

EXHIBIT "A"

*Shannon C. McGrath and The Shannon C. McGrath 2005 Trust v. Thomas J. McGrath, TD Ameritrade, Inc., E\*Trade Securities, LLC, and E\*Trade Clearing, LLC*  
Charleston County Case No. 2013-CP-10-893

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 SHANNON C. MCGRATH, AND THE )  
 SHANNON C. MCGRATH 2005 TRUST, )  
 )  
 PLAINTIFFS, )  
 )  
 V. )  
 )  
 THOMAS J. MCGRATH, TD AMERITRADE, )  
 INC., E\*TRADE SECURITIES, LLC AND )  
 E\*TRADE CLEARING, LLC, )  
 )  
 DEFENDANTS. )

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-10-000893

**RECEIVED**

SEP 04 2014

**ORDER ON DEFENDANT TD Ameritrade's Motion to Dismiss and Compel Arbitration**

2014 AUG 18 AM 11:08  
 JULIE J. ARMSTRONG  
 CLERK OF COURT  
 BY [Signature]

**FILED**

*gcn*


THIS MATTER came before the Court on Defendant TD Ameritrade Inc's ("Ameritrade") Motion to Dismiss claims of Plaintiff Shannon C. McGrath and The Shannon McGrath 2005 Trust and compel those claims to arbitration. Upon consideration of the arguments of counsel, memoranda of law, affidavits, and other materials submitted by the parties, the Court denies Ameritrade's motion as to Plaintiffs' claims for negligence, gross negligence and violation of the South Carolina Securities Act but grants Ameritrade's motion as to Plaintiffs' for breach of contract and breach of contract accompanied by fraudulent intent.

**FACTUAL BACKGROUND**

Defendant Thomas J. McGrath, as trustee for the Shannon C. McGrath 2005 Trust, opened a trust account with Ameritrade in March of 2010. This process included Thomas McGrath entering into a client agreement with Ameritrade, which contained an arbitration provision that states, in part, that the parties:

agree that any controversy between you and your affiliates, any of their

respective officers, directors, employees or agents and me (including any of my officers, directors, employees or agents) arising out of or relating to this Agreement, our relationship, any services provided by you, or use of the Services, and whether arising before or after the date of this Agreement, shall be arbitrated and conducted under the provisions of the Code of Arbitration of the FINRA.




At some point during 2010, Plaintiffs allege that Defendant Thomas McGrath provided the online account name and password for the Ameritrade trust account to Michael J. McGrath, Plaintiff Shannon McGrath's father and Thomas McGrath's brother. At the time Thomas McGrath provided this information to his brother, Michael McGrath was a convicted felon. Plaintiffs allege that Ameritrade subsequently wired hundreds of thousands of dollars out of the trust account to an E\*Trade Clearing account set up by Michael McGrath without authorization from or notification to Plaintiffs. Plaintiffs allege that the amounts ultimately wired by Ameritrade constituted virtually all of the assets of the Shannon C. McGrath Trust.

This lawsuit was filed on February 14, 2013. On March 25, 2013, Ameritrade filed a notice of removal to federal court and Plaintiffs filed a motion to remand the case back to state court. On November 20, 2013, the federal court remanded the case back to this Court. On March 3, 2014, Ameritrade filed the instant motion to dismiss Plaintiffs' claims and compel arbitration. The Court held a hearing on the motion on March 5, 2014 in which all parties were represented by counsel.

#### **LAW/ANALYSIS**

The policy of our state favors the arbitration of disputes. Hatcher v. Edward D. Jones & Co., L.P., 379 S.C. 549, 552, 666 S.E.2d 294, 296 (Ct. App. 2008) (citing Zabinski v. Bright

Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007)). However, because arbitration is a matter of contract, a party cannot be required to arbitrate any dispute that she has not agreed to arbitrate. Zabinski at 596, 553 S.E.2d at 118. Thus, our courts have typically held that broadly-worded arbitration agreements apply only to disputes in which a “significant relationship” exists between the party’s claims and the contract containing the agreement to arbitrate. Id. at 598, 553 S.E.2d at 119 (citing Long v. Silver, 248 F.3d 309 (4th Cir. 2001)). Here, because the Court finds that Plaintiffs’ claims for negligence, gross negligence and violation of the South Carolina Securities Act are legally distinct from the contractual relationship between the parties, Ameritrade’s motion to compel these claims to arbitration is denied.

 In Aiken v. World Finance Corporation of South Carolina, our Supreme Court refused to apply a broadly-worded arbitration clause to the theft of the plaintiff’s personal information by employees of the defendant. 373 S.C. 144, 644 S.E.2d 705 (2007). In holding there was not a significant relationship between the plaintiff’s contracts with World Finance and the tortious acts of its employees, the Court stated:

Applying what amounts to be a “but-for” causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties’ agreement to arbitrate claims between them. Such a result is illogical and unconscionable. . . . The mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one ‘arising out of or relating to’ the underlying agreement.

Id. at 150, 644 S.E.2d at 708.

The Court announced a “definitive rule” and “will refuse interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the

context of normal business dealings.” 373 S.C. at 151, 644 S.E.2d at 709. Because the theft of the plaintiff's personal information was “wholly unexpected tortious conduct” that could not possibly have been foreseen when Aiken agreed to do business with World Finance, the Court held Aiken's claims for outrage and emotional distress, negligence, and unfair trade practices were not subject to arbitration. Id.

In Hatcher v. Edward D. Jones and Company, the Court of Appeals refused to apply an arbitration agreement to the withdrawal and theft of the plaintiff's funds by a third party. 379 S.C. 549, 551, 666 S.E.2d 294, 295 (Ct. App. 2008). Hatcher opened a Roth IRA account with defendant, Edward Jones. Subsequent to the plaintiff's deposit of funds with Edward Jones, the majority of those funds were withdrawn from the IRA account, deposited into another of Hatcher's accounts and then withdrawn and stolen by a third party. Id. The defendants' motion to compel arbitration was denied because the “theft and conversion of [the plaintiff's] money funds was completely independent of the contract and could be maintained without reference to the contract.” Id. at 551, 666 S.E.2d at 296.

Relying on Aiken, the Supreme Court affirmed and found that:

to interpret the arbitration provision contained in Hatcher's contract with Edward Jones to apply to alleged action completely outside the expectations of the parties at the time the contract was entered would be inconsistent with the goal favoring arbitration as an effective means for resolving disputes.

379 S.C. at 554, 666 S.E.2d at 297.

The Court finds Aiken and Hatcher dispositive of Ameritrade's motion. Plaintiffs' alleged that Ameritrade allowed at least \$395,000.00 of Plaintiffs' money to be withdrawn by an unauthorized third party and that Ameritrade wired these funds to bank accounts with a different legal owner at a different bank without authorization from or notice to Plaintiffs. The Court

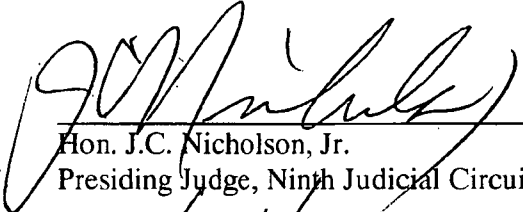
finds that this constitutes “wholly unexpected tortious conduct” that was not foreseen when Plaintiffs agreed to do business with Ameritrade and executed the client agreement.

Thus, while the Court orders that Plaintiffs’ claims against Ameritrade for breach of contract and breach of contract accompanied by fraudulent intent are compelled to arbitration, the Court holds that although the claims for negligence, gross negligence and violation of the South Carolina Securities Act may be factually related to the performance of the client agreement, the conduct alleged in these claims is legally distinct from the contractual relationship between the parties. 373 S.C. at 152, 644 S.E.2d at 709.

**CONCLUSION**

For the reasons set forth above and all others present in the record, the Court GRANTS, IN PART, Defendant Ameritrade’s Motion to Dismiss and Compel Arbitration as to Plaintiffs’ claims breach of contract and breach of contract accompanied by a fraudulent act claims but DENIES the Motion to Dismiss and Compel Arbitration as to Plaintiffs’ claims for negligence, gross negligence and violation of the South Carolina Securities Act.

**AND IT IS SO ORDERED.**

  
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Hon. J.C. Nicholson, Jr.  
Presiding Judge, Ninth Judicial Circuit  
E/19/14