

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

TD AMERITRADE, INC.

**Petitioner and
Defendant Below,**

NO.: 091003

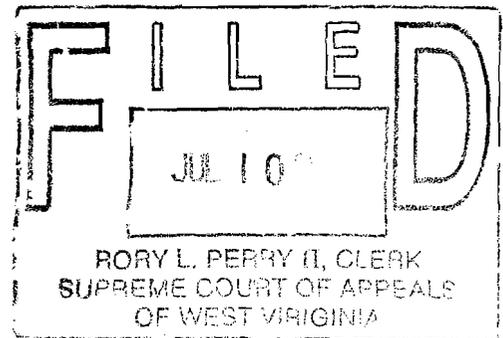
**THE HONORABLE TOD KAUFMAN,
Judge of the Circuit Court of Kanawha County**

Respondent

and

DAN SALAMIE.

**Respondent and
Plaintiff, Below**



**RESPONDENT SALAMIE'S
RESPONSE TO TD AMERITRADE'S PETITION FOR
A WRIT OF PROHIBITION**

Executive Summary

The Petitioner, TD Ameritrade, misstates the issue in this case: The contracts at issue in this case were NOT entered into by TD Ameritrade! Rather, the contracts by which TD Ameritrade seeks to compel arbitration were entered into by TD Ameritrade's predecessor, TD Waterhouse. Well... you might ask, what difference does it make that TD Ameritrade is NOT the same entity that contracted with the Respondent? After all, TD Ameritrade, you

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add, is the successor in interest to TD Waterhouse. Ah! but TD Ameritrade is substantially different from TD Waterhouse.¹ At the time that Respondent entered into his contract with TD Waterhouse, TD Waterhouse was a “bricks and mortar,” full service stockbroker with offices in Charleston, while Bruce T. Conrad was an affiliated financial adviser. TD Ameritrade is not a bricks and mortar, full-service broker; rather, TD Ameritrade is a discount, on-line broker with no office whatsoever in Charleston.

This is a case in which Respondent sued his financial adviser Conrad and the brokerage firm TD Ameritrade for intentional wrongs and negligence with regard to the handling of Respondent’s investment accounts. In September, 1999, when TD Waterhouse had offices in Charleston, Plaintiff entered into a contract by which TD Waterhouse was Plaintiff’s “brokerage firm.” That contract with a real brokerage firm provided that disputes with TD Waterhouse would be submitted to arbitration. It is on the basis of that contract that TD Ameritrade, the cheap discount on-line trader, moved the circuit court to compel arbitration!

The Respondent Salamee never objected to going to arbitration under the entire original contract, but Respondent did object to going to arbitration under circumstances that allowed TD Ameritrade to assert that the only applicable part of the contract was the arbitration clause itself. In other words, Respondent did not want to go to arbitration under

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A look at the contracts in question, all of which are exhibits to Petitioner’s Exhibit 3, reveals that all of those contracts were entered into with TD Waterhouse and not TD Ameritrade. *See, also*, Affidavit of Jeff Plummer, filed as Exhibit #3 to Petitioner’s tabbed Exhibit 3.

a contract with a bricks and mortar, full service stockbroker (TD Waterhouse) only to have the successor discount, on-line broker (TD Ameritrade) repudiate the terms of that contract (except for the arbitration clause) in front of the arbitrators!² It is black letter law that arbitration is entirely contractual: Absent a contract agreeing to arbitration, a party cannot be forced to relinquish his or her right to seek relief in the courts of this State.³

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Plaintiff Salamee pled in his complaint the following:

20. Defendant TD Ameritrade, through its website, gives the appearance that registered independent investment advisers who operate through TD Ameritrade are supervised and that TD Ameritrade provides quality control, including by way of example and not by way of limitation, requiring said independent investment advisers to purchase and have in force errors and omissions Insurance. Attached to this Complaint as Exhibit 1(a) and 1(b) are the two website pages indicating the services TD Ameritrade provides to independent investor advisors who use its services.
21. Plaintiff believed that at all times Defendant Conrad was evaluated by TD Ameritrade for the benefit of its clients in that TD Ameritrade required Defendant Conrad to have insurance to protect his and TD Ameritrade's clients from errors and omissions.
25. At all time relevant to this Complaint, Defendant TD Ameritrade gave the appearance to the Plaintiff that TD Ameritrade was providing quality control of Defendant Conrad.
27. Thus Defendant Conrad has the actual or apparent authority to hold himself out as a representative, joint venturer, agent, or servant of TD Ameritrade.

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"Again, the right to arbitration is purely a matter of contract. Thus, 'arbitration agreements are [as much] enforceable as other contracts, but not more so.' *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 1806 n.12, 18 L. Ed. 2d 1270, 1277 n.12 (1967)." *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168 (2000).

“Challenges to an arbitration clause itself are heard by the court considering the FAA claim, whereas challenges to the contract as a whole are referred to the arbitrator.” *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002). Thus, unless all parts of the original contract are binding, the arbitration clause cannot be applied because there can be no “free standing” arbitration clause!

In Petitioner’s Motion to Compel Arbitration, etc., Petitioner relied on TD Waterhouse’s original “brokerage” contracts with Plaintiff; however, Petitioner Ameritrade denied in its answer to Respondent’s circuit court complaint that it had a “brokerage” relationship with Plaintiff.

Therefore, based on Defendant’s judicial admissions in its Motion to Compel Arbitration, Plaintiff asked the circuit court, as part of the order staying proceedings and referring this case to arbitration, that the court simultaneously rule that if TD Ameritrade seeks to use the Respondent’s contract with TD Waterhouse as the lever to force arbitration, then the entire TD Waterhouse contract be determined to be in full force and effect and not just those parts of the contract favorable to Ameritrade’s forum shopping.

1. *Contract Law as it Applies to this Case*

Respondent asked that the circuit court enter judgement finding that the relationship between TD Ameritrade and Respondent is one of broker and client to which 15 U.S.C. 78(t) and Rule 3000 *et. seq.* of the NASD Manual titled “Responsibilities Relating to Associated

Persons, Employees, and Others' Employees," more specifically Rule 3010 concerning "Supervision" apply.

It is beyond cavil that: (1) TD Ameritrade judicially admitted that its relationship with Plaintiff arose out of the 1999 contracts that are still in full force and effect (otherwise those contracts would not support a motion to compel arbitration); (2) the contracts into which Respondent entered incorporated by reference and by operation of law all of the rules of the New York Stock Exchange and Rules of the National Association of Securities Dealers, specifically NASD Rule 3010; and, (3) because the contracts on which Ameritrade relied for its Motion to Compel Arbitration show that TD Ameritrade is Respondent's "broker," T.D. Ameritrade is liable to Plaintiff for the acts of Bruce Conrad to the extent that 15 U.S.C. 78t creates such liability.

However, contrary to the misleading implications in Ameritrade's petition, it should be noted that in the circuit court's Order, the circuit court was very careful to reserve to TD Ameritrade "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..." To the extent, then, that any factual defenses adumbrated by *Kaufman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 464 F. Supp. 528 (D. Md., 1978) cited by Ameritrade in its brief might be available to Ameritrade, those defenses are entirely available before the arbitrators and were in no way foreclosed by the circuit court's order referring the case to arbitration.

In its motion to compel arbitration, TD Ameritrade judicially admits the following:

The allegations and causes of action set forth in Plaintiff [sic] Complaint involve an account opened by Plaintiff "in or about October 1999" with TD Waterhouse. (Complaint at ¶ 4). This account is currently held by TDA, a named Defendant in this matter, following the acquisition of TD Waterhouse Investor Services, Inc. ("TD Waterhouse") by TD AMERITRADE Holding Corporation, a parent company of broker-dealer Ameritrade, Inc. ("Ameritrade"). Complaint at ¶ 5.

TD Ameritrade can take one of two positions: (1) TD Ameritrade stands in a broker/dealer relationship with Respondent; or (2) TD Ameritrade has no direct relationship whatsoever with Respondent. If the latter is TD Ameritrade's position, then the whole question of the misfeasance with regard to Respondent's account by Bruce Conrad is one for the circuit court. However, by moving the Circuit Court to require arbitration, Defendant Ameritrade admitted that it continues to operate under the 1999 original TD Waterhouse contract between itself and Respondent, and if that is the case, then arbitration is proper.

Obviously it would be a neat trick if TD Ameritrade could get Respondent out of circuit court and into an arbitration forum under the old TD Waterhouse contract and then say: "Caughty Caught Caught! We don't have any broker-customer relationship (i.e. contract) with you even though we got you into our forum based on a contract that doesn't exist!" Fortunately, this type of tactic is not permitted under general contract law, which applies with equal force to all issues in arbitration. Thus, "[i]n the interpretation of instruments, force and effect must be given, if possible, to all the words employed. **A part cannot be disregarded,** unless other terms used are so specific, clear, and convincing in contrary meaning as to prove

it to be a false demonstration.” Syl. Pt. 3, *South Penn Oil Co. v. Knox*, 68 W. Va. 362 (1910).

The same proposition is set forth with even greater clarity in § 383 of the *Restatement Second of Contracts* as follows:

Avoidance in Part:

A contract cannot be avoided in part except that where one or more corresponding pairs of part performances have been fully performed by one or both parties the rest of the contract can be avoided.⁴

Therefore, the circuit court correctly ruled, in strict conformity both to standard contract law and Federal Arbitration Act law, that TD Ameritrade must accept all parts of the contract, which includes the specific representations concerning TD Waterhouse’s original responsibility for its Account Officers when TD Ameritrade asserted as grounds for referral to arbitration the old TD Waterhouse contracts.

Respondent appropriately sought a decision by the circuit court that TD Ameritrade

⁴ § 383 *Restatement Second of Contracts*

COMMENTS & ILLUSTRATIONS: Comment:

a. No avoidance in part. A party who has the power of avoidance must ordinarily **avoid the entire contract**, including any part that has already been performed. **He cannot disaffirm part of the contract that is particularly disadvantageous to himself while affirming a more advantageous part, and an attempt to do so is ineffective as a disaffirmance.** The rule stated in this Section does not preclude avoidance of only one of two or more entirely separate contracts. Nor does it prevent reformation of a part of a contract for either mistake or misrepresentation. See §§ 155 and 166.[Emphasis added.]

judicially admitted that TD Ameritrade has a responsibility to supervise with regard to:

- (1) “[o]pening, approving and **monitoring** [Respondent’s] account, including obtaining and verifying account information;
- (2) “the supervision of Account Officers (registered representatives) in accordance with TD Waterhouse policies and applicable federal, state and industry regulations;”
- (3) “[g]eneral supervision of [the] account, including compliance with New York Stock Exchange Rules 342 and 405 and Rule 3010 of the National Association of Securities Dealers.”

because TD Ameritrade asserted the original contract. And, in the original contract, the New York Stock Exchange Rule 382 Disclosure appears clearly as an integral part of the TD Waterhouse standard contract. This provision may be found by this Honorable Court on page 7 of the TD Waterhouse *Account Agreement Booklet*, which is Exhibit #8 to Ameritrade’s tabbed Exhibit 3 filed with the current Petition for a Writ of Prohibition.⁵ Thus, the circuit

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The *Account Agreement Booklet’s* specific language referred to in the text, and where TD Waterhouse, now TD Ameritrade, lists as its duty the supervision of account officers such as Conrad pursuant to federal law etc. is as follows:

NEW YORK STOCK EXCHANGE RULE 382 DISCLOSURE

This disclosure is provided to inform you of the allocation of responsibilities between TD Waterhouse Investor Services, Inc. (TD Waterhouse”) and its clearing affiliate, National Investor Services Corp. (NISC”). TD Waterhouse has designated NISC as its clearing agent to handle the record keeping, clearance and settlement functions for its customers’ accounts pursuant to a written agreement. Please note that you will have a direct relationship with TD Waterhouse; the clearing services to be provided by NISC will not alter that relationship.

court's ruling that the entire TD Waterhouse contract applied in this case was actually a condition precedent to the enforceability of the arbitration clause, which under *Snowden v. Checkpoint Check Cashing, supra*, made it clearly a proper matter for the court.

2. *Who Decides What in Arbitration*

TD Waterhouse, as your broker, will be responsible for the following with respect to your account:

- Opening, approving and **monitoring your account, including obtaining and verifying account information;**
- Accepting and transmitting your orders, including responsibility for accepting or rejecting orders, procedures for screening orders prior to execution, transmission of your orders **and the supervision of Account Officers (registered representatives) in accordance with TD Waterhouse policies and applicable federal, state and industry regulations;**
- Prompt communication of instructions to NISC involving your account, including instructions for the transfer or delivery of securities, disbursement of funds from your account, and instructions regarding tender or exchange offers involving securities in your account;
- Prompt transmission to NISC of cash and securities delivered to TD Waterhouse for credit to your account;
- **General supervision of your account, including compliance with New York Stock Exchange Rules 342 and 405 and Rule 3010 of the National Association of Securities Dealers;**

[emphasis added.]

“When a contract is asserted as grounds for denying a court jurisdiction over an issue and compelling arbitration, the Court must determine (a) whether there is a contract at all; and (b) whether the issues about which the lawsuit has been filed are such issues as come within the agreement to arbitrate. Challenges to an arbitration clause itself are heard by the court considering the FAA claim, whereas challenges to the contract as a whole are referred to the arbitrator.”⁶ *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002). Respondent never challenged the contract as a whole; all Respondent did was ask the Court whether there was a contract or just an arbitration clause! As Ameritrade wished, the circuit court found a contract and ruled that not only the arbitration clause but all parts of the contract applied.

Respondent Salamie was entirely happy to proceed to arbitration under the contract that he originally signed; what Respondent Salamie was not happy to do was to proceed to arbitration under the contract he originally signed only to be confronted by some casuistic argument that TD Ameritrade had not really undertaken all the obligation of TD Waterhouse. Thus, what Respondent Salamie asked the Court to do came explicitly within (a) of *Snowden*, namely, to determine whether there was a contract at all.

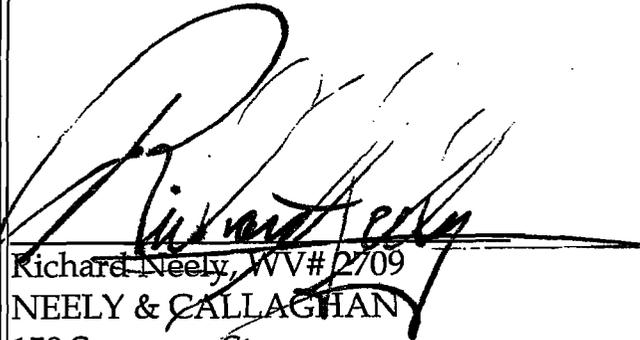
Any West Virginian must always be fearful of arbitration because here is how arbitration generally works for us: A bunch of guys in New York give some old country boy a good beating, and then when the old boy complains, the guys from New York drag out an

⁶ This process or procedure is called the "severability doctrine."

obscure arbitration clause that then allows three other guys from New York to stand around and clap, telling one another what a good idea it was that the old boy took a beating. Truth be told, Respondent wasn't up for that!

Wherefore, Respondent asks that TD Ameritrade's Petition for a Writ of Prohibition be denied.

Respectfully submitted
Plaintiff, by counsel



Richard Neely, WV# 2709

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**THE HONORABLE TODD KAUFMAN,
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DAN SALAMIE.

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Certificate of Service

I, Richard Neely, counsel for Respondent in the above-styled case, do hereby certify that I have served the foregoing document, to-wit:

**RESPONDENT'S RESPONSE TO TD AMERITRADE'S PETITION
FOR A WRIT OF PROHIBITION**

upon Defendant by causing same to be sent through the United States Mail, postage prepaid, to:

William V. DePaulo, Esq.
179 Summers St., Suite 232
Charleston, WV 25301-2163

Hon. Tod J Kaufman
Circuit Court of Kanawha County

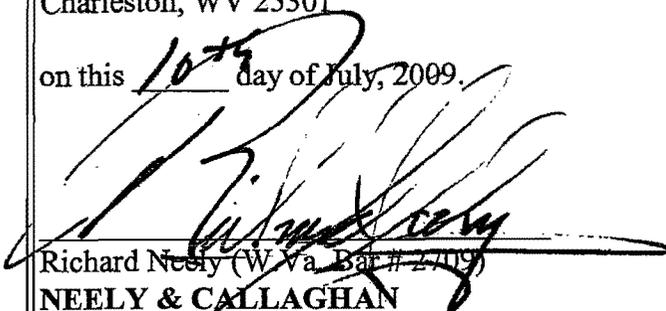
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Judicial Annex
Charleston, WV 25301

and

Mychal S. Schultz, Esq.
Ramonda C. Lyons, Esq.
Dinsmore & Shohl LLP
900 Lee St., Suite 600
Charleston, WV 25301

on this 10th day of July, 2009.


Richard Neely (W Va. Bar # 2709)

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