IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MITSUI & CO., LTD.,	§	
	§	
Plaintiff,	§	
	§	**Civil Action No. 3:04-CV-1070-L**
v.	§	
	§	
DELTA BRANDS, INC. and	§	
S & S INDUSTRIES, INC.,	§	
	§	
Defendants.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the District Court's *Order of Reference*, filed February 1, 2005, Plaintiff *Mitsui's Motion to Dismiss and to Refer to International Arbitration* ("MTD"), filed January 28, 2005, has been referred to this Court for hearing, if necessary, and for findings and recommendation. Also before the Court are *Defendants' Brief in Response to Mitsui's Motion to Dismiss and to Refer to International Arbitration and Brief in Support*, filed February 24, 2004, and *Mitsui's Reply Brief in Support of its Motion to Dismiss and to Refer to International Arbitration*, filed March 9, 2005.

In addition, pursuant to the District Court's *Order of Reference*, filed February 2, 2005, *Defendants' Motion to Refer Matter to Arbitration*, filed January 28, 2005, has been referred to this Court for hearing, if necessary, and for findings and recommendation. Also before the Court are *Mitsui's Response to Defendants' Motion for AAA Arbitration in Dallas County and Brief in Support*, filed February 24, 2005, and *Defendants' Reply Brief in Support of Defendants' Motion*

to Refer to Arbitration in Dallas County, Texas, filed March 11, 2005.[1]

Having reviewed the pertinent pleadings and the law applicable to the issues raised, the Court recommends that Plaintiff *Mitsui's Motion to Dismiss and to Refer to International Arbitration* be **GRANTED** and that Defendants' *Motion to Refer Matter to Arbitration* be **DENIED**.

I. BACKGROUND

A. Factual Background

Plaintiff Mitsui & Co, Ltd. ("Mitsui") is the main contractor for the construction of a steel pickling plant in Eregli, Turkey (the "Erdemir project"). (MTD at 2.) Defendant Delta Brands, Inc. ("DBI") is the main U.S. subcontractor for the project, and Defendant S & S Industries, Inc. ("S & S") is the guarantor of DBI's performance. *Id.* Mitsui and DBI entered into two subcontracts, the Subcontractor Agreement and an Internal Agreement ("the Agreements"), for the design, engineering and procurement of U.S. components for the plant, shipment of the components to the job site, oversight of the installation of the components, and provision of technical, engineering and financial information to Mitsui and other subcontractors. *Id.* at 3-4. Swiss law governs the Agreements, which contain binding arbitration clauses. *Id*. at 3. Article 14.2 in the Subcontractor Agreement provides in its entirety that:

> Any dispute between the parties arising out of this AGREEMENT shall be submitted to arbitration under the Rules of Arbitration of the International Chamber of Commerce. The arbitration shall take place at Zurich, Switzerland, and the proceedings shall be conducted in the English language. The award of the arbitrator shall be final and binding and shall be enforceable in any court of competent

[1]Defendants' reply brief contains one paragraph in support of their motion to refer to arbitration in Dallas County; the rest of the reply brief addresses Mitsui's motion to refer to international arbitration. Because Defendants previously filed a response to Mitsui's motion, the Court regards the second portion of Defendants' reply brief as a sur-reply to Mitsui's motion. Defendants did not seek leave to file a sur-reply. Accordingly, the Court does not consider that portion of the reply brief that addresses Mitsui's motion in making these findings, conclusions, and recommendations.

jurisdiction.

(App. to Compl., Exh. 2 at 15.) Article 15.4 of the Internal Agreement states in its entirety as follows:

> Any dispute between the PARTIES or any of them arising out of this AGREEMENT or PROJECT shall be submitted to arbitration under the Rules of Arbitration of the International Chamber of Commerce. The arbitration shall take place at Zurich, Switzerland, and the proceedings shall be conducted in the English language. The award of the arbitrator(s) shall be final and binding and shall be enforceable in any court of competent jurisdiction. Any dispute under this ARTICLE 15.4 involving more than two parties shall be decided by three arbitrators, all of whom shall be selected and appointed by the International Chamber of Commerce, unless the PARTIES otherwise agree on the method of constituting the arbitral tribunal within the time provided by the International Chamber of Commerce.

(App. to Compl., Exh. 4 at 21-22.)

