

WHERE DO WE FIGHT?: A WAY TO RESOLVE THE CONFLICT BETWEEN A FORUM SELECTION CLAUSE AND FINRA ARBITRATION RULE 12200

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I. INTRODUCTION

The Financial Industry Regulatory Authority (“FINRA”) operates the largest arbitration¹ forum in the United States.² It attempts to resolve disputes between brokerage firms and their customers, as well as between brokerage firms and their employees.³ Virtually all agreements between investors and their stockbrokers include mandatory arbitration agreements, whereby the parties waive their right to trial.⁴ Although the fairness of such mandatory arbitration clauses has been questioned, courts have often found them to be lawful.⁵ In addition, courts have generally upheld both the enforceability and result of the arbitrations.⁶

However, recently, a number of brokerage firms have contracted out the right to arbitration through a forum selection clause,⁷ which is causing friction between brokerage firms, their customers, and FINRA’s mandatory arbitration rules.⁸ Furthermore, a recent circuit court split over the interpretation of forum

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¹ Arbitration is “a method of [alternative] dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding.” BLACK’S LAW DICTIONARY 119 (9th ed. 2009).

² See *About*, FINRA, <http://www.finra.org/AboutFINRA> (last visited Feb. 8, 2015).

³ *Florida Alternative Dispute Resolution: Arbitration and Mediation*, MITCHMCRÆ.COM, <http://www.mitchmcrae.com/florida-business-litigation/alternative-dispute-resolution-arbitration-and-mediation> (last visited Feb. 8, 2015).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ A forum selection clause is “a contractual provision in which the parties establish the place (such as the country, state, or type of court) for specified litigation between them.” BLACK’S LAW DICTIONARY 726, *supra* note 1.

⁸ See generally Paul McCurdy, Philip D. Robben & Genna S. Steinberg, *The Uncertain State of FINRA Arbitration*, PRACTICAL LAW, 9–597–1088 (2015).

selection clauses in Broker-Dealer Agreements has added an additional layer of difficulty.⁹

On August 21, 2014, the United States Court of Appeals for the Second Circuit granted a financial services firm's motion to enjoin a FINRA arbitration brought against the firm by a public financing authority.¹⁰ In doing so, the Second Circuit respectfully erred in holding that a forum selection clause in the Broker-Dealer Agreement superseded FINRA's mandatory arbitration rule.¹¹

In *Golden Empire*, the forum selection clause at issue provided that all actions arising out of the agreement "shall be brought" in federal court in the County of New York.¹² Contrary to the terms of that agreement, FINRA states that members must arbitrate a dispute if the customer requests arbitration.¹³ Nevertheless, the Second Circuit reasoned that the contract at issue contained a merger clause,¹⁴ which stated that the contract contained the entire agreement between the parties.¹⁵ As a result, the forum selection clause was held to have superseded the background FINRA arbitration rule.¹⁶

However, "whether [similar] forum selection clauses [have] superseded [financial services firms'] obligation[s] to arbitrate under FINRA Rule 12200 . . . has been the subject of litigation in multiple circuits, with decidedly mixed results."¹⁷ For instance, similar to the Second Circuit, the United States Court of Appeals for the Ninth Circuit has held that such a forum selection clause superseded FINRA Rule 12200.¹⁸ On the other hand, the United States Court of Appeals for the Fourth Circuit has correctly held

⁹ *Id.*

¹⁰ See *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth. (Golden Empire)*, 764 F.3d 210 (2d Cir. 2014).

¹¹ *Id.*

¹² *Id.* at 216.

¹³ FINRA RULE 12200 (amended 2008), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106 (requiring that parties must arbitrate a dispute under the code if arbitration is requested by the customer).

¹⁴ A merger or integration clause is a "contractual provision stating that the contract represents the parties' complete and final agreements and supersedes all informal understandings and oral agreements relating to the subject matter of the contract." BLACK'S LAW DICTIONARY 880, *supra* note 1.

¹⁵ *Golden Empire*, 764 F.3d at 212.

¹⁶ *Id.* at 215.

¹⁷ *Id.* at 214 (quoting *Goldman, Sachs & Co. v. City of Reno (City of Reno)*, 747 F.3d 733, 736 (9th Cir. 2014)).

¹⁸ See *City of Reno*, 747 F.3d 733.

that a nearly identical forum selection clause did not supersede Rule 12200.¹⁹

Using *Golden Empire* as a case study, this Note will demonstrate that FINRA's mandatory arbitration rule in fact supersedes a forum selection clause. FINRA's rules compel members to arbitrate disputes if (1) the customer requests arbitration; and if (2) the dispute arises in connection with the member's business activities.²⁰

First, Section II summarizes the historical background of the dispute between Goldman Sachs & Co. ("Goldman Sachs") and Golden Empire Schools Financing Authority ("Golden Empire"). Second, Section II identifies the forum selection and merger clauses from the 2004 Broker-Dealer Agreement at issue in *Golden Empire*. Third, Section II provides a brief background of FINRA and its rules and regulations most pertinent to this dispute, mainly FINRA Rule 12200. Fourth, Section II discusses the emerging circuit split and explains the holdings from each of the circuits. As discussed more fully below, *Golden Empire* marks a growing circuit split over the availability of mandatory FINRA arbitration in light of such a narrow forum selection clause.²¹ It also raises several important issues for future litigation.²²

Section III explains why a forum selection clause does not supersede a preexisting obligation to arbitrate under FINRA Rule 12200. Section IV describes the flawed arguments in favor of a forum selection clause superseding FINRA's arbitration requirement. Section V presents a proposal and a guideline to effectively resolve the emerging circuit split.

II. HISTORICAL BACKGROUND

A. *The Dispute Between Goldman Sachs and Golden Empire*

In 2007, Golden Empire hired Goldman Sachs to assist it with three multi-million dollar bond issuances.²³ In each instance, Golden Empire alleged that Goldman Sachs recommended that

¹⁹ See *UBS Fin. Servs. Inc. v. Carilion Clinic (Carilion Clinic)*, 706 F.3d 319 (4th Cir. 2013); see also *UBS Secs. LLC v. Allina Health Sys. (Allina Health Sys.)*, 2013 WL500373 (D. Minn. Feb. 11, 2013) (following *Carilion Clinic*).

²⁰ FINRA RULE 12200, *supra* note 13.

²¹ See generally McCurdy, Robben & Genna S. Steinberg, *supra* note 8.

²² *Id.*

²³ Brief for Defendant-Appellant at 10, *Goldman, Sachs & Co. v. Golden Empire* (No. 13797-CV) (2d Cir. Jul. 19, 2013).

Golden Empire issue its bonds as auction rate securities (“ARS”).²⁴ Golden Empire accepted Goldman Sachs’ recommendations and issued \$95.30 million worth of ARS in 2004, \$20 million worth of ARS in 2006, and \$10 million worth of ARS in 2007.²⁵

However, Golden Empire alleged that in recommending ARS, Goldman Sachs withheld material information by failing to disclose the truth about the ARS market.²⁶ For instance, Goldman Sachs allegedly never told Golden Empire that the “auctions for Golden Empire’s ARS would depend on Goldman Sachs’ unconditional support.”²⁷ In other words, “Goldman Sachs and other banks had placed support bids in auctions for ARS to prevent those auctions from failing.”²⁸ But, Golden Empire did not discover this information until 2008, when Goldman Sachs had ceased its support, supposedly causing Golden Empire’s auctions to fail or set at high interest rates.²⁹ Ultimately, Golden Empire argued that had it “known the truth, it would not have issued ARS as Goldman Sachs recommended.”³⁰

On February 11, 2012, Golden Empire filed a Statement of Claim against Goldman Sachs with FINRA, alleging that Goldman Sachs was liable for the losses that Golden Empire sustained as a result of Goldman Sachs’s purported failure to disclose the truth about the ARS market.³¹

On the other hand, on August 8, 2012, Goldman Sachs sought to enjoin the arbitration of Golden Empire’s claims, on the premise that the parties agreed to litigate the underlying dispute in the United States District Court for the Southern District of New York.³² In support, Goldman Sachs pointed to a forum selection clause included in the contract.³³

On February 8, 2013, the District Court granted Goldman Sachs’ motion to preliminarily enjoin arbitration.³⁴ The District

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Brief for Defendant-Appellant, *supra* note 23, at 10.

³⁰ *Id.*

³¹ *Id.* at 11.

³² Brief for Plaintiff-Appellee at 3, *Goldman, Sachs & Co. v. Golden Empire* (No. 13797–CV) (2d Cir. Oct. 18, 2013); *See* Mot. for Prelim. Inj., *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.* (No. 12–CV–04588), 922 F. Supp. 2d 435 (S.D.N.Y. 2013).

³³ Mot. for Prelim. Inj., *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, *supra* note 32.

³⁴ *Golden Empire Sch. Fin. Auth.*, 922 F. Supp. 2d 435.

Court held that the forum selection clause in the Broker-Dealer Agreement supplanted the arbitration provision in an earlier executed underwriter agreement.³⁵ In essence, it ruled that even if the arbitration provision had not been overridden, the Broker-Dealer agreement covered resolution of the disputes.³⁶ On July 19, 2013, Golden Empire appealed to the Second Circuit.³⁷

B. *The 2004 Broker-Dealer Agreement*

According to both Goldman Sachs and Golden Empire, the 2004 Broker-Dealer Agreement between the two parties included a binding forum selection clause, which stated, in full:

The parties agree that all actions and proceedings arising out of this Broker-Dealer Agreement or any of the transactions contemplated hereby shall be brought in the United States District Court in the County of New York and that, in connection with any such action or proceeding, submit to the jurisdiction of, and venue in, such court.³⁸

In addition, Goldman Sachs alleged that Golden Empire failed to mention that the Broker-Dealer Agreement contained a merger clause, which according to Goldman Sachs, stated in full:

This Broker-Dealer Agreement, and the other agreements and instruments executed and delivered in connection with the issuance of the []ARS, contain the entire agreement between the parties relating to the subject matter hereof, and there are no other representations, endorsements, promises, agreements or understandings, oral, written or inferred, between the parties relating to the subject matter hereof.³⁹

C. *Brief Background of FINRA and Rule 12200*

FINRA is a private not-for-profit corporation that acts as a self-regulatory organization.⁴⁰ It is a non-governmental organiza-

³⁵ *Id.*

³⁶ *Id.*

³⁷ Brief for Defendant-Appellant, *supra* note 23.

³⁸ *Id.* at 33.

³⁹ Brief for Plaintiff-Appellee, *supra* note 32, at 11.

⁴⁰ See ABOUT FINRA, *supra* note 2.

tion, authorized by Congress to regulate member brokerage firms and exchange markets.⁴¹

FINRA's mission is to protect investors by ensuring that the United States securities industry operates fairly and honestly.⁴² In an effort to achieve that mission, FINRA writes and enforces rules,⁴³ governing the activities of more than 4,000 securities firms with approximately 637,000 brokers.⁴⁴ In addition, it monitors firms for compliance with its rules, fosters market transparency, and educates investors.⁴⁵

At issue here is a rule in FINRA's Customer Code, which governs arbitration between FINRA members and their customers.⁴⁶ Specifically, FINRA Rule 12200 states, in full:

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 activities of the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.⁴⁷

D. *The Second Circuit's Decision in Golden Empire*

In *Golden Empire*, the issue presented was whether "the forum selection clause executed by the parties . . . requiring 'all actions and proceedings' to be brought in the Southern District of New York, supersede[d] [FINRA Rule 12200]." ⁴⁸ Ultimately, the Second Circuit held that the forum selection clause superseded an earlier agreement to arbitrate.⁴⁹

Initially, the Second Circuit acknowledged the "federal policy favoring arbitration."⁵⁰ However, it reasoned that the "presump-

⁴¹ *Id.*

⁴² *Id.*

⁴³ FINRA RULES, <http://www.finra.org/Industry/Regulation/FINRARules/> (last visited Feb. 9, 2015).

⁴⁴ *See About, FINRA, supra* note 2.

⁴⁵ *Id.*

⁴⁶ FINRA RULE 12200, *supra* note 13.

⁴⁷ *Id.*

⁴⁸ *Golden Empire*, 764 F.3d 210, 214 (2d Cir. 2014).

⁴⁹ *Id.*

⁵⁰ *Id.* at 215 (citing *Granite Rock Co. v. Int'l Bhd. of Teamsters (Granite Rock)*, 561 U.S. 287, 302 (2010)).

tion [did] not apply to disputes concerning whether an agreement to arbitrate [was] made.”⁵¹ Instead, according to the Second Circuit, the presumption only applied to issues concerning the scope of an arbitration clause.⁵²

Secondly, the Second Circuit asserted that “an agreement to arbitrate is superseded by a later-executed agreement containing a forum selection clause if the clause ‘specifically precludes’ arbitration,⁵³ but there is no requirement that the forum selection clause mention arbitration.⁵⁴ Although the Broker-Dealer Agreement between Goldman Sachs and Golden Empire did not preclude nor mention arbitration, the Second Circuit still held that the forum selection clause was “all-inclusive” and “mandatory.”⁵⁵

Thirdly, the Second Circuit pointed that the Broker-Dealer Agreement contained a merger clause, which contained the entire agreement between the parties relating to the subject matter.⁵⁶ As a result, the Second Circuit determined that the contractual provisions were “sufficiently specific to impute to the contracting parties the reasonable expectation that they would litigate any disputes in federal court, thereby superseding . . . [the] default obligation to arbitrate under FINRA Rule 12200.”⁵⁷

Lastly, the Second Circuit rejected Golden Empire’s claim that the forum selection clause was narrower than at issue in *Applied Energetics*.⁵⁸ Instead, the Second Circuit interpreted the forum selection clause based on its plain meaning, “as generally understood.”⁵⁹ Since arbitrations are regularly described as pro-

⁵¹ *Id.* (quoting *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC.* (*Applied Energetics*), 645 F.3d 522, 526 (2d Cir. 2011)).

⁵² *Id.*

⁵³ *Id.* (citing *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278, 284 (2d Cir. 2005) (quoting *Pers. Sec. & Safety Sys. v. Motorola (Motorola)*, 297 F.3d 388, 396 n. 11 (5th Cir. 2002)).

⁵⁴ *Golden Empire*, 764 F.3d at 215 (citing *Applied Energetics*, 645 F.3d at 525).

⁵⁵ *Id.* at 216.

⁵⁶ *Id.*

⁵⁷ *Id.* (quoting *Applied Energetics*, 645 F.3d at 525–26).

⁵⁸ *Id.*

⁵⁹ *Id.* (quoting *Random House, Inc. v. Rosetta Books, LLC.*, 283 F.3d 490, 492 (2d Cir. 2002)).

ceedings,⁶⁰ it seemed to the Second Circuit that the general understanding of “actions and proceedings” encompassed arbitrations.⁶¹

Afterwards, on September 16, 2014, the Second Circuit granted Golden Empire’s unopposed motion requesting that the Second Circuit stay the mandate for a period of ninety days to allow the appellants time to file a timely petition for a writ of certiorari with the United States Supreme Court.⁶²

E. *The Fourth and Ninth Circuit Split*

On January 23, 2013, the Fourth Circuit held that a forum selection clause in a Broker-Dealer Agreements requiring proceedings to be brought in a particular court, and waiving right to trial by jury, did not have the effect of superseding or waiving a right to arbitrate under FINRA.⁶³ The case presented the issue of whether UBS Financial Services, Inc. (“UBS”) and Citigroup Global Markets, Inc. (“Citi”) were required, as members of FINRA, to arbitrate disputes arising out of the services they provided to Carilion Corporation (“Carilion”) in connection with its multi-million dollar bond issues.⁶⁴ Carilion claimed that during the course of providing those services, UBS and Citi made numerous misrepresentations to it and breached numerous duties.⁶⁵ To resolve its claims, Carilion initiated an arbitration proceeding against UBS and Citi under FINRA Rule 12200.⁶⁶

To an extent, the Fourth Circuit “agree[d] with UBS and Citi that the obligation to arbitrate under FINRA Rule 12200 [could] be superseded and displaced by a more specific agreement between

⁶⁰ *Golden Empire*, 764 F.3d at 216; *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) (“arbitral body conducting a proceeding”); *Citigroup v. VCG*, 598 F.3d 30, 32 (2d Cir. 2010) (“arbitration proceedings”); *City of New York v. Uniformed Fire Officers Ass’n, Local 854*, 263 A.D.2d 3 (N.Y. 1st Dep’t 1999) (referring to arbitration as “the proceeding”) (quoting *Wertlieb v. Greystone P’ships Grp.*, 165 A.D.2d 644 (1st Dep’t 1991); N.Y. C.P.L.R. § 7505 (“arbitration proceeding”); FINRA RULE 12405, http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4146 (last visited Feb. 10, 2015) (referring to FINRA RULE 12200 arbitration as “the proceeding”).

⁶¹ *Golden Empire*, 764 F.3d at 217.

⁶² Order at 1, *Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth.*, 764 F.3d 210 (2d Cir. 2014) (No. 13–797) (granting Motion to Stay the Mandate filed by Appellant Golden Empire Schools Financing Authority and Kern High School District).

⁶³ *Carilion Clinic*, 706 F.3d 319, 321 (4th Cir. 2013).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

the parties.”⁶⁷ However, the Fourth Circuit announced that “any such provision . . . must be sufficiently specific to impute to the contracting parties the reasonable expectation that they are superseding, displacing, or waiving the arbitration obligation created by FINRA Rule 12200.”⁶⁸

Ultimately, the Fourth Circuit ruled that as FINRA members, “UBS and Citi agreed to mandatory arbitration of specified disputes with customers when the customer ‘requests’ such arbitration.”⁶⁹ Thus, according to the Fourth Circuit, “when Carilion initiated arbitration proceedings, it invoked UBS and Citi’s obligation under the FINRA Rules, giving rise to a contractual obligation to arbitrate.”⁷⁰ The Fourth Circuit found “it a more natural reading of the forum selection clause to require that any *litigation* arising out of the agreement would have to be brought in [court] and that as to any such action or proceeding, a jury trial would be waived” (emphasis added).⁷¹ As such, the Court determined that the forum selection clause did not suggest that the right to FINRA arbitration was being superseded or waived.⁷²

On the other hand, on March 31, 2014, the Ninth Circuit held that a forum selection clause superseded the default obligation of FINRA Rule 12200 to arbitrate.⁷³ In 2005 and 2006, the City of Reno had issued approximately \$211 million in complex securities and employed Goldman Sachs as its sole underwriter and broker-dealer.⁷⁴ Years after Reno’s financing collapsed, Reno initiated arbitration before FINRA to resolve its claims against Goldman Sachs arising out of their contractual relationship.⁷⁵ However, Goldman Sachs filed an action to enjoin the FINRA arbitration arguing that Reno had “disclaimed any right to arbitrate by agreeing to forum selection clauses in the contracts between the parties.”⁷⁶

Similar to the Second Circuit, the Ninth Circuit held that “the presumption in favor of arbitra[tion] applies only where the *scope* of the agreement is ambiguous as to the dispute at hand” (empha-

⁶⁷ *Id.* at 328.

⁶⁸ *Id.*

⁶⁹ *Carilion Clinic*, 706 F.3d. at 324.

⁷⁰ *Id.*

⁷¹ *Id.* at 330.

⁷² *Id.*

⁷³ *City of Reno*, 747 F.3d 733 (9th Cir. 2014).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

sis added).⁷⁷ As such, “forum selection clauses need only be sufficiently specific to impute to the contracting parties the reasonable expectation that they would litigate any dispute in federal court.”⁷⁸ Lastly, the Ninth Circuit determined that “an arbitration [was] certainly an action or a proceeding” in terms of the forum selection clause at issue.⁷⁹

In August 2014, the City of Reno filed a writ of certiorari with the United States Supreme Court for review of the Ninth Circuit decision, arguing that the court should have applied a presumption in favor of arbitration pursuant to the Federal Arbitration Act (“FAA”).⁸⁰ On November 10, 2014, the Supreme Court denied the petition without explanation.⁸¹

III. DISCUSSION

In light of a federal policy favoring arbitration under the FAA, persuasive precedent, and FINRA’s mandatory arbitration rule, the Second Circuit in *Golden Empire* respectfully erred in holding that a forum selection clause superseded FINRA Rule 12200.⁸²

A. *The Forum Selection Clause Did Not Supersede FINRA Rule 12200*

First and foremost, the FAA provides that “an agreement in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable.”⁸³ In *Golden Empire*, the defendant Golden Empire accurately indicated that “FINRA Rule 12200 [was] an ‘agreement in writing’ within the scope of the FAA.”⁸⁴ In support, Golden Empire cited multiple circuit cases, which rightly stand for the proposition that FINRA Rule 12200 constitutes an agreement in writing.⁸⁵ In fact, Goldman Sachs al-

⁷⁷ *Id.* at 742.

⁷⁸ *Id.* at 744.

⁷⁹ *City of Reno*, 747 F.3d at 744.

⁸⁰ McCurdy, Robben, & Steinberg, *supra* note 8.

⁸¹ *City of Reno v. Goldman, Sachs, & Co. (City of Reno)*, 135 S. Ct. 477 (2014).

⁸² *See Golden Empire*, 764 F.3d 210, 211 (2d Cir. 2014).

⁸³ Federal Arbitration Act, 9 U.S.C. § 2 (2014).

⁸⁴ Brief for Defendant-Appellant, *supra* note 23, at 23.

⁸⁵ *Id.* at 27 (citing *Kidder, Peabody & Co., Inc. v. Zinsmeyer Tr. P’ship*, 41 F.3d 861, 863–64 (2d Cir. 1994) (FINRA RULE 12200 “constitutes an ‘agreement in writing’”); *see also* Waterford

legedly never “dispute[d] that FINRA Rule 12200 constitute[d] a written agreement to arbitrate.”⁸⁶

Therefore, as a FINRA member, Goldman Sachs was bound to adhere and to comply with FINRA’s rules and regulations, including FINRA Rule 12200.⁸⁷ As mentioned before, FINRA Rule 12200 had required that “parties must arbitrate a dispute under the Code if arbitration under the Code [was] . . . required by a written agreement.”⁸⁸ According to federal law, “the [FAA] . . . requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”⁸⁹

Therefore, the agreement in writing between Golden Empire and Goldman Sachs as per FINRA Rule 122000 was complete, clear, and unambiguous on its face.⁹⁰ As a result, it should have been enforced according to the plain meaning of its terms and should not have superseded a narrower forum selection clause in the 2004 Broker-Dealer Agreement.⁹¹

B. *The Federal Policy Favoring Arbitration*

Under federal law, a forum selection clause does not supplant a preexisting obligation to arbitrate.⁹² The Federal Arbitration Act guarantees a presumption in favor of arbitration and requires that where the parties have agreed to arbitrate, they must do so in lieu of going to court.⁹³ In *Golden Empire*, however, the Second Cir-

Inv. Serv., Inc. v. Bosco, 682 F.3d 348, 353 (4th Cir. 2012) (quoting *Wash. Square Sec. Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004)); *MONEY Secs. Corp. v. Bornstein*, 390 F.3d 1340, 1342 (11th Cir. 2004) (“Code itself constitutes the agreement”) (quoting *Multi-Fin. Sec. Corp. v. King*, 386 F.3d 1364, 1366 (11th Cir. 2004)); *Liberte Capt’l Grp., LLC v. Capwill*, 148 F. App’x 413, 416 (6th Cir. 2005) (unpublished) (“[W]e are mindful that the NASD Code constitutes an ‘agreement in writing’ under the Federal Arbitration Act.”).

⁸⁶ *Id.* at 27.

⁸⁷ FINRA BY-LAWS OF CORPORATIONS, art. 4 § 1 (amended July 2007), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4609 (last visited Feb. 11, 2015) (requiring all members to comply with FINRA Rules).

⁸⁸ FINRA RULE 12200, *supra* note 13.

⁸⁹ *UBS Fin. Servs., Inc. v. W. Virginia Univ. Hospitals, Inc.*, 660 F.3d 643, 648 (*W. Virginia Univ. Hospitals, Inc.*) (2d Cir. 2011) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Carilion Clinic*, 706 F.3d 319 (4th Cir. 2013).

⁹³ See Federal Arbitration Act, 9 U.S.C. §§ 1–16, 201–208, 301–307 (1925); see *In re Am. Express Fin. Advisors Secs. Litig.*, 672 F.3d 113, 127 (2d Cir. 2011) (“[T]he FAA’s primary purpose [is to] ensur[e] that private agreements to arbitrate are enforced according to their terms.”).

cuit “erred in failing to apply a presumption in favor of arbitration, given that it [was] undisputed that Golden Empire and Goldman Sachs ha[d] a written agreement to arbitrate.”⁹⁴

Indeed, the Second Circuit recognized the presumption in favor of arbitration.⁹⁵ However, it only applied the presumption to issues concerning the *scope* of an arbitration clause.⁹⁶ As a result, in interpreting FINRA Rule 12200, an agreement in writing within the scope of the FAA, the Second Circuit failed to give “due regard . . . to the federal policy favoring arbitration.”⁹⁷

In addition, “when determining whether to stay a judicial proceeding in favor of arbitration the court considers whether the dispute is arbitrable.”⁹⁸ In *Golden Empire*, that inquiry required the Second Circuit to address two questions: (1) whether the parties had agreed to arbitrate, and if so, (2) whether the scope of the agreement to arbitrate encompassed the claims asserted.⁹⁹ While FINRA Rule 12200 was not necessarily a typical arbitration clause, and while the rule was never mentioned in the 2004 Broker-Dealer Agreement, a presumption in favor of arbitration still applied “whether the problem at hand [was] the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”¹⁰⁰

In fact, the existence of a broad agreement to arbitrate—FINRA Rule 12200—created a presumption of arbitrability, “which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”¹⁰¹ Therefore, the federal policy favoring arbitration was triggered since the dispute between Golden Empire and Goldman Sachs was in fact arbitrable¹⁰² ac-

⁹⁴ Brief for Defendant-Appellant, *supra* note 23, at 23.

⁹⁵ *Golden Empire*, 764 F.3d 210, 215 (2d Cir. 2014).

⁹⁶ *Id.*

⁹⁷ *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76.

⁹⁸ *Biremis, Corp. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 11–CV–4934, 2012 WL 760564 (E.D.N.Y. Mar. 8, 2012).

⁹⁹ *Id.* (citing *Chelsea Square Textiles, Inc. v. Bombay Dyeing and Mfg. Co. Ltd.*, 189 F.3d 289 (2d Cir. 1999)).

¹⁰⁰ *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983); see *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 584–85 (1960) (In the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here . . . the arbitration clause [is] quite broad.”).

¹⁰¹ *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 74 (2d Cir. 1997) (citing *Collins & Aikman Products Co. v. Building Systems, Inc.* 58 F.3d 16 (2d Cir. 1995) (referencing federal policy in favor of arbitration)).

¹⁰² *Chelsea Square Textiles, Inc.*, 189 F.3d 289.

ording to FINRA Rule 12200, an arbitration agreement in writing within the scope of the FAA.¹⁰³

C. *Golden Empire Was Fully Entitled to Demand Arbitration*

Under FINRA Rule 12200, as a customer, Golden Empire was entitled to demand arbitration of a dispute with its underwriter, Goldman Sachs.¹⁰⁴ Even assuming, *arguendo*, that FINRA Rule 12200 does not constitute an agreement in writing, it nevertheless requires that members of FINRA arbitrate a dispute arising in connection with the member's business activities if "requested by a customer."¹⁰⁵

In addition, Goldman Sachs allegedly never "dispute[d] that Golden Empire was a 'customer' within the meaning of FINRA Rule 12200, or that the dispute '[arose] in connection with the business activities' of Goldman Sachs."¹⁰⁶ Besides, both the Second and Fourth Circuit have held that an issuer of securities such as Golden Empire is a "customer" within the meaning of FINRA Rule 12200 and therefore fully entitled to demand arbitration.¹⁰⁷

D. *Goldman Sachs' Failure to Arbitrate Violated the Law and Public Policy*

By seeking to avoid an arbitration instituted at the request of its customer, Goldman Sachs violated both the Securities Exchange Act of 1934 and numerous FINRA regulations. In particular, "Section 15A(b) of the Exchange Act provides FINRA with not only the statutory authority, but also the obligation, to discipline its members for failing to comply with FINRA regulations."¹⁰⁸

¹⁰³ FINRA RULE 12200, *supra* note 13.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (requiring parties to arbitrate if required by a written agreement *or* requested by the customer).

¹⁰⁶ Brief for Defendant-Appellant, *supra* note 23, at 27.

¹⁰⁷ *W. Virginia Univ. Hospitals, Inc.*, 660 F.3d 643, 650 (2d Cir. 2011) (ARS issuer was "customer" because it "purchased a service, specifically auction services" from its underwriter); *Carilion Clinic*, 706 F.3d 319, 327–28 (4th Cir. 2013) (ARS issuer was a "customer" of its underwriter); see *Multi-Fin. Sec. Corp.*, 386 F.3d 1364 (11th Cir. 2004) (holding that Rules 1010(c) and 1030(a) of the Code, a valid written agreement to arbitration, therefore provide[d] that King may demand arbitration for its dispute with IFG.).

¹⁰⁸ McCurdy, Robben & Steinberg, *supra* note 8; See Securities Exchange Act § 15A(b), 15 U.S.C.A. § 78o-3(b)(7) (West 2010).

As an initial matter, Goldman Sachs improperly inserted a forum selection clause in its contracts with customers.¹⁰⁹ In doing so, it allegedly violated FINRA IM-12000, titled “Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes.”¹¹⁰ FINRA IM-12000 provides that it “may be deemed conduct inconsistent with just and equitable principles of trade and a violation of FINRA Count Rule 2010 for a member . . . to fail to submit a dispute to arbitration under the Code as required by the Code.”¹¹¹

As mentioned many times before, Goldman Sachs failed to submit its dispute with Golden Empire to arbitration under the Code as required by FINRA Rule 12200.¹¹² Nothing in FINRA IM-12000 precluded Goldman from entering into a *specific* agreement with *Golden Empire* to waive arbitration under the Code.¹¹³ Rather, “the only effect of [IM-12000] [was] to provide that if the Code require[d] arbitration, a failure to arbitrate [was then] unjust” (emphasis added).¹¹⁴ Therefore, Goldman Sachs’ conduct was allegedly inconsistent with just and equitable principles of trade and a violation of FINRA Rule 2010.¹¹⁵

E. *The Forum Selection Clause Was Void*

Under the Securities Exchange Act of 1934, a forum selection such as the one at issue in *Golden Empire* is void. Section 29(a) of the Exchange Act states that “any condition, stipulation, or provision binding any person to waive compliance with . . . any rule of a self-regulatory organization, shall be void.”¹¹⁶ In other words, “Section 29(a) explicitly invalidates provisions in brokerage agreements that require customers to waive compliance with FINRA

¹⁰⁹ See generally *Second Circuit Rules Broad Forum Selection Clause Trumps FINRA Rule Requiring Arbitration*, BRACEWELL & GIULIANI.COM, <http://www.bracewellgiuliani.com/news-publications/updates/second-circuit-rules-broad-forum-selection-clause-trumps-finra-rule-require> (last visited Feb. 13, 2015).

¹¹⁰ FINRA IM-12000 (amended 2008), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4098 (last visited Feb. 11, 2015).

¹¹¹ *Id.*

¹¹² FINRA RULE 12200, *supra* note 13.

¹¹³ *Citigroup Glob. Markets, Inc. v. Municipal Elec. Auth. of Georgia*, No. 14-CV-2903 (AKH), 2014 WL 3858509 (S.D.N.Y. 2014).

¹¹⁴ *Id.* at 3.

¹¹⁵ FINRA IM-12000, *supra* note 110; FINRA RULE 2010 (amended 2008), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=5504 (last visited Feb. 11, 2015).

¹¹⁶ Securities Exchange Act § 29(a), 15 U.S.C.A. § 78cc (West 2010).

rules.”¹¹⁷ Therefore, the Second Circuit mistakenly “held in the past that parties could contract around FINRA rules” since that suggestion “seems to be “vitiated by [Section 29(a)].”¹¹⁸

Furthermore, “the voluntariness of an agreement is irrelevant to whether Section 29(a) forbids it.”¹¹⁹ If a stipulation, such as a forum selection clause, waives compliance with a statutory duty under FINRA, it is void under Section 29(a), whether voluntary or not.¹²⁰ As Golden Empire alleged, “even assuming that the forum selection clause cover[ed] the underlying dispute, and also that the term ‘actions and proceedings’ actually address[ed] arbitration, a forum selection clause does not affect a waiver of a preexisting obligation to arbitrate.”¹²¹ In *Golden Empire*, according to FINRA Rule 12200, the parties had a broad, preexisting obligation to arbitrate all “disputes.”¹²²

Moreover, since the forum selection clause presented a direct conflict, Goldman Sachs allegedly could and should have “included an express waiver of arbitration in the parties’ agreements.”¹²³ However, in failing to do so and considering the circumstances, the forum selection clause was not only improper but was also void.¹²⁴

F. *The Forum Selection Clause Never Excluded Nor Even Mentioned Arbitration*

In *Golden Empire*, the forum selection clause did not address, much less expressly exclude, arbitration.¹²⁵ In fact, it is undisputed that the forum selection clause at no point remotely referred to

¹¹⁷ Jill Gross, *Second Circuit Holds Forum Selection Clause Trumps FINRA Arbitration Requirement*, INDISPUTABLY (Aug. 21, 2014), <http://www.indisputably.org/?p=5783>.

¹¹⁸ *Id.*

¹¹⁹ *Harsco Corp. v. Segui*, 91 F.3d 337, 343 (2d. Cir. 1996) (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987)).

¹²⁰ *Id.*

¹²¹ Brief for Defendant-Appellant, *supra* note 23, at 42.

¹²² FINRA RULE 12200, *supra* note 13.

¹²³ Brief for Defendant-Appellant, *supra* note 23 at 42; *see UBS Fin. Servs. Inc. v. Carilion Clinic*, 880 F. Supp. 2d 724, 732 (E.D. Va. 2013) (“If they had intended to contract out of that obligation, and to overcome the federal preference in favor of arbitration, they could and should have included an explicit term in their written agreement.”).

¹²⁴ *See generally* 15 U.S.C.A. § 78cc (2010).

¹²⁵ *See Motorola*, 297 F.3d 388, 396 n. 11 (5th Cir. 2002) (“[W]e cannot nullify an arbitration clause unless the forum selection clause specifically precludes arbitration.”); *Kelso Enterprises Ltd. v. A.P. Moller-Maersk*, 375 F. App’x 48, 50 (2d Cir. 2010) (“The forum selection clause . . . does not specifically preclude arbitration We therefore find that the parties are bound to arbitrate their cargo damage claim.”).

arbitration.¹²⁶ Instead, it stated only that “actions and proceedings” must be brought in the Southern District of New York.¹²⁷

According to the Fourth Circuit and United States District Court of Minnesota, the term “actions and proceedings” as used in the forum selection clauses did not include arbitrations.¹²⁸ Assuming, *arguendo*, that the forum selection clause did include arbitration, it “would [then] state that ‘all proceedings, including arbitration . . . shall be brought in’ court.”¹²⁹ “In whatever way that sentence could be read, it could not be read to *preclude* arbitration; to the contrary, it presumes its availability but localizes it, albeit to a forum where it could not be pursued” (emphasis added).¹³⁰ In other words, the forum selection clause would then illogically require arbitration to be brought in a court of law.¹³¹

Overall, the term “actions and proceedings” is generally understood as a term of art.¹³² For instance, the “New York Civil Practice Law and Rules primarily use ‘action’ and ‘proceeding’ to refer to *judicial disputes, not to arbitration*” (emphasis added).¹³³ Similarly, Federal Rule of Civil Procedure 1 provides, in part, that “these rules govern the procedure the procedure in all *civil actions and proceedings* in the United States district courts” (emphasis added).¹³⁴ In addition, as per the Fourth Circuit, the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”) has also followed the approach of construing “actions and proceedings” when used in the context of courts and jury trials to refer to judicial actions and not arbitration.¹³⁵

¹²⁶ Brief for Plaintiff-Appellee, *supra* note 32, at 3; Brief for Defendant-Appellant, *supra* note 23, at 33.

¹²⁷ *Id.*

¹²⁸ *Carilion Clinic*, 706 F.3d at 329–30; *Allina Health Sys.*, 2013 WL 500373 (following *Carilion Clinic*).

¹²⁹ *Carilion Clinic*, at 329.

¹³⁰ *Id.*

¹³¹ Brief for Defendant-Appellant, *supra* note 23, at 39.

¹³² *Carilion Clinic*, 706 F.3d at 330.

¹³³ *Id.* (citing *Int’l Union of Operating Eng’rs Local No. 463 v. City of Niagara Falls*, 743 N.Y.S.2d 236, 238 (Sup. Ct. Niagara Co. 2002), *aff’d sub nom.*, *Bathurst v. City of Niagara Falls*, 298 A.D.2d 1010 (4th Dep’t 2002)).

¹³⁴ FED. R. CIV. P. 1.

¹³⁵ *Carilion Clinic*, 706 F.3d at 330; *Motorola*, 297 F.3d at 395–96 (interpreting agreement requiring “any suit or proceeding” to be subject to the exclusive jurisdiction of the Texas courts not to include arbitration).

G. *The Reasonable Intent of the Parties Was to Arbitrate*

Under the circumstances, as parties to FINRA Rule 12200, it is only reasonable to construe that the intent of both Goldman Sachs and Golden Empire was to arbitrate their dispute.¹³⁶

First, as mentioned before, there was no explicit intention to rescind or waive a prior obligation to arbitrate on the part of either Goldman Sachs or Golden Empire.¹³⁷ As a result, it is only logical to presume that the default mandatory arbitration rule was still in effect and governed the dispute, which arose in connection with the business activities of the member.¹³⁸

Second, as a FINRA member, Goldman Sachs could have very well faced disciplinary action by FINRA for violating its rules mandating arbitration.¹³⁹ While it may appear that the forum selection clause was intended to supersede or waive the right to arbitration under FINRA Rule 12200, the risk of facing disciplinary action certainly outweighed the benefit of seeking to enforce a favorable forum selection clause.¹⁴⁰

Third, the Fourth Circuit has found “it a more natural reading of the forum selection clause to require that any *litigation* arising out of the agreement would have to be brought in the United States District Court in New York County and that as to any such action or proceeding, a jury trial could be waived” (emphasis added).¹⁴¹ Overall, the Fourth Circuit “believe[s] that it would never cross a reader’s mind that the clause provides that the right to FINRA arbitration was being superseded or waived,” as “no word even suggesting supersedence, waiver, or preclusion exists in the sentence.”¹⁴²

Therefore, in *Golden Empire*, the Second Circuit respectfully ignored the context in which the term “actions and proceedings”

¹³⁶ See FINRA RULE 12200, *supra* note 13; see also *In re Am. Express Fin. Advisors Secs. Litig.*, 672 F.3d 113, 127 (2d Cir. 2011) (“As with any other contract, the parties’ intentions with respect to arbitration agreement control”).

¹³⁷ Brief for Plaintiff-Appellee, *supra* note 32, at 3; Brief for Defendant-Appellant, *supra* note 23, at 33.

¹³⁸ See *Carilion Clinic*, 706 F.3d at 329; see also *In re Am. Express Fin. Advisors Secs. Litig.*, 672 F.3d at 127 (“[F]ederal policy requires us to construe arbitration clauses as broadly as possible”) (quoting *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995)).

¹³⁹ FINRA IM-12000, *supra* note 110; FINRA RULE 2010, *supra* note 115; McCurdy, Robben & Steinberg, *supra* note 8.

¹⁴⁰ For further discussion, see *infra* Section IV(E).

¹⁴¹ *Carilion Clinic*, 706 F.3d at 330.

¹⁴² *Id.*

was used. Instead, it should have properly applied a presumption in favor of arbitration and interpreted the forum selection clause in a way that permitted arbitration. The parties obviously anticipated that disputes might arise under either of the agreements and intended that different rules of law would apply accordingly.¹⁴³

IV. THE FLAWED ARGUMENTS FAVORING THE FORUM SELECTION CLAUSE

On the other hand, Goldman Sachs argued that Golden Empire was properly enjoined from pursuing claims in a FINRA arbitration, where the parties' contractual agreement was that "all actions and proceedings . . . shall be brought in the United States District Court in the County of New York."¹⁴⁴ However, Goldman Sachs erroneously focused on the principle that its freely contracted agreement overrode *any* potential application of FINRA's general rule entitling its customers to elect arbitration.¹⁴⁵

A. *The Federal Arbitration Policy Did Not Favor a Pro-Arbitration Reading*

Initially, contrary to Golden Empire's insistence and persuasive federal law, Goldman Sachs argued that federal arbitration policy did not favor a pro-arbitration reading of the forum selection clauses in the parties' agreements.¹⁴⁶ Unsurprisingly, Goldman Sachs maintained that "the federal presumption [favoring arbitration] applie[d] only when the scope of an agreement to arbitrate [was] in question, not the existence of the agreement itself."¹⁴⁷ Goldman Sachs further indicated that the presumption only applied to an arbitration agreement, which was "ambiguous about whether it cover[ed] the dispute at hand."¹⁴⁸

¹⁴³ See *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 52–53 (2d Cir. 1993) ("Whether multiple writings should be construed as one agreement depends upon the intent of the parties.").

¹⁴⁴ Brief for Plaintiff-Appellee, *supra* note 32, at 3; Brief for Defendant-Appellant, *supra* note 23, at 33.

¹⁴⁵ See generally Brief for Plaintiff-Appellee, *supra* note 32.

¹⁴⁶ *Id.* at 22.

¹⁴⁷ *Id.* (citing *Applied Energetics*, 645 F.3d 522, 526 (2d Cir. 2011)).

¹⁴⁸ *Id.* (citing *Granite Rock*, 561 U.S. 287, 299–300 (2010)).

However, Goldman Sachs ignored that a valid agreement existed and misframed the issue presented. The question to be asked was not whether the parties had an agreement to arbitrate. In fact, as mentioned before, according to FINRA Rule 12200, the parties had an agreement in writing to arbitrate which was within the scope of the FAA.¹⁴⁹ Instead, the issue as per *Golden Empire*, was whether the “forum selection clause in separate, narrow agreements [was] broad enough to displace the preexisting obligation to arbitrate.”¹⁵⁰ Therefore, the federal presumption favoring arbitration should have applied since the *scope* of an arbitration agreement was in question.¹⁵¹

Furthermore, in arguing that the federal presumption did not apply, Goldman Sachs misapplied the Supreme Court’s ruling in *Granite Rock*. Instead, the Supreme Court had recognized that “where parties concede that they have agreed to arbitrate some matters pursuant to an arbitration clause, the law’s permissive policies in respect to arbitration counsel that any doubts concerning the scope of arbitral issues *should be resolved in favor of arbitration*” (emphasis added).¹⁵² Although Goldman Sachs may disagree, the parties had agreed to “arbitrate any customer dispute that ‘arises in connection with [Goldman Sachs’s] business activities’ and had arguably agreed to litigate only ‘actions and proceedings’ ‘arising out of’ the ‘Broker-Dealer Agreement[.]’”¹⁵³ As a result, since the parties had agreed to arbitrate some matters under FINRA Rule 12200, a presumption in favor of arbitration should have applied under *Granite Rock*.¹⁵⁴

B. *The Freely Contracted Forum Selection Clause Superseded FINRA Rule 12200*

Goldman Sachs incorrectly argued that the binding forum selection clause superseded *any* purported prior agreement to arbitrate.¹⁵⁵ Although FINRA Rule 12200 mandated arbitration,¹⁵⁶

¹⁴⁹ FINRA Rule 12200, *supra* note 13.

¹⁵⁰ Reply Brief for Defendant-Appellant at 6, *Goldman, Sachs & Co. v. Golden Empire* (No. 13797-CV) (2d Cir. Nov. 1, 2013).

¹⁵¹ *Id.*

¹⁵² *Granite Rock*, 561 U.S. at 298-99.

¹⁵³ Reply Brief for Defendant-Appellant, *supra* note 150, at 12.

¹⁵⁴ *Id.*

¹⁵⁵ Brief for Plaintiff-Appellee, *supra* note 32, at 19.

¹⁵⁶ FINRA Rule 12200, *supra* note 13.

Goldman Sachs nevertheless claimed that under federal law “contracting parties [were] free to revoke an earlier agreement to arbitrate by executing a subsequent agreement the terms of which plainly preclude arbitration.”¹⁵⁷ Therefore, according to Goldman Sachs, the parties had entered into an agreement, which “omitted any reference to arbitration” and contained an exclusive freely contracted forum selection clause providing the parties would litigate any dispute arising under the broker-dealer agreement.¹⁵⁸

Assuming, *arguendo*, that the forum selection clause required the parties to litigate, it was however not so broad that it fully displaced Goldman Sachs’ broader, preexisting obligation to arbitrate under FINRA Rule 12200.¹⁵⁹ It is undisputed that the forum selection clause stated that “all actions and proceedings arising out of th[e] Broker-Agreement” were required to be brought in federal court.¹⁶⁰ Likewise, it is undisputed that FINRA Rule 12200 provided that if requested by the customer, Goldman Sachs was required to arbitrate any customer dispute that “[arose] in connection with [its] business activities.”¹⁶¹ Therefore, based on just the text, FINRA Rule 12200 was much broader in scope than the freely contracted forum selection clause.

The forum selection clause did not mandate adjudication as opposed to arbitration. For instance, in this particular circumstance, the term “actions and proceedings” did not include arbitration and instead was understood to mean judicial proceedings.¹⁶² Indeed, according to *Golden Empire*, the parties had not specifically contemplated arbitration when they drafted the forum selection clause.¹⁶³ However, “given that the parties chose New York law to govern the transaction, and given that under New York law ‘actions and proceedings’ are judicial proceedings, it [was] logical that the parties drafted the forum selection clause with judicial proceedings specifically in mind.”¹⁶⁴ As mentioned before, certainly if

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (quoting *Applied Energetics*, 645 F.3d 522, 523–24 (2d Cir. 2011)).

¹⁵⁹ See FINRA RULE 12200, *supra* note 13; See also *O.N. Equity Sales Co. v. Steinke*, 504 F. Supp. 2d 913, 916 (C.D. Cal. 2007) (“[N]umerous courts have held that ‘even if ‘there is no direct written agreement to arbitrate . . . , the [NASD] Code serves as a sufficient agreement to arbitrate, binding its members to arbitrate a variety of claims with third-party claimants.’”). For further discussion, see *supra* Section III.

¹⁶⁰ Brief for Plaintiff-Appellee, *supra* note 32, at 3; Brief for Defendant-Appellant at 33, *supra* note 23.

¹⁶¹ FINRA RULE 12200, *supra* note 13.

¹⁶² *Carilion Clinic*, 706 F.3d 319, 330 (4th Cir. 2013).

¹⁶³ Reply Brief for Defendant-Appellant, *supra* note 150, at 12.

¹⁶⁴ *Id.*; See *Carilion Clinic*, 706 F.3d at 329.

Goldman Sachs had intended to exclude arbitration, it could have easily used appropriate contractual language to do so.¹⁶⁵

Furthermore, FINRA Rule 12200 had created a unilateral right for Golden Empire to demand arbitration of a dispute.¹⁶⁶ Under the forum selection clause, if Goldman Sachs had sought to bring a claim against Golden Empire, it was required to do so in federal court.¹⁶⁷ Meanwhile, as a customer of a FINRA member, Golden Empire was fully entitled to demand arbitration or initiate litigation.¹⁶⁸ Hence, as Golden Empire properly argued, “this result harmonize[d] the two agreements in light of the presumption in favor of arbitration, without doing any harm to the language of the contracts or reasonable expectation of the parties.”¹⁶⁹

C. *The Merger Clause Displaced FINRA Rule 12200*

Goldman Sachs alleged that the Broker-Dealer Agreement contained a merger clause, which stated that the contract contained the entire agreement between the parties.¹⁷⁰ According to Goldman Sachs, the merger clause stated that there were “no other . . . agreements or understandings, oral, written or inferred, between the parties relating to” Golden Empire’s ARS issuances.¹⁷¹ However, Goldman Sachs improperly assumed that the merger clause constituted the entire agreement relating to the parties’ broader relationship.

In fact, the merger clause provided only that the Broker-Dealer Agreement constituted the entire agreement relating to the subject matter hereof.¹⁷² In other words, “it [never] exclude[d] the possibility that the parties would agree to arbitrate disputes that

¹⁶⁵ See *Carilion Clinic*, 706 F.3d at 732; See, e.g., *Homestake Lead Co. of Missouri v. Doe Run Res. Corp.*, 282 F. Supp. 2d 1131, 1142 (N.D. Cal. 2003) (“An arbitration clause can also fail where a subsequent agreement supersedes the arbitration clause with a ‘clear and specific waiver.’ Absent the explicit intention to rescind an arbitration clause, however, the clause will survive even where the prior agreement itself is rescinded by the latter agreement.”) (citing *WorldCrisa Corp. v. Armstrong*, 129 F.3d 71, 75 (2d Cir. 1997)).

¹⁶⁶ FINRA RULE 12200, *supra* note 13.

¹⁶⁷ Brief for Plaintiff-Appellee, *supra* note 32, at 3; Brief for Defendant-Appellant, *supra* note 23, at 33.

¹⁶⁸ FINRA RULE 12200, *supra* note 13. For further discussion, see *supra* Section III.

¹⁶⁹ Reply Brief for Defendant-Appellant, *supra* note 150, at 17.

¹⁷⁰ Brief for Plaintiff-Appellee, *supra* note 32, at 20.

¹⁷¹ *Id.* at 27.

¹⁷² Brief for Plaintiff-Appellee, *supra* note 32, at 11.

fall outside the separate, narrow Broker-Dealer Agreement[],”¹⁷³ Furthermore, similar to the forum selection clause, the merger clause had not expressly excluded the prior agreement to arbitrate and nor did it even remotely mention arbitration.¹⁷⁴ As a result, the merger clause had not displaced FINRA Rule 12200.

D. *The Phrase “All Actions and Proceedings”
Encompassed Arbitration*

In addition, despite Golden Empire’s persistence, Goldman Sachs argued that the comprehensive phrase “all actions and proceedings” encompassed arbitration.¹⁷⁵ Goldman Sachs alleged that Golden Empire’s arguments to the contrary were “linguistic tricks.”¹⁷⁶ In Goldman Sachs’ perspective, an attempt to exclude arbitration from “all actions and proceedings” amounted to nothing more than “sophistry.”¹⁷⁷ Guided by those principles, Goldman Sachs believed that the parties’ agreements expressly required judicial resolution of their dispute.¹⁷⁸ As a result, it opposed the idea that “the plain language of the exclusive forum selection clause broadly covering ‘all actions and proceedings’ and the ‘plain meanings’ of FINRA Rule 12200’ could ever be harmonized.”¹⁷⁹

However, as mentioned, Golden Empire appropriately urged to follow the Fourth Circuit which stated that, “if the term ‘actions and proceedings’ as used in the agreements includes arbitration . . . , then the sentence would have to be read to . . . state that ‘all proceedings, including arbitration . . . shall be brought in’ court,” which would make no sense because an arbitration “could not be pursued” in court.¹⁸⁰ In other words, followed to its logical conclusion, Goldman Sachs’ reading of the forum selection clause—requiring the phrase “all actions and proceedings” to encompass

¹⁷³ Reply Brief for Defendant-Appellant, *supra* note 150, at 18.

¹⁷⁴ *Id.*; see *Carilion Clinic*, 706 F.3d 319, 329 (4th Cir. 2013); For further discussion, see *supra* Section III.

¹⁷⁵ Brief for Plaintiff-Appellee, *supra* note 32, at 4.

¹⁷⁶ *Id.* at 31.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 32.

¹⁸⁰ *Carilion Clinic*, 706 F.3d 319, 329 (4th Cir. 2013); See *J. Brooks Sec., Inc. v. Vanderbilt Sec., Inc.*, 484 N.Y.S.2d 472, 474 (N.Y. Sup. Ct. 1985) (“An arbitration is not an action or a proceeding, that status having terminated with the adoption of the CPLR.”).

arbitration—would render the default FINRA mandatory arbitration rule entirely hallow.¹⁸¹

E. *Other Relevant Factors and Policy Arguments in Favor of Enjoining Arbitration*

Finally, Goldman Sachs contended that an injunction would prevent irreparable harm, ensure balance of the hardships and equities, as well as public interest, which allegedly favors Goldman Sachs.¹⁸² Goldman Sachs alleged, as a matter of law, it would suffer irreparable harm because it would be “forced to expend time and resources arbitrating an issue that [was] not arbitrable.”¹⁸³

Under federal law, to satisfy the “irreparable harm” requirement for a preliminary injunction, a petitioner must demonstrate that absent a preliminary injunction it will suffer an injury that is neither remote nor speculative, but *actual and imminent*, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.¹⁸⁴ In determining whether a plaintiff has demonstrated a likelihood of success on the merits of the ultimate case, a court is not called upon to decide the merits of the controversy.¹⁸⁵ It is necessary only that the court find that the plaintiff has presented a strong *prima facie* case to justify the discretionary issuance of preliminary relief.¹⁸⁶

In *Golden Empire*, Goldman Sachs’ allegation was both baseless and meritless. Arbitration is generally believed to be faster and less expensive than litigation, particularly where discovery is limited and the proceedings are accelerated.¹⁸⁷ Arbitration also provides an opportunity to resolve disputes privately, often subject to confidentiality restrictions, which may be attractive to parties,

¹⁸¹ *J. Brooks Sec., Inc.*, 484 N.Y.S.2d 472.

¹⁸² Brief for Plaintiff-Appellee, *supra* note 32, at 7 (citing *Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 551 (6th Cir. 2007) (“general public interest in the enforcement of voluntarily assumed contract obligations supports issuance of a preliminary injunction”)).

¹⁸³ Brief for Plaintiff-Appellee, *supra* note 32, at 45 (citing *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 129 (2d Cir. 2003)).

¹⁸⁴ *J.P. Morgan Sec. Inc. v. Louisiana Citizens Prop. Ins. Corp.*, 712 F. Supp. 2d 70, 74 (S.D.N.Y. 2010).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *McCurdy, Robben & Genna S. Steinberg, supra* note 8.

such as global firms like Goldman Sachs, which may prefer to avoid media attention or other disclosure.¹⁸⁸

In addition, “arbitration is, justifiably, an increasingly popular method of dealing with disputes, as both institutional statistics and recent surveys have confirmed.”¹⁸⁹ In fact, arbitration has certain advantages over litigation.¹⁹⁰ In litigation, disputes over jurisdiction can be expensive and (once appeals are factored in) extremely time-consuming.¹⁹¹ By contrast, a carefully drafted arbitration agreement, such as FINRA Rule 12200, minimizes the chances of jurisdictional disputes.¹⁹² For instance, if the parties agree to institutional arbitration, or agree that a certain set of rules will apply to their arbitration,¹⁹³ this will ensure a degree of procedural certainty and predictability.¹⁹⁴ By simply referring to the applicable arbitration rules provided by FINRA, Goldman Sachs could have informed itself of what steps it needed to take, and when.¹⁹⁵

In essence, as a member of FINRA, Goldman Sachs had guidance for effective and efficient procedures.¹⁹⁶ Hence, the relative cost of arbitral proceedings was expected to be less than litigation because “an experienced tribunal . . . would . . . be able to devise procedures and minimi[z]e costs.”¹⁹⁷ Most importantly, the opportunities for appealing of otherwise challenging an arbitration award are very much more limited.¹⁹⁸ As Goldman Sachs already witnessed in its dispute with Golden Empire, a court judgment is frequently subject to an appeal.¹⁹⁹

While Goldman Sachs was subject to FINRA Rule 12200, it is possible that Goldman Sachs may have preferred to litigate its dispute with Golden Empire for self-interested reasons.²⁰⁰ There are

¹⁸⁸ *Id.* (citing Practical Law Arbitration, *Why Arbitrate*, PRACTICAL LAW, 1–204–0032 (2015)).

¹⁸⁹ Practical Law Arbitration, *supra* note 188.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See generally FINRA RULES http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4105 (Part II General Arbitration Rules) (last visited at Feb. 13, 2015).

¹⁹⁴ Practical Law Arbitration, *supra* note 188.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Practical Law Arbitration, *supra* note 188 (“However, it may be more difficult to conclude an agreement to arbitrate if one party has an *interest in delaying matters, or perceives a tactical disadvantage in arbitrating*”) (emphasis added).

several differences between FINRA arbitration and litigation that may have influenced Goldman Sachs' decision.²⁰¹

For instance, in a FINRA arbitration, there is a restriction on dispositive motions.²⁰² FINRA rules "preclude dispositive motions prior to a hearing, except in extremely limited procedural circumstances."²⁰³ In addition, judicial review of FINRA awards, as with all arbitration awards, is extraordinary narrow and deferential.²⁰⁴ Presumably, this was an important factor for Goldman Sachs because "in large, complex transactions, a losing party in litigation has a chance, not available in arbitration, to nullify a decision based on efforts of fact, law, or procedure."²⁰⁵ For example, in *Golden Empire*, Goldman Sachs was alleged to have been liable for the losses that Golden Empire sustained as a result of Goldman Sachs' dishonest recommendations to issue \$135.30 million worth of ARS.²⁰⁶

Assuming, *arguendo*, that Goldman Sachs had lost in arbitration, FINRA arbitrators are not required to give written reasons for their awards, unless all of the parties jointly request an explained decision.²⁰⁷ Additionally, Goldman Sachs may have been concerned about the subject matter expertise of the arbitrator.²⁰⁸ Arbitrators in FINRA arbitration proceedings are often securities law experts with an understanding of the industry and, therefore, may be less susceptible to customers' arguments than a judge or jury.²⁰⁹

Lastly, Goldman Sachs may have been worried that the arbitrator would have recognized Golden Empire's claims.²¹⁰ For instance, FINRA arbitrators are not strictly bound by the law and may recognize substantive claims, including breaches of FINRA

²⁰¹ McCurdy, Robben & Steinberg, *supra* note 8.

²⁰² *Id.* (citing FINRA RULE 12504(a) (amended 2011), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7377 (last visited Feb. 13, 2015)).

²⁰³ *Id.*

²⁰⁴ *Id.* (citing *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 78 (2d Cir. 2011) (stating that the court "will not vacate an award because of a simple error in law or a failure by the arbitrators to understand or apply it but only when a party clearly demonstrates that the panel intentionally defied the law"))).

²⁰⁵ *Id.*

²⁰⁶ Brief for Defendant-Appellant, *supra* note 23, at 11.

²⁰⁷ McCurdy, Robben & Steinberg, *supra* note 8 (citing FINRA RULE 1204(f)(g), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4192 (last visited Feb. 13, 2015)).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

regulations, which may not constitute valid causes of action in court.²¹¹

Overall, in light of all the advantages and benefits of arbitration, it is highly unlikely, that Goldman Sachs would have “suffered irreparable harm by being forced to arbitrate.”²¹² Indeed, an injunction may have ensured public interest and the balance of the hardships and equities.²¹³

However, “FINRA generally takes the position that contract provisions at variance with its rules may, at a minimum, conflict with the rule requiring members to conduct their businesses consistent with a ‘high standard of commercial honor and just and equitable principles of trade.’”²¹⁴ In essence, the attempt to avoid arbitration by Goldman Sachs was in fact “conduct inconsistent with just and equitable principles of trade”²¹⁵ and a violation of FINRA Rule IM-12000 for a member to fail to submit to a dispute for arbitration under the Code as required by the Code.²¹⁶

V. CONCLUSION

In order to resolve the emerging circuit split, a forum selection clause may be included in a Broker-Dealer Agreement, but is only enforceable when a customer does not request arbitration. As a matter of law, a forum selection clause does not supersede *any* potential application of FINRA Rule 12200 entitling its customer to elect arbitration of a dispute. While the law may be unsettled, broker-dealers cannot expect that forum selection clauses which waive a customer’s preexisting right to FINRA arbitration will be enforceable.²¹⁷

Moreover, even if the proper language is used in an agreement, issues remain concerning whether a forum selection clause exposes a FINRA member to discipline if FINRA takes the position that such a provision violates FINRA Rule 12200.²¹⁸ For instance, it remains to be seen whether FINRA will seek to ensure

²¹¹ *Id.*

²¹² Brief for Plaintiff-Appellee, *supra* note 32, at 45.

²¹³ *Id.*

²¹⁴ McCurdy, Robben & Steinberg, *supra* note 8 (quoting FINRA RULE 2010, *supra* note 115)).

²¹⁵ FINRA RULE 2010, *supra* note 115.

²¹⁶ FINRA RULE IM-12000, *supra* note 110.

²¹⁷ McCurdy, Robben & Steinberg, *supra* note 8.

²¹⁸ *Id.*

the viability of its customer arbitration procedures by means of FINRA IM-12000.²¹⁹ Nevertheless, FINRA members that outright refuse to arbitrate a dispute at the request of a customer likely violate just and equitable principles of trade under FINRA rules.²²⁰ Likewise, an attempt to avoid arbitration because it presents tactical disadvantages for a FINRA member is not only a violation of the law, but also of public policy.

Presently, the circuit split presents potential benefits and risks for member firms. Among other things, the Second Circuit's decision in *Golden Empire* may give comfort to firms who wish to enter into agreements with their customers containing forum selection provisions requiring that disputes be resolved in court, rather than by FINRA dispute resolution.²²¹ Given the pro-claimant shift that FINRA arbitration rules have taken in recent years, if left undisturbed, the Second Circuit's decision has the potential to remove from FINRA's purview *any* dispute where the parties agreed to a forum selection clause like the one in *Golden Empire*.²²² It remains to be seen whether firms will now elect to attempt to expand this apparent carve-out from mandatory arbitration to a larger group of potential disputes with customers.²²³

In addition, the United States Supreme Court may never resolve the emerging circuit split.²²⁴ For instance, the Supreme Court has already denied writ of certiorari, without giving an explanation in *City of Reno*.²²⁵ In *City of Reno*, the Ninth Circuit had improperly failed to apply the federal policy favoring arbitration and had erroneously held that a forum selection clause superseded FINRA Rule 12200.²²⁶ However, the Supreme Court decided not to clarify the distinction between litigation and other out-of-court avenues of dispute resolution.²²⁷

²¹⁹ *Second Circuit Rules Broad Forum Selection Clause Trumps FINRA Rule Requiring Arbitration*, *supra* note 109.

²²⁰ FINRA RULE 2010, *supra* note 115.

²²¹ *Id.*

²²² David Picon & Massiel Pedreira, *Firms Have Roadmap for Expanding Litigation of Customer Disputes After Second Circuit Holds Forum Selection Clauses Trump FINRA's Mandatory Arbitration Rule*, PROSKAUER, <http://www.corporatedefensedisputes.com/2014/11/firms-have-roadmap-for-expanding-litigation-customer-disputes/> (last visited Feb. 13, 2015).

²²³ *Id.*

²²⁴ *Second Circuit Rules Broad Forum Selection Clause Trumps FINRA Rule Requiring Arbitration*, *supra* note 109.

²²⁵ *City of Reno*, 135 S. Ct. 477 (2014).

²²⁶ *City of Reno*, 747 F.3d 733, 736 (9th Cir. 2014).

²²⁷ *City of Reno*, 135 S. Ct. 477.

