Mezzalingua v Deutsche Bank AG
2006 NY Slip Op 30812(U)
August 21, 2006
Supreme Court, New York County
Docket Number: 116269/2005
Judge: Karla Moskowitz

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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JOHN MEZZALINGUA, DANIEL N. MEZZALINGUA, DANIEL J. MEZZALINGUA, LAURIE MEZZALINGUA, KRISTEN MEZZALINGUA MCKENNA, TRACY MEZZALINGUA, KAREN MEZZALINGUA, JMA X INVESTMENTS, LLC, and JMA X, INC.,

Plaintiffs,

-against-

DEUTSCHE BANK AG, DEUTSCHE BANK SECURITIES, INC., D/B/A DEUTSCHE BANK ALEX BROWN, a DIVISION of DEUTSCHE BANK SECURITIES, INC., DAVID PARSE, TODD CLENDENING, CLARION CAPITAL, LLC, CLARION CAPITAL CORPORATION, CLARION CAPITAL HOLDINGS, LLC, CLARION CAPITAL PARTNERS, LLC, CLARION GLOBAL DERIVATIVES XV, LLC, DANIEL BROOKS, JR., and SOCIETE GENERALE,

Defendants.

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Index No. 116269/2005

DECISION and ORDER

MOSKOWITZ, J.:

Motion sequence numbers 002, 003, 004 and 005 are consolidated for disposition.

In this action, plaintiffs allege that defendants marketed, promoted and sold what defendants represented was a legitimate low-risk investment strategy, but was actually an illegal tax shelter. The six-count complaint asserts causes of action for a declaratory judgment, unjust enrichment, breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, fraud, and civil conspiracy.

In motion sequence number 002, defendants Deutsche Bank AG, Deutsche Bank Securities, Inc. (together, Deutsche Bank), David Parse (Parse) and Todd Clendening (Clendening) (Deutsche Bank, together with Parse and Clendening, Deutsche Bank Defendants) move to stay these proceedings and compel arbitration. In motion sequence number 003, these defendants move to dismiss the complaint for failure to state a cause of action, and for failure to plead their claims with sufficient particularity. These defendants request that the court address their motion to dismiss, and, thereafter, determine whether a stay pending arbitration of any surviving claims is warranted.

In motion sequence number 004, defendant Société Générale moves to dismiss the complaint for failure to state a cause of action and for failure to plead their claims with sufficient particularity. Alternatively, Société Générale moves to stay this action pending the arbitration of the claims against Deutsche Bank.

In motion sequence number 005, defendants Daniel Brooks, Jr. (Brooks), Clarion Capital Corporation and Clarion Global Derivatives XV, LLC (together, Clarion Defendants) move to dismiss the complaint for failure to state a cause of action and for failure to plead their claims with sufficient particularity. Alternatively, these defendants move to stay these proceedings and compel arbitration.

Facts

Plaintiffs are individuals and entities who sought to minimize their tax obligations following the receipt of substantial gains in 2001. Plaintiffs allegedly followed the advice of the defendants, who, acting in their tax and financial advising capacities, advised plaintiffs to pursue investments in foreign currency market-linked deposits (MLDs). Pursuant to the MLD strategy, plaintiffs allegedly purchased certain foreign exchange digital option contracts (FX Contracts).

The MLD transactions allegedly enabled plaintiffs to create losses for tax purposes that would eliminate, or offset, their gains. Plaintiffs were allegedly assured of the legality of the MLD investment strategy, by, among other things, opinion letters from law firms and the advice of defendants.

To this end, plaintiffs allegedly opened securities brokerage accounts with defendant Deutsche Bank and entered into Account Agreements. Each Account Agreement contains an arbitration clause. The Deutsche Bank Defendants submit copies of the Account Agreements with motion sequence numbers 002 and 003. The arbitration clause states:

> I agree to arbitrate with you any controversies which may arise, whether or not based on events occurring prior to the date of this agreement, including any controversy arising out of or relating to any account with you, to the construction, performance or breach of any agreement with you, or to transactions with or through you, only before

> the New York Stock Exchange [NYSE] or the National Association of Securities Dealers [NASD] Regulation, Inc., at my election.
>
> ... No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the punitive class action until (1) the class certification is denied; or (2) the class is decertified; or (3) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

Account Agreements, Hefter Aff., Exs. 2-9.

In December 1999 and August 2000, the Internal Revenue Service (IRS) allegedly publicly announced the illegality of transactions such as the MLD strategy. In August and November 2001, plaintiffs allegedly entered into MLD transactions through Société Générale. The complaint avers that Société Générale and Deutsche Bank were able to control the outcome of plaintiffs' MLD positions and that the MLD transactions were, in reality, private contractual wagers between Deutsche Bank and Société Générale.

According to plaintiffs, defendants developed, marketed and implemented the MLD investment strategy in order to extract millions of dollars in fees from plaintiffs, without advising plaintiffs that they faced substantial tax liability. Defendants allegedly failed to advise plaintiffs of the illegality of the

transactions after receiving the IRS notices.

According to Deutsche Bank, on December 15, 2004, plaintiffs joined a putative class action in the United States District Court for the Southern District of New York, in *Ling v Deutsche Bank, AG*, No. 04-CV-4566 (Ling Class Action). The plaintiffs in the Ling Class Action asserted claims for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and claims for damages from defendants' alleged breach of contract, breach of the duty of good faith and fair dealing, fraud, negligent misrepresentation, breach of fiduciary duty, unjust enrichment and illegal fees.

In the Ling Class Action, the defendants moved to dismiss the second amended complaint. The court granted the motions in its opinion and order, *Ling v Deutsche Bank, AG*, 2005 WL 1244689 (SD NY, May 26, 2005). The court declined to rule on the defendants' motions to dismiss the plaintiffs' common law claims and granted plaintiffs leave to file a third amended complaint. *Id.* According to defendants, rather than amending their complaint in the Ling Class Action, plaintiffs commenced this action.

Discussion

Deutsche Bank Defendants'
Motion to Compel Arbitration

Defendants move to stay these proceedings and compel arbitration, based upon the arbitration clause in the Account

Agreements, pursuant to sections 3 and 4 of the Federal Arbitration Act (FAA), and CPLR 7503 (a).[1] In opposition, plaintiffs argue that they are members of a putative class that the court has not yet certified, in *Kissell, et al. v Deutsche Bank AG, et al.*, Civil Action No. 06-CV-2045 (SD NY) (Kissell Class Action).

The FAA permits a party to petition a United States District Court "for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 USC § 4. It also permits the parties to submit applications to "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." 9 USC § 3.

CPLR 7503 (a) permits a party aggrieved by the failure of another to arbitrate to apply for an order compelling arbitration. It states that "[w]here there is no substantial question whether a valid agreement was made or complied with ..., the court shall direct the parties to arbitrate. ... If the application is granted, the order shall operate to stay a pending

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[1] The court notes that all defendants request that the court address their motions challenging the sufficiency of the pleading prior to determining whether to stay this action and compel arbitration. However, as the court stated at oral argument on May 11, 2006, the court will address the issue of arbitration prior to addressing the motions to dismiss. 5/11/06 Tr., at 6, 8.

or subsequent action, or so much of it as is referable to arbitration." CPLR 7503 (a). The court must determine (1) whether "the parties made a valid agreement to arbitrate," and (2) whether the dispute sought to be arbitrated falls within the scope of that agreement. *Rockland County v Primiano Constr. Co., Inc.*, 51 NY2d 1, 8 (1980).

Here, the Account Agreements that Deutsche Bank submits show that all of the plaintiffs, except JMA X, Inc., created an account with Deutsche Bank Securities, Inc., that the terms of the Account Agreements was to govern. The plain language of the Account Agreements makes clear that the signatories to those agreements bound themselves to the arbitration clause.

With respect to JMA X, Inc., the complaint states that the plaintiffs formed LLCs and S corporations "for the purpose of carrying out their respective MLD transaction[s]." (Complaint, ¶ 83). The complaint also states that "[t]he Individual Plaintiffs, or the entities controlled by them and created for the MLD transaction[s], each opened an account with Deutsche Bank with various cash contributions." (*Id.*, ¶ 84). According to the complaint, the individual plaintiffs "contributed their interests in JMA X Investments, LLC to JMA X, Inc., a corporation in which the Individual Plaintiffs were the only shareholders, as contribution to its capital." (*Id.*, ¶ 97). "Contemporaneously with this contribution, JMA X, Inc. became a member of JMA

Investments." *Id.* JMA X, Inc. allegedly recognized the losses resulting from the MLD transactions. (*Id.*, ¶ 105 [8]; *see also id.*, ¶ 116 [alleging that plaintiffs filed amended "2001 income tax returns for the entities created for the purpose of engaging in the MLD transactions"]).

In addition, the complaint makes no distinction between the claims of the plaintiffs who are signatories to the Account Agreements, and JMA X, Inc., a non-signatory, arising from the implementation of the MLD strategy and transactions. Therefore, the arbitration provision contained in the Account Agreements binds JMA X, Inc. (*See e.g. Camferdam v Ernst & Young Intl., Inc.*, 2004 WL 307292, *6 [SD NY, Feb. 13, 2004] ["it would defeat the purpose of the Arbitration Clause and the strong federal policy favoring arbitration to allow the Entity Plaintiffs to litigate issues that the Individual Plaintiffs - who created and control the Entity Plaintiffs - clearly agreed to arbitrate"]).

Plaintiffs do not dispute defendants' assertion that the arbitration provision binds all of them. Nor do they dispute defendants' assertion that Deutsche Bank AG may enforce the arbitration agreements, because it is an "affiliate" of Deutsche Bank Securities, Inc., subject to the arbitration provision in the Account Agreements. (Hefter Aff., Exs. 2-9). Plaintiffs also do not dispute that Parse and Clendening may enforce the arbitration provisions, because the Account Agreements also apply

to Deutsche Bank Securities' "officers, directors, agents and employees" (*id.*), and the complaint alleges that Parse and Clendening were "employees, agents and/or representatives of" Deutsche Bank (Complaint, ¶¶ 13, 14).

The complaint states a controversy between plaintiffs and Deutsche Bank that relates to the MLD transactions. These parties consummated the alleged transactions through the brokerage accounts plaintiffs opened pursuant to the Account Agreements. Plaintiffs do not dispute that the subject matter of their claims falls within the scope of the arbitration agreements. For the foregoing reasons, the Deutsche Bank Defendants have shown that the arbitration provision in the Account Agreements encompasses plaintiffs' claims.

Plaintiffs argue, and defendants do not dispute, that plaintiffs are members of a putative class in the Kissell Class Action. Plaintiffs argue that, therefore, defendants cannot enforce the arbitration provision in the Account Agreements.[2]

Wilson, et. al. v Deutsche Bank AG, et al. (Civil Action No. 05-C-3474), an action in the United States District Court for the Northern District of Illinois, involves the identical arbitration provision and several of the same defendants, including Deutsche

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[2] The court notes that plaintiffs' opposition papers do not discuss the Ling Class Action.

Bank, Parse and defendant Craig Brubaker (Brubaker).[3] In *Wilson*, the parties agreed that the plaintiffs were members of classes in another action pending in the Southern District of New York, including many of the same defendants (including Deutsche Bank and Parse) as in the *Wilson* action and alleged damages resulting from a similar tax shelter scheme. The plaintiffs argued that "the class action exclusion provision in the arbitration agreement prevents the [Deutsche Bank] defendants from moving to compel arbitration and allows plaintiffs to proceed in the instant case." (*Wilson v Deutsche Bank AG*, Case No. 05-C-3474 [ND IL, March 20, 2006] [Wilson Decision], Farber Aff., Ex. 1, at 3).

In the Wilson Decision, the court stated, and the parties agreed, that NASD Rule 10301 requires the class action limitation in the parties' agreements. The Securities and Exchange Commission (SEC) stated in its notice and order approving the proposed rule change for the NASD:

> in all cases, class actions are better handled by the courts and that investors should have access to the courts to resolve class actions efficiently. In the past, individuals who attempted to certify class actions in litigation were subject to the

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[3] According to Deutsche Bank, the same firm that represents plaintiffs here brought the Wilson action.

The court notes that the complaint refers to Brubaker as a defendant in this action; however, Brubaker is not named in the caption, and Brubaker submits no papers in connection with the Deutsche Bank Defendants' motion to compel arbitration.

> enforcement of their separate arbitration contracts by their broker-dealers. Without access of class actions in paragraph cases, both investors and broker-dealers have been put to the expense of wasteful, duplicative litigation. The new rule ends this practice.

Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions From Arbitration Proceedings, 57 FR 52659-02, (Release No. 34-31371; File No. SR-NASD-92-28), 1992 WL 316267 (Nov. 4, 1992).

In the Wilson Decision, the court cited the SEC notice and order and analyzed Rule 10301 as follows:

> [t]he obvious purpose of [NASD Rule 10301 (d)(3)], and the corresponding provision in the agreement, is to encourage resolution of disputes by class actions in courts, and to limit duplicative litigation either in the courts or in arbitration. The [SEC] stated as much in its notice and order approving the purposed rule change for the NASD ... .
>
> Nothing in the Rule or the SEC notice supports plaintiffs' interpretation. Accepting plaintiffs' position would mean that the existence of a putative class action would result in more individual litigation in the courts, not less, just the opposite of the desired intent. Under plaintiffs' view, they cannot initiate arbitration against defendants because of the existence of the [existing] class action, but somehow they can initiate and proceed with individual cases in federal court. This is obviously not the intent of the Rule, which was to exclude class claims from arbitration while requiring arbitrations of individual claims. ... .
>
> Plaintiffs cannot have it both ways. They can either elect to litigate in court as a member of the [existing] class action, or they can opt out of that case and arbitrate

> their claims individually. They cannot, however, rely on the [existing] class action to individually litigate their claims in this court.

(*Id.* at 5-6). Based upon this reasoning, the District Court granted Deutsche Bank's motion to stay the *Wilson* action in its entirety.

Here, plaintiffs and the Deutsche Bank Defendants agree that the arbitration agreement is based upon NASD Rule 10301. This court finds the reasoning of the *Wilson* court persuasive support for a stay of this action pending the disposition of the Kissell Class Action.

Plaintiffs argue that the arbitration clause is void, because defendants failed to comply with NASD rules in the Account Agreements. As discussed above, and for the reasons stated in the Wilson Decision, defendants have not violated any NASD rule plaintiffs identify. Therefore, this argument is without merit.

Plaintiffs also argue that the Deutsche Bank Defendants are judicially estopped from arguing that they have the right to compel arbitration, because they previously took the position that they could not enforce the arbitration provisions of the Account Agreements. Plaintiffs argue that, in *Blythe v Deutsche Bank AG* (2005 WL 53281 [SD NY, Jan. 7, 2005]), Deutsche Bank, Parse and Clendening, named defendants in that action, acknowledged that NASD Rule 10301 (d) (3) prohibited them "from

seeking to enforce an agreement to arbitrate during the pendency of a class action ... ." Plaintiffs' Opp. Mem. of Law, at 1 n 2.

> The doctrine of judicial estoppel or the doctrine of inconsistent positions precludes a party who assumed a certain position in a prior legal proceeding *and who secured a judgment in his or her favor* from assuming a contrary position in another action simply because his or her interests have changed.

(*Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176-177 [1st Dept 1998] [emphasis in original; internal citations and quotation marks omitted]).

Even assuming for the moment that defendants took an inconsistent position in a prior proceeding, plaintiffs fail to show that defendants received a favorable judgment based upon this alleged inconsistent position. Accordingly, plaintiffs' argument is unpersuasive.

Plaintiffs argue that the arbitration agreement is procedurally unconscionable, because plaintiffs lacked meaningful choice when entering into the Account Agreements. Plaintiffs also argue that the arbitration provision is buried in small print within the Account Agreement and that plaintiffs had no opportunity to negotiate the terms of the agreements.

"[D]eterminations of unconscionability are ordinarily based on the court's conclusion that both the procedural and substantive components are present." *Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 12 (1988). "[U]nconscionability ...

requires some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party [citation omitted] ... ." *Matter of State of New York v Avco Financial Service of New York Inc.*, 50 NY2d 383, 384 (1980).

The Account Agreements are three-page documents. Each paragraph, including the arbitration provision, contains a bolded subject heading. Moreover, directly above the signature line is the following statement: "THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE AT PARAGRAPH 19." Hefter Aff., Exs. 2-9, at 3. Further, plaintiffs fail to show that, at any time, they attempted to negotiate the terms of the Account Agreements or the arbitration provision. Plaintiffs also fail to explain what prevented them from rejecting the Account Agreements and seeking other opportunities if they were dissatisfied with the terms of the Account Agreements. Therefore, plaintiffs' argument that the agreements are procedurally unconscionable is unpersuasive.

Plaintiffs claim that the arbitration agreement is substantively unconscionable, because it requires the parties to arbitrate "any controversies" before the NYSE or the NASD. Plaintiffs argue that these tribunals are intended to resolve disputes between brokers and their clients, not cases involving the fraudulent implementation of an illegal tax strategy. Plaintiffs also argue that arbitration will limit them with

respect to depositions, interrogatories and document requests.

Substantive unconscionability requires "an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged." (*Gillman*, 73 NY2d at 12).

Here, plaintiffs fail to show that the NYSE and NASD are not intended to handle cases such as this action. Plaintiffs also fail to show that arbitration before either body would unreasonably favor defendants or that the terms of the Account Agreements prevent plaintiffs from pursuing their claims against defendants. That the NASD rules may provide for more limited discovery does not make the arbitration provision unconscionable. (*Stewart v Paul, Hastings, Janofsky & Walker, LLP*, 201 F Supp 2d 291, 292 [SD NY 2002] ["[t]he suggestion that an arbitration clause is unconscionable because discovery either is unavailable or more limited in arbitration than in litigation is preposterous"]). Accordingly, plaintiffs' argument concerning substantive unconscionability is unpersuasive.

For the foregoing reasons, the court grants the motion to stay these proceedings pending the disposition of plaintiffs' claims in the Kissell Class Action. This will preserve any of plaintiffs' surviving claims for arbitration under the parties' agreements. (*Reliance Natl. Ins. Co. v Seismic Risk Ins. Serv., Inc.*, 962 F Supp 385, 391 [SD NY 1997] [stating that party would

"suffer irreparable harm if it is deprived of its federal and state contractual right to arbitrate its disputes"]).

Société Générale's Motion to Stay Pending Arbitration

Société Générale moves to stay this action pending arbitration with the Deutsche Bank Defendants.

The First Department considers stays appropriate where the claims against the non-arbitrating defendant raised issues similar to those against the arbitrating defendant. (*Marcus v Millwork Trading Co., Ltd.*, 208 AD2d 448 [1st Dept 1994]; *see also Brown v V & R Advertising, Inc.*, 112 AD2d 856, 861 [1st Dept 1985], *affd* 67 NY2d 772 [1986] ["[i]ndeed, the direction by Special Term to stay the action against the other parties pending resolution of the arbitration has been sanctioned, particularly where the claims against the other parties are derivative and secondary and there are similar, if not identical, issues"]).

Moreover, "[w]here arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where, as here, the determination of issues in arbitration may well dispose of nonarbitrable matters." (*Cohen v Ark Asset Holdings, Inc.*, 268 AD2d 285, 286 [1st Dept 2000]).

Here, there is a commonality of parties and issues in the complaint. The allegations asserted against Société Générale are a subset of broader allegations asserted against Deutsche Bank

and the other defendants. Moreover, as discussed below, the allegations asserted against Société Générale are inextricably interwoven with the claims plaintiffs assert against the Deutsche Bank Defendants. Accordingly, the court grants Société Générale's motion to stay these proceedings pending plaintiffs' arbitration with the Deutsche Bank Defendants. (*See C. B. Strain & Son, Inc. v J. Baranello & Sons*, 90 AD2d 924, 925 [3d Dept 1982] ["[w]here parallel proceedings are pending, it is generally held that a stay of one or more is appropriate if there is such a commonality of parties and issues that the resolution of one proceeding will substantially determine the others"]).

Brooks & Clarion Defendants' Motion to Compel Arbitration

Brooks and the Clarion Defendants argue that they are entitled to compel arbitration and stay these proceedings, because Brooks was an employee of Deutsche Bank and because the Clarion Defendants are alleged agents in a conspiracy.

As discussed above, the Account Agreements apply to Deutsche Bank Securities' "agents and employees." (Hefter Aff., Exs. 2-9). The complaint claims that Deutsche Bank employed Brooks from 1996 through 2001 (Complaint, ¶ 29); that "Brooks of Deutsche" developed the plan to market the FX Contracts "in the mid-to-late 90s" (*id.*, ¶ 34); that "the Deutsche Defendants, including Brooks, decided to begin marketing ... an FX Contract tax strategy" (*id.*, ¶ 39); that "Brooks was a Deutsche Bank employee

at the time the Deutsche Defendants began marketing this new FX Contract tax strategy" (*id.* at 13 n 10); and that "others at Deutsche Bank ... , specifically including Brooks, advised and instructed Plaintiffs" (*id.*, ¶ 86). Therefore, according to the complaint, Brooks' alleged misconduct arose at a time when he was an employee of Deutsche Bank. That, thereafter, Brooks allegedly left Deutsche Bank and became "the principal owner and an employee, agent and/or representative of Clarion" is irrelevant. (*Id.*, ¶ 29). Accordingly, Brooks, as an employee of Deutsche Bank, may compel arbitration under the Account Agreements.

The claims plaintiffs assert against the Clarion Defendants are also subject to the arbitration agreement. Conspiracy relies upon principles of agency. (*United States v Russo*, 302 F3d 37, 45 [2d Cir 2002] ["[w]hen two persons engage jointly in a partnership for some criminal objective, the law deems them agents for one another. Each is deemed to have authorized the acts and declarations of the other undertaken to carry out their joint objective"]). "[W]hen two people enter into a joint venture of conspiratorial nature, the actions ... of either done in furtherance of that conspiracy are deemed authorized by the other." (*Id.*).

Here, plaintiffs allege that "[d]efendants and others, singly and in concert, directly or indirectly, engaged in a common plan, transaction and course of conduct described herein

in connection with the purchase and sale of the FX Contracts ... which operated as a fraud upon Plaintiffs." (Complaint, ¶ 43). Plaintiffs also claim that defendants "conspired to devise and promote the MLD transaction[s] for the purpose of receiving and splitting millions of dollars in fees" (*id.*, ¶ 117), and plaintiffs assert a cause of action for civil conspiracy against Deutsche Bank, Parse, Clendening, Brooks and the Clarion Defendants. Thus, implicit in plaintiffs' conspiracy allegations is that the Clarion Defendants acted as agents for Deutsche Bank.

In any event, underlying all of plaintiffs' claims is their assertion that defendants conspired to market and implement the alleged fraud and the illegal MLD tax shelter transactions. Thus, plaintiffs' claims against Brooks and the Clarion Defendants are inextricably interwoven with the claims asserted against the other defendants. Having determined that plaintiffs' claims against the Deutsche Bank Defendants are subject to arbitration, the court requiring all of the parties to submit to arbitration also furthers the goal of judicial economy.

The court notes that, in the Wilson Decision, the district court determined that all of the defendants, including the non-signatories to the arbitration provision, would likely be able to compel arbitration under the parties' agreements, because the plaintiffs' claims alleged "substantially inter-dependant and concerted misconduct" by the Deutsche Bank defendants as

signatories, and the remaining non-signatory defendants. (Wilson Decision, Farber Aff., Ex. 1, at 6). This court finds the reasoning of the Wilson Decision persuasive.

Accordingly, it is hereby

ORDERED that the motions (motion sequence numbers 002, 004 and 005) to compel arbitration and stay these proceedings are granted, pending the disposition of plaintiffs' claims in federal court in *Kissell, et. al. v Deutsche Bank AG, et al.*, Civil Action No. 06-CV-2045 (SD NY); and it is further

ORDERED that the motions to dismiss (motion sequence numbers 002, 003, 004 and 005) are held in abeyance pending the outcome of the arbitration.

Dated: August 21, 2006

ENTER:

J.S.C.