UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAN A. DORAN, BARBARA A. SOLOMONSON, LEONARD FAWCETT, LINDA FAWCETT, DIANNA J. IVES, JOYCE A. SHERIDAN, HARVEY L. SCHROEDER, and WILLIAM WAGNER,

Plaintiffs,

Case No. 5:04-CV-99

v.

SUSAN BONDY,

HON. GORDON J. QUIST

Defendant.
/

**OPINION**

Plaintiffs have filed a complaint against Defendant, Susan L. Bondy ("Bondy"), seeking an order compelling Bondy to submit to arbitration before the American Arbitration Association ("AAA"). Plaintiffs allege that this Court has jurisdiction over the case pursuant to 28 U.S.C. § 1332(a) because their claims exceed $75,000 and the parties are diverse, as Plaintiffs reside in Michigan and, at the time Plaintiffs filed their complaint, Bondy resided in New York. Presently before the Court are Plaintiffs' motion for leave to amend their complaint and motion to compel arbitration and Bondy's motion to dismiss.

**Background**

Bondy provided professional investment and asset management services to Plaintiffs in Traverse City, Michigan until approximately May 2002. In connection with those services, Plaintiffs signed a written agreement entitled "Investment Management Agreement for Money

Management Accounts" (the "Investment Agreements") with Bondy Financial Services Corp. ("BFSC"). Bondy, the sole director, sole shareholder, and President of BFSC, signed the Investment Agreements on behalf of BFSC. Paragraph 10 of the Investment Agreements contains the following arbitration provision:

> The parties agree that any controversy or claim arising out of or relating to this Agreement, or the breach thereof, will be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgement upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. However, this provision shall not constitute a waiver of any right provided under any federal securities or state laws, including the right to choose the forum, whether arbitration or adjudication, in which to seek resolution of any controversy or claim.

(Investment Agreement ¶ 10.)

Plaintiffs allege that Bondy failed to administer their accounts in accordance with their investment objectives and, as a result, they sustained substantial losses. In May 2004, Plaintiffs filed individual claims against Bondy with the AAA alleging that Bondy mismanaged their accounts. Thereafter, Bondy objected to arbitration based upon the language of the Investment Agreements and a prior decision issued by a state court judge in the case of Dean A. Robb, Sr. and Cynthia Robb v. Susan Bondy and Bondy Financial Services Corporation, No. 02-22203-CZ (Traverse County, Mich. Circuit Ct.) (hereafter referred to as "Robb"). In that case, Judge Philip E. Rodgers, Jr. denied Bondy's and BFSC's motion for summary disposition and motion to compel arbitration because he found that the arbitration provision did not preclude the plaintiffs from pursuing their claims in court. Plaintiffs filed their complaint in this case on July 20, 2004, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 - 208. On November 9, 2004, Plaintiffs filed a motion for leave to amend their complaint in order to: (1) clarify the basis for their claim that Bondy is bound by the arbitration provision in the Investment Agreement; and (2) allege that the Court has

supplemental jurisdiction over the claim of Plaintiffs Doran and Solomonson which, Plaintiffs concede, does not meet the amount in controversy requirement. The Court initially referred Plaintiffs' motion to amend to Magistrate Judge Brenneman for decision, but subsequently vacated the order referring the motion after Bondy filed a motion to dismiss on November 23, 2004. Finally, on December 21, 2004, Plaintiffs filed a motion to compel arbitration.

**Discussion**

The pending motions raise the following issues: (1) whether this Court lacks subject matter jurisdiction over the case either because BFSC, a Michigan corporation, is the real party in interest or BFSC is a necessary and indispensable party under Fed. R. Civ. P. 19; (2) whether Bondy, as a non-signatory to the Investment Agreements, can be compelled to arbitrate; (3) whether the arbitration provision is mandatory; and (4) whether the Court should exercise supplemental jurisdiction under 28 U.S.C. § 1367 over the claim of Plaintiffs Doran and Solomonson. Because the determination of whether BFSC is a necessary and indispensable party is fundamental to the maintenance of this action, the Court will first address Bondy's motion to dismiss.

**I. Motion to Dismiss**[1]

It is well established that the FAA does not create an independent basis for federal jurisdiction. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32, 103 S. Ct. 927, 942 n.32 (1983). Thus, to establish jurisdiction in federal court in an action to compel arbitration under the FAA, a plaintiff must plead facts upon the face of the complaint showing the

[1]Bondy initially moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(2), which provides for dismissal based upon lack of personal jurisdiction over the defendant. Bondy recognized her initial mistake (or misstatement) in a later-filed brief and now concedes that her motion to dismiss is properly brought under Rule 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(7) for failure to join a party under Rule 19. (Def.'s Br. Resp. Pls.' Mot Compel at 4.)

existence of either diversity jurisdiction or federal question jurisdiction. See Smith Barney, Inc. v. Sarver, 108 F.3d 92, 94-95 (6th Cir. 1997). Plaintiffs allege diversity as a basis for jurisdiction because Plaintiffs are all residents of Michigan, Bondy is a resident of New York, and Plaintiffs' claims (with the exception of the claim of Doran and Solomonson) exceed the jurisdictional threshold.

Bondy contends that diversity is lacking in this case because Plaintiffs failed to name BFSC, which she contends is a necessary and indispensable party. Rule 19, which governs the analysis, provides in pertinent part as follows:

> Rule 19. Joinder of Persons Needed for Just Adjudication
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> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render venue of the action improper, that party shall be dismissed from the action.
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> (b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(a) and (b). The Sixth Circuit has noted that Rule 19 establishes a procedure for determining whether a case should proceed in the absence of a particular party. See PaineWebber, Inc. v. Cohen, 276 F.3d 197, 200 (6th Cir. 2001). First, the court must determine whether the absent "'person is necessary to the action and should be joined if possible.'" Id. (quoting Soberay Mach. & Equip. Co. v. MRF Ltd., 181 F.3d 759, 763-64 (6th Cir. 1999)). If the court determines that a party is necessary, it must next determine whether the party is subject to personal jurisdiction and can be joined without destroying the basis for subject matter jurisdiction. Id. (citing Keweenaw Bay Indian Cmty. v. Mich., 11 F.3d 1341, 1345-46 (6th Cir. 1993)). Finally, the court must determine, in light of the four factors described in Rule 19(b), whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed. Id. (citing Soberay Mach. & Equip. Co., 181 F.3d at 764). "Dismissal should occur only if an indispensable party is not subject to personal jurisdiction or cannot be joined without eliminating the basis for subject matter jurisdiction." Id. If a court determines at the first step that the absent "person is not 'necessary' to the action, no further analysis, and no joinder, is needed." Yates v. Applied Performance Techs., Inc., 209 F.R.D. 143, 148 (S.D. Ohio. 2002) (citing Local 670, United Rubber, Cork, Linoleum & Plastic Workers of Am. v. Int'l Union, 822 F.2d 613, 618 (6th Cir. 1987)).

Bondy contends that BFSC's presence is necessary to the determination of this action because federal courts have consistently held that in contract actions, the parties to the contract are necessary to adjudicate the matter. As support, Bondy cites Soberay Machine & Equipment Co. v. MRF Ltd., 181 F.3d 759 (6th Cir. 1999), and Owens-Illinois, Inc. v. Meade, 186 F.3d 435 (4th Cir. 1999).

In Soberay, the plaintiff, an Ohio corporation engaged in the business of selling machinery,

sold a piece of equipment to another Ohio company referred to as "IPEC." IPEC resold the machine to the defendant, a corporation with its principal place of business in India. The defendant paid IPEC in full for the machine but was unaware that IPEC had purchased the machine from the plaintiff. IPEC paid the plaintiff a part of the purchase price but failed to pay the balance. The plaintiff then sued IPEC in state court seeking to recover the balance of the purchase price. The plaintiff later sued both IPEC and the defendant in federal court to recover the balance owing on the purchase of the machine. Several months later, the district court granted the plaintiff leave to amend its complaint to drop IPEC from the suit and to correct its suit for damages. The amended complaint also alleged that IPEC acted as the defendant's agent in purchasing the machine from the plaintiff. The Sixth Circuit held that IPEC was a necessary party under Rule 19(a)(1) because complete relief could not have been afforded to the plaintiff and the defendant without IPEC in the suit. Although the plaintiff was not successful on its claim against the defendant, the court noted that the defendant would have been required to seek relief against IPEC if the plaintiff had been successful. See 181 F.3d at 764. Moreover, the court found that it was likely, and not speculative, that both parties would have sought further legal recourse against IPEC because IPEC was a signatory to the contract at issue, under which the defendant had already paid IPEC in full. See id.

In Owens-Illinois, the Fourth Circuit held that the district court properly dismissed the plaintiff's petition to compel arbitration because the parties excluded from the petition were necessary and indispensable parties under Rule 19. In that case, asbestos plaintiffs from Ohio and West Virginia filed an action against Owens-Illinois, which had its principal place of business in Ohio, in West Virginia state court. Owens-Illinois responded by filing a motion to compel arbitration and a motion to stay the state court proceedings in federal court in West Virginia based

upon a prior agreement containing an arbitration provision. The petition, which invoked diversity jurisdiction, included only the West Virginia plaintiffs in the state court action. The Fourth Circuit held that the district court properly dismissed the case because the non-diverse Ohio plaintiffs were necessary parties. See 186 F.3d at 441. The court stated that the non-diverse Ohio plaintiffs were necessary because "permitting this suit to continue in both the state and federal courts would likely subject all of the parties to conflicting legal obligations in a manner prohibited by Rule 19(a)(2)(ii)." Id.

Contrary to Bondy's argument, Soberay and Owens-Ilinois are not applicable here because the facts in those cases were materially different from those in this case. In both cases, complete relief could not be obtained without the absent parties. In Soberay, which did not involve a motion to compel arbitration, there was a substantial likelihood of subsequent litigation against IPEC, and in Owens-Illinois, which involved its own unique set of facts, there was a real possibility of conflicting legal obligations because of the existence of two competing lawsuits. In applying Rule 19, general rules, such as that offered by Bondy, are not necessarily helpful, because "[w]hether a party is necessary or indispensable under Rule 19 is determined on a case-by-case basis and each case is to be examined pragmatically." Lambergs v. Total Health Sys, Inc., No. 88-0670-Z, 1989 WL 63243, at *3 (D. Mass. (June 5, 1989). Also, as another court has observed, "it is important to bear in mind the nature of the relief that is requested in the proceedings before the court." Legacy Wireless Servs., Inc. v. Human Capital, L.L.C., 314 F. Supp. 2d 1045, 1051 (D. Or. 2004).

Based upon its own pragmatic analysis, the Court concludes that BFSC is not a necessary party under Rule 19(a)(1). In this case, Plaintiffs request the limited relief of an order compelling Bondy to arbitrate their claims. The Court can grant all of the relief Plaintiffs seek without BFSC's

presence in this case. See Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 446 (2d Cir. 1995) (concluding that absent parties were not necessary because the district court could grant an order compelling arbitration regardless of whether the absent party was present); Legacy Wireless Servs., 314 F. Supp. 2d at 1051 (stating that "the absence of [non-party] HC in no way prevents the court from either entering an order requiring Human Capital to arbitrate or denying Legacy's petition"). BFSC is also not a necessary party under Rule 19(a)(2), because there is no risk that BFSC's absence from this case will impede its ability to protect an interest that it has in this litigation or may subject the parties in this case to double, multiple or inconsistent obligations. Joinder of an absent party is not necessary if the party's interests are adequately represented by the present parties. See Equimed, Inc. v. Genstler, 170 F.R.D. 175, 179 (D. Kan. 1996). Bondy, as the President, sole director, and sole shareholder of BFSC, has interests that are closely aligned, if not identical, to those of BFSC and, therefore, will sufficiently represent BFSC's interests. Moreover, there is no other pending or threatened federal or state court case that could possibly result in double, multiple, or inconsistent obligations for Bondy based upon the claims asserted here.

At oral argument, Bondy's counsel suggested the possibility of inconsistent obligations because the state court in Robb concluded that the arbitration provision did not require the plaintiffs to arbitrate their claims, while this Court may conclude that the arbitration provision is mandatory. Thus, the argument goes, Bondy may be required to litigate or arbitrate, depending upon the whims of plaintiffs in future cases. The Court rejects this argument because it interprets "inconsistent obligations" too broadly. The fact that two courts interpret the same arbitration provision differently in separate lawsuits involving different plaintiffs with distinct claims does not give rise to "inconsistent obligations" under Rule 19. Rather, "inconsistent obligations" means conflicting

judgments arising out of the same claim or related claims based upon the same transaction. For instance, a risk of inconsistent obligations arises where an insurer and its insured file competing actions in state and federal court concerning the issue of whether the insured provided timely notice to the insurer. See Nat'l Union Fire Ins. Co. v. Rite Aid of S. Carolina, Inc., 210 F.3d 246, 252 (4th Cir. 2000).[2] Accordingly, the Court will deny Bondy's motion to dismiss.

## II. Motion to Compel

Plaintiffs have filed a motion requesting that the Court enter an order compelling Bondy to submit to arbitration. This motion raises two issues, namely, whether Bondy, who is not a party to the Investment Agreements, can be required to arbitrate, and whether the arbitration provision requires arbitration or merely allows it.

### A. Bondy as a Nonsignatory to the Investment Agreements

As a general rule, "arbitration is a matter of contract and a party cannot be require to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S. Ct. 1347, 1353 (1960). Thus, although

[2]The Sixth Circuit's decision in PaineWebber, Inc. v. Cohen, 276 F.3d 197 (6th Cir. 2001), provides further support for the conclusion that BFSC is not a necessary party. In that case, Cohen, the executor of an estate, sued PaineWebber and Wilhelm, a PaineWebber branch manager, in state court alleging state law claims. A few days later, PaineWebber filed a petition in federal court seeking to compel Cohen to submit to arbitration pursuant to arbitration provisions in various agreements. Cohen moved to dismiss the petition for lack of subject matter jurisdiction, arguing that Wilhelm was a necessary and indispensable party whose presence would destroy diversity. The district court agreed with Cohen, but the Sixth Circuit reversed. The Sixth Circuit first determined that the district court did not abuse its discretion in determining that Wilhelm was a necessary party because Cohen would be faced with inconsistent procedural remedies against PaineWebber and Wilhelm if the state court and the federal court reached different conclusions about whether certain contract language also covered PaineWebber's employees. Id. at 201. However, the court concluded that Wilhelm was not an indispensable party. In doing so, the court noted that "Cohen's fear that the federal and state courts will reach conflicting interpretations of the arbitration clauses does not present the degree of prejudice necessary to support a conclusion that Wilhelm is an indispensable party." Id. at 203. The court further observed: "Determining whether the dispute is subject to arbitration, however, is a matter of contract interpretation for which Wilhelm's presence and input is not necessary. Analyzed in this manner, the prejudice that Cohen perceives has nothing to do with Wilhelm's absence from PaineWebber's petition to compel arbitration." Id.

there is a strong federal policy favoring arbitration, a party cannot be forced to arbitrate unless he has agreed to do so. See McCarthy v. Azure, 22 F.3d 351, 355 (1st Cir. 1994). However, courts have held that nonsignatories can, in certain situations, be bound by arbitration provisions under ordinary contract and agency principles. See Arnold v. Arnold Corp., 920 F.2d 1269, 1281 (6th Cir. 1990). Five theories have been recognized as bases for binding nonsignatories to arbitration agreements: (1) incorporation by references; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel. See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000).

Plaintiffs argue that Bondy is bound by the arbitration provision under theories of agency and estoppel. The Court finds it unnecessary to consider whether estoppel applies to the circumstances in this case, because Bondy's alleged misconduct occurred while she was acting in her capacity as an agent or employee of BFSC.

Federal courts, including the Sixth Circuit, have held that the agents and employees of a principle subject to an arbitration agreement will be bound by the agreement even though they did not sign the agreement where the employee's or agent's acts give rise to the plaintiff's claim. See Arnold, 920 F.2d at 1281-81 (holding that the arbitration clause to which the defendant corporation was bound was applicable to the nonsignatory individual defendants, whose alleged wrongful acts were committed in the course of operating the corporation as officers and directors); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1121 (3d Cir. 1993) ("Because a principal is bound under the terms of a valid arbitration clause, its agents employees, and representatives are also covered under the terms of such agreements."). Courts have often applied this principle to claims brought by a customer against a financial investment firm and the agent or financial

representative who serviced the customer's account. For example, in Letizia v. Prudential Bache Securities, Inc., 802 F.2d 1185 (9th Cir. 1986), the plaintiff sued the brokerage firm, his account executive, and the executive's supervisor, alleging that they had churned his account and traded securities on his behalf without regard to his investment objectives. The Ninth Circuit observed that courts in other similar cases had held that the brokerage firm employees were bound by the arbitration agreements under agency principles. Id. at 1188. The court concluded that the same rule applied in that case because the individual defendants' alleged wrongful acts related to their handling of the plaintiff's account and the principal "clearly indicated its intention to protect its employees" in the customer agreement containing the arbitration clause. Id. See also McCarthy v. Azure, 22 F.3d 351, 357 (1st Cir. 1994) (noting the routine application of agency principles to bind nonsignatory agents in "disputes growing out of service contracts between individuals and financial institutions"); Pritzker, 7 F.3d at 1121-22 (holding that an arbitration provision between the plaintiff pension plan trustees and the defendant securities broker applied to a nonsignatory financial consultant employed by the broker and stating that "[i]n keeping with the federal policy favoring arbitration, we share the views of the Courts of Appeals for the Sixth and Ninth Circuits and will extend the scope of the arbitration clauses to agents of the party who signed the agreements"); Lee v. Chica, 983 F.2d 883, 886 (8th Cir.1993) ("Federal courts have found that an arbitration agreement between a customer and a brokerage firm can also be binding on the agent who represented or traded in the customer's account even if the agent had not signed the customer agreement.").

Although most of the cases holding that an agent is bound by the brokerage firm's arbitration agreement with the customer occur in the posture of the nonsignatory agent or representative seeking

the benefit of arbitration, at least one case has held that a nonsignatory agent may be required to arbitrate pursuant to the brokerage's agreement. In Lee v. Chica, 983 F.2d 883 (8th Cir. 1993), the plaintiff signed a customer agreement containing an arbitration provision with a broker dealer. Chica was the plaintiff's sole account representative. The arbitration provision provided, in part, as follows: "If any controversy arises out of this agreement, it shall be determined by arbitration, except where prohibited by law." Id. at 884. The plaintiff subsequently filed a demand for arbitration against the broker dealer and Chica, alleging that they opened a margin account in her name without disclosing the risks to her. Neither defendant answered the demand for arbitration, and the plaintiff obtained an award against both the broker dealer and Chica. Subsequently, a federal district court confirmed the award. On appeal, Chica argued that he should not be a party to the action because he did not sign the arbitration agreement. The Eighth Circuit rejected the argument because it found that as an agent of the broker dealer, Chica was bound by its agreement to arbitrate. Id. at 886. The court held that Chica was bound because all of the plaintiff's allegations against Chica arose out of his actions as the broker dealer's employee. In addition, the court noted that the plain language of the arbitration agreement showed that it was intended to cover the plaintiff's claims against Chica. Id. at 887.

In this case, there is no dispute that all of the actions Bondy took in connection with the management of Plaintiffs' accounts were performed in her capacity as an agent of BFSC. In addition, the language of the arbitration agreement, which states that "[t]he parties agree that any controversy or claim arising out of or relating to this Agreement, or the breach thereof, will be settled by arbitration," demonstrates, as in Lee, an intention to arbitrate all claims against Bondy arising out of her services performed as an agent of BFSC. Accordingly, the Court concludes that

under Lee, which it finds persuasive, Bondy can be compelled to arbitrate Plaintiffs' claims against her based upon her performance of financial services as an agent of BFSC.

**B. Whether the Arbitration Clause is Mandatory or Permissive**

The remaining issue concerning Plaintiffs' motion to compel is whether the arbitration clause requires or merely permits arbitration of Plaintiffs' claims. The issue is not one of scope, i.e., whether the claims at issue fall within the scope of the arbitration clause, because Bondy admits that Plaintiffs' claims would be arbitrable. Rather, the issue is whether the clause requires arbitration or permits it upon the mutual consent of the parties. In deciding this issue, the Court will apply state law contract principles. See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."); Perry v. Thomas, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 2527 n.9 (1987) (stating that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally"); Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 315 (6th Cir. 1998) (applying Michigan law to determine that the defendant's president did not sign the contracts in his individual capacity); Bell Atl. Corp. v. CTC Communications Corp., No. 98-7163, 1998 WL 536731, at *2 (2d Cir. July 2, 1998) (applying state law to determine whether arbitration was mandatory or permissive). Because the Investment Agreements provide that they are governed by Michigan law, the Court will apply Michigan rules of contract interpretation.

The primary goal of contract interpretation is to give effect to the parties' intent. Mikonczyk v. Detroit Newspapers, Inc., 238 Mich. App. 347, 349-50, 605 N.W.2d 360, 362 (1999) (per curiam).

To achieve this goal, courts must interpret contracts "according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense." Kingsley v. Am. Cent. Life Ins. Co., 259 Mich. 53, 55, 242 N.W. 836, 836 (1932) (quoting Imperial Fire Ins. Co. v. Coos County, 151 U.S. 452, 463, 14 S. Ct. 379, 381 (1894)). The court should interpret a contract, if possible, in a manner that reasonably gives effect to all provisions. De Boer v. Geib, 255 Mich. 542, 544, 238 N.W.226, 226 (1931); see also Klapp v. United Ins. Group Agency, Inc., 468 Mich. 459, 468, 663 N.W.2d 447, 453 (2003) (stating that "courts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory"). Where the parties' intent cannot be discerned by other means, ambiguities in a contract must be construed against the drafter. Wilkie v. Auto-Owners Ins. Co., 469 Mich. 41, 60, 664 N.W.2d 776, 786 (2003). A contract is ambiguous if the language is susceptible to two or more reasonable interpretations. Petovello v. Murray, 139 Mich. App. 639, 642, 362 N.W.2d 857, 858 (1984).

Although Plaintiffs and Bondy have made valiant efforts to explain why the arbitration clause is not ambiguous (and favors their respective positions), as the Court indicated at oral argument, it concludes that the arbitration clause is hopelessly ambiguous. The first sentence of the clause provides in explicit terms that "any controversy or claim arising out of or relating to this Agreement, or the breach thereof, will be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association . . . ." While this sentence mandates arbitration, the second sentence suggest that arbitration is optional: "However, this provision shall not constitute a waiver of any right provided under any federal securities or state laws, including the

right to choose the forum, whether arbitration or adjudication, in which to seek resolution of any controversy or claim." Plaintiffs contend that these two sentences are consistent, because the first sentence states that the parties agreed to arbitrate their claims, but the second sentence reserves to BFSC clients the right to choose between arbitration and litigation. Bondy, on the other hand, contends that the last sentence simply means that arbitration is optional at the mutual consent of the parties. Plaintiffs' argument must be rejected, because nothing in the second sentence limits the purported reservation of rights to BFSC clients. Rather, the language says that it does not constitute "a waiver of any right," presumably by either party. Furthermore, neither Plaintiffs nor Bondy have offered an interpretation which gives effect to both sentences of the arbitration clause. Finally, the Court rejects Bondy's suggestion that the Court should adopt the state court's interpretation in Robb because the state court's interpretation is not binding upon this Court. In addition, because the parties have only provided to this Court the state court's order denying the motion, this Court has no idea why the state court denied the motion.

The Court's conclusion that the clause is ambiguous does not mean that Plaintiffs are entitled to an order compelling arbitration, at least at this point. "If a contract is subject to two interpretations, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate." Mahnick v. Bell Co., 256 Mich. App. 154, 159, 662 N.W.2d 830, 833 (2003) (per curiam). In such case, extrinsic evidence may be considered to determine the understanding of the parties. Klapp, 468 Mich. at 469-70, 663 N.W.2d at 454. See also Aggrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co., 242 F.3d 777, 781 (8th Cir. 2001) (noting that extrinsic evidence may be considered regarding the parties' intent on arbitrability); Habitat Architectural Group, P.A. v. Capital Lodging Corp., No. 01-1106, 2002 WL 86682, at *3 (4th Cir. Jan. 23, 2002)

(holding that the district court properly considered extrinsic evidence in order to clarify the parties intent regarding an ambiguity concerning a term in the arbitration agreement). Because neither Plaintiffs nor Bondy has presented any extrinsic evidence to help resolve the ambiguity (and such evidence may be available), the Court will deny Plaintiffs' motion to compel without prejudice to allow the parties to conduct discovery on the existence of extrinsic evidence that may be helpful in clarifying the parties' intent.

**III. Motion to Amend**

Plaintiffs' motion to amend raises the issue of whether the Court may exercise supplemental jurisdiction over the claims of plaintiffs, in a non-class action setting, where such claims do not exceed $75,000. The supplemental jurisdiction statute permits federal district courts to exercise jurisdiction as follows:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
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> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(a) and (b).

The Sixth Circuit has not addressed the precise issue in this case. Recently, however, in Olden v. LaFarge Corp., 383 F.3d 495 (6th Cir. 2004), the Sixth Circuit held that the supplemental

jurisdiction statute confers jurisdiction in a class action based upon diversity over the claims of class members that independently do not meet the amount in controversy requirement. Joining the Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits, the Sixth Circuit held in Olden that the language of § 1367 unambiguously overrules the Supreme Court's decision in Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 505 (1973), which held that each unnamed class member must satisfy the jurisdictional amount even if the class representatives do so without aggregation. Although the court acknowledged that legislative history supported the conclusion that Congress did not intend § 1367 to overrule Zahn, it concluded that resort to the legislative history is improper because the statute is unambiguous and "achieves its intended purpose without any absurd result." Id. at 506-07. The court observed that the structure of § 1367 makes the statute unambiguous, because § 1367(a) "contains a sweeping grant of supplemental jurisdiction over all claims not excluded by" § 1367(b), and any exclusion from the broad grant in subsection (a) would naturally be included in subsection (b). Id. at 504. Thus, because Rule 23 (governing class actions) was not listed as an exclusion in subsection (b), district courts have supplemental jurisdiction in diversity class action cases. Id.

The Olden court cited, and concurred with, the Seventh Circuit's decision in Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996), which, like this case, did not involve a class action. In Stromberg, two plaintiffs, Stromberg and Comfort Control, filed suit against Press Mechanical, Inc. and individuals who were alleged to have controlled Press Mechanical, Inc. asserting separate claims arising out of the same construction project. Stromberg's claim exceeded the jurisdictional threshold, but Comfort Control's claim did not. The issue was whether supplemental jurisdiction extended to Comfort Control's claim. Id. at 930. Following the Fifth Circuit's decision in In re Abbott Laboratories, 51 F.3d 524 (5th Cir. 1995), which involved

a diversity class action, as in Olden, the court held that it did. The court first observed that the language of § 1367(a) is sufficiently broad to extend supplemental jurisdiction over a claim by a pendent party even if that party meets neither the diversity or jurisdictional amount requirements. Id. at 931. The court declined to distinguish the case from Abbott, which, like Zahn, involved a class action, because "§ 1367 does not distinguish class actions from other cases," and Zahn merely applied the rule set forth in Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S. Ct. 744 (1939), that each plaintiff's claim must meet the jurisdictional threshold, to class actions. Id. The court observed:

> To the extent practical considerations enter in, it is hard to avoid remarking that allowing thousands of small claims into federal court via the class device is a substantially greater expansion of jurisdiction than is allowing a single pendent party. It is therefore easy to imagine wanting to overturn *Clark* but not *Zahn*; it is much harder to imagine wanting to overturn *Zahn* but not *Clark*, and we have no reason to believe that Congress harbored such a secret desire.

Id. The court then addressed the apparent incongruity created by the exclusion in § 1367(b) for claims against persons made parties under Rule 20 (joinder for convenience) but not for claims by parties who join under Rule 20. The court reasoned that the difference in treatment was intended to prevent complete diversity from being destroyed by the addition of a non-diverse defendant, while allowing "an additional plaintiff with a closely related claim against the defendants who are already in the federal forum" where the principal action is jurisdictionally firm. Id. at 932. Finally, the court concluded that the claims of Stromberg and Comfort Control were sufficiently related for purposes of § 1367 because the plaintiffs were affiliated corporations under common control, the claims arose out of the same construction project, and the defendants were alleged to have engaged in the same course of conduct with respect to both plaintiffs, thus giving rise to identical factual and legal issues. Id.

Even though the instant case is not a class action, the Court concludes that the analysis in

Olden applies and that the Sixth Circuit would apply the same reasoning to this case, as did the Seventh Circuit in Stromberg. Based upon its review of Olden, this Court cannot construct a plausible argument to distinguish the application of § 1367 in class actions from non-class action cases because the principle is the same: so long as one plaintiff's claim is within the district court's original jurisdiction, it may exercise supplemental jurisdiction over other plaintiffs' claims not within the court's original jurisdiction if they are sufficiently related. In her brief and at oral argument, Bondy relied heavily upon Ortega v. Star-Kist Foods, Inc., 370 F.3d 124 (1st Cir. 2004), which rejected Stromberg and instead adopted the reasoning of the Third and Tenth Circuits in Meritcare, Inc. v. St. Paul Mercury Insurance Co., 166 F.3d 214 (3d Cir. 1999), and Leonhardt v. Western Sugar Co., 160 F.3d 631 (10th Cir. 1998). Given the Sixth Circuit's rejection of Leonhardt's analysis as an "[un]natural reading of the statute," Olden, 383 F.3d at 503, the Court declines to adopt the reasoning in Ortega, which, as the dissent in that case notes, "ignores the plain meaning of § 1367, causes the same word in the statue to have two meanings, and makes an entire provision of § 1367 meaningless." Ortega, 370 F.3d at 144-45 (Torruella, J., concurring in part and dissenting in part).

Bondy also contends that the Court cannot exercise supplemental jurisdiction over Doran's and Solomonson's claim because the claim is not so closely related to the claims of the other Plaintiffs as to form part of the same case or controversy. The Court disagrees. While it is true that Plaintiffs entered into separate investment agreements with Bondy and had different investments, investment objectives, and levels of sophistication, this case involves one discreet issue: whether the arbitration clause requires Bondy to arbitrate Plaintiffs' claims. This issue is common to all Plaintiffs, and there is no need for this Court to decide individual factual issues. Accordingly, the

Court will grant Plaintiffs' motion to amend and exercise supplemental jurisdiction over the claim of Doran and Solomonson.

## Conclusion

For the foregoing reasons, the Court will: (1) deny Bondy's motion to dismiss; (2) deny Plaintiffs' motion to compel, without prejudice; and (3) grant Plaintiffs' motion to amend.

An Order consistent with this Opinion will be entered.

Dated: February 18, 2005

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE