UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 17-8150-GW(JPRx)	Date	March 5, 2018
Title	*Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Christina Billington, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Richard C. St. John Jordan X. Navarrette	Paul W. Thomas

PROCEEDINGS: **DEFENDANTS' PETITION FOR AN ORDER COMPELLING BINDING ARBITRATION AND MOTION FOR ORDER STAYING PROCEEDINGS PENDING ARBITRATION [51]**

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, the Court defers its decision until resolution of the Southern District of New York matter. A status conference is set for March 12, 2018 at 8:30 a.m., with a joint status report to be filed by March 8, 2018.

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Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Christina Billington et al., Case No. CV 17-8150-GW(RAOx); Tentative Ruling on Defendants' Petition for an Order Compelling Arbitration and Motion for Order Staying Proceedings Pending Arbitration; and Final Ruling on Plaintiff's Motion for Preliminary Injunction and Defendants' Motion to Dismiss

I. Introduction

Plaintiff Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Plaintiff" or "MLPFS") sues Defendants Christina Billington as Successor Trustee for the James A. Billington Trust, Steven Moreno, and Donald Straszheim (collectively "Defendants") for a declaratory judgment pursuant to 28 U.S.C. § 2201 and for injunctive relief under Fed. R. Civ. P. 65(a). *See generally* Complaint ("Compl."), Docket No. 1. MLPFS seeks a judicial determination that it has no obligation to participate in arbitration proceedings brought by Defendants before the Financial Industry Regulation Authority ("FINRA"), and an order enjoining the three ongoing FINRA Arbitrations initiated by Defendants against MLPFS. *Id.*

MLPFS is a brokerage firm and FINRA member. *See id.* ¶ 3. Defendants are/were customers of MLPFS and held stock in accounts managed by MLPFS. *Id.* ¶ 6. In June and September of 2017, Defendants filed FINRA arbitration claims ("FINRA Claims") against MLPFS based on allegations that actions taken by MLPFS led to a decline in the value of Defendants' Merrill Lynch & Co., Inc. (""ML & Co.")[1] stock holdings held in their MLPFS brokerage accounts. *Id.* ¶¶ 1, 6, 25-35. In this action, MLPFS avers that the FINRA Claims only concern actions taken by non-party ML & Co., not MLPFS.[2] *Id.* ¶¶ 3, 6, 30, 34. MLPFS further alleges that ML & Co. is not a FINRA member. *Id.* ¶ 6. MLPFS also contends that Defendants

[1] The Complaint avers that:

> ML & Co. was, until 2008, a publicly traded company listed on the New York Stock Exchange under the ticker symbol "MER." ML & Co. was acquired by Bank of America Corporation ("BAC") in a merger that was consummated on January 1, 2009. Prior to the merger of ML & Co. into BAC, MLPF&S was a wholly owned subsidiary of ML & Co. At all relevant times, ML & Co. and MLPF&S were separate corporate entities.

See Complaint at ¶ 13.

[2] The Court would note that in the claims filed with FINRA, the Defendants have clearly (and arguably intentionally) obfuscated the distinctions between (and the conduct of) MLPFS and ML & Co., referring to both as "Merrill Lynch" without any differentiation. *See e.g.* Amended Statement of Claim filed in the *Matter of Arbitration between Christina Billington v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Case No. 17-01678, attached as Exhibit B to Complaint, Docket No. 1-2 at 6-10 of 38. However, given that pleading tactic, this Court cannot determine if in fact all of the germane allegations in the FINRA Claims only concern actions taken by non-party ML & Co., not MLPFS.

brought their FINRA Claims against MLPFS, knowing that it was the wrong party to sue, in order to avoid statute of limitations problems they would face if they sued ML & Co. in a correct forum. *Id.* ¶¶ 4-5. Plaintiff alleges these statute of limitations problems are obvious given the FINRA Claims refer to actions taken surrounding the 2008 Financial Crisis that were later the subject of a settlement between ML & Co. and the United States Government.[3] *See id.* ¶¶ 4, 6.

On November 28, 2017, Plaintiff filed a Motion for Preliminary Injunction ("MPI") to enjoin the ongoing FINRA Arbitrations because Defendants' claims "are not arbitrable." *See* Docket No. 13 at 6 of 26. On December 7, 2017, Defendants filed a Motion to Dismiss the Complaint, or in the Alternative to Stay Proceedings and Compel Arbitration ("MTD"). *See* Docket No. 22. Both motions were fully briefed; the Court heard oral argument on January 8, 2018; and it issued a Tentative Ruling on that date. *See* Tentative Ruling on Plaintiff's MPI and Defendants' MTD ("TR"), Docket No. 49.

As to Plaintiff's MPI, the Court indicated that it was inclined to deny the motion because Plaintiff failed to establish any likelihood of success on the merits. *See* TR at 11. The Court indicated that Plaintiff's attacks on the arbitrability of Defendants' FINRA claims addressed the merits of those claims and, as such, fell within the scope of the FINRA arbitration pursuant to the parties' agreement and/or certain FINRA rules. *See id.*

The Court also indicated, however, that it was inclined to deny Defendants' MTD. *See id.* at 4-7. The Court concluded that: (1) it has subject matter jurisdiction over Plaintiff's claim;

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[3] Defendants also aver that ML & Co. shareholder class actions were filed in the Southern District of New York, and the courts therein:

> held that by May 2009, investors were on notice of and had the practical ability to bring fraud claims alleging misrepresentations regarding mortgages and mortgage-securities originated or securitized by ML & Co. *Woori* [*Bank v. Merrill Lynch*], 923 F. Supp. 2d [491] at 496 [S.D.N.Y. 2013] ("Between early 2007 and May 2009, problems with mortgage standards and CDO ratings were reported extensively by the media and served as the basis for multiple government investigations and individual lawsuits . . . . [T]hese sources . . . exposed specific facts regarding Merrill Lynch that [Plaintiff] currently employs to substantiate its fraud claims."); *Woori Bank v. Merrill Lynch*, 542 F. App'x 81, 82 (2d Cir. 2013) ("[t]he district court carefully analyzed [plaintiff's] claims and correctly concluded that the overall publicity surrounding Merrill Lynch's CDOs, the lawsuits filed against Merrill Lynch relating to the CDOs, and the government investigations into Merrill Lynch's activities were sufficient to make [the plaintiff] 'actually and specifically recognize[ ]' this claim for damages").

See Complaint at ¶ 23.

(2) venue was proper; and (3) that Defendants failed to establish that the parties agreed to arbitrate the claims brought by Plaintiff in *this* action. *See id.* In reaching those conclusions the Court noted that the law clearly places the issue of arbitrability in the hands of the district court, absent an explicit agreement otherwise. *See id.* at 6 ("Plaintiff correctly points out that the applicable law squarely places the question of arbitrability under FINRA Rule 12200 in the province of the Court, not the arbitrator, in the absence of an explicit agreement otherwise.") (citing *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 738-39 (9th Cir.), *cert. denied sub nom. City of Reno, Nev. v. Goldman, Sachs & Co.*, 135 S. Ct. 477 (2014); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002)). The Court further noted that the parties never explicitly agreed to arbitrate the issue of arbitrability in FINRA and that the FINRA rules leave that determination to the courts. *See* TR at 6.[4] As such, the Court concluded that Defendants could not compel arbitration of the present case at that time. *See id.* at 6-7 ("In sum, this Court is the proper place to resolve Plaintiff's claim, even if the resolution of that claim will ultimately require Plaintiff to arbitrate Defendants' FINRA claims.").

The Court indicated that it would deny both parties' motions. For the reasons addressed in the Tentative Ruling and subsequent hearing, the Court hereby makes the January 8, 2018 Tentative Ruling its final decision on the motion for preliminary injunction and the initial motion to dismiss.

Now pending before the Court is Defendants' Petition for an Order Compelling Arbitration and/or Motion to Stay. *See* Defendants' Petition for an Order Compelling Arbitration and Motion for Order Staying Proceedings Pending Arbitration ("MTC II"), Docket No. 51. This time, Defendants move to compel and/or stay the action under Federal Arbitration Act ("FAA") § 2 or § 3. *See generally id.* Plaintiff opposes the motion. *See* Plaintiff's Opposition to Defendants' Petition for an Order Compelling Arbitration and Motion for Order Staying Proceedings Pending Arbitration ("Opp'n"), Docket No. 55. Defendants have filed a Reply. *See* Docket No. 57. Both parties have also submitted notices of supplemental authority from other district courts currently considering nearly identical actions brought by Plaintiff against other previous MLPFS employees and customers with pending FINRA claims. *See* Docket Nos. 58-

[4] As noted in the Court's Tentative Ruling, Defendants' motion suffered from procedural flaws to the extent it sought an order compelling arbitration because Defendants did not move for arbitration under the Federal Arbitration Act, but instead simply sought dismissal of this lawsuit under Fed. R. Civ. P. 12(b)(1) and 12(b)(3). *See* TR at 5.

60, 64-65.[5]

II. Defendants' Motion

Defendants move under the FAA to either force Plaintiff to arbitrate the current dispute in FINRA, or for a stay of the current matter pending the FINRA Arbitrations. *See* MTC II at 2. Defendants contend that Plaintiff concedes the existence of multiple arbitration agreements that require the present dispute to be resolved in FINRA proceedings. *Id.* at 6:17-7:12.

Plaintiff opposes the motion on the grounds that Defendants' moving papers focus exclusively on the arbitrability of the claims Defendants have already brought in FINRA as opposed to Plaintiff's present suit which only seeks injunctive and declaratory relief. *See* Opp'n at 1:14-28. Plaintiff made the same argument in opposition to Defendants' first attempt to compel arbitration, and the Court largely accepted that argument. *See* TR at 5-6 ("Defendants' motion also suffers from a major analytical flaw in that it focuses on the arbitrability of *Defendants' FINRA Claims*, not *Plaintiff's present action.*"). As detailed below, Defendants have committed the same analytical flaw this time around, and the Court would again agree with Plaintiff that the motion should be denied.

A. Legal Standard

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, determines the arbitrability of disputes between parties to an agreement. Agreements to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FINRA[6] Code constitutes an "agreement in writing" within the meaning of 9 U.S.C. § 2. *See Waterford Inv. Servs., Inc. v. Bosco*, 682 F.3d 348, 353 (4th Cir. 2012).

A district court's role under the FAA is limited to determining: (1) whether a valid

[5] Defendants' most recent submission includes copies of amendments filed in their ongoing FINRA actions. *See* Docket No. 64. Plaintiff takes exception to the timing of this filing and took the opportunity to object to conduct by defense counsel in some of the parallel cases brought by Plaintiff. *See* Docket No. 65. The material submitted by Defendants has no substantive effect on the Court's findings on the present motion, or its decision to finalize its previous tentative. Plaintiff's complaints about defense counsel are also irrelevant.

[6] The Court discusses FINRA and the relevant FINRA Rules in more detail in its previous tentative ruling. *See* TR at 8.

agreement to arbitrate exists; and, if it does, (2) whether the agreement encompasses the dispute at issue. *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). If the district court determines that a valid arbitration agreement encompasses the dispute, the court must enforce the arbitration agreement in accordance with its terms. *Id.* "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719-20 (9th Cir. 1999).

The FAA also allows the court to stay an action "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under [a written] agreement." 9 U.S.C. § 3; *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988). In ruling on a motion to stay pending arbitration, "the court's role . . . is limited to (1) determining whether a valid agreement to arbitrate exists and, if it does, (2) deciding whether the agreement encompasses the dispute at issue." *Fujian Pac. Elec. Co. Ltd. v. Bechtel Power Corp.*, No. C 04-3126-MHP, 2004 WL 2645974, *2 (N.D. Cal. Nov. 19, 2004) (citing *Simula*, 175 F.3d at 719-20). If the action involves both arbitrable and non-arbitrable claims "arbitrable claims must be stayed pending arbitration, but in its discretion, the Court may either stay the non-arbitrable claim or allow it to proceed in court while the arbitrable claims are arbitrated." *Gray v. Conseco, Inc.*, SA-CV-00-322-DOC(EEx), 2000 WL 1480273, *8 (C.D. Cal. Sept. 29, 2000) (citing *U.S. for Use and Benefit of Newton v. Neumann Caribbean Intern., Ltd.*, 750 F.2d 1422, 1426-27 (9th Cir. 1985) ("Considerations of economy and efficiency fully support the District Court's determination that the third party claim and other matters must await the final determination made in connection with the arbitration.")).

B. Application

Defendants move to compel arbitration under FAA Section 2, or, in the alternative seek a stay of the present case pending the result of the FINRA Arbitrations pursuant to FAA Section 3. The parties do not dispute the existence of enforceable arbitration agreements between Plaintiff and Defendants. Thus, the only remaining inquiry is whether issues in the present case fall within the scope of those agreements. *See Lifescan*, 363 F.3d at 1012.

The present dispute solely concerns the *arbitrability* of the Defendants' underlying FINRA claims. *See generally* Compl. As discussed in the Court's previous tentative, the issue of arbitrability is to be decided by the district court, not the arbitrator, absent an explicit

agreement otherwise. *See* TR at 6 ("Plaintiff correctly points out that the applicable law squarely places the question of arbitrability under FINRA Rule 12200 in the province of the Court, not the arbitrator, in the absence of an explicit agreement otherwise.") (citing cases).

Here, also as previously noted, Defendants fail to point to any contractual provision or language in the FINRA Code that explicitly takes the threshold issue of arbitrability out of the Court's hands. *See* TR at 6 ("Defendants also fail to demonstrate that any of the various arbitration provisions they have proffered on this subject contain explicit language which places the question of arbitrability itself in the hands of the arbitrator."). As such, the Court would again find that the present dispute is properly before this Court. *See id.* at 6-7 ("[T]his Court is the proper place to resolve Plaintiff's claim, even if the resolution of that claim will ultimately require Plaintiff to arbitrate Defendants' FINRA claims.").

Like in its previous motion to compel, Defendants' briefing focuses almost entirely on whether their underlying FINRA claims fall within the scope of the parties' agreement(s) to arbitrate.[7] While Defendants do, at times, assert that Plaintiff's present claim also belongs in FINRA, they fail to support their contention with coherent analysis or legal authority. Read generously, Defendants' argument proceeds as follows: (1) the subject agreements and FINRA rules require arbitration of any disputes between the parties that arise out of their employee-employer and/or client-broker relationship; (2) Defendants' underlying FINRA claims arise out of those relationships and thus belong in arbitration; (3) Plaintiff's current claim, in turn, arises out of Defendants' FINRA claims, and thus, (4) Plaintiff's present claim belongs in FINRA. *See* MTC II at 14:25-16:11. Though not entirely illogical, Defendants' argument: (1) is strained, (2) reaches an incorrect ultimate conclusion as to the third element, and (3) more importantly, is directly at odds with the clear authority that places the issue of arbitrability squarely in the province of the court absent explicit contractual language otherwise. *See Goldman*, 747 F.3d at 738-39; *Howsam*, 537 U.S. at 83-84.[8]

[7] *See, e.g.*, MTC II at 11:3-7 ("Defendants have filed FINRA Statements of Claim for FINRA arbitration. As discussed at length below, FINRA is the appropriate and required forum to decide these disputes and the FINRA arbitration actions are proceeding."); *id.* at 16 ("The fraudulent creation of financial instruments by a FINRA Member firm is, undoubtedly, a matter with some nexus to the activity regulated by FINRA and therefore any dispute regarding those fraudulent financial instruments is a dispute arising out of the business activities of a member firm.").

[8] Admittedly, the cited authority does not involve declaratory relief actions filed by arbitration defendants

In sum, Defendants have again failed to demonstrate that the parties have agreed to arbitrate the present claim. The Court would deny Defendants' motion to the extent it seeks an order compelling arbitration.

C. Whether the Court Should Stay the Matter under the FAA

Defendants also ask the Court to stay the pending litigation until the FINRA Arbitrations are completed. However, the FAA only requires such a stay if the "issue involved" in [the] suit [before the Court]" is subject to arbitration under a valid arbitration agreement. *See* 9 U.S.C. § 3; *see also*, O'Connell & Stevenson, Federal Civil Procedure Before Trial (Rutter 2017) ¶ 16:110 ("The FAA stay provision (9 USC § 3) uses 'shall' language . . . . Most courts interpret the "shall" language as mandatory. Thus, *when all claims in the action have been ordered to arbitration*, the court must grant a requested stay; it has no discretion to, instead, dismiss the action.") (emphasis added); *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1048 (9th Cir. 1996). Additionally, the FAA gives the Court the discretion to stay any matter pending arbitration where at least some claims before the Court are subject to a binding arbitration agreement. *See* 9 U.S.C. § 3; *see also*, O'Connell, ¶ 16:110; *Newton*, 750 F.2d at 1426.

Here, there is no claim *before this Court* in this lawsuit that is subject to a binding arbitration agreement enforceable through the FAA.[9] As such, the Court is not required to stay this case under the FAA, nor has it been presented with any persuasive authority for its ability to do so.[10]

D. Whether the Court Should Otherwise Stay the Matter

The Court has the inherent power to grant a stay in a case before it "to control the

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attempting to stop already pending arbitration proceedings. That being said, Defendants fail to make much, if anything out of this distinction. As it stands, whether a claim falls within the scope of an agreement to arbitrate is traditionally a matter for a court to decide absent an explicit agreement otherwise. Here, there is no such agreement, and therefore, the issue is properly before the Court. Given the case's procedural posture, the only way to ensure the Court addresses the issue of arbitrability is by denying the motion to compel.

[9] While the Court is aware that at least two other district courts have chosen to stay similar cases brought by Plaintiff, it is unclear from those rulings what exactly was the statutory or common law basis for doing so. *See* Defendants' Notice of Supplemental Authority Ex. A, Docket No. 58-1; *see also*, Plaintiff's Notice of Supplemental Authority Ex. A, Docket No. 59-1 at pages 85-86.

[10] The Court was unable to locate case authority extending the reach of FAA Section 3 to cases in which *no* claims before the Court are subject to binding arbitration. Conversely, it could not locate authority that directly prohibits a stay where, as in here, issues involved in a pending arbitration may render the present case moot. The Court would direct the parties to address this issue at the hearing.

disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In making its decision, the Court must "weigh competing interests and maintain an even balance." *Id.* "Among these competing interests are [1.] the possible damage which may result from the granting of a stay[; 2.] the hardship or inequity which a party may suffer in being required to go forward[;] and [3.] the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

The party seeking a stay "bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis*, 299 U.S. at 255). The Supreme Court explained, "If there is even a fair possibility that the stay . . . will work damage to someone else," the party seeking the stay "must make out a clear case of hardship or inequity." *Landis*, 299 U.S. at 255. The decision whether to grant or deny a stay is committed to the court's discretion. *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). "However, while it is the prerogative of the district court to manage its workload, case management standing alone is not necessarily a sufficient ground to stay proceedings." *Id.* (citing *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (holding that a *Landis* stay was inappropriate where grounds other than judicial economy were offered and found to lack merit)).

Here, Defendants have not made the showing required under *Landis*. As a result, the Court would not stay the matter at this time under its inherent power.

IV. Conclusion

The Court would DENY Defendants' MTC II. The Court would also finalize its previous tentative ruling.[11]

[11] The Court would ask the parties to address the following topics at the oral argument. It would appear to the Court that it has jurisdiction to decide the fundamental issue underlying Plaintiff's present action, *i.e.* whether the Court is supposed to decide the arbitrability of Defendants' claims alleged in the pending FINRA actions. The Court has indicated that, in making that determination, it would find – without formally reaching the merits of those claims (although it has grave doubts as to their viability, especially as to the statute of limitations problems) – that the claims are within the scope of the FINRA arbitration provisions because they are currently alleged to be disputes which arise between a FINRA member and its customer and/or associate. Once the Court formalizes that determination, wouldn't this action essentially be over and, hence, there would be nothing left to decide or to stay?