UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2010

(Argued: April 14, 2011 Decided: September 22, 2011)

Docket No. 11-235-cv

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UBS FINANCIAL SERVICES, INC., UBS SECURITIES LLC,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

- X

Before: RAGGI and LOHIER, Circuit Judges, and PRESKA, Chief District Judge.[*]

UBS Financial Services, Inc. and UBS Securities LLC (collectively, "UBS") appeal the denial of their motion for a preliminary injunction enjoining the defendants from proceeding with an arbitration before the Financial Industry Regulatory Authority ("FINRA"), and alternatively requiring that the arbitration proceed in New York County. In the arbitration, the defendants seek damages for UBS's alleged fraud in connection with the defendants' issuances of auction rate securities. The District Court for the Southern District of New York (Marrero, J.)

[*] Chief Judge Loretta A. Preska of United States District Court for the Southern District of New York, sitting by designation.

denied the requested injunction, held that a forum selection clause in one of the agreements between the parties was unenforceable because it conflicts with FINRA's rules, and ordered that the arbitration proceed in West Virginia. We hold that the defendants are entitled to arbitration because they became UBS's "customer" under FINRA's rules when they undertook to purchase auction services from UBS. We also conclude that the enforceability of the forum selection clause is a procedural issue for FINRA arbitrators to address and that the District Court lacked jurisdiction to resolve it.

AFFIRMED in part and VACATED and REMANDED in part.

Chief Judge Preska dissents by separate opinion.

ANDREW J. CERESNEY, Debevoise & Plimpton LLP, New York, NY (Jeremy Feigelson, on the brief), for Plaintiffs-Appellants.

JAMES R. SWANSON, Fishman Haygood Phelps Walmsley Willis & Swanson, LLP, New Orleans, LA (Joseph C. Peiffer; Athanasios Basdekis, Bailey & Glasser, LLP, Charleston, WV, on the brief), for Defendants-Appellees.

Jenice L. Malecki, Malecki Law, New York, NY (Braden W. Sparks, Dallas, TX; Lisa A. Catalano, St. John's University School of Law, Jamaica, NY; Robert C. Port, Cohen Goldstein Port & Gottlieb, LLP, on the brief), for Amicus Curiae The Public Investors Arbitration Bar Association.

Robert J. Giuffra, Jr., Sullivan & Cromwell LLP, New York, NY (Brent J. McIntosh; Ira D. Hammerman, Kevin Carroll, The Securities Industry and Financial Markets Association, Washington, DC, on the brief), for Amicus Curiae The Securities Industry and Financial Markets Association.

LOHIER, Circuit Judge:

Plaintiff-Appellant UBS Financial Services, Inc. ("UBS") appeals from a judgment of the United States District Court for the Southern District of New York (Marrero, J.) dismissing its

action to enjoin the arbitration of claims filed by Defendant-Appellee West Virginia University Hospitals, Inc. ("WVUH")[1] before the Financial Industry Regulatory Authority, Inc. ("FINRA") and declining to enjoin WVUH from proceeding with any action outside New York County pursuant to an agreement between the parties purportedly selecting New York as the applicable forum. We conclude, as a matter of law, that WVUH was UBS's "customer" under FINRA's arbitration rules and that WVUH's claims relating to its agreement to purchase UBS's auction services arise from its business dealings with UBS. We therefore affirm the District Court's judgment dismissing UBS's claims and affirm its order denying UBS's motion to enjoin arbitration. We further conclude that the enforceability of the forum selection clause at issue is a procedural question for FINRA arbitrators, not the courts, to decide in the first instance. We therefore vacate the District Court's order denying UBS's motion to enjoin WVUH from proceeding with any action outside New York County, and we remand with instructions to the District Court to dismiss that motion for lack of subject matter jurisdiction.

BACKGROUND

The relevant facts are limited and not in dispute. UBS is a corporation engaged in a range of finance-based businesses. In particular, it has underwritten municipal bonds and similar securities and served as a broker-dealer responsible for facilitating auctions for certain auction rate securities ("ARS") in the form of auction rate certificates. At all relevant times, UBS was a

[1] In addition to UBS Financial Services, Inc., UBS Securities LLC is also an Appellant and was a Plaintiff in the District Court. Defendants-Appellees also include West Virginia University Hospitals-East, Inc., United Hospital Center, Inc., City Hospital Foundation, Inc., and West Virginia United Health System, Inc. The individual corporate identity of the Appellants and Appellees does not affect our analysis of the issues presented in this appeal. For convenience, we refer to the Appellants collectively as "UBS" and to the Appellees collectively as "WVUH."

FINRA member subject to FINRA's Code of Arbitration Procedure for Customer Disputes (the "FINRA Code" or the "Code"). WVUH is a not-for-profit health consortium that has issued bonds to finance capital improvements and refinance existing debt.

In three separate offerings in 2003, 2005, and 2006, WVUH issued a total of $329 million of bonds, a significant portion of which were, at UBS's suggestion, structured as ARS and issued in the form of auction rate certificates, which are floating-rate debt securities with long-term maturities. The offering documents associated with the issuances provided that the interest rates on the bonds would be set through periodic Dutch auctions, in which buyers would submit orders specifying the number of bonds they wished to purchase and the maximum interest rate they were willing to pay. As we recently explained:

> ARS are long-term bonds and stocks whose interest rates or dividend yields are periodically reset through auction. At each auction, holders and buyers of the securities specify the minimum interest rate at which they want to hold or buy. If buy/hold orders meet or exceed sell orders, the auction succeeds. If supply exceeds demand, however, the auction fails and the issuer is forced to pay a higher rate of interest in order to penalize it and to increase investor demand.

Ashland Inc. v. Morgan Stanley & Co., --- F.3d ----, 2011 WL 3190448, at *1 (2d Cir. July 28, 2011).[2] At UBS's recommendation, WVUH entered into derivative transactions in the form of swap agreements, which were intended to create a synthetic fixed rate of interest payments for a portion of the bonds and thereby protect WVUH against high interest rates.

[2] More specifically, in the type of auctions used for WVUH's bonds, purchase orders were filled beginning with the lowest interest rate bid until all bonds offered for sale were matched with purchase orders. The interest rate at which the final order was filled then applied to all of the bonds until the next auction occurred. Insufficient demand for all the bonds offered for sale, as occurred with WVUH's bonds beginning in 2008, resulted in the interest rate resetting to a "penalty" or "maximum" rate until the next auction.

For each offering, UBS served as both the lead underwriter and the main broker-dealer responsible for facilitating the Dutch auctions in which WVUH's bonds were resold and their interest rates set. To establish the parties' rights and obligations in both contexts, the parties executed a pair of contracts for each of the three offerings: first, a broker-dealer agreement explaining UBS's duties in its capacity as a broker-dealer, and second, a purchase contract establishing the underwriter/issuer relationship and pursuant to which WVUH's bonds, termed "auction rate certificates," were sold to UBS. Each year, the same representatives of UBS and WVUH executed both the broker-dealer and purchase agreements, and the agreements were executed at nearly the same time. For the 2003 and 2005 offerings, the broker-dealer agreements were executed over three weeks prior to the purchase agreements. The purchase and broker-dealer agreements for the 2006 offering were executed within two days, on June 6, 2006 and June 8, 2006, respectively.

As the underwriter, UBS agreed to purchase the auction rate securities outright from WVUH at a discounted price and resell a substantial portion of them to UBS's customers and other dealers. UBS profited by exploiting the difference between the discounted price at which it purchased the bonds from WVUH and the price at which it resold them to the market. As the broker-dealer, UBS facilitated the auctions that determined the interest payable on the same bonds that it underwrote – for example, by soliciting and processing purchase and sale orders. In a provision entitled either "Compensation" or "Broker-Dealer Fee" that appears in each of the broker-dealer agreements in 2003, 2005, and 2006, WVUH agreed to pay UBS a substantial fee equal to either (1) 0.25 percent of the principal amount of bonds held or purchased pursuant to orders submitted for a particular auction, or (2) if no auction took place on a particular auction

date, 0.25 percent of the principal amount of bonds held by holders through UBS, prorated to reflect the number of days in the applicable auction period, to compensate UBS for facilitating the auctions. The same provision in all three broker-dealer agreements added that "the fee for the [auction rate certificates] shall be paid by [WVUH] and represents compensation for the services of [the] Broker-Dealer [UBS] in facilitating Auctions for the benefit of the beneficial owners of the [auction rate certificates]."

Although the broker-dealer agreements for the 2003 and 2005 issuances do not contain a forum selection clause, the 2006 broker-dealer agreement provides the following:

> The parties agree 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, in connection with any such action or proceeding, submit to the jurisdiction of, and venue in, such County.

J.A. 1036.

In February 2008, the ARS market collapsed, and the auctions for WVUH's bonds promptly failed. Thereafter, the swap agreements UBS had recommended failed to shield WVUH from high interest rates, forcing WVUH to pay significantly higher rates on the bonds until October 2008, when it refinanced its payments.

On February 12, 2010, WVUH initiated the FINRA arbitration that is the subject of this appeal by filing an arbitration Statement of Claim against UBS under Rule 12200 of the FINRA Code. Among other claims, WVUH alleged that UBS violated the Securities Exchange Act of 1934 and the Uniform Securities Act by advising WVUH to issue ARS while withholding critical information about the ARS market and UBS's role in it. The Statement of Claim also alleged that UBS fraudulently induced WVUH to purchase auction services, again by

withholding critical information about the ARS market and UBS's role. For example, WVUH claimed that UBS failed to disclose its practice of placing support bids in the Dutch auctions for ARS it underwrote (including WVUH's ARS), the significance of that support to the success of the auctions, and that the auctions for WVUH's bonds would fail as soon as UBS stopped submitting support bids. In addition to the substantive claims, WVUH alleged that FINRA had jurisdiction over the claims because WVUH was a "customer[] of [UBS] and this dispute [arose] from the business activities of [UBS], including but not limited to underwriting and broker-dealing." J.A.1065.

In May 2010, UBS filed this action in district court seeking a declaration that it had not violated any legal duty to WVUH and owed it no damages or other relief. With respect to both the bond issuances it underwrote and the auctions it agreed to facilitate, UBS asserted that WVUH was not its "customer" entitled to arbitration under FINRA Rule 12200. It moved for a preliminary injunction to halt the pending FINRA arbitration, or at least prohibit it from proceeding outside New York County in accordance with the forum selection clause in the 2006 broker-dealer agreement. Both parties submitted limited documentary evidence concerning the bond offerings and the parties' business dealings, including the underwriting agreements and the broker-dealer agreements between the parties from 2003 through 2006, none of which contains an arbitration clause or refers to the FINRA Code. For its part, WVUH relied principally on two declarations submitted by the Chief Financial Officer ("CFO") of United Health Center, Inc. and the CFO of West Virginia University Hospitals, Inc. Both declarations stated that UBS advised WVUH on the appropriate bond-issuance structure, facilitated the auctions at which the bonds'

interest rates were set, and "performed various other tasks as WVUH's advisor, partner, agent, and fiduciary" in connection with the issuances. J.A. 1174.

On January 4, 2011, the District Court denied UBS's motion for a preliminary injunction. UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc., 760 F. Supp. 2d 373 (S.D.N.Y. 2011). Although it determined that UBS would suffer irreparable harm if it were "'forced to expend time and resources arbitrating an issue that is not arbitrable,'" id. at 377 (quoting UBS Sec. LLC v. Voegeli, 684 F.Supp.2d 351, 355 (S.D.N.Y. 2010)), the District Court concluded that UBS had not demonstrated a likelihood of success on the merits or serious questions going to the merits. With respect to whether WVUH became UBS's customer, the court concluded that the existence of an issuer-underwriter relationship between WVUH and UBS sufficed to establish WVUH's status as UBS's customer under FINRA's rules. Relying on Patten Securities Corp. v. Diamond Greyhound & Genetics, Inc., 819 F.2d 400 (3d Cir. 1987), and J.P. Morgan Securities Inc. v. Louisiana Citizens Property Insurance Corp., 712 F. Supp. 2d 70 (S.D.N.Y. 2010), the District Court held that "FINRA intended for an issuer to be a customer of an underwriter." 760 F. Supp. 2d at 378.

The District Court then turned to the 2006 forum selection clause and ruled that it conflicted with FINRA Rule 12213(a)(1), which provides that "[t]he Director [of FINRA Dispute Resolution] will decide which of [the] hearing locations will be the hearing location for the arbitration." J.A. 1313. Because the FINRA Rules "constitute[d] the arbitration contract between UBS and [WVUH]," the District Court concluded that "its provision on the hearing location" – and not the 2006 forum selection clause – determined the location of the arbitration. 760 F. Supp. 2d at 380.

By letter dated January 11, 2011, UBS informed the District Court that it did not intend to prosecute the case further and requested entry of a final order of dismissal. The District Court entered judgment on January 13, 2011. This appeal followed.

DISCUSSION

On appeal, UBS principally contends that the District Court should have enjoined the arbitration proceedings because there is no record evidence that WVUH was UBS's customer either when UBS underwrote the WVUH securities at issue or when it served as a broker-dealer for the ARS auctions. With respect to services UBS rendered in its capacity as a broker-dealer charged with facilitating the ARS auctions, we disagree and conclude that WVUH was UBS's customer under the applicable FINRA rules. We therefore affirm the District Court's order denying an injunction on that alternative ground.

"When reviewing a district court's denial of a preliminary injunction, we review the district court's legal holdings de novo and its ultimate decision for abuse of discretion." Cnty. of Nassau, N.Y. v. Leavitt, 524 F.3d 408, 414 (2d Cir. 2008) (citation and quotation marks omitted). "A preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). To prevail on its motion for a preliminary injunction, UBS was required to demonstrate "'(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010) (quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979)).

Since the parties agree that UBS will suffer irreparable harm if it is wrongfully required to arbitrate this dispute, we focus exclusively on UBS's claim that WVUH is not entitled to arbitration under FINRA's rules because WVUH did not become UBS's "customer" in connection with WVUH's issuances of ARS. For the reasons that follow, UBS has failed to demonstrate either a likelihood of success on the merits of that claim or sufficiently serious questions going to the merits to make a fair ground for litigation.

1. Customer-Member Arbitration Under FINRA's Rules

Since 2007, FINRA has been a self-regulatory organization established under Section 15A of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78o-3; Karsner v. Lothian, 532 F.3d 876, 879 n.1 (D.C. Cir. 2008); SEC Release No. 34-56145 (July 26, 2007), and has had the authority to exercise comprehensive oversight over "all securities firms that do business with the public." Sacks v. SEC, --- F.3d ---, 2011 WL 3437088, at *2 (9th Cir. Aug. 8, 2011) (quoting 72 Fed. Reg. 42170 (Aug. 1, 2007)). Upon joining FINRA, a member organization agrees to comply with FINRA's rules. See FINRA Bylaws art. 4 § 1, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4609 (last visited Sept. 19, 2011). As a FINRA member, therefore, UBS is bound to adhere to FINRA's rules and regulations, including its Code and relevant arbitration provisions contained therein. With respect to these provisions, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); see also Bensadoun v. Jobe-Riat, 316 F.3d 171, 176 (2d Cir. 2003) (FINRA Rules must be interpreted in accordance with principles of contract interpretation). In

interpreting the FINRA Rules, we need not reach the issue of which state law applies. Under New York, West Virginia, or Delaware[3] law, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms[.]" Greenfield v. Philles Records, Inc., 780 N.E.2d 166, 170 (N.Y. 2002); accord Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co., 37 S.E.2d 519, 522 (W. Va. 1946); Osborn v. Kemp, 991 A.2d 1153, 1159-60 (Del. 2010); 11 Williston on Contracts § 32:3 (4th ed. 2010).

With these principles in mind, we look to Rule 12200 of the FINRA Code, which obligates UBS to arbitrate a dispute with a "customer" at the customer's demand, subject to an exception not relevant here:

> Parties must arbitrate a dispute under the Code if:
>
> - Arbitration under the Code is either:
>
> (1) Required by a written agreement, or
>
> (2) Requested by the customer;
>
> - The dispute is between a customer and a member or associated person of a member; and
>
> - The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

FINRA Code, Rule 12200 (emphasis added) (all FINRA Rules available at http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=607&record_id=609) (last visited Sept. 19, 2011).

[3] A number of agreements pursuant to which FINRA was formed state that they are governed by Delaware law. See, e.g., FINRA Manual 1061 (July 2008 ed.) (Limited Liability Company Agreement of the Trade Reporting Facility LLC).

We have observed that "if the rules of an exchange (or similar organization) require arbitration of customer disputes, a broker's membership obligation confers upon the customer an option to arbitrate as the exchange rules provide." Kidder, Peabody & Co. v. Zinsmeyer Trusts P'ship, 41 F.3d 861, 864 (2d Cir. 1994) (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109, 113 (2d Cir. 1990)). A customer under the exchange's rules is entitled to invoke the arbitration provision "as an intended third-party beneficiary" in a dispute with a member. Id.

Although UBS is indisputably a "member" under the Code, neither FINRA nor the courts have "offer[ed] [a] precise definition of 'customer.'" Oppenheimer & Co. v. Neidhardt, 56 F.3d 352, 357 (2d Cir. 1995). The Code states only that "[a] customer shall not include a broker or dealer." FINRA Code, Rule 12100(i). An online FINRA glossary, to which no reference is made in the FINRA rules, states that a "customer" is "[a] person or entity (not acting in the capacity of an associated person or member) that transacts business with any member firm and/or associated person." FINRA, Glossary of Arbitration Terms, http://www.finra.org/ArbitrationMediation/Glossary/ (last visited Sept. 19, 2011). In cases interpreting FINRA's rules as well as predecessor rules promulgated by the National Association of Securities Dealers, Inc. ("NASD"), we have avoided offering an exhaustive definition of the term. See, e.g., Bensadoun, 316 F.3d at 176; Citigroup Global Mkts., Inc., 598 F.3d at 39; John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 59 (2d Cir. 2001) (noting that NASD Code "defines 'customer' broadly"). UBS asserts, and the parties conceded at oral argument, that "customer" means "someone who buys goods or services." Appellant's Br. at 18 (internal quotation marks omitted). See Webster's Third New International Dictionary 559 (3d ed. 2002) (defining "customer" as "one that purchases some commodity or service" (def. 2a)); id. at 1844

(defining "purchase" as "buy for a price" (def. 1d)); American Heritage Dictionary of the English Language 450 (4th ed. 2000) (defining customer as "[o]ne that buys goods and services" (def. 1)). Because the term is unambiguous with respect to this core definition, we need not here provide a comprehensive definition of the term under Rule 12200. The term "customer" includes at least a non-broker or non-dealer who purchases, or undertakes to purchase, a good or service from a FINRA member.

2. Application of FINRA Rule 12200

Under this framework, we consider UBS's argument that WVUH was not its customer.

Relying principally on the Third Circuit's decision in Patten, which held that an issuer was an underwriter's customer under the predecessor rules promulgated by the NASD, the District Court concluded that WVUH became UBS's customer because UBS served as the underwriter for those issuances. We need not resolve whether its ruling on this ground was correct,[4] since we affirm on the different ground that WVUH was UBS's customer because WVUH purchased a service, specifically auction services, from UBS. See, e.g., Boy Scouts of Am. v. Wyman, 335 F.3d 80, 90 (2d Cir. 2003) ("[W]e may affirm the judgment of the district court on any ground appearing in the record.").

[4] The court in Patten focused on a 1983 statement made by the NASD's National Arbitration Committee that "[a]n issuer of securities should be considered a public customer of a member firm where a dispute arises over a proposed underwriting," and held that the statement constituted a binding interpretation of the NASD rules. 819 F.2d at 405-406; accord J.P. Morgan, 712 F. Supp. 2d at 79. FINRA has not issued a comparable interpretive statement addressing the status of issuers vis-á-vis underwriters. Although we do not address whether every issuer is a customer of its underwriter, we disagree with the dissent's categorical assertion that issuers can never be customers "under any reasonable definition" of the term. Preska, C.J., Dissenting Op., post at [8] ("Dissent").

The section entitled "Compensation" or "Broker-Dealer Fee" in all three broker-dealer agreements reflects an undertaking by WVUH to pay UBS a fee for its services in facilitating the auctions at which the bonds were resold and their interest rates set. In view of that undertaking and a definition of customer that at least includes an entity that undertakes to purchase a good or service, WVUH became UBS's customer under Rule 12200 by contracting with UBS to obtain auction services for a fee.

In urging otherwise, UBS points to language in the broker-dealer agreements to suggest that WVUH agreed to compensate UBS "for the benefit of . . . investors" "who are buying and selling [WVUH's] auction rate[]" securities, not for WVUH's benefit. Tr. of Oral Arg. 6. Both the agreements taken as a whole and the specific compensation provisions on which UBS relies make plain that UBS's broker-dealer fee is for facilitating the auctions for the purpose of, among other things, "achieving the lowest possible interest rate on the [auction rate certificates]" for WVUH's benefit. J.A. 303. We reject UBS's suggestion that WVUH, a sophisticated party seeking to raise capital, charitably undertook to pay a substantial fee for the benefit of unknown investors rather than itself.

UBS also argues that WVUH is not its customer because the FINRA Rules do not contemplate arbitration for sophisticated parties such as WVUH, WVUH did not purchase investment or brokerage services, and UBS was not a fiduciary of WVUH. For support, it points to provisions of FINRA's rules intended to facilitate the arbitration of disputes between retail investors and brokerages, and to our decision in Bensadoun, 316 F.3d at 177, where we noted the Eighth Circuit's holding in Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc., 264 F.3d 770, 772 (8th Cir. 2001), "that banking advice did not give rise to a 'customer' relationship within the meaning of the NASD [rules]." We reject the argument for the following reasons.

UBS's argument about sophisticated parties ignores provisions of the FINRA Code, such as the rule governing depositions, that explicitly contemplate arbitration in "large or complex cases." FINRA Rule 12510.[5] See also FINRA Rule 12901 (specifying member surcharges for arbitrations involving $10,000,000 or more). Several FINRA rules expressly contemplate customers who are well-capitalized or sophisticated institutions and individuals. E.g., FINRA Rule 2124(e)(1) ("[For purposes of this rule,] 'institutional customer' shall mean a customer whose account qualifies as an 'institutional account' under NASD Rule 3110(c)(4)."); see also NASD Rule 3110(c)(4) ("[T]he term 'institutional account' shall mean the account of . . . a bank, savings and loan association, insurance company, or registered investment company; . . . or . . . any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million."), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3734 (last visited Sept. 20, 2011). Other rules define "customer" broadly, with no restriction to unsophisticated, individual, or small investors. E.g., FINRA Rule 1250(b)(1) ("'Customer' shall mean any natural person and any organization, other than another broker or dealer, executing securities transactions with or through or receiving investment banking services from a member."); FINRA Rule 4530, n.08 ("[For purposes of this rule,] a 'customer' includes any person, other than a broker or dealer, with whom the member has engaged, or has sought to engage, in securities activities."). Consistent with these definitions, FINRA arbitration has been

[5] FINRA Rule 12510 is based on former NASD Rule 12510, which became effective in April 2007. See Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Customer Disputes, 72 Fed. Reg. 4574, 4594 (Jan. 31, 2007). The rule postdated the Eighth Circuit's decision in Fleet Boston by over five years and our decision in Bensadoun by four years.

employed to resolve complex claims arising out of the failure of the ARS market without any suggestion that the dispute was rendered non-arbitrable because of the parties' financial sophistication. E.g., STMicroelectronics, N.V. v. Credit Suisse Secs. (USA) LLC, 648 F.3d 68 (2d Cir. 2011) (upholding confirmation of $400 million award). We cannot say, therefore, that FINRA's rules exclude the arbitration of complex cases or those initiated by financially sophisticated parties.

We also reject UBS's contention that FINRA has a narrow "investor-protection mandate," such that "customers" should include only those receiving "investment or brokerage services." Appellant Br. at 24-25. FINRA's purposes are not limited to investor protection. Rather, as previously noted, FINRA serves as the sole self-regulatory organization chartered under the Exchange Act and exercises comprehensive oversight of the securities industry. See NASD v. SEC, 431 F.3d 803, 804 (D.C. Cir. 2005). Among its stated purposes are to "encourage and promote among members observance of federal and state securities laws"; "[t]o investigate and adjust grievances between the public and members and between members"; and "[t]o adopt, administer, and enforce rules of fair practice." Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc. § 3 (July 2, 2010), available at http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4589. UBS does not explain why "customer" should be limited to investors in light of FINRA's purposes, its other broad definitions of "customer" applicable to other provisions, and the ordinary usage of the term.

Similarly, we reject UBS's contention that a customer relationship requires a fiduciary relationship and cannot be founded on arm's-length transactions. UBS points to no support for this limitation in the text or structure of the FINRA Rules.

Finally, FINRA appears to have rejected the interpretation of FINRA's rules advanced by UBS and the dissent. While this appeal was pending, UBS raised the very argument it raises here in seeking a stay of arbitration from the Director of FINRA Dispute Resolution, who "perform[s] all the administrative duties relating to arbitrations submitted under the Code." FINRA Rule 12103. That motion was summarily denied. Though we need not rely on FINRA's decisions to conclude that WVUH was UBS's customer, we note that FINRA's practical application of its own rules in this case does not support UBS's position.

3. "In Connection with" UBS's Business Activities

Having determined that WVUH was UBS's customer by virtue of its undertaking to pay for UBS's auction services, we turn to whether its dispute with UBS "arises in connection with the business activities of" UBS, as Rule 12200 requires. UBS argues, and the dissent asserts, that there is no nexus between the auction service transactions, which establish customer status, and the alleged fraud involving the bond issuances, which both UBS and the dissent regard as forming the basis of WVUH's arbitration demand. More particularly, the dissent declares that our decision permits arbitration of the dispute between UBS and WVUH based on "the provision of ancillary services" (namely, the auction services) rather than the "gravamen" of the claim (that is, according to the dissent, the dispute concerning UBS's role as underwriter). Dissent at [**1**].

We are not persuaded. The auction services transactions that establish WVUH's customer status are integrally related to and of a piece with the underwriting services UBS provided. For example, all three purchase agreements between the parties termed WVUH's bonds "auction rate certificates," clearly envisioning that the bonds WVUH issued would be auctioned. J.A. 260, 938, 953. The "Official Statements" publicly announcing and providing

information about each bond issuance simultaneously detailed the terms of the issuance and underwriting arrangement and the auction procedures and UBS's role as auction broker-dealer. WVUH's Statement of Claim similarly characterizes UBS's underwriting and auction services as part of an integrated whole, alleging that "[t]he misrepresentations and omissions made by UBS . . . induced [WVUH] to enter into the recommended component transactions" – including underwriting, auction services and swap transactions – "using the structure proposed by UBS," J.A. 1090, and WVUH accordingly asserts claims for intentional misrepresentation, negligent misrepresentation, and fraud.

Nor are we persuaded by the dissent's suggestion that WVUH's claims relate to the underwriting arrangement alone, without reference to UBS's auction services. WVUH's Statement of Claim specifically asserts that UBS fraudulently induced WVUH to purchase auction services by misrepresenting the structure of the ARS market and UBS's role therein. The Statement of Claim variously alleges that "UBS represented that the ARS market was stable and would provide sufficient liquidity for WVUH's bonds," that "UBS did not inform WVUH that UBS had a policy of placing support bids in every auction to prevent auction failures," and that "UBS ultimately recommended that WVUH issue the majority of its 2003 ARS using a 'synthetic fixed rate structure.'" J.A. 1067-68. Furthermore, it demands "[r]estitution and disgorgement of all fees and costs associated with issuing the ARS, conducting the auctions, and any and all other associated fees and costs." J.A. 1098 (emphasis added). Under any conceivable interpretation of Rule 12200's nexus requirement that the dispute "arises in connection with the business activities of the member," the allegations here satisfy the requirement for purposes of defeating a motion for preliminary injunction and link the grievance WVUH asserts in arbitration to the transaction that established its customer status.

Lastly, the dissent endorses a "foreseeable consequences" test to assert that the dispute relating to the underwriting services is not arbitrable, even if the claims relating to auction services may be. While acknowledging that, "[i]f anything, the broker-dealer transaction flows from the underwriting transaction," the dissent states that "the underwriting transaction does not flow from the broker-dealer transaction" and is therefore not a "foreseeable consequence[] of the transaction for which arbitration is available." Dissent at [20]-[21]. The dissent's test has no apparent basis in the text of Rule 12200 or any other provision of the FINRA Code relating to arbitration. Even if we were to employ that test, moreover, arbitration of the underwriting services would be appropriate, as both the underwriting and auction services transactions were "foreseeable" when the purchase and broker-dealer agreements were executed. Indeed, the purchase agreements in 2003 and 2005 were entered over three weeks after the respective broker-dealer agreements, and the 2006 purchase agreement was entered within two days of the 2006 broker-dealer agreement.[6]

4. Forum Selection Clause

UBS also contends that, in the event it is compelled to arbitrate its dispute with WVUH, the forum selection clause in the 2006 broker-dealer agreement prohibits WVUH from

[6] Contrary to the dissent's characterization, we do not here establish a bright line rule or broadly pronounce that "once 'customer' status is established through a single transaction or agreement, any related matter may be arbitrated." Dissent at [15]. Our holding is that, in this case, UBS cannot avoid arbitration by arguing that WVUH was a customer only in a limited respect when the customer relationship is part of a series of interrelated transactions serving a common purpose and when there is a "contractual basis for concluding that the party agreed to" arbitration with a party that was its customer under the FINRA Rules. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010) (emphasis omitted). Nor does Stolt-Nielsen otherwise support UBS's position. The Court held in that case that class arbitration could not be inferred from an arbitration agreement that did not mention it; it hardly precludes arbitration where, as here, the text of the relevant agreement plainly covers it. Id.

proceeding with the arbitration outside of New York County. That clause states 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, in connection with any such action or proceeding, [the parties] submit to the jurisdiction of, and venue in, such County."

UBS's argument finds some support in our decision in Bear, Stearns & Co. v. Bennett, 938 F.2d 31, 31-32 (2d Cir. 1991), where we enforced an agreement between two parties to arbitrate their disputes in New York City under the rules of the American Stock Exchange on the ground that "[w]here there is a valid agreement for arbitration, Congress has directed the district courts to order that arbitration proceed 'in accordance with the terms of the agreement.'" Id. at 32 (quoting 9 U.S.C. § 4). Two subsequent Supreme Court decisions have cast doubt on the continued viability of Bear Stearns. In Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002), the Court distinguished between (1) a "relatively narrow category" of "'questions of arbitrability'" that "include[] disputes about . . . 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy,'" Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38, 351 F.3d 43, 45 (2d Cir. 2003) (quoting Howsam, 537 U.S. at 84), and (2) "other kinds of general circumstances where parties would likely expect that an arbitrator would decide the gateway matter," including "'procedural' questions which grow out of the dispute and bear on its final disposition." Howsam, 537 U.S. at 84 (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964)). In Howsam, the Court held that, unlike the former, the latter questions are "presumptively not for the judge, but for an arbitrator, to decide." Id. (dispute over applicability of an NASD time limit for filing claims is a presumptively arbitrable issue) (emphasis in original).

In Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), a plurality of the Supreme Court held that whether an arbitration agreement forbids class arbitration is a procedural matter that under Howsam should be decided by an arbitrator, not a court. Id. at 452-53. The plurality emphasized that the relevant question was "what kind of arbitration proceeding the parties agreed to" (a procedural question), not "whether [the parties] agreed to arbitrate a matter" in the first instance (a question of arbitrability), and concluded that an arbitrator is better equipped to decide the procedural question. Id. (emphasis in original; citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942-45 (1995); Volt Info. Scis., 489 U.S. at 474-76)); see also Howsam, 537 U.S. at 85 (observing the superior competence of NASD arbitrators, respective to courts, in interpreting and applying NASD arbitration rules). We are guided by the rationale of Green Tree, which helps clarify Howsam.[7]

Here, UBS acknowledges that the issue relating to the 2006 forum selection clause arises only after the question of the arbitrability of the dispute has been resolved in favor of arbitration. In any event, the clause does not mention arbitration or the FINRA Rules or limit the tribunal in which a dispute may be initiated. It simply concerns the site of arbitration. Having now determined that WVUH was UBS's customer and that the dispute arises in connection with UBS's business activities, the question to be resolved is not "whether to proceed by arbitration, but which arbitration panel should decide certain issues." Cent. W. Va. Energy, Inc. v. Bayer

[7] Other courts have held that Justice Stevens's concurrence in the judgment, read together with the plurality opinion, produces a controlling rationale on this question. See Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co., 489 F.3d 580, 586 n.2 (3d Cir. 2007); Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc., 343 F.3d 355, 358-59 (5th Cir. 2003). But see Emp'rs Ins. Co. of Wausau v. Century Indem. Co., 443 F.3d 573, 580 (7th Cir. 2006). Because Howsam controls this case, we need not decide whether Green Tree is also controlling in this regard.

Cropscience LP, 645 F.3d 267, 274 (4th Cir. 2011). Keeping in mind both this question and the federal policy in favor of arbitration, see Green Tree, 539 U.S. at 452, we hold that venue is a procedural issue that FINRA's arbitrators should address in the first instance, and that the District Court lacked subject matter jurisdiction to resolve it.

Our holding accords with the decisions of other sister courts in similar cases involving forum selection clauses. Relying on Howsam and Green Tree, the First and Fourth Circuits have both held that disputes over the interpretation of forum selection clauses in arbitration agreements raise presumptively arbitrable procedural questions. See Cent. W. Va. Energy, 645 F.3d at 276; Richard C. Young & Co. v. Leventhal, 389 F.3d 1, 4-5 (1st Cir. 2004) ("Since the dispute between the parties is concededly arbitrable, determining the place of the arbitration is simply a procedural matter and hence for the arbitrator.").[8]

CONCLUSION

For the reasons stated, we AFFIRM the District Court's judgment dismissing UBS's claims. In so doing, we AFFIRM the District Court's January 4, 2011 order to the extent it denies UBS's motion for a preliminary injunction restraining WVUH from proceeding with FINRA arbitration. However, we VACATE that order to the extent it denies a preliminary injunction with respect to the forum selection clause and REMAND with instructions for the District Court to dismiss that challenge for lack of subject matter jurisdiction. We DENY as

[8] Without citing either Howsam or Green Tree or using the framework established in those cases, the Eleventh Circuit followed our decision in Bear, Stearns to conclude that venue is a matter for judicial rather than arbitral determination. Sterling Fin. Inv. Grp., Inc. v. Hammer, 393 F.3d 1223, 1225 (11th Cir. 2004). To the extent that arbitrators, not courts, presumptively have jurisdiction to adjudicate disputes over the enforceability of forum selection clauses, our holding to the contrary in Bear, Stearns was abrogated by Howsam, as clarified by Green Tree.

moot UBS's motion, made after oral argument, for an order staying arbitration during the pendency of this appeal.