

1
2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION
5

6 WACHOVIA SECURITIES, LLC, n/k/a
7 WELLS FARGO ADVISORS, LLC, and
8 GEORGE GORDON, III,

9 Plaintiffs,

10 vs.

11 GREGORY RAIFMAN, in his individual
12 capacity, SUSAN RAIFMAN, in her individual
13 capacity, GEKKO HOLDINGS, LLC, and
14 HELICON INVESTMENTS, LTD.,

15 Defendants.

Case No: C 10-04573 SBA

**ORDER GRANTING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Dkt. 3

16 On October 8, 2010, Plaintiffs filed a diversity jurisdiction complaint for declaratory
17 and injunctive relief. Plaintiffs seek to enjoin Defendants from proceeding with their claims
18 against Plaintiffs in a Financial Industry Regulatory Authority (“FINRA”) arbitration and to
19 stay the arbitration proceedings. Along with their Complaint, Plaintiffs filed an Ex Parte
20 Motion for Temporary Restraining Order and Order to Set Show Cause Hearing for a
21 Preliminary Injunction (“TRO Motion”).

22 On October 20, 2010, the Court granted Plaintiffs’ TRO Motion, temporarily enjoining
23 Defendants from proceeding with the FINRA arbitration. Dkt. 24. The Court granted the
24 motion, in part, because Plaintiffs had shown that they are likely to succeed on their claim that
25 Defendants are not “customers” of Plaintiffs, such that Defendants can compel arbitration.
26 Now, the parties are before the Court on Plaintiffs’ Motion for Preliminary Injunction. Dkt. 3.
27 Having read and considered the papers filed in connection with this matter and being fully
28 informed, the Court hereby GRANTS the motion for the reasons set forth below. The Court, in

1 its discretion, finds this matter suitable for resolution without oral argument. See Fed.R.Civ.P.
2 78(b).

3 **I. BACKGROUND**

4 **A. FACTUAL BACKGROUND**

5 On July 19, 2010, Defendants Gregory Raifman and Susan Raifman filed a Statement of
6 Claim with FINRA, to commence arbitration against the instant Plaintiffs - Wachovia
7 Securities Financial Network, LLC (“Wachovia”) and George Gordon, III (“Gordon”), a
8 Wachovia financial advisor (collectively, “Plaintiffs”). Compl. ¶ 1. In their Statement of
9 Claim, the Raifmans assert the following claims against Plaintiffs: (1) fraud, concealment, and
10 conspiracy to commit fraud; (2) breach of fiduciary duty; (3) breach of contract; (4) aiding and
11 abetting fraud and breach of fiduciary duty; (5) violation of the California Securities Act; (6)
12 violation of NASD and NYSE rules; and (7) conversion. Id. ¶ 13; see also Dkt. 4, Wood Decl.,
13 Ex. A at 20-26. Defendants seek, among other things, \$2,128,035 in compensatory damages
14 and \$10,235,600 in consequential damages. Wood Decl., Ex. A at 27.

15 The Raifmans bring their FINRA action individually and as trustees of the Raifman
16 Family Revocable Intervivos Trust (the “Raifman Trust”), as sole members of Gekko
17 Holdings, Ltd. (“Gekko”), and as assignees in interest and beneficial owners of Helicon
18 Investments, Ltd. (“Helicon”). Id. at 2. As explained more fully below, the Statement of
19 Claim alleges that each of these three entities had entered into separate “90% Stock Loan”
20 transactions with third-party Derivium Capital, LLC (“Derivium”) or its related entities.

21 **1. The First Loan Transaction Between the Raifman Trust and**
22 **Derivium**

23 According to Defendants’ FINRA Statement of Claim, Derivium marketed a “90%
24 Stock Loan” to prospective borrowers, including the Raifmans. Id. at 6. Derivium solicited the
25 Raifmans to pledge publicly-traded stock (specifically, shares in “ValueClick”) to Derivium as
26 collateral for loans in the amount of 90% of the collateral’s market value. Id. The 90% Stock
27 Loan was marketed as a way for owners of securities to borrow up to 90% of the value of their
28 stock without selling the stock. Id. at 2. A major feature in the marketing material for the 90%

1 Stock Loan was that the transaction was a loan, not a sale, so even though the Raifmans would
2 receive 90% of the value of their securities in cash as a loan, the loan would not trigger capital
3 gains tax recognition, and the Raifmans could defer paying capital gains tax for the three-year
4 loan term. Id. Derivium represented to the Raifmans that it would employ a proprietary
5 hedging strategy that would preserve the value of the collateral. Id. at 6. At the end of the loan
6 term, the Raifmans could pay the loan balance and retrieve their collateral, surrender their
7 collateral in satisfaction of the loan, or renew their loan. Id.

8 In August 2003, based upon these representations, and upon the advice of the Raifmans'
9 own financial advisors, Private Consulting Group, Inc. ("PCG") and Joe Ramos, PCG's
10 Managing Director, the Raifmans entered into a loan agreement, as trustees of the Raifman
11 Trust, with Derivium.¹ Id. at 12. Derivium and PCG instructed the Raifmans to open an
12 account at Wachovia in the name of the Raifman Trust. Id. Wachovia selected Gordon as the
13 financial advisor to the Raifmans' account. Id. at 13.

14 When the Raifmans opened the Wachovia account, they completed an Account
15 Application, listing under the section "Account Registration" the "Raifman Family Rev Inter
16 Trust DTD 07/02/2003 Gregory R. Raifman & Susan Raifman TTEES." Dkt. 15, Raifman
17 Decl., Ex. 1 at 1. The application also states that the account is a "Non-Personal Account
18 Types – Trust," and the Raifmans indicate in their respective signatory lines that they are each
19 signing under the title "TTEE." Id. at 3. Moreover, under the section "Primary Account
20 Owner Information," the application lists only the "Raifman Fam Rev Inter Trust." Id.

21 In his declaration, Mr. Raifman represents that the Account Application "registered the
22 Raifman Family Rev. Inter. Trust, Gregory Raifman, and Susan Raifman as trustee and
23 Gregory R. Raifman as the Account holders." Id. ¶ 2 (emphasis added). However, according
24 to the Gordon Declaration, "the Raifmans, in their individual capacities, never opened an
25 account with me at Wachovia" Dkt. 6, Gordon Decl. ¶ 4 (emphasis added). Moreover,
26 Plaintiffs have submitted a declaration from Christina Minakais, senior paralegal in the

27 ¹ In their Statement of Claim, Defendants explain that they previously obtained a
28 FINRA arbitral award against PCG and Ramos with respect to the loan transactions at issue.
Id. at 13.

1 Wachovia (now Wells Fargo) corporate legal department, who states that, after conducting a
2 search of Wachovia's systems, she was not able to locate any account opened in the name of
3 Gregory Raifman or Susan Raifman. Dkt. 5, Minakais Decl. ¶ 3.

4 Turning back to the loan transaction, on August 8, 2003, Mr. Raifman signed a
5 Wachovia "Joint Owner/Associated Person Information" form, providing various items of
6 personal information. Raifman Decl. Ex. 2. In the section entitled "Relationship to Primary
7 Account Owner," Mr. Raifman wrote "TTEE." Id. On August 29, 2003, Mrs. Raifman also
8 signed a Wachovia "Joint Owner Associated Person Information" form, setting forth her
9 personal information. Id. Ex. 3. Mrs. Raifman wrote "Wife" in the section entitled
10 "Relationship to Primary Account Owner." Id. In his Supplemental Declaration, Gordon
11 explains that the "Joint Ownership/Associated Person Information" is a form:

12 that was required by Wachovia whenever a non-natural entity, such as a trust,
13 sought to open an account among other things. The form is used to notify
14 Wachovia as to those individuals who can act on behalf of the non-natural
15 account holder. In the case of Exhibits 2 and 3 [of the Raifman Decl.], the Trust
16 (as account holder) informed Wachovia that Gregory Raifman and Susan
Raifman, as trustees, were empowered to act on its behalf vis-à-vis the account
at Wachovia.

17 Dkt. 20, Supp. Gordon Decl. ¶ 3.

18 Subsequently, Gordon set up a Wachovia account for the Raifman Trust. Wood Decl.,
19 Ex. A at 13. At Gordon's direction, the Raifmans executed an Authorization to Transfer
20 Securities or Money to transfer their ValueClick shares into Derivium affiliate Witco Services
21 Ltd.'s ("Witco") account, established by Wachovia. Id. That document did not authorize
22 Wachovia to sell the Raifmans' securities. Id. Nevertheless, without informing the Raifmans,
23 Wachovia sold the Raifmans' 320,000 shares of ValueClick stock collateral immediately upon
24 receipt into Witco's account for a total of \$2,914,683. Id. The buyer is not identified in the
25 Statement of Claim. Derivium and Wachovia transferred 90% of the sale proceeds to the
26 Raifmans to fund the loan, and then "pocketed" the remaining 10%. Id. The Raifmans
27 believed that their stock would be held upon transfer into Witco's Wachovia account, and did
28 not know it had been sold until 2007. Id. at 13-14.

1 **2. The Second Loan Transaction Between Helicon and Derivium’s**
2 **Affiliate Optech Ltd.**

3 In July 2004, Helicon entered into a second “90% Stock Loan” agreement with
4 Derivium’s affiliate, Optech Ltd. (“Optech”). Id. at 14. Helicon is a company wholly-owned
5 by the Raifmans. Compl. ¶ 8. Helicon has since assigned all rights and claims arising out of
6 Helicon’s investments to “Gregory and Susan Raifman, as Trustees of the Raifman Family
7 Trust.” Raifman Decl., Ex. 4 at 1. Helicon deposited 300,000 shares of Value Click into
8 Optech’s Wachovia account. Wood Decl., Ex. A at 14. Again, Wachovia immediately sold the
9 shares upon receipt into the Optech account. Id. Derivium and Wachovia then transferred 86%
10 of the sale proceeds to the Raifmans to fund the loan, and “pocketed” the remaining 14%. Id.
11 The Raifmans did not discover the sale of the shares until March 2007. Id.

12 According to the Gordon Declaration, Helicon never opened an account with him at
13 Wachovia. Gordon Decl. ¶ 4. Moreover, Ms. Minakais states that she was not able to locate
14 any Wachovia account opened in the name of Helicon. Minakais Decl. ¶ 3.

15 **3. The Third Loan Transaction Between Gekko and Optech**

16 In November 2004, Gekko entered into a third “90% Stock Loan” agreement with
17 Optech. Wood Decl., Ex. A at 14. Gekko is a limited liability company with the Raifmans as
18 the only members. Raifman Decl., ¶ 9. Gekko deposited 200,000 shares of Value Click into
19 Optech’s Wachovia account. Wood Decl., Ex. A at 14. Once more, Wachovia immediately
20 sold the shares upon receipt into the Optech account. Id. Derivium and Wachovia then
21 transferred 90% of the sale proceeds to the Raifmans to fund the loan, and “pocketed” the
22 remaining 10% Id. at 14-15. Again, the Raifmans did not discover the sale of the shares until
23 March 2007. Id. at 15.

24 Gordon indicates that Gekko never opened an account with him at Wachovia. Gordon
25 Decl. ¶ 4. Also, Ms. Minakais states that she was not able to locate any Wachovia account
26 opened in the name of Gekko. Minakais Decl. ¶ 3.

1 **B. PROCEDURAL HISTORY**

2 On October 8, 2010, Plaintiffs filed a diversity jurisdiction complaint for declaratory
3 and injunctive relief. Plaintiffs seek to enjoin Mr. and Mrs. Raifman, in their individual
4 capacities, and Gekko and Helicon (collectively, “Defendants”) from proceeding with their
5 claims in the FINRA arbitration and to stay the arbitration proceedings with respect to those
6 claims. Plaintiffs contend that there is no agreement to arbitrate between either Plaintiff and
7 any of the Defendants, and no Defendant is, or ever has been, a “customer” of Plaintiffs, such
8 that Plaintiffs would be required to arbitrate Defendants’ claims under the applicable FINRA
9 rules. Compl. ¶ 2.

10 Notably, while the Raifman Trust is also a claimant in the FINRA arbitration, Plaintiffs
11 have not named the Raifman Trust as a defendant here “because the Statement of Claim alleges
12 that the Trust actually opened an account with Wachovia.” Id. ¶ 20 n. 2. Therefore, Plaintiffs
13 only challenge arbitration of the claims related to the second and third loan transactions,
14 described above. Id.

