the Florida Arbitration Code, court review of decisions made by arbitrators is extremely Limited. *Davenport v. Dimitrijevic*, 857 So. 2d 957, 4th DCA, 2003), citing *Boyhan v. Maguire*, 693 So.2d 659, 662 (Fla. 4th DCA 1997). "A high degree of conclusiveness attaches to an arbitration award because the parties themselves have chosen to go this route in order to avoid the expense and delay of litigation." *Affiliated Mktg., Inc. v. Dyco Chems. & Coatings, Inc*., 340 So.2d 1240, 1242 (Fla. 2d DCA 1976).

A court may not set aside an arbitration award except upon those grounds set forth in section 682.13(1), Florida Statutes (2002). See *Schnurmacher Holding, Inc. v. Noriega*, 542 So.2d 1327, 1328 (Fla.1989). Section 682.13(1)(a) provides that a court "shall vacate" an arbitration award if "[t]he award was procured by corruption, fraud[,] or other undue means."

Arbitration is a private dispute resolution process, a process, which is, in the last analysis, a creature of contract. As this Court is aware, arbitrations can be conducted in a variety of ways under procedures established by the parties themselves (held with one or more arbitrators) or under the formal rules of a dispute resolution provider, such as FINRA or AAA. Arbitrator selection differs dramatically from judicial selection or jury selection. Rules of evidence and procedural safeguards are either absent or relaxed. Appellate review is extremely limited. Discovery is often curtailed, as under FINRA's Code of Arbitration Procedure where depositions are rarely permitted. (See Rule 12510, "Depositions are strongly discouraged in arbitration.")

> [A] hallmark of private arbitration is the unofficial status of the arbitration tribunal. The arbitrator is not necessarily a judge or a government official; arbitrators' power over the parties stems from their appointment. Therefore, in theory and practice, the parties can fashion the arbitration in whatever mold they wish to suit their common needs and preferences. They can limit the issues to be arbitrated. Within limits, they can choose the arbitrator or arbitrators. Likewise, the parties can design the arbitration process and its rule to suit themselves, importing or omitting as much or as little procedural formality as they wish. The boundaries of the process are contoured by the imagination of the parties.

Robert M. Smith, 46 Am. Jur. Trials 231 (Originally published in 1993)

Therefore, to conclude that the Legislature considered the objectives behind Chapter 95 (to eliminate stale claims) to apply with equal force and, therefore, intended to include arbitrations under the umbrella term "proceedings" would be a leap of logic too far for any court to make. Respondents therefore submit that the District Court's opinion that arbitrations were not intended to be subject to Chapter 95 limitations is the only permissible and defensible conclusion to reach.

B. PETITIONER OPTED FOR A DISPUTE RESOLUTION PROCESS WITH ITS OWN LIMITATIONS PERIOD

Petitioner raises on its appeal the argument that statutes of limitations are in furtherance of a public policy designed to eliminate stale claims brought against parties, such as Raymond James, ill-equipped to defend themselves due to the passage of time, faulty memories and discarded records. (Petitioner's Initial Brief, page 14) Hence, Petitioner argues, it must have been the legislative intent to include arbitrations within the ambit of Chapter 95 FL. STAT. This argument fails for several reasons.

First, Petitioner's contract required Respondents to submit their claims to be heard under the rules of the arbitration sponsoring organization, FINRA, which rules contain a period of prescription of their own, uniformly applied throughout the

country to discourage stale claims. Rule 10304(a) of NASD's Code of Arbitration Proceeding provides as follows:

> 10304. Time Limitation Upon Submission
>
> (a) 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 panel will resolve any questions regarding the eligibility of a claim under this Rule.

The six-year eligibility rule was designed to afford a defense against claims brought too late in light of industry rules requiring broker-dealers to maintain records for the relevant six-year period and was adopted in such a way as to apply to all broker-dealers subject to FINRA's jurisdiction. (See report, "National Association of Securities Dealers, Inc., Securities Arbitration Reform," 1996, commonly known as the "Ruder Report" which stated "The eligibility rule initially was adopted to serve the same purposes as a statute of limitations, that is, to eliminate stale claims. . . . [S]ix years was the period selected to conform to many of the SEC's record retention requirements for broker-dealers. . .").

