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SUPREME COURT  
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IN THE  
SUPREME COURT OF CALIFORNIA

JACK JEVNE; and AVALON INVESTMENTS, S.A.,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE  
COUNTY OF LOS ANGELES,

Respondent.

JB OXFORD HOLDINGS, INC.; S.A., JB OXFORD & COMPANY

Real Parties In Interest

After a Decision by the Court of Appeal  
Second Appellate District, Division Seven  
(Case No. B167044)

PETITION FOR REVIEW

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO  
THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME  
COURT:

Petitioners Jack Jevne and Avalon Investments, S.A. (collectively referred to herein as “Jevne”), petition for review of a decision by the Court of Appeal, Second Appellate District, Division Seven, Number B167044, filed on November 19, 2003, denying petitioners’ writ of mandate and thus leaving in place the Trial Court’s order compelling arbitration of Jevne’s dispute with his brokers, real parties in interest, JB Oxford Holdings, Inc. and JB Oxford & Company (collectively referred to herein as “JB Oxford”). The opinion of the Court of Appeal, ordered published in full, is attached to this Petition.

### **ISSUES PRESENTED**

1. Has there been a failure of the arbitration agreement due to the arbitration provider’s refusal to proceed with an arbitration of this case, for well over one (1) year, such that petitioners are excused from their obligation to arbitrate?

2. Are petitioners required to waive their statutory rights under California law in order to arbitrate their dispute with JB Oxford?

3. Do the California Ethical Standards for Neutral Arbitrators (Cal. Rules of Court, append. Div. VI) (herein “Standards”) apply to arbitrations conducted by arbitrators appointed by self-regulatory organizations (herein “SRO’s”)?

4. Are the Standards preempted by the federal securities laws?
5. Are the Standards preempted by the Federal Arbitration Act?

### **NECESSITY FOR REVIEW**

Review of the Court of Appeal decision is necessary pursuant to Cal. Rule of Court 28(b)(1) “to secure uniformity of decision” and “to settle an important question of law.”

#### Uniformity of Decision

The Court below holds that the Standards are preempted by the federal securities laws and that Jevne must arbitrate this securities dispute without the benefit of the Standards. This Decision lies in stark contrast to *Alan v. Superior Court* (UBS PaineWebber Inc.)(August 14, 2003) 111 Cal.App.4th 217. In *Alan*, Division One of the Second District Court of Appeal resolved essentially the same arbitration impasse between investor and broker by invoking “general contract law principles,” holding that if the underlying arbitration agreement required arbitration in California, then the case should be tried in State Court because effective and speedy arbitration was impossible. (*Id.* at 220 and 229.) While the *Alan* Court indicated that it would “defer” to other courts considering the preemption question, its holding that the dispute before it could be resolved under the rubric of contract law, without consideration of the preemption question, is basically incompatible with the holding here that the Standards are preempted and therefore, by implication, the delays occasioned by JB Oxford and the

arbitration service provider (NASD Dispute Resolution, Inc.)<sup>1</sup> do not constitute a breach or abrogation of the arbitration agreement. This Court should decide which approach for the resolution of the current statewide investor-broker arbitration impasse, an impasse currently at issue in over a dozen Appellate and Trial Court cases,<sup>2</sup> and which affects hundreds of California investors<sup>3</sup>, is the correct one.

Review is also necessary because the legal questions presented are extremely complex and continue to be a source of confusion to the courts. That confusion is evidenced by inconsistent rulings on preemption in other courts. (*See, e.g., Mayo v. Dean Witter* (N.D. Cal. 2003) 258 F.Supp.2d 1097 [finding Standards preempted under *both* the federal securities laws and the Federal Arbitration Act (“FAA”), disagreed with

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<sup>1</sup> NASD Dispute Resolution, Inc. is a subsidiary of the non-profit corporation the National Association of Securities Dealers (“NASD”). NASD and the New York Stock Exchange (“NYSE”) are self-regulatory organizations (“SRO’s”), private organizations designated by Congress to act as watchdogs for the securities industry with Securities and Exchange Commission (“SEC”) oversight. In 2001 alone 1,095 arbitrations cases were assigned to NASD in California. Declaration of George H. Friedman, etc., at ¶5, Ex. 1 to September 26, 2003 Request for Judicial Notice in Support of Amicus Curiae Brief of Attorney General Bill Lockyer.

<sup>2</sup> First District: Case No. A102929 (Davis); Second District: Case No. B167743 (Cohen), Case No. B169665 (Barney), Case No. B167607 (Goel), Case No. B168200 (Hart) and Case No. B167545 (Chen); Third District: Case No. C043684 (Dupree); Fourth District: Case No. G031933 (Bugarini) and Case No. G032194 (Schackle); Fifth District: Case No. F042866 (Winberg); Los Angeles Superior Court: Case No. BC294245 (Payne) and Case No. BC 288076 (Neumann); San Francisco Superior Court: Case No. GGC 03 421042 (Marcus) and Case No. 318679 (Witty); and Santa Barbara Superior Court: Case No. 1130088 (Woolf) and Case No. 1130902 (Mikutta).

<sup>3</sup> *Alan v. Superior Court* (UBS PaineWebber Inc.)(2003) 111 Cal.App.4th 217, 222.

in the Opinion below at Page 5, fn. 2]; *Credit Suisse First Boston Corp. v. Grunwald* (N.D. Cal., Mar. 31, 2003) No. C 02-2051 SBA, currently before the Ninth Circuit, cited in the Opinion below at Page 5, fn. 2 [finding no federal preemption but finding the Standards inapplicable to SRO securities arbitrations under state law].)

In unpublished decisions, other California courts have also reached inconsistent results.<sup>4</sup> Division Six of the Second District Court of Appeal considered the question of whether an investor, like the investor here, must waive her rights under California law as a pre-condition to arbitration of her securities dispute and concluded that such a waiver would violate due process. (*Linden v. American Express Financial, Inc.* (Oct. 27, 2003) No. B162566, 2003 WL 22430229 at Page 3.) And, in another unpublished decision, the Fourth District Court of Appeal has, like the *Alan* Court (although with different results), resolved a parallel broker-investor arbitration dispute without reaching the preemption question. (*Rodriguez v. Morgan Stanley Dean Witter, Inc.* (September 10, 2003) No. D040868, 2003 WL at Page 5, fn. 7.)

#### Review is Necessary to Settle an Important Issue of Law

This Court should also accept review in order to settle an important issue of law. The holding that the Standards are preempted by the federal securities laws nullifies the Standards in hundreds of securities arbitrations conducted each year and, by doing so,

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<sup>4</sup> These unpublished decisions are not cited in support of Petitioners' substantive arguments but only as evidence of confusion in the Courts. Therefore Petitioner does not consider the citation as violating Rule 977.

undermines the purpose of that law which is to strengthen public confidence in arbitration generally.<sup>5</sup> As stated by the Court below, “[t]his writ petition raises several issues of first impression.” (Opinion at Page 2.) In requesting amicus briefing from the Attorney General, the Judicial Council, the Securities and Exchange Commission (“SEC”) and the SRO’s (NASD and the NYSE, *see* fn. 1), the lower court stated that the writ triggered “significant issues of broad statewide importance.”

The determination that the Standards are preempted by the federal securities laws is also plainly incorrect. Congress has never indicated in the context of securities laws that it favors arbitration of securities disputes over litigation. That being the case, arbitration rules developed by private SRO’s do not carry the weight of a Congressional mandate, do not have the force of federal law and cannot override state law. More significantly, the procedures private parties choose to conduct their arbitrations are not a matter of federal securities law, they are a matter of private contract and neither the SRO’s nor the SEC can dictate the terms of those private contracts.

Finally, and most importantly, unless this Court accepts review, both *Jevne* and countless other California investors will be left in arbitration limbo, unable to resolve their disputes with brokers. The SRO’s have made clear that, without a waiver, they will

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<sup>5</sup> *See* Cal. Rules of Court, append. Div. VI, Standard 1(b): “[F]or arbitration to be effective there must be broad public confidence in the integrity and fairness of the process” and 1(a): the Standards are designed to “promote public confidence in the arbitration process.”

not appoint arbitrators until there is a definitive ruling by the courts as to the validity of the Standards and such a “definitive” ruling could take years. *Alan v. Superior Court* (2003)(UBS PaineWebber Inc.) 111 Cal.App.4th 217, 229. If the decision below were definitive in the eyes of the SRO’s, they would already be appointing arbitrators without requiring a waiver from investors. They are not. (Declaration of Eric Woosley in Support of December 11, 2003 Petition for Rehearing at Page 1.)

### **STATEMENT OF THE FACTS AND THE CASE**

Petitioners’ claims against JB Oxford were set forth in a Complaint that was filed on August 14, 2000. The First Amended Complaint in this action was filed on November 2, 2000.

JB Oxford moved to compel arbitration and stay proceedings pending completion of arbitration.

Petitioners filed a Notice of Non-Opposition to the Motion to Compel Arbitration on February 23, 2001. The court granted the Motion to Compel Arbitration.

Three arbitrators were appointed in conformance with NASD rules and the case proceeded toward arbitration. The three arbitrators were: Michael Steven Carona, Public Arbitrator, Norman R. Cohen, Public Arbitrator, and W. Reece Bader, Industry Arbitrator.

In 2001, the California Legislature enacted S.B. 475 that dealt, in the main, with the subject of arbitration. The principal premises of this enactment are set forth in new

Code of Civil Procedure Sections, and the effective date for these Sections was July 1, 2002. Specifically, Section 1281.85 requires that the person serving as the neutral arbitrator shall comply with the ethical standards adopted by the Judicial Council, pursuant to this section. Sections 1281.9 and 1281.91 further set out the requirements attached to the neutral arbitrator. Section 1286.2 provides that an arbitration award can be vacated if the arbitrator failed to comply with the requirements of the new sections.

After the effective date of July 1, 2002, of the new Code of Civil Procedure sections, the Industry Arbitrator, Mr. Bader, disqualified himself. The NASD refused to reveal the reason for this disqualification.

The NASD refused to allow the arbitration process to go forward unless the Petitioners agreed to waive the new California law requirements for arbitrators and, further, agree to have any arbitration take place outside the State of California.

The NASD modified its position slightly as set forth in a proposed Waiver sent to the parties by the NASD, on November 18, 2002. In this Waiver, the Petitioners are required to give up the following rights:

The California Ethical Standards for Neutral Arbitrators, the right to have a court determine whether or not an arbitrator is fair, and, “expressly agree that they will not seek to enforce any right or claim any remedies under or pursuant to the California Standards in any court, proceeding or forum in any matter relating to this arbitration, and expressly and irrevocably release any claim or claims that they may have based on the

California Standards in connection with this arbitration or any proceeding related thereto.”

Petitioners are not willing to give up these protections but still want their claim resolved.

The NASD will not proceed with Petitioners’ claims without Petitioners giving up these protections<sup>6</sup>.

Therefore, on April 23, 2003, Petitioner sought to restore this matter to the Active Civil Trial Calendar and set a trial date.

The Trial Court denied Petitioner’s Motion, instead finding that Federal Law preempted California Law on this issue and ordered Petitioners to arbitration.

On November 19, 2003, the Court of Appeal, Second Appellate District, Division Seven, denied petitioner’s writ, finding that “the California Standards are preempted by the Securities Exchange Act of 1934, in that they conflict with the NASD’s arbitration procedures authorized by the Securities and Exchange Commission.”

On December 11, 2003, Petitioner filed a Petition for Rehearing to address the issues left unaddressed by the Court of Appeal’s Decision. On December 12, 2003, this Petition was denied.

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<sup>6</sup> This remains the position of the NASD even after the Appellate Decision in this case was issued.

## ARGUMENT

### I.

#### **Jevne Remains Without An Arbitral Forum Because The Decision Below Fails To Resolve The Question Of How They Are To Arbitrate; No Arbitrator Will Be Appointed Unless They Waive Their Rights Under California Law**

The decision below does not order Jevne to sign the waiver proffered by JB Oxford, if indeed such an order would be effective. Nor does it, somehow, find Jevne to have impliedly waived their rights under California law. That being the case, the order to arbitrate is meaningless because, unless Jevne does sign such a waiver, no arbitrator will be appointed. Jevne is in the same position after the decision as they were before—without a means of resolving his dispute.

As the *Alan* court recognized, “The purpose of arbitration is to resolve private disputes in an expeditious . . . manner.” (*Alan v. Superior Court* (UBS PaineWebber Inc.) (2003)111 Cal.App.4th at 229 [citing *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1080]). And “surely the plaintiffs are entitled to a speedy resolution of their claims.” *Id.*, [citing *In re Salomon Inc. Shareholders’ Derivative Lit.* (2d Cir. 1995) 68 F.3d 554, 561)]. Jevne does not and never has opposed arbitration of their claims. This action was not originally initiated to avoid arbitration. Jevne has done everything possible to induce the NASD to arbitrate this matter, short of waiving their statutory safeguards. Thirty-four (34) months have now passed, and Jevne not only has not been

availed of an “expeditious” or “speedy” resolution of their claims as set forth in *Alan, Broughton* or *Salomon*, they are no closer to having this matter resolved than when they initiated the arbitration process. Whatever may ultimately be the outcome of the legal wrangles over the Standards, justice for Jevne, and other investors like them, should not be put on hold indefinitely until it is resolved.

## II.

### **The Standards Are Not Preempted By The Federal Securities Laws**

The Court below finds the Standards<sup>7</sup> preempted by the federal securities laws because Standard 10 (dealing with arbitrator disqualification) “create[s] a physical impossibility such that private parties cannot comply with both the California Standards and the NASD regulations on disqualification” and Standard 7 (dealing with arbitrator disclosure) “stands as an obstacle to the Exchange Act.” (Op. at p. 16.<sup>8</sup>) While it is true that the NASD rules were incorporated into the parties’ arbitration agreement, petitioners dispute the Court’s interpretation of its arbitration agreement; as a matter of contract law, the NASD rules and the Standards can and should be read as consistent with each other. Moreover, the Court seriously errs in according NASD arbitration rules the title and

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<sup>7</sup> Of course, a determination that the Standards are preempted translates into a judicial determination that Code of Civil Procedure sections 1281.85, 1281.9 and 1281.91, which incorporate the Standards, are also preempted.

<sup>8</sup> The lower court declined to clarify whether other Standards not cited in the case were also in conflict and therefore also preempted. (See December 12, 2003 Order denying petition for rehearing.)

status of federal “regulations.” They are not and Petitioner is not aware that any Court has ever held them to be.

SRO rules carry the weight and preemptive effect of federal law only when “the particular rule [is] integrally related to or substantially effect[s] the aims and purpose of the [Exchange] Act.” (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware* (1973) 414 U.S. 117, 137.) The Court below ignores *Ware*--the seminal case on the pre-emptive effect of SRO rules on conflicting state law--and makes no serious attempt to tie NASD arbitration rules to any stated purpose of the Exchange Act. The Court only echoes the justification offered by the SEC--uniformity and the avoidance of inconsistency in a national system of arbitration. (Opinion at Page 26.) Uniformity, while no doubt contributing to the securities industry’s convenience in the arbitration of customer disputes, is not a valid justification for the ousting of state law. (*Id.* at 137 [uniformity is “spurious” and “has meaning only in the context of a federal interest.”].)

Since neither the original Exchange Act, nor the 1975 amendments (which JB Oxford contends overrule *Ware*) say anything about arbitration, the arbitration rules of private entities cannot further a Congressional policy in favor of arbitration, much less arbitration under specific rules. The fact that SRO’s conduct almost all securities arbitrations in the country does not translate by any measure into Congressional endorsement of arbitration. Nor does the SEC’s “intense oversight in the area of SRO

arbitrations,” even assuming such were the case,<sup>9</sup> mean that Congress has directed the SEC to institute a nationwide securities arbitration system under particular rules. “The rulemaking power granted an administrative agency charged with the administration of a federal statute is not the power to make law.” (*Ernst & Ernst v. Hochfelder* (1976) 425 U.S. 185, 213.)

Finally, it is difficult to square preemption under the securities laws with the fact that each arbitration agreement between a broker and a customer is a private agreement which the parties are free to negotiate under whatever terms they please and/or have the bargaining power to insist upon. No investor (as a matter of law if not as a matter of practice) is bound to enter into any arbitration agreement, much less one calling for an SRO forum and rules; NASD rules requiring SRO arbitrations apply only if the customer agrees. A theoretical investor could negotiate an arbitration agreement requiring adherence to the Standards in the same way an investor could negotiate that all potential disputes be resolved before the Hague. Neither choice is foreclosed by SRO rules and

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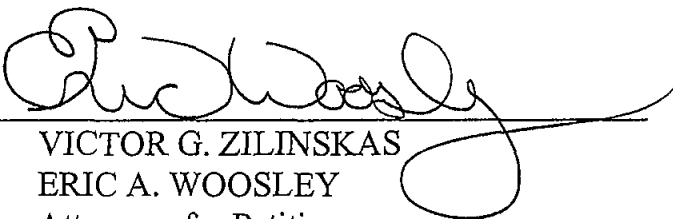
<sup>9</sup> There is nothing to indicate that the SEC’s oversight of arbitration rules is any more “intense” than its oversight of other SRO rules. Almost all SRO rules, including rules relating to broker remuneration, bookkeeping, reporting and stock listing are subject to SEC approval. Does it follow then that all SRO rules that conflict with state law preempt that state law? No. (*See, Green v. Fund Asset Mgt.* (3<sup>rd</sup> Cir. 2001) 245 F.3d 214, 227 [“Indeed, if we were to accept defendants’ argument that procedural differences both indicate congressional intent to preempt state law . . . then the ‘33 and 34 Act would also, by definition, preempt much state law in the areas of corporate and securities law since many of the procedural and substantive requirements . . . differ markedly from the corresponding procedural and substantive requirements of corporate and securities law in most states.”]

neither choice, in and of itself, poses any obstacle to enforcement of the securities laws. It makes no sense to argue that arbitrations conducted under the Standards (if specifically negotiated) do not impede the operation of the securities laws while arbitrations conducted under the Standards (as a matter of State law) do. Preemption does not lie.

### CONCLUSION

For all the foregoing reasons, this Court should accept review and reverse the opinion of the Court of Appeal.

DATED: December 19, 2003      LAW OFFICES OF ZILINSKAS & WOOSLEY

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