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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA VITZETHUM, DIETER GYSIN, HORST ZIEGLER, TOBIAS ZIEGLER, MARIANNE ZIEGLER, HELMUT FISHER, MONIKA FISCHER, JURGEN BEISSWENGER, KARIN MACHNIK, HORST WISSMANN, HERMANN ESSIG, ANNA ESSIG, ANNA ZELLER, HELMUT DINELACKER, and PETER MOHRMANN,

Plaintiffs,

-against-

DOMINICK & DOMINICK, INCORPORATED,

Defendant.

DOMINICK & DOMINICK INCORPORATED, PETER M. KENNEDY, III, PAUL L. KENNEDY, JOSEPH L. CACCIOTTI, JOHN HENDERSON, JOHN B. MEEHAN, and ROBERT L. NOSWORTHY,

Plaintiffs,

-against-

HUBERT ANDERS, SIGRID BAUER, PROF. DR. JURGEN BELLERS, ANTON BIERINGER, FRIEDA BIERINGER, DIRK BITTINGHOFER, DIETER BOCK, GERHARD EHNLE, SIMONE ENSELING, MANFRED FELDMANN, HUBERTUS FRIETAG, PETER GORALSKY, KARL ANTON HAYDTER, PETER HEISING, DR. REINGARDT HELM, GERHARD HOFL, CHRISTA JUNGBAUER, MANFRED KLEINDIENST, ANGELIKA KNEIBL, ROLAND KONOPAC, FRANZ KRAMLINGER, KLAUS KROHE, RALF KUHNAPPEL, CARL-LUDWIG LEBETH, DR. CARSTEN LOOSE, HANS MACIOL, HANS GUNTER MAIER, GUNTER MERBOTH, BERND MULLER-THEDERAN, JUTTA NAGEL, HERBERT NOELLE, MARGARETE NOTHAFT, KLAUS NURNBERGER, DR. JOACHIM PONGRATZ, ROBERT RASCHKE, GEBHARD RATHGEB, HANS HENNING SCHEEL, MICHAEL SCHLOTMANN, SABINE SCHMID, THOMAS SCHNEIDER, INGRID STRNAD, RUDOLF VOGL, ROBERT VOIT, JOHANN WAGNER, EMA WAMRZYNIAK, and HARRY WOLF,

Defendants.

OPINION and ORDER

94 Civ. 4938(AGS)

95 Civ. 429(AGS)

ALLEN G. SCHWARTZ, DISTRICT JUDGE:

Motions in two related actions, Vitzethum, et al. v. Dominick & Dominick Inc., 94 Civ. 4938 (AGS), ("Vitzethum v. Dominick") and Dominick & Dominick Inc. v. Anders, et al., 95 Civ. 429 (AGS), ("Dominick v. Anders"), are before the Court. In Vitzethum v. Dominick, defendant Dominick & Dominick Inc. ("Dominick") moves to dismiss the complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1), 9(b) and 12(b)(6), or to stay proceedings in this action pending arbitration of plaintiffs' claims in Germany, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. Plaintiffs cross-move to compel discovery.

In Dominick v. Anders, Dominick and the six individual plaintiffs (collectively, "Dominick") move to compel arbitration of the parties' dispute before a panel of arbitrators in Frankfurt, Germany, pursuant to the FAA, 9 U.S.C. § 4, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 206. Defendants in that action cross-move to dismiss the complaint for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6).

BACKGROUND

The fifteen plaintiffs in Vitzethum v. Dominick, and forty-six defendants in Dominick v. Anders are all citizens and residents of the Federal Republic of Germany who invested in a German investment program known as the "DAX Program" which was developed and sold by the investment advisory firm Dominick & Dominick Deutschland Kapitalanlageberatung AG ("DD AG"), a subsidiary of Dominick,

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located in Frankfurt, Germany.[1] The DAX Program was an investment program designed to trade in derivative securities, futures, related to the index of the German Stock Exchange, and was offered exclusively to persons outside of the United States. DD AG was adjudicated bankrupt on April 15, 1994 in Frankfurt and is not a party to either of these actions.

The DAX Program Subscription Brochure, as translated from German to English for purposes of these actions, states that DD AG, a subsidiary of Dominick, acts as portfolio manager "concluding trades directly using the DIS (DAX Investment Strategy), the appointment of additional investment advisors, as well as the investment and re-investment of the assets of the program employing the above-mentioned investment strategy." Affidavit of Henry F. Minnerop, Esq. in Support of Defendant's Motion to Dismiss, dated November 16, 1994 ("Minnerop Aff."), Ex. M at bates no. 207. The DIS is described as having been "developed on the basis of many years of practical trading experience" and being a strategy which "follows strict guidelines of money management, in order to achieve optimum utilization of the potential in futures markets." Id. at 209. The brochure further states that management of the program has been separated from the control function to avoid conflicts of interest. Thus, "[t]he operative area is the responsibility of affiliates of Dominick & Dominick Inc. . . . . The management of the program is exclusively the responsibility of Dominick &

[1]For purposes of clarity, the Court will refer to plaintiffs in Vitzethum v. Dominick and defendants in Dominick v. Anders collectively as the "investors", where appropriate.

Dominick Deutschland Kapitalanlageberatung AG. . . . The control function is carried out by authorities not associated with Dominick & Dominick, such as auditors, trustees etc., in the interest of investors." Id. Under the heading "Risk Factors" is the following paragraph:

> Trade in futures contracts is speculative and volatile. The prices of futures contracts are subject to severe fluctuations. Entering into positions in these markets is associated with risks and opportunities, especially if the leverage effect is used. Under certain conditions (high price jumps, limit limitations, etc.), futures contracts can be illiquid. This may lead to the inability to sell existing positions immediately and thus may cause losses.

Id. at 213. Investors are instructed to "fill out completely the enclosed certificate of subscription, the contract . . ., and the arbitration agreement and to forward these to Dominick & Dominick Deutschland Kapitalanlageberatung AG." Id. at 215. The "Contract Providing for the Effecting of a Transaction between the subscriber and [DD AG]", included in the subscription package contains the statement, "This agreement is subject to German law. The discharge of business is subject to commission agreements, brokerage agreements, stock exchange regulations, customs and laws, which are applicable to the implementing transactions." Id. at 231.

1. Vitzethum v. Dominick

Based on their investment losses in the DAX Program, plaintiffs in Vitzethum v. Dominick seek damages for violation of Sections 10, 15(c)(1), and 20 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j, 78o, 78t, and Rules 10b-5 and 15c1-7 promulgated thereunder, 17 C.F.R. §§ 240.10b-5,

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240.15cl-7; Section 12(2) of the Securities Act of 1933, 15 U.S.C. § 771; the Racketeer Influenced and Corrupt Organization Act, 118 U.S.C. § 1961, et seq. ("RICO"); and the common law of New York State based on breach of contract, breach of fiduciary duty, negligence and fraud. Plaintiffs allege that DD AG's reputation and goodwill in Germany were based solely on that of its parent corporation, Dominick, which represented to plaintiffs through advertisements, press releases, promotional literature and brochures that it had been doing business in New York since 1870 and was a source of reliable, competent, expert, ethical and professional financial advice and consultation. Plaintiffs claim that these and other representations, some of which were false and misleading, lulled plaintiffs into a false sense of security to make and continue their investments in the DAX Program.

Plaintiffs further allege that Dominick, directly or indirectly through DD AG, caused to be issued and distributed to plaintiffs the prospectus and subscription agreement for the DAX Program which contained further misrepresentations. These alleged misrepresentations include that (1) the DAX Program would utilize only conservative, tested strategies, which avoid unnecessary risks, and that any change of such strategies would occur only with the consent of the investors; (2) the investment strategies had been developed on the basis of Dominick's expertise, and the DAX Program would follow strict rules of management in order to limit trading losses by employing built-in, pre-determined price, stop-loss thresholds; (3) the DAX Program would be administered and

operated by DD AG, whereas, in accordance with plans and intentions existing at the time of this representation, Dominick sold all of its interest in DD AG to an inexperienced management group; and (4) the investors would be provided with high quality professional advice and expertise by ongoing consultations between DD AG and Dominick. Plaintiffs claim that, subsequent to their purchase of interests in the DAX Program, Dominick caused DD AG to engage in highly speculative trading, unsuitable to the investment needs of plaintiffs, and churn plaintiffs' accounts. This, plaintiffs allege, resulted in a substantial loss of capital assets of DD AG to the extent that it became insolvent, which, in turn, caused plaintiffs to lose their investments in the DAX Program.

Dominick counters that, following the limited discovery ordered by the Court on the issue of the Court's subject matter jurisdiction, plaintiffs have failed to produce any evidence to substantiate their claims that Dominick directed and supervised the DAX Program from the United States. Dominick contends that the DAX Program prospectus makes clear that DD AG, and not Dominick, established and managed the DAX Program and that the prospectus expressly states that "[t]he management [of the DAX Program] is exclusively under Dominick & Dominick Deutschland Kapitalanlageberatung AG." See Minnerop Aff., Ex. M at bates no. 209. Dominick further submits that, "[f]rom plaintiffs' document production it appears that the only document that even relates to Dominick is a general corporate brochure that is completely unrelated to the DAX Program or plaintiffs' claims of improper

trading practices in Germany . . . . Memorandum in Support of Defendant's Motion to Dismiss ("Defendant's Mem. of L.") at 4. Finally, Dominick states that "plaintiffs' document production reveals that their investments in the DAX Program were subject to an arbitration agreement, under which they are bound to resolve any dispute arising out of their investments before arbitrators in Frankfurt, Germany. Id. at 3. Hence, Dominick moves to stay the proceedings in this action pending arbitration before the designated arbitration tribunal in Germany.

Prior to plaintiffs' bringing this action against Dominick, Dominick commenced an action for a declaratory judgment in the Landgericht (district court) in Frankfurt, Germany, relating to the same facts and issues addressed in plaintiffs' complaint.

2. Dominick v. Anders

Dominick brought Dominick v. Anders in response to the defendants' filing a Statement of Claim with the National Association of Securities Dealers, Inc. ("NASD") alleging violations of various provisions of the United States securities laws, RICO, New York's Martin Act and principles of New York common law based on defendants' losses in connection with their investments in the DAX Program. In their NASD Statement of Claim, defendants allege that they were customers of Dominick and, as such, are entitled to invoke the NASD Code of Arbitration Procedure requiring all NASD members and persons "associated" with members to arbitrate any dispute "arising in connection with the business of any member of the [NASD] . . . ." NASD Code of Arbitration

Procedure Part I § 1. See Affidavit of Robert L. Nosworthy dated February 28, 1995 ("Nosworthy Aff.") Ex. D. These investors make allegations similar to those made by plaintiffs in Vitzethum v. Dominick, adding claims, such as, that the prospectus failed to disclose that Dominick could terminate its and/or DD AG's involvement in the DAX Program without notice to investors, that Dominick or DD AG failed to give the investors notice of Dominick's sale of its interest in DD AG, and that after DD AG was sold, the new owners proceeded to churn the investors' accounts. See Nosworthy Aff. Ex. A.

Dominick seeks a judgment declaring that (1) if Dominick is required to arbitrate with defendants, such arbitration shall proceed in Germany pursuant to the arbitration agreement between the investors and DD AG made in conjunction with the investors' subscribing in the DAX Program (referred to above), and (2) Dominick is not required to arbitrate with defendants before the NASD because the defendants were not customers of Dominick.

DISCUSSION

1. Dominick's Motion to Stay Vitzethum v. Dominick Pending Arbitration

Dominick moves to stay this action pending arbitration of plaintiffs' claims according to an arbitration agreement between DD AG and DAX Program investors which was incorporated in the DAX Program subscription agreement. Plaintiffs submit that (1) Dominick, as a non-signatory to the agreement, cannot enforce it, (2) the arbitration agreement is unenforceable under German law, and (3) Dominick has waived any right it may have had to

arbitration by bringing a suit in Germany.

a. The Arbitrability of Plaintiffs' Claims

The Federal Arbitration Act ("FAA"), 9 U.S.C § 1, et seq., provides that a district court must "stay the trial of the action" if satisfied that "the issue involved in such suit or proceeding is referable to arbitration" under a written arbitration agreement, until the arbitration has been had in accordance with the terms of that agreement. 9 U.S.C. § 3; see also McMahan Securities Co. L.P. v. Forum Capital Markets L.P., 35 F.3d 82, 85 (2d Cir. 1994). The FAA embodies a strong federal policy favoring the arbitration of disputes when agreed to by the parties. See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983) ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"). Indeed, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 105 S.Ct. 1238, 1241 (1985) (emphasis in original). Thus, "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 Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. at 24-25, 103 S.Ct. at 941; see also Coudert v. Paine Webber Jackson & Curtis, 705 F.2d 78, 81 (2d Cir. 1983) ("arbitration agreements are favored in the law and are to be broadly construed"). That an arbitration is to take place in a foreign country does not affect the right to a stay under the FAA. Ohio Reinsurance Corp. v. British Nat'l Ins. Co., 587 F.Supp. 710, 711, n. 1 (S.D.N.Y. 1984).

Claims brought under the federal securities laws and RICO are arbitrable. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483, 109 S.Ct. 1917, 1921 (1989) (overruling Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182 (1953)); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 242, 107 S.Ct. 2332, 2345 (1987). Moreover, unless the parties have specifically agreed to arbitrate the arbitrability of claims, the district court should determine arbitrability independently. First Options of Chicago, Inc. v. Kaplan, 115 S.Ct. 1920, 1924, 1995 WL 306184 at *5 (May 22, 1995).

In the instant actions, there is an arbitration agreement between DD AG and each subscriber to the DAX Program.[1] See Minnerop Aff., Ex. M at bates no. 233-37. Paragraph one of the arbitration agreement provides:

> All future legal actions, which might arise between the parties about or out of or in connection with the agreement concerning the discharge of business relating to DAX futures transactions and its derivatives, no matter for what legal reason (such as contractual claims,

[1]Plaintiffs refer to the agreement produced by them in discovery as the "purported arbitration agreement." See e.g. Memorandum of Law in Opposition to Defendant's Motion to Dismiss and in Support of Plaintiffs' Cross-Motion ("Plaintiffs' Mem. of L.") at 5. They do not dispute the existence of such a document, but rather contend that it is unenforceable under German law. See infra at 17.

> negligence while concluding the agreement, unjust enrichment, unauthorized actions), including those which relate to the interpretation and validity of this arbitration agreement, will be decided by the arbitration tribunal agreed to in this agreement with the exclusion of ordinary courts.[3]

Id. at 233, ¶ 1. The arbitration agreement calls for the application of German law (the Deutschen Ausschusses fur Schiedsgerichtswesen) by an arbitration tribunal consisting of two arbitrators and one chairman who must qualify as a judge in the Federal Republic of Germany, under the auspices of the Deutschen Terminhandel Verbandes e.V. in Frankfurt, Germany. Id. at 233-35, ¶¶ 4, 5, 9. The agreement does not specifically provide for the arbitration of the question of arbitrability of claims.

The issue before the Court is whether plaintiffs' claims in Vitzethum v. Dominick constitute "legal actions, which might arise between the parties about or out of or in connection with the agreement concerning the discharge of business relating to DAX futures transactions and its derivatives." Id. at 233, ¶ 1 (emphasis supplied). If so, such claims are arbitrable under the agreement and, pursuant to the FAA, must be referred to the German arbitration panel for its consideration. There is no question that plaintiffs' claims arise in connection with the agreement concerning the discharge of business relating to the DAX Program. However, for such claims to be arbitrable under this arbitration agreement, Dominick must be deemed a "party" to the agreement under

[3]The arbitration agreement has been submitted to the Court by Dominick in the original German along with an English translation. The investors do not object to this portion of the translation.

"federal substantive law." See Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 43 (3d Cir. 1978).

Plaintiffs urge that since Dominick was not a signatory to the arbitration agreement, it cannot enforce such agreement. Plaintiffs did not specifically agree to submit to arbitration claims against Dominick relating to the DAX Program, only those against DD AG. See United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 1353 (1960) ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"). In support of this argument, plaintiffs refer the Court to two cases decided in this district: Matter of Arbitration between Keystone Shipping and Texport Oil, 782 F.Supp. 28 (S.D.N.Y. 1992) and Conway v. Icahn & Co., Inc., 787 F.Supp. 340 (S.D.N.Y. 1990).

In Keystone Shipping, Judge Edelstein stated that an arbitration clause may be applied to a non-signatory where the Court is justified in piercing the corporate veil and holding that the non-signatory is the signatory's alter ego. 782 F.Supp. at 30. Since the party resisting arbitration alleged that the signatory and non-signatory were merely "affiliated", the Court declined to pierce the corporate veil and permit the non-signatory to enforce the arbitration agreement. Id. at 31.

In Conway v. Icahn, the defendant, a stock broker, attempted to enforce an arbitration clause in the Customer Agreement between

his client and the clearing broker', who was not a party to the action. There was no corporate affiliation between the two brokers, and the Court declined to find that the defendant was an agent of the clearing broker or a third-party beneficiary of the Customer Agreement. Judge Ward specifically stated that, "[t]he overwhelming weight of authority in this district and in other jurisdictions rejects attempts by introducing brokers to enforce arbitration clauses contained in customer agreements between their clients and clearing brokers." Conway v. Icahn, 787 F.Supp. at 344 (citations omitted).

We find that both of these cases are distinguishable from the instant action on their facts. As asserted by plaintiffs in their complaint, DD AG is a wholly-owned subsidiary of Dominick, not merely an affiliate. Moreover, plaintiffs allege that Dominick established the DAX Program through DD AG, Dominick sold plaintiffs interests in the Program, and Dominick "exercised exclusive control of plaintiffs' accounts, through the management, supervision and/or control of its subsidiary DD AG." See Complaint at ¶¶ 25, 30-45. Thus, according to plaintiffs' own allegations, Dominick exercised significant control over DD AG and the DAX Program, which suggests both that Dominick may be a third-party beneficiary of the arbitration agreement between DD AG and the investors and that DD AG may have acted as Dominick's agent in carrying out the DAX

'The Court noted that clearing brokers typically perform mechanical "back office" type functions related to the clearance and settlement of transactions in the accounts of a stock broker's customers. See 787 F.Supp. at 341, n. 1.

Program business allegedly established by Dominick.

Arbitration agreements "must not be so broadly construed as to encompass claims and parties that were not intended by the original contract. It does not follow, however, that under the [FAA] an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." Thomson-CSF, S.A. v. American Arbitration Assoc., 64 F.3d 773, 776 (2d Cir. 1995) (citations and internal quotations omitted). We find persuasive the Eleventh Circuit's reasoning in Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993). In that case, the Court was faced with the question of whether Del Monte, the parent company of Sunkist Soft Drinks, Inc. ("SSD")[5] and a non-signatory to a licensing agreement between SSD and the defendant, Sunkist Growers, Inc. ("Sunkist"), could enforce an arbitration clause in that agreement and arbitrate counterclaims that the defendant had brought against it. The Court noted that, "Sunkist argues that it did not consent to nor intend to arbitrate any claims with Del Monte. Absent a written agreement to arbitrate with Del Monte itself, Sunkist asserts that the district court erred in compelling arbitration." Id. at 757. The Court found Sunkist's argument unpersuasive:

> . . . Sunkist contends that Del Monte, through its management and operation of SSD, caused SSD to violate various terms and provisions of the license agreement. Each claim asserted by Sunkist makes reference to the license agreement. Although Sunkist does not rely exclusively on the license agreement to support its

[5]As in the case of DD AG and Dominick, SSD was the wholly-owned subsidiary of Del Monte.

> claims, each claim presumes the existence of such an agreement. . . . The nexus between Sunkist's claims and the license agreement, as well as the integral relationship between SSD and Del Monte, leads us to the conclusion that the claims are intimately founded in and intertwined with the license agreement. Therefore, we hold that Sunkist is equitably estopped from avoiding arbitration of its claims.

Id. at 758.

The Court in Sunkist cited decisions in other Circuits, such as J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988). In J.J. Ryan, the Fourth Circuit held that, "[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." Id. at 320-21. Similarly, in Hughes Masonry Co., Inc. v. Greater Clark County School Bldg. Corp., 659 F.2d 836 (7th Cir. 1981), the Seventh Circuit held that since, in making its claims against the defendant, the plaintiff ultimately had to rely on the terms of a construction agreement, to which the defendant was not a signatory, the plaintiff was equitably estopped from repudiating the arbitration clause of the agreement. Id. at 840-41; see also McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc., 741 F.2d 342, 344 (11th Cir. 1984) (where claims are "intimately founded in and intertwined with the underlying contract obligations" and the underlying contract contains an arbitration clause, the lack of a written arbitration agreement between the actual parties does not preclude arbitration); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d, 1110, 1122 (3d Cir. 1993) ("arbitration

agreements may be upheld against non-parties where the interests of such parties are directly related to, if not congruent with, those of a signatory").

Indeed, courts in this Circuit have held that a non-signatory to an arbitration agreement may nevertheless be bound by the agreement. In In re Salomon Inc. Shareholders' Derivative Litig., 91 Civ. 5500 (RRP), 1994 WL 533595 (S.D.N.Y. Sept. 30, 1994), Judge Patterson held that Salomon Inc. was bound by an arbitration agreement signed by its subsidiary Salomon Brothers, stating:

> Salomon Inc is the sole parent of Salomon Brothers, and Plaintiffs' claims on behalf of Salomon Inc are largely predicated on the conduct of the business of its subsidiary and agent, Salomon Brothers.

Id. at *5-6 (citing Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, 7 F.3d at 1122); see also Thomson-CSF, S.A. v. American Arbitration Assoc., 64 F.3d at 776 ("we have recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel").

We find that plaintiffs' claims in this action are founded in and intertwined with the subscription agreement for the DAX Program, which incorporated the arbitration agreement. Plaintiffs cannot escape enforcement of the arbitration agreement simply by suing the parent, Dominick, rather than DD AG, especially when their claims are based on Dominick's alleged control of the DAX Program and of the actions of DD AG. We hold that plaintiffs are estopped from avoiding their arbitration agreement with DD AG, and that Dominick, as the parent of DD AG and alleged controller of the

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DAX Program, may enforce the arbitration agreement. Accordingly, plaintiffs' claims in this action are arbitrable under paragraph one of the arbitration agreement.

b. Enforceability of the Arbitration Agreement under German Law

Plaintiffs contend that they cannot be compelled to submit to arbitration pursuant to the arbitration agreement because such agreement is a nullity under German law according to two legal principles. First, plaintiffs submit that German law requires an arbitration agreement to be entered into explicitly in a separate document, and "[a]greements other than those having regard of the arbitration procedure may not be contained in such document." Plaintiffs' Mem. of L. at 5-6 (citing § 1027, German Code of Civil Procedure, ¶ 1). Plaintiffs' expert on German law, Stephan Schmitt, states that

> [T]he clause relied upon is stated to be part of the "Zeichnungsschein" (Subscription Agreement) executed by various Plaintiffs on occasion of their investment in the DAX Program. Such Subscription Agreements, obviously contain, besides an arbitration clause, inter alia, provisions concerning the amount of the investment, the termination of the contract and the management of the investment. Since a valid arbitration agreement under the clear mandates of Section 1027 ZPO may not contain provisions other than those governing this arbitration, The Arbitration Agreement alleged to by Defendant is invalid under German law.

Affidavit of Herbert Rubin, Esq. in Opposition to Defendant's Motion to Dismiss and in Support of Plaintiffs' Cross-Motion to Compel Further Discovery, dated December 8, 1994, Ex. 1 at ¶ 7. Second, plaintiffs argue that German law precludes the enforcement of an arbitration agreement entered into between a subsidiary and a third party by the subsidiary's parent company. On this point, Stephan Schmitt states

> A party agreeing to submit its claims arising out of a contract through arbitration waives a variety of significant rights, inter alia, the right guaranteed by the German Constitution to have such dispute heard by a lawfully appointed judge. For that reason, German courts have been reluctant to extend the binding force of arbitration agreements beyond the actual signatories of such agreements. Since Dominick & Dominick Inc. is not an actual signatory, it could not seek arbitration under the agreement.

Id. at ¶ 10.[1]

We note that Dominick has offered credible responses to plaintiffs' arguments under German law. First, Dominick points out that the arbitration agreement was a separate document, contained on a single sheet of paper. Although it appears to have been sent to investors along with the prospectus for the DAX Program, the arbitration agreement, as well as the application form, are separated from the prospectus by a cover sheet stating: "Please

[1] Defendants in Dominick v. Anders join in these arguments and make the additional points that (1) Sections 416 and 420 of the German Civil Code require a party seeking to enforce an arbitration agreement to produce the agreement in its original form, and Dominick has not done so; and (2) DD AG cannot be compelled to arbitrate pursuant to the agreement because it was adjudicated a bankrupt entity on April 15, 1994 by a German court and dissolved pursuant to German Bankruptcy law. Dominick has not responded to these points; however, presumably, Dominick would produce the original arbitration agreement following discovery in Germany. Moreover, that DD AG cannot be compelled to arbitrate the investors' claims in Germany is inapposite. Dominick has not moved the Court to compel arbitration between the investors and DD AG, as the defendants in Dominick v. Anders incorrectly state. See Memorandum of Law in Support of Cross-Motion to Dismiss Complaint and in Opposition to Motion to Compel Arbitration at 1-2. Rather, Dominick moves to compel arbitration in Germany between itself and the investors pursuant to the arbitration agreement between the investors and DD AG.

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take out the enclosed agreements before filling them in. The Agreements should be sent to [DD AG]." Minnerop Aff., Ex. M at bates no. 223. Moreover, the application form contains the following statement to be signed by the subscriber: "In signing and submitting this Application Form, I declare, legally binding, the following: . . . (4) I have also read and signed . . . the arbitration contract." Id. at 225. Thus, the application form clearly refers to the arbitration agreement as a separate contract which the investors must agree to sign and return to DD AG.

Second, although it is not a signatory to the arbitration agreement, Dominick has agreed to be bound by the decision of the German arbitration tribunal, thereby waiving its rights under the German Constitution to have the dispute heard by a lawfully appointed judge.[1] In addition, Dominick argues that, under German law, it has the right to enforce the arbitration agreement as a third-party beneficiary of the contract. Dominick's German law expert, Otto Gf. Praschma, states that the arbitration agreement itself is "such a contract for the benefit of a third party" because paragraph three of the agreement reads in translation:

> This arbitration agreement applies as well to claims which a customer raises against performance agents (employees or collaborators) of [DD AG] in connection with or on the occasion of the agreement when and if the employee or collaborator affected consent to the deciding of the arbitration panel. (emphasis added)

[1]Dominick states several times, throughout its motion papers in both actions, that it consents to be bound by the decision of the designated arbitration tribunal in Germany under the arbitration agreement between DD AG and the investors. The Court will hold Dominick to its consent to be bound.

Affidavit of Otto Gf. Praschma, dated December 29, 1994 ("Praschma Aff.") at ¶ 6; see also Minnerop Aff., Ex. M at bates no. 233. Praschma further states that the term performance agent in the German Civil Code means "any natural or corporate person who is used by the debtor of an obligation in order to perform the obligation." Praschma Aff. at ¶ 7. Plaintiffs' German law expert disputes Praschma's translation of the German word "Mitarbeiter" as "collaborator" and offers "free lance worker" as the appropriate definition. He states that "Defendant's translation of "Mitarbeiter" as "collaborator" while being literally correct is somewhat problematic, and overly broad." Affidavit of Stephan Schmitt, dated January 13, 1995, at ¶ 8, n. 1.

Such intricacies of German law and language are not for this Court to ponder. Having determined that, under United States law, the investors' claims are arbitrable as being a "legal action[], which might arise between the parties about or out of or in connection with the agreement concerning the discharge of business relating to DAX futures transactions and its derivatives," the Court has performed the task assigned to it by the FAA. The questions as to whether, under German law, the arbitration agreement is valid and enforceable by Dominick as a "performance agent" or "collaborator" are relegated to the arbitration panel by paragraph one of the arbitration agreement: "All future legal actions . . . including those which relate to the interpretation and validity of this arbitration agreement, will be decided by the arbitration tribunal agreed to in this agreement with the exclusion

of ordinary courts."[1] Minnerop Aff., Ex. M at bates no. 233. The Court's role at this time is limited to deciding the threshold issue of the arbitrability of the investors' claims, that is, whether the "issue involved in [this] suit or proceeding is referable to arbitration under [the arbitration] agreement." 9 U.S.C. § 3; see also Ohio Reinsurance Corp. v. British National Insurance Co., 587 F.Supp at 712 ("The court need not involve itself in a discussion of English law. As indicated above, the Federal Arbitration Act governs the scope of the arbitration in the federal courts"); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d at 43 ("There has been much discussion by the parties concerning the applicability of German law or Pennsylvania law in the resolution of this dispute. It may well be that the question of which law is to be applied will have to be answered in deciding the merits of the underlying controversy. However, the case before us presents only the issue of the arbitrability of that controversy") (emphasis in original).

c. Waiver of Arbitration Rights

Plaintiffs also argue that Dominick has waived any right to submit claims to arbitration that it might have had pursuant to the arbitration agreement between DD AG and the investors because

[1]While such a determination relates, in this case, to the arbitrability of plaintiffs' claims under the arbitration agreement, we find that the agreement does not specifically provide for the arbitration of arbitrability, as required by First Options, Inc. v. Kaplan, 115 S.Ct. at 1924, 1995 WL 306184 at *5 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so").

Dominick brought an action for a declaratory judgment against plaintiffs in Germany. In addition, plaintiffs argue, neither Dominick nor DD AG has served plaintiffs with a notice of intent to arbitrate.

This issue is properly before the Court, rather than the arbitrators, as the Second Circuit has held that "a district court may reach the question of waiver whenever a party seeking arbitration has engaged in any prior litigation." Doctor's Associates, Inc. v. Distaio, 66 F.3d 438, 456, n. 12 (2d Cir. 1995).

"Mere delay in seeking arbitration, absent prejudice to the opposing party, does not constitute waiver. However, the litigation of substantial issues going to the merits may constitute a waiver of arbitration." Com-Tech Associates v. Computer Associates Int'l, Inc., 938 F.2d 1574, 1576 (2d Cir. 1991) (citations and internal quotations omitted). In Rush v. Oppenheimer & Co., 779 F.2d 885 (2d Cir. 1985), the Second Circuit held that "[g]iven [the] dominant federal policy favoring arbitration, waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated." Id. at 887 (emphasis supplied). Prejudice to the other party "can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration, or it can be found when a party too long postpones his invocation of his contractual right to arbitration, and thereby causes his adversary to incur

unnecessary delay or expense." Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991). However, "pretrial expense and delay--unfortunately inherent in litigation-- without more, do not constitute prejudice sufficient to support a finding of waiver." Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 26 (2d Cir. 1995).

Plaintiffs state in a conclusory fashion that, "Defendant's actions at a minimum meet the criteria for a finding of waiver by their conduct of a full-fledged litigation in the German court, thereby causing plaintiffs to incur unnecessary delays and expenses." Plaintiffs' Mem. of L. at 10. Dominick commenced its action for a declaratory judgment in the German district court on March 29, 1994. Plaintiffs brought the instant action approximately four months later. On November 16, 1994, Dominick brought this motion to stay the proceedings pending arbitration or to dismiss the complaint for lack of subject matter jurisdiction. Plaintiffs do not describe the "unnecessary delays and expenses" they have incurred or any other prejudice to them.[3] In short, plaintiffs fail to demonstrate that Dominick's actions have caused them to suffer prejudice.

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[3]The Court requested the parties to submit a statement regarding the status of the action commenced by Dominick in the German district court. In a letter to the Court dated January 16, 1996, Dominick's counsel states that "the German court has informally stayed all further proceedings in Vitzethum, pending a ruling by this Court on Dominick & Dominick's motion to dismiss for lack of subject matter jurisdiction." Letter from Henry F. Minnerop, Esq., dated January 16, 1996.

The defendants in Dominick v. Anders do not raise the issue of waiver in their opposition to Dominick's motion to compel arbitration.

Moreover, Dominick states that it only discovered the existence of the arbitration agreement between DD AG and the investors through discovery in this action and that Dominick "was never in possession of any of the customer agreements or other documents of [DD AG] so as to have knowledge of the existence of an arbitration agreement." Reply Memorandum of Law in Support of Defendant's Motion to Dismiss ("Defendant's Reply Mem. of L.") at 13. Plaintiffs point to no evidence to the contrary. Since a party cannot waive a right it does not know it has, plaintiffs' argument lacks merit. See Hibbard Brown & Co., Inc. v. ABC Family Trust, 772 F.Supp. 894, 896 (D. Md. 1991) (waiver is "the voluntarily relinquishment of a known right"); cf. Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, 50 F.3d 388, 391 (7th Cir. 1995) ("The shape of the case might so alter as a result of unexpected developments during discovery that the party should be relieved from its waiver and arbitration allowed to proceed").

We find that the claims raised by plaintiffs in Vitzethum v. Dominick are referable to arbitration pursuant to the arbitration agreement between DD AG and the investors in the DAX Program. Accordingly, Dominick's motion to stay the proceedings in this action pending arbitration is granted.

2. Dominick's Motion to Dismiss Vitzethum v. Dominick Pursuant to F.R.C.P. 12(b)(1) and 9(b) and the Doctrine of Forum Non Conveniens

The Court reserves decision on Dominick's motion to dismiss Vitzethum v. Dominick pursuant to Federal Rules of Civil Procedure 12(b)(1) and 9(b) and the doctrine of forum non conveniens, as well

as plaintiffs' motion to compel further discovery, having stayed this action pending arbitration in Germany. In the event that the arbitration panel in Frankfurt finds the arbitration agreement between DD AG and the investors to be unenforceable under German law, the Court shall rule on these motions. At this juncture, the Court merely makes the following preliminary observations.

First, we note that it is questionable whether the federal securities laws may be applied in this case. The Exchange Act is silent as to its extraterritorial application. See 15 U.S.C. § 78aa (1988). Thus, "in addressing transnational frauds, courts must ascertain whether Congress would have wished the precious resources of the United States courts to be devoted to such transactions." Alfadda v. Fenn, 935 F.2d 475, 478 (2d Cir. 1991), cert. denied, 502 U.S 1005, 112 S.Ct. 638 (1991) (citations and internal quotations omitted). The Second Circuit has enunciated two jurisdictional tests, which may be applied separately or in combination, to determine whether there is sufficient United States involvement to justify the exercise of jurisdiction by a United States court. Itoba Ltd. v. Lep Group Plc., 54 F.3d 118, 122 (2d Cir. 1995). Under the "conduct" test, a federal court has subject matter jurisdiction only if the defendant's conduct in the United States was "more than merely preparatory to the fraud, and particular acts or culpable failures to act within the United States directly caused losses to foreign investors abroad." Alfadda v. Fenn, 935 F.2d at 478 (citations omitted). The "effects" test is satisfied when illegal activity abroad causes a

"substantial effect within the United States." Id.

Plaintiffs claim to meet the requirements of the conduct test because the following general allegations are either admitted by Dominick or supported by affidavit: (1) Dominick established DD AG in 1990, (2) the supervisory board of DD AG consisted of executives of Dominick, (3) Dominick owned 95% of the outstanding shares of DD AG, (4) Dominick established DD AG as a "representative" of Dominick, (5) in May 1993, Dominick assumed control of DD AG, establishing an on-site supervisory presence in Germany, (6) Dominick determined to withdraw from DD AG and to transfer operations to a "straw man", and (7) Dominick "purported to divest its interest in DD AG, defaulted in its obligation to provide responsible management, and transferred same to another individual affiliated with Dominick, all the while incurring large losses for plaintiffs." Plaintiffs' Mem. of L. at 18-19. Plaintiffs' broad and indefinite allegations do not demonstrate how Dominick's actions were "more than merely preparatory" to the fraud alleged. Moreover, plaintiffs have introduced no evidence to indicate that Dominick's particular acts or culpable failures to act within the United States directly caused losses to plaintiffs. See Alfadda v. Fenn, 935 F.2d at 478. Plaintiffs acknowledge the weakness of their position with regard to the conduct test and claim that if Dominick were compelled to provide further discovery, they would be able to satisfy the test's requirements. We note that if, following further discovery, plaintiffs were unable to substantiate their allegations with evidence of Dominick's specific acts or

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culpable failures to act committed within the United States, then the Court would have no choice but to dismiss plaintiffs' claims under the federal securities laws for lack of subject matter jurisdiction.

In addition, the Court questions whether the Southern District of New York is the appropriate forum for a trial of this action. The Court would need to weigh both the private interests of the parties and the public interests of the states involved, a balancing which might more appropriately be conducted following further discovery. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843 (1947). At this time, the Court makes the preliminary observation that several factors weigh in favor of dismissing this action on forum non conveniens grounds.

In Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56, 102 S.Ct. 252, 266 (1981), the Supreme Court stated that

> a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

The central focus of a forum non conveniens inquiry is convenience. Dismissal may be warranted where a plaintiff has chosen a particular forum in order to take advantage of favorable law. Id., 454 U.S. at 249, n. 15, 102 S.Ct at 262, n. 15. The Supreme Court also noted in Piper Aircraft that a court "must determine whether there exists an alternative forum . . . [where] the defendant is

amenable to process . . . ." Id. 454 U.S. at 254, n. 22, 102 S.Ct. at 265, n. 22.

Plaintiffs in this action are all citizens and residents of Germany, who cannot claim that they would be inconvenienced by a trial in Germany. Plaintiffs argue that there is no alternative forum for this action because "[a]lthough plaintiffs are citizens of Germany and the fraud was completed in Germany, Dominick is not amenable to personal jurisdiction in Germany." Plaintiffs' Mem. of L. at 24. This is simply untrue. Not only has Dominick commenced an action for a declaratory judgment in a German district court, thereby submitting to the jurisdiction of that court, but also Dominick has represented to this Court, and has agreed, that it will honor any judgment against it imposed in any forum in Germany. See Defendant's Reply Mem. of L. at 22, n. 13.

One private interest factor that the Court would carefully weigh is the location of evidence and witnesses. See Department of Economic Dev. v. Arthur Andersen & Co. (U.S.A.), 683 F.Supp. 1463, 1483 (S.D.N.Y. 1988). Dominick points out that many relevant witnesses, such as the officers and employees of DD AG, the "general distributor" for the DAX Program,[10] and the bank that executed the trades for the DAX Program,[11] as well as much of the

[10]The German company VVB Vermittlung und Verwaltung von Borsenanlagen GmbH acted as general distributor, or marketing agent, for the DAX Program. See Minnerop Aff., Ex. A at 3.

[11]Dominick states that the actual trading in the DAX Program was executed by the securities division of the Bayerische Hypotheken und Wechselbank, located in Germany. See Defendant's Reply Mem. of L. at 21.

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documentary evidence plaintiffs will need to prove their allegations, such as trading records and internal memoranda regarding the management of investments in the DAX Program, are located in Germany. Moreover, Dominick states that it does not have any documents concerning the formation, marketing, and administration of the DAX Program, which plaintiffs have sought to discover. Reply Mem. of L. at 21, n. 12. Weighing in plaintiffs' favor is the United States' interest in preventing "the United States [from being] used as a base for manufacturing fraudulent security devices for export." IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975). However, as noted above, if plaintiffs cannot show that Dominick's conduct was more than merely preparatory to the alleged fraud, then the Court lacks subject matter jurisdiction over plaintiffs' claims under the federal securities laws.

3. Dominick's Motion to Compel Arbitration in Dominick v. Anders

Dominick moves, under Section 4 of the FAA and Section 206 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), 9 U.S.C. § 201 et seq., to compel arbitration of the parties' dispute before a panel of arbitrators in Frankfurt, Germany, pursuant to the arbitration agreement between DD AG and the DAX Program investors, rather than before the NASD where defendants have brought an arbitration proceeding. In addition, Dominick seeks a declaration that it is not required to arbitrate defendants' claims against it before the NASD because defendants were never customers of Dominick.

Section 4 of the FAA provides that

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Section 206 of the Convention provides that the Court may "direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206; see also Oil Basins Ltd. v. Broken Hill Proprietary Co. Ltd., 613 F.Supp. 403, 407 (S.D.N.Y. 1985) ("Section 4's requirement that a court direct arbitration in its own district . . . is . . . superseded by [] Section 206 to the extent that the parties specify an arbitration site in the contract"). As noted above, the FAA mandates that the district courts direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. at 218, 105 S.Ct. at 1241. Moreover, "absent evidence that the arbitration agreement was procured through fraud or excessive economic power, we must rigorously enforce agreements to arbitrate." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109, 112 (2d Cir. 1990) (citations and internal quotations omitted).

The Court has found, see supra, that an arbitration agreement exists between the DAX Program investors and DD AG, and that Dominick, as the parent and alleged controller of DD AG, may enforce that agreement to compel the arbitration of claims founded in and intertwined with the DAX Program subscription agreement.

The claims presented to the NASD by defendants in this action are extremely similar to those made by plaintiffs in Vitzethum v. Dominick. We find that defendants' claims are founded in and intertwined with the subscription agreement and Dominick may enforce the arbitration agreement against defendants.

The remaining question presented by Dominick's motion to compel arbitration is whether the arbitration agreement between DD AG and defendants in this action supersedes the NASD Code of Arbitration Procedure (the "NASD Code"). Section 12(a) of the NASD Code provides

> Any dispute, claim or controversy eligible for submission under Part I of this Code between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code, as provided by any duly executed and enforceable written agreement or upon the demand of the customer.

NASD Manual--Code of Arbitration Procedure, 3714 at ¶ 3712.

In Merrill Lynch v. Georgiadis, 903 F.2d at 112, the Second Circuit held that "the arbitration provision of the AMEX Constitution may be superseded by a more specific customer agreement of the parties." In that case, the defendant had signed a "Standard Operations Agreement" with Merrill Lynch, which provided that arbitration of claims would take place only before the NASD, New York Stock Exchange, or an Exchange located in the United States upon which listed options transactions are executed. The defendant brought a demand for arbitration before the American Arbitration Association ("AAA"), invoking the "AMEX Window" provision of the Constitution of the American Stock Exchange, which

provides that customers have the right to arbitrate disputes before the AAA. The Second Circuit explained that, "the arbitration rules of an exchange are sufficient to compel arbitration of exchange-related disputes in the absence of a specific written arbitration agreement. . . . [But] [w]here, as here, the parties have agreed explicitly to settle their disputes only before particular arbitration fora, that agreement controls." Id. at 113 (citations omitted) (emphasis in original). The Court in Merrill Lynch also quoted with approval the following language from the Sixth Circuit's decision in Roney & Co. v. Goren, 875 F.2d 1218, 1223 (6th Cir. 1989):

> When Congress enacted the Arbitration Act making arbitration agreements enforceable, it surely did not intend that the parties be able to disregard selected contractual obligations willy-nilly in order to choose an arbitral forum more convenient or more suited to a party's particular needs.

903 F.2d at 113.

Defendants argue that the Anti-waiver provision of the Exchange Act, in conjunction with Securities and Exchange Commission ("SEC") Litigation Release No. 12198, renders the arbitration agreement between DD AG and defendants unenforceable. The Anti-waiver provision of the Exchange Act declares void "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Exchange Act] or of any rule or regulation thereunder, or of any rule of an exchange required thereby." 15 U.S.C. § 78cc(a) (1982). The SEC promulgated its Litigation Release No. 12198 in response to the Sixth Circuit's decision in Roney & Co. v. Goren, 875 F.2d 1218 (6th Cir. 1989),

upholding the arbitration clause of a Customer Agreement which provided that claims were to be arbitrated under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange. The SEC, appearing as amicus in that action, argued that enforcement of the clause, limiting the customer to only one arbitration forum, would be inconsistent with the regulatory scheme set up by the Exchange Act. In Litigation Release No. 12198, the SEC states, "a member of the NYSE, NASD, AMEX or CBOE will not be permitted to limit customers to a single arbitration forum if any [self-regulatory organization ("SRO")] to which the member belongs has a conflicting arbitration rule." In addition, the SEC noted that "new rules adopted by the NYSE, NASD, AMEX and CBOE, and approved by the Commission, provide that '[n]o agreement shall include any condition which limits or contradicts the rules of any self-regulatory organization or limits the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award." SEC Litigation Release No. 12198 (Aug. 7, 1989), 1989 WL 257732 at *1. Defendants point out that the Second Circuit in Merrill Lynch v. Georgiadis, 903 F.2d at 113, acknowledges that the SEC release "prohibits arbitration agreements which limit customers to a single SRO arbitration forum" and argue that the Court upheld the arbitration agreement in that case only because it provided the defendant with a choice of several SRO fora.

With the exception of this argument, defendants have urged the Court to determine the arbitration agreement's enforceability

pursuant to German law. Defendants even note that "Plaintiffs concede that German law applies to the question of whether it may enforce the 'arbitration agreements,'" citing Dominick's Reply Memorandum in Vitzethum v. Dominick at 3-5. Having determined that, according to United States law, the investors' claims are arbitrable under the arbitration agreement between them and DD AG, the Court refers issues of the agreement's enforceability pursuant to German law to the German arbitration panel, as noted above. We agree with both the investors and Dominick that German law governs the enforceability of the agreement; thus, we find defendants' argument that the Anti-waiver provision of the Exchange Act and SEC Litigation Release No. 12198 render the agreement unenforceable inapposite. Furthermore, the Court rejects the notion that Congress or the SEC, respectively, could have intended the provision or release to apply to an arbitration agreement made in Germany between German investors and a German company, not a member of a United States self-regulatory organization, that agreement being included in a subscription agreement, which is explicitly subject to German law, pertaining to the sale of derivatives based on the German Shares Index at the German Futures Exchange in Frankfurt.

Defendants cannot escape the fact that they signed a subscription agreement, which incorporated an arbitration agreement, pursuant to which they agreed to refer all claims in connection with the subscription agreement to an arbitration panel in Frankfurt, Germany. Dominick has offered to arbitrate

defendants' claims in Frankfurt in accordance with the arbitration agreement, which would serve the convenience of defendants.[13] Dominick states that it makes this offer "not out of altruism-- but because it will be greatly prejudiced by an arbitration or legal action in the United States" due to the fact that former employees of DD AG in Germany would not be available as witnesses before the NASD, nor would the records and sales personnel of the distributor of the DAX Program, located in Kaarst, Germany, be subject to compulsory production or attendance at hearings in the United States. Affidavit of Henry F. Minnerop, Esq., dated May 11, 1995, at 4. Moreover, in their NASD Statement of Claim, defendants request to testify before the NASD by telephone because of "the burden of cost upon them to travel to and remain in the United States." Nosworthy Aff., Ex. A at 11. Dominick points out that "[s]uch testimony would deprive Dominick and the Dominick Officers of the opportunity for meaningful cross-examination, and would deprive the arbitration panel of the ability to evaluate fully the credibility of such testimony." Memorandum of Law in Support of Plaintiffs' Motion to Compel Arbitration at 8, n. 7. In short, the Court rejects, for the reasons stated herein, defendants'

[13]Defendants repeatedly mischaracterize Dominick's offer to arbitrate in Germany, stating, for example, that "plaintiffs contend that the defendants should be compelled to arbitrate before a German arbitration tribunal against Dominick & Dominick, Inc.'s former German subsidiary-- which is not a party to defendants' NASD arbitration and which is now defunct." Defendants' Mem. of L. at 2. On the contrary, Dominick has offered that it will arbitrate the claims defendants make against it in their NASD Statement of Claims, as well as plaintiffs' claims against it in Vitrethum v. Dominick, before a German arbitration panel in accordance with the arbitration agreement between its subsidiary and the investors.

insistence on arbitration before the NASD and reluctance to arbitrate in their own country, in accordance with an arbitration agreement to which they are parties. Under the FAA, as well as the basic principles of contract law, the Court has a duty to enforce arbitration agreements. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. at 24, 103 S.Ct. at 941. Accordingly, Dominick's motion to compel arbitration is granted. Defendants' motion to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(6) is denied.

Dominick also asks the Court to declare that Dominick is not required to arbitrate with defendants before the NASD because the defendants were never customers of Dominick. Dominick notes that defendants do not claim to have had accounts or customer agreements with Dominick, nor do they claim that Dominick ever executed transactions on their behalf. Defendants argue that the Court must not decide this question because it goes to the very merits of their NASD claims and is thus properly before the NASD arbitration panel. We find that resolution of this issue is not necessary to the determination that defendants must arbitrate their claims in accordance with their arbitration agreement with DD AG; therefore, we reserve decision on this matter. Defendants' NASD arbitration is hereby stayed pending the arbitration of defendants' claims against Dominick before the Deutsche Terminhandel Verband in Frankfurt, Germany.

CONCLUSION

In Vitrethum v. Dominick, 94 Civ. 4938 (AGS), defendant's

motion to stay the action pending arbitration is granted. The Court reserves decision on defendant's motion to dismiss the action pursuant to Federal Rules of Civil Procedure 12(b)(1) and 9(b) and the doctrine of forum non conveniens. The Court also reserves decision on plaintiffs' motion to compel further discovery.

In Dominick v. Anders, 95 Civ. 429 (AGS), plaintiffs' motion to compel arbitration is granted; defendants' motion to dismiss the action is denied. Arbitration of defendants' claims before the NASD is stayed pending arbitration before the Deutsche Terminhandel Verband in Frankfurt, Germany.

The Court hereby transfers these actions to the Suspense Docket. The parties are directed to inform the Court in writing when the arbitration proceedings before the Deutsche Terminhandel Verband have concluded.

SO ORDERED.

ALLEN G. SCHWARTZ, U.S.D.J.

Dated: New York, New York
January 18, 1996

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