IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SMITH BARNEY SHEARSON INC., Plaintiff-Appellant, vs. WARREN BOONE, INDIVIDUALLY AND AS TRUSTEE FOR WATERCOL PROFIT SHARING PLAN, DATED 1/7/80, Defendant-Appellee.	)	Case No. 93-9174
- AND -		
SMITH BARNEY SHEARSON INC., Plaintiff-Appellant, vs. SCOTT G. SHERMAN, Defendant-Appellee.	)	Case No. 94-10031

BRIEF OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION AS AMICUS CURIAE

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-AND-

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SUPPORT OF DEFENDANT-APPELLEE
WARREN BOONE

*Admitted, U.S. Court of Appeals for the 5th Circuit.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

The parties are as follows:

Smith Barney Shearson, Inc.

Warren Boone, Individually and as Trustee for Watercol Profit Sharing Plan, Dated 1/7/80

Scott G. Sherman

The Public Investors Arbitration Bar Association is appearing and submitting a brief as amicus curiae

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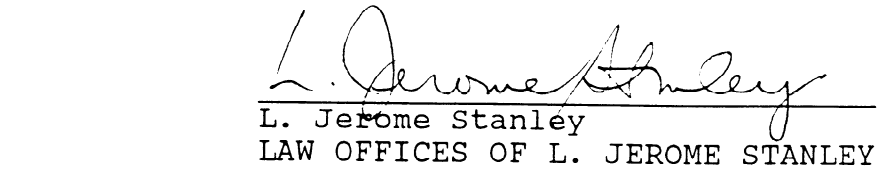

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PUBLIC INVESTORS BAR ASSOCIATION
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PRELIMINARY STATEMENT

This Brief is submitted by the Public Investors arbitration Bar Association (hereinafter referred to as ("PIABA") as amicus curiae on behalf public investors involved in arbitrating claims against securities brokerage firms such as the Appellant herein. PIABA urges this Court to affirm the December 6, 1993 Opinion and Order in the action entitled, Smith Barney Shearson Inc. v. Warren Boone, et ano., 7:93-CV-146-K (Fifth Circuit Case No. 93-9174), and specifically directs the arguments herein to the facts and circumstances of that case.

INTEREST OF THE AMICUS CURIAE

The Public Investors Arbitration Bar Association is a Texas not-for-profit corporation. PIABA has as members 222 prominent attorneys from 38 states, all of whom practice in the securities arbitration field representing public investors. PIABA members represent thousands of public investors involved in securities arbitrations around the country. The official mission of PIABA is:

> To promote the interests of the public investor in securities arbitration by:
>
> (1) protecting public investors from abuses in the arbitration process;
>
> (2) making securities arbitration just and fair; and

(3) creating a level playing field for the public investor in securities arbitration.

PIABA submits this brief out of concern that: i) judicial intervention in the arbitration process; and ii) the inflexible judicial application of the Self-Regulatory Organization's (SRO) "eligibility rule" will each have the effect of depriving thousands of investors from proceeding in arbitration with otherwise legitimate claims as well as the chance to recover some or all of their losses occasioned by transgressions by members of the securities industry. Securities arbitration was designed to allow arbitrators possessed with expertise in the securities field to weigh all issues and, based upon their expertise, knowledge of the vagaries of the securities industry, and securities investors, render an impartial decision. To decide in favor of Appellant Smith Barney Shearson, Inc. ("Smith Barney") would be to whittle away at this arbitration process and provide impunity to the securities industry by casting in an inflexible legal mold the issue before the Court. This is precisely what arbitration was designed to prevent.

As a bar association of attorneys representing the interests of public investors PIABA recognizes the importance of this case and the impact it could have on the issues discussed in the previous paragraph. The amicus urges this Court to look to the controlling authority of the Supreme Court of the United States and decisions from five other

United States Circuit Courts of Appeals in affirming the District Court's decision. (1) Considerable attention is given in this brief to the decisions of the Second Circuit Court of Appeals (and to a lesser extent the District Courts bound by Second Circuit precedent) which has been confronted with the issues before this tribunal on numerous occasions. There is a small body of law that has taken the position contrary to that espoused herein. (2) However, it is submitted that to make a determination based on these decisions would deprive thousands of investors from proceeding with legitimate claims in arbitration.

