IN THE SUPREME COURT OF OHIO

JAMES REINGLASS, *Plaintiff-Appellant,* vs. **MORGAN STANLEY DEAN WITTER, INC.,** *Defendant-Appellee.*	No. 2006-1017 ON MOTION TO CERTIFY an Appeal from the Eighth District Court of Appeals (No. CA 05 086407) (Cuyahoga Common Pleas No. CV-512134)

MEMORANDUM OF AMICUS CURIAE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF JURISDICTION

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STATEMENT IN SUPPORT OF JURISDICTION

To the honorable Chief Justice and Associate Justices of the Supreme Court of Ohio:

Amicus curiae Public Investors Arbitration Bar Association ("PIABA") respectfully urges this Court to accept appellant James Reinglass' appeal as a matter "of public or great general interest," Ohio Const. art. 4, § 2(B)(2)(e).

Arbitration is intended as "an alternative to the complications of litigation," *Wilko v. Swan* (1953), 346 U.S. 427, 431, intended to operate under far less restrictive procedures. Under the NASD Code of Arbitration Procedure, claims need not be pled formally or with specificity, as might be necessary in actions before state and federal courts. In fact, the NASD rules provide that a claim may *not* be dismissed solely upon the pleadings without the consent of all parties.

The Court of Appeals ignored those policies and held that fraud claims in arbitration[1] must be pled according to heightened pleading requirements like those of Civ. R. 9(B) and the Private Securities Litigation Reform Act of 1995 ("the PSLRA"). Should that decision stand, arbitration claimants will be required to plead with the exactitude and prolixity required in federal court. That is a direct affront to the longstanding judicial policy of simplicity. Worse yet, pleading issues would be decided by arbitrators with no legal training, unguided by any standards, and subject to no review. Such practices are not bargained for in arbitration.

The Court of Appeals' decision carries dangerous consequences not only for parties involved in securities arbitration, but indeed for participants in arbitration proceedings of every stripe. This Court should accept jurisdiction and reverse the decision of the Court of Appeals.

[1] The Court of Appeals saw Dr. Reinglass' claim against Morgan Stanley as sounding only in fraud. Court of Appeal Opinion, slip op. ¶ 18. That is a fundamental mischaracterization of Dr. Reinglass' claim. The claim was also based upon breach of fiduciary duty, breach of contract, and negligence, a fact that the Court of Appeals even recognized in an earlier passage in its opinion. *Id.,* ¶ 4. This makes the dismissal of the *entire claim* that much more egregious.

STATEMENT OF INTEREST

Based in Norman, Oklahoma, PIABA was established in 1990 as an educational and networking non-profit organization for securities arbitration attorneys who represent the public investor in securities disputes. Through the constant efforts of its officers, staff, and over 650 member attorneys throughout the United States and internationally, PIABA promotes the interests of the public investor in securities and commodities arbitration, protects public investors from abuses in the arbitration process, and makes securities and commodities arbitration as just and fair as possible through legislative reforms and judicial enforcement.

STATEMENT OF THE CASE AND FACTS

Amicus PIABA incorporates herein the statement of the case and the recitation of the facts as set forth by appellant James Reinglass in his memorandum in support of jurisdiction.

ARGUMENT

The importance of this matter cannot be overstated.[2] Through the creeping ubiquity of arbitration clauses in cellphone plans, home construction contracts, credit card agreements, and other mundane consumer transactions, arbitration is fast becoming the exclusive forum for dispute resolution for many unwitting consumers. Legislators and the courts have frequently lauded arbitration as an inexpensive, fair, speedy, and *uncomplicated* alternative to court. The

[2] Although this case appears to concern only Ohio law and policy, the effect of the Court of Appeals' decision will not stop at the state's borders. It is common practice in arbitration for parties to rely on cases from other jurisdictions. In fact, *amicus* is aware of at least one instance in which the Court of Appeals' decision has been cited in support of its "motion" to dismiss a claim at the pleading stage. By accepting jurisdiction, this Court can arrest the spread of an improvident and poorly considered precedent.

Court of Appeals' decision, however, seeks to graft court-like motion practice into arbitration without the consent of the parties, and without any basis in the rules governing the arbitration.

To allow such practice would not only permit the arbitrators to exceed the powers granted to them by the parties, but would also do violence to the policies of simplicity and expedience underlying the arbitration system. This Court should therefore accept jurisdiction of this matter not only to correct the wrong that has been done to Dr. Reinglass, who was never given a chance to present the merits of his claim, but also for the protection of all Ohio consumers (and some businesses as well) who are bound to pursue a claim through arbitration rather than the courts.

A. ***General Policies Underlying Arbitration.***

Discussion of this matter must begin with a reiteration of Ohio's policy of encouraging arbitration. "Arbitration provides the parties with an alternate method of dispute resolution. 'It provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets.'" *Mahoning Cty. Bd. of Mental Retardation v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St.3d 80, 83. This Court has adhered to those policies, reminding parties that "Ohio public policy… generally favors arbitration as a means to settle disputes." *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 500; see also *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 711.

Arbitration has been held out to investors and consumers as a means of adjudicating their claims in a fair forum that trades formality for efficiency. The Supreme Court of the United States has consistently assured litigants that arbitration is simply an alternative to court which offers expedience and simplicity without sacrificing fairness or remedies:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral,

> rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985), 473 U.S. 614, 628.

Procedural simplicity is also commonly held up by proponents of the arbitration system as one of its benefits. Appearing last year before Congress, Karen Kupersmith, the arbitration director of the New York Stock Exchange, stated that arbitration claimants can file their claims without having to meet procedural requirements like those in court:

> Public investors with relatively small claims may find it difficult or impractical to retain an attorney. In this situation, or if they simply choose not to hire an attorney, they may still file a claim in arbitration without dealing with the daunting nature of legal proceedings. ***There is no requirement for a formal submission of pleadings similar to that required in court.*** Instead, an investor may file a statement of claim in simple letter format that explains what happened and what the investor seeks to recover.

A Review of the Securities Arbitration System, Hearing before House Com. on Financial Services, Subcom. on Capital Markets, Insurance and Government Sponsored Enterprises, 109th Cong. (Mar. 17, 2005), written testimony of Karen Kupersmith.[3] In the same hearing, the president of the Securities Industry Association (the trade association for the securities industry) agreed, telling the subcommittee outright that "[u]nlike in court cases, ***claimants in arbitration are not held to technical pleading standards.***" *Id.,* testimony of Marc E. Lackritz (emphasis added). These sentiments are echoed in the self-regulatory organizations' arbitration rules, which are conspicuously devoid of any particular standards for pleading a claim. *See* NASD Code of Arb. Proc., Rule 10314(a)(1), NYSE Arb. Rule 612(a)(1) (both requiring only a statement of "the relevant facts and the remedies sought").

Because simplicity is so fundamental to arbitration, courts look with disfavor upon attempts to transform arbitration claims into trial-like judicial proceedings. *White v. Preferred*

[3] For the Court's convenience, copies of non-decisional and non-statutory sources are attached.

Research, Inc. (S.C.App. 1993), 315 S.C. 209, 212, 432 S.E.2d 506, 508. Requiring parties to adhere to formal pleading standards, as the Court of Appeals did here, would contravene that principle and promote arbitrator misconduct by lending apparent judicial approval to the unauthorized practice of dismissing arbitration claims in the "pleading" stage. The law does not countenance such practice, and this Court should not permit that trend to continue.

B. ***Grounds for Vacatur of Arbitration Awards.***

This matter stems from the denial of Dr. Reinglass' motion to vacate the award, in which the arbitrators dismissed his claim without hearing for the purported failure to state a claim with particularity. Section 2711.10 of the Revised Code sets forth the grounds upon which an arbitration award may be vacated. That section provides in pertinent part:

> In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:
>
> ***
>
> (C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

An award can be vacated only upon the grounds set forth in section 2711.10. *Goodyear Tire & Rubber Co. v. Rubber Workers Local 200* (1975), 42 Ohio St.3d 516. However, once one of those grounds is established, the court *must* vacate the award. § 2711.10 (the court "shall" vacate the award if any of the listed conditions are established); *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 107 ("shall" is mandatory, rather than directory, language).

C. ***Proposition of Law No. 1:***

Court rules and statutes requiring that certain causes of action be pled specifically are procedural requirements that apply to actions in court, not to arbitration claims.

The Court of Appeals' decision rested upon an erroneous assumption that fraud must be pled with specificity in arbitration proceedings. That assumption begs for immediate correction.

1. Civil Rule 9(B) does not apply to arbitration claims.

The main premise of the Court of Appeals' decision was that Dr. Reinglass was required to plead his claims with the specificity required by Civ. R. 9(B). That ruling assumes that the Civil Rules apply in arbitration claims. They do not.

The scope of the Ohio Rules of Civil Procedure is set forth in Civ. R. 1(A), which provides that the Rules "prescribe the procedure to be followed in all courts of the state[.]" The Civil Rules are limited to actions in *court.* See, e.g., *Yoder v. Ohio St. Bd. of Ed.* (1988), 40 Ohio App.3d 111, 112 (Civil Rules do not apply to adjudications by state agencies). Ohio courts, including this Court, have thus held that the Civil Rules do not apply in arbitration proceedings. See, e.g., *Hutchinson v. J.C. Penney Ins. Co.* (1985), 17 Ohio St.3d 195 (refusing to apply Civ. R. 54(C) to arbitration), overr. on other grounds *State Farm Mut. Ins. Co. v. Blevins* (1990), 49 Ohio St.3d 165; *Lockhart v. American Reserve Ins. Co.* (1981), 2 Ohio App. 3d 99 (Civ. R. 59). Under the same rationale, Civ. R. 9(B) cannot be said to apply in arbitration claims either.

Courts in other states have similarly held that procedural and evidentiary rules do not apply in arbitration. For instance, a Florida court held that a claimant's failure to demand punitive damages in an arbitration "complaint" did not prevent the arbitrators from awarding such damages, even though they would have had to be demanded specifically in a court action.

Kintzele v. J.B. & Sons, Inc. (Fla.App. 1995), 659 So.2d 130, 132-33. In California, the courts have held that the Code of Civil Procedure (which includes the procedural rules of court) does not apply in arbitration except in very limited and expressly stated instances. *Workman v. Superior Court* (1986), 176 Cal.App.3d 493, 498, 222 Cal.Rptr. 69, 72-73. A Pennsylvania court also vacated the dismissal of an arbitration claim when the claimant failed to appear at hearing, since the state rule relied upon by the arbitrators applied to "trial," not to arbitration. *Pisano v. Southeastern Pa. Transp. Auth.* (Pa.Com. 1996), 673 A.2d 442, 443. The federal courts have also held that the Federal Rules of Civil Procedure do not apply to arbitration claims. *Champ v. Siegel Trading Co., Inc.* (7th Cir. 1995), 55 F.3d 269, 275-77; *Government of United Kingdom v. Boeing Co.* (2d Cir. 1993), 998 F.2d 68, 73; *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.* (S.D.N.Y. 1957), 20 F.R.D. 359, 361. This should come as no surprise; the Federal Rules of Civil Procedure, like their Ohio counterparts, are expressly limited to court actions. Compare Fed.R.Civ.P. 1 and Civ. R. 1(A).[4]

Given the limited application of the Civil Rules, as well as the idea that arbitration should be simpler than court, arbitrators need not follow the procedural "niceties" of court. See, e.g., *Burton v. Bush* (4th Cir. 1980) 614 F.2d 389, 390. Arbitration thus operates without the rigid constraints of procedural rules of court. *Page Internat. Ltd. v. Adam Maritime Corp.* (S.D.N.Y. 1999), 53 F.Supp.2d 591; *Congreso de Uniones Industriales de Puerto Rico v. Bacardi Corp.* (D.P.R. 1997), 961 F.Supp.2d 338; *Areca, Inc. v. Oppenheimer & Co.* (S.D.N.Y. 1998), 960 F.Supp.2d 52; *Mantle v. Upper Deck Co.* (N.D.Tex. 1997), 956 F.2d 719. The Court of Appeals,

[4] The federal courts came to that conclusion in the same manner as the *Hutchinson* court did with respect to Ohio's Civil Rules: although court rules may apply to judicial proceedings *regarding* arbitration, they do *not* apply to the arbitration proceedings themselves. *Champ,* 55 F.3d at 276 (construing Fed.R.Civ.P. 81(a)(3)); see also *Gerl Constr. Co. v. Medina Co. Bd. of Comm'rs* (1985), 24 Ohio App.3d 59, 66 (Civil Rules apply to court proceedings concerning arbitration).

however, ignored that policy. Its holding places Ohio distinctly out of step with national arbitration policy and practice, and portends a procedural nightmare for parties in arbitration.

Court rules simply do not apply to arbitration claims, and for good reason. The parties have not agreed to such rules, and arbitrators are ill-equipped to understand or enforce them. Requiring arbitration claimants to follow Civ. R. 9(B) in pleading fraud is thus without foundation and does violence to the basic principles of arbitration.

2. <u>The PSLRA is inapposite in the context of arbitration</u>.

To the extent that the decisions of the lower courts and the arbitration panel were influenced by consideration of the PSLRA, such consideration was erroneous because the provisions of the PSLRA apply only to court proceedings.[5]

The pleading requirements of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995), are found in 15 U.S.C. § 78u-4, which states in part:

> In any private action arising under this chapter in which the plaintiff alleges that the defendant -
>
> (A) made an untrue statement of a material fact; or
> (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;
>
> the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

[5] Although the Court of Appeals did not directly cite the PSLRA in its opinion, the court noted that federal securities claims are subject to heightened pleading requirements. Court of Appeals Opinion, slip op. at ¶ 20 n. 1. Those requirements, of course, are imposed by the PSLRA. Because the arbitrators and the lower courts did give considerable weight to the PSLRA in reaching their decisions, and because incorporating the PSLRA into arbitration proceedings would bring such momentous and adverse consequences upon the process, PIABA submits that it would be suitable for the Court to address the issue in more depth here.

15 U.S.C. § 78u-4(b)(1). The statute, by its terms, pertains to a "private *action*" involving a "*plaintiff*" and a "*defendant,*" and imposes particular pleading requirements for a "*complaint.*" (Emphasis added.) Those terms are the province of court actions, not arbitration. See Fed.R.Civ.P. 2 and Civ. R. 2 (both referring to "one form of *action*"). Conversely, arbitration adjudicates "claims" that are brought by a "claimant" against a "respondent," through the filing of a "Statement of Claim." NASD Rule 10314; NYSE Rule 612.[6] Congress' choice of terms, therefore, demonstrates that the PSLRA's pleading requirements are limited to actions in *court.*

For an arbitration panel or a court to rely on the PSLRA in this manner is, as far as *amicus* can determine, unprecedented. Although the PSLRA has been in force since 1995, there appears to be no published case in which a court has addressed its applicability to arbitration. This silence impels the conclusion that the PSLRA's inapplicability to arbitration is simply too axiomatic a principle to deny. There is nothing in the legislative history or case law of the PSLRA to indicate that the act's pleading standards apply anywhere but in federal court.

In fact, the congressional debate on the PSLRA shows that the act is limited to *court* actions. The proponent of the act referred to "class action *lawsuits*," "litigation," and "complaints," and stated that the act "gives *judges* the tools they need to dismiss frivolous cases[.]" Remarks of Rep. Bliley, House Conf. Report on H.R. No. 1058 (PSLRA), 104th Cong. (Dec. 6, 1995), 104 Cong. Rec. H14039 (emphasis added). These are court-related references that are foreign to the common parlance of arbitration practice. Given the language used by

[6] Although the Court of Appeals used the appellations found in Civ. R. 9(B) and the PSLRA in describing Dr. Reinglass and his claim against Morgan Stanley, see Court of Appeals slip op. at ¶¶ 17-21 and n. 1 (referring to "plaintiff," "defendant," and "complaint"), the court also used the term "claimant" instead of "plaintiff" when referring to another case concerning the dismissal of an arbitration claim. *Id*. at ¶ 17, citing *Prudential Securities, Inc. v. Dalton* (N.D.Okl. 1996), 929 F.Supp. 1411. This is more than a matter of semantics; the choice of words demonstrates that *arbitration is different from court*.

Congress, Ohio courts (and arbitrators who adjudicate claims in this state) cannot be allowed to read into the PSLRA a congressional intent for the act to apply to arbitration, when the language of the statute – not to mention the weight of common sense – preclude such an interpretation.[7]

The PSLRA cannot be considered in the context of arbitration. To do so would establish a dangerous practice with nationwide implications. This Court should foreclose any trend in that direction by accepting jurisdiction and reversing the decision of the Court of Appeals.

D. ***Proposition of Law No. 2:***

> **Arbitrators derive their powers from the agreement of the parties and the procedural rules to which the parties have agreed to adhere. Absent the existence of analogous provisions in the arbitration agreement or in the rules by which the parties have agreed to be governed, the dismissal of an arbitration claim for failure to state claims with the specificity required by rules and statutes applicable to actions in court constitutes a ground for vacatur of the award under R.C. 2711.10(C) and (D).**

An arbitration award must be vacated if "[t]he arbitrators were guilty of… misbehavior by which the rights of any party have been prejudiced," R.C. § 2711.10(C), or if "[t]he arbitrators exceeded their powers," R.C. § 2711.10(D). The dismissal of a claim for the perceived failure to state claims with the specificity required in court, but without any basis in the arbitration rules, falls within both provisions and must be vacated.

An award must be vacated if arbitrator misconduct renders the award "unjust, inequitable, or unconscionable." *Goodyear Tire*, 42 Ohio St. 2d at 522. Misbehavior does not have to rise to the level of fraud or corruption; misbehavior "born of indiscretion" will suffice. *Weinberg v.*

[7] Surely the Court is aware that federal jurisprudence is awash with decisions in which learned jurists, including those on the nation's highest bench, have grappled with the pleading specificity required by the PSLRA. For a claimant's arbitration claim to be subjected to such arcane and often conflicting standards, applied by arbitrators who have been given at most a few *hours* of legal training, hardly satisfies the law's requirement that arbitration proceedings be fundamentally fair.

Silber (N.D.Tex. 2001), 140 F.Supp.2d 712, 719. This ground for vacatur "is frequently applied when the arbitrator has run afoul of his or her own rules in conducting the arbitration." *Id.*

The "excess of power" ground, R.C. § 2711.10(D), is similar. The limits of an arbitrator's authority are found in the agreement between the parties; the award must draw its essence from that agreement. *Fostoria v. Ohio Patrolmen's Benevolent Assn.,* 106 Ohio St.3d 194, 2005-Ohio-4558, ¶ 11; *Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Assn., Local 11* (1991), 59 Ohio St.3d 177. In NASD arbitration, the parties' Uniform Submission Agreement states that the claim is submitted "in accordance with the… Code of Arbitration Procedure of [NASD]," and that "the arbitration will be conducted in accordance with" those provisions. See Uniform Submission Agreement. Therefore, the NASD rules form part of the arbitration agreement, *Volt Information Sciences v. Leland Stanford Jr. Univ.* (1989), 489 U.S. 468, and the arbitrators are required to follow those rules. *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995), 514 U.S. 52. An award which exceeds the arbitrator's authority under that agreement will be vacated. *State Farm v. Blevins,* 49 Ohio St.3d at 169 (vacating award of punitive damages where contract did not provide for such damages).

Under NASD rules, the arbitrators have *no authority* to dismiss a claim "on the pleadings" for the purported failure to state a claim with specificity. Every claim "shall require a hearing *unless all parties waive such hearing in writing* and request that the matter be resolved solely upon the pleadings and documentary evidence." NASD Rule 10303(a) (emphasis added). Nor are there any pleading standards; Rule 10314, entitled "Initiation of Proceedings," does not dictate any particular form. All a claimant must do is "specify the relevant facts and the remedies sought." NASD Rule 10314(a)(1). There is no requirement as to specificity, the pleading of specific facts, or how remedies shall be demanded. Nor is there any provision for a

motion attacking the pleadings. Since the NASD rules do not give such power to the arbitrators, and in fact expressly forbid them to dismiss claims without a hearing except in the most limited circumstances,[8] an arbitrator that does so is guilty of misbehavior and acts in excess of authority.

The Court of Appeals' disagreement with that principle is evinced in a short statement that "the arbitration panel was within its authority to grant a prehearing motion to dismiss based solely on the pleadings." Court of Appeals opinion, slip op. at ¶ 15. As support for that premise, the court cited *Sheldon v. Vermonty* (10th Cir. 2001), 269 F.3d 1202, and *Warren v. Tacher* (W.D. Ky. 2000), 114 F.Supp.2d 600. Those two cases, which have found their way into countless motions to dismiss filed by respondents in securities arbitrations, are wholly unsupportable and should not form the basis for Ohio law on this subject.

In *Sheldon*, the Tenth Circuit declined to vacate a dismissal on motions due to Sheldon's failure to state a claim. In the arbitration, Sheldon had brought his own motion for summary judgment and had thus given the arbitrators permission to render a decision based on the parties' briefs and oral arguments. *Sheldon,* 269 F.3d at 1205. Based on that procedural history, the court found that Sheldon received "a fundamentally fair arbitration proceeding in that he was provided with the opportunity to fully brief and argue the motions to dismiss." *Id*. at 1207.

Sheldon therefore stands for the unexceptional proposition that parties to an NASD arbitration can voluntarily waive their right to an evidentiary hearing in writing and authorize the arbitrators to decide the case on the pleadings and documentary evidence. See NASD Rule 10303(a). But to draw broader conclusions from it, as the Court of Appeals did, is erroneous.

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[8] Rule 10305 allows a claim to be dismissed without a hearing in three very limited instances: (a) dismissal of the claim without prejudice to refer the matter to court or another arbitral forum; (b) dismissal of a claim (or preclusion of a defense) for failure to comply with an order of the arbitrators "if lesser sanctions have proven ineffective" (usually used only in discovery disputes); and (c) dismissal "at the joint request of the parties." None of those instances remotely resemble a motion to dismiss made under Civ. R. 9(B), 12(B)(6), or other such provisions.

First, *Sheldon* cannot support an argument that NASD rules do not withhold authority to grant a motion to dismiss. As noted above, that is incorrect; Rule 10303(a) bars such dismissals *unless* all parties agree in writing to waive their right to an evidentiary hearing. Nowhere does the decision address Rule 10303, much less conclude that the rule does not mean what it says. Second, the court mistakenly relied on Rule 10214 in concluding that NASD Rules contained a "broad grant of authority" for the arbitrators to award the same relief, including dismissals with prejudice, that may be had in court. Rule 10214 is inapplicable to consumer claims, since the 10200 series of rules, "Industry and Clearing Controversies," apply only to disputes between securities industry members. See NASD Rule 10201. There is no comparable rule in the 10300 series applicable to consumer arbitrations, and *Sheldon* was simply incorrect in so holding.

Third, *Sheldon* does not support a proposition that NASD arbitration imports litigation-style heightened pleading standards from Fed.R.Civ.P. 9(b) or the PSLRA. Like Dr. Reinglass here, Sheldon pled claims under the Securities Exchange Act of 1934. Yet the court in *Sheldon* sustained the dismissal not because of an extra pleading requirement, but because the "party's claims are facially deficient *and the party therefore has no relevant or material evidence to present at an evidentiary hearing*." *Id.,* 269 F.3d at 1207 (emphasis added). That is not a Rule 9(b) or PSLRA standard, but a basic Rule 12(b)(6) failure to state a factually sustainable claim. *Conley v. Gibson* (1957), 355 U.S. 41, 45-46; *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245. As the district court wrote in *Prudential Securities,* that standard is essential for making sure the claimant receives fundamental fairness:

> Before an arbitration panel should be able to dismiss a claim for failure to state a claim upon which relief can be granted, the claim should be facially deficient. Such is not the case here for if the allegations of the claimant's complaint are taken to be true, he would be entitled to some form of relief…. Thus, to assure fundamental fairness, claimant is entitled to offer evidence relevant to his claim.

Prudential Securities, 929 F.Supp. at 1416-17. *Sheldon*, therefore, is limited to its unique procedural facts and does not support the arbitrators' award or the Court of Appeals' ruling.

In *Warren,* the district court refused to vacate an award dismissing a claim against a clearing firm without a hearing. *Warren,* 114 F.Supp.2d at 601. The claimants moved to vacate, alleging that the arbitrators refused to hear evidence material to the controversy. The district court disagreed. *Warren* at 602, citing 9 U.S.C. § 10(c). Although the *Warren* court said that there was no rule entitling the claimants to a full evidentiary hearing or prohibiting the arbitrators from granting the motion to dismiss, those again are direct misstatements of the NASD rules. The vitality of *Warren* as authority is thus also suspect.[9]

The gist of the Court of Appeals' rationale was that because Dr. Reinglass could submit a opposition to an unauthorized motion which attacked the statement of claim on purely formalistic grounds, and could argue his position to the arbitrators over the telephone, he received a fundamentally fair "hearing" on his claim and therefore cannot challenge the award. That reasoning is deficient and ignores the rules of arbitration. Contrary to what the Court of Appeals and the *Sheldon* and *Warren* courts surmised, the NASD rules do not authorize – and expressly *prohibit* – the dismissal of an arbitration claim for failure to state a claim in a sufficient manner. It was thus an excess of arbitral power, as well as arbitral misconduct, for the arbitrators to dismiss this claim. The award should have been vacated.

[9] *Amicus* is aware of no published decision (other than *Sheldon,* which cited *Warren*) in which either case has ever been cited for the premise upon which the Court of Appeals based its decision: that arbitrators can supposedly dismiss claims due to deficiencies of form in a statement of claim. The apparent refusal of other courts to follow *Sheldon* or *Warren* should give this Court serious doubts about allowing those cases to become precedent in Ohio.

CONCLUSION

To allow the decision of the Court of Appeals to go unanswered would not only be a corruption of Ohio law and the NASD rules, but would render thousands of arbitration claims across the country vulnerable to an instant death through a procedural vehicle invented of whole cloth. Dr. Reinglass, as well as thousands of other consumers who depend upon arbitration for the resolution of disputes, did not bargain for the possibility that their claims could be dismissed because they might have been pled less than perfectly. In fact, they were assured the direct opposite. The award against Dr. Reinglass was an excess of arbitral authority and was the product of arbitrator misconduct, and should have been vacated.

For the reasons expressed herein, *amicus curiae* Public Investors Arbitration Bar Association respectfully urges this Court to exercise jurisdiction over this matter, and ultimately to reverse the decision of the Court of Appeals.

Respectfully submitted this 23rd day of May, 2006.

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CERTIFICATE OF SERVICE

I certify that on May 23, 2006, I served a copy of the foregoing Memorandum of *Amicus Curiae* Public Investors Arbitration Bar Association in Support of Jurisdiction by ordinary U.S. Mail, postage prepaid, upon the following:

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