

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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UBS AG and UBS SECURITIES LLC, :  
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 : Index No. 600909/09  
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 Plaintiffs, :  
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 :  
 -- against -- :  
 : IAS Part 39  
 : (Hon. Barbara R. Kapnick)  
 :  
 JATIN SURYAWANSHI, PARTHA SARKAR, :  
 and SANJAY GIRDHAR, :  
 :  
 :  
 Defendants. :  
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 :  
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**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' MOTION (A) TO COMPEL ARBITRATION  
OR, IN THE ALTERNATIVE, FOR A STAY PENDING  
ARBITRATION, AND (B) FOR A PROTECTIVE ORDER**

FRIEDMAN KAPLAN  
SEILER & ADELMAN LLP  
Eric Seiler  
Lance J. Gotko  
1633 Broadway  
New York, NY 10019-6708  
(212) 833-1100

May 26, 2009

*Attorneys for Defendants Jatin Suryawanshi,  
Partha Sarkar, and Sanjay Girdhar*

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Defendants Jatin Suryawanshi (“Suryawanshi”), Partha Sarkar (“Sarkar”), and Sanjay Girdhar (“Girdhar”), by their undersigned counsel, submit this memorandum in support of their motion for (a) an order compelling plaintiffs to arbitrate their claims before the Financial Industry Regulatory Authority, Inc. (“FINRA”) or, in the alternative, for an order compelling arbitration before FINRA of all arbitrable claims and staying any non-arbitrable claims in this action, and (b) for a protective order relieving defendants and non-party Jefferies & Company, Inc. of the unnecessary burden of responding to plaintiffs’ discovery requests in this action while the arbitration proceeds.

### **PRELIMINARY STATEMENT**

Plaintiffs UBS Securities LLC and UBS AG have brought this plenary action in blatant violation of their mandatory obligation to arbitrate this dispute before FINRA. Defendants are employees (or “persons associated with” a FINRA member (UBS Securities LLC), and under the FINRA rules disputes between FINRA members and persons associated with FINRA members are subject to mandatory FINRA arbitration. UBS AG, while not a FINRA member, does business through UBS Securities LLC, reaped substantial benefits from UBS’s Algorithmic Trading Group and from defendants’ employment in the Group, and has sued to enforce its rights to those benefits. Thus, UBS AG should be estopped from denying its obligation to arbitrate this dispute, which arises out of defendants’ employment with UBS Securities LLC. The Court should, therefore, issue an order compelling the arbitration before FINRA of all claims in this action

Even if this Court were to find that some portion of this action is not subject to mandatory FINRA arbitration, the majority of undoubtedly would be. In that

circumstance, considerations of judicial economy, and deference to defendants' right to arbitrate, would weigh heavily in favor of this Court staying any non-arbitrable portion of this action while the arbitrable part proceeds to FINRA.

In addition, a protective order should be entered in connection with plaintiffs' discovery requests. Regardless of whether all of this action is sent to arbitration, or a portion of this action is sent to arbitration while the remaining portion is stayed, defendants and Jefferies should be relieved of the unnecessary burden of responding to plaintiffs' discovery requests in this action while the arbitration proceeds.

### **STATEMENT OF FACTS**

Until May 5, 2009, defendant Suryawanshi was employed by plaintiff UBS Securities LLC. (Suryawanshi Aff. ¶ 1.)<sup>1</sup> Suryawanshi's written employment agreement was with UBS Securities LLC (Suryawanshi Aff. Ex. 1), and during his employment with UBS Securities LLC he was the head of its Algorithmic Trading Group (Compl. ¶ 4)<sup>2</sup> which, as Suryawanshi's employment agreement indicates, is "within the Equities Area of UBS Securities LLC" (Suryawanshi Aff. Ex. 2). UBS Securities LLC registered Suryawanshi with FINRA as UBS Securities LLC's representative.

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<sup>1</sup> Citations to "Suryawanshi Aff." are to the accompanying *Affidavit of Jatin Suryawanshi in Support of Defendants' Motion to (A) Compel Arbitration or, in the Alternative, for a Stay Pending Arbitration, and (B) for a Protective Order*, sworn to May 26, 2009.

<sup>2</sup> Citations to "Compl." are to the complaint, which is attached as Exhibit 1 to the accompanying *Affirmation of Lance J. Gotko in Support of Defendants' Motion to (A) Compel Arbitration or, in the Alternative, for a Stay Pending Arbitration, and (B) for a Protective Order*, dated May 26, 2009.

