11-0235-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UBS FINANCIAL SERVICES, INC. and UBS SECURITIES LLC,

Plaintiffs-Appellants,

—against—

WEST VIRGINIA UNIVERSITY HOSPITALS, INC., UNITED HOSPITAL CENTER, INC., WEST VIRGINIA UNIVERSITY HOSPITALS-EAST, INC., CITY HOSPITAL FOUNDATION, INC., and WEST VIRGINIA UNITED HEALTH SYSTEM, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (10 CIV. 4298)

BRIEF OF *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF APPELLANTS UBS FINANCIAL SERVICES, INC. AND UBS SECURITIES LLC IN SUPPORT OF REVERSAL

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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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES AND RULES

FINRA RULES

OTHER AUTHORITIES

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 *amicus curiae* in support of Plaintiffs-Appellants' appeal seeking to reverse the decision of the United States District Court for the Southern District of New York (Marrero, J.), entered on January 4, 2011, declining to enjoin the arbitration of the underlying dispute before the Financial Industry Regulatory Authority ("FINRA").[1]

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 confidence in the financial markets. SIFMA, with offices in New York 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.

Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.[2]

SIFMA has a particular interest in this litigation because the District Court's holding regarding the reach of FINRA's mandatory customer arbitration process, if adopted by this Court, would have an adverse impact on the securities industry. SIFMA's members are parties to thousands of disputes each year—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 compelled arbitration, because the relevant parties have agreed to submit any such dispute to arbitration. But other types of disputes—such as the counterparty-to-counterparty dispute at issue here—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 stay arbitrations when, as here, a party tries to force another to arbitrate a dispute not covered by such agreements.

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[2] For more information, visit www.sifma.org.

SUMMARY OF ARGUMENT[3]

Appellees WVUH advance, and the District Court accepted, an overbroad construction of FINRA's Code of Arbitration Procedure (the "Code") to cover sophisticated counterparties, such as issuers and underwriters, that stretches the Code's terms beyond their breaking point. The District Court's ruling that "FINRA intended to require its members to arbitrate disputes with the full array of parties with whom they have business dealings"—notwithstanding that FINRA members have agreed to mandatory arbitration only of disputes with their "customers"—would result in the arbitration of many disputes that were never intended to be arbitrated and that industry participants never would have expected to be subject to compelled arbitration.

Under the Code, FINRA members have agreed to arbitrate business-related disputes with their *customers*—that is, with investors who use FINRA members' investment and/or brokerage services. SIFMA strongly supports the use of FINRA arbitration for member-customer disputes. Indeed, FINRA

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[3] This brief presumes familiarity with the facts of this dispute, as set out in Plaintiffs-Appellants' Brief. *See* Brief and Special Appendix for Plaintiffs-Appellants, No. 11-0235-cv, at 5-11 (2d Cir. Feb. 22, 2011) (docket no. 41). This brief refers to Plaintiffs-Appellants UBS Financial Services, Inc. and UBS Securities LLC collectively as "UBS" and to Defendants-Appellees West Virginia University Hospitals, Inc., West Virginia University Hospitals-East, Inc., United Hospital Center, Inc., City Hospital Foundation, Inc., and West Virginia United Health System, Inc. collectively as "WVUH."

performs a valuable service in protecting the interests of investors through fair and efficient member-customer arbitration. In such disputes, "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) (emphasis added).[4]

That said, FINRA's mission is to provide a fair and efficient forum for disputes between members and their *customers*, *not* to resolve every dispute in which a FINRA member is involved—including those with sophisticated and counseled non-investors. FINRA members do not opt out of the judicial system for all disputes involving "the full array of parties with whom they have business dealings," including sophisticated counterparties in securities transactions, such as issuers and underwriters, by opting into the FINRA Code for resolution of customer disputes. Nothing about FINRA or the Code suggests that FINRA is the *only* dispute-resolution forum for disputes involving FINRA members, or that FINRA must resolve every dispute involving a financial services firm, whether the dispute involves a counterparty or even a vendor or service provider.

[4] http://www.sifma.org/WorkArea/DownloadAsset.aspx?id=21334.

