No. 14-0781-cv

In The United States Court Of Appeals
For The Second Circuit

ELIOT COHEN, on behalf of himself and all others similarly situated,

PLAINTIFF-APPELLANT,

DAVID HALE, CHARLES SHOEMAKER, on behalf of themselves and all others similarly situated, PHILIP RICASATA, STAN SKLENAR,

PLAINTIFFS,

V.

UBS FINANCIAL SERVICES, INC., UBS AG,

DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, NO. 12-CV-02147 (LGS)
THE HONORABLE LORNA G. SCHOFIELD, JUDGE PRESIDING.

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

Andrew J. Schaffran
Sam S. Shaulson
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
Telephone: 212-309-6000

Ira D. Hammerman
Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, DC 20005
Telephone: 202-962-7382

ATTORNEYS FOR *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

October 1, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

CORPORATE DISCLOSURE STATEMENT viii

STATEMENT OF INTEREST 1

PRELIMINARY STATEMENT 3

ARGUMENT 7

I. UNDER CONTROLLING SECOND CIRCUIT PRECEDENT, FINRA MEMBER FIRMS AND THEIR EMPLOYEES ARE FREE TO ENTER INTO AND ENFORCE ARBITRATION AGREEMENTS THAT SUPERSEDE FINRA'S ARBITRATION RULES 7

A. Controlling Second Circuit Precedent Establishes That FINRA Member Firms And Their Employees Are Free To Enter Into And Enforce Arbitration Agreements That Supersede FINRA's 7

B. No FINRA Rule Prohibits Member Firms From Entering Into Agreements With Their Employees That Modify Or Supersede FINRA Rules, Or In Which Employees Agree To Waive Any Right To File Or Participate In A Class Or Collective Action 9

C. The Cases Relied Upon By Plaintiff-Appellant Are Inapposite 10

II. THE FAA TRUMPS FINRA'S ARBITRATION RULES AND MANDATES THAT PLAINTIFF-APPELLANT'S ARBITRATION AGREEMENT BE ENFORCED ACCORDING TO ITS TERMS 12

A. The FAA Requires That Arbitration Agreements Be Enforced According To Their Terms "Unless The FAA's Mandate Has Been Overridden By A Contrary Congressional Command." 12

B. There Is No Contrary Congressional Command In The Exchange Act Concerning Arbitration Of Employment Disputes Sufficient To Overcome The FAA's Mandate 14

1. Section 19(b)(2) Simply Sets Forth the Procedural Process By Which the SEC Approves SRO Rules. 15

2. Section 15A Applies Only to Customer Disputes 15

TABLE OF CONTENTS
(continued)

Page

3. Section 29(a) Limits Only Waivers of Substantive Obligations, Not Procedural Rights, and the Right To Participate in Class or Collective Actions Is Procedural 16

4. Dodd-Frank Further Evidences that Congress Did Not Issue a Command in the Exchange Act that Overrides the FAA. 22

C. The FINRA Board's Decision In The Schwab Disciplinary Proceeding Is Neither Entitled To Deference Nor Relevant Or Controlling Law 23

III. RECENT AMENDMENTS TO THE FINRA COLLECTIVE ACTION RULE DO NOT APPLY TO THIS ACTION 26

IV. CLAIMS UNDER THE CALIFORNIA PRIVATE ATTORNEYS GENERAL ACT ARE ARBITRABLE 27

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 30

TABLE OF AUTHORITIES

Page(s)

CASES

Adkins v. Labor Ready, Inc.,
303 F.3d 496 (4th Cir. 2002) 19

American Exp. Co. v. Italian Colors Restaurant,
133 S. Ct. 2304 (2013).....12, 18

AT&T Mobility v. Concepcion,
131 S. Ct. 1740 (2011).....18, 28

Banus v. Citigroup Global Markets, Inc.,
No. 09-CV-7128, 2010 WL 1643780 (S.D.N.Y. Apr. 23, 2010), *aff'd*,
422 F. App'x 53 (2d Cir. 2011) 2

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988).....26

Carter v. Countrywide Credit Indus., Inc.,
362 F.3d 294 (5th Cir. 2004) 19

Christensen v. Harris Cnty.,
529 U.S. 576 (2000).....27

City of Arlington, Tex. v. FCC,
133 S. Ct. 1863 (2013).....16

Coan v. Kaufman,
457 F.3d 250 (2d Cir. 2006) 19

CompuCredit Corp. v. Greenwood,
132 S. Ct. 665 (2012).....12, 14, 19, 21

Credit Suisse First Boston Corp. v. Pitofsky,
4 N.Y.3d 149 (N.Y. Feb. 10, 2005) 8

Delaware Cnty. Employees Ret. Fund v. Portnoy,
No. 13-10405, 2014 WL 1271528 (D.Mass. Mar. 26, 2014) 17

Facebook, Inc. v. Pac. Nw. Software, Inc.,
640 F.3d 1034 (9th Cir. 2011) 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Fardig v. Hobby Lobby Stores Inc.,
No. 14-CV-00561, 2014 WL 4782618 (C.D.Cal. Aug. 11, 2014) 28

Fiero v. Fin. Indus. Regulatory Auth., Inc.,
660 F.3d 569 (2d Cir. 2011) 16

FINRA v. Charles Schwab & Co., Inc.,
15 Cardozo J. Conflict Resol. 623 (2014) 15

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991).....12

Goldman, Sachs & Co. v. City of Reno,
747 F.3d 733 (9th Cir. 2014) 8

Goldman, Sachs & Co. v. Golden Empire Schools Financing Auth.,
--- F.3d ----, 2014 WL 4099289 (2d Cir. Aug. 21, 2014).....8

Gomez v. Brill Sec., Inc.,
95 A.D.3d 32 (N.Y.A.D. 1 Dep't Mar. 15, 2012) 11

Good v. Ameriprise,
No. 06-CV-1027, 2007 WL 628196 (D.Minn. Feb. 8, 2007).....11

In re Am. Express Fin. Advisors Sec. Litig.,
672 F.3d 113 (2d Cir. 2011) 8

Iskanian v. CLS Transp. Los Angeles,
No. S204032, 327 P.3d 129 (Cal. Jun. 23, 2014) 27, 28

