COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ELLEN RUBEY, Trustee of The W. Harold and Dorothy L. Simon Trust Dated January 17 1984; and DOROTHY SIMONS individually Plaintiffs/Appellees vs. FOX & COMPANY INVESTMENTS, INC., an Arizona corporation, STEVE ALOI and JANE DOE ALOI; MARY J. WADE and JOHN DOE WADE, Defendants/Appellants.	No. 1 CA-CV 09-0448 Maricopa County Superior Court Case No. 2007-07065

AMICUS CURIAE BRIEF OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS/APPELLEES

SCHNEIDER WALLACE
COTTRELL BRAYTON KONECKY LLP
Garrett W. Wotkyns (025887)
7702 E. Doubletree Ranch Road, Suite 300
Scottsdale, Arizona 85258
Telephone: (480) 607-4368
Facsimile: (480) 607-4366
gwotkyns@schneiderwallace.com

Of counsel:
Alin L. Rosca, Esq.
Attorney at law
John S. Chapman & Associates, LLC
700 West St. Clair Ave. Ste. 300
Cleveland, OH 44113
Telephone: 216-241-8172
Facsimile: 216-241-8175

Of counsel:
Birgitta Siegel, Esq.
P.O. Box 6543
Syracuse, New York 13217
Telephone: 315-443-4582

Kirk Reasonover, Esq.
Reasonover & Olinde, LLC
400 Poydras Street, Suite 1980
New Orleans, LA 70130
Telephone: 504-587-1440
Facsimile: 504-587-1577

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IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE AND AUTHORITY TO FILE THIS BRIEF

I. *AMICUS CURIAE,* PIABA, Advances the Rights of Public Investors.

The Public Investors Bar Association ("PIABA") is a national, non-profit, voluntary, public bar association established in 1990, with a membership of approximately 450 attorneys, including members of law school clinics, located in 44 states and Puerto Rico. In order to qualify for membership, attorneys must devote a significant portion of their practice to representing public investors in securities arbitrations. Collectively, PIABA members have represented tens of thousands of investors in securities arbitrations around the country. PIABA members include former securities regulators, directors of securities clinics, and numerous practitioners who have decades of experience in representing investors in securities disputes.

PIABA advances the rights of public investors by publishing books and articles on securities law, conducting regular CLE programs, providing comment letters to the SEC, FINRA (f/k/a the "NASD") in connection with the rule-making processes of those entities, and by submitting briefs *amicus curiae.* PIABA's mission is

> to promote the interests of the public investor in securities and commodities arbitration by protecting public investors from abuses in the arbitration process ... making securities and commodities arbitration as just and

> fair as systematically possible; and creating a level playing field for the public investor in securities and commodities arbitration.[1]

PIABA has identified this case as having a potentially important impact because of the precedent that it will create for the many investors who are seeking recoveries from defunct brokerage firms and their affiliated or formerly representatives. The procedural hurdles that stand in the way of such investors impose important, practical limitations on the ability to obtain representation and the financial burdens and delays associated with the proceedings. PIABA seeks to ensure that investor choice is preserved, as provided by the applicable rules of the arbitration forum at issue.

Under those rules, once a firm withdraws from the securities industry, investors have the choice to either pursue arbitration or proceed in court. The rule of law advocated by the Fox Appellants[2] would permit the employees of a brokerage firm that has withdrawn from the industry to compel arbitration, even though the firm could not, itself, do so. Such a rule would impose an obligation on customers to arbitrate against individual representatives who are not expressly

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[1] "About PIABA," available at PIABA's website, https://piaba.org/about-piaba.

[2] The Marshall Appellants do not advocate anything separately, having merely adopted the Fox Appellants' Opening Brief by attaching the intirety of the same as their "Opening Brief" to the cover pages filed on January 12, 2010 and mail-served on January 13, 2010. Marshall is no longer registered with FINRA and has not been for sometime. For the impact of this non-registration, *see* footnote 6, supra, regarding Appellant Aloi and Wade's non-registered status with FINRA.

named in the arbitration agreement when the named party to the actual arbitration agreement (the brokerage firm) could not do so.

