

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-09542

SUPERADIO LIMITED PARTNERSHIP, Plaintiff-Appellant,

v.

WALT "BABY" LOVE PRODUCTIONS, INC.,
Defendant-Appellee,

ON FURTHER APPELLATE REVIEW OF AN APPEAL FROM
A JUDGMENT OF THE WORCESTER SUPERIOR COURT
CONFIRMING ARBITRATION AWARD

NO. SJC-09529

STEVEN MSCISZ, ET AL., Appellants

v.

KASHNER DAVIDSON SECURITIES CORP., ET AL., Appellees

ON APPEAL FROM JUDGMENT OF THE
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION AS AMICUS
CURIAE

Timothy P. Burke, BBO # 558893
Matthew C. Applebaum, BBO #653606
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110-1726
(617) 951-8000

Attorneys for the Securities
Industry Association

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I. INTRODUCTION AND STATEMENT OF INTEREST

The Securities Industry Association ("SIA") brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. (More information about SIA is available at: www.sia.com.)

As a member of the Securities Industry Conference on Arbitration ("SICA"), SIA has been intimately involved in the arbitration process, which is the principal dispute resolution mechanism for the securities industry. One function of SIA is to address judicial issues, as well as legislative and regulatory matters, affecting the securities industry. In the context of arbitration, SIA has participated as amicus curiae before courts considering unauthorized practice of law issues similar to those before the Court, including the Florida Supreme Court in

connection with its recent adoption of amendments to Florida's disciplinary rules concerning multi-jurisdictional practice of law and the California Supreme Court in *Birbrower, Montalbano, Condon & Frank et al. v. Superior Court (ESQ Business Services, Inc.)*, 949 P.2d 1 (1998). SIA has also participated as *amicus curiae* before the United States Supreme Court in cases involving arbitration, including *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

Perhaps more so than any other industry in the United States, the securities industry relies on arbitration to resolve disputes with its customers and others. SIA and its members use arbitration to resolve thousands of customer claims annually. Thus SIA members have a significant interest in ensuring that the process provides an effective mechanism for resolving disputes quickly, efficiently, economically and fairly.

The ability of broker-dealers (as well as investor claimants) to be represented by counsel of

their choice in arbitration proceedings is an important factor in ensuring the efficiency and economy of those proceedings. This freedom of choice ensures that broker-dealers are represented by the counsel most familiar with their company, the securities industry, the applicable securities arbitration process, and recurring legal issues in arbitration proceedings.¹ The brokerage firm members of SIA are represented by hundreds of attorneys - many of whom are in-house counsel to the brokerage firm. Not surprisingly, the vast majority of the legal staffs of its members are located in New York and other major commercial centers. By virtue of modern technology, including the internet, however, broker-dealers frequently have clients in states in which the broker-dealer has no physical presence, and thus are subject to arbitration proceedings in such states.

SIA, therefore, has a substantial interest in this Court's consideration of the issues presented in

¹ Security industry proceedings are governed by arbitration rules adopted by the National Association of Securities Dealers Regulation, Inc. or by the various exchanges, such as the New York Stock Exchange Arbitration Rules, all of which are approved by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934. 15 U.S.C. §§ 78c(a), 78f, 78o-3, 78s. Many broker-dealers also allow for the election of American Arbitration Association as an arbitration forum in their client agreements.

Mscisz v. Kashner Davidson Securities Corp., and *Superadio v. Walt "Baby" Love Productions*, in which the appellants assert that G.L. c. 221, s. 46A prohibits parties from being represented in arbitrations in Massachusetts by any counsel not licensed to practice law in Massachusetts.

II. ISSUES PRESENTED

1. Whether a lawyer licensed to practice and in good standing in another United States jurisdiction engages in the unauthorized practice of law by appearing in arbitration proceedings held in Massachusetts.²

III. STATEMENT OF THE CASE

For purposes of this appeal, SIA accepts the description of the prior proceedings in these cases as set forth in the parties' briefs before this Court.

IV. STATEMENT OF THE FACTS

SIA understands that the facts relevant to the unauthorized practice of law issue addressed herein are not in dispute. Accordingly, for purposes of this appeal, SIA accepts the statements of the facts set forth in the parties' briefs before this Court.

² SIA takes no position on any other issues raised in this case, except as noted in note 11, below.

V. SUMMARY OF ARGUMENT

Massachusetts' unauthorized practice of law statute, Mass. G.L. ch. 221 s. 46A, should not be unreasonably interpreted so as to hinder the ability of broker-dealers to retain counsel of their choice in securities arbitrations held in Massachusetts even if such counsel are members other state bars but not licensed in this state.

Such a holding would present a significant problem for broker-dealers because, since most such companies are not headquartered in Massachusetts, their internal corporate legal staff are generally not located in Massachusetts and thus are not licensed in Massachusetts. A broker-dealer's in-house counsel is often the best qualified and most efficient to handle the arbitration by virtue of being the most familiar with the company, the securities industry and the applicable arbitration rules. Barring out-of-state attorneys would thus substantially diminish the efficiency, economy and fairness of securities arbitrations. (Pages 7 - 9).

The same considerations apply when broker-dealers choose their regular outside counsel to represent them in arbitrations, when those outside counsel are not licensed in Massachusetts but possess expertise in securities regulation, industry standards, and

arbitration procedures, and have developed knowledge of and familiarity with the broker-dealer party itself. Regular outside counsel are also chosen to handle arbitrations involving recurring industry wide issues, and a requirement of using different counsel depending on where the arbitration is held would be extremely inefficient and deprive broker-dealers of the most qualified representation. (Pages 9 - 13).

The American Bar Association Commission on Multijurisdictional Practice, considering the unauthorized practice of law issues raised in these cases with respect to arbitrations generally, voiced many of the same concerns, and recommended the adoption of a revised version of Model Rule 5.5(c) which would permit out-of-state attorneys to appear in arbitrations. The NASD has proposed a similar change to its arbitration rules. SIA believes that the policy considerations that guided the ABA Commission in support of its proposed rules are compelling. (Pages 13 - 19)

Rather than prohibit representation by out-of-state attorneys in arbitrations, Massachusetts should join the growing number of states that have adopted the proposed Model Rule 5.5(c), in order to encourage the growing adoption of the Model Rule and also to avoid the added costs and burdens that a restrictive

rule could impose on Massachusetts citizens participating in arbitrations.³ (Pages 19 - 21).

VI. ARGUMENT

A. Limiting Representation by Out-of-State Lawyers Would Substantially Undermine Securities Arbitration as an Efficient Means of Dispute Resolution.

1. Out-of-State Lawyers Can Often Provide the Most Expert and Efficient Representation to Broker-Dealers in Securities Arbitrations.

Since the United States Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), arbitration has become the dominant means of resolving securities disputes between investors and broker-dealers, as well as disputes between broker-dealers or between broker-dealers and associated persons. Since 2001, NASD Dispute Resolution, the largest securities arbitration forum, has received over 6,000 arbitration filings annually, with over 8,000 annual filings in 2003 and 2004. See NASD Dispute Resolution Statistics, available at

³ SIA also wishes to associate itself with the position set forth in the amicus brief submitted by the Boston Bar Association ("BBA") that neither Rule 5.5 of the Massachusetts Rules of Professional Conduct nor G.L. c. 221, § 46A resolves the issues in these cases. The undersigned attorneys are co-counsel for the BBA in this matter.

<http://www.nasd.com>. The New York Stock Exchange, another major arbitration forum, received over one thousand annual arbitration filings in 2003 and 2004. See NYSE Arbitration Statistics, available at http://www.nyse.com/pdfs/arbitration_stats.pdf.

Broker-dealers have a significant interest in the ability to be represented by counsel of their choice - both in-house attorneys or regular outside attorneys -- regardless of whether counsel is licensed in Massachusetts. Broker-dealers frequently choose in-house counsel to represent them in securities arbitration because those attorneys are uniquely qualified to provide skillful and economic representation to their employers. In-house counsel, however, are often located and licensed in a jurisdiction other than the state in which an arbitration is held.

In-house lawyers are intimately familiar with their company, including its policies, procedures, operations, business areas, products, and personnel, as well as the securities industry generally, the self-regulatory organization ("SRO") rules and standards in issue in securities arbitration, and the SRO arbitration rules. The in-house lawyer's specialized knowledge in areas such as the securities markets, the securities and other investment products

underlying the claims alleged in securities arbitrations, and the applicable SRO rules are usually more important in a securities arbitration than knowledge of the substantive and procedural rules of the state in which the arbitration is held, or familiarity with that state's court system. In-house lawyers can also render these specialized services economically because they can apply their knowledge and experience in successive arbitrations regardless of the forum site.

These same considerations often apply when a broker-dealer retains an outside lawyer, who may not be licensed in Massachusetts, to represent it in a Massachusetts arbitration. Firms frequently choose outside lawyers to represent them in arbitrations on the basis of expertise in relevant securities law, SRO rules and industry standards of conduct, familiarity with arbitration procedures, and knowledge developed over time of the broker-dealer's policies, procedures, personnel, and operations. (This is the situation in *Mscisz*, where Kashner Davidson Securities Corp. ("KDSC"), a broker-dealer based in Florida, was represented by a New York attorney who had represented it for years and who was related to an owner of KDSC.)

Significantly, broker-dealers frequently retain outside counsel in circumstances which place an even

greater premium on the expertise and efficiency that regular outside counsel provide. For example, broker-dealers choose regular outside counsel in those arbitrations that are likely to involve extensive proceedings requiring the resources that a law firm can provide. Also, in many cases, outside counsel is chosen to represent a firm in successive arbitrations involving a recurring industry-wide issue, such as issues concerning a particular product or sales practice. Broker-dealers obtain far more effective and efficient representation in these situations by using regular outside counsel, rather than using different counsel depending on the forum state.

Two additional considerations heighten the adverse impact that a restrictive rule would have on the efficiency of securities arbitrations. One is the interstate character of the business in which broker-dealers engage in terms of the geographical dispersion of its clients. See, e.g., Richard C. Breeden, *Reforming Regulation of Financial Services in the United States: Issues and Opportunities*, 20 Int'l Law. 775, 775 (1986) ("Exponential improvements in data processing and telecommunications have made it economically feasible for firms to deliver financial services irrespective of geographic proximity.") Not only do clients frequently live outside the state in

which a broker-dealer maintains its headquarters and legal staff, they may reside in a state in which a firm has no physical presence at all (the situation in *Mscisz*). This is particularly true with the advent of the internet and online brokerage firms, which permit customers to purchase securities electronically. See Speech by Paul F. Roye, Director, Division of Investment Management Division of the U.S. Securities Exchange Commission, 1999 WL 1135231, *7 (Dec. 9, 1999) ("[T]he Internet has virtually deleted geographic boundaries, redefined the ways in which consumers and businesses interact, and altered many long-standing market relationships.")

Under the procedural rules of the NASD and NYSE, venue of the arbitration will likely be in the state in which the customer resides, regardless of where the broker-dealer is located.⁴ Accordingly, a rule

⁴ NASD Code of Arbitration Rule 10315 provides that the NASD Director "shall determine the time and place of the first meeting of the arbitration panel and the parties," and "the arbitrators shall determine the time and place for all subsequent meetings." See the NASD Code of Arbitration, available at <http://www.nasd.com>. The Arbitrator's Manual states that the "[t]he general policy in cases involving customers is to conduct the hearing wherever the customer resided when the dispute arose or in the nearest major city." See The Arbitrator's Manual, at 11 (May 2005), available at <http://www.nasd.com>. Arbitrators may, however, select a different location based on other factors such as convenience of the parties. See *id.* The Arbitrator's Manual is a publication of SICA that

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prohibiting representation by out-of-state counsel would not only deprive a broker-dealer of the attorney of its choice, but in some instances would require using counsel who lives at a distance from his clients, imposing additional travel burdens and expense throughout the entire proceeding, including investigation and case preparation before the hearing.

Second, a significant number of securities arbitrations are filed under the NASD's and NYSE's simplified claims procedures, which provide that claims for less than \$25,000 (exclusive of costs and interest) are decided by a single arbitrator on the papers, unless the customer demands or consents to a hearing. See NASD Code of Arbitration Rule 10302; NYSE Arbitration Rule 601, available at <http://www.nasd.com>. A simplified arbitration filed by a resident of Massachusetts would likely be "in" Massachusetts under the venue rules cited above. Given the expedited and generally straightforward nature of simplified arbitrations, both substantively and procedurally, it is usually far more efficient for

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provides guidance to the Uniform Code of Arbitration Rules promulgated by SICA and which have been substantially adopted by the SROs which administer securities arbitrations.

in-house attorneys (or perhaps experienced regular outside counsel) to handle these claims directly. Requiring a Massachusetts attorney to handle a simplified arbitration, whether exclusively or in association with the in-house counsel through some type of procedure analogous to *pro hac vice* procedures, would be grossly inefficient.

The Court has recognized the "strong public policy" in this state "favoring arbitration as an expeditious alternative to litigation for settling commercial disputes," *Plymouth-Carver Regional Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006, 1007 (1990), and should not adopt restrictions on the use of out-of-state attorneys that would significantly reduce the efficiency of arbitration.

2. The Model Rules Proposed by the American Bar Association's Commission on Multijurisdictional Practice Recognize a Strong Justification for Allowing Out-of-State Attorneys to Appear in Arbitrations.

The American Bar Association's Commission on Multijurisdictional Practice (ABA Commission) proposed Model Rule 5.5(c)(3)⁵ permits out-of-state attorneys to

⁵ The proposed Model Rule provides: "(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide services on a temporary basis in this jurisdiction that:

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appear in arbitration proceedings. Recognizing the unique considerations that apply to arbitrations, the ABA Commission stated:

[I]t is generally recognized that, in the ADR context, there is often a strong justification for choosing a lawyer who is not admitted to practice law in the jurisdiction in which the proceeding takes place but who has an ongoing relationship with the client, who is admitted to practice in the jurisdiction in which the client is located, or has developed a particular knowledge or expertise that would be advantageous in providing the representation. Admission to practice law in the jurisdiction in which the proceeding takes place may be relatively unimportant, in part, because that jurisdiction may have no relation to the law governing the proceeding or to the dispute.

ABA Commission, Client Representation in the 21st Century: Report of the Commission on Multijurisdictional Practice, available at

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(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission"

Rule 5.5(c)(3) of the ABA Model Rules for Professional Conduct (ABA Model Rule 5.5(c)(3)).

http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf (Aug. 12, 2002), at 26-27 (ABA Commission Report).

The ABA Commission also concluded that this rule would not diminish a state's ability to regulate attorney conduct. ABA Model Rule 5.5(c)(3) allows an out-of-state attorney to appear only if he is "admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction." ABA Model Rule 5.5(c)(3). In addition, the ABA Commission's Proposed Model Rule 8.5(a) extends the state's disciplinary authority to include any attorneys providing legal services in that state, whether admitted to practice there or not. ABA Model Rule 8.5(a) ("A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.").

At least 17 states have adopted rules identical or substantially identical to Model Rule 5.5(c)(3).⁶ A

⁶ The following states have adopted ABA Model Rule 5.5(c)(3) or another provision similarly hospitable to the appearance of out-of-state lawyers in arbitrations: Arizona, Arkansas, Delaware, Georgia, Indiana, Iowa, Louisiana, Minnesota, Missouri, Nebraska, New Mexico, North Carolina, Oregon, Pennsylvania, South Dakota, Utah, and Vermont.

number of other states are in the process of considering proposals similar to the ABA's proposed model rules. Six states recently adopted rules that in some respects are more restrictive than the ABA Model Rule but that permit appearances by out-of-state counsel in arbitrations.⁷

The NASD, which administers most securities arbitrations, has followed the ABA Model Rule approach in a proposed rule change filed with the Securities and Exchange Commission. The NASD proposal would amend its Code of Arbitration Rule 10316 to provide that "all parties shall have the right be represented by an attorney at law admitted practice" in "any state of the United States." *National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Representation in Arbitration and Mediation*, SEC Release No. 52045, 2005 WL 2838857, * 1 (July 15,

⁷ Since 2004, California, Florida, Idaho, Maryland, New Jersey and South Carolina have adopted rules permitting out of state lawyers to appear in arbitrations, with certain limitations. Florida, for example, limits the number of appearances to three arbitrations in one year. See Rule Regulating the Florida Bar 1-3.11(d); *id.* Rule 4-5.5(c) comment. SIA believes that this limitation is unduly restrictive, particularly in securities arbitrations, in which counsel may be called upon to appear in more than three arbitrations in a year simply by virtue of filing an answer, without ever actually appearing at a hearing in the state.

2005). The proposed rule "is intended to reflect current practice in the forum, which, based on experience, shows that the level of knowledge, training and skill of an attorney affects the outcome of an arbitration . . . more than the jurisdiction from which the attorney received his license to practice." *Id.*, at * 3.

With respect to in-house attorneys specifically, the ABA Commission also recommended Proposed Model Rule 5.5(d)(1), which, in addition to the temporary practice permitted by Rule 5.5(c)(3), permits out-of-state in-house attorneys to establish "an office or other systematic or continuous presence" in a jurisdiction in connection with providing legal services to their employer (unless the representation requires *pro hac vice* admission under the rules of that state).⁸ As the ABA Commission stated:

This proposed provision reflects well-accepted contemporary law practice. Corporations and similar entities with ongoing and recurring legal issues have an interest in retaining in-house lawyers to

⁸ ABA Model Rule 5.5(d)(1) provides: "A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission."

provide legal assistance with respect to those matters, wherever they arise. In recent years, in-house corporate lawyer's work has grown increasingly national and global along with the business of corporate clients. The organizations interest in being provided legal assistance in an efficient, cost-effective and competent manner by a lawyer in whom it reposes confidence is furthered by permitting an organization to employ a lawyer to assist it with recurring matters."

ABA Commission Report at 30. At least thirteen states have adopted a rule identical to Model Rule 5.5(d)(1).⁹

SIA believes that this proposed Model Rule correctly recognizes the unique considerations that pertain to in-house counsel. Although proposed Model Rule 5.5(c)(3) sufficiently addresses the issue before this Court with respect to arbitration, the ABA Commission's Proposed Model Rule 5.5(d)(1) supports SIA's position that, at a minimum, in-house counsel not licensed in Massachusetts should be able to provide legal services here on a temporary basis in arbitrations.

⁹ The thirteen states with an identical rule are: Arizona, Arkansas, Delaware, Georgia, Indiana, Iowa, Maryland, Nebraska, Oregon, South Carolina, South Dakota, Utah, Vermont. At least nine other states have provisions permitting out-of-state in-house counsel to practice law in the state on behalf of their employer, subject to various restrictions. These are Idaho, Louisiana, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, and Pennsylvania.

B. Prohibiting Representation by Out-of-State Attorneys Is Unnecessary and Could Impose Costs and Burdens on Massachusetts Citizens.

Section 46A is designed to protect Massachusetts citizens from "being advised and represented in legal matters by incompetent and unreliable persons, over whom the judicial department could exercise little control." *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 180 (1943). Prohibiting broker-dealers from retaining non-Massachusetts attorneys in securities arbitration would not advance this goal in the vast majority of cases. The relationship of in-house lawyers to their employer clients does not implicate concerns about the protection of the public from incompetent, unethical, or irresponsible representation. Corporations, including licensed broker-dealers, are among the most sophisticated consumers of professional legal services, and they are particularly qualified to evaluate the competency of the lawyers they hire as employees. These in-house counsel are especially able to evaluate outside counsel that they retain.¹⁰

¹⁰ It is likely that in most securities arbitrations it would be the broker-dealer, not the Massachusetts client, who would wish to be represented by out-of-state counsel. Furthermore, ABA Model Rule 5.5(c)(3) limits appearances by out-of-state lawyers to representations that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice," a condition that likely would not be met by most out-of-

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A prohibition on representation by out-of-state attorneys could have negative consequences for Massachusetts citizens who are parties to arbitration proceedings. A restrictive rule in Massachusetts might lead other states to adopt similar restrictions, which would limit the ability of Massachusetts clients to be represented by Massachusetts counsel -- or other counsel of their choice -- in arbitrations in other states. Such a rule would especially impact litigants who are unable to retain a law firm that can field attorneys licensed in various states.

A restrictive rule could also discourage parties from agreeing to arbitrate in Massachusetts as opposed to a state in which they can be represented by counsel of their choice. In securities arbitrations, a broker-dealer who files a securities arbitration claim against a Massachusetts client would likely seek to have the arbitration venued elsewhere, potentially resulting in inconvenience to the Massachusetts client. Broker-dealer respondents could argue that a Massachusetts rule depriving them of their choice of counsel presents a compelling reason not to venue the

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state attorneys seeking to represent a Massachusetts client.

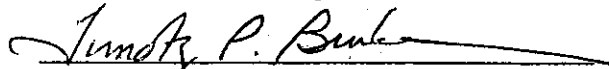
arbitration in Massachusetts, particularly if the arbitration could instead be held in another convenient state such as a nearby state. Therefore, a restrictive rule could have a negative impact on Massachusetts citizens, without advancing the purpose for which Section 46A was enacted.¹¹

¹¹ SIA wishes to associate itself with the BBA's alternative argument for confirming the arbitration awards on appeal; namely, that the unauthorized practice of law issues raised by appellants do not present any grounds for vacatur.

VII. CONCLUSION

For the reasons set forth above, this Court should conclude that attorneys not licensed to practice law in Massachusetts are permitted to appear in arbitration proceedings in the Commonwealth, provided that they are licensed in another jurisdiction and not disbarred or suspended in any jurisdiction.

By its attorneys,



Timothy P. Burke,
BBO # 558893
Matthew C. Applebaum,
BBO #653606
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110-1726
(617) 951-8000

Attorneys for the Securities
Industry Association

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