Kidder Peabody & Co. v. Zinsmeyer Trusts P'ship,
41 F.3d 861 (2d Cir. 1994) 8

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994).....26

Lloyd v. J.P. Morgan Chase & Co.,
Nos. 11-CV-9305 and 12-CV-2197, 2013 WL 4828588 (S.D.N.Y. Sept. 9, 2013) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Lopez v. Terrell,
654 F.3d 176 (2d Cir. 2011) 27

Luckie v. Smith Barney, Harris Upham & Co., Inc.,
999 F.2d 509 (11th Cir. 1993) 8

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis,
903 F.2d 109 (2d Cir. 1990) 7, 8

Morgan Keegan & Co. v. Drzayick,
No. 11-CV-00126, 2011 WL 5403031 (D.Idaho Nov. 8, 2011) 23

Morgan Keegan & Co. v. Johnson,
No. 11-CV-502, 2011 WL 7789796 (E.D. Va. Dec. 22, 2011).....23

Myers v. Hertz Corp.,
624 F.3d 537 (2d Cir. 2010) 18

Owen v. Bristol Care, Inc.,
702 F.3d 1050 (8th Cir. 2013) 19

PaineWebber, Inc. v. Rutherford,
903 F.2d 106 (2d Cir. 1990) 8

Parisi v. Goldman, Sachs & Co.,
710 F.3d 483 (2d Cir. 2013) 18

Perry v. Thomas,
482 U.S. 483 (1987).....28

Preston v. Ferrer,
552 U.S. 346 (2008).....19, 28

Raniere v. Citigroup Inc.,
533 F. App'x 11 (2d Cir. 2013) 18

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989).....19

TABLE OF AUTHORITIES
(continued)

Page(s)

Roney & Co. v. Goren,
875 F.2d 1218 (6th Cir. 1989) 17

Securities Indus. Ass'n. v. Connolly,
883 F.2d 1114 (1st Cir. 1989).....19

Shahriar v. Smith & Wollensky Rest. Grp., Inc.,
659 F.3d 234 (2d Cir. 2011) 18

Shearson/American Exp. Inc. v. McMahon,
482 U.S. 220 (1987).....13, 15, 17, 20

Smith v. T-Mobile USA Inc.,
570 F.3d 1119 (9th Cir. 2009) 19

Sorrell v. SEC,
679 F.2d 1323 (9th Cir. 1982) 24

Suschil v. Ameriprise Fin. Serv., Inc.,
No. 07-CV-2655, 2008 WL 974045 (N.D. Ohio Apr. 7, 2008) 10

Sutherland v. Ernst & Young LLP,
726 F.3d 290 (2d Cir. 2013) 18

Todd & Co. v. SEC,
557 F.2d 1008 (3d Cir. 1977) 24

UBS Financial Services, Inc. v. Carilion Clinic,
706 F.3d 319 (4th Cir. 2013) 8

United States v. NASD,
422 U.S. 694 (1975).....15

Velez v. Perrin Holden & Davenport Capital Corp.,
769 F.Supp.2d 445 (S.D.N.Y. Feb. 3, 2011) 11, 27

Wright v. RBC Capital Markets Corp.,
No. S-09-3601, 2010 WL 2599010 (E.D. Cal. June 24, 2010) 3

TABLE OF AUTHORITIES
(continued)

Page(s)

Zeltser v. Merrill Lynch & Co.,
No. 13-CV-1531, 2013 WL 4857687 (S.D.N.Y. Sept. 11, 2013) 10

STATUTES

29 U.S.C. § 216(b) 12, 18

29 U.S.C. § 626(b) 12

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae The Securities Industry and Financial Markets Association is a non-profit corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The Securities Industry and Financial Markets Association ("SIFMA") respectfully submits this brief as an *amicus curiae* in support of the decisions below granting Defendants-Appellees' motion to compel arbitration and denying Plaintiff-Appellant's motion for reconsideration.

STATEMENT OF INTEREST

SIFMA is a trade association that brings together the shared interests of hundreds of securities firms, banks, and asset managers.[1] SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets.

SIFMA has a particular interest in this case because affirmance of the decision below would be consistent with the strong federal policy favoring arbitration, would lead to greater predictability and respect for contractual commitments, and would allow for employment disputes to be resolved promptly and cost effectively, all of which would inure to the benefit of all industry participants.

---

[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 SIFMA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties to this appeal have consented to the filing of this brief.

Affirmance would also preserve shareholder value and protect industry shareholders and investors from defense costs and potential damages exposure associated with class litigation by permitting employment disputes to be resolved in arbitration. The ability to use and enforce class and collective action waivers in employment arbitration agreements is necessary to prevent abusive and manipulative litigation tactics from being used to oust the Financial Industry Regulatory Authority ("FINRA") of its proper jurisdiction. If member firms are prohibited from using and enforcing such waivers, their employees would be able to abuse class and collective action procedures in order to evade their contractual arbitration obligations and to impose unfair pressure on member firms to settle questionable claims. There are many cases such as this one in which employees of member firms have sought to circumvent their arbitration obligations by the mere expedient of filing their individual claims in court and styling them as class or collective actions, and then claiming that Rule 13204 of FINRA's Code of Arbitration Procedure for Industry Disputes (the "Industry Code") precludes arbitration of the dispute. *See Banus v. Citigroup Global Markets, Inc.*, No. 09-CV-7128, 2010 WL 1643780, at *4, *9 (S.D.N.Y. Apr. 23, 2010), *aff'd*, 422 F. App'x 53 (2d Cir. 2011) (plaintiffs "file[d] a class action," "contending that they cannot be forced to arbitrate because FINRA Rule 13204 precludes arbitration of class action claims," "in a transparent attempt to oust FINRA of its authority to

proceed with [arbitration] and to frustrate [defendant's] right to [arbitrate] its claim"); *Wright v. RBC Capital Markets Corp.*, No. S-09-3601, 2010 WL 2599010, at *10-*11 (E.D. Cal. June 24, 2010) (rejecting plaintiff's attempt to "turn [FINRA Rule 13204] on its head" by "tak[ing] his defenses to [his employer's] arbitration claim and assert[ing] them … before this court … on behalf of a putative class so that he may invoke FINRA Rule 13204 and shield himself from … arbitration," concluding "such misuse of Rule 13204 cannot be condoned"). Thus, SIFMA has an interest in ensuring that arbitration agreements between member firms and their employees that include class and collective action waivers are enforced according to their terms.

Finally, affirmance would keep the financial services industry on a level playing field with other industries competing for talent. Employers in the financial services industry should be treated no differently than employers in other industries in their ability to enter into and enforce employment arbitration agreements. Indeed, as many employees in the financial services industry are highly compensated, their claims (when legitimate) deserve individual airing and justify individualized treatment.

PRELIMINARY STATEMENT

The principal issues in this case are (1) whether under controlling Second Circuit precedent, FINRA member firms and their employees are free to enter into

individual arbitration agreements that modify and supersede FINRA's arbitration rules; and (2) whether the Federal Arbitration Act ("FAA") trumps FINRA's arbitration rules and mandates that Plaintiff-Appellant's arbitration agreements be enforced according to their terms because there is no contrary congressional command to overcome the FAA's mandate. The answer to both of these questions – per application of binding Supreme Court and Second Circuit precedent – is "yes."

First, controlling Second Circuit precedent establishes that FINRA arbitration rules may be modified or superseded by a more specific agreement of the parties, and that FINRA member firms are therefore free to enter into and enforce individual arbitration agreements that modify and supersede FINRA's arbitration rules, which is exactly what the parties have done here. The Court need not go any further to affirm Judge Jones' decision than follow this binding precedent that FINRA rules may be modified and superseded by agreement of the parties. Defendants-Appellees were within their rights to enter into an individual arbitration agreement to that effect with Plaintiff-Appellant, and under this binding precedent that arbitration agreement should be enforced according to its terms.

Second, even if enforcement of the parties' arbitration agreement would be inconsistent with FINRA's rules – which it would not – the FAA trumps FINRA's rules and mandates that the arbitration agreement be enforced according to its

terms. Plaintiff-Appellant has not carried his burden of demonstrating a "contrary congressional command" that overrides the FAA's mandate, as is required by recent Supreme Court precedent. None of the three provisions of the Securities Exchange Act of 1934 ("Exchange Act") relied upon by Plaintiff-Appellant includes a congressional command concerning arbitration of **employment** disputes sufficient to overcome the FAA's mandate or otherwise supports Plaintiff-Appellant's argument that the Exchange Act authorizes the SEC to approve rules of self-regulatory organizations ("SROs" such as FINRA) it deems appropriate for the protection of **employees** by preserving for **employees** the right to pursue **employment** class and collective actions in court. To the contrary, none of these provisions authorizes the SEC to approve SRO rules regulating arbitration of **employment** disputes, let alone to approve FINRA rules limiting the rights of FINRA member firms under the FAA to enter into and enforce arbitration agreements with **employees** that include class and collective action waivers.

The first section of the Exchange Act on which Plaintiff-Appellant relies, Section 19(b), merely describes the procedure by which the SEC approves FINRA rules. The second, Section 15A, addresses FINRA regulation of broker-dealers' dealings with **customers** – not employees – and does not authorize the SEC to oversee and regulate FINRA rules concerning **employment** disputes. And controlling Supreme Court precedent establishes that the third section relied upon

by Plaintiff-Appellant, Section 29(a), applies only to waivers of **substantive** rights under the Exchange Act and has no application to waivers of **procedural** rights, such as rights to participate in class or collective actions. Indeed, Congress's recent amendments to the Exchange Act provide further evidence that Congress did not issue a command in the Exchange Act that would override the FAA mandate to enforce arbitration of employment disputes.

Third, Plaintiff-Appellant's reliance on the FINRA Board of Governors' ("Board") decision in the *Schwab* disciplinary proceeding (ADD-45 to 72) is misplaced, because *Schwab* is neither entitled to any deference nor relevant, let alone controlling law and, to the contrary, is inapposite because it (1) was issued in an administrative disciplinary proceeding involving FINRA's authority to enforce its Customer Code rules against member firms and has no application in a court action where FINRA is not a party and the issue is the enforceability of private arbitration agreements between an employer and its employees, (2) did not involve the FINRA rule relied upon by Plaintiff-Appellant, and (3) did not even involve a motion to compel arbitration or an arbitration agreement between an employer and its employees. Nor can Plaintiff-Appellant invoke FINRA's recent rule amendments seeking to extend Rule 13204 to cover collective actions, as those amendments were not in effect either when Plaintiff-Appellant entered into his arbitration agreement or when this case was filed, and have no retroactive effect.

Finally, his reliance on a recent California Supreme Court decision finding certain of his California state law claims to be non-arbitrable fails because that decision is not binding on this Court and was wrongly decided. Only a clear congressional command can preempt the FAA and exclude claims from arbitration – state statutes cannot preempt the FAA.

ARGUMENT

I. UNDER CONTROLLING SECOND CIRCUIT PRECEDENT, FINRA MEMBER FIRMS AND THEIR EMPLOYEES ARE FREE TO ENTER INTO AND ENFORCE ARBITRATION AGREEMENTS THAT SUPERSEDE FINRA'S ARBITRATION RULES.

As Judge Jones correctly held, under established principles of contract law and controlling Second Circuit precedent directly on point, FINRA member firms and their employees are free to enter into individual arbitration agreements that modify or supersede FINRA's arbitration rules, and those agreements must be enforced according to their terms. *See* A-173 to 174 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109, 113 (2d Cir. 1990)).

A. Controlling Second Circuit Precedent Establishes That FINRA Member Firms And Their Employees Are Free To Enter Into And Enforce Arbitration Agreements That Supersede FINRA's.

