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MONEX DEPOSIT COMPANY and
MONEX CREDIT COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT

(SOUTHERN DIVISION – SANTA ANA)

MONEX DEPOSIT COMPANY, et al.,

Plaintiffs,

vs.

JASON GILLIAM, et al.,

Defendants.

AND RELATED COUNTECLAIMS.

Case No. 8:09-CV-00287-JVS-RNBx

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND TO STAY COUNTERCLAIMS

Date: May 18, 2009
Time: 1:30 p.m.
Location: Courtroom 10C

The Hon. James V. Selna

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Monex Deposit Company and Monex Credit Company (collectively, "Monex") seek an order compelling arbitration and staying the counterclaims of defendant Jason Gilliam ("Gilliam"), pursuant to 9 U.S.C. §§ 3–4. All of Gilliam's counterclaims for trading losses are subject to binding arbitration under two March 24, 2008, account agreements that govern all disputes arising out of defendants' transactions with Monex. Each account agreement, both of which Gilliam signed, contained the exact same arbitration terms. Judge David O. Carter of this court, in February, enforced Monex arbitration agreements that are identical, in all relevant clauses, to those between Gilliam and Monex. *Cronin v. Monex Deposit Co.*, No. SACV 08-1297 DOC (MLGx), 2009 WL 412023, at *9 (C.D. Cal. Feb. 17, 2009). Monex's claims against defendants are not affected by the arbitration agreement. The Court should, under well-established law, sever Gilliam's counterclaims and send them to binding arbitration.

II. STATEMENT OF FACTS

Monex Deposit Company ("MDC") deals in precious metals. (*See* Mar. 20, 2009 Decl. of Louis Carabini ("Carabini Decl."), Dkt. 13, ¶ 4.) Its affiliate, Monex Credit Company ("MCC"), lends money to customers for their purchases of metals from MDC. (*Id.* ¶¶ 5, 7.) Both companies are located in Newport Beach, California. (*Id.* ¶¶ 3, 6.)

A. The Atlas Account Customer Agreements and Arbitration Clauses.

On March 25, 2008, Richard and Jason Gilliam opened their Atlas Account with Monex. (Decl. of Neil A. Goteiner In Supp. of Mot. To Compel Arbitration and to Stay Countercls. ("Goteiner Decl."), Ex. A at 14, 30.)[1] Opening an Atlas

[1] All citations to exhibits are to exhibits to the Declaration of Neil A. Goteiner In Support of Motion to Compel Arbitration and To Stay Counterclaims ("Goteiner Decl.") unless otherwise indicated. Pin citations to pages of Exhibit A, the Customer Agreements, are to the original pagination of the Agreements.

Account required signing two agreements: (1) a Purchase and Sale Agreement with MDC and (2) a Loan, Security and Storage Agreement with MCC (collectively, the "Customer Agreements.") (*See* Ex. A.)

Here, the parties repeatedly agreed in writing that arbitration would govern any and all disputes arising out of transactions pursuant to the Customer Agreements. For example, the following language is contained in Section 15.11 of the MDC Purchase and Sale Agreement:

> The parties agree that any and all disputes, claims or controversies arising out of or relating to any transaction between them or to the breach, termination, enforcement, interpretation or validity of the Agreement**, including the determination of the scope or applicability of this agreement to arbitrate, shall be subject to the terms of the Federal Arbitration Act and shall be submitted to final and binding arbitration before JAMS**, or its successor, in Orange County, California, in accordance with the laws of the State of California for agreements made in and to be performed in California.

(Ex. A at 9, § 15.11 [emphasis added].) The remainder of that subsection explains in great detail the additional terms governing arbitration. (*See id.* at 9–12.) The Loan, Security and Storage Agreement with MCC contains the same arbitration language. (*Compare id.* at 9–12, § 15.11 [MDC contract] to *id.* at 24–27, § 31 [MCC contract].)

