EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH EQUITY SERVICES, LLC, et al., Plaintiffs, v. THE OHIO NATIONAL LIFE INSURANCE COMPANY, et al., Defendants.	Civil Action No. 1:18-cv-12314

MOTION OF DEFENDANTS THE OHIO NATIONAL LIFE INSURANCE COMPANY AND OHIO NATIONAL LIFE ASSURANCE CORPORATION TO CERTIFY THE COURT'S APRIL 3, 2019 ORDER FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

Pursuant to 28 U.S.C. § 1292(b), Defendants, The Ohio National Life Insurance Company and Ohio National Life Assurance Corp., move for an order certifying the Court's April 3, 2019, Memorandum and Order (the "4/3/19 Order"; Doc.# 28) for interlocutory appeal. The basis for this Motion is set forth in the attached memorandum in support.

April 30, 2019

Respectfully submitted,

THE OHIO NATIONAL LIFE INSURANCE COMPANY AND OHIO NATIONAL LIFE ASSURANCE CORPORATION
By their Attorneys,

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CERTIFICATE OF COMPLIANCE WITH RULE 7.1(a)(2)

I, Robert R. Berluti, hereby certify that in accordance with Local Rule 7.1(a)(2), counsel for the parties have conferred and have attempted to resolve or narrow the issues contained herein.

/s/ Robert R. Berluti
Robert R. Berluti (BBO #039960)

CERTIFICATE OF SERVICE

I, Robert R. Berluti, hereby certify that on this 30th day of April, 2019, I electronically filed the foregoing using the CM/ECF system, which constitutes service upon counsel of record.

/s/ Robert R. Berluti
Robert R. Berluti (BBO #039960)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH EQUITY SERVICES, LLC, et al., Plaintiffs, v. THE OHIO NATIONAL LIFE INSURANCE COMPANY, et al., Defendants.	Civil Action No. 1:18-cv-12314

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANTS THE OHIO NATIONAL LIFE INSURANCE COMPANY AND OHIO NATIONAL LIFE ASSURANCE CORPORATION TO CERTIFY THE COURT'S APRIL 3, 2019 ORDER FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

I. INTRODUCTION

> *"Interlocutory appeals under § 1292(b) require an order (1) 'involving a controlling question of law,' (2) 'as to which there is substantial ground for difference of opinion,' and (3) for which 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.' "*

Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7, 9 (1st Cir. 2005).

All of the statutory factors for certifying the Court's 4/3/19 Order are satisfied here. A key point is that availability of an interlocutory appeal under 28 U.S.C. § 1292(b) presents a question of timing. We submit that the issue of whether Plaintiffs' claims against Defendants, The Ohio National Life Insurance Company ("ONLIC") and Ohio National Life Assurance Corp. ("ONLAC"), are arbitrable should be decided expeditiously on an interlocutory appeal, rather than waiting for the arbitration to be completed before this threshold issue is resolved.

To summarize the issue of arbitrability presented here, *first*, the *pre-dispute* arbitration provision contained in the Selling Agreement between Plaintiff Commonwealth and the Defendants provides *only* for arbitration "in accordance with the Code of Arbitration Procedure of the NASD, *or similar rules or code in effect on the date of the submission of any such dispute*." (Emphasis added.) *Second*, current FINRA (f/k/a NASD) Rules for industry disputes, unlike the NASD Rules in effect when the Selling Agreement was executed, *do not provide for or even contemplate arbitration of industry-related disputes against non-FINRA members, such as ONLIC and ONLAC*. As a result, FINRA *lacks jurisdiction* over ONLIC and ONLAC, and no enforceable agreement to arbitrate exists as to those entities. See Defendants' Memo Contra, at 1.[1] The Court, however, decided otherwise in its 4/3/19 Order.

Granting an interlocutory appeal may "materially advance" this litigation. As one court put it, if claims are not arbitrable, the parties will not have wasted their time "arbitrating claims that are later held to be nonarbitrable," but if the court's decision to compel arbitration is affirmed, the parties can conduct arbitration "with full confidence that its results will be binding." S.A. Mineracao Da Trindade v. Utah Int'l Inc., 579 F. Supp. 1049, 1051 (S.D.N.Y 1984) (certifying arbitration order for interlocutory appeal). Thus, if the First Circuit, on interlocutory appeal, were to *reverse* this Court's order and find that Plaintiffs' claims against ONLIC and ONLAC are not arbitrable, then the time and expense of litigating Plaintiffs' claims in the FINRA forum would be saved. On the other hand, if the First Circuit were to affirm, then this litigation, which is as yet in its early stages, could proceed before a FINRA arbitration panel with the arbitrability issue

[1] For the sake of brevity, the instant Motion incorporates by reference, and thus does not extensively restate, the legal arguments and undisputed factual matters set forth in Defendants' Memorandum in Opposition to Plaintiffs' Motion to Compel Arbitration ("Memo Contra"). Doc.# 53.

completely off the table. For these reasons and those set forth below, the Court should grant the requested certification.

II. GROUNDS FOR CERTIFICATION: 28 U.S.C. § 1292(b)

A. The Court Should Certify The 4/3/19 Order Under 28 U.S.C. § 1292(b) To Permit Immediate Appellate Review

1. The Federal Arbitration Act Provides That Interlocutory Appeals May Be Taken From Orders Compelling Arbitration

The Federal Arbitration Act, at 9 U.S.C. § 16(b), provides that an appeal may be taken from an interlocutory order compelling arbitration and/or granting a stay of an action pending arbitration, as the 4/3/19 Order directed. See 16 U.S.C. § 16(b)(1) & (2). Section 16(b) provides that this appeal may be taken as provided by 28 U.S.C. § 1292(b).

2. The Section 1292(b) Factors

Turning to the three statutory factors contained in 28 U.S.C. § 1292(b), the Court may certify its 4/3/19 Order for interlocutory appeal if is an "order (1) 'involving a controlling question of law,' (2) 'as to which there is substantial ground for difference of opinion,' and (3) for which 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.' " Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7, 9 (1st Cir. 2005) (quoting Section 1292(b)). As discussed below, all three factors are satisfied here, and the 4/3/19 Order should be certified for review by the First Circuit.

B. The First And Third Section 1292(b) Factors Are Readily Satisfied

Although courts in this Circuit do not appear to have considered the issue of whether an order to stay court proceedings and/or compel arbitration should be certified for interlocutory appeal as allowed by 9 U.S.C. § 16(b), several federal courts have considered this issue and concluded that such orders readily satisfy the first and third Section 1292(b) factors, which are related. These courts recognize that if there is a dispute over whether arbitration was incorrectly

ordered, the appeal presents "a controlling question of law." They also recognize that deciding this question may "materially advance the ultimate termination of the litigation" because its resolution may avoid sending claims to arbitration that are non-arbitrable.

For example, in Kuehner v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996), the district court entered an order staying its proceedings pending arbitration between the parties and then certified its order to the Ninth Circuit under 9 U.S.C. § 16(b), concluding, among other things, that the order presented a controlling question of law. The Ninth Circuit rejected an argument that it lacked jurisdiction to hear the appeal under Section 1292(b) on grounds that the certified order presented no controlling question of law. The party opposing certification argued that no question of law can be "controlling" unless the question goes to who will win on the merits of the underlying dispute. Id. at 319. To the contrary, the court noted, issues collateral to the merits – whether the underlying claims are arbitrable – are a proper subject of an interlocutory appeal. Id. And the court agreed with the district court that an order compelling arbitration "may involve a controlling question of law if it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter."[2] Id. More fundamentally, the Ninth Circuit declared that a contrary holding would nullify part of the Federal Arbitration Act because it "would render meaningless the acknowledgment in 9 U.S.C. § 16(b) that an interlocutory order pursuant to the Federal Arbitration Act may, in some circumstances, satisfy the requirements of 28 U.S.C. § 1292(b)." Id.

As another example, in S.A. Mineracao Da Trindade, *supra*, the Southern District of New York held that notwithstanding "the strong federal policy in favor of arbitration," the issue of

[2] The Ninth Circuit's interpretation of "controlling question" squares with the majority view of the federal courts. For example, Wright, Miller & Cooper, state, "[t]here is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment … for further proceedings … ." 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Fed. Practice & Procedure § 3930, at 496 (2012).

whether the claims at bar fell within the scope of the parties' arbitration agreement presented a controlling question of law that "should be promptly reviewed" by the court of appeals. 579 F. Supp. at 1050. The third factor was readily met, the court held, because if the claims were not arbitrable, the parties will not have wasted their time "arbitrating claims that are later held to be nonarbitrable," but if the court's decision is affirmed, the parties can conduct their arbitration "with full confidence that its results will be binding." Id. at 1051.

Also illustrative is Delock v. Securitas Sec. Servs. USA, Inc., 883 F. Supp. 2d 774 (E.D. Ark. 2012). There, the court concluded that an order compelling arbitration presented a controlling question of law, particularly because "no facts are disputed" and the arbitrability issue presents a "pure question of law." Id. at 791. The court noted that "[t]he enforceability question is controlling because it can 'head off protracted, costly litigation' about where the parties' dispute belongs and how it will be resolved." Id. (quoting Ahrenholz v. Bd. of Trustees of Univ. of Ill., 219 F.3d 674, 677 (7th Cir. 2000)). On the third factor, the court explained that "resolution of the controlling and contested issue of law 'must promise to *speed up* the litigation.' (emphasis original). It does." Id. (citing Ahrenholz). The reason is that if the district court is mistaken about enforceability of the arbitration term and arbitration goes forward to a final award, *after* the claims have been arbitrated and "after the Court of Appeals reverses and returns the case for adjudication …, the parties will have to start over." Id. at 792.[3]

[3] Other courts have certified orders compelling arbitration after making similar findings on the first and third factors. See, e.g., Vernon v. Qwest Communs. Int'l, Inc., 925 F. Supp. 2d 1185, 1195 (D. Colo. 2013) (certifying an order compelling arbitration, finding, among other things, that the issue turned on a controlling question of law because the enforceability of the arbitration agreement was in dispute); Youssofi v. Credit One Fin., 2016 U.S. Dist. LEXIS 149864, at *10-14 (S.D. Cal., Oct. 28, 2016) (following Kuehner v. Dickinson & Co., court certified order to compel arbitration, holding the issue of whether plaintiff's claim is arbitrable is a controlling question of law and certifying the order would result in sidestepping expense and delay if the arbitration forum has no power to decide the dispute); Hoffman v. Citibank (South Dakota), N.A., 2007 U.S. Dist. LEXIS 98644, at *5-7 & 10 (C.D. Cal., Feb. 15, 2007) (court reached same result, following Kuehner).

Applying these principles, the Court's 4/3/19 Order involves a controlling question of law: The Court ordered Plaintiffs' claims against ONLIC and ONLAC to arbitration, yet claims against those entities are *not arbitrable* in a FINRA forum against their consent. Thus, as in the cases cited above, interlocutory review of the 4/3/19 Order could save the needless expense and delay of litigating claims against these entities in a forum that has no power to decide the claims. If on the other hand, if ONLIC and ONLAC were to lose in arbitration *and only then* be able to appeal the order compelling arbitration, a decision that the 4/3/19 Order was incorrect would require the award to be vacated and these claims sent right back to this Court to start over again.

C. The Second Section 1292(b) Factor Is Also Satisfied, As There Is Substantial Ground For Difference Of Opinion As To Whether The Court's Order Was Correct

The second factor requires that the controlling question of law is one "as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). One basis for finding a substantial ground for a difference of opinion is where an issue involves "one or more difficult and pivotal questions of law not settled by controlling authority." Phillip Morris Inc. v. Harshbarger, 957 F. Supp. 327, 330 (D. Mass. 1997) (O'Toole, Jr., J.) (quoting McGillicuddy v. Clements, 746 F.2d 76, 76 n.1 (1st Cir. 1984)).

As noted above, the First Circuit apparently has never considered certification for interlocutory appeal of an order staying litigation and/or compelling arbitration under 9 U.S.C. § 16(b). (District courts in the Circuit also apparently have not considered this issue, either.) Courts in this District have held that the second Section 1292(b) factor may be satisfied where the First Circuit has not decided a particular legal issue and there is disagreement among courts nationwide concerning the issue. See S. Orange Chiropractic Ctr., LLC v. Cayan LLC, 2016 U.S. Dist. LEXIS

70680, at *6 (D. Mass., May 31, 2016) (Saris, C.J.).[4] Also, courts within this District have granted interlocutory appeals on the basis that courts *within* the District have reached different opinions on the same legal issue. In Muniz v. Winn, 462 F. Supp. 2d 175 (D. Mass. 2006) (Young, J.), for example, the court certified an interlocutory appeal where there were conflicting decisions within the District regarding the discretion afforded to the Bureau of Prisons under a statute governing the placement of prisoners. In granting the interlocutory appeal, the court cited the fact that "[t]he judges in this District are divided," and, thus, the "issue cries out for authoritative, prompt, precedential resolution in the First Circuit." Id. at 183.

Here, the legal issue of whether a non-FINRA member can be compelled to arbitrate in the FINRA forum has not been "settled by controlling authority," as neither the First Circuit nor the U.S. Supreme Court has ruled on this issue. Furthermore, courts both within and outside of this District have reached conclusions on this issue that are the opposite of the Court's decision. As explained next, these decisions demonstrate there is substantial ground for difference of opinion as to whether the Court's 4/3/19 Order is correct.

1. A Substantial Ground For Difference Of Opinion Exists As To Whether There Is A Valid Agreement To Arbitrate Between Commonwealth And ONLIC Or ONLAC

a. There Is Disagreement Among Courts Nationwide As To Whether An Entity That Is Not Subject To FINRA Jurisdiction Can Be Compelled To Arbitrate Under An Arbitration Agreement That Incorporates FINRA Rules

1) The District of Utah Reached A Contrary Holding In UBS Bank USA v. Hussein

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[4] Accord: Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 894 F. Supp. 2d 144, 157 (D. Mass. 2012) (Stearns, J.) (citation omitted) (granting an interlocutory appeal where "[n]either the Supreme Court nor the First Circuit has addressed this issue, and the courts that have done so are divided"); Natale v. Pfizer Inc., 379 F. Supp. 2d 161, 182 (D. Mass. 2005) (Young, C.J.) (granting an interlocutory appeal where the "case law to date demonstrates marked litigant confusion and disagreement in this area, thus providing good reason for the First Circuit expeditiously to address this issue"); Cabot v. Lewis, 2015 U.S. Dist. LEXIS 89257, *3-4 (D. Mass. July 8, 2015) (Saylor, J.) (granting an interlocutory appeal where "courts have taken a variety of approaches to the subject" and "[t]he First Circuit has not adopted any specific approach, and therefore the issue is unsettled within this district").

This Court's decision directly conflicts with the holding of a district court outside of this District – the District of Utah's decision in UBS Bank USA v. Hussein, 2014 U.S. Dist. LEXIS 56106 (D. Utah, Apr. 21, 2014) – on the very same issue. See Memo Contra, at 13-14. In that case, the court held that a FINRA customer claimant could not compel UBS Bank USA ("UBS Bank") a non-FINRA-member affiliate of UBS Financial Services, Inc., a FINRA-member broker-dealer, to arbitrate before FINRA under the terms of a pre-dispute Client Relationship Agreement ("CRA"). Id. at *1-4. There, the court noted that the contract provision at issue identified FINRA as the sole forum in which an arbitration could be conducted, and, further, that the parties agreed to give up the right to sue "except as provided by the rules of the arbitration forum in which a claim is filed." Id. at *3-4. The court cited this language referring to application of the rules of the arbitration forum (*i.e.,* FINRA) and held that the UBS Bank, the non-FINRA-member affiliate, *could not be compelled* to participate in a FINRA arbitration, absent *post-dispute consent* to do so, because:

> [T]he CRA arbitration provision clearly states the rules of the arbitration forum where the claim is filed govern. Hussein filed his arbitration claim with FINRA, and FINRA's rules do not allow jurisdiction over UBS Bank.

Id. at *9-10.

This Court's holding is in direct opposition to the District of Utah's holding in UBS Bank. Here, the arbitration provision cited by Plaintiffs as the basis for compelling ONLIC and ONLAC to arbitrate before FINRA clearly provides that the rules of the NASD, n/k/a/ FINRA, apply.[5] This

[5] See Memo Contra, at 6. The Addendum to the Selling Agreement, at page 5, states: "All parties to this agreement submit and agree that all disputes between the parties of whatever nature or subject matter relating to the duties, obligations, representations, and warranties undertaken by this Agreement, and relating to this Agreement itself, whether existing on the date hereof or arising hereafter, shall be submitted *to arbitration in accordance with the Code of Arbitration Procedure of the NASD*, or similar rules in effect on the date of the submission of any such dispute. Judgment upon the award rendered by the arbitrators may be entered in any court of competent jurisdiction." (Emphasis added.)

language is essentially identical to the arbitration provision in UBS Bank, which provided that FINRA rules governed. The court in UBS Bank held that under FINRA rules that were expressly incorporated into the parties' arbitration provision, UBS Bank, as a non-member of FINRA, could not be compelled to arbitrate before FINRA. This Court has held just the opposite – that ONLIC and ONLAC, as non-members of FINRA, can be compelled to arbitrate before FINRA, notwithstanding the fact that the parties' arbitration provision incorporates FINRA rules that *do not* provide for jurisdiction over those entities. Thus, these decisions conflict with each other.

a) The Court's Factual Distinction Between Its Order and UBS Bank Is Immaterial

The issue of arbitrability here presents a pure question of law. At pages 14-15 of the 4/3/19 Order, however, the Court stated Defendants' reliance on UBS Bank was "unavailing" for two reasons. We will now address why the distinctions the Court identified have no bearing on the legal issues presented in either UBS Bank or this case.

As for the first reason identified by the Court, the Court noted a factual distinction with respect to UBS Bank, that in UBS Bank, "FINRA had already indicated to the parties that the case did not fall under its jurisdiction," whereas "[i]n the present case, FINRA has not indicated whether it has jurisdiction." 4/3/19 Order, at 14. This distinction is immaterial, however: Whether FINRA has sent a letter to the parties stating whether it has jurisdiction to arbitrate or not does not change the ultimate legal issue – *which is for a court to decide if arbitrability is challenged* – of whether FINRA has jurisdiction over non-members as a matter of law. This determination is one that can be made through a court's review of FINRA Rules. See Memo Contra, at 14-16.

In the review of FINRA Rules, two points are important, and we offer this brief recap:

First, former NASD Rule 10201(a), *unlike current FINRA Rule 13200(a)*, provided for arbitration by "certain others." The former rule was, thus, not limited to disputes solely between

and among members and/or associated persons. A comparison of the current and former rules shows that arbitration by "certain others" is no longer contemplated by the industry code. Rather, *only* disputes between and among FINRA members and associated persons are subject to arbitration before FINRA. Memo Contra, at 14-15.

Second, a comparison of current FINRA Rule 13200(a) with FINRA's current customer arbitration code reveals a key difference that further emphasizes FINRA's lack of jurisdiction over non-members in industry disputes. Specifically, under FINRA Rule 12201, which provides for "Elective Arbitration" in *customer* disputes:

> Parties may arbitrate a dispute under the Code if:
>
> • The parties *agree in writing* to submit the dispute to arbitration under the Code ***after the dispute arises***; and
>
> • The dispute is between a customer and a member, associated person of a member, ***or other related party*;** and
>
> • The dispute arises in connection with the business activities of a member or an associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

(Emphasis added.)

No similar provision for "elective arbitration" and no reference to arbitration of disputes involving a "related party" are found in FINRA's industry code. The absence of such language was clearly intentional. FINRA's industry code does not contemplate arbitration by any parties other than FINRA members and/or associated persons.[6] Memo Contra, at 15-16.

b) The Court's Reliance On Arbitration Awards To Distinguish UBS Bank Is Misplaced

[6] Even though voluntary submission to FINRA's jurisdiction is permissible in the *customer* context, such a submission is effective only where the parties execute a *post-dispute agreement to arbitrate*, as the court recognized in UBS Bank. Indeed, as previously noted, FINRA has provided formal guidance stating that it will exercise arbitration jurisdiction over non-party SEC Registered Investment Advisers, in *customer* disputes, *only* where the RIA executes a *post-dispute* agreement to arbitrate and a submission agreement. See Memo Contra, at 2-3, 16 & Exh. 1.]

The second reason identified by the Court for concluding that UBS Bank is "unavailing" on the arbitrability issue is the Court's conclusion, in agreement with the Plaintiffs, that five selected decisions of FINRA/NASD arbitration panels are "precedent" that "establishes that the Court can compel FINRA arbitration for non-members." 4/3/19 Order, at 10.

The Court commented that "Defendants do not distinguish these cases." Id. We did point out that Plaintiffs' citation to arbitration awards, which have no value as precedent, is a red herring. Memo Contra, at 18. A review of these arbitration awards demonstrates they do not even touch on the legal issue presented here. Nevertheless, as the Court placed significant reliance on arbitration awards in distinguishing the UBS Bank decision, further explication is pertinent.

Two points are salient: *First*, "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide," *not for arbitrators to decide*. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002). Thus, in the absence of ruling by a court on the issue of arbitrability, it is immaterial whether some arbitration matter by happenstance included a non-FINRA-member respondent. *Second*, arbitration decisions are not "precedent" that should be deemed either binding or persuasive on a federal court, for many reasons. For one, FINRA arbitrators are not even required to apply the law. Moreover, even when FINRA panels do apply the law, they seldom explain their reasoning. Indeed, the five cited arbitration awards give no clue as to what, if any, legal analysis was made. *Most tellingly, only one of the five decisions even mentions that a non-FINRA member objected to being named as a respondent, and that entity apparently allowed the arbitration to proceed without seeking a court ruling on arbitrability*.

Nevertheless, the Court's reliance invites review of these five arbitration awards. As an initial point, one of the arbitration decisions involved *plaintiffs* (not defendants) who were – apparently wrongly – compelled to arbitrate:

- St. Onge v. Fin. Mgmt., Inc., 2009 FINRA Arb. LEXIS 92 (Oct. 23, 2009). Under FINRA's "Elective Arbitration" rule, as noted above, customers have the right to choose to file claims in court and cannot be forced to arbitrate. Yet in this *customer complaint*, as the FINRA panel indicated, an Arkansas state trial court apparently flouted FINRA Rules and granted respondents' motion to compel the *claimants* to arbitrate rather than pursue their claims in court.[7] The panel compounded that error by denying – *without explanation* – the claimants' motion to dismiss the arbitration on the basis that they could not be forced to arbitrate. Id. at *3-4. At page 11 of the 4/3/19 Order, the Court relies on one of the several arguments made by the respondents in opposition to claimants' motion to dismiss, that "the Code does not require that persons be registered with FINRA to arbitrate before FINRA." Id. at *4. That argument was flat wrong, especially as applied to the customers who were forced to arbitrate instead of bringing their claims in court, as FINRA's customer code permits. The Arkansas trial court's apparently erroneous order and an incorrect argument made by a party in an arbitration case hardly amount to a principle of law that anyone can rely on.

The remaining four decisions are equally irrelevant – they also did not involve a non-FINRA-member defendant being compelled to arbitrate in FINRA over its objection:

- Raymond, James & Assocs. v. S.W. Corporate Inv. Servs., 2005 NASD Arb. LEXIS 1252 (Mar. 4, 2005). An NASD member and its registered representative brought claims in arbitration against two respondents: the registered representative's former broker-dealer, an NASD member, and a non-NASD-member affiliate of the broker-dealer. As the panel award indicates, the claimant former registered representative had a dual employment agreement with both of the respondents. The matter involved claims concerning enforceability and alleged breach of the employment agreement at issue. The decision states that the non-NASD-member respondent at one point "argued that NASD lacked jurisdiction" and filed a motion to dismiss, but the respondent otherwise apparently acquiesced to the arbitration. This is the single decision of the five that involved a non-FINRA member objecting to being named as a respondent. *But there is no indication that the respondent filed a court action challenging arbitrability*.

- UBS Fin. Servs. Inc. v. Fagenson, 2017 FINRA Arb. LEXIS 835 (Oct. 17, 2017), was an action to collect on unpaid loans that were made to the respondent, a former registered representative of claimant UBS Financial Services, Inc., a FINRA member. Also joined as a claimant was a non-FINRA-member UBS affiliate that apparently was the entity that actually loaned the money. The respondent did not even enter an appearance to contest the

[7] The panel gave no hint about the trial court's reason for compelling arbitration. We searched the LEXIS legal database and other available sources on the Internet and did not find any Arkansas trial court order in this case.

claim, and there was no challenge to the affiliate's standing to join in a FINRA arbitration as a claimant. This case *did not involve* a non-FINRA member being compelled by a court to arbitrate over its objection.

- PMW Partners v. NBC Sec., Inc., 2011 FINRA Arb. LEXIS 642 (May 9, 2011), involved a complicated dispute between, on one hand, the claimant, an entity under which a FINRA-registered associated person conducted his business, and, on the other hand, the associated person's former broker-dealer (a FINRA member) and a non-FINRA-member affiliate of the company that purchased his former broker-dealer. At issue was the alleged breach of liquidated-damages and change-of-control provisions in a contract between the associated person and/or his business and the former broker-dealer. This dispute was also litigated by these and various related parties in state and federal court, and the federal court decisions provide more-complete background information.[8] Suffice it to say that the non-FINRA-member entity that was named a respondent in this FINRA matter *consented to the arbitration, executed a submission agreement, filed a statement of answer, and appeared at the hearing*. Id. at *10. Thus, this case *did not involve* a non-FINRA member being forced to arbitrate over its objection.

- E*Trade Fin. Corp. v. Carrasquillo, 2009 FINRA Arb. LEXIS 99 (Jan. 27, 2009); see also E*Trade Fin. Corp. v. Carrasquillo, 2007 U.S. Dist. LEXIS 64148 (M.D. Fla., Aug. 29, 2007). The claimant, a non-FINRA member that is an affiliate of a FINRA member, filed a statement of claim and a submission agreement in the FINRA system against respondents, a FINRA member and two associated persons. The claimant filed the court action for the purpose of seeking a preliminary injunction – which is routinely done where parties to an arbitration desire to obtain injunctive relief, because injunctions are available only in court, not in arbitration. In the 4/3/19 Order, the Court noted that the Middle District of Florida denied claimant's request for injunctive relief and, without discussion, directed the parties to "proceed to arbitration in accordance with their agreements." 2007 U.S. Dist. LEXIS 64148, at *4. No information was provided in either the court decision or the arbitration award on the content of "their agreements." It appears the parties had contracts in which they consented to bring any claims in arbitration. There is no mention that anyone objected. As we are left to guess what the agreements were, the E*Trade matter has no bearing on the legal issue of whether ONLIC and ONLAC can be forced to arbitrate in this matter. Moreover, this case also *did not involve* a non-FINRA member being forced to arbitrate over its objection.

In sum, we believe we are correct: The five FINRA matters cited by Plaintiffs and relied on by the Court are inapposite. They have no bearing on the applicability of UBS Bank to the issues in this case.

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[8] See Pagliara v. Johnston Barton Procter & Rose, LLP, 2010 U.S. Dist. LEXIS 107012 (M.D. Tenn., Oct. 6, 2010); Pagliara v. Johnston Barton Procter & Rose, LLP, 2012 U.S. Dist. LEXIS 35673 (M.D. Tenn., Mar. 16, 2012); Pagliara v. Johnston Barton Procter & Rose, LLP, 708 F.3d 813 (6th Cir. 2013); PWM Partners v. NBC Sec., Inc. 2010 Tenn. LEXIS 1182 (Tenn., Dec. 2010) (decision without published opinion, denying permission to appeal).

2. ***There Is Disagreement Among Courts Outside This Circuit: The Ninth Circuit Has Reached A Different Conclusion Regarding Whether An Arbitration Clause That Incorporates NASD/FINRA Rules Is Modified When Those Rules Change***

As noted above, the Addendum to the Selling Agreement expressly states that arbitrations under the agreement are to be held "in accordance with the Code of Arbitration Procedure of the NASD." The Court ordered ONLIC and ONLAC to submit to FINRA arbitration despite the fact that the Selling Agreement expressly incorporates FINRA Rules *that have been amended to preclude jurisdiction over those entities*. In so doing, the Court stated that "the historical changes from the NASD Rules do not tip the scales in Defendants' favor." 4/3/14 Order, at 14 For that view, the Court again relied on the arbitration decisions discussed above.

This result directly conflicts with the Ninth Circuit's decision in Kuehner v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996), discussed at pages 3-4, *supra*. In Kuehner, the plaintiff, an NASD-registered representative, filed suit in court against her former broker-dealer, Dickinson & Co., bringing claims arising from her employment. The plaintiff challenged the district court's order granting Dickinson & Co.'s motion to compel arbitration in the NASD. Per terms of her NASD registration, plaintiff had signed a Form U-4, the standardized contract between broker-dealers and associated persons used throughout the industry, which contained an arbitration provision that required the representative to "arbitrate any dispute … that is required to be arbitrated under the rules, constitutions, or by-laws of the NASD … ." Id. at 318.

The year after plaintiff signed the Form U-4, the NASD amended its rule pertaining to its arbitration jurisdiction in employment disputes. Id. Significantly, Plaintiff conceded that the amended rule would make her claims subject to NASD arbitration, but she argued that *the previous NASD rule* was incorporated into her Form U-4 employment agreement and was, therefore, still part of the contract. Thus, she contended, the old rule should be applied to hold that the NASD

lacked jurisdiction, which would enable her to assert her claims in court. See id. at 320. Rejecting Plaintiff's position, the Ninth Circuit held that it did not need to reach the issue of whether the old NASD rule would give the district court jurisdiction for adjudication of the dispute, because *the new NASD rule was incorporated into the Form U-4*: "Kuehner agreed in signing the Form U-4 to be bound by the NASD rules" and "[t]he new NASD rule governs under the Form U-4." Id.

Whereas in Kuehner the substantive NASD rule change resulted in the NASD having jurisdiction to arbitrate the dispute, here FINRA Rules have changed so that FINRA *does not* have jurisdiction to arbitrate the dispute. The fundamental principle is that as a FINRA rule is amended, so is the contract incorporating the rule – and under that principle, ONLIC and ONLAC cannot be forced to submit to FINRA arbitration. This Court adopted the exact opposite proposition, however, demonstrating substantial ground for difference of opinion between the 4/3/19 Order and a decision outside this Circuit.

a. Courts Within This District Are Divided On Whether An Entity That Is Not Subject To FINRA's Jurisdiction Can Be Compelled To Arbitrate Before FINRA Under An Arbitration Agreement That Incorporates FINRA Rules

Further substantial ground for difference of opinion lies in the fact that a court *within the District of Massachusetts* reached a holding contrary to the 4/3/19 Order on this same issue – whether an entity that is not subject to FINRA's jurisdiction can nevertheless be compelled to submit to FINRA arbitration pursuant to an arbitration clause that incorporates FINRA Rules.

The other case, Heller v. AXA Equitable Fin. Servs., 2014 U.S. Dist. LEXIS 51836 (D. Mass., Apr. 15, 2014) (Saylor, J.), involved plaintiff's action to vacate an arbitration award in an employment dispute between himself and the defendant, AXA Advisors LLC ("AXA Advisors"), a FINRA member. Plaintiff had signed an employment agreement with AXA Advisors and its affiliate, AXA Network, LLC ("AXA Network"), which is not a FINRA member. Id. at *3. The

employment agreement contained an arbitration clause that provided that "[a]ny arbitration pursuant to this [a]greement shall be conducted in accordance with, and *governed by the Code of Arbitration Procedures of the National Association of Securities Dealers ("NASD"), if within the NASD's jurisdiction*, and if not, then by in accordance [sic] with the rules and procedures of the American Arbitration Association." Id. at *11 (emphasis added).

After plaintiff filed an arbitration action in FINRA against *both* AXA Advisors (the FINRA member) and AXA Network (the non-FINRA member), the arbitration panel dismissed the claims against AXA Network on grounds that it was neither a member nor an associated person of FINRA. Id. at *5. Plaintiff argued that this dismissal was wrongful, contending that AXA Network was required to arbitrate in the FINRA system pursuant to the employment agreement, thus rendering AXA Network a necessary party to the arbitration. Id. at *10. The court summarily rejected plaintiff's argument, holding:

> It is undisputed that AXA Network is not a member of FINRA. Furthermore, under the FINRA Code, AXA Network is not an associated person of a member and AXA Network did not voluntarily elect to arbitrate under FINRA's jurisdiction. *Although the contractual language contained in the employment contract may bind AXA Network to arbitration,* ***it does not bind AXA Network to arbitrate disputes with FINRA***.

2014 U.S. Dist. LEXIS 51836, at *11-12 (emphasis added).

The Court's 4/3/19 Order directly conflicts with Heller. Just like the parties in Heller, who were subject to an arbitration clause providing that NASD (*i.e.* FINRA) rules governed, the parties here are subject to a contract that contains an arbitration clause that provides that the dispute shall be "submitted to arbitration *in accordance with the Code of Arbitration Procedure of the NASD*." Addendum at 5 (emphasis added). And just like the non-FINRA-member entity the plaintiff sought to submit to FINRA arbitration in Heller, neither ONLAC nor ONLIC are FINRA members

or associated persons. Nevertheless, despite being confronted with the exact same legal issue as the court in Heller, this Court reached the opposite conclusion and determined that ONLIC and ONLAC are subject to FINRA arbitration.

b. These Contrary Holdings Compel The Conclusion That A Substantial Ground For Difference Of Opinion Exists As To Whether ONLIC and ONLAC Are Subject To Arbitration Pursuant To The Selling Agreement.

As set forth above, courts both within and outside of this District have decided that an entity that is not subject to FINRA's jurisdiction cannot be compelled to submit to FINRA arbitration merely because an arbitration clause in a contract provides that FINRA is the arbitration forum. This Court came to the opposite conclusion. Substantial ground for difference of opinion has been established, and all three factors of Section 1292(b) are satisfied.

3. A Substantial Ground For Difference Of Opinion Exists As To Whether Plaintiff Benison, A Registered Representative, Can Compel ONLIC And ONLAC To Arbitrate Before FINRA

Separate grounds for interlocutory review are presented with respect to this Court's decision to compel ONLIC and ONLAC to arbitrate claims brought by Plaintiff Benison, a FINRA-registered representative of Plaintiff Commonwealth. Setting aside the fact that Benison is not even a party to the Selling Agreement, the Court's decision is in conflict with case law nationwide on the issue of whether Benison, by virtue of her status as a FINRA-registered representative, may compel non-FINRA-members ONLIC and ONLAC to submit to FINRA arbitration.

The Court's rationale for the proposition that Benison may compel ONLIC and ONLAC to arbitrate in FINRA is that Benison, as a FINRA associated person, "is subject to mandatory FINRA arbitration" and thus is able to "compel ONLIC and ONLAC through her membership in FINRA" to submit to FINRA arbitration, as stated in footnote 3 at page 10 of the 4/3/19 Order.

The Court cited no authority for the proposition that FINRA members or associated persons, *merely because they would be subject to arbitration* brought by another party, can therefore compel other parties *that are not subject to FINRA arbitration* to submit to FINRA arbitration.

The Court's conclusion directly conflicts with cases from courts nationwide that have considered the issue. On point is Variable Annuity Life Ins. Co. v. Dull, 2009 U.S. Dist. LEXIS 86555 (S.D. Fla. Sept. 22, 2009). There, the court held that the defendant, a registered representative and, as such, an associated person of FINRA, could not compel FINRA arbitration against the plaintiff, Variable Annuity Life Insurance Company ("VALIC"), an entity that was neither a FINRA member nor an associated person. In so holding, the court explained that

> FINRA's jurisdiction is limited to claims between or among members and/or associated persons on both sides of the dispute. ... VALIC ... is not a member or associated person of FINRA ... . Since Rule 13200 permits arbitration only at the insistence of members or associated persons against members or associated persons, this dispute is outside the scope of FINRA's jurisdiction.

Id. at *9 n.3.

Indeed, courts across the country have routinely held that a FINRA member or associated person cannot compel a party that is not a FINRA member or associated person to submit to mandatory FINRA arbitration.[9] Thus, the Court's holding that Benison, through her status as an

[9] See, e.g., Bank of Am., N.A. v. UMB Fin. Servs. Inc., 618 F.3d 906, 912 (8th Cir. 2010) (affirming the district court, holding that UMB Financial Services, a FINRA member, could not compel Bank of America to submit to FINRA arbitration, as "BOA is not a FINRA member and did not directly agree to subject itself to arbitration under FINRA's terms"); Cantor Fitzgerald, L.P. v. Prebon Sec. (USA) Inc., 731 A.2d 823, 829-830 (Del. Ch. 1999) (holding that the defendant, an NASD member, could not compel the non-member plaintiff to arbitrate before the NASD under NASD rules: "Since [the plaintiff] is neither a member nor an 'associated person' this is not an instance in which arbitration would involve (i) a member against another member, (ii) a member against a person associated with a member. (iii) a person associated with a member against a member or (iv) a person associated with a member against a person associated with a member"); Cent. Trust Bank v. Graves, 495 S.W.3d 797, 801 (Mo. Ct. App. 2016) (affirming the trial court's denial of the defendant associated person's motion to compel arbitration where it was "undisputed that [the plaintiff] was not a member of FINRA. And, as a business entity, it is evident that [the plaintiff] is not a natural person and, thus, cannot be considered an 'associated person'" under FINRA Rules); Alliancebernstein L.P. v. Gelwarg, 2012 N.Y. Misc. LEXIS 6248, at *11-12 (N.Y. Sup. Ct. Apr. 23, 2012) (denying the defendant associated persons' motion to compel arbitration against the plaintiff, a corporation that was an affiliate of a FINRA member but was "not itself a member of FINRA").

associated person of FINRA, may force ONLIC and ONLAC – entities that are neither FINRA members nor associated persons – to submit to arbitration before FINRA directly conflicts with case law nationwide holding just the opposite. Therefore there is a substantial ground for difference of opinion, and the second Section 1292(b) factor is satisfied as to this issue.[10]

III. CONCLUSION

For all of these reasons, the Court should issue an order certifying its April 3, 2019, Memorandum and Order for interlocutory appeal.

April 30, 2019

Respectfully submitted,

THE OHIO NATIONAL LIFE INSURANCE COMPANY AND OHIO NATIONAL LIFE ASSURANCE CORPORATION
By their Attorneys,

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[10] In the same footnote, the Court listed an alternative reason for compelling ONLIC and ONLAC to arbitrate with Plaintiff Benison, declaring without analysis or explanation that Benison could compel arbitration as a third-party beneficiary because the Selling Agreement "manifest[s] an intent to confer specific legal rights" on Benison. The Court quoted from the First Circuit's recent decision in Hogan v. SPAR Group, Inc., 914 F.3d 34 (2019), which actually *militates against* a finding of third-party beneficiary status here. Briefly, Hogan applied the settled principles that: (1) "A third-party beneficiary must demonstrate with 'special clarity that the contracting parties intended to confer a benefit on him' "; (2) "In evaluating whether such 'special clarity' exists, a court should focus on the 'specific terms' of the agreement at issue, being mindful that it 'ought not to distort the clear intention of contracting parties or reach conclusions at odds with the unambiguous language of a contract' "; (3) "a mere benefit to the nonsignatory resulting from a signatory's exercise of its contractual rights is not enough"; and (4) "Rather, the contract must "mention [or] manifest an intent to confer specific legal rights upon" the plaintiff. 914 F.3d at 39-40. Hogan held that the plaintiff failed to prove it was a third-party beneficiary of the contract at issue. For the same reasons, the contract language that Plaintiff Benison points to also "does not make the cut." Id. at 40. Hogan is fully consistent with the Ohio case law we cited for the point that Benison is not an intended third-party beneficiary of the Selling Agreement under the governing Ohio law. Memo Contra, at 12, n.8 As we noted, the Court should not reach the issue of third-party beneficiary standing because under terms of the Selling Agreement ONLIC and ONLAC cannot be compelled to arbitrate.

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CERTIFICATE OF SERVICE

I, Robert R. Berluti, hereby certify that on this 30th day of April, 2019, I electronically filed the foregoing using the CM/ECF system, which constitutes services upon counsel of record.

/s/ Robert R. Berluti
Robert R. Berluti (BBO #039960)

CERTIFICATE OF COMPLIANCE WITH RULE 7.1(a)(2)

I, Robert R. Berluti, hereby certify that in accordance with Local Rule 7.1(a)(2), counsel for the parties have conferred and have attempted to resolve or narrow the issues contained herein.

/s/ Robert R. Berluti
Robert R. Berluti (BBO #039960)

CERTIFICATE OF SERVICE

I, Robert R. Berluti, hereby certify that on this 30th day of April, 2019, I electronically filed the foregoing using the CM/ECF system, which constitutes service upon counsel of record.

/s/ Robert R. Berluti
Robert R. Berluti (BBO #039960)