The dispute between UBS and WVUH bears no resemblance to a customer-member dispute of the type that must be arbitrated at FINRA. WVUH did not open an investment account with UBS, entrust assets to UBS or place investment trades through UBS. Nor did UBS act as a fiduciary to WVUH. As a result, WVUH was not a "customer" of UBS within any meaning of that term recognized in the securities industry. Rather, WVUH's argument rests entirely on construing the limitation in FINRA Rule 12100(i)—"A customer shall not include a broker or dealer"—to command that any person or entity that is not a broker or dealer is *ipso facto* a customer of any FINRA member with which it interacts.

Under WVUH's strained interpretation of the Code (adopted by the District Court below, but rejected by a variety of other courts) essentially *any* business interaction with a FINRA member would be subject to mandatory arbitration, whether or not it involves an actual *customer* of a FINRA member. While SIFMA agrees that FINRA customer arbitration is appropriate and desirable for member-*customer* disputes and should be encouraged in that context as serving the interests of all parties, the District Court erred in adopting the blanket theory that *all* FINRA members must arbitrate *any* business-related dispute with *any* party that is not a broker or dealer. This holding ignores the plain meaning of the word "customer," contravenes the sound policy of respecting parties' agreements regarding choice of forum, is inconsistent with parties' settled expectations, and

gives short shrift to sophisticated counterparties' ability to evaluate for themselves the relative advantages and disadvantages of differing forums.

SIFMA therefore submits this brief *amicus curiae* to urge this Court to respect the choice-of-forum agreement arrived at by the sophisticated counterparties that are parties here—a choice-of-forum agreement that does *not* mention arbitration and expressly requires resolution of disputes in "the County of New York," not West Virginia—to avoid forcing Appellants into an arbitration to which they did not consent, and thus to restore appropriate respect for parties' ability to contract freely for particular dispute-resolution methods. This Court should reject Appellees' *post hoc* attempts to evade the parties' explicit bargain as to forum selection, contort the word "customer" beyond recognition, and displace the reasonable expectations of sophisticated counterparties by dramatically expanding the scope of FINRA jurisdiction.

Declining to extend the reach of mandatory FINRA arbitration to this dispute between counterparties is fully consistent with the recognition that FINRA is a vital forum for resolution of customer disputes and with general federal pro-arbitration policies. FINRA members and their customers expect and contract to arbitrate disputes with one another. Prior to the District Court's decision, however, members of SIFMA and others subject to FINRA governance had no expectation of being compelled to arbitrate disputes with issuers or other

sophisticated transactional counterparties absent explicit, negotiated prior agreement.

Instead, these sophisticated parties negotiating arm's-length transactions had the reasonable expectation that such disputes would be heard in the forum of their choice—either in arbitration by agreement of the parties, or otherwise in court, the traditional forum for complex issuer-underwriter disputes. The blanket requirement that FINRA members arbitrate all disputes with "the full array of parties with whom they have business dealings" is not appropriate for sophisticated counterparties, advised by counsel, who can and should be able to bargain for dispute-resolution provisions in their contracts and be held to their agreements.

The District Court's erroneous holding that every person or institution that is not a broker or dealer can unilaterally force FINRA members into mandatory arbitration raises grave issues for the securities industry and the primacy of the judiciary in resolving disputes according to law, and will disturb settled expectations of sophisticated counterparties. For these reasons, SIFMA urges that the District Court's decision be reversed.

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 for resolving certain disputes within the securities industry. SIFMA has supported FINRA arbitration as an appropriate forum for alternative dispute resolution for member-customer disputes—a forum that provides an impartial and efficient venue for resolution of member-customer disputes and, in doing so, bolsters the public's trust in the industry and the markets.

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, lower overall costs borne by investors and FINRA members, and secure the oversight of 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.

SIFMA, *White Paper on Arbitration in the Securities Industry* (Oct. 2007). 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. BECAUSE ISSUERS ARE NOT "CUSTOMERS" OF UNDERWRITERS, THE DISTRICT COURT SHOULD HAVE ENJOINED WVUH'S EFFORT TO ARBITRATE WITH UBS.

Were this dispute between UBS and one of its customers, it would be ripe for arbitration. But this dispute is not. Issuers are not customers of underwriters. The District Court erroneously held that a securities issuer is the "customer" of the underwriters of its issuances and thus entitled to mandatory arbitration under the FINRA Code. In doing so, the District Court ignored that the issuer-underwriter relationship is a counterparty relationship, not a customer relationship. After all, it is the underwriter who purchases securities from the issuer, not vice versa.

Thus, the District Court failed to differentiate between an investor dealing with a broker or financial advisor—who FINRA's mandatory arbitration provisions were designed to protect—and a sophisticated counterparty that may

consider it more desirable to litigate disputes. Sophisticated counterparties such as UBS and WVUH are well-equipped to determine in advance through arm's-length negotiations whether arbitration is the forum they prefer for particular disputes, in light of the nature of the transactions they engage in and the counterparties with which they contract.

A. The Interaction at Issue Here Between UBS and WVUH Was Counterparty to Counterparty, Not Member to Customer.

The process of selling auction rate securities ("ARS") to investors is complex. When a sophisticated party such as WVUH decides to issue ARS, it generally selects one or more investment banks to underwrite the ARS—that is, to *buy* those ARS from the issuer and to *sell* them to the public.[5] With the advice of counsel, issuers and investment banks negotiate the terms of the underwriting contract, which governs their relationship. The underwriting agreement defines both the rewards each side expects to receive from the contemplated transaction and the risks each agrees to assume.[6] At its core, this agreement is a contract for

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[5] "The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking." Thomas Lee Hazen, LAW OF SEC. REG. § 4.27 (2011) (quoting 15 U.S.C. § 77b(a)(11)).

[6] The swap agreement does not change this analysis: WVUH was a counterparty of UBS, not its customer. Similarly, a broker-dealer agreement does not make UBS *WVUH's* broker.

the sale of securities. *See* John S. D'Alimonte, *Underwriting Documents—Their Purpose and Content, in* SECURITIES UNDERWRITING: A PRACTITIONER'S GUIDE 211, 213 (Kenneth J. Bialkin & William J. Grant, Jr. eds., 1985).

Thus, there is no fiduciary relationship created by the interactions of issuers and underwriters:

> New York courts and jurisdictions applying New York law have long recognized the nonfiduciary nature of the underwriter-issuer relationship . . . . Not only is a fiduciary aspect absent from the majority of underwriting relationships, *such relationships are better characterized as adversarial* since the statutorily-imposed duty of underwriters is to investors . . . .

H.F. Management Services v. *Pistone*, 34 A.D.3d 82, 86, 818 N.Y.S.2d 40, 43 (N.Y. App. Div. 2006) (emphasis added).

As a matter of longstanding practice, the price the underwriters are willing to pay for the securities depends on a variety of factors and considerations, including the issuing company, market conditions, and the success of marketing efforts. The issuer and the lead underwriter, each represented by counsel, have differing interests in the price, particularly in a so-called "firm commitment" underwriting. Thus, in setting the offering price, the issuer and underwriters, as seller and buyer, represent diametrically opposing interests. *See* William J. Grant, Jr., *Overview of the Underwriting Process*, *in* SECURITIES UNDERWRITING: A PRACTITIONER'S GUIDE 25 ("The underwriter wants a deal that can be sold in the

marketplace and will create as little legal exposure as possible, while the issuer seeks to maximize the price it receives for its securities."). It is for this reason that courts have recognized that underwriting is generally "done on an arm's-length basis, with the issuer and underwriters each acting in their own interest rather than in concert." *In re WICAT Sec. Litig.*, 600 F. Supp. 1236, 1240 (D. Utah 1984). In short, neither UBS nor WVUH was a "customer" of the other.

B. The Broad Definition of "Customer" Advocated by Appellees Would Lead to Absurd and Problematic Results.

FINRA Rule 12220 requires mandatory arbitration if (1) required by a written agreement between the parties or (2) requested by a "customer." The Code does not provide an affirmative definition of "customer," but it does exclude "a broker or dealer" from the meaning of that term. FINRA Rule 12100(i). WVUH argued below that this means it must be a customer of UBS because it "is plainly not a broker or dealer." (Memorandum in Opposition to Motion for Preliminary Injunction, *UBS Financial Services, Inc.* v. *West Virginia University Hospitals, Inc.*, No. 10-cv-04298-VM, at 12.) In essence, WVUH reads the exclusion as the *only* outside bound on who or what is a "customer" of a FINRA member.

Such an expansive reading is inconsistent with the commonly understood meaning of "customer" and would be highly problematic, in that it would require a member to submit to arbitration in *every* dispute with a non-broker/dealer that involves its business activities, whether or not the

non-member is actually in a customer relationship—or *any* relationship, for that matter—with the member. On WVUH's reading, a FINRA member would be required to submit to compelled arbitration any dispute between itself and any entity it encounters in the course of its business: the contractor that installs the member's trading systems, the company that cleans the member's headquarters, the member's outside counsel, even FINRA itself.

