SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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OPPENHEIMER & CO. INC.,

Plaintiff-Appellant,

-against-

LOUIS PITCH and DONNA PITCH,

Defendants-Respondents.

----------x

Index No. 651213/2014

NOTICE OF MOTION REQUESTING LEAVE TO FILE BRIEF AS AMICUS CURIAE

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Adam M. Nicolazzo, Esq. dated May 21, 2015, and the papers annexed thereto, the undersigned respectfully moves this Court, at the courthouse, thereof located at 27 Madison Avenue, New York, New York 10010, on the 1st day of June, 2015, at 9:30 in the forenoon of such day or as soon thereafter as counsel may be heard, for leave to file the accompanying brief *amicus curiae* in support of Defendants-Respondents' request for affirmance of the lower Court's decision.

Dated: New York, New York
May 21, 2015

By: Adam M. Nicolazzo

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

OPPENHEIMER & CO. INC., Plaintiff-Appellant, -against- LOUIS PITCH and DONNA PITCH, Defendants-Respondents.	Index No. 651213/2014

AFFIRMATION OF ADAM M. NICOLAZZO IN SUPPORT OF MOTION TO FILE A BRIEF AMICUS CURIAE

Adam M. Nicolazzo, an attorney admitted to practice law before the Courts of the State of New York, hereby affirms the following to be true under penalty of perjury:

1. I am an associate attorney with the firm Malecki Law, counsel to Public Investors Arbitration Bar Association ("PIABA") as *amicus curiae*, and I submit this affirmation in support of the motion to file a brief *amicus curiae* in support of affirmance of the New York Supreme Court, New York County's judgment, which correctly granted Defendants-Respondents' motion to compel arbitration.

2. PIABA is an international bar association whose members are attorneys who represent public investors in securities arbitration proceedings. The

mission of PIABA is to promote the interests of public investors in arbitration by protecting investor claimants from abuses in the arbitration process, such as those associated with failure and/or refusal to provide full disclosure through the arbitral process. PIABA seeks to make securities and commodities arbitration as just and fair as systematically possible and to create a level playing field for the public investor in securities and commodities arbitration.

3. PIABA has a particular interest in the present litigation because the failure or refusal of a member of the Financial Industry Regulatory Authority ("FINRA") that goes without recourse in the jurisdiction currently designated by the Securities and Exchange Commission may unfortunately embolden other FINRA member broker-dealers or associated registered representatives to also avoid the limited disclosure and discovery requirements of the FINRA Rules. This may have a substantially negative effect upon public investors, who start at a significant disadvantage, and must prepare for their trials without the benefit of many discovery tools taken for granted in Federal and State Court proceedings, including interrogatories and depositions.

4. Currently, FINRA arbitrators possess the tools to enforce FINRA Dispute Resolution's arbitration discovery rules. If the lower Court's decision is reversed, the effect of these rules will be obliterated, and unscrupulous members

and registered representatives may withhold discovery without fear of consequences.

5. PIABA's practitioners have specialized experience with the securities laws and rules of the FINRA arbitration forum, and seek to provide the Court with a perspective that has not been provided by the parties, or might otherwise escape the Court's consideration. Such arguments are set forth in the proposed amicus brief submitted herewith.

WHEREFORE, PIABA respectfully requests that this Court grant their motion for leave to file a brief, amicus curiae, in support of affirmance.

Dated: New York, New York
May 21, 2015

Adam M. Nicolazzo

Adam M. Nicolazzo

EXHIBIT A

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NOTICE OF APPEAL, DATED DECEMBER 16, 2014

INDEX NO. 651213/2014
NYSCEF DOC. NO. 34
RECEIVED NYSCEF: 12/16/2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

OPPENHEIMER & CO. INC., Plaintiff-Appellant, v. LOUIS PITCH and DONNA PITCH, Defendants-Respondents.	Index No. 651213/2014 **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Plaintiff Oppenheimer & Co. Inc. hereby appeals to the Appellate Division of the Supreme Court, First Department, from the Decision and Order (Dkt. No. 32) of the Supreme Court, New York County (Eileen Bransten, J.S.C.), entered in the Office of the County Clerk, New York County, on November 25, 2014, and each and every part thereof.