The result advocated by the Fox Appellants would undermine the effectiveness of the private right of action under state securities laws, impose unreasonable expense to investors, and require investors to arbitrate some of their claims to conclusion as to some of the responsible parties, while other claims proceed against other responsible parties in a completely separate arbitration venue and/or in court. The rights of investors could be further be impaired if the brokerage firm asks that the case be stayed pending the outcome of the arbitration against the representatives. In light of those concerns, PIABA respectfully requests leave to appear as *amicus curiae,* and offers the following brief.

2. Mandatory Arbitration Clauses In The Securities Industry Restrict Investors' Rights Of Redress From Broker-Dealers.

The United States Supreme Court between 1987 and 1989 reversed longstanding precedent holding that contracts providing for the arbitration of federal securities claims were void.[3] Since that time, virtually every broker-dealer in America has included in its customer agreements broad mandatory arbitration clauses calling for arbitration specifically before one or more of the various securities exchanges or self-regulatory organizations ("SRO's"). Except in the rare

[3] *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917 (1989).

circumstance, American investors no longer have the right to a trial of claims they may have against a stockbroker or brokerage firm. All such claims must be submitted to the arbitration forum established and operated by the Financial Institution Regulatory Authority (FINRA).[4]

Notwithstanding the judicial and statutory policy favoring enforcement of arbitration agreements, before a party can be compelled to arbitrate, there must exist a valid agreement to arbitrate the dispute at issue. An essential starting point in determining whether such an agreement has been formed is the Federal Arbitration Act, 9 U.S.C. § 2, which provides, in pertinent part, that such an agreement may not be enforceable if grounds exist at law or in equity for its revocation.

In deciding the threshold question of whether the parties have formed an agreement requiring arbitration in the first instance, state law principles governing formation of contracts must be applied. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). In *First Options*, the Supreme Court clarified that, notwithstanding a general presumption favoring

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[4] FINRA was created in July 2007 through the consolidation of the National Association of Securities Dealers ("NASD") and the member regulation, enforcement and arbitration functions of the New York Stock Exchange. It is now the only self regulatory organization ("SRO") that maintains arbitration facilities for securities disputes.

arbitrability (generally as to scope of a dispute), such presumption simply does not arise when there is a question as to whether the parties agreed to arbitrate at all.

Absent "clear and unmistakable" evidence that the parties intended that arbitrators would decide whether an arbitration agreement was made, the presumption favoring arbitration does not apply to the threshold issue of whether an agreement to arbitrate exists. *Id. See also In Re Morgan Stanley*, 293 S.W.3d 182 (Tex. 2009); *Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003).

3. Appellants Advocate a Position That Will Impair Investor Protection.

The present case concerns efforts of a small brokerage firm whose FINRA membership has been terminated to delay the final trial of claims brought by elderly victims, one of whom was on his deathbed when he allegedly agreed to arbitrate. Appellants/Defendants strive desperately to force Appellees to arbitrate their claims under the alleged agreement, notwithstanding FINRA Rules and applicable law that clearly bar the defunct brokerage firm, Fox & Company Investments, Inc. ("Fox"), from doing so. Now that FINRA has denied the Fox Appellants' attempt to arbitrate in their Dispute Resolution forum, they are resorting to creative but ultimately meritless arguments to prevent prompt resolution of this case:

- they urge that Appellees' claims should be heard in other arbitration *fora* other than FINRA, notwithstanding the inability of such *fora* to hear these

claims, and the fact that Appellants elected FINRA as a forum; and

- they argue that Fox's formerly "associated persons" have an independent right to force FINRA arbitration with Appellees, notwithstanding that Fox's formerly "associated persons" have no agreement to arbitrate with Appellees, and Fox is no longer a FINRA member.

Under case law and the longstanding law of agency, the brokerage firm's former employees ("associated persons") -- who have no separate contract to arbitrate with these Appellees, but who instead seek to invoke the principal's alleged rights -- are precluded from compelling the principal's customers to arbitrate their claims against Appellants. FINRA Rules, as approved by the SEC, recognize that victims such as Appellees in the present case must be afforded the choice of whether to proceed in court or to submit to arbitration. As a matter of law, none of the Appellants can force arbitration under the circumstances presented in this case.