WVUH may assert that the issuer-underwriter relationship is different from these, but the District Court's decision provides no reason to think so: These parties plainly fall within "the full array of parties with whom [FINRA members] have business dealings," which the District Court held to be the category of entities that can compel arbitration. Once the term "customer" is construed to include *non*-customers and FINRA's Rules are stretched beyond actual member-customer relationships, they contain no limitation on the term "customer" other than exclusion of brokers and dealers. On the construction of the Code articulated by the District Court, all are "customers," and all can compel arbitration.

While purporting to agree "that as a general proposition" WVUH's position "would lead to an over-inclusive and absurd result," the District Court's conclusion that "FINRA intended to require its members to arbitrate disputes with the full array of parties with whom they have business dealings" leads to precisely that outcome. (S.P.A. 8-10.) Judge Marrero's holding that "the FINRA Code

constitutes the arbitration contract" between UBS and WVUH (*id.* at 14) is possible *only* by adopting WVUH's over-inclusive definition of "customer."

As courts have recognized, FINRA's rules should not be read so broadly. In particular, the Code should not be read to upset settled industry expectations as to what disputes will be arbitrated. *See 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"). Sweeping this dispute within the scope of mandatory customer arbitration would violate this imperative.

For example, *Bensadoun* v. *Jobe-Riat* involved a broker seeking an injunction preventing *investors* from arbitrating a dispute. *See* 316 F.3d 171 (2d Cir. 2003). This Court cautioned against a limitless interpretation of "customer," rejecting a construction under which "every purchaser of shares in a mutual fund and every beneficiary of a pension fund would arguably be 'customers' of every investment institution with which those funds did business, and would be entitled to demand arbitration under the NASD." *Id.* at 177.

Similarly, in *UBS Securities LLC* v. *Voegeli*, the investor-defendants became shareholders of a company that UBS Securities was advising in connection with an IPO and claimed that signing so-called "lockup agreements" with UBS created a customer relationship. *See* 684 F. Supp. 2d 351, 356 (S.D.N.Y. 2010),

aff'd No. 10-690-cv, 2011 WL 13465 (2d Cir. Jan. 4, 2011) (summary order). In a decision this Court summarily affirmed, Judge Cote rejected as "absurd" defendants' position that "since they [were] neither brokers nor dealers, they must therefore be customers of UBS Securities." *Id.* at 356. Judge Cote ruled that "[t]he lockup agreements did not create a 'business relationship' between defendants and UBS Securities that is in any way 'related directly' to UBS Securities providing 'investment or brokerage services' to the defendants." *Id.*

Other courts have agreed that the term of "customer" is not unlimited and instead must involve a relationship in the nature of an investment and/or brokerage relationship. For example, in *Fleet Boston Robertson Stephens, Inc.* v. *Innovex, Inc.*, the Eighth Circuit said "[w]e do not believe that the NASD Rules were meant to apply to every sort of financial service an NASD member might provide, regardless of how remote that service might be from the investing or brokerage activities, which the NASD oversees." 264 F.3d 770, 772 (8th Cir. 2001).

C. FINRA Customer Arbitrations Focus on Resolving Customer Disputes, Not Policing Relations Between Sophisticated Counterparties, Such as Issuers and Underwriters.

Examination of the procedures used in FINRA customer arbitrations and FINRA's own statements about the purpose of customer arbitrations makes clear that the Code does not contemplate the arbitration of disputes between

sophisticated counterparties, such as issuers and underwriters, and that the securities industry has had no reason to expect such disputes would be subject to mandatory FINRA arbitration.

