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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Douglas A. Haviland,

10 Plaintiff,

11 v.

12 TD Ameritrade Incorporated,

13 Defendant.
14

No. CV-15-00611-PHX-NVW

ORDER

15 Before the court are Plaintiff Douglas A. Haviland's Motion to Confirm FINRA
16 Arbitration Award (Doc. 1) and Defendant TD Ameritrade Inc.'s Motion to Vacate the
17 FINRA Arbitration Award (Doc. 14). For the reasons that follow, Haviland's Motion
18 will be granted in part.
19

20 **I. BACKGROUND**

21 The following facts are taken from TD Ameritrade's Motion and the sworn
22 Declaration (Doc. 14-2) of its attorney, Miles D. Hart, as well as exhibits attached to that
23 Declaration. In his brief Response (Doc. 22), Haviland does not appear to contest the
24 accuracy of TD Ameritrade's factual assertions. Haviland's Motion levels various
25 allegations at TD Ameritrade and disputes several of TD Ameritrade's facts, but these
26 disagreements are largely irrelevant to the pending motions. Given the posture of this
27 case, the parties have not had the opportunity to exchange discovery. The court will
28 therefore assume that TD Ameritrade's version of events is accurate.

1 Haviland opened a brokerage account with a predecessor to TD Ameritrade in
2 2001. (Doc. 14 at 4.) On July 13, 2005, TD Ameritrade executed for Haviland the
3 purchase of 75,000 shares of Bancorp International Group (“Bancorp”), which sold for
4 \$0.0026 per share. (*Id.* at 5.) These shares were part of an issuance assigned No.
5 05968X106 (“X106”) by the Committee on Uniform Securities Identification Procedures
6 (“CUSIP”). (*Id.* at 3 & n.2.) TD Ameritrade held the stock in its name for the benefit of
7 Haviland. (*See id.* at 4-5.) Later that summer, on August 16, 2005, the Depository Trust
8 Company issued a “Global Lock” on Bancorp shares in its custody. (*Id.* at 7.) The
9 Depository Trust Company is “the central securities depository and clearing agency in the
10 United States operating under regulatory oversight of the SEC.” (*Id.* at 6.) Pursuant to
11 its own rules, which are regulated by the Securities and Exchange Commission, the
12 Depository Trust Company “determine[s] whether to accept a security as an ‘eligible
13 security’ and when an eligible security ceases to be an eligible security.” (*See id.* at 7.)
14 When it imposes a global lock, also known as a “freeze,” the Depository Trust Company
15 “discontinue[s] all non-custodial services for a security.” (*Id.*) “[Depository Trust
16 Company] participants such as [TD Ameritrade], issuers such as [Bancorp], and owners
17 of issuers’ stock are bound by these restrictions. As a broker-dealer, [TD Ameritrade] is
18 required, under FINRA Rule 11310, to use [Depository Trust Company] (and its parent)
19 to clear electronic transactions.” (*Id.* (citation omitted).).

20 The SEC temporarily suspended the trading of Bancorp stock on August 31, 2005.
21 (*Id.* at 8.) The SEC lifted the suspension on September 14, 2005, but on November 3,
22 2009, it “revoked the registration of all [Bancorp] securities because of [Bancorp’s]
23 repeated failure to satisfy its public reporting requirements.” (*Id.*) The Global Lock and
24 the revocation both remain in effect. (*Id.* at 7-8.) At some unspecified time “after
25 [Depository Trust Company] imposed the Global Lock,” Bancorp issued a second
26 category of stock with CUSIP No. 05968X205 (“X205”). (*Id.* at 3, 8.) “These shares
27 were not registered with the SEC and are not publicly traded.” (*Id.* at 8.) In February
28 2012, Bancorp purported to “ . . . require the mandatory exchange’ of all existing

1 common stock certificates issued under CUSIP X106 for new certificates bearing CUSIP
2 X205.” (*Id.*) The Financial Industry Regulatory Authority (“FINRA”), however, did not
3 approve the exchange because “the stock was delisted in 2006 and the SEC revoked the
4 registration of [Bancorp’s] stock in 2009.” (*Id.*) Accordingly, the Depository Trust
5 Company “could not process the exchange.” (*Id.*)

6 On July 14, 2014, Haviland filed an arbitration claim with FINRA, asserting that
7 in September 2011 he had “made a demand to [TD Ameritrade] to transfer [his] 75,000
8 [Bancorp] shares into [his] name on the books of [Bancorp] and to deliver a certificate,”
9 and that TD Ameritrade had refused in light of the Global Lock. (Doc. 14-2 at 1; Doc.
10 14-3 at 4.) Haviland asked the arbitrator for an order compelling TD Ameritrade to
11 transfer his Bancorp shares into his name and to deliver “a [Bancorp] stock certificate as
12 proof of [his] registered ownership.” (Doc. 14-3 at 3.) The prayer for relief also
13 contained the following request: “If [TD Ameritrade] do[es] not have the shares [it] can
14 either buy-in the seller, or obtain my [Bancorp] shares from another source, or in the
15 alternative, authorize me to buy-in for [TD Ameritrade] with a guarantee I will be
16 reimbursed the purchase price and other costs for doing so.” (*Id.*)

17 TD Ameritrade agreed on July 31, 2014, to submit to arbitration of Haviland’s
18 complaint. (*Id.* at 32-33.) The Submission Agreement provides that if the arbitrator
19 issues an award, “a judgment and any interest due thereon, may be entered upon such
20 award(s) and, for these purposes, the parties hereby voluntarily consent to submit to the
21 jurisdiction of any court of competent jurisdiction which may properly enter such
22 judgment.” (*Id.* at 32.) In its Answer and Affirmative Defenses, filed with FINRA on
23 September 4, 2014, TD Ameritrade explained that it had already relayed Haviland’s
24 request to the Depository Trust Company, which “could not (and cannot) honor
25 [Haviland’s] demand as a result of restrictions it (DTC) placed on the security.” (*Id.* at
26 36.) “Since [TD Ameritrade] has no control or authority over [Depository Trust
27 Company],” TD Ameritrade wrote, “it is not able to provide [Haviland] with a
28 certificate.” (*Id.* at 37.)

1 The single arbitrator in the case read the parties’ paper submissions but did not
2 conduct a hearing. (Doc. 14 at 9; Doc. 1-1 at 3.) In a March 12, 2015 Award, the
3 arbitrator announced that TD Ameritrade “is liable for and shall pay to [Haviland]
4 \$205.00 in compensatory damages” and “must deliver to [Haviland] a physical share
5 certificate for 75,000 Bancorp International Group, Inc. shares registered in [Haviland’s]
6 name.” (Doc. 1-1 at 3.) The Award does not specify which type of shares—X106 or
7 X205—TD Ameritrade is required to deliver. TD Ameritrade requested a correction
8 from FINRA on March 20, 2015, to clarify the appropriate class of stock. (Doc. 16 at 3-
9 4.) But the time for a ruling from the arbitrator lapsed without any response, and so TD
10 Ameritrade’s request was deemed “considered and denied” under FINRA rules on April
11 9, 2015. (Doc. 14-2 at 6.) That same day, TD Ameritrade paid Haviland the monetary
12 portion of the Award. (*Id.*)

13 Haviland, a resident of Scottsdale, Arizona, moved to confirm the arbitrator’s
14 award in this court on April 6, 2015. (Doc. 1.) TD Ameritrade filed the present Motion
15 on May 15, 2015, asking the court to set aside the arbitrator’s Award on the grounds that
16 1) the Global Lock made it impossible to transfer X106 shares to Haviland and 2) transfer
17 of unregistered X205 shares would violate the Securities Act of 1933.

18 **II. LEGAL ANALYSIS**

19 If an arbitration agreement does not specify the court in which a party may apply
20 to confirm the award, “then such application may be made to the United States court in
21 and for the district within which such award was made.” 9 U.S.C. § 9. A motion to
22 confirm may also be brought “in any district proper under the general venue statute.”
23 *Cortez Byrd Chips v. Bill Harbert Constr. Co.*, 529 U.S. 193, 195 (2000). At “any time
24 within one year after the award is made any party to the arbitration may apply to the court
25 . . . for an order confirming the award, and thereupon the court must grant such an order
26 unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of
27 this title.” *See* § 9. The district court may entertain the application as long as subject
28 matter jurisdiction exists, which is not disputed in this case.

1 Ordinarily, the court’s power to vacate, modify, or correct is narrowly
2 circumscribed. Under § 10, “arbitrators ‘exceed their powers’ . . . not when they merely
3 interpret or apply the governing law incorrectly, but when the award is ‘completely
4 irrational’ or exhibits a ‘manifest disregard of law.’” *Kyocera Corp. v. Prudential-Bache*
5 *T Servs.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc) (citations omitted). Section 11
6 similarly “afford[s] an extremely limited review authority.” *See id.* at 998. “In sum, the
7 Federal Arbitration Act allows a federal court to correct a technical error, to strike all or a
8 portion of an award pertaining to an issue not at all subject to arbitration, and to vacate an
9 award that evidences affirmative misconduct in the arbitral process or the final result or
10 that is completely irrational or exhibits a manifest disregard for the law.” *Id.* at 997-98.

11 “Nevertheless, the purpose of federal arbitration law is ‘to make arbitration
12 agreements as enforceable as other contracts, but not more so.’” *Am. Postal Workers*
13 *Union v. U.S. Postal Serv.*, 682 F.2d 1280, 1286 (9th Cir. 1982). “It is a general principle
14 of contract law that courts will not enforce contracts requiring the performance of an
15 illegal act.” *Id.* Accordingly, although § 9 makes no mention of illegality as a basis for
16 vacatur, modification, or correction, “the courts cannot enforce an arbitrator’s award if it
17 requires the performance of an illegal act.” *Id.*

18 Were TD Ameritrade to deliver to Haviland a certificate for 75,000 Bancorp
19 shares, that certificate would have to reflect stock with either CUSIP No. X106 or CUSIP
20 No. X205. Section 5 of the Securities Act of 1933 makes it unlawful to “offer to sell or
21 offer to buy . . . any security, unless a registration statement has been filed as to such
22 security.” 15 U.S.C. § 77e(c). It also prohibits selling, or delivering after sale, any
23 unregistered security. *Id.* § 77e(a). Because the X205 shares are not registered with the
24 SEC, and because TD Ameritrade does not have any of those shares in its possession,
25 acquiring X205 shares to transfer to Haviland would require TD Ameritrade to “offer to
26 buy” and then to deliver a security for which no “registration statement has been filed.”
27 That is, delivery of a certificate for X205 shares would require “the performance of an
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1 illegal act.” *Am. Postal Workers Union*, 682 F.2d at 1286. To the extent the arbitrator’s
2 Award requires delivery of a certificate for X205 shares, it is unenforceable.

3 TD Ameritrade acknowledges in its Reply (Doc. 24) that the ban on offering to
4 buy unregistered securities does not apply to “any security which is issued in exchange
5 for one or more bona fide outstanding securities, claims or property interests, or partly in
6 such exchange and partly for cash, where the terms and conditions of such issuance and
7 exchange are approved, after a hearing upon the fairness of such terms and conditions at
8 which all persons to whom it is proposed to issue securities in such exchange shall have
9 the right to appear, by any court, or by any official or agency of the United States, or by
10 any State or Territorial banking or insurance commission or other governmental authority
11 expressly authorized by law to grant such approval.” 15 U.S.C. § 77c(a)(10). If this
12 court determined after a hearing that the exchange of X205 shares for “bona fide
13 outstanding securities, claims or property interests” were “fair,” then TD Ameritrade’s
14 acquisition of those shares would not qualify as illegal, and the arbitrator’s Award could
15 be confirmed. But Haviland does not mention this provision in his Motion or his
16 Response, and he has not moved for a § 77c(a)(10) fairness hearing. Indeed, other than
17 his suggestion in the arbitration complaint that TD Ameritrade “buy-in” shares from
18 Bancorp—i.e., apparently a cash transfer, which is not permitted by the plain language of
19 § 77c(a)(10)—Haviland has not even proposed an “exchange” on which this court could
20 conduct a hearing. Section 77c(a)(10) therefore cannot render an otherwise illegal act
21 valid.

22 Given the holding in *American Postal Workers Union*, the court can confirm the
23 Award only if it is construed to require TD Ameritrade to deliver a certificate for X106
24 shares. TD Ameritrade has already done everything in its power to grant Haviland this
25 portion of the relief awarded by the arbitrator. Namely, TD Ameritrade has directed the
26 Depository Trust Company to transfer to Haviland a certificate reflecting 75,000 X106
27 shares in Haviland’s name, but the Depository Trust Company has declined to do so. TD
28 Ameritrade has no power to force such a transfer, and courts cannot order performance of

1 a condition with which it is impossible to comply. *See Taylor-Edwards Warehouse &*
2 *Transfer Co. v. Burlington N., Inc.*, 715 F.2d 1330, 1336 (9th Cir. 1983) (recognizing
3 defense to breach of contract where “the thing cannot by any means be effected”). The
4 court will therefore confirm the arbitrator’s Award, but only to the extent that TD
5 Ameritrade must continue to make good faith efforts to transfer to Haviland a certificate
6 recognizing ownership in his name of the 75,000 Bancorp X106 shares currently held by
7 the Depository Trust Company. While the Global Lock remains in place, there is nothing
8 more TD Ameritrade can do to effect this transfer. If and when the Global Lock is lifted,
9 however, TD Ameritrade will be required by the Award, and by this Order, to request the
10 transfer of Haviland’s X106 shares by the Depository Trust Company. TD Ameritrade is
11 otherwise excused from attempts to comply with the arbitrator’s Award.

12 IT IS THEREFORE ORDERED that Defendant TD Ameritrade Inc.’s Motion to
13 Vacate the FINRA Arbitration Award (Doc. 14) is denied.

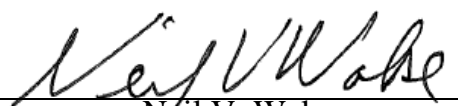
14 IT IS FURTHER ORDERED that Plaintiff Douglas A. Haviland’s Motion to
15 Confirm FINRA Arbitration Award (Doc. 1) is granted to the extent, and only to the
16 extent, that TD Ameritrade must continue to make good faith efforts to transfer to
17 Haviland a certificate recognizing ownership in his name of the 75,000 Bancorp X106
18 shares currently held by the Depository Trust Company.

19 IT IS FURTHER ORDERED that the Clerk shall enter judgment in favor of
20 Haviland and against TD Ameritrade, confirming the Award to the extent, and only to the

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1 extent, that TD Ameritrade must continue to make good faith efforts to transfer to
2 Haviland a certificate recognizing ownership in his name of the 75,000 Bancorp X106
3 shares currently held by the Depository Trust Company. The Clerk shall terminate this
4 case.

5 Dated this 25th day of June, 2015.

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9 Neil V. Wake
United States District Judge

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