Importantly, in the event a broker-dealer chooses to invoke Rule 10304 to dismiss a claim filed beyond the six-year period of eligibility, the claimant would then be relegated to his or her rights in court under Rule 10304(b), which provides:

> (b) Dismissal of a claim under this Rule does not prohibit a party from pursuing the claim in court. By requesting dismissal of a claim under this Rule, the requesting party agrees that if the panel dismisses a claim under the Rule, the party that filed the dismissed claim may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

In other words, if a claimant brings a claim in FINRA arbitration more than six years after the "occurrence or event giving rise to the claim" and that claim is dismissed, the claims, once re-filed in court, *are* subject to any relevant statutes of limitations. Under this scheme, respondents in FINRA arbitration are entitled to rely on statutes of limitations to dismiss stale claims, but only if the claims are ineligible for arbitration under the six-year rule (not applicable here) and the claims are then heard in court. There is nothing unfair about this system, certainly not from the standpoint of a broker-dealer which imposed the requirement of arbitration on the customer in the first instance.

Quite simply, Raymond James seeks to take advantage of a mandatory claims submission process in arbitration with a built-in limitations period of six years *and* to subject any claims to a separate set of limitations applicable to court cases. Raymond James' argument is simply that it wants the benefit of whichever limitations period is more favorable to its defense.

Second, and equally important, addressing the various points made by the Amicus Curiae submissions supporting Petitioner, parties to arbitration agreements are free to insert provisions incorporating the statutes of limitations of relevant jurisdictions, if they so choose. Here, Raymond James chose not to do so. The Washington Supreme Court expressed this point as follows, "However, the parties did not explicitly state in their agreement that claims would be subject to Washington State statutes of limitations." *Broom v. Morgan Stanley*, 236 P. 3d 182, 2010.

Therefore, it is inaccurate to state that failing to extend the protections of statutes of limitations to arbitrations in Florida would be against public policy and would unfairly subject arbitration respondents to stale claims. Moreover, the District Court's decision is by no means hostile to arbitration. The cases cited by Petitioners and the Amicus Curiae all suggest that somehow the decision below divests arbitration panels with the decision on timeliness, an arbitrable issue under a legion of cases.

For example, Petitioner cites to this Court's ruling in *O'Keefe Architects, Inc. v. CED Construction Partners, Ltd.* as support of its position on this appeal. Yet the District Court's opinion is completely consonant with the holding in *O'Keefe,* as that Court pointed out on page 11 of its decision. "In sum, neither the

Fifth District nor the supreme court in *O'Keefe Architects* reached the limitations issue on its merits but held only that the parties had made a contract in which this decision was relegated to the arbitrators." Here, the parties made a contract in which this decision was relegated to the Courts. Nothing in this case remotely suggests the usurpation of the traditional role of arbitrators or a lack of appreciation of the rights of parties to contract for alternative means of dispute resolution..

But the very reason this case is in the Court system to begin with is Petitioner's client agreement form which, at the election of either party, divested the arbitrators' authority to decide timeliness issues and placed them in the hands of the Courts. Absent that unique contractual provision, the timeliness of Respondents' arbitration claims would have been decided long ago, by the arbitrators appointed by FINRA to hear this case.

Interestingly, this Court in *Raymond James v. Saldukas,* stated ,"Thus, the policy embodied in the Federal Arbitration Act is one favoring enforcement of contracts, not one favoring arbitration over litigation." In that case, the issue was waiver of a right to require enforcement of an arbitration clause. Raymond James lost on its bid to avoid its own conduct which constituted waiver, incorrectly arguing that the Respondents had to show they were prejudiced by that conduct. Here, Raymond James claims it is prejudiced by *its* choice to relegate to the Courts

the issue of timeliness of Respondents' arbitration claims, seeking to avoid the consequences of its actions by claiming it lost a valuable "property right" in the process. This Court stated, it is "clear that because a party may waive its contractual rights by simply taking actions inconsistent with those rights, a waiver of the contractual right to arbitrate may arise through a party's inconsistent conduct even in the absence of prejudice."

