IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AEGIS CAPITAL CORP.	:	
v.	:	**No. 14-6739**
EARL MANGIN, et al.	:	

ORDER

AND NOW, this 12th day of Jan 2014, upon consideration of Plaintiff Aegis Capital Corp.'s Motion for Preliminary Injunction (Doc. 2), Defendant Earl Mangin, et al.'s Response in Opposition (Doc. 9), and Plaintiff Aegis Capital Corp.'s Reply Brief in Support of Plaintiff's Motion for Preliminary Injunction (Doc. 19), it is hereby **ORDERED** and **DECREED** that Plaintiff Aegis Capital Corp.'s Motion for Preliminary Injunction is **DENIED**.[1]

BY THE COURT:

Petrese B. Tucker

Hon. Petrese B. Tucker, C.J.

[1] Plaintiff Aegis Capital Corp. ("Aegis") seeks a preliminary injunction against Defendants Earl Mangin, Derek Mangin (individually and as custodian for Alicia Mangin, Tiffany Mangin, and Keirsten Mangin), and Heidi Mangin (individually and as custodian for Jake McBride) ("the Mangins") stemming from a series of financial transactions between Malcolm Segal ("Mr. Segal"), a broker for Aegis, and the Mangins. The Mangins initiated a Financial Industry Regulatory Authority ("FINRA") Arbitration proceeding against Aegis on September 24, 2014, but Aegis petitions this Court to enjoin the Mangins from further pursuing their arbitration claims in that forum. *See Mangin, et al. v. Aegis Capital et al.*, FINRA No. 14-02773.

In April of 1993, Mr. Segal became the President of National C.D. Sales. In May of 2002, Mr. Segal started J & M Financial. Years later, in April of 2011, Mr. Segal became associated with Aegis in addition to his activities with National C.D. Sales and J&M Financial. Mr. Segal's business through J & M Financial and National C.D. Sales was separate and apart from his employment with Aegis, however it was known by Aegis as "Outside Business Activities."

On September 24, 2014, the Mangins filed a FINRA Arbitration claim against Aegis and Mr. Segal alleging that Mr. Segal, through J & M Financial and National C.D. Sales, engaged in a Ponzi scheme that cost the Mangins their investments. Additionally, the Mangins assert that Aegis knew of Mr. Segal's outside business activities yet failed to monitor, detect, or prevent Mr. Segal's conversion of the Mangins' investments. Aegis seeks a preliminary injunction to enjoin the Mangins from further pursuing these claims.

In deciding whether to enjoin a party, courts consider the following factors: (1) the likelihood that the moving party will succeed on the merits; (2) the extent to which the moving party will suffer irreparable harm without injunctive relief; (3) the extent to which the nonmoving party will suffer irreparable harm if the injunction is issued; and (4) the public interest. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co.*, 290 F.3d 578, 586 (3d Cir. 2002); *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 109 (3d Cir. 2010). Additionally, the Third Circuit has stated that preliminary injunctive relief is an "extraordinary remedy, which should be granted only in limited circumstances." *Ferring Pharmaceuticals, Inc. v. Watson Pharmaceuticals, Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (citing *Novartis Consumer Health, Inc.*, 290 F.3d at 586). Here, Aegis fails to show that it is likely to succeed on the merits.

Aegis argues that the Mangins' claims are not arbitrable. Under FINRA Rule 12200, claims against FINRA members like Aegis are subject to arbitration 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.

The Mangins and Aegis do not have a written arbitration agreement, so in order to bring a FINRA claim against Aegis, the Mangins must be "customers" in a dispute arising between "a

customer and a member or associated person of a member . . . in connection with the business activities of the member or the associated person." *See* FINRA Rule 12200.

FINRA rules speak in terms of exclusion when defining the meaning of "customer" under Rule 12200. The rules state only that a "customer shall not include a broker or dealer." *See* FINRA Rule 12100(i). The Third Circuit has not yet defined the term "customer" under FINRA Rule 12200 although district courts in this circuit have opined on the matter. *O.N. Equity Sales Co. v. Emmertz*, 526 F. Supp. 2d 523, 529-32 (E.D.Pa. 2007); *O.N. Equity Sales Co. v. Hoegler*, Nos. 07-2703 (FLW), 07-3211(FLW), 2008 WL 304924, at *3 (D.N.J. Jan. 28, 2008). In *O.N. Equity Sales Co. v. Emmertz*, investor Emmertz sought to arbitrate claims against O.N. Equity Sales Company for, among other actions, failing to supervise, inspect, and monitor the outside business activities of one Gary Lancaster, a representative associated with the company. 526 F. Supp. 2d at 524. In deciding the issue, the district court discussed the meaning of "customer" within the rules of the National Association of Securities Dealers, Inc. ("NASD"), FINRA's predecessor. *Id.* at 529-32. Focusing on the fact that Emmertz's claim included allegations of negligent supervision, the district court found that Emmertz was a customer under NASD rules and could bring arbitration claims against O.N. Equity Sales Company stemming solely from Emmertz's relationship with Lancaster. Another district court came to the same conclusion in *O.N. Equity Sales Co. v. Hoegler*, a case also involving Lancaster's outside business activities. 2008 WL 304924, at *3.

