PRESKA, Chief District Judge, dissenting:

Puzzlingly, the majority declines to answer the question squarely presented in this appeal — whether an issuer of securities is entitled under the FINRA Rules to arbitrate a dispute with its underwriter regarding the underwriting. More puzzlingly yet, the majority affirms a decision that such a dispute is subject to mandatory arbitration by answering a different question. It transforms this case into one where the provision of ancillary services about which there is no dispute entitles the issuer to arbitrate — and collect damages related to — a different dispute about a different transaction under a different contract. This cannot be. Judges may not employ this type of metamorphosis to decide contract cases. The majority errs in judgment and in law, so I respectfully dissent.

I.

The gravamen of WVUH's notice of claim is summarized in the first paragraph: WVUH alleges that UBS's misinformation defrauded WVUH into issuing ARS. Virtually the entire notice of claim is dedicated to allegations about the alleged fraud in causing WVUH to issue ARS, and the claimed damages are about the issuance transaction. Almost no other claim asserted discusses the purchase of ancillary auction services. One sentence in paragraph 114 of a 143-paragraph, 40-page notice of claim alleges that UBS's "misrepresentations and omissions ... induced Claimants to enter into the recommended component transactions,"

(Notice of Claim ¶ 114), presumably including UBS's ancillary auction services under separate broker-dealer agreements. Fixating on this single sentence, the majority effectively ignores the point of the notice of claim and requires UBS to arbitrate wide-ranging claims involving damages that are not consequential to the fraud alleged in the sentence in paragraph 114.

As in most of the ARS-related cases filed in the U.S. District Court for the Southern District of New York and appealed in this Court, WVUH's main claims are that in the course of underwriting WVUH's ARS issuance, UBS misrepresented the demand for ARS and manipulated the market for ARS with its own bids, artificially setting a low interest rate for ARS bonds. This state of affairs caused WVUH to issue ARS rather than traditional fixed- or variable-rate bonds. When UBS stopped submitting support bids for WVUH's ARS, the market for those ARS failed, causing interest rates on WVUH's ARS to soar to the "penalty rate" of 12-15%. Primarily, the resulting damages were significantly increased debt-service payments and significantly increased funding costs because WVUH's debt had to be refinanced to non-ARS bonds. This is an expensive undertaking in itself — another underwriting transaction — and, after the ARS debacle, WVUH had to purchase expensive bond insurance to reassure investors. Based on these facts, WVUH claimed breach of fiduciary duty, intentional and negligent misrepresentation,

breach of the underwriting agreement, violation of the securities laws, breach of warranty, and unjust enrichment. Indeed, the breach of contract count states that "[a]s a result of UBS' agreement to serve as underwriter," (Notice of Claim ¶ 116 (emphasis added)), WVUH sustained damages; it does not discuss the broker-dealer agreements at all. As WVUH framed the damages for these claims in the notice of claim, it sought "tens of millions of dollars . . . in increased interest charges and other funding costs." (Id. ¶ 1.) Specifically, WVUH says it is entitled to recover "all extra interest expenses," "refinancing expenses," and "bond insurance." (Id. ¶¶ 100-103.) Fees paid for auction services, which form the basis of the majority's holding, are not mentioned in the section of the notice of claim entitled "Claimants' Damages."

To be sure, WVUH tucks a claim for damages for fees paid for "component transactions" into the single count of the notice of claim containing the single sentence upon which the majority relies. This presumably includes WVUH's ancillary claim for damages related to payment of fees for broker-dealer services provided under the broker-dealer agreements.[1] WVUH had engaged

[1] The "component transactions" are never specified, and this term also probably covers interest-rate swaps, credit enhancements, and the like, which were provided under the underwriting and/or other agreements apart from the broker-dealer agreements. While the notice of claim offers no further explanation, the majority now defines "component transactions" to include "underwriting, auction services and swap transactions." Majority Op. at 20.

UBS as its broker-dealer under separate contracts for a fee. As broker-dealer, UBS agreed to solicit bids for WVUH's ARS, and it hired an agent then to collect and tally the bids and to match buyers and sellers under certain criteria to set the interest rate for the ARS for the next period. There is no evidence in the record that UBS breached its broker-dealer agreements in any way, and WVUH did not make such an allegation.

In short, WVUH's notice of claim rings familiar to those involved in ARS-related litigation, of which there has been much. The allegations involve UBS's alleged failure to disclose material information about the ARS market and UBS's bidding practices for its own account. Here, WVUH has two sets of distinct grievances: one related to the underwriting and issuance of ARS, with damages consisting primarily of increased interest payments and refinancing costs, and another related to the alleged fraudulently induced purchase of "recommended component transactions," including broker-dealer services, with damages consisting of fees paid for those services.

The majority ignores these fundamental distinctions and concludes that by purchasing UBS's broker-dealer/auction services, WVUH is entitled to arbitrate — and obtain damages related to — a dispute not about being duped into purchasing UBS's broker-dealer services, but about being duped into purchasing UBS's underwriting services. It says that conclusory allegations involving the purchase of broker-dealer services

"link the grievance WVUH asserts in arbitration to the transaction that established its customer status." Majority Op. at 20. This is not so. Both the claim for damages related to underwriting and the claim for damages related to the purchase of broker-dealer services involve proving that WVUH was duped. But the grievance asserted in arbitration is not being duped generally. The grievance is being duped into taking a particular action. See Restatement (Second) of Torts § 531 (1977) (stating that liability for fraudulent misrepresentation attaches "for pecuniary loss suffered by [the intended or foreseeable victims] through their justifiable reliance in the type of transaction in which [the tortfeasor] intends or has reason to expect their conduct to be influenced"); id. § 538 (stating that misrepresentation only actionable if a reasonable person would attach importance to the representation "in determining his choice of action in the transaction in question" (emphasis added)).

Based on the alleged fraud, WVUH took at least two separate actions for which it now seeks damages: it issued ARS, and it purchased broker-dealer services. The causes of action supporting and damages asserted for each grievance are wholly different and involve different evidence. Arbitration is unavailable for the issuance-related grievance because, as explained below, WVUH does not satisfy the definition of "customer" in the underwriting transaction. Yet the majority

permits an arbitration not only for the claim and damages related to the fees paid for broker-dealer services but also for the full panoply of claims and damages related to UBS's underwriting of these ARS. Put another way, the majority concludes that buying the services of a pilot entitles the buyer to arbitrate and obtain damages for a dispute about the purchase of an airplane, for which arbitration is independently unavailable. This is mistaken judgment.

On appeal, WVUH sums up the issue in its brief as follows:

> [WVUH] engaged [UBS] to recommend, design and implement an optimal financial structure for the issuances. UBS ultimately recommended that [WVUH] issue a portion of each bond offering as auction rate securities ("ARS"). UBS did not disclose to [WVUH], however, that UBS had been propping up the market for ARS through a ubiquitous support bid practice, and that if UBS stopped providing support the market for [WVUH's] ARS would collapse. When UBS stopped supporting the ARS market in February 2008, the market did in fact collapse, and [WVUH] suffered significant damages as a direct result.
>
> [WVUH] sought to recover those damages through a FINRA arbitration against UBS . . . .

(WVUH Br. at 11.) Accordingly, the parties' briefs focus on WVUH's allegations that UBS misled WVUH about the ARS market and about UBS's participation in it, which caused WVUH to issue ARS.[2]

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[2] E.g., WVUH Br. at 18 ("The gravamen of [WVUH's] claims is that UBS inveigled [WVUH] . . . to employ a financial product (ARS) to raise capital . . . . UBS did this by concealing from [WVUH] that [WVUH] would pay [the projected low interest rates with ARS] only so long as UBS provided continuing bidding support in [WVUH's] ARS auctions. When UBS stopped providing this support, [WVUH's] auctions failed."); id. at 26 ("[WVUH] engaged (continued...)

The parties dedicate a few stray sentences in their briefs to the broker-dealer agreements. WVUH suggests that UBS may have had a motive to recommend an ARS issuance because, aside from its profit on the underwriting spread, it could also earn fees from conducting the auctions. (WVUH Br. at 16.) But even when arguing that the broker-dealer agreements provide a basis for a "customer" relationship, WVUH returns to its "real" complaint here: that UBS misrepresented the fundamentals of the ARS market to induce WVUH to issue ARS. WVUH says, incorrectly, that UBS was engaged in misconduct in its role as broker-dealer "in submitting undisclosed bids to prop up the ARS market," which is the basis for WVUH's claim for damages relating to underwriting. (Id. at 27.) However, UBS, as broker-dealer, was not submitting but, rather, soliciting bids. In submitting bids, UBS (whether properly or not) was acting as a marketplace bidder, not an auctioneer. UBS's role in submitting bids for its own account thus cannot be a basis for damages for fraudulently inducing WVUH to buy broker-dealer services. WVUH's argument on appeal is a nonstarter.

The majority concludes that this Court does not have to resolve whether WVUH became UBS's "customer" because of UBS's underwriting services or advice that caused WVUH to issue ARS.

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[2](...continued)
UBS to structure the three bond issuance at issue here and . . . advised [WVUH] to issue" ARS "in a structure proposed by UBS." (internal quotation marks omitted)).

However, as WVUH framed it, this is the question presented in this appeal, and this is the question WVUH submitted to FINRA arbitration for which it seeks related damages. I disagree with declining to answer this question and instead answering the question of whether WVUH's purchase of broker-dealer services entitles WVUH to arbitration on all of WVUH's claims.

The majority's approach is of concern because there is no basis in this record to conclude here that WVUH became UBS's "customer" in connection with the underwriting under any reasonable definition of the term.[3] The majority focuses on the plain-meaning definition of "customer": one who "purchases, or undertakes to purchase a good or service from a FINRA member." Majority Op. at 14. There is no record evidence in this case that WVUH undertook to pay or paid, in any form, UBS for underwriting the issuance of WVUH ARS or providing advice in connection with the issuance. As in any other negotiated underwriting transaction, UBS purchased the WVUH ARS from WVUH at a discount and resold the ARS in the market to UBS's customers. In that transaction, UBS took on the risks inherent in an offering of securities, and there is no record evidence that WVUH carried a cost for this transaction on its books. Thus, as explained below, WVUH did not "purchase" any goods or services

[3] Contrary to the majority's characterization, this dissent makes no "categorical assertion" that issuers can never be customers, merely that there exists no basis in this record to conclude that WVUH became UBS's "customer" in connection with the underwriting agreement. Majority Op. at 15 n.4.

from UBS pursuant to the underwriting agreement and thus did not become UBS's customer pursuant to that agreement. In contrast, the record reflects that WVUH undertook to pay UBS a specific fee for the provision of broker-dealer services pursuant to the broker-dealer agreements. Nevertheless, the majority permits WVUH to compel arbitration to seek damages from UBS not only for the broker-dealer transaction but also for the underwriting transaction.

The underwriting dispute and the broker-dealer dispute contain allegations about some of the same basic facts about nondisclosure of supply and demand for ARS and UBS's bidding practices. However, there are significant differences. The underwriting dispute involves allegations of breach of fiduciary duty, breach of the underwriting agreement, and securities law violations. The underwriting dispute necessarily would involve determining whether, because of the basic facts upon which it relied, WVUH issued ARS and is owed for increased interest payments made, missed opportunities on alternative options, advisory fees, debt restructuring costs, and debt insurance. The damages for these claims are in the tens of millions of dollars annually.

The facts involved in the broker-dealer dispute are entirely different. The broker-dealer dispute necessarily involves determining only whether, because of the basic facts upon which it relied, WVUH purchased broker-dealer services and

is owed for payment of a set 25 basis point fee on WVUH's issuance amount annually. Because of this decision made by WVUH premised on the allegedly misrepresented facts, WVUH asserts a different claim of fraud for entering into a different transaction. The damages for this claim are in the hundreds of thousands of dollars annually. The transactions are different in their essential character. See Restatement (Second) of Torts § 531 cmt. g (stating that the transaction induced by fraud "may differ in matters of detail or in extent [from that contemplated by defendant], unless these differences are so great as to amount to a change in the essential character of the transaction.").

If underwriting does not establish a "customer" relationship, it is not appropriate to allow a party to shoehorn a dispute about that transaction into an arbitration about a different transaction. The fact that WVUH undertook to pay UBS to collect and tally ARS bids was not the primary aim of the alleged fraud. The alleged fraud, as all of the materials before the Court allege, caused WVUH to enter into a transaction to issue ARS. The issuance, not the broker-dealer agreement, resulted in increased interest and refinancing costs. The fact that UBS, as underwriter, supposedly coaxed WVUH to issue ARS is the point of the notice of claim. As an additional, necessary consequence of that transaction, WVUH also entered into a separate transaction to purchase broker-dealer services. There is nothing in the record to suggest that WVUH had to purchase

these services from UBS; as the ARS-related litigation shows, many broker-dealers were available to perform these services.[4] That the three purchase agreements termed the WVUH bonds "auction rate certificates," Majority Op. at 19, contemplated only that the bonds would necessarily be auctioned, not that UBS in its capacity as an underwriter would undertake to auction them absent a separate agreement. It cannot be that this separate transaction that is downstream from the alleged fraud allows for arbitration of the upstream consequences of the alleged fraud when the upstream consequences are not arbitrable on their own. The law and logic permit a party to obtain damages consequential to the claimed wrong. They do not permit the converse. The damages related to WVUH's purchasing the broker-dealer services were possibly a consequence of the underwriting. But the damages related to the underwriting were not a consequence of WVUH's purchasing broker-dealer services. It is for this same reason that UBS's subsequent release of "Official Statements" detailing both the underwriting arrangement and its role as auction broker-dealer is insignificant. The majority's re-characterization of this multi-part ARS process as an "integrated whole," Majority

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[4] See, e.g., In re Citigroup, Inc., No. 09 MD 2043, 2011 WL 744745, at *2 (S.D.N.Y. Mar. 1, 2011) ("Investors submit buy, sell, or hold orders through broker-dealers selected by issuers of the ARS [here, Citigroup]." (emphasis added)); In re Merrill Lynch ARS Litig., 758 F. Supp. 2d 264, 271-72 (S.D.N.Y. 2010) (Merrill Lynch serving as broker-dealer). Indeed, in this case, Deutsche Bank provided the auction-related services for UBS as its agent. A. 296-323.

Op. at 20, does not alter the facts that WVUH and UBS entered into two separate and distinct transactions and there was no requirement that WVUH had to retain UBS to perform the component services. See n.4 supra.

The majority relies on the seemingly stray sentences in the notice of claim alleging fraud in the inducement to enter into the agreement for component services. Majority Op. at 7, 20. To the extent an arbitration based on those allegations were permitted to proceed,[5] it would be limited to the claim that arises from the broker-dealer transaction creating "customer" status. Damages would be limited to the fees paid for the purchase of broker-dealer services (and any consequential damages allowable). The result the majority reaches allows WVUH to obtain damages for another claim by using a Trojan Horse. It allows the arbitration of one claim (alleged fraudulent inducement to buy broker-dealer services) to become a basis for damages for a different claim entirely (misstatements or omissions in connection with an underwriting transaction). I do not concur in this error of judgment.

II.

The majority also commits an error of law. FINRA is a self-regulatory organization, and its rules are creatures of

[5] It is not entirely clear to me that this result is required. The 2006 broker-dealer agreement states that the parties shall "submit to the jurisdiction of . . . [New York] County."

agreement among the members. As the majority correctly points out, the FINRA Rules are interpreted as contracts are. The majority also correctly concludes that because FINRA Rule 12200 gives "customers," who are not FINRA members, an option to arbitrate, "customers" are intended third-party beneficiaries. Because the term "customer" is not defined in the FINRA Rules, determining whether a party invoking the right to arbitrate is a "customer" resolves whether that party is entitled to arbitration under the FINRA Rules in any given case. Making this determination is no different from ordinary contract interpretation: the question is whether the contracting parties intended to confer the right to arbitrate. Subaru Distribs. Corp. v. Subaru of Am., Inc., 425 F.3d 119, 124-25 (2d Cir. 2005) (third-party beneficiary claim may be dismissed when "language in the contract or other circumstances . . . will not support the inference that the parties intended to confer a benefit on the claimant"); 9 Corbin on Contracts § 44.6 (Joseph M. Perillo ed., 2009) ("Whether a promisor and promisee intend to confer upon the third party a right to enforce the contract against the promisor will depend upon the same rules and guides to interpretation as are applied in other contexts.").

The contractual nature of the FINRA "customer's" entitlement to arbitration is essential. "Arbitration is strictly a matter of consent." Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2857 (2010) (internal quotation marks

omitted). When the arbitration agreement's "enforceability or applicability to the dispute is in issue," the court "must resolve the disagreement." Id. "In this endeavor, as with any other contract, the parties' intentions control." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1774 (2010) (internal quotation marks omitted); see Bensadoun v. Jobe-Riat, 316 F.3d 171, 176 (2d Cir. 2003).

Therefore, parties may "structure their agreements [to arbitrate] as they see fit." Stolt-Nielsen, 130 S. Ct. at 1774 (internal quotation marks omitted). Parties may limit such an agreement in myriad ways. They may "agree to limit the issues they choose to arbitrate," "choose who will resolve specific disputes," and "specify with whom they choose to arbitrate their disputes," among other things. Id. Indeed, they may specify that only certain disputes are subject to arbitration. Id. at 1774-76; EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002) ("[N]othing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement."). In other words, arbitration by contract "is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." First Options of Chi. v. Kaplan, 514 U.S. 938, 943 (1995) (emphasis added).

"It falls to courts . . . to give effect to these contractual limitations, and when doing so, courts and

arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." Stolt-Nielsen, 130 S. Ct. at 1774-75. In my view, the majority has lost sight of these principles in deciding this case.

Although the majority discusses a "nexus requirement" inherent in FINRA Rule 12200 – a proposition with which I fully agree because there must be a relationship between the dispute giving rise to "customer" status and the dispute the "customer" seeks to arbitrate – the majority's analysis does not comport with principles of contract. The definition of "customer" and the "nexus requirement" are at best loosely defined in the FINRA Rules. As the Supreme Court pointed out in Stolt Nielsen, "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." Id. at 1775 (quoting Restatement (Second) of Contracts § 204 (1979)).

It is not reasonable, as the majority opinion presumes, to think that the parties to the FINRA Rules agreed that once "customer" status is established through a single transaction or agreement, any related matter may be arbitrated. It is not reasonable to find, as the majority does, that just because an underwriting transaction between WVUH and UBS made it foreseeable that WVUH would purchase ancillary services from someone, not

necessarily UBS, the agreement to arbitrate disputes arising out of the purchase of those services can somehow be construed as an agreement to arbitrate disputes arising out of the underwriting agreement. The Supreme Court in Stolt-Nielsen rejected similar reasoning. In that case, an arbitration panel determined that because an uncontested bilateral arbitration agreement did not contain any language precluding class arbitration, the party to the bilateral agreement had agreed to class arbitration. Id. The Court rejected the view that once an entitlement to arbitration is established, any claim may be arbitrated. Id. Instead, the Court required that there must be "a contractual basis for concluding that the party agreed to" the particular arbitration. Id. The same concerns addressed in Stolt-Nielsen are applicable here and in future ARS disputes. The majority's attempt to limit its holding to the facts of "this case," Majority Op. at 21 n.6, evidences its continued misunderstanding of the individual and separate agreements comprising ARS transactions generally.

In an analogous scenario to this case, the Court of Appeals for the Eleventh Circuit, interpreting the precursor NASD Rules, held that the transaction creating "customer" status must occur at the time of the events constituting the alleged fraud. Wheat, First Sec., Inc. v. Green, 993 F.2d 814, 820 (11th Cir. 1993). Where a broker-dealer that entered into the challenged transaction conferring "customer" status becomes a NASD member

only after the transaction is complete, the court held that it would "do significant injustice to the reasonable expectations of NASD members" to require the newly minted NASD member to arbitrate. Id. Its reasoning anticipated the later admonition of the Supreme Court in Stolt-Nielsen that arbitration may be ordered only when there is a contractual basis for finding an agreement to arbitrate the claim in question. See id. ("We cannot imagine that any NASD member would have contemplated that its NASD membership alone would require it to arbitrate claims which arose while a claimant was a customer of another member merely because the claimant subsequently became its customer."). I cannot imagine that a FINRA member would have contemplated that a separate transaction involving a different agreement, different facts, and different damages would entitle a party that became a "customer" because of that transaction to require arbitration of claims arising out of a different transaction.

In the FINRA context, a single party may have a host of business dealings with a FINRA member, and each of those dealings could — or could not — give rise to "customer" status independently. Each dealing, in effect, contains a possible entitlement to arbitration under the FINRA Rules because a business transaction with a member gives rise to "customer" status. It is reasonable in the circumstances to construe the intent of the FINRA Rules as allowing "customers" to compel arbitration for the transaction that gives them such an

entitlement and not for other transactions. See Consol. Edison, Inc. v. Ne. Utils., 426 F.3d 524, 529 n.2 (2d Cir. 2005) (distinguishing between transactions to determine whether third-party beneficiary rights bestowed for specific transactions); Leawood Bancshares Inc. v. Alesco Preferred Fundings X, Ltd., No. 10 Civ. 5637, 2011 WL 1842295, at *4 (S.D.N.Y. May 10, 2011) (same). Therefore, whether a certain transaction with a FINRA member makes the other party a "customer" must be determined for that transaction to find an agreement to arbitrate in any particular case. See Stolt-Nielsen, 130 S. Ct. at 1775; First Options, 514 U.S. at 943; cf. Wheat, First, 993 F.2d 814 at 820. This is all the more true when, as here, the agreement to arbitrate is an ill-defined third-party beneficiary right under the FINRA Rules.[6] See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) ("[A] disagreement about whether an

[6] Because a party may transact business with a FINRA member and be a "customer" in some instances but not in others, this is not a situation where the presumption in favor of arbitrability applies. See Granite Rock, 130 S. Ct. at 2858; Applied Energetics, Inc. v. NewOak Capital Mkts., LLC, 645 F.3d 522, 526 (2d Cir. 2011). Instead, in challenging a complainant's "customer" status, the FINRA member is, in essence, "challenging the enforceability of the arbitration clause itself" in that transaction. Granite Rock, 130 S. Ct. at 2858. In other words, the question is whether a third-party beneficiary right was conferred for that transaction, not whether, in the face of a clear third-party beneficiary entitlement to arbitration, a certain dispute is arbitrable. In any event, the policy favoring arbitration does not "override the principle that a court may submit to arbitration only those disputes that the parties have agreed to submit." Id. at 2859 (internal quotation marks and alteration omitted).

arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court.").

