IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

WEI WANG, JOHN LINDSTROM, individually and on behalf of all similarly situated, Plaintiffs, v. TD AMERITRADE INC., TD AMERITRADE FUTURES & FOREX, LLC dba THINKORSWIM, Defendants.	20 CV 4028 **Hon. Virginia M. Kendall**

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

Plaintiffs Wei Wang and John Lindstrom (collectively, "Plaintiffs"), by and through their undersigned counsel, respectfully move this Court to deny Defendants' Motion to Compel Arbitration ("Motion") pursuant to Section 6b(e)3 of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 9, *et seq.*, and 17 C.F.R. Sec. 180.1 of the regulations promulgated pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the Federal Arbitration Act, and the Seventh Amendment to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES

SEVENTH CIRCUIT CASES

OTHER FEDERAL CASES

.

ILLINOIS CASES

UNITED STATES CONSTITUTION

FEDERAL REGULATIONS

FEDERAL STATUTES

LAW REVIEW ARTICLES

PRELIMINARY STATEMENT

Defendants' Motion purposefully ignores the first arbitration agreement entered into by the Plaintiffs with TDA, and falsely states to this court that there is only one arbitration agreement. Mtn ¶ 2 The Motion never even mentions the first arbitration agreement. Leaving aside their misrepresentation to this court, the Defendants are not entitled to their own set of facts.

There are actually two relevant, albeit contradictory arbitration agreements at issue in this case; the one with the Plaintiffs and TDA, and a second one with the Plaintiffs and TDFF. There are also serious questions about the legality of both arbitration agreements, along with issues of unconscionability, and doubts about the validity of the purported signatures allegedly involved in the second arbitration agreement, that is the one between the Plaintiffs and TDFF. There is also the issue that the second lead Plaintiff, John Lindstrom, has not signed an arbitration agreement with TDFF.

The second purported arbitration agreement attached to Defendants' motion as Dkt-22-1 may not be authentic. It shows two supposed 'acceptances" by Plaintiff Wang of the second arbitration agreement, signed three years apart. It is also dated 2020. Plaintiff Wang does not believe this document is authentic.

There are hundreds of Plaintiffs in the class and their claims cannot be forced through an expedited arbitration proceeding-nor would attempting to do this be in fact expeditious or cost effective. Arbitration is not a sufficiently robust venue for this class action.

This case calls for the adjudication of complex allegations of fact whose determination would necessitate a great number of witnesses, expert witnesses, complex evidence, and extensive discovery-none of this would lend itself or fit the limited discovery and expedited process that is arbitration. The facts of this case do not allege a simple bilateral merchant dispute. Instead of a single dispute, this matter involves many disputes between possibly hundreds of parties including the adjudication of which of these hundreds of a parties properly belong in the class. The matters in controversy are far too fact intensive and numerous for adjudication through expedited arbitration.

The issues involved in this case were never intended for arbitration- not by the plain language contained within the four corners of the one arbitration agreement, the Defendants admit exists (the one between the Plaintiffs and TDFF). Forcing all the members of the Plaintiffs' class into arbitration in a case like this, against their express wishes, and the language of both arbitration agreements, goes against the purpose and intention of the Federal Arbitration Act ("FAA"). It also violates the Plaintiffs' Seventh Amendment rights to a trial by jury.

RELEVANT FACTS

The plaintiffs in this action are clients of Defendant TD Ameritrade Futures and Forex, LLC ("TDFF") and TD Ameritrade ("TDA"). Amended Complaint ("AC") at ¶¶ 12, 13. Defendant TD Ameritrade Futures and Forex is a brokerage firm registered with the Commodity Futures Trading Commission ("CFTC") as a futures

commission merchant ("FCM"). TDFF is an affiliate of TD Ameritrade ("TDA"), a registered brokerage firm, and another Defendant. AC at ¶ 15

Defendants claim that all Plaintiffs' claim arise out of or relate to their futures account. But this misrepresents the facts. TDA plays an integral role in this litigation. There is only one account number and that is for a securities account with TDA, which is also later used for a futures account. The futures account is interlinked with the securities account. In fact margin, a key issue in this case, is deposited into and comes out of the securities account opened with TDA as determined by TDFF. Funds from the TDA securities accounts can be, and are, utilized in the TDFF futures accounts not only for margin purposes but also to reduce a debit balance in the futures account as may be determined by TDFF, per the TDFF Client Agreement. Every plaintiff in this case has a securities account with TDA. AC at Exhibit A-¶37.

In order to invest and trade in futures and options with TDFF, a customer is required to open a futures account by entering into a Futures Client Agreement. AC at ¶ 21.

But as a condition precedent of opening an account with TDFF, an investor is first required to open a securities account with TDA. AC at ¶ 22. Both Plaintiffs first opened a securities account with TDA and received an account number. It was only then that they were able to open an account with TDFF, which is also this same account number. Plaintiffs are individual investors with brokerage accounts at TDFF and TDA. AC at ¶ 23. Customers cannot have an account with TDFF

without also having the same account with TDA-both accounts share the same single account number. It is impossible to open or trade futures with TDFF without first opening this TDA account. AC at Exhibit A-¶ 37.

The TDA account was opened after the Plaintiffs entered into a Client Agreement with TDA. Part of this agreement is a mandatory arbitration agreement. AC-Exhibit B-¶ 49.

This first arbitration agreement does not apply to this class action case because its language specifically states that it does not apply to class actions. AC ¶ 32, 116, Exhibit B-¶ 49.

The other issue with the first arbitration agreement is that it is a mandatory arbitration clause. In order to trade futures at TDFF/TDA, customers must agree to mandatory arbitration of all claims. However this violates 17 C.F.R. §166.5, which specifically bars mandatory arbitration clause for opening futures account-unless their agreement is separately stated. CFTC Rule 166.5 states in pertinent part:

> *Customers. No Commission registrant shall enter into any agreement or understanding with a customer in which the customer agrees, prior to the time a claim or grievance arises, to submit such claim or grievance to any settlement procedure except as follows: (1) Signing the agreement must not be made a condition for the customer to utilize the services offered by the Commission registrant. (2) If the agreement is contained as a clause or clauses of a broader agreement, the customer must separately endorse the clause or clauses containing the cautionary language and provisions specified in this section.*

TDA/TDFF is attempting to do an end run around this CFTC Rule by making mandatory arbitration a condition precedent for opening a futures account by asking every customer to sign the TDA Client Agreement first. The problem is the agreement nowhere solicits a separate signature acknowledging the arbitration agreement.

Despite the Defendants' assertions that the second, "Futures Arbitration Agreement" conforms to the CFTC regulations, it does not. Though not mandatory, it does not conform to 17 C.F.R. §1.3 because it does not record an actual signature. There is no signature attached to the record. This second arbitration agreement also violates 17 C.F.R. § 1.4 which requires that a record of what the customer actually signed be stored in a way to prevent tampering or alteration such as in a .pdf file. In this case there is no signature record at all and there is nothing to prevent the record from being altered or tampered with by virtually anyone at TDFF.

The record of Plaintiff Wang's alleged acquiesce to the second arbitration agreement resides in the software code. What this means is that anyone, while performing updates of any portion of the trading software or front end, could access the document and alter it or the entire portion of the record can be altered as part of regular software updates. AC ¶ 31.

The second arbitration agreement does not apply to this case because by its own terms it does not even contemplate class action litigation. The second arbitration agreement is boilerplate taken, unaltered from the text of CFTC

Regulation 166.5. The language of this rule does not address class action litigation and does not apply to this case.

The arguments that follow address this second arbitration agreement but the Plaintiffs are not, in making these arguments, waiving any claims towards their questioning of the authenticity of the agreement, whose authenticity and legality they do dispute.

ARGUMENT

Defendants' motion to dismiss is based on their desire to enforce the second, Futures Arbitration Clause but not the first arbitration clause.

Under Federal Rule of Civil Procedure § 12(b)(3), a dismissal of a complaint is proper if it is established that venue properly belongs elsewhere. In making this determination, the court considers all the allegations in the complaint bearing on the venue question, which are generally taken as true. Faulkenberg v. CB Tax Franchise Systems, LP, 637 F.3d 801, 806 (7th Cir. 2011). A district court may examine facts outside the complaint to determine whether its venue is proper. Deb v. SIRVA, Inc., 832 F.3d 800 (7th Cir. 2016). Just as in other contexts, the court must make reasonable inferences and resolve all factual conflicts in favor of the plaintiff. Jackson v. Payday Financial, LLC, 764 F.3d 765, 773 (7th Cir. 2014).

Defendants also bring their motion to compel arbitration for the Futures Arbitration Agreement pursuant to the Federal Arbitration Act ("FAA").

Whether the parties have agreed to arbitrate a dispute is generally for the court, not the arbitrator, to decide. "It is similarly well settled that where the dispute

at issue concerns contract formation, the dispute is generally for the courts to decide." Granite Rock Co. v. International Broth. of Teamsters, 561 U.S. 287, 130 S. Ct. 2847, 2855-2856, 177 L. Ed. 2d 567 (2010). An additional determination in this case is which of two contradictory arbitration agreements apply-if they apply at all? And can the courts or the Defendants enforce arbitration agreements that violate CFTC rules?

I. Federal Arbitration Act

The legislative history of the FAA shows that the drafters simply intended for arbitration clauses to be treated like other contracts--no better and no worse. Before the enactment of the FAA, arbitration agreements were not being enforced. The FAA was proposed to cure this non-enforcement. The drafters of the FAA did not want arbitration clauses to be unenforceable simply because of their status as arbitration clauses.

The House Report accompanying the legislation indicates that the purpose was to place arbitration agreements "upon the same footing as other contracts, where it belongs," and also emphasizes that "[a]rbitration agreements are purely matters of contract, and [[that] the effect of the bill is simply to make the contracting party live up to his agreement." H.R. Rep. No. 68-96, at 1H.R. Rep. No. 68-96, at 1 (1924).

II. The FAA Does Not Elevate Arbitration Contracts

The legislative history of the FAA shows that the purpose of the FAA was to enforce arbitration agreements according to their terms, not to bestow with the

status of *uber* contracts upon them. But like Hegel's theory of history with a thesis and then an anti-thesis, the exaggerated reaction to an idea (the anti-thesis) is often from one extreme to the other emulating the arc of the pendulum.

Where the FAA was intended to insure that arbitration agreements would not be ignored. The Defendants seem to think this bestows a *supra* contractual nature to arbitration agreements, making them *uber*-contracts.

The Defendants' motion cites an early U.S. Supreme Court which led the way in stating that arbitration is "favored," and has cited the Federal Arbitration Act as supporting this position. In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., in 1983, the Court stated,

> *[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration .... The Arbitration Act establishes that, 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.*
> Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

But a preference for arbitration is not a guarantee. It would be poor public policy to enforce contracts of adhesion between parties with great asymmetries in bargaining power for no other reason than that they are arbitration agreements.[1]

[1] *Arbitration: Is It Fair When Forced?: Hearing Before the S. Comm. on the Judiciary,* 112th Cong. 59, 62-64 (2011) [hereinafter Hearing] (statement of F. Paul Bland, Senior Attorney, Public Justice) (noting that millions of consumers are subject to mandatory arbitration clauses in consumer contracts and that arbitration clauses are prevalent in credit card agreements, financial services agreements, cell phone contracts, employment contracts, car sales, and securities brokerage services, among others) In affording arbitration agreements

It is the asymmetry in bargaining power that makes the arbitration agreements in this case also unconscionable. The first arbitration agreement is a contract of adhesion and shows the unequal bargaining power between the parties. TDA/TDFF have numerous great law firms, a customer wanting to open a futures account has no commensurate bargaining power. If investors want to trade futures, they have to agree to mandatory arbitration. After seeing this agreement, they are presented with another arbitration agreement and can draw the conclusion that the acceptance of it, is redundant or in any case meaningless because they have already agreed to arbitration. Both arbitration agreements govern the account of the Plaintiffs with TDA/TDFF and their significance is "greatly reduced" by their use of boilerplate, in both contracts. Williams v. Illinois State Scholarship Comm'n, 139 Ill.2d 24, 72, 150 Ill.Dec. 578, 563 N.E.2d 465 (1990).

This court should not use the FAA to overturn the doctrine of contra proferentem and interpret ambiguous contracts in favor of arbitration because of the FAA and not interpret ambiguities in accordance with traditional contract law. [2]

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a stature above regular contracts, many courts have misconstrued or ignored legislative intent.

[2] "When courts enforce anti-plaintiff terms in arbitration clauses, they claim to be honoring the will of the 1925 Congress that enacted the FAA. Such assertions are wrong for several related reasons. First, the 1925 Congress did not intend the FAA to reach statutory rights. Second, Congress did not intend the FAA to apply to consumer contracts. Third, Congress did not intend arbitration clauses in contracts of adhesion to be enforceable. Fourth, Congress did not intend arbitration clauses to serve as vehicles for non-negotiable terms that systematically undermine the rights and remedies of plaintiffs, including plaintiffs' ability to meaningfully enforce their rights. We now have a legal regime completely at odds with the modest goal that Congress did intend: to make agreements between merchants to arbitrate in order to resolve commercial disputes enforceable. Instead we have a legal system where courts are complicit in allowing firms to effectively prevent consumers and workers from protecting their rights.

"[C]ommercial arbitration agreements, like other contracts, 'are enforced according to their terms'…"First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947, 115 S. Ct. 1920, 1925, 131 L. Ed. 2d 985 (1995). Arbitration agreements are not above the principle of contra proferentem merely by a defendant's invocation of the FAA.

In this case, there are many ambiguities with both arbitration agreements like why does the second one not address class action litigation? Why are there two contradictory arbitration agreements? And the contradictions are not benign-the first disallows arbitration for class action and is mandatory. Why does the second arbitration agreement equivocate in its warning that agreement makes arbitration mandatory by also stating, "By signing this agreement, you: (1) **may be waiving your right to sue** in a court of law.." This creates doubt in a person's mind whether they are actually signing away their right to seek justice in a court of law.

III. Recognition of Legislative Intent

Congress had a modest goal when it enacted the FAA-to make sure that arbitration agreements would cease being ignored in wholesale fashion.[3] Later

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If a contract term would not be enforceable if it were outside of an arbitration clause, it should not become enforceable because it is inserted into an arbitration clause."
Christopher R. Leslie, The Arbitration Bootstrap, 94 Tex. L. Rev. 265, 329–30 (2015)

[3]" FAA, a statute enacted in 1925 with the seemingly limited purpose of overcoming the then-existing 'judicial hostility' to the arbitration of contract disputes between businesses, which was most commonly manifested in diversity cases….There is little doubt that the Court's interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it."
Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U. L. Rev. 286, 323-324 (2013)

cases have been more in accordance with legislative intent of the FAA and recognized that the FAA does not create special status for arbitration agreements, but makes them as enforceable as other contracts. Volkswagen Of America, Inc. v. Sud's of Peoria, Inc., 474 F.3d 966, 970 (7th Cir. 2007).

IV. Agreement to Class Action Arbitration Cannot Be Inferred

Subsequent Supreme Court cases like Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685–86, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) stand for the principle that parties' acquiesce to class action arbitration should not be inferred from silence or ambiguity.

> *An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); Mitsubishi Motors, 473 U.S., at 628, 105 S.Ct. 3346; see also 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, ——, 129 S.Ct. 1456, 1463–65, 173 L.Ed.2d 398 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution") (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001)); Gardner–Denver, supra, at 57, 94 S.Ct. 1011 ("Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations"). But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to*

> *resolve *686 disputes through class- **1776 wide arbitration. Cf. First Options, supra, at 945, 115 S.Ct. 1920 (noting that "one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate" contrary to their expectations)*
> Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685–86, 130 S. Ct. 1758, 1775–76, 176 L. Ed. 2d 605 (2010)

The Supreme Court reiterated the argument in Stolt-Neilsen last year in Lamps Plus v. Varela, 139 S. Ct. 1407- where it held that ambiguity or silence cannot be the basis upon which agreement to arbitration can be inferred.

> *Although parties are free to authorize arbitrators to resolve such questions, we will not conclude that they have done so based on "silence or ambiguity" in their agreement, because "doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." First Options, 514 U.S. at 945, 115 S.Ct. 1920 (emphasis added); see also Howsam, 537 U.S. at 83–84, 123 S.Ct. 588. We relied on that same reasoning in Stolt-Nielsen, 559 U.S. at 686–687, 130 S.Ct. 1758, and it applies with equal force here. Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself.*
> Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416–17, 203 L. Ed. 2d 636 (2019)

In this case, there is no ambiguity in the first arbitration agreement which states by its own terms that it does not apply to class actions. AC at Exhibit B.

Unsurprisingly, the Defendants focus on the second arbitration agreement, the Futures Arbitration Agreement. But this arbitration agreement, assuming for the sake of argument it is authentic, and leaving aside the issues that make it

violative of CFTC regulations, is perfectly silent and ambiguous about class action litigations. Dkt 22-1.

This agreements' ambiguities are entirely TDA and TDFF's to own. If TDFF or TDA wanted the Futures Arbitration Agreement to apply to class actions, they could have simply stated so. Instead they do not mention it anywhere, not even above or below the boilerplate language copied from CFTC Rule 166.5.

This case is not a simple dispute as the Defendants attempt to characterize it by, "an investor claiming to have suffered trading losses." Plaintiffs lost money entirely and directly because they were unable to execute trades and get out of their positions as a result of the catastrophic and total failure of TDFF's systems. AC at ¶ 13- 14 Unlike the case of Knowles v. TD Ameritrade Holding Corp., 427 F. Supp. 3d 1070, 1075 (D. Neb. 2019), this was not the failure of a mere trading feature or software function, but *the breakdown of their entire platform and ability to accept orders -leaving the Plaintiffs unable to exit their positions*. What is unforgivable is that TDFF knew their entire system would fail because they were not prepared to deal with negative oil prices-something they knew, and hid from their customers. AC at¶ 10-12. TDFF hid both the warnings of negative prices- and the fact that they would not be prepared. Had the Plaintiffs known about TDFF's planned negligence, they would have adjusted their positions and traded elsewhere, and been spared substantial losses. It is important to realize that these warnings, despite Defendants' truly incredible and repeated protestations otherwise, were not

addressed to the public; they were addressed to, meant for, and sent directly to the back offices of futures commission merchants, like TDFF. Exhibit A.

These are the allegations for an entire class of investors and customers who trusted the written assurances of a major Wall Street brokerage firm that they managed risk, had sophisticated trading platforms and would not act in a grossly negligent manner. AC at ¶ 13-14. They also trusted this major brokerage to abide by its agreements to provide margin calls, per their agreement, and liquidate positions in a commercially reasonable manner. AC at ¶ 15-17.

Instead, the customers of TDFF were hoodwinked and left exposed to unlimited risk despite all the claims of TDFF about its risk control processes. As a result, they suffered substantial damages. The Defendants did nothing despite receiving multiple warnings from the trading exchanges-to be prepared and to advise their customer- not even informing their customers that they would remain unprepared. Instead, TDFF passed all the attendant losses onto their customers. Their incentive to do so is obvious. TDA does not have to declare these losses as their own on their balance sheet. Nor did they spend resources testing their trading platform in preparation for the possibility of negative oil prices (as directed by the CME Group, Inc.) so their balance sheet looks better albeit at the expense of their customers, the class of plaintiffs in this suit.

V. Plaintiffs' Claims Are Not Arbitrable

A line of cases after Stolt-Nielsen including, AT&T Mobility LLC v. Concepcion, 563 U.S.333, 131 S.Ct. 1740, recognized that in enforcing arbitration

agreements without express consent, in cases of ambiguity, is problematic because of the inherent differences between class actions and ordinary disputes.

> *[O]ur decision in Stolt–Nielsen is instructive. In that case we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation. 559 U.S., at 684 – 687, 130 S.Ct. at 1773–1776. We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." Id., at 686, 130 S.Ct. at 1776. This is obvious as a *348 structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, **1751 to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA.* AT&T Mobility LLC v. Concepcion, *563 U.S. 333, 347–48, 131 S. Ct. 1740, 1750–51, 179 L. Ed. 2d 742 (2011)*
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> *Because of these "crucial differences" between individual and class arbitration, Stolt-Nielsen explained that there is "reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration." 559 U.S. at 687, 685–686, 130 S.Ct. 1758. And for that reason, we held that courts may not infer consent to participate in class arbitration absent an affirmative "contractual basis for concluding that the party agreed to do so." Id., at 684, 130 S.Ct. 1758. Silence is not enough; the "FAA requires more." Id., at 687, 130 S.Ct. 1758.*
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> Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416, 203 L. Ed. 2d 636 (2019)

The nature of the evidence, the numerosity of plaintiffs in the class, this court's subject matter jurisdiction over the federal questions raised by the Commodity Exchange Act and Dodd-Frank, do not make arbitration of this class action reasonable or just. Nor can the class of plaintiffs be expected to forego their rights to be heard with the benefit of hearing before an Article III court and appellate review. In fact nowhere in the second arbitration is this even asked of them.

Looking within the four corners of the second arbitration agreement, there is no mention of class action litigation or any litigation other than bilateral merchant/consumer disputes. Typical disputes arising between FCMs and customers involve trading fees or the collection of account deficits. This is no typical dispute.

What happened on April 20, 2020 has never happened in the history of the trading markets. Its occurrence may never happen again in the futures markets. It goes without saying that an event that has never ever occurred in the history of the futures trading markets and is not mentioned in any TDFF futures risk disclosure statement or TDFF or TDA customer agreement, cannot be said to have been anticipated by either arbitration agreement -even were the arbitration agreement to be valid and legal-which the Futures Arbitration Agreement is not.[4]

[4] This makes the three warnings from the exchanges all the more crucial. The Defendants were well warned of the possibility of a Black Swan event by the exchange so that they could adjust their margin requirements, test their platforms on a special exchange

VI. Consent

The Courts have also held that in order to enforce arbitration agreements, consent must be demonstrated, "[a]rbitration is strictly a matter of consent." Granite Rock Co. v. Teamsters, 561 U.S. 287, 299, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010); "arbitration "is a matter of consent, not coercion." Volt v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 664, 130 S. Ct. 1758, 1763, 176 L. Ed. 2d 605 (2010). "Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419, 203 L. Ed. 2d 636 (2019).

In this case, there is no consent to class action arbitration to be shown within the four corners of the Futures Arbitration Agreement between the parties.

VII. Authenticity of Defendants' Arbitration Agreement with TDFF

Since May of 2020, Plaintiff Wang has requested copies of all his actual account opening papers from TDA and TDFF and as of the date of this filing, not yet received a response.[5] The TDFF arbitration agreement that is offered by the Defendants in their motion, has two separate electronic records claiming to show acceptance of the arbitration agreement by Plaintiff Wang - twice. One on 11/26/2013 and another on 2/18/2017. This calls the authenticity of this document

generated testing environment and above all, warn their customers and BE PREPARED. Astonishingly, the Defendants did none of the above.

[5] Defendants have to this date, not provided Plaintiff Wang with a copy of his account opening papers, despite multiple requests.

into question. The document itself states a date of July 20, 2020. Plaintiff Wang questions the authenticity of this record. Dkt. 22-1

Furthermore, the original Futures Client Agreement signed by Plaintiff Wang, does not contain a mandatory arbitration clause. AC-Exhibit A. However, the Futures Client Agreement has since been amended by TDFF and as of 2020 has a new section 24 making arbitration mandatory.[6]

This is an example of how TDFF's multiple compliance failures work in real time. Just looking at the purported acceptance of Plaintiff Wang to TDFF's arbitration agreement, it is clear that none of the documents he allegedly accepts, have a date next to them. Like the Futures Client Agreement, they can be altered by TDFF at any time, subsequent to their signing, and there is no record of this for the customer because TDFF does not comply with 17 C.F.R.§ 1.4. There is no specificity in even what form and in what iteration the Plaintiff is supposed to have "modified" or "agreed" to. This applies also to the purported agreement to the arbitration agreement, as seen by the "Compliance Events Summary" of Dkt. 22-1. The Plaintiff does not remember if this arbitration agreement is what he is alleged to have accepted, or what version of it he is said to have accepted; a 2013 version, a 2017 version, or the later iteration in 2020? The Plaintiff is certain, however, he did not sign account opening papers with TDFF twice.[7]

[6] This clause added in a new numbered paragraph 24 in 2020 conflicts with CFTC Rule 166.5, and TDFF's arbitration agreement.

[7] To the extent that the Court finds this is not adequately stated in the Plaintiffs' complaint, it can be more clearly stated should the Court grant leave to file an amended complaint.

VIII. TDFF Arbitration Agreement and Signature Invalid

Plaintiffs contend that the language of the arbitration agreement offered by the defendants may itself have been altered because TDFF does not take minimum safeguards required by CFTC Regulations at 17 C.F.R. § 1.31 and 17 C.F.R. § 1.4.

Plaintiffs further contend that TDFF does not perform periodic tests of its system to determine whether it accurately stores changes to prior versions of its software code, which includes arbitration agreement language. AC ¶ 31.

The second arbitration agreement has two separate signatures dated three years apart allegedly from Plaintiff Wang. Dkt. 22-1. Plaintiff Wang did not sign an arbitration agreement twice but this is exactly what the Defendants' exhibit alleges. Id. This is likely because as Plaintiffs have repeatedly alleged, TDFF does not employ minimum safeguards to prevent alteration of the electronic record after it has been signed as it is supposed to do according to 17 C.F.R.§ 1.4.

The failure of the Defendants to comply with CFTC regulations regarding electronic signatures renders any electronic signature on a TDFF Futures Arbitration Agreement invalid and unenforceable, or at a minimum, a justiciable controversy.

IX. Standard of review

Defendants cite two cases but not for the purpose of deploying the standard of review the cases suggest, but to quote *dicta*. Regardless, the standard for review of whether a motion to compel arbitration is successful is stated in Chambers v. Aviva Life & Annuity Co., 2013 WL 1345455. "When petitioning to compel arbitration

pursuant to the FAA, the moving party must demonstrate: (1) the existence of a written agreement to arbitrate; (2) that the dispute is within the scope of the arbitration agreement; and (3) that there is a refusal to arbitrate. *Zurich Am. Ins. Co. v. Watts Indus., Inc.,* 417 F.3d 682, 687 (7th Cir.2005)." Chambers v. Aviva Life & Annuity Co., No. 12 C 9589, 2013 WL 1345455, at *2 (N.D. Ill. Mar. 26, 2013)

In this case, there are two contradictory arbitration agreements. There is no basis upon which one can be selected but not the other. They both govern the single account between each of the Plaintiffs and the Defendants. The second prong of the test also fails in that class action arbitration is not within the scope of the first or second arbitration agreements. It is disallowed in the first, and not mentioned in the second. Nor are the events of April 20, 2020, a Black Swan event, properly within the arbitration agreement. The only prong of the test above that is met is that there is a refusal to arbitrate by the Plaintiffs.

X. Seventh Amendment right to jury trial

Neither a judicial policy favoring arbitration or a vague arbitration agreement should nullify a federal Constitutional right. The Seventh Amendment's right to a trial by jury is a substantive and fundamental right whose importance to a litigant seeking relief in an Article III court cannot be overstated. "[T]he right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." Aetna Ins. Co. v. Kennedy to Use of Bogash, 301 U.S. 389, 393, 57 S. Ct. 809, 811–12, 81 L. Ed. 1177 (1937) "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every

encroachment upon it has been watched with great jealousy." Judge Story in Parsons v. Bedford, 3 Pet., 433, 446, 7L.Ed.732 (1830). The inclusion of the right to a trial by jury was seen as a crucial inclusion to the Bill of Rights, "I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution." 3 *The Writings of Thomas Jefferson 71* (Washington ed. 1861)

> *The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence. Today, however, the Court reduces this valued right, which Blackstone praised as "the glory of the English law," to a mere "neutral" *339 factor and in the name of procedural reform denies the right of jury trial to defendants in a vast number of cases in which defendants, heretofore, have enjoyed jury trials. Over 35 years ago, Mr. Justice Black lamented the "gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." …*
> *It is perhaps easy to forget, now more than 200 years removed from the events, that the right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England.*
> Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338–40, 99 S. Ct. 645, 655–56, 58 L. Ed. 2d 552 (1979)

There are no exceptions to the trial by jury in federal court. Enforcing an arbitration agreement under the FAA that is as in this case, both vague and deficient by statute, and invalid, would be a violation of the Plaintiffs' Seventh Amendment right to a jury trial.

This case cannot be decided in any venue but an Article III Court as there are substantive issues of federal law arising from federal statutes, that are the exclusive jurisdiction of this court.

The resolution of this dispute should not be privatized to an unknown arbitral tribunal, whose ability to understand the substantive legal issues and complex factual ones, will in no way equal that of a federal court judge. What is more, the venue of an arbitral tribunal would be deficient in that it will only allow limited discovery and limited witnesses. Yet the issues in contention in this case are complex and several, and they cannot be considered without looking at a substantial amount of data. For example, discovery in this case may have to look at changes to TDFF's software code between 2017 and 2020. This requires the examination of a significant and complex set of data. Discovery would also have to look at a significantly larger set of data which is market and trade data from the CME Group, Inc., on April 20, 2020, whose analysis would require substantial computation resources and quantitative expertise.

Possibly hundreds of plaintiffs in this class sharing substantive rights and unjustly harmed by TD Ameritrade and TD Ameritrade Futures and Forex would see their chance at substantial justice evaporate if they are given the bum's rush to anywhere else other than in an Article III court. Arbitration is simply not the right venue for an expeditious, fair and fulsome adjudication of the issues in controversy. It is absolutely an improper forum for this class action.

For the reasons set forth above, this Court should deny the Defendants' Motion to Compel Arbitration.

Dated: October 29, 2020

Chicago, Illinois

Respectfully submitted,

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Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that, on October 29 2020, she caused a true and correct copy of the foregoing to be served upon all parties by electronically filing the same with the Pacer/ECF system.

/s/ R Tamara de Silva
Attorney for the Plaintiffs

EXHIBIT A

CME Group | Advisory Notice

TO: Clearing Member Firms
Chief Financial Officers
Back Office Managers

FROM: CME Clearing

ADVISORY #: 20-152

SUBJECT: CME Clearing Plan to Address the Potential of a Negative Underlying in Certain Energy Options Contracts

DATE: April 8th, 2020

The purpose of this advisory is to assure CME clearing firms and end clients that if major energy prices continue to fall towards zero in the coming months, CME Clearing has a tested plan to support the possibility of a negative options underlying and enable markets to continue to function normally. That plan is as follows:

- If WTI Crude Oil futures prices settle, in any month, to a price between $8.00/bbl and $11.00/bbl, CME Clearing MAY switch its pricing and margining options models from the existing models to the Bachelier model, currently utilized in numerous spread options products where negative underlying prices and strike levels are a regular occurrence. If any WTI Crude Oil futures prices settle, in any month, to a level below $8.00/bbl, CME Clearing WILL move to the Bachelier model for all WTI Crude oil options contracts as well as all related crude oil options contracts effective the following trade date. CME Clearing will send out an advisory notice with one day notice before any implementation occurs with all appropriate details.

- Similarly, if RBOB Gasoline futures prices settle, in any month, to a price between $0.20/gal and $0.30/gal, CME Clearing MAY switch its pricing and margining options models from the existing models to the Bachelier model. If any RBOB Gasoline futures price settle, in any month, to a level below $0.20/gal, CME Clearing WILL move to the Bachelier model for all RBOB Gasoline options contracts as well as all related gasoline options contracts effective the following trade date. CME Clearing will send out an advisory notice with one day notice before any implementation occurs with all appropriate details.

- Similarly, if Heating Oil futures prices settle, in any month, to a price between $0.20/gal and $0.30/gal, CME Clearing MAY switch its pricing and margining options models from the existing models to the Bachelier model. If any Heating Oil futures price settle, in any

month, to a level below $0.20/gal, CME Clearing WILL move to the Bachelier model for all Heating Oil options contracts as well as all related heating oil options contracts effective the following trade date. CME Clearing will send out an advisory notice with one day notice before any implementation occurs with all appropriate details.

The primary goal of this advisory is to let the market know that CME Clearing is ready to handle the situation of negative underlying prices in major energy contracts and we want to give all of our clearing firms, customers, and partners a view into what the CME Clearing plan is so that each of our partners can do their own respective planning for this potential situation.

Negative strike prices will NOT be listed in any of these energy markets until this model change is made per the plan above and may not occur even if the modelling changes do happen.

Please note that all existing CME Clearing message and file formats already support, without modification, negative futures prices as well as negative strike prices. We will publish additional information shortly regarding the details of potentially affected products and sample files.

Should you have any questions, please contact CME Clearing Risk Management at Clearing.RiskManagement@cmegroup.com or 312-648-3888 or CME Clearing Pricing & Valuations at OTCPricing&ValuationsFnOTeam@cmegroup.com

CME Group | Advisory Notice

DATE: April 15, 2020

TO: Clearing Member Firms

FROM: CME Clearing

ADVISORY #: **20-160**

SUBJECT: Testing opportunities in CME's "New Release" environment for negative prices and strikes for certain NYMEX energy contracts

Recent market events have raised the possibility that certain NYMEX energy futures contracts could trade at negative or zero trade prices or be settled at negative or zero values, and that options on these futures contracts could be listed with negative or zero strike prices.

Were this to occur, all of CME's trading and clearing systems would continue to function normally. Support for zero or negative futures and/or strike prices is standard throughout CME systems. All file and message formats support such prices, and we have a variety of products which have long behaved in this manner, for example **NYMEX BY** (WTI-Brent Bullet) futures contracts and **NYMEX BV** options on those futures contracts.

Clearing Advisory 20-152 was published on April 8, 2020, and detailed the process, considerations and timing by which CME would transition from the Whaley option pricing model to the Bachelier option pricing model for margining and settlements for particular groups of products. It's at: https://www.cmegroup.com/content/dam/cmegroup/notices/clearing/2020/04/Chadv20-152.pdf

Globex Advisory 20200403 was published on April 3, 2020 and details the changes to Price and Strike Price Eligibility flags associated with this possibility. It's at: https://www.cmegroup.com/notices/electronic-trading/2020/04/20200403.html#pageNumber=1

Effective immediately, firms wishing to test such negative futures and/or strike prices in their systems may utilize CME's "New Release" testing environments, for products **CL** (crude oil futures) and **LO** (options on those futures.) "New Release" SPAN files and settlement price files already reflect such prices. In the New Release environment, orders may be submitted in CME Globex, block trades may be submitted through CME Clearport, and all normal trade and position processing may be performed in Clearing.

The full list of potentially affected products is provided on the following page.

For more information please contact CME Clearing at ccs@cmegroup.com or via phone at Chicago (312) 207 2525 | London (44) 203 379 3198 | Singapore (65) 6593 5591.

Product	Clearing Code	Clearing Product Type	Globex Code	Group Code	Category	Benchmark
Brent Crude Oil Last Day Financial Futures	**BZ**	**FUT**	**BZ**	**OP**	**BZ**	**Y**
Brent Crude Oil Average Price Option	BA	OOF	BA	OT	BZ	N
Brent Crude Oil BALMO Futures	J9	FUT	AJ9	BB	BZ	N
Brent Crude Oil European Financial Option	BE	OOF	BE	OT	BZ	N
Brent Crude Oil Futures-Style Margin Option	BZO	OOF	BZO	PR	BZ	N
Brent Crude Oil Option	OS	OOF	OSX	OT	BZ	N
Brent Crude Oil Penultimate Financial Futures	BB	FUT	BB	BB	BZ	N
Brent Financial Futures	CY	FUT	CY	CC	BZ	N
Dated Brent (Platts) BALMO Futures	DBB	FUT	DBB	BB	BZ	N
Mini Brent Financial Futures	MBC	FUT	MBC	CC	BZ	N
Light Sweet Crude Oil Futures	**CL**	**FUT**	**CL**	**CL**	**CL**	**Y**
Argus WTI Formula Basis Calendar Month Futures	39	FUT	39	CC	CL	N
Argus WTI Trade Month Futures	V7	FUT	V7	CC	CL	N
Crude Oil Bullet Futures	WS	FUT	WS	WS	CL	N
Crude Oil Last Day Financial Futures	26	FUT	26	CC	CL	N
Crude Oil Weekly Options	LO1-LO5	OOF	LO1-LO5	LO	CL	N
Daily Crude Oil Option	CD	OOF	ICD	LO	CL	N
Daily WTI Financial Futures	DCL	FUT	DCL	CC	CL	N
E-mini Crude Oil Futures	QM	FUT	QM	CL	CL	N
Light Sweet Crude Oil European Financial Option	LC	OOF	LCE	LO	CL	N
Light Sweet Crude Oil Option	LO	OOF	LO	LO	CL	N
LLS (Argus) Financial Futures	XA	FUT	AXA	CC	CL	N
WTI BALMO Futures	42	FUT	A42	CC	CL	N
WTI Financial Futures	CS	FUT	CSX	CC	CL	N
WTI Trade Month Futures	TCS	FUT	TCS	CC	CL	N
WTI Average Price Option	AO	OOF	AAO	LO	CS	N
WTI Houston Crude Oil Option	**HCO**	**OOF**	**HCO**	**H3**	**HCL**	**Y**
WTI Houston Crude Oil Futures	HCL	FUT	HCL	HC	HCL	N
NY Harbor ULSD Option	**OH**	**OOF**	**OH**	**OH**	**HO**	**Y**
E-mini NY Harbor ULSD Futures	QH	FUT	QH	CL	HO	N
NY Harbor ULSD Average Price Option	AT	OOF	ATX	EP	HO	N
NY Harbor ULSD BALMO Futures	1G	FUT	A1G	RF	HO	N
NY Harbor ULSD Bullet Futures	BH	FUT	ABH	RF	HO	N
NY Harbor ULSD European Financial Option	LB	OOF	LB	EF	HO	N
NY Harbor ULSD Financial Futures	MP	FUT	MPX	PT	HO	N
NY Harbor ULSD Futures	HO	FUT	HO	CL	HO	N
NY Harbor ULSD Last Day Financial Futures	23	FUT	23	CP	HO	N
DME Oman Crude Oil Futures	**OQD**	**FUT**	**OQD**	**DE**	**OQD**	**Y**
DME Dubai Crude Oil (Platts) BALMO Futures	DDI	FUT	DDI	DE	OQD	N
DME Dubai Crude Oil (Platts) Futures	DCD	FUT	DCD	DE	OQD	N
Dubai Crude Oil (Platts) BALMO Futures	BI	FUT	ABI	BB	OQD	N
Dubai Crude Oil (Platts) Financial Futures	DC	FUT	DCB	BB	OQD	N
RBOB Gasoline Average Price Option	RA	OOF	RA	EF	RB	Y
E-mini RBOB Gasoline Futures	QU	FUT	QU	CL	RB	N
RBOB Gasoline BALMO Futures	1D	FUT	A1D	RF	RB	N
RBOB Gasoline Bullet Futures	RT	FUT	RT	WS	RB	N
RBOB Gasoline European Financial Option	RF	OOF	ARF	EF	RB	N
RBOB Gasoline Financial Futures	RL	FUT	RLX	PT	RB	N
RBOB Gasoline Futures	RB	FUT	RB	CL	RB	N
RBOB Gasoline Last Day Financial Futures	27	FUT	27	CP	RB	N
RBOB Gasoline Option	OB	OOF	OB	OB	RB	N