JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| ROYAL ALLIANCE ASSOCIATES, INC.,<br>Plaintiff,<br>v.<br>LORELEI MOONEY, et al.,<br>Defendants. | CV 16-2379 PA (AFMx)<br>JUDGMENT |

Pursuant to the Court's September 7, 2016, Minute Order granting the Motion to Compel Arbitration filed by defendants Lorelei Mooney, as trustee and on behalf of the Herbert and Helen Schweiger Trust dated November 5, 2002, and Robert Schmeideke (collectively "Defendants"),

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this action is dismissed without prejudice and Defendants shall recover their costs of suit.

DATED: September 7, 2016

Percy Anderson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | CV 16-2379 PA (AFMx) | Date | September 7, 2016 |
|---|---|---|---|
| Title | Royal Alliance Associates, Inc. v. Lorelei Mooney, et al. | | |

| Present: The Honorable | PERCY ANDERSON, UNITED STATES DISTRICT JUDGE | |
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| Stephen Montes Kerr | Not Reported | N/A |
| Deputy Clerk | Court Reporter | Tape No. |
| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: | |
| None | None | |

**Proceedings:** IN CHAMBERS - COURT ORDER

Before the Court is a Motion to Compel Arbitration and Request for Stay of Proceeding filed by defendants Lorelei Mooney, as trustee and on behalf of the Herbert and Helen Schweiger Trust dated November 5, 2002, and Robert Schmeideke (collectively "Defendants"). (Docket No. 35.) Plaintiff Royal Alliance Associates, Inc. ("Royal" or "Plaintiff") filed an Opposition (Docket No. 46), to which Defendants submitted a Reply (Docket No. 48). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for September 12, 2016 is vacated, and the matter taken off calendar.

## I. Background & Procedural History

Royal brought this action in response to FINRA[1] Dispute Resolution Case No. 16-02936 (the "Arbitration"). Defendants commenced the Arbitration in March 2016 against Royal, Jeffrey J. Cannella ("Cannella"), Michael W. Jones ("Jones"), and National Planning Corporation ("NPC"). Initially, the Arbitration concerned certain securities acquired by Defendants between 2004 and 2006. Collectively, Defendants invested over $2.3 million in these securities on the recommendation of a broker, Robert Tweed ("Tweed"), who was registered with NPC and another brokerage, United Securities Alliance, Inc. ("United"). Defendants allege that Tweed and United misrepresented the suitability of these investments in relation to their investment goals.

Defendants' original Statement of Claims ("SOC") describes Cannella and Jones as registered principals and representatives of United and, later, Royal. NPC is described as the securities broker-dealer through which Tweed offered the securities. Royal is described as United's successor in interest based on Royal's acquisition of United in March 2007. All of the claims asserted in the March 2016 SOC are based on conduct that occurred prior to 2007.

1/ The Financial Industry Regulatory Authority, or FINRA, is a self-regulatory organization for member firms and markets. Royal is a member firm.

On June 13, 2016, Plaintiffs filed a motion to preliminarily enjoin the Arbitration. (Docket No. 15.)

On June 27, 2016, Defendants filed an Amended SOC with FINRA alleging a direct customer relationship between Defendants and Royal (Declaration of Tim O'Keefe, Ex. 3.):

> Royal . . . acquired all of United's Customer Accounts, including those of Claimants, and other going concern assets in a transaction dated in 2006 which closed in March 2007 and thereby became (1) obligated to the Claimants as its own customers as of March of 2007 upon the assignment for its post-assignment acts and omissions described below and (2) liable as successor in interest for purposes of the claims asserted herein related to the pre-assignment acts and omissions of United.

(Amended SOC ¶ 9.) Defendants allege that, after the March 2007 transfer, Royal "consciously chose to ignore his/its/their duties to inform the Claimants, whose Customer Account Agreements it had accepted assignment of that they held unsuitable securities and recommend that they take immediate steps to sell . . . ." (Id. ¶ 54.)

On July 15, 2016, the Court denied Plaintiffs' Motion for Preliminary Injunction finding, among other things, that Plaintiff had not demonstrated either a likelihood of success on the merits or serious questions going to the merits. (Docket No. 31.) On August 8, 2016, Defendants filed the instant Motion.

## II. Legal Standard

"The [Federal Arbitration Act ("FAA")] provides that any arbitration agreement within its scope 'shall be valid, irrevocable, and enforceable,' and permits a party 'aggrieved by the alleged . . . refusal of another to arbitrate' to petition any federal district court for an order compelling arbitration in the manner provided for in the agreement." Chiron Corp. v. Ortho Diagnostic Systems, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000) (quoting 9 U.S.C. § 4). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 105 S. Ct. 1238, 1241, 84 L. Ed. 2d 158 (1985) (emphasis in original). "The court's role under the Act is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. . . . If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." Chiron Corp., 207 F.3d at 1130 (citations omitted).

In determining whether parties have agreed to arbitrate a dispute, courts apply "general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration

by resolving ambiguities as to the scope of arbitration in favor of arbitration." Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1044 (9th Cir. 2009). On the other hand, "[f]ederal substantive law governs the question of arbitrability." Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 719 (9th Cir. 1999). "As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)).

## III. Analysis

Defendants argue that there are two bases for compelling arbitration in this matter: (1) that FINRA Rule 12200 requires arbitration of a dispute when requested by the customer and (2) that Royal is bound by an agreement to arbitrate disputes between Defendants and United. A threshold issue for either theory is whether Defendants' customer accounts with United were acquired by Royal pursuant to a transfer agreement executed by United and Royal.

### A. Royal Acquired Defendants' Customer Accounts

Royal has submitted a copy of the Rights and Transfer Agreement ("Transfer Agreement") between Royal and United, dated December 29, 2006. (Declaration of Dmitry Goldin ("Goldin Decl."), Ex. A.) Pursuant to Section 2.1(a)(iii), Royal acquired United's interests in "all customer accounts and any data and documents relating thereto, including any computer data." As the Court previously noted, this language provides, without qualification, for the transfer of all customer accounts, including those of Defendants. Royal suggests that "[i]t is evident that the . . . phrase 'relating thereto' in § 2.1(a)(iii) connotes that the customer accounts being transferred are only those relating to the Transferred Representatives . . . ." (Opp. at 4.) Because the broker responsible for Defendants' accounts was not a Transferred Representative, Royal takes the position that Defendants' accounts were excluded from the transfer. This is a tortured, implausible reading of a phrase that unambiguously provides for the transfer of all customer accounts as well as any related data and documents.

#### 1. New York's Parol Evidence Rule

Section 11.3 of the Transfer Agreement provides that "[t]his Agreement shall be governed by, and construed in accordance with, the Laws of the State of New York, without regard to the conflicts of Law principles thereof." Under New York law, "[p]arol evidence—evidence outside the four corners of the document—is admissible only if a court finds an ambiguity in the contract. As a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement." Schron v. Troutman Sanders, LLP, 986 N.E.2d 430, 433 (N.Y. 2013); see also Care Travel Co., Ltd. v. Pan Am. World Airways, Inc., 944 F.2d 983, 987-88 (2d Cir. 1991) ("Under New York law, which governs the

Agreement at issue here, if a contract is unambiguous on its face, the parties' rights under such a contract should be determined solely by the terms expressed in the instrument itself 'rather than from extrinsic evidence as to terms that were not expressed or judicial views as to what terms might be preferable.'") (quoting Met. Life Ins. Co. v. RJR Nabisco, Inc., 906 F.2d 884, 889 (2d Cir. 1990)). Similarly, evidence of the parties' practical construction of a written agreement may be considered only when the writing is ambiguous. See, e.g., Continental Cas. Co. v. Rapid-American Corp., 609 N.E.2d 506, 511 (N.Y. 1993) ("Evidence of practical construction may only be referenced where the policy provisions are ambiguous."). "Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable interpretation." Brad H. v. City of New York, 951 N.E.2d 743, 746 (N.Y. 2011). "Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement and, therefore, extrinsic evidence 'may be considered only if the agreement is ambiguous.'" Id. (quoting Innophos, Inc. v. Rhodia, S.A., 882 N.E.2d 389, 392 (N.Y. 2008)).

**2. The Transfer Agreement is Not Ambiguous**

Section 11.4 of the Transfer Agreement provides that "[t]his Agreement constitutes the entire agreement between the Parties pertaining to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written, of the Parties with respect to the subject matter hereof." Accordingly, the extensive extrinsic evidence submitted by Royal[2] may be considered only if the Transfer Agreement is ambiguous. While Royal is correct that Section 2.1(a)(iii) cannot be read in isolation from the Transfer Agreement's other terms, its contention that these render Section 2.1(a)(iii) ambiguous is not persuasive.

First, Royal points out that Section B of the Recitals to the Transfer Agreement explains that "[t]he parties desire to effect a transfer of a portion of Transferor's assets . . . ." According to Royal, this "conflicts" with the transfer of all customer accounts. (See Opp. at 11.) However, to the extent that customer accounts did not comprise all of United's assets, there is no apparent conflict. In other words, the recital that only "a portion" of United's assets transferred is consistent with the term transferring all customer accounts so long as some other asset did not transfer. By emphasizing that not all Transferor Representative Contracts transferred, Royal defeats its own argument.

Second, Royal argues that the sweeping language of Section 2.1(a)(iii) is limited by Section 2.1(a)(i)(A). Section 2.1(a) provides for the transfer of three categories of "assets, properties, interests and rights," including:

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2/ For example, Royal has submitted declarations signed by its corporate counsel, Gregory M. Curley, its current CEO, Dmitry Goldin, and its Director of Advisor Support & Operations, Joseph Martinez concerning the circumstances of the transaction.

> (i) (A) the Transferor Representative Contracts relating to the Transferred Representatives and (B) trails or other payments from Product sponsors . . . ;
>
> (ii) copies or originals of all computer data, books, records, account statements, correspondence and other data and documents of every nature relating to the Transferred Representatives and their related business . . . ;
>
> (iii) all customer accounts and any data and documents relating thereto, including any computer data.

Royal contends that, "[a]s set forth in Article 2, § 2.1(a)(i)(A), the Agreement effectuated the transfer of only those customer accounts and contracts relating to 'Transferred Representatives' . . . ." (Opp. at 7.) This construction is not plausible. Article 1 of the Transfer Agreement defines Transferor Representative Contracts as "all of the independent contractor agreements between the Transferor and its Associated Persons, whether or not they are in the form of the Transferor Form Representative Contract." Transferred Representative is defined as "an Associated Person of the Transferor who has submitted to Buyer the executed U-4 and any other forms required by CRD and any applicable States for registration as an Associated Person of Buyer, and who becomes registered as an Associated Person of Buyer concurrent with or promptly subsequent to Closing." Nothing in either Section 2.1(a) or in the definitions of the terms used therein suggests that a customer account would be transferred only if the Transferor Representative Contract for the broker who solicited the account also transferred.

Third, Royal points out that, pursuant to Section 2.2(a)(i) of the Transfer Agreement, the purchase price included:

> an amount equal to five percent (5%) of the Pre-Closing Qualifying Revenue . . . ; provided, however, that this amount shall be calculated solely on the basis of those Transferred Representatives who have submitted to Buyer the executed U-4 and any other forms required by [the Central Registration Depository] and any applicable States for registration as Associated Persons of Buyer, and who become registered as Associated Persons of Buyer prior to or concurrent with the Closing . . . .

Royal argues that because "the Purchase Price was calculated based upon the Transferred Representatives, it is implausible and nonsensical that United Securities would have transferred over customer accounts from Non-Transferred Representatives, for which United Securities would receive no payment under this Purchase Price calculation." (Opp. at 12.) The Court does not agree. It is not "nonsensical" that the price paid for one asset would be included in, and determined by, the price paid for another. For instance, the percentage paid on the Transferred Representative accounts might have

been set higher than it otherwise would have been in order to cover other accounts (i.e. those associated with Non-Transferred Representatives).

Finally, Royal points to Section 2.1(b)'s "Procedures for Transfer" applicable "At Closing," which provide that:

> the Transferring Parties shall cause all accounts of the Transferred Representatives to be transferred via tape-to-tape transfer, ACAT or such other method as Buyer may reasonably determine from the Transferor and the Transferor's clearing firm to Buyer (or its designee) and Buyer's (or its designee's) clearing firm . . . .

(Section 2.1(b)(ii)(B).) It is true that there is no specific provision for the means by which any accounts other than those "of the Transferred Representatives" are to be transferred. Still, the Court does not find that a potential oversight in a section of the contract addressing how assets were to be transferred renders ambiguous a clear statement about what was to be transferred.[3] Considering the contract as a whole, the Transfer Agreement is not susceptible to more than one reasonable interpretation. Section 2.1(a)(iii) unambiguously transferred all United customer accounts to Royal.

**B. FINRA Rule 12200 Requires Arbitration When Requested by a Customer**

FINRA Code of Arbitration Procedure Rule 12200 ("FINRA Rule 12200") provides as follows:

> Parties must arbitrate a dispute under the Code if:
>
> - Arbitration under the Code is either:
>
>  (1) Required by a written agreement, or
>
>  (2) Requested by the customer;
>
> - The dispute is between a customer and a member or associated person of a member; and

[3] As the Court held in its order denying Royal's Motion for Preliminary Injunction, Royal's reliance on other district courts' constructions of the Transfer Agreement is unfounded because these courts did not consider Section 2.1(a)(iii). See Royal Alliance Associates, Inc. v. George R. Joyce, et al., No. 08-cv–02086 (D. Colo. Jan. 23, 2009); Royal Alliance Associates, Inc. v. Branch Ave. Plaza, LP, No. 1:08-cv-449 (E.D. Va. Nov. 20, 2008).

- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

FINRA Rule 12200 is an "agreement in writing" enforceable by customers under the Federal Arbitration Act. See Waterford Inv. Servs., Inc. v. Bosco, 682 F.3d 348, 353 (4th Cir. 2012). While Royal disputes Defendants' status as customers for the reasons discussed above, its Opposition does not otherwise address the applicability of FINRA Rule 12200. A person is a customer of a FINRA member for purposes of Rule 12200 if they either (1) purchase a good or service from a FINRA member or (2) have an account with a FINRA member. Citigroup Global Markets, Inc. v. Abbar, 761 F.3d 268, 275 (2d Cir. 2014). The Abbar court reasoned that "[a]n account holder has a reasonable expectation to be treated as a customer, whether or not goods or services are purchased directly from the FINRA member. Likewise, the FINRA member should anticipate that account-holders may avail themselves of the arbitration forum to dispute transactions arising from the account." Id. Here, while none of the parties appear to have thoroughly considered whether Defendants "ha[ve] an account" with Royal prior to this litigation, the Court finds no basis to deviate from Abbar. Because Defendants' customer accounts transferred from United to Royal, Defendants are customers of Royal and may invoke Rule 12200. Because this is sufficient to grant Defendants' Motion, the Court need not reach the alternative argument that Defendants may compel arbitration based upon an arbitration agreement included in their Customer Account Forms from United.

**Conclusion**

For the foregoing reasons, the Court grants in part and denies in part Defendants' Motion.[4] Specifically, Plaintiff is ordered to submit to arbitration in FINRA Dispute Resolution Case No. 16-02936.

However, because Plaintiff's only claims are resolved by this order compelling arbitration, the Court concludes that this action should be dismissed rather than stayed under 9 U.S.C. § 3. See Martin Marietta Aluminum, Inc. v. Gen. Elec. Co., 586 F.2d 143, 147 (9th Cir. 1978); Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988) (affirming trial court's dismissal of claims referred to arbitration). The Court will enter a Judgment consistent with this order.

IT IS SO ORDERED.

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[4] The Court has not relied on any evidence to which an evidentiary objection has been filed. Accordingly, the parties' Evidentiary Objections (Docket Nos. 46-2, 50, 51) are overruled as moot.