DATED: December 16, 2014

By: /s/ Patrick R. Kingsley

Patrick R. Kingsley, Esquire (Bar ID 5189659)
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TO: CLERK OF THE SUPREME COURT,
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Timothy J. Dennin, Esquire
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361 Main Street
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Attorney for Defendants-Appellees

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DECISION AND ORDER OF THE HONORABLE EILEEN BRANSTEN, DATED NOVEMBER 21, 2014, APPEALED FROM [6-7]

FILED: NEW YORK COUNTY CLERK 11/25/2014 11:02 AM INDEX NO. 651213/2014
NYSCEF DOC. NO. 32 RECEIVED NYSCEF: 11/25/2014

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN **PART** 3
Justice

OPPENHEIMER & CO. INC.

INDEX NO. 651213/2014

-V-

MOTION DATE 11/19/2014

PITCH, LOUIS

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for compel arbitration

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	No(s)	1
Answering Affidavits - Exhibits	No(s)	2
Replying Affidavits	No(s)	3
Cross Motion		No

Upon the foregoing papers, it is ordered that this motion is

granted for the reasons stated on the November 5, 2014 record (Nina Koss, OCR).

DATED: 11/ 21 /2014

EILEEN BRANSTEN , J.S.C.

1. CHECK ONE : [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE : MOTION IS : [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE : [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

FILED: NEW YORK COUNTY CLERK 12/08/2014 05:14 PM INDEX NO. 651213/2014
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 12/08/2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

OPPENHEIMER & CO. INC., Plaintiff, v. LOUIS PITCH and DONNA PITCH, Defendants.	Index No. 651213/2014 **NOTICE OF ENTRY** **Motion Seq. 001**

PLEASE TAKE NOTICE that the annexed is a true and correct copy of the Order entered November 25, 2014, by the Clerk of the Supreme Court of the State of New York, County of New York.

DATED: December 8, 2014

By: /s/ Patrick R. Kingsley
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EXHIBIT B

Supreme Court of the State of New York
Appellate Division: First Department

OPPENHEIMER & CO., INC.,

Plaintiff-Appellant,

-against-

LOUIS PITCH and DONNA PITCH,

Defendants-Respondents.

BRIEF OF AMICUS CURIAE THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF DEFENDANTS-RESPONDENTS' REQUEST FOR AFFIRMANCE

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[Reproduced on Recycled Paper]

Supreme Court, New York County, Index No. 651213/14

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Investors Arbitration Bar Association is a non-profit association. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Pursuant to New York Rule of Appellate Procedure § 600.2 *et seq.*, the Public Investors Arbitration Bar Association ("PIABA") respectfully submits this, its brief *amicus curiae*, in support of Defendants-Respondents' request for affirmance of the decision of the New York Supreme Court, New York County (Bransten, J.), entered on November 25, 2015, compelling arbitration before the Financial Industry Regulatory Authority ("FINRA").[1]

STATEMENT OF INTEREST

PIABA is an international bar association established in 1990. PIABA's members are attorneys who represent public investors in securities arbitration proceedings. The mission of PIABA is to promote the interests of public investors. In furtherance of this mission, a goal of PIABA is the protection of investor claimants from abuses in the arbitration process, such as those associated with failure and/or refusal to provide full and fair disclosure through the arbitral process. PIABA seeks to make securities and commodities arbitration as just and fair as systematically possible and to create a level playing field for the public investor in securities and commodities arbitration.

[1] No counsel for a party or a party to this proceeding authored this brief in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than PIABA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

PIABA has a particular interest in the present litigation because disclosure methods in the arbitration forum are limited, meaning that the effectiveness of the forum is dependent upon full compliance with those methods that are permitted under the rules of the FINRA[2] jurisdiction, through which substantially all public investor securities disputes are litigated. In FINRA arbitration, there are no depositions, parties generally are not required to affirm that full production has been made, but FINRA directives require fair disclosure and do allow arbitrators to sanction parties for discovery abuses.

The lower Court's decision to compel arbitration was consistent with the Federal Arbitration Act ("FAA"), New York State law, as well as the agreements between the investor Defendants-Respondents and broker-dealer Plaintiff-Appellant because (i) the underlying matter is subject to mandatory arbitration under the FAA; the parties agreed to submit the controversy, including the underlying discovery issues, to arbitration; and (ii) the discovery process under FINRA, and parties' full compliance with that process, is critical to the arbitration process. Plaintiff-Appellant's failure to comply with its affirmative discovery obligations must have consequences, which are properly determined by the arbitration panel, not the courts.

[2] FINRA, formerly the National Association of Securities Dealers ("NASD"), is a self-regulatory organization that licenses and regulates securities broker-dealers in the national securities industry. Its Code of Arbitration Procedure governs, *inter alia*, arbitrations between its members and their customers and has been approved by the Securities and Exchange Commission pursuant to the Securities and Exchange Act of 1934. See 15 U.S.C. § 78a *et seq*.

PIABA appears as *amicus* because it is in its members' interest, and therefore the public interest, that their clients – aggrieved public investors and/or customers of brokerage and investment firms – have available a speedy, efficient, inexpensive and fair forum to vindicate their rights. More importantly, a clear and unambiguous decision by this Court upholding the decision of the lower Court to compel arbitration will further FINRA's mandate and regulatory role as the administrator of the dispute resolution forum for disputes between public customers and broker-dealers, and would also support the requirement for full disclosure through the FINRA arbitration process.

ARGUMENT

A. BOTH UNDER THE FAA AND NEW YORK LAW, THE DIRECTOR OF FINRA DISPUTE RESOLUTION HAS THE AUTHORITY TO DETERMINE WHETHER CLAIMS ARE APPROPRIATE FOR FINRA ARBITRATION

Under long standing Supreme Court authority, where an arbitration provision, as here, requires the arbitration of all controversies, "'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge" even though questions about arbitrability remain with the judge. Howsam v. Dean Witter Reynolds, Inc., 537 US 79, 84, 123 S.Ct. 588, 592 (2002). Although determining what is a question of arbitrability and what is a procedural question is not always an easy task, the test under Howsam to determine if a question is one of arbitrability for the court is whether the

"contracting parties would likely have expected a court to have decided the gateway matter . . . ." Id.; see also Diamond Waterproofing Sys., Inc. v. Liberty Owners Corp., 4 N.Y.3d 247 (N.Y. 2005) (following the precedent set in Howsam, the New York Court of Appeals recognizes that questions concerning whether or not certain prerequisites and conditions precedent to an obligation to arbitrate have been met is for the arbitrators to decide).

Parties who seek to challenge the appropriateness of claims being presented to FINRA Dispute Resolution may file an objection with the Director of FINRA Dispute Resolution. FINRA Rule 12203(a) (Denial of FINRA Forum) provides:

> The Director may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate . . . .

Similarly, FINRA Rule 12408 (Director's Discretionary Authority) states that "[t]he Director may exercise discretionary authority and make any decision that is consistent with the purposes of the FINRA Rules to facilitate the appointment of arbitrators and the resolution of arbitrations."

1. The Parties' Conduct Necessitates that This Matter Be Submitted to FINRA Dispute Resolution

The parties empowered the Director to make the determination of whether or not the second Defendants-Respondents' case (Pitch II) was appropriate for FINRA arbitration. The agreements signed by the parties incorporated the FINRA

Rules, which specifically provide the Director with the discretion to make the determination.

The Client Agreement Form that Plaintiff-Appellant required the Defendants-Respondents to sign before they could open their account with Plaintiff-Appellant contains an arbitration provision that explicitly provides as follows:

> Any arbitration under this agreement shall be conducted pursuant to the Federal Arbitration Act and the laws of the State of New York, before FINRA and in accordance with its rules then in force.

See R. at pg. 34, ¶ 33.[3]

That Plaintiff-Appellant itself believed that the issue it now places before this Court was one to be determined by the Director, and not by a court, is conclusively established by Plaintiff-Appellant's conduct in this matter. Specifically, after Plaintiff-Appellant was served with the Defendants-Respondents' statement of claim in Pitch II, its first response was to make a motion before the Director under Rule 12203(a) to dismiss or stay the arbitration proceeding. Thus, Plaintiff-Appellant clearly evidenced its belief that the determination of whether this controversy was appropriate for FINRA arbitration was one to be made, pursuant to the FINRA Rules, by the Director, and not by the court. Indeed, it is submitted that even if, standing on its own, the matter was a

[3] References to the Record on Appeal Filed by the Plaintiff-Appellant shall be denoted as "R."

question of arbitrability to be decided by the court, by first bringing a motion to the Director, Plaintiff-Appellant waived its right to have a court make that determination. Accordingly, the order of the trial court should be affirmed.

2. A Second Action Arising from a First Action Is Still Subject to the Terms of the Agreement Between the Parties

As noted above, the Client Agreement Form which Plaintiff-Appellant required the Defendants-Respondents to sign stated that all controversies between them will be decided in an arbitration proceeding "before FINRA and in accordance with its rules then in force." See R. at pg. 34, ¶ 33. The Client Agreement Form also states that "[t]he rules of the arbitration forum in which the claim is filed, and amendments thereto, shall be incorporated into this agreement," id. at pg. 34, ¶ 32.G., and that both the Pitches and Plaintiff-Appellant agree to arbitrate before FINRA "all controversies which may arise between the client and Oppenheimer . . . relating to, but not limited to, those involving . . . the construction, performance or breach of this or any other agreement between the client and Oppenheimer pertaining to securities and other property, whether entered into prior, on or subsequent to the date hereof . . . .," id. at pg. 34, ¶ 33.

In the Defendants-Respondents' statement of claim submitted in Pitch II, they appear to allege a separate cause of action arising out of the Pitch I arbitration proceeding, and not from prior dealings with Plaintiff-Appellant. If true, it is conceivable that Plaintiff-Appellant committed a further breach of the Client

Agreement Form, giving rise to a separate arbitrable claim, as already determined by the Director.

Thus, the Defendants-Respondents' claim against Plaintiff-Appellant in Pitch II is a separate claim brought to seek damages for Plaintiff-Appellant's breach of the terms of both the Client Agreement Form and the FINRA Arbitration Submission Agreement. Accordingly, there is no gateway arbitrability question to be determined by the court, as Plaintiff-Appellant explicitly agreed both in the Client Agreement Form and in the FINRA Arbitration Submission Agreement to submit to FINRA arbitration the claims asserted by the Pitches in the statement of claim in Pitch II.

B. THE DISCOVERY PROCESS UNDER FINRA, AND PARTIES' COMPLIANCE WITH THAT PROCESS, IS CENTRAL TO THE ARBITRATION PROCESS; PLAINTIFF-APPELLANT'S FAILURE TO COMPLY WITH ITS AFFIRMATIVE DISCOVERY OBLIGATIONS MUST HAVE CONSEQUENCES, WHICH ARE PROPERLY RESOLVED BY THE ARBITRATION PANEL, NOT THE COURTS

FINRA properly has the jurisdiction to enforce its own rules against its own members, including those related to discovery abuses. In Shearson/American Express v. McMahon, 482 U.S. 220 (1987), the U.S. Supreme Court explained that self-regulatory organizations ("SROs") such as the Financial Industry Regulatory Authority ("FINRA," formerly NASD and NYSE), with oversight from the Securities and Exchange Commission, have the ability to police their own rules

and policies. The McMahon Court cited the 1975 amendments and legislative intent to § 29(b) of the Securities Exchange Act, which states, as amended, in part:

> Modification of disciplinary procedures. Nothing in this title [15 USCS §§ 78a et seq.] shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or participants, … or (3) of any action described in paragraph (1) or (2) on any person who has agreed to be bound thereby.

15 U.S.C. § 78bb(b). This, the Supreme Court reasoned, sought to "enhanc[e] the self-regulatory function of the SROs under the [Securities] Exchange Act," McMahon, 482 U.S. at 236, and gave "exchanges a means of enforcing their rules against their members," id. at 235 (citing Tullis v. Kohlmeyer & Co., 551 F.2d 632, 638 (5th Cir. 1977) and Axelrod & Co. v. Kordich, Victor & Neufeld, 451 F.2d 838, 840-841 (2d Cir. 1971) for support).

Similarly, in Howsam, the Supreme Court addressed whether determining arbitrability in the context of the then-NASD's "Eligibility Rule" was a job for the courts or for the arbitrators. In determining that the issue was one for the arbitrators to decide, the Court acknowledged that "the NASD [now FINRA] arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it" than are the courts. Howsam, 537 U.S. at 85.

FINRA, the main forum for substantially all public investor securities disputes, maintains a discrete arbitration procedure, which is set out in the 12000 section of the FINRA Rules. Discovery requests are propounded and responded to, like New York State court cases, but the use of interrogatories and depositions are generally not permitted. See FINRA Rule 12507(a)(1) (Other Discovery Requests) ("Standard interrogatories are generally not permitted in arbitration"); Rule 12510 (Depositions) (Depositions are strongly discouraged in arbitration … [except, *inter alia*] to preserve the testimony of ill or dying witnesses…"). FINRA Rule 12505 (Cooperation of Parties in Discovery) mandates "the parties must cooperate to the fullest extent practicable in the exchange of documents and information to expedite the arbitration."

FINRA Rule 12506 (Document Production Lists) requires that parties must automatically respond to the FINRA Discovery Guide, which sets forth a set of approximately 20 groups of documents that are "presumptively discoverable" in all public investor arbitrations. See FINRA Discovery Guide (2013), pg. 1, https://www.finra.org/sites/default/files/ArbMed/p394527.pdf. If a document that is responsive to the FINRA Discovery Guide is not produced, the party who did not produce the documents must, on demand, provide an affirmation describing the search for the document and that the document is not within the party's possession, custody or control. Id. at pg. 5.

Parties' full compliance with their respective discovery obligations in FINRA arbitration is essential for an efficient functioning of the process. However, due to the nature of the disputes between FINRA member firms and public customers heard by FINRA arbitration panels,[4] customers are especially vulnerable to discovery abuse.

As illustrated in the case underlying the instant appeal, member firms are regularly in the exclusive possession of documents that are critical to a customer's ability to put forth their case. Two of the most common examples are (i) inquiries from and responses to regulators and (ii) materials evidencing supervision such as documents generated in the mandatory supervisory review of customer accounts and mandatory audits of branch offices.[5] Given the confidential nature of these materials, there is no way for the customer party to obtain said materials from any other source, nor is there any way for the customer party to vet any statements made by the member firm as to the existence or non-existence of such materials or

[4] Frequently, cases brought against FINRA member firms are based upon claims of a failure to supervise the firm's registered representative. For example, according to arbitration statistics published by FINRA, in the years 2011 through 2014, over 40% of the arbitrations handled by FINRA included failure to supervise allegations (2,007 out of 4,729 in 2011, 1,657 out of 4,299 in 2012, 1,480 out of 3,714 in 2013, and 1,742 out of 3,822 in 2014). See Dispute Resolution Statistics: Summary Arbitration Statistics March 2015, http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics (last visited May 15, 2015).

[5] Both of these types of documents are commonly used by practitioners in FINRA arbitration to cross-examine the registered representative(s) and firm supervisor(s) during the arbitration hearing to prove a failure to supervise.

whether the set of documents produced by the member firm is complete or incomplete.

Therefore, candor during discovery in FINRA arbitrations is critical to preventing the exploitation of public investors in the FINRA forum. To ensure that candor on the part of the FINRA member firms, public customers who are deceived or defrauded during an arbitration must not be left without redress.

FINRA Rules provide a means for discovery sanctions against a party to arbitration. FINRA Rule 12511 (Discovery Sanctions) sets forth "[f]ailure to cooperate in the exchange of documents and information as required under the Code may result in sanctions. The panel may issue sanctions against any party…" FINRA training materials for its arbitrators instruct that appropriate sanctions for discovery abuses may include:

> assessing monetary penalties payable to one or more parties; precluding a party from presenting evidence; making an adverse inference against a party; assessing postponement and/or forum fees; assessing attorneys' fees, costs and expenses; and dismissal of a claim, defense or proceeding.

FINRA Discovery, Abuses & Sanctions Training and Exam (Nov. 2013), pg. 26, https://www.finra.org/sites/default/files/ArbMed/p125425.pdf; see also, FINRA Rule 12212 (Sanctions) (stating same).

In the event the misconduct and deception is not known until after the arbitration is complete, seeking sanctions becomes impossible. Therefore, the

public investor who is injured due to the deception of his or her adversary in a FINRA arbitration must be permitted to seek compensation for the damage sustained in a subsequent action in the chosen jurisdiction (here, FINRA Dispute Resolution). To allow otherwise, would encourage bad actors to engage in deceptive practices during discovery without fear of reprisal, thereby undermining the integrity of the arbitration process and compromising its effectiveness as a fair alternative to litigation for resolving disputes.

Given the statutory and legislative preference for enforcing arbitration agreements, and permitting self-regulatory organizations such as FINRA to enforce their own rules, this Court should affirm the lower Court's decision to compel arbitration. The above referenced FINRA Rules and interpretive materials make clear that discovery in the arbitration process is limited, cooperation and full production between the parties are essential, with FINRA arbitrators having the ability to effectively enforce the arbitration rules against the participants in the forum. Without the ability to enforce its own rules and procedures, the integrity and effectiveness of the FINRA Dispute Resolution forum will be compromised.

CONCLUSION

The FAA mandates that the dispute between the parties is arbitrable and therefore does not present an argument for the courts. Further, FINRA Rules provide for the means to enforce their own rules, in which FINRA has a substantial

interest, given the virtually obligatory nature of arbitration for public investors' securities disputes. Equity necessitates that this Court not countenance the wrongful conduct of Oppenheimer & Co, Inc. for clearly failing and/or refusing to produce documents considered by FINRA to be presumptively discoverable in all investor securities disputes.

For these reasons, the Court should affirm the lower Court's decision to compel arbitration.

Dated: New York, New York
May 21, 2015

Respectfully Submitted,

/s/

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CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 2,892.

DB