RECORD NO. 12-1208

In The
United States Court of Appeals
For The Fourth Circuit

MORGAN KEEGAN & COMPANY, INC.,

Plaintiff – Appellee,

v.

LOUISE SILVERMAN; LOUISE SILVERMAN TRUST; MAX SILVERMAN,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT GREENBELT

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 12-1208 Caption: Morgan Keegan & Co., Inc. v. Silverman Trust, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Morgan Keegan & Co., Inc.
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

See response to # 3 below.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:

Morgan Keegan & Co., Inc. is 100% owned by Raymond James Financial Corporation, which is traded on the New York Stock Exchange under ticker symbol RJF.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on May 10, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Plaintiff-Appellee, Morgan Keegan & Co., Inc. ("Morgan Keegan"), respectfully submits this opposition to the brief filed by Defendants-Appellants, the Louise Silverman Trust, Max Silverman, and Louise Silverman (collectively, the "Silvermans"). This appeal arises from the entry of a preliminary and permanent injunction by the United States District Court for the District of Maryland (the "District Court"), prohibiting the Silvermans from arbitrating their claims against Morgan Keegan. The injunctions were issued because no valid agreement to arbitrate exists between the Silvermans and Morgan Keegan and because Morgan Keegan is not required to arbitrate the Silvermans' claims under the rules of the Financial Industry Regulatory Authority ("FINRA").

STATEMENT OF JURISDICTION

A. Basis for Subject Matter Jurisdiction in the District Court

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 because the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and because the Silvermans are citizens of the State of Maryland and Morgan Keegan is a citizen of the State of Tennessee. The District Court also had subject matter jurisdiction because the Silvermans' underlying dispute was predicated on alleged violations of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, and the Securities Act of 1933, 15 U.S.C.

§§ 77a, *et seq.* *See Hunter Douglas, Inc. v. Sheet Metal Workers Int'l Association, Local 159*, 714 F.2d 342, 345 (4th Cir. 1983).

B. Basis for Jurisdiction in the Court of Appeals

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) because the District Court entered a consent order granting Morgan Keegan permanent injunctive relief on January 26, 2012. [J.A. 336].[1]

STATEMENT OF ISSUES

I. Did the District Court properly enjoin the Silvermans from pursuing their claims in arbitration where no written arbitration agreement exists between the Silvermans and Morgan Keegan and where the Silvermans have no right to arbitrate under the FINRA Rules?

STATEMENT OF THE CASE

Last summer, the Silvermans filed a Statement of Claim ("SOC") with FINRA, styled *Louise Silverman Trust, Max and Louise Silverman v. Morgan Keegan & Co., Inc.*, FINRA Case No. 11-03031 (the "Arbitration"). [J.A. 14-34]. In their SOC, the Silvermans allege violations of state and federal securities laws against Morgan Keegan and request that the dispute be arbitrated pursuant to the FINRA Code of Arbitration Procedure (the "FINRA Code"). Because the Silvermans had never been customers of either Morgan Keegan or any of its

[1] References to the page number from the Joint Appendix are herein designated as [J.A. __].

brokers and had no agreements with the firm, Morgan Keegan filed a Complaint for Declaratory Judgment and Injunctive Relief with the District Court. Morgan Keegan requested an order enjoining the Silvermans from pursing their claims in arbitration and declaring that the Silvermans have no right to arbitrate the dispute. [J.A. 6-13].

At no point during the proceedings in the District Court did the Silvermans ever dispute that they (1) never had an account at Morgan Keegan, (2) never purchased the securities at issue at, from or through Morgan Keegan, (3) never entered any written agreement, including any arbitration agreement, with Morgan Keegan, and (4) never had any business dealings with Morgan Keegan or any of the firm's brokers or advisors. Relying on the facts and the applicable law, the District Court granted Morgan Keegan's motion for a preliminary injunction. [J.A. 322-335]. Shortly thereafter, by agreement of counsel during a conference call with the District Court, the District Court converted the preliminary injunction to a permanent injunction. [J.A. 336].

STATEMENT OF FACTS

The Silvermans' claims in the arbitration all relate to the Silvermans' alleged purchases of shares of certain closed-end, high-yield bond funds (collectively, the "Funds") that were traded on the New York Stock Exchange ("NYSE") and that

dropped in value dramatically in late 2007 and 2008.[2] [J.A. 58-60]. The Silvermans admit they purchased the Funds, not through Morgan Keegan, but through Legg Mason, an unrelated broker-dealer, upon the advice of their Legg Mason brokers, Jim Potter and Dennis Laughlin. [J.A. 58-60]. After receiving the Silvermans' SOC, Morgan Keegan searched its records and determined that the Silvermans had never entered into any agreement with Morgan Keegan, never had an account at the firm, and never received investment advice from the firm or anyone associated with it. [J.A. 79-80, at ¶¶ 7-8].

Last fall, Morgan Keegan filed a Complaint for Declaratory Judgment and Injunctive Relief (the "Complaint"). [J.A. 6-13]. The firm then filed a motion for a preliminary injunction seeking to prohibit the Silvermans from pursuing their claims in arbitration. [J.A. 35-55]. In opposing the motion, the Silvermans did not deny that they (1) never had an account at Morgan Keegan, (2) never purchased the

[2] The Silvermans seek to prejudice Morgan Keegan by referring impermissibly to several settled regulatory proceedings concerning the Funds. Those settlements are irrelevant to the issue of arbitrability before this Court. Equally important, neither the initial regulatory charges nor the settlements have any probative value in this case or in any other. *See, e.g., Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976) ("neither a complaint nor references to a complaint which results in a consent judgment may be properly cited in the pleadings"). Neither the charges nor the settlements contain any admissions of wrongdoing and certainly are not proof of any wrongdoing by Morgan Keegan. *See id.* at 893-94 (excluding an SEC consent decree because it "was the result of private bargaining, and there was no hearing or rulings or any form of decision on the merits"). As the District Court here properly concluded: "The merits of [the Silvermans'] underlying claims against Morgan Keegan are irrelevant[.]" [J.A. 325].

Funds – or any other securities – at or through Morgan Keegan or any of its associated persons, (3) never engaged in any other business transactions with Morgan Keegan or any of its associated persons, and (4) never signed any agreements, including an arbitration agreement, with Morgan Keegan. [J.A. 44, 97-126].

The Silvermans opposed Morgan Keegan's motion on the ground that, even though they had no agreement or business relationship with the firm, they were nonetheless customers of it and, therefore, were entitled to arbitrate their disputes with it pursuant to the FINRA Code. The primary issue before the District Court was whether the Silvermans were customers of Morgan Keegan under FINRA Rule 12200 and, thus, were entitled to arbitrate their claims against the firm pursuant to the agreement between Morgan Keegan and FINRA requiring Morgan Keegan to arbitrate disputes with the firm's customers. After carefully considering the submissions of the parties, the facts, and the applicable law, the District Court rejected the Silvermans' arguments, adopted Morgan Keegan's, and entered a memorandum ruling and order (the "Memorandum and Order"), granting Morgan Keegan's motion for a preliminary injunction. [J.A. 322-335].

In its ruling, the District Court relied heavily on the analysis adopted by the Eighth Circuit Court of Appeals in *Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc.*, 264 F.3d 770, 773 (8th Cir. 2001). [J.A. 327-28]. The Eighth

Circuit is the only federal appellate court that has directly addressed the issue of whether an investor who has no agreement, accounts or contacts with a FINRA member firm (or with any of the firm's brokers or associated persons) is nonetheless a customer of the firm under FINRA Rule 12200 and may demand arbitration based on an agreement between the member firm and FINRA. The *Fleet Boston* court declined to adopt the broad definition of "customer" urged by the investor because it would require FINRA members to submit to arbitration "every dispute that involves its business dealings with a nonmember," [J.A. 327] (quotations omitted), including disputes with vendors, as well as disputes with people who sustain personal injuries at a member's offices while there on business. The District Court here likewise noted that every other federal court that has addressed the issue, including every federal court in cases in which Morgan Keegan was the plaintiff seeking injunctive relief against investors just like the Silvermans, has reached the same conclusion the Eighth Circuit reached. [J.A. 328].

Since the Silvermans never had an account with Morgan Keegan, never purchased any securities at or through the firm, never spoke with anyone at the firm, never signed an agreement to arbitrate with the firm, and never had any other dealings with the firm, the parties agreed discovery was unnecessary. On January 25, 2012, counsel for Morgan Keegan and counsel for the Silvermans

participated in a telephonic conference with the District Court and agreed that the preliminary injunction should be converted into a permanent injunction pursuant to Federal Rule of Civil Procedure 65(a)(2). The next day, the District Court entered a permanent injunction. [J.A. 336].

SUMMARY OF THE ARGUMENT

The District Court's ruling should be affirmed. No person may be compelled to arbitrate absent an agreement to arbitrate. Here, the parties never agreed to arbitrate. The Silvermans never signed an agreement with Morgan Keegan to arbitrate, and the FINRA Rules do not contain or create an agreement to arbitrate between the Silvermans and Morgan Keegan.

