COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

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No. SJC-11356

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JANE B. McINNES,

Plaintiff/Appellee,

v.

LPL FINANCIAL LLC & ANOTHER,

Defendants/Appellants.

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On Appeal from Orders of the Barnstable Superior Court

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# BRIEF OF AMICUS CURIAE AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF DEFENDANTS/APPELLANTS

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## CORPORATE DISCLOSURE STATEMENT

Amicus curiae the American Financial Services Association ("AFSA"), pursuant to S.J.C. Rule 1:21, states that it is the national trade association for the consumer credit industry. AFSA is a 26 U.S.C. § 501(c)(3) nonprofit association. AFSA has been in existence since 1916, and has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies. AFSA does not have any parent corporation, and no publicly held corporation holds 10% or more its stock.

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## ISSUE PRESENTED

Whether the decision in Hannon v. Original Gunite Aquatech Pools, Inc., holding that "consumers need not submit to arbitration as a precondition to asserting their rights" under G.L. c. 93A, § 9, remains viable after subsequent decisions of the United States Supreme Court that applied federal preemption doctrine to preclude state-law policy limitations on arbitration proceedings relating to interstate commerce subject to the Federal Arbitration Act.

## AMICUS'S INTEREST IN THIS CASE

Amicus curiae the American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies. The association represents financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices.

Many of AFSA's members have independently adopted as part of their consumer contracts provisions that call for arbitration of disputes arising from or relating to those contracts, upon the election of either party. Those members use arbitration because

it is a prompt, fair, inexpensive, and effective method of resolving disputes and because arbitration minimizes the disruption and loss of good will that often results from litigation in court. AFSA's members strive to ensure that their arbitration agreements provide fair, efficient, and cost-effective means for both members and their customers to resolve disputes between them.

The decision in Hannon v. Original Gunite Aquatech Pools, Inc., 385 Mass. 813 (1982), has had the effect of undermining the Federal Arbitration Act[1] and it casts into doubt the enforceability in Massachusetts of arbitration agreements to which AFSA's members are parties. Accordingly, AFSA has a compelling interest in this case and in having Hannon overruled.[2]

**SUMMARY OF ARGUMENT**

Hannon is contrary to the FAA and to the direction of the Supreme Court interpreting and applying the FAA. As this Court has acknowledged in multiple decisions, the Supremacy Clause mandates that the enforceability of an arbitration agreement that is

[1] 9 U.S.C. §§ 1-18 ("FAA").

[2] Neither appellants LPL Financial LLC and Karl G. McGhee nor their counsel, nor any individual or entity other than AFSA and its counsel, has authored this brief in whole or in part or has made any monetary contribution to its preparation or submission.

subject to the FAA cannot be precluded by state law that singles out arbitration for special treatment. However, Hannon construed Section 9(6) of Chapter 93A to prohibit arbitration of a limited class of disputes--certain consumer claims. Thus, this Court long ago in effect overruled Hannon sub silentio.

Massachusetts public policy cannot override the FAA, nor can the Court's concern for plaintiff's vindication of her rights under Chapter 93A, or any other state statute. The trial court's refusal to enforce the parties' arbitration agreement as to the plaintiff's claims other than her Chapter 93A claim because, as the court put it, those claims are "inexorably intertwined" with the Chapter 93A claim also runs afoul of longstanding Supreme Court FAA precedent. That being the case, Hannon has the result of multiplying litigation expense and burden because it requires Chapter 93A claims to be prosecuted in court when other, related claims must be arbitrated. Finally, enforcement of Chapter 93A and furtherance of its goals does not depend on private claims--the statute endows the Attorney General with broad enforcement powers.

## ARGUMENT

"Agreements to arbitrate that fall within the scope and coverage of the [FAA] must be enforced in state and federal courts. State courts, then, 'have a prominent role to play as enforcers of agreements to arbitrate.'" KPMG LLP v. Cocchi, 132 S. Ct. 23, 24 (2011)(per curiam) (quoting Vaden v. Discover Bank, 556 U.S. 49, 59 (2009)); see also Nitro-Lift Technologies, L.L.C. v. Howard, 133 S. Ct. 500, 501 (2012) (per curiam) ("It is a matter of great importance . . . that state supreme courts adhere to a correct interpretation of the [FAA].").

### I. HANNON IS INCONSISTENT WITH THE FAA AND WITH U.S. SUPREME COURT DECISIONS INTERPRETING AND APPLYING THE FAA--AND THEREFORE IS NO LONGER GOOD LAW.

In Hannon this Court held that G.L. c. 93A, § 9 claims cannot be compelled to arbitration because § 9(6) exempts § 9 plaintiffs from any exhaustion of remedies requirements that might otherwise apply. Although § 9(6) does not explicitly include arbitration, this Court concluded that arbitration fit within the categories of proceedings to which that provision applies. 385 Mass. at 826.

The precept on which Hannon is based--that the Massachusetts legislature can overrule the FAA--is incorrect.

### A. State Laws Invalidating or Limiting Arbitration Are Preempted by the FAA.

The Supreme Court has repeatedly held that the FAA preempts state laws invalidating arbitration agreements. This has been established by a string of Supreme Court cases dating to 1984, two years after Hannon was decided. In Southland Corp. v. Keating, 465 U.S. 1, 10-12 (1984), the Supreme Court declared that Congress, by enacting [FAA] Section 2 "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." The Supreme Court held that the FAA preempts a state financial investment statute's prohibition of arbitration of claims brought under that statute. See also Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201, 1204 (2012) (per curiam) ("a categorical rule prohibiting arbitration of a particular type of claim . . . is contrary to the terms and coverage of the FAA"; listing Supreme Court decisions holding that the FAA preempts state laws prohibiting arbitration of particular categories of claims).

Most recently, the Supreme Court vacated an Oklahoma Supreme Court decision that refused to enforce an arbitration clause on the ground the confidentiality and non-competition agreements in which the clause was contained were rendered invalid

by an Oklahoma statute. Nitro-Lift Technologies, L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam).

This Court has itself long recognized that "[t]he enforceability of an arbitration clause cannot be precluded by State law." Martin v. Norwood, 395 Mass. 159, 161-162 (1985) (citing Southland). Accord Warfield v. Beth Israel Deaconess Medical Center, Inc., 454 Mass. 390, 400 n.14 (2009) ("We recognize that where the FAA applies, it would preempt a conflicting State law -- one that might, for example, bar arbitration or authorize a party to proceed in a judicial forum regardless of the party's having entered into an agreement to arbitrate." (citing Perry v. Thomas, 482 U.S. 483, 490-492 (1987)); Miller v. Cotter, 448 Mass. 671, 678-679 (2007) ("those State acts that seek to limit the enforceability of arbitration contracts are preempted by the Federal [Arbitration] Act").

Superior Court Judge van Gestel recognized over a decade ago that Hannon does not apply to preclude arbitration in cases covered by the FAA. Wolff v. Fidelity Brokerage Services, LLC, 15 Mass. L. Rptr. 224, 2002 WL 31382606, at *3 (Mass. Super. Sept. 5, 2002) (citing Martin v. Norwood). McInnes does not

dispute that the FAA applies to this case.[3]

Numerous courts, including the First, Fifth and Ninth Circuits of the United States Court of Appeals; United States District Courts in Connecticut, Illinois, New Jersey, Utah, West Virginia and Wisconsin, and state courts in Georgia, Michigan and New Jersey, have consistently applied Southland's preemption doctrine to void provisions of state statutes or regulations that prohibit or limit arbitration agreements.[4]

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[3] Although irrelevant to this case because the FAA applies, the outcome should not be different under the Massachusetts Arbitration Act ("MAA"). See Warfield v. Beth Israel Deaconess Medical Center, Inc., 454 Mass. 390, 394 (2009) ("In all relevant respects, the language of the FAA and the MAA providing for enforcement of arbitration provisions are similar, and we have interpreted the cognate provisions in the same manner."); Miller v. Cotter, 448 Mass. at 679 ("unless there is clear reason to do otherwise, we interpret cognate provisions of State and Federal law similarly").

[4] E.g., Ting v. AT&T, 319 F.3d 1126, 1128 (9th Cir. 2003) (FAA preempts California's Consumer Legal Remedies Act because that statute applies to a limited set of consumer transactions and therefore is not a law of general applicability); Saturn Distribution Corp. v. Paramount Saturn, Ltd., 326 F.3d 684, 687 (5th Cir. 2003) (if Texas statute gave Texas Motor Vehicle Board exclusive jurisdiction over contractual disputes between motor vehicle franchisors and franchisees, statute would be preempted by FAA to extent it limited arbitration of such disputes); Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 338 (5th Cir. 1984) (provision of Texas Deceptive Trade Practices Act voiding arbitration agreements is preempted by FAA); Securities Industry Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989),

Thus, it is not surprising that the plaintiffs in Feeney I, although seeking to avoid arbitration of

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cert. denied, 495 U.S. 956 (1990) (striking down Massachusetts Securities Division regulations restricting use of mandatory arbitration clauses); In re Sprint Premium Data Plan Mktg. & Sales Pract. Litig., No. 10-CV-6334 (SDW) (MCA), 2012 WL 847431, at *12 (D.N.J. Mar. 13, 2012) (claims for injunctive relief under consumer protection statutes are arbitrable and any argument that they are not is preempted by FAA and abrogated by Supreme Court decisions); Miller v. Corinthian College, Inc., 769 F. Supp. 2d 1336, 1341-1343 (D. Utah 2011) (the FAA preempts argument that claims under Utah Consumer Sales Practices Act are not subject to arbitration); Canyon Sudar Partners, LLC v. Cole ex rel. Haynie, No. 3:10-1001, 2011 WL 1233320, at *9-10 (S.D. W. Va. Mar. 29, 2011) (FAA preempts West Virginia statute limiting arbitration of claims against nursing home); Battle v. Nissan Motor Acceptance Corp., No. 05-C-0669, 2007 WL 1095681, at *4-5 (E.D. Wis. March 9, 2006) (to the extent the Wisconsin Consumer Act creates a non-waivable right to sue in court, it is preempted by the FAA because, inter alia, the Wisconsin law applies only to consumer issues and not to contracts generally); American Financial Services Ass'n v. Bulke, 169 F. Supp. 2d 62, 69 (D. Conn. 2001) (provision of Connecticut Abusive Home Loan Lending Practices Act forbidding inclusion of arbitration agreement in home loan contracts was preempted by FAA and unenforceable); Carter v. SSC Odin Operating Co., 927 N.E.2d 1207, 1219-1220 (Ill. 2000) (Illinois statute limiting arbitration of nursing home disputes preempted by FAA); Estate of Roszala v. Brookdale Living Communities, Inc., 415 N.J. Super. 272, 293 (2010) (FAA preempts specific prohibition of arbitration of nursing home disputes in New Jersey statute); Triad Health Mgmt. of Georgia, III, LLC v. Johnson, 679 S.E.2d 785, 790 (Ga. Ct. App. 2009) (Georgia statute limiting arbitration of malpractice claims preempted by FAA); Abela v. General Motors Corp., 257 Mich. App. 513, 524-525 (2003) (FAA preempts "lemon law" statute provision prohibiting arbitration of claims).

their Chapter 93A claims, did not rely on Hannon. See Feeney v. Dell, Inc., 454 Mass. 192, 199 n.25 (2009); see also Anderson v. Comcast Corp., 500 F.3d 66 (1st Cir. 2007) (affirming district court's order granting motion to compel arbitration of, inter alia, c. 93A, § 9 claims; no mention of Hannon).

### B. Hannon Construes G.L. c. 93A, § 9 to Prohibit or Limit Arbitration of a Limited Class of Disputes.

FAA Section 2 provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The exception for "grounds . . . at law or in equity for the revocation of any contract," applies only to "generally applicable contract defenses." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-687 (1996) (the FAA "preclude[s] States from singling out arbitration for suspect status").

Chapter 93A, § 9, however, applies to a narrow set of transactions. It is limited to consumer transactions, and thus is not a law of "general applicability." Moreover, there are certain subject matters which are exempted from the scope of Chapter

93A altogether (such as employment matters and intra-company disputes). See Manning v. Zuckerman, 388 Mass. 8, 12-14 (1983) (disputes between employers and employees); Zimmerman v. Bogoff, 402 Mass. 650, 662-663 (1988) (intra-company disputes between shareholders); Szalla v. Locke, 421 Mass. 448, 451-452 (1995) (disputes between joint venturers); Newton v. Moffie, 13 Mass. App. Ct. 462, 469-470 (1982) (disputes between members of same partnership). Therefore, Hannon's construction of G.L. c. 93A, § 9 cannot be justified as a law of general applicability under Section 2 of the FAA.

