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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

NATHALIE AL-THANI,

Plaintiff,

vs.

WELLS FARGO & COMPANY, WELLS FARGO INVESTMENTS, LLC, SHALOM MORGAN, DAN HILKEN, and ANDREY MOVSESYAN,

Defendants.

No. CV 08-1745 CW

DEFENDANTS' MOTION TO COMPEL ARBITRATION, SUPPORTING MEMORANDUM, AND DECLARATION OF ERIC G. WALLIS

Date: August 21, 2008
Time: 2:00 p.m.
Courtroom: 2

Attached Documents: Exhibits A & B to Wallis Declaration

Honorable Claudia Wilken

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NOTICE OF MOTION TO COMPEL ARBITRATION

On August 21, 2008 at 2:00 p.m. in Courtroom 2 Defendants Wells Fargo Investments, LLC (WFI), Shalom Morgan (Morgan), Andrey Movsesyan (Movsesyan) and Dan Hilken (Hilken) will move the Court for an order as follows.

(1) Granting Defendants' motion to compel arbitration and ordering Plaintiff Nathalie Al-Thani (Plaintiff) to submit her claims herein to arbitration under the auspices of the Financial Industry Regulatory Authority, Inc. (FINRA), and (2) staying proceedings in this action pending arbitration.

This motion will be made on the grounds that Plaintiff entered a written agreement with these Defendants to arbitrate disputes and that the claims in Plaintiff's First Amended Complaint (FAC) are subject to arbitration. The motion will be made and based on this Notice, the attached Memorandum and Declaration of Eric G. Wallis, the accompanying Declaration of Shalom Morgan, and the files and pleadings in this case.

MEMORANDUM SUPPORTING MOTION TO COMPEL ARBITRATION

I

PRELIMINARY STATEMENT

Plaintiff signed a brokerage account agreement with WFI that contained a provision requiring arbitration of disputes arising between them. Notwithstanding that promise, Plaintiff filed the FAC herein raising claims that are clearly subject to the arbitration provision, and refused to arbitrate them simply because she did not read the agreement's arbitration provision. Because her failure to do so is not grounds for revoking the arbitration agreement, the Court should grant Defendants' motion to compel arbitration and stay these proceedings pending that arbitration.

II

FACTUAL BACKGROUND

A. In January 2008 Plaintiff Signed an Agreement Promising to Arbitrate Disputes with these Defendants

1. Plaintiff Opened a Brokerage Account with WFI and Purchased Securities

In January 2008 Plaintiff deposited $1,750,000 into a bank account with nonparty Wells Fargo Bank (the Bank). After she advised a Bank teller that she was not interested in using those funds to acquire a certificate of deposit from the Bank, the teller referred her to Morgan, a financial advisor with WFI in its 1900 Union Street, San Francisco office. FAC, ¶¶6 & 10-12; accompanying Declaration of Shalom Morgan (Morgan Dec.), ¶1.

Morgan and Plaintiff met on Friday, January 11, 2008 and discussed possible investments including auction rate securities (ARS).[1] Morgan Dec., ¶¶ 2-5. During the conversation Morgan gave Plaintiff a copy of WFI's Brokerage Account Agreement (Agreement). *Id*., ¶4 & Exh. A. Plaintiff agreed to open an account, but left the WFI offices before she signed the Agreement. *Id*., ¶5. Morgan then electronically established an account for Plaintiff with WFI (no. 45091942) and, per Plaintiff's instructions, transferred $1,750,000 from Plaintiff's account with the Bank into her WFI account. Morgan Dec., ¶6. The account was nondiscretionary, so Morgan did not have the authority to purchase securities for Plaintiff despite having the funds in the WFI account. *Id*.

[1] ARS were developed in the mid-1980s. They are debt securities (bonds or preferred stock) with long-term maturities (usually twenty or thirty years) for which the interest rates (in the case of bond) or dividend yields (for preferred stock) are periodically reset through "Dutch auctions" every seven to 35 days depending upon the specific issue. Securities & Exchange Commission Administrative Proceeding Release No. 33-8684 at 3 (May 31, 2006). Because the auctions resulted in yields that were slightly higher than traditional money market rates but lower than long-term bond yields issuers – often municipalities or closed-end mutual funds – were able to borrow long-term money at short-term rates.

During the week of January 14, 2008 Plaintiff and Morgan continued their conversations about possible investments, and Plaintiff decided to purchase $1,750,000 worth of a form of ARS known as "auction market preferred shares" (AMPS) issued in 2004 by a closed-end mutual fund managed by Neuberger Berman. The sale occurred January 17, 2008. Morgan Dec., ¶ 7; FAC, ¶17.

2. In January 2008 Plaintiff Signed the Agreement and Promised to Arbitrate Disputes with these Defendants

During conversations the week of January 14, Morgan told Plaintiff that she needed to sign the Agreement to have an account with WFI. Morgan Dec., ¶ 8. Plaintiff was unable to visit the WFI offices again until January 23, 2008, however. *Id*., ¶ 9. At that time Plaintiff sat down at Morgan's desk, and he handed her the Acknowledgement (last) page of the Agreement. *Id*., ¶9 & Exh. B.

The Acknowledgement is titled "Client Acknowledgement/Agreement." The right hand corner states "PLEASE READ AND SIGN." The Acknowledgement states that "I/We {Plaintiff} understand and agree to the following:

> 1. I/We have read and understand the terms and conditions of the Brokerage Account Agreement and I/we agree to be bound by them.

The footer below the signature line states, "WFI Brokerage Account Agreement." Above the signature line the following appears:

> 5. BY SIGNING BELOW, I/WE ACKNOWLEDGE RECEIPT OF A COPY OF THE WELLS FARGO INVESTMENTS BROKERAGE ACCOUNT AGREEMENT WHICH CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE IN SECTION 15, PAGE 3.

Morgan advised Plaintiff that she needed to sign the Agreement. Morgan Dec., ¶9; FAC, ¶104. Plaintiff did not ask any questions about the Agreement, nor did she request a full copy of the Agreement (which previously she had been handed), and left shortly after signing. Morgan Dec., *id.*

The arbitration provision referenced in the Agreement provides in relevant part:

> THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS . . . I AGREE THAT ALL CLAIMS, CONTROVERSIES, AND OTHER DISPUTES BETWEEN ME AND WELLS FARGO INVESTMENTS AND ANY OF ITS DIRECTORS, OFFICERS, EMPLOYEES, OR AGENTS ARISING OUT OF OR RELATING TO THE BROKERAGE ACCOUNT OR ANY ORDERS OR TRANSACTIONS THEREIN . . . WHETHER ENTERED INTO BEFORE, ON, OR AFTER THE DATE THIS ACCOUNT IS OPENED, SHALL BE DETERMINED BY ARBITRATION CONDUCTED BY, AND SUBJECT TO THE ARBITRATION RULES THEN IN EFFECT OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.

B. In February 2008 a Dispute Arose over Plaintiff's Purchase of AMPS that She Refuses to Arbitrate Despite Demand

In February 2008 the market for ARS securities, including Plaintiff's AMPS, suddenly evaporated. FAC, ¶19-22, 25 & 30. Unhappy with WFI's inability to find a buyer for the AMPS, Plaintiff filed the Complaint on April 1, 2008 naming WFI, Morgan, two other WFI employees Movsesyan[2] and Hilken[3], and Wells Fargo & Company (WFC), the alleged parent corporation of WFI.

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[2] The FAC states that the purchase confirmation slip contained the names of both Morgan and Movsesyan and that due to this listing, and **not** any alleged wrongdoing by Movsesyan, Movsesyan has been sued. FAC, ¶¶ 8 & 77.

[3] The FAC does not allege that Hilken made any misstatements to Plaintiff or otherwise acted wrongfully.

On April 30, 2008 Defendants' counsel demanded arbitration on behalf of WFI, Morgan, Movsesyan and Hilken pursuant the Agreement's arbitration provision in a letter to Plaintiff's counsel that enclosed a copy of the Agreement. Attached Declaration of Eric G. Wallis, ¶ 2 & Exhibit A. On May 12 Plaintiff responded by: (1) refusing to arbitrate (*id*., ¶ 3 & Exh. B), and (2) filing the FAC. The FAC added, as a Fourteenth Claim, her defense to arbitration – that Morgan's failure to specifically point out the arbitration provision in the Agreement and provide a legal opinion on its meaning and consequences rendered the arbitration provision unenforceable due to "fraud." FAC, ¶¶ 104-06. This motion to compel then became necessary.

C. Summary of Argument

Plaintiff admits signing the Agreement on January 23, 2008. Without question the FAC falls within the Agreement's arbitration provision. Plaintiff's contention that the arbitration provision is revocable due to Morgan's "fraud" in failing to direct her attention to it is contrary to law. The motion to compel should be granted and the action stayed pending arbitration.

III

LEGAL ANALYSIS

A. Authority For Motion

Section 4 of the Federal Arbitration Act[4], 9 U.S.C. Section 4, provides statutory authority for this motion to compel:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that

[4] 9 U.S.C. Section 1 *et seq.*

> such arbitration proceed in the manner provided for in such agreement.

Section 3 of the FAA provides authority for staying this action pending arbitration:

> If 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…

B. The Requisites for Granting the Motion Exist

1. Requirements for Granting a Motion to Compel Arbitration

A court must grant a motion under the FAA to compel arbitration if two requisites exist: (1) a valid arbitration agreement and (2) the dispute falls within its terms. *Stern v. Cingular Wireless Corp.*, 453 F.Supp.2d 1138, 1143 (C.D. Cal. 2006).

There is no dispute that the second element exists - clearly Plaintiff's allegations that the AMPS purchases were induced by Morgan's fraud or negligence is a "dispute" between Plaintiff and these Defendants "arising out of or relating to the brokerage account or any orders or transactions therein . . . ." No genuine dispute exists whether the arbitration provision is valid.

2. No Plausible Claim for "Fraud in the Inception" Exists

a. A Written Arbitration Agreement Exists Between Plaintiff and the Moving Defendants

Plaintiff's FAC concedes that she executed the Agreement's Acknowledgement (FAC, ¶ 104); by doing she – as the Acknowledgement **expressly states** - assented to its terms.[5] *Stewart v.*

[5] That is true if the Acknowledgement is considered a separate contract – by expressly stating that it included the terms of the Agreement a valid incorporation by reference occurred. E.g., *Wolschlager v. Fidelity Nat'l Title Ins. Co.*, 111

Preston Pipeline Inc., 134 Cal.App.4th 1565, 1587, 36 Cal.Rptr.3d 901 (2005). Those terms include, of course, the arbitration provision set forth in Section 15.

Plaintiff's defense is that she was unaware the Agreement contained an arbitration provision due to "fraud in the inception" and is therefore void *ab initio*. She claims the fraud occurred because: (1) she did not read the Acknowledgement page or the Agreement and (2) Morgan failed to specifically to call the arbitration provision to her attention. See FAC, ¶¶ 106-07. But plainly neither contention creates a valid ground to refuse arbitration.

b. Under California Law[6] Plaintiff's Alleged Failure to Read the Acknowledgment or the full Agreement Does Not Bar Enforcement of the Arbitration Provision

Because a party's signing a contract manifests assent to its terms, that party's failure to actually read the contract's contents is not a defense to enforcement of its terms. *Stewart*, 134 Cal.App.4th at 1588-89. This basic principle of contract law applies when the term at issue is an arbitration clause. *Macaulay v. Norlander*, 12 Cal.App.4th 1, 6, 15 Cal.Rptr.2d 204 (1992). Plaintiff's neglect to read the Acknowledgement and request a copy of the Agreement referenced therein thus creates no basis for revoking the arbitration provision. *Id*.

This general principle is, of course, subject to an exception for fraud that prevents a signing party from becoming aware of the arbitration provision so that no contract is deemed to have existed. *Rosenthal v. Great Western Financial Securities Corp.*, 14 Cal.4th 394, 415-16, 58 Cal.Rptr.2d 875 (1996). However, to deny enforcement of a written arbitration provision on

Cal.App.4th 784, 790-91, 4 Cal.Rptr.3d 179 (2003).

6 California state law applies to general contract formation defenses including fraud. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir.), cert. denied, 535 U.S. 1112 (2002); *Olmstead v. Dell, Inc.*, 473 F.Supp.2d 1018, 1022 (N.D. Cal. 2007).

grounds of "fraud in the inception" the party seeking to disavow its promise must plead and prove that the failure to discover the arbitration provision was caused by: (1) the other party's affirmative misrepresentations or active concealment of the arbitration provision and (2) the lack of a reasonable opportunity to learn the terms of the contract before signing. *Id.*, 14 Cal.4th at 423-26. Neither exists here.

First, the FAC (confirmed by Morgan's Declaration) admits that Morgan made no misstatements concerning the Acknowledgement; to the contrary, he specifically told her that it was a document related to her securities account (into which she had just invested a not-inconsiderable $1,750,000) that she needed to sign. Having handed the Acknowledgement to her (and having previously handed her a complete copy of the Agreement), and being available to answer questions concerning it, Morgan obviously did not "actively conceal" the Agreement's terms.

Second, Plaintiff had the opportunity to read the simple one-page Acknowledgement; indeed, all she had to do was lift her eyes a quarter inch above where she signed to see language, set off from the rest by its fully-capitalized letters, informing her that the Agreement contained an arbitration provision.

c. Morgan Had No Duty to Point Out and Explain the Arbitration Provision to Plaintiff

Plaintiff's last argument is that Morgan's failure to point out and explain the arbitration provision was a breach of his "fiduciary duty" that constituted fraud by "preventing her" from

being aware of the arbitration provision that she would not have otherwise agreed to.[7] That argument is without merit.

The California Supreme Court has held that a stock broker does not have a "fiduciary obligation" to point out and explain an arbitration provision in an account agreement. *Rosenthal*, 14 Cal.4th at 425-26 (citing cases). This is consistent with the great weight of authority, including that in the Ninth Circuit. *Cohen v. Wedbush, Noble & Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988), overruled on other grounds, *Ticknor v. Choice Hotels, Inc.*, 265 F.3d 931 (9th Cir. 2001), cert. denied, 534 U.S. 1133 (2002). This principle applies even where, as here, the contract was signed after a transaction occurred (i.e., the AMPS purchase on January 17).

When a stock broker buys and sells stock for another, the broker acts as an agent. *Allen v. Todd*, 12 Cal. App. 3d 654, 658, 90 Cal. Rptr. 807 (1970). California law recognizes that a broker's duties are derived from that agency relationship. E.g., *Duffy v. Cavalier*, 215 Cal. App. 3d 1517, 1534, 264 Cal. Rptr. 740 (1990).

A stock broker is considered a special, rather than a general, agent because the broker is hired to perform a specific transaction or task – that is, to buy and sell securities. *Rhode v. Bartholomew*, 94 Cal. App. 2d 272, 278, 210 P.2d 768 (1949). Thus:

> A broker is distinguishable from an agent generally by reason of the fact that his authority is of a **special and limited** character in most respects... A broker is also distinguishable from an agent in that a broker sustains no fixed and permanent employment by, or relation to, any principal, but holds himself out for employment by the public generally, his employment in each instance being that of a special agent for a single object . . . .
> [12 Am. Jur. 2d, Brokers, § 3 at p. 635 (1997) (emphasis added).]

[7] Defendants note that any assertion Plaintiff's "fiduciary relationship" was based, in part, on her existing business relationship with the Bank is meritless – the relationship between a bank and its depositor is that of debtor-creditor, not fiduciary-beneficiary. E.g., *Price v. Wells Fargo Bank*, 213 Cal.App.3d 465, 476, 261 Cal.Rptr. 735 (1991).

Consequently, once the task a broker is employed to perform is completed – e.g., buying or selling a security – the agency, and the broker's authority and duty, terminates. See Cal. Civ. Code § 2355; *E.A. Strout Western Realty v. Gregoire*, 101 Cal. App. 2d 512, 519, 225 P.2d 585 (1950); Restatement (2d), Agency, § 386 (1957). This is consistent with the general rule that because a fiduciary relationship requires control by the fiduciary over the other's property [see *Vai v. Bank of America*, 56 Cal. 2d 329, 338, 15 Cal.Rptr. 71 (1961)], termination of control – e.g., completion of the transaction - ends the fiduciary relationship.

Plaintiff's WFI account was nondiscretionary. Morgan Dec., ¶6; see generally *Leib v. Merrill Lynch, Pierce, Fenner & Smith*, Inc., 461 F. Supp. 951, 953-54 (E.D. Mich. 1978), aff'd without opinion, 647 F.2d 165 (6th Cir. 1981). Morgan's authority to act for, and duties to, Plaintiff thus ended with the execution of the AMPS buy order. *Leib*, 461 F. Supp. at 955-56; accord *Caravan Mobile Home Sales, Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, 769 F.2d 561, 567 (9th Cir. 1985); *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F. Supp. 107, 111 (N.D. Ala. 1971), aff'd, 453 F.2d 417 (5th Cir. 1972). As one commentator stated, "In a nondiscretionary account, the relationship of agency, and any duties attached, ends when each transaction is completed. . . ." Weiss, A Review of the Historic Foundations of Broker-Dealer Liability for Breach of Fiduciary Duty, 23 J. Corp. L. 65, 111 (1997).

When Plaintiff signed the Acknowledgement the "task" Morgan had been hired for – to purchase the AMPS – had already been completed.[8] Thus, his agency had been concluded, and no fiduciary relationship between himself and Plaintiff existed when the Acknowledgment was presented. Even under Plaintiff's "fiduciary duty" theory, therefore, her argument fails.

[8] It is undisputed that when Plaintiff signed the Acknowledgement she had not given Morgan any order to sell her AMPS; thus, no agency relationship existed for that non-existent sell order.

C. The Action Should be Stayed Pending Arbitration

9 U.S.C. Section 3 requires that when arbitration is ordered the court must issue an order staying proceedings on the claims referred to arbitration. *Gutierrez v. Academy Corp.*, 967 F.Supp. 945, 947 (S.D. Tex. 1997). Consequently, concurrent with granting the notion to compel this action should be stayed against these Defendants pending arbitration.

IV
CONCLUSION

Plaintiff signed an agreement promising to arbitrate the disputes at bar. Her claim that she did not read the arbitration provision because Morgan did not expressly point it out to her does not create even a potentially viable defense to enforcement of the arbitration agreement. Accordingly, the motion to compel arbitration should be granted and this action stayed as to these Defendants pending arbitration.

DATED: June 6, 2008.

REED SMITH LLP

By /s/
Eric G. Wallis
Attorneys for Defendants

DECLARATION OF ERIC G. WALLIS

I, Eric G. Wallis, say:

1. I am a partner of the law firm of Reed Smith LLP, attorneys for Defendants.

2. On April 30, 2008 I sent to Plaintiff's counsel a written demand that she agree to arbitrate her claims against these moving Defendants, a true copy of which is attached Exhibit A.

3. On May 12, 2008 I received a response to my April 30 arbitration demand, a true copy of which is attached Exhibit B, in which Plaintiff refused to agree to arbitrate her claims.

Signed at Oakland, California on June 6, 2008. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

/s/
Eric G. Wallis