The Silvermans' argument that FINRA Rule 12200 contains or creates the requisite arbitration agreement is misguided. FINRA Rule 12200 only requires member firms to arbitrate disputes with their customers. The Silvermans were customers of Legg Mason, not of Morgan Keegan. Although the Silvermans contend they are customers of Morgan Keegan because they are neither a "broker" nor a "dealer," no federal court has adopted such a broad definition of "customer" where the investors urging its adoption had no separate agreement to arbitrate with the member firm, had no accounts at the firm, did not trade securities at or through the firm or its associated persons, and had no other business dealings with the firm

or its associated persons.[3] Indeed, every federal court that has directly addressed the issue under the circumstances that are relevant here has rightly rejected the definition of "customer" the Silvermans propose. This Court should do the same.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews *de novo* a district court's determination that a dispute is arbitrable. *Washington Square Sec., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004) (citing *Cara's Notions v. Hallmark Cards*, 140 F.3d 566, 569 (4th Cir. 1998)).[4]

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[3] FINRA Rule 12100(a) defines "'associated person' or 'associated person of a member'" as "a person associated with a [FINRA] member." The terms commonly refer to brokers, as well as others, at a member firm. *See id.*

[4] The Silvermans appealed only the District Court's arbitrability determination, but not any of the other elements the court found present in granting a preliminary and permanent injunction. [J.A. 331-333] (irreparable harm, harm to defendants, and public interest). Because the Silvermans have not challenged the District Court's determinations as to those elements in their opening brief, any appeal of those issues is waived. *See, e.g., Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996) (holding issue not raised in appellant's initial brief "is not properly before a court of appeals") (collecting cases); *see also United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004) (stating that issue not raised on appeal is waived); *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999) (same).

II. LAW AND ARGUMENT.

A. The Silvermans Are Not Entitled to Arbitrate Their Dispute Without an Agreement to Arbitrate.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (citation and quotations omitted). While federal policy favors arbitration, "the initial inquiry is whether the parties agreed to arbitrate their dispute." *Syndor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).[5] This inquiry requires a two-pronged analysis. A court must ascertain (1) "'that a valid agreement to arbitrate exists between the parties and [(2)] that the specific dispute falls within the substantive scope of that agreement.'" *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (quoting *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 453 (4th Cir. 1997)); *Mawing v. PNGI Charles Town Gaming, L.L.C.*, 426 F. App'x. 198, 199 (4th Cir. 2011) (same).

[5] The Silvermans do not dispute that the question of arbitrability was properly before the District Court. *See Cathcart Props., Inc. v. Terradon Corp.*, 364 F. App'x. 17, 18 (4th Cir. 2010) ("'the question of arbitrability . . . is undeniably an issue for judicial determination'" (quoting *AT&T Techs.*, 475 U.S. at 648-49)). [J.A. 324] ("The defendants did not have an arbitration agreement with Morgan Keegan; therefore, it is properly within this court's power to decide whether arbitration is appropriate and to enjoin or compel arbitration as is appropriate.").

Although courts commonly suggest there is a "presumption of arbitrability," *see, e.g.*, *Aune*, 385 F.3d at 436, the Supreme Court recently reaffirmed that this presumption does not apply to determinations of whether an arbitration agreement exists; it applies only to determinations about the scope of an agreement: "The presumption of arbitrability only [applies] where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." *Granite Rock Co. v. Int'l Broth. of Teamsters*, 130 S. Ct. 2847, 2858–59 (2010). "[W]e have never held that this policy [favoring arbitration] overrides the principle that a court may submit to arbitration only those disputes that the parties have agreed to submit." *Id.* "In other words, while doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made." *Applied Energetics, Inc. v. New Oak Capital Markets, LLC*, 645 F.3d 522, 526 (2d Cir. 2011) (citing *Granite Rock*, 130 S. Ct. at 2858-59).

The Silvermans concede that "[t]here is no written agreement between [Morgan Keegan] and [them]," including no agreement to arbitrate. [J.A. 109]. *See also* [J.A. 325] ("There is no arbitration agreement between Morgan Keegan and the defendants.") They contend, instead, that the FINRA Rules qualify as an arbitration agreement, that Morgan Keegan, by virtue of its FINRA membership, is bound "to arbitrate disputes under FINRA Rule 12200" brought against the firm by

its customers, and that they are in fact customers of the firm. (App.'s Br. at 13.) The fatal flaw in this theory is that the Silvermans are not "customers" of Morgan Keegan under FINRA Rule 12200.

B. The Silvermans Do Not Qualify as "Customers" Under FINRA Rule 12200.

Even though no separate agreement to arbitrate exists between them and Morgan Keegan, the Silvermans contend they are entitled to arbitrate because they supposedly are customers of Morgan Keegan pursuant to the FINRA Code under Rule 12200. Rule 12200 provides:

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

Because the FINRA Code does not define "customer" for purposes of Rule 12200 but merely states that a "customer" cannot be "a broker or dealer," *see* FINRA Rule 12100(i); [J.A. 84], the Silvermans argue that anyone who alleges an injury pertaining to a FINRA member's business activities is entitled to arbitrate his claims against that member. (*See* App.'s Br. at 14.) The Silvermans' theory has no support in the case law. Every court that has addressed facts materially

identical to those here has held that investors who, like the Silvermans, purchased securities from third party broker dealers had no basis to arbitrate with a separate broker dealer with whom they had no brokerage or business relationship.

The seminal case on the subject is *Fleet Boston Robertson Stephens, Inc. v. Innovex. Inc.*, 264 F.3d 770 (8th Cir. 2001). In *Fleet Boston*, a FINRA (then NASD) member firm filed a court action against a former client for failing to pay it for "financial advice" related to a merger. *Id.* at 771. The former client, which did not have an account with the member firm, moved to stay the court action and to compel arbitration under NASD Rules. *Id.* Because there was, as here, no agreement to arbitrate between the member firm and the former client, the only issue before the court was whether the former client was entitled to arbitrate against the member under NASD (now FINRA) Rules and Regulations. *Id.*

On appeal, the Eighth Circuit noted that, absent a separate agreement to arbitrate, NASD members are required to arbitrate disputes with investors only "if [the disputes] 'arise out of or in connection with the business of any member' and are 'between or among members or associated persons and public customers.'" *Id.* (emphasis added) (quoting NASD Code of Arbitration Proc. § 10101). The former client in *Fleet Boston* argued that the NASD Rules defined "customer" broadly: "'The term 'customer' shall not include a broker or dealer.'" *Id.* (quoting NASD Manual General Provisions § 0120(g)). The former client then insisted that, "by

negative inference, this definition means a 'customer' is everyone who is not a broker or dealer." *Id.* at 772.

The Eighth Circuit rejected this definition as "too broad," stating: "We do not believe that the NASD Rules were meant to apply to every sort of financial service an NASD member might provide, regardless of how remote that service might be from the investing or brokerage activities, which the NASD oversees." *Id.* at 772. In analyzing the former client's argument, the court surveyed the NASD Rules that described the term "customer" in the context of various brokerage services and noted that "the NASD's Manual and Notices to Members state that the arbitration forum exists '[t]o assist in the resolution of monetary and business disputes between investors and their securities firms (as well as between member firms).'" *Id.* (quoting NASD Manual & Notices to Members-Administrative-Profile of the NASD-Regulation of the Broker/Dealer Profession and Securities Markets-Arbitration and Mediation). The Eighth Circuit held that the term "customer" under the "NASD Code refer[s] to one involved in a business relationship with an NASD member that is related directly to investment or brokerage services." *Id.* "[D]eclin[ing] to extend the definition where the business relationship did not include these activities," the court concluded that "we do not believe the NASD Rules require a member to submit to arbitration in every dispute that involves its business activities with a non-member." *Id.* at 773.

Virtually every district court that has subsequently addressed this issue, including the lower court here, has followed the rule the Eighth Circuit announced in *Fleet Boston*. In addition to being guided by the *Fleet Boston* court's analysis, these courts have also been guided by the notion that any interpretation of Rule 12200 (or its NASD predecessors) should, as the Eleventh Circuit first declared, comport with "the reasonable expectations of NASD [now FINRA] members." *Wheat, First Sec., Inc. v. Green*, 993 F.2d 814, 820 (11th Cir. 1993) (holding that it "would do significant injustice to the reasonable expectations of NASD members" to interpret what is now Rule 12200 to require arbitration of all business-related claims by any person who is not a broker or a dealer).

One of the leading district court cases decided since *Fleet Boston* is *Herbert J. Sims & Co., Inc. v. Roven*, 548 F. Supp. 2d 759, 763 (N.D. Cal. 2008). The *Roven* court, just like the lower court here, refused to find that investors were customers of a FINRA member firm merely because the firm underwrote and sold bonds the investors purchased at a different broker dealer, where they had an account. *See id.* at 759. In *Roven*, the investors had an account with Muriel Siebert & Co., Inc. ("Siebert"), a FINRA member firm. *Id.* at 760. Siebert purchased bonds for the investors from Herbert J. Sims & Company, Inc. ("Sims"), another FINRA member firm, which underwrote the bonds. *Id.* at 761. When the bonds suffered losses, the investors initiated an NASD arbitration, not against

Siebert, where they had their account, but against Sims. *Id.* Sims sought to enjoin the arbitration because the investors had no basis to compel the firm to arbitrate. *Id.*

Since there was no written agreement to arbitrate between the investors and Sims, the sole question before the *Roven* court was whether the investors qualified as Sims's customers under NASD Rules by virtue of their broker dealer having purchased bonds from Sims on their behalf. *Id.* at 763. Relying on *Fleet Boston* and its progeny, the *Roven* court noted that, "[w]hen [as here] the relationship between the parties is more tenuous, courts should determine if there is some form of business relationship that includes some brokerage or investment relationship between the parties." *Id.* (citing *Fleet Boston*, 264 F.3d at 772). Finding that the investors did not purchase securities at or through Sims, had no accounts with Sims, and had never entered a written agreement to arbitrate with Sims, the court held that Sims "made a clear showing" that the investors were not its customers under NASD Rules. *Id.* at 762, 764-66.

