11-0235-cv

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UBS Financial Services, Inc. and UBS Securities, LLC,

Plaintiffs-Appellants,

-against-

Wests Virginia University Hospitals, Inc., United Hospital Center, Inc., West Virginia University Hospitals-East, Inc., City Hospital Foundation, Inc. and West Virginia United Health System, Inc.,

Defendants-Appellees

On appeal from the United States District Court
for the Southern District of New York (10 Civ. 4298)

BRIEF OF *AMICUS CURIAE* THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT TO DEFENDANTS-APPELLEES IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

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

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I.

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29 and this Court's Local Rule 29.1, the Public Investors Arbitration Bar Association ("PIABA") respectfully submits this, its brief *amicus curiae*, in support of Defendants-Appellees' response to the appeal of Plaintiffs-Appellants seeking to reverse the decision of the United States District Court for the Southern District of New York (Marrero, J.), entered on January 4, 2011, declining to enjoin the arbitration of the underlying dispute before the Financial Industry Regulatory Authority ("FINRA").[1]

All parties to this appeal have consented to the filing of this brief.

II.

STATEMENT OF INTEREST

PIABA is a national bar association established in 1990 as an educational and networking organization for attorneys representing the public investor in securities disputes. PIABA's members are involved in promoting the interests of

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

the public investor in securities and commodities arbitration. The mission of PIABA is to promote the interests of the public investor in securities and commodities arbitration by protecting public investors from abuses in the arbitration process, such as those associated with document production and discovery; 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.

PIABA has particular interest in this litigation because the district court's decision upholding the mandatory arbitration of disputes between FINRA members and their direct customers at the customer's behest is consistent with longstanding judicial precedent, the plain language of the relevant FINRA rule, past FINRA pronouncements, and the FINRA Director's unequivocal indications that such disputes are arbitrable, as well as this Circuit's presumption in favor of arbitrability.

The limitation that Appellants seek to impose upon the plain meaning of the term, "customer" would significantly harm the efficient, timely and inexpensive resolution of disputes between FINRA members and their customers. If the position Appellants advocate were to be adopted, it would be an invitation for FINRA members to burden the courts with endless arguments denying a "customer" relationship in a wide spectrum of investment, underwriting and

brokerage services disputes. No doubt, many such claims would be made in factual circumstances like those here, where the facts reveal that the party seeking to arbitrate was a "customer" under any reasonable interpretation or understanding of the term. Having to first debate in a court proceeding whether a claim is arbitrable would impose additional unnecessary burdens and hardships upon customers attempting to compel proper disputes to arbitration.

PIABA appears as *amicus* since it is in its members' interest that their clients – aggrieved "customers" of brokerage and investment firms -- have available a speedy, efficient and relatively inexpensive arbitration forum to vindicate their rights. More importantly, a clear and unambiguous decision by this Court rejecting Appellant's attempt to parse and twist the word "customer" into an unrecognizable form furthers FINRA regulatory role as the adminstrator of that dispute resolution forum and would also promote predictability in the FINRA arbitration process.

III.

SUMMARY OF ARGUMENT

The district court properly determined that Rule 12100(2) of the FINRA Code[2] requires a FINRA member to arbitrate disputes with all of its "customers,"

[2] This brief presumes familiarity with the facts of the dispute, as set out in the Defendants-Appellees' brief. *See* Brief and Appendix for Defendants-Appellees, No 11-0235-cv, at ___ (2d Dir. Feb. 22, 2011) (docket no.41). This brief refers to

including "the full array of parties with whom they have business dealings, without limiting the scope of the rule to parties who reasonably relied on the FINRA member for impartial advice."[3] UBS had a direct advisory and negotiations-related relationship with WVUHS in connection with the business of UBS, a Member of FINRA. FINRA's members are obligated under FINRA Rule 12200 to arbitrate business-related disputes with their customers, the only exception being broker-dealers.

UBS's attempt to limit the meaning of the term, "customer" solely to "broker-dealer disputes and other matters that relate directly to the provision of investment or brokerage services"[4] , is far too narrow and emasculates FINRA's significant role in providing the forum in which securities disputes are resolved. The district court's rejection of a narrow definition is in the interests of investors, FINRA members and the securities industry as a whole. It is also supported by language of FINRA rule 12200(i), prior decisions of this Circuit, other judicial precedent, administrative guidance, and the presumption favoring arbitration.

Plaintiffs-Appellants collectively as "UBS" and to Defendants-Appellees collectively as "WVUH."

[3] Decision and Order, No. 10 civ 4298 (VM) (docket no. 27), p. 6 (herein, "Decision and Order"), quoting *Wachovia Bank. N.A. v. VCG Special Opportunities Master Fund Ltd.*, No. 08 Civ. 5655, 2010 WL 1222026, at *3 (S.D.N.Y. Mar. 29, 2010).

[4] UBS Brief, p. 12.

FINRA's interpretation of its own regulations should also be given deference under *Auer v. Robbins*,[5] or at a minimum, weight as persuasive under *Skidmore v. Swift*.[6]

Finally, because the FINRA Rules under which these parties must arbitrate constitute the parties' arbitration agreement, those Rules govern the venue of the dispute. FINRA expressly bans pre-dispute venue clauses, a matter of particular interest to PIABA, whose members, despite such prohibition, often must debate that issue in arbitration proceedings. Therefore, PIABA favors this Court's affirmance of the district court's refusal to grant UBS a preliminary injunction on this issue.

IV.

ARGUMENT

A.

THE FINRA CODE, PRIOR DECISIONS OF THIS CIRCUIT, OTHER PRECEDENT, ADMINISTRATIVE GUIDANCE AND THE PRESUMPTION FAVORING ARBITRATION SUPPORT THE DISTRICT COURT'S CONCLUSION THAT WVHUS WAS A "CUSTOMER"

The district court, in finding that WVUHS was a "customer" of UBS, noted that this outcome is supported by the language of the Code, the decisions of this

[5] 519 U.S. 452, 117 S.Ct. 905, 137 U.S. 79 (1997); *see also Gomez v. Brill Securities*, 2010 WL 4455827, at *1 (S.D.N.Y. 2010).
[6] 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944); *see also Gomez, supra.*

Circuit,[7] a recent district court opinion on indistinguishable facts,[8] administrative guidance,[9] and in the event that the term "customer" is considered ambiguous, by this Circuit's presumption in favor of arbitration,[10] as well as decisions meriting the district court's detailed consideration.[11]

B.

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[7] *Id.*, citing *Wachovia Bank, N.A. v. VCG Special Opportunities Master Fund, Ltd.*, No 08 Civ. 5655, 2010 WL 1222026, at *3 (S.D.N.Y. Mar. 29, 2010). The district court also found that "[s]ince 'ambiguity in the language [of Rule 12100(i)] must be construed in favor of arbitration,' courts have interpreted the term, 'customer,' broadly." Opinion and Order, p. 7, citing *John Hancock Life Ins. V. Wilson*, 254 F.3d 48, 58 (2d Cir. 2001).

[8] *J.P. Morgan Secs. v. La. Citizens Prop. Ins. Corp.*, 712 F.Supp. 2d 70, 73 (S.D.N.Y. 2010).

[9] *Id.*, at p. 8, citing *Patten Secs. Corp., Inc., v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 406 (3rd Cir. 1987), in reliance upon an interpretive statement regarding the National Association of Securities Dealers' ("NASD") Code of Arbitration Procedure (the "NASD Code"), in which the NASD's National Arbitration Committee held that a securities issuer is a customer of a member firm where a dispute arises over a proposed writing.

[10] Opinion and Order, pp. 7-9.

[11] *Patten Secs. Corp, Inc., v. Diamond Breyhound & Genetics, Inc.*, 819 F.2d 400, 406 (3rd Cir. 1987) (holding that a securities issuer is a "customer" of a member firm where a dispute arises over a proposed underwriting); *J.P. Morgan Secs. v. La. Citizens Prop. Ins. Corp.*, 712 F.Supp.2d 70, 73 (S.D.N.Y. 2010) ("persuasive" reasoning on an "almost identical issue" to the instant case; and holding, in the words of the district court that "FINRA intended for an issuer to be a customer of an underwriter;" Opinion and Order, p. 9); *Wachovia, supra* (similar); *UBS Securities LLC v. Voegeli*, 684 F.Supp.2d 351, 355 (S.D.N.Y., 2010) ("customer" refers to "one involved in a business relationship with an [FINRA] member that is related directly to investment or brokerage services), citing *Bensadoun v. Jobe-Riat*, 316 F. 3d 171, 177 (2d Cir. 2003), quoting *Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc.*, 264 F.3d 770, 772 (8th Cir.2001).

CASE LAW SUPPORTS THE DISTRICT COURT'S CONCLUSION THAT WVUHS WAS A "CUSTOMER" OF UBS

As the district court noted, "The FINRA Code does not define the term 'customer.' Rather it simply states that '[a] customer shall not include a broker or dealer.' FINRA Code, Rule 12100(i)."[12] The plain meaning of the Rule leaves no room for debate. As the Eleventh Circuit noted in considering essentially the identical rule under the NASD arbitration process,[13] the rule is "unambiguous[]. [It] provide[s] that [the party] is a customer as long as [he, she it] is not a broker or dealer; nothing in the Code directs otherwise or requires more. Enforcing the limitation [the securities firm] seeks would be tantamount to reading language into the Code that is conspicuously absent."[14] The same simple and direct analysis applies here.

In order to reach a predetermined contrary outcome, UBS ignores *Patten*, declines to address *J. P. Morgan* on spurious grounds,[15] and misconstrues *Voegeli*,

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[12] Opinion and Order, p. 7.

[13] In July 2007, the member regulation, enforcement and arbitration functions of the New York Stock Exchange (NYSE) and the National Association of Securities dealers (NASD) were consolidated into one self-regulatory function, The Financial Industry Regulatory Authority (FINRA).

[14] *Multi-Financial Securities Corp v. King*, 386 F.3d 1364, 1368 (11th Cir. 2004).

[15] "UBS does not attempt to distinguish its situation from that it [sic] issue in J.P. Morgan Securities Inc., but rather asks that the court not be guided by that decision. However, the Court finds the reasoning in that case to be persuasive and agrees that FINRA intended for an issuer to be a customer of an underwriter." Opinion and Order, p. 9.

Bensadoun and *Fleet Boston*, despite the fact that those cases clearly sustain the district court's decision. All of these cases support the conclusion that a "customer" for purposes of the FINRA Code "refers to one involved in a business relationship with an NASD member that is related directly to investment or brokerage services."[16] That description, too, fairly reflects the district court's findings. PIABA therefore suggests that in order to eliminate further confusion over who is entitled to invoke Rule 12100 and compel arbitration, the Court adopt the following bright line test:

> A "customer," for the purposes of Rule 12200 of the FINRA Code, is any party, other than a broker or dealer, involved in a business relationship with a FINRA member that is related to that member's investment or brokerage services.

This simple test to determine whether a party is deemed to be a "customer" of a FINRA member for the purposes of compelling that member to arbitrate comports with common sense understanding of the term, as well as the reasonable

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[16] *Fleet Boston, supra*, 264 F.3d at 772. The *Fleet Boston* court also noted that "Although [the NASD] provision defines customer in one specific context, there are numerous other provisions in the NASD Rules of Conduct that support this [same] definition of customer. *See id.* § 2230 (governing broker transaction confirmations); § 2260 (forwarding securities related information); § 2280 (investor education); § 2310 (investment recommendations); § 2320 (executing orders); § 2330 (maintaining customer's securities and accounts); §§ 2400-2460 (commissions on brokerage accounts and securities transactions); §§ 2700-2780 (securities distributions)." *Id.*

expectations of both retail and institutional parties who deal with investment or brokerage firms that are FINRA members.

It should be pointed out that some of the cases discuss whether a member's advisory or fiduciary capacity is a prerequisite to "customer" status. The district court declined to so find, noting with approval that the *Wachovia* court, rejecting this approach,[17] held instead that a bank's facilitation of a securities trade was sufficient to meet the requirements of Rule 12200.[18] The services provided by UBS to WVUHS in this case were significantly broader, including "advis[ing] [WVUHS] to issue, thorough UBS, municipal bonds structured as auction rate securities,"[19] as well as negotiation of derivative agreements between WVUHS and UBS affiliates and other counter-parties. WVUHS was a "customer" of UBS in each of these respects.[20]

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[17] Opinion and Order, p. 7, citing *Wachovia, supra*, 2010 WL 1222026, at n.*3. The *Wachovia* district court found that a FINRA member is bound to arbitrate disputes that fulfill the "two substantive elements" of Rule 12200: (1) whether the parties interactions related to the credit default swap under review; *id.*, at *1; and (2) whether they were undertaken "in connection with the business activities of the member." *Id.*, at *2, citing FINRA Rule 12200.

[18] *Id.*, *4.

[19] Opinion and Order, p. 2.

[20] In an Amicus Curiae Brief filed in support of UBS, The Securities Industry and Financial Markets Association ("SIFMA") argues that a host of procedural and discovery limitations would hamper FINRA arbitration of complex matters. Brief in Amicus Curiae of SIFMA (document 56), pp. 24 – 27. FINRA's rules are sufficiently flexible to provide an adequate array of procedural and discovery mechanisms in the appropriate case. *See, e.g.,* Notice to Members 99-90

C.

A BROAD INTERPRETATION OF THE TERM "CUSTOMER" IS CONSISTENT WITH THE MEANING AND PURPOSE OF THE FINRA RULE AND PROMOTES FINRA'S INVESTOR-PROTECTION MANDATE, FINRA'S ROLE IN RESOLVING SECURITIES DISPUTES AND CUSTOMER AUTONOMY

The district court noted that the FINRA code does not define the term "customer."[21] Quoting *Wachovia*, the court concluded that the scope of the rule was sufficiently broad to include parties who rely on a FINRA member for advice, although not finding such an advisory role to be a prerequisite.[22] The court also noted that any ambiguity in the language of Rule 12100(i) must be "construed in favor of arbitration."[23] These conclusions are reasonable, appropriate, and support FINRA's important role in the resolution of disputes in the securities industry. Weakening the definition of "customer" will only serve to impede these ends.

UBS corrupts the plain meaning and purpose of Rule 12100 by focusing upon FINRA's investor-protection mandate, and thus asserting that "customers"

(November 1999) (the "Discovery Guide"). See FINRA Discovery Guide, www.**finra**.org/web/groups/industry/@ip/@reg/.../p004058.pdf (last visited April 4, 2011).

[21] Opinion and Order, p. 2.

[22] *Id.*

[23] *Id.*, citing *John Hancock Life Ins. V. Wilson*, 254 F.3d 48, 58 (2nd Cir. 2001).

should only be those who "receive[] investment or brokerage services" – *i.e.*, investors.[24] While it is true that FINRA does, indeed, provide the forum in which a vast majority of investor claims must be arbitrated,[25] FINRA undeniably has a much larger resolving securities industry disputes.

FINRA's principal role in providing the venue by which securities industry disputes are resolved is apparent from a review of other Rules governing the its arbitration process, as well as its Code of Arbitration Procedure. For example, Rule 13200 provides that all disputes "arising out of the business activities of a member or associated person" "must" be arbitrated "between or among Members; Members and Associated Persons; or Associated Persons," as those terms are defined in the Code.[26] Clearly, the arbitration forum provided by the industry regulator, FINRA, is not limited to servicing garden variety investor claims.

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[24] UBS Br. at 17-22.

[25] Since the Supreme Court's 1987 decision in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), the overwhelming majority of disputes between individual investors and their stockbrokers have been resolved by compulsory arbitration.

[26] Rule 13200(b) also provides that "Disputes arising out of the insurance business activities of a member that is also an insurance company are not required to be arbitrated under the Code." This narrow limitation also runs directly counter to UBS's argument that only the disputes of "investors" are contemplated by the Code. It also demonstrates that FINRA is entirely capable of precisely identifying any business activities that are *not* subject to arbitration. Other Code sections similarly belie the argument, *e.g.*, by imposing "high standards of commercial honor and just and equitable principles of trade" on members, without limitation (Rule 2010); and by addressing members' fiduciary responsibilities "in the

In short, UBS's proposed definition of "customer" is far too narrow if FINRA is to faithfully execute its regulatory function over the securities industry, and its administrative function in providing a forum in which disputes concerning the securities industry are resolved. The definition advanced by UBS would carve a huge hole in FINRA's core mission and responsibilities. UBS's desire to avoid arbitration for this particular dispute should not be permitted to have such potential wide reaching ramifications. Certainly where the relationship includes investment advice and assistance in negotiations relating to securities transactions, a broker-dealer/ relationship is established.[27]

D.

VENUE

THE DISTRICT COURT PROPERLY REFUSED TO GRANT UBS A PRELIMINARY INJUNCTION ON THE ISSUE OF VENUE

In appealing the district court's failure to enjoin WVUHS from arbitrating its dispute outside New York County, UBS relies on a venue clause contained in one of the parties' contracts that is entirely silent as to arbitration. Unfortunately, UBS omits to mention that FINRA expressly bans pre-dispute venue clauses. Because

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capacity of paying agent, transfer agent, trustee, or any other similar capacity" (Rule 2060). As referenced above, the district court found that UBS acted in an advisory role here.

[27] Opinion and Order, p. 2.

the FINRA Rules constitute the parties' arbitration agreement here and provide for a given venue, and given that the venue clause cited by UBS does not even refer to arbitration, it was certainly not an abuse of discretion for the district court to refuse to grant UBS a preliminary injunction on this issue.

