

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TD AMERITRADE, INC.

Petitioner and
Defendant Below,

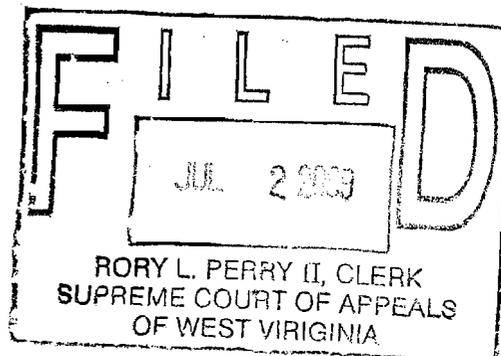
v.

No. _____

THE HONORABLE TOD KAUFMAN,
Judge of the Circuit Court of Kanawha County,
Respondent,

and

DAN SALAMIE,
Respondent and
Plaintiff Below.



PETITION OF TD AMERITRADE, INC.
FOR WRIT OF PROHIBITION

I. INTRODUCTION

Petitioner TD Ameritrade ("TDA" and/or "Petitioner") asks pursuant to W. Va. Code § 53-1-1, *et seq.*, and W. Va. R. App. P.14 that a rule to show cause be issued against the Honorable Tod Kaufman, Judge of the Circuit Court of Kanawha County ("Circuit Court"), as to why he should not be prohibited from committing a clear error by addressing the merits of a dispute subject to arbitration before referring the matter to arbitration and *ordering* the arbitrator to follow the Court's findings of facts and conclusions of law reached *before* the referral to arbitration. In the order referring the parties to arbitration, Judge Tod Kaufman also *ordered* the arbitrator to "follow the directive of this Court" that Bruce P. Conrad ("Conrad") is a "controlled person" within the purview of 15 U.S.C. §78(t), Rule 3010 of the NASD and/or related regulatory statutes and rules. *See* Circuit Court's Order Referring Case to Arbitration Combined with Findings Fact and Conclusions of Law for Motion for Partial Summary Judgment dated May 28, 2009 ("Order") (Appendix ("App.") 1 at p.

7). By addressing the merits of the controversy between the parties and *ordering* the arbitrator to accept his ruling, Judge Kaufman exceeded his legitimate power and authority under the Federal Arbitration Act (“FAA”). For reasons more fully set forth below, a rule to show cause should issue.

II. FACTS, BACKGROUND AND THE RULING OF THE CIRCUIT COURT

On November 14, 2008, Salamie filed a civil complaint against Bruce P. Conrad, an independent financial advisor, and TDA, a New York corporation that provides discount securities, brokerage and financial services. (“Complaint”) (App. 2 at p. 1). Salamie’s claims against TDA are based upon various investment agreements, each of which contains a separate agreement to arbitrate all disputes between the parties. (See Motion to Compel Arbitration (“Arbitration Motion”) (App. 3, Exhibits 2, 4 to 9). Salamie also served various discovery requests upon TDA along with the Complaint. (Salamie’s Discovery Requests) (App. 4). In a Motion for Protective Order, TDA advised the Circuit Court that it would be filing a motion to compel arbitration and asked the Circuit Court to preclude discovery as the discovery process in arbitration is generally more limited than and different from that afforded the parties in civil litigation.¹ (Motion for Protective Order) (App. 5). Thereafter, TDA filed its Motion to Compel Arbitration. (App. 3). While these motions were pending, the parties conferred on the issue of arbitration in an effort to resolve the issue without the need for further motion practice. Ultimately, Salamie advised TDA that he would only honor his agreements to arbitrate his claims against TDA if and *only if* TDA agreed to stipulate that his independent financial advisor, Bruce Conrad, was a “controlled” entity pursuant to 15 U.S.C. 78t and that TDA therefore was vicariously liable for Mr. Conrad’s handling of Salamie’s investment accounts. TDA refused to do so because Salamie’s agreements to arbitrate his claims are valid and

¹ Notably, the Circuit Court has not ruled upon TDA’s *Motion for Protective Order*.

enforceable under the FAA, and he cannot place conditions or mandates upon the arbitration process. Just as importantly, TDA denies that it “controlled” Mr. Conrad.

Salamie filed a Combined Response to Defendant TD Ameritrade's Motion To Compel Arbitration and Motion For Partial Summary Judgment. (App. 6). Notably, Salamie did not oppose referral to arbitration, but rather he asked the Circuit Court to address the issue of vicarious liability *before* referring the matter to arbitration. (App. 6 at p. 4, 8-9). Specifically, Salamie sought a partial summary judgment ruling that Bruce Conrad was a “controlled person” under 15 U.S.C. 78t. (App. 6 at p. 4).

By order dated May 28, 2009, the Circuit Court granted TDA’s Motion to Compel Arbitration, but it *also* granted Salamie’s Motion for Partial Summary Judgment. (App. 1). Specifically, the Circuit Court made the following ruling:

Accordingly, it is ADJUDGED, ORDERED AND DECREED that there is a ***judicial finding that Bruce P. Conrad is a “controlled person” within the purview of 15 U.S.C. 78t*** and, subject to any defenses that may be available to TD Ameritrade under 15 U.S.C. 78t, Rule 3010 of the NASD, and/or related regulatory statutes and rules designed to protect consumers of brokerage houses, TD Ameritrade, by demanding that this Court compel arbitration, judicially admits the viability of all clauses contained in the original contracts.

And, it is further ADJUDGED, ORDERED AND DECREED that all proceedings in this case be referred to arbitration and this case is hereby DISMISSED and STRICKEN from the docket of the Circuit Court with the understanding that ***the arbitrator shall follow the directive of this Court.***

(App. 1 at p. 7-8) (emphasis added).

III. STANDARD OF REVIEW

Petitioner is seeking a writ of prohibition pursuant to W. Va. Code § 53-1-1, *et seq.*, and Rule 14 of the West Virginia Rules of Appellate Procedure. A writ of prohibition lies as a matter of right where a Circuit Court, having proper jurisdiction over a matter, exceeds its legitimate powers. W.

Va. Code § 53-1-1. This Court has acknowledged that a petition for a writ of prohibition is the appropriate method by which to obtain review of a circuit court's decision to compel arbitration. *McGraw v. The American Tobacco Company, et al.*, --- S.E.2d ----, 2009 WL 1835011, W. Va., June 22, 2009 (No. 33873); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 555, 567 S.E.2d 265, 271 (2002). As it is an extraordinary remedy, “[p]rohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.” Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d 370 (1953).

In determining whether to entertain and issue a writ of prohibition for an action where it is claimed, as here, that the lower tribunal exceeded its legitimate powers, this Court evaluates five factors. Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Those factors are:

1. Whether the party seeking the writ has no other adequate means, such as a direct appeal, to obtain the desired relief;
2. Whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
3. Whether the action is clearly erroneous as a matter of law;
4. Whether the action is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
5. Whether the action raises new and important problems or issues of law of first impression.

Id. (the “Hoover factors”). “Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” *Id.*

IV. DISCUSSION

The May 28, 2009 Order by the Circuit Court, adopting in conclusory and uncritical fashion the language of Salamie's post-hearing submission,² ordered the arbitrator to follow its directive and finding that Conrad was a "controlled person":

Accordingly, it is ADJUDGED, ORDERED AND DECREED that there is a judicial finding that Bruce P. Conrad is a "controlled person" within the purview of 15 U.S.C. 78t and, subject to any defenses that may be available to TD Ameritrade under 15 U.S.C. 78t, Rule 3010 of the NASD, and/or related regulatory statutes and rules designed to protect consumers of brokerage houses, TD Ameritrade, by demanding that this Court compel arbitration, judicially admits the viability of all clauses contained in the original contracts.

And, it is further ADJUDGED, ORDERED AND DECREED that all proceedings in this case be referred to arbitration and this case is hereby DISMISSED and STRICKEN from the docket of the Circuit Court with the understanding that the arbitrator shall follow the directive of this Court.

(App. 1 at p. 7-8.).

In so ruling, the Circuit Court exceeded its legitimate powers. To allow the Circuit Court's ruling to stand would effectively rob TDA of the benefit of its bargain with Salamie -- the parties bargained for and agreed to abide by the arbitrator's determinations, not those of the Circuit Court.