1. FINRA's Self-Identified Mission Is *Investor* Protection.

The District Court's conclusion that "FINRA intended to require its members to arbitrate disputes with the full array of parties with whom they have business dealings" (S.P.A. 9-10) wholly ignores FINRA's recent policy statements emphasizing *investor* protection as FINRA's mission both generally and in the arbitration context. To reach its conclusion, the District Court erroneously gave great weight to a dated NASD Committee policy statement, disregarding recent FINRA publications. A review of these more recent FINRA statements demonstrates beyond doubt that FINRA's mandatory arbitration process is designed to protect consumers of the services of brokers and financial advisors, rather than sophisticated issuers such as WVUH.[7]

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[7] In the midst of the financial crisis, FINRA established "a special process for resolving auction rate securities-based claims in its arbitration forum." FINRA, Press Release, *FINRA Creates Process for Arbitrations Involving Auction Rate Securities* (Aug. 7, 2008), http://www.finra.org/Newsroom/NewsReleases/2008/P039025. Consistent with FINRA's investor protection mandate, the ARS arbitration process was created for "qualifying *investors*." *Id.* As stated by the President of FINRA Dispute Resolution, "FINRA believes it is a matter of fairness that all *investors* with auction rate securities claims, regardless of the firm involved in the dispute, be handled in this manner." *Id.* (emphasis added); *see also* FINRA, *Special Arbitration Procedures for Investors Involved in Auction Rate Securities Regulatory*

According to FINRA's mission statement, it is "an independent, not-for-profit organization with a public mission: to protect America's *investors* by making sure the securities industry operates fairly and honestly." FINRA, *Get To Know Us*.[8] And according to FINRA's Chairman and CEO, "[v]igorous enforcement of rules and regulations is a cornerstone of FINRA's commitment to protecting *investors*." FINRA, *2009 Year in Review*.[9]

FINRA's statements regarding the arbitration process also evidence a clear focus on investors: "Today's *investors* have a lot at stake. And because of that, they expect to be treated fairly. When problems *between brokers and investors* occur, we administer the largest forum specifically designed to resolve securities-related disputes between and among investors, securities firms and individual brokers." FINRA, *Get To Know Us*.[10]

Settlements, http://www.finra.org/ arbitrationmediation/P117440 (last visited Mar. 1, 2011) ("Investors covered by auction rate securities (ARS) final settlements with the regulators identified below may participate in a Special Arbitration Process (SAP) to recover consequential damages.").

8 http://www.finra.org/web/groups/corporate/@corp/@about/documents/ corporate/ p118667.pdf (last visited Mar. 1, 2011).

9 http://www.finra.org/web/groups/corporate/@corp/@about/@ar/ documents/corporate/p121646.pdf (last visited Mar. 1, 2011).

10 http://www.finra.org/web/groups/corporate/@corp/@about/documents/ corpo rate/p118667.pdf (last visited Mar. 1, 2011).

2. FINRA's Arbitral Procedures Further Demonstrate Its Focus on Investor Disputes

Even cursory examination of the procedures applicable to FINRA customer arbitrations shows those procedures are designed for disputes over trading and brokerage accounts held by customers of brokers and over financial advice provided by financial advisors. For example, FINRA's "Discovery Guide For Arbitration Proceedings" (the "Guide") gives parties to customer arbitrations guidance on discovery—but does not even mention the sorts of discovery that would be necessary in a dispute like the one between UBS and WVUH. The Guide lists a variety of categories of documents as "presumptively discoverable," none of which are the sorts of documents that would be at issue here:

- 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 3-4 (emphasis added).[11] Needless to say, the relationship between an issuer and an underwriter does not give rise to monthly account statements.

Moreover, FINRA customer arbitrations generally do not permit the involved, often quite expensive procedural mechanisms and discovery devices generally considered appropriate to resolve complex securities disputes such as this dispute between UBS and WVUH. There are significant limits placed on the ability to conduct depositions, obtain third-party discovery and file dispositive motions. For example, FINRA Rule 12504(a) provides that "[m]otions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration," and that same rule severely constrains the set of issues that can be raised on pre-arbitration dispositive motions: The moving party can argue *only* that it was "not associated with the account(s), security(ies), or conduct at issue" or that the non-moving party previously released its claim.

