No. 24-2379

In the United States Court of Appeals for the Ninth Circuit

OPPENHEIMER & CO., INC.,
Plaintiff-Appellee,

v.

STEVEN MITCHELL, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington (No. 2:23-cv-00067)
The Honorable Marsha J. Pechman

BRIEF OF *AMICUS CURIAE* THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, a*micus curiae* The Securities Industry and Financial Markets Association states that is a non-profit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST

The Securities Industry and Financial Markets Association (SIFMA) is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of the industry's one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. It also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).[1]

SIFMA has a particular interest in this litigation because affirmance of the decision below would lead to greater predictability and respect for contractual commitments in the securities industry, to the benefit of all industry participants. SIFMA's members are parties to thousands of disputes

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[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund preparing or submitting this brief. No person other than SIFMA or its counsel made a monetary contribution to the preparation or submission of this brief. All parties to this appeal have consented to the filing of this brief.

each year, including both judicial proceedings and arbitrations, many of them before FINRA. Some of those disputes—for example, disputes between FINRA members and their customers—are rightly subject to mandatory arbitration because the relevant parties have agreed to submit those disputes to arbitration. But other disputes—such as the 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 those 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 mechanism. Thus, SIFMA believes that it is essential for courts to enjoin arbitrations when, as here, a party tries to force another to arbitrate a dispute not covered by such agreements.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

FINRA's Code of Arbitration Procedure governs all FINRA members. Under Rule 12200 of that Code, a "customer" of the FINRA member or its

[2] Because SIFMA's interest is in the correct legal rule adopted by the district court, this brief takes no position on any factual disputes or on the propriety of the underlying conduct set out in the district court's opinion. *See* 1-ER-4-8.

associated person has the right to arbitrate certain business disputes with the member. This appeal is about whether the appellant investors (the Investors)—who did not hold any accounts with or make any purchase from appellee Oppenheimer & Co., Inc., a FINRA member, or its registered broker, Woods—are nevertheless "customers" of Oppenheimer under Rule 12200 and can compel arbitration with it. As a matter of plain text, overwhelming case law, good policy, and industry expectations, the answer is no.

FINRA performs a valuable service in protecting the interests of investors by providing fair and efficient arbitration as an alternative dispute resolution for member-customer disputes. But in agreeing to arbitrate member-customer disputes, FINRA members do not also obligate themselves to arbitrate disputes with investors who are *not* their customers. Put differently, FINRA members consent to arbitrate disputes with *their own* customers. They have not agreed to, and do not expect to be compelled to, arbitrate disputes with other institutions' customers.

To avoid protracted litigation and ensure the benefits of FINRA arbitration for member-customer disputes, participants in the securities industry need clear and administrable standards for when a party seeking to bring a FINRA arbitration is a "customer" of a FINRA member and is thus

entitled to compel arbitration of that dispute. In ordinary parlance, a "customer" is a person or organization that procures a particular good or service. Likewise here, a "customer" is a person or organization that executes a transaction or opens a brokerage account with a FINRA member or its associated person. All four courts of appeals to consider the question—including this one—have either expressly adopted that common-sense and administrable view of who is a "customer," or have taken a consistent approach without expressly reaching the question.

The district court applied the appropriate clear test in concluding that the Investors here were never customers of the FINRA member or its associated person: the Investors did not hold any accounts or execute any transactions with Oppenheimer or its registered broker, Woods. The district court properly rejected the Investors' contrary argument that they could become "customers" of Woods (and for these purposes, Oppenheimer) within the meaning of Rule 12200 simply because Woods obtained some financial benefit from the investments. Rule 12200 does not allow the Investors to seize on other relationships of varying forms with Oppenheimer or Woods; it requires a direct customer relationship with the FINRA member or its associated person.

The purchase-or-account test for customer relationships is by this point well established. It not only adheres to the text of Rule 12200 but also makes good sense and achieves a number of important policy goals. It provides clarity to market participants and courts by supplying an easily administrable standard that allows parties to predict with fair certainty, and without years of litigation, whether their dispute is subject to mandatory arbitration. It is derived from and consistent with the decisions of this Court and other federal courts of appeals, which have looked to brokerage accounts and purchase transactions as the criteria for a customer relationship. Finally, it accords with the reasonable expectations of FINRA members and the investing community.

Affirmance of the district court's decision and embrace of the purchase-or-account test for customer status would lead to greater predictability and respect for contractual commitments in the securities industry, to the benefit of all industry participants. And the Investors' and their amici's claims of unfairness are overblown. After all, the Investors are not left without a remedy if they have viable legal claims; they simply must seek that remedy in a judicial forum rather than in a FINRA arbitration to which Oppenheimer has not agreed.

ARGUMENT

I. FINRA ARBITRATION IS BENEFICIAL, WITHIN AGREED-UPON LIMITS.

SIFMA supports arbitration, with a simple condition: that the parties have in fact agreed to submit the dispute to arbitration. FINRA arbitration provides a fair venue to resolve securities disputes in an efficient and less costly manner than typical litigation. Because of those benefits, FINRA members have, by virtue of their membership in FINRA, agreed to consent to arbitration for certain disputes with their "customers." But in order to obtain the full benefits of FINRA arbitration—and consistent with the longstanding principle that arbitration is fundamentally a matter of consent—it is critical that courts apply a clear, administrable, and reasonable definition of "customer" when an investor seeks to compel a FINRA member to arbitrate.

A. FINRA Arbitration Provides a Fair and Efficient Forum to Resolve Member-Customer Disputes.

SIFMA, like regulators and participants in the securities industry, supports FINRA arbitration in the appropriate circumstances. FINRA arbitration provides an impartial and efficient venue for resolving member-customer disputes and, in so doing, bolsters the public's trust in the industry and the markets. When they have agreed to it, investors and markets greatly benefit from FINRA arbitration.

FINRA's arbitration process is well-suited for handling disputes between financial services firms and their customers. For instance, FINRA arbitration "incorporates substantive and procedural protections comparable to court-based litigation, and thereby ensures fair case outcomes for retail customers." SIFMA, Securities Arbitration Works Effectively and Benefits Investors (Oct. 5, 2021) (SIFMA Arbitration Article).[3] And FINRA arbitration provides for "faster resolution of disputes" than court-based litigation and "reduces legal costs." SIFMA, White Paper on Arbitration in the Securities Industry 50-51 (Oct. 2007) (SIFMA White Paper).[4] Finally, FINRA arbitration employs procedures designed for, and arbitrators familiar with, disputes in the financial services industry. *See* SIFMA White Paper 50-51. As a result, FINRA arbitration "is overall less expensive, more expedient, and just as fair as court-based litigation." SIFMA Arbitration Article.

Because of these benefits, FINRA arbitration has proven to be a popular and effective method for resolving disputes within the securities industry.

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[3] https://www.sifma.org/resources/news/securities-arbitration-system-works-effectively-and-benefits-investors/.

[4] https://www.sifma.org/wp-content/uploads/2017/03/White-Paper-on-Arbitration-in-the-Securities-Industry-October-2007.pdf.

Nearly all broker-dealer firms now include arbitration clauses in customer contracts. *See* SIFMA Article. Each year, FINRA administers between 4,000 and 8,500 arbitrations and numerous mediations in 69 hearing locations across the United States, including one in each State. *See* FINRA, FINRA Dispute Resolution Services Party's Reference Guide 4 (Jan. 18, 2024).[5]

In short, FINRA arbitration has been a resounding success for the participants in the securities industry, and SIFMA fully supports it as a just, effective, and efficient forum for alternative dispute resolution.

B. FINRA Members Must Agree to That Arbitral Forum.

SIFMA's support for arbitration assumes that the parties have affirmatively agreed to that forum for their dispute. Although almost all broker-dealers now include FINRA arbitration clauses in their customer contracts, broker-dealers do not agree to arbitrate every dispute with everyone. SIFMA believes that a FINRA member's choice *not* to consent to arbitrate certain disputes must be respected, just as the choice *to* consent must be.

It is a "fundamental principle" that under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (FAA), arbitration is a "matter of contract," *Coinbase, Inc.*

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[5] https://www.finra.org/sites/default/files/Partys-Reference-Guide.pdf.

v. *Suski*, 144 S. Ct. 1186, 1192 (2024). Indeed, "the first principle of our FAA jurisprudence [is] that arbitration is strictly a matter of consent." *Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. 639, 651 (2022). Consent means that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). That is, one party can force the other party into arbitration only "if there is a contractual basis for concluding that the party *agreed* to" it. *Viking River Cruises, Inc.*, 596 U.S. at 651 (emphasis original).

The only contractual basis for FINRA arbitration here is through Oppenheimer's membership in FINRA.[6] FINRA Rule 12200 provides an alternative dispute mechanism to which FINRA members agree by virtue of their membership. In particular, for a claim against a FINRA member to be subject to mandatory arbitration, (i) the dispute must be "between a customer and a member or an associated person of a member" and (ii) the dispute must arise "in connection with the business activities of the member." FINRA Rule 12200. In other words, FINRA members agree to arbitrate disputes with

[6] Although broker-dealers include arbitration clauses in nearly every customer contract, *see supra* at 8, Oppenheimer did not enter into an agreement with any of the Investors, *see* 1-ER-10.

their customers, not with all investors with whom they may come in contact. *See Raymond James* v. *Cary*, 709 F.3d 382, 386 (4th Cir. 2013) ("When it accepted FINRA Rule 12200, [FINRA member Raymond James] agreed to arbitrate disputes with its customers, not with those who fall outside that category.").

Although SIFMA supports FINRA arbitration as a method of resolving member-customer disputes, it does not follow that any investor should be entitled to compel FINRA arbitration against a FINRA member merely because the FINRA member or its associated person had some relationship to, or obtained some financial benefit from, the investment. Requiring FINRA members to submit to arbitration to resolve any disputes with any investor with whom they come into contact would undermine the foundational contractual premise of arbitration. It would also vastly expand the number of disputes eligible for FINRA arbitration, imposing enormous burdens on FINRA members and the FINRA arbitration system. *See infra* at 32-35 (discussing burdens of overly expansive definition of "customer"). SIFMA thus strongly supports FINRA arbitration *when it is agreed to*.

C. Certainty About the Definition of "Customer" Is Critical to Achieve the Benefits of FINRA Arbitration.

One of the primary benefits of FINRA arbitration is that it allows investors to have their claims decided more quickly and at lesser cost than would be the case if the claim had to be litigated. This benefit is all but lost, however, when the threshold determination of whether a dispute is arbitrable—here, whether the Investors are "customers"—requires lengthy preliminary proceedings in court. It is therefore critical that the definition of a member-customer relationship be clear, allowing investment firms, investors, and courts to understand at the outset whether a dispute belongs in arbitration or in court.

A complex and uncertain test to determine whether someone is a "customer" would undermine the benefits of FINRA arbitration. As the Supreme Court has recognized, parties enter into arbitration to obtain "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010); *see Cary*, 709 F.3d at 388 ("Arbitration is a favored mechanism of dispute resolution precisely because it helps parties to control legal risk in a more predictable and less capricious fashion."). If the determination of "customer status" were to become a

fact-intensive inquiry that "entails inquiring into each communication, agreement, side agreement, understanding, and rendering of advice," it could lead to "contentious discovery disputes" and "sprawling litigation" that would "defeat[] the express goals of arbitration to yield economical and swift outcomes." *Citigroup Glob. Markets Inc.* v. *Abbar*, 761 F.3d 268, 276 (2d Cir. 2014). In fact, that arguably happened here: before the district court entered its permanent injunction, the parties engaged in nearly nine months of costly discovery on the threshold arbitrability question, *see* Order Setting Trial Date & Related Dates, Dkt. No. 52, including at least seven oral depositions, *see* 2-ER-187-240.

This case thus reflects the importance—to both parties and courts—of a definition of "customer" that is easily determinable at the outset of the dispute. Market participants and courts need a definition of "customer" that provides predictability and conserves judicial and party resources. Without a clear test, a threshold dispute over whether a dispute is arbitral may defeat the very purpose of having FINRA arbitration. To ensure the continued value of FINRA arbitration for member-customer disputes, it is important that the determination of a customer relationship under Rule 12200 be simple, clear, and easily administrable.

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

Four federal courts of appeals, including this one, have addressed the meaning of "customer" in FINRA Rule 12200. All have found, or at least suggested, that the term "customer" requires the investor either to have opened an account or made a purchase from the FINRA member or its associated person. *Abbar*, 761 F.3d at 276; *Goldman, Sachs & Co.* v. *City of Reno*, 747 F.3d 733, 741 (9th Cir. 2014); *Cary*, 709 F.3d at 386; *Berthel Fisher & Co. Fin. Servs.* v. *Larmon*, 695 F.3d 749, 752-753 (8th Cir. 2012). The district court's decision below properly followed that precedent. The district court recognized that (1) there must be an actual purchase or account, and not an abstract financial benefit; and (2) the purchase or account must be with the FINRA member or one of its associated persons, not anyone loosely connected to the FINRA member. The district court's approach is correct as a matter of the plain text of Rule 12200, and precedent interpreting that rule. It is also easily administrable by courts, and consistent with the reasonable expectations of FINRA members and the investing public.

A. The District Court Correctly Applied a Purchase-or-Account Test to Determine Customer Status.

After reviewing decisions of this Court and other federal courts of appeals, the district court correctly held that, to be a "customer" of a FINRA member or its associated person, a party must have either "held an[] account" with or "purchased [a] commodity or service" from the FINRA member or its associated person. *See* 1-ER-12-13. That test is far superior to the amorphous financial-benefit test that the Investors have advocated.[7]

1. The Purchase-or-Account Test Is Correct and Well Established.

a. The district court's test is consistent with the plain meaning of the word "customer." The FINRA Rules do not define "customer," except to state that it excludes brokers and dealers. *See* FINRA Rule 12100(k) ("A customer shall not include a broker or dealer."). But as ordinarily understood, a "customer" is "one that purchases a commodity or service," Merriam-Webster's Collegiate Dictionary 308 (11th ed. 2006); *see* American Heritage

[7] Although supporting the Investors, PIABA advocates a distinct "two-part test" that looks to (i) "the nature of the dealings or services between the associated person and the investor" and (ii) "whether the associated person represented that he was acting on behalf of the FINRA member, or the investor perceived as much." PIABA Br. 11. That test suffers from the same flaws as the Investors' preferred formulation: it is not clear or readily ascertainable, and would lead to substantial discovery on the threshold question of whether the dispute is arbitrable. *See infra* at 20-25.

Dictionary of the English Language 450 (4th ed. 2000) ("[o]ne that buys goods and services"); New Oxford American Dictionary 427 (3d ed. 2010) ("a person or organization that buys goods or services from a store or business"); The American Heritage College Dictionary 351 (4th ed. 2007) ("[o]ne that buys goods or services"). Consistent with that ordinary understanding, a customer in the securities industry is an investor who opens an account or executes a transaction. Those are the goods and services that FINRA members offer.

That is also how the word "customer" is used in other FINRA rules. Courts generally presume that the same word bears the same meaning throughout a text. *See In re Stevens*, 15 F.4th 1214, 1218 (9th Cir. 2021) ("When we read a statute as a whole and see that it uses nearly identical terms in different places, we give those terms similar meanings."). In addition to Rule 12200, numerous other FINRA rules use the term "customer" when outlining a FINRA member's obligations to investors who hold accounts or execute transactions. *See*, *e.g.*, FINRA Rule 2090 (Know Your Customer); Rule 2231 (Customer Account Statements); Rule 2232 (Customer Confirmation); Rule 5300 (Handling of Customer Orders); Rule 8110 (Availability of Manual to Customers).

PIABA and the Investors take the contrary position that Rule 12200 is "especially broad," PIABA Br. 7, and provides an "expansive definition" of customer, Investors Br. 1. But again, aside from an inapplicable exclusion, the FINRA Rules do not define "customer"—much less provide a supposedly "expansive" definition. And nothing about the plain meaning of the word "customer" suggests that FINRA intended Rule 12200 to be "especially broad." To the contrary, had FINRA intended to provide "the investing public" unfettered access to FINRA arbitration, as PIABA repeatedly contends, *see* PIABA Br. 5, 7, there would be no reason for FINRA to have limited Rule 12200 to only those with a *customer* relationship to a FINRA member. The Rules could have instead authorized arbitration for any dispute between an "investor and a FINRA member," or simply for any dispute "with a FINRA member." Rule 12200 does not create such an open-ended scheme; consistent with arbitration's contractual moorings, it limits arbitration to a presumably knowable set of "customers."

b. This Court has previously applied a test for who is a "customer" consistent with the word's ordinary meaning. In 2014, the Court defined "a customer" as "a non-broker and non-dealer who *purchases commodities or services from a FINRA member* in the course of the member's

FINRA-regulated business activities, i.e., the member's investment banking and securities business activities." *Goldman*, 747 F.3d at 741 (emphasis added). Although the Court did not expressly hold that making a purchase or holding an account with a FINRA member is *required* to be a "customer" under Rule 12200, that requirement follows from the plain-meaning definition of "customer" that this Court already embraced.

In arriving at that definition of customer, this Court found "persuasive" the analysis of the Second and Fourth Circuits. In *UBS Financial Services* v. *West Virginia University Hospitals*, the Second Circuit, while expressly declining to provide a "comprehensive definition," recognized that "[t]he 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." 660 F.3d 643, 650 (2d Cir. 2011). A few years later, in *UBS Financial Services* v. *Carilion Clinic*, the Fourth Circuit held that, "when FINRA uses 'customer' in Rule 12200, it refers to one, not a broker or dealer, who purchases commodities or services from a FINRA member in the course of the member's business activities insofar as those activities are covered by FINRA's regulation, namely the activities of investment banking and the securities

business." 706 F.3d 319, 325 (4th Cir. 2013); *see Cary*, 709 F.3d at 386 (requiring purchase of commodities or services from a FINRA member).

Soon after this Court decided *Goldman*, the Second Circuit doubled-down on its *UBS* decision. This time, it defined the "precise boundaries of the FINRA meaning of customer" and adopted a "bright-line test" that the "only relevant inquiry in assessing the existence of a customer relationship is whether an account was opened or a purchase made." *Abbar*, 761 F.3d at 276; *see Bensadoun* v. *Jobe-Riat*, 316 F.3d 171, 176-177 (2d Cir. 2003) (reasoning that opening an account with a FINRA member creates customer status). Despite minor variations in language, these definitions "all have one thing in common—a business relationship between the purported customer and the FINRA member, usually by purchasing goods or services from a FINRA member." *Centaurus Fin., Inc.* v. *Ausloos*, 2019 WL 2027271, at *5 (E.D. Wis. May 8, 2019).

Recent decisions by district courts in this Circuit have determined whether an investor is a customer by looking to whether the investor held an account with or made a purchase from the FINRA member. For example, in a parallel proceeding involving the same investment at issue here, another district court permanently enjoined the underlying arbitration because the

investor had not "purchase[d] commodities or services from a FINRA member." *Oppenheimer & Co. Inc.* v. *Ginn*, 2023 WL 5019901, at *4 (C.D. Cal. Aug. 7, 2023) (citing *Abbar* and *Cary*). Other district courts have likewise determined that an investor was not a customer because he or she had never made a purchase or held an account with the FINRA member. *See*, *e.g.*, *COR Clearing, LLC* v. *LoBue*, 2016 WL 9088704, at *3-4 (C.D. Cal. June 16, 2016) (investor "did not open any accounts" or "purchase[] [stock] directly from [the FINRA member]"); *COR Clearing, LLC* v. *Ashira Consulting, LLC*, 2016 WL 7638177, at *3, 5 (C.D. Cal. Jan. 13, 2016) (investor "did not purchase commodities or services from [the FINRA member]" and "never opened her own account with [the FINRA member]").

The purchase-or-account test is thus the better reading of the plain text, would continue to align this Circuit with the Second and Fourth Circuits, and is supported by prevailing precedent nationwide.

2. The Purchase-or-Account Test Is Clear and Easily Administrable.

The purchase-or-account test also has a number of practical benefits—most notably transparency, administrability, and fairness.

First, the purchase-or-account test is transparent to everyone, including FINRA members, the investing public, and courts. As the Second Circuit

highlighted, "[t]he elements of an account and a purchase are visible to all." *Abbar*, 761 F.3d at 273. As a result, the purchase-or-account test "gives the financial community reasonable expectations" about the relationships that will qualify as a customer relationship and subject the FINRA member to mandatory arbitration. *Id.*

Second, the purchase-or-account test is administrable by courts, ensuring that the benefits of FINRA arbitration are not lost. Unlike other potential tests that would require an examination into every interaction or communication surrounding the investment, account status or a purchase can typically be determined "at the outset of the dispute resolution process," thereby "avoid[ing] the need for lengthy proceedings over whether arbitration is available." *Abbar*, 761 F.3d at 273. The test is also objective, avoiding lengthy inquiries into the parties' intentions.

Third, the purchase-or-account test is fair to the investing public. If the investor transacts with the FINRA member or its associated person, or even opens an account as the precursor to a transaction, that investor is "assure[d] access to FINRA arbitration for its grievances." *Abbar*, 761 F.3d at 276-277. To determine which financial advisors are associated persons of a FINRA member (and thus would be subject to mandatory FINRA arbitration), the

investing public need only consult FINRA's Broker-Check website, FINRA's free online tool that assists investors researching the background of brokers and FINRA member brokerage firms.[8]

Finally, it is important to remember that an investor who is unable to establish a customer relationship is not stripped of her legal claim. PIABA falsely warns that some fraud "victims would not be able to seek redress" under a purchase-or-account test. PIABA Br. 14. But investors who cannot arbitrate can still raise available claims in a judicial proceeding. The purchase-or-account test simply requires a clear and knowable relationship between two parties *sufficient to send them to FINRA arbitration*. It reflects that, without a real member-customer connection or a separate arbitration clause, there is simply no contractual basis for forcing FINRA members to arbitrate. *See Viking River Cruises, Inc.*, 596 U.S. at 651.

3. The Investors' Financial-Benefit Test Lacks Support.

The Investors advocate an alternative financial-benefit test to determine customer status. In their view, if the FINRA member or associated person "ultimately benefited financially" from an investment, "one could say that" the investor has "purchased a commodity from" that member or associated

[8] https://brokercheck.finra.org/.

person. 1-ER-14; *see* Investors Br. 13, 15 (looking at who had "financial control" or "owned' the entity whose securities the Investors purchased). That test departs both from the text of Rule 12200 and from precedent.

First, the financial-benefit theory "does not track the FINRA rule." 1-ER-14. In Rule 12200, FINRA used the word "customer," which "focuses on the broker's action in facilitating the purchase, not on the entity or person who may have derived an ultimate financial benefit from the investment." *Id.* We do not ordinarily use the word "customer" to refer to an abstract financial benefit. An author of a book may benefit financially when a shopper purchases that book from a local bookstore, but it would be odd to call the shopper a "customer" of the author. A private equity fund may benefit financially when somebody purchases a product from a start-up that the fund invests in, but it would be odd to call the purchaser a "customer" of the private equity fund. The same is true here: many entities or individuals, including Woods or Oppenheimer, may have benefited financially from the Investors' purchases, but that does not mean that the Investors were customers of Woods or Oppenheimer.

Of course, FINRA could have written Rule 12200 more expansively. If FINRA had wanted to authorize arbitration against any FINRA member who

benefited financially, it could have provided that a dispute must be between an "investor and any FINRA member that benefited financially from the investor." Instead, Rule 12200 specifically limits the right to compel arbitration to customers—a limitation that should be respected.

Second, various courts have rejected the theory that financial benefit is sufficient to establish a customer relationship. In *UBS Securities LLC* v. *Leitner*, the investor seeking to compel arbitration "contend[ed] that he purchased a service from UBS Securities [a FINRA member] by virtue of having paid fees in connection with his investment." 735 Fed. Appx. 16, 18 n.1 (2d Cir. 2018). The Second Circuit held that the argument was "unavailing" because (i) the investor had not "paid fees directly to" the FINRA member, and (ii) even if the FINRA member had received "some portion of the fees [the investor] incurred" from an affiliate, the FINRA member's service "would have been purchased by, and performed for the benefit of," the affiliate rather than the investor. *Id.*

The Fourth Circuit has likewise rejected an arbitration demand from an investor grounded in the fact that the FINRA member's associated person obtained a financial benefit from the investment. In *Cary*, an investor sought to compel arbitration because the FINRA member's associated person

obtained "commissions . . . for the referrals" that he made to another financial advisor who ultimately sold the investments to the investor. 709 F.3d at 387. The Fourth Circuit determined that even though the two financial advisors "shared commissions" (*i.e.*, benefited financially) from the investments, investors were not automatically customers of both financial advisors. *Id.* at 387-388. In sum, "[s]imply because [a FINRA member] is benefiting financially from [a] bargain does not mean that" the investor is a customer under Rule 12200. *Ausloos*, 2019 WL 2027271, at *5.

B. The District Court Correctly Required That the Customer Relationship Be Directly with the FINRA Member or Its Associated Person.

Although a purchase or an account is a prerequisite to establishing a customer relationship, not any purchase or account suffices. The purchase must be made or the account opened *directly with the FINRA member or its associated person*. To determine whether the Investors were customers of Oppenheimer (the FINRA member) or Woods (an associated person) within the meaning of Rule 12200, the district court appropriately asked whether the Investors had made purchases from or held accounts with Oppenheimer or Woods. In asking that common-sense question, the district court did not graft

"novel" or "additional" requirements onto Rule 12200, as PIABA and the Investors claim it did. PIABA Br. 8; *see* Investors Br. 2.

1. The District Court Correctly Avoided Conflating the Activities of Separate Entities and Individuals.

The district court appropriately rejected the Investors' invitation to collapse together all the entities and individuals that had any connection to the investments at issue. Instead, the court analyzed whether any of the Investors had a direct customer relationship with either Oppenheimer or with Woods, in his capacity as an Oppenheimer associated person.

Understanding the identity of the parties involved in a transaction is critical to applying Rule 12200. Use of complex corporate structures and networks of financial advisors to market and sell the same investment opportunities is common in the financial services industry. The fact that those financial advisors have relationships or coordinate on a particular investment does not mean that a customer of one of the advisors is automatically also a customer of another advisor. *See Cary*, 709 F.3d at 387. And nothing in Rule 12200 suggests that it is appropriate to disregard separate corporate identities. There is no rule unique to FINRA arbitration that allows a court to disregard the corporate form of related entities and make a customer of one entity the customer of other affiliates. To the contrary, as the Second Circuit

has recognized, the customer relationship may be limited to one entity and place, even though "finance nowadays often involves worldwide sources, networks of information, talent and technology." *Abbar*, 761 F.3d at 276.

Courts have thus declined attempts to compel arbitration with a FINRA member where the claimant did not personally have a customer relationship with the FINRA member or its associated person. For example, they have found that FINRA arbitration is not available where the investor had a customer relationship only with an affiliate of the FINRA member. *See Deutsche Bank Sec. Inc.* v. *Roskos*, 692 Fed. Appx. 52, 54 (2d Cir. 2017) (investors transacted and held accounts with non-member Deutsche Bank entities and "did not purchase a good or service from, nor did they have an account with, either of the Deutsche Bank [FINRA members]"); *Abbar*, 761 F.3d at 276. They have also found that FINRA arbitration is not available where the FINRA member provided services relating to the investment. *See Berthel Fisher & Co.*, 695 F.3d at 753 (FINRA member "provided those services not to the Investors but instead to the [other entities]"); *Morgan Keegan & Co.* v. *Silverman*, 706 F.3d 562, 564 (4th Cir. 2013) (investors "did not have a contractual relationship with [the FINRA member]" when they purchased bonds underwritten by that member). At

bottom, the "mere interaction between a member firm and a third party" does not "transform an investor who only dealt with the third party into a customer of the [FINRA] member firm." *Cary*, 709 F.3d at 387.

2. Requiring a Direct Customer Relationship Does Not Create "Loopholes."

The Investors and their amicus, PIABA, contend that requiring a direct purchase-or-account relationship with a FINRA member or its associated person would create an unwarranted "loophole" in Rule 12200. PIABA Br. 14; *see* Investors Br. 2-3.

For starters, Rule 12200 is precisely written to extend its radius outside the FINRA member itself. The text of the Rule applies not just to FINRA members but also to "associated persons," which are carefully defined. *See* FINRA Rule 12100(b), (w). The district court recognized as much, *see* 1-ER-11-12, and nobody here contests that associated persons are covered. But PIABA asks to broaden Rule 12200 further still, not just to associated persons but to people loosely affiliated with—that is, not even agents of—an associated person. That extension would blow past the text of the Rule and exceed the bounds of permissible arbitration requirements.

Seizing on the district court's use of the word "direct," PIABA accuses the district court of adopting a "novel" indirect/direct distinction that would

allow a "FINRA-registered brokerage firm to avoid arbitration of disputes" by "enlist[ing] the help of agents" and "deal[ing] with investors through such agents." PIABA Br. 2-3. PIABA is wrong on both accounts.

First, far from being "novel," the district court's requirement of a direct relationship between the FINRA member or associated person and the Investors is consistent with the approach taken by other federal courts.[9]

Second, PIABA's contention that a FINRA member "can avoid arbitration" if the FINRA member's associated persons "enlist the help of agents," PIABA Br. 2, rests on a misreading of the district court's decision.

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[9] *See*, *e.g.*, *Cary*, 709 F.3d at 387 (enjoining arbitration where the "investors had no direct customer relationship" with the FINRA member or its associated person); *NYLIFE Sec., LLC* v. *Duhame*, 2020 WL 7075599, at *3 (N.D. Cal. Dec. 3, 2020) (enjoining arbitration because the "registered agent" of the FINRA member had not "acted as a broker-dealer in the underlying transactions"); *Shevland* v. *Orlando*, 629 F. Supp. 3d 1252, 1262-1263 (S.D. Fla. 2022) (requiring "some sort of 'transactional relationship' . . . [to] qualify as a customer under FINRA"); *Jefferies LLC* v. *WTW Inv. Co. LTD*, 2017 WL 8677355, at *1 (N.D. Tex. July 31, 2017) (reasoning that investors were not customers of the FINRA member because they "did not purchase [the] securities from [the FINRA member] or purchase any other services from [the FINRA member] related to their acquisition of [the] securities"); *Pershing LLC* v. *Bevis*, 2014 WL 1818098, at *2-3 (M.D. La. May 7, 2014) (requiring "a direct relationship, contractual or otherwise," and concluding that the failure "to establish a direct customer relationship between the two parties [means] the prerequisites to arbitration under Rule 12200 cannot be met"), *aff'd sub nom. Pershing, L.L.C.* v. *Bevis*, 606 Fed. Appx. 754 (5th Cir. 2015).

PIABA assumes that the financial advisor with whom the Investors transacted (Mooney) was an agent of an associated person (Woods). *See* PIABA Br. 13 (asserting that the district court "determin[ed] that Woods acted through an agent while dealing with [the Investors]"). In fact, the district court found the *opposite*. It previously determined that Mooney was *not* an agent of Oppenheimer or of Woods, in his capacity as an Oppenheimer associated person. *See* SER-196 (The Investors "have pointed to no evidence that Mooney had apparent authority to act as Oppenheimer's agent or as Woods' agent in his capacity as a registered broker of Oppenheimer."). And in the decision below, the court found that the Investors had dropped that agency argument. *See* 1-ER-13 (The Investors "no longer conten[d] that Mooney acted as Woods' agent and therefore [] they were effectively customers of Woods."). Because the district court determined that the Investors did not purchase from an agent of Oppenheimer or its associated person, PIABA targets a strawman.

Properly understood, the district court's decision is entirely consistent with FINRA members' duty to supervise. The duty to supervise applies only to persons associated with a member firm. Indeed, FINRA's supervisory rule, Rule 3100, provides that "[e]ach member shall establish and maintain a system

to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules." FINRA Rule 3100 (Supervisory Responsibilities); *see* FINRA Rule 3200 (Responsibilities Relating to Associated Persons) (detailing specific supervisory responsibilities with respect to associated persons). Requiring the customer relationship to be with a FINRA member's associated person—and not other financial advisors—is thus consistent with the FINRA member's duty to supervise only its associated persons.

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

It is well established that in "construing an arbitration clause," courts "must give effect to the . . . expectations of the parties." *Stolt-Nielsen*, 559 U.S. at 682. That principle applies equally when construing the meaning of the word "customer" in Rule 12200. *Abbar*, 761 F.3d at 274 ("the word 'customer' must be construed in a manner consistent with the reasonable expectations of FINRA members"); *Herbert J. Sims & Co.* v. *Roven*, 548 F. Supp. 2d 759, 763 (N.D. Cal. 2008) (holding that "customer" "must not be defined so broadly as to upset the reasonable expectations of FINRA members"). Adhering to the

reasonable expectations of FINRA members reflects "the longstanding principle that arbitration is a consent-based process." *Cary*, 709 F.3d at 388.

The district court's approach—that an account or a transaction with a FINRA member or its associated person is necessary to establish a customer relationship—results in a predictable outcome that respects the reasonable expectations of FINRA members and their customers. Were this dispute between Oppenheimer and one of its account holders, Oppenheimer would reasonably expect it to be subject to arbitration. In fact, Oppenheimer did not even challenge the arbitration of one investor because that investor "had accounts directly with Oppenheimer and his monthly Oppenheimer statements reflected his investment in Horizon." SER-189. But none of the Investors here was a customer of Oppenheimer or its associated persons. The Investors were instead customers of Mooney, a separate financial advisor, and his employer, Southport, an independent company. Oppenheimer would not reasonably anticipate being pulled into arbitration for Mooney's or Southport's behavior.

Sweeping this dispute within the scope of mandatory customer arbitration would make it nearly impossible for participants in the financial industry to predict with certainty when mandatory arbitration applies, and

thus to formulate reasonable expectations going forward. FINRA members would be deemed to have agreed to arbitrate with some shifting population of investors based on an indeterminate assessment of financial interests and the closeness of complex relationships. That is not what FINRA members expect today, and they would be at a loss as to how to conform their behavior under such a regime.

Departing from the reasonable expectations of the parties may also have the perverse consequence of "discourag[ing] entities from agreeing to arbitrate at all." *Cary*, 709 F.3d at 388. If FINRA members become concerned that Rule 12200 is being "stretched too far in the course of judicial construction," *Cary*, 709 F.3d at 388, FINRA may modify Rule 12200 to eliminate customer status as an independent basis to compel arbitration and may limit arbitration to specific clauses in customer contracts.[10] The upshot would be that some FINRA members and customers could lose the opportunity to benefit from the efficiencies of FINRA arbitration.

* * *

[10] *See* FINRA, Retrospective Rule Review, https://www.finra.org/rules-guidance/rulemaking-process/retrospective-rule-review.

Although there may be "understandable frustration" where there are alleged "fraudulent sales of securities," the district court here respected its "sworn fealty to text." *Cary*, 709 F.3d at 388. The court correctly interpreted Rule 12200 not to permit the Investors to compel Oppenheimer to arbitrate their claims for the simple reason that they were not customers of Oppenheimer or its associated person, Woods. This Court should adopt the Second Circuit's clear purchase-or-account test for customer status and affirm the district court's well-reasoned decision.

CONCLUSION

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

Respectfully submitted,

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September 16, 2024

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1, counsel for *Amicus Curiae* SIFMA hereby certifies that this *amicus* brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 29-2(c) because this brief contains 6,710 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. Counsel's approximation is based on the "Word Count" function of the word-processing program used to draft the enclosed brief.

Counsel for *Amicus Curiae* SIFMA certifies that this brief also complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Expanded font.

Dated: September 16, 2024

/s/ *Robert J. Giuffra, Jr.*
Robert J. Giuffra, Jr.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned attorney states that I am not aware of any related cases currently pending in this Court.

Dated: September 16, 2024

/s/ *Robert J. Giuffra, Jr.*
Robert J. Giuffra, Jr.

CERTIFICATE OF SERVICE

I, Robert J. Giuffra, hereby certify that on September 16, 2024, I caused the foregoing Brief of *Amicus Curiae* SIFMA to be filed with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 16, 2024

/s/ *Robert J. Giuffra, Jr.*
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