

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

STAMFORD HOLDING COMPANY,	:	
Plaintiff,	:	
	:	
v.	:	No. 3:02CV1236(CFD)
	:	
MAUREEN CLARK, ET AL.,	:	
Defendants.	:	

**RULING ON MOTIONS TO DISMISS  
AND FOR OTHER RELIEF**

Plaintiff Stamford Holding Company brought this action against Maureen Clark (“Clark”), Christopher Plummer (“Plummer”), New England Equity, Inc. (“New England Equity”), Charles J. Irving (“Irving”), Ramona E. DeSalvo (“DeSalvo”), and Merrill Lynch Pierce Fenner & Smith, Inc. (“Merrill Lynch”), alleging violations of the Racketeer Influenced and Corrupt Organization Act (“RICO”), 18 U.S.C. § 1964(c), 18 U.S.C. 1962(c) and § 1962(d), Organized Crime Control Act of 1970, and state law claims of fraud, conversion, legal malpractice, fraudulent concealment, malicious interference with business, and breach of the duty of good faith and fair dealing.

**I. Procedural History**

This case was originally filed in the Eastern District of Pennsylvania and assigned to United States District Judge Robert F. Kelly. Judge Kelly transferred the case to this Court pursuant to 28 U.S.C. § 1404(a) in a memorandum order. Judge Kelly indicated that the defendants’ motions to dismiss were to remain outstanding, pending resolution by this Court.

Pending are the following motions to dismiss: Merrill Lynch’s Motion to Dismiss, or in the Alternative, to Refer to Arbitration and for a Stay [Docs. ##8-1, 8-2, 8-3]; Clark, Plummer, and New

England Equity's Motion to Dismiss and for other Relief [Doc. #12]; Irving's Motion to Dismiss and for Costs [Docs. #18-1, #18-2]; and DeSalvo's Motion to Dismiss [Doc. #66].<sup>1</sup> A hearing was held on the motions and the parties were given an opportunity to file supplemental briefs.

## **II. Factual Background<sup>2</sup>**

On October 18, 1993, Edward A. Massullo, M.D., F.A.C.S. ("Dr. Massullo"), and his wife, Anne Marie Massullo, entered into an Agreement ("Agreement") with defendant New England Equity. New England Equity is located in Niantic, Connecticut, and defendants Clark and Plummer are its owners and officers. On March 18, 1994, the Massulos and New England Equity entered into a supplemental agreement (the "Addendum"). Pursuant to the Agreement and Addendum, New England Equity was to perform certain services relating to the financial restructuring and possible resolution of the Massulos' severe financial problems, including debts in excess of \$12,000,000. Both the Agreement and Addendum provided that all disputes between the Massulos and New England Equity would be resolved by arbitration pursuant to the rules of the American Arbitration Association.

In order to manage the Massulos' financial and business affairs, all of the defendants, except for Merrill, Lynch, formed the Massullo Financial Group. Defendants Clark and Plummer acted as the financial advisors and managers, defendant Irving was the attorney for New England Equity, and defendant DeSalvo acted as the stock escrow agent and counsel.

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<sup>1</sup>DeSalvo originally filed a motion to dismiss in the Eastern District of Pennsylvania [Doc. #5]. That motion was denied, without prejudice, by this Court on September 10, 2002. DeSalvo re-filed the motion on October 15, 2002.

<sup>2</sup>These facts are taken from the plaintiff's complaint and the plaintiff's responses to the motions to dismiss unless otherwise indicated.

The Massullo Financial Group submitted a plan calling for the creation of the plaintiff Stamford Holding Company. The plan was to fund the Stamford Holding Company with the proceeds from the sale of certain properties owned by the Massullos located in Bucks County, Pennsylvania and proceeds from the liquidation of assets contained in the existing Massullo Ohio Pension Plan from Dr. Massullo's Ohio medical practice and to increase the funds with investment through Merrill Lynch. On June 24, 1994, defendant Irving, through Pacific Assets, Inc., obtained title to the Bucks County properties at a County Sheriff's sale for \$2,273.88. On August 27, 1994, the Massullo Financial Group sold the properties for \$2.4 million dollars.<sup>3</sup> At that time, the Massullo Ohio Pension Plan amounted to approximately \$3 million dollars. On July 18, 1995, Stamford Holding Company was incorporated in Delaware with Dr. Massullo as the sole shareholder, Clark as the president/secretary, and Plummer as the vice-president. On August 8, 1995, Stamford Holding Company opened two accounts with defendant Merrill Lynch. The two account agreements required arbitration of any disputes. In 1995, Stamford Holding Company was funded by the Massullo Financial Group in the amount of \$2,288,306.10. In 1998, Stamford Holding Company had a closing balance of \$5,838.24.

On November 23, 1998, Dr. and Mrs. Massullo filed a complaint in the United States District Court for the Northern District of Ohio against the New England Equity defendants (Clark, Plummer, and New England Equity), Irving, DeSalvo, and Merrill Lynch, claiming breach of fiduciary duty and conversion in connection with the management of the assets and liabilities of the Massullos ("the Ohio

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<sup>3</sup>As noted in Judge Kelly's opinion at page five, footnote four, it is unclear whether these are the correct purchase and sale figures for the Bucks County properties. However, as these figures are used throughout the plaintiff's affidavits and responses to the motions to dismiss, and appear to be undisputed, the Court will employ these figures.

lawsuit”).

According to the docket sheet of the Ohio lawsuit, Merrill Lynch moved to compel arbitration of the claims against it on January 4, 1999. On April 7, 1999, the New England Equity defendants served a demand of arbitration upon the Massullos and moved to compel arbitration of the amount of unpaid fees for services rendered to the Massullos and of the claims alleged in the Ohio lawsuit by the Massullos, under the Agreement and Addendum. On May 26, 1999, the Massullos voluntarily dismissed their claims against Merrill Lynch, without prejudice. On October 18, 1999, the New England Equity defendants’ motion to compel arbitration was granted. Shortly thereafter, the Massullos voluntarily dismissed their claims against the New England Equity defendants, DeSalvo, and Irving in the Ohio lawsuit.<sup>4</sup>

Arbitration began in Connecticut on February 10, 2000, pursuant to the arbitration clauses in the Agreement and Addendum.<sup>5</sup> The Massullos filed a counterclaim in the arbitration proceeding setting forth claims of breach of contract, fraud, conversion, breach of fiduciary duty, negligence, breach of fiduciary duty in the retention and supervision of counsel, negligence in connection with accountants, and a request for an accounting, all in connection with the restructuring of the Massullos’ debt by the New England Equity defendants.

The arbitration resulted in a settlement agreement, which was read into the record on April 5,

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<sup>4</sup>Before their claims were dismissed, but after the motion to compel arbitration was granted, the Massullos’ complaint was amended to set forth claims of RICO violations, conversion, breach of fiduciary duty, professional negligence, breach of contract, and fraud.

<sup>5</sup>The New England Equity defendants, Irving, and DeSalvo are located in Connecticut, and the Agreement and Addendum provided for arbitration to take place in Connecticut. Merrill Lynch was not a part of the Connecticut arbitration.

2000. This agreement included a payment to New England Equity by the Massulos and specifically resolved the Ohio lawsuit's claims by the Massulos against the New England Equity defendants and DeSalvo. On July 19, 2000, the arbitrator awarded and confirmed as binding and enforceable the terms of the settlement.

The New England Equity defendants subsequently requested the Superior Court of the State of Connecticut to confirm the settlement award, which was granted by the Superior Court on May 8, 2001. On August 15, 2001, the arbitration settlement was reduced to a judgment in the amount of \$177,500 in favor of New England Equity, which was also recorded in the Court of Common Pleas in New London County, Ohio on August 15, 2001.

On January 17, 2002, the plaintiff Stamford Holding Company filed this action, alleging RICO violations, conversion, breach of contract, legal malpractice, fraudulent concealment, malicious interference with business, and breach of the duty of good faith and fair dealing. As noted above, each of the defendants here has a filed a motion to dismiss the plaintiff's complaint. Merrill Lynch has moved to dismiss on the basis of (1) lack of subject matter jurisdiction and (2) failure to state a claim. Merrill Lynch has also moved for arbitration and for a stay. The New England Equity defendants have moved to dismiss on the following bases: (1) res judicata and collateral estoppel; (2) lack of personal jurisdiction; (3) lack of subject matter jurisdiction; (4) improper venue; (5) failure to state a claim; and (6) expiration of the statute of limitations. These defendants have also moved for arbitration and for attorney's fees and costs. Irving has moved to dismiss on the following bases: (1) lack of personal jurisdiction; (2) lack of subject matter jurisdiction; (3) improper venue; (4) failure to

state a claim; and (5) expiration of the statute of limitations.<sup>6</sup> DeSalvo has moved to dismiss on the following bases: (1) lack of standing; (2) res judicata; (3) lack of subject matter jurisdiction; (4) failure to state a claim; and (5) expiration of the statute of limitations. DeSalvo has also joined Merrill, Lynch's request for arbitration and a stay.

### III. Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all factual allegations in the complaint and draws inferences from these allegations in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984); Easton v. Sundram, 947 F.2d 1011, 1014-15 (2d Cir. 1991), cert. denied, 504 U.S. 911 (1992). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with his allegations, it is clear that no relief can be granted. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." United States v. Yale-New Haven Hosp., 727 F. Supp. 784, 786 (D. Conn. 1990) (citing Scheuer, 416 U.S. at 232). Thus, a motion to dismiss under 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994) (citations and internal quotations omitted), cert. denied, 513 U.S. 816 (1994). In its review of a 12(b)(6) motion to dismiss, a court may

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<sup>6</sup>In his motion to dismiss, Irving also joins in the New England Equity defendants' motion for attorney's fees and costs.

consider “only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken.” Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

When considering a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), “a district court must look to the way the complaint is drawn to see if it claims a right to recover under the laws of the United States.” IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1055 (2d Cir. 1993) (quoting Goldman v. Gallant Secs. Inc., 878 F.2d 71, 73 (2d Cir. 1989)), cert. denied, 513 U.S. 822 (1994). In doing so, the allegations of the complaint are construed in the plaintiff’s favor. See Connell v. Signoracci, 153 F.3d 74 (2d Cir. 1998). A district court, however, need not confine its evaluation of subject matter jurisdiction to the face of the pleadings and may consider affidavits and other evidence submitted by the parties. See Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947); Exchange Nat’l Bank v. Touche Ross & Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976); Matos v. United States Dep’t of Hous. & Urban Dev., 995 F. Supp. 48, 49 (D. Conn. 1997). Once the question of subject matter jurisdiction has been raised, the burden of establishing subject matter jurisdiction rests on the party asserting jurisdiction. See Thomas v. Gaskill, 315 U.S. 442, 446 (1942).

#### **IV. Discussion**

##### **A. Subject Matter Jurisdiction, Personal Jurisdiction, and Venue**

As to subject matter jurisdiction, in footnote two of his May 23, 2002 memorandum, Judge Kelly wrote:

Regarding subject matter jurisdiction, Plaintiff invokes federal question jurisdiction because of

the federal RICO statute and supplemental jurisdiction over the state law claims. See 28 U.S.C. § 1331; 28 U.S.C. 1367. (Compl., ¶ 1). All of the Defendants, except for DeSalvo, move for dismissal of Plaintiff’s Complaint for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(1). The District Court may “grant a Rule 12(b)(1) motion when the claim clearly appears to be immaterial and made solely for the basis of obtaining jurisdiction or is wholly unsubstantial and frivolous.” Sun Co., Inc. v. Badger Design & Constructors, Inc., 939 F. Supp. 365, 368 (E.D. Pa. 1996 (citing Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-1409 (3d Cir. 1991) (citation omitted)). Without addressing the merits of Plaintiff’s case, the Court finds that it does have subject matter jurisdiction since Plaintiff’s claims are arguable and not so absolutely devoid of merit or frivolous to warrant dismissal for lack of subject matter jurisdiction.

Memorandum of Judge Robert F. Kelly, at 2 n.2. For the same reasons, the Court declines to dismiss this case at this time for lack of subject matter jurisdiction. Additionally, the Court finds that the defendants’ arguments regarding personal jurisdiction and venue are now moot as they relate to jurisdiction and venue in Pennsylvania. Moreover, the defendants have not raised these arguments as they relate to the District of Connecticut in their supplemental briefs.

