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United States District Court, S.D. New York.
 Franklin W. BLYTHE, et al., Plaintiffs,
 v.

DEUTSCHE BANK AG; Deutsche Bank Securities, Inc., d/b/a Deutsche Bank Alex Brown, a Division of Deutsche Bank Securities, Inc.; Craig Brubaker; David Parse; Todd Clendening; BDO Seidman LLP; Christopher Truit; Morry Gottlieb; Paul Shanbrom; Robert Greisman; Thom Taylor; and Charles McNealy, Defendants.
No. 04 Civ. 5867(SAS).

Jan. 7, 2005.

[David R. Deary](#), [W. Ralph Canada](#), [Jeven R. Sloan](#), [Stewart Clancy](#), Deary Montgomery Defeo & Canada, Dallas, Texas, [Joe R. Whatley, Jr.](#), Othni J. Latham, Whatley Drake L.L.C., Birmingham, Alabama, [Jeffrey H. Daichman](#), Kane & Kessler, P.C., New York, New York, [Ernest Cory](#), Cory Watson Crowder & Degaris, Birmingham, Alabama, for Plaintiffs.

[Lawrence M. Hill](#), [Seth C. Farber](#), Dewey Ballantine, L.L.P., New York, New York, for the Deutsche Bank Defendants.

[Michael R. Young](#), [I. Bennett Capers](#), [Anamika Samanta](#), Wilkie Farr & Gallagher, L.L.P., New York, New York, for the BDO Defendants.

OPINION AND ORDER

[SCHEINDLIN](#), J.

I. INTRODUCTION

*1 Plaintiffs allege that defendants violated the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C. § 1962](#), and are liable for damages and other relief arising from unjust enrichment, breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, fraud, negligent misrepresentation, professional malpractice, and civil conspiracy.^{[FN1](#)} BDO now moves to compel arbitration with respect to certain plaintiffs, and to stay the proceedings with respect to the remaining plaintiffs.^{[FN2](#)} Deutsche Bank moves to stay the proceedings

with respect to all plaintiffs.^{[FN3](#)}

^{[FN1](#)} Plaintiffs fall into six groups. The “Blythe Plaintiffs” are Franklin W. Blythe, Connie D. Blythe, Luther J. Blythe, Molly D. Blythe, FWB Westinghouse Investments, LLC, LJB Westinghouse Investments, LLC, Blythe Brothers Partners, and Blythe Brothers Investors, Inc. The “Ramsey Plaintiffs” are Barnwell S. Ramsey, Individually and as the Grantor and Trustee of the Barnwell S. Ramsey Grantor Trust; Vicki P. Ramsey; BSR Sims Investments, LLC; Davidson Partners, and Davidson Investors, Inc. The “Zimmerman Plaintiffs” are Jordan Zimmerman, JRB Pelican Point Investments, LLC, Pelican Point Partners, and Pelican Point Investors, Inc. The “Baker Plaintiffs” are JRB Pelican Point Investments, LLC; Pelican Point Partners; Pelican Point Investors, Inc.; Mitchell W. Baker and Eva T. Baker. The “Mosley Plaintiffs” are MWB Pinecrest Investments, LLC; Pinecrest Investors, Inc.; Jerry L. Mosley; Margaret A. Mosley; Jimmy J. Mosley; Margaret Mosley; Carey Winters; Dorothy Winters, and the Bakers. The “Ekaireb Plaintiffs” are JLM Grant Investments, LLC; JJM Ouachita Investments, LLC; CW Roberts Investments, LLC; Progressive Investments; MMW Holdings, Inc. and Hannah Ekaireb, M.D., individually and in her capacity as grantor of the Hannah Ekaireb Living Trust and as a representative of the Estate of Huskel Ekaireb and the Huskel Ekaireb Living Trust. According to the Complaint and plaintiffs' brief, the Hannah Ekaireb Living Trust and the Huskel Ekaireb Living Trust themselves are members of the Ramsey Plaintiffs group; this is presumably an error.

^{[FN2](#)} “BDO” refers to the defendants BDO Seidman, LLP, Christopher Truit, Morry Gottlieb, Paul Shanbrom, Robert Greisman, Thom Taylor and Charles McNealy.

^{[FN3](#)} “Deutsche Bank” refers to the defendants Deutsche Bank AG, Deutsche Bank

Securities, Inc., David Parse, Todd Clenden-
ing, and Craig Brubaker.

II. BACKGROUND

This case arises out of tax and consulting services marketed by defendants. The Complaint alleges that defendants defrauded plaintiffs through the marketing and sale of a tax shelter (a strategy involving digital options or swaps on foreign currency sometimes known as “COBRA”) which they knew or should have known the IRS would challenge as lacking economic substance.

Plaintiffs allege that the tax shelter scheme was developed by Deutsche Bank in concert with the law firm of *Jenkins & Gilchrist, P .C.* (“Jenkins”). [FN4](#) Deutsche Bank agreed to act as the counter-party to the tax shelter transactions. Jenkins and Deutsche Bank recruited BDO and others to market the schemes to high net-worth clients, including plaintiffs.

[FN4.](#) Jenkins is not named as a defendant.

The Blythe Plaintiffs were introduced to the scheme through their longtime accountant Christopher Truitt, an employee of BDO. The Ramsey Plaintiffs were introduced to the scheme by their accountant, Charles McNealy, also an employee of BDO. The Zimmerman Plaintiffs were introduced to the scheme through their accountant Morry Gottlieb, an employee of BDO. The Baker, Ekairieb and Mosley Plaintiffs contacted Jenkins and/or Deutsche Bank directly to learn about COBRA, without dealing with BDO.

All individual plaintiffs in this case are members of a putative settlement class with Jenkins in *Denney v. Jenkins & Gilchrist*, [FN5](#) also before this Court. The Jenkins settlement class has been preliminarily certified. [FN6](#) Plaintiffs are also members of other putative classes in *Denney* that have not yet been preliminarily certified. None of the plaintiffs in this case have opted out of the Jenkins class. [FN7](#) Deutsche Bank AG, Deutsche Bank Securities, and BDO Seidman are named as defendants in *Denney* .The individual defendants in this case are not named as defendants in *Denney*.Some, but not all, of the claims asserted by plaintiffs here are encompassed by *Denney*. [FN8](#)

[FN5.](#) 03 Civ. 5460.

[FN6.](#) See *Denney v. Jenkins & Gilchrist*, No. 03 Civ. 5460, 2004 WL 1197251 (S.D.N.Y. May 19, 2004) (preliminarily certifying class).

[FN7.](#) See Affidavit of W. Ralph Canada, Plaintiffs' counsel (“Canada Aff.”) ¶ 6.

[FN8.](#) Although plaintiffs in this case are members of the *Denney* class, they assert certain claims here on their behalf-*e.g.*, for fraud-which are asserted in *Denney* on behalf of the named plaintiffs, but *not* on behalf of the class. See Complaint, Seventh Cause of Action; *Denney* Second Amended Complaint, Eighth Cause of Action. See also Transcript of December 15, 2004 Conference.

A. BDO's Motion to Compel Arbitration and Stay the Proceedings

1. The Blythe/BDO Agreement

On June 30, 1998, Luther J. Blythe entered into a consulting agreement with BDO. This agreement contained the following language:

WHEREAS, Mr. Blythe is interested in transferring, by sale, lease or otherwise, an interest in certain investments, primarily investments in entities owning various golf properties;

*2 WHEREAS, BDO is in the business of providing accounting and consulting services; and

WHEREAS, Mr. Blythe desires BDO to provide certain Consulting services in connection with any potential transactions, and BDO desires to provide such services ... [FN9](#)

[FN9.](#) Blythe/BDO Agreement, Ex. 2 to the Affidavit of Michael R. Young, counsel to BDO (“Young Aff.”).

The consulting agreement requires BDO to provide the following services:

consulting services in conjunction with any potential transaction, including assistance in determination of sales price and allocations thereof, assistance in structuring the Transaction, assisting Mr. Blythe and/or its advisors in structuring a reorganization qualifying as a nontaxable merger, income and estate planning for Mr. Blythe, and assisting Mr. Blythe in discussions and/or negotiations with potential purchasers of the golf course investments, on a specifically requested basis. For purposes of this Agreement, (i) the term "Transaction" shall mean the transfer, whether by sale, merger or otherwise, of all or any portion of the golf course investments.^{FN10}

[FN10](#).*Id.*

The Blythe/BDO Agreement also contains a mandatory arbitration clause, providing for arbitration of "any dispute, controversy or claim [that] arises in connection with the performance or breach of this Agreement."^{FN11}

[FN11](#).*Id.*

2. The Zimmerman/BDO Agreement

On September 30, 1999, Jordan B. Zimmerman entered into a consulting agreement with BDO. This agreement contains the following language:

WHEREAS, [Zimmerman] is interested in transferring, by sale, lease or otherwise, any or all of his business operations (... such transfer [is referred to as] the "Transaction");

WHEREAS, BDO is in the business of providing accounting and consulting services; and

WHEREAS, [Zimmerman] desires BDO to provide certain tax and business consulting services in connection with the Transaction, and BDO desires to provide such services ...^{FN12}

[FN12](#). Zimmerman/BDO Agreement, Ex. 3 to Young Aff.

The consulting agreement requires BDO to provide the following services:

consulting services in connection with the Transaction, including assistance in structuring the Transaction, assisting the client in determining a tax treatment for the Transaction, and the preparation of 1999 and 2000 income tax returns that would reflect the Transaction.^{FN13}

[FN13](#).*Id.*

The Zimmerman/BDO Agreement also contains a mandatory arbitration clause identical to that in the Blythe/BDO Agreement.

3. The Unsigned Ramsey/BDO Agreement

BDO has submitted an unsigned consulting agreement between BDO and, among others, Barnwell S. Ramsey. The agreement appears to be in draft form. Its provisions are similar to those of the Blythe and Zimmerman Agreements, and it contains an identical arbitration clause.

On the basis of the Blythe and Zimmerman Agreements, BDO moves to compel the Blythe and Zimmerman Plaintiffs to arbitrate their claims. Having been unable to locate a signed agreement with the Ramsey Plaintiffs, BDO does not seek to compel that group to arbitrate, but requests that the Court stay their claims pending certification of the class in *Denney*, on the ground that if the class action in *Denney* is certified, it will encompass the Ramsey Plaintiffs' claims.

B. Deutsche Bank's Motion to Stay the Proceedings

*3 The Baker, Mosley and Ekaireb Plaintiffs opened brokerage accounts with DB Alex. Brown in 2000. Through individual members or entities within each group, these plaintiffs signed Account Agreements.^{FN14} Each Account Agreement contains an identical arbitration clause:

[FN14](#).*See* 2000 Account Agreements, Exs. 1-11 to Declaration of Marla Alhadeff, Director and Senior Counsel of Deutsche Bank AG, in Support of Deutsche Bank's Motion to Stay ("Alhadeff Decl.").

I agree to arbitrate with you any controversies which

may arise, whether or not based on events occurring prior to the date of this agreement, including any controversy arising out of or relating to any account with you, to the construction, performance or breach of any agreement with you, or to transactions with or through you, only before the New York Stock Exchange or the National Association of Securities Dealers Regulation, Inc., at my election.

However, the clauses go on to provide that:

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the punitive [sic] class action until (1) the class certification is denied; or (2) the class is decertified; or (3) the customer is excluded from the class by the court.^{FN15}

^{FN15}. See, e.g., Alhadeff Decl. Ex. 1 ¶ 19 (“Class Action Provision”).

This Class Action Provision is based on NASD Rule 10301(d)(3), which provides that:

No member or associated person shall seek to enforce any agreement to arbitrate against a customer, other member or person associated with a member who has initiated in court a putative class action or is a member of a putative or certified class with respect to any claims encompassed by the class action unless and until: (A) the class certification is denied; (B) the class is decertified; (C) the customer, other member or person associated with a member is excluded from the class by the court; or (D) the customer, other member or person associated with a member elects not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.^{FN16}

^{FN16}. NASD Rule 10301(d)(3).

The Blythe, Zimmerman and Ramsey Plaintiffs executed transactions with Deutsche Bank in 1999. The Account Agreements signed by these plaintiff groups did not contain arbitration clauses.

Deutsche Bank argues that it will be entitled to compel the Baker, Mosley and Ekaireb Plaintiffs to arbitrate. However, Deutsche Bank concedes that, because these plaintiffs are members of the putative class in *Denney*, it cannot, pursuant to the Class Action Provision and NASD Rule 10301(d)(3), *presently* compel them to arbitrate any claims encompassed by *Denney*; rather, Deutsche Bank argues that it will be able to compel the Baker, Mosley and Ekaireb plaintiffs to arbitrate if and when class certification in *Denney* is denied or those plaintiffs are excluded from the class.

Although Deutsche Bank has no arbitration agreement with the Blythe and Zimmerman Plaintiffs, Deutsche Bank argues that it is entitled to compel those plaintiffs to arbitrate through their arbitration agreements with BDO, because plaintiffs allege that BDO acted in concert with Deutsche Bank. However, in light of NASD Rule 10301(d)(3), Deutsche Bank does not seek to compel arbitration against these plaintiffs at this time.

*4 Deutsche Bank argues that it *is* entitled to compel arbitration now as to all claims that are *not* encompassed by *Denney*. However, Deutsche Bank does not (yet) seek to do so, recognizing that it would be “wasteful and inefficient.”^{FN17} Instead, Deutsche Bank asks that the Court stay the Blythe, Zimmerman, Baker, Mosley and Ekaireb Plaintiffs' claims pending certification of the class in *Denney*. Deutsche Bank argues that, if the *Denney* class is certified, and those plaintiffs do not opt out of it, then their claims will be resolved as part of the *Denney* class action; or, if the *Denney* class is not certified or those plaintiffs opt out, then Deutsche Bank will be entitled to compel arbitration as to all of their claims. Deutsche Bank argues that there is no scenario in which those plaintiffs' claims will ever proceed in this action.

^{FN17}. December 17, 2004 Letter to the Court from Deutsche Bank at 2.

Finally, although neither Deutsche Bank nor BDO appears to have an arbitration agreement with the Ramsey Plaintiffs, Deutsche Bank asks the Court to stay the Ramsey Plaintiffs' claims. Deutsche Bank argues that “the fact that the Ramsey Plaintiffs may still choose to opt into [sic] any certified *Denney* litigation class warrants a stay of their claims until they make such a decision. It makes no sense to litigate

these claims in an individual lawsuit if they eventually will be resolved as part of such a class action.”^{FN18}

^{FN18}. Deutsche Bank's Memorandum of Law in Support of Motion to Stay at 11.

III. LEGAL STANDARD

The determination of whether a dispute is arbitrable under the FAA comprises two questions: “(1) whether there exists a valid agreement to arbitrate at all under the contract in question ... and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement.”^{FN19}To find a valid agreement to arbitrate, a court must apply the “generally accepted principles of contract law.”^{FN20}“[A] party is bound by the provisions of a contract that he signs, unless he can show special circumstances that would relieve him of such obligation.”^{FN21}A court should consider only “whether there was an objective agreement with respect to the entire contract.”^{FN22}

^{FN19}. Hartford Acc. and Indem. Co. v. Swiss Reinsurance Amer. Corp., 246 F.3d 219, 226 (2d Cir.2001) (quotation omitted).

^{FN20}. Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845 (2d Cir.1987).

^{FN21}. *Id.*

^{FN22}. *Id.*

Because there is “a strong federal policy favoring arbitration ... where [] the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability.”^{FN23}Thus, the Second Circuit has emphasized that

^{FN23}. Ace Capital Re Overseas Ltd. v. Cent. United Life Ins. Co., 307 F.3d 24, 28 (2d Cir.2002) (quotation marks and citations omitted).

any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Accordingly, [f]ederal policy requires us to construe arbitra-

tion clauses as broadly as possible. We will compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”^{FN24}

^{FN24}. Collins & Aikman Prods. Co. v. Building Sys., Inc., 58 F.3d 16, 19 (2d Cir.1995). See also WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 74 (2d Cir.1997).

However, although federal policy favors arbitration, it is a matter of consent under the FAA, and “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”^{FN25}

^{FN25}. Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir.2001) (quotation omitted).

*5 The Second Circuit has established a three-part inquiry for determining whether a particular dispute falls within the scope of the arbitration agreement.^{FN26}First, “a court should classify the particular clause as either broad or narrow.”^{FN27}Second, if the clause is narrow, “the court must determine whether the dispute is over an issue that ‘is on its face within the purview of the clause,’ or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause.”^{FN28}“Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview.”^{FN29}Third, if the arbitration clause is broad, “‘there arises a presumption of arbitrability’ and arbitration of even a collateral matter will be ordered if the claim alleged ‘implicates issues of contract construction or the parties’ rights and obligations under it.’”^{FN30} “In the end, a court must determine whether, on the one hand, the language of the clause, taken as a whole, evidences the parties’ intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the clause, or if, on the other hand, arbitration was designed to play a more limited role in any future dispute.”^{FN31}

^{FN26}. See *id.*

^{FN27}. *Id.*

^{FN28}. *Id.* (quoting Rochdale Vill., Inc. v. Public Serv. Employees Union, 605 F.2d

[1290, 1295 \(2d Cir.1979\)](#)).

[FN29](#).*Id.*

[FN30](#).*Id.* (quoting [Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.](#), 58 F.3d 16, 23 (2d Cir.1995)).

[FN31](#).*Id.* at 225.

IV. DISCUSSION

A. BDO's Motion to Compel Arbitration [FN32](#)

[FN32](#). BDO states that “[i]f the Court believes additional facts are necessary to evaluate the arbitrability of this dispute, we would be pleased to engage in discovery on that issue.”BDO's Reply Memorandum of Law (“BDO Reply Mem.”) at 9. The Court makes its decision on the record before it. If BDO wishes to engage in discovery on this issue, it may do so and again move to compel arbitration if it believes newly discovered facts warrant such a motion.

In *Denney*, BDO sought to compel arbitration of the *Denney* plaintiffs' claims on the basis of consulting agreements almost identical to those at issue here (the “*Denney* Agreements”). In an Opinion and Order dated April 28, 2004, I denied BDO's motion to compel arbitration, finding that the *Denney* Agreements were mutually fraudulent, because they were intended to conceal the nature of the work BDO was performing.^{[FN33](#)} In a subsequent Opinion and Order, dated June 14, 2004, I found, as an additional ground for denying BDO's motion to compel arbitration, that the *Denney* Agreements did not encompass the *Denney* plaintiffs' dispute.^{[FN34](#)}

[FN33](#). *Denney v. Jenkins & Gilchrist*, 340 F.Supp.2d 338 (S.D.N.Y.2004) (“*Denney I*”).

[FN34](#). *Denney v. Jenkins & Gilchrist*, 340 F.Supp.2d 348 (S.D.N.Y.2004).

Like the *Denney* Agreements, the consulting agreements here contain misleading language, from which “[i]t appears that neither plaintiffs nor BDO wanted

any third party to know the nature of the contracts into which they entered, or that BDO had contracted with plaintiffs to provide tax shelter advice. As a result, they entered into agreements that described consulting work that was never performed and was different from the consulting services that were actually provided.”^{[FN35](#)}

[FN35](#). *Denney I*, 340 F.Supp.2d at 346-47.

The *Denney* Agreements, like those at issue here, described services in connection with the sale of plaintiffs' business operations, rather than the tax shelter services actually provided. As an indication of the fraudulent nature of the *Denney* Agreements, I noted that plaintiffs had in fact already sold their business operations before they entered into consulting agreements, and so the services described were never performed. Similarly, here, Zimmerman had already sold his business operations prior to the time he and BDO entered into the consulting agreement, and the services described were never performed.^{[FN36](#)}

[FN36](#).*See* Affidavit of Jordan Zimmerman in Support of Plaintiffs' Opposition ¶ 10. BDO played a minor role with respect to the sale of one of the Blythe Plaintiffs' properties, as described in the consulting agreements. *See* Affidavit of Franklin Blythe in Support of Plaintiffs' Opposition ¶ 9.

*6 Moreover, since my decision in *Denney*, new evidence of the fraudulent nature of BDO's consulting agreements has come to light. In a recently discovered internal memorandum (“the Kerekes Memorandum”), dated August 11, 2000,^{[FN37](#)} Michael Kerekes, a principal at BDO and a member of the committee at BDO responsible for tax shelters, states that the agreements “have been structured *not to make clear* exactly what services we were providing in return for our fee.”^{[FN38](#)} This memorandum strongly supports my finding of mutual fraud.

[FN37](#).*See* Canada Aff. ¶¶ 7-8. The copy of the Kerekes Memorandum submitted to the Court in connection with plaintiffs' opposition to BDO's motion was destroyed pursuant to the October 19, 2004 Order of Judge J. Curtis Joyner of the Eastern District of Pennsylvania, finding, for the purposes of the case before him, *Miron v. BDO Seidman*,

LLP, No. 04 Civ. 968, that the document was privileged. *See* Ex. E to Canada Aff. BDO continues to assert that the Kerekes Memorandum is privileged. In *Denney v. Jenkins & Gilchrist*, No. 03 Civ. 5460, 2004 WL 2712200 (S.D.N.Y. Nov. 23, 2004), I determined that any privilege that might have attached to the Kerekes Memorandum was waived in early 2001, when BDO shared it with Jenkins & Gilchrist. The memorandum itself is attached as Exhibit A to the *Denney* Plaintiffs' Notice of Motion to Lift Stay, filed October 21, 2004.

[FN38](#). Canada Aff. ¶ 8 (emphasis added). In the memorandum, Kerekes discusses whether BDO's tax shelters were subject to the IRS' list-keeping requirements. Following the quoted language, he goes on to suggest that “[i]n order to fall clearly within the protection of the date the engagement letters were signed, we might wish to send letters to our clients clarifying that one of the services is consulting with respect to their current hedge fund transaction or some such innocuous but clear language.”*Id.*

Because the consulting agreements containing the arbitration clauses are mutually fraudulent, the contracts cannot be enforced.[FN39](#) Therefore, there is no valid agreement to arbitrate. BDO's motion to compel arbitration must be denied.

[FN39](#).*See Denney I*, 340 F.Supp.2d at 347 (citing *Gardenier v. Tubbs*, 21 Wend. 169, 169 (N.Y. 1839); *Jackson v. Ashton*, 36 U.S. 229, 239 (1837); *Richard A. Lord, Williston on Contracts*, § 19:79 (4th ed.1998); Morris R. Cohen, *The Basis of Contract*, 46 Harv. L.Rev. 553, 562 (1933)).

BDO argues that “even evidence of ‘mutual fraud’ would not render the arbitration agreements inoperative, for arbitration agreements are separable from the underlying agreements in which they are embedded.”[FN40](#) BDO relies on *Prima Paint*, in which the Supreme Court “announced what has become known as the severability doctrine—that ‘arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitra-

tion clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.” [FN41](#) BDO's reliance on *Prima Paint* is misplaced.

[FN40](#). BDO's Memorandum of Law in Support of Motion to Compel Arbitration (“BDO Mem.”) at 11 (citing *Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395 (1967)).

[FN41](#). *Sphere Drake Ins. Ltd v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 31 (2d Cir.2001) (quoting *Prima Paint*, 388 U.S. at 402).

The Second Circuit elucidated the holding of *Prima Paint* in *Sphere Drake*. Where the underlying contract in which an arbitration clause is contained is void, arbitration may not be compelled; where the underlying contract is merely voidable, the arbitration clause is severable from the contract, and arbitration may be compelled unless the arbitration clause itself is voidable.[FN42](#) The *Sphere Drake* court offered “a good example of a void contract[:] when parties fail to agree to essential contract terms, the agreement does not come into existence—it is void and wholly unenforceable.”[FN43](#) By contrast, where a party alleges fraud in the inducement, the contract is merely voidable, not void, and arbitration must be compelled.[FN44](#)

[FN42](#).*See id.* at 31-32.

[FN43](#).*Id.* at 31 (citing *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 462 F.2d 673 (2d Cir.1972)).*See also Opals on Ice Lingerie v. Bodylines, Inc.*, No. 99 Civ. 3761, 2002 WL 718850 (E.D.N.Y. Mar. 5, 2002) (holding that fraud in the factum, in the form of the forgery of a party's signature, renders underlying contract void and arbitration may not be compelled).

[FN44](#).*See Sphere Drake*, 263 F.3d at 32 (citing *Prima Paint*). There is no allegation here that any party was fraudulently induced to enter into these contracts. Rather, the contracts themselves appear to be fraudulent.

Because they are mutually fraudulent, the consulting agreements are not merely voidable, but void *ab ini-*

tio. The consulting agreements describe services that were (with the exception of limited services performed for Blythe) never rendered nor intended to be rendered, and conceal the real substance of the parties' agreement—the provision of tax shelter advice. The consulting agreements do not represent a meeting of the minds of the parties, but are merely a sham or cover for their real agreement.^{FN45} The consulting agreements are therefore void, and the arbitration clauses are not enforceable.^{FN46}

^{FN45}. See [Denney I, 340 F.Supp.2d at 346](#) (noting that plaintiffs' counsel “went so far as to acknowledge that the consulting agreements ‘appear to be some kind of trick [] in the sense [that] I think the use of the word ‘cover’ may well be appropriate in reality.’”).

^{FN46}. See [Camping Constr. Co. v. District Council of Iron Workers, Local 378, 915 F.2d 1333, 1340 \(9th Cir.1990\)](#) (courts “must determine whether a contract *ever* existed; unless that issue is decided in favor of the party seeking arbitration, there is no basis for submitting any question to an arbitrator.”).

Moreover, the consulting agreements do not cover the tax shelter services at issue here. The language of the arbitration clauses is broad, because it covers “any dispute, controversy or claim [that] arises in connection with the performance or breach of this Agreement.” However, this dispute is not subject to arbitration because plaintiffs' allegations do not arise in connection with the performance or breach of the contracts. The underlying dispute here is wholly unrelated to the obligations encompassed by the contracts, and does not constitute even a collateral matter. The consulting agreements only involve services in connection with the transfer of assets and investments; they do not relate in any way to the tax shelter transactions which are at issue here. Plaintiffs' claims do not implicate issues of the construction of the consulting agreement or the parties' rights and obligations under it. As in *Denney*, the consulting agreements simply do not cover the plaintiffs' claims.^{FN47}

^{FN47}. In an argument that appears to be directed toward my decision in *Denney I & II*, rather than the present matter, BDO charac-

terizes the consulting agreements in *Denney* as using “broad, generalized language ... to capture the full breadth of the services to be provided. The parties may use generalized language in anticipation of additional follow-up services.” BDO Reply Mem. at 5 n. 8. BDO's argument (insofar as it is addressed to the present motion) misses the point. The consulting agreements do not use broad, generalized language that might encompass the tax shelter services; rather, they specifically describe very different services.

*7 I note again that, since my opinion in *Denney*, new evidence has come to light supporting my findings. The Kerekes Memorandum makes it clear that BDO deliberately drafted its agreements so as *not* to cover the tax shelter services that are at issue here. Instead, the tax shelter services appear to have been provided pursuant to oral understandings between the parties, which do not, of course, contain arbitration clauses.

For the foregoing reasons, BDO's arbitration agreements are void, and inapplicable to this dispute. There is therefore no need to consider the argument that Deutsche Bank is entitled to compel arbitration pursuant to these agreements.

B. The Motions to Stay

A district court has discretion to stay a case pursuant to “the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”^{FN48} However, such a stay is appropriate only in “rare circumstances.”^{FN49} “[T]he burden of making out the justice and wisdom of a departure from the beaten track l[ies] heavily on the [party seeking a stay in favor of another action] and discretion [is] abused if the stay [is] not kept within the bounds of moderation.”^{FN50}

^{FN48}. *Nederlandse Erts-Tankersmaatschappij, N.V. v. Isbrandtsen Co.*, 339 F.3d 440, 441 (2d Cir.1964) (citing [Landis v. North American Co.](#), 299 U.S. 248, 254 (1936)).

^{FN49}. [Landis](#), 299 U.S. at 255.

overlap.

[FN50. *Id.* at 256.](#)

BDO argues that the Ramsey Plaintiffs' claims should be stayed pending resolution of class certification issues in *Denney*, to conserve judicial and party resources.^{FN51} Deutsche Bank argues that the entire case “should be stayed pending resolution of the class issues in *Denney*. It simply makes no sense for Plaintiffs to be permitted to litigate their case on both a class-wide basis and in a separate, individual action simultaneously.”^{FN52}

[FN51.](#) BDO's motion seeks a stay only as to the Ramsey Plaintiffs, arguing that the Zimmerman and Blythe Plaintiffs' claims should go to arbitration. Of course, it would make no sense in terms of efficiency to stay *only* the Ramsey Plaintiffs' claims, while permitting other claims to proceed. Accordingly, I will consider BDO's motion in conjunction with Deutsche Bank's motion to stay the action in its entirety.

[FN52.](#) December 17, 2004 Letter to the Court from Deutsche Bank at 1.

I am not persuaded that the drastic remedy of a stay is justified here. *Denney* is at an early stage; it is unlikely, although possible, that class certification issues in *Denney* will be resolved within a year. It is important to note that *Blythe* includes claims that are *not* encompassed by *Denney*. Plaintiffs in this case should not be required to wait for a year, and perhaps more, for their individual claims—those not encompassed in *Denney*—to advance.

Indeed, at defendants' urging, pre-trial proceedings in *Denney* as to BDO and Deutsche Bank have been stayed by orders of the Second Circuit, pending appeal of my decisions in *Denney I & II*.^{FN53} It would be entirely improper to stay plaintiffs' claims against BDO and Deutsche Bank in favor of *Denney*, while the *Denney* plaintiffs are barred from proceeding as to those defendants. Moreover, while proceedings in *Denney* as to those defendants are stayed, the class issues in *Denney* *cannot* be resolved; *Denney* is effectively dead in the water. Contrary to Deutsche Bank's argument, therefore, plaintiffs are not presently able to litigate their case in *Denney* and in *Blythe* simultaneously, even insofar as those cases

[FN53.](#) See December 30, 2004 Order of the Court of Appeals for the Second Circuit in *Denney v. Jenkins & Gilchrist*, 04-2654-CV (staying proceedings as to BDO) and January 5, 2005 Order of the Court of Appeals for the Second Circuit in *Denney v. Jenkins & Gilchrist*, 04-2654 (staying proceedings as to Deutsche Bank).

Once all appeals from my decisions here and in *Denney I & II* are complete, it is likely that some or all of the claims of the plaintiffs in both cases will proceed in this Court.^{FN54} At that time, there will be no great hardship to defendants, nor any untoward drain on judicial resources, in allowing *Blythe* to proceed alongside *Denney*.^{FN55} To the extent that *Blythe* and *Denney* overlap, the Court has the power to manage the two cases so as to avoid duplication of efforts. Defendants' motion to stay is therefore denied.

[FN54.](#) In *Blythe*, defendants appear to have no arbitration agreements with certain plaintiffs, and may never be able to enforce arbitration agreements against others so long as *Denney* proceeds. In *Denney I*, I noted that “defendants in this action have failed to submit any evidence that all putative class members entered into identical agreements containing an arbitration clause. Thus, defendants' motion to compel arbitration and dismiss the complaint in its entirety is inappropriate with respect to the unidentified, putative class members.” [Denney I, 340 F.Supp.2d at 346](#). It is likely, therefore, that at least part of *Denney* and *Blythe* will proceed in this Court, regardless of the outcome of any appeal.

[FN55.](#) Deutsche Bank indicates that it may move to compel arbitration of all claims not encompassed in *Denney* if the present motion to stay is denied. If Deutsche Bank brings such a motion, it is possible that it may be able to compel arbitration as to the Zimmerman and Blythe Plaintiffs; I do not decide that issue here. Deutsche Bank cannot, of course, compel arbitration with respect to the Baker, Mosley and Ekairieb Plaintiffs on the basis of BDO's consulting

agreements, which have been found here to be void and inapplicable to the present dispute. If Deutsche Bank chooses to compel arbitration as to some plaintiff groups and claims but not others, Deutsche Bank will be forced to proceed in two separate fora. However, that burden would be of Deutsche Bank's own making, and cannot justify a stay of this entire action.

V. CONCLUSION

*8 For the foregoing reasons, defendants' motions to compel arbitration and for a stay are denied. The Clerk of the Court is directed to close these motions [# 10, 21]. A conference is scheduled for January 17, 2005 at 4:00 p.m.

SO ORDERED:

S.D.N.Y., 2005.
Blythe v. Deutsche Bank AG
Not Reported in F.Supp.2d, 2005 WL 53281
(S.D.N.Y.), RICO Bus.Disp.Guide 10,806

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