

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

PAUL BEARD,)	
)	
Plaintiff,)	
)	
v.)	Case No. 01-4030-CV-C-5
)	
AMERICAN EXPRESS FINANCIAL)	
ADVISORS, INC.,)	
)	
Defendant.)	

ORDER

Pending before the Court is Defendant’s Motion to Stay Proceedings [Doc. 4]. For the reasons stated below, the Motion will be granted.

I. Factual Background

Paul Beard (“Beard”) began his relationship with IDS Financial Services, Inc. (“IDS”) on November 1, 1964. Beard was a financial planner and was classified as an independent contractor. Beard entered into a financial planner’s agreement with IDS on January 1, 1987. IDS is the predecessor to the Defendant, American Express Financial Advisors, Inc. (“American Express”).

Under the agreement, Beard sold IDS financial products and services, including annuities and insurance policies. Beard had sole discretion concerning his business hours and who to solicit for business. He was solely responsible for paying taxes, government and license fees, social security and other business expenses. Beard was required to

promptly deliver any premium receipts, policies or contracts to IDS. Moreover, Beard had to follow IDS' rules and policies concerning applications for annuity contracts and insurance policies. Beard was not allowed to use any information obtained during his work for IDS in a manner adverse to the interests of IDS.

During his employment with IDS and then later, American Express, Beard was registered with the National Association of Securities Dealers, Inc. ("NASD"). Beard applied for registration with NASD on January 17, 1973. The application contained a provision indicating that Beard agreed to abide by, comply with and adhere to all of NASD's regulations as adopted, changed or amended. The regulations of NASD include a Code of Arbitration Procedure which provides that all business and employment-related disputes between a member/member or member/associated person must be arbitrated.

By the late 1990s, Beard's business was generating "trailer commissions" of approximately \$20,000 per year, in addition to other sales commissions. "Trailer commissions" are income commissions generated by the accounts even if there is no additional sales or activity in the account during the year. In early 1999, American Express unilaterally re-assigned Beard's accounts to another financial adviser. On March 1, 1999, American Express communicated directly with Beard's clients and informed them that their new financial adviser was Doris Dollar-Kiretech. The letter sent to Beard's clients also indicated that Beard had "decided to manage only his own accounts and those of his family." Beard retired in November of 1999. As of November 1, 1999,

Beard's registration with the NASD was terminated.

II. Discussion

The Federal Arbitration Act ("FAA") provides that "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable" 9 U.S.C. § 2. The FAA reflects a strong congressional policy in favor of arbitration and requires courts to enforce valid arbitration agreements. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). If a lawsuit is brought which is properly referable to arbitration pursuant to a valid arbitration agreement, the FAA mandates that courts stay the proceedings until an arbitration has occurred. 9 U.S.C. § 3. "The purpose of the FAA was to reverse judicial hostility to arbitration agreements and to place arbitration agreements on equal footing with other contracts." *Keymer v. Management Recruiters Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir. 1999).

The Eighth Circuit has recognized that a dispute must be submitted to arbitration if there is a valid agreement to arbitrate and the dispute falls within the scope of that agreement. *Telectronics Pacing Systems, Inc. v. Guidant Corp.*, 143 F.3d 428, 433 (8th Cir. 1998). "Arbitrability questions must be considered with a 'healthy regard for the federal policy favoring arbitration' and . . . 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Keymer*, 169 F.3d at 504 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

However, the pro-arbitration policy of the FAA is not without limits. *Id.* It “does not operate without regard to the intent of the contracting parties, for arbitration is a matter of consent, not of coercion.” *Id.* Accordingly, a party cannot be forced to arbitrate a type of dispute that he has not previously agreed to submit to arbitration. *Id.* In order to determine whether a stay of the proceedings is warranted under the FAA, courts should examine the following factors: 1) whether the parties agreed to arbitrate; 2) whether the FAA governs the agreement to arbitrate; and, 3) whether the claims at issue are arbitrable. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834-837 (8th Cir. 1997).

A. Whether the parties agreed to arbitrate

1. Personal Financial Planner’s Agreement

Beard argues first that the written agreement between the parties, the Personal Financial Planner’s Agreement, neither contains an arbitration clause nor refers to the NASD or its articles or by-laws. Thus, Beard suggests that his dispute is not arbitrable because he had no direct agreement with IDS to arbitrate. The Court disagrees.

In *Bryant v. American Express Financial Advisors, Inc.*, 595 N.W.2d 482 (Iowa 1999), the plaintiff was a sales representative for IDS Financial Services and its successor. The plaintiff signed a financial planner’s agreement that did not refer to arbitration, however, he also applied for membership in the NASD. *Id.* at 483. After a dispute arose between the parties, the plaintiff filed a complaint in state court alleging conversion, breach of fiduciary duty and breach of the settlement agreement (the parties

had previously been in a disability discrimination dispute which was settled). *Id.* at 483-84. The defendant moved to compel arbitration and the motion was granted. *Id.* at 484.

On appeal, the Supreme Court of Iowa noted that a party cannot be forced to arbitrate a dispute unless there is a valid agreement to arbitrate. *Id.* at 484. However, it determined that when the plaintiff signed his application to be registered with the NASD, he agreed to be bound by the regulations of the association, including the regulation requiring arbitration of disputes. *Id.* See also *First Liberty Investment Group v. Nicholsberg*, 145 F.3d 647 (3d Cir. 1998). Thus, the court upheld the lower court's decision to compel arbitration of the dispute. *Id.*

The instant case is analogous to the decision reached in *Bryant*. Although the Personal Financial Planner's Agreement signed by Beard does not refer to arbitration, Beard applied with the NASD and agreed to be bound by the regulations of NASD. Numerous courts have indicated that an individual is bound by the arbitration provision contained in the NASD regulations if they join the NASD, even though they have no direct agreement to arbitrate with a covered third party. See e.g., *First Liberty Group v. Nicholsberg*, 145 F.3d 647, 653 (3d Cir. 1998) (stating that each member of NASD is contractually bound by its regulations - including all of its arbitration provisions); *Paul Revere Variable Annuity Ins. Co. v. Zang*, 81 F.Supp.2d 227, 234 (D. Mass. 2000), *affd.* by 226 F.3d 15 (1st Cir. 2000).

Thus, the Court finds that the mandatory arbitration provision of the NASD

regulations will control if that provision covers Beard's dispute with IDS. Whether the mandatory arbitration provision covers Beard's dispute depends on whether the dispute is either between two members of NASD or between a member and an associated person.

2. NASD Regulations

In January of 1973, Beard applied for registration with NASD. The NASD application provides that applicants will accept and agree to abide by the regulations of NASD. The regulations of NASD include a Code of Arbitration Procedure. Rule 10101 of the NASD Code of Arbitration Procedure provides as follows:

10101. Matters Eligible for Submission

This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(iv) of the By-Laws of the Association for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company.

- (a) between or among members;
- (b) between or among members and associated persons; . . .

Rule 10201 of the NASD Code of Arbitration provides as follows:

10201. Required Submission

(a) Except as provided in paragraph (b) or Rule 10216, a dispute, claim, or controversy eligible for submission under the Rule 10100 Series between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) with such member, shall be arbitrated under this Code, at the instance of:

- (1) a member against another member;

- (2) a member against a person associated with a member or a person
- (3) a person associated with a member against a person associated with a member. . . .

The dispute between Beard and IDS clearly arises in connection with their business relationship. Thus, the first prong of Rule 10201 is met. Beard argues, however, that the second prong of the rule is not satisfied because his dispute is not a dispute between two current members or between a member and an associated person. Beard was not a member of NASD at the time suit was filed. Moreover, according to Beard, he was never “a person associated with a member” because he was an independent contractor for IDS and was never under its control.

American Express contends that Beard is currently a person associated with a member. The NASD regulation relied on by American Express provides that a “person associated with a member” includes “(1) a natural person who is registered or has applied for registration under the Rules of the Association; (2) a sole proprietor, partner, officer, director, or branch manager of a member; or other natural person occupying a similar status or performing similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member” Given this definition, the Court does not agree that Beard is a current “person associated with a member”. However, the Court finds that he was a “person associated with a member” when he served as an independent contractor for IDS.

In *First Liberty Investment Group v. Nicholsberg*, 145 F.3d 647, 651 (3d Cir. 1998), the court examined the second prong of NASD Rule 10101. The court found that the defendant was an associated person within the meaning of the NASD Code because he was a natural person engaged in the securities business who was directly or indirectly controlled by a NASD member, the plaintiff. *Id.* at 651-52.

The plaintiff argued that the defendant could not be an associated person because the agreement between the parties specifically labeled the defendant as an independent contractor. *Id.* at 652. However, the court indicated that the independent contractor characterization was not controlling since the provisions of the agreement revealed a different type of relationship. *Id.* For instance, the plaintiff provided facilities for the defendant and in return, the defendant agreed not to open competing offices without the prior consent of the plaintiff. *Id.* The limitations placed by the plaintiff on the defendant and the conduct of the parties amounted to at least indirect control over the defendant, therefore, the court found that the defendant was an associated person under the NASD regulations. *Id.*

Based on the parties' relationship prior to the lawsuit when Beard was still working with American Express, the Court finds that Beard would be considered an individual associated with a member. The Personal Financial Planner's Agreement between the parties provides that Beard must follow all of IDS' rules and policies in seeking applications. It indicates that Beard cannot alter or change products or services

offered by IDS and that any products or services submitted by Beard to IDS, or its successor, American Express, are subject to American Express' acceptance or rejection. These provisions indicate that American Express had at least indirect control over Beard during his employment with the company. *See First Liberty Investment Group*, 145 F.3d at 652.

Even if Beard were not a person associated with a member at the time of the dispute, he was himself a member and so was American Express. Hence, if his status is to be measured at the time the dispute arose, it is clear that the second prong of Rule 10201 is satisfied. Beard, however, argues that his status should be measured at the time suit was filed, when he was neither a member nor a person associated with a member.

Beard's primary argument in support of his position is that the present tense is used in the NASD regulations defining both member and person associated with a member, suggesting that his status at the time suit was filed is the relevant inquiry. However, if the Court were to evaluate Beard's status under NASD regulations at the time the lawsuit was initiated, it would allow plaintiffs like Beard to avoid the mandatory arbitration provision of the NASD regulations simply by canceling their membership with NASD prior to filing suit for their grievances. Such action would thwart the mandatory arbitration provision of the NASD regulations.

Furthermore, the language of the Code of Arbitration Procedure suggests that the Code contemplates suits by former associated members. Rule 10216(f) provides in

relevant part that “[i]f a member or a current or former associated person of a member files in court a claim against a member or a current or former associated person of a member that includes matters that are subject to mandatory arbitration, either by the rules of the association or by private agreement, the defending party may move to compel arbitration of the claims that are subject to mandatory arbitration” (emphasis added). Also, Rule 10101 and Rule 10201 of the NASD Code of Arbitration Procedures both refer to arbitration being available or mandatory in disputes “. . . arising out of the employment or termination of employment of associated person[s] with any member” Once an associated person is terminated, he would no longer be an associated person. Yet, the regulations suggest that arbitration is still available and under Rule 10201 mandatory.

Given the language of the NASD Code of Arbitration Procedures and Congress’ policy in favor of arbitration, the Court finds that Rule 10201 covers Beard’s dispute with American Express. Despite Beard’s current status as a non-member of the NASD, he is still bound by the NASD Code of Arbitration as a member of the NASD at the time the dispute arose and as an individual who was associated with a NASD member (IDS) at the time the dispute arose.

B. Whether the FAA governs the agreement to arbitrate

If there is a valid arbitration agreement between the parties, the Court must next determine whether the FAA governs the agreement to arbitrate. There must be an

arbitration agreement “evidencing a transaction involving commerce” in order for Beard’s claims to be subject to arbitration under the FAA. 9 U.S.C. § 2. In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995), the Supreme Court examined the language contained in 9 U.S.C. § 2 and concluded that the word “involving” should be broadly defined and was the functional equivalent to “affecting.” The Court went on to analyze the “evidencing a transaction” language and held that it means that the transaction in fact involved interstate commerce, even if the parties did not contemplate an interstate commerce connection. *Id.* at 279.

Numerous courts have held that the NASD arbitration clause “evinces a transaction involving commerce.” *Austin Mun. Securities, Inc. v. National Ass’n of Securities Dealers, Inc.*, 757 F.2d 676, 697 (5th Cir. 1985). *See also Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 401 n.7 (1967); *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1210 (6th Cir. 1982). Accordingly, the Court finds that the NASD arbitration clause does evidence a transaction involving interstate commerce and, therefore, the FAA is applicable to the instant case.

C. Whether Beard’s claims are arbitrable

Finally, the Court must determine whether Beard’s claims contained in his Complaint are arbitrable. Beard’s Complaint sets forth the following claims: tortious interference with business relationships, defamation, conversion and breach of contract. American Express asserts that each of these claims arise from or in connection with its

business and involve rights and obligations arising out of Beard's former relationship with American Express.

Tort claims are contained within the scope of a broadly worded arbitration agreement, unless the agreement expressly excludes tort claims. *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986) (citing *Prima Paint*, 388 U.S. at 406-07)). For instance, in *Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc.*, 757 F.2d 676 (5th Cir. 1985), the court held that a stockbroker's defamation claim was subject to arbitration under the FAA.

In *First Investors Corporation v. American Capital Financial Services, Inc.*, 823 F.2d 307 (9th Cir. 1987), both the plaintiff and the defendant were members of NASD. On appeal, the court was asked to determine whether the plaintiff's claims of breach of contract, breach of fiduciary duties, interference with contractual and business relations, unfair competition and conspiracy in restraint of trade were subject to arbitration. *Id.* at 308. The court noted that the FAA establishes that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 309 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)). Therefore, the court indicated that it would mandate arbitration of the matter if the NASD Code of Arbitration Procedure reasonably could be interpreted as applying to the causes of action alleged in the complaint. *Id.* The court stated that claims of unfair competition and interference with contractual and business relations are the very type of claims that

the NASD Code contemplates. *Id.* The court noted that “[u]nfairly soliciting the accounts and employees of a competitor fits precisely within the scope of this language.”

The NASD Code of Arbitration Procedures provides that any dispute “arising out of or in conjunction with the business of any member of the Association, or arising out of the employment or termination of employment of associated persons with any member” is covered by the provision. After reviewing the Counts contained in Beard’s Complaint, the Court finds that the claims are all covered by the arbitration provision contained in the NASD regulations.

III. Conclusion

Accordingly, it is hereby

ORDERED that Defendant’s Motion to Stay Proceedings [Doc. 4] is GRANTED.

It is further

ORDERED that this case be statistically closed, subject to be being reopened by the parties for judicial review following resolution of the pending arbitration.

Dated: July 19, 2001
Kansas City, Missouri

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge