**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**JACKSON DIVISION**

**JOHN S. CHEW, JR.; THE JOHN S. CHEW, JR. REVOCABLE TRUST; KAREN TRUMPORE F/K/A KAREN ROBINSON, INDIVIDUALLY AND AS THE PARENT AND LEGAL GUARDIAN OF THREE MINOR CHILDREN CLAIRE E. ROBINSON, KELLY P. ROBINSON , AND OLIVIA A ROBINSON; THE CLAIRE E. ROBINSON SUBCHAPTER S TRUST; THE KELLY P. ROBINSON SUBCHAPTER S TRUST; THE OLIVIA A. ROBINSON SUBCHAPTER S TRUST; AND NORTH HAMPTON INVESTMENTS, LLC** **PLAINTIFFS**

**VS.** **CIVIL ACTION NO. 3:04CV748BN**

**KPMG, LLP, PEDER JOHNSON, TRACIE HENDERSON, DONNA BRUCE, SIDNEY AUSTIN BROWN & WOOD LLP, R.J. RUBLE, DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES, INC. D/B/A DEUTSCHE BANK ALEX BROWN, PRESIDIO ADVISORS LLC, JOHN M. LARSON, FUNSTON STREET LLC, FUNSTON STREET, LTD., VALLEJO STREET LLC, VALLEJO STREET, LTD., AND ATHABASCA, L.P.** **DEFENDANTS**

**OPINION AND ORDER**

This casue is before the Court on Plaintiffs' Motion to Remand. Having considered the Motion, the Response and the Rebuttal, as well as supporting and opposing authority, the Court finds that the Motion is not well taken and that it should be denied.

## I. FACTS

This cause of action arises out of Defendants' promotion and sale of a tax shelter to Plaintiffs. The tax shelter is known as the Offshore Portfolio Investment Strategy, or OPIS.[1] The facts of this case are complex. However, for purposes of this Opinion and Order the relevant facts are summarized in this and the following section of the Opinion.

Defendant KPMG, LLP (hereinafter "KPMG") is a large accounting firm.[2] Defendant Presidio Advisory Services, LLC (hereinafter "Presidio") is an investment advisory firm.[3] KPMG and Presidio allegedly recruited the Deutsche Defendants[4] and the Brown & Wood

---

[1]The substance of the OPIS strategy is set forth paragraph 55 (pages 23 - 25) of the Complaint. In brief summary, the strategy involves a series of *foreign* investments and re-investments (investments and re-investments in securities of entities *outside of the United States*) in an attempt, through use of Internal Revenue Code provisions, to inflate the cost basis of the client's investment. When the investment is subsequently sold, the client realizes a capital loss for income tax purposes, based on the inflated cost basis.

[2]Defendants Peter Johnson, Donna Bruce and Tracie Henderson are alleged agents of KPMG.

[3]Defendant John M. Larson is an alleged agent of Presidio.

[4]The Deutsche Defendants include Deutsche Bank AG (hereinafter "Deutsche Bank") and Deutsche Bank Securities, Inc. d/b/a Deutsche Bank Alex Brown (hereinafter "DB Alex Brown"). Deutsche Bank is a German corporation. It is "a joint stock company principally dedicated to financing foreign trade." Complaint, p. 10, ¶ 23. DB Alex Brown is a Delaware Corporation, with its principle place of business in New York. It is a firm which deals in the purchase and sale of securities. DB Alex Brown is a member of the New York Stock Exchange. The brokerage contract between Plaintiff John S. Chew, Jr. Revocable Trust and DB Alex Brown contains an arbitration

Defendants[5] to put the OPIS strategy into action. Complaint, p. 13, ¶ 30. The remaining Defendants are Funston Street LLC, Funston Street, Ltd., Vallejo Street LLC, Vallejo Street, Ltd., and Athabasca, L.P. The primary role of these Defendants was the purchase and/or sale of call options and/or put options within the OPIS strategy.

Regarding the OPIS strategy, the Complaint states that:

> KPMG would market the transaction to long-term wealthy clients of itself and the other participants. Presidio, as the investment advisor, provided the design and rhetoric to recast the tax strategies as investment strategies. The Deutsche Defendants would provide financing and nominal investment transactions that provided the investment "cover" to disguise the tax driven motives. Brown & Wood would provide the purportedly "independent" opinion letters blessing the strategy and supposedly insulating the clients from Internal Revenue Service ("IRS") penalties in the event of an audit.

Id.

Beginning in 1998, Plaintiffs began engaging in the OPIS strategy. "The KPMG Defendants, along with the Brown & Wood Defendants, advised the Plaintiffs that, as a result of [their investments in the OPIS strategy], it was proper to utilize the losses generated by the OPIS transaction on Plaintiffs' tax returns [for 1998 and 1999]." Complaint, p. 35, ¶ 80. "These Defendants

---

clause. The remand issue addressed herewith hinges upon the jurisdictional effect of that arbitration clause.

[5]The Brown & Wood Defendants are Sidney Austin Brown & Wood, L.L.P. (hereinafter "Brown & Wood") and R. J. Ruble. Brown & Wood is a law firm, and Ruble is alleged to be an agent of Brown & Wood.

repeatedly reiterated to Plaintiffs that the OPIS transaction was a legal tax shelter." Id. at p. 36, ¶ 80. However, beginning in year 1999 and evolving through 2002, the IRS took the position that losses based on investment strategies such as OPIS were invalid for tax purposes. Nevertheless, Defendants allegedly continued to advise Plaintiffs that the OPIS tax strategy continued to be valid. Id. at p. 38, ¶ 87.

In late 2001, the IRS offered a "disclosure initiative" which allowed participants in OPIS and similar investment strategies the opportunity to disclose information regarding their transactions. In return, the IRS would forego assessing penalties based on the transactions. In April 2002, Plaintiffs enrolled in the disclosure initiative program. In October 2002, the IRS initiated another plan under which it offered to finally settle the dispute by allowing OPIS participants to avoid penalties and to recognize approximately twenty percent of claimed capital losses relating to their OPIS transactions. Plaintiffs accepted this offer and, as a result of the ensuing IRS audit, Plaintiffs allegedly paid over sixteen million dollars in back-taxes and interest. Complaint, p. 39, ¶ 93. Plaintiffs also allege that they will owe additional back-taxes, penalties and interest to the Mississippi State Tax Commission. Id. at p. 40, ¶ 95. Plaintiffs finally contend that they expended eight million dollars in fees paid to Defendants for executing the OPIS transactions. Id. at p. 44, ¶ 106.

Based on these facts, Plaintiffs filed suit against Defendants in the Circuit Court of the First Judicial District of Hinds County, Mississippi, on January 28, 2004. The claims asserted in the Complaint are:

COUNT ONE: Breach of contract and the breach of the duty of good faith and fair dealing; asserted against the Deutsche Defendants, the Presidio Defendants, Funston Street LLC and Vallejo Street LLC.

COUNT TWO: Breach of fiduciary duty; asserted against all Defendants.

COUNT THREE: Fraud; asserted against all Defendants.

COUNT FOUR: Negligent misrepresentation and professional malpractice; asserted against the Brown & Wood Defendants, the KPMG Defendants and the Presidio Defendants.

COUNT FIVE: Breach of contract / unjust enrichment; asserted against the Brown & Wood Defendants, the KPMG Defendants and the Presidio Defendants.

COUNT SIX: Declaratory judgment; asserted against all Defendants.

COUNT SEVEN: Unethical, excessive and illegal fees; asserted against the KPMG Defendants and the Brown & Wood Defendants.

COUNT EIGHT: Civil conspiracy; asserted against all Defendants.

Plaintiffs seek an unspecified amount of both compensatory and punitive damages, as well as declaratory relief.

Defendants removed the case to this Court on September 10, 2004. Defendants contend that this Curt has subject matter jurisdiction over the case pursuant to 9 U.S.C. § 205, which sets forth provisions for removing a case to federal court based on Chapter 2 of the Federal Arbitration Act (hereinafter "FAA"). The arbitration agreement which forms the basis of Defendants' removal argument is part of a brokerage contract titled "Customer's Agreement" between Plaintiff John S. Chew, Jr. Revocable Trust (hereinafter "Chew") and Defendant DB Alex Brown.[6] Both of these parties are citizens of the United States in the context of the FAA. The significance of this fact becomes apparent below.

Plaintiffs filed the subject Motion to Remand on September 29, 2004. The Motion to Remand is now ripe for consideration.

## II. ANALYSIS

Based solely on the arbitration agreement between Chew and DB Alex Brown, Defendants contend that "[t]his Court has jurisdiction over this lawsuit under 9 U.S.C. § 203, because '[a]n action or proceeding falling under the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('Convention')] shall be deemed to arise under the laws and treaties of the United States.'"

[6]The Customer's Agreement is attached as Exhibit "A" to Defendants' Notice of Removal.

Notice of Removal. p. 4, ¶ 4. The "Convention" referenced by Defendants is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention is described by the United States Court of Appeals for the Fifth Circuit in Beiser v. Weyler, 284 F.3d 665, 666 n.2 (5th Cir. 2002), as follows:

> Congress ratified the Convention in 1970 to provide United States citizens predictable enforcement of arbitral contracts in foreign courts. Signatories to the Convention agree that they will enforce written agreements to submit disputes to arbitration. Signatories also agree that they will enforce the judgments of arbitrators.
>
> Congress implemented the Convention at 9 U.S.C. §§ 201-208.[7] Section 202 defines which arbitration agreements "fall under the Convention." In order for an agreement to fall under the Convention, it must arise out of a commercial relationship. At least one of the parties to the agreement must not be a U.S. citizen, or, if the agreement is entirely between U.S. citizens, it must have some "reasonable relation" with a foreign state. 9 U.S.C. § 202.
>
> 9 U.S.C. § 208 provides that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16,[8] applies to arbitration agreements under the Convention to the extent that the FAA does not conflict with either the Convention or its implementing legislation.

(Internal citations to case law omitted).

---

[7] 9 U.S.C. §§ 201-208 comprise Chapter 2 of the FAA, which is titled "Convention on the Recognition and Enforcement of Foreign Arbitral Awards." Chapter 2 of the FAA is referred to above and below as the "Convention." This Chapter, of course, pertains to the jurisdictional and enforcement aspects of an arbitration agreement which contains a "foreign" component, as defined by the FAA.

[8] 9 U.S.C. §§ 1-16 comprise Chapter 1 of the FAA. This Chapter is titled "General Provisions." As indicated by its title, Chapter 1 contains generally applicable provisions of the FAA.

To summarize, Defendants contend that because the arbitration agreement between Chew and DB Alex Brown falls under the purview of the Convention, this Court has subject matter jurisdiction over the entire cause, including the claims asserted by non-signatories to the Customer's Agreement, pursuant to the provisions of Chapter 2 of the FAA.[9] Plaintiff's, of course, argue a contrary position.

To establish a foundation for this analysis the Court must set forth applicable statutory law, all of which is contained in Title 9 of the United States Code. First, § 203 grants federal courts jurisdiction over cases involving arbitration agreements which fall under the Convention. Section 203 states in relevant part that "[a]n 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, regardless of the amount in controversy."

---

[9]The arbitration clause in question is contained in paragraph 14 of the Customer's Agreement. In part, the arbitration clause states:

> THE UNDERSIGNED [DB Alex Brown] AGREES, and by carrying an Account of the Undersigned you [Chew] agree, that except as inconsistent with the foregoing, all controversies which may arise between us concerning any transaction of construction, performance, or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration.

Id. at ¶ 14(v).

Next, § 202 sets forth the standards which the Court must apply in determining whether an arbitration agreement falls under the Convention. Section 202 states:

> An arbitration agreement...arising out of a legal relationship...which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, 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 [1] involves property located abroad, [2] envisages performance or enforcement abroad, or [3] 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.

(Emphasis added).

Finally, § 205 allows for removal of a state court case to federal court when the claims in the state court proceeding "relate to" an arbitration agreement "falling under the Convention." In relevant part, § 205 states "[w]here the *subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention*, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to" federal court. (Emphasis added).

The Court begins by analyzing § 202 to determine whether the subject arbitration agreement falls under the Convention. In this case, it is undisputed that the only arbitration agreement in issue is included as part of the Customer's Agreement between Plaintiff

Chew and Defendant DB Alex Brown, and that both of these patties are citizens of the United States for purposes of the FAA. Therefore, unless the Customer's Agreement *either* (1) involves property located abroad, *or* (2) envisages performance or enforcement abroad, *or* (3) has some other reasonable relation with one or more foreign states, the arbitration agreement does not fall under the Convention and Plaintiffs' Motion to Remand must be granted. Conversely, if *any one* of these three tests is met then the arbitration agreement falls under the Convention and the Motion to Remand must be denied.

The first of the three § 202 tests is clearly met; that is, the Customer's Agreement containing the arbitration clause involves property located abroad. The reasoning of the Court on this issue is best summarized by an excerpt from the Memorandum of the Deutsche Bank Defendants' Opposition to Plaintiffs' Motion to Remand.

> As alleged in the Complaint, "[t]he first phase [of the OPIS transaction] is a direct investment in the stock of Deutsche Bank [AG]." Complt. ¶ 55(a). Deutsche Bank AG is a foreign corporation with its principal place of business in Frankfurt, Germany. Complt. ¶ 11. Furthermore, "[t]he second phase is an indirect investment through an *offshore* trading entity" – also in Deutsche Bank AG common stock. Id. ¶ 55(b)(emphasis added). Accordingly, the investment property used in the OPIS transaction was located abroad and, for this reason alone, the arbitration agreement falls under the Convention.

Id. at pp. 6-7. Adopting this argument, the Court finds that the subject arbitration agreement involves property located abroad and

that it falls under the Convention. Next considered is whether removal was proper under § 205.

Removal of this case was proper under § 205 so long as the subject claims "relate to" an arbitration agreement "falling under the Convention." As the Court found above, the subject arbitration agreement falls under the Convention. Therefore, the only issue to be resolved in determining whether removal was proper is whether Plaintiffs' claims "relate to" the subject arbitration agreement.

In Beiser, the Fifth Circuit provides a detailed analysis of the meaning of "relates to" in the context of § 205. "[T]he phrase 'relates to' sweeps broadly...." Beiser, 284 F.3d at 669 (citation omitted). The phrase "generally conveys a sense of breadth." Id. (citation omitted). Beiser goes on to hold that

> whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff's case, the agreement "relates to" the plaintiff's suit. Thus, the district court will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense. As long as the defendant's assertion is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case. That is all that is required to meet the low bar of "relates to."

Id. (emphasis in original).

Without the need for a detailed analysis, this Court finds that under the Beiser court's broad interpretation of the phrase "relates to" in the § 205 context, the claims asserted in this suit certainly

relate to the subject arbitration agreement. Accordingly, the Court finds that removal of this case was proper.

Next considered is whether the case should be severed and remanded in part to state court. Arguing in the alternative that severance and partial remand is proper in this case, Plaintiffs point to the fact that the only arbitration agreement in issue in this case is between Plaintiff Chew and Defendant DB Alex Brown. It is undisputed that no other parties in this case signed the Customer's Agreement which contains that arbitration clause. Accordingly, Plaintiffs seek severance and remand to state court of all claims other than those asserted by Chew against DB Alex Brown.

Plaintiff's argument is based on the provisions of 28 U.S.C. § 1441(c), which states:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

At this phase of the litigation, the Court opts to refrain from exercising its discretion regarding the severance and partial remand of this case. However, as further developed below in the "Conclusion" section of this Opinion, the Court will later revisit the issue as the case unfolds.

## III. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion to Remand must be denied. Two other pending Motions pertaining to the Motion to Remand are: (1) the Deutsche Defendants' Motion for an Extension of Time in Which to Serve Response to Plaintiffs' Motion to Remand (docket entry no. 30); and (2) the Motion of KPMG for Extension of Time in Which to Serve Response to Plaintiffs' Motion to Remand (docket entry no. 54). The Responses referenced in these two Motion were submitted without objection, and the Court considered those Responses in the above analysis. Therefore, both of these Motions should be denied as moot.

The Court notes that the holdings contained herein do *not* relate to whether the arbitration agreement in question is enforceable as to one, all or any combination of the Plaintiffs by one, all or any combination of the Defendants. For purposes of determining jurisdiction under the Convention, the question of whether the arbitration agreement is actually enforceable must not be considered. Beiser, 284 F.3d at 671 (holding that "the jurisdictional and merits issues are separate."). The Court must therefore rule on whether the arbitration agreement is enforceable and/or the extent to which it is enforceable at a later phase of this proceeding.

As multiple parties have filed Motions to Compel Arbitration, the arbitration issue will soon be ripe for consideration.[10] Plaintiffs are directed to file Responses to the outstanding Motions stated in footnote 10 of this Order on or before **Monday, January 31, 2005.** Defendant are directed to Reply to Plaintiffs' Responses in accordance with the Local Rules of this Court. In the Responses and Replies, the parties are directed to address the issue of whether this case should be remanded in total or in part if: (1) none or less than all of the Plaintiffs are ordered to arbitrate their claims; or (2) none or less than all of the claims themselves are subject to binding arbitration.

Based on the holdings herein:

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Remand [18-1] is hereby denied.

IT IS FURTHER ORDERED that the Deutsche Defendants' Motion for an Extension of Time in Which to Serve Response to Plaintiffs' Motion to Remand [30-1] is hereby denied as moot.

---

[10]Through an Order rendered by Magistrate Judge Alfred G. Nicols on September 29, 2004, all aspects of this case were stayed with the exception of the remand issue. Based on the stay, Plaintiffs have not responded to the following pending Motions: (1) Deutsche Bank Defendants' Motion to Dismiss the Action and Compel Arbitration (docket entry no. 7); (2) Motion to Dismiss of Defendants Presidio Advisory Services, LLC and John M. Larson (docket entry no. 10); (3) KPMG's Motion to Compel Arbitration and Stay Proceedings (docket entry no. 12); and (4) Defendant Sidney Austin Brown & Wood LLP's Motion to Compel Arbitration (docket entry no. 13).

IT IS FURTHER ORDERED that the Motion of KPMG for Extension of Time in Which to Serve Response to Plaintiffs' Motion to Remand [54-1] is hereby denied as moot.

IT IS FURTHER ORDERED that Plaintiffs must file Responses to the following Motions on or before **Monday, January 31, 2005**: (1) Deutsche Bank Defendants' Motion to Dismiss the Action and Compel Arbitration (docket entry no. 7); (2) Motion to Dismiss of Defendants Presidio Advisory Services, LLC and John M. Larson (docket entry no. 10); (3) KPMG's Motion to Compel Arbitration and Stay Proceedings (docket entry no. 12); and (4) Defendant Sidney Austin Brown & Wood LLP's Motion to Compel Arbitration (docket entry no. 13). Defendant must Reply to Plaintiffs' Responses in accordance with the Local Rules of this Court. In the Responses and Replies, the parties are ordered to address the issue of whether this case should be remanded in total or in part if: (1) none or less than all of the Plaintiffs are ordered to arbitrate their claims; or (2) none or less than all of the claims themselves are subject to binding arbitration.

SO ORDERED this the 6th day of January, 2005.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

tct