

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TD AMERITRADE, INC.,
Petitioner,

v.

THE HONORABLE TOD KAUFMAN,
Kanawha County Circuit Judge,
Respondent,

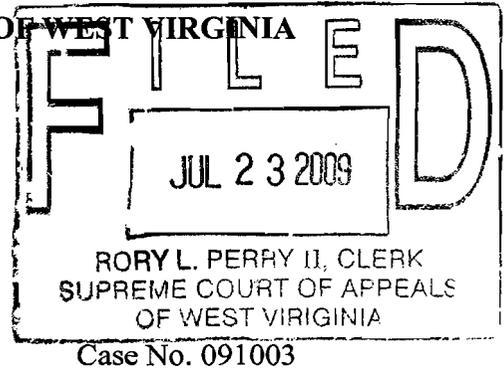
and

DAN SALAMIE,
Respondent-Plaintiff-Below

**DEFENDANT-BELOW BRUCE P. CONRADS' RESPONSE
TO TD AMERITRADE, INC.'S PETITION FOR WRIT OF PROHIBITION
AND RESPONDENT SALAMIE'S OPPOSITION THERETO**

For his Response to the Petition for a Writ of Prohibition of TD Ameritrade, Inc., and Respondent-Plaintiff-Below Dan Salamie's Opposition to that Petition, Defendant-Below Bruce P. Conrad, by his counsel, William V. DePaulo, Esq., states as follows:

1. Bruce Conrad is an associate professor of business at Marshall University and operates, by himself and on his own, a small investment advisory business. Unlike registered broker-dealers, investment advisors do not take custody of securities; they only provide advice. Under applicable law, investment advisors are required to register with the United States Securities and Exchange Commission if and when the assets under their management exceed \$25,000,000. Bruce Conrad has never incurred any registration requirement with the S.E.C.



2. Nearly a decade ago, in 1999, Bruce Conrad began to give investment advice to Dan Salamie, and Salamie opened trading accounts and executed documents permitting Conrad to could conduct trades in those accounts on behalf of Plaintiff-Respondent Salamie.

3. In November 2008, two months after the stock market crash that began in September 2008, Plaintiff-Defendant Salamie filed suit against Defendant Bruce Conrad, an investment advisor, claiming that Defendant Conrad had disregarded instructions – purportedly given in a telephone call from a pizza parlor a year earlier in October 2007 – to liquidate his long stock positions and “short” the market because, Plaintiff-Defendant Salamie claimed, peering over the pepperoni, he foresaw the economic devastation that awaited investors in the stock market.

4. Defendant Bruce Conrad denied below that any such conversation occurred and stated that the crash of the stock market was not foreseen by Respondent-Plaintiff in the conveniently dated, October 2007 “pizza parlor” phone call or any other communication with Conrad.

5. Additionally, Defendant Bruce Conrad below denied any relationship whatsoever with T. D. Ameritrade. In response to Requests for Admission, Defendant Conrad responded as follows:

FIRST REQUEST FOR ADMISSION:

Kindly admit that Defendant Conrad was associated with TD Waterhouse Investor Services, Inc. at the time it had a physical facility in Charleston, WV.

RESPONSE:

Bruce Conrad asserts his general objections, and without limitation to the generality of the foregoing identifies

as applicable to this discovery request the specific objections numbered 7 as vague in its use of the term “associated with.” Without waiving the foregoing objections, the matter is Denied.

SECOND REQUEST FOR ADMISSION:

Kindly admit that Defendant Conrad has held himself out to be an “independent investment advisor” associated with TD Ameritrade since the merger of TD Waterhouse with Ameritrade.

RESPONSE:

Bruce Conrad asserts his general objections, and without limitation to the generality of the foregoing identifies as applicable to this discovery request specific objections numbered 7 and 8. The request is compound and contradictory. The request is vague in its use of the term “associated with” and ambiguous to the extent that it requests that Defendant simultaneously admit he was “independent.” Without waiving the foregoing objections, the matter is Denied.

Attachment “A”

6. In response to interrogatories, Defendant Bruce was equally clear that he neither had, nor had had, any relationship with T.D. Ameritrade or its predecessor T. D. Waterhouse.

4. What is your current relationship with TD Ameritrade and does your relationship with TD Ameritrade differ from your relationship with TD Waterhouse?

ANSWER:

Bruce Conrad asserts his general objections, and without limitation to the generality of the foregoing identifies as applicable to this discovery request the specific objections numbered 7 to the extent that the discovery request refers to the undefined term “relationship.” Without waiving the foregoing objections, Plaintiff responds that he has no relationship with TD Ameritrade, nor had any relationship with TD Waterhouse, other than which arose from the fact that he has and had accounts with both, in his own name and in the names of clients.

Attachment “B”

7. Notwithstanding the absence of any relationship between TD Ameritrade and Conrad, public records and the discovery below make plain why this litigation was filed against

T. D. Ameritrade. The 8K filed by T. D. Ameritrade with the SEC on July 21, 2009 reports net income of \$487 million dollars (**Attachment “C”**) for the nine months ended June 30, 2009, and net assets of \$3.3 billion dollars (**Attachment “D”**).

8. Defendant Conrad’s assets are, by comparison, miniscule. Surely, they are insufficient to provide Plaintiff, portrayed as a “good ole boy” in his populist-themed pleadings in this Court, a free “put” on all stock market transactions (certainly not in an account that exceeded \$1,000,000), which is effectively what Respondent-Plaintiff, one of literally millions of victims of an economic Tsunami, really wants. In response to an interrogatory regarding insurance, Defendant Conrad stated as follows:

8. Kindly identify any policy of insurance that would cover your errors and omissions and provide a fund to cover any loss that Plaintiff proves that he has suffered as a result of the circumstances alleged in the complain and kindly explain in your answer: (1) the total amount of coverage per each account; (2) the aggregate amount of coverage for all accounts; and (3) whether any insurance company has agreed to defend you but under a reservation of rights.

ANSWER:

Bruce Conrad asserts his general objections. Without waiving those objections, Bruce Conrad denies that Plaintiff has suffered any loss as a result of the circumstances alleged in the complaint pertaining to this Defendant. Bruce Conrad responds that he is not required by law to maintain, and does not maintain, any insurance to cover losses in transactions he directs. As required by applicable law, Bruce Conrad maintains and has maintained a \$10,000 security bond with Hartford Fire Insurance for the years 2006, 2007 and 2008.

Attachment “E”

9. So why has Repondent-Plaintiff Salamie sued TD Ameritrade? As famed bank robber Willie Sutton said when asked why he robbed banks: *“That’s where the money is!”*

10. The stock trading account agreements governing the four accounts opened by Respondent-Plaintiff Dan Salamie included the following unambiguous language committing **all disputes**, with **all parties**, to arbitration:

- Accounts numbered 901940340 (originally 501-94034-18) and 901940350 (originally 501-94035-17) contain the following identical language – “In the event there is a dispute as to any account, agreement or investment, the Employer, Participant or Investment Advisor agrees to submit to Arbitration ...
- Accounts numbered 961918290 (401 K account) and 901359420 (Dan Salamie Personal Account) contain the following identical language – “I agree that any controversy relating to any of my accounts or any agreement that I have with you will be submitted to arbitration...

11. Defendant Conrad is a third party beneficiary of the arbitration provisions of Plaintiff's agreements with Defendant TD Ameritrade, Inc. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993) (non-signatory to the arbitration agreement could nevertheless compel arbitration of claims based upon the broad language of the arbitration provision, in effect as a third-party beneficiary); *Alamria V. Telcor International, Inc.*, 920 F.Supp 658 (D.Md. 1996) (non-signatories of arbitration agreements can benefit from such agreements under ordinary contract law and agency principles); *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923 (3d Cir. 1985) (same); *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994) (“to be sure, the law recognizes certain contract and agency principles under which non-signatories sometimes can be obligated by, or benefit from, agreements signed by others, and these principles can apply to arbitration provisions); *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 776 (2d Cir. 1995) (a non-signatory party can be bound to an arbitration agreement under principles of contract and agency); *AT&T Technologies, Inc. v. Communications Workers Of America*, 475 U.S. at 648 (there is no strict requirement that only signatories be susceptible to arbitration agreements).

12. By letter dated March 8, 2009 to Counsel for Plaintiff Salamie, Defendant Conrad has demanded referral to arbitration. No other action is required to trigger the arbitration clauses of the contracts.

13. Defendant Conrad takes no position on the primary question presented by the Petition -- whether the arbitrator has jurisdiction to rule on the nature and extent of the liability, if any, of the respective parties, or, stated alternatively, whether T. D. Ameritrade's vicarious liability for Defendant's actions, is established by the bare fact of T. D. Ameritrade having invoked the arbitration clause. However, plainly, the determination that Defendant Conrad is, or is not, an "other associated person" for purposes of § 3010 of the NASD Manual, is not co-extensive with the determination that the dispute is properly referred to arbitration, a question which is determined by the unambiguous language quoted above.

14. Defendant Conrad does not want to go through the procedure of arbitration only to discover – after the inevitable finding that T. D. Ameritrade has no liability – that Respondent-Plaintiff Salamie wishes to proceed against Conrad in the Kanawha County Circuit Court. Defendant Conrad suggests that this Court issue an order insuring that any referral to arbitration includes the entire case against all defendants.

15. Below, Plaintiff-Respondent Salamie's counsel stated: "**Plaintiff admits that this is the operative contract and does not contest referral to arbitration as long as what is sauce for the goose is sauce for the gander.**" February 23, 2009 Response to Motion to Compel Arbitration and Motion for Partial Summary Judgment at p.2 (bold in original).

16. Defendant Conrad respectfully requests that this Court direct a query to Plaintiff Salame: viz., **“If this Court in fact refers the claims against TD Ameritrade, Inc. to arbitration, does Plaintiff Salame concede that such referral necessarily compels referral of the claims against Bruce Conrad, under the “goose-gander” doctrine?”**

17. In his Response in this proceeding, Respondent-Plaintiff Salame states at p. 10 that “Respondent never challenged the contract as a whole...” On remand, he should not be permitted to challenge it in part.

Respectfully submitted,

BRUCE P. CONRAD

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TD AMERITRADE, INC.,
Petitioner,

v.

THE HONORABLE TOD KAUFMAN,
Kanawha County Circuit Judge,
Respondent,

Case No. 091003

and

DAN SALAMIE,
Respondent-Plaintiff-Below

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response was mailed, postage pre-paid, this
23rd day of July, 2009, to the following persons at the addresses listed:

Hon. Tod Kaufman
111 Court Street
Charleston, WV 25301

Richard Neely, Esq. #2709
159 Summers Street, Suite 310
Charleston, WV 25301-2134

Ramonda C. Lyons, Esq. # 6927
P. O. Box 11887
Charleston, WV 25339


William V. DePaulo

II. BRUCE CONRAD'S RESPONSES AND OBJECTIONS TO INTERROGATORIES and REQUESTS FOR ADMISSION

1. Kindly identify each and every person who has participated in any way in the preparation of the answers and responses to these interrogatories, requests for admission, and requests for production.

ANSWER:

Bruce Conrad asserts his general objections, and without limitation to the generality of the foregoing identifies as applicable to this discovery request the specific objections numbered 1, 3 and 4.

FIRST REQUEST FOR ADMISSION:

Kindly admit that Defendant Conrad was associated with TD Waterhouse Investor Services, Inc. at the time it had a physical facility in Charleston, WV.

RESPONSE:

Bruce Conrad asserts his general objections, and without limitation to the generality of the foregoing identifies as applicable to this discovery request the specific objections numbered 7 as vague in its use of the term "associated with." Without waiving the foregoing objections, the matter is Denied.

SECOND REQUEST FOR ADMISSION:

Kindly admit that Defendant Conrad has held himself out to be an "independent investment advisor" associated with TD Ameritrade since the merger of TD Waterhouse

with Ameritrade.

RESPONSE:

Bruce Conrad asserts his general objections, and without limitation to the generality of the foregoing identifies as applicable to this discovery request specific objections numbered 7 and 8. The request is compound and contradictory. The request is vague in its use of the term “associated with” and ambiguous to the extent that it requests that Defendant simultaneously admit he was “independent.” Without waiving the foregoing objections, the matter is Denied.

2. Unless your response to the first and second requests for admission are unqualified admissions, kindly set forth each and every fact known to you that supports your denials.

ANSWER:

Bruce Conrad asserts his general objections, and without limitation to the generality of the foregoing identifies as applicable to this discovery request the specific objections numbered 1, 7 and 8, for the reasons stated above.

3. Kindly identify each and every document in your possession on which you would rely to negate the allegations in the Plaintiff’s complaint against you.

ANSWER:

Bruce Conrad asserts his general objections and without waiving those objections incorporates by reference the response to Request for Admission number 2. Additionally Bruce Conrad directs Plaintiff to the documents bearing bates numbers produced

herewith, and any other documents hereafter produced in the course of discovery.

4. What is your current relationship with TD Ameritrade and does your relationship with TD Ameritrade differ from your relationship with TD Waterhouse?

ANSWER:

Bruce Conrad asserts his general objections, and without limitation to the generality of the foregoing identifies as applicable to this discovery request the specific objections numbered 7 to the extent that the discovery request refers to the undefined term "relationship." Without waiving the foregoing objections, Plaintiff responds that he has no relationship with TD Ameritrade, nor had any relationship with TD Waterhouse, other than that which arose from the fact that he has and had accounts with both, in his own name and in the names of clients.

THIRD REQUEST FOR ADMISSION:

Kindly admit that on 18 October 2007 Plaintiff instructed you to sell all his holdings of stocks and electronically traded stock funds and convert to cash, government securities and "inverse" funds.

RESPONSE:

Bruce Conrad asserts his general objections. Without waiving those objections, the matter is Denied.

ATTACHMENT "C"

TD AMERITRADE HOLDING CORPORATION
CONSOLIDATED STATEMENTS OF INCOME
In thousands, except per share amounts
(Unaudited)

	<u>Quarter Ended</u>			<u>Nine Months Ended</u>	
	<u>June 30, 2009</u>	<u>Mar. 31, 2009</u>	<u>June 30, 2008</u>	<u>June 30, 2009</u>	<u>June 30, 2008</u>
Revenues:					
Transaction-based revenues:					
Commissions and transaction fees	\$ 338,450	\$ 265,442	\$ 248,861	\$ 891,005	\$ 754,017
Asset-based revenues:					
Interest revenue	101,204	70,242	174,940	263,960	635,983
Brokerage interest expense	<u>(2,564)</u>	<u>(2,837)</u>	<u>(43,008)</u>	<u>(13,076)</u>	<u>(217,084)</u>
Net interest revenue	98,640	67,405	131,932	250,884	418,899
Money market deposit account fees	125,124	136,537	155,708	424,891	467,634
Investment product fees	<u>39,079</u>	<u>48,096</u>	<u>77,552</u>	<u>156,341</u>	<u>223,242</u>
Total asset-based revenues	262,843	252,038	365,192	832,116	1,109,775
Other revenues	<u>12,475</u>	<u>8,019</u>	<u>9,551</u>	<u>26,875</u>	<u>24,315</u>
Net revenues	<u>613,768</u>	<u>525,499</u>	<u>623,604</u>	<u>1,749,996</u>	<u>1,888,107</u>
Expenses:					
Employee compensation and benefits	141,216	120,808	129,039	379,413	367,167
Fair value adjustments of compensation-related derivative instruments	—	—	—	—	764
Clearing and execution costs	16,141	15,077	11,110	46,846	32,548
Communications	20,795	17,853	17,898	57,392	52,851
Occupancy and equipment costs	29,951	29,536	24,030	89,614	74,257
Depreciation and amortization	11,162	10,635	9,841	33,299	26,423
Amortization of acquired intangible assets	17,551	15,200	15,337	48,289	43,809
Professional services	32,923	22,069	28,964	82,332	76,826
Interest on borrowings	8,365	8,244	16,344	32,246	62,674
Other	14,513	8,720	6,421	34,798	37,460
Advertising	<u>39,402</u>	<u>53,097</u>	<u>36,724</u>	<u>139,196</u>	<u>129,490</u>
Total expenses	<u>332,019</u>	<u>301,239</u>	<u>295,708</u>	<u>943,425</u>	<u>904,269</u>
Income before other income (expense) and income taxes	281,749	224,260	327,896	806,571	983,838
Other income (expense):					
Gain (loss) on sale of investments	<u>(2,003)</u>	<u>—</u>	<u>284</u>	<u>(2,003)</u>	<u>928</u>
Pre-tax income	279,746	224,260	328,180	804,568	984,766
Provision for income taxes	<u>109,209</u>	<u>92,230</u>	<u>123,818</u>	<u>317,603</u>	<u>352,848</u>
Net income	\$ 170,537	\$ 132,030	\$ 204,362	\$ 486,965	\$ 631,918

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ATTACHMENT "D"



**TD AMERITRADE HOLDING CORPORATION
CONDENSED CONSOLIDATED BALANCE SHEETS**

*In thousands
(Unaudited)*

	<u>June 30, 2009</u>	<u>Sept. 30, 2008</u>
Assets:		
Cash and cash equivalents	\$ 1,119,824	\$ 674,135
Short-term investments	52,071	369,133
Segregated cash and investments	5,251,563	260,000
Broker/dealer receivables	1,540,165	4,177,149
Client receivables	5,012,819	6,933,926
Goodwill and intangible assets	3,715,977	2,960,781
Other	527,215	576,398
Total assets	<u>\$17,219,634</u>	<u>\$15,951,522</u>
Liabilities and stockholders' equity:		
Liabilities:		
Broker/dealer payables	\$ 2,268,745	\$ 5,769,676
Client payables	9,188,183	5,070,671
Long-term debt	1,424,275	1,444,000
Other	960,865	742,137
Total liabilities	<u>13,842,068</u>	<u>13,026,484</u>
Stockholders' equity	<u>3,377,566</u>	<u>2,925,038</u>
Total liabilities and stockholders' equity	<u>\$17,219,634</u>	<u>\$15,951,522</u>

ANSWER:

Bruce Conrad asserts his general objections, and without limitation to the generality of the foregoing identifies as applicable to this discovery request the specifies general objections numbered 8, 9 and 10 to the extent that the discovery request refers to an overbroad period of time. Without waiving the foregoing objections Bruce Conrad responds that he generally looked at charts for purchased stocks, if, as and when appropriate, both before and after transactions were consummated, along with a broad range of other materials relating to market – asset allocation.

8. Kindly identify any policy of insurance that would cover your errors and omissions and provide a fund to cover any loss that Plaintiff proves that he has suffered as a result of the circumstances alleged in the complain and kindly explain in your answer: (1) the total amount of coverage per each account; (2) the aggregate amount of coverage for all accounts; and (3) whether any insurance company has agreed to defend you but under a reservation of rights.

ANSWER:

Bruce Conrad asserts his general objections. Without waiving those objections, Bruce Conrad denies that Plaintiff has suffered any loss as a result of the circumstances alleged in the complaint pertaining to this Defendant. Bruce Conrad responds that he is not required by law to maintain, and does not maintain, any insurance to cover losses in transactions he directs. As required by applicable law, Bruce Conrad maintains and has maintained a \$10,000 security bond with Hartford Fire Insurance for the years 2006, 2007 and 2008.