Because of this vagueness, other cases, including some in this Circuit, have similarly looked for aids in determining what transactions reasonably give rise to "customer" status under the NASD Rules when presented with unique claims. See Bensadoun, 316 F.3d at 177 (citing with approval the proposition that a "customer" is only "one involved in a business relationship with an NASD member that is related directly to investment or brokerage services"). Most cases finding an entitlement to arbitration are run-of-the-mill "customer" disputes – even in ARS cases – where a party uses a broker-dealer to purchase securities and disputes the purchase transaction. E.g., STMicroelectronics, N.V. v. Credit Suisse Secs. (USA) LLC, 2011 WL 2151008 (2d Cir. June 2, 2011) (cited by the majority at 17). The ARS context aside, this case does not involve a dispute about the purchase of securities from a broker-dealer, and an agreement to arbitrate the disputed transaction must be found before arbitration is mandated.

To find an agreement to arbitrate, a stronger nexus is required between the transaction creating "customer" status and the dispute than that found by the majority. Otherwise, no principled limits on a FINRA member's agreement to arbitrate would exist. The Supreme Court has not condoned ignoring limits on agreements to arbitrate. See Stolt-Nielsen, 130 S. Ct. at

1774-75. And it is appropriate to consider the circumstances and logical basis for determining whether a party is or is not a "customer" with respect to a certain dispute. Restatement (Second) of Contracts § 302, cmt. a ("A court in determining the parties' intention should consider the circumstances surrounding the transaction as well as the actual language of the contract.").

A reasonable construction of a "nexus requirement" is that a "customer's" complaint must arise out of the transaction conferring "customer" status. This rule would ensure that in any specific transaction, the FINRA member intended to entitle its counterparty to arbitrate a dispute arising out of the transaction. As I explained in Part I, supra, it cannot be that the transaction conferring "customer" status arises out of the transaction complained of. That is putting the cart before the horse. Only the foreseeable consequences of the transaction for which arbitration is available — not some other transaction — are includable within that arbitration. Cf. Restatement (Second) of Contracts § 347 (stating that only losses "incidental or consequential" to the breach are available as damages); Restatement (Second) of Torts § 549 (damages available for fraudulent misrepresentation for losses "suffered otherwise as a consequence of the recipient's reliance upon the mispresentation").

In this case, purchasing broker-dealer services may be a foreseeable consequence of issuing ARS, but issuing ARS is not a foreseeable consequence of purchasing broker-dealer services. Thus, although damages relating to the purchase of broker-dealer services could be included in an arbitration about underwriting, damages relating to the issuance of ARS cannot be included in an arbitration about purchasing broker-dealer services. The underwriting, issuance, and auctions are all related, but the purchase of broker-dealer services was done by way of an agreement separate from the underwriting agreement for a separate fee. To be sure, engaging a broker-dealer was necessary for the ARS to function. But, as noted above, those services could have been sourced elsewhere (indeed, Deutsche Bank provided the bulk of them in this case as UBS's agent). The underwriting and the broker-dealer transactions are different. Even if the broker-dealer transaction gives rise to "customer" status, the underwriting transaction does not flow from the broker-dealer transaction. If anything, the broker-dealer transaction flows from the underwriting transaction. The underwriting transaction cannot be the basis for mandatory FINRA arbitration because there is no evidence that WVUH undertook to pay or paid UBS for any underwriting service. Because the underwriting transaction is not subject to mandatory arbitration, the claims for damages related to underwriting cannot be included, as a matter of contract, in a mandatory arbitration over the transaction for

broker-dealer services. Therefore, the majority's holding fails to determine satisfactorily that the parties "agreed to authorize" arbitration about the underwriting. Stolt-Nielsen, 130 S. Ct. at 1776.

For all of these reasons, UBS satisfies the standard for granting a preliminary injunction, which is the operative question reviewed here. It has at least demonstrated that there are sufficiently serious questions about the merits to make the case "fair ground for litigation," and the balance of hardships tips in favor of UBS because being required to arbitrate a claim means that the party forfeits a substantial right.

Respectfully, I dissent.