Since arbitrations are matters of contract, whether or not to utilize state statutes of limitations, or to impose separate and different limitations periods, as with the FINRA Code of Arbitration Procedure, it a matter best left *to the parties* in their negotiations. To those advocates calling for a reversal here due to their pre-conceived concept that Florida's statutes of limitations are applicable in arbitration, Respondents say, "What about the other parties to your arbitration agreements? What were *their* expectations?" This Court should leave it to the contracting parties to decide how best to safeguards inherent in statutes of limitations and not assume either side is prejudiced by the holding of the District Court.

It is also incorrect to state that Petitioner's contract expressly or impliedly imports Florida's statutes of limitations, as claimed by Petitioner. (See Initial Brief, page 43.) The language found in the agreement is as follows:

> Nothing in this agreement shall be deemed to limit or waive the application of any relevant state or federal statute of limitations, repose or other time bar. Any claim made by either party to the agreement which is time barred for any reason shall not be eligible for arbitration. (VI, T1, Exh. G.)

The agreement also includes this language:

> This agreement and any accounts opened hereunder shall be construed, interpreted and the rights of the parties shall be determined in accordance with the internal laws of the State of Florida.

In other words, Raymond James seems to be saying that the statutes of limitations enacted in this state will apply to arbitrations throughout the country brought by Raymond James customers in FINRA arbitrations, because the parties chose to incorporate Florida substantive law. This is patently absurd.

Using this language Petitioner makes an assumption, based upon another assumption, that statutes of limitations do apply to arbitrations, that this "substantive law" is to be incorporated as part of the understanding of the parties at the time they contracted to arbitrate their disputes and that, therefore, statutes of limitations must apply as a matter of contract construction.

This assertion misconstrues the agreements. The first sentence of the first clause simply advises that the *agreement* does not affect whatever timeliness defenses might otherwise be available to the parties. Moreover, it does not state, as

Petitioner urges, that otherwise unavailable defenses *do* apply in an arbitration brought by either party, although that would have been a simple matter to address, if Raymond James had so chosen.

The second sentence of that provision is also misinterpreted by Raymond James. When the agreement states that any time-barred claim is "ineligible" for arbitration, it does not mean that the claim is subject to *dismissal*. Ineligibility for arbitration is incorporated within NASD Rule 10304(b) and requires that the case be brought in court, *not* dismissed.

Furthermore, Raymond James misstates the law when it claims that "Absent a specific exclusion in the arbitration agreement of the applicability of statutes of limitations, those statutes will apply." (Initial Brief, page 43). The case cited by Raymond James for this premise, *Marschel v. Dean Witter Reynolds, Inc*., 609 So.2d 718 (Fla. 2d DCA 1992) does not so hold, ruling only that it is for the arbitration panel assigned to the dispute to decide the application of the statutes of limitations.

There is simply nothing inequitable about an arbitration party having to submit to claims brought in arbitration under a contractually established limitations period, unless public policy dictates against an unreasonably abbreviated period.

In sum, Raymond James contractual provisions do not incorporate statutes of limitations otherwise inapplicable.

C. AFFIRMING THE DISTRICT COURT RULING WOULD ALIGN THIS COURT WITH A DEVELOPING NATIONAL CONSENSUS

Consistently, jurisdictions interpreting their own of statutes of limitations have concluded that these statutes do not apply to arbitrations. Arbitrations are not viewed by these courts as judicial actions; rather they are the private enforcement of contract rights through non-judicial proceedings. In these circumstances, the rules of the arbitration forum specifying the allowable claims period are the only terms limiting a claimant's right to bring the arbitration action. No reason is advanced by Petitioner for this Court to deviate from this well-settled and well-reasoned strain of authority.

