IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM JAIRETT, ET AL.	:	**CIVIL ACTION**
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
FIRST MONTAUK SECURITIES CORP., ET AL.	:	
	:	
	:	
Defendants.	:	**NO. 00-1889**

Reed, S.J. **May 14, 2001**

M E M O R A N D U M

Plaintiffs brought this law suit after losing money in an allegedly fraudulent investment scheme. They claim that defendant First Montauk Securities Corporation ("First Montauk") is liable under the sections 10 (b) and 20 (a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j (b), 78t (a), the Pennsylvania Securities Act of 1972, 70 P.S. § 1-101 et. seq., and state tort law. Defendant First Montauk brought a motion to compel arbitration which this Court denied. Defendant now files a motion to reconsider. (Document No. 55). For the following reasons, the motion will be denied

Typically, a motion for reconsideration is decided under Federal Rule of Civil Procedure 59 (e) or 60 (b). See Dayoub v. Penn-Del Directory Co., 90 F. Supp. 2d 636, 637 (E.D. Pa. 2000). However, neither Rule 59 (e) nor 60 (b) applies here because the order First Montauk seeks to have reconsidered is not a final judgment or order but rather an interlocutory decision. See Johnson v. West Suburban Bank, 225 F.3d 366, 370 (3d Cir. 2000) (noting that a refusal to compel arbitration is an interlocutory order even though it is immediately appealable).

A federal district court has the inherent power to reconsider interlocutory orders "when it

is 'consonant with justice'" to do so. Walker by Walker v. Pearl S. Buck Foundation, Inc., No. 94-1503, 1996 WL 706704, at *6 (E.D. Pa. Dec. 3, 1996) (quoting United States v. Jerry, 487 F.2d 600, 605 (3d Cir. 1973)). "'The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.'" Confer v. Custom Eng's Co. Employee Health Benefit Plan, 760 F. Supp. 75, 77 (W.D. Pa.) (quoting Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), aff'd in part on other grounds and dismissed in part on other grounds, 952 F.2d 41 (3d Cir. 1991)). Because of the interest in finality, however, courts should grant motions for reconsideration sparingly. See Rottmund v. Continental Assurance Co., 813 F. Supp. 1104, 1107 (E.D. Pa. 1992).[1]

The facts of this case are fully stated in this Court's prior decision which includes the adjudication of First Montauk's motion to compel arbitration, as well as motions to dismiss separately filed by First Montauk and defendant United Bank. See Jairett v. First Montauk Sec. Corp., Civ. A. 00-1889, 2001 WL 267869, at *1, *7, *10 (E.D. Pa. Mar. 14, 2001). I recount here only the barest of facts necessary to resolve the motion for reconsideration. Plaintiffs William Jairett, Thomas Sinibaldi, and Peter Hoet (collectively referred to as "customer plaintiffs") apparently maintained a customer account at First Montauk. Plaintiffs have *not* brought suit against First Montauk for any alleged misconduct regarding the accounts held by the customer plaintiffs.[2] First Montauk, however, contends that the claims brought by customer

[1] Plaintiffs argue that the motion of defendant for reconsideration was filed one day too late pursuant to Local Rule 7.1 (g) and should therefore be dismissed. Defendant contends that the motion was timely filed. In the interest of maintaining a full record, and as plaintiffs have failed to show prejudice even if the motion was untimely filed, this Court will reach the merits of the motion.

[2] Rather, plaintiffs claim that First Montauk is liable for its alleged failure to monitor and supervise defendant Ronald V. Hatfield, who was a registered agent of First Montauk, and who allegedly induced plaintiffs to invest in securities in defendant Monument Financial by claiming the securities were reviewed, recommended, monitored and purchased through First Montauk. See id., 2001 WL 267869, at *7.

plaintiffs should be compelled to arbitration because those plaintiffs signed a Cash Account Agreement, which included an arbitration clause, with Schroder & Co., Inc. ("Schroders"), in which First Montauk was an intended beneficiary. Schroders is not a party to this lawsuit, nor has any party attempted to join them as a party. Schroders serves as the clearing firm for First Montauk, which served as introducing broker.[3]

While the United States Supreme Court has declared that any ambiguities regarding the scope of arbitrable issues should be resolved in favor of arbitration, see Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983), the High Court has also made clear that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT & T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986) (citation omitted). Under the Federal Arbitration Act, 9 U.S.C. § 4, the court must determine whether there is a "valid agreement to arbitrate" and whether the "specific dispute falls within the substantive scope of that agreement." PaineWebber Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990) (citations omitted). If the court answers both determinations in the affirmative, than it must refer the case to arbitration without reaching the merits. See id. A motion to compel arbitration should be denied "unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT & T Tech., 475 U.S. at 650, 106 S. Ct. at 1419 (emphasis added) (citations omitted). Under this standard, the scope of an arbitration agreement is judicially determined, see PaineWebber Inc. v. Hofmann, 984 F.2d 1372, 1374 (3d Cir. 1993), such that "a compelling case

[3] In industry practice, the clearing broker has no client contact and executes orders with the securities exchange as directed by the introducing broker which solicits orders and makes recommendations to their clients.

for nonarbitrability should not be trumped by a flicker of interpretive doubt." Hartmann, 921 F.2d at 513.

Generally, arbitration agreements are enforceable only by signatories. See Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1296 (3d Cir. 1996) (citing Kaplan v. First Options of Chicago, Inc., 19 F.3d 1503, 1516 (3d Cir. 1994), aff'd, 514 U.S. 938 (1995)). There are, however, exceptions to that general rule such as demonstrating third party beneficiary status. See In re the Prudential Ins. Co. of Am. Sales Practice Litig., 133 F.3d 225, 229 (3d Cir. 1998); see also, Dayhoff, 86 F.3d at 1296-97 (reconciling precedential case law to determine that non-signatories must be in obvious and close nexus with non-parties and contract or contracting parties in order to enforce contract).

First Montauk alleges that it is an intended beneficiary of the agreement between customer plaintiffs and Schroders. State law governs general questions of the enforceability of arbitration agreements. See Stone v. Pennsylvania Merchant Group, Ltd., 949 F. Supp. 316, 321 (E.D Pa. 1996) (citing Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S. Ct. 2520, 2527 n. 9, 96 L. Ed. 2d 426 (1987)). Under Pennsylvania law, a party is deemed an intended beneficiary under a few circumstances. First, if "both parties to the contract express an intention to benefit the third party in the contract itself;" second, if "the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties," and either the performance satisfies an obligation to pay money *or* the circumstances indicate that the promisee intends the benefit to be conferred upon the beneficiary the benefit of the promised performance. See Scarpetti v. Weborg, 530 Pa. 366, 372-73, 609 A.2d 147, 150-51 (Pa. 1992). In sum, the intent of the parties to the contract is dispositive.

The agreement in question here provides:

> THE UNDERSIGNED [customer plaintiffs] AGREES AND BY CARRYING AN ACCOUNT FOR THE UNDERSIGNED YOU [Schroders] AGREE, THAT ALL CONTROVERSIES WHICH MAY ARISE BETWEEN *US* CONCERNING ANY TRANSACTION OR THE CONSTRUCTION, PERFORMANCE, OR BREACH OF THIS OR ANY OTHER AGREEMENT BETWEEN *US* PERTAINING TO SECURITIES AND OTHER PROPERTY, WHETHER ENTERED INTO PRIOR, ON OR SUBSEQUENT TO THE DATE HEREOF SHALL BE DETERMINED BY ARBITRATION.....The undersigned's broker [Fist Montauk] has authorized you [Schroders] to enter into this agreement with the undersigned [customer plaintiffs] on its behalf and the terms and conditions hereof, including the pre-arbitration provision shall be applicable to all matters between the undersigned [customer plaintiffs], the undersigned's broker [First Montauk] *and* you [Schroders].

(Def.'s Exs. C, D and E) (emphasis added). Parties seem to agree that First Montauk, though not specifically named anywhere in the agreement, served as the referenced broker in the agreement. It is possible by this reference in the last sentence that First Montauk is an intended beneficiary of the agreement for certain claims brought by customer agreements. However, for the following reasons, I conclude that the claims brought in this suit fall outside the scope of that intended benefits.

The first sentence, by use of the word *us,* clearly applies only to matters between Schroders and customer plaintiffs. See Arrants v. Buck, 130 F.3d 638-39, 641 (4th Cir. 1997) (determining that under agreement with identical phrase introducing broker lacks standing to enforce); Antinoph v. Laverell Reynolds Sec., Inc., 703 F. Supp. 1185, 1191 (E.D. Pa. 1989) (construing similar language as failing to benefit to introducing broker); Adams v. Laidlaw, Adams & Peck, Inc., Civ. A. No. 87-0165, 1987 WL 13388, at *2 (E.D. Pa. 1987), aff'd, 845 F.2d 1009 (3d Cir. 1988) (same); see also Taylor v. Investors Assoc., Inc., 29 F.3d 211, 213, 216 (5th Cir. 1994) (determining that introducing broker and non-signatory to arbitration agreement

was not an intended beneficiary); O'Connor v. R.F. Lafferty & Co., Inc., 965 F.2d 893, 902 (3d Cir. 1992) (same); McPheeters v. McGinn, Smith and Co., Inc., 953 F.2d 771, 773-74 (2d Cir. 1992) (same); Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc., 795 F.2d 1111, 1117 (1st Cir. 1986) (same); but see, Nesslage v. York Sec., Inc., 823 F.2d 231, 233 (8th 1987); Okcuoglo v. Hess, Grant & Co., Inc., 580 F. Supp. 749, 751-52 (E.D. Pa. 1984).

First Montauk argues that the second sentence modifies the more expansive language of the first sentence thus contending that First Montauk is fully entitled to compel arbitration of *any* claims brought by customer plaintiffs against it. This Court disagrees. The last sentence merely requires that any claims involving *all three* entities must be compelled to arbitration. By use of the word "and," the agreement does not allow for First Montauk to compel arbitration where customer plaintiffs bring suit against only First Montauk and *not* Schroders. See Everett v. Dickinson & Co., Inc., 929 P.2d 10, 13 (Colo. Ct. App. 1996) (construing identical language as compelling arbitration only where all three entities are involved). The agreement reads "all matters between the undersigned [customer plaintiffs], the undersigned's broker [Fist Montauk] *and* you [Schroders]." It does not read, e.g., "all matters between the undersigned [customer plaintiffs], the undersigned's broker [Fist Montauk] *and/or* you [Schroders]," or simply "*or* you," or delete Schroders from the sentence altogether. See Macaulay v. Norlander, 15 Cal. Rptr. 2d 204, 207 (Cal. Ct. App. 1993) (compelling arbitration where agreement read "shall be applicable to all matters between such broker [introducing broker] and you [customers]").

This Court's construction of the agreement is further bolstered by the fact that it does not appear that Schroders could conceivably be joined as an additional defendant since the misconduct allegedly stems from a failure to supervise a registered agent who took money from

plaintiffs and placed it in an account held by defendant Monument Financial Service Group, Inc. In other words, Schroders has no connection to the allegedly mishandled money. There is simply no evidence that the parties to the agreement, namely, customer plaintiffs and Schroders, intended this agreement to extend to matters which did not involve, or even implicate, Schroders. Likewise, First Montauk does not share a nexus to both parties with respect to the claims brought against it here. See, Dayhoff, 86 F.3d at 1296-97 (reconciling precedential case law to determine that non-signatories must be in obvious and close nexus with non-parties and contract or contracting parties in order to enforce contract). Rather, First Montauk, in the context of the facts of this case, is connected only to plaintiffs and not Schroders since plaintiffs are not suing over any alleged mishandling of their accounts with First Montauk.

Defendant primarily relies on three cases which are each distinguishable. First, in Macaulay v. Norlander, 15 Cal. Rptr. 2d 204, 208 (Cal. Ct. App. 1993), the court granted the motion by the defendant, who was the introducing broker and not a party to the arbitration agreement, to compel the law suit to arbitration. That arbitration agreement, however, as noted above, employed different language. Specifically, it read:

> 8. INTRODUCED ACCOUNTS....[T]he introducing broker has authorized Tucker Anthony [clearing broker] 'to enter into this agreement with you [plaintiffs] on their [introducing broker's] behalf and the terms and conditions hereof, including the arbitration provision..., shall be applicable to all matters between broker and you....*Each reference to "we" or "us" in paragraph 9 shall be understood to include any such broker [referring to introducing broker]*.
> ....
> 9. ARBITRATION....You [plaintiffs] agree, and by carrying an account for you [plaintiffs] we [clearing broker] agree, that...all controversies which may arise between you [plaintiffs] and us concerning any transaction or the construction, performance or breach of this or any other agreement between you [plaintiffs] and us...shall be determined by arbitration.

Id. at 206 n.1, 207 n. 2 (emphasis in the original). Thus in Macaulay, the agreement specified

that the arbitration clause extended to matters between only the "broker and you [plaintiffs]," as opposed to matters encompassing all three parties. In addition, the final sentence of paragraph 8 clearly indicates an intention that the "us" in the arbitration clause extend to the introducing broker. In contrast, the agreement presented here fails to signal that the arbitration agreement extends to litigation between only First Montauk and customer plaintiffs.

First Montauk also relies on Okcuoglo v. Hess, Grant & Co., Inc., 580 F. Supp. 749, 751-52 (E.D. Pa. 1984), which in essence adopted the following four step analysis, drawing largely on agency law: (1) because the transaction sued upon involved unauthorized or unexecuted trades, the clearing house could still be joined as a necessary party; (2) as long as that possibility remained, the clearing house had the right to compel the claims to arbitration; (3) the course of dealings between the parties indicates that the introducing broker acted as an agent for both the customer's and the clearing broker's agent; (4) thus the introducing broker was the clearing broker's agent and could thus enforce the right to arbitrate. See id. at 750-52; see also, Mowbray, 795 F.2d at 1116 (interpreting Okcuoglo under four step process). The agreement before this Court, however, clearly absolves Schroders from any liability for acts committed by First Montauk, which defeats any claims that First Montauk is an agent of Schroders. See Lenhart v. Westfield Fin. Corp., 909 F. Supp. 744 (D. Haw. 1995) (concluding that agency law cannot apply where agreement clearly absolves clearing broker of all liability for wrongful act(s) of introducing broker); Antinoph, 1989 WL 67332, at *5 (same); Kyung Sup Ahn, M.C. v. Rooney, Pace Inc., 624 F. Supp. 368, 370 (S.D. N.Y. 1985) (same). Specifically, the agreement here reads, "The undersigned [customer plaintiffs] understands and agrees that you [Schroders] shall have no responsibility or liability to the undersigned for any acts or omissions of such other

broker [First Montauk], its officers, employees or agents." (Def.'s Exs. C, D and E). Thus the reasoning in Okcuoglo cannot be applied here.

Finally, defendant relies on Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1114-15 (3d Cir. 1993), in which the Court of Appeals determined that the clause "all controversies which may arise between [us]" is expansive and applies to all disputes. However, the clause presented for construction here is not the first part of the arbitration clause, but rather, the language: "The undersigned's broker [Fist Montauk] has authorized you [Schroders] to enter into this agreement with the undersigned [customer plaintiffs] on its behalf and the terms and conditions hereof, including the pre-arbitration provision shall be applicable to all matters between the undersigned [customer plaintiffs], the undersigned's broker [Fist Montauk] *and* you [Schroders]." As a result of this sentence, for the reasons explained above, First Montauk cannot benefit from the expansive language unless all three entities are involved in the dispute.

I conclude that defendant First Montauk is not entitled to compel the claims brought by customer plaintiffs to arbitration because even if First Montauk is an intended beneficiary in some sense under the agreement signed by customer plaintiffs and Schroders, the claims brought here clearly fall outside the scope of that relationship. Thus, it is not consonant with justice to grant First Montauk's motion for reconsideration.

An appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM JAIRETT, et al.	**:**	**CIVIL ACTION**
	:	
Plaintiffs,	**:**	
	:	
v.	**:**	
	:	
FIRST MONTAUK SECURITIES CORP., et al.	**:**	
	:	
	:	
Defendants.	**:**	**NO. 00-1889**

ORDER

AND NOW, this 14th day of May, 2001, upon consideration of the motion of defendant First Montauk Securities Corporation for reconsideration of the Court's denial to compel claims brought by customer plaintiffs to arbitration (Document No. 55), and the response of plaintiffs thereto, and for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** that the motion for reconsideration is **DENIED**.

LOWELL A. REED, JR., S.J.