UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ARNOLD CHASE FAMILY, LLC, CHASE ENTERPRISES HOLDINGS, LLC, CHERYL CHASE FAMILY, LLC, DTC FAMILY INVESTMENTS, LLC, THE CHERYL ANNE CHASE GRANTOR TRUST, and THE DARLAND TRUST, Plaintiffs, v. UBS AG, UBS SECURITIES, LLC, and UBS FINANCIAL SERVICES INC., Defendants.	CIVIL ACTION NO. 3:08-cv-00581 (MRK) JUNE 10, 2008

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS UBS SECURITIES, LLC AND UBS FINANCIAL SERVICES INC.

PRELIMINARY STATEMENT

Defendants UBS Securities, LLC and UBS Financial Services Inc. (collectively "Defendants" or "UBS") respectfully submit this memorandum of law in support of their motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiffs' application for failure to state a claim upon which relief can be granted.[1]

Plaintiffs are concurrently prosecuting an arbitration against UBS concerning certain Auction Rate Securities ("ARS") in their accounts. See Arnold Chase Family, LLC, et al. v. UBS AG, et al., FINRA Arbitration No. 08-01117. After commencing that arbitration, Plaintiffs then filed an application with this Court, ostensibly to secure any award that they may receive in the pending arbitration. Plaintiffs' application to this Court, however, is specifically barred by the parties' written contracts which govern this relationship. First, Plaintiffs agreed to arbitrate any and all disputes under FINRA and to do so in accordance with FINRA's arbitration rules and procedures. Under the FINRA rules, all related court proceedings, such as this present action, are prohibited. Second, Plaintiffs agreed that New York law would govern the parties' relationship and contracts. As a result, any application for an attachment in aid of arbitration must be brought under New York law, not that of Connecticut. For these reasons, Plaintiffs' application for an attachment pursuant to Conn. Gen. Stat. § 52-422 must be dismissed with prejudice.

[1] As of the date of this motion, UBS AG has not yet been served with a summons and application.

FACTUAL BACKGROUND

A. *Auction Rate Securities*

UBS served as underwriter for issuance of certain ARS as well as broker-dealers/managers in auctions and the secondary ARS market. See Amended Statement of Claim ("Amended Claim") ¶ 21. ARS include municipal bonds, corporate bonds and preferred stocks that pay interest rates or dividend yields at a floating rate that is set periodically by way of a series of auctions. See Amended Claim ¶ 12. One type of ARS offered by UBS is Auction Rate Certificates ("ARC"). ARCs are long-term municipal bonds, generally with a final maturity of 20 to 30 years. Issuers include student loan trusts, power authorities, health and educational facilities, states, municipalities and related agencies and authorities. After the initial interest rate for an ARC is set, the floating rate is reset (typically every 7, 28 or 35 days) through a Dutch Auction process. See Amended Claim ¶ 14. A broker-dealer acts as the auction manager and accumulates the bids and sends them to an independent auction agent who calculates the clearing rate. The resulting rate for all holders is the lowest rate at which the cumulative total of securities demanded (by buyers) is equal to the amount auctioned (by sellers). See Amended Claim ¶ 15.

If there are not enough orders to purchase all of the securities offered for sale, the result is a "failed auction." When an auction fails, the rate is reset to a "maximum rate," which is defined in the offering documents. See Amended Claim ¶ 17. A failed auction also results in the holders of ARS continuing to hold their securities until the next successful auction. See Amended Claim ¶ 17. In mid-2007, concerns in the sub-prime market and the general contraction of the credit markets led to a decrease in the number of potential bidders for ARS.

See Amended Claim ¶ 26. In February 2008, due to the mounting crisis in the credit markets, many auctions failed. See Amended Claim ¶¶ 26-28.

B. *Plaintiffs' ARS Investments and Account Agreements with UBS*

Plaintiffs are six different legal entities (four limited liability companies and two trusts) controlled by or affiliated with members of the Chase family. Each of the Plaintiffs currently maintains at least one account with the UBS branch in Hartford, Connecticut. See Amended Claim ¶ 2, 35 (Count Four). As of the date of the Amended Claim, Plaintiffs had collectively invested $74,375,000.00 in principal in ARS. Id. ¶ 11.