These other jurisdictions have had no difficulty holding statutes of limitations inapplicable to arbitration proceedings, including the ruling from the Supreme Court of the State of Washington in *Broom v. Morgan Stanley*, *supra*. In that case, a FINRA arbitration panel, in a proceeding similar to that filed by Respondents, had applied state statutes of limitations to dismiss the claims in arbitration. In *Broom*, the Court held that the arbitrators had exceeded their authority because Washington's statutes of limitations apply only to "actions," not arbitrations.

> In the absence of a clear statement to the contrary by the Washington legislature, we thus read the statutory language and our own precedent to conclude that arbitration is not an "action" subject to state statutes of limitations in these circumstances.

Similarly, the Superior Court of Arizona, in *Morgan v. Carillon Investments*, 109 P.3d 82, 210 Ariz. 187 (2005), held that "The Court determines that the statutes of limitations do not apply in arbitration proceedings unless the contract requiring arbitration makes a specific reference to the statutes of limitations applying or the documents comprising the rules of arbitration refer to the application of statutes of limitations. Statutes of limitations apply to actions brought in court. Arbitration agreed to by contract is not an action brought in court."

In Texas, limitation periods apply to "suits." See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 2005). In 1855, the Texas Supreme Court stated, "[t]he words *court* and *suit* have a distinct meaning, and suggest a very different idea from arbitrators and arbitration." *Yarborough v. Leggett*, 14 Tex. 677 (1855). Connecticut's rule is the same: "[A]n arbitration is not a civil action." *Viggiano v. Tuscano-Moss*, 2005 Conn. Super. LEXIS 3179, at * 13. The courts of Connecticut have concluded that statutes of limitations do not apply in arbitration proceedings because such statutes apply only to court "actions" which

are not defined to include arbitrations. "Arbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitation." *Skidmore, Owings & Merrill v. Connecticut General Life Ins. Co.*, 25 Conn. Sup. 76, 197 A.2d 83 (Conn. 1963) . Further, the *Skidmore* Court continued, "there appears to be no sound reason, in the absence of an express statutory provision, for including an arbitration proceeding within the type of actions intended to be encompassed within the bar of the Statute of Limitations." *Id*.

A quite thorough judicial review of this issue appears in *NCR Corp. v. CBS Liquor Control ("NCR")*, in which an arbitrator's refusal to apply a statute of limitations was found not to be manifest disregard of the law. *NCR Corp. v. CBS Liquor Control* (S.D. Ohio 1993) 874 F. Supp. 168, *partially modified on unrelated grounds*, 1993 WL 767119 (NO. C-3-91-027, C-3-01-031) *aff'd sub nom. NCR Corp. v. Sac-Co.* (6th Cir. Ohio 1995) 43 F.3d 1076, cert. denied sum nom. *Sac-Co Inc. v. AT&T Global Info. Solutions Co.*, (1995) 516 U.S. 906.

During the arbitration underlying that case, NCR Corp. stressed that the claims were barred by a number of applicable statutes of limitation. The arbitrator refused to apply those statutes of limitation and awarded damages to CBS Liquor Control. NCR Corp. petitioned to vacate the award, claiming that the arbitrator's

refusal to apply a statute of limitations was a manifest disregard of the law. The U.S. District Court disagreed, stating that "the effect of a statute of limitations is to bar an action at law, not arbitration." *Id.* at 172. The court further stated that if NCR had allowed the claims against it to remain in court, rather than forcing them into arbitration, it might well have defended successfully on statute of limitations grounds:

> Had these claims remained pending in the New York Supreme Court, NCR would have had an excellent motion to dismiss the counterclaims as barred by the statute. It chose instead to demand the claims be arbitrated. *Id.* at 172.

The *NCR* court looked to *Son Shipping Co. v. De Fosse & Tanghe* (2d Cir. 1952) 199 F. 2d 687, which held that a claim made outside of the time limit provided by a statutory cause of action was not barred. The court stated:

> Nor does the reservation to the carrier in the charter party of all rights it would have under the Carriage of Goods by Sea Act, 46 U.S.C.A. section 1300 et seq., make the demand for arbitration untimely. It is true that the demand was not made within the one year limitation upon suits, contained in section 1303(6) of the above Act, but there is, nevertheless, no time bar because arbitration is not within the term "suit" as used in the statute. Instead, it is the performance of a contract providing for the resolution of a controversy without suit. *Id,* at 689.