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(1) See, e.g., Moses H. Cohen Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); Conticommodity Serv. v. Philipp & Lion, 613 F.2d 1222 (2d Cir. 1980); Shearson Lehman Hutton v. Wagoner, 944 F.2d 114 (2nd Cir. 1991); O'Neel v. National Association of Securities Dealers, Inc., 667 F.2d 804 (9th Cir 1982); Belke v. Merrill Lynch Pierce Fenner & Smith, 693 F.2d 1023 (11 Cir. 1982); County of Durham v. Richards & Associates, 742 F.2d 811 (4th Cir. 1984), In Re Mercury Constr. Corp., 656 F.2d 922 (4th Cir. 1981); Automotive, Petroleum and Allied Industries v. Town and Country Ford, 709 F.2d 509 (8th Cir.1983), FSC Securities Corp. v. Freel, 811 F.Supp. 439 (D.Minn. 1993).

(2) See, e.g. PaineWebber, Inc. v. Farnam, 870 F.2d 1286 (7th Cir. 1989); PaineWebber v. Hartmann, 921 F.2d 507 (3rd Cir. 1990); and Roney & Co. v. Kassab, 981 F.Supp. 894 (6th Cir. 1992).

The Fifth Circuit's determination of the issue before it will have a nationwide impact and PIABA recognizes the importance of being heard on this vital issue. PIABA believes that the rule propounded by Smith Barney will have an unwarranted chilling effect on arbitration, is contrary to the dictates of the Federal Arbitration Act, and inconsistent with the parties' agreement to arbitrate their disputes. Thus it is respectfully urged that this Court reject the "eligibility rule" as urged by Smith Barney.

ARGUMENT

POINT I. THE ASCENT AND DESCENT OF SECURITIES ARBITRATION

Since the June, 1987, United States Supreme Court decision in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), virtually all public investor claims against retail brokerage firms have been arbitrated. (3) This is the result of the requirement of Smith Barney and other brokerage firms that their clients execute customer agreements containing pre-dispute arbitration clauses when opening brokerage accounts.

Most customer agreements, including the one at issue, provide that arbitration shall take place either "before" or "under the rules of" the industry self-regulatory organizations ("SROs"), including, the National Association of Securities Dealers, Inc. ("NASD"), New York Stock Exchange ("NYSE"), and/or the American Stock Exchange ("AMEX"). The rules of each of these SROs provide:

> No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction. (4)

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(3) In that case, the Supreme Court ruled that he arbitration clause found in the standard customer agreements were binding on the customers.

(4) NASD Code Section 15; NYSE Rule 603; AMEX Rule 605.

Smith Barney Shearson, Inc. ("Smith Barney") and members of the securities industry in general argue that this "eligibility rule" bars claims where the "purchase dates" of the investments at issue are more than six years before the date on which the investor files a claim for arbitration. With increasing frequency, however, the eligibility rule argument is being made to the courts. In each of these court cases, brokerage firms seek to gain a collateral advantage by arguing for strict judicial application of the eligibility rule. In doing so, the securities industry causes investors to expend additional legal fees in conjunction with the court actions, by forcing the investor to defend his or her "right" to arbitrate; the same "right" that was imposed upon them by the industry in the first place. McMahon, supra; see also Dean Witter Reynolds v. Byrd, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

This Court can and should deny Smith Barney and the securities industry as a whole the opportunity to gain such a collateral advantage. Having made their bed, the securities industry should be made to sleep in it. As was eloquently stated in a Florida case with facts similar to those in the case at bar:

> For its own purposes, Dean Witter [a nationwide brokerage firm] chose to draft customer agreements requiring customers to submit to arbitration any controversy. It is not surprising that, in circumstances like those presented in this case, Dean Witter would now prefer the procedural and

> substantive advantages of a judicial forum for the prompt and dispassionate application of such dispositive legal defenses as the statute of limitations. But Dean Witter elected a different, nonjudicial forum for resolution of 'any controversy' with its customers. Having provided for arbitration in the customer agreement, Dean Witter will have to trust the arbitrators to do their jobs properly.

Victor v. Dean Witter Reynolds. Inc., 606 So.2d 681 (Fla. 5th DCA 1992).

For this compelling reason, and for the other reasons set forth below, this Court should dismiss the instant appeal. By doing so, this Court would meaningfully contribute to the equitable administration of justice by referring eligibility questions to the arbitrators in accordance with the mandates of the Federal Arbitration Act and consistent with a plain reading of the parties' agreements to arbitrate.

POINT II. THE FEDERAL ARBITRATION ACT MANDATES ARBITRATION OF THIS CONTROVERSY

The Federal Arbitration Act mandates that all issues as to the timeliness of claims, arising under the eligibility rules of self regulatory organizations such as the NASD or New York Stock Exchange, be determined by the arbitrators. The distinction between substantive and procedural issues has less relevance under the Federal Arbitration Act particularly in a circumstance, such as in the action at bar, where there exists a broad arbitration provision. The United States Supreme Court has considered

issues relating to the breadth of arbitration agreements governed by the Federal Arbitration Act, and the United States Court of Appeals for the Second Circuit has on numerous occasions considered the effect of the Federal Arbitration Act on securities industry arbitration agreements. The United States Court of Appeals for the Fifth Circuit has considered the effect of the Federal Arbitration Act in arbitral controversies in light of relevant United States Supreme Court decisions, and given it a wide berth. It is respectfully suggested that this Court apply to securities industry arbitration agreements, including the agreement at issue, the precepts embraced by the Second Circuit and followed by at least four other Federal Circuit Courts of Appeals, and leave to the arbitrators determinations as the timeliness of claims as provided in arbitration agreements.

A. Applicability of the Federal Arbitration Act

The Federal Arbitration Act, 9 U.S.C.A., Sections, 1-16 (hereinafter referred to as the "FAA") is applicable to this dispute. Appellant Smith Barney ("Smith Barney") is a Delaware corporation, with its principal place of business in New York. Appellees are residents of the State of Texas. While the FAA does not confer independent jurisdiction upon the District Courts, Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), there exists complete

diversity in this case, and the amount in controversy exceeds $50,000.00, thus the District Court had original jurisdiction over the controversy.

Section 2 of the FAA provides that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Section 2. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act." Moses H. Cone Hospital v. Mercury Constr. Corp., 460 U.S. 1, at 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); see also Volt Information Sciences Inc. v. Board of Trustees of the Lleland Stanford, Jr. U., 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

As stated in Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2d Cir. 1987) (quoting Wilko v. Swan, 346 U.S. 427, 431, 74 S.Ct. 182, 184-185, 98 L.Ed. 268 (1953))

the FAA "reflects a [congressional] recognition of the 'desirability of arbitration as an alternative to the complications of litigation.'" "'[T]he Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts **shall** direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.'" Genesco, 815 F.2d at 844 (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 105 S.Ct. 1238, 1241 84 L.Ed.2d 158 (1958)).

In the action at bar, the contract at issue, between a Delaware Corporation headquartered in New York (see Boone ROA at 1 and 2), and residents of the State of Texas, concerns a transaction in interstate commerce. Thus, the FAA applies to the dispute at issue. (5) See Moses H. Cone Hospital, 460 U.S. 1, at 25, and Austin Mun. Securities v. Nat. Ass'n of Securities Dealers, Inc., 757 F.2d 676 (5th Cir. 1985).

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(5) Though the District Court did not consider the applicability of the FAA, as pointed out by Appellants at page "13" of Appellant's brief "conclusions of law made by the district court are not binding on the Appellate Court and the latter is free to substitute judgment on the law for that of the court below." Ruff v. Boosier Medical Center, 952 F.2d 138, 140 (5th Cir. 1992). Appellee argued before the District Court for the Applicability of the FAA at Boone ROA at 111.

B. The FAA Mandates Strict Adherence to the Terms of the Parties' Agreement

Arbitrability is subject to the specific provisions of the arbitration agreement. "[A]mbiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration." Volt, supra. In Volt the Court went on to state:

> These cases [Moses H. Cone Memorial Hosp., supra. and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)] of course establish that, in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the [FAA], due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.

489 U.S. at 475-76 (citation omitted). As stated in Moses H. Cone Hospital, supra, 460 U.S. at 24-25:

> Any doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or the allegation of waiver, delay, or a like defense to arbitrability.

See also Mitsubishi Motors, 473 U.S. at 626, 105 S.Ct. at 3354; S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc., 745 F.2d 190, 194-95 (2d Cir.1984).

As noted by Appellants, the United States Supreme Court held in AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed. 648 (1986), that pursuant to the FAA "[a]rbitration is a matter of contract and a party cannot be required to submit

to arbitration any dispute which he has not agreed so to submit." According to the Supreme Court in AT & T, there is a "presumption of arbitrability", 475 U.S. at 650, and

> '[a]n order to arbitrate the particular grievance should not be denied **unless it may be said with positive assurance** that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' Warrior & Gulf Navigation, 363 U.S. at 582-583. See also Gateway Coal Co. v. Mine Workers, supra, at 377-378. Such a presumption is particularly applicable where the clause is [] broad . . . (emphasis added)

"Although '[t]he scope of an arbitration clause, like any contract provision, is a question of the intent of the parties,' id. at 193 (citing Necchi S.p.A v. Necchi Sewing Machine Sales Corp., 348 F.2d 693, 696 (2d Cir. 1965), cert denied, 383 U.S. 909, 86 S.Ct. 892, 15 L.Ed.2d 664 (1966)), the strong federal presumption in favor of arbitration dictates that doubts as to arbitrability should be resolved in favor of coverage, id. at 194." McDonnell Douglas Finance v. Pa. Power & Light Co., 858 F.2d 825 (2d Cir. 1988). In McDonnell Douglas at 858 F.2d 832 the Second Circuit Court of Appeals went on to state:

> In construing arbitration clauses, courts have at times distinguished between 'broad' clauses that purport to refer all disputes arising out of a contract to arbitration and 'narrow' clauses that limit arbitration to specific types of disputes. (citations omitted) If a court concludes that a clause is a broad one, then it will order arbitration and any subsequent construction of the contract and of the parties' rights and obligations under it are within the jurisdiction of the arbitrator. (citations omitted) Moreover, as the Supreme Court has noted,

> the strong federal presumption in favor of arbitrability applies with greater force when an arbitration clause is a broad one. See AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650, 106 S.Ct. 1415, 1419, L.Ed.2d 648 (1986).

In Shearson Lehman Hutton, Inc. v. Wagoner, 944 R.2d 114 (2d Cir. 1991) the Court of Appeals for the Second Circuit determined that a brokerage firm customer agreement which provided that "any controversy arising out of or relating to my account, to transactions with you for me or this authorization or the breach thereof shall be settled by arbitration . . ." was a "broad" arbitration provision that required arbitral determinations on all issues, including timeliness issues. In Conticommodity Serv. v. Philipp & Lion, 613 F.2d 1222 (2d Cir. 1980) the court likewise defined as a "broad" arbitration provision one that stated "[a]ny controversy . . . arising out of or relating to" the trading contract be referred to arbitration. Tehran-Berkeley Civ & Env. Eng. v. Tippetts-Abbett, 816 F.2d 864 (2d Cir. 1987) defined as a "broad" arbitration provision the following: **"[a]ll the disputes** that may arise between the Contractor and the Consultant **whether relating to the execution of the works under the Contract or relating to interpretation of any of the Paragraphs of the General Conditions or Technical Provisions or other documents attached to the Contract** (emphasis added)." Finally, Reconstruction Finance Corp. v. Harrisons & Crosfield, 204

F.2d 366 (2d Cir. 1953) defined as a "broad" arbitration provision a contract containing the following language: "all claims, disputes or controversies arising under or in relation to this contract shall be determined by arbitration".

The customer agreements executed by Appellees provide in pertinent part:

> Any controversy arising out of or relating to . . . my accounts, to transactions with you . . . or to this agreement or the breach thereof shall be settled by arbitration . . .

(Boone ROA at 42-47)

This is clearly a "broad" arbitration provision that can be read to refer to arbitrators determinations as to timeliness claims under the relevant SRO rules. Moreover, "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute" all questions as to timeliness must be referred to the arbitrators. AT&T, 475 U.S. at 650.

POINT III. UNDER THE FAA TIMELINESS AND ELIGIBILITY ISSUES ARE FOR THE ARBITRATORS TO DECIDE

"[A]ny limitations defense--whether stemming from the arbitration agreement, arbitration association rule, or state statute--is an issue to be addressed by the arbitrators." Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d at 121 (citing Conticommodity Serv. v. Phillipp & Lion,

613 F.2d at 1224-25 (2d Cir.1980); see also Reconstruction Fin. Corp. v. Harrisons & Crosfield, Ltd., supra.

> [O]nce it is determined that parties to a contract have created an enforceable arbitration clause, then the policies inherent in the Federal Arbitration Act dictate that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'

McDonnell Douglas Fin. v. Pa Power & Light Co., 858 F.2d at 831 (quoting Moses H. Cone Mem. Hosp., supra at 460 U.S. 1, at 24-24). "[A]ll questions of delay which relate to issues which the parties have agreed to submit to arbitration . . . [must] be resolved by arbitrators, not the court." Trafalgar Shipping Co. v. International Milling Co., 401 F.2d 568 (2d Cir. 1968); see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shaddock, 822 F.Supp. 125, 131 (S.D.N.Y., 1993).

Conticommodity Services Inc. v. Philipp & Lion, the most authoritative Second Circuit decision on the issue, involved an application to stay the arbitration of a commodities claim before the Commodities Exchange Inc. ("COMEX"). The relevant arbitration agreement provided for arbitration of "any controversy . . . arising out of or relating to" the trading contract between the parties. The COMEX rules required the filing of an arbitration statement of claim "within one year of the date of the transaction or event which gave rise to the claim or grievance . . ." The Second

Circuit in Conticommodity stated that "the validity of time bar defenses to the enforcement of arbitration agreements should generally be determined by the arbitrator rather than the court." 613 F.2d at 1225. Pursuant to Section 4 of the FAA "unless the 'making' of the agreement to arbitrate or 'the failure, neglect, or refusal' of one party to arbitrate is in dispute, the court **must** compel arbitration." (emphasis added) 613 F.2d at 1225. (See also Tehran-Berkeley Civ. & Eng. v. Tippetts-Abbett, 816 F.2d 864 (2d Cir. 1987) and Trafalgar Shipping Co. International Milling Co. , 401 F.2d 568 (2d Cir.1968)). The Conticommodity Court ultimately held:

> It is undisputed that there was an agreement to arbitrate and that Conti has refused to do so. The dispute instead concerns whether Philipp's original demand to arbitrate its dispute with Conti was time-barred under the one-year provision in the parties' private agreement or under the COMEX rule. Under the cases already discussed, this question is within the exclusive province of the arbitrator (citation omitted). This does not mean that the one-year limitation period in the contract is meaningless, since there is no reason to assume that an arbitrator will ignore any provision of the agreements that bind the parties. It does mean that the arbitrator, not the court, should determine the effect of the one-year limitation.

Shearson Lehman Hutton, Inc. v. Wagoner, supra., another leading Second Circuit case, involved a customer complaint filed against Shearson at the New York Stock Exchange ("NYSE"). The relevant customer agreement provided "any controversy arising out of or relating to my account, to

transactions with you for me or this authorization or the breach thereof, shall be settled by arbitration . . ." (Compare this language with the almost identical customer agreement language herein at Boone ROA at 42-47.) Shearson filed a petition in Federal Court to stay the arbitration. In reversing the District Court's determination that timeliness questions were for the courts, the Second Circuit stated:

> 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . [including] an allegation of waiver, delay, or a like defense to arbitrability.' [citing Moses H. Cone Memorial Hosp., supra] . . . 'doubts regarding [the intent of the parties] must also be resolved in favor of arbitrability' [McDonnell Douglas Fin. Corp., supra, 858 F.2d at 831] 'Again, when the contract contains a 'broad' arbitration clause, as the one at issue, that purports to 'refer all disputes arising out of a contract to arbitration,' the strong presumption in favor of arbitrability applies with even greater force.' Id. at 832, (citing AT & T Technologies, 475 U.S. at 650, 106 S.Ct. at 1419).

All issues as to timeliness were ultimately referred to the arbitrators at the NYSE.

The Federal District Court for the Southern District of New York has been called upon to address the issue of the proper forum for determining eligibility issues in securities disputes with great frequency in recent years. Though the decisions are not authoritative, several are well reasoned and can offer guidance to the Court. In Merrill Lynch v. Noonan, 1992 WL 196741 (S.D.N.Y. 1992) Judge Kram stated:

> First, the rules of the various SROs specifically provide that this decision [as to the timeliness of claims under the NASD Code] should be left to the arbitrators. Section 35 of the NASD Code of Arbitration Procedure, for example, provides that 'the arbitrator shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.' Further, in Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 121 (2d Cir. 1991), the court held that 'any limitations defense -- whether stemming from the arbitration agreement, arbitration association rule, or state statute -- is an issue to be addressed by the arbitrators.' (citing Conticommodity Serv. v. Phillip & Lion, 613 F.2d 1222, 1224-25 (2d Cir. 1980)).
>
> Since the NASD Code reserves the right to interpret all provisions under its Code, including Section 15, and since the Second Circuit has mandated that any limitations defense is in the province of the arbitrators, this Court compels arbitration before the NASD in New York City and defers to the arbitrator's judgment on the issue of the timeliness of respondent's claims.

In Merrill Lynch v. Shaddock, at 822 F. Supp 131 (S.D.N.Y. 1993), the Court stated:

> There is little dispute as to the interstate nature of the transactions underlying this controversy: they involve investors from Colorado, a New York financial institution, and the execution of trades involving financial instruments on a national exchange. On this ground at least, respondents' reliance on the FAA is unimpeachable.

In Shaddock, the Court went on to state:

> That the [Federal Arbitration] Act and subsequent court decisions embrace a clear federal policy in favor of arbitration is now virtually axiomatic and, thus, the numerous decisions underscoring a strong presumption in favor of arbitrability need not be recounted here at length. It suffices to state that where the agreement contains a 'broad'

> arbitration clause, such as the one at issue here, purporting to submit to arbitration 'any controversy between us arising out of your business or this agreement,' the strong presumption in favor of arbitrability has been held to apply with even greater force. (citations omitted) Under this presumption, any doubts as to the arbitrability of particular issues must be resolved in favor of arbitration; moreover, statute of limitations defenses have been specifically held by the Second Circuit to be an issue for the arbitrators. Wagoner, 944 F.2d at 121.

The Shaddock court ultimately held:

> Rather, under the clear direction of the law in this circuit, these [time limitation] defenses must be submitted to the NASD arbitration panel for resolution. Wagoner, 944 F. 2d at 121. Consequently, Merrill Lynch's motion for a permanent stay of the pending arbitration proceedings is denied.

It is respectfully suggested that this Court employ the interpretation of the FAA utilized by the Second Circuit that remands to arbitrators questions of timeliness under the broad securities industry arbitration agreements. If the agreement at issue can even arguably be said to require an arbitral determination then the issue should be referred to the arbitrators.

POINT IV. THE FIFTH CIRCUIT HAS LIBERALLY READ ARBITRATION CLAUSES CONSISTENT WITH THE FAA MANDATE

The Fifth Circuit, and the District Courts in this jurisdiction, have given an expansive reading to arbitration provisions such as the one at issue in light of the policies underlying the FAA as discussed herein. Austin Mun. Securities v. National Association of Securities Dealers,

Inc., 757 F.2d 676 (5th Cir. 1985); Smith v. Merrill Lynch, Pierce, Fenner & Smith Incorporated, 575 F.Supp 904 (N.D.Tex. 1983); Transcontinental Gas Pipeline Corporation v. Dakota Gasification Co., 782 F.Supp 336 (S.D.Tex. 1991).

Austin involved claims by Austin, a member of the NASD, against the NASD. This Court determined that Austin was bound by an arbitration provision contained in the NASD membership agreement that provided: "'any dispute, claim or controversy arising out of or in connection with the business of any member . . . (1) between or among members; (2) between or among members and public customers or others . . .' is subject to arbitration." The issue was whether the relevant provision required Austin to arbitrate his claim with the NASD. This Court stated:

> The arbitration clause is ambiguous, and arguably covers this dispute . . . The arbitration agreement fails to clearly resolve whether the agreement to arbitrate encompasses claims that also involve the NASD itself, or claims arising out of the acts of its officers. In light of the federal policy favoring arbitration, however, the written agreement to submit disputes to arbitration should be liberally construed, and any doubt as to arbitrability should be resolved in favor of arbitration. Moses H. Cohen Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983). See also Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir.1979) ('unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted.')

In Austin this Court ultimately held:

> The district court, therefore, lacks discretion to decide whether to stay the proceedings, despite the presence of any intertwining nonarbitrable claims. The district court is directed to compel arbitration on any arbitrable issues, including the defamation and intentional interference with business relations claims.

In Smith v. Merrill Lynch, supra the relevant agreement provided "any controversy between me and any member organization . . . arising out of my employment or the termination of my employment shall be settled by arbitration." Merrill Lynch claimed that since the events at issue took place after Smith left its employ, the arbitration agreement was not in force. The court disagreed and added: "Furthermore, any doubts concerning the subject matter of arbitration agreements are to be resolved in favor of arbitration." (citing Moses H. Cone Hospital, supra.) The court therefore denied Merrill Lynch's application to stay arbitration.

POINT V. THE SECOND, FOURTH, EIGHTH, NINTH AND ELEVENTH CIRCUITS HAVE CONSTRUED ARBITRATION CLAUSES LIBERALLY IN KEEPING WITH THE DICTATES OF THE FAA

The Second Circuit is not alone in its interpretation of the FAA as requiring that timeliness issues in arbitration agreements be determined by the arbitrators. See the Fourth Circuit decisions including Miller v. Prudential Bache Securities, Inc. 884 F.2d 128 (4th Cir. 1989), County of Durham v. Richards & Associates, 742 F.2d

811 (4th Cir. 1984), In Re Mercury Constr. Corp., 656 F.2d 922 (4th Cir. 1981); Eighth Circuit decisions including Automotive, Petroleum and Allied Industries v. Town and County Ford, 709 F.2d 509 (8th Cir. 1983), FSC Securities Corp. v. Freel, 811 F.Supp. 439 (D.Ct.Minn., 4th Div.); Ninth Circuit decisions, including, O'Neel v. National Association of Securities Dealers, Inc., 667 F.2d 804 (9th Cir. 1982); and Eleventh Circuit decisions, including Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982).

POINT VI. The FAA is Controlling Despite a New York Choice of Law Provision in an Arbitration Agreement

Many of the standard securities industry customer agreements provide that such agreements be governed and interpreted by the laws of the State of New York. Article 75 of the New York Civil Practice Law and Rules provides that statute of limitations issues be determined by the Courts. The securities industry has argued that this requires courts applying New York law to determine timeliness issues under the SRO rules, citing Volt Information Sciences, Inc., 489 U.S. 468, supra. However, this has been met with universal condemnation in the Federal Courts, including those in the Second Circuit.

In Wagoner, supra, the Second Circuit Court of Appeals applied the precepts embodying the FAA, and the determination that arbitrators and not the courts should decide the

applicability of time limitations issues, despite the existence of a New York choice of law provision. See also Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1062 (9th Cir. 1991) (federal rather than state arbitration rules apply, though contract contained New York choice of law provision); Ackerberg v. Johnson, 892 F.2d 1328, 1333-34 (8th Cir. 1989) (Minnesota choice-of-law provision does not prevent arbitration of claims that are non-arbitrable under Minnesota law where such claims otherwise arbitrable under federal law); Appalachian Regional Healthcare, Inc. v. Beyt, Rish, Robbins Group, Architects, 963 F.2d 373 (6th Cir. 1992) (choice of law provision does not operate to require application of state rather than federal arbitration law); Barbier v. Shearson Lehman Hutton, Inc. 752 F.Supp. 151, 156-58 (S.D.N.Y. 1990) (choice-of-law provision does not implicate state arbitration rules); and Shaddock, 822 F.Supp. 125, (general discussion on the issue).

CONCLUSION

Based upon the foregoing, the Public Investors Arbitration Bar Association as amicus curiae respectfully urges the United States Court of Appeals for the Fifth Circuit affirm the Opinion and Order of the Court below, or in the alternative conduct a de novo review of that decision and render a determination that under the precepts of the

Federal Arbitration Act, questions of timeliness of claims pursuant to the securities industry arbitration agreements at issue herein are the province of the arbitrators.

Respectfully submitted,

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