As set forth above, this Court has previously indicated that it will consider the five (5) *Hoover* factors in examining whether a writ of prohibition should be granted. These factors are not rigid, but are merely general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). Although all five factors need not be satisfied, it is clear that the third factor, the

² The Order adopts virtually verbatim Salamie's proposed order, which was itself largely a reprint of Plaintiff's briefing. *Compare* Order to Plaintiff's Proposed Order Referring Case to Arbitration Combined with Findings of Fact and Conclusions of Law for Motion for Partial Summary Judgment. (App. 7). The only difference between the two appears in the second paragraph of the Judgment section of the Order on page 7. This is further evidence that the Circuit Court did not perform a thorough and independent analysis of the issues presented.

existence of clear error as a matter of law, should be given substantial weight." *Id.* at 21. Beyond this, W. Va. Code § 53-1-1 (2000 Repl. Vol.) makes clear that a writ of prohibition "shall lie as a matter of right in all cases of usurpation and abuse of power[.]" That has clearly and obviously occurred here.

A. The Circuit Court Exceeded its Legitimate Powers by Adjudicating the Merits of the Dispute between Salamie and TDA and Ordering the Arbitrator to Follow his Ruling.

The FAA provides that:

[i]f 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

9 U.S.C. § 3 (emphasis added). While it was the province of the Circuit Court “to decide in the first instance whether [a] dispute [i]s to be resolved through arbitration,” *Toppings v. Meritech Mortgage Services, Inc.*, 140 F.Supp.2d 683, 685 (S.D.W.Va. 2001) (citations omitted), such courts have been directed to conduct ““a limited review to ensure . . . [1] that a valid agreement to arbitrate exists between the parties and [2] that the specific dispute falls within the substantive scope of that agreement.” *Id.* (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (internal citations omitted)). Thus, the law is clear that arbitrability is a threshold issue that must be decided without addressing the merits of the underlying dispute, which are solely for the arbitrators. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987) (Courts considering arbitrability “have no business weighing the merits of the grievance”); *Chevron Phillips Chem. Co. v. Sulzer Chemtech USA, Inc.*, 2002-598 (La.App. 5 Cir. 10/30/02); 831 So. 2d 474, 476 (“in deciding whether the parties have agreed

to submit a particular grievance to arbitration, a court is not to rule on the potential merits”). *See also Barber v. Union Carbide Corp.*, 172 W. Va. 199, 304 S.E.2d 353 (1983).

Even if there were any room for doubt that the arbitration clauses contained in the agreements between TDA and Salamie do not cover the issue of TDA’s vicarious liability for the actions and/or inactions of Bruce Conrad, the strong and well-established presumption in favor of arbitration required that the Circuit Court submit the issue to arbitration, rather than ruling on the issue without the benefit of discovery and ordering the arbitrator to accept its directive. Under both West Virginia and Federal law, courts have held that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *State ex rel. Wells v. Matish*, 215 W.Va. 686, 693, 600 S.E.2d 583, 590 (2004); *accord Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). In fact, the rule in West Virginia and in Federal court is that “in determining whether or not the parties to a[n] . . . agreement have agreed to submit a particular issue to arbitration, it must be recognized that there is a presumption favoring arbitration, and this presumption may be rebutted only where it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Local Div. No. 812 v. Cent. W. Va. Transit Auth.*, 179 W.Va. 31, 35, 365 S.E.2d 76, 80 (1987); *see also AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986). Here, the arbitration clauses in the various agreements contain very broad language and specifically provide that:

- In the event that there is a dispute as to any account, agreement or investment, the Employer, Participant or Investment Advisor agrees to submit to Arbitration conducted only in accordance with the provisions of the Constitution and Rules of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration of the National Association of Securities Dealers, Inc. (App. 3, Exhibit 2 at unnumbered page 5).
- The parties are waiving their right to seek remedies in court, including the right to jury trial.

...

I agree that any controversy relating to any of my accounts or any agreement that I have with you will be submitted to arbitration conducted only under the provisions of the Constitution and Rules of the New York Stock Exchange, inc. or pursuant to the code of the Arbitration of the National Association of Securities Dealers, Inc. (App. 3, Exhibit 8 at unnumbered page 3).

All parties to this Agreement give up their right to sue each other in court, including the right to jury trial, except as provided by the rules of the arbitration forum in which a claim is filed. (App. 3, Exhibit 9 at page 7 of 9) (emphasis in original).

Importantly, Salamie did *not* argue that the above-referenced arbitration agreements did *not* cover the issue of vicarious liability -- nor could he credibly make such an argument in light of the broad and sweeping language of the arbitration clauses.