Numerous other jurisdictions analyzing this issue have reached the same conclusion.[2] The reason so many courts have arrived at the same result is because of a basic understanding that statutes of limitations govern the filing of a legal "action," whereas claims brought in arbitration are not legal "actions." Instead, the time limit for arbitration claims is controlled by the arbitration contract. As such, the issue of when a claim has to be brought is not one of statutory interpretation but one of contract interpretation. In this case, the only time limitation that is relevant is the six-year rule in NASD Rule 10304.

In addition, various legal articles and treatises similarly conclude that statutes of limitations do not apply in arbitration. "Statutes of Limitations Don't Apply In Arbitration" (PLI's Securities Arbitration, 2005), Joseph C. Long,

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[23](See, e.g. *Nielsen v. Butterworth Hospital*, 182 Mich. App. 507, 511 (1990), rev'd on other grounds 441 Mich. 1 (1992) (Court held that arbitration panel committed error by dismissing case based on statutes of limitations because these statutes do not apply to arbitration.); *Dayco Corp. v. Fred T. Roberts and Co.*, 192 Conn. 497, 472 A.2d 780 (1984); *Nunno v. Wixner*, 257 Conn. 671, 778 A.2d 145 (2001); *Cameron v. Griffith*, 91 N.C. App. 164 (1988) (statutes of limitations do not apply to arbitration); *Carpenter v. Pomerantz*, 643 N.E.2d 587, 589 (Mass. 1994); *Shafnacker v. Raymond James & Assoc*., 425 Mass. 724, 683 N.E.2d 662 (1997) (". . . the filing of a claim for arbitration is not an "action" within the meaning of c. 260, § 32.); *Maltz v. Smith Barney, Inc*., 427 Mass. 560, 694 N.E.2d 840 (1998); *Lewiston Fire Fighters Association v. City of Lewiston*, 354 A.2d 154, 167 (Me. 1976); *Har-mar v. Thorsen & Thorshov*, 218 N.W.2d 751, 755 (Minn. 1974); *Sheppard v. Lightpost Museum Fund* (2006) 146 Cal.App.4th 315 (Arbitration is not a judicial proceeding-it is an alternative thereto; "Arbitration claims ... are not filed in courts and they do not initiate judicial proceedings.")

Professor Emeritus at the University of Oklahoma Law School; Securities Arbitration Procedure Manual, § 5-10, pages 5-191 to 5-192.1; Charles W. Austin, "Having Their Cake and Eating It Too: Motion Practice and the Mongrelization of SRO Arbitration," available on Westlaw at 1399 PLI/Corp. 183, 192 (Dec. 2003); Kenneth R. Jones, "Applicability of Statutes of Limitations in AAA Arbitration", 5 PIABA Quarterly (No. 4) 8 (Dec. 1998); Securities Arbitration Desk Reference, 2009-2010 ed. (Securities Law Handbook Series), by Seth E. Lipner and Joseph C. Long.

According to ALR Annot. "Statute of Limitations As Bar to Arbitration Under Agreement," 94 A.L.R.3d 533 (1979), all the decided cases hold that an arbitration is neither a "civil action" nor a "suit." Therefore, statutes of limitations governing such actions do not apply in arbitration.

In his October 2007 Florida Bar Journal article, Mr. Weintraub states, "The relevant case law reflects that statutes of limitations generally apply in arbitration only under limited circumstances." According to Mr. Weintraub, there are three circumstances under which statutes of limitation would apply to an arbitration. The first circumstance is where a state statute expressly provides for their application.

While some state legislatures have enacted arbitration statutes which specifically incorporate state statutes of limitations into arbitrations, (See, New York's CPLR Section 7502 and Georgia's Official Code Section 9-9-5), and presumably the Florida Legislature has been aware for many years that other legislatures chose to take that route, our Legislature has decided not to follow in the footsteps of those States.

The second circumstance is where a statute of limitation's application to arbitration is implicit in the statutory language. That is not the case in Florida, according to Mr. Weintraub, since all of Florida's limitations statutes are expressly limited to "civil actions" and had the Florida legislature intended for arbitrations to be considered "actions" in all contexts, statutes similar to those in Georgia or New York would have been adopted.

The third circumstance under which statutes of limitations would apply in arbitrations, according to Mr. Weintraub, is when the parties' contract expressly provides. "Unless dictated otherwise by public policy, attorneys may include contractual language expressly providing that statutes of limitations shall apply in arbitration." As previously stated, the contracts entered into by Respondents and Raymond James did not provide that statutes of limitations *shall* apply, only that the agreements in question would not "limit or waive the application of any

relevant" statute of limitations. Since the law of Florida does not make the statutes of limitations applicable to Respondents' arbitration claims, there are no "relevant" statutes of limitations to apply.

In the absence of any one of these three circumstances, according to Mr. Weintraub, without action by the Legislature to extend the application of statutes of limitations to arbitrations, the law in Florida holds that arbitration claims may not be defeated by the application of statutes of limitations.

The vast weight of authority and scholarly analysis support the lower court's ruling and further justify this Court's adoption of Respondents' position that their arbitration claims are not subject to Florida's statutes of limitations.

D. PETITIONER HAS IMPROPERLY RAISED ON THIS APPEAL ISSUES NOT RAISED AT THE TRIAL COURT; FAA PREEMPTION DOES NOT RENDER THE DISTRICT COURT'S INTERPRETATION OF CHAPTER 95 TO BE UNCONSTITUTIONAL

For the first time on appeal, Petitioner asserts that the determination that Chapter 95.011 does not apply to arbitration is preempted by the Federal Arbitration Act (hereinafter "FAA") and is in violation of the Supremacy Clause. This is not the first time that Raymond James has attempted to raise issues to this Court which were not raised below. In *Raymond James v. Saldukas, supra*, this Court observed, "Raymond James contends that even if it is subject to litigation,

VandenBerg should not be because he was not a party to the NYSE arbitration proceeding and therefore could not have waived his right to arbitrate. This issue was never raised in the trial court, and this court will not review issues raised for the first time on appeal. *Dober v. Worrell*, 401 So.2d 1322, 1323 (Fla.1981); *Mendelson v. Great Western Bank*, 712 So.2d 1194, 1197 (Fla. 2d DCA 1998). Therefore, we decline to address this issue."

In the event this Court deems it appropriate to review these newly raised issues, Respondent respectfully submits that the District Court ruling in no way implicates the Supremacy Clause or the FAA, in that the ruling below does not reflect hostility towards arbitration. The District Court did not act to subvert the role of arbitrators in deciding arbitrable issues. Indeed, the Court was only able to act (and, in fact, was compelled to do so) by virtue of Raymond James' contractual provision relegating issues of timeliness to a court of competent jurisdiction

The primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms. See *Volt Information Services, Inc. v. Board of Trustees of Leland Standard Junior University*, 489 U.S. 468, 478 (U.S. 1989).

To the extent Petitioner relies upon the theory that the FAA's policy favoring enforcement of arbitration agreements has been somehow violated in this case, the

Court should note that the determination that Florida's statutes of limitations do not apply in arbitration is in no way a decision disfavoring arbitration. While Petitioner claims it has been deprived of a defense otherwise available to litigants in court, there was nothing preventing Raymond James from drafting its adhesion contract to provide for such a defense. Therefore, the District Court *was* enforcing Petitioner's contract according to its terms.

Indeed, there is no express pre-emptive provision in the FAA, which, according to the Supreme Court, does not "reflect a congressional intent to occupy the entire field of arbitration." *Volt*, 489 U.S. at 477.

Neither Chapter 95 nor the decision of the District Court require that statute of limitations issues are to be decided only by a court. Rather, it was Raymond James' contract that imposed that requirement in this case.

CONCLUSION
THE QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL SHOULD BE ANSWERED IN THE NEGATIVE

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I hereby certify that the foregoing Answer Brief of Appellees complies with the font requirements of FRAP Rule 9.100(l).

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