Mitsui contends that DBI missed a number of critical deadlines for the project. (MTD at 4.) According to Mitsui, DBI had not shipped all parts to the jobs site by April 2004, even though the plant start-up was scheduled for June 1, 2004. *Id.* Mitsui asserts that it conducted an investigation revealing that only a few of the outstanding parts were ready to be shipped. (Compl. at 2.) Mitsui's investigation also revealed that due to DBI's financial troubles, many parts had not yet been made, either because DBI failed to pay or enter into agreements with suppliers. *Id*. Because the plant could not be completed without those parts, and because many were specifically designed for the Erdemir project, Mitsui alleges that it then attempted to contact DBI's suppliers to purchase the parts or guarantee payment. *Id*. at 3. Mitsui contends that in order to ensure that the parts obtained were appropriate for the plant's design, Mitsui needed a list of DBI's suppliers, engineering specifications, detail manufacturing drawings, purchase orders, bills of quantity, and engineering documents. *Id*. According to Mitsui, in May 2004 DBI declared that it would cease production, and it sent its employees home because of its inability to meet the payroll. (MTD at 4.) Based on these

events and DBI's refusal to provide the information necessary to complete the project, Mitsui asserts that it "was forced to file for emergency, interim relief with this Court to obtain the required information." *Id.*

B. Procedural History

On May 19, 2004, Mitsui filed its *Verified Original Complaint, Application for Temporary Restraining Order, and Application for Preliminary Injunction* against DBI and S & S. As part of the TRO, Mitsui requested that the District Court order Defendants to:

> [m]ake all non-privileged information in the custody, possession, or control regarding the Erdemir project available for inspection and copying by Mitsui. The information would include...a complete list of DBI's suppliers; a complete list of outstanding parts...and information on the status of all parts in DBI's warehouse and/or factory.

(Compl. at 21, ¶ 56(a)). Mitsui also requested information and equipment needed with respect to specific parts, as well as engineering documents, financial statements, delivery of all completed parts, and the cooperation of Defendants with regard to outstanding engineering questions. *Id*. at 21-22, ¶ 56(a)-(c). In its request for relief, Mitsui expressly stated that it was "reserving the parties' rights to arbitration." *Id*. at 23, ¶ 64.

On May 19, 2004, Mitsui also filed a motion for expedited discovery "[i]n order to prepare effectively and adequately for the fast-approaching hearing [on the preliminary injunction]. (Mot. for Exp. Disc., at 1, ¶ 2) By its motion, Mitsui sought "[a]ll information ordered to be produced under the Temporary Restraining Order in this action." (Mot. for Exp. Disc., Exh. A at ¶ 1.) Most of the specific documents Mitsui requests in its motion for expedited discovery are the same items requested in the TRO, such as documents identifying the parts for the Erdemir project in DBI's possession and the status of any parts not shipped as of May 19, 2005, as well as engineering plans, designs, and specifications for the Erdemir project, non-privileged files relating to vendors,

subcontractors, and suppliers for the Erdemir project, and financial statements. (Mot. for Exp. Disc., Exh. A at ¶¶ 5, 10, 16-18.)

On May 20, 2004, the District Court issued an agreed order ("Agreed Order") which required that DBI "make all non-privileged information in its custody, possession or control regarding the Erdemir project available for inspection and copying by Mitsui." (Agreed Order, Docket Entry No. 5, at 1.) DBI also agreed to "deliver all completed parts that DBI has in its warehouse to a shipping company designated by Mitsui for shipment to Turkey" and to provide financial statements and a list of "the parts whose drawings DBI claims are proprietary." *Id*. at 1-2. Otherwise, the Agreed Order denied Mitsui's application for a temporary restraining order. In light of the Agreed Order, the District Court denied Mitsui's motion for expedited discovery as moot on September 1, 2004.

Subsequently, on September 7, 2004, the District Court ordered the parties to file a joint status report. In the joint status report, filed October 6, 2004, the parties stated that "many if not all of the items below do not apply to this case, as they are issues for an arbitration panel to determine, not for this Court." (See Joint Status Report, at 1.) In response to question number 6 regarding time needed for discovery, the parties stated that "[t]his item does not apply to the instant case." *Id*. at 3. To question number 8, regarding requested trial, estimated length of trial, and jury demand, the parties responded "[n]ot applicable." *Id*. On October 6, 2004, Defendants filed *Defendants' Correction to Joint Status Report*, stating that while they "joined in the enumerated items 1 through 11 in the Joint Status Report...for purposes of clarity, Defendants do not submit that the issues presented in this lawsuit are considered to be appropriate for an arbitration panel." (Def. Corr. to Jt. Status Report at 1.)

On November 1, 2004, the District Court issued an order noting that in the joint status report, "[t]he parties agreed that many of the issues in this case 'are issues for an arbitration panel to

determine.'" (Order, Docket Entry No. 14, at 1, citing Jt. Status Report at 1.) For that reason, the order directed the parties to "file an agreed motion to refer this matter to arbitration and stay this litigation." (Order, Docket Entry No. 14, at 1.) However, on January 28, 2005, both parties instead submitted separate motions to refer the matter to arbitration. Mitsui contends that the contracts at issue are governed by Swiss law and provide for the arbitration of any disputes arising out of the contracts in Zurich, Switzerland, pursuant to the Rules of Arbitration of the International Chamber of Commerce ("ICC"). (MTD at 1.) Mitsui further requests that the District Court dismiss the case after referring the matter to arbitration. *Id*. at 2. Defendants assert that "[t]his matter is not subject to ICC arbitration, or any other arbitration for that matter, because Mitsui, through its actions, waived any and all rights to arbitration." (Def. Resp. at 1.) Notwithstanding this assertion, Defendants filed a motion to refer the matter to arbitration in Dallas County, Texas, before the American Arbitration Association ("AAA"). The motions are now before the Court and are ripe for determination.

II. PLAINTIFF'S MOTION TO DISMISS AND TO REFER TO INTERNATIONAL ARBITRATION

A. Mitsui's Motion to Refer to Arbitration

The Court first considers whether Mitsui has a right to compel arbitration. *See Keytrade USA, Inc. v. Ain Temouchent M/V*, 404 F.3d. 891, 893 (5th Cir. 2005) (examining whether party had a right to compel arbitration prior to addressing argument that party had waived that right). Mitsui asserts that the Agreements are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). "Congress' implementing legislation for the Convention is found as part of the Arbitration Act." *Sedco v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir. 1985) (citing 9 U.S.C. § 1 *et seq*.) In *Sedco*, the Fifth Circuit

explains that "'[t]he goal of the convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standard by which the agreements to arbitrate are observed...in the signatory countries.'" *Id*. at 1147 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

The Convention contemplates a limited inquiry by courts considering a request to compel arbitration:

> (1) is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;
>
> (2) does the agreement provide for arbitration in the territory of a Convention signatory;
>
> (3) does the agreement to arbitrate arise out of a commercial legal relationship;
>
> (4) is a party to the agreement not an American citizen?

Sedco, 767 F.2d at 1144-45 (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 185-86 (1st Cir. 1982)). "If these requirements are met, the Convention requires district courts to order arbitration." *Sedco*, 767 F.2d at 1145.

Mitsui contends, and Defendants do not dispute, that these requirements are met. (Mot. at 7.) First, language in the Agreements explicitly provides that disputes between the parties arising out of those respective Agreements shall be submitted to arbitration pursuant to the Rules of Arbitration of the ICC. Second, the Agreements provide for arbitration in Switzerland, a country that is a signatory to the Convention. *See* 9 U.S.C. § 201, at 514-15 (West 1999) (listing Switzerland as a signatory country); *La Societe Nationale v. Shaheen Natural Resources*, 585 F. Supp. 57, 64 (S.D. N.Y. 1983) (noting that Switzerland is a signatory to the Convention)). Third, the Agreements reflect that Mitsui retained the services of DBI in constructing a steel pickling plant, thus satisfying

the requirement that agreements to arbitrate arise from a commercial, legal relationship. *See Island Territory of Curacao v. Solitron Devices, Inc*., 356 F. Supp. 1, 13 (S.D. N.Y. 1973) (holding that agreement to construct factories embodied a commercial, legal relationship) (citing 9 U.S.C.A.§ 202). Fourth, Mitsui is a Japanese corporation with its principal place of business in Tokyo, thus satisfying the requirement that one of the parties to the agreement not be an American citizen. Accordingly, the Court finds that the requirements for mandatory arbitration are met, and Mitsui has a right to have the matter referred for arbitration. *See Freudensprung v. Offshore Technical Svcs., Inc*., 379 F.3d 327, 341 (5th Cir. 2004) (finding that because all four requirements were met, arbitration clause was enforceable under the Convention).

B. Waiver

Having found that Mitsui has a right to compel arbitration, the Court next considers whether it waived that right, as Defendants assert. *(*Def. Resp. at 1.)

