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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 On June 25, 2015, the court granted Plaintiff Douglas A. Haviland's Motion to  
16 Confirm FINRA Arbitration Award (Doc. 1) "to the extent, and only to the extent, that  
17 TD Ameritrade must continue to make good faith efforts to transfer to Haviland a  
18 certificate recognizing ownership in his name of the 75,000 Bancorp X106 shares  
19 currently held by the Depository Trust Company."<sup>1</sup> (Doc. 29 at 7.) The court's Order  
20 assumed, consistent with the parties' briefing, that confirming the Award in full would  
21 impermissibly require TD Ameritrade to perform an illegal act, since the Securities and  
22 Exchange Commission had revoked the registration of Bancorp's stock in 2009. Section  
23 5 of the Securities Act of 1933 makes it unlawful to "offer to sell or offer to buy . . . any  
24 security, unless a registration statement has been filed as to such security," 15 U.S.C.  
25 § 77e(c), or to sell, or deliver after sale, any unregistered security, *id.* § 77e(a).

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28 <sup>1</sup> For a full account of the prior proceedings in this case, see *Haviland v. TD Ameritrade, Inc.*, No. CV-15-00611-PHX-NVW, 2015 U.S. Dist. LEXIS 83340, 2015 WL 3907117 (D. Ariz. June 25, 2015).

1           On a Motion for Reconsideration (Doc. 31), however, Haviland attached a copy of  
2 an Oklahoma state court order, issued in January 2006, that approved a settlement  
3 agreement between Bancorp and two brokers, Capital Growth Financial, L.L.C., and JH  
4 Darbie & Co., among others. (*See* Doc. 31-2 at 25-29.) The agreement provided that  
5 Bancorp would issue new shares of common stock (“New Shares”) to the brokers and  
6 stipulated that those shares would be “deemed to be free-trading stock exempt from  
7 registration pursuant to Section 3(a)(10) of the 1933 Act, as amended.” (*Id.* at 27.)  
8 Under that provision, the prohibition on selling and buying unregistered securities does  
9 not apply to “any security which is issued in exchange for one or more bona fide  
10 outstanding securities, claims or property interests, or partly in such exchange and partly  
11 for cash, where the terms and conditions of such issuance and exchange are approved,  
12 after a hearing upon the fairness of such terms and conditions at which all persons to  
13 whom it is proposed to issue securities in such exchange shall have the right to appear, by  
14 any court, or by any official or agency of the United States, or by any State or Territorial  
15 banking or insurance commission or other governmental authority expressly authorized  
16 by law to grant such approval.” 15 U.S.C. § 77c(a)(10). As the Oklahoma court had  
17 invoked § 3(a)(10), it appeared TD Ameritrade could lawfully comply with the  
18 arbitrator’s Award by delivering to Haviland a certificate recognizing ownership in his  
19 name of 75,000 New Shares. This court therefore ordered TD Ameritrade to submit a  
20 supplemental brief “explaining why the court should not grant Haviland’s Motion for  
21 Reconsideration.” (Doc. 41 at 3.)

22           In a Response (Doc. 43) filed on August 7, 2015, TD Ameritrade argues that  
23 purchase of any New Shares would violate 15 U.S.C. § 78l(j), which provides, “No  
24 member of a national securities exchange, broker, or dealer shall make use of the mails or  
25 any means or instrumentality of interstate commerce to effect any transaction in, or to  
26 induce the purchase or sale of, any security the registration of which has been and is  
27 suspended or revoked.” TD Ameritrade contends the SEC “revoked the registration of  
28 [Bancorp]” in November 2009, and therefore “any transaction” involving any Bancorp

1 shares is barred by § 78l(j). (Doc. 43 at 3.) In fact, the SEC’s November 3, 2009 order  
2 merely directs that, “pursuant to Section 12(j) of the Securities Exchange Act of 1934, the  
3 registration of each class of *registered* securities of [Bancorp] is hereby REVOKED.”  
4 (Doc. 14-3 at 25 (italics added).) That order does not purport to affect any Bancorp  
5 shares, such as the New Shares, that are exempt from registration. And the statutory  
6 provision on which the SEC relied does not give the agency power to remove from the  
7 market shares issued under the authority of § 3(a)(10). Instead, it merely empowers the  
8 SEC to revoke a registration when such a registration exists. *See* 15 U.S.C. § 78l(j) (“The  
9 Commission is authorized . . . to revoke the registration of a security, if the Commission  
10 finds . . . that the issuer of such security has failed to comply with any provision of this  
11 title or the rules and regulations thereunder.”). But where, as here, the shares in question  
12 are unregistered, § 78l(j) by its terms is inapplicable.

13 TD Ameritrade next argues that the “settlement presented to the Oklahoma state  
14 court for approval called for” the New Shares “to be presented to, and accepted by, the  
15 [Depository Trust Company] in exchange for the alleged ‘counterfeit’ shares of  
16 [Bancorp].” (Doc. 43 at 4.) But the Depository Trust Company allegedly “refused to  
17 accept the share certificates issued pursuant to the Oklahoma state court order.” (*Id.* at  
18 5.) It is not clear why TD Ameritrade believes this fact absolves it of its duty to comply  
19 with the arbitrator’s Award. TD Ameritrade offers no support for the idea that the  
20 Depository Trust Company’s rejection of the New Shares somehow renders the sale or  
21 purchase of those shares illegal.

22 In any event, TD Ameritrade’s brief appears to misstate the record. The  
23 settlement agreement merely requires Bancorp to “take such steps as are reasonably  
24 necessary and appropriate to ensure that such New Shares, among other things, shall be:  
25 a) Reasonably acceptable to [the Depository Trust Company] for deposit therein.” (Doc.  
26 31-2 at 35.) The court’s order itself makes no mention of the Depository Trust Company.  
27 There is no indication that Bancorp failed to comply with this term of the agreement.  
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1 Nor is there any reason to think that such failure would strip the New Shares of their  
2 exemption from the prohibition on buying or selling unregistered securities.

3 TD Ameritrade insists that it does not know how or where to purchase New Shares  
4 because a “real market” for such shares does not exist. (Doc. 43 at 5-6.) According to  
5 TD Ameritrade, “there has been no trading in those, or any other, [Bancorp] shares  
6 except for a 30 minute period in 2006.” (*Id.* at 5.) One of the brokers to whom the New  
7 Shares were issued was allegedly “expelled from the securities industry by order of the  
8 SEC in July 2008.” (*Id.* at 5-6 n.7.) That TD Ameritrade may have difficulty locating a  
9 seller of New Shares, however, does not mean that purchasing such shares and  
10 transferring them to Haviland would be either illegal or impossible.

11 Finally, it is irrelevant that the “Oklahoma state court proceeding is not referenced  
12 in the record before the Arbitrator, and . . . was not raised in the underlying arbitration as  
13 a basis for relief.” (Doc. 43 at 2.) Haviland’s request for relief to the arbitrator included  
14 a demand that TD Ameritrade “transfer my [Bancorp] ownership which is now registered  
15 on [TD Ameritrade’s] books into my name on the books of [Bancorp] and deliver to me a  
16 [Bancorp] stock certificate as proof of my registered ownership.” (Doc. 14-3 at 3.)  
17 Nevertheless, the arbitrator’s Award ordered only that TD Ameritrade “deliver to  
18 Claimant a physical share certificate for 75,000 [Bancorp] shares registered in Claimant’s  
19 name.” (Doc. 1-1 at 3.) The Award did not indicate that TD Ameritrade had to deliver  
20 Haviland’s previously purchased shares, or that TD Ameritrade would be excused from  
21 compliance if those specific shares were not transferrable. When TD Ameritrade asked  
22 the arbitrator to clarify which class of stock the Award called for—CUSIP No.  
23 05968X106, like Haviland’s original shares, or CUSIP No. 05968X205—the arbitrator  
24 did not respond. (Doc. 29 at 4.) The Award therefore appears to contemplate that TD  
25 Ameritrade may comply by furnishing Haviland a certificate for shares of a class other  
26 than that which he purchased in 2005. As a result, Haviland’s failure to mention the New  
27 Shares during arbitration does not mean those shares cannot be used to fulfill the Award.

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1 A court's authority to vacate, modify, or correct an arbitration award is "narrowly  
2 circumscribed." *Haviland*, 2015 U.S. Dist. LEXIS 83340, at \*7, 2015 WL 3907117, at  
3 \*3. "In sum, the Federal Arbitration Act allows a federal court to correct a technical  
4 error, to strike all or a portion of an award pertaining to an issue not at all subject to  
5 arbitration, and to vacate an award that evidences affirmative misconduct in the arbitral  
6 process or the final result or that is completely irrational or exhibits a manifest disregard  
7 for the law." *Id.* at \*7-8, 2015 WL 3907117, at \*3. An award may also be modified if it  
8 calls for the performance of an impossible or illegal act. *Id.* at \*8, 11, 2015 WL 3907117,  
9 at \*3-4. TD Ameritrade has not shown that any such grounds for vacatur, modification,  
10 or correction exist in this case.

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12 IT IS THEREFORE ORDERED that the court's June 25, 2015 Order (Doc. 29)  
13 and Judgment (Doc. 30) are vacated.

14 IT IS FURTHER ORDERED that Plaintiff Douglas A. Haviland's Motion for  
15 Reconsideration (Doc. 31) is granted. The arbitrator's Award of March 11, 2015, is  
16 confirmed in its entirety.

17 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Haviland  
18 and against Defendant TD Ameritrade, Inc., confirming the arbitrator's Award of March  
19 11, 2015, in its entirety.

20 Dated this 10th day of August, 2015.

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23 Neil V. Wake  
24 United States District Judge  
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