Thus, the only issue properly before the Circuit Court was whether the parties' dispute was subject to a valid arbitration agreement. Nothing more. If the parties entered into valid arbitration agreements -- which they did -- then whether or not the contract established a broker/dealer relationship and whether Bruce Conrad was a "controlled person" were issues for the *arbitrator* to decide in the first instance:

In passing upon a § 3 application for a stay while the parties arbitrate, *a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.* In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (emphasis added). As set forth above, Salamie did not contest referral to arbitration and did not argue that the claims set forth in his Complaint were not subject to valid arbitration agreements. The issue of whether Bruce Conrad was a "controlled person" was, therefore, irrelevant to the making and performance of the agreements to arbitrate and, as such, should not have been considered by the Circuit Court.

Salamie's argument for summary judgment simply had nothing to do with the validity or enforceability of the arbitration agreements. As such, Salamie's argument was not relevant to the only issue properly before the Circuit Court, (*i.e.*, whether the dispute between Salamie and TDA was subject to a valid arbitration agreement) and should not been considered -- much less decided -- by the Circuit Court.

The Circuit Court clearly exceeded its legitimate powers when it considered the merits of the dispute between the parties and ruled on Salamie's Motion for Partial Summary Judgment. As dictated by both West Virginia and Federal law, the Circuit Court should have referred Salamie's Motion for Partial Summary Judgment to the arbitrator for consideration. The Circuit Court compounded its error by *ordering* the arbitrator to follow its directive.

Notably, Salamie is represented in this matter by a former member of this Court -- Justice Neely. As a member of this Court, Justice Neely authored at least one decision that touches upon the issues presented in this petition. In *Barber v. Union Carbide*, 172 W.Va. 199, 304 S.E.2d 353 (1983), Justice Neely authored this Court's decision which held that if a contract calls for arbitration, then arbitration is all the parties are entitled to receive. Justice Neely eloquently noted the dangers of allowing the judiciary to second-guess an arbitrator's decision:

Once arbitration is established as the bargained-for remedial procedure for resolving ...[disputes], it must be an exclusive remedy, enforceable through summary judgment. Otherwise, arbitration is less than useless-where it is a mere shadow-play prefiguring eventual court litigation it is a positive curse.

In order for arbitration to be effective, it must achieve three goals: (1) it must be quick; (2) it must be cheap; and (3) it must be more flexible than the ordinary rules of law. If arbitration awards can be challenged in court on any theory other than actual fraud or failure to follow the procedures that were bargained for in the arbitration clause, then the goals of speed, parsimony, and flexibility are all entirely defeated; the process then becomes more expensive and less flexible than it would have been if the parties went to court in the first instance.

In this regard it must be understood that the court litigation process itself is not without flaws. Parties become bankrupt because funds are frozen in place while cases are prisoners of the languid peristalsis of court procedure. Where one party has the power to bring a project to a perhaps disastrous halt, that party also has the power to coerce the other party into an unjust settlement. Thus the fact that the party in the right will prevail in the long-run does not obviate the positive advantages of litigation per se to the party in the wrong in the short-run. For, as the great Keynes once said, "in the long-run, we are all dead." Thus, if courts are willing to second-guess the arbitration process, arbitration is doubly jeopardized: the very process of litigation defeats the goals of speed and parsimony in resolution of the dispute, and careful court scrutiny of the decision itself may defeat the goal of flexibility. For these reasons, courts of this State will not review an arbitration award rendered pursuant to the terms of a commercial contract except for actual fraud.

Id at p. 202-203. In this case, Justice Neely -- acting as an advocate rather than a member of the judiciary -- convinced the Circuit Court to substitute its judgment for that of the arbitrator in the first instance and, in essence, to rob the parties of their bargained-for remedial procedure -- arbitration. By imposing its judicial finding that Bruce Conrad is a "controlled person" on the arbitrator, the Circuit Court has, in great measure, defeated, the three goals of arbitration, and it has instead (1) lengthened the process by exceeding its legitimate powers and forcing TDA to accept his erroneous ruling or seek further judicial review, *i.e.*, the filing of this petition, (2) increased the attendant costs to TDA to obtain its bargained-for remedial procedure, and (3) insinuated the less flexible rules of law.

B. The Circuit Court Also Exceeded its Legitimate Powers by Granting Salamie's Motion for Partial Summary Judgment Despite the Existence of Genuine Issues of Material Fact.

Salamie argued that the contractual relationship between TDA and Bruce Conrad "creates sufficient nexus to bring Bruce Conrad within the 15 U.S.C. 78t provision concerning "controlled" persons" because of NASD Rule 3010. (App. 6 at p. 8). Yet, NASD Rule 3010 does not define what circumstances evince "control"; instead it discusses "elaborate requirements for the supervision of "other associated persons"". Salamie cited no precedent for the proposition that, as a matter of

law, the contracts at issue here create "control person" liability under 15 U.S.C. § 78t. To the contrary, it has been held that it is inappropriate to issue summary judgment as to whether "control" exists where "there are some factual questions concerning the nature of the relationship and dealings between [the plaintiff] and [the investment advisor] and [the broker/dealer]." *Kaufman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 464 F. Supp. 528, 539 (D. Md. 1978). Here, there are significant factual issues concerning the nature of the relationship and dealings between Salamie, Bruce Conrad, and TDA, none of which have been explored by the parties because there has been *no discovery on these issues*. As set forth above, TDA did not respond to Salamie's discovery, but rather filed a Motion for Protective Order (App. 5) based on the parties' agreement to arbitrate disputes.³ Thus, summary judgment was inappropriate and the Circuit Court exceeded its legitimate powers by entertaining and granting Salamie's summary judgment motion.

C. The Petition Meets the Criteria Set Forth In *Hoover*.

Under the *Hoover* factors, issuance of the requested writ would likewise be proper.

- i. Petitioner has no other adequate means, such as a direct appeal, to obtain the desired relief.**

Petitioner has no other adequate means of avoiding to unwarranted effects of the Circuit Court's clearly erroneous Order to arbitrate this matter subject to his finding of 78t vicarious liability for the actions and/or inactions of Bruce Conrad absent this Court's intervention.⁴ Assuming the arbitrator accepts the Circuit Court's directive, the Circuit Court's ruling of 78t vicarious liability

³ Bruce Conrad responded to Salamie's discovery requests before TDA filed its Motion for Protective and Motion to Compel Arbitration.

⁴ TDA filed an action in the United States Court for the Southern District of West Virginia against Salamie seeking, among other things, an order compelling Salamie to arbitrate his dispute. *TD Ameritrade, Inc. v. Salamie*, Civil Action No. Civil Action No. 3:09-0147.

will so taint the arbitration and play such an integral role in that proceeding that Petitioner will effectively be denied the right to a full and fair arbitration.

ii. Petitioner will be damaged or prejudiced in a way that is not correctable on appeal.

Petitioner will be damaged and prejudiced in a way that is not correctable on appeal because the agreements clearly provide that the arbitrator's decisions are generally binding and a party's ability to have the award reversed or subject to appeal is very limited. (App. 3, Exhibit 9 at page 7 of 9) ("Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is generally very limited.").

iii. The Circuit Court's Order is clearly erroneous as a matter of law.

The Circuit Court's consideration of and ruling on Salamie's Motion for Partial Summary Judgment was clearly erroneous. As set forth above, West Virginia and Federal law clearly mandate that a court not address the merits of a dispute that is subject to a binding and valid arbitration agreement.

iv. The Circuit Court's Order clearly raises new issues of law and poses problems in arbitration cases.

Lastly, the Circuit Court's ruling also raises new issues of law and poses problems in arbitration cases, and, as such, action by this Court in the form of a writ is warranted. Salamie's tactic of asking a circuit court to carve out an issue and address the merits before referring the matter to arbitration pursuant to the parties' agreement is not appropriate, and this Court has rejected other litigants who also attempted an "end run" around arbitration. As recently as ten (10) days ago, this Court decided a matter in which Attorney General McGraw attempted to convince Judge Irene C. Berger, also of the Circuit Court of Kanawha County, to address the merits of a dispute between the State of West Virginia ("the State") and certain tobacco companies arising out of the Master Settlement Agreement ("MSA") entered into after the State filed suit against certain tobacco