The Court will address the defendants’ remaining arguments below.

**B. New England Equity Defendants**

The New England Equity defendants (Clark, Plummer, and New England Equity) argue, inter alia, that the settlement agreement, the arbitration award, and the Connecticut state court judgment regarding the arbitration award bar relitigation of the issues raised against them in Stamford Holding Company (“SHC”)’s complaint. The New England Equity defendants also seek to compel arbitration as an alternative to dismissal. For the following reasons, the Court concludes that the preclusive effect of the prior arbitration must be arbitrated.

In National Union Fire Insurance Company of Pittsburgh, P.A. v. Belco Petroleum Corporation, 88 F.3d 129 (2d Cir. 1996), the Second Circuit held that an arbitration agreement and

the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq., required that the preclusive effect of a prior arbitration be arbitrated. The case concerned insurance claims by Belco against National Union and other insurers stemming from the Peruvian government's seizure of Belco's oil exploration and development operations in Peru. See Belco, 88 F.3d at 131. The insurance agreement contained a clause providing that "all disputes which may arise under or in connection with this policy" were to be arbitrated. Id. Pursuant to that agreement, a dispute regarding the insurance claims was arbitrated. An arbitration award issued, and the New York State Supreme Court confirmed that award. See id.

A subsequent dispute arose regarding the insurance claims, and a second arbitration was convened. While the second arbitration proceeded, Belco filed a complaint in federal court seeking a declaratory judgment on the insurance claims based on res judicata. The district court held that the preclusive effect of the prior arbitration should be arbitrated, pursuant to the insurance agreement. Id. at 132. The Second Circuit affirmed the district court's decision, holding that (1) federal law applied, and (2) the preclusive effect of the prior arbitration fell within the scope of the arbitration agreement. Id. at 135-36.

According to the Second Circuit, the arbitrability of a dispute "comprises the questions of (1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement. Under section 4 of the FAA these are the principal questions for the court to decide . . . ." Id. at 134. "[W]hen the parties have a contract that provides for arbitration of some issues," the question becomes "whether a particular merit-related dispute is arbitrable because it is within the scope of a valid arbitration agreement." Id. (quotation omitted). In that context, "any doubts concerning the

scope of arbitrable issues should be resolved in favor of arbitration.” Id.

Finding that the preclusive effect of the prior arbitration was itself an arbitrable issue in Belco, the Second Circuit held:

Belco's claim of preclusion is a legal defense to National Union's claim. As such, it is itself a component of the dispute on the merits. Belco's attempt to characterize the preclusion issue as not related to the merits is unavailing. It is as much related to the merits as such affirmative defenses as a time limit in the arbitration agreement or laches, which are assigned to an arbitrator under a broad arbitration clause similar to the one in the AIG Policy. As discussed above, the arbitration provision in the AIG Policy is sufficiently broad to encompass disputes about what was decided in a prior arbitration. The provision covers "[a]ll disputes which may arise under or in connection with this policy", and is not limited, as Belco contends, to disputes that require an interpretation of the AIG Policy. We do not believe that the arbitration provision is ambiguous, but even if it were, the FAA would require resolving any ambiguity in favor of arbitration.

Id. (internal citations omitted).

The Second Circuit reached a similar conclusion in United States Fire Insurance Company v. National Gypsum Company, 101 F.3d 813 (2d Cir. 1996). There, the Second Circuit held that a claim of collateral estoppel based on an earlier court decision was an arbitrable issue. The court again considered the FAA's "strong presumption" of arbitrability and found that issue preclusion relates to the merits of an agreement. National Gypsum, 101 F.3d at 816-17. The court also found that the arbitration clause contained within the agreement was broad, and there was no doubt as to "whether the parties intended [issue preclusion] be subject to arbitration." See id. The court also noted the fact that the collateral estoppel issue required interpretation of the agreement. Accordingly, the Second Circuit reversed the district court's ruling on the collateral estoppel of the earlier court decision and indicated that the claim of issue preclusion should be raised before an arbitrator. Id. at 817.

Other circuits and district courts have reached similar conclusions. In United Computer

Systems, Inc. v. AT&T Corporation, 298 F.3d 756 (9<sup>th</sup> Cir. 2002), the Ninth Circuit held that, notwithstanding the defendant’s “forceful argument that this case is nothing more than a naked attempt to re-litigate claims that were finally laid to rest in [the prior arbitration],” id. at 763, the broad language of the arbitration clause and the policies of the FAA required the preclusive effect of the prior arbitration to be arbitrated, id. at 766. See also Chiron Corp. v. Ortho Diagnostic Systems Inc., 207 F.3d 1126, 1132 (9<sup>th</sup> Cir. 2000). In North River Insurance Company v. Allstate Insurance Company, 866 F. Supp. 123 (S.D.N.Y. 1994), then-district judge Sotomayor noted the relevant arbitration clause’s expansive reach and the policies of the FAA, and held that the “question of whether to apply collateral estoppel . . . is no different from an adjudication by the arbitrators of any other matter in dispute between the parties.” Id. at 129. Judge Sotomayor also noted that the confirmation of the arbitration award by a state court did not affect the issue. Id. Accordingly, Judge Sotomayor held that the preclusive effect of the prior arbitration must be decided by arbitrators, rather than the court. Id. at 129-30 (citing Transit Mix Concrete Corp. v. Local Union No. 282, 809 F.2d 963, 965 (2d Cir. 1987)); see also Philadelphia Electric Company v. Nuclear Electric Ins. Ltd., 845 F. Supp. 1026, 1029 (S.D.N.Y. 1994).

In the instant case, the Court notes that SHC does not dispute that the Agreement and Addendum contain agreements to arbitrate. Nor does SHC argue that the Agreement and Addendum or the agreements to arbitrate are void. However, SHC argues that it was not a party to the Agreement or Addendum. In resolving this issue, in the context of a request to compel arbitration, the

Court “applies a standard similar to that applicable for a motion for summary judgment.”<sup>7</sup> Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003) (citations omitted). Using that standard, the Court finds that there is no genuine issue of material fact that SHC is bound by the Agreement and Addendum.

Paragraph 10 of the Agreement and paragraph 5 of the Addendum provide that the agreement “shall be binding upon the parties, their executors, administrators, heirs, successors, assigns, principals, solicitors and all associated parties involved in the transactions that are the subject matter to this agreement.” There is no genuine issue of material fact that SHC was an associated party to the other parties and to the transactions that were the subject matter of the Agreement and Addendum. Indeed, SHC was created in furtherance of New England Equity’s obligations under those agreements to manage the Massullo financial situation. Additionally, as noted above, Dr. Massullo is the sole shareholder of SHC. Both the relationship between Dr. Massullo and SHC, and SHC’s connection to the transactions associated with the Agreement and Addendum indicate all parties intended SHC to be bound by the Agreement and Addendum. SHC has not presented any evidence in contravention. Accordingly, there is no genuine issue of material fact as to whether SHC is bound by the Agreement and Addendum.

As to the agreement to arbitrate the preclusion issue, the Court notes that arbitration clauses contained within the Agreement and Addendum are quite broad. Paragraph 11 of the Agreement and

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<sup>7</sup>Though the New England Equity defendants’ request to compel arbitration is raised in the context of a motion to dismiss, the Court finds the summary judgment standard appropriate, as stated by the Second Circuit in Bensadoun. In any event, SHC has been given an opportunity to develop a factual record here. This applies equally to Merrill Lynch’s request to compel arbitration.

paragraph 6 of the Addendum provide that “in the event of a dispute concerning any aspect of this agreement, including breach or claimed breach thereof, the parties agree to have any such matter arbitrated . . . .” This language is similar to the broad language in Belco, National Gypsum, and North River. Additionally, as in Belco, “[n]othing in the arbitration clause gives any indication that anyone other than the arbitrator should decide the preclusive effect of a prior arbitration.” Id. at 134-35.

The only apparent difference between the instant case and the cited cases is that the arbitrator here confirmed the terms of a settlement agreement reached between the parties during the arbitration in making his award. The Court does not find this difference to be of any material significance, however. Courts have held that a dispute regarding a settlement agreement may be an arbitrable issue pursuant to an arbitration clause. See, e.g., Inland Boatmans Union of the Pacific v. Dutra Group, 279 F.3d 1075, 1078-80 (9<sup>th</sup> Cir. 2002) (holding that dispute over alleged breach of settlement agreement was required to be arbitrated where settlement agreement resolved grievance that was required to be arbitrated under arbitration clause); Niro v. Fearn Int’l Inc., 827 F.2d 173, 175 (7<sup>th</sup> Cir. 1987) (holding that settlement agreement was “an arbitrable subject when the underlying dispute is arbitrable, except in circumstances where the parties expressly exclude the settlement agreement from being arbitrated). Here, there is no question that the settlement agreement resolved arbitrable disputes.

In sum, the Court concludes that the arbitration clauses of the Agreement and Addendum require the preclusive effect of the prior arbitration and settlement agreement to be arbitrated. Moreover, even if the arbitration clauses were ambiguous on this issue, “the FAA would require resolving any ambiguity in favor of arbitration.” Belco, 88 F.3d at 136.

In light of the foregoing, the portions of the New England Equity defendants’ Motion to Dismiss

and for Other Relief [Doc. #12] that seek to compel arbitration and a stay are GRANTED.<sup>8</sup>

Arbitration is hereby ordered in accordance with the arbitration provisions of the Agreement and Addendum.

**C. Merrill Lynch**

Merrill Lynch also argues that SHC's claims against it must be arbitrated. Merrill Lynch has provided the Court with two "Account Agreements" that were executed on August 8, 1995, and relate to two financial services accounts that were opened in SHC's name and into which Dr. Massullo and SHC deposited funds. The Account Agreements include clauses that provide that all controversies which arise between SHC and Merrill Lynch relating to the agreements shall be determined by arbitration. Merrill Lynch has moved to compel arbitration of SHC's claims against Merrill Lynch in the instant action and stay all proceedings until arbitration is complete.

As noted above, the FAA codifies a federal policy favoring arbitration as an alternative to litigation. See Perry v. Thomas, 482 U.S. 483, 488 (1987). Also as noted above, "[i]n the context of motions to compel arbitration brought under the [FAA], the court applies a standard similar to that applicable for a motion for summary judgment. Par- Knit Mills v. Stockbridge Fabrics Co., 636 F.2d 51, 54 n. 9 (3d Cir.1980); Doctor's Associates v. Distajo, 944 F.Supp. 1010, 1014 (D. Conn.1996), aff'd, 107 F.3d 126 (2d Cir.1997). If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary. 9 U.S.C. § 4." Bensadoun, 316 F.3d at 175. That is, "a court may compel arbitration under the Act only if the agreement is not null and void, inoperative or incapable

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<sup>8</sup>Accordingly, the Court will not address the New England Equity defendants' alternative arguments for dismissal.

of being performed. If the making of the agreement to arbitrate is placed in issue . . . the court must set the issue for trial. However, the party putting the agreement to arbitrate in issue must present some evidence in support of its claim before a trial is warranted.” Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co., 263 F.3d 26, 30 (2d Cir.2001) (internal quotation marks and citation omitted); see also Almacenes Fernandez, S.A. v. Golodetz, 148 F.2d 625, 628 (2d Cir. 1945) ("To make a genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the agreement had been made was needed, and some evidence should have been produced to substantiate the denial.").

As the Supreme Court held in Prima Paint Corp. v. Flood & Conklin Mfg Co., 388 U.S. 395, 403-04 (1967), where a contract contains an arbitration clause that is covered by the FAA, a federal court may not hear a claim of fraud in the inducement of the entire contract, but may hear a claim of fraud in the inducement of the arbitration clause contained within that contract. Interpreting Prima Paint, however, the Second Circuit held that, “[i]f a party alleges that a contract is void and provides some evidence in support, then the party need not specifically allege that the arbitration clause in that contract is void, and the party is entitled to a trial on the arbitrability issue . . . .” Sphere Drake, 263 F.3d at 32. In reaching this conclusion, the Second Circuit distinguished void and voidable contracts. See id. at 31. “A void contract is one that produces no legal obligation,” while a voidable contract produce legal obligations until rescinded. Id. The Second Circuit held that Prima Paint precluded courts from hearing claims of fraud in the arbitration clause where a party claims the contract containing that clause is voidable, rather than void. See id. at 31-32. Where the party claims that the contract is void and presents some evidence substantiating that claim, however, Prima Paint does not prohibit a trial on the arbitrability issue, according to the Second Circuit. See id.

Here, SHC does not specify its allegations of fraud as to the arbitration clauses of the account agreements. Rather, SHC argues that “no individuals were authorized to enter into [the account agreements] on behalf of [SHC].” Pl’s. Supp. Mem. at 17; see also Pl’s Opp’n at 12. SHC has submitted an affidavit from Dr. Massullo contending that the agreements were “a nullity and a fraud.” Second Massullo Aff. (filed March 19, 2002) at 4. Thus, it appears that SHC is claiming that the entire agreements are void. See Sphere Drake, 263 F.3d at 32.

The evidence presented, however, is insufficient to create a genuine issue of material fact that the agreements are void. First, as Merrill Lynch points out, SHC has not “unequivocally” denied the existence and enforceability of the account agreements. Rather, SHC’s denial occurred only after Merrill Lynch sought to compel arbitration. Dr. Massullo’s claim that the agreements are void is completely lacking in his first affidavit filed in this case. Compare First Massullo Aff. (filed March 5, 2002) with Second Massullo Aff. Additionally, those allegations contradict the amended complaint filed by Dr. Massullo in the Ohio lawsuit, where Dr. Massullo alleged that Clark opened the accounts within her capacity as President and Secretary of SHC. Finally, SHC has not created a genuine issue of material fact as to whether Clark’s opening of the accounts with Merrill Lynch was an unauthorized act. Moreover, unlike in Sphere Drake, SHC has not created a genuine issue of material fact as to whether Merrill Lynch had any basis to conclude that Clark was unauthorized to execute the agreements and therefore lacked actual or apparent authority. Accordingly, SHC has failed to establish a genuine issue of material fact as to the arbitrability of the account agreements, and arbitration must be ordered in accordance with the account agreements. See Bensadoun, 316 F.3d at 175.

In light of the foregoing, Merrill Lynch’s motion to compel arbitration and for a stay is

GRANTED.<sup>9</sup> Arbitration is hereby ordered in accordance with the arbitration provisions of the account agreements.

**D. DeSalvo and Irving**

DeSalvo and Irving raise several grounds for the dismissal of the claims against them.

However, in light of the above orders for arbitration, the Court concludes that the appropriate course would be to stay the case as to them. Cf. Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 856 (2d Cir.1987) (holding that "[b]road stay orders are particularly appropriate if the arbitrable claims predominate the lawsuit and the nonarbitrable claims are of questionable merit"). Accordingly, their motions to dismiss are DENIED, without prejudice to renewal following the completion of the arbitrations above.<sup>10</sup> Additionally, the case is STAYED as to these defendants as well.

**V. Conclusion**

For the preceding reasons, Merrill Lynch's motions for arbitration and a stay [Docs. # 8-2, 8-3] are GRANTED; Merrill Lynch's Motion to Dismiss [Doc. #8-1] is DENIED.

Clark, Plummer, and New England Equity's Motion to Dismiss and for other Relief [Doc. #12] is GRANTED IN PART. The requests to compel arbitration and for a stay are GRANTED. The motion to dismiss is DENIED, and the motion for attorney's fees and costs is DENIED, without prejudice to renewal following the completion of the arbitration.

DeSalvo's Motion to Dismiss [Doc. #66] is DENIED, without prejudice; and Irving's Motion

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<sup>9</sup>Accordingly, the Court will not address Merrill Lynch's alternative arguments for dismissal.

<sup>10</sup>Furthermore, to the extent DeSalvo joined Merrill, Lynch's request for arbitration and a stay, that request is denied, without prejudice, as DeSalvo has not alleged or established that she was a party to the account agreements.

to Dismiss and for Costs [Docs. #18-1, #18-2] is DENIED, without prejudice.

The case is hereby STAYED pending completion of the arbitrations.

SO ORDERED this \_\_\_\_\_ day of March 2003, at Hartford, Connecticut.

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**CHRISTOPHER F. DRONEY**  
**UNITED STATES DISTRICT JUDGE**