UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 16-909 JGB (KKx)**	Date	June 16, 2016
Title	***COR Clearing, LLC v. Laura B. LoBue et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order GRANTING Plaintiff COR Clearing, LLC's Motion for Preliminary Injunction (Doc. No. 9) (IN CHAMBERS)

Before the Court is Plaintiff COR Clearing, LLC's Motion for a Preliminary Injunction. (Doc. No. 9.) The Court finds this matter appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After consideration of the papers filed in support of and in opposition to the Motion, the Court GRANTS the Motion. The June 20, 2016 hearing is VACATED.

I. BACKGROUND

A. Procedural History

On May 4, 2016, Plaintiff COR Clearing, LLC ("Plaintiff" or "COR Clearing") filed a Complaint for declaratory and injunctive relief against Laura B. LoBue.[1] (Complaint, Doc. No. 1.) Plaintiff seeks to enjoin LoBue from pursuing an arbitration against it before the Financial Industry Regulatory Authority ("FINRA"). (Id.)

On May 6, 2016, Plaintiff filed a Motion for Preliminary Injunction. ("Motion," Doc. No. 9.) In support of the Motion, Plaintiff submitted the declaration of its counsel Gayle Jenkins ("Jenkins Decl.," Doc. No. 9-1), an accompanying exhibit,[2] and the declaration of Plaintiff's Deputy Chief Compliance Officer Lisa Bridgeford ("Bridgeford Decl.," Doc. No. 9-3).

[1] This case is related to another matter currently before this Court, COR Clearing, LLC v. Sheik Fidrosh Kahn et al., Case No. EDCV 15-668 JGB (KKx).

[2] Plaintiff filed the exhibit under seal, after being granted leave to do so by the Court. (Doc. No. 19.)

On May 19, 2016, LoBue filed an Opposition to the Motion. (Doc. No. 13.) In support, LoBue submitted her own declaration ("LoBue Decl.," Doc. No. 13-1), a declaration by her counsel Richard Nervig ("Nervig Decl.," Doc. No. 13-2), and three accompanying exhibits.

On May 27, 2016, Plaintiff filed a Reply. (Doc. No. 17.)

B. Factual Background

The submissions by the parties establish the following facts. Plaintiff – a member of FINRA – is a national securities clearing firm that provides clearing and administrative services to its customers. (Bridgeford Decl. ¶ 2.) From August 2013 to October 2014, persons could become Plaintiff's customers by either: (1) being a customer of an Independent Broker/Dealer ("IBD") with whom Plaintiff had a clearing relationship or (2) opening a "self-directed account" with Plaintiff's "Equity Desk." (Id. ¶¶ 5-7.) Moreover, Plaintiff provides for custodying of clients' securities and other investments. (Id. ¶ 9.) A search of Plaintiff's records shows LoBue never opened any accounts with Plaintiff, nor had Plaintiff custody any documents or share certificates for her. (Id. ¶ 10.)

On April 14, 2016, LoBue filed a Statement of Claim against Plaintiff, securities broker-dealer Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), and securities broker-dealer Ameritas Investment Corp. ("Ameritas") (collectively, "Respondents") with FINRA to commence an arbitration there.[3] (Jenkins Decl., Ex. A ("Statement of Claim").) FINRA is a non-governmental, "self-regulatory agency that has the authority to exercise comprehensive oversight over all securities firms that do business with the public." Goldman, Sachs & Co. v. City of Reno, 747 F.3d 733, 737 (9th Cir.) cert. denied sub nom. City of Reno, Nev. v. Goldman, Sachs & Co., 135 S. Ct. 477 (2014) (citations omitted). To exercise this oversight, FINRA has instituted rules with which its members, including Plaintiff, agree to comply. See FINRA Bylaws, art. IV, § 1(a). One of these rules provides that FINRA members and their customers "must arbitrate a dispute . . . [i]f [a]rbitration . . . [is] [r]equested by the customer; [t]he dispute is between a customer and a member . . . ; and [t]he dispute arises in connection with the business activities of the member . . . ." See FINRA Rule 12200.