15 Also on October 8, 2010, Plaintiffs filed their TRO Motion. Dkt. 3. By that motion,
16 Plaintiffs sought: (1) an order temporarily restraining and enjoining Defendants from
17 proceeding with their claims in the FINRA arbitration; (2) an order temporarily staying the
18 proceedings in the FINRA arbitration; and (3) an order to show cause as to why Defendants
19 should not be preliminary restrained and enjoined, pending trial of this action, from proceeding
20 with the FINRA arbitration, and why proceedings in the FINRA arbitration should not be
21 stayed. After Plaintiffs filed their TRO Motion, the parties stipulated to extend the deadline for
22 Plaintiffs to file an answer in the FINRA arbitration, in order to allow Defendants an
23 opportunity to respond to Plaintiffs’ TRO Motion.

24 After full briefing on Plaintiffs’ TRO Motion, the Court granted that motion,
25 temporarily enjoining Defendants from proceeding with their claims against Plaintiffs in the
26 FINRA arbitration. Dkt. 24. The Court also set a briefing schedule on Plaintiffs’ motion for
27 preliminary injunction. This matter has now been fully briefed and is ripe for adjudication.
28

1 **II. LEGAL STANDARD**

2 Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear
3 showing that the plaintiff is entitled to such relief.” Winter v. Natural Res. Def. Council, Inc., -
4 -- U.S. ---, ---, 129 S.Ct. 365, 376 (2008). A party seeking a preliminary injunction “must
5 establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in
6 the absence of preliminary relief, that the balance of equities tips in his favor, and that an
7 injunction is in the public interest.” Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly, 572
8 F.3d 644, 651 (9th Cir. 2009) (quoting Winter, 129 S.Ct. at 374). The issuance of a
9 preliminary injunction is committed to the discretion of the district court. Id.

10 All parties erroneously rely on the Ninth Circuit’s pre-Winter alternative “sliding-scale”
11 test under which a preliminary injunction may be granted where the plaintiff “demonstrates
12 either a combination of probable success on the merits and the possibility of irreparable injury
13 or that serious questions are raised and the balance of hardships tips sharply in his favor.” Save
14 Our Sonoran, Inc., v. Flowers, 408 F.3d 1113, 1120 (9th Cir. 2005). In light of Winter, the
15 Ninth Circuit has abandoned that test. See National Meat Ass’n v. Brown, 599 F.3d 1093,
16 1097 n.3 (9th Cir. 2010); Am. Trucking Ass’ns, Inc. v. City of Los Angeles, 559 F.3d 1046,
17 1052 (9th Cir. 2009).

18 Arbitrability is “[the] question [of] whether the parties have submitted a particular
19 dispute to arbitration.” Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).
20 “Unless the parties clearly and unmistakably provide otherwise, the question of whether the
21 parties agreed to arbitrate is to be decided by the court, not the arbitrator.” AT&T Techs., Inc.
22 v. Communications Workers of Am., 475 U.S. 643, 649 (1986). In this case, Defendants have
23 not argued against this Court deciding arbitrability.

24 **III. ANALYSIS**

25 FINRA arbitrations are governed by the National Association of Securities Dealers
26 (“NASD”) Code of Arbitration Procedure. Rule 12200 of the Code states:
27
28

1 Parties must arbitrate a dispute under the Code if:

2 • Arbitration under the Code is either:

3 (1) Required by a written agreement; or

4 (2) Requested by the customer.

5 • The dispute is between a customer and a member or associated person of a
6 member; and

7 • The dispute arises in connection with the business activities of the member or
8 the associated person, except the insurance business activities of a member that
is also an insurance company.

9 NASD Code Arb. Proc. 12200. Therefore, under the Code, customers can compel registered
10 members of FINRA to arbitrate certain disputes even when no written arbitration agreement
11 exists. See NASD Code Arb. Proc. 12200; see also Goldman Sachs & Co. v. Becker, No. 07-
12 1599, 2007 WL 1982790 at *5 (N.D. Cal. 2007).

13 Here, Plaintiffs do not dispute that they are members subject to the NASD Code, or that
14 this dispute arises in connection with Plaintiffs' business activities as members. Additionally,
15 Defendants do not assert that they entered into a written arbitration agreement with Plaintiffs.
16 Therefore, the only disputed issue is whether Defendants are "customers" of Plaintiffs who
17 have a right to demand arbitration under the NASD Code.