PIABA believes that FINRA's compulsory arbitration provision creates a written agreement to arbitrate between WVUHS and UBS.[28] "As an addendum to that notional agreement, Rule 12213(a) essentially creates a forum selection clause dictating that FINRA, in accordance with its rules, will determine the location of the arbitration."[29] FINRA's Rules clearly state that "the Director will select the hearing location" and that any motions to change venue must be made to the Director or, once appointed, to the Panel.[30] Those rules plainly require that the Director and/or panel determine arbitral venue.[31]

Pre-dispute venue selection clauses are not permitted in FINRA arbitration agreements, and FINRA is not bound by a pre-dispute hearing location clause.[32] In

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[28] *Kidder Peabody & Co v. Zinsmeyer Trusts Partnership*, 41 F.3d 861, at 865(2nd Cir. 1994) ("[T]he NASD provision constitutes an 'agreement in writing' under the Federal Arbitration Act ... [that WVUHS is] entitled to invoke ... as an intended third-party beneficiary...") (internal citations omitted).

[29] *J.P. Morgan Securities, supra*, 712 F.Supp.2d at 81.

[30] *See* FINRA Rule 12213, attached as exhibit H to Burge Decl.; FINRA Rule 12503(c)(2), attached as exhibit J to Burge Decl.

[31] *J.P. Morgan Securities, supra*, 712 F.Supp.2d at 74-75.

[32] *See* FINRA Notice 95-16, attached as exhibit L to Burge Decl., at *1:

> Customer agreements used by some members attempt to dictate the location for the arbitration hearing. For example, some require that the

fact, including a pre-dispute hearing location clause in an agreement is a violation of SEC and NASD rules for FINRA-regulated entities.[33] In particular, the SEC's rules prohibiting forum selection clauses in FINRA arbitrations are entitled to deference from this court.[34] Notwithstanding such broad authority that such clauses are unenforceable, however, the security industry often attempts to have

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> hearing be held in New York or Denver regardless of where the customer resides. Any such provision is inconsistent with Section 26 of the NASD Code of Arbitration Procedure, which states that "the time and place for the initial hearing shall be determined by the Director of Arbitration and each hearing thereafter by the arbitrators." In 1989, the SEC noted that customer agreements "may not be used to restrict the situs of an arbitration hearing contrary to SRO rules." (See, Securities Exchange Act Release No. 26805.)

See also FINRA Notice 95-85, attached as exhibit M to Burge Decl., at *2:

> Question No. 7: May a firm designate a hearing location for self-regulatory organization (SRO) arbitrations in its arbitration clause?
>
> Answer: No.

[33] *See* Securities Exchange Act Release No. 34-26805, attached as exhibit P to Burge Decl., at *22 ("The proposal also prohibits SRO members from having agreements with customers that limit or contradict the rules of any SRO or limit the ability of a party to file any claim in arbitration or limit the ability of the arbitrators to make any award.").

[34] *First Heritage Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 785 F. Supp. 1250, 1251 (E.D. Mich. 1992) ("Deference is particularly appropriate since the statute requires that the Securities and Exchange Commission review the rules of a self-regulatory body such as the NASD."); *Gurfel v. Sec. & Exch. Comm'n*, 205 F.3d 400, 402 (D.C. Cir. 2000) ("[Deference would be appropriate to the SEC's] interpretation of the NASD rules[3] because the Commission must approve and may on its own initiative modify the NASD Bylaws."); *Krull v. S.E.C.*, 248 F.3d 907, 912 (9th Cir. 2001) ("Because of the Commission's expertise in the securities industry, we owe deference to its construction of NASD's Rules of Fair Practice.").

such clauses enforced in arbitration, a continuing issue for PIABA's members.

PIABA urges this Court to reject UBS's attempt to enforce the invalid forum selection clause contained in the parties' agreement. Forum selection clauses should not constitute grounds for transferring hearing location under FINRA's rules, under these or any other circumstances.

CONCLUSION

In order to preserve the important role played by FINRA in the resolution of disputes between the members of FINRA and their customers, this Court should affirm the opinion of the district court and adopt the bright line test set forth hereinabove.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 3,143 words, excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

Dated: April 4, 2011
New York, New York

/s/ Jenice L. Malecki
Jenice L. Malecki

CERTIFICATE OF SERVICE AND CM/ECF FILING

I hereby certify that I caused the forgoing Brief of *Amicus Curiae* of Public Investors Arbitration Bar Association in Support of Appellants USB Financial Services, Inc. and UBS Securities LLC in Support of Reversal to be served on counsel for Plaintiffs-Appellants and Defendants-Appelleees via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

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I certify that an electronic copy was uploaded by the Court's electronic filing system. Six hard copies of the foregoing Brief of *Amicus Curiae* of Public Investors Arbitration Bar Association in Support of Appellants USB Financial Services, Inc. and UBS Securities LLC in Support of Reversal was sent to the Clerk's Office by Hand Delivery to:

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On this 4th day of April, 2011.
/s/ Adam M. Nicolazzo
Notary Public
Sworn to me this 4th day of April, 2011

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My Commission Expires February 08, 2014