When Plaintiffs opened investment accounts at UBS, they each executed and entered into a series of account opening documents. One of those signed opening documents was titled "Client Agreement" which provided in part as follows:

> BY SIGNING BELOW, I UNDERSTAND, ACKNOWLEDGE AND AGREE. . . that I have received and read a copy of this Client Agreement and the attached Master Account Agreement (which contains a copy of this Paragraph for my reference) and agree to be bound by the terms and conditions therein (which terms and conditions are hereby incorporated by reference) as of this date. See Declaration of Matthew R. Paul, Esq. ("Paul Decl."), Exhibit C, at 6.[2]

The Master Account Agreement contained, among other terms, extensive provisions regarding arbitration and applicable law. With respect to arbitration, the Master Account Agreement provides that:

---

[2] Plaintiffs' account agreements with UBS are expressly referenced in its arbitration statement of claim which is attached to their application for an attachment and therefore can be considered by the Court on a motion to dismiss. See ATSI Communications, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d. Cir. 2007) (holding "we may consider any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit"); Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 100 (2d Cir. 2005) (holding a court in deciding a motion to dismiss can consider "documents attached to the complaint as exhibits or incorporated by reference").

Arbitration
This agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree as follows:
Arbitration is final and binding on the parties. All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed . . . .
The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this agreement.
You agree, and by carrying an account for you UBS Financial Services Inc. agrees, that any and all controversies which may arise between you and UBS Financial Services Inc. concerning any account(s), transaction, dispute or the construction, performance, or breach of this or any other Agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this Agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act, and shall be conducted before an arbitration panel convened by the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc. you may also select any other national security exchange's arbitration forum upon which UBS Financial Services Inc. is legally required to arbitrate the controversy with Client, including, where applicable, the Municipal Securities Rulemaking Board. Such arbitration shall be governed by the rules of the organization convening the panel. . . .
Paul Decl., Ex. C, at 26. (Original was in all bold; underlining added).

As to applicable law, the Master Account Agreement provides:

This Agreement, its enforcement and the relationship between you and UBS Financial Services shall be governed by the laws of the State of New York, including the arbitration provisions contained herein, without giving effect to the choice of law or conflict of laws provisions thereof, and shall be binding upon you, your authorized agents, personal representatives, heirs, successors and assigns. . . . Id.

C. *The Claims Pleaded in the Amended Statement of Claim*

Plaintiffs filed their statement of claim with FINRA[3] on April 15, 2008. On April 17, 2008, Plaintiffs filed an application in this Court under Conn. Gen. Stat. § 52-422 for an

[3] The Financial Industry Regulatory Authority (FINRA) is the largest non-governmental regulator for all securities firms doing business in the United States. FINRA was created in July 2007 through the consolidation of NASD and the member regulation, enforcement and arbitration functions of the New York Stock Exchange. See http://www.finra.org/AboutFINRA/CorporateInformation/index.htm.

attachment of UBS' property in aid of arbitration in the amount of $150,000,000 (the "Application").[4] Plaintiffs filed an amended statement of claim with FINRA on or about May 21, 2008 (the "Amended Claim"). See Paul Decl., Exhibit A. Plaintiffs assert that UBS violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (Counts One and Two); were negligent (Count Three); violated Chapter 72 (Securities and Business Investments Law) of the Connecticut General Statutes (Count Four); and violated fiduciary duties owed to Plaintiffs (Count Five). By rule, UBS' answer to the Amended Claim is due by July 8, 2008. On May 30, 2008, Plaintiffs served extensive discovery requests in the FINRA arbitration.

ARGUMENT

PLAINTIFFS' APPLICATION SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

I. LEGAL STANDARD

On a motion to dismiss, while the Court must accept as true all well-pleaded facts alleged in the complaint, it should dismiss the complaint where "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 100 (2d Cir. 2005) (citation omitted); see also ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) ("[t]o survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level'") (quoting Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965 (2007)). In addition, "bald assertions and conclusions of law" are insufficient to overcome a

[4] It should be noted that any such action under Conn. Gen. Stat. § 52-422 must meet an extremely tough standard as it should be granted "only in extraordinary circumstances" and only in situations where the applicant can affirmatively establish that its rights "will be lost irretrievably in the absence of judicial intervention." New England Pipe Corp. v. Northeast Corridor Foundation, 271 Conn. 329, 336-37 (2004).

motion to dismiss. Reddington v. Staten Island University Hosp., 511 F.3d 126, 131 (2d Cir. 2007).

II. PLAINTIFFS AGREED BY CONTRACT TO FINRA RULE 12209 WHICH PROHIBITS RELATED COURT PROCEEDINGS

Since Plaintiffs specifically agreed to follow the rules of FINRA, and the rules of FINRA specifically prohibit judicial proceedings concerning matters pending in arbitration, Plaintiffs are contractually prohibited from bringing this present claim for attachment. As noted above, the Master Account Agreement provides that "[t]he rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this agreement." Plaintiffs obviously do not contest that their claims are subject to arbitration before FINRA given that they unilaterally commenced the pending FINRA arbitration and have subsequently filed document requests in that proceeding.

FINRA Rule 12209 provides that "[d]uring an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration." (Emphasis added).[5] Plaintiffs' Application clearly "concerns" the matters raised in arbitration because a ruling on the request for prejudgment remedy would necessarily involve a review and assessment by the Court of the very same matters at issue in the arbitration. See, e.g., Metal Mgmt. v. Schiavone, 514 F. Supp. 2d 227, 235-37 (D. Conn. 2007) (holding that a showing of probable cause was necessary to get prejudgment relief).

Indeed, the dictionary definition of "concern" is "to relate to: be about; to bear on; to have an influence on: involve." Merriam-Webster's Collegiate Dictionary (10th Ed.).

[5] The FINRA-NASD Code of Arbitration Procedure for Customer Disputes is attached as Exhibit B to the Paul Decl.

Without a doubt, this prejudgment remedy application relates to and is about the matters at issue in the FINRA arbitration. Plaintiffs freely entered into a contract which, by its terms, prohibits any legal proceeding which concerns the same matters raised in the arbitration. Consequently, Plaintiffs are contractually barred from seeking a prejudgment remedy in this Court.

The policy underlying the Federal Arbitration Act further supports this result. See Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University, 489 U.S. 468, 479 (1989) (holding that the Federal Arbitration Act "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms" and that parties "may . . . specify by contract the rules under which that arbitration will be conducted"); Saunderson v. Gary Goldberg & Co., Inc., 899 F.Supp. 177, 180 (S.D.N.Y. 1995) (dismissing complaint because claims were subject to arbitration and were barred by the FINRA/NASD statute of limitations rule).[6] Simply put, Plaintiffs have contractually waived the right to utilize a judicial forum here by operation of the FINRA rules.

FINRA arbitration provides for expeditious and effective dispute resolution and offers many advantages and protections to customers, such as: (i) FINRA's dispute resolution operation is subject to oversight by the Securities and Exchange Commission, (ii) FINRA rules dictate a prompt and orderly exchange of documents, and (iii) FINRA cases are usually concluded within approximately thirteen months from filing.[7] However, Plaintiffs cannot selectively recognize those aspects of the FINRA rules that they find favorable and yet

---

[6] The Connecticut Superior Court was also faced with an application for attachment in aid of arbitration in Macartney v. GCG SBIC Mgmt. Corp., 2005 Conn. Super. LEXIS 1780, at *11 (Conn. Super. Ct. June 28, 2005). In that case, the court denied the defendant's motion to dismiss the plaintiff's application for an attachment under Conn. General Statutes § 52-422. However, the court held that the parties agreed the rules of the American Arbitration Association ("AAA") would apply and that the AAA rules specifically provided for such an attachment proceeding before a court. In contrast, here FINRA has no comparable rule providing for such judicial relief, but instead FINRA affirmatively prohibits Plaintiffs' present application.

[7] See http://www.finra.org

simultaneously repudiate other provisions of those same FINRA rules which they now consider restrictive or inconvenient. Plaintiffs agreed to the FINRA rules in their totality and without qualification, including Rule 12209, and, as such, their application for extraordinary relief should be dismissed.

III. BY CONTRACTUALLY AGREEING TO THE APPLICATION OF NEW YORK LAW, PLAINTIFFS CANNOT SEEK A SUBSTANTIVE REMEDY UNDER CONNECTICUT LAW

Under Connecticut law, it is well settled that parties "are allowed to select the law that will govern their contract." Elgar v. Elgar, 238 Conn. 839, 850 (1996). Here, the parties explicitly agreed that New York law would govern their contractual relationship. The Master Account Agreement provides that the "Agreement, its enforcement and the relationship between you and UBS Financial Services shall be governed by the laws of the State of New York. . . without giving effect to the choice of law or conflicts of laws provisions thereof. . ." Consequently, this application for relief under Connecticut law violates the parties' agreement to be governed by New York law.[8]

A Connecticut Superior Court decision reinforces this conclusion. In Macrolease Int'l v. Nemeth, No. CV 990364471S, 2000 Conn. Super. LEXIS 1466, at *2-4 (Conn. Super. Ct. June 9, 2000), the Connecticut Superior Court held that a plaintiff could not seek a prejudgment remedy under Connecticut's prejudgment remedy statute (§§ 52-278a et seq.), the sister statute to

[8] Rule 64 of the Federal Rules of Civil Procedure leads to the same conclusion. Rule 64 provides that when addressing a motion for prejudgment attachment in a diversity action a court applies the law of the state in which the district court sits. Significantly, under Rule 64, the district court must first apply the choice of law rules where the court sits to determine what law it would apply to prejudgment attachment. See Stephens v. National Distillers & Chem. Corp., 69 F.3d 1226, 1229 (2d Cir. 1995) (District Court found that Kentucky law pertaining to the posting of security, rather than New York law, was applicable); S & G Press, Inc. v. Harris Graphics Corp., 718 F. Supp. 1459, 1460 (N.D. Cal. 1989) (upholding parties New York choice-of-law clause under Fed. R. Civ. P. 64).

§ 52-422, because the choice of law clause in the parties' agreement provided for the application of New York law. As such, the plaintiff's application for a prejudgment remedy was denied.

The only potential issue for consideration is whether the prejudgment remedy of attachment under § 52-422 is substantive or procedural in nature. If the remedy is procedural in nature, and therefore does not concern the rights and duties of the respective parties, then the New York choice-of-law provision is not implicated. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 64 (1995) ("the choice-of-law provision covers the rights and duties of the parties"); Preston v. Ferrer, 128 S.Ct. 978, 989 (2008) (California choice-of-law provision "govern[ed] the parties' substantive rights and obligations"). Conn. Gen. Stat. § 52-422 provides that:

> At any time before an award is rendered pursuant to an arbitration under this chapter, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when said court is not in session, any judge thereof, upon application of any party to the arbitration, may make forthwith such order or decree, issue such process and direct such proceedings as may be necessary to protect the rights of the parties pending the rendering of the award and to secure the satisfaction thereof when rendered and confirmed.

This provision is clearly substantive in nature. The right to attach property under Connecticut law is "purely statutory." Ambroise v. William Raveis Real Estate, 226 Conn. 757, 767 (1993). When a statute gives a right of action that did not exist at common law, the entire statute is considered substantive rather than procedural. Roberts v. Caton, 224 Conn. 483, 489 (1993).

In summary, the parties agreed that New York law would govern the rights and obligations of the parties.[9] Under Connecticut law, parties are permitted to select the law that

[9] New York Civil Practice Law and Rules (CPLR) Section 7502(c) grants the New York Supreme Court the authority to issue orders of attachment or preliminary injunction in connection with an arbitration "but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." This provision imposes a difficult standard on applicants as evidenced by several courts that have

will govern their contract. Plaintiffs are now pursuing in this action a substantive remedy exclusively under Connecticut law. The application of Connecticut substantive law, however, would directly contravene the choice-of-law agreement of the parties. Accordingly, Plaintiffs' application must be dismissed for failure to state a claim upon which relief can be granted.

---

considered it. See, e.g., Founders Insurance Co, Ltd. v. Everest National Insurance Co., 2007 NY Slip Op 5651, 41 A.D.3d 350 (1st Dep't 2007) (denying application under CPLR 7502(c)); Erickson v. Kidder Peabody & Co., Inc., 166 Misc.2d 1, 5, 630 N.Y.S.2d 861, 862 (NY Supr. 1995) (denying application, noting that "CPLR 7502(c) does not entitle petitioners to a guaranty that their awards following arbitration will be satisfied").

CONCLUSION

For the reasons set forth above, Plaintiffs' application for a prejudgment remedy in aid of arbitration under Section 52-422 of the Connecticut General Statutes should be dismissed in its entirety against all defendants for failure to state a claim upon which relief can be granted.

Respectfully submitted,

Dated: New York, New York
June 10, 2008

PAUL, HASTINGS, JANOFSKY
& WALKER LLP

By: /s/ Kurt W. Hansson

Kurt W. Hansson (ct 01373)
Matthew R. Paul (ct 21036)
75 East 55th Street
New York, NY 10022
Telephone: 212-318-6000
Fax: 212-319-4090
kurthansson@paulhastings.com
matthewpaul@paulhastings.com

Attorneys for Defendants
UBS Securities, LLC and
UBS Financial Services Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2008, a copy of the foregoing Memorandum of Law in Support of Motion to Dismiss was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Kurt W. Hansson
Kurt W. Hansson (ct 01373)
Paul, Hastings, Janofsky & Walker LLP
75 East 55th Street
New York, NY 10022
Tel: (212) 318-6000
Fax: (212) 319-4090
kurthansson@paulhastings.com