manufacturers in the Circuit Court of Kanawha County based upon the marketing and sale of tobacco products in West Virginia in contravention of the MSA's arbitration clause.⁵ *McGraw v. The American Tobacco Company, et al.*, --- S.E.2d ----, 2009 WL 1835011, W. Va., June 22, 2009 (No. 33873). Specifically, the State conceded that arbitration of the 2003 NPM Adjustment was appropriate under the terms of the MSA, but it initially⁶ argued that the issue of its diligent enforcement of its qualifying statute, W. Va. Code § 16-9B-1, *et seq.* (1999), was not subject to arbitration. Thus, like *Salamie*, the State conceded that arbitration was generally appropriate, but it then attempted to carve out a critical issue for judicial determination. Judge Berger refused to accept the State's invitation to deviate from the terms of the MSA. Judge Kaufman, however, accepted *Salamie's* invitation --as delivered by former Justice Neely -- to deviate from the terms of the various agreements between the parties. Perhaps *Salamie* will follow the State's lead and abandon his argument in this regard if this Court issues a rule to show cause in response to this Petition.

By ordering the arbitrator to follow its directive, the Circuit Court has, in effect, ordered the arbitrator to give collateral estoppel effect to its ruling without conducting an independent analysis

⁵ To paraphrase the opinion of this Court, under the terms of the MSA, the participating tobacco manufacturers make an annual payments into a national escrow account in amounts determined by an independent auditor. Not only does the independent auditor determine the amount of the manufacturers' individual annual payments, but the independent auditor also performs certain calculations as set forth by the terms of the MSA and allocates those payments among the settling states. Among the calculations performed by the independent auditor is the Non-Participating Manufacturer Adjustment (hereinafter "NPM Adjustment") which, if applied, reduces the manufacturers' annual payments to account for market share losses caused by MSA's marketing and advertising restrictions. The NPM Adjustment is triggered when the participating manufacturers demonstrate that they have collectively lost a market share of more than two percent to the non-participating manufacturers compared to their combined market share prior to participation in the MSA and an economic consulting firm finds that participation in the MSA was a significant factor contributing to that market share loss. Diligent enforcement of its qualifying statute allows a settling state to avoid the NPM Adjustment under the terms of the MSA and shifts that state's share of the NPM Adjustment to settling states which do not qualify for the exemption in pro rata proportion to their respective allocable shares. If all settling states demonstrate diligent enforcement then the NPM Adjustment is not applicable for that year's calculation. *McGraw*, 2009 WL 1835011, p. 2-3.

⁶ Ultimately, the State "wisely" abandoned its argument in this regard. *Id.* at p. 8, fn. 7.

of the issue. TDA's research did not reveal a case in which this Court has addressed the issue of a circuit court's power to issue such orders to an arbitrator. Thus, Petitioner raises new issues of law.

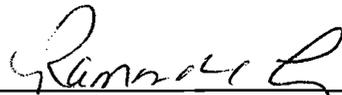
Simply put, allowing the arbitration to go forward based upon the Circuit Court's Order and *directive* to the arbitrator as currently in force would effectively rob TDA of the benefit of its bargain. More fundamentally, allowing the civil court system to interject rulings into the arbitration process -- in this case, a ruling made without the benefit of discovery or the presentation of evidence -- would render the entire arbitration process meaningless. The potential ramifications are far reaching as well as destructive to the foundation of arbitration as a vehicle for alternative dispute resolution and should not be countenanced by this Court.

V. CONCLUSION

WHEREFORE, Petitioner, by counsel, respectfully requests that this Court (i) issue a rule to show cause why a writ of prohibition should not be awarded prohibiting the Circuit Court from addressing the merits of the parties' dispute and ordering the arbitrator to follow its ruling on Salamie's Motion for Partial Summary Judgment; (ii) upon consideration of any response by the Honorable Tod Kaufman, grant the writ of prohibition requested by Petitioner; (iii) issue a preliminary stay of proceedings to prevent Salamie from pursuing arbitration subject to the Circuit Court's ruling of vicarious liability; and (iv) grant such further relief as may be warranted.

TD AMERITRADE, INC.

BY COUNSEL



Ramonda C. Lyons (WVSB #6927)
Mychal S. Schulz (WVSB #6092)
DINSMORE & SHOHL LLP
P.O. Box 11887
Charleston, West Virginia 25339
(304) 357-0900; (304) 357-0919 fax

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TD AMERITRADE, INC.

Petitioner and
Defendant Below,

v.

No. _____

THE HONORABLE TOD KAUFMAN,
Judge of the Circuit Court of Kanawha County,
Respondent,

and

DAN SALAMIE,
Respondent and
Plaintiff Below.

