No. 16-825

In The
Supreme Court of the United States

DANIEL E. TAYLOR and WILLIAM TAYLOR, as Co-Executors of the Estate of Anna Marie Taylor, deceased,

Petitioners,

v.

THE EXTENDICARE HEALTH FACILITIES, INC. d/b/a HAVENCREST NURSING CENTER; EXTENDICARE HOLDINGS, INC.; EXTENDICARE HEALTH FACILITY HOLDINGS, INC.; EXTENDICARE HEALTH SERVICES, INC.; EXTENDICARE REIT; EXTENDICARE, L.P.; and EXTENDICARE, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY BRIEF

STEPHEN TRZCINSKI
Counsel of Record
DANIEL R. MCGRATH
DANIEL R. KLAPROTH
WILKES & MCHUGH, P.A.
1601 Cherry Street, Suite 1300
Philadelphia, PA 19102
(800) 255-5070
strzcinski@wilkesmchugh.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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OTHER AUTHORITIES

REPLY BRIEF

Respondents claim there is no reason to grant review in this case, but their own Brief proves otherwise.

A. Sometimes, Timing is Everything

Respondents' argument can be summed up as follows: No matter what the circumstances or how harsh the consequences, courts must sever arbitrable and nonarbitrable claims to comply with the Federal Arbitration Act ("FAA"). Any facially neutral state law that happens to interfere with the courts' ability to do so must be preempted. No exceptions.

To that end, Respondents claim that this Court's "liberal federal policy favoring arbitration" requires lower courts to always give "preference" to arbitration agreements. Resp't Br. at 2, 12-17. In their words, "there is no reasonable dispute about the state of the law, or the Justices' belief in the propriety of the state of the law." *Id.* at 2.

Ironically, on the same day that Respondents made this assertion, this Court held oral argument in another nursing home neglect and abuse case, *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015), *cert. granted*, *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 368 (2016) – and, in the process, repudiated Respondents' position. Faced with a similar pro-arbitration argument, the Honorable Justice Kagan pushed back by evoking the "equal footing" principle:

> But that . . . suggests that arbitration is a preferred right, and I thought that the idea of the FAA was to say it can't be – whatever, dis-preferred, un-preferred, you know – but not to put it on its own separate plane, like you can't deal with this in the same way that you could deal with any other fundamental right.

Transcript of Oral Argument at 41, *Kindred*, 137 S. Ct. 368 (2016) (No. 16-32); App. 1-2.

Clearly, there is disagreement as to whether arbitration agreements should enjoy a "preferred" status over all other contracts. *Id. See also* Pet'rs' Br. at 23-25. For this reason alone, certiorari is warranted.

B. The "Need" for Piecemeal Litigation

Relying on three cases, Respondents argue that courts must always enforce arbitrable claims by severing them from the underlying litigation: *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *KPMG, LLP v. Cocchi*, 565 U.S. 18 (2011); and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). In fact, these cases are readily distinguishable.

Moses H. Cone only requires severance "when necessary to give effect to an arbitration agreement." *Moses H. Cone*, 460 U.S. at 20; *see also* Pet'rs' Br. at 27-29. In this case, the arbitration agreement not only calls for "speed, efficiency and cost-effectiveness," but also expresses preference for a "single" forum. R. 83a-84a. Thus, severing the claims would not "give effect" to this agreement, but would undermine its express intent.

Nor does *KPMG*, which involved commercial transactions between sophisticated parties, support Respondents' position. First, *KPMG* instructs that "[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." *KPMG*, 565 U.S. at 19. There, the lower court refused "to compel arbitration on any of the four claims based ***solely*** on a finding that two of them . . . were nonarbitrable." *Id.* at 21 (emphasis added). Here, the lower courts were not just acting on a whim; they were adhering to the longstanding dictates of Rule 213(e) and the Wrongful Death Act. Second, the agreement in *KPMG* is not even remotely similar to this one. It neither mentions "speed, efficiency and cost-effectiveness," nor expresses any preference for a "single" forum. *See* App. 3-13 (*KPMG* agreement).[1]

Respondents' reliance on *Dean Witter* is also misplaced. In that case, the lower court refused to compel arbitration due to concerns about federal securities laws and issues of collateral estoppel. *Byrd v. Dean Witter Reynolds, Inc.*, 726 F.2d 552, 554 (9th Cir. 1984). Before reversing, this Court analyzed the lower court's justifications and found them insufficient. *Dean Witter*, 470 U.S. at 223-24. If, as Respondents suggest, courts must automatically bifurcate in all circumstances, there would have been no need for this Court to delve

[1] A copy of the arbitration agreement in *KPMG* was attached to the Petition for Writ of Certiorari and is accessible by viewing the original image of the Petition at the following citation: Petition for Writ of Certiorari at 62a-71a, *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (No. 10-1521), 2011 WL 2441700.

into the lower court's reasoning. *See also* Pet'rs' Br. at 21 n.13.

As a fallback, Respondents argue that if this case is reversed, parties will avoid arbitration "by simply joining non-signatories to the arbitration agreement or by including claims not covered in the agreement. . . ." Resp't Br. at 19-20. But this assumes that counsel will violate their ethical responsibilities. As noted by the Honorable Justice Brennan, that type of argument is inconsistent with "the foundation of trust and ethics which underlies our professional honor system." William J. Brennan, Jr., Junior Bar Section of Bar Ass'n of District of Columbia, *Discovery in Federal Criminal Cases* (May 9, 1963), *reprinted in* 33 F.R.D. 47, 63 (1963).

C. Frustrating-the-Federal-Policy Argument

Throughout their papers, Respondents continue to make a vague "frustrating the federal policy" argument. Instead of explaining the parameters of their argument, Respondents repeatedly cite to *Moses H. Cone*. To the extent that *Moses H. Cone* established a precedent of favoritism, it was only intended for very specific – and inapposite – circumstances: when there is doubt as to the scope of an existing and valid arbitration agreement. Yet, Respondents try to expand this narrow pro-enforcement presumption to ***all*** questions of arbitrability, while simultaneously questioning the FAA's equal-footing principle. Resp't Br. at 13 n.5.

In reaching for an across-the-board favoritism, Respondents cite authority unrelated to the FAA: *United*

Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574 (1960). The context of *Steelworkers* – collective bargaining in labor disputes – reveals that the favoritism applied there derived from Section 301 of the Labor Management Relations Act, which seeks to "promote industrial stabilization through the collective bargaining agreement." *Id.* at 578. *Steelworkers* even recognized that traditional arbitration case law was "irrelevant" to its analysis because "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement. . . ." *Id.*

After cherry-picking this Court's language, Respondents proclaim that all doubts must be resolved in favor of enforcing arbitration agreements. That is wrong. As this Court has already explained, the policy favoring arbitration does not apply to all questions of arbitrability, *e.g.*, formation issues. *See Granite Rock Company v. International Brotherhood of Teamsters*, 561 U.S. 287, 300 (2010). Other courts have correctly held that "when the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away." *Riley Manufacturing Company, Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995)). Likewise, in the context of an FAA preemption analysis, any presumption in favor of enforcement should also "fall away."

D. "Frustration Preemption" Under the FAA

Respondents – along with the court below – have taken this Court's precedent to mean that FAA preemption should eviscerate neutral rules of general applicability, like Rule 213(e), under a "frustration preemption" doctrine. Although this Court explained in *Volt* that the FAA does not employ field preemption,[2] it has not provided any other boundaries or workable rules for lower courts to follow. Without additional guidance, courts will continue to expand FAA preemption to cover any law that happens to interfere with blanket enforcement – regardless of the consequences.

Members of this Court have expressed concern with frustration preemption, fearing it "leads to decisions giving improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress. . . ." *Wyeth v. Levin*, 555 U.S. 555, 604 (2009) (Thomas, J., concurring).[3] Of course, "[e]very federal statute presumably was enacted to further a strong or liberal federal policy

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[2] *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 477 (1989).

[3] *See also Geier v. American Honda Motor Company*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (discussing the importance of "prevent[ing] federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purpose."); *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part) ("A free wheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law.").

in favor of or against something, but that does not lead inexorably to preemption of every state law that touches on the same subject." *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 728 (4th Cir. 1990) (Widener, J., dissenting). Where Congress is silent as to preemption, courts should not assume that it intended to displace all related state laws. *See Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983); *Commonwealth Edison Company v. State of Montana*, 453 U.S. 609 (1981).[4]

In *Pacific Gas*, for example, this Court upheld California's moratorium on nuclear-power-plant construction, notwithstanding the federal policy promoting nuclear power. *Pacific Gas*, 461 U.S. at 222. There, in language directly applicable to this case, this Court noted that the federal policy was "not to be accomplished 'at all costs.'" *Id.*

Likewise, in *Montana*, this Court upheld a state severance tax on coal, despite the federal policy "to encourage and foster greater use of coal and other alternate fuels." *Montana*, 453 U.S. at 633 (internal quotations omitted). This Court rejected the notion that this policy "demonstrate[s] a congressional intent to pre-empt ***all*** state legislation that may have an adverse impact on the use of coal." *Id.* (emphasis added).

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[4] *See also* Kevin O. Leske and Dan Schweitzer, *Frustrated with Preemption: Why Courts Should Rarely Displace State Law Under the Doctrine of Frustration Preemption*, 65 N.Y.U. Ann. Surv. Am. L. 585, 592 (2010).

The Pennsylvania Supreme Court should have applied the same traditional principles of preemption in this case. Thus, the appropriate starting point here is not the "liberal policy favoring arbitration agreements," as Respondents suggest. Instead, "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict." *Montana*, 453 U.S. at 634.

Similarly, an FAA preemption analysis must be tailored to the individual arbitration agreement at issue. *See Preston v. Ferrer*, 552 U.S. 346 (2008). In *Preston*, this Court held that the FAA could displace a carefully-designed state administrative scheme, but only when the parties' arbitration agreement has a broad scope. This Court emphasized that the "dispositive issue" is "***not*** whether the FAA preempts [state law] wholesale" because the "FAA plainly has no such destructive aim or effect." *Id.* at 352 (emphasis added).

Here, the Pennsylvania Supreme Court was asked to determine – in the abstract – whether the FAA and Rule 213(e) conflict. *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 498 (Pa. 2016) (questions presented). This analysis, however, was divorced from the agreement itself. And now, following *Taylor*, Pennsylvania courts are required to follow suit ***without even considering*** the language in the parties' agreement. *See, e.g.*, Orders/Decisions from the

Pennsylvania Superior Court[5] and Supreme Court.[6] All of this is contrary to United States Supreme Court

[5] *Churlick v. Manor Care of Carlisle PA, LLC*, No. 1108 MDA 2015, 2017 WL 769825 (Pa. Super. Feb. 28, 2017) ("Section 2 of the FAA binds state courts to compel arbitration of claims subject to an arbitration agreement, even at the expense of judicial efficiency."); *Cosgrove v. ManorCare of Lancaster PA, LLC*, No. 761 MDA 2014, 2017 WL 564817 (Pa. Super. Feb. 13, 2017); *Collins v. ManorCare of Lancaster PA, LLC*, No. 762 MDA 2014, 2017 WL 564818 (Pa. Super. Feb. 13, 2017); *Hetrick v. ManorCare of Carlisle PA, LLC*, No. 266 MDA 2014, 2017 WL 570947 (Pa. Super. Feb. 13, 2017); *Foster v. Golden Gate National Senior Care, LLC*, No. 1147 WDA 2015, 2017 WL 243472 (Pa. Super. Jan. 20, 2017); *Stubits v. Golden Gate National Senior Care, LLC*, No. 1160 WDA 2015, 2017 WL 243473 (Pa. Super. Jan. 20, 2017); *Martz v. Golden Gate National Senior Care, LLC*, No. 855 WDA 2015, 2017 WL 117694 (Pa. Super. Jan. 12, 2017); *Minich v. Golden Gate National Senior Care, LLC*, No. 314 MDA 2015, 2016 WL 7403777 (Pa. Super. Dec. 21, 2016); *Brosius v. HCR ManorCare, LLC*, No. 789 MDA 2015, 2016 WL 7048818 (Pa. Super. Dec. 5, 2016); and *Davis v. HCR ManorCare, LLC*, No. 507 MDA 2015, 2016 WL 7387880 (Pa. Super. Dec. 21, 2016).

[6] *Churlick v. Manor Care of Carlisle PA, LLC*, No. 506 MAL 2016, 2016 WL 7011389 (Pa. Dec. 1, 2016); *Martz v. Golden Gate National Senior Care, LLC*, 150 A.3d 956 (Pa. 2016); *Foster v. Golden Gate National Senior Care, LLC*, No. 249 WAL 2016, 2016 WL 6806507 (Pa. Nov. 17, 2016); *Stubits v. Golden Gate National Senior Care, LLC*, No. 250 WAL 2016, 2016 WL 6807020 (Pa. Nov. 17, 2016); *Collins v. Manor Care of Lancaster, PA, LLC*, No. 550 MAL 2015, 2016 WL 6704360 (Pa. Nov. 15, 2016); *Cosgrove v. Manor Care of Lancaster, PA, LLC*, No. 549 MAL 2015, 2016 WL 6704428 (Pa. Nov. 15, 2016); *Hetrick v. Manorcare of Carlisle PA, LLC*, No. 506 MAL 2015, 2016 WL 6704589 (Pa. Nov. 15, 2016); *Davis v. HCR ManorCare, LLC*, No. 210 MAL 2016, 2016 WL 6704632 (Pa. Nov. 15, 2016); *Tuomi v. Extendicare, Inc.*, No. 281 WAL 2015, 2016 WL 6773195 (Pa. Nov. 15, 2016); *Davis v. HCR ManorCare, LLC*, No. 210 MAL 2016, 2016 WL 6704632 (Pa. Nov. 15, 2016); *Burkett v. St. Francis Country House*, No. 162 EAL 2016,

precedent, not to mention settled principles of contract law.

CONCLUSION

As some have noted, even the original purpose of the FAA seems up for debate:

> The Court has written that "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract." Elsewhere, the Court explained that the FAA reflected "a liberal federal policy favoring arbitration agreements." On other occasions, the Court indicated that Congress intended for Section 2 to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Finally, the Court recently mentioned, but never thoroughly articulated, the theory that the FAA was intended to promote a quick and efficient resolution of private disputes.

Arpan A. Sura and Robert A. DeRise, *Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations*, 62 U. Kan. L. Rev. 403, 406 (2013) (quotations omitted). Without further guidance, courts will

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2016 WL 6077259 (Pa. Oct. 17, 2016); and *Brosius v. HCR Manorcare, LLC*, No. 354 MAL 2016, 2016 WL 6078561 (Pa. Oct. 17, 2016).

continue to wrestle with the seemingly irreconcilable language in this Court's FAA jurisprudence.

Perhaps Respondents are correct and courts should always exalt arbitration agreements over any other contract, consequences be damned. On the other hand, maybe a return to "equal footing" is in order. Either way, clarification is needed.

Respectfully submitted,

STEPHEN TRZCINSKI
Counsel of Record
DANIEL R. MCGRATH
DANIEL R. KLAPROTH
WILKES & MCHUGH, P.A.
1601 Cherry Street, Suite 1300
Philadelphia, PA 19102
(800) 255-5070
strzcinski@wilkesmchugh.com

IN THE SUPREME COURT
OF THE UNITED STATES

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCUIT HEALTH AND REHABILITATION, ET AL.,	:	No. 16-32
Petitioners	:	
v.	:	
JANIS E. CLARK, ET AL.,	:	
Respondents.	:	

Washington, D.C.

Wednesday, February 22, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:22 a.m.

APPEARANCES:

ANDREW J. PINCUS, ESQ., Washington, D.C.; on behalf of the Petitioners.

ROBERT E. SALYER, ESQ., Lexington, Ky.; on behalf of the Respondents.

* * *

[41] MR. PINCUS: And – and I – I – I think our answer to that question would be – although the Court doesn't have to reach it here – that lumping arbitration agreements into that category of fundamental rights is a judgment that the FAA precludes the State from making because the judgment –

JUSTICE KAGAN: But that – that suggests that the arbitration is a preferred right, and I thought that the idea of the FAA was to say it can't be – whatever, dis-preferred, un-preferred, you know – but not to put it on its own separate plane, like you can't deal with this in the same way that you could deal with any other fundamental right.

[42] MR. PINCUS: Well, that's why I say it would be a harder question, Your Honor, but – but I think the – the critical thing is here, it's quite clear from the State court's own opinion that that isn't the rule of decision here because the State court, as the dissent points out, the – the express authorization requirement doesn't apply to jury waivers in a host of different circumstances, as Justice Breyer's opinions pointed out, and it also doesn't apply to lots of fundamental – other kinds of fundamental rights.

* * *

APPENDIX G

EXHIBIT 1

KPMG LLP
757 Third Avenue
New York, NY 10017

Telephone 212 758 9700
Fax 212 872 3001
Internet www.us.kpmg.com

November 23, 2004

Tremont Capital Management Inc.
555 Theodore Fremd Avenue
Rye, NY 10580

Attention: Arthur Brown, Chief Financial Officer

This letter will confirm our understanding of our engagement to provide professional services to certain partnerships (the "Partnerships") within Tremont Capital Management, Inc. ("Tremont" or the "Company")

Objectives and limitations of services

Audit Services

We will issue a written report upon our audits of the Partnerships' financial statements as set forth in Appendix I.

* * *

Dispute Resolution

Any dispute or claim arising out of or relating to the engagement letter between the parties, the services provided thereunder, or any other services provided by or on behalf of KPMG or any of its subcontractors or agents to Tremont or at its request

(including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved in accordance with the dispute resolution procedures set forth in Appendix II, which constitute the sole methodologies for the resolution of all such disputes. By operation of this provision, the parties agree to forego litigation over such disputes in any court of competent jurisdiction. Mediation, if selected, may take place at a place to be designated by the parties. Arbitration shall take place in New York, New York. Either party may seek to enforce any written agreement reached by the parties during mediation, or to confirm and enforce any final award entered in arbitration, in any court of competent jurisdiction.

Notwithstanding the agreement to such procedures, either party may seek injunctive relief to enforce its rights with respect to the use or protection of (i) its confidential or proprietary information or material or (ii) its names, trademarks, service marks or logos, solely in the courts of the State of New York or in the courts of the United States located in the State of New York. The parties consent to the personal jurisdiction thereof and to sole venue therein only for such purposes.

* * *

Appendix II

Dispute Resolution Procedures

The following procedures are the sole methodologies to be used to resolve any controversy or claim ("dispute"). If any of these provisions are determined to be invalid or unenforceable, the remaining provisions shall remain in effect and binding on the parties to the fullest extent permitted by law.

Mediation

Any party may request mediation of a dispute by providing a written Request for Mediation to the other party or parties. The mediator, as well as the time and place of the mediation, shall be selected by agreement of the parties. Absent any other agreement to the contrary, the parties agree to proceed in mediation using the CPR Mediation Procedures (effective April 1, 1998) issued by the Center for Public Resources, with the exception of paragraph 2 which shall not apply to any mediation conducted pursuant to this agreement. As provided in the CPR Mediation Procedures, the mediation shall be conducted as specified by the mediator and as agreed upon by the parties. The parties agree to discuss their differences in good faith and to attempt, with facilitation by the mediator, to reach a consensual resolution of the dispute. The mediation shall be treated as a settlement discussion and shall be confidential. The mediator may not testify for any party in any later proceeding related to the dispute. No recording or transcript shall be made of the mediation

proceeding. Each party shall bear its own costs in the mediation. Absent an agreement to the contrary, the fees and expenses of the mediator shall be shared equally by the parties.

Arbitration

Arbitration shall be used to settle the following disputes: (1) any dispute not resolved by mediation 90 days after the issuance by one of the parties of a written Request for Mediation (or, if the parties have agreed to enter or extend the mediation, for such longer period as the parties may agree) or (2) any dispute in which a party declares, more than 30 days after receipt of a written Request for Mediation, mediation to be inappropriate to resolve that dispute and initiates a Request for Arbitration. Once commenced, the arbitration will be conducted either (1) in accordance with the procedures in this document and the Rules for Non-Administered Arbitration of the CPR Institute for Dispute Resolution ("CPR Arbitration Rules") as in effect on the date of the engagement letter or contract between the parties, or (2) in accordance with other rules and procedures as the parties may designate by mutual agreement. In the event of a conflict, the provisions of this document and the CPR Arbitration Rules will control.

The arbitration will be conducted before a panel of three arbitrators, two of whom may be designated by the parties using either the CPR Panels of Distinguished Neutrals or the Arbitration Rosters

maintained by any United States office of the Judicial Arbitration and Mediation Service (JAMS). If the parties are unable to agree on the composition of the arbitration panel, the parties shall follow the screened selection process provided in Section B, Rules 5, 6, 7, and 8 of the CPR Arbitration Rules. Any issue concerning the extent to which any dispute is subject to arbitration, or any dispute concerning the applicability, interpretation, or enforceability of these procedures, including any contention that all or part of these procedures are invalid or unenforceable, shall be governed by the Federal Arbitration Act and resolved by the arbitrators. No potential arbitrator shall be appointed unless he or she has agreed in writing to abide and be bound by these procedures:

The arbitration panel shall issue its final award in writing. The panel shall have no power to award non-monetary or equitable relief of any sort. Damages that are inconsistent with any applicable agreement between the parties, that are punitive in nature, or that are not measured by the prevailing party's actual damages, shall be unavailable in arbitration or any other forum. In no event, even if any other portion of these provisions is held to be invalid or unenforceable, shall the arbitration panel have power to make an award or impose a remedy that could not be made or imposed by a court deciding the matter in the same jurisdiction.

Discovery shall be permitted in connection with the arbitration only to the extent, if any, expressly authorized by the arbitration panel upon a showing of substantial need by the party seeking discovery.

All aspects of the arbitration shall be treated as confidential. The parties and the arbitration panel may disclose the existence, content or results of the arbitration only as provided in the CPR Arbitration Rules. Before making any such disclosure, a party shall give written notice to all other parties and shall afford such parties a reasonable opportunity to protect their interests.

The award reached as a result of the arbitration will be binding on the parties, and confirmation of the arbitration award may be sought in any court having jurisdiction.

* * *

EXHIBIT 2

KPMG LLP
345 Park Avenue
New York, NY 10154

Telephone 212 758 5700
Fax 212 758 9819
Internet www.us.kpmg.com

Tremont Group Holdings Inc.
555 Theodore Fremd Avenue
Suite C-300
Rye, NY 10580

October 6, 2006

Attention: Anthony Marcello, AVP-Product Operations:

This letter will confirm our understanding of our engagement to provide professional services to the Funds listed in Appendix I.

Objectives and Limitations of Services

Audit Services

We will issue a written report upon our audits of the financial statements of the Funds as set forth in Appendix I, herein after referred to as the "Funds".

* * *

Dispute Resolution

Any dispute or claim arising out of or relating to the engagement letter between the parties, the services provided thereunder, or any other services provided by or on behalf of KPMG or any of its subcontractors or agents to the Funds or at its request (including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved in accordance with the dispute resolution procedures set forth in Appendix II which constitute the sole methodologies for the resolution of all such disputes. By operation of this provision, the parties agree to forego litigation over such disputes in any court of competent jurisdiction. Mediation, if selected, may take place at a place to be designated by the parties. Arbitration shall take place in New York, New York. Either party nary [sic] seek to enforce any written agreement reached by the parties during mediation, or to confirm and enforce any final award entered in arbitration, in any court of competent jurisdiction.

Notwithstanding the agreement to such procedures, either party may seek injunctive relief to enforce its rights with respect to the use or protection of i) its confidential or proprietary information or material or ii) its names, trademarks, service marks or logos, solely in the courts of the State of New York or in the courts of the United States located in the State of New York. The parties consent to the personal jurisdiction thereof and to sole venue therein only for such purposes.

* * *

Appendix II

Dispute Resolution Procedures

The following procedures are the sole methodologies to be used to resolve any controversy or claim ("dispute"). If any of these provisions are determined to be invalid or unenforceable, the remaining provisions shall remain in effect and binding on the parties to the fullest extent permitted by law.

Mediation

Any party may request mediation of a dispute by providing a written Request for Mediation to the other party or parties. The mediator, as well as the time and place of the mediation, shall be selected by agreement of the parties. Absent any other agreement to the contrary, the parties agree to proceed in mediation using the CPR Mediation Procedures (effective April 1, 1998) issued by the Center for Public Resources, with the

exception of paragraph 2 which shall not apply to any mediation conducted pursuant to this agreement. As provided in the CPR Mediation Procedures, the mediation shaft [sic] be conducted as specified by the mediator and as agreed upon by the parties. The parties agree to discuss their differences in good faith and to attempt, with facilitation by the Mediator, to reach a consensual resolution of the dispute. The mediation shall be treated as a settlement discussion and shall be confidential. The mediator may not testify for any party in any later proceeding related to the dispute. No recording or transcript shall be made of the mediation proceeding. Each party shall bear its own costs in the mediation. Absent an agreement to the contrary, the fees and expenses of the mediator shall be shared equally by the parties.

Arbitration

Arbitration shall be used to settle the following disputes: (1) any dispute not resolved by mediation 90 days after the issuance by one of the parties of a written Request for Mediation (or, if the parties have agreed to enter or extend the mediation, for such longer period as the parties may agree) or (2) any dispute in which a party declares, more than 30 days after receipt of a written Request for Mediation, mediation to be inappropriate to resolve that dispute and initiates a Request for Arbitration. Once commenced, the arbitration will be conducted either (1) in accordance with the procedures in this document and the Rules for Non-Administered Arbitration of the CPR Institute for

Dispute Resolution ("CPR Arbitration Rules") as in effect on the date of the engagement letter or contract between the parties, or (2) in accordance with other rules and procedures as the parties may designate by mutual agreement. In the event of a conflict, the provisions of this document and the CPR Arbitration Rules will control.

The arbitration will be conducted before a panel of three arbitrators, two of whom may be designated by the parties using either the CPR Panels of Distinguished Neutrals or the Arbitration Rosters maintained by any United States office of the Judicial Arbitration and Mediation Service (JAMS). If the parties are unable to agree on the composition of the arbitration panel, the parties shall follow the screened selection process provided in Section B, Rules 5, 6, 7, and 8 of the CPR Arbitration Rules. Any issue concerning the extent to which any dispute is subject to arbitration, or any dispute concerning the applicability, interpretation, or enforceability of these procedures, including any contention that all or part of these procedures are invalid or unenforceable, shall be governed by the Federal Arbitration Act and resolved by the arbitrators. No potential arbitrator shall be appointed unless he or she has agreed in writing to abide and be bound by these procedures.

The arbitration panel shall issue its final award in writing. The panel shall have no power to award non-monetary or equitable relief of any sort. Damages that are inconsistent with any applicable agreement between the parties, that are punitive in nature, or that

are not measured by the prevailing party's actual damages, shall be unavailable in arbitration or any other forum. In no event, even if any other portion of these provisions is held to be invalid or unenforceable, shall the arbitration panel have power to make an award or impose a remedy that could not be made or imposed by a court deciding the matter in the same jurisdiction.

Discovery shall be permitted in connection with the arbitration only to the extent, if any, expressly authorized by the arbitration panel upon a showing of substantial need by the party seeking discovery.

All aspects of the arbitration shall be treated as confidential. The parties and the arbitration panel may disclose the existence, content or results of the arbitration only as provided in the CPR Arbitration Rules. Before making any such disclosure, a party shall give written notice to all other parties and shall afford such parties a reasonable opportunity to protect their interests.

The award reached as a result of the arbitration will be binding on the parties, and confirmation of the arbitration award may be sought in any court having jurisdiction.

* * *