In the Statement of Claim, LoBue asserts three claims against Respondents: (1) breach of contract; (2) negligence; and (3) aiding and abetting. (Statement of Claim at 14-16.) LoBue's claims against Plaintiff arise from allegations that LoBue's investment advisor, Abida Khan, purchased shares of stock in VGTEL, Inc. ("VGTL") on behalf of LoBue without her authorization, through LoBue's accounts at Merrill Lynch. (Id. at 1-9.) LoBue alleges these purchases were fraudulent because the shares were "not a legitimate investment" and were instead "dominated, manipulated and controlled" by Khan, recidivist securities violator Edward Durante (a/k/a Ted Wise), and Plaintiff's employees. (Id. at 9-11.) LoBue alleges Durante maintained various accounts in the name of various corporations with Plaintiff and held numerous shares of VGTL in these accounts. (Id. at 5.) LoBue alleges Plaintiff's employees

[3] The arbitration is styled Laura B. LoBue v. Ameritas Investment Corp., COR Clearing, LLC and Merrill Lynch, Pierce, Fenner & Smith, Inc., FINRA Case No. 16-01074. (Compl. ¶ 1.)

negligently allowed Durante to "dump" VGTL stock "onto unsuspecting investors like LoBue." (Id. at 11.)

Plaintiff argues that LoBue is not a "customer" within the meaning of FINRA – and as such Plaintiff is not subject to FINRA arbitration – because (1) LoBue never had an account with Plaintiff, and (2) LoBue never had Plaintiff custody any documents or share certificates for her. (Mot. at 10.) Moreover, Plaintiff argues it never executed an arbitration agreement with LoBue. (Id. at 6.) Accordingly, Plaintiff seeks an order from this Court enjoining the FINRA arbitration. (Id. at 12.)

II. LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." Munaf v. Geren, 553 U.S. 674, 690 (2008) (citations omitted). A preliminary injunction "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Towery v. Brewer, 672 F.3d 650, 657 (9th Cir. 2012). The Ninth Circuit has adopted a "sliding scale" test for preliminary injunctions. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. Id. For example, "serious questions" as to the merits of a case, combined with a showing that the hardships tip sharply in the plaintiff's favor, can support the issuance of an injunction, assuming the other two elements of the Winter test are also met. Id.

III. DISCUSSION

Plaintiff seeks a preliminary injunction that would enjoin LoBue from pursuing the FINRA arbitration. The Court addresses whether Plaintiff has satisfied the requirements for preliminary injunctive relief below.

A. Likelihood of Success on the Merits

1. Applicable Law

As a member of FINRA, Plaintiff has agreed to comply with its rules, which includes the submission of certain disputes to a panel of FINRA arbitrators. FINRA Rule 12200 provides in pertinent part that its members must arbitrate a dispute if: (1) it is requested by a "customer"; (2) the dispute is between "a customer and a member or associated person of a member"; and (3) "the dispute arises in connection with the business activities of the member . . . ." A "'customer' is a non-broker and non-dealer who purchases commodities or services from a FINRA member in the course of the member's FINRA-regulated business activities, i.e., the member's investment banking and securities business activities." Goldman, Sachs & Co. v. City of Reno,

747 F.3d 733, 741 (9th Cir.), cert. denied sub nom. City of Reno, Nev. v. Goldman, Sachs & Co., 135 S. Ct. 477 (2014).

Arbitration is a matter of contract and a party cannot be required to submit to arbitration a dispute which it has not agreed to so submit. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002). "The question of whether the parties have agreed to submit a particular dispute to arbitration is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." Id. The Ninth Circuit has held that courts – not FINRA – determine the arbitrability of disputes brought pursuant to FINRA Rule 12200. City of Reno, 747 F.3d at 747. The Court addresses the arbitrability of LoBue's claims against Plaintiff below.

2. The Parties' Contentions

Plaintiff argues LoBue was not its "customer," for purposes of FINRA Rule 122000 because she never opened any accounts with Plaintiff or received any services from Plaintiff. (Mot. at 9.)

LoBue concedes she never opened any formal accounts with Plaintiff. (Opp. at 8.) Nonetheless, LoBue contends she was Plaintiff's "customer" under FINRA Rule 122000 because "the VGTL stock purchased in her Merrill [Lynch] account ultimately came from COR because the VGTL stock which was ultimately sold or dumped upon her came from [Durante's] accounts maintained and serviced at COR and via trades which were processed with the assistance of COR personnel and [the] COR trading department." (Id. at 8.) Although unclear, LoBue appears to argue she was a "customer" of Plaintiff because the VGTL stock at issue was "ultimately purchased from accounts maintained at COR [Clearing]."[4] (Id. at 14.) LoBue does not specify, however, whether Plaintiff's platform was used to purchase the VGTL stock.

Plaintiff replies that LoBue cannot be considered its "customer" simply because she "purchased shares of VGTL that may have been traded on COR Clearing's platform." (Reply at 8.) Moreover, Plaintiff notes that "[a]ccepting [LoBue]'s interpretation of the term 'customer' would allow an individual who purchased a share of a stock to bring an arbitral claim against any FINRA member whose platform also processed that stock." (Id.) Because Plaintiff and LoBue "did not conduct business directly with each other, nor did either the buyer or seller conduct a transaction with the other's representative in the market," Plaintiff argues LoBue was not its "customer." (Id. at 9.)

[4] LoBue also attaches an April 26, 2016 letter by FINRA stating it has served LoBue's Statement of Claim on Respondents and that FINRA rules "require [Plaintiff] to arbitrate this dispute." (Nervig Decl., Ex. A.) LoBue claims the letter amounts to an opinion by FINRA that Plaintiff must arbitrate its dispute with LoBue and contends the Court must defer to this "interpret[ation] of [FINRA's] own rules." (Opp. at 7-8.) The Court is unpersuaded by LoBue's argument. The letter appears to be no more than an order that Plaintiff respond to LoBue's Statement of Claim. In any case, "[t]he question of whether the parties have agreed to submit a particular dispute to arbitration is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).

3. Analysis

The record before the Court indicates LoBue was not Plaintiff's "customer," for purposes of FINRA Rule 12200. The Ninth Circuit has defined a "customer," under FINRA Rule 12200, as a "non-broker and non-dealer who purchases commodities or services from a FINRA member in the course of the member's FINRA-regulated business activities." City of Reno, 747 F.3d at 747. Here, the parties do not dispute that LoBue did not open any accounts with Plaintiff or receive any services from Plaintiff. Although LoBue contends the VGTL stock at issue was at some point processed by Plaintiff and its employees in connection with Durante's account with Plaintiff, she does not make clear whether she used Plaintiff's trading platform to purchase it or argue she purchased it directly from Plaintiff. In fact, LoBue does not make clear or present any evidence regarding Plaintiff's role, if any, in the purchase of the VGTL stock. Rather, LoBue herself acknowledges the stock was purchased from Durante, using LoBue's Merrill Lynch account. (See Statement of Claim at 1-9.)

Hence, because LoBue never opened her own account with Planitiff, never used Plaintiff to custody any documents or share certificates for her, and never used Plaintiff's trading platform to purchase stocks or other commodities, she was not a "customer," as that term is defined for purposes of FINRA arbitrations. See City of Reno, 747 F.3d at 747. Accordingly, Plaintiff is likely to succeed in showing that it cannot be compelled to arbitrate the claims brought by LoBue in the Statement of Claim.

B. Likelihood of Irreparable Harm

Having found in favor of Plaintiff as to the likelihood of success on the merits, the Court likewise finds that Plaintiff will suffer irreparable harm if it is forced to participate in an arbitration where the disputes at issue are not subject to an agreement to arbitrate. See Herbert J. Sims & Co. v. Roven, 548 F. Supp. 2d 759, 766 (N.D. Cal. 2008) (finding a plaintiff would suffer irreparable harm if forced to arbitrate a dispute not subject to arbitration because it would have "no adequate remedy at law to recover the monetary and human capital it would expend defending itself in arbitration"); see also Goldman Sachs & Co. v. Becker, No. C 07 01599 WHA, 2007 WL 1982790, at *7 (N.D. Cal. July 2, 2007) (finding that a party will suffer irreparable harm if arbitration is not stayed); Credit Suisse Sec. (USA) LLC v. Sims, No. CIV.A. H-13-1260, 2013 WL 5530827, at *3 (S.D. Tex. Oct. 4, 2013) ("Plaintiffs will suffer irreparable harm if they are forced to participate in an arbitration where the dispute is not subject to an agreement to arbitrate"); Monavie, LLC v. Quixtar Inc., 741 F. Supp. 2d 1227, 1242 (D. Utah 2009) ("the prospect of defending arbitration proceedings as to issues [plaintiffs] did not agree to arbitrate constitutes 'irreparable harm' warranting preliminary injunctive relief"); Chase v. Manhattan Bank USA, N.A. v. Nat'l Arbitration Counsel, Inc., No. 3:04-cv-1205, 2005 WL 1270504, at *4 (M.D. Fla. May 27, 2005) ("being compelled to arbitrate a claim in the absence of an agreement to arbitrate that claim constitutes an irreparable injury").

C. The Balance of the Equities

The balance of the equities favors Plaintiff. Assuming the Court's ruling granting the injunction is erroneous, LoBue's ability to arbitrate this dispute would only be delayed, not

precluded. See Monavie, LLC, 741 F. Supp. 2d at 1242 ("If the [plaintiffs] ultimately prevail on the issue of arbitrability, [defendant] will have lost no "bargained-for contractual rights to arbitration" because it had none. If [defendant] ultimately prevails on that issue, the preliminary injunction will be dissolved, and [defendant] may proceed to exercise those rights.").

Further, in light of Plaintiff's strong showing of a substantial likelihood that the underlying dispute is not arbitrable, and that irreparable injury flows from that forced arbitration, the harm to Plaintiff clearly outweighs any harm to LoBue. See Credit Suisse Sec. (USA) LLC, 2013 WL 5530827, at *4 (finding the balance of equities tipped in the plaintiff's favor where plaintiff demonstrated a substantial likelihood of success that it could not be forced to submit an underlying dispute to FINRA arbitration); see also Morgan Keegan & Co. v. Shadburn, 829 F. Supp. 2d 1141, 1153 (M.D. Ala. 2011) (same). Consequently, the balance of hardships weighs in Plaintiff's favor.

D. The Public Interest

The Federal Arbitration Act reflects "a liberal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). However, this policy is inapposite where the question before the court is whether a particular party is bound by an arbitration agreement. Comer v. Micor, 436 F.3d 1098, 1101 n. 11 (9th Cir. 2006) citing Fleetwood Enters, Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002) ("[The] federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties; instead 'ordinary contract principles determine who is bound.'").

Rather, "[a]llowing an arbitration to proceed without an agreement to arbitrate does not serve the public interest." Berthel Fisher & Co. Financial Servs. v. Frandino, No. CV 12-02165 PHX (NVWx), 2013 WL 2036655 at *8 (D. Ariz. May 14, 2013); see also Berthel Fisher & Co. Fin. Servs. v. Larmon, No. CIV. 11-889 ADM/JSM, 2011 WL 3294682, at *8 (D. Minn. Aug. 1, 2011) aff'd, 695 F.3d 749 (8th Cir. 2012) ("Public confidence in arbitration would be undermined if a party could be compelled to arbitrate without its consent"). Accordingly, the Court finds that the public interest weighs in favor of enjoining LoBue from pursuing an arbitration before FINRA.

IV. CONCLUSION

The Court finds that Plaintiff has made a clear showing that it is likely to succeed on the merits; that it is likely to suffer irreparable harm in the absence of an injunction; that the balance of equities tips in its favor; and that an injunction is in the public interest. Plaintiff's Motion for Preliminary Injunction is GRANTED. (Doc. No. 9.)

Defendant Laura B. LoBue is hereby ENJOINED from pursuing the arbitration brought before the Financial Industry Regulatory Authority styled Laura B. LoBue v. Ameritas Investment Corp., COR Clearing, LLC and Merrill Lynch, Pierce, Fenner & Smith, Inc., FINRA Case No. 16-01074.

The June 20, 2016 hearing is VACATED.

IT IS SO ORDERED.