(Suryawanshi Aff. Ex. 3.) Suryawanshi reported to William J. Sterling, a Managing Director and Global Head of Direct Execution Services of . . . UBS Securities LLC,” who had “management responsibility for [UBS Securities LLC’s] Algorithmic Trading Group . . . .” (Gotko Aff. Ex. 2, ¶ 1.)

Defendants Sarkar and Girdhar also worked in UBS Securities LLC’s Algorithmic Trading Group. (Compl. ¶ 4; Suryawanshi Aff. ¶ 7; Sarkar Aff. ¶ 1; Girdhar Aff. ¶ 1.)<sup>3</sup> UBS Securities LLC registered Sarkar with FINRA as UBS Securities LLC’s representative (Sarkar Aff. Ex. 3), and as of their resignation from employment Sarkar’s and Girdhar’s salary was paid by UBS Securities LLC. (Sarkar Aff. ¶ 1; Girdhar Aff. ¶ 1.) Sarkar’s and Girdhar’s jobs were substantially the same, and consisted of writing source code for programs that were used in connection with UBS Securities LLC’s algorithmic securities trading programs. (Suryawanshi Aff. ¶ 7; Sarkar Aff. ¶ 6; Girdhar Aff. ¶ 3.) Sarkar and Girdhar reported directly to Suryawanshi. (Compl. ¶ 4; Suryawanshi Aff. ¶ 7; Sarkar Aff. ¶ 2; Girdhar Aff. ¶ 2.)

UBS AG and UBS Securities LLC commenced this action on March 24, 2009, and obtained an *ex parte* temporary restraining order (“TRO”) on the same date. (Gotko Aff. Exs. 1 & 3.) Plaintiffs allege that defendants are liable for “misappropriation of trade secrets, breach of contract, breach of fiduciary duty, unfair

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<sup>3</sup> Citations to “Girdhar Aff.” are to the accompanying *Affidavit of Sanjay Girdhar in Support of Defendants’ Motion to (A) Compel Arbitration or, in the Alternative, for a Stay Pending Arbitration, and (B) for a Protective Order*, sworn to May 26, 2009. Citations to “Sarkar Aff.” are to the accompanying *Affidavit of Partha Sarkar in Support of Defendants’ Motion to (A) Compel Arbitration or, in the Alternative, for a Stay Pending Arbitration, and (B) for a Protective Order*, sworn to May 26, 2009.

competition and other wrongdoing.” (Compl. ¶ 1.) All of plaintiffs’ allegations relate to defendants’ conduct while they were employees of UBS Securities LLC. UBS alleges that defendants possess and intend to disclose confidential and proprietary information – specifically source code (Compl. ¶ 2), that they have violated their duties as employees by beginning to work for Jefferies while they were still employee of “UBS” (*id.*), and that Suryawanshi has breached his fiduciary duties to UBS by soliciting Sarkar and Girdhar to join him at Jefferies. (Compl. ¶¶ 16-21.)

According to the complaint, the source code at issue is “the source code for the Group’s programs” (Compl. ¶ 8), and “[t]he defendants were integrally involved in developing UBS’ ” i.e., UBS Securities LLC’s and UBS AG’s – “trade secret algorithmic trading programs and had access to the source code.” (Compl. ¶ 9.)

The complaint alleges that “UBS” – i.e., UBS Securities LLC and UBS AG – derived competitive advantage and benefit from the algorithmic trading programs in which defendants were “integrally involved in developing.” Thus, in paragraph 6 of the complaint it is alleged that “UBS is an industry leader in algorithmic trading,” and “[t]he heart of algorithmic trading, and the basis for competition in the industry, are the computer programs used to implement investment strategies.” (Compl. ¶ 6.) In paragraph 43 of the complaint it is alleged that the algorithmic trading programs in which defendants were “integrally involved in developing” were “highly successful” for UBS Securities LLC and UBS AG. (Compl. ¶ 43.) And in paragraph 46 of the complaint it is alleged that such programs give UBS Securities LLC and UBS AG “competitive advantage.” (Compl. ¶ 46.)

The UBS.com website states that UBS’s activities concerning algorithmic trading of US securities “are conducted through UBS Securities LLC, a US broker dealer.” (Gotko Aff. Ex. 17.)

After this action was filed, the parties engaged in discussions concerning potential means of resolving this dispute. To this end, the parties stipulated to continue the TRO, while reserving all of their rights. (Gotko Aff. Ex. 4.) Those negotiations stalled (Gotko Aff. ¶ 6), and defendants thereafter answered the complaint (Gotko Aff. Ex. 5) (asserting as a first affirmative defense that this dispute is subject to mandatory FINRA arbitration, *id.* ¶ 74), and commenced an arbitration of this dispute by filing a Statement of Claim with FINRA (Gotko Aff. Ex. 6) UBS, on the other hand, has pressed on with this action, serving discovery requests on defendants and a subpoena on non-party Jefferies. (Gotko Aff. Exs. 7, 8, 9, & 10.)

## **ARGUMENT**

### **I.**

#### **UBS SECURITIES LLC AND UBS AG SHOULD BE COMPELLED TO ARBITRATE ALL OF THEIR CLAIMS BEFORE FINRA**

##### **A. The Applicable Law Strongly Favors Arbitration**

It is settled that “the arbitration of disputes concerning employment in the securities industry and the enforceability of the arbitration clause embodied in . . . U-4 Form applications are governed by the Federal Arbitration Act (FAA) [9 U.S.C. § 1, *et seq.*]” *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173, 180, 623 N.Y.S.2d 790, 793 (1995). Here, all of the defendants worked in the securities industry and are being sued by their employer concerning alleged wrongdoing committed in the

course of that employment; and defendants Suryawanshi and Sarkar signed a Form U-4 in connection with their employment with UBS Securities LLC. Accordingly, the FAA applies to defendants' motion to compel arbitration under CPLR 7503(a).<sup>4</sup>

To determine whether all or part of an action should be sent to arbitration pursuant to an arbitration clause, a court conducts the following inquiries:

*First*, it must determine whether the parties agreed to arbitrate; *second*, it must determine the scope of that agreement; *third*, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and *fourth*, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.<sup>5</sup>

*JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 169 (2d Cir. 2004); *see also Salvano*, 85 N.Y.2d at 181 (“The primary policy and purpose of the FAA is to ‘ensure the

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<sup>4</sup> CPLR 7503(a) provides as follows:

**(a) Application to compel arbitration; stay of action.** A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

CPLR 7503(a).

<sup>5</sup> Since plaintiffs have asserted no federal statutory claims in this case, there is no need to discuss the third prong. As for the fourth prong, defendants address it separately in Section II, *infra*.

enforceability, according to their terms, of private agreements to arbitrate.”) (quoting *Volt Info. Scis., Inc. v. Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989)).

When conducting the above-listed inquiries, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *JLM Indus., Inc.*, 387 F.3d at 171 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)); *see also AT&T Techs. v. Comm. Workers of Am.*, 475 U.S. 643, 656-57 (1986) (“Where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”) (internal quotation marks omitted). “This principle is based upon the fact that the FAA is an expression of a strong federal policy favoring arbitration as an alternative means of dispute resolution.” *JLM Indus., Inc.*, 387 F.3d at 171 (internal quotation omitted).

**B. All Parties Have Agreed to Arbitrate This Dispute**

There is no doubt that the defendants have all agreed to arbitrate this dispute before FINRA. When Defendants commenced the FINRA arbitration each of them submitted a written agreement consenting to arbitration before FINRA. (Gotko Aff. Ex. 18.) In addition, the arbitration clause in the Form U-4 signed by defendants Suryawanshi and Sarkar provides that they “agree to arbitrate any dispute, claim or controversy that may arise between [them] and [their] *firm*, or a customer, or any other

person, that is required to be arbitrated under the rules, constitutions, or by-laws of [FINRA].” (Suryawanshi Aff. Ex. 2, at 14 (emphasis in original).)

It also is clear that via FINRA’s bylaws and rules UBS Securities LLC has agreed to FINRA arbitration of its dispute with defendants:

UBS Securities LLC is a Member of FINRA (Gotko Aff. Ex. 11) and FINRA’s bylaws provide that all of its Members must agree to comply with FINRA’s rules (Gotko Aff. Ex. 12).

The FINRA rules provide for mandatory arbitration of disputes between members of FINRA and persons associated with member of FINRA. Thus, FINRA Rule 13200(a) provides in pertinent part that

a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons.

(Gotko Aff. Ex. 15).

FINRA Rule 13100(o) provides in pertinent part that a “member” means “any broker or dealer admitted to membership in FINRA . . .” (Gotko Aff. Ex. 16).