Under the FINRA Code, only arbitrators—not attorneys for the parties—can issue subpoenas to third parties, and this Court has said that even arbitrators are powerless "to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding." FINRA Rule 12512; *Life Receivables Trust*

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[11] http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbrul/documents/arbmed/p018922.pdf (last visited Mar. 1, 2011).

v. *Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 212 (2d Cir. 2008). Depositions "are strongly discouraged" in FINRA arbitrations and are available only with permission of the arbitral panel "under very limited circumstances." FINRA Rule 12510. The interrogatories typical in complex litigation "are generally not permitted in arbitration." FINRA Rule 12507. And arbitrators are "not bound to follow the substantive law or rules of procedure that govern litigation, nor must they apply the strict rules of evidence used in court." SECURITIES AND EXCHANGE COMMISSION, INVESTOR ADVISORY COMMITTEE, FINRA, PANEL ON SECURITIES ARBITRATION 1 (May 17, 2010).[12]

These cost-reducing limitations make eminent good sense in member-customer disputes, and sophisticated parties contemplating complex disputes might choose to avail themselves of these streamlined procedures on a case-by-case basis. But the benefit and rationale of *mandatory* arbitration—"within a framework that was specifically designed for *investor* claims and has demonstrated fairness" in making it "possible for *investors* to pursue small claims, provid[ing] a friendly forum for *pro se* investor claimants, lower[ing] overall costs borne by investors and securities firms, and secur[ing] the oversight of expert regulators"—does not apply here or in other complex disputes between

[12] http://www.sec.gov/spotlight/invadvcomm/iacmeeting051710-finra.pdf.

sophisticated counterparties operating at arm's length. SIFMA, *White Paper on Arbitration in the Securities Industry* 5 (emphasis added).

III. THE DISTRICT COURT ERRED IN FORCING UBS TO ARBITRATE A DISPUTE IT NEVER AGREED TO ARBITRATE.

Displacing the contractually bargained-for relationship between two sophisticated, well-advised commercial parties, in favor of non-negotiated obligations that would actually conflict with their agreement, undermines the fundamental legal principles on which parties rely in establishing their commercial relationships. If the District Court's decision is permitted to stand, it will undermine New York's long and settled policy, critical to its role as the nation's financial center, of upholding the bargains struck by buyers and sellers—and in particular issuers and underwriters.

While FINRA's arbitration process is well-suited for disputes between members and their customers, and thus it is sensible to require submission of all such disputes to FINRA arbitration, it makes little sense to require mandatory submission of disputes of this sort, in which sophisticated counterparties negotiated a forum-selection provision *ex ante* and did not mention arbitration at all. Such parties are fully capable of evaluating the relative strengths and weaknesses of differing forums and opting for a judicial rather than arbitral forum.

Here, the parties specifically agreed in the Broker-Dealer Agreement "that all actions and proceedings arising out of this Broker-Dealer Agreement and

any of the transactions contemplated hereby shall be brought *in the County of New York* and, . . . submit to the jurisdiction of, and venue in, such County." (A-1036.) That is to say, following arm's-length negotiations, they opted for venue in "the County of New York"—a contract term the District Court simply rejected—and were silent as to arbitration. (*Id.*)

If these sophisticated parties had intended disputes arising out of their issuer-underwriter relationship to be subject to mandatory arbitration, surely they could and would have said so in the venue-selection clause they negotiated—and if they had intended such disputes to be arbitrated *in West Virginia*, surely they would not have said all such disputes were to be resolved *in "the County of New York."* Requiring the parties to arbitrate this dispute, especially in Charleston, West Virginia, thus contradicts the clear written intent of the parties and renders the parties' agreed-upon choice of venue a nullity.

CONCLUSION

For the foregoing reasons, and to avoid harmful effects on the financial industry, SIFMA submits that the judgment of the District Court is erroneous and should be reversed.

Respectfully submitted,

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March 1, 2011

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,881 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.

Dated: March 1, 2011
New York, New York

/s/ Matthew L. Lippert
Matthew L. Lippert

CERTIFICATE OF SERVICE & CM/ECF FILING

11-0235-cv UBS Financial Services v. West Virginia University

I hereby certify that I caused the foregoing Brief of *Amicus Curiae* The Securities Industry and Financial Markets Association in Support of Appellants UBS Financial Services, Inc. and UBS Securities LLC in Support of Reversal to be served on counsel for Plaintiffs-Appellants and Defendants-Appellees via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

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I certify that an electronic copy was uploaded to the Court's electronic filing system. Six hard copies of the foregoing Brief of *Amicus Curiae* The Securities Industry and Financial Markets Association in Support of Appellants UBS Financial Services, Inc. and UBS Securities LLC in Support of Reversal were sent to the Clerk's Office By Hand Delivery to:

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on this 1st day of March 2011.

Notary Public:

/s/ Nadia R. Oswald-Hamid

Sworn to me this

March 1, 2011

NADIA R. OSWALD HAMID
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