PIABA asks for leave to provide this Court with additional perspectives from the viewpoint of attorneys and their clients who operate within the FINRA arbitration system and who have no personal stake in the immediate controversybut who may be greatly affected by the impact of the Court's ruling on the securities arbitration system nationwide.

II. ISSUES PRESENTED

1. Did the trial court properly decide that Appellant Fox, as a terminated FINRA member, and its former associated persons, who claim contract rights under the alleged arbitration agreement between Appellees and Appellant Fox, are all barred from compelling arbitration under FINRA Rule 12202?

2. Does the alleged arbitration contract constitute a forum selection for FINRA arbitration under the facts and circumstances of this case?

3. Must the trial court undertake to fashion alternative arbitration methods before an unspecified tribunal after Appellants FINRA membership has been terminated and they are no longer permitted to compel arbitration in the FINRA forum?

III. LEGAL ARGUMENT

A. Because FINRA Rule 12202 Bars Enforcement of Arbitration Agreements by Terminated Members Such As Appellant Fox, Former Associated Persons Employed by Such Firms Cannot Independently Enforce the Contract Between the Firm and Customer where the Firm, Itself, Cannot.

The arbitration agreement in question requires parties to arbitrate in a forum sponsored by one of any SRO that the claimant may elect. But since the creation of FINRA in 2007, FINRA is the only SRO arbitration forum available. Appellants cannot compel Appellees to submit to FINRA arbitration, and FINRA Rule 12202 bars the Fox Appellants from enforcing arbitration in that forum, or, as

shown below, in any forum. The Fox associated persons (Marshall, Aloi and Wade) are also prohibited from availing themselves of FINRA arbitration for disputes involving their affiliation with Fox.

FINRA Rule 12202 provides that a claim against a FINRA member whose membership is terminated "is ineligible for arbitration under the Code unless the customer agrees in writing to arbitrate after the claim arises . . ." Plaintiffs/Appellees have not consented to arbitration in FINRA's arbitration forum, or anywhere else for that matter.

Appellant Fox acknowledges on appeal that it cannot enforce the alleged agreement in light of the bar imposed by FINRA Rule 12202. (*See* Appellants' Opening Brief, at 17, and n. 19 therein.) Thus, there is no dispute that the FINRA forum is unavailable to Appellant Fox.[5]

The individual Appellants, Aloi, Wade, and Donald Marshall, claim that despite their role as Fox's agents, and despite the undisputed fact that they were not parties to any alleged contract (thereby lacking independent standing to enforce the contract), they are not precluded from compelling FINRA arbitration under the

[5] Appellant Fox cannot compel arbitration anywhere. Its argument that the rules of FINRA can or should be applied by some other arbitral body fails. Not only was the designation of SRO arbitration integral to the NFS/Fox contracts, but the rules of the only SRO still in existence– FINRA – would require incorporation of FINRA's Code of Arbitration Procedure. The Code in turn includes the necessary and equitable bar of FINRA Rule 12202.

same contract and rules that preclude their principal from compelling arbitration. Their argument fails as a matter of law.

Marshall lost or withdrew from his registration with FINRA some time ago. In addition, around the time Appellants filed their Opening Brief, Appellant Aloi lost or withdrew from his registration with FINRA. Appellant Wade has also recently ceased to be registered with FINRA. Verification that Marshall, Aloi and Wade are no longer associated or registered with FINRA may be found on FINRA's official web page, which is provided for this and other public disclosure purposes:[6] http://brokercheck.finra.org/Support/ReportViewer.aspx. *See FINRA Notice 08-79*, n.2, available on Westlaw at *2008 WL 63215,* (describing FINRA's broker check resource, available online at www.finra.org/Investors/ ToolsCalculators/BrokerCheck/index.htm, as providing a "free online tool to help investors check the background of current and former FINRA-registered securities firms and brokers"). The individual Appellants based their own arguments on their claimed status as current associated persons, working for another FINRA brokerage firm that is a stranger to these proceedings. Yet, according to FINRA's

[6] Interestingly, Appellants Wade and Fox have neglected to inform or notify this Court of the fact of their termination and/or withdrawal from their registration with FINRA in any of their Briefs as it impacts their arguments for FINRA arbitration as to them on appeal. This Court may take judicial notice of facts which are readily ascertainable and capable of independent demonstration. *See State v. Rojers*, 216 Ariz. 555, 560, 169 P.3d 651 (App. 2007) (court took judicial notice of online police procedures and attendant order), Ariz. R. Evid. 201(b), (c) and (f).

records, Marshall was terminated long time ago, and Aloi had been terminated as of September 2, 2009, when FINRA updated its records. Aloi's Opening Brief was filed on about September 14, 2009. Wade was terminated more recently, but before the Reply Brief; however, this fact was still omitted from the Ex Appellants' Reply Brief filed January 15, 2010. Appellants' continued reliance on their former status with FINRA is unavailing.

Appellants' arguments in this case also fail regardless of whether the individuals maintained current FINRA registration or terminated their registration. Upon examination, Appellants' arguments are illogical, circular and unsupported by applicable law. Appellants claim that Rule 12202's omission of the words "associated persons" from its bar of compulsory arbitration means that FINRA intended that associated persons of inactive members may still compel a member's customer to arbitrate claims involving events at the terminated member. Appellants' argument is mistaken and ignores the regulatory framework and purpose behind the enactment of Rule 12202 and its predecessor.

Rule 12202 is substantially similar to its predecessor, NASD Rule 10301, which was enacted to

> prohibit a member firm whose membership has been terminated, suspended, canceled, or revoked, or that has been expelled from the NASD, or that is otherwise defunct, from enforcing a predispute arbitration agreement against a customer in the NASD forum.

NASD Notice to Members 01-29 ("NTM 01-29").

NASD took action to allow customers to sue former NASD members in court after the Government Accounting Office ("GAO") reported that

> a significant percentage of the awards favorable to customers that were issued in 1998 were unpaid. The majority of unpaid awards involved arbitration cases against firms that the NASD had terminated from membership for serious violations of the federal securities laws and NASD rules, or that had filed for bankruptcy.

SEC Rel. No. 34-43998, 66 Fed. Reg. 13362-63 (March 5, 2001) ("Purpose").[7] The GAO report stated that, despite NASD's efforts to ensure payment of arbitration awards, "customers in arbitration cases involving terminated or suspended members face a significantly higher risk of non-payment than in cases involving active members." *Id.* In response to the GAO's findings, NASD's position was that

> even customers who have signed a predispute arbitration agreement should be able to seek relief in court, where they could more directly avail themselves of any judicial remedies available under state law, including those that might prevent the dissipation of assets. Due to the time required for the appointment of arbitrators, and the delay inherent in the process of converting an arbitration award into an enforceable judgment, the ability to go directly to court to seek relief may save customers precious time in cases in which the dissipation of assets is a threat.

[7] Available at http://www.gpo.gov/fdsys/pkg/FR-2001-03-05/html/01-5250.htm.

Id. The Securities and Exchange Commission emphasized that the purpose of the NASD Rule 10301 changes was to "protect investors and the general public by giving customers greater flexibility to seek remedies against [inactive] firms." *Id.* at 13364.

Appellants suggest that the Rule referring disputes to court does not apply to "associated persons", because FINRA Rule 12202 and its predecessor, NASD Rule 10301, as well as NTM 01-29 and SEC Rel. 34-43998, consistently refer to disputes between customers and [inactive] member firms and omit mention of "associated persons." However, the omission of "associated persons" does not reflect intent to permit "associated persons" to enforce arbitration clauses of a terminated member who in itself is barred from such enforcement. Rather, the Rule simply reflects that typical, predispute arbitration clauses like the one in this case are between customers and member firms, not between customers and individual associated persons of the firms. *See, e.g.* FINRA Rule 3110(f)(3)(A) ("A member shall provide a customer with a copy of any predispute arbitration clause or customer agreement executed between the customer and the member . . ."), NTM 05-32 ("NASD Rule 3110(f) governs a member's use of predispute arbitration agreements with customers"). Thus, any rights or duties of associated persons regarding arbitration are created derivatively through the arbitration agreements between customers and FINRA members. (Associated persons must

register with FINRA, but they are "associated" with a member; they are not members.)

Appellants offer an incomplete excerpt from a regulatory notice issued by FINRA's predecessor, the NASD (specifically NTM 01-29), to assert that associated persons may still compel customers to arbitrate disputes. The regulation, as promulgated in the NASD's "Notice to Members," states in pertinent part as follows:

> Because the rule does not apply to claims against associated persons, such claims remain **eligible** for arbitration **pursuant to Rule 10301(a)**. However, before serving a customer claim against an associated person, NASD Dispute Resolution will inform the customer if the associated person's registration is terminated, revoked, or suspended.

NTM 01-29 ("Description of Amendment") (emphasis added). It is clear that NTM 01-29 provides that (1) claims against associated persons are "eligible" for arbitration, not that the associated persons of defunct broker-dealers may compel arbitration, and that (2) the "election" to arbitrate belongs to the customer, not the associated person. NASD Rule 10301(a), to which reference is made in NTM 01-29, provided that

> Any dispute, claim, or controversy . . . between a customer and a member and/or associated person . . . shall be arbitrated under this Code, as provided ***by any duly executed and enforceable written agreement or upon the demand of the customer.***

NASD Rule 10301(a) (emphasis added). Since the "duly executed and enforceable written agreement" is concluded between the customer and the member, not an associated party, claims between associated persons and customers can be arbitrated only "upon the demand of the customer." This is the "election" referred to in NTM 01-29, and this is why NTM 01-29 provides that the customer must be informed by NASD Dispute Resolution (or, now, FINRA) as to whether the associated person's registration is terminated or not. The clear purpose of requiring such a notice is to ensure that the customer may make the "election" to pursue the associated person in arbitration in Court.

Courts that have discussed FINRA's arbitration rules have consistently applied this interpretation. *See e.g. Multi-Financial Secs., Corp. v. King*, 386 F.3d 1364, 1369-70 (11th Cir. 2004) (stating that the right to arbitration under Rule 10301(a) belongs primarily to the customer). Particularly instructive is *Medina v. Holguin*, 145 N.M. 303, 307 (N.M. Ct. App. 2008), wherein the Court explained that:

> Upon termination of a membership, NASD Rules cease to apply to the former member. It follows, then, that an associated person, being dependent for its status on and derivative of the member's, should likewise lose NASD privileges upon termination of the qualifying membership. It makes little sense to prohibit nonmember firms from enforcing arbitration while the associated persons of such firms remain free to do so. We reject this interpretation.

Id. See also Elston v. Toma, 2004 U.S. Dist. LEXIS 8760 (D. Or. App. 15, 2004) ("as reflected in the legislative history, Rule 10301(a) is a substantive rule designed to protect a plaintiff under circumstances such as those present in this case. . . . The NASD promulgated Rule 10301(a) specifically to provide customers . . . with the opportunity to opt out of arbitration agreements entered into with subsequently terminated NASD members"). FINRA Rule 12202, and the former NASD Rule 10301, provide important terms that are incorporated into and become an integral part of arbitration agreements. *Galey v. World Mktg. Alliance*, 2006 U.S. Dist. LEXIS 40784 (N.D. Miss. 2006) (". . . NASD Rule 10301 serves important public policy objectives by expressly retaining the right to jury trial in cases where a former NASD member has left the organization, and thus places itself outside the organization's jurisdiction"); *Provencio v. WMA Securities, Inc.*, 125 Cal. App. 4th 1028, 1032 (Cal. App. 2d Dist. 2005) (when "[broker-dealer] becomes defunct or is no longer an NASD member," . . . "arbitration before the NASD is allowed, but only at the option of [the customers]. . . Strictly speaking, therefore, the issue is not whether NASD is available as a forum: it is available if [the customers] choose to make it available").

Thus, while FINRA Rule 12202 prohibits inactive members and their "associated persons" from compelling a customer to arbitrate disputes, it allows a customer to "elect" to arbitrate claims against associated persons who have a valid

registration with a new, active member. This interpretation is consistent both with the FINRA regulatory framework as well as with the purpose behind the enactment of Rule 12202: to protect customers, ensure collectability, and avoid the "dissipation of assets." Neither Fox nor its former "associated persons" may compel arbitration in this case.

B. The Alleged Arbitration Agreement Limits Arbitration to FINRA or to NYSE *fora*, and the NYSE No Longer Sponsors an Arbitration Forum.

By designating FINRA or NYSE[8] as the arbitration forum, Appellant Fox followed the usual industry practice of mandating arbitration before an SRO. More precisely, the clearing broker, NFS (*see* Appellants Opening Brief, at 3, n.3) drafted these contracts[9] and required that arbitration be conducted before NASD/FINRA, the NYSE, or a self regulatory body of which NFS might be a member. The designation of FINRA arbitration constitutes a forum selection which

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[8] One of the NFS contracts provides also that arbitration might be brought in another SRO or exchange of "which the entity against whom the claim is made is a member"). *See* Appellants' Opening Brief, Exhibit 'D', at 11. Appellants do not deny the fact that they have not been members of any exchange or other SRO and this alternative would never have been available to them. Currently, the only applicable SRO is FINRA. The NYSE no longer provides arbitration services. In any event, Appellants were never able to enforce arbitration anywhere but before FINRA. The identification of other SROs or exchanges, for the benefit of NFS, however, underscores the integral intent of NFS that arbitration be held in an industry regulated forum, such as FINRA.

[9] The various account agreements appear as forms of NFS, with provision for the introducing broker, Appellant Fox, to be included. *See* Appellants' Opening Brief, Exhibit 'C', Margin Account Agreement, at 3, 4 and Exhibit 'D', at 6, 11.

was integral to the NFS contracts. Under all the circumstances of this case, Appellants have no legitimate basis for seeking arbitration elsewhere.

Courts across the country have stated that, where a broker-dealer and its customers have agreed that all controversies between them shall be arbitrated pursuant to the rules of FINRA/NASD, that agreement represents a forum selection clause. *See, e.g. Luckie v. Smith Barney, Harris Upham & Co.*, 999 F.2d 509, 514 (11th Cir. 1993) (stating that when the parties have agreed to arbitration in accordance with the rules of either the NYSE, AMEX, or NASD, they "have agreed to submit disputes to arbitration before the three SROs -- the NYSE, AMEX and NASD. They have not agreed to submit disputes to arbitration before the AAA[]"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis,* 903 F.2d 109, 111-12 (2d Cir. 1990); *PaineWebber, Inc. v. Rutherford*, 903 F.2d 106, 108 (2d Cir. 1990) (stating that when an arbitration agreement calls for arbitration "***in accordance with the rules, then obtaining, of either the Arbitration Committee of the New York Stock Exchange, American Stock Exchange, National Association of Securities Dealers or, where appropriate, Chicago Board Options Exchange or Commodity Futures Trading Commission," such language "should be construed simply as an agreement to arbitrate before one of the [respective SRO's], rather than the AAA***" and noting that the phrase 'in accordance with the

rules' [of an SRO] was effectively the same as saying arbitration shall occur only before an SRO) (emphasis added).

The question of forum selection has been heavily litigated over the years when securities firms have opposed customers' efforts to arbitrate outside the regimes of the various SRO arbitration programs, such as Fox now strives to do. For example, during the 1980s, customers arguing for the "Amex Window" tried to elect arbitrations before the American Arbitration Association, a forum that was available at one time under the Constitution of the American Stock Exchange. *See, generally*, "*Securities Arbitration Procedure Manual*, Fifth Edition, § 7-5, by David E. Robbins, LexisNexis (2009). Customer efforts were almost routinely opposed by securities firms, with arguments that the SRO facilities were exclusive, essential to arbitration of securities disputes and that the contract language must be read narrowly. Thus, in *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 861 (4th Cir. 2000), the court found that the arbitration contract constituted forum selection for an SRO and rejected arguments for application of the AMEX window,[10] reasoning that:

> [t]he agreement specifies that arbitration may take place according

[10] The parties arbitration agreement provided that "any controversy arising out of or relating to any of my accounts . . . shall be settled by arbitration, in accordance with the rules then in effect of the NASD, or the Boards of Directors of the NYSE or the American Stock Exchange, Inc.(AMEX)." Critical Health argued that Article VIII, Section 2(c) of the AMEX was a 'rule' of AMEX and thus AAA arbitration was permissible.

> to the rules of three SROs. It does not mention any other organization and does not specifically provide for arbitration before the AAA. Under the principle of *expressio unius est exclusio alterius*, arbitration is limited to the three prescribed *fora*").

Id.; See also Galey v. World Mktg. Alliance, 510 F.3d 529, 532 (5th Cir. 2007) ("absent state law to the contrary, the language of the arbitration agreement at issue, requiring 'arbitration in accordance with the rules then in effect of the National Association of Securities Dealers, Inc. (NASD),' constitutes a forum selection"); *Roney & Co. v. Goren*, 875 F.2d 1218, 1219-21 (6th Cir. 1989) (interpreting an agreement providing for "arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the [NYSE]," as a forum selection clause meaning that only the NYSE could arbitrate a dispute between the parties); *Luckie v. Smith Barney, Harris Upham & Co.*, 999 F.2d 509, 514 (11th Cir. 1993) (stating that when the parties have agreed to arbitration in accordance with the rules of either the NYSE, AMEX, or NASD, they "have agreed to submit disputes to arbitration before the three SROs -- the NYSE, AMEX and NASD. They have not agreed to submit disputes to arbitration before the AAA[]"). If an arbitration agreement designates a particular arbitral forum and arbitration in that forum is not possible, courts may not compel a party to arbitrate in an alternate forum by appointing substitute arbitrators under § 5 of the FAA). *In re Salomon Inc. Shareholders Derivative Litig.),* 68 F.3d 554, 558 (2d Cir. 1995).

The forum selection of FINRA, or other SRO then existing, was integral to the NFS-Fox contracts. The landmark case of *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220.107 S. Ct. 2332 (1987), upholding the enforceability of mandatory arbitration clauses for claims brought under Section 10(b)(5) of the Securities Exchange Act of 1934, highlighted the integral nature of the SRO arbitration forum in securities cases. Shearson argued successfully that SRO arbitration provides unique safeguards, rendering the arbitration process suitable for customer disputes. For example, pursuant to its authority under the Securities Exchange Act of 1934, the Securities and Exchange Commission ("SEC") specifically considers and approves certain arbitration procedures of the NYSE, NASD, and other exchanges. 15 U.S.C. § 78s(b)(1)(2004).

Moreover, under principles of federal preemption, courts cannot order arbitration before other arbitral bodies that might attempt to conduct an arbitration in accordance with FINRA rules. In *Credit Suisse First Boston Corp., v. Grunwald,* 400 F.3d 1119 (9th Cir. 2005), the court rejected an employee's arguments that arbitration in accordance with NASD procedure could be accommodated through another forum, specifically the AAA. The Ninth Circuit relied on the Supremacy Clause: "[i]n sum, we conclude that SRO rules that have been approved by the Commission pursuant to 15 U.S.C. § 78s(b)(2)[18] preempt state law when the two are in conflict, either directly or because the state law

stands as an obstacle to the accomplishment of the objectives of Congress. Specifically, we hold that the NASD arbitration procedures in dispute here have preemptive force over conflicting state law."

In the present appeal, the purported agreement would call for disputes to be submitted to arbitration in accordance with the rules "then prevailing of FINRA or the NYSE". In accordance with the overwhelming weight of the decisions on this issue, such language operates as a forum selection clause. The question as to whether the brokerage firm that drafted the contract (NFS) and introducing firm Fox considered this forum selection to be integral to an understanding of the arbitration clause can be answered with a plain reading of the contracts. The answer to the question is 'yes' -- the drafters of the contract and Appellants deemed SRO arbitration to be crucial. The fact that Appellants forfeited their access to FINRA arbitration by their own conduct does not change that conclusion. Appellant Fox (or its "associated persons") ought not now be permitted to re-write the alleged contracts of itself or NFS to comport with recent developments.

Not only do the subject contracts select only FINRA and NYSE as the arbitration bodies, they expressly state the possibility for some disputes to be litigated in court, as provided by these SRO rules. Nowhere, however, does the contract reference any possibility of other arbitration bodies resolving disputes as provided by SRO rules or otherwise. The call for SRO arbitration appears integral,

with no thought for another arbitral forum, even though operation under the SRO rules might result in the parties litigating in court. For example, paragraphs 20(A) and (F) of the Margin Agreement each reference that a claim might in some instances be brought in court. *See* Appellants Brief, Ex. C, at 4. ¶ 20(A) states:

> All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, *except as provided by the rules of the arbitration forum in which a claim is filed.*

Id. (*emphasis added*). The same contract continues:

> The rules of some arbitration forums may impose time limits . . . In some cases, *a claim that is ineligible for arbitration may be brought in court.*

Id. at ¶ 20(F) (*emphasis added*).

While Fox concedes that it cannot compel FINRA arbitration and, therefore, will presumably not file arbitration there, the effect of this paragraph for present purposes is two-fold. First, as to Fox's contention that FINRA or NYSE arbitration was not an "integral" part of the arbitration term, this paragraph entitled Pre-Dispute Arbitration Agreement, reads otherwise. Paragraph 20(A) states, in part, that the parties might sue each other in court as "provided by the [SRO] rules." Paragraph 20(F) also mentions that certain claims, ineligible for arbitration because of time limits, might be brought in court. The drafters of this contract knew how to mention the possibility of another forum – court – and yet failed to reference possibilities of arbitration bodies besides FINRA or the NYSE. If SRO arbitration

was not, indeed, integral to Fox's understanding, and other arbitral *fora* were contemplated, the drafters could have said as much, just as they referenced the possibility of court. The failure to do so reflects the simple fact that SRO arbitration (FINRA or NYSE), and not AAA arbitration for example, was integral to the brokerage's expectations.

IV. CONCLUSION

The NASD and FINRA arbitration rules permit customers to elect to proceed in court when a brokerage firm withdraws from the industry. Courts have repeatedly held that such rules are integral to agreements to arbitrate. A failure to enforce the Arbitration Rules, by compelling the Appellee to arbitrate before some other forum, would frustrate the goal behind the Rule, and would strip the Plaintiff here of other protections afforded by arbitration through FINRA, which operates under the oversight of the SEC. For all of the foregoing reasons, the Judgment of the Maricopa County Superior Court should be affirmed. This motion is timely because briefing by the parties is still under way, and the parties only recently corrected deficiencies in the record, so as to perfect appellate jurisdiction in this Court.

Respectfully submitted,

SCHNEIDER WALLACE
COTTRELL BRAYTON KONECKY LLP
Garrett W. Wotkyns (025887)
7702 E. Doubletree Ranch Road, Suite 300
Scottsdale, Arizona 85258
Telephone: (480) 607-4368
Facsimile: (480) 607-4366
gwotkyns@schneiderwallace.com

Of counsel:

Alin L. Rosca, Esq.
Attorney at law
John S. Chapman & Associates, LLC
700 West St. Clair Ave. Ste. 300
Cleveland, OH 44113
Tel: 216-241-8172
Fax: 216-241-8175

Birgitta Siegel, Esq.
P.O. Box 6543
Syracuse, New York 13217
Tel: 315-443-4582

Kirk Reasonover, Esq.
Reasonover & Olinde, LLC
400 Poydras Street, Suite 1980
New Orleans, LA 70130
Tel: 504-587-1440
Fax: 504-587-1577

CERTIFICATE OF COMPLIANCE

Pursuant to the Arizona Rules of Civil Appellate Procedure, the undersigned certifies that the accompanying Petition complies with those rules. The Petition is double-spaced, utilizes 14-point proportionally spaced Times New Roman typeface, and contains 5,757 words.

Garrett W. Wotkyns

CERTIFICATE OF SERVICE

I hereby certify that I have transmitted a copy of the above and foregoing on this 17 day of February, 2010, by United States Mail, properly addressed and postage prepaid, to:

Kimberly A. Demarchi, Esq.
Edwin A. Barkel, Esq.
Michael J. Hammer, Esq.
40 North Central Avenue
Phoenix, AZ 85004-4429

David Brnilovich, Esq.
Garett Olexa, Esq.
Jennings Strouss & Salmon, PLC
201 East Washington, 11th Floor
Phoenix, AZ 85004-2385

LeslieAnn Haacke, Esq.
Haacke & Associates, PLLC
5712 East Desert Vista Trail
Cave Creek, AZ 85331

Garrett W. Wotkyns