FINRA Rule 13100(r) provides in pertinent part that a “Person Associated with a Member” means:

- (1) a natural person registered under the Rules of FINRA;  
or
- (2) . . . a natural person engaged in the investment banking or securities business who is directly or indirectly . . . controlled by a member, whether or not any such person is registered or exempt from registration with FINRA under the By-Laws or the Rules of FINRA.

For purposes of the Code, a person formerly associated with a member is a person associated with a member.

(Gotko Aff. Ex. 16).

Accordingly, FINRA arbitration is mandatory in disputes between, on the one hand, Members of FINRA (such as UBS Securities LLC), and, on the other hand, (1) persons registered with FINRA, or (2) persons engaged in the investment banking or securities business who are directly or indirectly controlled by a Member of FINRA, irrespective of whether that person is required to register with FINRA.

Defendants Suryawanshi and Sarkar are registered under the rules of FINRA – indeed, during their employment with the Algorithmic Trading Group, UBS Securities LLC filed their U-4's with FINRA and designated them registered representatives of UBS Securities LLC. (Suryawanshi Aff. Ex. 3; Sarkar Aff. Ex. 1.) In addition, by registering Suryawanshi and Sarkar with FINRA as its registered representatives, UBS Securities LLC acknowledged that it directly or indirectly controlled these individuals.

Accordingly, as persons registered with FINRA *and* as person directly or indirectly controlled by UBS Securities LLC, Suryawanshi and Sarkar are “persons associated with” UBS Securities LLC.

Thus, there is no doubt whatsoever that this dispute between UBS Securities LLC (a Member of FINRA) and Suryawanshi and Sarkar (persons associated with UBS Securities LLC) is subject to mandatory arbitration before FINRA.

Even though defendant Girdhar is not registered with FINRA, it is equally clear that he is a “person associated with a Member” within the meaning of Rule

13100(r)(2). Girdhar was employed in UBS Securities LLC's Algorithmic Trading Group, and reported to Suryawanshi, who was employed by UBS Securities LLC and was a registered representative of UBS Securities LLC. In addition, as of his resignation, Girdhar's salary was paid by UBS Securities LLC. Accordingly, there can be no doubt that Girdhar was "a natural person engaged in the . . . securities business who is directly or indirectly . . . controlled by a member, whether or not any such person is registered or exempt from registration with FINRA" – and thus a "person associated with a member" under Rule 13100(r)(2). Thus, UBS Securities LLC's dispute with Gidhar also is subject to mandatory FINRA arbitration under FINRA Rule 13200(a).

As a result, the claims of UBS Securities LLC against all three defendants – Suryawanshi, Sarkar, and Girdhar – must be decided by a FINRA arbitration panel, and UBS Securities LLC wrongly commenced this plenary action against them.

The claims of UBS AG against defendants also are subject to mandatory FINRA arbitration because, even though it is not a FINRA Member, (nor an associated person), UBS AG's conduct equitably estops it from denying its obligation to arbitrate its claims.

"[N]on-signatories may be bound by arbitration agreements entered into by others. This can happen pursuant to five different theories: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999) (internal citation omitted). The theory applicable to this case is estoppel. The Second Circuit has summarized the estoppel theory as follows:

Under the estoppel theory, a company knowingly exploiting an agreement with an arbitration clause can be estopped from avoiding arbitration despite having never signed the agreement. Guided by ordinary principles of contract and agency, we have concluded that where a company knowingly accepted the benefits of an agreement with an arbitration clause, even without signing the agreement, that company may be bound by the arbitration clause. The benefits must be direct – which is to say, flowing directly from the agreement.

*MAG Portfolio Consult, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58, 61 (2d Cir. 2001) (internal citations and quotations omitted).

In this case, UBS AG should be compelled to arbitrate its claims against defendants because it has knowingly accepted benefits flowing directly from UBS Securities LLC's agreements with FINRA as a Member of FINRA (which include an agreement to arbitrate), and from the at-will employment agreements that defendants had with UBS Securities LLC (which included an agreement to arbitrate).

The complaint makes it clear that UBS AG derived significant competitive advantages and benefits from UBS Securities LLC and the algorithmic trading programs defendants were “integrally involved in developing” for UBS Securities LLC. In addition, UBS AG benefitted from the supervisory roles that Sterling, Suryawanshi, and Sarkar played in UBS Securities LLC's Algorithmic Trading Group as registered FINRA representatives of UBS Securities LLC. The vigor with which UBS AG has prosecuted this action illustrates the magnitude of the value of the benefit that UBS AG has received from UBS Securities LLC and defendants' work for UBS Securities LLC – benefits that UBS AG knowingly.

In light of these facts, UBS AG cannot, in fairness, claim the benefits of UBS Securities LLC and the work defendants did for UBS Securities LLC without accepting the corresponding burdens – including the obligation to arbitrate disputes with defendants that arise out of their work for UBS Securities LLC. This is particularly true where, as here, UBS AG is suing to enforce its rights to the benefits of defendants’ employment – rights that are identical to those claimed by defendants’ direct employer, UBS Securities LLC. *See, e.g., In re SSL Int’l, PLC*, 44 A.D.3d 429, 429, 843 N.Y.S.2d 264, 265 (1st Dep’t 2007) (holding that a non-signatory to an arbitration agreement was estopped from denying its obligation to arbitrate where it had “exploited” the agreement containing the arbitration clause “by marketing products that utilized technology covered by the license agreement”); *Int’l Paper Co. v. Schwabedissen Maschinen Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (estopping the non-signatory party, International Paper, from refusing to arbitrate, because the contract containing the arbitration clause “provides part of the factual foundation for every claim asserted by International Paper against Schwabedissen”); *Wood v. Penntex Res., L.P.*, 458 F. Supp. 2d 355, 369 (S.D. Tex. 2006) (“Both federal and Texas state law are clear that a court may compel arbitration against a nonsignatory under direct-benefits estoppel if the nonsignatory has sued the signatory under a contract containing arbitration clause and the other requirements for direct-benefit estoppel and arbitrability are met.”).

Accordingly, UBS AG should be compelled to arbitrate its claims against defendants before FINRA.

**C. Plaintiffs' Claims Are Within the Scope of the Arbitration Agreement**

FINRA Rule 13200(a) provides that, “[e]xcept as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute *arises out of the business activities of a member or an associated person* and is between or among: Members; Members and Associated Persons; or Associated Persons.” (Gotko Aff. Ex. 15. (emphasis added).) Plaintiffs’ claims clearly arise out of the “business activities” of their business activities, and are asserted against defendants, who was “persons associated with” a FINRA Member. Accordingly, the claims herein are within the scope of the applicable arbitration agreement, and this Court should, therefore, compel UBS Securities LLC and UBS AG, pursuant to CPLR 7503(a), to arbitrate all of their claims against defendants before FINRA.

**II.**

**IF ANY PART OF THIS ACTION IS DETERMINED TO BE NON-ARBITRABLE, THE COURT SHOULD STAY THE NON-ARBITRABLE PART**

If this Court compels both UBS AG and UBS Securities LLC to arbitrate their claims against defendants, those claims will not be dismissed but rather will be stayed automatically. *See* CPLR 7503(a) (“If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.”); *see also* 13 Weinstein, Korn & Miller, *New York Civil Practice: CPLR* ¶ 7503.18[1] (2d ed. 2008) (“It is not necessary to move separately for a stay of an action pending in a court having jurisdiction to hear a motion to compel arbitration.”). But if UBS AG is not required to arbitrate its claims before FINRA, this Court should grant

defendants' alternative motion for a stay of any non-arbitrable part this action pursuant to CPLR 2201.

“Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” CPLR 2201. “The court may stay an action pending resolution of a New York arbitration if: (1) ‘plaintiff is closely related to the signatories of the agreement containing a broad arbitration clause’; (2) ‘the issues raised in the . . . litigation . . . are closely related to the issues raised in the arbitration’; and (3) ‘the issues in the overall dispute between the contracting parties are inextricably interwoven’ with the claims raised by the non-signing plaintiff.” *GFI Secs. LLC v. Tradition Asiel Secs. Inc.*, 873 N.Y.S.2d 511, 2008 N.Y. Misc. LEXIS 5946, at \*15 (Sup. Ct. N.Y. Cty. July 28, 2008) (quoting *Pacer/Cats/CCS v. Moviefone, Inc.*, 226 A.D.2d 127, 128, 640 N.Y.S.2d 55, 56 (1st Dep’t 1996)).

Two related concerns underpin this rule. First, when a court orders that part of an action be resolved by arbitration, staying the remainder of the action pending the outcome of the arbitration promotes judicial economy by avoiding duplicative proceedings on common legal and factual issues. *See Zodkevitch v. Feibush*, 851 N.Y.S.2d 62, 2007 N.Y. Misc. LEXIS 6650, at \*11 (Sup. Ct. N.Y. Cty. Sept. 11, 2007). Second, a stay in these circumstances recognizes that any merits-based ruling in this Court might have collateral estoppel effect in the FINRA arbitration, or vice versa, thus impairing defendants right to arbitrate in that forum and this Court’s ability to proceed efficiently. *See Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner*, 243 A.D.2d 1, 9, 671 N.Y.S.2d 905, 911 (1st Dep’t 1998) (noting that “the potential for conflict exists between

a court and an arbitral forum”); *McCowan v. Sears, Roebuck & Co.*, 908 F.2d 1099, 1107 (2d Cir. 1990) (where only part of the action was sent to arbitration, reversing the district court’s denial of a stay of the remaining claims); *cf. Safchik v. Board of Educ.*, 158 A.D.2d 277, 278, 550 N.Y.S.2d 679, 680 (1st Dep’t 1990) (according collateral estoppel effect, in a subsequent state court action, to findings from a prior arbitration).

In light of these established principles, the Court should stay UBS AG’s remaining claims if it does not hold that UBS AG’s claims are subject to mandatory arbitration. UBS AG is the over 50% owner of, and thus “closely related” to, UBS Securities LLC. Moreover, the issues in this action are identical to the issues the FINRA arbitrators will decide, making UBS AG’s claims “inextricably interwoven” with the claims of UBS Securities LLC.

Accordingly, this Court should stay UBS AG’s claims pursuant to CPLR 2201, pending the outcome of UBS Securities LLC’s arbitration before FINRA, because doing so will promote judicial economy and preserve the defendants’ right to arbitrate by avoiding conflicting rulings in duplicative proceedings. *See GFI Secs.*, 2008 N.Y. Misc. LEXIS 5946, at \*15-16 (so holding on similar facts).

### III.

#### **THE COURT SHOULD ENTER A PROTECTIVE ORDER RELIEVING DEFENDANTS AND NON-PARTY JEFFERIES OF THE BURDEN OF RESPONDING TO UBS’S UNNECESSARY DISCOVERY REQUESTS**

In addition to the relief requested above, defendants request that the Court grant their alternative motion for a protective order under CPLR 3103(a), relieving them

and non-party Jefferies of the burden of responding to UBS's duplicative discovery while the arbitration proceeds.<sup>6</sup>

UBS has served interrogatories and requests for the production of documents, has noticed a deposition for each defendant, and has subpoenaed a non-party (*i.e.*, Jefferies). As discovery in an amount to be determined by the arbitrators will be available in the FINRA arbitration, and as this action will in whole or in part be sent to arbitration, the burden and expense of responding to the duplicative discovery sought by plaintiffs herein is unreasonable and unnecessary. *See Williamson v. Weinman*, 261 A.D.2d 147, 147, 689 N.Y.S.2d 495, 496 (1st Dep't 1999) (holding that the lower court properly refused to compel compliance with duplicative discovery requests); *Statewide Med. Acupuncture, P.C. v. Travelers Ins. Co.*, 824 N.Y.S.2d 770, 2006 N.Y. Misc LEXIS 2100, at \*1 (Sup. Ct. App. Term Aug. 2, 2006) (affirming the trial court's protective order barring duplicative discovery).

Thus, in addition to compelling plaintiffs to arbitrate their claims, or staying any non-arbitrable portion of this action while compelling arbitration of the rest, the Court should also grant defendants' motion for a protective order.

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<sup>6</sup> CPLR 3103(a), governing protective ordered, provides in pertinent part as follows:

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

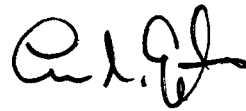
**CONCLUSION**

For the foregoing reasons, the Court should grant defendants' motion pursuant to CPLR 7503(a) and compel plaintiffs to arbitrate before FINRA, or, in the alternative, stay any non-arbitrable portion of this action pursuant to CPLR 2201 while compelling the arbitrable portion to be arbitrated before FINRA. The Court also should enter a protective order pursuant to CPLR 3103, relieving defendants and non-party Jefferies of the burden of responding to plaintiffs' unnecessary discovery requests.

Dated: New York, New York  
May 26, 2009

Respectfully submitted,

FRIEDMAN KAPLAN  
SEILER & ADELMAN LLP



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Eric Seiler  
Lance J. Gotko  
1633 Broadway  
New York, NY 10019-6708  
(212) 833-1100

*Attorneys for Defendants Jatin Suryawanshi,  
Partha Sarkar, and Sanjay Girdhar*