UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
at LEXINGTON

CIVIL ACTION NO. 5:11-CV-352-KKC

MORGAN KEEGAN & COMPANY, INC.

PLAINTIFF

v.

MEMORANDUM OPINION AND ORDER

ROBERT RAS

DEFENDANT

* * * * * * * * * * * * * * *

This matter is before the Court on the motion for preliminary injunction filed by Morgan Keegan & Company, Inc. [DE 3]. Morgan Keegan seeks to enjoin Defendant Robert Ras from pursuing his claims against Morgan Keegan in an arbitration before FINRA, styled *Robert Ras v. Morgan Keegan & Company, Inc.*, FINRA Dispute Resolution Arbitration No. 11-02322. Morgan Keegan argues that it is not subject to FINRA arbitration with Defendant because he was never a customer of Morgan Keegan. The Court has reviewed the parties' briefs and the matter is ripe for a decision.

For reasons stated in this opinion, the Court grants the motion for preliminary injunction.

I. FACTUAL BACKGROUND

Robert Ras sought to supplement his retirement income by investing in the Regions Morgan Keegan High Income Fund ("RMK Fund"). After visiting Morgan Keegan's website and reading the prospectus, Mr. Ras invested $34,000 in the RMK Fund through his local broker, Lexington Investment Company. When Mr. Ras's investment in the RMK Fund began to

decline, his broker at Lexington Investment Company contacted Morgan Keegan's local office. The broker was told "that everything was fine and that there was nothing out of the ordinary with the RMK Funds." [DE 10]. Subsequently, Mr. Ras's investment in the fund lost approximately $27,046.48. [DE 10].

In June 2011, Mr. Ras filed a Statement of Claim initiating arbitration proceedings before the Financial Industry Regulatory Authority ("FINRA") against Morgan Keegan. FINRA is a self-regulatory organization under the Securities and Exchange Act of 1934 and "has authority to, *inter alia*, create and enforce rules for its members in order to provide 'regulatory oversight of all securities firms that do business with the public.'" *Wachovia Bank v. VCG Special Opportunities Master Fund*, __ F.3d __, No. 10-1648-cv, 2011 WL 5110122 at *7 (2d Cir. Oct. 28, 2011) (quoting Securities and Exchange Commission Release No. 34-56145, 72 Fed. Reg. 42169, 42170 (Aug. 1, 2007)). FINRA was created in 2007 through a consolidation of the National Association of Securities Dealers, Inc. ("NASD") [1] and the regulatory arm of the New York Stock Exchange Group, Inc. *Id.*

Morgan Keegan had until August 5, 2011 to respond to the FINRA Statement of Claim. On August 4, 2011, Morgan Keegan filed a motion for preliminary injunction in the District Court for the Western District of Kentucky. [DE 3]. On November 1, 2011, the case was *sua sponte* transferred to the Eastern District of Kentucky.

[1] Authority arising under the NASD Code governs and guides the interpretation of the FINRA Rules to the extent that there was no meaningful change from the NASD Code. The relelvant rule, Rule 12200, does not materially differ from NASD Rule 10301. *See J.P. Morgan Sec. Inc. v. La Citizens Prop. Ins. Corp.*, 712 F.Supp.2d 70, 72 n. 45 (S.D.N.Y. 2010).

II. DISCUSSION

A. Preliminary Injunction Standard

A preliminary injunction is an extraordinary remedy, which should be granted only if the moving party carries its burden of proving that the circumstances clearly demand it. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). This Court's decision on whether to issue the injunction requires balancing four factors: (1) the likelihood that Morgan Keegan will succeed on the merits; (2) whether Morgan Keegan will suffer irreparable harm if the injunction does not issue; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the injunction advances the public interest. *Jones v. Caruso*, 569 F.3d 258, 270 (6th Cir. 2009). These four considerations are "factors to be balanced, not prerequisites that must be met." *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003). If there are no disputed factual issues and the primary issues are questions of law, no hearing is required. *Certified Restoration Dry Cleaning Network v. Tenke Corp.*, 511 F.3d 535, 552 (6th Cir. 2007). Here, the material facts are not in dispute and the Court declines to hold a hearing.

Morgan Keegan argues that it did not agree to FINRA Arbitration with Mr. Ras, because he was never a customer of Morgan Keegan. [DE 3]. Mr. Ras argues that he was a customer of Morgan Keegan under a broader definition customer. [DE 9].

B. ANALYSIS

This dispute is virtually identical to a case recently decided in the Middle District of Alabama. *See Morgan Keegan & Co. v. Shadburn*, No. 2:11-CV-624-WKW, 2011 WL 5244696 (M.D. Ala. Nov. 3, 2011). In both cases, individual investors purchased the RMK Fund on the secondary market from third-party brokers and initiated FINRA arbitration proceedings against Morgan Keegan. *See id.* at *3. In both cases, Morgan Keegan filed for a preliminary injunction to

enjoin the FINRA arbitration because it did not agree to arbitrate the defendants' claims as both defendants were not customers. *See id.* at *5. In fact, the legal memorandum filed by Shadburn is virtually identical to Defendant's memorandum. [*Compare Shadburn* DE 13, Defendant's Memorandum of Law in Objection to Motion for Preliminary Injunction *with* DE 9]. In *Shadburn*, the court granted the preliminary injunction and followed the great weight of authority in ruling that Shadburn was not a customer of Morgan Keegan. *Id.* at *12. In addition, on substantially similar facts, two courts have vacated FINRA arbitration awards because the investors who purchased RMK Funds from third-party brokers were not customers, and thus, could not arbitrate against Morgan Keegan before FINRA. *See Morgan Keegan & Co. v. Garrett*, __ F. Supp. 2d __, No. 4:10-cv-04308, 2011 WL 4716060 at *1–2 (S.D. Tex. Sept. 30, 2011); *Zarecor v. Morgan Keegan & Co.*, No. 4:10-cv-01643-SWW at 8–9 (E.D. Ark. July 29, 2011).[2] The Court finds *Shadburn*, *Garrett*, and *Zarecor's* analyses persuasive and adopts its reasoning.

1. Likelihood of Success on the Merits

Morgan Keegan is a member of FINRA, an industry association that provides an arbitration forum for claims against its members. FINRA Rules provide that "[p]arties must arbitrate a dispute under the Code if . . . (1) Required by a written agreement, or (2) Requested by the customer." FINRA Rule 12200. The parties must also arbitrate if the dispute is "between a customer and a member or associated person of a member; and [t]he dispute arises in connection with the business activities of the member." FINRA Rule 12200. It is undisputed that Morgan Keegan and Mr. Ras did not have a "written agreement." Therefore, Defendant can only compel Morgan Keegan to arbitrate if he was a "customer" of Morgan Keegan.

[2] *Zarecor*, an unpublished opinion with no Westlaw citation, is attached as Exhibit D to Morgan Keegan's Motion for Preliminary Injunction [DE 3].

The FINRA Arbitration Rules' definition of "customer" simply states that "[a] customer shall not include a broker or dealer." FINRA Rules 12100. Defendant argues, like the defendant in *Shadburn*, that he is a customer of Morgan Keegan because he is not a broker or a dealer.

Defendant's argument has been rejected. *Fleet Boston Robertson Stephens Inc. v. Innovex, Inc.*, 264 F.3d 770, 772 (8th Cir. 2001) (rejecting the argument that "by negative inference this definition means a 'customer' is everyone who is not a broker or dealer"); *Shadburn*, 2011 WL 5244969 at *8. Under Defendant's "proposed definition . . . a FINRA member's membership alone would require arbitration. Such a result would 'do significant injustice to the reasonable expectations of [FINRA] members.'" *Shadburn*, 2011 WL 5244696 at *8 (quoting *Wheat First Sec., Inc. v. Green*, 993 F.3d 814, 820 (11th Cir. 1993))(alteration in original).

Here, like the defendant in *Shadburn*, Mr. Ras's relationship with Morgan Keegan is "void of any form of business qualities whatsoever." *Shadburn*, 2011 WL 5244696 at *8. Just like the defendant in *Shadburn*, Mr. Ras "did not have any written contract or customer agreement with Morgan Keegan." *Id.* Mr. Ras "did not purchase shares in the RMK Fund through Morgan Keegan." *Id.* Mr. Ras "did not invest in the RMK Fund in its initial public offering." *Id.* He "did not pay for any investment, brokerage or other service through Morgan Keegan." *Id.* Mr. Ras "did not have a direct transactional relationship with Morgan Keegan (or its associated person)." *Id.* (quotation marks and citation omitted). In fact, Mr. Ras did not have an account with Morgan Keegan, and "Morgan Keegan has no record of any documents, accounts, or files related to anyone named Robert Ras." [DE 3-2 p. 2, Decl. of Thomas Barnett].

The only difference between this case and *Shadburn* is that Mr. Ras's broker at Lexington Investment Company contacted the local Morgan Keegan office, and a Morgan

Keegan representative told him "that everything was fine [and] that there was nothing out of the ordinary with the RMK Funds." [DE 10]. This communication between Mr. Ras's broker and a Morgan Keegan representative is not sufficient to make Mr. Ras a customer of Morgan Keegan. In a similar case, investors who purchased the RMK Fund through third-party brokers had two conversations with Morgan Keegan representatives who discussed how the funds functioned and gave assurances that "the funds were very liquid" and "dividends were not in danger". *See Zarecor*, No. 4:10-cv-01643-SWW at 8–9. In addition, the investors traveled to Memphis, Tennessee to attend the annual meeting of Morgan Keegan because the funds seemed to be in trouble. *Id.* These contacts "failed to transform [the investors] into 'customers' entitled to demand arbitration under Rule 12200." *Id.* at 10.

Another court reached the same conclusion and vacated a FINRA arbitration award for investors who purchased the RMK fund through third-party brokers. *See Garrett*, 2011 WL 471606 at *1–2. The court held that two investors "were not Morgan Keegan's customers" because they did not have a direct relationship with the firm. *Id.* Just like Mr. Ras, the two investors "bought shares in the fund from third-party brokers on the secondary market." *Id.*

Three district courts in three different circuits have all concluded that individual investors who purchased the RMK Fund from third-party brokers were not customers of Morgan Keegan and cannot force Morgan Keegan to participate in FINRA arbitration. Defendant offers no case law that reaches a contrary result on similar facts. Instead, Defendant characterizes as "erroneous decisions" the entire line of cases that lead to the obvious conclusion that he is not a customer Morgan Keegan. [DE 9 p. 9]. The Court disagrees with Defendant's assertion and finds that "[t]he mere fact that Morgan Keegan made available to the public on its website materials

pertaining to the RMK Fund is insufficient . . . to bestow 'customer' status" on Mr. Ras. *Shadburn*, 2011 WL 5244696 at *9.

Morgan Keegan has demonstrated a substantial likelihood of success on the merits of its claim that Mr. Ras cannot compel it to arbitrate before FINRA.

2. Remaining Factors for Injunctive Relief

Defendant does not contest that forcing Morgan Keegan to arbitrate claims which it did not agree to arbitrate would cause it irreparable harm. [DE 9 p. 7]. Defendant does not articulate how a preliminary injunction would cause substantial harm to others. The Court finds there is a low probability that this injunction will cause any harm to others.

Finally, Defendant argues the public interest weighs against the issuance of an injunction. The Court disagrees. The public interest weighs in favor of Morgan Keegan because "[a]rbitration is in the public interest only where 'the subject of the arbitration is one that the parties actually agreed to arbitrate.'" *Shadburn*, 2011 WL 5244696 at *12 (quoting *Chi. Sch. Reform Bd. of Trs. v. Diversified Pharm. Servs., Inc.*, 40 F. Supp. 2d 987, 996 (N.D. Ill. 1999)). The Court finds that a preliminary injunction would serve the public interest by avoiding the time and expense that will result from a needless arbitration.

III. CONCLUSION

Having considered and balanced all of the factors required for entry of a preliminary injunction, the Court finds that Morgan Keegan has overwhelmingly met its burden of proving circumstances warranting entry of an injunction.

Accordingly, IT IS HEREBY ORDERED that:

(1) Morgan Keegan's motion for preliminary injunction [DE 3] is GRANTED.

(2) Defendant, Robert Ras, is immediately RESTRAINED and ENJOINED from pursuing his claims against Morgan Keegan in the arbitration proceeding styled *Robert Ras v. Morgan Keegan & Company, Inc.*, FINRA Dispute Resolution Arbitration No. 11-02322.

This the 14th day of November, 2011.

Signed By:
Karen K. Caldwell
United States District Judge