

LAURENT J. LaBRIE * IN THE
Plaintiff * DISTRICT COURT
v. * FOR
TD AMERITRADE * BALTIMORE COUNTY
Defendant * Case No: 0804-0021814-2010
* * * * *

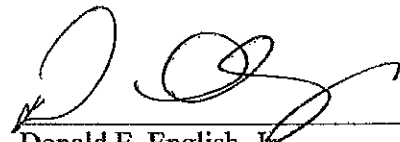
**AFFIRMATION IN SUPPORT OF
MOTION OF TD AMERITRADE, INC. TO COMPEL ARBITRATION**

I, Donald E. English, Jr., a member of the Bar of the State of Maryland, hereby declare under penalty of perjury:

1. I am an attorney admitted to practice before this Court and an attorney with the law firm of Miles & Stockbridge P.C., counsel for defendant TD Ameritrade, Inc. ("TDA") in this action. I submit this affirmation in support of TDA's motion for an order pursuant to CPLR § 7503(a) and 9 U.S.C. § 4: (a) compelling arbitration of plaintiff's claim asserted against TDA, on the grounds that (i) plaintiff signed an agreement to arbitrate through the dispute resolution forum of the National Association of Securities Dealers, Inc. (NASD), which is now known as the Financial Industry Regulatory Authority ("FINRA"), all controversies with TDA relating to this account, (ii) the claim asserted in the Small Claims Summons and Complaint Form clearly relates to this account and, therefore, (iii) the claim is within the scope of the arbitration provisions of the agreement; (b) staying plaintiff's claim against TDA in this Court pending completion of arbitration; and (c) granting TDA such other relief as may be just, proper, and equitable, including the costs and disbursements of this proceeding.

2. The Court should also be aware that plaintiff was informed of his obligation to resolve all disputes with TDA through FINRA arbitration in the account agreement.

3. Attached as Exhibit A is a copy of the Small Claims Summons and Complaint Form.
4. Attached as Exhibit B is a copy of the Account Application plaintiff signed when opening a TDA brokerage account.
5. Attached as Exhibit C is a copy of the TDA Terms and Conditions and Account handbook, governing the account.
6. For the reasons set forth in TDA's accompanying Memorandum of Law, I respectfully request that this Court issue an order (a) compelling arbitration of plaintiff's claim against TDA to the dispute resolution forum of FINRA, (b) staying this action pending completion of the arbitration and (c) awarding TDA such other and further relief as may appear just and proper.



Donald E. English, Jr.
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10 Light Street
Baltimore, Maryland 21202
410-385-3850

Attorney for Defendant, TD Ameritrade

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2010, a copy of the foregoing

AFFIRMATION IN SUPPORT OF MOTION OF TD AMERITRADE, INC. TO COMPEL

ARBITRATION was mailed, first class, postage prepaid to:

Laurent J. LaBrie, *pro se*
5 Pleasant Ridge Drive #205
Owings Mills, Maryland 21117



Donald E. English, Jr.

LAURENT J. LaBRIE

Plaintiff

v.

TD AMERITRADE

Defendant

* IN THE
* DISTRICT COURT
* FOR
* BALTIMORE COUNTY
* Case No: 0804-0021814-2010

* * * * *

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO COMPEL ARBITRATION**

Defendant, TD Ameritrade, Inc. ("TDA"), by its undersigned counsel, hereby submits this memorandum of law in support of its motion to compel the plaintiff's complaint against it to arbitration pursuant to CPLR 7503(a) and 9 U.S.C. § 4, (the Federal Arbitration Act), and to stay this litigation in this Court pending the completion of arbitration.

Plaintiff maintained an individual brokerage account at TDA and the Small Claims Summons asserts a claim for money owed in connection with that account. (A copy of the Small Claims Summons and Complaint Form is attached as Exhibit A to the Affirmation dated August 5, 2010, in support of the Motion ("Affirmation."), which is submitted herewith.) As described below, when plaintiff opened the account, an Account Application was completed and executed requiring all controversies relating to the account to be resolved through arbitration at the dispute resolution forum of the National Association of Securities Dealers, Inc. ("NASD") n/k/a FINRA. As this claim relates to alleged option transaction errors in the plaintiff's account, this Court should compel this claim against TDA to arbitration and stay this action pending completion of the arbitration.

STATEMENT OF FACTS

On or about January 24, 2006 plaintiff opened an individual brokerage account (the "Account") at Waterhouse Securities Inc. ("TD Waterhouse"), by executing an Account Application. (A copy of the Account Application is attached as Exhibit B to the Affirmation) TD Waterhouse was renamed as TDA, following its acquisition by the parent company of TD Ameritrade in 2006. TD Waterhouse clients, including the plaintiff, were sent an updated agreement titled "Client Agreement and Account Handbook," which then governed the Account. In addition, the plaintiff signed a TDA Application in 2006, which also includes an arbitration clause by stating:

I acknowledge that I have received and read the "Terms and Conditions" available at www.Tdameritrade.com or by calling 877-TDAMERITRADE, that will govern my account. I agree to be bound by the "Terms and Conditions" which may be amended from time to time and which are incorporated by reference. The Terms and Conditions applicable to this brokerage account contain predispute arbitration clauses. ***By signing this agreement, the parties agree to be bound by the terms of the agreement including the arbitration agreement located at paragraphs 91-93 of the Terms and Conditions.*** (Emphasis added).

Attached as Exhibit C to the Affirmation is a copy of the Account Handbook Terms and Conditions which was sent with a "negative consent letter" to former TD Waterhouse clients when it merged with Ameritrade which referenced the Account Handbook providing (in bold lettering) as follows:

All controversies concerning (a) any transaction, (b) the construction, performance or breach of this or any other agreement, whether entered into prior to, on or after the date of this Agreement, or (c) any other matter which may arise between TD AMERITRADE or Ameritrade Clearing, or their representatives and me shall be determined by arbitration in accordance with the rules of the National Association of Securities Dealers, Inc.

The Small Claims Summons and Complaint Form assert one claim -- for alleged option transactional errors (unauthorized trading) in the plaintiff's Account. Because the agreement governing plaintiff's Account requires arbitration of all disputes, including those relating to this Account, this controversy must be resolved in arbitration before the dispute resolution forum of FINRA.¹ Accordingly, TDA's motion to compel arbitration should be granted and this action should be stayed.

LEGAL ANALYSIS

1. THE ACCOUNT AGREEMENT EXECUTED BY PLAINTIFF EXPRESSLY REQUIRES THE ARBITRATION OF PLAINTIFF'S CLAIM.

Plaintiff's claim against TDA is subject to a valid arbitration agreement between plaintiff and TDA. Accordingly, plaintiff's claim against TDA should be compelled to FINRA arbitration and this action stayed pending completion of the arbitration.

The United States Supreme Court Has Ruled That Arbitration Agreements Between Brokerage Firms And Their Customers Must Be Enforced

On multiple occasions, the Supreme Court has enforced arbitration clauses contained in brokerage firm customer account agreements. *See, e.g., Rodriguez de Quijas v. Shearson/Lehman Brothers*, 845 F.2d 1296 (5th Cir.) *aff'd* 490 U.S. 477, 109 S. Ct. 1917 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218, 105 S. Ct. 1238, 1241, (1985) (holding the "Arbitration Act requires district courts to compel arbitration of pendent arbitration claims . . . even where the result would be . . . inefficient maintenance of separate proceedings in different forums"). *McMahon* is the seminal United States Supreme Court case enforcing the arbitrability

¹ In July 2007, the NASD changed its name to the Financial Industry Regulatory Authority, or "FINRA" and the dispute resolution section of the NASD was consolidated with the dispute resolution section of the NYSE. *See* the FINRA website -- www.finra.org/AboutFINRA/index.htm.

of securities disputes. In *McMahon*, the Court reasoned that “the Federal Arbitration Act establishes a ‘federal policy favoring arbitration,’ requiring that ‘we rigorously enforce agreements to arbitrate.’” 482 U.S. at 226, 107 S. Ct. at 2337 (citation omitted). In *Rodriguez*, the Supreme Court affirmed the lower court’s decision that an arbitration clause was enforceable. *Rodriguez* involved securities investors who signed a standard customer agreement which included a provision requiring disputes to be resolved through binding arbitration. The Court of Appeals held that a pre-dispute agreement to arbitrate claims under the Securities Act of 1933 was enforceable and did not require resolution of the claims in a judicial forum. To support its holding, the court relied on *McMahon*, stressing the strong federal policy favoring arbitration. *Rodriguez*, 845 F.2d at 1297-99. The pronouncements of the United States Supreme Court have essentially been adopted by the Fourth Circuit and Baltimore state courts. The Maryland Arbitration Act has been called the ‘State analogue . . . to the Federal Arbitration Act. See *Regina v. Envirmech*, 80 Md. App. 662, 667, 565 A.2d 693, 696 (1989). The same policy favoring enforcement of arbitration agreements is present in both acts. Compare *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983) (noting the ‘liberal federal policy favoring arbitration agreements’) with *Gold Coast Mall*, 298 Md. at 103, 468 A.2d at 95 (noting the state legislative policy favoring enforcement of executory agreements to arbitrate). We therefore reference decisions interpreting the Federal Arbitration Act. The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (1970) (the “FAA”), which governs the enforceability of the arbitration agreement executed by plaintiffs, likewise requires arbitration of plaintiff’s claims. The FAA applies to all contracts evidencing a transaction involving commerce.

Section 2 of the FAA, 9 U.S.C. § 2, provides in relevant part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Securities brokerage account agreements consistently have been held to involve commerce. See *Robinson v. Bache & Co.*, 227 F. Supp. 456, 458 (S.D.N.Y. 1964) (holding customer's margin and lending agreement with brokerage firm evidenced a "transaction involving commerce" within the Federal Arbitration Act, 9 U.S.C. § 2); *Kribs v. Bache, Flasley, Stuart, Shields, Inc., et al.*, 1982 WL 1360 (S.D.N.Y. Dec. 7, 1982) ("courts have long held this [Arbitration] Act applicable to arbitration agreements relating to brokerage accounts . . ."); *Brown v. Gilligan, Will and Co.*, 287 F. Supp. 766, 770 (S.D.N.Y. 1982) (holding contracts to arbitrate disputes between broker dealer firms registered with the Securities and Exchange Commission evidenced a "transaction involving commerce."). Therefore, the Account Application signed by the plaintiff upon opening this Account and the "client agreement and account handbook" Terms and Conditions incorporated by reference including the arbitration provisions, is governed by the FAA.

Plaintiff's Claim Is Governed Within The Scope Of The Arbitration Agreement

Section 4 of the FAA, 9 U.S.C. § 4, authorizes the district court to order a recalcitrant party to arbitrate a controversy pursuant to the terms of a written arbitration agreement. The statute provides in relevant part:

A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

CPLR 7503(a) similarly provides that “[w]here there is no substantial question whether a valid agreement was made or complied with, . . . , the court *shall* direct the parties to arbitrate.”

(Emphasis added).

Both the FAA and the CPLR reflect the strong public policy favoring arbitration of disputes -- a policy that requires any doubt to be resolved in favor of arbitration. As the United States Supreme Court stated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S. Ct. 927 (1983):

The Arbitration Act establishes that, as a matter of federal law, 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.

Moses H. Cone, 460 U.S. at 25-26, 103 S. Ct. at 941 (emphasis added). See also *S.A. Mineracao da Trindade-Samitri v. Utah Int'l, Inc.*, 745 F.2d 190, 194 (2d Cir. 1984) (holding that “arbitration should be ordered ‘unless it may be said with positive assurance that the arbitration clause is not an interpretation that covers the asserted dispute’”).

When plaintiff opened the Account, he agreed, among other things, to arbitrate “[a]ll controversies concerning (a) any transaction, (b) the construction, performance or breach of this or any other agreement, whether entered into prior to, on or after the date of this Agreement, or (c) any other matter which may arise between TDA or Ameritrade Clearing, or their representatives and me . . .” Terms and Conditions, Affirmation., Exhibit C. As plaintiff’s claim relate to securities transactions in the Account (see Small Claims Complaint Form, Affirmation, Exhibit A), the claim falls squarely within the scope of the arbitration provision and this controversy must be resolved in arbitration before the dispute resolution forum of the National Association of Securities Dealers, now known as FINRA. The law supports agreements to

arbitrate and should be enforced. Accordingly, TDA's motion to compel arbitration should be granted.

2. COURTS HAVE A DUTY TO STAY ACTIONS PENDING ARBITRATION

Because this claim against TDA is related to securities transactions in the plaintiff's Account, this action must be stayed pursuant to section 3 of the FAA, 9 U.S.C. § 3 and CPLR 7503(a). Section 3 of the FAA provides in relevant part that:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement (Emphasis added).

CPLR 7503(a) similarly provides that "[i]f the application [to compel arbitration] is granted, the order *shall* operate to stay a pending or subsequent action." (Emphasis added.)

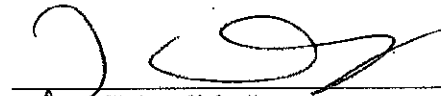
These sections do *not* allow for discretionary authority by a court to decide whether or when to stay an action and order arbitration. Rather, the court need only satisfy itself that the issue to be determined is referable to arbitration and, once that determination has been made, as the United States Supreme Court has held, the court hearing the matter *is required* to compel arbitration and stay the action. *Byrd*, 470 U.S. at 218 (FAA mandates that district courts "shall direct [plaintiff] to proceed to arbitration on issues as to which an arbitration agreement has been signed").

Accordingly, this Court should stay plaintiff's claim against TDA.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court issue an order (1) granting the defendant's motion to compel the plaintiff's claim to arbitration, (2) staying this

action pending completion of the arbitration, and (3) awarding TDA any other relief as may appear just and proper.



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Attorney for Defendant, TD Ameritrade

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2010, a copy of the foregoing

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL ARBITRATION

was mailed, first class, postage prepaid to:

Laurent J. LaBrie, *pro se*
5 Pleasant Ridge Drive #205
Owings Mills, Maryland 21117



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