CERTIFICATE OF SERVICE

The undersigned counsel for TD Ameritrade, Inc., does hereby certify that the foregoing "PETITION OF TD AMERITRADE, INC. FOR WRIT OF PROHIBITION", "APPENDIX TO PETITION OF TD AMERITRADE, INC. FOR WRIT OF PROHIBITION" and "VERIFICATION" have been served upon the following this 2nd day of July, 2009, by first class mail, postage prepaid, a true copy thereof:

Honorable Tod Kaufman, Judge
Circuit Court of Kanawha County
Kanawha County Judicial Annex
111 Court Street
Charleston, WV 25301

William DePaulo, Esq.
179 Summers Street
Suite 232
Charleston, WV 25301

Richard Neely, Esq.
Neely & Callaghan
159 Summers Street
Charleston, WV 25301


Mychal S. Schulz (WVSB #6092)
Ramonda C. Lyons (WVSB #6927)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TD AMERITRADE, INC.

Petitioner and
Defendant Below,

v.

No. _____

THE HONORABLE TOD KAUFMAN,
Judge of the Circuit Court of Kanawha County,
Respondent,

and

DAN SALAMIE,
Respondent and
Plaintiff Below.

VERIFICATION

I, Ramonda C. Lyons, counsel for Petitioner, TD Ameritrade, having been first duly sworn, say that I have read the "Petition of TD Ameritrade For Writ Of Prohibition" and further say that the facts and allegations contained therein are true, except insofar as they are therein stated to be upon information, and insofar as they are stated to be upon information, I believe them to be true.

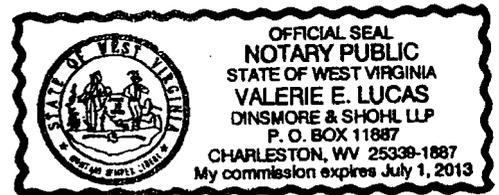
Ramonda C. Lyons

RAMONDA C. LYONS, ESQ. (WV Bar No. 6927)

Taken, subscribed and sworn to before me this 1st day of July, 2009.

My commission expires July 1, 2013

Valerie E. Lucas
NOTARY PUBLIC





IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TD AMERITRADE, INC.

Petitioner and
Defendant Below,

v.

No. _____

THE HONORABLE TOD KAUFMAN,
Judge of the Circuit Court of Kanawha County,
Respondent,

and

DAN SALAMIE,
Respondent and
Plaintiff Below.

APPENDIX TO
PETITION OF TD AMERITRADE, INC.
FOR WRIT OF PROHIBITION

1. Order Referring Case To Arbitration Combined With Findings Of Fact And Conclusions of Law For Motion For Partial Summary Judgment.
2. Complaint.
3. Defendant TD Ameritrade Inc.'s Motion To Compel Arbitration And To Dismiss, Or In The Alternative, Stay This Litigation.
4. Plaintiff's First Set Of Interrogatories, Plaintiff's First Set of Requests For Admission, Plaintiff's First Set of Requests For Production of Documents To Defendant TD Ameritrade, Inc.
5. TD Ameritrade's Motion For Protective Order.
6. Plaintiff's Combined Response To Defendant TD Ameritrade's Motion To Compel Arbitration and Plaintiff's Motion For Partial Summary Judgment.

7. Plaintiff's Proposed Order Referring Case To Arbitration Combined With Findings Of Fact and Conclusions Of Law For Motion For Partial Summary Judgment.

8. *Toppings v. Meritech Mortgage Services, Inc.*, 140 F.Supp.2d 683, 685 (S.D.W.Va. 2001).

9. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

10. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987).

11. *Chevron Phillips Chem. Co. v. Sulzer Chemtech USA, Inc.*, 2002-598 (La.App. 5 Cir. 10/30/02); 831 So. 2d 474, 476.

12. *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).

13. *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986).

14. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (U.S. 1967).

15. *Kaufman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 464 F. Supp. 528, 539 (D. Md. 1978).

Respectfully submitted,

TD AMERITRADE, INC.

By Counsel



Mychal S. Schulz (WVSB # 6092)
Ramonda C. Lyons (WVSB # 6927)
DINSMORE & SHOHL, LLP
P. O. Box 11887
Charleston, West Virginia 25339-1887
Telephone: (304) 357-0900
Facsimile: (304) 357-0919

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE