13-2172-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

CITIGROUP GLOBAL MARKETS INC.,

Plaintiff-Counter-Defendant-Appellee,

-against-

GHAZI ABDULLAH ABBAR, as temporary administrators of the estate of ABDULLAH MAHMOUD ABBAR, shall be substituted for Decedent, AJIAL LEVERAGED FEEDER HOLDINGS LIMITED, AMATRA LEVERAGED FEEDING HOLDINGS LIMITED, AMAVEST HOLDINGS LIMITED, GAMA INVESTMENT HOLDINGS LIMITED, CHRISTINE WOODHOUSE, as temporary administrators of the Estate of ABDULLAH MAHMOUD ABBAR, shall be substituted for Decedent,

Defendants-Counter-Claimants-Appellants,

ABDULLAH MAHMOUD ABBAR,

Defendant-Counter-Claimant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (11 CIV. 6993)

BRIEF OF AMICUS CURIAE THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE'S REQUEST FOR AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae The Securities Industry and Financial Markets Association is a non-profit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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Pursuant to Federal Rule of Appellate Procedure 29 and this Court's Local Rule 29.1, The Securities Industry and Financial Markets Association ("SIFMA") respectfully submits this brief as an *amicus curiae* in support of Plaintiff-Counter-Defendant-Appellee and the decision of the United States District Court for the Southern District of New York (Stanton, J.), entered on May 2, 2013, permanently enjoining the arbitration of the underlying dispute before the Financial Industry Regulatory Authority ("FINRA").[1] *See Citigroup Global Markets, Inc.* v. *Abbar*, No. 11-CV-6993, 2013 WL 1855733 (S.D.N.Y. May 2, 2013) ("Dist. Ct. Op."). All parties to this appeal have consented to the filing of this brief.

STATEMENT OF INTEREST

SIFMA is a trade association representing the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's members include the leading investment banks, broker-dealers, and mutual fund companies. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and

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[1] No counsel for a party or party to this proceeding authored this brief in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than SIFMA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

SIFMA has a particular interest in this litigation because affirmance of the decision below would lead to greater predictability and respect for contractual commitments in the securities industry, to the benefit of all industry participants. SIFMA's members are parties to thousands of disputes each year, including both judicial proceedings and arbitrations, many of them before FINRA. Some types of disputes—for example, disputes between FINRA members and their customers—are rightly subject to mandatory arbitration, because the relevant parties have agreed to submit any such dispute to arbitration. But other types of disputes—such as the dispute at issue here between a FINRA member and one who is at most a customer of the member's foreign affiliate—are not subject to mandatory arbitration and instead are arbitrated only on a transaction-specific basis at the bilateral agreement of the parties.

SIFMA has a substantial interest in ensuring that courts enforce agreements among participants in the securities industry reflecting their choice of forum for the resolution of disputes—whether that choice is arbitration, litigation, or some other means. Thus, SIFMA believes that it is essential for courts to enjoin

arbitrations when, as here, a party tries to force another to arbitrate a dispute not covered by such agreements.[2]

SUMMARY OF ARGUMENT

Participants in the securities industries need a clear and administrable standard for when a party seeking to bring a FINRA arbitration to resolve a dispute is a customer of a FINRA member and thus is entitled to arbitration of that dispute. It would be difficult to find a better demonstration of the need for clarity than the proceedings below. Unsure what they needed to show to demonstrate that arbitration was or was not available, the parties conducted a *nine-day trial* going solely to the question whether the Investors were customers of a FINRA member. That is to say, the parties took up nearly two weeks of the court's time—to say nothing of the year and a half of discovery and pretrial proceedings—to determine only the threshold question whether they would or would not submit their dispute to FINRA arbitration, without ever touching the merits of the underlying dispute. Such a burdensome pre-arbitration judicial inquiry is inconsistent with the virtues

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[2] This brief presumes familiarity with the facts of this dispute, as set out in Plaintiff-Counter-Defendant-Appellee's Brief. *See* Brief of Plaintiff-Counter-Defendant-Appellee at 6-18, *Citigroup Global Markets Inc.* v. *Abbar*, No. 13-2172-cv (2d Cir. Dec. 9, 2013) (docket no. 65). This brief refers to Plaintiff-Counter-Defendant-Appellee Citigroup Global Markets, Inc. as "CGMI" and to all Defendants-Counter-Claimants-Appellants and the Defendant-Counter-Claimant collectively as the "Investors."

of arbitration, which is intended to provide parties with an efficient and relatively inexpensive way to resolve disputes.

