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

MARUBENI CORPORATION and MARUBENI PULP AND PAPER (NORTH AMERICA), INC.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 02-0914-P-L
MOBILE BAY WOOD CHIP CENTER, SOUTHEAST WOOD FIBER, LLC and MID ATLANTIC TERMINALS, LLC,	)	
Defendants.	)	

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

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

action and this action pending arbitration proceedings. Id.[1]

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

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

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

F.R.D. 480, 489 (M.D.Fla. (Oct. 7, 1999)) (citing Gov't Personnel Serv., Inc. v. Gov't Personnel Mut. Life Ins. Co., 759 F.Supp. 792, 793 (M.D.Fla. (Mar. 14, 1991)), *aff'd*, 986 F.2d 507 (11th Cir. 1993)).

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

As noted in this court's June 16, 2003 Order, this court found that it had original jurisdiction under 9 U.S.C. §§ 201-208, the Convention, and a valid arbitration agreement existed which governed the business relationship of the parties, their dealings, and the underlying dispute, i.e., the Suppliers' fraud and misrepresentation claims[2] (see doc.27, p.14-24).

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

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

of the contention. Sonnier, 168 F.Supp.2d at 1336; Alabama State Docks, 1998 WL 1749263, at *1. As such, the Suppliers' request to reconsider the Order compelling arbitration is hereby DENIED.

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

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

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

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

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

This court finds both cases distinguishable from the case *sub judice*.[3] Both Dean Witter, and

[3] In Dean Witter Reynolds, Byrd invested $160,000 in securities through Dean Witter. The Customer Agreement, executed by Byrd, contained an arbitration provision pursuant to 9 U.S.C. §§ 1-14. When Byrd's account suffered a serious decline in a seven-month period, he filed an action against Dean Witter in federal court alleging violations of the Securities

Dimenstien, involve arbitration under the FAA, and both address dichotomies between provisions of the Security Exchange Act of 1934, and the FAA (Security Exchange claims are not arbitrable, Dean Witter, 470 U.S. at 215, n.1; Dimenstien, 759 F.2d at 1516). The FAA requires an independent basis for jurisdiction, e.g., diversity.

Herein, however, the controversy involves arbitrable claims under the Convention which mandates that federal courts have original jurisdiction to address such claims.[4] Neither case supports

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Exchange Act of 1934, and various state-law provisions. Jurisdiction was based on diversity, with pendent jurisdiction. Dean Witter filed a motion to sever the pendent state claims, to compel arbitration, and to stay arbitration of those claims pending resolution of the federal-court action. 470 U.S. 214-16. The district court denied the motion to sever and to compel arbitration of the pendent state claims; the Ninth Circuit Court of Appeals affirmed. Id. The United States Supreme Court reversed. Id., at 217.

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

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

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

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

[4] The Suppliers, specifically, direct the court to Justice White's concurring opinion in Dean Witter, 470 U.S. 224-25, in support of their position regarding this court's imposed stay (doc.29, p.2-3). Therein, Justice White discussed the subtle difference between the Securities Exchange Acts of 1933, and 1934, *in re* arbitrability of claims, and wrote:

> The Court's opinion makes it clear that a district court should ***not*** stay arbitration, or refuse to compel it at all, for fear of its preclusive effect. And I can perceive few, if any, other possible reasons for

the Suppliers' contention that this court's stay of the state court action is improper under the Convention.

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

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

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

In Atlantic Coast, the Union picketed the Railroad's Moncrief Yard near Jacksonville, Florida. The Railroad, unsuccessfully, sought an injunction in federal court. Thereafter, the Railroad immediately

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> staying the arbitration pending the outcome of the lawsuit. Belated enforcement of the arbitration clause, though a less substantial interference than a refusal to enforce it at all, nonetheless significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement. In addition, once it is decided that the two proceedings are to go forward independently, the concern for speedy resolution suggests that neither should be delayed. While the impossibility of the lawyers being in two places at once may require some accommodation in scheduling, it seems to me that the heavy presumption should be that arbitration and the lawsuit will each proceed in its normal course...

470 U.S. at 225 (emphasis added); Dimenstien, 759 F.2d at 1517. Again, this court notes that neither Dean Witter, nor Dimenstien, pertain to arbitration under the Convention.

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

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

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

a stay of the state court action was necessary in the aid of this court's continuing jurisdiction (see doc.27, p.31-33).

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

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

The Suppliers also rely on National Railroad, 929 F.2d 1532.[5] Plaintiffs' argue that the case is inapposite (doc.35, p.12). This court agrees.

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

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

ongoing, Congress amended federal law stating that

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

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

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

The Suppliers also rely on Ultracashmere, 664 F.2d 1176.[6] Plaintiffs argue that Ultracashmere,

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[6] The plaintiff, Ultracashmere, a New York clothing manufacturer, and the defendant, Meyer, an Alabama retailer, executed contracts for the purchase and sale of clothing. A dispute arose between the parties and Ultracashmere demanded arbitration under the terms of the contracts. Meyer refused to arbitrate and instead initiated a suit in state court alleging that the arbitration clauses were concealed in fine print, he had no notice that the clauses called for arbitration in New York, rather than Alabama, and that Ultracashmere had fraudulently misrepresented facts concerning the substantive terms of the contracts. Beyond damages, Meyer requested an injunction against Ultracashmere's attempts to compel arbitration. Ultracashmere moved to dismiss Meyer's state court suit. Meyer moved for partial summary judgment declaring the arbitration clauses invalid and unenforceable. The state court denied Ultracashmere's motion to dismiss, postponed a decision on Meyer's motion for partial summary judgment, enjoined the American Arbitration Association from conducting arbitration, and directed Ultracashmere to comply with Meyer's discovery requests. Despite the state court's directive, Ultracashmere persisted in its attempts to arbitrate, and failed to produce requested documents. Thereafter, finding Ultracashmere in violation of its order, the state court granted partial summary judgment to Meyer, declaring the arbitration clauses void and unenforceable. Ultracashmere continued with its obstructionists tactics, and all the issues, except for damages, were determined by the court. 664 F.2d at 1178-79.

Four days before the state trial, Ultracashmere filed a federal action seeking a stay of the state court proceedings under the Anti-Injunction Act, and an order compelling arbitration under 9 U.S.C. § 4. The district court denied the stay indicating that "assuming... it had authority to grant the stay... it would not exercise its discretion... because of [Ultracashmere's] delay in seeking a stay until the state court had adjudicated all issues except the amount of damage," and because Ultracashmere had failed to remove the state court action to federal court when it could have. Id., at 1179. The Eleventh Circuit affirmed. Id., at 1184.

is not relevant (doc.35, p.10, n.5).

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

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

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

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

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

> [W]here a district court with nothing before it but whether to compel arbitration and stay state court proceedings issues an order compelling arbitration, staying the underlying state court proceedings, and closing the case, thereby effectively ending the entire matter on its merits and leaving nothing more for the district court to do but execute the judgment, appellate jurisdiction lies, as the decision is "final" within the contemplation of § 16(a)(3) of the FAA.

294 F.3d at 708.

This court finds Orr, distinguishable in that § 16(a) was applicable therein.[7] Herein, it is § 16(b) which is applicable, in that arbitration was compelled pursuant to 9 U.S.C. § 206 (see doc.27, p.24).

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

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

taken place...") (emphasis in original).

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

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

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

As noted, herein, although this court directed the Clerk to close the file for statistical purposes, it retained jurisdiction over the controversy (doc.27, p.34). Herein, as in ATAC, none of the pending claims have been dismissed and arbitration has yet to take place. 280 F.3d at 1099, n.5 (see doc.35, Ex.A-Plaintiffs Demand For Arbitration to the American Arbitration Association International Centre For Dispute Resolution, dated July 18, 2003). Further, as in Apache Bohai, this court did not, but for an oversight, intend to dismiss this action 330 F.3d at 310; this court stayed both the state court action

and this action pending arbitration proceedings. 330 F.3d at 310. Due to the contentious nature of this litigation and the protracted procedural wrangling in which the parties have engaged (see doc.27, p.3-14, "Procedural History and Facts"), this court anticipates that other issues may arise before a final judgment is entered in this action.

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

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

DONE this 19th day of September, 2003.

/s/ Virgil Pittman
SENIOR UNITED STATES DISTRICT JUDGE