In addition to the above discussion in both account agreements, there is bold language immediately above the signature block in both the MDC and MCC account agreements which states:

> **I have carefully read and understand the foregoing. I understand that I am agreeing to submit all disputes,**

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> **claims and controversies arising out of or related to, my transactions with [Monex] or this agreement to binding arbitration before JAMS . . . I understand that by agreeing thereto I am also agreeing to . . . give up my rights to a jury trial of any claims.**

(Ex. A at 14, § 16(n) [MDC contract], and at 29, § 36(n) [MCC contract] [bold in originals].) On March 25, 2008, Jason Gilliam and his father signed the agreements. (*Id*. at 14, 30)

B. The Gilliams' Losses.

In conjunction with his father Richard, and pursuant to the Customer Agreements used to open their Atlas Account, Jason Gilliam invested in precious metals with Monex. (Carabini Decl. ¶ 10.) In 2008, he and his father lost a total of approximately $32,600 in transactions made under the Customer Agreements. (*Id.* ¶ 11.) The Gilliams asked for a payment of $5,580 from Monex to cover a portion of the losses for which they said Monex was to blame. (*Id.*) Monex offered them half that amount, $2,790. (*Id.*) The Gilliams declined the offer. (*Id.*)

C. Jason Gilliam's Counterclaims.

On March 15 of this year, Gilliam filed his Answer and, in a separate document, his counterclaims, asserting six causes of action against Monex, all arising out Atlas Account transactions with Monex. The counterclaims allege RICO violations, breach of fiduciary duty, and negligence, and seek declaratory relief arising out of alleged failure to register as an investment adviser, illegal contract, and fraud in the inducement. (Countercl., Dkt. 6.) He also requests damages, treble damages, costs, and attorneys' fees.

Monex's attorneys invited Gilliam to dismiss the counterclaims and file in arbitration because all of his allegations arise from his transactions with Monex pursuant to the Customer Agreements and therefore are subject to the twice-stated

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and signed arbitration clauses. (Goteiner Decl. ¶ 4.) Gilliam declined, requiring Monex to file this motion. (*Id*. ¶¶ 4–9.)

III. ARGUMENT

A. The Court's Only Task On This Motion Is To Determine Whether There Is A Valid Arbitration Agreement Between Gilliam and Monex, and There Is.

In considering whether to compel arbitration, a court may only inquire as to whether: (1) there is an agreement to arbitrate; (2) there are arbitrable claims; and (3) there has been a waiver of the right to arbitrate by the moving party or other defense to arbitration. *See Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994); *see also Chiron Corp. v. Ortho Diagnostic Sys., Inc*., 207 F.3d 1126, 1130 (9th Cir. 2000).

Accordingly, an application for an order compelling arbitration "should be granted unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Cione v. Foresters Equity Servs., Inc*., 58 Cal. App. 4th 625, 642, 68 Cal. Rptr. 2d 167, 177 (Cal. Ct. App. 1997). Any doubts or ambiguity concerning the existence or applicability of an arbitration agreement to a particular dispute should be settled in favor of arbitration. *Id*.; *see also Vianna v. Doctors Mgmt.*, 27 Cal. App. 4th 1186, 1189, 33 Cal. Rptr. 2d 188, 189 (Cal. Ct. App. 1994); *Hayes Children Leasing Co. v. NCR Corp.*, 37 Cal. App. 4th 775, 788, 43 Cal. Rptr. 2d 650, 658 (Cal. Ct. App. 1995).

Additionally, under settled case law interpreting the Federal Arbitration Act, 9 U.S.C. §§ 1–16 ("FAA"), courts must enforce arbitration clauses in private contracts involving maritime and interstate commerce. 9 U.S.C. § 2; *see also Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ*., 489 U.S. 468, 472, 109 S. Ct. 1248, 1252 (1989). Enforcement of arbitration clauses under the FAA is important because the Act reflects "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies

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to the contrary." *Perry v. Thomas*, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987).[2]

1. The Arbitration Agreements Here Are Presumptively and Actually Valid.

Arbitration agreements, like those at issue here, are presumptively valid under the FAA:

> 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 which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . **The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration** in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added).

Here, there is no question that the Gilliams entered into contracts with Monex that included valid, enforceable agreements to arbitrate any disputes "arising out of or relating to any transaction between them or to the breach, termination, enforcement, interpretation or validity of the Agreement, including the

[2] The arbitration agreement before Judge Carter in *Cronin v. Monex Deposit Co.*, No. SACV 08-1297 DOC (MLGx), 2009 WL 412023 (C.D. Cal. Feb. 17, 2009), applied the California Arbitration Act. The CAA and the FAA, however, are similar in the strong presumptions in favor of enforcement of arbitration provisions.

determination of the scope or applicability of this agreement to arbitrate." (*E.g.*, Ex. A at 9, § 15.11.) The Customer Agreements were signed by Gilliam and his father. (*Id.* at 14, 30.) Indeed, Gilliam concedes their existence in his counterclaims and merely contests their enforceability. (Countercl. at 6:16–20.)

B. The Arbitrator Decides Whether Gilliam's Counterclaims Are Arbitrable.

Because the Customer Agreements are valid and enforceable, the express terms of the arbitration clauses require the arbitrator, and not a court, to resolve issues relating to arbitrability. Where the parties clearly and unmistakably assign determination of an arbitration agreement's scope to the arbitrator, the court must allow the arbitrator to decide that issue. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944–45, 115 S. Ct. 1920, 1924 (1995); *see also Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997) (arbitration clause "arising out of or relating to" means arbitrator determines scope of clause).

Here, the arbitration clauses provide that disputes over the "interpretation or validity of this Agreement, including the determination of the scope or applicability of this agreement to arbitrate shall be submitted to final and binding arbitration." (*E.g.*, Ex. A at 9, § 15.11(a) [Purchase and Sale Agreement].) Thus the agreements on their face require disputes over the scope of the arbitration clauses to be submitted to arbitration.

JAMS rules, which the arbitration clauses expressly incorporate by reference, similarly provide that the arbitrator determines the scope of arbitrability.[3] (*See id.* at 10, § 15.11(d), and at 25, § 31.4 [clauses incorporating JAMS rules].) Courts enforce such rules "where the parties' agreement to arbitrate includes an

[3] Rule 11(c) of JAMS Comprehensive Arbitration Rules provides: "Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." (Ex. B.)

agreement to follow a particular set of arbitration rules . . . that provide for the arbitrator to decide arbitrability." *Poponin v. Virtual Pro, Inc.*, No. C 06-4019 PJH, 2006 WL 2691418, at *9 (N.D. Cal. Sept. 20, 2006).[4]

1. The Arbitration Clauses Cover Gilliam's Counterclaims.

Here, the arbitration clauses require arbitration of "any and all disputes, claims or controversies arising out of or relating to any transaction" between the Gilliams and Monex. (*E.g.*, Ex. A at 9, § 15.11(a).) The Honorable David O. Carter of this court recently interpreted identical arbitration language contained in a Monex customer agreement and ordered arbitration. *Cronin,* 2009 WL 412023, at *9. There, the court considered the applicability of the arbitration clause to transactions the plaintiff claimed were pursuant to a later oral agreement — more challenging facts than presented here. *Id*. at *5. Judge Carter concluded the arbitration language was "extremely broad" and that "the plain language of the contract clearly and unmistakably indicates that the arbitrator must decide the scope and applicability of the arbitration clause to the parties' dispute." *Id.* at *6. The court granted the Monex parties' motion to compel arbitration of not only claims related to the oral agreement, but also claims of fraud, breach of contract, and negligence related to the underlying written agreements.

Nothing in Gilliam's counterclaims takes his allegations outside of the reach of the arbitration agreement. The counterclaims variously purport to: (1) challenge the validity of the Customer Agreements based on 15 U.S.C. § 80b-15, fraudulent inducement and illegality of contract; and (2) seek damages based on purported

[4] *See also Packeteer Inc. v. Valencia Sys., Inc*., No. C-06-07342 RMW, 2007 WL 707501, at *2 (N.D. Cal. Mar. 6, 2007) (finding "that because it incorporates the rules of the American Arbitration Association, the agreement to arbitrate is sufficiently broad as to give the arbitrator the authority to determine arbitrability of issues."); *Anderson v. Pitney Bowes, Inc*., No. C 04-4808 SBA, 2005 WL 1048700, at *2–*4 (N.D. Cal. May 4, 2005) (citing with approval *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 557, 21 Cal. Rptr. 3d 322, 329 (Cal. Ct. App. 2004) (holding that clause specifying that arbitration would be "in accordance with the AAA Commercial Arbitration Rules" constituted clear and unmistakable evidence that parties intended arbitrator rather than court determine arbitrability)).

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breach of fiduciary duty, negligence, and violations of RICO statutes. But regardless of how creatively Gilliam tries to cast his claims against Monex, what is abundantly clear is that they all hinge on the Gilliams' investments and transactions made pursuant to the Customer Agreements. For example, one counterclaim asserts that Monex's alleged RICO violations caused him to "rel[y] on counterdefendants' advertisements, promotional activities, and financial advice, to invest money with counterdefendants only to end up losing everything . . . ." (Countercl. ¶ 12.) Similarly, Gilliam's request for declaratory relief under 15 U.S.C. § 80b-15 asserts that "Counterdefendants acted as Jason Gilliam's investment advisors, and actively lobbied, encouraged, and advised him to make leveraged trades in their commodities." (*Id*. ¶ 14.)

Such direct challenges to the Customer Agreements, arising as they do out of losses incurred on investments the Gilliams made pursuant to those agreements, must be arbitrated in the first instance. *See, e.g.*, *Cronin*, 2009 WL 412023, at *6. As the Supreme Court has stated, "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46, 126 S. Ct. 1204, 1209 (2006). Even challenges based on purported violations of federal statutes must be arbitrated. *See, e.g.*, *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 221, 108 S. Ct. 2332, 2335 (1987) ("RICO claim is also arbitrable under the Arbitration Act."). Plainly, all of Gilliam's claims are arbitrable. Even if Gilliam argues to the contrary, the claims must go the arbitrator because the parties expressly reserved that issue for the arbitrator to decide, not a court.

C. The Court Must Stay The Counterclaims Pending the Parties' Arbitration.

The FAA requires that actions subject to arbitration be stayed pending resolution in the arbitration forum:

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> 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, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. As discussed above, the dispute raised in the counterclaims remains properly arbitrable pursuant to the parties' agreements. "If the issues in a case are within the reach of the agreement, the district court has no discretion under [9 U.S.C.] section 3 to deny the stay." *Hornbeck Offshore (1984) Corp. v. Coastal Carriers Corp.*, 981 F.2d 752, 754 (5th Cir. 1993). Therefore, this Court must stay the counterclaims in favor of the parties' arbitration.

D. The Court Should Sever Gilliam's Arbitrable Counterclaims From Monex's Claims.

Under the FAA, and case law interpreting it, claims that are arbitrable can be severed from other claims, even if judicial "inefficiencies" would result. In *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217–21, 105 S. Ct. 1238, 1240–42 (1985), the Supreme Court considered whether arbitrable claims, and federal claims that the defendant did not contest were properly before the district court, could be tried separately before an arbitrator and before the court, respectively. The Supreme Court concluded that "the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a

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motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id*. at 217.[5]

There is no reason to divert from well-established doctrine requiring the Court to sever defendants' account-based claims and send them to arbitration, while allowing Monex's claims grounded in defendants' extortion scheme to proceed in this court.

IV. CONCLUSION

For the reasons stated, Monex asks the Court to compel arbitration of Gilliam's counterclaims and to stay those counterclaims pending arbitration.

Dated: April 21, 2009

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By:/s/ Neil A. Goteiner
Neil A. Goteiner

Attorneys for Plaintiffs and Counter Defendants MONEX DEPOSIT COMPANY and MONEX CREDIT COMPANY

[5] Here, there is not even the possibility of inefficiency since Monex's complaint and the injunctive relief against Gilliam's extortion and defamation scheme, including his fraudulent website allegations of firm-wise fraud by Monex, have nothing to do with his counterclaims against Monex.

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