Moreover, Section 3 of Chapter 93A expressly states that Chapter 93A does not apply to "transactions or actions otherwise permitted under laws . . . as administered by any regulatory board or officer acting under statutory authority of the United States." The arbitration agreement at issue in this case provides for arbitration pursuant to the rules of the Financial Industry Regulatory Authority ("FINRA"). FINRA, as a self-regulatory organization or "SRO," operates the largest dispute resolution forum in the securities industry, administering arbitrations for

both customer and employee disputes. FINRA arbitrations are governed by the FINRA Codes of Arbitration Procedure. As an SRO, FINRA's arbitral rules (and amendments thereto) must be approved by the Securities and Exchange Commission ("SEC") to ensure consistency with the purposes of the 1934 Exchange Act. See 15 U.S.C. § 78s(b)(2); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 233 (1987) ("No proposed rule change may take effect unless the SEC finds that the proposed rule is consistent with the requirements of the Exchange Act . . . .; and the Commission has the power, on its own initiative, 'to abrogate, add to, and delete from' any SRO Rule if it finds such changes necessary or appropriate . . . ." (citing 15 U.S.C. § 78s(b)(2) and (c)).[5]

The FINRA Code of Arbitration Procedure accordingly represents policy choices made by the SEC as to what arbitration organization and procedures are best suited for the needs of the securities industry

[5] The Exchange Act "delegated government power" to SROs "to enforce . . . compliance by members in the industry with both the legal requirements laid down in the Exchange Act and ethical standards going beyond those requirements." S. Rep. No. 94-75, at *23 (1975), reprinted in 1975 U.S.C.C.A.N. 179, 201.

and to instill public confidence in the fairness of SRO-supervised arbitration. [6] FINRA's arbitration procedures thus have been approved and recognized by the SEC as a desirable method of resolution of

[6] In 1989, after the SROs overhauled their arbitration procedures, and with substantial input from the SEC, the Securities Industry Conference on Arbitration ("SICA"), securities industry members, and the public, "the SEC . . . specifically approved the arbitration procedures" of the NASD, including review and approval of the NASD Arbitration Code's rules. Shearson/Am. Express, 482 U.S. at 234; see also Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., and the American Stock Exchange, Inc. Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed. Reg. 21,144 (1989). Those rules, with certain amendments and updates, are the arbitration rules used by FINRA today. See, e.g., FINRA Regulatory Notice 13-04 (Jan. 2012) (SEC approval of amendments to rules regarding subpoenas and orders to direct the appearance of witnesses); FINRA Regulatory Notice 09-74 (Dec. 2009) (SEC approval of amendments to rules regarding definition of "associated person," distribution of the FINRA Discovery Guide, and applicability of hearing session fees); NASD Notice to Members 04-49 (June 2004) (SEC approval of amendments to rules regarding arbitrator classification, disclosures, and challenges). (FINRA Regulatory Notices (f/k/a NASD Notices to Members) are available on the FINRA website: www.finra.org/Industry/Regulation/Notices.)

FINRA was created in 2007, upon the consolidation of the New York Stock Exchange ("NYSE") member regulation, enforcement and arbitration operations and the National Association of Securities Dealers ("NASD"). See FINRA News Release, "NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority - FINRA" (July 30, 2007), available at www.finra.org/NewsRoom/NewsReleases/2007/PO36329.

securities-related disputes,[7] and FINRA arbitrations are conducted by FINRA under the oversight of the SEC.[8] FINRA arbitrations therefore constitute "transactions or actions . . . permitted under laws . . . as administered by [a] regulatory board . . . acting under statutory authority of the United States." The explicit language of G.L. c. 93A, § 3 indicates that FINRA arbitrations are exempt from any limitations on arbitration imposed by § 9(6), and this case must therefore be arbitrated.

## II. THE PUBLIC POLICY GROUND RELIED ON BY THE COURT IN FEENEY I IS NOT A VALID ALTERNATIVE BASIS TO UPHOLD HANNON: THAT GROUND IS ALSO INCONSISTENT WITH THE FAA AND WITH SUPREME COURT DECISIONS INTERPRETING AND APPLYING THE FAA.

The Court in Feeney I held a class action waiver in an arbitration clause to be unenforceable based on "the tenet that a contract may be invalidated on grounds that it violates public policy," and on what the Court found to be "a strong public policy in favor of the aggregation of small consumer protection

[7] FINRA members and associated persons are required to arbitrate a dispute if requested to do so by a customer. FINRA IM-12000; Code of Arbitration Procedure (Customer Code) Rule 12200 (available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106).

[8] Ms. McInnes does not contend that FINRA arbitration is unfair, in general or as applied to her case.

claims" under Chapter 93A. 454 Mass. at 201, 209.[9] However, that reasoning also runs afoul of the FAA and the Supreme Court precedent discussed above. See also Marmet Health Care Center v. Brown, 132 S. Ct. 1201 (2012) (per curiam) (vacating decision of the West Virginia Supreme Court of Appeals holding unenforceable, on public policy grounds, all predispute arbitration agreements that apply to claims against nursing homes alleging personal injury or wrongful death). In short, it is not open to this Court to declare that G.L. c. 93A, § 9(6) states a "strong public policy" that overrides the FAA's protection of arbitration agreements.[10]

In addition to the preemption point, this Court's jurisprudence on arbitrability of Wage Act claims is instructive. In Melia v. Zenhire, Inc., 462 Mass. 164, 169-171 (2012), the Court declared that the Massachusetts Wage Act protects "fundamental public policy," but nevertheless "recognize[d] a presumption that forum selection clauses are enforceable with respect to Wage Act claims." The Court noted that the Appeals Court held in Dixon v. Perry & Slesnick, P.C., 75 Mass. App. Ct. 271, 273 (2009), that Wage Act

[9] Reconsideration of this decision in light of the Supreme Court's AT&T Mobility LLC v. Concepcion decision, 131 S. Ct. 1740 (2011), is pending. See No. SJC-11133.

[10] And Ms. McInnes does not so argue.

claims are arbitrable because arbitration "did not implicate [an] employee's substantive rights." Id. at 173-74.

These decisions place in focus the intractable dilemma created by Feeney I: how to draw the line between "strong" public policy (not arbitrable)[11] and "fundamental" public policy (arbitrable)? What criteria should parties to arbitration agreements (e.g., employers, employees, consumers/customers), and courts interpreting and applying such agreements, employ to make the distinction? The inevitable ambiguity undercuts contracts by engendering uncertainty that creates lack of faith in predictable outcomes and leads to the perception of arbitrary outcomes.

Moreover, the asserted public policy precluding arbitration of c. 93A, § 9 claims is tenuous, and selectively applied. It applies to c. 93A, § 9 claims, but not to c. 93A, § 11 claims.[12] See Drywall Systems, Inc. v. Zvi Constr. Co., 435 Mass. 664, 667 (2002) ("A broad arbitration clause . . . includes

[11] Or "overriding governmental policy." See Warfield v. Beth Israel Deaconess Medical Center, Inc., 454 Mass. 390, 397, 400 n.16 (2009) (to be enforceable, arbitration agreement must state clearly and specifically that claims involving such a policy are covered).

[12] There is no § 11 counterpart to the § 9(6) exhaustion of remedies provision.

statutory claims under G.L. c. 93A, § 11."); Greenleaf Engineering & Constr. Co. v. Teradyne, Inc., 15 Mass. App. Ct. 571, 576 (1983) (a § 11 claim is arbitrable if it constitutes a "private matter" and does not "seek to vindicate any aspect of strong public policy"); Albertson v. Magnetmakers LLC, 11 Mass. L. Rptr. 173, 2000 WL 282449, at *1 & n.2 (Mass. Super. Jan. 18, 2000) (a "§ 11 claim [is] arbitrable under Massachusetts law"); see also Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 378 (1990) (a limitation of liability provision is enforceable as to a § 11 claim).

What if a particular § 9 claim constitutes a "private matter" and does not "seek to vindicate any aspect of strong public policy"? Such as Mrs. McInnes's claims in this case?[13] It would seem to follow from the rationale expressed in Greenleaf that such § 9 claims should be arbitrable, or at the very least that c. 93A, § 9(6)'s broad sweep as construed in Hannon is much wider than the public policy behind it.

[13] Ms. McInnes's ch. 93A claim is asserted under § 11. See McInnes brief at 15; Complaint Count VI (A16-17).

## III. THE VINDICATION OF STATUTORY RIGHTS ARGUMENT RELIED UPON BY THE COURT IN FEENEY I DOES NOT PROVIDE AN ALTERNATIVE GROUND TO UPHOLD HANNON BECAUSE, EVEN IF IT WERE VALID, IT DOES NOT APPLY TO STATE STATUTES SUCH AS CHAPTER 93A.

The Court's Feeney I decision upholding a trial court's invalidation of a class action waiver contained in an arbitration agreement was based on the Court's finding that such a waiver "creates the potential for [consumers with small value claims] to be without an effective method to vindicate their [Chapter 93A] statutory rights, a result clearly at odds with our public policy." 454 Mass. at 205. This argument is wrong as a matter of law, and, if applied to this case, would be wrong as a matter of the facts of the case.

First, as a matter of law: the Supreme Court and federal Courts of Appeals have plainly stated that state statutes--and pursuit of rights and remedies under such statutes--do not trump the FAA. E.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."); Stutler v. T.K. Constructors Inc., 448 F.3d 343, 346 (6th Cir. 2006) (declining to apply vindication of federal statutory rights analysis where plaintiffs assert only state law claims); Brown v. Wheat First Securities, Inc., 257 F.3d 821, 825-826

(D.C. Cir.), cert. denied, 534 U.S. 1067 (2001) (same). "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Concepcion, 131 S.Ct. at 1753. Again, it is not in this Court's power to declare that the FAA is overridden by a state public policy protective of consumers' vindication of Chapter 93A rights.

Second, as a factual matter, even if the vindication of statutory rights argument had any validity, in this case there can be no legitimate claim that Ms. McInnes would be prevented from vindicating her Chapter 93A rights in arbitration. Indeed, Ms. McInnes does not explain how she would be prevented from vindicating her Chapter 93A rights in arbitration. The amount of her claim is at least $330,000 (the amount of premiums paid). McInnes brief at 7. There is no reason why she would be any less able to pursue a claim of this magnitude in arbitration than she would in court. Indeed, pursuit of her claim would be facilitated by the more expeditious and less formalistic procedure afforded by arbitration. "[A]rbitration's advantages often would seem helpful to individuals . . . who need a less

expensive alternative to litigation." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995).[14]

Significantly, Ms. McInnes submitted no evidence substantiating a claim that she would be unable to vindicate any of her statutory rights. She submitted no affidavits, expert or otherwise, detailing why her claims cannot be arbitrated, or how the amount at stake would not justify the hiring of an attorney. Compare Kristian v. Comcast Corp., 446 F.3d 25, 58-59 (1st Cir. 2006). Nor is the subject matter of her claim so complex that it necessitates the retention of multiple experts and complicated computer and statistical analysis such as in an antitrust action. See id. To the contrary, Ms. McInnes's complaint presents fairly straightforward issues and claims.

[14] See also Concepcion, 141 S. Ct. at 1749 ("the informality of arbitral proceedings . . . reduce[s] the cost and increase[es] the speed of dispute resolution"); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010) ("the benefits of private dispute resolution" include "lower costs" and "greater efficiency and speed"); Christopher Drahozal & Samantha Zyontz, An Empirical Study of AAA Consumer Arbitrations, 25 Ohio St. J. on Disp. Resol. 843 (2010); Michael Delikat & Morris Kleiner, An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?, 58 Disp. Resol. J. 56 (Nov. 2003 - Jan. 2004); Lewis Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum. Human Rts. L. Rev. 29 (1998); see generally St. Fleur v. WPI Cable Systems/Mutron, 450 Mass. 345, 354 n.8 (2008) ("the Federal and Massachusetts [arbitration] Acts share a common policy in favor of arbitration as an expeditious alternative to litigation").

Moreover, Chapter 93A provides for the recovery of costs and attorneys' fees by successful plaintiffs. G.L. c. 93A, §§ (9)4, 11. This remedy is equally available in arbitration as it would be in court. See Dixon v. Perry & Slesnick, P.C., 75 Mass. App. Ct. 271, 275 (2009) (Wage Act); Warfield v. Beth Israel Deaconess Medical Center, Inc., 454 Mass. 390, 398 n.13 (2009) (G.L. c. 151B). In addition, McInnes could defer payment of litigation expenses, thanks to the availability of contingent fee arrangements, which are available for arbitration of securities claims as they are for prosecution of such claims in court.

Third, as a matter of judicial administration, every invocation of rights under an arbitration agreement should not necessitate a mini-trial on whether the plaintiff could vindicate his or her rights in arbitration. The Court should not "breed litigation from a statute that seeks to avoid it." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. at 275.

## IV. THE "INEXORABLY INTERTWINED" JUSTIFICATION RELIED UPON BY THE TRIAL COURT IS NOT VALID: THE FAA, AND THIS COURT'S OWN PRECEDENT, REQUIRE THAT ARBITRABLE CLAIMS BE ARBITRATED EVEN IF RELATED NON-ARBITRABLE CLAIMS MUST BE PROSECUTED SEPARATELY IN COURT.

The trial court compounded the error caused by its reliance on Hannon by refusing to enforce the parties' arbitration agreement with respect to McInnes's claims other than her Chapter 93A claim.

The court sought to justify this by a finding that the other claims are "inexorably intertwined" and "inseverable" from the Chapter 93A claim because they "all stem from the same facts and circumstances." On that basis, the court held that, "notwithstanding the Arbitration Agreement, none of Plaintiff's claims can be compelled to arbitration." Order on Defendant's Motion for Stay of Proceedings and an Order to Proceed to Arbitration (A67).

The Supreme Court long ago instructed that, when a complaint contains both arbitrable and nonarbitrable claims, the FAA requires a court to "compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 217 (1985).

This directive was most recently reaffirmed by the Supreme Court in KPMG LLP v. Cocchi, 132 S. Ct. 23, 24 (2011) (per curiam): a "court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration." The court noted that this result must obtain "even if this will lead to

piecemeal litigation," with attendant additional cost and burden.[15] Id.

This Court and the Appeals Court have recognized that such duplication of proceedings may be required if some related claims are arbitrable and some are not. Indeed, in Hannon this Court noted that "Aquatech's contractual counterclaims . . . were properly before the arbitrator: nothing in our decision today forecloses binding arbitration of such claims." 385 Mass. at 826-827. In Miller v. Cotter, 448 Mass. 671, 683-686 (2007), this Court, applying the MAA, held that principles of judicial economy did not provide adequate grounds to set aside an otherwise valid arbitration agreement, even if requiring the plaintiff to arbitrate his claims against a nursing home and its employees, and to proceed separately against a physician who examined the plaintiff's father at the nursing home, would be duplicative. The Court stated, "We find no support for [an equitable principle of judicial economy that seeks to avoid forcing parties into duplicative efforts] in case law

[15] So much of this Court's decision in Warfield v. Beth Israel Deaconess Medical Center, Inc., 454 Mass. 390, 403-404 (2009), as directs that the arbitrable claims of the plaintiff in that case "be resolved in one judicial proceeding" is incorrect, as it--contrary to Byrd and Cocchi--in effect invalidated the parties' arbitration agreement as to all--statutory and common law--causes of action.

or in the rules of civil procedure, and do not think it adequate grounds to set aside an otherwise valid [arbitration] agreement." Id., 448 Mass. at 684.

The Appeals Court, in Danvers v. Wexler Constr. Co., 12 Mass. App. Ct. 160, 166-167 (1981), held that the facts that a party may be exposed to inconsistent results (in court and in arbitration), and that it may have to try certain aspects of the case twice and assert contradictory positions in different proceedings, were not sufficient to justify denying contractually-agreed arbitration. The Court stated that, "to deny recourse to arbitration . . . would, in essence, disregard the method specifically chosen by the parties to settle all their disputes and . . . judicially rewrite their contract for them," which the Court declined to do. Id., 12 Mass. App. Ct. at 166-167; see generally Joulé Inc. v. Simmons, 459 Mass. 88, 99 (2011) ("there is no legal bar to having an arbitration and the MCAD proceeding continue concurrently, on parallel tracks").

The sole legal authority relied upon by the trial court for this aspect of its decision, Iannochino v. Ford Motor Co., 451 Mass. 623, 634 (2008), is inapposite. That decision does not concern arbitration at all, but rather a motion to dismiss.

Because the "intertwined" argument is not valid, a result of continued application of the Hannon rule

would be pointless multiplication of proceedings. That would be contrary to the legislature's apparent intent when it enacted c. 93A, § 9(6): to streamline resolution of Chapter 93A claims by eliminating any requirement that a consumer plaintiff first exhaust administrative remedies.[16]

Chapter 93A claims are commonly asserted in Massachusetts litigation. A Chapter 93A claim is seldom the only asserted basis for recovery--as in this case, it is almost always accompanied by other common law and/or statutory causes of action. That being the case, the end product of a rule that G.L. c. 93A, § 9 claims are not arbitrable is multiplication of the costs of dispute resolution: the expense of litigating Chapter 93A claims in court added to the expense of arbitrating other claims arising from the same transaction or occurrence.[17] That leads

[16] Indeed, Ms. McInnes in her brief makes passing, unsupported reference to the notion that requiring her to arbitrate her common law and Chapter 110A claims would somehow foreclose vindication of her Chapter 93A statutory rights, and therefore, she argues, her common law claims cannot be compelled to arbitration. This argument provides further validation for overruling Hannon: Ms. McInnes is in effect arguing that Hannon's anti-arbitration rule would prevent her from vindicating her Chapter 93A rights.

[17] See decisions stating that, because of Hannon, an arbitration award on other claims does not have preclusive effect as to a Chapter 93A claim that was not asserted in the arbitration, so that such a claim may be prosecuted in a separate court action. E.g., Beals v. Commercial Union Ins. Co., 61 Mass. App. Ct.

inexorably to increased cost and/or less availability of goods and services for consumers, a matter of direct concern to amicus AFSA. See, e.g., Stephen Ware, Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 91; Steven Shavell, Alternative Dispute Resolution: An Economic Analysis, 24 J. Legal Stud. 1, 5-7 (1995).

## V. PROTECTION AND FURTHERANCE OF THE PUBLIC POLICY BEHIND CHAPTER 93A IS ENTRUSTED TO THE ATTORNEY GENERAL; THE COMMONWEALTH DOES NOT RELY SOLELY ON PRIVATE LITIGATION OF CHAPTER 93A CLAIMS.

The public policy behind Chapter 93A is furthered by arbitration of Chapter 93A claims just as it is by judicial resolution of such claims. In any event, the Commonwealth does not rely solely on private litigation to further that policy--the statute empowers the Attorney General to enforce its standards and bring actions against violators. G.L. ch. 93A § 4. In Miller v. Cotter, this Court noted that, "[i]nsofar as there is a strong public policy favoring

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189, 194-196 (2004); Simas v. House of Cabinets, Inc., 53 Mass. App. Ct. 131, 137-138 (2001).

The Hannon procedural history is illustrative: the parties engaged in three days of arbitration hearing followed by a seven day bench trial. The plaintiff recovered nothing and the defendant recovered about $1500 on its counterclaims, plus attorneys' fees. 385 Mass. at 815, 820, 829.

the proper management of nursing facilities, and the provision of quality care to their residents, that policy is firmly imbedded in a regulatory scheme through which complaints and concerns regarding those matters are investigated and remedied by State and Federal administrative agencies. None of these remedies is precluded by the arbitration agreement." 448 Mass. at 683; see also Melia v. Zenhire, Inc., 462 Mass. 164, 173 & n.10 (2012) (considering the enforceability of a forum selection clause in the context of a Wage Act claim, the Court found it pertinent that "the Attorney General always retains the power to enforce the Wage Act in Massachusetts"); Dixon v. Perry & Slesnick, P.C., 75 Mass. App. Ct. 271, 276 n.6 (2009) (holding Wage Act does not bar arbitration, court noted "the Attorney General's considerable enforcement powers under the Wage Act").

**CONCLUSION**

Hannon is contrary to the FAA and to the direction of the Supreme Court interpreting and applying that statute. Neither the Massachusetts legislature nor this Court's interpretation of Massachusetts public policy can override the FAA. The Court should formally confirm what it has already in effect acknowledged in subsequent decisions--and what Supreme Court precedent now clearly requires: Hannon is no longer good law.

Respectfully submitted,

Amicus Curiae American Financial Services Association,

By its attorneys,

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Dated: March 27, 2013

## CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies with the rules of court pertaining to the filing of an amicus curiae brief, including, but not limited to, Mass. R. App. P. 16, 17, and 20.

Dated: March 27, 2013

/s/ John R. Snyder
John R. Snyder

## CERTIFICATE OF SERVICE

I, John R. Snyder, hereby certify that on March 27, 2013, I served the within brief by causing two copies to be delivered by first-class mail, postage paid, to the following counsel of record for the parties:

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