"There is a strong presumption against finding a waiver of arbitration, and the party claiming that the right to arbitrate has been waived bears a heavy burden." *Republic Ins. Co. v. Paico Receivables, LLC*, 383 F.3d 341, 344 (5th Cir. 2004) (citing *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir. 1999)). Moreover, "where...the party seeking arbitration has made a timely demand for arbitration at or before the commencement of judicial proceedings in the Trial Court, the burden of proving waiver falls even more heavily on the shoulders of the party seeking to prove waiver." *Southwest Industrial Import & Export, Inc. v. Wilmod Co., Inc*., 524 F.2d 468, 470 (5th Cir. 1975) (citing *Hilti Inc. v. Oldach*, 392 F.2d 368, 371 (1st Cir. 1968)).

Here, Mitsui expressly reserved all rights to arbitration in its complaint[2] and repeated its

[2]In a section entitled "Reservation of All Rights to Arbitration," Mitsui states:

The Subcontractor Agreement and the Internal Agreement provide for arbitration in Switzerland of

assertion that the matters were ultimately destined for arbitration in the joint status report. Accordingly, Defendants bear a particularly heavy burden in showing waiver. *See Keytrade USA*, 404 F.3d at 897 (finding that because the party seeking to arbitrate had "specifically called on the district court to refer the case to arbitration" in its answer, the party opposing arbitration "must overcome a particularly heavy presumption against waiver.")

1. Substantially Invoking the Judicial Process

Defendants first argue that "Mitsui has waived any and all right to arbitration because Plaintiff has substantially invoked the judicial process[.]" (Def. Resp. at 1.) Defendants contend that "[b]y pursuing a mandatory injunction to receive immediate access to the information and parts it sought, instead of resolving these substantive issues through arbitration, Mitsui not only demonstrated a 'disinclination' for arbitration on those issues, but also substantially invoked the litigation machinery." *Id.* at 3. "'Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.'" *Republic Ins. Co.*, 383 F.3d at 344 (citing *Subway*, 169 F.3d at 326 (quoting *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986))).

a. Invoking the Judicial Process

To invoke the judicial process, a party "must, at the very least, engage in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration."

> all disputes arising out of those agreements, pursuant to the Rules of Arbitration of the International Chamber of Commerce. Mitsui does not waive in any respect its rights to arbitration by filing this Original Complaint and Application, and nothing in this filing should be construed as any such waiver. Mitsui is filing this suit solely as an emergency, interim, conservatory measure, leaving all other disputes with DBI and S&S Industries to be decided through arbitration.

(Compl. at 6.)

Subway, 169 F.3d at 329. Courts have held that a party substantially invoked the judicial process where the party failed to make a timely demand for arbitration, conducted significant discovery related to arbitrable claims, and forced the opposing party to either respond to a motion for summary judgment or defend itself in extensive litigation not related to the arbitrability of the dispute. Defendants rely on two such cases. In *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d at 497, the plaintiff did not mention arbitration when it filed suit. Instead, the plaintiff waited eight months to announce its intent to arbitrate, did not move to compel arbitration until 3 ½ years after filing suit, and meanwhile forced the other party to participate and defend itself in four different judicial forums. *Id.* The Fifth Circuit also found that the legal position of the defendant had been prejudiced by four depositions the plaintiff took concerning to the merits of arbitrable matters. *Id.* at 498.

In *Price v. Drexel Burnham Lambert, Inc*., 791 F.2d 1156, 1157-58; 1160 (5th Cir. 1986), the defendant waited fifteen months to move to compel arbitration, and only three weeks before the initial deadline for the submission of pre-trial orders. The demand was made after the parties had conducted pretrial discovery related to arbitrable claims. *Id.* at 1159. In addition, the defendant had forced the plaintiffs to go to the time and expense of defending a summary judgment motion. *Id.* at 1162.

In contrast, courts have declined to find substantial invocation of the judicial process where parties have made a timely demand for arbitration and conducted minimal or no discovery. For example, in *Keytrade USA, Inc. v. Ain Temouchent M/V*, 404 F.3d at 897-98, the Fifth Circuit found no waiver because although the defendant filed a motion for summary judgment, it was filed from a defensive posture, and the defendant concurrently filed a motion to compel arbitration. In addition, the defendant had included in its answer a demand for arbitration, and had engaged in little

discovery. *Id*. at 898.

Further, the Fifth Circuit found in *Williams v. Cigna Financial Advisors, Inc*. 56 F.3d 656, 661 (5th Cir. 1995), that the defendant did not substantially invoke the judicial process. The defendant had filed a motion for a stay pending arbitration as soon as it discovered the claim was arbitrable and participated in discovery only after seeking an agreement confirming that responding to the opposing party's discovery requests would not constitute a waiver of arbitration rights. *Id*. at 661-662.

In *Tenneco Resins v. Davy Int'l, AG*, 770 F.2d 416, 420-21 (5th Cir. 1989), the Court found that the defendant did not substantially invoke the judicial process where the defendant's answer alleged that the dispute was covered by a valid, enforceable arbitration clause, the defendant moved to stay proceedings pending arbitration less than five months after filing answer, and only minimal discovery had been conducted, throughout which the defendant continued to assert the desire for arbitration.

Here, Mitsui's actions differ markedly from those of the parties seeking to arbitrate in *Miller* and *Price*, and more closely parallel those of the parties seeking to arbitrate in *Keytrade USA*, *Williams* and *Tenneco*. Mitsui expressly stated its intent to arbitrate in its initial complaint, which sought injunctive relief pending arbitration. The day after filing that complaint, the parties submitted the Agreed Order, signed by the District Court, authorizing most of the relief requested in the complaint. Such activity, by itself, does not fairly support a conclusion that Mitsui substantially invoked the judicial process before moving to refer to arbitration. In addition, although Mitsui filed a motion for expedited discovery, there is no indication that Mitsui actually conducted pretrial discovery, and the motion was denied as moot. Mitsui also did not file a motion for summary judgment, or attempt to litigate the matter further after obtaining the Agreed Order, other

than by filing the instant motion to dismiss and refer to arbitration. Thus, the Court finds that Mitsui has not substantially invoked the judicial process.

b. Prejudice

Even assuming, for purposes of this motion only, that Mitsui's request for injunctive relief constitutes a substantial invocation of the judicial process, Defendants have not shown prejudice. "In addition to the invocation of the judicial process, there must be prejudice to the party opposing arbitration before we will find that the right to arbitrate has been waived." *Republic Ins. Co.*, 383 F.3d at 346. "'[P]rejudice...refers to inherent unfairness–in terms of delay, expense, or damage to a party's legal position–that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate the same issue.'" *Subway*, 169 F.3d at 327 (quoting *Doctor's Associates v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997)). "Three factors are particularly relevant when making a prejudice determination." *Republic Ins. Co.*, 383 F.3d at 346 (citing *Price*, 791 F.2d at 1159, 1162). Those factors include whether discovery related to arbitrable issues has taken places, the time and expense incurred in defending against a summary judgment motion, and a party's failure to timely assert its right to arbitrate a dispute. *Republic Ins. Co.*, 383 F.3d at 346 (citing *Price*, 791 F.2d at 1159, 1161-62).

In this case, Defendants generally assert that "[s]ubstantially invoking the judicial process qualifies as prejudice, and thus, waiver." (Def. Resp. at 3.) However, they have not specified how they were actually prejudiced by Mitsui's actions. Indeed, Defendants' own request that the matter be referred to arbitration, albeit in a forum more convenient to them, belies any showing of prejudice arising from enforcement of the arbitration clauses. Nor have Defendants alleged the presence of any of the factors relevant to a determination of prejudice. Thus, Defendants have failed to establish that Mitsui invoked the judicial process to their detriment or prejudice. *See Subway,* 169 F.3d at 329

(finding that district court erred in denying motion to stay proceedings pending arbitration because party opposing arbitration did not show prejudice as a result of action they alleged invoked the judicial process).

In conclusion, the Court finds that Defendants have failed to meet their burden to establish that Mitsui waived its right to arbitrate the instant dispute by substantially invoking the judicial process to their prejudice.

2. Relief that Extends Beyond Preserving the Status Quo

Next, Defendants argue that "...Mitsui has waived its right to arbitration by seeking pre-arbitration relief that does more than merely maintain the status quo." (Def. Resp. at 5.) According to Defendants, the relief Mitsui sought did not seek to preserve the status quo because Mitsui "asked for and received relief that required DBI to take affirmative action." *Id*. at 4. That affirmative action includes "(1) making all non-privileged information regarding the Erdemir project available for inspection and copying by Mitsui, and (2) delivering all completed parts to a shipping company for delivery to Turkey." *Id*.

Defendants assert that, while courts recognize that some temporary relief may be needed before arbitration, "the relief sought must only insure 'the maintenance of the status quo until the arbitration could be completed.'" (Def. Resp. at 4, quoting *Lever Bros. Co. v. Int'l Chem. Workers Union*, 554 F.2d 115, 119 (4th Cir. 1976)). This quote, however, is from the Fourth Circuit's description of the trial court's handling of the defendant's application for a preliminary injunction, not its holding.[3] In *Lever Bros.*, the Fourth Circuit found that the "District Judge did not abuse his

[3]The paragraph from which Defendants quote states in full that:

> Before issuing the preliminary injunction, the court below analyzed the prerequisites to the issuance of injunctive relief and concluded that as to the first prerequisite, the Union had shown a "probable right," that is, a likelihood that the Union would prevail at a trial on the merits. The

discretion by issuing the preliminary injunction preserving the status quo until the completion of the pending arbitration." *Id*. at 120. The Fourth Circuit did not state that preliminary injunctions may only issue to preserve the status quo, nor discuss whether, by preserving the status quo, the Fourth Circuit referred to a maintenance of the state of affairs between the parties before or after the alleged breach occurred. Thus, Defendants have failed to elucidate how this case supports their position, particularly in light of the fact that Defendants do not appear to be challenging the propriety of the District Court's signing of the Agreed Order authorizing injunctive relief.

For the principle that "neither federal law nor the Federal Arbitration Act allows a party to seek relief that does more than merely 'preserve the status quo pending arbitration[,]'" Defendants cite *Nos Communications, Inc. v. Robertson*, 936 F. Supp. 761, 766 (D. Colo. 1996). (Def. Resp. at 4.) In *Nos*, the plaintiff filed a TRO three days after filing a complaint, and stated in the TRO that the dispute was subject to arbitration to the extent provided for in the contract. The court found that the defendants' argument that the plaintiff's "unequivocal intention to waive its right to arbitrate can be inferred from its filing of the complaint and motion for temporary injunctive relief is unpersuasive." *Id*. at 766. The court in *Nos* noted that a number of circuit courts of appeals have found that injunctive relief to preserve the status quo pending arbitration is often necessary and fully consistent with and appropriate under the Federal Arbitration Act. *Id*. at 766. The injunction issued in *Nos* required affirmative action on the part of the defendants, who were enjoined from "[f]ailing to return, or to destroy, any of NOS' confidential and proprietary customer, business development

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> court equated this with the likelihood that the Union would prevail in its contention that the dispute in issue was one for the arbitrator. Thus, the preliminary injunction was issued halting the transfer of the plant and insuring **the maintenance of the status quo until the arbitration could be completed**.

Lever Brothers, 554 F.2d at 119 (Defendants' quoting of the case in bold).

and training information, techniques and materials." *Id*. at 762. Thus, *Nos* appears to support the proposition that a party does not waive the right to arbitrate a dispute by seeking injunctive relief requiring action on the part of the opposing party pending arbitration.

Defendants cite no cases supporting the contention that seeking injunctive relief requiring that one party engage in affirmative action constitutes a waiver of the right to refer a matter to arbitration. Moreover, the ICC Rules of Arbitration specifically state that a party does not waive the right to arbitrate by applying for injunctive relief from a court prior to arbitrating a dispute.[4] Under such circumstances, Defendants have failed to meet their heavy burden to establish waiver, and the Court finds that Mitsui did not waive its right to pursue arbitration by seeking injunctive relief.

C. Financial Hardship

Even if the Court finds that Mitsui did not waive its right to arbitration, Defendants request relief because "requiring DBI to arbitrate in Switzerland would create a financial hardship that DBI simply could not bear." (Def. Resp. at 6.) Defendants cite *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79 (2000), for the proposition that the Court may invalidate the arbitration agreement on the ground that arbitration would be prohibitively expensive. In *Green Tree*, the Supreme Court stated that "where...a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Id*. at 92. The Supreme Court also stated that "[h]ow detailed the showing of

[4] Article 23 of the ICC Rules of Arbitration provides in relevant part that:

> Before the file is transmitted to the Arbitral Tribunal...the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures....shall not be deemed to be an infringement or a waiver of the arbitration agreement...

ICC Rules of Arb. Art. 23, ¶ 2.

prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on this point." *Id*.

Defendant asserts that "[a]rbitration in Zurich, Switzerland places an undue burden on DBI to bear the expense not only of additional attorneys' fees because of the time and travel involved, but also for airfare, lodging, meals, and expenses for [DBI], its witnesses and experts. Key members of [DBI] would be forced to leave their current assignments and projects, which would result in essentially shutting [DBI] down to conduct arbitration in Switzerland." (Def. Resp. at 7.) Because, like the plaintiff in *Green Tree*, Defendants seek to have the agreement to arbitrate invalidated on the ground that arbitration would be prohibitively expensive, Defendants bear the burden of showing the likelihood of incurring such costs. However, the only way in which Defendants attempt to support their contention is by pointing to a section of Mitsui's complaint entitled "[DBI's] Current Financial Crisis," and statements in Mitsui's complaint related to DBI's inability to pay its employees. *Id*. at 6-7. Defendants have provided no detail or evidentiary support for their assertions with respect to prohibitive cost. For example, Defendants have not made a showing that their financial resources would preclude them from participating in arbitration in Switzerland. *See, e.g.*, *Ciago v. Ameriquest Mortgage*, 295 F. Supp. 324, 334 (S.D.N.Y. 2003) (rejecting plaintiff's argument that travel costs precluded enforcement of arbitration clause); *Stewart v. Paul, Hastings, Janofsky & Walker*, 201 F. Supp. 2d 291, 293-294 (S.D.N.Y. 2002) (rejecting plaintiff's argument that a cost-sharing provision invalidated the arbitration agreement because plaintiff had failed to make a particularized showing of her financial means or expected costs of litigation versus arbitration); *Feltner v. Bluegreen Corp.*, 2002 WL 31399106, at *8 (S.D. Ind. Oct. 8, 2002) (rejecting plaintiff's argument that arbitrating out of state would create a significant cost barring her

from vindicating her statutory rights, in part due to her failure to make a showing that her financial resources would preclude her from arbitrating out of state).

In addition, Defendants have neither argued nor presented evidence that unequal bargaining power, fraud, or misrepresentation induced them to enter into the agreement to arbitrate in Switzerland. *See China Resource Prods. (U.S.A.), Ltd. v. Fayda Int'l., Inc.*, 747 F. Supp. 1101, 1107 (D. Del. 1990) (finding that where defendant was aware at time it signed contract that arbitration would take place in China, and presented no evidence of unequal bargaining power, fraud, or misrepresentation, the concern with the "great expense of time and money" to be incurred in arbitration was one that defendant "should have considered before it signed the contract").

Because they have failed to support their assertion that arbitration would be prohibitively expensive, Defendants have failed to meet their burden to demonstrate that invalidation of the arbitration agreement is appropriate on such grounds. *See Green Tree*, 531 U.S. at 92 (finding that enforcement of an arbitration agreement not precluded where litigant fails to support assertion that arbitration would be prohibitively expensive). Accordingly, enforcement of the agreements to arbitrate should not be precluded on grounds of alleged financial hardship to Defendants.

D. Dismissal of Suit Pending Arbitration

In sum, the Court finds that Mitsui has not waived its arbitration rights under the Agreements, and Defendants have failed to demonstrate that arbitration should be precluded on the basis of hardship. The Court therefore finds that the dispute between the parties must be submitted to arbitration in accordance with the Agreements. Mitsui asserts that because the dispute between the parties is subject to arbitration, the Court should refer the matter to arbitration and dismiss the case. (MTD at 9.)

Defendants, however, argue that Mitsui's motion to dismiss "is improper at this time because

the correct motion to accompany a motion to refer to arbitration is a motion to stay the proceedings pending arbitration."[5] (Def. Resp. at 7.) For this proposition, Defendants cite *Williams v. Cigna Financial Advisors, Inc*., 56 F.3d at 661-62. *Williams* does not address the issue of whether a motion to refer to arbitration is more properly accompanied by a motion for a stay rather than a motion to dismiss, but simply notes that the party seeking to arbitrate filed a motion for a stay pending arbitration. In fact, "[t]he weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration." *Alford v. Dean Witter Reynolds, Inc*., 975 F.2d 1161, 1164 (5th Cir. 1992) (citing *Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 638 (9th Cir. 1988) (expressly holding that 9 U.S.C. § 3 does not preclude dismissal); *Dancu v. Coppers & Lybrand*, 778 F. Supp. 832, 835 (E.D. Pa. 1991)*; Hoffman v. Fid. and Deposit Co. of Md.*, 734 F. Supp. 192, 195 (D.N.J. 1990); *Sea-Land Service, Inc. v. Sea-Land of P.R., Inc*., 636 F. Supp. 750, 757 (D. Puerto Rico 1986)).

In the instant matter, the Court has found, as discussed above, that any remaining disputes between the parties must be submitted to arbitration in accordance with the Agreements. Defendants have neither asserted nor demonstrated that any of the issues between the parties fall outside the scope of the arbitration clauses contained in the Agreements. Accordingly, the Court finds that dismissal of Mitsui's suit is appropriate, and Mitsui's motion to dismiss should be granted. *See Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674, 679 (5th Cir. 1999) (finding that district court acted within its discretion in dismissing case after determining that all of the issues and claims presented

[5]Defendants have also argued that Mitsui should have filed a motion to stay proceedings pending arbitration because the parties were ordered to do so by the District Court. Defendants, however, also failed to accompany their motion to refer to arbitration with a request for a stay of proceedings pending arbitration. Defendants cite no authority for the proposition that a motion to dismiss should be denied because a party was ordered to submit a motion to stay proceedings. Thus, while the Court in no way condones a party's failure to comply with an order of the District Court, the Court does not find that denial of Mitsui's motion to dismiss would be appropriate due to Mitsui's failure to file a motion to stay proceedings pursuant to the District Court's order in the instant circumstances.

were subject to arbitration).

III. DEFENDANTS' MOTION TO REFER MATTER TO ARBITRATION

Defendants' motion to refer the matter to arbitration, filed without a brief, states in its entirety that:

> Pursuant to the Court's Orders of November 1st and 26th, Defendants move the Court to refer the matter to binding arbitration before the American Arbitration Association, which arbitration shall occur in Dallas County, Texas. A copy of the proposed order is attached as Exhibit A.

Defendants' motion does not point to any contractual provision authorizing the Court to refer arbitration as requested, nor contain any authority for allowing the Court to refer a matter to arbitration in a manner other than that provided for by the Agreements between the parties. In their reply, Defendants explain that they filed the motion only because they were ordered to do so by the District Court. (Def. Reply at 4.)

Mitsui contends that the Court lacks the authority to refer the matter to AAA arbitration in Dallas County, and points to numerous authorities for the proposition that courts may only compel arbitration in the manner provided for in the parties' agreement. (Pl. Resp. at 2-4.) Section 4 of the FAA "confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in the parties' agreement.*'" *Volt Info. Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (1989) (quoting 9 U.S.C. § 4) (emphasis in *Volt*). "[T]he Fifth Circuit has consistently held that agreements selecting a specific forum for arbitration must be upheld." *Terrell Ind. Sch. Dist. v. Benesight, Inc.*, 2001 WL 1636418, at *5 (N.D. Tex. Dec. 18, 2001) (denying request to compel arbitration in Dallas, Texas, where parties' contract provided that Minneapolis, Minnesota would be the forum for arbitration) (citing *Nat'l. Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 330-32 (5th Cir. 1987) (affirming lower court's finding that where

a contract provided for arbitration in Iran, the court could not compel arbitration in Mississippi)); *see also Barber v. Gloria Jean's Gourmet Coffees Franchising Corp*., 2001 WL 87349, at *4-5 (ordering that arbitration take place as provided for in parties' contract, in location closest to franchisor, rather than in Texas as franchisee sought).

A forum selection clause "must be enforced unless it conflicts with an 'explicit provision of the Federal Arbitration Act.'" *Nat'l. Iranian Oil Co.*, 817 F.2d at 332 (citing *Sam Reisfeld & Son Imp. Co. v. S.A. Eteco*, 530 F.2d 679, 680-81 (5th Cir. 1976)). Thus, to avoid enforcement of a forum selection clause, a party "must allege and prove that the arbitration clause itself was a product of fraud, coercion, or 'such grounds as exist at law or in equity for the revocation of the contract.'" *Sam Reisfeld*, 530 F.2d at 680 (quoting 9 U.S.C. § 2; citing *Prima Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). Defendants have neither alleged nor offered evidence indicating that the forum selection clauses in the Agreements providing for arbitration in Zurich, Switzerland were a product of fraud, coercion, or that any other grounds exist for the revocation of the clause. The Court therefore finds that Defendants have failed to demonstrate that the Agreements' forum selection clauses should not be enforced as written. Accordingly, the Defendants' motion for arbitration in Dallas, Texas should be denied.

IV. CONCLUSION

For the reasons herein stated, the Court **RECOMMENDS** that Plaintiff *Mitsui's Motion to Dismiss and to Refer to International Arbitration* be **GRANTED**, and further **RECOMMENDS** that Plaintiff's suit be dismissed without prejudice.[6] In addition, the Court **RECOMMENDS** that *Defendants' Motion to Refer Matter to Arbitration* be **DENIED**.

[6] *See Fedmet Corp.*, 194 F.3d at 679 (affirming district court's dismissal of suit without prejudice after determining that all issues were subject to arbitration).

SO RECOMMENDED this 20th day of May 2005.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT

Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions and recommendation must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. A party's failure to file such written objections to these proposed findings, conclusions and recommendation shall bar that party from a *de novo* determination by the District Court. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985)*; Perales v. Casillas*, 950 F.2d 1066, 1070 (5th Cir. 1992). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE