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2 In the
3 United States Court of Appeals
4 For the Second Circuit
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7 AUGUST TERM, 2013

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9 ARGUED: APRIL 4, 2014
10 DECIDED: AUGUST 21, 2014

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12 Nos. 13-797-cv, 13-2247-cv
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15 GOLDMAN, SACHS & CO.,
16 *Plaintiff-Appellee,*

17
18 *v.*

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20 GOLDEN EMPIRE SCHOOLS FINANCING AUTHORITY, KERN HIGH
21 SCHOOL DISTRICT,
22 *Defendants-Appellants.*
23

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25 CITIGROUP GLOBAL MARKETS INC.,
26 *Plaintiff-Appellee,*

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28 *v.*

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30 NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY,
31 *Defendant-Appellant.*
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34 Before: KATZMANN, *Chief Judge*, WALKER and DRONEY, *Circuit Judges.*

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3 Because these appeals raise the same legal issue, we dispose of
4 them in a single opinion. In each case, the district court granted a
5 financial services firm's motion to enjoin a Financial Industry
6 Regulatory Authority ("FINRA") arbitration brought against the
7 firm by a public financing authority. *Goldman, Sachs & Co. v. Golden*
8 *Empire Sch. Fin. Auth.*, 922 F. Supp. 2d 435 (S.D.N.Y. 2013); *Citigroup*
9 *Global Mkts. Inc. v. N.C. E. Mun. Power Agency*, No. 13 CV 1703
10 (S.D.N.Y. May 10, 2013), ECF No. 29. We agree that in each case, the
11 FINRA arbitration rules have been superseded by forum selection
12 clauses requiring "all actions and proceedings" related to the
13 transactions between the parties to be brought in court. We thus
14 AFFIRM in both appeals.

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JOHN M. WALKER, JR., *Circuit Judge:*

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1 securities (“ARS”)¹ in 2004, 2006, and 2007, for which Golden Empire
2 retained plaintiff-appellee Goldman, Sachs & Co. (“Goldman”) as an
3 underwriter and broker-dealer. For each ARS issuance, the parties
4 executed both an underwriter agreement, which was silent as to
5 dispute resolution, and a broker-dealer agreement. The 2004 and
6 2006 broker-dealer agreements included the following forum
7 selection clause:

8 The parties agree that all actions and proceedings arising out
9 of this Broker-Dealer Agreement or any of the transactions
10 contemplated hereby shall be brought in the United States
11 District Court in the County of New York and that, in
12 connection with any such action or proceeding, submit to the
13 jurisdiction of, and venue in, such court.

14 The forum selection clause in the 2007 agreement was the same in all
15 material respects. Each broker-dealer agreement also contained a
16 merger clause stating that it and any other agreements executed in
17 connection with that ARS issuance “contain the entire agreement
18 between the parties relating to the subject matter hereof.”

19 In February 2012, Golden Empire commenced a FINRA
20 arbitration, alleging that Goldman fraudulently induced it to issue
21 the ARS. In June 2012, Goldman brought this action, seeking
22 declaratory and injunctive relief against arbitration. On February 8,
23 2013, after briefing and argument, the district court (Sullivan, J.)

¹ “ARS are debt or equity interests issued by various public and private entities and traded through periodic auctions.” *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 123 (2d Cir. 2011).

1 granted Goldman's motion for a preliminary injunction. *Goldman v.*
2 *Golden Empire*, 922 F. Supp. 2d at 445. The district court concluded
3 that the forum selection clause in the broker-dealer agreements
4 overrode the FINRA rule governing arbitration, and that Goldman
5 was thus likely to succeed on the merits. *Id.* at 439-44. Golden
6 Empire timely appealed from this interlocutory order.

7 II. *Citigroup v. NCEMPA*

8 The procedural history of the second appeal closely parallels
9 the first. Defendant-appellant North Carolina Eastern Municipal
10 Power Agency ("NCEMPA") retained plaintiff-appellee Citigroup
11 Global Markets Inc. ("Citigroup") to underwrite approximately \$223
12 million of ARS issued in 2004. The parties' broker-dealer agreement
13 contained a forum selection clause and a merger clause identical to
14 those in *Goldman v. Golden Empire*, and the parties' underwriting
15 agreement was similarly silent on dispute resolution.

16 In December 2012, NCEMPA began a FINRA arbitration in
17 North Carolina, asserting claims against Citigroup in connection
18 with the ARS. In March 2013, Citigroup brought this action seeking
19 declaratory relief and an injunction against arbitration. In May 2013,
20 the district court (Furman, J.) granted Citigroup's motion for a
21 preliminary injunction from the bench, noting that the issue was
22 identical to the one raised in *Goldman v. Golden Empire*. Transcript of
23 Oral Argument at 55-68, *Citigroup v. NCEMPA*, No. 13 CV 1703
24 (S.D.N.Y. May 3, 2013), ECF No. 30. With the parties' consent, the

1 preliminary injunction was made permanent and final judgment
2 was entered on May 10, 2013. *Citigroup v. NCEMPA*, No. 13 CV 1703
3 (S.D.N.Y. May 10, 2013), ECF No. 29. NCEMPA timely appealed,
4 and we heard argument in both appeals on April 4, 2014.

5 DISCUSSION

6 I. Jurisdiction and Remedial Authority

7 In light of our “obligation to satisfy ourselves that we have
8 jurisdiction,” *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 184 (2d Cir.
9 2006), we first note that this case involves arbitrability under the
10 Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16, which requires an
11 independent basis for subject-matter jurisdiction. *See Vaden v.*
12 *Discover Bank*, 556 U.S. 49, 59 (2009). In a suit to compel arbitration,
13 we evaluate jurisdiction “by ‘looking through’ . . . to the parties’
14 underlying substantive controversy.” *Id.* at 62. We discern no reason
15 not to apply the logic of *Vaden* equally to actions to enjoin
16 arbitration, so we conclude that subject-matter jurisdiction exists
17 both under 28 U.S.C. § 1331, because the arbitrations involve claims
18 under the Securities Exchange Act of 1934, and under 28 U.S.C.
19 § 1332, because the parties in each case are diverse and over \$75,000
20 is at issue in the underlying arbitrations. *Cf. Webb v. Investacorp, Inc.*,
21 89 F.3d 252, 256 (5th Cir. 1996) (same jurisdictional standards apply
22 in suits to enjoin or compel arbitration); *A.F.A. Tours, Inc. v.*
23 *Whitchurch*, 937 F.2d 82, 87 (2d Cir. 1991) (value of claim for

1 injunction is “impairment to be prevented”). We have appellate
2 jurisdiction in *Goldman v. Golden Empire* under 9 U.S.C. § 16(a)(2) and
3 28 U.S.C. § 1292(a)(1), and in *Citigroup v. NCEMPA* under 9 U.S.C.
4 § 16(a)(3) and 28 U.S.C. § 1291.

5 We also conclude that the District Court for the Southern
6 District of New York had authority to enjoin arbitration in both
7 appeals. Federal courts generally have remedial power to stay
8 arbitration. *See In re Am. Exp. Fin. Advisors Sec. Litig.*, 672 F.3d 113,
9 139-41 (2d Cir. 2011). NCEMPA argues, however, that the district
10 court below lacked authority to enjoin its arbitration in North
11 Carolina because the FAA states that compelled arbitration “shall be
12 within the district in which the petition for an order directing such
13 arbitration is filed,” 9 U.S.C. § 4, which some district courts have
14 construed to restrict their power to enjoin arbitrations outside that
15 district, *see, e.g., UAL Corp. v. Mesa Airlines, Inc.*, 88 F. Supp. 2d 910,
16 912-14 (N.D. Ill. 2000). However, the FAA does not restrict the venue
17 for an action to enjoin arbitration, and it is well established that a
18 “court of equity having personal jurisdiction over a party has power
19 to enjoin him from committing acts elsewhere.” *Bano v. Union*
20 *Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004) (quoting *Vanity Fair*
21 *Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956)). Moreover,
22 we routinely enjoin out-of-state arbitrations. *See, e.g., In re Am. Exp.*,
23 672 F.3d at 124 n. 10, 139-43 (expressly enjoining arbitration in
24 Illinois); *see also Wachovia Bank, N.A. v. VCG Special Opportunities*

1 *Master Fund, Ltd.*, 661 F.3d 164, 174 (2d Cir. 2011) (enjoining FINRA
2 arbitration which was pending in Florida); *Citigroup Global Mkts.,*
3 *Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 40 (2d
4 Cir. 2010) (same). Furthermore, the Ninth Circuit has expressly held
5 that a district court may enjoin an arbitration pending outside its
6 own district. *See Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781,
7 784-86 (9th Cir. 2001). We thus proceed to the merits.

8 **II. Arbitrability**

9 When reviewing an order granting either a preliminary or a
10 permanent injunction, we review the district court's legal holdings
11 de novo and its ultimate decision for abuse of discretion. *See UBS*
12 *Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 648 (2d Cir.
13 2011); *ACORN v. United States*, 618 F.3d 125, 133 (2d Cir. 2010). The
14 issue on appeal is the arbitrability of these disputes under the FAA
15 in light of the all-inclusive forum selection clause signed by the
16 parties, which is a legal question reviewed de novo. *See Gold v.*
17 *Deutsche Aktiengesellschaft*, 365 F.3d 144, 147 (2d Cir. 2004).

18 Golden Empire and NCEMPA argue that their disputes are
19 subject to mandatory arbitration before FINRA, a self-regulatory
20 organization with authority to oversee securities firms. *See UBS Fin.*
21 *Servs.*, 660 F.3d at 648. As FINRA members, Goldman and Citigroup
22 are bound by its rules. *See id.* at 649. FINRA Rule 12200 states that
23 members "must arbitrate a dispute" if arbitration is "[r]equested by
24 the customer" and "[t]he dispute arises in connection with the

1 business activities of the member.” FINRA Rule 12200, *available at*
2 [http://finra.complinet.com/en/display/display_main.html?rbid](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106)
3 [=2403&element_id=4106](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106) (last visited Aug. 20, 2014).

4 Goldman and Citigroup do not dispute that FINRA Rule
5 12200 is a written agreement to arbitrate with customers such as
6 Golden Empire and NCEMPA that is “enforceable, save upon such
7 grounds as exist at law or in equity for the revocation of any
8 contract.” 9 U.S.C. § 2; *see UBS Fin. Servs.*, 660 F.3d at 648-49. Here
9 we must decide whether the forum selection clause executed by the
10 parties in each case, requiring “all actions and proceedings” to be
11 brought in the Southern District of New York, supersedes this
12 agreement.

13 “[W]hether [similar] forum selection clauses superseded
14 [financial services firms’] obligation to arbitrate under FINRA Rule
15 12200 . . . has been the subject of litigation in multiple circuits, with
16 decidedly mixed results.” *Goldman, Sachs & Co. v. City of Reno*, 747
17 F.3d 733, 736 (9th Cir. 2014). The Ninth Circuit has held that such a
18 forum selection clause supersedes Rule 12200, referencing district
19 court decisions in this Circuit. *Id.* at 743-47 (citing *Goldman, Sachs &*
20 *Co. v. N.C. Mun. Power Agency No. One*, No. 13 CIV. 1319, 2013 WL
21 6409348 (S.D.N.Y. Dec. 9, 2013); *Goldman v. Golden Empire*, 922 F.
22 Supp. 2d 435); *see also Citigroup Global Mkts. Inc. v. All Children’s*
23 *Hosp., Inc.*, No. 13 CIV. 8558, 2014 WL 1133401 (S.D.N.Y. Mar. 20,
24 2014). However, the Fourth Circuit has held that a nearly identical

1 forum selection clause does not supersede Rule 12200. *See UBS Fin.*
2 *Servs., Inc. v. Carilion Clinic*, 706 F.3d 319 (4th Cir. 2013); *see also UBS*
3 *Sec. LLC v. Allina Health Sys.*, No. 12–2090, 2013 WL 500373 (D. Minn.
4 Feb. 11, 2013) (following *Carilion Clinic*).

5 As explained below, based on this Circuit’s precedent, we
6 hold that a forum selection clause requiring “all actions and
7 proceedings” to be brought in federal court supersedes an earlier
8 agreement to arbitrate.²

9 The FAA embodies a “federal policy favoring arbitration.”
10 *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010).
11 Courts thus apply a “presumption of arbitrability,” but only if an
12 “enforceable arbitration agreement is ambiguous about whether it
13 covers the dispute at hand.” *Id.* at 301. “In other words, while doubts
14 concerning the scope of an arbitration clause should be resolved in
15 favor of arbitration, the presumption does not apply to disputes
16 concerning whether an agreement to arbitrate has been made.”
17 *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*, 645 F.3d 522,
18 526 (2d Cir. 2011). Because the question presented here concerns
19 whether an arbitration agreement remains in force in light of a later-

² Of course, there must be an independent basis for federal jurisdiction, as “consent of a party is . . . wholly insufficient to create subject-matter jurisdiction.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 127-28 (1996). We need not determine now how the forum selection clause should be interpreted if federal subject-matter jurisdiction is absent.

1 executed agreement, the presumption does not apply.³ In this
2 Circuit, an agreement to arbitrate is superseded by a later-executed
3 agreement containing a forum selection clause if the clause
4 “specifically precludes” arbitration, *Bank Julius Baer & Co. v. Waxfield*
5 *Ltd.*, 424 F.3d 278, 284 (2d Cir. 2005) (quoting *Pers. Sec. & Safety Sys.*
6 *v. Motorola*, 297 F.3d 388, 396 n. 11 (5th Cir. 2002)), but there is no
7 requirement that the forum selection clause mention arbitration, *see*
8 *Applied Energetics*, 645 F.3d at 525.

9 In *Bank Julius*, we held that an arbitration agreement was not
10 superseded by an agreement providing that a bank’s customer
11 “submits to the jurisdiction of any New York State or Federal court”
12 and “agrees that any Action *may* be heard” in such court. 424 F.3d at
13 282 (emphasis in original). The subsequent agreement also was “not
14 exclusive of any rights or remedies provided under any other
15 agreement.” *Id.* We held that this agreement should be read “as
16 complementary to [the] agreement to arbitrate,” such that “[the
17 parties] are [still] required to arbitrate their disputes, but that to the
18 extent the Bank files a suit in court in New York [such as] to enforce
19 an arbitral award . . . [the customer] will not challenge either
20 jurisdiction or venue.” *Id.* at 285.

³ To the extent our decision in *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278 (2d Cir. 2005), suggested otherwise, it is no longer good law in the wake of the Supreme Court’s subsequent decision in *Granite Rock. See Applied Energetics, Inc.*, 645 F.3d at 526.

1 In contrast, in *Applied Energetics*, we held that an arbitration
2 agreement was superseded by an agreement stating that “[a]ny
3 dispute arising out of this Agreement shall be adjudicated in” New
4 York courts, and that the agreement and related documents (not
5 including the earlier arbitration agreement) “constitute the entire
6 understanding and agreement” of the parties with respect to the
7 securities at issue. 645 F.3d at 523-24. Unlike in *Bank Julius*, the
8 subsequent agreement “specifically preclude[d] arbitration,” even
9 though it did not mention arbitration, because the forum-selection
10 clause was “all-inclusive” and “mandatory.” *Id.* at 525.

11 The forum selection clause at issue in the present appeals is
12 indistinguishable from that in *Applied Energetics* because it states that
13 “all actions and proceedings . . . shall be brought” in the Southern
14 District of New York. Unlike the clause in *Bank Julius*, which simply
15 waived objection to jurisdiction in New York, the clause here is all-
16 inclusive and mandatory. And as in *Applied Energetics*, the later-
17 executed agreements have a merger clause stating that they “contain
18 the entire agreement between the parties relating to the subject
19 matter hereof.” These provisions require that disputes arising out of
20 the broker-dealer agreements be adjudicated in the Southern District
21 of New York, and they thus supersede the background FINRA
22 arbitration rule. *See also Goldman v. City of Reno*, 747 F.3d at 744
23 (“[T]he forum selection clauses need only be sufficiently specific to
24 impute to the contracting parties the reasonable expectation that

1 they would litigate any disputes in federal court, thereby
2 superseding . . . [the] default obligation to arbitrate under FINRA
3 Rule 12200.” (citing *Applied Energetics*, 645 F.3d at 525-26)).

4 Golden Empire and NCEMPA offer two principal arguments
5 to the contrary. First, they argue that the broker-dealer agreements
6 do not cover their entire relationships with Goldman and Citigroup,
7 respectively, because the financial services firms had already
8 provided numerous services related to the ARS issuances (including
9 services at issue in the FINRA arbitrations) by the time the broker-
10 dealer agreements were signed. But the broadly worded forum
11 selection clause encompasses “all actions and proceedings arising
12 out of . . . any of the transactions contemplated” by the broker-dealer
13 agreements, which plainly include Golden Empire’s and NCEMPA’s
14 ARS issuances. Each of the four broker-dealer agreements at issue
15 (the three signed by Golden Empire and Goldman in 2004, 2006, and
16 2007, and the one signed by NCEMPA and Citigroup in 2004) begins
17 with the statement: “WHEREAS, the [public financing authority] is
18 issuing [a certain dollar amount] of . . . []ARS Bonds”

19 Second, Golden Empire and NCEMPA argue that the phrase
20 “all actions and proceedings” does not include arbitrations, so that
21 the forum selection clause here is narrower than that at issue in
22 *Applied Energetics*, which referred to “[a]ny dispute.” They note that
23 New York law governs the broker-dealer agreements and point to
24 two lower New York court decisions stating that “[a]n arbitration is

1 not considered an action or a proceeding” under the N.Y. C.P.L.R.’s
2 forms of procedure. *Int’l Union of Operating Eng’rs, Local No. 463 v.*
3 *City of Niagara Falls*, 743 N.Y.S.2d 236, 238 (Sup. Ct. 2002); *J. Brooks*
4 *Sec., Inc. v. Vanderbilt Sec., Inc.*, 484 N.Y.S.2d 472, 474 (Sup. Ct. 1985).

5 However, the broker-dealer agreement does not suggest that it
6 is limited to civil actions contemplated by the C.P.L.R., and we must
7 interpret “all actions and proceedings” based on its plain meaning
8 “as generally understood.” *Random House, Inc. v. Rosetta Books LLC*,
9 283 F.3d 490, 492 (2d Cir. 2002). Arbitrations are regularly described
10 as “proceedings” by the United States Supreme Court, our Circuit,
11 New York state courts, the C.P.L.R., and the FINRA rules. *See, e.g.,*
12 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614,
13 634 (1985) (“arbitral body conducting a proceeding”); *Citigroup v.*
14 *VCG*, 598 F.3d at 32 (“arbitration proceedings”); *City of N.Y. v.*
15 *Uniformed Fire Officers Ass’n, Local 854, IAFF, AFL–CIO*, 699 N.Y.S.2d
16 355, 357 (App. Div. 1999) (referring to arbitration as “the
17 proceeding”) (quoting *Wertlieb v. Greystone P’ships Grp.*, 569 N.Y.S.2d
18 61, 62 (App. Div. 1991)); N.Y. C.P.L.R. § 7505 (“arbitration
19 proceeding”); FINRA Rule 12405 (referring to Rule 12200 arbitration
20 as “the proceeding”), available at
21 [http://finra.complinet.com/en/display/display.html?rbid=2403&elem](http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4146)
22 [ent_id=4146](http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4146) (last visited Aug. 20, 2014). Even Golden Empire’s and
23 NCEMPA’s own statements of claim before FINRA used the terms
24 “action” and “proceeding” to describe the arbitrations they were

1 commencing. It seems plain that the general understanding of
2 “actions and proceedings” encompasses arbitrations.

3 We thus disagree with the contrary conclusion reached by the
4 Fourth Circuit in *Carilion Clinic*. The Fourth Circuit reasoned that if
5 “all actions and proceedings” includes arbitration proceedings, then
6 “the paragraph becomes nonsensical” because it would require an
7 arbitration proceeding to be “brought” in federal court. 706 F.3d at
8 329. But as district court judges in this Circuit have noted, “this is
9 ‘little more than a linguistic trick.’” *Citigroup v. All Children’s*, 2014
10 WL 1133401, at *3 (quoting *Golden Empire*, 922 F. Supp. 2d at 442).
11 State court proceedings also cannot be “brought” in federal court,
12 but it is undisputed that they are encompassed within “all actions
13 and proceedings.” The Fourth Circuit also “expect[ed] that a clause
14 designed to supersede, displace, or waive arbitration would mention
15 arbitration,” *Carilion Clinic*, 706 F.3d at 329, but that is not the law of
16 this Circuit, see *Applied Energetics*, 645 F.3d at 525-26. Under our
17 precedent, the forum selection clause at issue in these cases is plainly
18 sufficient to supersede FINRA Rule 12200.

19 CONCLUSION

20 For the reasons stated above, we AFFIRM the judgment of the
21 district court in both appeals.