18 The NASD Code does not define the term "customer," although the Code does provide
19 that the term "customer shall not include a broker or dealer." NASD Code Arb. Proc. 12100(i);
20 accord Herbert J. Sims & Co., Inc. v. Roven, 548 F. Supp. 2d 759, 763 (N.D. Cal. 2008). Nor
21 has the Ninth Circuit further defined this term. There are, however, decisions authored by
22 judges of this court and several out-of-circuit cases that inform the analysis as to whether
23 Defendants are customers of Plaintiffs, and therefore, entitled to arbitrate their claims. In this
24 analysis, the courts are guided by the notion that the term "customer" should not be too
25 narrowly construed, nor should the definition upset the reasonable expectations of FINRA
26 members. See Oppenheimer v. Neidhardt, 56 F.3d 352, 357 (2d Cir. 1995); Wheat, First Sec.,
27 Inc. v. Green, 993 F.2d 814, 820 (11th Cir. 1993).

1 In Goldman Sachs & Co. v. Becker, the court noted that some courts have held that a
2 direct customer relationship between the member firm and the purported customer is not
3 necessary, so long as there is “some nexus between the investor and the member or associated
4 person.” Goldman Sachs, 2007 WL 1982790, at *6 (N.D. Cal. 2007) (Alsup, J.) (quoting
5 Malak v. Bear Stearns & Co., Inc., 2004 WL 213014, at *4 (S.D.N.Y. 2004)).² Other courts,
6 the Goldman Sachs court explained, “have interpreted ‘customer’ to require the purchase of
7 securities from that NASD member, or to require at least some informal business relationship
8 between the parties.” Id. (citing Fleet Boston Robertson Stephens v. Innovex, Inc. 264 F.3d
9 770 (5th Cir. 1993); BMA Financial Servs. Inc. v. Buin, 164 F. Supp. 2d 813, 819 (W.D. La.
10 2001)). The court found that the alleged customer relationship in Goldman Sachs was too
11 tenuous because the relationship was based on (a) either the member firm’s underwriting of
12 another firm’s initial public offering or (b) the member firm’s alleged ownership of the
13 purported customers’ mortgage. Id. The court instead found that the investors’ customer
14 relationship, if any, was with the firm that it purchased investment products from or the
15 mortgage servicer itself, but not the member firm that was only tangentially related to these
16 transactions. Id.

17 Also instructive is Herbert J. Sims & Co., Inc. v. Roven, 548 F.Supp.2d 759 (N.D. Cal.
18 2008) (Jenkins, J.). There, plaintiff, a member of FINRA, was an investment banking and
19 brokerage firm whose business activities included underwriting and selling new bond offerings.
20 Id. 761. Defendants were an investment advisor, Darden, and his clients, who held accounts
21 with a third party discount brokerage, Seibert. Id. Darden had communicated over the years
22 with Drayer, a broker working for plaintiff. Darden’s clients participated in approximately
23 forty of plaintiff’s bond offerings over the years. Id. Siebert did not maintain an inventory of
24 plaintiff’s bonds and it had to fill orders for these bonds directly from plaintiff. Plaintiff sought
25 to enjoin defendants from pursuing a FINRA arbitration relating to defendants’ claim that one of
26 plaintiff’s bond offerings, in which Darden’s clients had invested with his assistance, was an

27 ² An “associated person” under the NASD rules has been described as including “a
28 natural person associated with an investment bank who was authorized to sell securities on its
behalf” Id. (citing John Hancock Life Ins. v. Wilson, 254 F.3d 48, 59 (2d Cir. 2001)).

1 unsuitable investment. Plaintiff argued that defendants were not its “customers.” The court
2 granted injunctive relief, rejecting defendants’ argument that “an investment made through a
3 brokerage firm, on advice from an agent at a separate firm, creates a customer relationship
4 between the investor and the latter firm ...” Id. at 766. The court ruled “[i]nstead, the case
5 law supports the conclusion that the reasonable expectations of the parties in this case are that
6 the Investors were customers of Seibert, not Plaintiff.” Id.

7 In Brookstreet Securities Corp. v. Bristol Air, Inc., the district court confirmed that
8 narrow definitions of the term “customer” have been rejected, but that the term must not be
9 defined so broadly as to upset the reasonable expectations of FINRA members. No. C 02-
10 0863, Slip Op. at 11 (N.D. Cal. filed August 5, 2002) (Illston, J.) The court explained that a
11 customer relationship was typically created between a member firm and a third party when “the
12 individual who solicited the investments or provided investment advice to the purported
13 ‘customers’ was a representative or employee of the broker.” Id. In the cases reviewed by the
14 court, the solicitor was a representative or employee of the broker with whom the investor
15 made an investment. Id. at 11-12. The court found that a customer relationship was not
16 established when the investors interacted only with their investment advisor, who maintained
17 an account with the member firm Brookstreet, but was not an employee, agent or registered
18 representative of Brookstreet. Id. at 12. In Brookstreet, the court determined that while the
19 investment advisor himself was a customer of the member Brookstreet, the investors were not.
20 Id.

21 Certain out-of-circuit cases similarly set out the parameters of who is, and is not, a
22 “customer.” If an investor invests directly with a member firm, then the investor is likely a
23 customer of that firm. See Oppenheimer, 56 F.3d at 357. Moreover, if an “associated person”
24 of the member firm solicits an investor to invest funds with the member, then the investor is
25 also a customer of that firm. See id.; John Hancock Life Ins., 254 F.3d at 59 (holding that a
26 customer relationship with an associated person is sufficient to establish a customer
27 relationship with the member firm itself). When, however, the relationship between the parties
28 is more tenuous, courts should determine if there is “some brokerage or investment relationship

1 between the parties.” See Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc., 264 F.3d
2 770, 772 (8th Cir. 2001). In Fleet, the Eighth Circuit held “[w]e agree with the district court
3 that ‘customer’ does not include an entity such as AdFlex, which only received financial
4 advice, without receiving investment or brokerage related services, from an NASD member.”
5 Id. at 773.

6 Applying those principles here, the next question is whether Plaintiffs have shown a
7 likelihood of succeeding on the merits regarding their assertion that Defendants are not
8 Plaintiffs’ “customers” with respect to the Helicon (second) and Gekko (third) loan
9 transactions.

10 **A. LIKELIHOOD OF SUCCESS ON THE MERITS**

11 **1. Defendants Are Not “Customers” of Plaintiffs**

12 As indicated above, Helicon and Gekko never opened an account with Wachovia.
13 Defendants do not dispute those facts. Rather, Defendants argue that the Raifmans, as
14 individuals, were customers of Wachovia because they signed a Wachovia Account
15 Application and a Joint Owner Information with Wachovia. It follows, according to
16 Defendants, that they can compel arbitration of issues related to the second and third loan
17 transactions (a) as individuals, and (b) in their capacities as sole members of Gekko and
18 assignees in interest and beneficial owners of Helicon.

19 However, the submitted evidence shows that the only party that opened an account with
20 Wachovia was the Raifman Trust, not the Raifmans as individuals. There are no allegations
21 that Wachovia or Gordon was a party to Helicon’s or Gekko’s loan agreements with the
22 Optech. The Raifmans concede in their Statement of Claim that it was their own financial
23 advisor, PCG, that gave them advice with respect to their stock loan transactions, not Plaintiffs.
24 The only connection Helicon and Gekko had with Plaintiffs is that Helicon and Gekko
25 transferred securities directly to the Wachovia accounts of Optech.

26 Given those facts, the analysis in Brookstreet, described above, is instructive. There,
27 the court found that investors were not “customers” of Brookstreet because the only
28 relationship between the investors and Brookstreet was that the inventors placed their funds

1 into their financial advisor’s account at Brookstreet. There were no other interactions between
2 Brookstreet and the investors. The advisor was Brookstreet’s customer, while the investors
3 were not. The Brookstreet court rejected the notion, also advanced by the instant Defendants,
4 that a “person who is merely doing business with an account holder of a member firm becomes
5 a ‘customer’ of the firm itself.” Brookstreet at 12. Put simply, the Raifmans’ (as individuals),
6 and Helicon’s and Gekko’s relationships with Plaintiffs are too tenuous for Plaintiffs to
7 reasonable expect that they would be subject to FINRA arbitration with respect to the second
8 and third loan transactions.

9 As in their opposition to Plaintiffs’ TRO Motion, Defendants again have not attempted
10 to distinguish the decisional authority cited by Plaintiffs, including Brookstreet. Instead, they
11 proffer a new argument: that Defendants are entitled to compel arbitration of their claims
12 under agency and third-party beneficiary principles. That argument is without merit, as
13 discussed below.

14 2. Defendants’ Agency Argument

15 Defendants assert, without submitting any supporting evidence, that Wachovia’s
16 brokerage account agreement with Optech contains a written arbitration provision. Dkt. 31,
17 Defs.’ Opp. at 9. As indicated, Optech was the Derivium affiliate with whom Gekko and
18 Helicon entered into loan transactions. Defendants next argue that Optech was the agent of
19 Gekko and Helicon, by way of the loan agreements, and Gekko and Helicon can therefore
20 enforce the written arbitration agreement with Wachovia as principals. In particular, the loan
21 agreement between Optech and Helicon states that Optech “is hereby engaged and authorized
22 by [Helicon] to undertake the following activities: ... [p]rovide, as lender, or arrange, as agent,
23 financing by way of a loan or loans from one or more lenders [and] hold, as agent and
24 secured party, in accounts located with a nationally or internationally recognized financial
25 institution, collateral” Dkt. 30, Raifman Decl., Ex. 5 ¶ 1 (emphasis added). The loan
26 agreement between Optech and Gekko contains similar language. Id., Ex. 6 ¶ 1.

27 As an initial matter, Defendants have failed to submit the brokerage account agreement
28 between Wachovia and Optech containing the alleged arbitration provision. Nor have they

1 submitted any testimonial evidence regarding the terms of the account agreement. On that
2 basis alone, their agency argument fails. Defendants' agency argument also fails on its merits.
3 Defendants do not allege that Optech opened its brokerage account at Wachovia on
4 Defendants' behalf or as Defendants' agent. Rather, pursuant to the loan agreements, Optech
5 was required, as Defendants' agent, to simply hold Defendants' collateral (i.e., the ValueClick
6 shares) in such an account. Defendants offer no evidence that Optech entered into the
7 Wachovia account agreement in any capacity other than on its own behalf.

8 The case law cited by Defendants is also unavailing. Harris v. Sup. Ct. (Mirsaidi), 188
9 Cal. App. 3d 475, 478-79 (1986) stands for the proposition that where a principal enters into an
10 agreement with a third-party, and where the principal can only provide its services to the other
11 party through its employee agents, those agents may also be required to arbitrate disputes
12 covered by the arbitration agreement. Id. at 478-79. Here, Defendants do not claim to be
13 agents of a principal who is party to an agreement to arbitrate. Rather, they claim the exact
14 opposite; namely, to be principals of an agent who entered into an arbitration agreement.
15 Moreover, as previously noted, here, the alleged agent (i.e., Optech) is not alleged to have
16 entered into the agreement on behalf of the principals.

17 Barrowclough v. Kidder, Peabody, & Co., Inc., 752 F.2d 923, 938 (3rd Cir. 1985)
18 (overruled on other grounds in Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d
19 1110, 1112 (3rd Cir. 1993)) also does not apply here. In that case, the court's analysis was not
20 based on any alleged agency relationship. Id. at 938. Rather, the court focused on whether an
21 employee's contingent beneficiaries (i.e., family members) were bound by the employee's
22 arbitration agreement with his employer to arbitrate their derivative claims against the
23 employer. Id. at 938. In Barrowclough, the family members were essentially standing in the
24 shoes of the employee with respect to their claims against the employer. Here, Defendants'
25 claims are not derivative of any claims that Optech may have. Indeed, there is no allegation
26 that Optech is pursuing claims against anyone.

27 Finally, Defendants' reliance on American Builder's Ass'n v. Au-Yang, 226 Cal. App.
28 3d 170, 176 (1990) is misplaced. That case stands for the unremarkable proposition that a

1 contract made by an agent for an undisclosed principal is for most purposes deemed a contract
2 of the principal. *Id.* at 176. Here, as previously noted, however, the alleged agent, Optech, is
3 not alleged to have entered into the account agreement with Wachovia on behalf of Defendants,
4 its alleged principals, or other than on its own behalf.

5 3. **Defendants’ Third-Party Beneficiary Argument**

6 In their TRO papers, Defendants claimed that they were third-party beneficiaries of the
7 Raifman Trust’s account agreement with Wachovia, and therefore could enforce the arbitration
8 provision of that agreement. In its Order granting Plaintiffs’ TRO Motion, the Court rejected
9 that argument, pointing out that, pursuant to the case law cited by Defendants, Defendants have
10 to be intended beneficiaries of an agreement to arbitrate, not simply beneficiaries of a trust
11 agreement. *See* Dkt. 24 at 12; citing *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir.
12 2006); *Fisser v. International Bank*, 282 F.2d 231, 233 n.6 (2d Cir. 1960). Defendants also
13 failed to submit as evidence the alleged arbitration provision.

14 Now, Defendants have abandoned their third-party beneficiary claim vis-à-vis the
15 Raifman Trust, and instead contend they were third-party beneficiaries of the account
16 agreement between Optech and Wachovia. While the relevant parties may have changed, the
17 law has not. Defendants have proffered no evidence suggesting they were intended
18 beneficiaries of an agreement to arbitrate between Optech and Wachovia.

19 Defendants also argue that they were third-party beneficiaries of the account agreement
20 between Wachovia and a newly-introduced entity called the “Palladian Trust.” Defendants
21 offer a convoluted and confusing explanation regarding the relevance of the Palladian Trust to
22 the two loan transactions at issue. As they attempt to explain, the Raifmans, as individuals, are
23 the beneficiaries of the Palladian Trust. Raifman Decl., ¶ 2, Ex. 1. Defendants assert that the
24 trustee of the Palladian Trust, Winward Isles Trust Company Limited, entered into a stock
25 pledge agreement with a company called Khronos Capital Inc., which is an entity with no
26 apparent connection to these proceedings. *Id.*, Ex. 1. The Raifmans transferred 300,000 shares
27 of ValueClick into the Palladian Trust account at Wachovia, and the shares were then sold
28 without their knowledge. *Id.* ¶¶ 7-8. However, Defendants have entirely failed to explain how

1 this Palladian Trust transaction bears any relation to the Gekko and Helicon loan transactions at
2 issue. Thus, Defendants’ third-party beneficiary argument in this respect is wholly
3 unpersuasive.

4 In sum, Plaintiffs are likely to succeed in showing that the relationships between
5 Defendants and Plaintiffs are too tenuous to establish any customer relationships and to compel
6 FINRA arbitration.

7 **B. IRREPARABLE HARM**

8 Plaintiffs also assert that they will suffer irreparable harm if the arbitration is not stayed
9 because they have no adequate remedy at law to recover the monetary and resources they
10 would expend in defense of the arbitration. See e.g., Maryland Cas. Co. v. Realty Advisory
11 Bd. on Labor Rels., 107 F.3d 979, 984-85 (2d Cir. 1997) (“Although an injury that is
12 adequately compensated by a monetary award is not considered ‘irreparable,’ ...here the time
13 and resources [plaintiff] would expend in arbitration is not compensable by any monetary
14 award of attorneys’ fees or damages pursuant to the provisions of the Agreement or the
15 Arbitration Act.”); see also Brookstreet at 12 (finding that a party will suffer irreparable harm
16 if arbitration is not stayed); Goldman Sachs, 2007 WL 1982790, at *7 (same).

17 In response, Defendants assert that Plaintiffs will not suffer irreparable harm because it
18 was reasonable for them to expect that Defendants would bring FINRA arbitration claims
19 against them. As explained above, this could not have been Plaintiffs’ “reasonable
20 expectation,” as the submitted evidence shows that Defendants were not customers of
21 Plaintiffs. In light of this factor and the relevant decisional authority, Plaintiffs have shown
22 that it is likely that they will suffer irreparable harm if the FINRA arbitration proceeds forward.

23 **C. BALANCE OF THE EQUITIES**

24 Plaintiffs argue that, whereas they are likely to suffer irreparable harm in the absence of
25 a temporary restraining order, Defendants are not likely to suffer harm if the Court enjoins the
26 arbitration proceedings because Defendants can bring their claims in a court of competent
27 jurisdiction. Defendants offer no argument to the contrary. Therefore, this factor weighs in
28 favor of granting Plaintiffs’ motion.