The district court recognized that FINRA's Code of Arbitration Procedure obviates the need for that sort of onerous pre-arbitration inquiry. Under FINRA Rule 12200, FINRA members must arbitrate business-related disputes with their "customers." The district court correctly reasoned that in order to be a "customer" of a FINRA member, a party must at least have either opened an account or executed a transaction with that FINRA member. In ordinary parlance, a customer is a person or organization that procures, or perhaps undertakes to procure, a particular good or service. So too in this context, a customer is a person or organization that, at a minimum, executes a transaction or opens a brokerage account with a FINRA member. As the district court aptly observed, either the execution of a transaction or the opening of a brokerage account is a necessary prerequisite for customer status within the securities industry.

That approach makes obvious sense. FINRA members expect to arbitrate disputes with *their own* customers. They do not expect to be compelled to arbitrate disputes with *other institutions'* customers, including the customers of foreign affiliates. Here, the Investors do not dispute that they entered into an investment advisory agreement, opened accounts, and engaged in transactions with a separate corporate entity, Citigroup Global Markets, Ltd. ("CGML"). They

simply contend that because CGML and CGMI are foreign affiliates that work closely together, including in connection with the investments at issue, in effect the Investors became customers of CGMI as well. But the Investors cannot ride the coattails of CGML's relationship with CGMI; they must point to their own customer relationship with CGMI—and they were never customers of CGMI in any usual sense.

Relying on the industry touchstones for a member-customer relationship—*i.e.*, placement of an account or execution of a transaction—as minimum requirements for customer status achieves a number of important goals. It provides clarity to market participants and courts by supplying an easily administrable standard that allows parties to predict with fair certainty, and without years of litigation, whether their dispute is subject to mandatory arbitration. It is derived from and consistent with the decisions of this Court and other courts of appeals, which have looked to brokerage accounts and purchase transactions as the criteria for a customer relationship. Finally, it accords with the reasonable expectations of FINRA members. FINRA performs a valuable service in protecting the interests of investors through fair and efficient member-customer arbitration. But in agreeing to arbitrate member-customer disputes, FINRA members do not thereby also obligate themselves to arbitrate disputes with parties that are *not* their customers—such as the customers of foreign affiliates.

ARGUMENT

I. FINRA ARBITRATION PROVIDES A FAIR AND EFFICIENT FORUM TO RESOLVE MEMBER-CUSTOMER DISPUTES.

Regulators and participants in the securities industry have long recognized that, in appropriate circumstances, investors and markets greatly benefit from alternative dispute resolution. Arbitration is a popular and effective method for resolving many types of disputes.

FINRA, a self-regulatory organization and successor to the National Association of Securities Dealers ("NASD"), has established an arbitration process tailored to resolving certain disputes within the securities industry. SIFMA supports FINRA arbitration as an appropriate forum for alternative dispute resolution for member-customer disputes. FINRA arbitration provides an impartial and efficient venue for resolving such disputes and, in so doing, bolsters the public's trust in the industry and the markets. Put simply, "securities arbitration affords investors the opportunity to have their claims heard close to home, before highly trained and experienced arbitrators, in a forum that has proven to resolve disputes at least as fairly as the judicial system, and much faster and less expensively." SIFMA, *White Paper on Arbitration in the Securities Industry* 5 (Oct. 2007).[3]

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[3] http://www.sifma.org/WorkArea/DownloadAsset.aspx?id=21334 (last visited on Dec. 13, 2013)

There are a number of aspects that make arbitration well-suited for handling disputes between financial services firms and their customers. For example:

- Pre-dispute arbitration agreements empower investors to pursue small claims, provide a friendly forum for *pro se* investor claimants, and lower overall costs borne by investors and FINRA members, all in a system overseen by expert regulators.
- Arbitration clauses provide a valuable degree of predictability to the relationship between firms and their customers.
- Arbitration saves time and money because motion practice and discovery are more limited in arbitration than in litigation.
- FINRA arbitration puts members and their customers on equal footing when disputes emerge and deters forum-shopping tactics.

Id. at 3-5. In short, SIFMA believes that the enforceability of pre-dispute arbitration clauses is vital to just, effective, and efficient resolution of disputes between broker-dealers and their customers.

II. THE DISTRICT COURT'S APPROACH TO THE MEMBER-CUSTOMER RELATIONSHIP IS SUBSTANTIVELY CORRECT AND EASILY ADMINISTRABLE.

Although SIFMA supports FINRA arbitration as a method of resolving member-customer disputes, it does not follow that the customer of a FINRA member's affiliate should be entitled to compel FINRA arbitration against the member merely because the FINRA member aided its affiliate in providing services to the affiliate's customer. The district court's decision properly polices

the line between member-customer disputes and other types of disputes, and it does so in a way that is clear and easy to apply.

A. The Proceedings Below Demonstrate the Need for Certainty and Clarity with Respect to the Member-Customer Relationship.

One of the primary benefits of FINRA arbitration is that it allows investors to have their claims decided more quickly and at lesser cost than would be the case if the claim had to be litigated. This benefit is all but lost when the threshold determination whether a dispute is arbitrable requires lengthy proceedings before the courts.

The proceedings here are a case in point. Litigation over arbitrability has entered its 27th month. Before issuing the decision below, the district court initially undertook to "examin[e] and evaluat[e] the substance, nature, and frequency of each interaction and task performed by the various persons who dealt with Mr. Abbar, their contemporaneous understandings of whose behalf the person was acting, and the extent to which the person's activities shaped or caused the transaction." Dist. Ct. Op. at *3. This led to 43 pretrial filings and nine days of trial. The parties submitted 128 agreed findings of fact, plus 760 disputed proposed findings of fact, and agreed to 354 exhibits being received into evidence, with 144 more exhibits in dispute. All of that work went simply to arbitrability, without reaching the merits of the Investors' claims.

This case thus demonstrates the manifest importance—to both parties and courts—of an approach to FINRA arbitration that provides predictability to market participants and conserves scarce judicial resources. Such an approach would advance the goals of the Federal Arbitration Act more generally by limiting the costs of arbitrating disputes. Those goals are only becoming more important over time in this context. As the district court noted, "litigation over FINRA arbitrability" is "increasingly commonplace." Dist. Ct. Op. at *4. It is therefore more important than ever that the requirements for a member-customer relationship allow investment firms and investors to understand when a dispute belongs in arbitration.

B. The Decision Below Provides a Correct, Clear, and Easily Administrable Rule as to Who May Compel FINRA Arbitrations.

FINRA's Code of Arbitration Procedure (the "Code") provides an alternative dispute mechanism to which FINRA members agree by virtue of their membership. FINRA Rule 12200. As such, FINRA arbitration is subject to the undisputed maxim that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).[4] FINRA members agree to arbitrate

[4] Despite the Investors' contention to the contrary, the Supreme Court "[has] never held that [the federal] policy [favoring arbitration] overrides the principle that a court may submit to arbitration 'only those disputes . . . the parties have agreed to submit.'" *Granite Rock Co.* v. *Int'l Broth. of*

disputes with their customers, not others with whom they may come in contact. *See Raymond James*, 709 F.3d at 386 ("When it accepted FINRA Rule 12200, [FINRA member Raymond James] agreed to arbitrate disputes with its customers, not with those who fall outside that category."). The district court's decision correctly applies that principle to this dispute—and does so in a way that provides valuable pre-dispute certainty.

For a claim against a FINRA member to be subject to mandatory arbitration, (i) the dispute must be "*between a customer and a member* or an

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Teamsters, 130 S. Ct. 2847, 2859 (2010) (quoting *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995)). No public policy favors arbitration of disputes between two parties that do not have an agreement to arbitrate disputes between them. Thus, although "any doubts concerning the scope of arbitrable *issues* should be resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added), no such presumption applies to the threshold inquiry whether a valid agreement to arbitrate exists between particular *parties*. *See Banc One Acceptance Corp.* v. *Hill*, 367 F.3d 426, 429 (5th Cir. 2004) ("While there is a strong federal policy favoring arbitration, the policy does not apply to the initial determination whether there is a valid agreement to arbitrate."). By virtue of their membership in FINRA, members agree to arbitrate disputes with their customers, and only their customers. Whether a customer relationship exists lies at the heart of whether a FINRA member has agreed to arbitrate a dispute with a particular party. For this reason, SIFMA submits that dicta in *John Hancock Life Ins. Co.* v. *Wilson*, 254 F.3d 48, 58 (2d Cir. 2001), concluding that any ambiguity in the meaning of "customer" must be construed in favor of arbitration, is inconsistent with the current jurisprudence on this question. *See, e.g., Raymond James Fin. Serv., Inc.* v. *Cary*, 709 F.3d 382, 386 (4th Cir. 2013) ("[T]he presumption in favor of arbitration does not apply to the question of appellants' customer status, and we must consider that issue under ordinary principles of contract law.").

associated person of a member" and (ii) the dispute must arise "in connection with the business activities of the member." FINRA Rule 12200 (emphasis added). As ordinarily understood, a "customer" is "one that purchases some commodity or service." Webster's Third New International Dictionary 559 (3d ed. 2002); *see also* American Heritage Dictionary of the English Language 450 (4th ed. 2000) (defining a customer as "[o]ne that buys goods and services"). Consistent with that common meaning, in the context of the securities industry, a customer is one who at the least executes a transaction or opens an account with a FINRA member. *See UBS Fin. Serv., Inc.* v. *West Virginia Univ. Hosp., Inc.*, 660 F.3d 643, 650 (2d Cir. 2011) (citing the American Heritage Dictionary of the English Language's definition of "customer" and ruling that "'customer' includes at least a non-broker or non-dealer who purchases, or undertakes to purchase, a good or service from a FINRA member"); *Bensadoun* v. *Jobe-Riat*, 316 F.3d 171, 176-77 (2d Cir. 2003) (reasoning that the opening of an account with a FINRA member indicates customer status).

As the district court recognized, affording the term "customer" its ordinary meaning provides clarity and transparency to participants in the securities markets. The district court reasoned that "[t]he elements of an account and a purchase are visible to all at the outset of the dispute resolution process." Dist. Ct. Op. at *5. Requiring an account or transaction with the FINRA member to

establish customer status thus produces predictable and consistent results that are compatible with the reasonable expectations of FINRA members. It is, as the district court explained, a "direct, available, reliable, and predictable ground for decisions." *Id*. at *4. It allows the parties to readily and reliably ascertain, at the outset of a dispute, whether arbitration is available.[5]

The Investors criticize the district court's ruling as underinclusive because, they say, the district court's test requires both an account *and* a purchase to prove customer status. *See* Brief for Defendants-Counter-Claimants-Appellants ("Appellants' Br.") at 19, *Citigroup Global Markets Inc.* v. *Abbar*, No. 13-2172-cv (2d Cir. Dec. 9, 2013) (docket no. 52). The most natural reading of the district court's decision, however, is that *either* an account with a FINRA member *or* a transaction with a FINRA member is necessary to establish a customer relationship. *See, e.g.*, Dist. Ct. Op. at *4 ("None of the defendants purchased a product from *or* opened an account with CGMI." (emphasis added)). That reading is consistent with the decisions cited by the district court, all of which analyze one

[5] Although the district court rested its decision on the absence of a transaction or an account in the present case, it also indicated that, based on the documentary evidence and witness testimony presented at trial, the Investors were not customers of CGMI "because of the overwhelming significance of the execution of the transactions with CGML and the Swiss banks" and the fact that "the planning, structuring, and other services performed by CGMI in New York were ancillary and collateral to those central core transactions." Dist. Ct. Op. at 8. This brief does not address that alternative basis for affirming the district court's decision.

of those factors but not both.[6] Indeed, there would have been no reason in this case for the district court to address whether a would-be customer must show *both* factors, because here the Investors do not satisfy *either* factor.

C. Requiring an Account or a Transaction Is Consistent with the Decisions of This Court and Other Courts of Appeals.

Although the Code's definition of "customer" merely excludes brokers and dealers, this Court and others have recognized that the term "customer" has a more limited meaning than simply all entities other than brokers or dealers. *See, e.g.*, *UBS Sec. LLC* v. *Voegeli*, 684 F. Supp. 2d 351, 356 (S.D.N.Y. 2010) ("Such an interpretation of FINRA Rule 12100 would be absurd."), *aff'd* 405 F. App'x 550 (2d Cir. 2011). Courts have properly given the term "customer" its ordinary meaning as a party or organization that, at a minimum, opens an account or executes a transaction with a FINRA member.

In *UBS Financial Services, Inc.* v. *West Virginia University Hospital, Inc.*, for example, this Court held that "[t]he term 'customer' includes at least a non-broker or non-dealer who purchases, or undertakes to purchase, a good or

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[6] *See Raymond James*, 709 F.3d at 388 (no purchase of securities from FINRA member); *Morgan Keegan & Co.* v. *Silverman*, 706 F.3d 562, 567-68 (4th Cir. 2013) (no transaction with FINRA member); *Wachovia Bank N.A.* v. *VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 173 (2d Cir. 2011) (no brokerage agreement with FINRA member); *West Virginia Univ. Hosp.*, 660 F.3d at 650 (no purchase or effort to purchase good or service from FINRA member).

service from a FINRA member." 660 F.3d at 650. Moreover, the Court observed that the term "customer" was "unambiguous with respect to [its] core definition"—someone who buys goods or services from a FINRA member. *Id.*

This Court has also acknowledged that an investor's possession of an account with a member is significant to determining customer status. In *Wachovia Bank N.A.* v. *VCG Special Opportunities Master Fund, Ltd.*, this Court enjoined arbitration where, among other things, the FINRA member and the would-be customer did not have a brokerage agreement. 661 F.3d at 173. In two other cases—*Oppenheimer & Co.* v. *Neidhardt*, 56 F.3d 352 (2d Cir. 1995), and *Bensadoun* v. *Jobe-Riat*, 316 F.3d 171—the investors alleged that the plaintiff, or an associated person of the plaintiff, conspired to fraudulently divert investors' "funds into *an account that did not reflect their status as customers*" of the plaintiff. *Oppenheimer*, 56 F.3d at 357 (emphasis added); *see also Bensadoun*, 316 F.3d at 177. These cases recognize that an account with a FINRA member is an important prerequisite for customer status. The investors were permitted to compel arbitration where the member (or an associated natural person, *see* FINRA Rule 12100(a), (r)) defrauded investors as to that very fact—that the investor had an account with the member.[7]

[7] In their opening brief, the Investors rely heavily on two Second Circuit cases: *John Hancock Life Ins.*, 254 F.3d 48, and *Twenty-First Sec. Corp.* v. *Crawford*, 502 F. App'x 64 (2d Cir. 2012). *See* Appellants' Br. at 24-27.

The district court's decision also finds support in the jurisprudence of other courts. Most recently, several cases decided by the Fourth Circuit have held that a customer is one "who purchases commodities or services from a FINRA member." *UBS Fin. Serv., Inc.* v. *Carilion Clinic*, 706 F.3d 319, 327 (4th Cir. 2013); *see also Morgan Keegan*, 706 F.3d at 567-68 (holding that the defendants were not customers of Morgan Keegan because they did not purchase commodities or services from Morgan Keegan in the course of its business activities regulated by FINRA); *Raymond James*, 709 F.3d at 388 (same).

However, neither case stands for the propositions that the Investors suggest. In *John Hancock*, the Court was asked to decide whether a customer of a FINRA member's associated person could force that member to submit to arbitration. 254 F.3d at 59-60. In the context of that question, the Court rejected as contrary to the plain language of the rule the requirement that there be indicia of a direct relationship between the member and the customer. *Id.* at 60 (citing NASD Rule 10301 (requiring a member to arbitrate "[a]ny dispute . . . between a customer and a member *and/or associated person* arising in connection with the business of such member or in connection with the activities of such *associated persons* . . . upon demand of the customer" (emphasis added))). In *Twenty-First Securities*, Twenty-First provided Crawford with information about a fund in which Crawford subsequently invested using a third-party broker. 502 F. App'x at 65. The Second Circuit affirmed the district court's decision that Crawford was a customer of Twenty-First where Twenty-First "failed to present *any* evidence contradicting Crawford's showing that he was a customer." *Id.* at 66 (emphasis added).

D. Requiring an Account or a Transaction Is Consistent with FINRA's Arbitral Procedures and Other FINRA Guidance.

The procedures applicable to FINRA member-customer arbitrations presuppose that customers will have trading and brokerage accounts. For example, FINRA's "Discovery Guide For Arbitration Proceedings" (the "Guide") gives parties to customer arbitrations guidance on discovery. The Guide lists a variety of categories of documents as "presumptively discoverable," of which almost all include references to an account. For example:

> - Copies of all documents the customer received from the firm/Associated Person(s) and from any entities in which the customer invested through the firm/Associated Person(s), including monthly statements, opening *account* forms, confirmations, prospectuses, annual and periodic reports, and correspondence.
>
> - *Account* statements and confirmations for *accounts* maintained at securities firms other than the respondent firm for the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.
>
> - All agreements, forms, information, or documents relating to the *account(s)* at issue signed by or provided by the customer to the firm/Associated Person(s).
>
> - All notes, including entries in diaries or calendars, relating to the *account(s)* at issue.

FINRA Discovery Guide 4-9 (2011) (emphasis added).[8] Here, the Investors had no account with CGMI.

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[8] Available at http://www.finra.org/ArbitrationAndMediation/Arbitrators/CaseGuidanceResources/DiscoveryGuide/ (last visited on Dec. 3, 2013).

Similarly, recent guidance from FINRA regarding suitability (that is, whether an investment is suitable for a particular customer), promulgated as FINRA Regulatory Notice 12-55, defines a "customer" as "a person who is not a broker or dealer who *opens a brokerage account* at a broker-dealer *or purchases a security* for which the broker-dealer receives or will receive, directly or indirectly, compensation even though the security is held at an issuer, the issuer's affiliate or a custodial agent . . . or using another similar arrangement." FINRA Reg. Not. 12-55 (emphasis added). The Investors' *amicus*, the Public Investors Arbitration Bar Association ("PIABA"), goes to great lengths to minimize the relevance of this definition. *See* Brief for Amicus Curiae PIABA in Support of Defendants-Appellants' Request for Reversal at 11-18, *Citigroup Global Markets Inc.* v. *Abbar*, No. 13-2172-cv (2d Cir. Dec. 9, 2013) (docket no. 59). But the definition is plainly relevant to any inquiry into FINRA's understanding of the meaning of "customer."

By way of background, Regulatory Notice 12-55 provides guidance on FINRA Rule 2111, which requires in relevant part that a FINRA-member broker-dealer or its registered representative "have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based upon . . . the customer's investment profile." FINRA Rule 2111(a). The regulatory notice primarily addresses the

scope of the terms "customer" and "investment strategy" as they are used in Rule 2111, and as explained above, it defines a "customer" in terms substantially identical to those the district court used below. The simple fact is that within this industry, FINRA understands its members' customers to be those entities that, at a minimum, open accounts or purchase securities with its members, and FINRA Regulatory Notice 12-55 reflects that understanding.

As a result, although FINRA Regulatory Notice 12-55 may not itself mandate the rule of decision the district court applied, it does shed substantial light on the types of relationships that the term "customer" is intended to cover when FINRA uses it in the Code. There is no merit to the suggestion in PIABA's brief that FINRA's interpretative guidance as to the meaning of "customer" is irrelevant because it arises in the context of a suitability inquiry: Courts have regularly looked to FINRA rules outside the Code to provide helpful context on the meaning of the term "customer." *See West Virginia Univ. Hosp.*, 660 F.3d at 651 (looking to, among others, FINRA Rules 1250, 2124, and 4530, which are not part of the Code, in rejecting argument that FINRA arbitration was not intended to cover sophisticated parties); *cf. Wachovia Bank*, 661 F.3d at 172-73 (citing an online FINRA glossary in discussing the definition of the term "customer").

The underlying dispute here shows why the meaning of "customer" for suitability purposes is an appropriate interpretative touchstone: In the present

dispute, at least one of the Investors' claims is that the investment products related to the Options Transaction and the Private Equity Loan Facility were unsuitable for them. *See* Appellants' Br. at 1. If the Investors were successful in compelling arbitration, it appears they intend to raise a suitability claim under FINRA Rule 2111(a). Neither the Investors nor their *amicus* points to any reason why the Investors should be deemed "customers" for purposes of compelling *arbitration* of a suitability claim while not being "customers" for purposes of the *merits* of that same suitability claim under FINRA Regulatory Notice 12-55. This Court should reject PIABA's unsupported suggestion that "customer" should mean one thing when FINRA uses it to discuss suitability and another thing entirely when FINRA uses it to discuss arbitrability.

E. The District Court's Ruling Comports with the Reasonable Expectations of FINRA Members and Their Customers.

As courts have repeatedly cautioned, FINRA's rules should not be read so broadly that they upset settled industry expectations as to what disputes will be arbitrated. *See, e.g., Citigroup Global Markets, Inc.* v. *VCG Special Opportunities Master Fund, Ltd.*, No. 08-CV-5520, 2008 WL 4891229, at *4 (S.D.N.Y. Nov. 12, 2008) ("While . . . the term 'customer' should not be too narrowly construed, [it] should not go so far as to upset the reasonable expectations of FINRA members."), *aff'd* 598 F.3d 30 (2d Cir. 2010); *Herbert J. Sims & Co.* v. *Roven*, 548 F. Supp. 2d 759, 763 (N.D. Cal. 2008) (ruling that "customer" "must

not be defined so broadly as to upset the reasonable expectations of FINRA members").

The district court's approach—that an account with a FINRA member or a transaction with a FINRA member is necessary to establish a customer relationship—results in a predictable outcome that does not upset the reasonable expectations of FINRA members and their customers. *See Wachovia Bank*, 661 F.3d at 171 (instructing that, in general, "terms such as 'customer' should be construed in a manner consistent with the 'reasonable expectations' of FINRA members" (quoting *Wheat, First Sec., Inc.* v. *Green*, 993 F.2d 814, 820 (11th Cir. 1993))).

Were this dispute between CGMI and one of its customers, one would reasonably expect it to be subject to arbitration. But it is not. To be sure, CGMI is a FINRA member and as such is required to arbitrate disputes with its customers. *See* FINRA Rule 12200. But none of the Investors is or ever was a customer of CGMI. The Investors were at most customers of three foreign affiliates of Citigroup—CGML and Switzerland, Citibank N.A. (Geneva Branch) and Citibank (Switzerland) (together the "Swiss Citi affiliates")—none of which are members of FINRA or associated persons of CGMI. *See* FINRA Rule 12100(a), (r) (defining "associated person" as "a natural person").

It is undisputed that the Investors never opened an account or consummated a transaction with CGMI. Instead, the Investors argue that the assistance CGMI personnel provided to CGML and the Swiss Citi affiliates renders the Investors customers of CGMI as well. But this Court has already held that the Investors cannot ride the coattails of CGML's relationship with CGMI. *See Citigroup Global Markets, Inc.* v. *VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 39 (2d Cir. 2010) (holding that "[i]f VCG's credit default swap arrangements were never handled by an agent of CGMI, *acting for that purpose*, then VCG was not the 'customer' of CGMI under any reasonable construction of that term" even where CGMI had helped Citibank, N.A. negotiate the swap arrangements and, in doing so, communicated directly with VCG (emphasis added)). Rather, the Investors must show their own direct customer relationship with CGMI—and they were not CGMI's customers in any usual sense.

In engaging in transactions with CGML, the Investors expressly agreed to forum selection and choice-of-law clauses governing disputes over those transactions. It is these clauses that inform the reasonable expectations of the parties to those transactions and their affiliates, including CGMI, as to where and under what law disputes will be resolved. By purporting to invoke FINRA's mandatory arbitration provisions, the Investors are seeking an end-run around these clauses, all in an effort to force CGMI—a party with whom they have never had a

customer relationship—to arbitrate a dispute that CGMI never agreed to arbitrate. Allowing the Investors into an unexpected forum, FINRA arbitration, would result not only in the application of different procedural rules than anticipated, but also the application of what is potentially a completely different body of substantive law.[9] Moreover, in contrast to the efficiency gains that FINRA arbitration provides where it is an appropriate forum, *see supra* Section I, arbitration of matters involving the conduct of a foreign affiliate and that affiliate's relationship with a foreign investor would result in significant inefficiencies. Such matters would necessitate testimony of foreign witnesses and the collection and production of evidence from a foreign jurisdiction—obstacles that are more easily overcome by the tools afforded parties to litigation.

Such a result would fly in the face of well-established law regarding when arbitration may be compelled by the courts and disregard the contractual obligations of the Investors, thus contravening CGMI's reasonable expectations regarding what disputes it agreed to arbitrate. Indeed, adopting the Investors' approach would make it near-impossible for participants in the financial industry to predict with certainty when mandatory arbitration applies. Sweeping this dispute

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[9] This concern is particularly relevant here because the Investors' claims sound in suitability under FINRA Rule 2111, thus suggesting that the Investors are seeking to apply a substantive rule of decision that CGML and the Swiss Citi affiliates would not have understood to apply. *See supra* Section II.D.

within the scope of mandatory customer arbitration would not only violate the imperative regarding the reasonable expectations of parties to arbitration agreements, it would make it difficult for FINRA members even to formulate reasonable expectations going forward, because it would undermine the predictability on which reasonable expectations would be based.

First, if the Investors were deemed to be customers of CGMI by virtue of the facts that (1) they engaged in transactions with CGMI's foreign affiliates and (2) CGMI employees, acting on behalf of CGML, helped negotiate and structure the Options Transaction, then all sorts of disputes would suddenly be arbitrable before FINRA, regardless of whether those transactions would have given rise to a reasonable expectation that a customer relationship existed between the parties. Any time an employee of a FINRA member assists or assisted an affiliate that is not a FINRA member in a transaction with that affiliate's customer, the risk would arise that the affiliate's customer could go around the affiliate to force FINRA arbitration with the FINRA member.

Second, where an investor and a foreign affiliate of a FINRA member have entered into an agreement that contains a forum-selection clause, the parties will reasonably expect that provision to determine where disputes between them are to be resolved. The foreign entity would have no reason to believe that the investor could demand arbitration before FINRA of claims related to the agreement

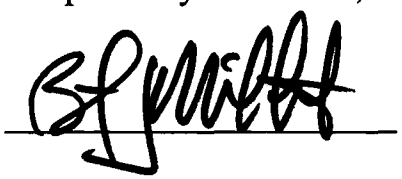
simply because employees of a U.S.-based affiliate had worked on the deal. *See Citigroup Global Markets*, 598 F.3d at 39. A contrary ruling here would cast doubt on the enforceability of such forum-selection clauses, contrary to the reasonable expectations of parties negotiating them.

In short, the Investors' theory, if adopted, would present global institutions such as Citigroup with an unfortunate and unnecessary dilemma: either eschew having FINRA-registered affiliates lend assistance and expertise to foreign affiliates, or face a vastly expanded set of relationships that give rise to mandatory FINRA arbitration, sweeping away forum-selection clauses that would seem to govern those relationships. To avoid that unfortunate and unnecessary result, this Court should affirm the district court's decision permanently enjoining the arbitration. That outcome would not leave the Investors without a remedy; it simply would confine them to seeking that remedy in the agreed-upon forum and under the agreed-upon governing law.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 5,724 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point font.

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Brent J. McIntosh