Roven is just one in a long line of district court cases that have adopted the Eighth Circuit's view that a "customer" under FINRA Rule 12200 must have "a business relationship with an NASD [now FINRA] member that is related directly

to investment or brokerage services."[6] What's more, not only have numerous federal district courts rejected arguments like the Silvermans', six federal district

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[6] *See, e.g.*, *OppenheimerFunds Distributor, Inc. v. Liska*, No. 11-cv-1586, 2011 WL 5984036, at *3 (S.D. Cal. Nov. 28, 2011) (granting preliminary injunction and holding that, to determine whether claimant is a customer, courts should determine "whether there is 'some brokerage or investment relationship between the parties'" (quoting *Fleet Boston*, 264 F.3d at 772); *Berthel Fisher & Co. Fin. Servs., Inc. v. Larmon*, No. 11–889 ADM/JSM, 2011 WL 3294682, at *7 (D. Minn. Aug. 1, 2011) (finding that private placement investors were not "customers" of the broker-dealer who marketed the private placements to investors on behalf of a third party because "[i]f the Court were to find a 'brokerage or investment relationship' here, then . . . every purchaser of shares in a mutual fund and every beneficiary of a pension fund would arguably be 'customers' of every investment institution with which those funds did business, and would be entitled to demand arbitration" (citation and quotations omitted)); *Charles Schwab & Co., Inc. v. Reaves*, No. CV-09-2590, 2010 WL 447370, at *8 (D. Ariz. Feb. 4, 2010) (finding that defrauded investors of a broker-dealer's personal account holder had no contractual basis to arbitrate their claims against the broker dealer although the account was used to defraud investors and enjoining FINRA arbitration); *UBS Secs. LLC v. Voegeli*, 684 F. Supp. 2d 351, 351 (S.D.N.Y. 2010) (permanently enjoining defendants from pursuing claims in arbitration because they were not customers of FINRA member), *aff'd*, 405 F. App'x. 550 (2d Cir. 2011); *Proshares Trust v. Schnall*, 695 F. Supp. 2d 76, 80 (S.D.N.Y. 2010) (enjoining the investors' FINRA arbitration because the investors failed to demonstrate that they were customers of any of the brokers); *Interactive Brokers, LLC v. Duran*, No. 08-cv-6813, 2009 WL 393827, at *3 (N.D. Ill. Feb. 17, 2009) (granting preliminary injunction and holding that "customer" relationship was established only where investor "opened, maintained, controlled, or traded in an account at [the broker dealer] or entered into an account or customer agreement with [the broker dealer]"); *Royal Alliance Associates, Inc. v. Branch Ave. Plaza, L.P.*, 587 F. Supp. 2d 729, 736 (E.D. Va. 2008) (rejecting argument "that under Rule 12200, arbitration is available not only to 'customer[s]' of the FINRA member against whom arbitration is sought, but to 'customer[s]' generally" and granting injunction (quoting defendant's brief)); *Goldman Sachs & Co. v. Becker*, No. 07-1599, 2007 WL 1982790, at *6 (N.D. Cal. Jul. 2, 2007) (enjoining arbitration because, "[i]n order for someone to be a 'customer,' there must be

courts in four different Circuits over the past several months have enjoined similar FINRA arbitrations filed against Morgan Keegan, holding that Morgan Keegan did not agree to arbitrate and is not subject to FINRA arbitration with non-customer investors like the Silvermans.[7] The recent decision in *Morgan Keegan &*

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some nexus between the investor and the member or associated person"); *BMA Fin. Servs. Inc. v. Guin*, 164 F. Supp. 2d 813, 819 (W.D. La. 2001) (rejecting defendants' argument that, because they bought goods or services and were not brokers or dealers, they should be given "customer" status without being required to show that the investment was purchased from plaintiff broker dealer because "[s]uch a boundless definition would surely upset the reasonable expectations of NASD members").

[7] *E.g.*, *Morgan Keegan & Co., Inc. v. Johnson*, No. 2:11CV502, 2011 WL 7789796, at *6 (E.D. Va. Dec. 22, 2011) (Magistrate Judge's Report and Recommendation) ("Johnson 'bought shares in the fund from third-party brokers on the secondary market.' . . . Under these circumstances Johnson was not also a customer of Morgan Keegan with regard to the same investment transaction." (citations omitted)); *Morgan Keegan & Co., Inc. v. McPoland*, No. C11-1471RSM, 2011 WL 6326956, at *4, --- F. Supp. 2d ---- (W.D. Wash. Dec. 6, 2011) (on appeal) ("Defendants have not provided the Court with any authority to the contrary to the cases cited [by Morgan Keegan]. The Court therefore finds no basis to diverge from these well-reasoned decisions, and joins the courts in this circuit and others which have found that investors who purchased Morgan Keegan funds from third-party broker-dealers are not 'customers' of Morgan Keegan. . . ."); *Morgan Keegan & Co., Inc. v. Jindra*, No. 3:11-cv-5704, 2011 WL 5869586, at *3 (W.D. Wash. Nov. 22, 2011) (on appeal) (finding claimants not customers where their "relationship with Morgan Keegan is 'void of any form of business qualities whatsoever,'" because they "did not purchase shares . . . through Morgan Keegan," "did not pay for any investment, brokerage or other service through Morgan Keegan," and "did not have a direct transactional relationship with Morgan Keegan" (internal citations and quotation marks omitted)); *Morgan Keegan & Co., Inc. v. Shorthouse*, No. C11-5734BHS, 2011 WL 7790893, at *3 (W.D. Wash. Nov. 22, 2011) (same); *Morgan Keegan & Co., Inc. v. Ras*, No. 11-cv-0352, at *3, 7-8 (E.D. Ky. Nov. 14, 2011) (holding investor's lack of relationship with Morgan Keegan doomed

Company, Inc. v. Shadburn, No. 2:11-cv-624, 2011 WL 5244696, --- F. Supp. 2d --- -- (M.D. Ala. Nov. 3, 2011) – the first of these decisions involving Morgan Keegan – is illustrative.

In *Shadburn*, the Chief Judge of the Middle District of Alabama found dispositive that the investor had no relationship with Morgan Keegan:

> Dr. Shadburn did not have any written contract or customer agreement with Morgan Keegan. [He] did not purchase shares in the RMK Fund through Morgan Keegan. [He] did not invest in the RMK Fund in its initial public offering. He did not pay for any investment, brokerage or other service from or through [the firm]. . . . He did not have any direct contact with Morgan Keegan. . . . In fact, Dr. Shadburn did not have an account with Morgan Keegan, and Morgan Keegan does not have a record of . . . anyone named William Shadburn.

Id. at *8. Relying heavily on *Fleet Boston* and in part on *Wheat First*, the *Shadburn* court found "that Dr. Shadburn and Morgan's relationship [is not only] void of any investment or brokerage qualities, it is void of any form of business

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his contention that he was a "customer"); *Morgan Keegan & Co., Inc. v. Drzayick*, No. 11-cv-00126, 2011 WL 5403031, at *4 (D. Idaho Nov. 8, 2011) ("[T]here was no customer relationship between Morgan Keegan and the Defendants are not 'customers' of Morgan Keegan."); *Morgan Keegan & Co., Inc. v. Shadburn*, No. 2:11-cv-624, 2011 WL 5244696, at *8, --- F. Supp. 2d --- - (M.D. Ala. Nov. 3, 2011) (finding claimant not a "customer" where there was no "written contract or customer agreement with Morgan Keegan," he did not "purchase shares . . . through Morgan Keegan," and he did not "pay for any investment, brokerage or other service from or through Morgan Keegan"); *see also Morgan Keegan & Co., Inc. v. Sokol*, No. 11-CA-0053 (Fl. Cir. Ct. Dec. 8, 2011) ("Rapidly emerging case law from various federal district courts appears to be in accord that an investor's purchase of a FINRA member's fund shares from an unrelated third-party brokerage firm does not, in and of itself, render 'customer' status upon the investor as it relates to the FINRA member").

qualities whatsoever." *Id*. Therefore, "the relationship between it and Dr. Shadburn is too tenuous to establish a customer relationship." *Id*. at 11.[8]

Additionally, two other federal district courts have recently vacated FINRA arbitration awards against Morgan Keegan because the investors there were not "customers" under Rule 12200. Last summer, the Eastern District of Arkansas vacated an award in *Zarecor v. Morgan Keegan & Company, Inc.*, where the investors had no accounts at Morgan Keegan and no agreement with the firm, noting the investors failed to show they were "'involved in a business relationship with a [FINRA] member that is related directly to investment or brokerage services.'" No. 4:10-cv-01643-SWW, 2011 WL 5592861, at *5 (E.D. Ark. July 29, 2011) (quoting *Fleet Boston*, 264 F.3d at 772), *reconsideration denied*, 2011 WL 5508860 (E.D. Ark. Nov. 10, 2011). Even more recently, the Southern District of Texas vacated an arbitration award against Morgan Keegan because, in part, the investors lacked any meaningful relationship with the firm, and, therefore, were not "customers" entitled to arbitrate. *Morgan Keegan & Co., Inc. v. Garrett*, 816 F. Supp. 2d 439, 440-41 (S.D. Tex. 2011) (on appeal).

[8] Moreover, the *Shadburn* court expressly rejected the broad interpretation of Rule 12200 urged by the investor – that a "customer" is any non-broker dealer. *See id.* at 8 (defendant's definition "would do significant injustice to the reasonable expectations of [FINRA] members, and would contravene the core principle . . . that an obligation to arbitrate can be based only on consent." (quotation marks and citations omitted)).

Undeterred by over a decade of case law holding to the contrary, the Silvermans assert nonetheless that they qualify as "customers" under FINRA Rule 12200 because they are neither a "broker" nor "dealer." Taken to its logical conclusion, the Silvermans' proposed definition of "customer" would allow virtually any party dealing with a FINRA member to compel that firm to submit to FINRA arbitration. Courts across the country repeatedly have rejected such an expansive interpretation of "customer" as not comporting with basic principles of contract interpretation and the reasonable expectations of FINRA members. *See, e.g.*, *Voegeli*, 684 F. Supp. 2d at 356 (rejecting the notion that a party need only not be a broker or dealer to qualify as a "customer" because "[s]uch an interpretation . . . would be absurd"); *see also Fleet Boston*, 264 F.3d at 772 (rejecting argument that "by negative inference . . . a 'customer' is everyone who is not a broker or dealer"); *Shadburn*, 2011 WL 5244696, at *8 ("proposed definition could lead to scenarios where a FINRA member's membership alone would require arbitration. Such a result would 'do significant injustice to the reasonable expectations of [FINRA] members,' and 'would contravene the core principle . . . that 'an obligation to arbitrate can be based only on consent'" (quoting *Wheat, First* 993 F.2d at 820)); *Waterford Inv. Services, Inc. v. Bosco*, No. 3:10CV548-REP, 2011 WL 3820723, at *6 (E.D. Va. July 29, 2011) *report and recommendation adopted sub nom. Waterford Inv. Services, Inc. v. Bosco*, No. 3:10CV548, 2011 WL

3820496 (E.D. Va. Aug. 26, 2011) ("Defendants' reading of "customer" for purposes of Rule 12200 would allow any customer of a FINRA member to compel arbitration against any other FINRA member, regardless of whether there had been any relationship or contact between the parties.").

Under the Silvermans' interpretation of FINRA Rule 12200, anyone who engaged in business with a FINRA member could demand that the member arbitrate his dispute under Rule 12200 so long as he was neither a "broker" nor a "dealer" and so long as the dispute arose out of the member firm's "business activities." *See* FINRA Rule 12200. For example, FINRA member firms subscribe to and receive services provided by Bloomberg, Fitch, Standard & Poor's, and even Federal Express, to assist in connection with their business activities. If a dispute arose between the member and any of these vendors, the member would be required to arbitrate the dispute. In fact, under the Silvermans' definition, a member firm would have to arbitrate a sandwich vendor's slip-and-fall case if he fell in the firm's lobby on his way to delivering lunch for a firm function. Such a result clearly "frustrates the FINRA members' reasonable expectations." [J.A. 331].

No doubt aware of the problems their expansive definition of "customer" would create, the Silvermans seek to minimize those problems by arguing that the scope of the second prong of Rule 12200 should be severely limited. The second

prong of Rule 12200 requires that, to be arbitrable, disputes must "arise[ ] in connection with the business activities of the member . . . except disputes involving the insurance activities of a member that is also an insurance company." The Silvermans assert that this prong of the rule should be limited to situations where "an investor . . . can trace [his] injury to a member's business activity in violation of the exchange's rules." (App.'s Br. at 14.) Apart from the fact that the Silvermans never expressly pressed this point below, the authorities they cite in support are inapposite. Those authorities pertain, not to the FINRA Rules, but to the judicial gloss courts have imposed on the NYSE Rules, which merely require an NYSE member to arbitrate "'[a]ny dispute . . . between a . . . non-member and a member . . . arising in connection with the business of such member.'" *Spear, Leeds & Kellogg v. Cent. Life Assur. Co.*, 85 F.3d 21, 26 (2d Cir. 1996) (quoting NYSE Rule 600(a)) (cited by the Silvermans).[9]

At bottom, the Silvermans' interpretation of the scope of Rule 12200 defies the most basic tenets of contract interpretation. On the one hand, the Silvermans urge the Court to adopt the broadest meaning possible of the term "customer," based on the alleged plain meaning of the text, while, on the other hand, they urge the court to adopt an exceedingly narrow definition of "business activities" that is neither discernible from the rule's text nor supported by the applicable case law.

[9] As more fully explained below, *see infra*, at 31, the jurisprudence based on the NYSE Rules has no application to the FINRA or NASD Rules.

The Silvermans have not cited a single case in which a court has adopted this interpretation. This Court should not be the first.

C. This Court's Decision in *Washington Square Securities, Inc. v. Aune* Does Not Support the Silvermans' Position.

Citing this Court's decision in *Washington Square Securities, Inc. v. Aune*, 385 F.3d 432 (4th Cir. 2004), the Silvermans maintain that the Eighth Circuit and all the federal district courts that have followed it are wrong. The Silvermans' reliance on *Aune*, however, is misplaced for several reasons. To begin, the investors in *Aune* sought to arbitrate with a member firm based on their relationship with the firm's broker or associated person. *See id.* at 433. It was "undisputed" that the investors in *Aune* were customers of a broker at the firm and that the broker was in fact associated with the firm. *Id.* at 436. Because their customer relationship with the firm's associated person entitled the investors to arbitrate with the member firm under the NASD's rule, the *Aune* Court never considered whether investors without "even the most remote connection" with a member firm qualify as "customers" of that firm, as the Silvermans must establish here. [J.A. 331].

The Silvermans overlook the central fact in *Aune* – namely, that the broker there with whom the investors had a customer relationship was the member firm's agent and that the investors there "believed they were dealing with the member through [its] associated person." *Id.* at 436. Here, by contrast, the Silvermans had

a customer relationship with two brokers of another member firm – Legg Mason – but never had any relationship with any broker or associated person at Morgan Keegan. [J.A. 330]. *See also*, *e.g.*, *Royal Alliance Assocs.*, 587 F. Supp. 2d at 737 (In *Aune*, "[t]he investors dealt only with the broker, but were under the impression he was acting on behalf of the NASD member, which he was not. On those facts, the Fourth Circuit held that the NASD member was bound to arbitrate claims arising from the broker's outside dealings, even though the investors were not actually customers of the NASD member firm."). This case is therefore readily distinguishable from *Aune*.[10]

[10] The courts that have enjoined FINRA arbitrations under materially indistinguishable facts as here, moreover, have recognized that cases in which courts compelled FINRA member firms to arbitrate with investors who were undisputedly customers of an associated person of the firm are readily distinguishable. For example, the *Shadburn* court found *Multi-Fin. Sec. Corp. v. King*, 386 F.3d 1364 (11th Cir. 2004), and *John Hancock Life Ins. v. Wilson*, 254 F.3d 48 (2d Cir. 2001), inapplicable to its customer analysis because both involved compelling a member firm to arbitrate based on the investors' customer relationship with the member firm's associated person:

> The issue turned on whether the customer of a member's *associated* person was also the customer of the member. . . . *In both cases, the member was compelled to arbitrate "solely because" the investor was a customer of the associated person.* Alternatively, *King* held that arbitration was required because "[w]hen an investor deals with a member's agent or representative, the investor deals with the member." It was in this factual context that *King* and *John Hancock* rejected the notion that a direct customer relationship between the customer and the member was required. Here, unlike in *King* and *John Hancock*, the issue is not whether Morgan Keegan and Dr. Shadburn conducted transactions through Morgan Keegan's associated person.

Shadburn, 2011 WL 5244696, at *7-8 (emphases added) (citations omitted).

D. The Silvermans' Interpretation of *Aune* Conflicts with Both Supreme Court Precedent and Decisions of This Court.

Although the Silvermans rely on *dicta* in *Aune* to argue that the presumption of arbitrability should be applied to the threshold determination of whether the parties here have agreed to arbitrate,[11] (*see* App.'s Br. at 13-19) this view conflicts both with Supreme Court precedent and with other decisions of this Court. The Supreme Court, for example, most recently in *Granite Rock*, unequivocally stated that courts should "apply[] the presumption of arbitrability *only* where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." 130 S. Ct. at 2858-59 (emphasis added). "In other words, while doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made." *Applied Energetics*,

[11] The passages from *Aune* on which the Silvermans rely are *dicta* because they do not form an integral part of the *Aune* court's analysis or ultimate holding. *See, e.g.*, *The Pittston Co. v. United States*, 199 F.3d 694, 703 (4th Cir. 1999) ("Dictum is 'statement [sic] in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding-that, being peripheral, may not have received the full and careful consideration of the court that uttered it.'" (quoting *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988)); *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) ("[B]road language [that] was unnecessary [for] the Court's decision[] cannot be considered binding authority.").

Inc. v. New Oak Capital Markets, LLC, 645 F.3d 522, 526 (2d Cir. 2011) (citing *Granite Rock*, 130 S. Ct. at 2858-59).[12]

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[12] *See also, e.g., Blaustein v. Huete*, 434 F. App'x. 304, 305 (5th Cir. 2010) ("Although there is a presumption favoring liberal construction of arbitration clauses, that presumption is not applicable to the threshold determination [of] whether a party has agreed to arbitrate." (citation omitted)); *Century Indem. Co. v. Certain Underwriters at Lloyd's London*, 584 F.3d 513, 527 (3d Cir. 2009) ("We determine whether a party has [agreed to arbitrate] by applying ordinary state-law principles that govern the formation of contracts, not by applying a presumption in favor of arbitration." (citations and quotations marks omitted)); *Grundstad v. Ritt*, 106 F.3d 201, 205 n.5 (7th Cir. 1997) ("[T]he federal policy favoring arbitration applies to issues concerning the scope of an arbitration agreement entered into consensually by contracting parties; it does not serve to extend the reach of an arbitration provision to parties who never agreed to arbitrate in the first place."); *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994) (once agreement between parties has been proven, "the federal policy favoring arbitration requires that any doubts concerning the scope of an arbitrable issue be resolved in favor of arbitration," but this policy "does not extend to situations in which the identity of the parties who have agreed to arbitrate is unclear." (internal quotation marks omitted)).

For the same reason, the Silvermans' reliance on *Bank of the Commonwealth v. Hudspeth*, 714 S.E.2d 566 (Va. 2011), is misplaced. The *Hudspeth* court misapplied the federal policy favoring arbitration to the threshold determination of whether the parties had, in fact, agreed to arbitrate. The court's analysis, thus, runs afoul of clear Supreme Court precedent holding "that courts may [not] use policy considerations as a substitute for party agreement." *Granite Rock*, 130 S. Ct. at 2859. Moreover, when analyzing virtually identical claims brought by other non-customer investors, courts have distinguished *Hudspeth* on factual grounds as well. *See, e.g., Johnson*, 2011 WL 7789796, at *6 ("For purposes of distinguishing [the non-customer Funds investor]'s claim it is sufficient to note that the bank in *Hudspeth* had a direct contractual relationship with Hudspeth's affiliated broker, B.I. Investments. . . . Unlike [the non-customer Funds investor]'s claim [against Morgan Keegan] the dispute in *Hudspeth* was between a 'customer' (the bank) and an 'affiliated person (Hudspeth) of a member (BI Investments).'").

While the FINRA Rules qualify as a written agreement to arbitrate, *Aune*, 385 F.3d at 435 ("The NASD Code constitutes an 'agreement in writing' under the Federal Arbitration Act"), the Silvermans are not signatories to that agreement and may invoke its terms only if they qualify as "customers" under FINRA Rule 12200. [J.A. 109] ("There is no written agreement between [Morgan Keegan] and [the Silvermans]."). The determination of whether the Silvermans are "customers" under FINRA Rule 12200 is the initial, threshold determination under the first prong of the arbitrability test and, under *Granite Rock*, the presumption favoring arbitration does not apply to that determination. *See also Wachovia Bank, Nat. Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 170-71 (2d Cir. 2011) (rejecting argument that any ambiguity as to whether investor was "customer" should be resolved in favor of arbitration).

As non-signatories to the agreement between Morgan Keegan and FINRA, the Silvermans can reasonably claim they are a party to the agreement or otherwise enjoy rights under it only if they are third-party beneficiaries of the agreement. Under this Court's jurisprudence (before and since *Aune*), a non-signatory seeking to invoke an arbitration agreement as a third party beneficiary may only do so if "the language of the [agreement] . . . *clearly* indicate[s] that, at the time of contracting, the parties intended to provide [the purported third party beneficiary] with a direct benefit." *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n Inc.*,

384 F.3d 157, 165 (4th Cir. 2004) (emphasis added) (citation and quotation marks omitted); *see also Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 396, 397 (4th Cir. 2005) (same); *Arrants v. Buck*, 130 F.3d 636, 641 (4th Cir. 1997) (introducing broker is third-party beneficiary only "where a specific provision in the customer-clearing broker agreement makes the arbitration clause applicable to the introducing broker.").[13] Since the determination of whether a person is a third-party beneficiary under an arbitration agreement is the threshold determination of whether parties have agreed to arbitrate, the Supreme Court has made clear that the presumption of arbitrability does not apply to third-party beneficiary determinations. *E.g.*, *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370-72 (1984) (rejecting application of the presumption of arbitrability and concluding that, "[w]ithout the presumption of arbitrability, the agreements at issue here evidences no intent on the part of the parties to require arbitration of disputes between" a party and non-party); *cf. Granite Rock*, 130 S. Ct. at 2858-59.

FINRA Rule 12200 defines the third party beneficiary who may invoke the terms of the FINRA Rules as a "customer." Over a decade of jurisprudence

[13] This Court's decision in *R.J. Griffin* cannot be reconciled with the Silvermans' expansive interpretation of *Aune*. Because *R.J. Griffin* was decided before *Aune*, the Silvermans' expansive interpretation should be rejected for yet another reason: "[W]hen there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is one that must be followed, unless and until it is overruled by this court sitting *en banc* or by the Supreme Court." *McMellon v. United States*, 387 F.3d 329, 334 (4th Cir. 2004) (*en banc*), *cert. denied*, 125 S. Ct. 1828 (2005).

interpreting that term "clearly indicates," *R.J. Griffin*, 384 F.3d at 165, that an investor who qualifies as a "customer" is "one involved in a business relationship with an NASD [FINRA] member that is related directly to investment or brokerage services." *Fleet Boston*, 264 F.3d at 772. The Silvermans have conceded they never had such a "business relationship" with Morgan Keegan, [J.A. 44, 97-126]; therefore, they cannot show that FINRA Rule 12200 clearly identified them as third party beneficiaries ("customers") entitled to invoke the arbitration agreement with Morgan Keegan.

E. The Legislative History of the FINRA Rules Does Not Support the Silvermans' Expansive Interpretation of Rule 12200.

The Silvermans' contention that "FINRA's predecessor [Self Regulatory Organizations], the NASD and the NYSE, required all disputes arising out of the business activities of a member to be arbitrated," (App.'s Br. at 21) is erroneous. The FINRA Code's legislative history, in fact, shows the opposite to be true. Neither FINRA Rule 12200 nor its NASD predecessor rule was intended to encompass the same, broad spectrum of persons who were entitled to arbitrate against a member firm under NYSE Rule 600. In arguing otherwise, the Silvermans overlook the differences in the language of the two sets of rules. While the NYSE took a broad approach and permitted arbitration upon demand by either a "customer or a non-member," the NASD rules permitted only a "customer" to arbitrate. *Compare* NYSE Arbitration Rule 600(a) ("Any dispute, claim or

controversy between a . . . non-member and a member . . . arising in connection with the business of such member . . . shall be arbitrated under the Constitution and Rules of the [NYSE] as provided by any duly executed and enforceable written agreement or upon the demand of the . . . non-member." (emphasis added)) *with* NASD Rule 10301 ("Any dispute, claim, or controversy . . . between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code. . . ." (emphasis added)).

The NYSE's broader approach is based on the NYSE Constitution, which provides that "any [] person" may compel any member to arbitrate any dispute, so long as the dispute arises out of the business activities of the member. NYSE Const. art. XI, § 1. The NASD Constitution had no comparable provision. Indeed, the NASD had advised arbitrators, members, and customers that the NASD arbitration forum was created to "assist in the resolution of monetary and business disputes between investors and *their* securities firms (as well as between member firms)." *See Fleet Boston*, 264 F.3d at 772 (citations omitted and emphasis added). When FINRA was created in 2007, it adopted the more restrictive NASD rule – permitting only a "customer" to demand arbitration. *See* FINRA Comparison Chart of Old and New NASD Arbitration Codes for Customer Disputes at 24

(noting "no substantive change" between NASD Rule 10301 and FINRA Rule 12200).[14]

Contrary to what the Silvermans contend, moreover, the NYSE Rules are not the "predecessor" of the FINRA Rules. FINRA's predecessor was the NASD. The NASD and the NYSE provided parallel but separate arbitration forums, operating under distinct rules, until the NYSE arbitration forum was folded into the NASD's forum. As the SEC release to which the Silvermans cite states: "On July 30, 2007, NYSE Regulation *ceased* to provide an arbitration program, and its arbitration department ("NYSE Arbitration") was consolidated with that of NASD Dispute Resolution, Inc. ("NASD DR")." [J.A. 274] SEC Release No. 34-56208, 72 FR 45077-02 (emphasis added). In fact, the SEC release makes clear that the scope of the NYSE rule and NASD rule is not identical, and that, going forward, the NASD rule controls: "This obligation to arbitrate shall extend only to those matters that are permitted to be arbitrated under NASD DR Codes of Arbitration Procedure." [J.A. 275].

Finally, while FINRA has been on notice of the numerous cases rejecting the broad interpretation of "customer" the Silvermans urge and could have changed Rule 12100(i) and 12200 to reflect its disagreement with the case law, no change has been made. The absence of any change in the face of over a decade of case

[14] *Available at http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbrul/documents/arbmed/p018335.pdf.*

law indicates FINRA agrees with the courts' interpretation. *See Multi-Fin. Sec. Corp. v. King*, 386 F.3d 1364, 1369-70 (11th Cir. 2004) (noting "[t]he NASD . . . has been on notice" of the interpretation courts had given to NASD Code of Arbitration provision and could have changed its language; given the unchanged wording, "this Court can only conclude that the [courts'] interpretation is consistent with the NASD members' reasonable expectations").

F. The Jurisprudence Interpreting the NYSE Rules Does Not Support the Silvermans' Contention That Morgan Keegan Should Have Reasonably Expected to Arbitrate With Them.

Although courts have repeatedly rejected the contention, the Silvermans nevertheless argue that Morgan Keegan should have reasonably expected to arbitrate claims like theirs under the circumstances here. (App.'s Br. at 27-28.) One source of authority the Silvermans rely on is *dicta* in *Lehman Bros. Inc. v. Certified Reporting Co.*, 939 F. Supp. 1333 (N.D. Ill. 1996). *Lehman*, however, involved an arbitration under the NYSE Rules – *not* those of the NASD, FINRA's predecessor, whose rules differ significantly from the NYSE Rules. *Compare* NYSE Arbitration Rule 600(a) *with* NASD Rule 10301 and FINRA Rule 12200.[15]

Further, even while interpreting the more expansive NYSE Rules, the *Lehman* court insisted that a "business relationship," even if "less formal," was

[15] For the same reason, the Silvermans' reliance on *Coenen v. R. W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir. 1972), *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987), and *Nomura Sec. Int'l Inc. v. Citibank, N.A.*, 81 N.E.2d 385 (N.Y. 1993), is equally inapposite.

needed for "customer" status under the NYSE rules. In *Lehman*, the business relationship was created through direct and repeated solicitations of the investor by a Lehman Brothers registered representative. *Id.* at 1340. The Silvermans, by contrast, concede that Morgan Keegan did not sell them the Funds, did not solicit their investment, and never had any communications with them regarding their brokerage accounts at Legg Mason. Thus, the lack of any relationship with Morgan Keegan is fatal even under *Lehman*.

The Second Circuit's decision in *Spear, Leeds & Kellogg v. Cent. Life Assur. Co.*, 85 F.3d 21 (2d Cir. 1996), likewise, provides no support for the Silvermans' position. The *Spear* arbitration, like the *Lehman* arbitration, was initiated under the more expansive NYSE Rules, which only required that the claims asserted relate to exchange-related business. There was no requirement that the investors be "customers" under the NYSE code, as there is under FINRA Rule 12200. *See id.* at 23-24. Accordingly, the arbitrability analysis in *Spear* is not applicable here.

Nor does the Second Circuit's decision in *Bensadoun v. Jobe-Riat*, 316 F.3d 171 (2d Cir. 2003), assist the Silvermans. *Bensadoun* correctly insisted on some form of business relationship with a broker for an investor to qualify as a customer of the broker's firm, noting that, otherwise, "every purchaser of shares in a mutual fund and every beneficiary of a pension fund would arguably be 'customers' of

every investment institution with which those funds did business, and would be entitled to demand arbitration under the NASD." *Id.* at 177. Additionally, *Bensadoun* follows the Supreme Court's holding in *Granite Rock* that the federal policy in favor of arbitration only applies to the *scope* of arbitrable issues – not to whether an *agreement* between the parties *exists*. *See* 316 F.3d at 176. The Silvermans have neither advanced any arguments nor provided this Court with any law that would warrant reversing the District Court, and its decision should be affirmed.

G. Decisions by the Director of FINRA in Other Proceedings Are Irrelevant.

The Silvermans further assert that this Court should defer to the FINRA Director's letter in *Barrett v. Morgan Keegan & Co., Inc.*, FINRA-DR No. 08-03869, and in other cases, in which FINRA concluded, without providing any analysis or reasons, that disputes purportedly similar to this were arbitrable. (App.'s Br. at 24-26.) This argument has been rightly rejected in every case it has been made. There are a variety of reasons, including important procedural reasons, that are not relevant here that might lead the Director to allow an arbitration to proceed. More important, FINRA is not a governmental agency entitled to deference. *See, e.g., Epstein v. S.E.C.*, 416 F. App'x. 142, 148 (3d Cir. 2010); *Perpetual Secs., Inc. v. Tang*, 290 F.3d 132, 137 (2d Cir. 2002); *Desiderio v. N.A.S.D.*, 191 F.3d 198, 206 (2d Cir. 1991). For this reason, courts have

consistently refused to give any deference to the letter in *Barrett* or to others. *See, e.g.*, *Johnson*, 2011 WL 7789796, at *7 ("FINRA's interpretation . . . is not due the deference accorded to agency interpretations. . . ."); *Drzayick*, 2011 WL 5403031, at *2 n.1 (same); *Shadburn*, 2011 WL 5244696, at *7 ("Under any standard, no deference is due. . . ."); *Royal Alliance Assocs.*, 587 F. Supp. 2d at 735 n.6 ("[E]ven if the Court were inclined to give some deference to FINRA's decision, via letter, to deny Royal Alliance's request for a stay of the arbitration . . . the letter . . . provides no reason for the denial at all."); *Becker*, 2007 WL 1982790, at *5 ("[although] [t]he NASD did deny plaintiffs' motion to be excused from arbitration . . . there [was] little indication that the NASD actually took a close look"); *see also Velez v. Perrin Holden & Davenport Capital Corp.*, 769 F. Supp. 2d 445, 447 (S.D.N.Y. 2011) (declining to afford either *Auer* or even *Skidmore* deference to FINRA staff opinion); *Gomez v. Brill Sec., Inc.*, No. 10 CIV 3503 JSR, 2010 WL 4455827, at *1 (S.D.N.Y. Nov. 2, 2010) (same).

CONCLUSION

This Court should affirm the order of the District Court granting a preliminary and permanent injunction prohibiting the Silvermans from arbitrating their claims against Morgan Keegan. The order should be affirmed because the Silvermans have not shown and cannot show that Morgan Keegan is contractually obligated to arbitrate their claims. The Silvermans may not force Morgan Keegan

to arbitrate with them unless they have an agreement with Morgan Keegan to arbitrate. The Silvermans concede they never signed an arbitration agreement with the firm. Because they never had any agreements, accounts or contacts with Morgan Keegan or any of the firm's associated persons, moreover, the Silvermans were never customers of Morgan Keegan and, thus, have no agreement to arbitrate with the firm under FINRA Rule 12200. The District Court therefore rightly ruled in favor of Morgan Keegan and against the Silvermans.

REQUEST FOR ORAL ARGUMENT

Morgan Keegan respectfully requests oral argument be heard. The issues raised by this appeal are matters of concern for the financial industry and the investing public, and Morgan Keegan believes oral argument will materially aid the Court in reaching its decision.

Respectfully submitted,

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ADDENDUM

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
at LEXINGTON

CIVIL ACTION NO. 5:11-CV-352-KKC

MORGAN KEEGAN & COMPANY, INC.

PLAINTIFF

v.

MEMORANDUM OPINION AND ORDER

ROBERT RAS

DEFENDANT

* * * * * * * * * * * * * * * *

This matter is before the Court on the motion for preliminary injunction filed by Morgan Keegan & Company, Inc. [DE 3]. Morgan Keegan seeks to enjoin Defendant Robert Ras from pursuing his claims against Morgan Keegan in an arbitration before FINRA, styled *Robert Ras v. Morgan Keegan & Company, Inc.*, FINRA Dispute Resolution Arbitration No. 11-02322. Morgan Keegan argues that it is not subject to FINRA arbitration with Defendant because he was never a customer of Morgan Keegan. The Court has reviewed the parties' briefs and the matter is ripe for a decision.

For reasons stated in this opinion, the Court grants the motion for preliminary injunction.

I. FACTUAL BACKGROUND

Robert Ras sought to supplement his retirement income by investing in the Regions Morgan Keegan High Income Fund ("RMK Fund"). After visiting Morgan Keegan's website and reading the prospectus, Mr. Ras invested $34,000 in the RMK Fund through his local broker, Lexington Investment Company. When Mr. Ras's investment in the RMK Fund began to

decline, his broker at Lexington Investment Company contacted Morgan Keegan's local office. The broker was told "that everything was fine and that there was nothing out of the ordinary with the RMK Funds." [DE 10]. Subsequently, Mr. Ras's investment in the fund lost approximately $27,046.48. [DE 10].

In June 2011, Mr. Ras filed a Statement of Claim initiating arbitration proceedings before the Financial Industry Regulatory Authority ("FINRA") against Morgan Keegan. FINRA is a self-regulatory organization under the Securities and Exchange Act of 1934 and "has authority to, *inter alia*, create and enforce rules for its members in order to provide 'regulatory oversight of all securities firms that do business with the public.'" *Wachovia Bank v. VCG Special Opportunities Master Fund*, __ F.3d __, No. 10-1648-cv, 2011 WL 5110122 at *7 (2d Cir. Oct. 28, 2011) (quoting Securities and Exchange Commission Release No. 34-56145, 72 Fed. Reg. 42169, 42170 (Aug. 1, 2007)). FINRA was created in 2007 through a consolidation of the National Association of Securities Dealers, Inc. ("NASD") [1] and the regulatory arm of the New York Stock Exchange Group, Inc. *Id.*

Morgan Keegan had until August 5, 2011 to respond to the FINRA Statement of Claim. On August 4, 2011, Morgan Keegan filed a motion for preliminary injunction in the District Court for the Western District of Kentucky. [DE 3]. On November 1, 2011, the case was *sua sponte* transferred to the Eastern District of Kentucky.

[1] Authority arising under the NASD Code governs and guides the interpretation of the FINRA Rules to the extent that there was no meaningful change from the NASD Code. The relelvant rule, Rule 12200, does not materially differ from NASD Rule 10301. *See J.P. Morgan Sec. Inc. v. La Citizens Prop. Ins. Corp.*, 712 F.Supp.2d 70, 72 n. 45 (S.D.N.Y. 2010).

II. DISCUSSION

A. Preliminary Injunction Standard

A preliminary injunction is an extraordinary remedy, which should be granted only if the moving party carries its burden of proving that the circumstances clearly demand it. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). This Court's decision on whether to issue the injunction requires balancing four factors: (1) the likelihood that Morgan Keegan will succeed on the merits; (2) whether Morgan Keegan will suffer irreparable harm if the injunction does not issue; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the injunction advances the public interest. *Jones v. Caruso*, 569 F.3d 258, 270 (6th Cir. 2009). These four considerations are "factors to be balanced, not prerequisites that must be met." *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003). If there are no disputed factual issues and the primary issues are questions of law, no hearing is required. *Certified Restoration Dry Cleaning Network v. Tenke Corp.*, 511 F.3d 535, 552 (6th Cir. 2007). Here, the material facts are not in dispute and the Court declines to hold a hearing.

Morgan Keegan argues that it did not agree to FINRA Arbitration with Mr. Ras, because he was never a customer of Morgan Keegan. [DE 3]. Mr. Ras argues that he was a customer of Morgan Keegan under a broader definition customer. [DE 9].

B. ANALYSIS

This dispute is virtually identical to a case recently decided in the Middle District of Alabama. *See Morgan Keegan & Co. v. Shadburn*, No. 2:11-CV-624-WKW, 2011 WL 5244696 (M.D. Ala. Nov. 3, 2011). In both cases, individual investors purchased the RMK Fund on the secondary market from third-party brokers and initiated FINRA arbitration proceedings against Morgan Keegan. *See id.* at *3. In both cases, Morgan Keegan filed for a preliminary injunction to

enjoin the FINRA arbitration because it did not agree to arbitrate the defendants' claims as both defendants were not customers. *See id.* at *5. In fact, the legal memorandum filed by Shadburn is virtually identical to Defendant's memorandum. [*Compare Shadburn* DE 13, Defendant's Memorandum of Law in Objection to Motion for Preliminary Injunction *with* DE 9]. In *Shadburn*, the court granted the preliminary injunction and followed the great weight of authority in ruling that Shadburn was not a customer of Morgan Keegan. *Id.* at *12. In addition, on substantially similar facts, two courts have vacated FINRA arbitration awards because the investors who purchased RMK Funds from third-party brokers were not customers, and thus, could not arbitrate against Morgan Keegan before FINRA. *See Morgan Keegan & Co. v. Garrett*, __ F. Supp. 2d __, No. 4:10-cv-04308, 2011 WL 4716060 at *1–2 (S.D. Tex. Sept. 30, 2011); *Zarecor v. Morgan Keegan & Co.*, No. 4:10-cv-01643-SWW at 8–9 (E.D. Ark. July 29, 2011).[2] The Court finds *Shadburn*, *Garrett*, and *Zarecor's* analyses persuasive and adopts its reasoning.

1. Likelihood of Success on the Merits

Morgan Keegan is a member of FINRA, an industry association that provides an arbitration forum for claims against its members. FINRA Rules provide that "[p]arties must arbitrate a dispute under the Code if . . . (1) Required by a written agreement, or (2) Requested by the customer." FINRA Rule 12200. The parties must also arbitrate if the dispute is "between a customer and a member or associated person of a member; and [t]he dispute arises in connection with the business activities of the member." FINRA Rule 12200. It is undisputed that Morgan Keegan and Mr. Ras did not have a "written agreement." Therefore, Defendant can only compel Morgan Keegan to arbitrate if he was a "customer" of Morgan Keegan.

[2] *Zarecor*, an unpublished opinion with no Westlaw citation, is attached as Exhibit D to Morgan Keegan's Motion for Preliminary Injunction [DE 3].

The FINRA Arbitration Rules' definition of "customer" simply states that "[a] customer shall not include a broker or dealer." FINRA Rules 12100. Defendant argues, like the defendant in *Shadburn*, that he is a customer of Morgan Keegan because he is not a broker or a dealer.

Defendant's argument has been rejected. *Fleet Boston Robertson Stephens Inc. v. Innovex, Inc.*, 264 F.3d 770, 772 (8th Cir. 2001) (rejecting the argument that "by negative inference this definition means a 'customer' is everyone who is not a broker or dealer"); *Shadburn*, 2011 WL 5244969 at *8. Under Defendant's "proposed definition . . . a FINRA member's membership alone would require arbitration. Such a result would 'do significant injustice to the reasonable expectations of [FINRA] members.'" *Shadburn*, 2011 WL 5244696 at *8 (quoting *Wheat First Sec., Inc. v. Green*, 993 F.3d 814, 820 (11th Cir. 1993))(alteration in original).

Here, like the defendant in *Shadburn*, Mr. Ras's relationship with Morgan Keegan is "void of any form of business qualities whatsoever." *Shadburn*, 2011 WL 5244696 at *8. Just like the defendant in *Shadburn*, Mr. Ras "did not have any written contract or customer agreement with Morgan Keegan." *Id.* Mr. Ras "did not purchase shares in the RMK Fund through Morgan Keegan." *Id.* Mr. Ras "did not invest in the RMK Fund in its initial public offering." *Id.* He "did not pay for any investment, brokerage or other service through Morgan Keegan." *Id.* Mr. Ras "did not have a direct transactional relationship with Morgan Keegan (or its associated person)." *Id.* (quotation marks and citation omitted). In fact, Mr. Ras did not have an account with Morgan Keegan, and "Morgan Keegan has no record of any documents, accounts, or files related to anyone named Robert Ras." [DE 3-2 p. 2, Decl. of Thomas Barnett].

The only difference between this case and *Shadburn* is that Mr. Ras's broker at Lexington Investment Company contacted the local Morgan Keegan office, and a Morgan

Keegan representative told him "that everything was fine [and] that there was nothing out of the ordinary with the RMK Funds." [DE 10]. This communication between Mr. Ras's broker and a Morgan Keegan representative is not sufficient to make Mr. Ras a customer of Morgan Keegan. In a similar case, investors who purchased the RMK Fund through third-party brokers had two conversations with Morgan Keegan representatives who discussed how the funds functioned and gave assurances that "the funds were very liquid" and "dividends were not in danger". *See Zarecor*, No. 4:10-cv-01643-SWW at 8–9. In addition, the investors traveled to Memphis, Tennessee to attend the annual meeting of Morgan Keegan because the funds seemed to be in trouble. *Id.* These contacts "failed to transform [the investors] into 'customers' entitled to demand arbitration under Rule 12200." *Id.* at 10.

Another court reached the same conclusion and vacated a FINRA arbitration award for investors who purchased the RMK fund through third-party brokers. *See Garrett*, 2011 WL 471606 at *1–2. The court held that two investors "were not Morgan Keegan's customers" because they did not have a direct relationship with the firm. *Id.* Just like Mr. Ras, the two investors "bought shares in the fund from third-party brokers on the secondary market." *Id.*

Three district courts in three different circuits have all concluded that individual investors who purchased the RMK Fund from third-party brokers were not customers of Morgan Keegan and cannot force Morgan Keegan to participate in FINRA arbitration. Defendant offers no case law that reaches a contrary result on similar facts. Instead, Defendant characterizes as "erroneous decisions" the entire line of cases that lead to the obvious conclusion that he is not a customer Morgan Keegan. [DE 9 p. 9]. The Court disagrees with Defendant's assertion and finds that "[t]he mere fact that Morgan Keegan made available to the public on its website materials

pertaining to the RMK Fund is insufficient . . . to bestow 'customer' status" on Mr. Ras. *Shadburn*, 2011 WL 5244696 at *9.

Morgan Keegan has demonstrated a substantial likelihood of success on the merits of its claim that Mr. Ras cannot compel it to arbitrate before FINRA.

2. Remaining Factors for Injunctive Relief

Defendant does not contest that forcing Morgan Keegan to arbitrate claims which it did not agree to arbitrate would cause it irreparable harm. [DE 9 p. 7]. Defendant does not articulate how a preliminary injunction would cause substantial harm to others. The Court finds there is a low probability that this injunction will cause any harm to others.

Finally, Defendant argues the public interest weighs against the issuance of an injunction. The Court disagrees. The public interest weighs in favor of Morgan Keegan because "[a]rbitration is in the public interest only where 'the subject of the arbitration is one that the parties actually agreed to arbitrate.'" *Shadburn*, 2011 WL 5244696 at *12 (quoting *Chi. Sch. Reform Bd. of Trs. v. Diversified Pharm. Servs., Inc.*, 40 F. Supp. 2d 987, 996 (N.D. Ill. 1999)). The Court finds that a preliminary injunction would serve the public interest by avoiding the time and expense that will result from a needless arbitration.

III. CONCLUSION

Having considered and balanced all of the factors required for entry of a preliminary injunction, the Court finds that Morgan Keegan has overwhelmingly met its burden of proving circumstances warranting entry of an injunction.

Accordingly, IT IS HEREBY ORDERED that:

(1) Morgan Keegan's motion for preliminary injunction [DE 3] is GRANTED.

(2) Defendant, Robert Ras, is immediately RESTRAINED and ENJOINED from pursuing his claims against Morgan Keegan in the arbitration proceeding styled *Robert Ras v. Morgan Keegan & Company, Inc.*, FINRA Dispute Resolution Arbitration No. 11-02322.

This the 14th day of November, 2011.

Signed By:
Karen K. Caldwell
United States District Judge

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
GENERAL CIVIL DIVISION

MORGAN KEEGAN & COMPANY, INC., a Tennessee Corporation,
Plaintiff,

CASE NO.: 11-CA-009953

v.

DIVISION: G

WESLEY SOKOL,
Defendant.
_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

This matter came before the Court for hearing on November 28, 2011, on the Plaintiff's ("Morgan Keegan") Motion for Temporary Injunction to enjoin Defendant ("Mr. Sokol") from moving forward with arbitration proceedings pursuant to Financial Industry Regulation Authority ("FINRA") rules. Having considered the pleadings filed in support of and in opposition to the motion, arguments of counsel, and applicable law, the Court FINDS and ADJUDGES as follows:

PROCEDURAL AND FACTUAL HISTORY

On or about May 27, 2011, Mr. Sokol initiated an arbitration proceeding against Morgan Keegan before FINRA, styled *Wesley Sokol v. Morgan Keegan & Co., Inc.* FINRA Case No. 11-02140 (the "Arbitration"). Mr. Sokol's complaint contains numerous allegations relating to Morgan Keegan's sale and Mr. Sokol's purchase of Regions Morgan Keegan Bond Funds ("RMK Funds"). Mr. Sokol purchased RMK Funds, not through Morgan Keegan, but through a third-party broker-dealer, A.G. Edwards. Mr. Sokol then transferred the funds to another third-party broker-dealer, TD Ameritrade. A.G. Edwards and TD Ameritrade are not associated with Morgan Keegan.

On August 10, 2011, Morgan Keegan filed in this Court a Complaint for Declaratory Judgment and Application to Enjoin Arbitration. On September 2, 2011, Morgan Keegan filed the instant Motion for Temporary Injunction seeking to enjoin the arbitration proceedings.

SUMMARY OF ARGUMENTS

The crux of the parties' dispute as it relates to the motion for temporary injunction is whether Mr. Sokol is a "customer" of Morgan Keegan for purposes of FINRA's arbitration provisions. FINRA Rule 12200 provides that parties must arbitrate a dispute if (1) required by written agreement or requested by a customer; (2) the dispute is between a customer and a member or associated person of a member; and (3) the dispute arises in connection with the business activities of the member or associated person.

Morgan Keegan contends that although it is a FINRA member, it is not subject to arbitration before FINRA on Mr. Sokol's claims because it did not have an arbitration agreement with Mr. Sokol and Mr. Sokol is not a customer of Morgan Keegan as required by FINRA regulations in the absence of an arbitration agreement. Morgan Keegan highlights the facts that Mr. Sokol purchased the RMK Funds at issue through an unrelated third-party, A.G. Edwards, and that Mr. Sokol never engaged in any direct business transactions with Morgan Keegan. Morgan Keegan claims that if the Court does not enter a temporary injunction, it will suffer irreparable injury by being forced to participate in binding arbitration that it did not agree to and is not otherwise subject to.

Mr. Sokol contends that because he invested in RMK Funds, relied upon Morgan Keegan prospectuses, their website, and statements made by Morgan Keegan representatives at a local Morgan Keegan presentation, he is a customer for purposes of FINRA Rule 12200. He further contends that as a customer, he is entitled to compel arbitration of his claims against Morgan Keegan.

DISCUSSION

Section 682.03, Florida Statutes (2011), gives this Court the authority to enter an injunction preventing arbitration in cases where there is a dispute over whether a claim is arbitrable. In general, to obtain a temporary injunction, a party must establish that: "(1) irreparable injury will result if the injunction is not granted; (2) there is no adequate remedy at law; (3) the party has a clear legal right to the requested relief; and (4) the public interest will be served by the temporary injunction." *Provident Management Corp. v. City of Treasure Island*, 796 So. 2d 481, 485 n. 9 (Fla. 2001). For the reasons discussed below, the Court finds that Morgan Keegan has satisfied each of these elements and is entitled to a temporary injunction.

(1) Irreparable Harm & (2) No adequate remedy at law

The parties and the law concur that the irreparable harm prong of the temporary injunction standard is met in circumstances where the arbitrability of a claim is in dispute. Morgan Keegan would suffer irreparable harm if forced to arbitrate a dispute that it has not agreed to arbitrate if it is not otherwise legally bound to do so. *See K.W. Brown and Co. v. McCutchen*, 819 So. 2d 977, 979 (Fla. 4th DCA 2002) (finding that party forced to arbitrate in absence of agreement to arbitrate has no adequate remedy at law, and impliedly finding irreparable harm); *Prudential Securities, Inc. v. Yingling*, 226 F.3d 668 (6th Cir. 2000) (affirming district court's issuance of an injunction permanently prohibiting defendant from pursuing claims in arbitration). *See also Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F. 3d 125, 129 (2d Cir. 2003) (finding that a party suffers irreparable harm when it is forced to expend time and resources arbitrating an issue that is not arbitrable).

Additionally, the Court agrees with Morgan Keegan that there is no adequate remedy at law because monetary damages cannot compensate Morgan Keegan for having to arbitrate

matters it did not agree to arbitrate, in a forum it did not choose, with the limited rights of review and appeal associated with arbitration awards. *See K.W. Brown*, 819 So. 2d at 979.

(3) **Clear Legal Right to the Requested Relief**

The Court finds that Morgan Keegan has a strong prima facie case that there exists no basis upon which Mr. Sokol may compel Morgan Keegan to arbitrate. In other words, Morgan Keegan is likely to succeed on the merits of the declaratory relief action.

Here, because no arbitration agreement exists between Mr. Sokol and Morgan Keegan, the only available basis upon which Mr. Sokol could force Morgan Keegan to arbitrate his claims appears to be under FINRA if he is determined to be a "customer" of Morgan Keegan. As additionally noted above, FINRA Rule 12200 provides that parties must arbitrate a dispute if (1) required by written agreement or requested by a customer; (2) the dispute is between a customer and a member or associated person of a member; and (3) the dispute arises in connection with the business activities of the member or associated person. FINRA does not define customer, except to state that a customer shall not be a broker or dealer. *See* FINRA Rule 12100(i). Accordingly, this Court must look to other jurisdictions' interpretations of what it means to be a customer. Although there is no controlling case on point, there is recent persuasive authority dealing with Morgan Keegan and investors similarly situated to Mr. Sokol that has assisted this Court in reaching the determination that Mr. Sokol is not a customer of Morgan Keegan for purposes of the FINRA arbitration requirements.

Rapidly emerging case law from various federal district courts appears to be in accord that an investor's purchase of a FINRA members' fund shares from an unrelated third-party brokerage firm does not, in and of itself, render "customer" status upon the investor as it relates to the FINRA member. *See Morgan Keegan & Company, Inc. v. Jindra*, No. C11-5704BHS, 2011 U.S. Dist. LEXIS 135464 (W.D. Wash. November 22, 2011); *Morgan Keegan &*

Company, Inc. v. Shorthouse, No. C11-5734BHS, 2011 U.S. Dist. LEXIS 135459 (W.D. Wash. November 22, 2011); *Morgan Keegan & Company, Inc. v. Ras*, No. 5:11-CV-352-KKC (E.D. Ky. November 14, 2011); *Morgan Keegan & Company, Inc. v. Drzayick*, No. 1:11-CV-126-EJL, 2011 U.S. Dist. LEXIS 129366 (D. Idaho November 8, 2011); *Morgan Keegen & Company, Inc. v. Shadburn*, No. 2;11-CV-624-WKW[WO], 2011 U.S. Dist. LEXIS 128009 (M.D. Ala. November 3, 2011). The investor does not obtain customer status, even if the investor alleges that he relied on the members' materials available to the public such as prospectuses, reports, and website marketing materials. *See*, *e.g.*, *Shadburn,* 2011 U.S. Dist. LEXIS at *30-32. Unless the investor individually receives direct brokerage or investment services such as facilitation of purchases and transactions and exchange of money, for non-exclusive examples, from the FINRA member or a person associated with the member, the investor is not a "customer" of the member for purposes of FINRA arbitration regulations. *See*, *e.g.*, *Id.*

Other courts in the past have similarly held that to qualify as a "customer" for purposes of NASD Rule 10301 (the predecessor of FINRA Rule 12200), a party must actually *conduct business* with a member firm or its registered representative. *See, e.g.*, *Vestax Securities Corp. v. McWood*, 280 F.3d 1078, 1082 (6th Cir. 2002); *see also USAllianz Securities, Inc. v. Southern Michigan Bancorp, Inc.*, 290 F. Supp.2d 827, 873 (W.D. Mich. 2003).

Here Mr. Sokol never purchased any shares of the RMK Fund through Morgan Keegan or its associated persons, never maintained an account with Morgan Keegan, and never conducted business transactions with Morgan Keegan or its associated persons. Mr. Sokol's purchased the RMK Fund shares through T.G. Edwards. It is undisputed that T.G. Edwards was not associated with Morgan Keegan. Mr. Sokol asks this Court to ascertain an alleged intent of the drafters of Rule 12200, craft its own definition of "customer" apart from the recent federal holdings, and determine that the definition of "customer" is actually much broader and, in fact,

reaches anyone who is not a broker or dealer and who brings a claim against a FINRA member. However, the Court agrees with the reasoned opinions cited above and, for purposes of determining Morgan Keegan's likelihood of success on the merits, declines Mr. Sokol's invitation to extend the reach of "customer" to this extreme.

(4) Public Interest

It is not in the public interest to force a party into arbitration on issues that are not arbitrable. Accordingly, Morgan Keegan additionally meets the fourth and final prong of the necessary elements to obtain a temporary injunction.

It is therefore **ORDERED** and **ADJUDGED** that Plaintiff's Motion for Temporary Injunction is hereby **GRANTED**.

DONE AND ORDERED, in Chambers in Tampa, Hillsborough County, Florida, this _____ day of December, 2011.

ORIGINAL SIGNED
DEC 06 2011
MARK R. WOLFE
CIRCUIT COURT JUDGE

MARK R. WOLFE
Circuit Court Judge

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CERTIFICATE OF COMPLIANCE

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Dated: May 14, 2012

/s/ Larry E. Mobley
Counsel for Appellee

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 14th day of May, 2012, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 14th day of May, 2012, I caused the required copies of the Brief of Appellee to be hand filed with the Clerk of the Court.

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