Despite these cases from sister courts within this circuit, Aegis asks this Court to instead follow a recent Second Circuit decision that defines a "customer" as "one who, while not a broker or dealer, either (1) purchases a good or service from a FINRA member, or (2) has an account with a FINRA member." *Citigroup Global Markets Inc. v. Abbar*, 761 F.3d 268, 275 (2d Cir. 2014).

Aegis argues that a rule restricting the definition of "customer" to those interacting directly with FINRA members would provide predictability to FINRA members, minimize litigation over FINRA arbitrability, and allow litigation such as this to proceed on a summary basis. The company also contends that the *Emmertz* and *Hoegler* opinions predate *Abbar* and only add to the state of complexity and confusion that the Second Circuit sought to remedy with its clear rule. Additionally, Aegis argues that cases cited by the Mangins do not properly analyze the reasonable expectations of FINRA members, wrongfully employ a presumption in favor of arbitration, and wrongfully defer to FINRA statements that support arbitrability.

Many of the cases cited by both parties are outside of the Third Circuit and, while these cases hold some persuasive authority, they are not controlling upon this Court. The two cases from within this circuit, however, hold that investors interacting only with associated persons of FINRA members can bring FINRA claims against FINRA member institutions. *See Emmertz*, 526 F.Supp.2d at 529; *Hoegler*, 2008 WL 304924, at *3. Despite whatever administrative benefits having a limited definition would garner, FINRA Rules leave the definition of "customer" open while specifically limiting the definition of "customer" in other sections of its rules, thus suggesting a more flexible interpretation in this case. *See* FINRA Rule 4210(a)(3)

(defining a "customer" as "any person for whom securities are purchased or sold or to whom securities are purchased or sold whether on a regular way, when issued, delayed or future delivery basis."); FINRA Rule 2261(c) (defining "customer" as "any person who, in the regular course of such member's business, has cash or securities in the possession of such member."); *Metlife Securities, Inc. v. Pizzano*, No. 09-CV-4459, 2010 WL 2545170, at *3 n.1 (D.N.J. June 18, 2010) (detailing NASD Conduct Rule 2520(a)(3) and NASD Conduct Rule 2270(b), later adopted by FINRA as Rule 4210 and FINRA Rule 2261(c), respectively).

Additionally, while it is the responsibility of the courts to decide the issue of arbitrability, FINRA's statements regarding the interpretation of its own rules remain persuasive. In a procedural rule change proposal to the Securities and Exchange Commission ("SEC"), FINRA endorsed an interpretation of Rule 12200 that favors arbitrability in cases in which an investment professional sells securities and other financial products away from his associated firm ("selling away cases"). *See Order Approving Proposed Rule Change*, 74 Fed. Reg. 731, 736 n.37 (Jan. 7, 2009). The SEC notes that:

> FINRA reiterated its position that "selling away" claims are arbitrable under the Codes. Under the Codes, FINRA accepts cases brought by customers against associated persons in selling away cases, and cases by customers against the associated person's member firm if there is any allegation that the member was or should have been involved in the events, such as an alleged failure to supervise the associated person.

Id. At this current time, this Court sees no reason to read limitations into a definition that FINRA has left open, particularly when FINRA has issued such a clear interpretive statement regarding that very definition.

At all relevant times, Mr. Segal was an employee and broker for Aegis. Aegis does not dispute his status as an "associated person of a [FINRA] member" within the meaning of FINRA Rule 12200. The Mangins' claims against Aegis stem from Mr. Segal's outside business activities, the existence of which Aegis was aware. Moreover the FINRA claims brought against Aegis specifically cite a failure of oversight on Aegis' part. *See Mangin, et al. v. Aegis Capital et al.*, FINRA No. 14-02773. There is no dispute that the Mangins were customers of Mr. Segal. There is also no disagreement that the underlying FINRA action concerns a dispute that arose in connection with Mr. Segal's business dealings. Given the foregoing, Aegis cannot show it is likely to succeed on the merits of its claim, and therefore cannot provide the showing necessary to attain a preliminary injunction in this matter.