Controlling Second Circuit precedent establishes that FINRA arbitration rules may be modified or superseded by a more specific agreement of the parties, and that FINRA member firms and their employees are therefore free to enter into and enforce individual agreements that modify or supersede FINRA's arbitration

rules. *See Goldman, Sachs & Co. v. Golden Empire Schools Financing Auth.*, --- F.3d ----, 2014 WL 4099289, at *3-*4, *6 (2d Cir. Aug. 21, 2014) (FINRA member firms are free to enter into agreements that "supersede" FINRA's arbitration rules); *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 132 (2d Cir. 2011) ("different or additional contractual arrangements for arbitration can supersede the rights conferred on [a] customer by virtue of [a] broker's membership in [FINRA]"); *Kidder Peabody & Co. v. Zinsmeyer Trusts P'ship*, 41 F.3d 861, 864 (2d Cir. 1994) (same); *Georgiadis*, 903 F.2d, at 112 (2d Cir. 1990) (exchange arbitration rule was validly modified and superseded by member firm's separate arbitration agreement because, under "ordinary contract principles," exchange arbitration rules "may be superseded by a more specific … agreement of the parties"); *PaineWebber, Inc. v. Rutherford*, 903 F.2d 106, 108 (2d Cir. 1990) ("agreement between a broker and a customer … may supersede the terms of a stock exchange constitution").

Other Circuit Courts and the New York Court of Appeals agree. *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 736, 741, 746 (9th Cir. 2014) (parties' agreement can supersede default obligation to arbitrate under FINRA Rules)*; UBS Financial Services, Inc. v. Carilion Clinic*, 706 F.3d 319, 328 (4th Cir. 2013) (same); *Luckie v. Smith Barney, Harris Upham & Co., Inc.*, 999 F.2d 509, 514 (11th Cir. 1993) (same); *Credit Suisse First Boston Corp. v. Pitofsky*, 4 N.Y.3d

149, at 155 (N.Y. Feb. 10, 2005) (member firms and their employees are "free to supplant or modify [exchange arbitration rules] with the protocols articulated in [an individual arbitration agreement]").

The Court need not go any further to affirm Judge Jones' decision than follow its binding precedent that FINRA rules may be modified and superseded by agreement of the parties. That is exactly what the parties did here when they entered into an individual arbitration agreement that modified and superseded FINRA's arbitration rules. Under binding precedent, this agreement is valid and should be enforced.

B. No FINRA Rule Prohibits Member Firms From Entering Into Agreements With Their Employees That Modify Or Supersede FINRA Rules, Or In Which Employees Agree To Waive Any Right To File Or Participate In A Class Or Collective Action.

No Industry Code rule prohibits member firms from entering into agreements with their employees that modify or supersede FINRA rules or in which the employees agree to waive any right they may have to file or participate in a class or collective action in exchange for valuable consideration, as the parties did here. Rather, as Judge Jones correctly ruled, the savings clause in Rule 13204 specifically "(1) recognizes that parties may choose to enter into additional arbitration agreements beyond the scope of the Code, and (2) provides that the Code does not affect the enforceability of these additional agreements." A-173. Rule 13204's savings clause states that nothing in that Rule will "otherwise affect

the enforceability of any rights under the Code **or any other agreement**." (emphasis added). Thus, Rule 13204 explicitly contemplates that member firms and associated persons can enter into separate agreements, and expressly provides that nothing in that Rule will affect the enforceability of any rights under those separate agreements, including private arbitration agreements that contain class and collective action waivers. *See* A-173; *Suschil v. Ameriprise Fin. Serv., Inc.*, No. 07-CV-2655, 2008 WL 974045, at *6 (N.D. Ohio Apr. 7, 2008) (enforcing arbitration agreement with class action waiver based on "the exception delineated at the close of the FINRA/NASD class action rule: 'This paragraph does not otherwise affect the enforceability of any rights under the Code or ***any other agreement***.'") (emphasis in original). Plaintiff-Appellant cites no contrary judicial decisions holding otherwise.

C. The Cases Relied Upon By Plaintiff-Appellant Are Inapposite.

The cases relied upon by Plaintiff-Appellant to argue that courts "repeatedly deny motions to compel arbitration in the face of a pending class and/or collective action in accordance with FINRA rules" (*see* Brief for Plaintiff-Appellant ("Pl. Br.") at 22-24) are inapposite because, unlike this case, none of those cases involved the enforcement of a separate agreement that included an express waiver of the right to bring or participate in a class or collective action. *See Zeltser v. Merrill Lynch & Co.*, No. 13-CV-1531, 2013 WL 4857687, at *1 (S.D.N.Y. Sept.

11, 2013); *Gomez v. Brill Sec., Inc.*, 95 A.D.3d 32, 34-35 (N.Y.A.D. 1 Dep't Mar. 15, 2012); *Velez v. Perrin Holden & Davenport Capital Corp.*, 769 F.Supp.2d 445, 446-47 (S.D.N.Y. Feb. 3, 2011). *Lloyd v. J.P. Morgan Chase & Co.*, Nos. 11-CV-9305 and 12-CV-2197, 2013 WL 4828588 (S.D.N.Y. Sept. 9, 2013), is entirely consistent with Judge Jones' ruling because the *Lloyd* court reviewed **two** arbitration agreements and **enforced** the arbitration agreement (including the class and collective action waivers included therein) that is similar to the arbitration agreement and class and collective action waivers at issue here. *Lloyd*, 2013 WL 4828588, at *2, *6. The only reason the *Lloyd* court did not enforce the other agreement was because it read that agreement as expressly limiting arbitration to only disputes that were "required to be arbitrated by the FINRA Rules." *Id.* at *7. Here, the parties' agreement does not expressly limit arbitration to only disputes required to be arbitrated by FINRA rules.[2]

[2] Plaintiff-Appellant's reliance on *Good v. Ameriprise*, No. 06-CV-1027, 2007 WL 628196 (D.Minn. Feb. 8, 2007) is misplaced because, *inter alia*, it is not controlling authority and neither addresses nor distinguishes the controlling Second Circuit authority discussed above.

II. THE FAA TRUMPS FINRA'S ARBITRATION RULES AND MANDATES THAT PLAINTIFF-APPELLANT'S ARBITRATION AGREEMENT BE ENFORCED ACCORDING TO ITS TERMS.

A. The FAA Requires That Arbitration Agreements Be Enforced According To Their Terms "Unless The FAA's Mandate Has Been Overridden By A Contrary Congressional Command."

Under controlling Supreme Court authority, the FAA requires that arbitration agreements be enforced according to their terms "unless the FAA's mandate has been 'overridden by a contrary **congressional** command."' *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (emphasis supplied); *see also American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309-11 (2013) (finding antitrust laws contain no "contrary congressional command" that would override the FAA, and emphasizing that the Supreme Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue … expressly permitted collective actions") (citing with approval enforcement of arbitration agreement with class action waiver in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).[3]

Accordingly, while Judge Jones properly concluded that Plaintiff-Appellant's arbitration agreement is not inconsistent with FINRA's rules, even if it

---

[3] The statutory provision focused on by the Supreme Court in *Gilmer* that expressly permitted collective actions under ADEA is precisely the same provision that expressly permits collective actions under the FLSA. See 29 U.S.C. § 216(b) (FLSA collective action provision); 29 U.S.C. § 626(b) (ADEA collective action provision).

was, the FAA trumps FINRA's rules and mandates that Plaintiff-Appellant's arbitration agreement (and the class and collective action waivers included therein) be enforced according to its terms because Plaintiff-Appellant has not met his burden of demonstrating a "contrary congressional command" to counter the FAA's mandate. *See Shearson/American Exp. Inc. v. McMahon*, 482 U.S. 220, 227 (1987) ("the burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies"). Neither FINRA Rule 13204 nor its regulatory history qualifies as a "congressional command" to counter the FAA's mandate.

Moreover, nothing in the Exchange Act provides a "contrary congressional command" to counter the FAA's mandate or authorizes FINRA to impose limitations on a member firm's rights under the FAA to enter into and enforce arbitration agreements with its employees that include class and collective action waivers.[4] *See infra*, Point II.B. Nor is the Board's contrary ruling in *Schwab* entitled to deference both because the Board has no special competence or experience with interpreting the FAA, and because FINRA is not a state actor and,

---

[4] Plaintiff-Appellant identifies no provision of the Exchange Act or its legislative history that suggests Congress intended the Exchange Act to override the FAA's mandate by ensuring that **employees** of FINRA member firms have an unwaivable right to pursue **employment** claims against their employers in class and collective actions in court rather than in non-class arbitrations.

consequently, the Board's interpretation of FINRA's rules is not due the deference accorded to governmental agency interpretations. *See infra*, Point II.C. As the Supreme Court stated in *CompuCredit*, where Congress has intended to provide a congressional command sufficient to overcome the FAA's mandate, it has done so clearly and explicitly. *See CompuCredit*, 132 S. Ct. at 672 ("Had Congress meant to prohibit these very common [arbitration] provisions … it would have done so in a manner less obtuse than what respondents suggest. When it has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications"). As Plaintiff-Appellant has not established any such clear and explicit congressional command sufficient to overcome the FAA's mandate, his arbitration agreement must be enforced according to its terms.

B. There Is No Contrary Congressional Command In The Exchange Act Concerning Arbitration Of Employment Disputes Sufficient To Overcome The FAA's Mandate.

None of the provisions of the Exchange Act relied upon by Plaintiff-Appellant includes a contrary congressional command concerning arbitration of employment disputes sufficient to overcome the FAA's mandate, or otherwise supports Plaintiff-Appellant's argument that the Exchange Act authorizes the SEC to approve rules it deems appropriate for the protection of **employees** by preserving for **employees** the right to pursue class and collective actions in court. Indeed, none of these provisions authorizes the SEC to approve SRO rules limiting

the rights of FINRA member firms and their **employees** to enter into enforceable arbitration agreements that include class and collective action waivers.

1. Section 19(b)(2) Simply Sets Forth the Procedural Process By Which the SEC Approves SRO Rules.

First, Section 19(b)(2) of the Exchange Act simply sets forth the procedural process by which the SEC approves SRO rules. It does not reference or address arbitration in any way, let alone authorize FINRA or the SEC to adopt or approve rules regulating arbitration of **employment** disputes. Such procedural provisions that are utterly silent regarding arbitration cannot possibly constitute a clear and explicit congressional command overriding the FAA.

2. Section 15A Applies Only to Customer Disputes.

Second, Section 15A of the Exchange Act, which incorporates the Maloney Act amendments and which Plaintiff-Appellant cites as authorizing the SEC "to oversee and regulate [SRO rules] relating to **customer** disputes" (*see* Pl. Br. at 34) does not authorize the SEC to oversee and regulate SRO rules relating to **employment** disputes. *See United States v. NASD*, 422 U.S. 694, 700 (1975) (Maloney Act "authorizes [the SEC] to promulgate rules designed … generally to protect **investors** and the public interest") (emphasis supplied); *McMahon*, 482 U.S. at 233-34 (SEC has authority to "oversee and to regulate the rules adopted by the SROs relating to **customer** disputes") (emphasis supplied); Teresa Verges, Opening the Floodgates of Small Customer Claims in FINRA Arbitration: FINRA

v. Charles Schwab & Co., Inc., 15 Cardozo J. Conflict Resol. 623, fn. 110 (2014) (SEC review and comment process "ensures that proposed rules, and any changes or deletions to existing rules, promote **fairness and efficiency in the markets** and **protect investors**") (emphasis supplied).[5]

3. Section 29(a) Limits Only Waivers of Substantive Obligations, Not Procedural Rights, and the Right To Participate in Class or Collective Actions Is Procedural.

Third, Plaintiff-Appellant has not met his burden of showing that a contrary congressional command sufficient to overcome the FAA's mandate is "deducible from [the] text or legislative history [of Section 29(a) of the Exchange Act]" because Section 29(a) only limits waivers of substantive obligations imposed by

---

[5] Accordingly, insofar as Plaintiff-Appellant relies on Section 15A to argue that the SEC's approval of FINRA Rule 13204 – which relates solely to **employment** disputes – is sufficient to overcome the FAA's mandate, his reliance is misplaced because the SEC's congressionally-delegated authority under Section 15A is expressly limited to **customer** disputes and, consequently, the SEC's approval of FINRA Rule 13204 does not have the force of federal law and is not sufficient to overcome the FAA's mandate because the SEC was not acting within the scope of its congressionally-delegated authority (which was expressly limited to **customer** disputes) when it approved that rule. *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1869 (2013) ("for agencies charged with administering congressional statutes both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less when they act beyond their jurisdiction, what they do is ultra vires"); *Fiero v. Fin. Indus. Regulatory Auth., Inc.*, 660 F.3d 569, 574, 578-79 (2d Cir. 2011) (in evaluating whether FINRA has authority to take action pursuant to its rules, "[t]he first question is whether the Exchange Act provides FINRA with the necessary authority [to so act]. We hold that it does not" and that courts are **not** bound by FINRA's characterization of its authority under the Exchange Act.)

the Exchange Act, not procedural rights. *McMahon*, 482 U.S. at 227 (citations omitted). Indeed, the Supreme Court held in *McMahon* that there is no such "contrary congressional command" in Section 29(a), which "was designed to prohibit waiver of only the '**substantive** obligations imposed by the Exchange Act.'" *Roney & Co. v. Goren*, 875 F.2d 1218, 1220 (6th Cir. 1989) (quoting *McMahon*, 482 U.S. at 228) (emphasis supplied). Thus, waivers of procedural rights such as the right to pursue claims in court rather than in arbitration are permissible under Section 29(a) because procedural waivers "do[] not effect a waiver of the protections of the [Exchange] Act." *See McMahon*, 482 U.S. at 229-30, 234.[6]

---

[6] The Dodd-Frank Act's sole amendment to Section 29(a) – substituting "self-regulatory organization" for "exchange" – does not address let alone change the controlling Supreme Court law as set forth in *McMahon*. Indeed, courts interpreting Section 29(a) after Dodd-Frank continue to follow *McMahon*'s controlling precedent that Section 29(a) applies only to waivers of **substantive** obligations imposed by the Exchange Act, and not to waivers of procedural rights. *See Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1041 (9th Cir. 2011) ("[S]ection 29(a) 'applie[s] only to express waivers of non-compliance' … with the '**substantive** obligations imposed by the Exchange Act'") (quoting *McMahon*, 482 U.S. at 228 (emphasis added)); *Delaware Cnty. Employees Ret. Fund v. Portnoy*, No. 13-10405, 2014 WL 1271528, at *14 (D.Mass. Mar. 26, 2014) ("First, [as] the Supreme Court has held[,] the anti-waiver provision of [Section 29(a) of] the Exchange Act does not apply to 'procedural provisions,' including compulsory arbitration").

In addition, as explained below, the recent Dodd-Frank amendments to the Exchange Act actually provide further evidence that Congress did **not** issue a command in the Exchange Act that would override the FAA mandate to enforce

Controlling Supreme Court and Second Circuit precedent establishes that the right to participate in a class or collective action is a **procedural** right that can be waived. As the Second Circuit recently explained in ruling that class and collective action waivers are enforceable in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013):

> Our conclusion that nothing in the text of the FLSA prevents an employee from waiving his or her ability to proceed collectively under the FLSA is reinforced by our earlier decision referring to the FLSA collective action "right" as a "**procedural** mechanism[ ]." *Shahriar v. Smith & Wollensky Rest. Grp., Inc*., 659 F.3d 234, 244 (2d Cir. 2011). We have previously explained that the **procedural** "right" to proceed collectively presupposes, and does not create, a non-waivable, substantive right to bring such a claim. *See Parisi* [*v. Goldman, Sachs & Co.*, 710 F.3d 483, 488 (2d Cir. 2013)]. Indeed, as the Supreme Court noted in *Italian Colors*, "[o]ne might respond, perhaps, that federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the **procedural** strictures of Rule 23 or invoking some other informal class mechanism in arbitration. But we have already rejected that proposition...." 133 S. Ct. at 2310 (citing *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1748 (2011)).

Sutherland, 726 F.3d at 297, n.6 (emphasis added). *See Raniere v. Citigroup Inc.*, 533 F. App'x 11, 13 (2d Cir. 2013) (same); *Shahriar*, 659 F.3d, at 244, 247 ("the procedural mechanisms available under 29 U.S.C. §216(b)" are distinct from the FLSA's "substantive provisions" because the former are merely a vehicle for bringing claims under the latter); *Myers v. Hertz Corp*., 624 F.3d 537, 542 (2d Cir.

---

arbitration agreements between member firms and their employees according to their terms. *See infra*, Point II.B.

2010) (distinguishing between §216(b)'s collective-action provisions and the "FLSA's substantive provisions"); *Coan v. Kaufman*, 457 F.3d 250, 261 (2d Cir. 2006) (describing a class action as a "procedural device"); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-53 (8th Cir. 2013) ("if an employee must affirmatively opt in to [an FLSA] class action, surely the employee has the power to waive participation in a class action as well"); *Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009) (right to represent others in an FLSA collective action is a "procedural right"); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (right to proceed collectively is not substantive and can be waived); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) ("Congress [did not] confer a nonwaivable right to a class action under [the FLSA]").[7]

---

[7] Even statutory provisions that, unlike Section 29(a), expressly provide individuals with a "right to sue" in "court" and further provide that a waiver of rights "shall be treated as void" do not constitute the type of clear statement of congressional intent required to trump the FAA. *See CompuCredit*, 132 S.Ct. at 670-71, 672 ("It takes a considerable stretch to regard the [statutory] nonwaiver provision as a 'congressional command' that the FAA shall not apply"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 482-83 (1989) (arbitration agreements are "in effect, a specialized kind of forum-selection clause" and thus do not waive any substantive rights); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (parties to arbitration agreement "relinquish [] no substantive rights"); *Securities Indus. Ass'n. v. Connolly*, 883 F.2d 1114, 1121 (1st Cir. 1989) ("nothing in … the Exchange Act … manifests a congressional intent to limit or prohibit waiver of a judicial forum for a particular claim, or to abridge the sweep of the FAA").

Plaintiff-Appellant does not dispute that "[t]he *McMahon* Court … held that Section 29 'prohibits waiver of … **substantive** obligations'", instead contending that "FINRA Rule 13204 … imposes duties and **substantive** obligations on FINRA member firms … to refrain from limiting the ability of their **employees** to file claims in court[.]" Pl. Br. at 42 (emphasis added). However, FINRA Rule 13204 does not confer any substantive obligations on FINRA member firms or rights on employees; it merely provides default arbitration rules and procedures that apply in the absence of an agreement to the contrary. And the parties' arbitration agreement does not waive compliance with any substantive obligations imposed by FINRA rules; it merely provides new contractual procedures for resolving employment disputes that modify and supersede FINRA's arbitration procedures. As explained above, controlling Second Circuit authority establishes that FINRA arbitration rules may be modified or superseded by a more specific agreement of the parties, and that FINRA member firms are free to enter into and enforce individual agreements that modify or supersede FINRA's arbitration rules, as was done here. *See supra*, Point I.A.

Moreover, while the *McMahon* Court observed that Section 19 of the Exchange Act confers on the SEC "broad authority to oversee and … regulate … rules adopted by the SROs relating to **customer** disputes" (*McMahon*, 482 U.S. at 233-34) (emphasis supplied), it does not confer any authority to regulate rules

adopted by SROs relating to **employment** disputes.[8] As explained below, unlike Rules 2268(d)(1) and (d)(3) of the **Customer** Code, which prohibit member firms from placing conditions in arbitration agreements with **customers** that limit or contradict the **Customer** Code or that limit the ability of a party to file any claim in court permitted to be filed in court under the rules of the **Customer** Code, there is no rule in the **Industry** Code that prohibits member firms from entering into agreements with their employees that limit or contradict the **Industry** Code or that limit the ability of a party to file any claim in court permitted to be filed in court under the rules of the **Industry** Code. *See infra*, Point II.C. And as explained above, there is no FINRA rule that prohibits member firms from entering into agreements with their employees in which the employees agree to waive any right they may have to file or participate in a class or collective action, as the parties did here. *See supra*, Point I.B. Thus, UBS did not violate any FINRA rule by entering into an arbitration agreement with Plaintiff-Appellant that includes class and

---

[8] In addition, the Board's reliance in *Schwab* on the Supreme Court's reference in *CompuCredit* to the Consumer Financial Protection Act's ("CFPA") delegation of authority to the Consumer Financial Protection Bureau ("CFPB") (ADD-64) is misplaced because, while the CFPA clearly and expressly delegates to the CFPB authority to issue regulations that "prohibit or impose conditions or limitations on the use of arbitration agreements [with consumers]" (ADD-64 at n.23), there is no similarly clear and express delegation of authority to regulate the use of arbitration agreements with employees in the Exchange Act.

collective action waivers, and under controlling Supreme Court and Second Circuit precedent, that agreement must be enforced according to its terms.

4. Dodd-Frank Further Evidences that Congress Did Not Issue a Command in the Exchange Act that Overrides the FAA.

Finally, the Dodd-Frank amendments to the Exchange Act further evidence that Congress did not issue a command in the Exchange Act that would override the FAA mandate or authorize the SEC to approve rules limiting the ability of member firms and their **employees** to enter into agreements to arbitrate employment disputes on a non-class basis. Section 921 of Dodd-Frank amended the Exchange Act to provide that: "The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require **customers or clients** … to arbitrate **any** … **dispute** … **arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization** if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and **for the protection of investors**." (emphasis added). This new delegation of authority to the SEC demonstrates that Congress believed that it had not previously granted the SEC sufficient authority to impose conditions or limitations arbitration agreements. And, importantly, this new delegation of authority to regulate arbitration agreements only applies (1) to agreements with "customers or clients", not employees; (2) where the SEC first finds that regulating such agreements will protect "investors", not employees; and

(3) to arbitration of disputes "arising under the Federal securities laws, the rules and regulations thereunder, or the rules of [an SRO]", not disputes arising under employment laws. Thus, it is clear that Congress has not authorized the SEC to regulate either arbitration agreements with **employees** or arbitration of disputes arising under **employment** laws.

C. The FINRA Board's Decision In The *Schwab* Disciplinary Proceeding Is Neither Entitled To Deference Nor Relevant Or Controlling Law.

The Board's decision in the *Schwab* disciplinary proceeding (ADD-45 to 72), cited by Plaintiff-Appellant, is neither entitled to deference nor relevant, let alone controlling law, in the context of a motion to compel arbitration in an employment class action.

First, the Board's rulings in *Schwab* are not entitled to any deference by this Court both because the Board has no special competence or experience with interpreting the FAA, and because, as the Board itself confirmed in *Schwab* and on its own website, FINRA is not a "state actor",[9] and, consequently, its "interpretation of [its rules] … is not due the deference accorded to agency interpretations." *Morgan Keegan & Co. v. Johnson*, No. 11-CV-502, 2011 WL 7789796, at *7 (E.D. Va. Dec. 22, 2011); *see also Morgan Keegan & Co. v.*

---

[9] *See* ADD-61 at n.18; http://www.finra.org/aboutfinra/ ("FINRA is not part of the government. We're an independent, not-for-profit organization…").

Drzayick, No. 11-CV-00126, 2011 WL 5403031, at *2 n.1 (D.Idaho Nov. 8, 2011) (FINRA decision "is not binding precedent … and … need not be given deference by this Court").[10]

Second, *Schwab* is inapposite because it was issued in a disciplinary proceeding involving FINRA's authority to enforce Customer Code rules against member firms. It has no application in a court action where FINRA is not a party and the issue is the enforceability of private arbitration agreements between an employer and its employees.[11]

Third, *Schwab* is inapposite because the FINRA rules Schwab was found to have violated were Rules 2268(d)(1) and (d)(3) of the **Customer** Code, which do not apply to employment disputes and have no analogue in the **Industry** Code.

---

[10] Even the SEC grants no deference to FINRA disciplinary decisions such as *Schwab*. *See Sorrell v. SEC*, 679 F.2d 1323, 1326 n.2 (9th Cir. 1982) (SEC engages in "independent" and "de novo" "review of [FINRA] decisions"); *Todd & Co. v. SEC*, 557 F.2d 1008, 1012-13 (3d Cir. 1977) (SEC conducts "full review" of FINRA "disciplinary actions" and "must base its decision on its own findings").

[11] Nor does FINRA IM-13000, which states "it may be deemed … a violation of Rule 2010 for a member to require associated persons **to waive the arbitration of disputes** contrary to the provisions of the Code of Arbitration Procedure" (emphasis added) apply here, as there is no allegation that Plaintiff-Appellant was required to **waive** arbitration of any disputes. Rather, both the parties' agreement and the District Court's decision **require** arbitration of the parties' dispute, and nothing in FINRA IM-13000 bars waivers of either the right to pursue claims in court or the right to pursue claims in a class or collective action.

The *Schwab* decision itself explains some of the important differences between the Customer Code and the Industry Code, and expressly distinguishes FINRA rules applying to customer disputes from those applicable to employment disputes. *See* ADD-55 to 56. In particular, *Schwab* explains that unlike Rules 2268(d)(1) and (d)(3) of the **Customer** Code, which prohibit member firms from placing conditions in arbitration agreements with **customers** that limit or contradict the **Customer** Code or limit a party's ability to file claims in court that are permitted to be filed in court under the **Customer** Code, nothing in the **Industry** Code prohibits member firms from entering into agreements with their employees that limit or contradict the **Industry** Code or limit a party's ability to file claims in court. ADD-55 ("there are no restrictions upon firms regarding the content of predispute arbitration agreements with **employees**, unlike the strict parameters set forth by FINRA Rule 2268 for predispute arbitration agreements with **customers**") (emphasis added). *Schwab* also specifically discusses Judge Jones' decision below and concludes that the two cases are inapposite because of this important difference between the Customer Code at issue in *Schwab* and the Industry Code at issue here. *See* ADD-55 to 56.

Fourth, the ruling in *Schwab* that the Exchange Act and its amendments comprised a congressional command for the SEC to approve FINRA rules regulating arbitration of **customer** disputes is irrelevant to this case involving

FINRA rules regulating **employment** disputes. In the Board's own words, the Exchange Act "empowers FINRA to regulate … how [broker-dealers] resolve disputes **with their customers**, subject to SEC oversight" and provides the SEC with "authority to oversee and to regulate the rules adopted by the SROs relating to **customer** disputes." ADD-62, 63 (emphasis supplied).

Finally, the *Schwab* decision did not address the controlling Second Circuit cases holding that FINRA arbitration rules may be modified or superseded by a more specific agreement of the parties. *See supra*, Point I.A.

III. RECENT AMENDMENTS TO THE FINRA COLLECTIVE ACTION RULE DO NOT APPLY TO THIS ACTION.

Plaintiff-Appellant cannot rely on recent rule amendments seeking to extend FINRA Rule 13204 to apply to collective action claims. This amendment was not effective until July 9, 2012 – after Plaintiff-Appellant entered into his arbitration agreement and after this action was filed – and has no retroactive effect. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 268 (1994) ("the presumption against retroactive legislation . . . is deeply rooted in our jurisprudence" and "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to

promulgate retroactive rules unless that power is conveyed by Congress in express terms"). Here, Plaintiff-Appellant received valuable consideration in exchange for entering into an arbitration agreement with a collective action waiver; it would be fundamentally unfair to now invalidate that agreement and collective action waiver based on a FINRA rule not in place when the agreement was made.[12]

IV. CLAIMS UNDER THE CALIFORNIA PRIVATE ATTORNEYS GENERAL ACT ARE ARBITRABLE.

Plaintiff-Appellant argues (*see* Pl. Br. at 23, n.6) that his claims under California's Private Attorneys General Act ("PAGA") are not arbitrable based on the recent California Supreme Court decision in *Iskanian v. CLS Transp. Los Angeles*, No. S204032, 327 P.3d 129 (Cal. Jun. 23, 2014), finding that the FAA did not preempt PAGA. This argument fails because *Iskanian* is not binding on this court and is wrongly decided. Only Congress can issue a mandate excluding certain types of claims from arbitration pursuant to the FAA. *See supra*, Point I. The *Iskanian* court did not even address this issue, considering instead only whether PAGA "stands as an obstacle" to accomplishing the FAA's objectives. *Iskanian*, 327 P.3d at 149. By applying this incomplete test, the *Iskanian* court

---

[12] The 1999 Interpretative Letter relied upon by Plaintiff-Appellant is not entitled to deference. *See Lopez v. Terrell*, 654 F.3d 176, 182 (2d Cir. 2011) (citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000)); *Velez*, 769 F. Supp. 2d at 447 (FINRA "staff opinion letters are not … entitled to deference by this Court").

wrongly allowed a state law to trump the FAA, contravening the many Supreme Court decisions holding that the FAA preempts any state law prohibiting outright the arbitration of a particular type of claim. *See, e.g.*, *Concepcion*, 131 S. Ct. at 1749 (2011) (FAA preempted rule established by the California Supreme Court which rendered unenforceable most arbitration agreements in consumer adhesion contracts that included class action waivers); *Preston*, 552 U.S. at 356 (FAA preempted California law granting state commissioner exclusive jurisdiction to decide issue the parties had agreed to arbitrate); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (FAA preempts California Labor Code provision that allows wage actions to be maintained despite arbitration agreement). At least one federal court has already found *Iskanian* to be wrongly decided. *Fardig v. Hobby Lobby Stores Inc.*, No. 14-CV-00561, 2014 WL 4782618, *3-4 (C.D.Cal. Aug. 11, 2014).[13]

[13] The impact of *Iskanian* will remain unsettled until after the Supreme Court resolves the *Iskanian* defendants' certiorari petition (filed on September 22, 2014) and, if granted, until the Supreme Court decides the case. *See* Supreme Court Docket No. 14-341.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Date: October 1, 2014

Respectfully submitted,

/s/ Andrew J. Schaffran

Ira D. Hammerman
Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, DC 20005
Telephone: 202-962-7382

Andrew J. Schaffran
Sam S. Shaulson
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
Telephone: 212-309-6000

Counsel for Amicus Curiae
The Securities Industry and Financial Markets Association

CERTIFICATE OF COMPLIANCE

I, Andrew J. Schaffran, an attorney, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C)(i), certify that the foregoing brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). The Brief contains 6,908 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief also complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 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.

/s/ *Andrew J. Schaffran*
Andrew J. Schaffran