

Nos. 02-3820/3823/3825/3867/3869/3871/3873

In the
United States Court of Appeals
for the **Sixth Circuit**

ROBERT FAZIO, et al.,
Plaintiffs-Appellees,

v.

LEHMAN BROTHERS, INC., et al.,
Defendants-Appellants.

**On Appeal from the United States District Court
for the Northern District of Ohio, Eastern Division**

FINAL BRIEF OF APPELLANTS
SG COWEN SECURITIES and SOCIETE GENERALE

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ORAL ARGUMENT REQUESTED

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to Sixth Circuit Rule 26.1, Defendants-Appellants SG

Cowen Securities Corporation and Société Générale make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Yes.

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

SG Cowen Securities Corporation is a subsidiary of Société Générale, a publicly-held company also a party to this case. Neither party has any other publicly-held affiliates.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Yes.

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

The following publicly-held companies have subsidiaries whose insurance policies cover SG Cowen Securities Corporation and/or Société Générale:

American International Group, Inc.
Citigroup
The Chubb Corporation
The Hartford Financial Services Group, Inc.
AXA

Laurence A. Silverman

Date

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Defendants-Appellants SG Cowen Securities Corporation and Société

Générale request oral argument. This case involves complex legal issues. Oral argument will assist the Court in making its determination.

Defendants-Appellants SG Cowen Securities Corporation and Société Générale (together, “SG Cowen”) respectfully submit this brief in support of their appeal from the District Court’s opinion and order denying their motions pursuant to the Federal Arbitration Act (“FAA”) to stay the underlying actions pending arbitration of Plaintiffs-Appellees’ claims.

STATEMENT OF JURISDICTION

The District Court has jurisdiction in these cases pursuant to 28 U.S.C. § 1332 and, in all of the cases except Bonutti, pursuant to 28 U.S.C. §§ 1331, 1367(a). On July 19, 2002, the District Court denied SG Cowen’s motions pursuant to section 3 of the Federal Arbitration Act (“FAA”), **9 U.S.C. § 3**, to stay these cases pending arbitration. On July 22, 2002, SG Cowen filed timely notices of appeal. (E.g., Fazio R. 84, Notice of Appeal, Apx. pg. 198.) This Court has jurisdiction over this appeal pursuant to Section 16(a)(1)(A) of the FAA, **9 U.S.C. § 16(a)(1)(A)**.

STATEMENT OF ISSUES

1. Did the District Court fail to apply the U.S. Supreme Court’s mandate in Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967), and this Circuit’s clear construction of the Prima Paint rule in numerous recent cases, by refusing to require arbitration of Plaintiffs-Appellees’ claims based upon the District Court’s factual determinations that their individual broker intended to

878, 888 (6th Cir. 2002); Stout v. J.D. Byrider, 228 F.3d 709, 714 (6th Cir. 2000); Wiepking v. Prudential-Bache Sec., Inc., 940 F.2d 996, 998 (6th Cir. 1991); accord Adamovic v. METME Corp., 961 F.2d 652, 653 (7th Cir. 1992) (de novo review of order denying motion to stay and compel arbitration).

ARGUMENT

I. THE DISTRICT COURT’S DETERMINATION THAT PLAINTIFFS’ CUSTOMER AGREEMENTS WERE “VOID AB INITIO” WAS ERRONEOUS UNDER PRIMA PAIN AND THIS CIRCUIT’S DECISIONS.

The District Court’s sweeping determination that the Prima Paint analysis did not apply in any of the seven consolidated cases presented here – purportedly on the ground that Plaintiffs’ allegations “challenged the very existence of the contract” between them and the Defendant brokerage firms – conflicts with the fundamental principle of Prima Paint and with this Circuit’s clear and coherent application of the Prima Paint rule. Plaintiffs’ allegations that Gruttadauria intended to steal from them at the time they executed the customer agreements make out no more than claims of “fraudulent inducement,” which stand squarely within the rule of Prima Paint. Furthermore, in Burden v. Check Into Cash of Kentucky, LLC, supra, this Court made clear that the “void ab initio” exception to Prima Paint is, at most, narrowly restricted to “questions of signatory power” which none of the Plaintiffs has ever raised here. The District Court dodged Prima Paint and Sixth Circuit law by mislabeling Plaintiffs’ allegations as

theft.” (Mem. Op. at 12-13, Apx. pgs. **354-355**.) The Court’s distinction between broker theft and other kinds of misconduct lacks merit.

First, as explained above, federal courts have ordered parties to arbitrate claims of outright broker theft. See Section II.A., supra. Second, churning claims are a kind of broker theft. When a broker trades excessively in a customer’s account in order to generate more commissions for himself, he leaves the customer with less money than she would have had if her broker had been trading only for her benefit. For that reason, claims of churning, like claims of theft, may be brought as state law conversion claims. See [Bartels v. Clayton Brokerage Co. of St. Louis, Inc.](#), 631 F. Supp. 442, 448 (S.D.N.Y. 1986) (“Churning, or frequent trades by a broker to maximize commissions, may be conversion.”). Third, brokerage customers opening new accounts with a brokerage firm are no more likely to foresee churning in their accounts than they are to foresee more blatant methods of theft from their accounts. If they foresaw either of these activities prior to opening brokerage accounts, they would be unlikely to open the accounts at all. If churning claims are arbitrable, then claims of theft must be arbitrable as well.

Inconsistent internally and at odds with the strong federal policy in favor of arbitration, the District Court’s opinion sets a dangerous precedent by which disgruntled brokerage customers can avoid their arbitration agreements

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT FAZIO, et al.,)	
)	CASE NO. 1:02 CV 157
Plaintiffs,)	
)	
v.)	JUDGE JOHN M. MANOS
)	
LEHMAN BROTHERS, INC., et al.,)	
)	
Defendants.)	
)	

NOTICE OF APPEAL

Notice is hereby given that Defendants SG Cowen Securities Corporation and Societe Generale hereby appeal, pursuant to 9 U.S.C. § 16(a)(1)(A), to the United States Court of Appeals for the Sixth Circuit from the order entered on July 19, 2002 denying Defendants' Motion to Stay Pending Arbitration or to Dismiss.

Respectfully Submitted,

s/ Mark O'Neill

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Service: **Get by LEXSEE®**
Citation: **961 F.2d 652**

*961 F.2d 652, *; 1992 U.S. App. LEXIS 6508, ***

CHARLES ADAMOVIC, Plaintiff-Appellee, v. METME CORPORATION, DANIEL ALLEN, and
STEVEN M. SOBLE, Defendants-Appellants.

No. 91-2793

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

961 F.2d 652; 1992 U.S. App. LEXIS 6508

February 28, 1992, Argued
April 10, 1992, Decided

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 91 C 13--Harry D. Leinenweber, Judge.

DISPOSITION: VACATED AND REMANDED.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer requested review from an order of the United States District Court for the Northern District of Illinois, denying their request to refer appellee employee's wrongful termination complaint to arbitration. Appellant contended that appellee's employment contract and the Arbitration Act, 9 U.S.C.S. § 3, mandated arbitration of the parties' dispute.

OVERVIEW: The trial court denied appellant employer's request to transfer appellee employee's improper termination complaint to arbitration. The trial court concluded that the employment contract did not permit appellant to unilaterally refer employment disputes to arbitration. Appellant contended that the Arbitration Act, 9 U.S.C.S. § 3, mandated arbitration and there was no requirement that the parties stipulate to arbitration. The appellate court vacated the order and remanded for an evidentiary hearing because the employment contract was ambiguous regarding the parties' intent to arbitrate dispute, and it could not compel arbitration unless the agreement actually provided for it.

OUTCOME: The appellate court vacated the order denying appellant employer's request to transfer appellee employee's improper termination complaint to arbitration. The appellate court remanded the action for an evidentiary hearing because the employment contract was ambiguous regarding the parties' intent to arbitrate disputes.

CORE TERMS: arbitration, arbitrator, arbitration clause, submitted to arbitration, employment contract, federal policy, unilateral, arbitrate, tip, federal district, adjudicated, lawsuit

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[Labor & Employment Law](#) > [Collective Bargaining & Labor Relations](#) > [Arbitration](#)

HN1 ↓ The Arbitration Act, 9 U.S.C.S. § 3, provides for a stay of legal proceedings when a dispute in federal court is arbitrable pursuant to a contract. The Act leaves no place for the exercise of discretion in these circumstances, mandating that district courts

*631 F. Supp. 442, *; 1986 U.S. Dist. LEXIS 27497, **;
Comm. Fut. L. Rep. (CCH) P22,983*

KARL H. BARTELS, et al., Plaintiffs, v. CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., et al.,
Defendants

No. 85 Civ. 7096 (GLG)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

631 F. Supp. 442; 1986 U.S. Dist. LEXIS 27497; Comm. Fut. L. Rep. (CCH) P22,983

March 28, 1986

DISPOSITION: [1]**

Clayton's motion to dismiss for forum non conveniens is denied with leave to renew.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant filed a motion to dismiss plaintiffs' complaint in an action involving commodity futures contracts, brought under § 4b of the Commodity Exchange Act, 7 U.S.C.S. § 6b, § 901(a) of the Organized Crime Control Act of 1970, 18 U.S.C.S. § 1961, and common law fraud.

OVERVIEW: Plaintiffs, a group of foreign investors, filed suit against defendant futures commission merchant for fraudulently inducing them to invest in commodity futures contracts. Plaintiffs alleged that defendant misrepresented the financial risks of commodity futures and neglected to conform to the Commodity Futures Trading Commission rules in setting up plaintiffs' accounts. Plaintiffs' complaint alleged violations of § 4b of the Commodity Exchange Act, 7 U.S.C.S. § 6b, § 901(a) of the Organized Crime Control Act of 1970, 18 U.S.C.S. § 1961, and common law fraud. Defendant filed a motion to dismiss the complaint. The court held that plaintiffs did not plead their allegations of fraud with sufficient particularity to withstand defendant's challenge under Fed. R. Civ. P. 9(b). Thus, although plaintiffs stated a cause of action under the CEA, the court dismissed the claims with leave to replead in accordance with pleading specificity requirements.

OUTCOME: Defendant's motion to dismiss granted in part and denied in part. Plaintiffs' claim under the Commodities Exchange Act and their claim for common law fraud were dismissed, with leave to replead, for failing to meet specificity requirements; plaintiff's claim under the Organized Crime Control Act was dismissed as time-barred.

CORE TERMS: customer, commodity, timeliness, statute of limitations, broker, fraudulent, two-year, borrow, common law fraud, right of action, federal statute, time barred, trading, particularity, omission, commission merchant, causes of action, cause of action, introducing, reparations, conveniens, conversion, organized crime, motion to dismiss, promulgated, wilfully, fifty-six, specify, gold, limitations period

LexisNexis (TM) HEADNOTES - Core Concepts - ♦ [Hide Concepts](#)