MARUBENI CORPORATION and **MARUBENI** PULP AND PAPER (NORTH AMERICA), INC., Plaintiffs, vs. MOBILE BAY WOOD CHIP CENTER, SOUTHEAST WOOD FIBER, LLC and MID ATLANTIC TERMINALS, LLC, Defendants.

CIVIL ACTION NO. 02-0914-P-L

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

2003 U.S. Dist. LEXIS 13675

June 16, 2003, Decided

DISPOSITION: Plaintiff's motion to compel arbitration granted. State court proceedings stayed pending arbitration.

CORE TERMS: arbitration, suppliers, chip, compel arbitration, misrepresentation, wood, arbitration provision, arbitration agreement, signatory, waived, vessel, arbitrate, buyer, original jurisdiction, terminal, loading, arbitral, undisputed, shipping, discovery, motion to dismiss, calendar year, non-signatory, counterclaim, proffered, domestic, quantity, agreement to arbitrate, pertaining, international commerce

COUNSEL: [*1] For **Marubeni** Corporation, **Marubeni** Pulp and Paper North America, Inc., Plaintiffs: Bryan O. Balogh, Starnes & Atchison, LLP, Birmingham, AL. John E. Davis, Pillsbury Winthrop LLP, New York, NY. Edward Flanders, Pillsbury Winthrop LLP, New York, NY. William Christian Hines, III, Starnes & Atchison, LLP, Mobile, AL. W. Stancil Starnes, Starnes & Atchison, LLP, Birmingham, AL.

For Mid Atlantic Terminals, LLC, Mobile Bay Wood Chip, Southeast Wood Fiber, LLC, Defendants: Steven L. Nicholas, Olen, Nicholas & Copeland, P.C., Mobile, AL. Steve Olen, Olen, Nicholas & Copeland, P.C., Mobile, AL.

JUDGES: Virgil Pittman, SENIOR UNITED STATES DISTRICT JUDGE.

OPINIONBY: Virgil Pittman

OPINION: ORDER COMPELLING ARBITRATION AND IMPOSING A STAY

This is an action, brought by plaintiffs **Marubeni** Corporation ("Marubeni"), and Marubeni Pulp and Paper [*2] (North America), Inc. ("MPP"), to compel defendants Mobile Bay Wood Chip Center ("MBWC"), Southeast Wood Fiber, LLC ("SEWF"), and Mid Atlantic Terminal, LLC ("MAT") (collectively referred to herein as the "Suppliers"), to arbitrate pursuant to 9 U.S.C. §§ 1, et seq., the Federal Arbitration Act (the "FAA"), and pursuant to 9 U.S.C. §§ 201, et seq., the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). n1 **Marubeni** and MPP seek to compel arbitration of a dispute arising out of agreements executed by the parties hereto, pertaining to the process, sale, and shipment of southern hardwood wood chips, a dispute which is currently being litigated in the Circuit Court of Mobile County, Alabama n2 (docs. 1-2).

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The... Convention was drafted in 1958 under the auspices of the United Nations... The purpose of the... Convention, and of the United States' accession to the Convention, is to "encourage the recognition and enforcement of international arbitral awards,"..., to: relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation."... The Convention, and American enforcement of it through the FAA, "provide[] businesses with a widely used system through which to obtain domestic enforcement of international commercial arbitration awards resolving contract and other transactional disputes, subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy."...

The... Convention is incorporated into federal law by the FAA, which governs the enforcement of arbitration agreements, and of arbitral awards made pursuant to such agreements, in federal and state courts... As an exercise of the Congress' treaty power and as federal law, "the Convention must be enforced according to its terms over all prior inconsistent rules of law."...

9 U.S.C. §§ 201, Historical and Statutory Notes (West 2003); Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte, 141 F.3d 1434, 1440 (11th Cir. 1998)(citations omitted), *cert. denied*, 525 U.S. 1068, 142 L. Ed. 2d 659, 119 S. Ct. 797 (1999); Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co., 767 F.2d 1140, 1145-46 (5th Cir. 1985). [*3]

n2 Mobile Bay Wood Chip, Southeast Wood Fiber, LLC., and Mid Atlantic Terminals, LLC., v. **Marubeni** Corporation and **Marubeni** Pulp and Paper, Inc., CV-01-4385 (docs. 1, 16, Ex.D).

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Currently pending before this court is **Marubeni** and MPP's Complaint to Enforce Arbitration Agreements, Compel Arbitration and Stay Litigation, with a Memorandum in support thereof (docs. 1-2), an Amended Reply Memorandum in Support of the Complaint, n3 and the Declaration of W. Christian Hines, III, authenticating the exhibits proffered (docs. 12, 15). **Marubeni** and MPP have also filed a Motion For Hearing on their Petition to Compel Arbitration and Stay the State Court Action (doc. 17). n4 In response, the Suppliers filed an Answer (doc. 9), and a Brief in Opposition to Complaint to Compel Arbitration and Stay Proceedings (doc. 16).

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n3 On January 28, 2003, **Marubeni** and MPP filed a Reply Memorandum of Law in Support of Complaint to Enforce Arbitration Agreements, Compel Arbitration and Stay Litigation (doc. 11). On February 4, 2003, **Marubeni** and MPP filed a Motion to Substitute Amended Reply Memorandum of Law in Support of Complaint to Enforce Arbitration Agreements, Compel Arbitration and Stay Litigation (doc. 13). The Motion was granted (docs. 13-14). The Amended Reply Memorandum was filed on February 5, 2003 (doc. 15). [*4]

n4 For the reasons stated herein, the Motion For Hearing (doc. 17), is hereby MOOT.

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After careful consideration of all relevant matter, and for the reasons stated herein, this court finds that **Marubeni** and MPP's Complaint to Enforce Arbitration Agreements, Compel Arbitration and Stay Litigation (docs. 1-2) (hereinafter referred to as the Motion to enforce arbitration n5) is GRANTED.

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n5 Under the FAA, "any application to the court hereunder shall be made and heard in the manner provided by law for the making of motions,..." 9 U.S.C. §§ 6; Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1257 (7th Cir. 1992).

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A. Procedural History and Facts

It is undisputed that **Marubeni** is a Japanese corporation with its principal place of business in Tokyo, Japan. MPP is a Delaware corporation with its principal place of business in New York. MBWC is an Alabama general partnership [*5] with all of its members having citizenship in Alabama. SEWF is an Alabama limited liability company with its members having citizenship in Alabama and Delaware. MAT is an Alabama limited liability company with its members having citizenship in Alabama or Georgia (doc. 1, P 1-5; doc. 9, P B1-5). The owners of MBWC and SEWF are related through their corporate members (doc. 16, p. 6).

Marubeni and MPP allege that the parties' interrelated dealings arise out of three separate agreements pertaining to the sale, purchase, processing, loading and shipping of wood chips and each agreement contains or incorporates by reference binding arbitration clauses (doc. 1, P 10).

It is undisputed that on February 6, 1995, **Marubeni** America Corporation, a New York subsidiary of **Marubeni,** n6 entered into a Sale and Purchase Agreement with SEWF (hereinafter referred to as the "SEWF Agreement") (doc. 1, P 11, Ex. A; doc. 16, Ex. A). It is also undisputed that under the SEWF Agreement, **Marubeni** America Corporation agreed to purchase a quantity of southern hardwood wood chips per year from SEWF (docs. 1, 16, Ex. A). The SEWF Agreement concerns, *inter alia* specifications and quantities of product, [*6] shipping particulars and loading conditions, as well as price and conditions of payment. Id.

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n6 **Marubeni** America Corporation is a seperate and distinct entity from **Marubeni** (doc. 16, Ex. E-Affidavit of Russel Myles, dated February 1, 2003). **Marubeni** America Corporation is not a party to this action (doc. 2, p. 3).

Mr. Myles states that he has personal knowledge of the matters before this court as he is "directly or indirectly involved in the management of each of the Defendant entities named... and [has] been personally involved in the dealings of **Marubeni** from the inception of the relationship with [the Suppliers]." (doc. 16, Ex. E).

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Marubeni and MPP allege that on April 1, 1998, **Marubeni** America Corporation assigned its rights and obligations under the SEWF Agreement to MPP (doc. 1, Ex. A, p. 25-26). The Assignment Agreement states: "ASSIGNOR [**Marubeni** America Corporation] hereby assigns to ASSIGNEE [MPP] all of ASSIGNOR's rights and obligations under the Agreement... ASSIGNEE hereby accepts [*7] the said assignment and delegation by ASSIGNOR to ASSIGNEE and, specifically but without limiting the generality hereof, ASSIGNEE hereby agrees to perform all the obligations of ASSIGNOR under the Agreement." Id.

The Suppliers contend that SEWF did not consent to any assignment of the SEWF Agreement to anyone; SEWF provided a signed consent to the assignment to MPP, but that consent was rescinded (doc. 16, Ex. E-Myles Affidavit). No written rescission has been proffered.

It is undisputed that on February 3, 1998, **Marubeni** America Corporation entered into a second Sale and Purchase Agreement with MAT, an affiliate of MBWC and SEWF (hereinafter referred to as the "MAT Agreement") (docs. 1, 16, Ex. B). The MAT Agreement concerns, *inter alia* specifications and quantities of product, shipping particulars and loading conditions, as well as price and conditions of payment. Id. With regard to "SHIPMENT," the MAT Agreement states, in part,

SELLER shall provide and maintain an installation located on the southern branch of the Elizabeth

River in the city of Chesapeake, Virginia U.S.A. or other port mutually agreed by SELLER and BUYER ("LOADING PORT") [*8] ***for the storage of the CHIPS and the berthing of ocean-going Vessels..., together with necessary facilities for loading the CHIPS aboard such Vessels.*** Seller shall ensure that the LOADING PORT shall provide a safe berth for Vessel with the minimum draft or not less than 38 feet, and also shall provide BUYER's Vessel berth and loading priority over all other Vessels using LOADING PORT.

Id Art. 5 (emphasis added). The MAT Agreement is governed by New York law (docs. 1, 16, Ex. B, Art. 19.

It is undisputed that the MAT and SEWF Agreements each contain substantively the same arbitration provision (docs. 1 and 9, P B13-14). The MAT Agreement provides:

All disputes, controversies or differences which may arise between the parties hereto, out of, in relation to or in connection with this AGREEMENT, or for the breach thereof which cannot be resolved amicably by the parties ***shall be finally settled by arbitration in Mobile[,] Alabama[,]*** in accordance with the then existing Rules of Conciliation and Arbitration of the American Arbitration Association if invoked by BUYER or in Japan if invoked by SELLER by three (3) arbitrators to be selected [*9] in accordance with said rules.

The award rendered therein shall be final and binding upon both parties.

(docs. 1 and 16, Ex. B, Art. 20, P 1-2) (emphasis added). The SEWF arbitration provision provides for "arbitration in Mobile[,] Alabama if invoked by BUYER or in New York if invoked by SELLER." (docs. 1, 16, Ex. A).

Marubeni and MPP allege that **Marubeni** became a party to the MAT Agreement by Addendum dated February 9, 2000 (doc. 1, Ex. B; doc. 16, Ex. F). The Addendum states in full:

Addendum to the SALE AND PURCHASE AGREEMENT dated February 3, 1998

With regard to ARTICLE 4 QUANTITY of SALE AND PURCHASE AGREEMENT dated February 3, 1998, Mid-Atlantic Terminals, L.L.C. [MAT] (hereinafter called "SELLER") and **Marubeni** America Corporation (hereinafter called "BUYER") agree as follows:

The minimum quantity of CHIPS which SELLER agrees to sell to BUYER and which BUYER agrees to purchase from SELLER and pay for shall not be less than 900,000 GST beginning July 1, 2000 on an annualized basis (the "Minimum Quantity").

IN WITNESS WHEREOF, SELLER and BUYER have executed this agreement this 9th day of February, 2000.

Id. The Addendum [*10] is signed by representatives of MAT, "Russel E. Myles, Member" and "Sachito Yokozawa, General Manager, Wood Chip Department, **Marubeni** Corporation" (doc. 1, Ex. B; doc. 16, Ex. F).

Both sides to the dispute, *sub judice,* have proffered a copy of the Addendum. Id. The Suppliers proffered the one-page document standing alone (doc. 16, Ex. F). **Marubeni** and MPP proffered a copy of the Addendum with the MAT Agreement (doc. 1, Ex. B), along with copies of two additional letters both dated February 9, 2000. Id. The first is on MAT letterhead and is addressed to Marubeni and Marubeni America Corporation, and states, in part: "Per our agreement, Mid-Atlantic Terminal, L.L.C. [MAT] and **Marubeni**... have agreed to modify the freight differential contained in the Chip Sale and Purchase Agreement between **Marubeni** and MAT dated February 3, 1998." Id. The second letter is also on MAT letterhead, addressed to **Marubeni** and Marubem

America Corporation, and states, in part: "Per our conversations of Feb. 7, 8, and 9, this letter documents the agreement reached between **Marubeni** Corporation and Mid-Atlantic Terminal, L.L.C. [MAT] regarding fee payments to MAT by **Marubeni**..." Id. [*11] n7 Both letters are signed by Russel E. Myles. Both letters state: "Please acknowledge your understanding and agreement by executing in the space provided below." Id. Both letters reflect acknowledgments by "Sachito Yokozawa, **Marubeni** Corporation, General Manager, Wood Chip Department [dated] Feb. 9, 2000." Id.

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n7 The second letter delineates the scheduling of payments amounting to $ 1 million per year by **Marubeni** to MAT in 2000 and in 2001. Id.

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The Suppliers contend that MAT did not consent to any assignment of the MAT Agreement to any party, and that **Marubeni** is a party to the Addendum only, and that there is no arbitration provision in the Addendum (doc. 16, Ex. E). n8

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n8 Both the SEWF and MAT Agreements contain identical "Assignment" clauses: "No party shall assign, transfer or otherwise dispose of any of its rights or obligations under this AGREEMENT, in whole or in part, without the prior written consent of the other party." (docs. 1 and 16, Ex. A, B Art. 18).

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It is undisputed that on December 5, 2000, **Marubeni** and MPP entered into a "Terminal Agreement" with the Suppliers (doc. 1, P 15, Ex. C; doc. 16, Ex. E). **Marubeni** and MPP allege that the Terminal Agreement was executed to coordinate processing of wood chips purchased, from SEWF and MAT under the SEWF and MAT Agreements for loading onto ships for export (doc. 1, P 15).

The Terminal Agreement states, in part:

> Annual Guarantee Volume. ...**Marubeni** agrees that, for each calendar year during the term of this Agreement, it will cause approximately two million Green Short Tons of Wood Chips any kind not limited to southern mixed hardwood Wood Chips to be processed through the Terminal and loaded onto **Marubeni** designated ocean-going vessels during such calendar year...; provided, however, the parties hereto agree that the Annual Guarantee Volume for a particular calendar year shall be reduced by the amount of Green Short Tons of Wood Chips processed through the Mid-Atlantic Terminal (as defined below) and loaded onto **Marubeni** designated ocean-going vessels during such calendar year. For purposes of this Agreement, "Mid-Atlantic Terminal" means that certain terminal operated by [*13] MAT on the southern branch of the Elizabeth River in Chesapeake, Virginia.

(docs. 1, 16, Ex. C, Art. 2(a)). The Terminal Agreement also provides, in part:

> ***This Agreement supersedes all prior discussions and agreements between the parties with respect to the subject matter hereof*** and this Agreement contains the sole and entire agreement between the parties with respect to the matters covered hereby; provided, ***however, this Agreement shall not supersede the following agreements;... the SEWF Agreement,... and the Sale and Purchase Agreement dated February 3, 1998 between Marubeni and MAT shall remain in full force and effect...***

(docs. 1, 16, Ex. C, 7(a)(i)) (emphasis added).

On December 28, 2001, the Suppliers initiated litigation against **Marubeni** and MPP in the Circuit Court of Mobile County, Alabama (docs. 1, 16, Ex. D; doc. 9, P B18; see footnote 1, *supra*). The state court complaint alleges:

> In 1995, in order to secure and sell wood chips to **Marubeni** which would be handled through the MBWC facility, SEWF was formed and began business. SEWF is in the business of manufacturing and purchasing suitable wood chips for sale to [*14] **Marubeni.** These wood chips are transported to the MBWC facility for loading onto the ocean going vessels.
>
> From the time the relationship began between MBWC, SEWF, and **Marubeni,** representatives of **Marubeni** stressed that there was an immediate and long term need to expand the supply of wood chips from the southeast of the United States. These discussions focused on the desire of **Marubeni** for the partners of MBWC and SEWF to locate and build another wood chip handling facility, preferably on the east coast of the United States.
>
> In order to induce [MBWC and SEWF] to undertake the development of a new wood chip facility, **Marubeni** representatives specifically told plaintiffs that (a) **Marubeni** had long term contracts with paper manufacturers in Japan and would be able to guarantee minimum purchases of wood chips, (b) **Marubeni** had great flexibility with its suppliers and **Marubeni** was able to divert purchases to the new facility from other overseas sources of supply in order to assure minimums were achieved, (c) that ship schedules could be provided in advance to enable plaintiffs to buy inventory without storing the chips for long periods, (d) that Japanese paper manufacturers must use [*15] southern hardwood wood chips to successfully operate so that a steady demand for said chips existed, (e) that there was not enough supply overseas of suitable wood chips which could reduce the promised volumes to SEWF and MAT, and (f) that plantation wood chips owned by Japanese interests could not replace southern hardwood wood chip volume.
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> These representations and other similar statements were made on numerous occasions in 1997 and 1998 by Neota Itakura and S. Yokozawa. Itakura and Yokozawa are employees of **Marubeni** and the representations were made within the line and scope of their employment with **Marubeni.**
>
> Those representations were false. The representations as made were of then existing facts. To the extent the representations included promises for future action, those representations were made with no intent to perform those promises.
>
> In reliance on those representations and other similar representations, MAT was formed and built. In order to build MAT, MAT expended significant sums and incurred substantial debt which was based on the specific promised volume to be handled by that facility. MBWC and SEWF effectively pledged their assets to secure the MAT debt.
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> In order [*16] to induce the continued operation and cooperation of [MBWC, SEWF, and MAT], **Marubeni** agreed to provide financial assistance to MAT. A Letter Agreement dated February 9, 2000, was executed by Marubeni whereby Marubeni agreed to pay MAT one million dollars annually in quarterly payments of $ 250,000.00. **Marubeni** failed to make its required payment due October 1, 2001 and breached said Letter Agreement.
>
> Following execution of the Letter Agreement, **Marubeni** and its subsidiary Pulp and Paper entered into a Terminal agreement dated December 5, 2000 with [MBWC, SEWF, and MAT]. That Agreement provided that **Marubeni** and Pulp and Paper, jointly, guaranteed the shipping of a total of 2 million tons of wood chips through the wood chip facilities at MBWC less the amounts shipped through MAT, per year for each calendar year 2001 through 2010. In other words, [**Marubeni** and MPP] agreed they would ship a minimum of 2 million tons from the MBWC facility and [MAT] facility combined.
>
> [**Marubeni** and MPP] breached their obligation for calendar year 2001, by only shipping

approximately 1.45 million tons through the combined facilities. [**Marubeni** and MPP] have affirmatively repudiated their obligation [*17] to perform under the Terminal agreement for calendar year 2002 and the years following. [**Marubeni** and MPP] are in breach of said agreement both for year 2001 and for the future years as provided for in the Terminal Agreement.

(docs. 1, 16, Ex. D, p. 2-4, P 9-17). In the state court action, the Suppliers assert four counts: 1) **Marubeni** and MPP breached the Terminal Agreement by failing to perform their obligations under the Agreement; 2) **Marubeni** and MPP breached the Letter Agreement by failing to pay the payment due October 1, 2001; 3) **Marubeni** committed willful fraud in that the representations made were false and the Suppliers relied on the representations in building and capitalizing MAT; and 4) **Marubeni** committed innocent/reckless misrepresentation in that the representations made were false and the Suppliers relied on the representations in building and capitalizing MAT. Id., p. 4-6.

On February 7, 2002, MPP removed the state court action to this federal district court under 28 U.S.C. §§ 1332; at the time, **Marubeni** had not been served. See C.A. 02-0096-P-L. On February 14, 2002, MPP served their answer (doc. 12, Ex. H). Therein, MPP raised [*18] numerous affirmative defenses including the parties' agreement to arbitrate such and related claims, Id. (First Affirmative Defense). n9

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n9 MPP also asserted two counterclaims: 1) Breach of contract in that the Suppliers breached their obligations under the Terminal Agreement; and 2) indemnification in that the Suppliers' agreed to indemnify and hold harmless MPP from all claims arising out of or relating to the Suppliers' (a) negligent or intentional acts or omissions, and (b) breach of the Terminal Agreement. Id., P 8-16. MPP sought dismissal of the Complaint and judgment on the counterclaims, damages, interest, costs and attorneys' fees. Id., p. 10-11.

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On March 4, 2002, the Suppliers moved for remand, asserting lack of diversity. On May 2, 2002, following service of process, **Marubeni** moved to dismiss the Complaint arguing that the fraud and misrepresentation claims were subject to binding arbitration. On July 25, 2002, this court Ordered that the Complaint be remanded for lack of subject matter [*19] jurisdiction; **Marubeni's** motion to dismiss in favor of arbitration remained pending. **Marubeni** sought reconsideration which was denied. On August 8, 2002, **Marubeni** appealed the Remand Order arguing that the district court should have decided the issue of arbitration and dismissed the fraud claims before remanding the Complaint; **Marubeni** also appealed this court's denial of reconsideration (doc. 1, P 19). On November 4, 2002, the United States Court of Appeals for the Eleventh Circuit dismissed the appeals for lack of jurisdiction Id., see Ex. E; doc. 9, P B19; doc. 16, p. 4-5.

On December 10, 2002, **Marubeni** served its answer and affirmative defenses in the Circuit Court of Mobile County, in response to the Suppliers' Complaint (doc. 12, Ex. G). Therein, **Marubeni** raised numerous affirmative defenses including the parties' agreement to arbitrate such claims. Id. (First Affirmative Defense).

On December 10, 2002, **Marubeni** and MPP also filed the subject Motion to compel arbitration in this court (doc. 1). **Marubeni** and MPP allege that the Suppliers' state court fraud and misrepresentation claims, pertaining to MAT, are claims arising out of, in relation to or in connection with [*20] the SEWF and MAT Agreements, and as such the claims are subject to resolution by arbitration (doc. 1, P 21). n10

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n10 The Suppliers contend, and **Marubeni** and MPP do not dispute the fact that the Suppliers' contract claims are not due to be arbitrated (doc. 16, p. 5).

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Marubeni and MPP allege that this action is "governed by... federal law,... the Convention and the FAA." (doc. 1, P 23). The SEWF and MAT Agreements "are written and provide for arbitration in the territory of a signatory of the Convention (either Japan or the United States)." Id. The SEWF and MAT Agreements and the subject matter of the claims "concern... international commerce, involving the purchase, sale, and processing of goods for international shipping, and involve a foreign citizen, **Marubeni,** a Japanese corporation... Pursuant to [the Convention] and the FAA, the[] arbitration agreements are valid and must be enforced." (doc. 1, P 23).

Marubeni and MPP allege the Suppliers are signatories and are intentional beneficiaries of the [*21] SEWF and MAT Agreements and the Terminal Agreement, which incorporate by reference the arbitration provisions contained in the SEWF and MAT Agreements. **Marubeni** and MPP allege that the Terminal Agreement references and incorporates provisions of the SEWF and MAT Agreements relating to price and quantity of the wood chips to be processed by the Suppliers. **Marubeni** and MPP allege that "the [SEWF and MAT] Agreements and the Terminal Agreement are interdependent and interrelated agreements that collectively govern the parties' business dealings." (doc. 1, P 16-17; doc. 2, p. 4). **Marubeni** and MPP allege that the Suppliers, thus, have agreed to arbitrate the claims.

Marubeni and MPP charge that the Suppliers have refused to arbitrate their fraud and misrepresentation claims, and in filing suit in state court, have taken action contrary to the arbitration provisions contained within the SEWF and MAT Agreements (doc.1, P 12, 27).

With the subject Motion to compel arbitration, **Marubeni** and MPP demand arbitration under the Rules of the AAA, of the Suppliers' state court fraud and misrepresentation claims, in Japan or, that failing, in New York (doc.1, P 26). **Marubeni** and MPP seek: 1) An [*22] Order, pursuant to 9 U.S.C.§§§§ 3, 4, and 206, directing that if the Suppliers wish to proceed against **Marubeni** and MPP on their fraud and misrepresentation claims, they must first proceed with arbitration of those claims before the AAA, in either Japan or New York, under the SEWF and MAT Agreements; to take no further action outside of arbitration with regard to those claims; and 2) a Stay of the state court litigation pending final arbitration of the fraud and misrepresentations claims brought by the Suppliers (doc. 1, P 28).

On January 13, 2002, the Suppliers answered (doc.9). The Suppliers deny that there is an arbitration agreement encompassing the parties or claims stated in the state court lawsuit (doc.9, P A). The Suppliers deny that their state court misrepresentation and fraud claims (counts three and four) are subject to arbitration (doc.9, P B18). The Suppliers also assert four affirmative defenses: 1) The court should abstain from exercising jurisdiction over this matter; 2) **Marubeni** and MPP waived their arbitration rights by not asserting that right in the state court litigation, and by invoking the state court litigation process by filing counterclaims; [*23] 3) **Marubeni** and MPP are estopped from asserting any arbitration rights by their conduct; and 4) the Anti-Injunction Act prohibits any stay of the state court litigation absent a finding that a valid arbitration agreement exists between the parties to the litigation which covers the claims asserted in this litigation (doc.9, p.4-5). The Suppliers demand a jury trial. Id. n11

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n11 On January 14, 2003, this action was routinely set for a discovery scheduling conference, pursuant to Rule 16(b) of the Federal Rules of Civil Procedure (doc. 10). In response, **Marubeni** and MPP filed a Motion For Hearing on Plaintiffs' Petition to Compel Arbitration and Stay the State Court Action (doc. 17). Plaintiffs request that the court summarily determine the issues pointing to the inapplicability of the discovery rules in the context of arbitration. Id.

On February 28, 2003, this court continued the Rule 16(b) Scheduling Conference (doc.23). Although the court's Order stated that the scheduling conference would be reset at a later date, this court finds that a discovery conference is inappropriate. The Rules provide that "in proceedings under ... 9 U.S.C., relating to arbitration ..., these rules apply only to the extent that matters of procedure are not provided for in those statutes." Fed.R.Civ.P. 81(a)(3); Hughes, 975 F.2d at 1257. "The rules of procedure in the [FAA] govern proceedings arising under that Act. It is only where the [FAA] is silent that the Federal Rules of Civil Procedure become applicable ..." Booth v. Hume Publishing, Inc., 902 F.2d 925, 932 (11th Cir. 1990).

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On January 17, 2003, in the state court action, **Marubeni** and MPP's Motion For a Protective Order was denied (doc.12, Ex.G). **Marubeni** and MPP sought a stay of discovery in the state court action pending this court's determination of **Marubeni** and MPP's Motion to compel arbitration. Id. n12

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n12 On February 5, 2003, **Marubeni** and MPP filed their Amended Reply Memorandum of Law in Support of their Complaint to Enforce Arbitration contending that the Suppliers' fraud and misrepresentation claims must be arbitrated and that the action pending in the Circuit Court of Mobile County should be stayed (doc. 15).

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On February 10, 2003, the Suppliers filed their Brief in Opposition to the Motion to compel arbitration (doc. 16). Therein, the Suppliers argue that **Marubeni** is not a party to any agreement with the Suppliers which contains an arbitration provision, the arbitration provisions relied upon by **Marubeni** limit the arbitration rights to the parties to the contract, no legal or equitable theories would allow **Marubeni** [*25] to enforce arbitration provisions against non-signatories, the Terminal Agreement did not incorporate the arbitration provisions contained in the SEWF or MAT Agreements, the Suppliers fraud and misrepresentation claims do not arise out of and are not related to the performance of duties specified in the SEWF and MAT Agreements which contain the arbitration provisions, and, any arbitration rights **Marubeni** has, if such are found, have been waived (doc.16). n13

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n13 On February 21, 2003, **Marubeni** and MPP filed a Motion to Strike [Suppliers'] Opposition Brief, or in the alternative, for Leave to File a Surreply (doc. 19). **Marubeni** and MPP argue that the Opposition is untimely filed, and in violation of SD ALA LR. 7.1(b), in that it exceeds the 30-page limit without leave of court. Id. On February 26, 2003, the Suppliers filed their Response to **Marubeni's** Motion to Strike (doc.20). On March 6, 2003, **Marubeni** and MPP filed their Reply Memorandum in Support of Motion to Strike (doc.24).

Marubeni and MPP's Motion to Strike (doc. 19), is hereby DENIED, and their alternative Motion for Leave to File a Surreply is also hereby DENIED for the reasons set forth herein. In addressing the substantive issue at hand, whether this court can compel the parties to arbitrate the Suppliers' state court fraud and misrepresentation claims, this court has carefully reviewed the filings and exhibits of all parties herein for appropriateness and relevancy. This court finds that it has sufficient information before it upon which to render a determination of the issue.

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B. Issues Involved

The issues before this court are: 1) Whether this court has jurisdiction over this controversy; 2) whether a valid arbitration agreement exists between the parties, and if so, whether the Suppliers' state court fraud and misrepresentation claims are subject to arbitration; and if so, 3) whether this court should abstain from enjoining the state court from proceeding further.

C. Discussion

1. Jurisdiction.

Under the FAA, 9 U.S.C. §§§§ 1-16 (Chapter 1), and the Convention §§§§ 201-208 (Chapter 2), a district court must compel arbitration and stay the underlying action if the parties agreed to arbitrate their dispute. 9 U.S.C.

§§§§ 2-3, 201. Chapter 1 of the FAA, covers domestic arbitral proceedings, while Chapter 2, the Convention, covers international arbitral proceedings. Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte, 141 F.3d 1434, 1440 (11th Cir. 1998), *cert. denied* 525 U.S. 1068, 142 L. Ed. 2d 659, 119 S. Ct. 797 (1999).

> The goal of the Convention, and principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial [*27] arbitration agreements in international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 520, n.15, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974); Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co., 767 F.2d 1140, 1147 (5th Cir. 1985); Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982).

Chapter 2 mandates the enforcement of the Convention in courts of the United States, creating original jurisdiction over any action arising under the Convention regardless of the amount in controversy. 9 U.S.C. §§ 203. Section 203 provides: "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States... shall have original jurisdiction over such an action or proceeding." Industrial Risk Insurers, 141 F.3d at 1440.

Section 4 of the FAA "authorizes a party, who is a defendant in another action, 'to commence a separate original action in federal [*28] district court to seek enforcement of an arbitration agreement.'" Central Reserve Life Ins. Co. v. Kiefer, 211 F.R.D. 445, 449 (S.D.Ala. (Oct. 8, 2002)) (J. Butler) (staying a parallel state court action pending arbitration ordered by the district court); American Heritage Life Ins. Co. v. Harmon, 147 F. Supp. 2d 511 (N.D.Miss. (Jun. 28, 2001)).

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in... [9 U.S.C. §§ 2], falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. §§ 202; [*29] Industrial Risk Insurers, at 1440-41. In Industrial Risk Insurers, the Eleventh Circuit noted: "The Convention by its terms applies to only two sorts of arbitral awards: 1) awards made in a country other than that in which enforcement of the award is sought, and 2) awards 'not considered as domestic awards in the country where enforcement of the award is sought.'" Id. As to the second type, the Eleventh Circuit joined the First, Second, Seventh, and Ninth Circuits in holding that

> arbitration agreements and awards "not considered as domestic" in the United States are those agreements and awards which are subject to the Convention not because [they were] made abroad, but because [they were] made within the legal framework of another country, e.g., pronounced in accordance with foreign law *or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.* We prefer this broad[ ] construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards.

Id., at 1441 (emphasis in original). [*30]

Herein, **Marubeni** is a Japanese corporation with its principal place of business in Japan. **Marubeni** is engaged

with MPP and the Suppliers through their Agreements in international commerce, i.e., buying processed wood chips from the Suppliers, all Alabama commercial entities. The Suppliers do not dispute that jurisdiction arises under the Convention; the Suppliers contend that there is no valid arbitration agreement between the parties to this dispute which covers their state court fraud and misrepresentation claims. This court finds that it has original jurisdiction over this controversy pursuant to §§§§ 201, 203, of the Convention.

2. A Valid Arbitration Agreement.

> The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Memorial Hosp. [v. Mercury Constr. Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927,... [(1983)]. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400-404, 18 L. Ed. 2d 1270, 87 S. Ct. 1801,... [*31] (1967); Southland Corp. v. Keating, 465 U.S. 1, 12, 79 L. Ed. 2d 1, 104 S. Ct. 852... (1984). And that body of law counsels "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration... The Arbitration Act establishes that, as a matter of law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hosp., 460 U.S. at 24-25...

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985); see Sedco, 767 F.2d at 1147-48; accord Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc., 312 F.3d 1349, 1357-58 (11th Cir. 2002); Employers Ins. of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316, 1322 (11th Cir. 2001).

For an arbitration agreement to be enforceable, the Convention requires only that: 1) There is a written agreement [*32] n14; 2) which provides for arbitration in the territory of a signatory to the Convention; 3) the subject matter is commercial; and 4) the contract is not entirely domestic in scope. Smith/Enron Cogeneration Ltd., P'ship, Inc. v. Smith Cogeneration Int'l., Inc., 198 F.3d 88, 92 (2nd Cir. 1999), *cert. denied,* 531 U.S. 815, 148 L. Ed. 2d 20, 121 S. Ct. 51 (2000); Sedco, 767 F.2d at 1144-45; Ledee, 684 F.2d at 186-87. "If these requirements are met, the Convention requires district courts to order arbitration." Sedco, at 1145; Ledee, at 187.

---------- Footnotes ----------

n14 Under the Convention, "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" constitutes an "agreement in writing." 9 U.S.C. §§ 201 (Historical and Statutory Notes, Art. XII); Smith/Enron, 198 F.3d at 93. "There is no federal policy that favors arbitration for parties "who have not contractually bound themselves to arbitrate their disputes." Morewitz v. West of England Ship Owners Mutual Protection and Indemnity Ass'n., 62 F.3d 1356, 1365 (11th Cir. 1995), *cert. denied,* 516 U.S. 1114, 133 L. Ed. 2d 845, 116 S. Ct. 915 (1996).

---------- End Footnotes ---------- [*33]

Herein, it is undisputed that the underlying subject matter is commercial in nature, and not entirely domestic in scope in that the subject Agreements concern international commerce (the purchase, sale, processing, and shipment of wood chips).

Herein, the express arbitration provisions at issue contained in the SEWF and MAT Agreements, provide that "the situs of the arbitration" is either the United States or Japan. Smith/Enron, 198 F.3d at 94 ("The focus of... the Convention is not on the nationality of the party seeking to enforce... but on the situs of the arbitration."). The United States and Japan are both signatories of the Convention. 9 U.S.C. §§ 201 (Historical and Statutory Notes, Art. XVI, n. 13 [Japan], 29 [United States]). Thus, the determinative issue, herein, is whether the subject

dispute between the parties, the Suppliers' state court claims of fraud and misrepresentation, is subject to the arbitration provisions set forth in the SEWF or MAT Agreements. Ledee, at 186-87.

The undisputed facts establish that the MAT and Terminal Agreements concern the MAT facility. The MAT Agreement, executed February 3, 1998, provides [*34] for the creation and maintenance of the MAT facility located on the Elizabeth River in Chesapeake, Virginia. The MAT Agreement also concerns, *inter alia,* specifications and quantities of product, shipping particulars and loading conditions, as well as price and conditions of payment (docs. 1, 16, Ex.B). It is **Marubeni's** alleged fraud and misrepresentation which induced MBWC and SEWF to build, capitalize, and maintain the MAT facility. The Terminal Agreement, executed approximately two years later, on December 5, 2000, further concerns annual guaranteed volume to be processed through MAT, between the Suppliers, MBWC, SEWF, and MAT, and the buyers, **Marubeni** and MPP. Thus, this court looks specifically to the MAT Agreement and the Terminal Agreement as determinative. n15

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n15 The SEWF Agreement is not applicable to the Suppliers' fraud and misrepresentation claims asserted in state court against **Marubeni.** Although federal policy requires courts to resolve any doubt about the application of an arbitration clause in favor of arbitration, the policy "cannot serve to stretch contract beyond the scope originally intended by the parties." Seaboard Coast Line Railroad v. Trailer Train Co., 690 F.2d 1343, 1352 (11th Cir. 1982).

The facts presented indicate that the SEWF Agreement was executed between SEWF and **Marubeni** America Corporation on February 6, 1995, three years prior to the MAT Agreement under which the Chesapeake, Virginia, MAT facility was conceived. Thus, the Suppliers' fraud and misrepresentation claims pertaining to the creation, capitalization, and maintenance of the MAT facility cannot be interpreted to be a part of the SEWF Agreement. Moreover, **Marubeni** was never a party to the SEWF Agreement. It was to MPP, alone, not to Marubeni, that Marubeni America Corporation expressly assigned its "rights and obligations" under the SEWF. However, the SEWF Agreement signifies the beginning of the intertwined relationships of the parties, hereto, and which ultimately evolved into the controversy presently before this court.

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The contract relationship between the Suppliers and **Marubeni** and MPP is evidenced by the Terminal Agreement, the validity of which is not in dispute. All the parties are signatories to the Terminal Agreement. However, the Terminal Agreement contains no written arbitration provision.

If an agreement or contract does not provide for arbitration, then no federal law requires the parties to that agreement to arbitrate their disputes. Ivax Corp. v. B. Braun of Am., 286 F.3d 1309, 1315, 11th Cir. 2002); Seaboard Cost Line Railroad v. Trailer Train Co., 690 F.2d 1343, 1348 (11th Cir. 1982); Commercial Metals Co. v. Balfour Guthrie & Co. 577 F.2d 264, 266 (5th Cir. 1978). The parties to the Terminal Agreement have not contractually bound themselves to arbitrate disputes arising under that Agreement. As such, arbitration cannot be compelled based on the Terminal Agreement, alone.

Of note, however, the Terminal Agreement expressly does *'not supercede...* the Sale and Purchase Agreement dated February 3, 1998 between **Marubeni** and MAT..." (docs.1, 16, Ex.C, 7(a)(i) (emphasis added)). Thus, the Terminal Agreement does not alter [*36] the force and effect of the MAT Agreement.

Federal law "counsels that questions of arbitrabiity, when in doubt, should be resolved in favor of arbitration... Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." Employers Ins. of Wausau, 251 F.3d at 1322 (citing Moses H. Cone Mem'l Hospital, 460 U.S. at 24). The strong presumption in favor of arbitration applies with special force in the field of international commerce. Mitsubishi Motors, 473 U.S. 614, 631, 87 L. Ed. 2d 444, 105 S. Ct. 3346.

In seeking to compel the Suppliers to arbitrate their state court fraud and misrepresentation claims, **Marubeni** and MPP allege that **Marubeni** became a party to the MAT Agreement through the Addendum executed on February 9, 2000. However, as the Suppliers point out, the Addendum contains no assignment language, and no arbitration provision. Further, neither of the two letters dated February 9, 2000, proffered by **Marubeni** and MPP, contain assignment language between **Marubeni** America Corporation and **Marubeni,** nor an arbitration

provision or reference to the [*37] arbitration provision contained in the MAT Agreement (doc. 1, Ex.B). **Marubeni,** thus, is not a signatory to the MAT Agreement.

However, the Eleventh Circuit has held that "the lack of a written arbitration agreement is not an impediment to arbitration." MS Dealer Service Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 756-57 (11th Cir. 1993), *cert. denied,* 513 U.S. 869, 130 L. Ed. 2d 123, 115 S. Ct. 190 (1994). The courts "have recognized a number of theories under which nonsignatories may be bound to the arbitration agreements of others." Employers Ins. of Wausau, 251 F.3d at 1322. These theories "arise out of common law principles of contract and agency law: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." Id; MS Dealer Service, 177 F.3d at 947.

In MS Dealer Service, the Eleventh Circuit set forth:

> Existing law demonstrates that equitable estoppel allows a non-signatory to compel arbitration in two different circumstances. First, equitable estoppel applies when the signatory to a written [*38] agreement containing an arbitration clause "must rely on the terms of the written agreement in asserting [its] claims" against the non-signatory. Sunkist Soft Drinks, 10 F.3d at 757.
>
> When each of a signatory's claims against a non-signatory "makes reference to" or "presumes the existence *of*" the written agreement, the signatory's claims "arise out of and relate directly to the [written] agreement," and arbitration is appropriate. Id., at 758. Second, "application of equitable estoppel is warranted ... when the signatory [to the contract containing the arbitration clause] raises allegations of ... substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." Boyd [v. Homes of Legend. Inc.,] 981 F. Supp. [1423,] 1433 [M.D.Ala. 1997]... .
>
> Otherwise, "the arbitration proceedings [between the... signatories] would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976). Accordingly, we must scrutinize the nature of [the] claims [*39] against [the non-signatory] "to determine whether those claims fall within the scope of the arbitration clause contained in the [agreement]." Sunkist Soft Drinks, 10 F.3d at 758.

MS Dealer Service, 177 F.3d at 947.

Herein, this court finds that equitable estoppel is applicable under the first circumstance (the signatory's claims against a non-signatory "makes reference to" or "presumes the existence of' the written agreement). Id. The Suppliers are clearly relying on the MAT and Terminal Agreements as a basis for their fraud and misrepresentation claims against **Marubeni.** The MAT Agreement expressly calls for the Suppliers to provide and maintain the MAT facility. The MAT facility was conceived, created, and capitalized based on the negotiations between the **Marubeni** America Corporation and the Suppliers, MBWC and SEWF. **Marubeni** became a party to the MAT Agreement through the Addendum and letters executed on February 9, 2000. The Terminal Agreement which is signed by all the parties makes reference to the MAT Agreement, expressly does not supersede the MAT Agreement, and clearly evolved out of the other Agreements. Further, the Agreements [*40] collectively govern the business relationship and dealings of the parties. n16

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n16 The Suppliers contend that the neither the parties, nor the Agreements are interrelated. However, the facts presented (see p.2-14, *supra.),* belie the contention. The parties as well as the Agreements, the assignment, the Addendum, and the letters referred to herein, reflect a protracted and intertwined business relationship pertaining to the processing, sale, and shipment of wood chips in international commerce. None of the written documents should be viewed in a vacuum. Each reflects a further step in the evolution of the business relationship of the parties involved, beginning in 1995, with the SEWF Agreement. The Suppliers are clearly inter-related entities (through their signatory Russel Myles). They entered into a series of negotiations culminating in their Agreements, assignments, the Addendum, and letters with **Marubeni** America Corporation, **Marubeni,** and MPP.

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The arbitration provision contained in the MAT Agreement is [*41] broad and encompasses "all disputes, controversies or differences which may arise between the parties hereto, out of, in relation to or in connection with this AGREEMENT..." (docs.1, 16, Ex.B, Art.20). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.IVAX, 286 F.3d at 1320.

The MAT and Terminal Agreements, together, expressly define the commercial relationship between the Suppliers and **Marubeni** and MPP. The Agreements concern wood chip specification, evolving product quantities (Annual Guarantee Volume) which **Marubeni** would "cause... to be processed through the [MAT] Terminal," shipping particulars and loading conditions, and price and conditions of payment (doc. 1, Ex.B, C). It is the alleged representations of **Marubeni,** which the Suppliers assert they relied upon in building, capitalizing, and maintaining the MAT facility pursuant to the MAT Agreement. Proving the Suppliers claims will involve whether **Marubeni** met its Annual Guarantee Volume, and whether the Suppliers met their commitments under the MAT and Terminal Agreements.

This court finds that the Suppliers' fraud and misrepresentation claims clearly "make [*42] reference to," "presume the existence of," and "arise out of and relate directly to," the MAT Agreement. MS Dealer Service, 177 F.3d at 947; Sunkist Soft Drinks, 10 F.3d at 757-758. Thus, the Suppliers are equitably estopped from challenging the Motion to compel arbitration and arbitration is appropriate.

The Suppliers contend that their tort claims do not arise out of and are not related to the performance of duties specified in the arbitration provision (doc.16; p.30). The Suppliers rely on Telecom Italia, SPA v. Wholesale Telecom Corp., 248 F.3d 1109 (11th Cir. 2001). n17

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n17 Telecom Italia, 248 F.3d 1109, involves telecommunication corporations. Telemedia International ("TMI"), a subsidiary of Telecom Italia, executed a lease with Wholesale Telecom Corp. ("WTC"), allowing WTC the use of TMI's circuits for a substantial rental. The lease contained an arbitration provision. The provision states: "In the event of any dispute arising out of or relating to this service agreement, the dispute shall be submitted to and settled by arbitration..." Id., at 1111. Meanwhile, Telecom Italia continued to provide telecommunications services to WTC, but inflated the rates. WTC paid only the undisputed invoices. Telecom Italia responded by terminating WTC's use of TMI circuits. Then, Telecom Italia filed a complaint against WTC, alleging breach of contract (failure to pay $ 13 million worth of invoices). WTC answered and filed counterclaims alleging breach of price, quality, and prompt invoicing. The counterclaim also alleged that Telecom Italia caused TMI to increase the rate for use of its circuits, and that Telecom Italia caused TMI to terminate WTC's access to the TMI circuits. WTC then filed a third-party complaint against TMI alleging tortious interference with contract and civil conspiracy. TMI moved to dismiss the third-party complaint, alternatively requesting a stay pending arbitration under the lease. Id. at 1111-13.

The district court ruled that the third-party complaint failed to state a claim of civil conspiracy, but upheld the sufficiency of the tortious interference claim. The district court further ruled that the third-party complaint was not subject to the arbitration clause in the TMI-WTC lease, because the allegations concerned tortious interference with the Telecom Italia-WTC contract which lacked an arbitration provision. Id. at 1113. The Eleventh Circuit affirmed.

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In affirming the district court's denial of arbitration in Telecom Italia, the Eleventh Circuit determined that the arbitration language was broad, but "not as broad as a clause requiring arbitration of 'any dispute between them or by either party to the contract against the other.'" Id. ((citation omitted). The Eleventh Circuit noted that "where the dispute occurs as a fairly direct result of the performance of contractual duties..., then the dispute can fairly be said to arise out of or relate to the contract in question, and arbitration is required." Id. at 1116.

This court has already found that the Suppliers' fraud and misrepresentation claims clearly "make reference to,"

"presume the existence of," and "arise out of and relate directly to," the MAT Agreement, and that the arbitration provision contained in the MAT Agreement is sufficiently broad to encompass the Suppliers' fraud and misrepresentation claims.

Therefore, this court finds that **Marubeni** and MPP's Motion to compel arbitration is due to be granted. The parties are compelled to arbitrate their dispute, i.e., the Suppliers' fraud and misrepresentation claims as asserted in the state court [*44] action.

Section 206 of the Convention provides that "[a] court having jurisdiction under [Chapter 2 of the Convention] 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." Smith/Enron, 198 F.3d at 92; McCreary Tire & Rubber Co. v. CEAT. S.p.A., 501 F.2d 1032, 1037 [3rd Cir. 1974).

The arbitration provision contained in the MAT Agreement expressly sets out that if arbitration is invoked by the "BUYER," arbitration shall be conducted in Mobile, Alabama, under the existing Rules of Conciliation and Arbitration of the American Arbitration Association (docs. 1, 16, Ex.B, Art.20). **Marubeni** is the "BUYER" and has invoked arbitration. Therefore, arbitration shall take place in Mobile, Alabama, according to the Rules of Conciliation and Arbitration of the American Arbitration Association, as set forth in the MAT Agreement, and pursuant to 9 U.S.C.§§ 206.

3. Waiver

The Suppliers contend that **Marubeni** and MPP waived their right to compel arbitration by letting too much time lapse before seeking arbitration. The [*45] Suppliers contend that they have been prejudiced by the delay. n18

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n18 The Suppliers' waiver argument appears on pages 38-42 of their 45-page Brief In Opposition to the Motion to compel arbitration (doc. 16). This court notes that it denied **Marubeni** and MPP's Motion to Strike the Brief, and their Motion for Leave to File a Surreply, see footnote 9, *supra.*, and thus, **Marubeni** and MPP have not had an opportunity to reply to the Suppliers' waiver argument.

However, because this court finds the Suppliers' contention of waiver is without merit, eliciting a reply from **Marubeni** and MPP would simply protract this action unnecessarily.

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> An agreement to arbitrate, 'just like any other contract..., may be waived."Burton-Dixie Corp. v. Timothy McCarthy Constr. Co., 436 F.2d 405, 407 (5th Cir. 1971)... In determining whether a party has waived its right to arbitrate, we have established a two-part test. First, we decide if, "under the totality of the circumstances," the party "has acted [*46] inconsistently with the arbitration right," and, second, we look to see whether, by doing so, that party "has in some way prejudiced the other party." S&H Contractors, Inc. v. A.J. Taft Coal Co., Inc., 906 F.2d 1507, 1514 (11th Cir. 1990)[,*cert. denied,* 498 U.S. 1026, 112 L. Ed. 2d 669, 111 S. Ct. 677 (1991)].

IVAX, 286 F.3d at 1315-16. Whether a party has waived its right to arbitration "is a legal conclusion..., *but...* the findings upon which the conclusion is based are predicate questions of fact..." Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1159 (5th Cir. 1986) (emphasis in original). The burden of proving waiver "falls... heavily on the shoulders of the party seeking to prove waiver." Price, at 1161.

The Suppliers rely for the most part, on Morewitz; 62 F.3d 1356, and S&H Contractors, 906 F.2d 1507. **Marubeni** and MPP point the court to IVAX, 286 F.3d 1309, a recent case which distinguishes both Morewitz,

and S&H Contractors. 286 F.3d at 1316-18. n19 Notwithstanding, neither Morewitz, nor S&H Contractors, [*47] provide support for the Suppliers' contention of waiver. Both cases are factually distinguishable.

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n19 IVAX, involves litigation pertaining to an accounting agreement based on the purchase of outstanding common stock between Braun, Inc., and IVAX. The complex financial agreement contained an arbitration provision. The agreement also provided that Braun's relevant financial records were to be made available to IVAX's accountant, Arthur Anderson ("AA"). Braun provided AA access to its records. Braun and AA executed a confidentiality agreement with regard to Braun's trade secrets. A dispute arose out of the financial dealings. On December 20, 2000, Braun sued AA in state court for an alleged violation of the confidentiality agreement. On December 21, 2000, IVAX filed suit against Braun in the S.D. Florida, alleging breach of the financial agreement. Less than a month later, and before filing an answer, Braun petitioned the district court to compel arbitration pursuant to the arbitration provision contained in the financial agreement.

The district court summarily denied the petition, finding that Braun had waived arbitration by filing suit against AA in state court. 286 F.3d at 1311-15. The Eleventh Circuit, after reviewing the totality of the circumstances, reversed the district court's finding that Braun had waived its right to arbitrate. 286 F.3d at 1323-24.

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In Morewitz, 62 F.3d 1356, the administrator (Morewitz), for the estates of several seamen lost when their vessel disappeared in international waters in the "Bermuda Triangle," brought wrongful death actions, in the Eastern District of Virginia, between 1976 and 1977, against the vessel's owner and managing agent. 62 F.2d at 1358-59. On April 3, 1980, Morewitz obtained a favorable judgment against the managing agent as the owner *pro hac vice* of the lost vessel. Judgment was affirmed in 1981. On June 26, 1985, Morewitz brought an action to enforce the judgment in the Southern District of Alabama, seeking to recover on a maritime protection and indemnity policy issued by West, the vessel insurer, as the managing agent had become insolvent. 62 F.3d at 1359-60. The district court dismissed the action; the Eleventh Circuit reversed. Id.

On remand, Morewitz reasserted his claim relying on the Alabama direct action statutes. 62 F.3d at 1362. In 1990, the British House of Lords held that when the terms of an insurance policy require the insured to pay its obligation before it may collect against the insurer, the insured [*49] must pay before any other party can sue on the contract. Id. On October 17, 1990, West filed a motion to stay the litigation pending arbitration which was granted by the district court in January, 1991. 62 F.3d at 1360-61. Morewitz appealed. The Eleventh Circuit dismissed the appeal for lack of jurisdiction. Id.

On remand again, Morewitz argued that the seamen were not bound by the arbitration agreement and that, alternatively, West had waived its right to compel arbitration. 62 F.3d at 1359. The district court afforded the parties six months to proceed with arbitration. When Morewitz refused, the district court dismissed the action with prejudice for want of prosecution. 62 F.3d at 1359, 1361. Morewitz appealed a third time. Id.

In reversing the district court, the Eleventh Circuit addressed Morewitz's alternative waiver argument. The Eleventh Circuit stated:

> Arbitration should not be compelled when the party who seeks to compel arbitration has waived that right... In considering the issue of waiver, we are mindful of the Supreme Court's admonition that 'questions of arbitrability must be addressed with a healthy regard for [*50] the federal policy favoring arbitration." Moses H. Cone Mem'l Hosp., 460 U.S. at 24...
>
> Nevertheless, the doctrine of waiver is not an empty shell. Waiver occurs when a party seeking arbitration substantially participates in litigation to a point inconsistent with an intent to arbitrate and this participation results in prejudice to the opposing party. Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1158 (5th Cir. 1986). Prejudice has been found in situations where the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was

designed to alleviate. E.C. Ernst, Inc. v. Manhattan Constr. Co., 559 F.2d 268, 269 (5th Cir. 1977), *cert. denied*, 434 U.S. 1067, 55 L. Ed. 2d 769, 98 S. Ct. 1246 (1978).

Id., 62 F.3d at 1365-66 (footnote omitted); see Frank v. American General Finance, Inc., 23 F. Supp. 2d 1346, 1350 (S.D.Ala. 1998).

The Eleventh Circuit determined that Morewitz had been prejudiced by West's delay in demanding arbitration, noting that the 1990 change in British law which affected Morewitz's right to arbitrate the claim in England was [*51] not announced by the House of Lords until a decade after the wrongful death judgment was affirmed. Further, Morewitz filed the Alabama action in 1985, five years before the change in British law was announced. The Eleventh Circuit concluded that West

> had ample opportunity to demand arbitration well in advance of the decision that significantly changed the legal position of the parties to the prejudice of Morewitz... The appropriate time for West... to contest coverage and demand arbitration with [the managing agent]... was during the proceedings in the... Eastern District of Virginia. Because West... has waived its right to arbitrate with [the managing agent], it has also waived its right to demand arbitration with Morewitz.

62 F.3d at 1366.

S&H Contractors, 906 F.2d 1507, involves two separate suits evolving out of the same operative facts. Taft entered a contract with a company to purchase mining equipment. 906 F.2d at 1508. Taft then hired S&H to assemble the equipment; the parties entered into a contract which contained an arbitration provision. At the time, S&H (a Kentucky corporation) was not qualified to do business [*52] in Alabama.

The first S&H Contractors case came in March 1986, in the Northern District of Alabama, when S&H sued Taft alleging breach of contract (failing to pay for services rendered). Taft moved to dismiss the complaint contending that S&H's failure to qualify to do business in Alabama rendered the contract unenforceable. The district court took no action for several months and during that interim, S&H engaged in "extensive" pretrial discovery. Id., at 1508-09. In November 1986, S&H demanded arbitration of the dispute. In December 1986, the district court converted Taft's motion to dismiss into a motion for summary judgment and granted the motion, holding that S&H's failure to qualify to do business made the contract unenforceable. S&H appealed; the appeal was stayed pending the outcome of arbitration which S&H pursued. Id., at 1509.

In February 1987, Taft sought to enjoin arbitration based on the court's decision that the contract containing the arbitration provision was unenforceable. In April 1987, the district court enjoined arbitration proceedings in Alabama. The court reasoned that if arbitration was conducted in Alabama, a district [*53] court in Alabama may be required to enforce any award rendered and, in effect, enforce the underlying contract. Thereafter, S&H petitioned the American Arbitration Association to transfer the arbitration proceedings to Atlanta. Id.

In March 1988; Taft filed the second S&H Contractors case in the Northern District of Georgia, requesting that the court enjoin the Atlanta arbitration. Taft argued that the contract containing the arbitration had been declared void and that in bringing the initial suit in March 1986, before demanding arbitration, S&H had waived its right to demand arbitration. The district court held that the contract was void and thus the parties never agreed to arbitration; the court did not address Taft's waiver argument. Id.

S&H appealed. The Eleventh Circuit consolidated the two cases for appeal purposes and affirmed; the Eleventh Circuit's order enjoining arbitration is based on waiver. Id., at 1514. The Eleventh Circuit noted that S&H had waited eight months from the time it filed its initial suit before - seeking arbitration and during that interim, S&H had engaged in extensive discovery resulting in prejudice to Taft. n20 Id. [*54]

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n20 Taft filed two motions - a motion to dismiss and an opposition to S&H's motion for discovery. Also, S&H

took the depositions of five Taft employees (totaling approximately 430 pages) prior to demanding arbitration. Moreover, S&H pursued arbitration in Alabama, and in Georgia, despite the district court's ruling that the contract containing the arbitration provision was unenforceable.

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Herein, the Suppliers filed their state court action on December 28, 2001. On February 7, 2002, MPP removed the action to this court. On February 14, 2002, MPP filed their Answer asserting the parties' agreement to arbitrate as an affirmative defense. On March 2002, the Suppliers moved for remand. On May 2, 2002, **Marubeni** filed a motion to dismiss the Suppliers' Complaint arguing that the fraud and misrepresentation claims were subject to arbitration. On July 25, 2002, this court remanded the Suppliers' Complaint to state court. On August 8, 2002, **Marubeni** appealed the remand and on November 4, 2002, the Eleventh Circuit [*55] dismissed the appeal. On December 10, 2002, **Marubeni** filed their Answer in the state court action raising numerous affirmative defenses including the parties' agreement to arbitrate, as MPP did in February, 2002. Also on December 10, 2002, **Marubeni** and MPP filed the subject Motion to compel arbitration.

Marubeni and MPP's Motion to compel arbitration comes within one year of the initiation of the Suppliers' Complaint, a far less lapse in time than that set out in Morewitz (a five year delay constituted a waiver).

S&H Contractors, is further distinguished from the present controversy by the simple reason that **Marubeni** and MPP are in a defensive position as defendants in the state court action. Neither, initiated legal action against the Suppliers, prior to the filing of the Motion to compel arbitration. n21 S&H initiated the legal action and, then eight months into extensive discovery, requested arbitration.

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n21 The Suppliers contend that by filing counterclaims in their Answers to the Suppliers' state court Complaint, **Marubeni** and MPP "may" have waived their right to compel arbitration (doc. 16, p.40). However, the Suppliers have not proffered controlling authority for the contention.

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Moreover, herein, the Suppliers were on notice from the filing of MPP's Answer on February 14, 2002, that arbitration may be an issue. Price, 791 F.2d at 1161 ("A demand for arbitration puts a party on notice that arbitration may be forthcoming...").

As noted, the Suppliers also contend, in the context of waiver, that they have been prejudiced by the delay and expense of the litigation process over the past year. The Suppliers rely on S&H Contractors, 906 F.2d 1507.

However, because this court finds that **Marubeni** and MPP did not waive their right to arbitration, it is unnecessary to discuss the prejudice prong of the two-part waiver test. IVAX, 286 F.3d at 1320 (because no waiver was found, it was unnecessary to discuss the prejudice prong of the two-part test).

4. Whether this Court Should Abstain From Imposing A Stay.

(a) Abstention.

The Suppliers contend that this court should abstain from assuming jurisdiction over this matter as **Marubeni** is not a party to the Agreements containing the arbitration provision (doc. 16, p.42-45). n22 However, as noted herein, this court is faced with a valid written agreement [*57] to arbitrate the dispute involving international commerce under the Convention which invokes the original jurisdiction of this court. McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1037 [3rd Cir. 1974). n23

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n22 **Marubeni** and MPP have not had the opportunity to reply to the Suppliers' contention regarding abstention. See footnote number 16, *supra.*

n23 In McCreary, a Pennsylvania corporation (McCreary) sued an Italian corporation (CEAT) for breach of contract. CEAT removed the action to federal court and moved *inter alia* for a stay to permit arbitration in accordance with the terms of the contract. The district court denied relief. The Third Circuit reversed noting that the underlying contract fell under the jurisdiction of the Convention and as such the district court was bound by the Convention Id., at 1034-36.

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An action or proceeding falling under the Convention "shall be deemed to arise under the laws and treaties of the United [*58] States and... the district courts of the United States shall have original jurisdiction over such proceedings without regard to the amount in controversy..." 9 U.S.C.§§ 203; McCreary, at 1037. Article II(3) of the Convention provides: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Id. "There is nothing discretionary about Article II(3) of the Convention." Id.

As such, the Convention precludes any discussion regarding the assumption of jurisdiction by this court. This court would err by abstaining. (b) A Stay.

> Section 3 of the FAA provides:
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration [*59] under such an agreement, *shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,* providing the applicant for the stay is not in default in proceeding with such arbitration.

(emphasis added); McCreary, at 1037, n.2. In McCreary, the Third Circuit determined that "it was error to deny the motion for a stay in disregard of the Convention." Id., at 1037.

McCreary is persuasive authority. The Convention mandates the imposition of a stay.

The Suppliers argue that 28 U.S.C.§§ 2283, the Anti-Injunction Act, "prohibits any stay of the state court litigation absent a finding that a valid arbitration agreement exists between the parties to that litigation which covers the claims asserted in this litigation." (doc.9, p.5, Affirmative Defense 5). The argument fails as this court has found a valid and enforceable written arbitration agreement between the parties, that covers the Suppliers' state court claims at issue.

Further, this court notes that the Anti-Injunction Act

> prohibits a federal court from enjoining a state [*60] court proceeding except in three narrowly defined circumstances: 1) where there is an express congressional authorization to enjoin state proceedings; 2) where an injunction is necessary to protect a judgment that a federal court has rendered; and 3) where an injunction is necessary to aid the federal court's jurisdiction over an action. See 28 U.S.C.§§ 2283. Those exceptions are to be narrowly construed. See e.g., Atlantic Coast Line Ry. Co. v. Brotherhood of Locomotive Eng'rs., 398 U.S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739,... (1970).

TranSouth Financial Corp. v. Bell, 149 F.3d 1292, 1296 (11th Cir. 1998); Woodmen of the World Life Ins. Society v. Johnson, 23 F. Supp. 2d 1344, 1345 (S.D.Ala. (Aug. 24, 1998) (J. Hand)); Kiefer, 211 F.R.D. 445.

In TranSouth, the Eleventh Circuit adopted the exception to the Anti-Injunction Act, holding that, where a district court ordered arbitration of disputes related to those concurrently asserted in state court proceedings, the court may stay such proceedings in "aid of jurisdiction... Continued state court proceedings could jeopardize [*61] the federal court's ability to pass on the validity of the arbitration proceeding it has ordered." TranSouth, 149 F.3d at 1297 n24; Johnson, 23 F. Supp. 2d at 1345; Kiefer, 211 F.R.D. at 451.

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N24 In TranSouth, Bell filed suit in Alabama state court against TranSouth alleging fraud and misrepresentation claims. 149 F.3d at 1294. TranSouth filed a petition in federal court seeking to compel Bell to arbitrate his claims, and requesting that the state court proceedings be stayed. Id. Bell answered asserting a counterclaim that the arbitration agreement had been procured through fraud, and filed a motion to dismiss based on the principles of comity and abstention. Id. The district court granted Bell's motion to dismiss, finding that it would abstain from exercising jurisdiction. TranSouth appealed. Id.

The Eleventh Circuit vacated, in part, and affirmed, in part. 149 F.3d at 1298. The Court vacated the district court's order granting Bell's motion to dismiss; and affirmed the district court's denial of the motion to stay, holding that no exception to the Anti-Injunction Act was applicable, as jurisdiction was proper in both the state and federal courts. Id., at 1297 ("When there are concurrent jurisdiction state and federal proceedings arising out of the same transaction or occurrence, ordinarily neither forum should interfere with the other's exercise of jurisdiction.").

TranSouth is factually distinguishable from the controversy *sub judice*. Herein, this federal district court has original jurisdiction based on the Convention. In TranSouth, the state and federal courts had concurrent jurisdiction over that controversy.

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Herein, this court has original jurisdiction over the arbitration issue pursuant to the Convention. Further, this court finds that any decision rendered in the state court action has the distinct possibility of interfering with this court's continuing jurisdiction over the arbitration proceedings ordered herein. Therefore, a stay of the state court action is proper under the TranSouth exception to the Anti-Injunction Act under circumstances (1) express Congressional authorization to enjoin state court proceedings; and (3) in the "aid of jurisdiction." §§ 2283; TranSouth, at 1296; Kiefer, at 451.

D. Conclusion

For the reasons set for herein, this court finds that it has original jurisdiction over this controversy pursuant to§§§§ 201, 203 of the Convention; a valid arbitration agreement exists between the parties which is sufficiently broad to encompass the Suppliers' fraud and misrepresentation claims; this court would err if it abstained; and a stay of the state court action is appropriate in light of this court's original jurisdiction over the instant controversy.

Accordingly, it is ORDERED that **Marubeni** and MPP's Motion to compel arbitration and to [*63] stay the state court proceeding be and is hereby GRANTED. The Suppliers' fraud and misrepresentation claims are forthwith referred to arbitration pursuant to 9 U.S.C.§§ 206, which shall take place in Mobile, Alabama, in accordance with the Rules of Conciliation and Arbitration of the American Arbitration Association, as set forth in the MAT Agreement. All parties, **Marubeni,** MPP, MBWC, SEWF, and MAT shall participate in good faith.

It is further ORDERED that the state court action, Mobile Bay Wood Chip. Southeast Wood Fiber, LLC., and Mid Atlantic Terminals, LLC., v. **Marubeni** Corporation and **Marubeni** Pulp and Paper, Inc., CV-0l-4385, be and is hereby STAYED and ENJOINED in its entirety as this court has original jurisdiction over the matter.

It is further ORDERED that this action be and is hereby STAYED pending the above ordered arbitration. Although this court retains jurisdiction as stated above, the arbitration proceedings may take some time to complete and there may be no further need for this court's intervention. The Clerk is therefore DIRECTED to

close this action for statistical purposes.

DONE this 16th day of June, 2003.

S/Virgil Pittman

SENIOR [*64] UNITED STATES DISTRICT JUDGE

MARUBENI CORPORATION and **MARUBENI** PULP AND PAPER (NORTH AMERICA), INC., Plaintiffs, vs. MOBILE BAY WOOD CHIP CENTER, SOUTHEAST WOOD FIBER, LLC and MID ATLANTIC TERMINALS, LLC, Defendants.

CIVIL ACTION NO. 02-0914-P-L

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

2003 U.S. Dist. LEXIS 13675

June 16, 2003, Decided

DISPOSITION: Plaintiff's motion to compel arbitration granted. State court proceedings stayed pending arbitration.

CORE TERMS: arbitration, suppliers, chip, compel arbitration, misrepresentation, wood, arbitration provision, arbitration agreement, signatory, waived, vessel, arbitrate, buyer, original jurisdiction, terminal, loading, arbitral, undisputed, shipping, discovery, motion to dismiss, calendar year, non-signatory, counterclaim, proffered, domestic, quantity, agreement to arbitrate, pertaining, international commerce

COUNSEL: [*1] For **Marubeni** Corporation, **Marubeni** Pulp and Paper North America, Inc., Plaintiffs: Bryan O. Balogh, Starnes & Atchison, LLP, Birmingham, AL. John E. Davis, Pillsbury Winthrop LLP, New York, NY. Edward Flanders, Pillsbury Winthrop LLP, New York, NY. William Christian Hines, III, Starnes & Atchison, LLP, Mobile, AL. W. Stancil Starnes, Starnes & Atchison, LLP, Birmingham, AL.

For Mid Atlantic Terminals, LLC, Mobile Bay Wood Chip, Southeast Wood Fiber, LLC, Defendants: Steven L. Nicholas, Olen, Nicholas & Copeland, P.C., Mobile, AL. Steve Olen, Olen, Nicholas & Copeland, P.C., Mobile, AL.

JUDGES: Virgil Pittman, SENIOR UNITED STATES DISTRICT JUDGE.

OPINIONBY: Virgil Pittman

OPINION: ORDER COMPELLING ARBITRATION AND IMPOSING A STAY

This is an action, brought by plaintiffs **Marubeni** Corporation ("Marubeni"), and Marubeni Pulp and Paper [*2] (North America), Inc. ("MPP"), to compel defendants Mobile Bay Wood Chip Center ("MBWC"), Southeast Wood Fiber, LLC ("SEWF"), and Mid Atlantic Terminal, LLC ("MAT") (collectively referred to herein as the "Suppliers"), to arbitrate pursuant to 9 U.S.C. §§ 1, et seq., the Federal Arbitration Act (the "FAA"), and pursuant to 9 U.S.C. §§ 201, et seq., the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). n1 **Marubeni** and MPP seek to compel arbitration of a dispute arising out of agreements executed by the parties hereto, pertaining to the process, sale, and shipment of southern hardwood wood chips, a dispute which is currently being litigated in the Circuit Court of Mobile County, Alabama n2 (docs. 1-2).

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n1

The... Convention was drafted in 1958 under the auspices of the United Nations... The purpose of the... Convention, and of the United States' accession to the Convention, is to "encourage the recognition and enforcement of international arbitral awards,"..., to: relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation."... The Convention, and American enforcement of it through the FAA, "provide[] businesses with a widely used system through which to obtain domestic enforcement of international commercial arbitration awards resolving contract and other transactional disputes, subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy."...

The... Convention is incorporated into federal law by the FAA, which governs the enforcement of arbitration agreements, and of arbitral awards made pursuant to such agreements, in federal and state courts... As an exercise of the Congress' treaty power and as federal law, "the Convention must be enforced according to its terms over all prior inconsistent rules of law."...

9 U.S.C. §§ 201, Historical and Statutory Notes (West 2003); Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte, 141 F.3d 1434, 1440 (11th Cir. 1998)(citations omitted), *cert. denied*, 525 U.S. 1068, 142 L. Ed. 2d 659, 119 S. Ct. 797 (1999); Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co., 767 F.2d 1140, 1145-46 (5th Cir. 1985). [*3]

n2 Mobile Bay Wood Chip, Southeast Wood Fiber, LLC., and Mid Atlantic Terminals, LLC., v. **Marubeni** Corporation and **Marubeni** Pulp and Paper, Inc., CV-01-438-S (docs. 1, 16, Ex.D).

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Currently pending before this court is **Marubeni** and MPP's Complaint to Enforce Arbitration Agreements, Compel Arbitration and Stay Litigation, with a Memorandum in support thereof (docs. 1-2), an Amended Reply Memorandum in Support of the Complaint, n3 and the Declaration of W. Christian Hines, III, authenticating the exhibits proffered (docs. 12, 15). **Marubeni** and MPP have also filed a Motion For Hearing on their Petition to Compel Arbitration and Stay the State Court Action (doc. 17). n4 In response, the Suppliers filed an Answer (doc. 9), and a Brief in Opposition to Complaint to Compel Arbitration and Stay Proceedings (doc. 16).

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n3 On January 28, 2003, **Marubeni** and MPP filed a Reply Memorandum of Law in Support of Complaint to Enforce Arbitration Agreements, Compel Arbitration and Stay Litigation (doc. 11). On February 4, 2003, **Marubeni** and MPP filed a Motion to Substitute Amended Reply Memorandum of Law in Support of Complaint to Enforce Arbitration Agreements, Compel Arbitration and Stay Litigation (doc. 13). The Motion was granted (docs. 13-14). The Amended Reply Memorandum was filed on February 5, 2003 (doc. 15). [*4]

n4 For the reasons stated herein, the Motion For Hearing (doc. 17), is hereby MOOT.

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After careful consideration of all relevant matter, and for the reasons stated herein, this court finds that **Marubeni** and MPP's Complaint to Enforce Arbitration Agreements, Compel Arbitration and Stay Litigation (docs. 1-2) (hereinafter referred to as the Motion to enforce arbitration n5) is GRANTED.

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n5 Under the FAA, "any application to the court hereunder shall be made and heard in the manner provided by law for the making of motions,..." 9 U.S.C. §§ 6; Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1257 (7th Cir. 1992).

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A. Procedural History and Facts

It is undisputed that **Marubeni** is a Japanese corporation with its principal place of business in Tokyo, Japan. MPP is a Delaware corporation with its principal place of business in New York. MBWC is an Alabama general partnership [*5] with all of its members having citizenship in Alabama. SEWF is an Alabama limited liability company with its members having citizenship in Alabama and Delaware. MAT is an Alabama limited liability company with its members having citizenship in Alabama or Georgia (doc. 1, P 1-5; doc. 9, P B1-5). The owners of MBWC and SEWF are related through their corporate members (doc. 16, p. 6).

Marubeni and MPP allege that the parties' interrelated dealings arise out of three separate agreements pertaining to the sale, purchase, processing, loading and shipping of wood chips and each agreement contains or incorporates by reference binding arbitration clauses (doc. 1, P 10).

It is undisputed that on February 6, 1995, **Marubeni** America Corporation, a New York subsidiary of **Marubeni,** n6 entered into a Sale and Purchase Agreement with SEWF (hereinafter referred to as the "SEWF Agreement") (doc. 1, P 11, Ex. A; doc. 16, Ex. A). It is also undisputed that under the SEWF Agreement, **Marubeni** America Corporation agreed to purchase a quantity of southern hardwood wood chips per year from SEWF (docs. 1, 16, Ex. A). The SEWF Agreement concerns, *inter alia* specifications and quantities of product, [*6] shipping particulars and loading conditions, as well as price and conditions of payment. Id.

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n6 **Marubeni** America Corporation is a separate and distinct entity from **Marubeni** (doc. 16, Ex. E-Affidavit of Russel Myles, dated February 1, 2003). **Marubeni** America Corporation is not a party to this action (doc. 2, p. 3).

Mr. Myles states that he has personal knowledge of the matters before this court as he is "directly or indirectly involved in the management of each of the Defendant entities named... and [has] been personally involved in the dealings of **Marubeni** from the inception of the relationship with [the Suppliers]." (doc. 16, Ex. E).

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Marubeni and MPP allege that on April 1, 1998, **Marubeni** America Corporation assigned its rights and obligations under the SEWF Agreement to MPP (doc. 1, Ex. A, p. 25-26). The Assignment Agreement states: "ASSIGNOR [**Marubeni** America Corporation] hereby assigns to ASSIGNEE [MPP] all of ASSIGNOR's rights and obligations under the Agreement... ASSIGNEE hereby accepts [*7] the said assignment and delegation by ASSIGNOR to ASSIGNEE and, specifically but without limiting the generality hereof, ASSIGNEE hereby agrees to perform all the obligations of ASSIGNOR under the Agreement." Id.

The Suppliers contend that SEWF did not consent to any assignment of the SEWF Agreement to anyone; SEWF provided a signed consent to the assignment to MPP, but that consent was rescinded (doc. 16, Ex. E-Myles Affidavit). No written rescission has been proffered.

It is undisputed that on February 3, 1998, **Marubeni** America Corporation entered into a second Sale and Purchase Agreement with MAT, an affiliate of MBWC and SEWF (hereinafter referred to as the "MAT Agreement") (docs. 1, 16, Ex. B). The MAT Agreement concerns, *inter alia* specifications and quantities of product, shipping particulars and loading conditions, as well as price and conditions of payment. Id. With regard to "SHIPMENT," the MAT Agreement states, in part,

SELLER shall provide and maintain an installation located on the southern branch of the Elizabeth

River in the city of Chesapeake, Virginia U.S.A. or other port mutually agreed by SELLER and BUYER ("LOADING PORT") [*8] ***for the storage of the CHIPS and the berthing of ocean-going Vessels..., together with necessary facilities for loading the CHIPS aboard such Vessels.*** Seller shall ensure that the LOADING PORT shall provide a safe berth for Vessel with the minimum draft or not less than 38 feet, and also shall provide BUYER's Vessel berth and loading priority over all other Vessels using LOADING PORT.

Id Art. 5 (emphasis added). The MAT Agreement is governed by New York law (docs. 1, 16, Ex. B, Art. 19.

It is undisputed that the MAT and SEWF Agreements each contain substantively the same arbitration provision (docs. 1 and 9, P B13-14). The MAT Agreement provides:

All disputes, controversies or differences which may arise between the parties hereto, out of, in relation to or in connection with this AGREEMENT, or for the breach thereof which cannot be resolved amicably by the parties ***shall be finally settled by arbitration in Mobile[,] Alabama[,]*** in accordance with the then existing Rules of Conciliation and Arbitration of the American Arbitration Association if invoked by BUYER or in Japan if invoked by SELLER by three (3) arbitrators to be selected [*9] in accordance with said rules.

The award rendered therein shall be final and binding upon both parties.

(docs. 1 and 16, Ex. B, Art. 20, P 1-2) (emphasis added). The SEWF arbitration provision provides for "arbitration in Mobile[,] Alabama if invoked by BUYER or in New York if invoked by SELLER." (docs. 1, 16, Ex. A).

Marubeni and MPP allege that **Marubeni** became a party to the MAT Agreement by Addendum dated February 9, 2000 (doc. 1, Ex. B; doc. 16, Ex. F). The Addendum states in full:

Addendum to the SALE AND PURCHASE AGREEMENT dated February 3, 1998

With regard to ARTICLE 4 QUANTITY of SALE AND PURCHASE AGREEMENT dated February 3, 1998, Mid-Atlantic Terminals, L.L.C. [MAT] (hereinafter called "SELLER") and **Marubeni** America Corporation (hereinafter called "BUYER") agree as follows:

The minimum quantity of CHIPS which SELLER agrees to sell to BUYER and which BUYER agrees to purchase from SELLER and pay for shall not be less than 900,000 GST beginning July 1, 2000 on an annualized basis (the "Minimum Quantity").

IN WITNESS WHEREOF, SELLER and BUYER have executed this agreement this 9th day of February, 2000.

Id. The Addendum [*10] is signed by representatives of MAT, "Russel E. Myles, Member" and "Sachito Yokozawa, General Manager, Wood Chip Department, **Marubeni** Corporation" (doc. 1, Ex. B; doc. 16, Ex. F).

Both sides to the dispute, *sub judice,* have proffered a copy of the Addendum. Id. The Suppliers proffered the one-page document standing alone (doc. 16, Ex. F). **Marubeni** and MPP proffered a copy of the Addendum with the MAT Agreement (doc. 1, Ex. B), along with copies of two additional letters both dated February 9, 2000. Id. The first is on MAT letterhead and is addressed to Marubeni and Marubeni America Corporation, and states, in part: "Per our agreement, Mid-Atlantic Terminal, L.L.C. [MAT] and **Marubeni**... have agreed to modify the freight differential contained in the Chip Sale and Purchase Agreement between **Marubeni** and MAT dated February 3, 1998." Id. The second letter is also on MAT letterhead, addressed to **Marubeni** and Marubeni

America Corporation, and states, in part: "Per our conversations of Feb. 7, 8, and 9, this letter documents the agreement reached between **Marubeni** Corporation and Mid-Atlantic Terminal, L.L.C. [MAT] regarding fee payments to MAT by **Marubeni**..." Id. [*11] n7 Both letters are signed by Russel E. Myles. Both letters state: "Please acknowledge your understanding and agreement by executing in the space provided below." Id. Both letters reflect acknowledgments by "Sachito Yokozawa, **Marubeni** Corporation, General Manager, Wood Chip Department [dated] Feb. 9, 2000." Id.

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n7 The second letter delineates the scheduling of payments amounting to $ 1 million per year by **Marubeni** to MAT in 2000 and in 2001. Id.

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The Suppliers contend that MAT did not consent to any assignment of the MAT Agreement to any party, and that **Marubeni** is a party to the Addendum only, and that there is no arbitration provision in the Addendum (doc. 16, Ex. E). n8

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n8 Both the SEWF and MAT Agreements contain identical "Assignment" clauses: "No party shall assign, transfer or otherwise dispose of any of its rights or obligations under this AGREEMENT, in whole or in part, without the prior written consent of the other party." (docs. 1 and 16, Ex. A, B Art. 18).

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It is undisputed that on December 5, 2000, **Marubeni** and MPP entered into a "Terminal Agreement" with the Suppliers (doc. 1, P 15, Ex. C; doc. 16, Ex. E). **Marubeni** and MPP allege that the Terminal Agreement was executed to coordinate processing of wood chips purchased, from SEWF and MAT under the SEWF and MAT Agreements for loading onto ships for export (doc. 1, P 15).

The Terminal Agreement states, in part:

> Annual Guarantee Volume. ...**Marubeni** agrees that, for each calendar year during the term of this Agreement, it will cause approximately two million Green Short Tons of Wood Chips any kind not limited to southern mixed hardwood Wood Chips to be processed through the Terminal and loaded onto **Marubeni** designated ocean-going vessels during such calendar year...; provided, however, the parties hereto agree that the Annual Guarantee Volume for a particular calendar year shall be reduced by the amount of Green Short Tons of Wood Chips processed through the Mid-Atlantic Terminal (as defined below) and loaded onto **Marubeni** designated ocean-going vessels during such calendar year. For purposes of this Agreement, "Mid-Atlantic Terminal" means that certain terminal operated by [*13] MAT on the southern branch of the Elizabeth River in Chesapeake, Virginia.

(docs. 1, 16, Ex. C, Art. 2(a)). The Terminal Agreement also provides, in part:

> ***This Agreement supersedes all prior discussions and agreements between the parties with respect to the subject matter hereof*** and this Agreement contains the sole and entire agreement between the parties with respect to the matters covered hereby; provided, ***however, this Agreement shall not supersede the following agreements;... the SEWF Agreement,... and the Sale and Purchase Agreement dated February 3, 1998 between Marubeni and MAT shall remain in full force and effect...***

(docs. 1, 16, Ex. C, 7(a)(i)) (emphasis added).

On December 28, 2001, the Suppliers initiated litigation against **Marubeni** and MPP in the Circuit Court of Mobile County, Alabama (docs. 1, 16, Ex. D; doc. 9, P B18; see footnote 1, *supra*). The state court complaint alleges:

> In 1995, in order to secure and sell wood chips to **Marubeni** which would be handled through the MBWC facility, SEWF was formed and began business. SEWF is in the business of manufacturing and purchasing suitable wood chips for sale to [*14] **Marubeni.** These wood chips are transported to the MBWC facility for loading onto the ocean going vessels.
>
> From the time the relationship began between MBWC, SEWF, and **Marubeni,** representatives of **Marubeni** stressed that there was an immediate and long term need to expand the supply of wood chips from the southeast of the United States. These discussions focused on the desire of **Marubeni** for the partners of MBWC and SEWF to locate and build another wood chip handling facility, preferably on the east coast of the United States.
>
> In order to induce [MBWC and SEWF] to undertake the development of a new wood chip facility, **Marubeni** representatives specifically told plaintiffs that (a) **Marubeni** had long term contracts with paper manufacturers in Japan and would be able to guarantee minimum purchases of wood chips, (b) **Marubeni** had great flexibility with its suppliers and **Marubeni** was able to divert purchases to the new facility from other overseas sources of supply in order to assure minimums were achieved, (c) that ship schedules could be provided in advance to enable plaintiffs to buy inventory without storing the chips for long periods, (d) that Japanese paper manufacturers must use [*15] southern hardwood wood chips to successfully operate so that a steady demand for said chips existed, (e) that there was not enough supply overseas of suitable wood chips which could reduce the promised volumes to SEWF and MAT, and (f) that plantation wood chips owned by Japanese interests could not replace southern hardwood wood chip volume.
>
> These representations and other similar statements were made on numerous occasions in 1997 and 1998 by Neota Itakura and S. Yokogawa. Itakura and Yokozawa are employees of **Marubeni** and the representations were made within the line and scope of their employment with **Marubeni.**
>
> Those representations were false. The representations as made were of then existing facts. To the extent the representations included promises for future action, those representations were made with no intent to perform those promises.
>
> In reliance on those representations and other similar representations, MAT was formed and built. In order to build MAT, MAT expended significant sums and incurred substantial debt which was based on the specific promised volume to be handled by that facility. MBWC and SEWF effectively pledged their assets to secure the MAT debt.
>
> In order [*16] to induce the continued operation and cooperation of [MBWC, SEWF, and MAT], **Marubeni** agreed to provide financial assistance to MAT. A Letter Agreement dated February 9, 2000, was executed by Marubeni whereby Marubeni agreed to pay MAT one million dollars annually in quarterly payments of $ 250,000.00. **Marubeni** failed to make its required payment due October 1, 2001 and breached said Letter Agreement.
>
> Following execution of the Letter Agreement, **Marubeni** and its subsidiary Pulp and Paper entered into a Terminal agreement dated December 5, 2000 with [MBWC, SEWF, and MAT]. That Agreement provided that **Marubeni** and Pulp and Paper, jointly, guaranteed the shipping of a total of 2 million tons of wood chips through the wood chip facilities at MBWC less the amounts shipped through MAT, per year for each calendar year 2001 through 2010. In other words, [**Marubeni** and MPP] agreed they would ship a minimum of 2 million tons from the MBWC facility and [MAT] facility combined.
>
> [**Marubeni** and MPP] breached their obligation for calendar year 2001, by only shipping

approximately 1.45 million tons through the combined facilities. [**Marubeni** and MPP] have affirmatively repudiated their obligation [*17] to perform under the Terminal agreement for calendar year 2002 and the years following. [**Marubeni** and MPP] are in breach of said agreement both for year 2001 and for the future years as provided for in the Terminal Agreement.

(docs. 1, 16, Ex. D, p. 2-4, P 9-17). In the state court action, the Suppliers assert four counts: 1) **Marubeni** and MPP breached the Terminal Agreement by failing to perform their obligations under the Agreement; 2) **Marubeni** and MPP breached the Letter Agreement by failing to pay the payment due October 1, 2001; 3) **Marubeni** committed willful fraud in that the representations made were false and the Suppliers relied on the representations in building and capitalizing MAT; and 4) **Marubeni** committed innocent/reckless misrepresentation in that the representations made were false and the Suppliers relied on the representations in building and capitalizing MAT. Id., p. 4-6.

On February 7, 2002, MPP removed the state court action to this federal district court under 28 U.S.C. §§ 1332; at the time, **Marubeni** had not been served. See C.A. 02-0096-P-L. On February 14, 2002, MPP served their answer (doc. 12, Ex. H). Therein, MPP raised [*18] numerous affirmative defenses including the parties' agreement to arbitrate such and related claims, Id. (First Affirmative Defense). n9

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n9 MPP also asserted two counterclaims: 1) Breach of contract in that the Suppliers breached their obligations under the Terminal Agreement; and 2) indemnification in that the Suppliers' agreed to indemnify and hold harmless MPP from all claims arising out of or relating to the Suppliers' (a) negligent or intentional acts or omissions, and (b) breach of the Terminal Agreement. Id., P 8-16. MPP sought dismissal of the Complaint and judgment on the counterclaims, damages, interest, costs and attorneys' fees. Id., p. 10-11.

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On March 4, 2002, the Suppliers moved for remand, asserting lack of diversity. On May 2, 2002, following service of process, **Marubeni** moved to dismiss the Complaint arguing that the fraud and misrepresentation claims were subject to binding arbitration. On July 25, 2002, this court Ordered that the Complaint be remanded for lack of subject matter [*19] jurisdiction; **Marubeni's** motion to dismiss in favor of arbitration remained pending. **Marubeni** sought reconsideration which was denied. On August 8, 2002, **Marubeni** appealed the Remand Order arguing that the district court should have decided the issue of arbitration and dismissed the fraud claims before remanding the Complaint; **Marubeni** also appealed this court's denial of reconsideration (doc. 1, P 19). On November 4, 2002, the United States Court of Appeals for the Eleventh Circuit dismissed the appeals for lack of jurisdiction Id., see Ex. E; doc. 9, P B19; doc. 16, p. 4-5.

On December 10, 2002, **Marubeni** served its answer and affirmative defenses in the Circuit Court of Mobile County, in response to the Suppliers' Complaint (doc. 12, Ex. G). Therein, **Marubeni** raised numerous affirmative defenses including the parties' agreement to arbitrate such claims. Id. (First Affirmative Defense).

On December 10, 2002, **Marubeni** and MPP also filed the subject Motion to compel arbitration in this court (doc. 1). **Marubeni** and MPP allege that the Suppliers' state court fraud and misrepresentation claims, pertaining to MAT, are claims arising out of, in relation to or in connection with [*20] the SEWF and MAT Agreements, and as such the claims are subject to resolution by arbitration (doc. 1, P 21). n10

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n10 The Suppliers contend, and **Marubeni** and MPP do not dispute the fact that the Suppliers' contract claims are not due to be arbitrated (doc. 16, p. 5).

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Marubeni and MPP allege that this action is "governed by... federal law,... the Convention and the FAA." (doc. 1, P 23). The SEWF and MAT Agreements "are written and provide for arbitration in the territory of a signatory of the Convention (either Japan or the United States)." Id. The SEWF and MAT Agreements and the subject matter of the claims "concern... international commerce, involving the purchase, sale, and processing of goods for international shipping, and involve a foreign citizen, **Marubeni,** a Japanese corporation... Pursuant to [the Convention] and the FAA, the[] arbitration agreements are valid and must be enforced." (doc. 1, P 23).

Marubeni and MPP allege the Suppliers are signatories and are intentional beneficiaries of the [*21] SEWF and MAT Agreements and the Terminal Agreement, which incorporate by reference the arbitration provisions contained in the SEWF and MAT Agreements. **Marubeni** and MPP allege that the Terminal Agreement references and incorporates provisions of the SEWF and MAT Agreements relating to price and quantity of the wood chips to be processed by the Suppliers. **Marubeni** and MPP allege that "the [SEWF and MAT] Agreements and the Terminal Agreement are interdependent and interrelated agreements that collectively govern the parties' business dealings." (doc. 1, P 16-17; doc. 2, p. 4). **Marubeni** and MPP allege that the Suppliers, thus, have agreed to arbitrate the claims.

Marubeni and MPP charge that the Suppliers have refused to arbitrate their fraud and misrepresentation claims, and in filing suit in state court, have taken action contrary to the arbitration provisions contained within the SEWF and MAT Agreements (doc.1, P 12, 27).

With the subject Motion to compel arbitration, **Marubeni** and MPP demand arbitration under the Rules of the AAA, of the Suppliers' state court fraud and misrepresentation claims, in Japan or, that failing, in New York (doc.1, P 26). **Marubeni** and MPP seek: 1) An [*22] Order, pursuant to 9 U.S.C.§§§§ 3, 4, and 206, directing that if the Suppliers wish to proceed against **Marubeni** and MPP on their fraud and misrepresentation claims, they must first proceed with arbitration of those claims before the AAA, in either Japan or New York, under the SEWF and MAT Agreements; to take no further action outside of arbitration with regard to those claims; and 2) a Stay of the state court litigation pending final arbitration of the fraud and misrepresentations claims brought by the Suppliers (doc. 1, P 28).

On January 13, 2002, the Suppliers answered (doc.9). The Suppliers deny that there is an arbitration agreement encompassing the parties or claims stated in the state court lawsuit (doc.9, P A). The Suppliers deny that their state court misrepresentation and fraud claims (counts three and four) are subject to arbitration (doc.9, P B18). The Suppliers also assert four affirmative defenses: 1) The court should abstain from exercising jurisdiction over this matter; 2) **Marubeni** and MPP waived their arbitration rights by not asserting that right in the state court litigation, and by invoking the state court litigation process by filing counterclaims; [*23] 3) **Marubeni** and MPP are estopped from asserting any arbitration rights by their conduct; and 4) the Anti-Injunction Act prohibits any stay of the state court litigation absent a finding that a valid arbitration agreement exists between the parties to the litigation which covers the claims asserted in this litigation (doc.9, p.4-5). The Suppliers demand a jury trial. Id. n11

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n11 On January 14, 2003, this action was routinely set for a discovery scheduling conference, pursuant to Rule 16(b) of the Federal Rules of Civil Procedure (doc. 10). In response, **Marubeni** and MPP filed a Motion For Hearing on Plaintiffs' Petition to Compel Arbitration and Stay the State Court Action (doc. 17). Plaintiffs request that the court summarily determine the issues pointing to the inapplicability of the discovery rules in the context of arbitration. Id.

On February 28, 2003, this court continued the Rule 16(b) Scheduling Conference (doc.23). Although the court's Order stated that the scheduling conference would be reset at a later date, this court finds that a discovery conference is inappropriate. The Rules provide that "in proceedings under ... 9 U.S.C., relating to arbitration ..., these rules apply only to the extent that matters of procedure are not provided for in those statutes." Fed.R.Civ.P. 81(a)(3); Hughes, 975 F.2d at 1257. "The rules of procedure in the [FAA] govern proceedings arising under that Act. It is only where the [FAA] is silent that the Federal Rules of Civil Procedure become applicable ..." Booth v. Hume Publishing. Inc., 902 F.2d 925, 932 (11th Cir. 1990).

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On January 17, 2003, in the state court action, **Marubeni** and MPP's Motion For a Protective Order was denied (doc.12, Ex.G). **Marubeni** and MPP sought a stay of discovery in the state court action pending this court's determination of **Marubeni** and MPP's Motion to compel arbitration. Id. n12

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n12 On February 5, 2003, **Marubeni** and MPP filed their Amended Reply Memorandum of Law in Support of their Complaint to Enforce Arbitration contending that the Suppliers' fraud and misrepresentation claims must be arbitrated and that the action pending in the Circuit Court of Mobile County should be stayed (doc. 15).

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On February 10, 2003, the Suppliers filed their Brief in Opposition to the Motion to compel arbitration (doc. 16). Therein, the Suppliers argue that **Marubeni** is not a party to any agreement with the Suppliers which contains an arbitration provision, the arbitration provisions relied upon by **Marubeni** limit the arbitration rights to the parties to the contract, no legal or equitable theories would allow **Marubeni** [*25] to enforce arbitration provisions against non-signatories, the Terminal Agreement did not incorporate the arbitration provisions contained in the SEWF or MAT Agreements, the Suppliers fraud and misrepresentation claims do not arise out of and are not related to the performance of duties specified in the SEWF and MAT Agreements which contain the arbitration provisions, and, any arbitration rights **Marubeni** has, if such are found, have been waived (doc.16). n13

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n13 On February 21, 2003, **Marubeni** and MPP filed a Motion to Strike [Suppliers'] Opposition Brief, or in the alternative, for Leave to File a Surreply (doc. 19). **Marubeni** and MPP argue that the Opposition is untimely filed, and in violation of SD ALA LR. 7.4(b), in that it exceeds the 30-page limit without leave of court. Id. On February 26, 2003, the Suppliers filed their Response to **Marubeni's** Motion to Strike (doc.20). On March 6, 2003, **Marubeni** and MPP filed their Reply Memorandum in Support of Motion to Strike (doc.24).

Marubeni and MPP's Motion to Strike (doc. 19), is hereby DENIED, and their alternative Motion for Leave to File a Surreply is also hereby DENIED for the reasons set forth herein. In addressing the substantive issue at hand, whether this court can compel the parties to arbitrate the Suppliers' state court fraud and misrepresentation claims, this court has carefully reviewed the filings and exhibits of all parties herein for appropriateness and relevancy. This court finds that it has sufficient information before it upon which to render a determination of the issue.

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B. Issues Involved

The issues before this court are: 1) Whether this court has jurisdiction over this controversy; 2) whether a valid arbitration agreement exists between the parties, and if so, whether the Suppliers' state court fraud and misrepresentation claims are subject to arbitration; and if so, 3) whether this court should abstain from enjoining the state court from proceeding further.

C. Discussion

1. Jurisdiction.

Under the FAA, 9 U.S.C. §§§§ 1-16 (Chapter 1), and the Convention §§§§ 201-208 (Chapter 2), a district court must compel arbitration and stay the underlying action if the parties agreed to arbitrate their dispute. 9 U.S.C.

§§§§ 2-3, 201. Chapter 1 of the FAA, covers domestic arbitral proceedings, while Chapter 2, the Convention, covers international arbitral proceedings. Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte, 141 F.3d 1434, 1440 (11th Cir. 1998), *cert. denied* 525 U.S. 1068, 142 L. Ed. 2d 659, 119 S. Ct. 797 (1999).

> The goal of the Convention, and principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial [*27] arbitration agreements in international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 520, n.15, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974); Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co., 767 F.2d 1140, 1147 (5th Cir. 1985); Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982).

Chapter 2 mandates the enforcement of the Convention in courts of the United States, creating original jurisdiction over any action arising under the Convention regardless of the amount in controversy. 9 U.S.C. §§ 203. Section 203 provides: "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States... shall have original jurisdiction over such an action or proceeding." Industrial Risk Insurers, 141 F.3d at 1440.

Section 4 of the FAA "authorizes a party, who is a defendant in another action, 'to commence a separate original action in federal [*28] district court to seek enforcement of an arbitration agreement.'" Central Reserve Life Ins. Co. v. Kiefer, 211 F.R.D. 445, 449 (S.D.Ala. (Oct. 8, 2002)) (J. Butler) (staying a parallel state court action pending arbitration ordered by the district court); American Heritage Life Ins. Co. v. Harmon, 147 F. Supp. 2d 511 (N.D.Miss. (Jun. 28, 2001)).

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in... [9 U.S.C. §§ 2], falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. §§ 202; [*29] Industrial Risk Insurers, at 1440-41. In Industrial Risk Insurers, the Eleventh Circuit noted: "The Convention by its terms applies to only two sorts of arbitral awards: 1) awards made in a country other than that in which enforcement of the award is sought, and 2) awards 'not considered as domestic awards in the country where enforcement of the award is sought.'" Id. As to the second type, the Eleventh Circuit joined the First, Second, Seventh, and Ninth Circuits in holding that

> arbitration agreements and awards "not considered as domestic" in the United States are those agreements and awards which are subject to the Convention not because [they were] made abroad, but because [they were] made within the legal framework of another country, e.g., pronounced in accordance with foreign law *or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.* We prefer this broad[ ] construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards.

Id., at 1441 (emphasis in original). [*30]

Herein, **Marubeni** is a Japanese corporation with its principal place of business in Japan. **Marubeni** is engaged

with MPP and the Suppliers through their Agreements in international commerce, i.e., buying processed wood chips from the Suppliers, all Alabama commercial entities. The Suppliers do not dispute that jurisdiction arises under the Convention; the Suppliers contend that there is no valid arbitration agreement between the parties to this dispute which covers their state court fraud and misrepresentation claims. This court finds that it has original jurisdiction over this controversy pursuant to §§§§ 201, 203, of the Convention.

2. A Valid Arbitration Agreement.

> The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Memorial Hosp. [v. Mercury Constr. Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927,... [(1983)]. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400-404, 18 L. Ed. 2d 1270, 87 S. Ct. 1801,... [*31] (1967); Southland Corp. v. Keating, 465 U.S. 1, 12, 79 L. Ed. 2d 1, 104 S. Ct. 852... (1984). And that body of law counsels "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration... The Arbitration Act establishes that, as a matter of law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hosp., 460 U.S. at 24-25...

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985); see Sedco, 767 F.2d at 1147-48; accord Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc., 312 F.3d 1349, 1357-58 (11th Cir. 2002); Employers Ins. of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316, 1322 (11th Cir. 2001).

For an arbitration agreement to be enforceable, the Convention requires only that: 1) There is a written agreement [*32] n14; 2) which provides for arbitration in the territory of a signatory to the Convention; 3) the subject matter is commercial; and 4) the contract is not entirely domestic in scope. Smith/Enron Cogeneration Ltd., P'ship, Inc. v. Smith Cogeneration Int'l., Inc., 198 F.3d 88, 92 (2nd Cir. 1999), *cert. denied,* 531 U.S. 815, 148 L. Ed. 2d 20, 121 S. Ct. 51 (2000); Sedco, 767 F.2d at 1144-45; Ledee, 684 F.2d at 186-87. "If these requirements are met, the Convention requires district courts to order arbitration." Sedco, at 1145; Ledee, at 187.

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n14 Under the Convention, "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" constitutes an "agreement in writing." 9 U.S.C. §§ 201 (Historical and Statutory Notes, Art. XII); Smith/Enron, 198 F.3d at 93. "There is no federal policy that favors arbitration for parties "who have not contractually bound themselves to arbitrate their disputes." Morewitz v. West of England Ship Owners Mutual Protection and Indemnity Ass'n., 62 F.3d 1356, 1365 (11th Cir. 1995), *cert. denied,* 516 U.S. 1114, 133 L. Ed. 2d 845, 116 S. Ct. 915 (1996).

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Herein, it is undisputed that the underlying subject matter is commercial in nature, and not entirely domestic in scope in that the subject Agreements concern international commerce (the purchase, sale, processing, and shipment of wood chips).

Herein, the express arbitration provisions at issue contained in the SEWF and MAT Agreements, provide that "the situs of the arbitration" is either the United States or Japan. Smith/Enron, 198 F.3d at 94 ("The focus of... the Convention is not on the nationality of the party seeking to enforce... but on the situs of the arbitration."). The United States and Japan are both signatories of the Convention. 9 U.S.C. §§ 201 (Historical and Statutory Notes, Art. XVI, n. 13 [Japan], 29 [United States]). Thus, the determinative issue, herein, is whether the subject

dispute between the parties, the Suppliers' state court claims of fraud and misrepresentation, is subject to the arbitration provisions set forth in the SEWF or MAT Agreements. Ledee, at 186-87.

The undisputed facts establish that the MAT and Terminal Agreements concern the MAT facility. The MAT Agreement, executed February 3, 1998, provides [*34] for the creation and maintenance of the MAT facility located on the Elizabeth River in Chesapeake, Virginia. The MAT Agreement also concerns, *inter alia*, specifications and quantities of product, shipping particulars and loading conditions, as well as price and conditions of payment (docs. 1, 16, Ex.B). It is **Marubeni's** alleged fraud and misrepresentation which induced MBWC and SEWF to build, capitalize, and maintain the MAT facility. The Terminal Agreement, executed approximately two years later, on December 5, 2000, further concerns annual guaranteed volume to be processed through MAT, between the Suppliers, MBWC, SEWF, and MAT, and the buyers, **Marubeni** and MPP. Thus, this court looks specifically to the MAT Agreement and the Terminal Agreement as determinative. n15

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n15 The SEWF Agreement is not applicable to the Suppliers' fraud and misrepresentation claims asserted in state court against **Marubeni.** Although federal policy requires courts to resolve any doubt about the application of an arbitration clause in favor of arbitration, the policy "cannot serve to stretch contract beyond the scope originally intended by the parties." Seaboard Coast Line Railroad v. Trailer Train Co., 690 F.2d 1343, 1352 (11th Cir. 1982).

The facts presented indicate that the SEWF Agreement was executed between SEWF and **Marubeni** America Corporation on February 6, 1995, three years prior to the MAT Agreement under which the Chesapeake, Virginia, MAT facility was conceived. Thus, the Suppliers' fraud and misrepresentation claims pertaining to the creation, capitalization, and maintenance of the MAT facility cannot be interpreted to be a part of the SEWF Agreement. Moreover, **Marubeni** was never a party to the SEWF Agreement. It was to MPP, alone, not to Marubeni, that Marubeni America Corporation expressly assigned its "rights and obligations" under the SEWF. However, the SEWF Agreement signifies the beginning of the intertwined relationships of the parties, hereto, and which ultimately evolved into the controversy presently before this court.

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The contract relationship between the Suppliers and **Marubeni** and MPP is evidenced by the Terminal Agreement, the validity of which is not in dispute. All the parties are signatories to the Terminal Agreement. However, the Terminal Agreement contains no written arbitration provision.

If an agreement or contract does not provide for arbitration, then no federal law requires the parties to that agreement to arbitrate their disputes. Ivax Corp. v. B. Braun of Am., 286 F.3d 1309, 1315, 11th Cir. 2002); Seaboard Cost Line Railroad v. Trailer Train Co., 690 F.2d 1343, 1348 (11th Cir. 1982); Commercial Metals Co. v. Balfour Guthrie & Co. 577 F.2d 264, 266 (5th Cir. 1978). The parties to the Terminal Agreement have not contractually bound themselves to arbitrate disputes arising under that Agreement. As such, arbitration cannot be compelled based on the Terminal Agreement, alone.

Of note, however, the Terminal Agreement expressly does *'not supercede...* the Sale and Purchase Agreement dated February 3, 1998 between **Marubeni** and MAT..." (docs.1, 16, Ex.C, 7(a)(i) (emphasis added)). Thus, the Terminal Agreement does not alter [*36] the force and effect of the MAT Agreement.

Federal law "counsels that questions of arbitrabiity, when in doubt, should be resolved in favor of arbitration... Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." Employers Ins. of Wausau, 251 F.3d at 1322 (citing Moses H. Cone Mem'l Hospital, 460 U.S. at 24). The strong presumption in favor of arbitration applies with special force in the field of international commerce. Mitsubishi Motors, 473 U.S. 614, 631, 87 L. Ed. 2d 444, 105 S. Ct. 3346.

In seeking to compel the Suppliers to arbitrate their state court fraud and misrepresentation claims, **Marubeni** and MPP allege that **Marubeni** became a party to the MAT Agreement through the Addendum executed on February 9, 2000. However, as the Suppliers point out, the Addendum contains no assignment language, and no arbitration provision. Further, neither of the two letters dated February 9, 2000, proffered by **Marubeni** and MPP, contain assignment language between **Marubeni** America Corporation and **Marubeni,** nor an arbitration

provision or reference to the [*37] arbitration provision contained in the MAT Agreement (doc. 1, Ex.B). **Marubeni,** thus, is not a signatory to the MAT Agreement.

However, the Eleventh Circuit has held that "the lack of a written arbitration agreement is not an impediment to arbitration." MS Dealer Service Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 756-57 (11th Cir. 1993), *cert. denied,* 513 U.S. 869, 130 L. Ed. 2d 123, 115 S. Ct. 190 (1994). The courts "have recognized a number of theories under which nonsignatories may be bound to the arbitration agreements of others." Employers Ins. of Wausau, 251 F.3d at 1322. These theories "arise out of common law principles of contract and agency law: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." Id; MS Dealer Service, 177 F.3d at 947.

In MS Dealer Service, the Eleventh Circuit set forth:

> Existing law demonstrates that equitable estoppel allows a non-signatory to compel arbitration in two different circumstances. First, equitable estoppel applies when the signatory to a written [*38] agreement containing an arbitration clause "must rely on the terms of the written agreement in asserting [its] claims" against the non-signatory. Sunkist Soft Drinks, 10 F.3d at 757.
>
> When each of a signatory's claims against a non-signatory "makes reference to" or "presumes the existence *of*" the written agreement, the signatory's claims "arise out of and relate directly to the [written] agreement," and arbitration is appropriate. Id., at 758. Second, "application of equitable estoppel is warranted ... when the signatory [to the contract containing the arbitration clause] raises allegations of ... substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." Boyd [v. Homes of Legend. Inc.,] 981 F. Supp. [1423,] 1433 [M.D.Ala. 1997]... .
>
> Otherwise, "the arbitration proceedings [between the... signatories] would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976). Accordingly, we must scrutinize the nature of [the] claims [*39] against [the non-signatory] "to determine whether those claims fall within the scope of the arbitration clause contained in the [agreement]." Sunkist Soft Drinks, 10 F.3d at 758.

MS Dealer Service, 177 F.3d at 947.

Herein, this court finds that equitable estoppel is applicable under the first circumstance (the signatory's claims against a non-signatory "makes reference to" or "presumes the existence of' the written agreement). Id. The Suppliers are clearly relying on the MAT and Terminal Agreements as a basis for their fraud and misrepresentation claims against **Marubeni.** The MAT Agreement expressly calls for the Suppliers to provide and maintain the MAT facility. The MAT facility was conceived, created, and capitalized based on the negotiations between the **Marubeni** America Corporation and the Suppliers, MBWC and SEWF. **Marubeni** became a party to the MAT Agreement through the Addendum and letters executed on February 9, 2000. The Terminal Agreement which is signed by all the parties makes reference to the MAT Agreement, expressly does not supersede the MAT Agreement, and clearly evolved out of the other Agreements. Further, the Agreements [*40] collectively govern the business relationship and dealings of the parties. n16

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n16 The Suppliers contend that the neither the parties, nor the Agreements are interrelated. However, the facts presented (see p.2-14, *supra.),* belie the contention. The parties as well as the Agreements, the assignment, the Addendum, and the letters referred to herein, reflect a protracted and intertwined business relationship pertaining to the processing, sale, and shipment of wood chips in international commerce. None of the written documents should be viewed in a vacuum. Each reflects a further step in the evolution of the business relationship of the parties involved, beginning in 1995, with the SEWF Agreement. The Suppliers are clearly inter-related entities (through their signatory Russel Myles). They entered into a series of negotiations culminating in their Agreements, assignments, the Addendum, and letters with **Marubeni** America Corporation, **Marubeni,** and MPP.

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The arbitration provision contained in the MAT Agreement is [*41] broad and encompasses "all disputes, controversies or differences which may arise between the parties hereto, out of, in relation to or in connection with this AGREEMENT..." (docs.1, 16, Ex.B, Art.20). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.IVAX, 286 F.3d at 1320.

The MAT and Terminal Agreements, together, expressly define the commercial relationship between the Suppliers and **Marubeni** and MPP. The Agreements concern wood chip specification, evolving product quantities (Annual Guarantee Volume) which **Marubeni** would "cause... to be processed through the [MAT] Terminal," shipping particulars and loading conditions, and price and conditions of payment (doc. 1, Ex.B, C). It is the alleged representations of **Marubeni,** which the Suppliers assert they relied upon in building, capitalizing, and maintaining the MAT facility pursuant to the MAT Agreement. Proving the Suppliers claims will involve whether **Marubeni** met its Annual Guarantee Volume, and whether the Suppliers met their commitments under the MAT and Terminal Agreements.

This court finds that the Suppliers' fraud and misrepresentation claims clearly "make [*42] reference to," "presume the existence of," and "arise out of and relate directly to," the MAT Agreement. MS Dealer Service, 177 F.3d at 947; Sunkist Soft Drinks, 10 F.3d at 757-758. Thus, the Suppliers are equitably estopped from challenging the Motion to compel arbitration and arbitration is appropriate.

The Suppliers contend that their tort claims do not arise out of and are not related to the performance of duties specified in the arbitration provision (doc.16; p.30). The Suppliers rely on Telecom Italia, SPA v. Wholesale Telecom Corp., 248 F.3d 1109 (11th Cir. 2001). n17

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n17 Telecom Italia, 248 F.3d 1109, involves telecommunication corporations. Telemedia International ("TMI"), a subsidiary of Telecom Italia, executed a lease with Wholesale Telecom Corp. ("WTC"), allowing WTC the use of TMI's circuits for a substantial rental. The lease contained an arbitration provision. The provision states: "In the event of any dispute arising out of or relating to this service agreement, the dispute shall be submitted to and settled by arbitration..." Id., at 1111. Meanwhile, Telecom Italia continued to provide telecommunications services to WTC, but inflated the rates. WTC paid only the undisputed invoices. Telecom Italia responded by terminating WTC's use of TMI circuits. Then, Telecom Italia filed a complaint against WTC, alleging breach of contract (failure to pay $ 13 million worth of invoices). WTC answered and filed counterclaims alleging breach of price, quality, and prompt invoicing. The counterclaim also alleged that Telecom Italia caused TMI to increase the rate for use of its circuits, and that Telecom Italia caused TMI to terminate WTC's access to the TMI circuits. WTC then filed a third-party complaint against TMI alleging tortious interference with contract and civil conspiracy. TMI moved to dismiss the third-party complaint, alternatively requesting a stay pending arbitration under the lease. Id. at 1111-13.

The district court ruled that the third-party complaint failed to state a claim of civil conspiracy, but upheld the sufficiency of the tortious interference claim. The district court further ruled that the third-party complaint was not subject to the arbitration clause in the TMI-WTC lease, because the allegations concerned tortious interference with the Telecom Italia-WTC contract which lacked an arbitration provision. Id. at 1113. The Eleventh Circuit affirmed.

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In affirming the district court's denial of arbitration in Telecom Italia, the Eleventh Circuit determined that the arbitration language was broad, but "not as broad as a clause requiring arbitration of 'any dispute between them or by either party to the contract against the other.'" Id. ((citation omitted). The Eleventh Circuit noted that "where the dispute occurs as a fairly direct result of the performance of contractual duties..., then the dispute can fairly be said to arise out of or relate to the contract in question, and arbitration is required." Id. at 1116.

This court has already found that the Suppliers' fraud and misrepresentation claims clearly "make reference to,"

"presume the existence of," and "arise out of and relate directly to," the MAT Agreement, and that the arbitration provision contained in the MAT Agreement is sufficiently broad to encompass the Suppliers' fraud and misrepresentation claims.

Therefore, this court finds that **Marubeni** and MPP's Motion to compel arbitration is due to be granted. The parties are compelled to arbitrate their dispute, i.e., the Suppliers' fraud and misrepresentation claims as asserted in the state court [*44] action.

Section 206 of the Convention provides that "[a] court having jurisdiction under [Chapter 2 of the Convention] 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." Smith/Enron, 198 F.3d at 92; McCreary Tire & Rubber Co. v. CEAT. S.p.A., 501 F.2d 1032, 1037 [3rd Cir. 1974).

The arbitration provision contained in the MAT Agreement expressly sets out that if arbitration is invoked by the "BUYER," arbitration shall be conducted in Mobile, Alabama, under the existing Rules of Conciliation and Arbitration of the American Arbitration Association (docs. 1, 16, Ex.B, Art.20). **Marubeni** is the "BUYER" and has invoked arbitration. Therefore, arbitration shall take place in Mobile, Alabama, according to the Rules of Conciliation and Arbitration of the American Arbitration Association, as set forth in the MAT Agreement, and pursuant to 9 U.S.C.§§ 206.

3. Waiver

The Suppliers contend that **Marubeni** and MPP waived their right to compel arbitration by letting too much time lapse before seeking arbitration. The [*45] Suppliers contend that they have been prejudiced by the delay. n18

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n18 The Suppliers' waiver argument appears on pages 38-42 of their 45-page Brief In Opposition to the Motion to compel arbitration (doc. 16). This court notes that it denied **Marubeni** and MPP's Motion to Strike the Brief, and their Motion for Leave to File a Surreply, see footnote 9, *supra.*, and thus, **Marubeni** and MPP have not had an opportunity to reply to the Suppliers' waiver argument.

However, because this court finds the Suppliers' contention of waiver is without merit, eliciting a reply from **Marubeni** and MPP would simply protract this action unnecessarily.

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> An agreement to arbitrate, 'just like any other contract..., may be waived."Burton-Dixie Corp. v. Timothy McCarthy Constr. Co., 436 F.2d 405, 407 (5th Cir. 1971)... In determining whether a party has waived its right to arbitrate, we have established a two-part test. First, we decide if, "under the totality of the circumstances," the party "has acted [*46] inconsistently with the arbitration right," and, second, we look to see whether, by doing so, that party "has in some way prejudiced the other party." S&H Contractors, Inc. v. A.J. Taft Coal Co., Inc., 906 F.2d 1507, 1514 (11th Cir. 1990)[,*cert. denied,* 498 U.S. 1026, 112 L. Ed. 2d 669, 111 S. Ct. 677 (1991)].

IVAX, 286 F.3d at 1315-16. Whether a party has waived its right to arbitration "is a legal conclusion..., *but...* the findings upon which the conclusion is based are predicate questions of fact..." Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1159 (5th Cir. 1986) (emphasis in original). The burden of proving waiver "falls... heavily on the shoulders of the party seeking to prove waiver." Price, at 1161.

The Suppliers rely for the most part, on Morewitz; 62 F.3d 1356, and S&H Contractors, 906 F.2d 1507. **Marubeni** and MPP point the court to IVAX, 286 F.3d 1309, a recent case which distinguishes both Morewitz,

and S&H Contractors. 286 F.3d at 1316-18. n19 Notwithstanding, neither Morewitz, nor S&H Contractors, [*47] provide support for the Suppliers' contention of waiver. Both cases are factually distinguishable.

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n19 IVAX, involves litigation pertaining to an accounting agreement based on the purchase of outstanding common stock between Braun, Inc., and IVAX. The complex financial agreement contained an arbitration provision. The agreement also provided that Braun's relevant financial records were to be made available to IVAX's accountant, Arthur Anderson ("AA"). Braun provided AA access to its records. Braun and AA executed a confidentiality agreement with regard to Braun's trade secrets. A dispute arose out of the financial dealings. On December 20, 2000, Braun sued AA in state court for an alleged violation of the confidentiality agreement. On December 21, 2000, IVAX filed suit against Braun in the S.D. Florida, alleging breach of the financial agreement. Less than a month later, and before filing an answer, Braun petitioned the district court to compel arbitration pursuant to the arbitration provision contained in the financial agreement.

The district court summarily denied the petition, finding that Braun had waived arbitration by filing suit against AA in state court. 286 F.3d at 1311-15. The Eleventh Circuit, after reviewing the totality of the circumstances, reversed the district court's finding that Braun had waived its right to arbitrate. 286 F.3d at 1323-24.

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In Morewitz, 62 F.3d 1356, the administrator (Morewitz), for the estates of several seamen lost when their vessel disappeared in international waters in the "Bermuda Triangle," brought wrongful death actions, in the Eastern District of Virginia, between 1976 and 1977, against the vessel's owner and managing agent. 62 F.2d at 1358-59. On April 3, 1980, Morewitz obtained a favorable judgment against the managing agent as the owner *pro hac vice* of the lost vessel. Judgment was affirmed in 1981. On June 26, 1985, Morewitz brought an action to enforce the judgment in the Southern District of Alabama, seeking to recover on a maritime protection and indemnity policy issued by West, the vessel insurer, as the managing agent had become insolvent. 62 F.3d at 1359-60. The district court dismissed the action; the Eleventh Circuit reversed. Id.

On remand, Morewitz reasserted his claim relying on the Alabama direct action statutes. 62 F.3d at 1362. In 1990, the British House of Lords held that when the terms of an insurance policy require the insured to pay its obligation before it may collect against the insurer, the insured [*49] must pay before any other party can sue on the contract. Id. On October 17, 1990, West filed a motion to stay the litigation pending arbitration which was granted by the district court in January, 1991. 62 F.3d at 1360-61. Morewitz appealed. The Eleventh Circuit dismissed the appeal for lack of jurisdiction. Id.

On remand again, Morewitz argued that the seamen were not bound by the arbitration agreement and that, alternatively, West had waived its right to compel arbitration. 62 F.3d at 1359. The district court afforded the parties six months to proceed with arbitration. When Morewitz refused, the district court dismissed the action with prejudice for want of prosecution. 62 F.3d at 1359, 1361. Morewitz appealed a third time. Id.

In reversing the district court, the Eleventh Circuit addressed Morewitz's alternative waiver argument. The Eleventh Circuit stated:

> Arbitration should not be compelled when the party who seeks to compel arbitration has waived that right... In considering the issue of waiver, we are mindful of the Supreme Court's admonition that 'questions of arbitrability must be addressed with a healthy regard for [*50] the federal policy favoring arbitration." Moses H. Cone Mem'l Hosp., 460 U.S. at 24...
>
> Nevertheless, the doctrine of waiver is not an empty shell. Waiver occurs when a party seeking arbitration substantially participates in litigation to a point inconsistent with an intent to arbitrate and this participation results in prejudice to the opposing party. Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1158 (5th Cir. 1986). Prejudice has been found in situations where the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was

designed to alleviate. E.C. Ernst, Inc. v. Manhattan Constr. Co., 559 F.2d 268, 269 (5th Cir. 1977), *cert. denied*, 434 U.S. 1067, 55 L. Ed. 2d 769, 98 S. Ct. 1246 (1978).

Id., 62 F.3d at 1365-66 (footnote omitted); see Frank v. American General Finance, Inc., 23 F. Supp. 2d 1346, 1350 (S.D.Ala. 1998).

The Eleventh Circuit determined that Morewitz had been prejudiced by West's delay in demanding arbitration, noting that the 1990 change in British law which affected Morewitz's right to arbitrate the claim in England was [*51] not announced by the House of Lords until a decade after the wrongful death judgment was affirmed. Further, Morewitz filed the Alabama action in 1985, five years before the change in British law was announced. The Eleventh Circuit concluded that West

> had ample opportunity to demand arbitration well in advance of the decision that significantly changed the legal position of the parties to the prejudice of Morewitz... The appropriate time for West... to contest coverage and demand arbitration with [the managing agent]... was during the proceedings in the... Eastern District of Virginia. Because West... has waived its right to arbitrate with [the managing agent], it has also waived its right to demand arbitration with Morewitz.

62 F.3d at 1366.

S&H Contractors, 906 F.2d 1507, involves two separate suits evolving out of the same operative facts. Taft entered a contract with a company to purchase mining equipment. 906 F.2d at 1508. Taft then hired S&H to assemble the equipment; the parties entered into a contract which contained an arbitration provision. At the time, S&H (a Kentucky corporation) was not qualified to do business [*52] in Alabama.

The first S&H Contractors case came in March 1986, in the Northern District of Alabama, when S&H sued Taft alleging breach of contract (failing to pay for services rendered). Taft moved to dismiss the complaint contending that S&H's failure to qualify to do business in Alabama rendered the contract unenforceable. The district court took no action for several months and during that interim, S&H engaged in "extensive" pretrial discovery. Id., at 1508-09. In November 1986, S&H demanded arbitration of the dispute. In December 1986, the district court converted Taft's motion to dismiss into a motion for summary judgment and granted the motion, holding that S&H's failure to qualify to do business made the contract unenforceable. S&H appealed; the appeal was stayed pending the outcome of arbitration which S&H pursued. Id., at 1509.

In February 1987, Taft sought to enjoin arbitration based on the court's decision that the contract containing the arbitration provision was unenforceable. In April 1987, the district court enjoined arbitration proceedings in Alabama. The court reasoned that if arbitration was conducted in Alabama, a district [*53] court in Alabama may be required to enforce any award rendered and, in effect, enforce the underlying contract. Thereafter, S&H petitioned the American Arbitration Association to transfer the arbitration proceedings to Atlanta. Id.

In March 1988; Taft filed the second S&H Contractors case in the Northern District of Georgia, requesting that the court enjoin the Atlanta arbitration. Taft argued that the contract containing the arbitration had been declared void and that in bringing the initial suit in March 1986, before demanding arbitration, S&H had waived its right to demand arbitration. The district court held that the contract was void and thus the parties never agreed to arbitration; the court did not address Taft's waiver argument. Id.

S&H appealed. The Eleventh Circuit consolidated the two cases for appeal purposes and affirmed; the Eleventh Circuit's order enjoining arbitration is based on waiver. Id., at 1514. The Eleventh Circuit noted that S&H had waited eight months from the time it filed its initial suit before - seeking arbitration and during that interim, S&H had engaged in extensive discovery resulting in prejudice to Taft. n20 Id. [*54]

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n20 Taft filed two motions - a motion to dismiss and an opposition to S&H's motion for discovery. Also, S&H

took the depositions of five Taft employees (totaling approximately 430 pages) prior to demanding arbitration. Moreover, S&H pursued arbitration in Alabama, and in Georgia, despite the district court's ruling that the contract containing the arbitration provision was unenforceable.

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Herein, the Suppliers filed their state court action on December 28, 2001. On February 7, 2002, MPP removed the action to this court. On February 14, 2002, MPP filed their Answer asserting the parties' agreement to arbitrate as an affirmative defense. On March 2002, the Suppliers moved for remand. On May 2, 2002, **Marubeni** filed a motion to dismiss the Suppliers' Complaint arguing that the fraud and misrepresentation claims were subject to arbitration. On July 25, 2002, this court remanded the Suppliers' Complaint to state court. On August 8, 2002, **Marubeni** appealed the remand and on November 4, 2002, the Eleventh Circuit [*55] dismissed the appeal. On December 10, 2002, **Marubeni** filed their Answer in the state court action raising numerous affirmative defenses including the parties' agreement to arbitrate, as MPP did in February, 2002. Also on December 10, 2002, **Marubeni** and MPP filed the subject Motion to compel arbitration.

Marubeni and MPP's Motion to compel arbitration comes within one year of the initiation of the Suppliers' Complaint, a far less lapse in time than that set out in Morewitz (a five year delay constituted a waiver).

S&H Contractors, is further distinguished from the present controversy by the simple reason that **Marubeni** and MPP are in a defensive position as defendants in the state court action. Neither, initiated legal action against the Suppliers, prior to the filing of the Motion to compel arbitration. n21 S&H initiated the legal action and, then eight months into extensive discovery, requested arbitration.

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n21 The Suppliers contend that by filing counterclaims in their Answers to the Suppliers' state court Complaint, **Marubeni** and MPP "may" have waived their right to compel arbitration (doc. 16, p.40). However, the Suppliers have not proffered controlling authority for the contention.

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Moreover, herein, the Suppliers were on notice from the filing of MPP's Answer on February 14, 2002, that arbitration may be an issue. Price, 791 F.2d at 1161 ("A demand for arbitration puts a party on notice that arbitration may be forthcoming...").

As noted, the Suppliers also contend, in the context of waiver, that they have been prejudiced by the delay and expense of the litigation process over the past year. The Suppliers rely on S&H Contractors, 906 F.2d 1507.

However, because this court finds that **Marubeni** and MPP did not waive their right to arbitration, it is unnecessary to discuss the prejudice prong of the two-part waiver test. IVAX, 286 F.3d at 1320 (because no waiver was found, it was unnecessary to discuss the prejudice prong of the two-part test).

4. Whether this Court Should Abstain From Imposing A Stay.

(a) Abstention.

The Suppliers contend that this court should abstain from assuming jurisdiction over this matter as **Marubeni** is not a party to the Agreements containing the arbitration provision (doc. 16, p.42-45). n22 However, as noted herein, this court is faced with a valid written agreement [*57] to arbitrate the dispute involving international commerce under the Convention which invokes the original jurisdiction of this court. McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1037 [3rd Cir. 1974). n23

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n22 **Marubeni** and MPP have not had the opportunity to reply to the Suppliers' contention regarding abstention. See footnote number 16, *supra.*

n23 In McCreary, a Pennsylvania corporation (McCreary) sued an Italian corporation (CEAT) for breach of contract. CEAT removed the action to federal court and moved *inter alia* for a stay to permit arbitration in accordance with the terms of the contract. The district court denied relief. The Third Circuit reversed noting that the underlying contract fell under the jurisdiction of the Convention and as such the district court was bound by the Convention Id., at 1034-36.

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An action or proceeding falling under the Convention "shall be deemed to arise under the laws and treaties of the United [*58] States and... the district courts of the United States shall have original jurisdiction over such proceedings without regard to the amount in controversy..." 9 U.S.C.§§ 203; McCreary, at 1037. Article II(3) of the Convention provides: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Id. "There is nothing discretionary about Article II(3) of the Convention." Id.

As such, the Convention precludes any discussion regarding the assumption of jurisdiction by this court. This court would err by abstaining. (b) A Stay.

> Section 3 of the FAA provides:
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration [*59] under such an agreement, *shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,* providing the applicant for the stay is not in default in proceeding with such arbitration.

(emphasis added); McCreary, at 1037, n.2. In McCreary, the Third Circuit determined that "it was error to deny the motion for a stay in disregard of the Convention." Id., at 1037.

McCreary is persuasive authority. The Convention mandates the imposition of a stay.

The Suppliers argue that 28 U.S.C.§§ 2283, the Anti-Injunction Act, "prohibits any stay of the state court litigation absent a finding that a valid arbitration agreement exists between the parties to that litigation which covers the claims asserted in this litigation." (doc.9, p.5, Affirmative Defense 5). The argument fails as this court has found a valid and enforceable written arbitration agreement between the parties, that covers the Suppliers' state court claims at issue.

Further, this court notes that the Anti-Injunction Act

> prohibits a federal court from enjoining a state [*60] court proceeding except in three narrowly defined circumstances: 1) where there is an express congressional authorization to enjoin state proceedings; 2) where an injunction is necessary to protect a judgment that a federal court has rendered; and 3) where an injunction is necessary to aid the federal court's jurisdiction over an action. See 28 U.S.C.§§ 2283. Those exceptions are to be narrowly construed. See e.g., Atlantic Coast Line Ry. Co. v. Brotherhood of Locomotive Eng'rs., 398 U.S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739,... (1970).

TranSouth Financial Corp. v. Bell, 149 F.3d 1292, 1296 (11th Cir. 1998); Woodmen of the World Life Ins. Society v. Johnson, 23 F. Supp. 2d 1344, 1345 (S.D.Ala. (Aug. 24, 1998) (J. Hand)); Kiefer, 211 F.R.D. 445.

In TranSouth, the Eleventh Circuit adopted the exception to the Anti-Injunction Act, holding that, where a district court ordered arbitration of disputes related to those concurrently asserted in state court proceedings, the court may stay such proceedings in "aid of jurisdiction... Continued state court proceedings could jeopardize [*61] the federal court's ability to pass on the validity of the arbitration proceeding it has ordered." TranSouth, 149 F.3d at 1297 n24; Johnson, 23 F. Supp. 2d at 1345; Kiefer, 211 F.R.D. at 451.

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N24 In TranSouth, Bell filed suit in Alabama state court against TranSouth alleging fraud and misrepresentation claims. 149 F.3d at 1294. TranSouth filed a petition in federal court seeking to compel Bell to arbitrate his claims, and requesting that the state court proceedings be stayed. Id. Bell answered asserting a counterclaim that the arbitration agreement had been procured through fraud, and filed a motion to dismiss based on the principles of comity and abstention. Id. The district court granted Bell's motion to dismiss, finding that it would abstain from exercising jurisdiction. TranSouth appealed. Id.

The Eleventh Circuit vacated, in part, and affirmed, in part. 149 F.3d at 1298. The Court vacated the district court's order granting Bell's motion to dismiss; and affirmed the district court's denial of the motion to stay, holding that no exception to the Anti-Injunction Act was applicable, as jurisdiction was proper in both the state and federal courts. Id., at 1297 ("When there are concurrent jurisdiction state and federal proceedings arising out of the same transaction or occurrence, ordinarily neither forum should interfere with the other's exercise of jurisdiction.").

TranSouth is factually distinguishable from the controversy *sub judice*. Herein, this federal district court has original jurisdiction based on the Convention. In TranSouth, the state and federal courts had concurrent jurisdiction over that controversy.

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Herein, this court has original jurisdiction over the arbitration issue pursuant to the Convention. Further, this court finds that any decision rendered in the state court action has the distinct possibility of interfering with this court's continuing jurisdiction over the arbitration proceedings ordered herein. Therefore, a stay of the state court action is proper under the TranSouth exception to the Anti-Injunction Act under circumstances (1) express Congressional authorization to enjoin state court proceedings; and (3) in the "aid of jurisdiction." §§ 2283; TranSouth, at 1296; Kiefer, at 451.

D. Conclusion

For the reasons set for herein, this court finds that it has original jurisdiction over this controversy pursuant to§§§§ 201, 203 of the Convention; a valid arbitration agreement exists between the parties which is sufficiently broad to encompass the Suppliers' fraud and misrepresentation claims; this court would err if it abstained; and a stay of the state court action is appropriate in light of this court's original jurisdiction over the instant controversy.

Accordingly, it is ORDERED that **Marubeni** and MPP's Motion to compel arbitration and to [*63] stay the state court proceeding be and is hereby GRANTED. The Suppliers' fraud and misrepresentation claims are forthwith referred to arbitration pursuant to 9 U.S.C.§§ 206, which shall take place in Mobile, Alabama, in accordance with the Rules of Conciliation and Arbitration of the American Arbitration Association, as set forth in the MAT Agreement. All parties, **Marubeni,** MPP, MBWC, SEWF, and MAT shall participate in good faith.

It is further ORDERED that the state court action, Mobile Bay Wood Chip. Southeast Wood Fiber, LLC., and Mid Atlantic Terminals, LLC., v. **Marubeni** Corporation and **Marubeni** Pulp and Paper, Inc., CV-0l-4385, be and is hereby STAYED and ENJOINED in its entirety as this court has original jurisdiction over the matter.

It is further ORDERED that this action be and is hereby STAYED pending the above ordered arbitration. Although this court retains jurisdiction as stated above, the arbitration proceedings may take some time to complete and there may be no further need for this court's intervention. The Clerk is therefore DIRECTED to

close this action for statistical purposes.

DONE this 16th day of June, 2003.

S/Virgil Pittman

SENIOR [*64] UNITED STATES DISTRICT JUDGE

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Alabama Southern Division.

MARUBENI CORPORATION and **Marubeni** Pulp and Paper (North America), Inc.,
Plaintiffs,
v.
MOBILE BAY WOOD CHIP CENTER, Southeast Wood Fiber, LLC and Mid Atlantic Terminals, LLC, Defendants.

No. Civ.A. 02-0914-PL.

Sept. 19, 2003.

Bruce E. Fader, Thomas Clay Moore, Proskauer Rose LLP, New York, NY, Edward A. Hosp, Fournier J. Gale, III, Lee E. Bains, Jr., Tony G. Miller, Maynard, Cooper, and Gale P.C., Birmingham, AL, for Plaintiffs.

Steve Olen, Steven L. Nicholas, Michael A. Younggpeter, Olen, Nicholas & Copeland P.C., **Mobile**, AL, for Defendants.

ORDER DENYING MOTION TO AMEND, ALTER OR VACATE ORDER COMPELLING ARBITRATION AND IMPOSING A STAY

PITTMAN, Senior J.

***1** This is an action, brought by plaintiffs **Marubeni** Corporation **("Marubeni"),** and **Marubeni** Pulp and Paper (North America), Inc. ("MPP"), to compel defendants **Mobile** Bay Wood Chip Center ("MBWC"), Southeast Wood Fiber, LLC ("SEWF"), and Mid Atlantic Terminal, LLC ("MAT") (collectively referred to as the "Suppliers"), to arbitration pursuant to 9 U.S.C. § 1, et seq., the Federal Arbitration Act (the "FAA"), and pursuant to 9 U.S.C. § 201, *et seq.*, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). On June 16, 2003, this court Ordered arbitration (doc .27). To facilitate arbitration, this court stayed the underlying state court action and this action pending arbitration proceedings. *Id.* [FN1]

39-0532719

FN1. The underlying state court action, filed in the Circuit Court of **Mobile** County, Alabama, involves a dispute arising out of agreements executed by the parties pertaining to the process, sale, and shipment of southern hardwood wood chips. ***Mobile*** *Bay Wood Chip, Southeast Wood Fiber, LLC and Mid Atlantic Terminals, LLC, v.* ***Marubeni*** *Corporation and* ***Marubeni*** *Pulp and Paper, Inc.*, CV-01-4385 (*see* doc.27, p.2).

Currently pending before this court is the Suppliers' Motion to Amend, Alter or Vacate Order Compelling Arbitration and Imposing Stay and Brief in support thereof (docs.28-29). The Suppliers move this court to: 1) reconsider compelling arbitration; 2) reconsider the stay of the state court action; and 3) make it clear that this court's June 16, 2003 Order is final and appealable. The Suppliers also request oral argument (doc.28). Plaintiffs filed a Memorandum in Opposition (doc.35). After careful consideration of all relevant matter, and for the reasons stated herein, this court finds that Suppliers' Motion to Amend, Alter or Vacate Order Compelling Arbitration and Imposing Stay (doc.28), is DENIED. The Suppliers' request for oral argument is also DENIED.

The decision of whether to grant or deny such a motion is discretionary. *See Sonnier v. Computer Programs & Systems, Inc.* ., 168 F.Supp.2d 1322, 1336 (S.D.Ala. (May 21, 2001)) (Lee, M.J.). "Generally, courts have recognized three grounds justifying reconsideration of an order: 1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or manifest injustice ... Reconsideration of a previous order is an *extraordinary* remedy to be employed sparingly ..." *Id.* (emphasis in original); *Alabama State Docks Dep't v. Water Quality Ins. Syndicate*, 1998 WL 1749263, *1 (S.D.Ala.(Sept.23, 1998)) (Butler, C.J.). The court "will not reconsider a previous ruling when the ... motion fails to raise new issues and, instead, only relitigates what has already been found lacking." *Lamar Adver. of Mobile, Inc. v. City of Lakeland Florida*, 189 F.R.D. 480, 489 (M.D.Fla.(Oct.7, 1999)) (*citing Gov't Personnel*

Serv., Inc. v. Gov't Personnel Mut. Life Ins. Co., 759 F.Supp. 792, 793 (M.D.Fla.(Mar.14, 1991)), aff'd, 986 F.2d 507 (11th Cir.1993)).

1. The Suppliers Request Reconsideration of the Order Compelling Arbitration.

As noted in this court's June 16, 2003 Order, this court found that it had original jurisdiction under 9 U.S.C. §§ 201-208, the Convention, and a valid arbitration agreement existed which governed the business relationship of the parties, their dealings, and the underlying dispute, i.e., the Suppliers' fraud and misrepresentation claims [FN2] (*see* doc.27, p.14-24).

> FN2. Fraud and misrepresentation are Counts Three and Four of the Suppliers' four-count Complaint filed against **Marubeni** and MPP in the Circuit Court of **Mobile** County (*see* doc.27, p.2, n.2, and p.7-9). The first two counts are the Suppliers' breach of contract claims. *Id.*, p.9. There is no dispute that the suppliers' contract claims are not subject to arbitration. *Id.*, p.11, n. 10.

***2** The Suppliers contend that, in doing so, the court extended the doctrine of equitable estoppel beyond its logical limits (doc.29, p.10-11). The Suppliers argue that the court "compels arbitration between non-signatories by misapplication of the doctrine of estoppel." *Id.*, p.10 (emphasis in original). The Suppliers argue that the court erred when it "lumped [defendants] together, referred to them as suppliers, and treated them identically ... because each is an independent entity, and their relationship to the arbitration provision ... is different." *Id.*, p.10-11. However, as plaintiffs point out (doc.35, p.15-19), these factual and legal issues were thoroughly addressed by this court (*see* doc.27, p.16-24). The Suppliers proffer no basis for the court to revisit or to reconsider the factual findings upon which the legal conclusions are based. The Suppliers offer no new evidence or intervening change in the law. Moreover, although the Suppliers contend the court erred, they offer nothing new in support of the contention. *Sonnier*, 168 F.Supp.2d at 1336; *Alabama State Docks*, 1998 WL 1749263, at *****1. As such, the Suppliers' request to reconsider the Order compelling arbitration is hereby DENIED.

2. The Suppliers Request Reconsideration of the Stay of the State Court Action.

Under 9 U.S.C. § 3 and the Convention, this court stayed the state court action in its entirety (*see* doc.27, p.30-34, "Whether this Court Should Abstain From Imposing A Stay"). This court noted that it "has original jurisdiction over the arbitration issue pursuant to the Convention .... [and] this court finds that any decision rendered in the state court action has the distinct possibility of interfering with this court's continuing jurisdiction over the arbitration proceedings." *Id.*, p.33.

The Suppliers contend that a stay of the non-arbitrable claims, i .e., plaintiffs' contract claims, pending in state court is improper (doc.29, p.1-10). In support of the contention the Suppliers raise two arguments. *Id.*

First, the Suppliers argue that regardless of the outcome of arbitration, the contract claims will have to be litigated in state court, and that related arbitration and judicial proceedings should move forward simultaneously, neither being delayed, nor stayed. The Suppliers rely on *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 225, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (J. White, concurring opinion), and *Dimenstien v. Whiteman*, 759 F.2d 1514, 1517 (11th Cir.1985) (doc.29, p.1-4).

Plaintiffs argue that neither *Dean Witter Reynolds*, nor *Dimenstien*, have anything to do with whether the underlying state court case should be stayed while arbitration proceeds (doc.35, p.13-14).

This court finds both cases distinguishable from the case sub judice. [FN3] Both *Dean Witter*, and *Dimenstien*, involve arbitration under the FAA, and both address dichotomies between provisions of the Security Exchange Act of 1934, and the FAA (Security Exchange claims are not arbitrable, *Dean Witter*, 470 U.S. at 215, n. 1; *Dimenstien*, 759 F.2d at 1516). The FAA requires an independent basis for jurisdiction, e.g., diversity.

> FN3. In *Dean Witter Reynolds*, Byrd invested $160,000 in securities through Dean Witter. The Customer Agreement,

executed by Byrd, contained an arbitration provision pursuant to 9 U.S.C. §§ 1-14. When Byrd's account suffered a serious decline in a seven-month period, he filed an action against Dean Witter in federal court alleging violations of the Securities Exchange Act of 1934, and various state-law provisions. Jurisdiction was based on diversity, with pendent jurisdiction. Dean Witter filed a motion to sever the pendent state claims, to compel arbitration, and to stay arbitration of those claims pending resolution of the federal-court action. 470 U.S. 214-16. The district court denied the motion to sever and to compel arbitration of the pendent state claims; the Ninth Circuit Court of Appeals affirmed. *Id.* The United States Supreme Court reversed. *Id.*, at 217.

The issue before the Supreme Court was "whether, when a complaint raises both federal securities claims and pendent state claims [subject to arbitration], a[f]ederal [d]istrict [c]ourt may deny a motion to compel arbitration of the [arbitrable] state-law claims despite the parties' agreement to arbitrate their disputes." 470 U.S. at 214. The Supreme Court held that "the [FAA] requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.*, at 217-18, 224. The Court noted: "We conclude, ... on consideration of Congress' intent in passing the [FAA], that a court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made." *Id.*, at 219.

In *Dimenstien,* several individuals, including Nancy Dimenstien, executed individual trading authorizations giving the defendant, an employee of the investment firm of Bear Stearns & Co., discretionary power to trade on their separate accounts. The defendant concentrated all of their individual investments into a single, high-risk speculative stock which resulted in considerable declines of their respective accounts. The investors sued alleging violations of the Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations statute ("RICO"), breach of fiduciary duty, fraud, and the Georgia Fair Business Act of 1975; Deminstien, a trustee of a profit sharing plan, also claimed violations under the Employees' Retirement Income Security Act ("ERISA"). The trading authorizations included arbitration provisions. 759 F.2d at 1515.

Bear Stearns filed a demand for arbitration of all but the Securities Exchange Act claims, under the FAA. The plaintiffs moved to stay arbitration during the pendency of the federal litigation. Bear Stearns moved to stay the federal litigation pending arbitration. *Id.*, at 1515- 16. The district held that the facts required the application of the "intertwining" doctrine (a judicially created exception to the command under the FAA, 9 U.S.C. § 3, to stay an action until arbitration can be had), and denied Bear Stearns' motion to stay the litigation pending arbitration. *Id.*, at 1516.

On appeal, Bear Stearns argued that application of the intertwining doctrine nullified the FAA. *Id.* The Eleventh Circuit noted the recent *Dean Witter* pronouncement by the United States Supreme Court, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158, which nullified the intertwining doctrine and noted that *Dean Witter,* prevented it from affirming the district court's decision. *Id.*, at 1517. The Eleventh Circuit reversed. *Id.*

*3 Herein, however, the controversy involves arbitrable claims under the Convention which mandates that federal courts have original jurisdiction to address such claims. [FN4] Neither case supports the Suppliers' contention that this court's stay of the state court action is improper under the Convention.

FN4. The Suppliers, specifically, direct the court to Justice White's concurring opinion in *Dean Witter,* 470 U.S. 224-25, in support of their position regarding this court's imposed stay (doc.29, p.2-3). Therein, Justice White discussed the subtle difference between the Securities

> Exchange Acts of 1933, and 1934, in re arbitrability of claims, and wrote:
> The Court's opinion makes it clear that a district court should *not* stay arbitration, or refuse to compel it at all, for fear of its preclusive effect. And I can perceive few, if any, other possible reasons for staying the arbitration pending the outcome of the lawsuit. Belated enforcement of the arbitration clause, though a less substantial interference than a refusal to enforce it at all, nonetheless significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement. In addition, once it is decided that the two proceedings are to go forward independently, the concern for speedy resolution suggests that neither should be delayed. While the impossibility of the lawyers being in two places at once may require some accommodation in scheduling, it seems to me that the heavy presumption should be that arbitration and the lawsuit will each proceed in its normal course ...
> 470 U.S. at 225 (emphasis added); *Dimenstien*, 759 F.2d at 1517. Again, this court notes that neither *Dean Witter*, nor *Dimenstien*, pertain to arbitration under the Convention.

Second, the Suppliers argue that the Supreme Court has interpreted the Anti- Injunction Act as a strict prohibition against enjoining state courts, and that exceptions to the Act are to be construed very narrowly (doc.29, p.4-10). The Suppliers rely on *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286-87, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); *National Railroad Passenger Corp. v. State of Florida*, 929 F.2d 1532 (11th Cir.1991); and *Ultracashmere House, Ltd., v. Meyer*, 664 F.2d 1176 (11th Cir.1981), *overruled on other grounds, recognized in Batlin v. Alaron Trading Corp.*, 128 F.3d 1466, 1469, n. 8 (11th Cir.1997), cert. denied 525 U.S. 841, 119 S.Ct. 105, 142 L.Ed.2d 84 (1998).

However, as plaintiffs note, the cases cited by the Suppliers do not support their argument (doc.35, p.9-13).

This court finds the cases factually distinguishable. None seek to compel arbitration under the Convention which expressly provides the federal district courts with original jurisdiction to address arbitration in the international forum.

In *Atlantic Coast*, the Union picketed the Railroad's Moncrief Yard near Jacksonville, Florida. The Railroad, unsuccessfully, sought an injunction in federal court. Thereafter, the Railroad immediately went into the state court and succeeded in obtaining an injunction against the picketing. 398 U.S. at 283. Two years later, the United States Supreme Court decided *Brotherhood of Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969), holding that unions had a federally protected right to picket under the Railway Labor Act, and that right could not be interfered with by state court injunctions. The Union then filed a motion in state court to dissolve the Moncrief Yard injunction. The state court judge refused to dissolve the injunction. The Union did not appeal, but instead returned to federal court and requested an injunction against the enforcement of the state court injunction. The federal court granted the injunction and stayed it pending the filing and disposition of a petition for certiorari. The Court of Appeals summarily affirmed and certiorari was granted. 398 U.S. 283-84.

In *Atlantic Coast*, although the Supreme Court concluded that a federal court's injunction against the state court was not justified under the exceptions to the Anti-Injunction Act (to protect a judgment that a federal court has rendered or where it is necessary to aid the federal court's jurisdiction), and held that the federal injunction was improper, 398 U.S. 284-85, the Court noted that if the injunction was to be upheld, it had to fall within one of the three exceptions to the Act. *Id.*, at 287-88. Further, the Supreme Court noted with regard to the necessary-to-aid-the-federal-court's- jurisdiction exception, "if the [d]istrict [c]ourt does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be 'necessary in aid of' that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to 'protect or effectuate' jurisdiction." *Id.*, at 295.

*4 Herein, as noted, this court found that, under the Convention, it had express original jurisdiction to consider and address plaintiffs' motion to compel

arbitration. Further, as noted, this court found that a stay of the state court action was necessary in the aid of this court's continuing jurisdiction (*see* doc.27, p.31-33).

The *Atlantic Coast* case does not pertain to the third, and relevant herein, exception to the Anti-Injunction Act (where there is an express congressional authorization to enjoin state proceedings). Further, in *Atlantic Coast,* the federal court issued an injunction against the enforcement of a lower state court's injunction which the federal court found improper under the prevailing federal jurisprudence. The Supreme Court noted that "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Id.*, at 296.

Herein, at the time of entry of this court's June 16, 2003 Order, there had been no decision from the state court which would have been in danger of review by this court; the state court action was at a relatively early stage (*see* doc.27, p.7-14). The Suppliers proffer nothing which reflects otherwise.

The Suppliers also rely on *National Railroad,* 929 F.2d 1532. [FN5] Plaintiffs' argue that the case is inapposite (doc.35, p. 12). This court agrees.

> FN5. In *National Railroad,* 929 F.2d 1532, a Florida attorney filed a criminal information against Amtrak, in state court, charging it with commercial littering, dumping human waste while crossing two bridges spaning Rice Creek and St. Johns River, along Amtrak's right-of-way. Before trial on the criminal charge, Amtrak filed suit in the district court seeking a declaration that federal law preempted Florida's commercial litter law, an order enjoining the attorney and the State of Florida from proceeding with the criminal prosecution, and an order enjoining Florida from any further enforcement against Amtrak. *Id.*, at 1533. The criminal prosecution went forward and Amtrak was found guilty. However, before being sentenced, Amtrak returned to the district court and moved to enjoin the state court from imposing sentence or taking any further action in the case. The district court granted the requested injunctive relief. The Eleventh Circuit vacated the district court's order. *Id.*, at 1533-34. In so doing, the Eleventh Circuit noted: "It is clearly established that a claim of federal preemption is not within any of the exceptions to the Anti-Injunction Act; hence, such a claim does not authorize a federal court to enjoin a state court proceeding." *Id.*, at 1536-37.

Although the case pertains to the Anti-Injunction Act (specifically, the necessary-to-aid-the-federal-court's-jurisdiction exception), again, it does not involve arbitration under the Convention. *Id.*, at 1536. Moreover, in *National Railroad,* the Eleventh Circuit noted that while the litigation was ongoing, Congress amended federal law stating that

> state and local laws shall not apply to waste disposal from railroad conveyances operated in intercity rail passenger service and that the "United States district courts shall have *original jurisdiction* over any civil actions brought by [Amtrak] to enforce the exemption conferred hereunder and may grant equitable or declaratory relief as requested by [Amtrak]."... This provision was made retroactive ... Thus, Congress *may have* authorized the district court to issue the very injunction involved in this case. *If so, then the injunction would not be prohibited by the Anti-Injunction Act.*

929 F.3d at 1537 (citations and footnote omitted) (emphasis added). Beyond vacating the district court's Order enjoining the state court criminal action, as noted, the Eleventh Circuit remanded the the case to the district court to consider the effect of the change in the law. *Id.*, at 1538.

Herein, as this court has repeatedly stated, the Convention "mandates' its enforcement "in courts of the United States, creating original jurisdiction over any action arising under the Convention regardless of the amount in controversy" (doc.27, p.15). This court found that "it has original jurisdiction over this controversy pursuant to §§ 201, 203, of the Convention" *Id.*, p.16.

***5** The Suppliers also rely on *Ultracashmere,* 664 F.2d 1176. [FN6] Plaintiffs argue that *Ultracashmere,* is not relevant (doc.35, p.10, n.5).

FN6. The plaintiff, Ultracashmere, a New York clothing manufacturer, and the defendant, Meyer, an Alabama retailer, executed contracts for the purchase and sale of clothing. A dispute arose between the parties and Ultracashmere demanded arbitration under the terms of the contracts. Meyer refused to arbitrate and instead initiated a suit in state court alleging that the arbitration clauses were concealed in fine print, he had no notice that the clauses called for arbitration in New York, rather than Alabama, and that Ultracashmere had fraudulently misrepresented facts concerning the substantive terms of the contracts. Beyond damages, Meyer requested an injunction against Ultracashmere's attempts to compel arbitration. Ultracashmere moved to dismiss Meyer's state court suit. Meyer moved for partial summary judgment declaring the arbitration clauses invalid and unenforceable. The state court denied Ultracashmere's motion to dismiss, postponed a decision on Meyer's motion for partial summary judgment, enjoined the American Arbitration Association from conducting arbitration, and directed Ultracashmere to comply with Meyer's discovery requests. Despite the state court's directive, Ultracashmere persisted in its attempts to arbitrate, and failed to produce requested documents. Thereafter, finding Ultracashmere in violation of its order, the state court granted partial summary judgment to Meyer, declaring the arbitration clauses void and unenforceable. Ultracashmere continued with its obstructionists tactics, and all the issues, except for damages, were determined by the court. 664 F.2d at 1178-79.
Four days before the state trial, Ultracashmere filed a federal action seeking a stay of the state court proceedings under the Anti-Injunction Act, and an order compelling arbitration under 9 U.S .C. § 4. The district court denied the stay indicating that "assuming ... it had authority to grant the stay ... it would not exercise its discretion ... because of [Ultracashmere's] delay in seeking a stay until the state court had adjudicated all issues except the amount of damage," and because Ultracashmere had failed to remove the state court action to federal court when it could have. *Id.*, at 1179. The Eleventh Circuit affirmed. *Id.*, at 1184.

This court finds *Ultracashmere* distinguishable for two obvious reasons. First, the requested arbitration was domestic under the FAA rather than international pursuant to the Convention. Second, as plaintiffs point out, in *Ultracashmere,* the state court had already decided most of the case by the time Ultracashmere decided to file the federal action seeking to enforce arbitration. Herein, as this court noted, plaintiffs acted early in asserting their arbitration claim (doc.27, p. 10-11, 29-30).

This court finds *Ultracashmere* factually distinguishable and of no support to the Suppliers' argument, in re the Anti-Injunction Act. The Suppliers' request for reconsideration of the Stay of the state court action is hereby DENIED.

3. The Suppliers Request that the Order be Expressly Final and Appealable.

As noted, this court's June 16, 2003 Order compelling arbitration retained jurisdiction over the controversy and directed the Clerk to close the file for statistical purposes (*see* doc.27, p.33-34). The Suppliers request that the Order be amended to expressly state that it "is a final order designed to be immediately appealable" (doc.29, p.13). The Suppliers rely, for the most part, on *American Heritage Life Ins. v. Orr,* 294 F.3d 702 (5th Cir.2002), cert. denied, 537 U.S. 1106, 123 S.Ct. 871, 154 L.Ed.2d 775 (2003).

In *Orr,* the Fifth Circuit determined that the district court's order compelling arbitration which stayed the underlying state court proceedings and which closed the case in federal court ("[T]his case is CLOSED."), was immediately appealable. *Id.,* at 705, 707. The Fifth Circuit held:

> [W]here a district court with nothing before it but whether to compel arbitration and stay state court proceedings issues an order compelling arbitration, staying the underlying state court proceedings, and closing the case, thereby effectively ending the entire matter on its merits and leaving nothing more for the district court to do but execute the judgment, appellate jurisdiction lies, as the decision is "final" within

the contemplation of § 16(a)(3) of the FAA. 294 F.3d at 708.

This court finds *Orr*, distinguishable in that § 16(a) was applicable therein. [FN7] Herein, it is § 16(b) which is applicable, in that arbitration was compelled pursuant to 9 U.S.C. § 206 (*see* doc.27, p.24).

> FN7. Section 16(a) provides that "[a]n appeal may be taken from -
> (1) an order -
> (A) refusing a stay of any action under section 3 of this title,
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
> (C) denying an application under section 206 of this title to compel arbitration,
> (D) confirming or denying confirmation of an award or partial award, or
> (E) modifying, correcting, or vacating an award;
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title[.]

Under § 16(b) "an appeal *may not* be taken[, in pertinent part,] from an interlocutory order--(1) granting a stay of any action under section 3 of this title; ... [or] (3) compelling arbitration under section 206 of this title ..." 9 U.S.C. § 16(b) (emphasis added); *ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091, 1095 (6th Cir.2002). Section 3 is the statutory authority mandating this court to stay the pending state court action (*see* doc.27, p.31-32) ("... the court ..., upon being satisfied that the issue involved ... is referable to arbitration ..., *shall on application of one of the parties stay the trial of the action until such arbitration has been had* ..."), and § 206 is the statutory authority upon which this court based its Order compelling arbitration. *Id.*, p.24 ("A court having jurisdiction ... may direct that arbitration be held in accordance with the agreement ..."). The intent of Congress in enacting § 16 "was to favor arbitration, ... and it did so by authorizing immediate appeals from orders disfavoring arbitration and forbidding immediate appeals from orders favoring arbitration." *Apache Bohai Corp. v. Texaco China*, 330 F.3d 307, 309 (5th Cir.2003) (footnote omitted); *ATAC*, 280 F.3d at 1101 ("arbitrability is a legal issue that courts of appeals may consider *after* arbitration has taken place ...") (emphasis in original).

***6** Appealability of an arbitral decision turns on the issue of finality. *Id.* In *Apache Bohai*, (a more recent Fifth Circuit decision which plaintiffs point to,) the Fifth Circuit noted:

> A final decision is one that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86, 121 S.Ct. 513, 148 L.Ed.2d 373, ... (2000) ... Under this definition, a dismissal is a final decision ... The district court, however, did not dismiss the claims, but entered a stay pending arbitration. An arbitration order entered a stay pending arbitration. An arbitration order entering a stay, as opposed to a dismissal, is not an appealable final order ...
> Apache Bohai contends that when a district court enters an order staying an action and referring all disputed matters to arbitration, leaving no live issues before the district court, this court should consider the order to be, in effect, a *de facto* dismissal and thus a final decision appealable under § 13(a)(3). Unlike a dismissal, however, a stay, by definition, constitutes a postponement of proceedings, not a termination, and thus lacks finality. Further, as other courts have noted, entry of a stay rather than a dismissal "suggests that the district court perceives that it might have more to do than execute the judgment once arbitration has been completed." *ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091, 1099 (6th Cir.2002). Consequently, although it may be true that in some instances the entry of a stay disposes of most or all issues, that fact alone does not render it the functional equivalent of a dismissal.

330 F.3d at 309 (footnotes omitted); *ATAC*, 280 F.3d at 1099. "Even if the district court has nothing left to do unless and until one of the parties moves to reopen the case after arbitration, that does not make a stay and a dismissal equivalent." *Id.*, at 1099.

As noted, herein, although this court directed the Clerk to close the file for statistical purposes, it retained jurisdiction over the controversy (doc.27, p.34). Herein, as in *ATAC*, none of the pending claims have been dismissed and arbitration has yet to take place. 280 F.3d at 1099, n. 5 (*see* doc.35, Ex.A-Plaintiffs Demand For Arbitration to the American Arbitration Association International

Centre For Dispute Resolution, dated July 18, 2003). Further, as in *Apache Bohai,* this court did not, but for an oversight, intend to dismiss this action 330 F.3d at 310; this court stayed both the state court action and this action pending arbitration proceedings. 330 F.3d at 310. Due to the contentious nature of this litigation and the protracted procedural wrangling in which the parties have engaged (*see* doc.27, p.3-14, "Procedural History and Facts"), this court anticipates that other issues may arise before a final judgment is entered in this action.

Because this court's June 16, 2003 Order is an order under 9 U.S.C. § 16(b)(1) and (3), and because this court anticipates further legal proceedings will be necessary in this action before a final judgment can be entered, the Order is *not* appealable. § 16(b); *Apache Bohai,* 330 F.3d at 309; *ATAC,* 280 F.3d at 1099. The Suppliers' request that the Order be amended to expressly state that it is appealable is contrary to statutory law, and prevailing jurisprudence. The suppliers' request is hereby DENIED.

*7 Accordingly, it is ORDERED that the Suppliers' Motion to Amend, Alter or Vacate Order Compelling Arbitration and Imposing Stay (doc.28), is hereby DENIED.

2003 WL 22466216 (S.D.Ala.)

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