UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-22605-CIV-ALTONAGA/Goodman

SBMH GROUP DMCC, *et al.*,

Plaintiffs,

v.

NOADIAM USA, LLC d/b/a
Sky Organics, *et al.*,

Defendants.
_____/

ORDER

Plaintiffs, SBMH Group DMCC; and Saul Neiger, individually and as shareholder of DG Trading DMCC, seek remand of this action and the award of attorney's fees. (*See* Motion to Remand and for Attorneys' Fees and Costs for Wrongful Removal [ECF No. 18]). Defendants, Noadiam USA, LLC; Steven Neiger; Dean David Neiger; Emma Hazzan; and Global Assets Gem, S.A., oppose remand on the basis the Court has subject matter jurisdiction under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") and its implementing legislation, 9 U.S.C. sections 201–208 (the "Convention Act"). (*See generally* Response in Opposition . . . [ECF No. 29]). Defendant, JP Morgan Chase Bank, N.A., has not filed any papers in this action after removal. The Court has carefully reviewed the briefing and exhibits, including Plaintiffs' Reply Memorandum . . . [ECF No. 32], and applicable law. For the reasons stated below, the Motion to Remand is denied.

I. BACKGROUND

A. Plaintiffs' Claims

This case presents an unfortunate intra-family dispute, pitting a father against his sons and their mother, over allegedly stolen monies and abuse of trust. The odyssey began almost a year ago, when on October 20, 2016, Plaintiffs filed suit against Steven Neiger in a suit coincidentally before the undersigned, *SBMH Group DMCC, et al. v. Noadiam USA, LLC*, No. 16-cv-24419-CMA (S.D. Fla. 2017), asserting diversity jurisdiction. After litigating the first case for three months, Plaintiffs filed a notice of voluntary dismissal. On February 3, 2017, Plaintiffs filed this second suit in state court, adding additional, non-diverse parties. (*See* Complaint [ECF No. 1-3] 11–47[1]). The parties litigated the second suit for several months, until, on July 12, 2017, all Defendants but Chase Bank removed the case asserting subject matter jurisdiction under the Convention and the Convention Act. (*See* Notice of Removal [ECF No. 1] 1–2). Plaintiffs have continued to actively, and aggressively, litigate it here.

In their state-court Complaint, Plaintiffs, United Arab Emirates company SBMH, and Belgian citizen and U.A.E. resident, Saul Neiger ("Serge"), for himself and on behalf of U.A.E. company DG Trading, sue Florida limited liability company Noadiam, Belgian and U.S. citizen Steven Neiger, Belgian citizen Dean Neiger, U.S. citizen and Florida resident Emma Hazzan, Panamanian corporation Global Assets, and Chase Bank. (*See* Compl. 11–12). Steven and Dean are Serge's sons; Hazzan is their mother and Serge's ex-wife. (*See id.* ¶¶ 3, 15). Chase is named as a necessary party to Plaintiffs' claims for injunctive relief, but no affirmative relief or damages are sought from the Bank. (*See id.* ¶ 11).

[1] For consistency, the Court uses the pagination generated by the CM/ECF electronic filing system, which appears as a header on all court filings.

For over 20 years Serge was estranged from his sons; he desired to reunite with them and in order to do so paid each $100,000 based on their request for payment as precondition to any recommencement of father/son relationships. (*See id.* ¶ 17). Serge is in the business of rough diamond acquisition and distribution; he conducts his business through SBMH, of which he is principal and owner. (*See id.* ¶ 19). Serge and his sons operated a Brazil diamond business from 2013 to 2015. (*See id.* ¶¶ 20–21). Steven, through his company Noadiam, issued invoices totaling over $10,000,000 to Plaintiffs for diamonds, and Serge paid through SBMH. (*See id.* ¶ 21).

In May 2015, father and sons started a similar business in Angola, as the sons claimed they had contacts in Angola through their stepfather, Yacob Shemesh. (*See id.* ¶ 22). Serge transitioned from the Brazil diamond business to the one in Angola because he trusted and had confidence in his sons, and as part of the reunification process. (*See id.*). Serge, through SBMH, provided the investment to purchase rough diamonds in Angola, while the sons acted as "boots on the ground" in Angola. (*Id.* ¶ 23). Father and sons decided to conduct the Angola diamond business through DG Trading. (*See id.* ¶ 24). Serge acquired 66 and 2/3 percent of DG Trading's outstanding shares, of which Serge owned 33 and 1/3 percent as nominee for Steven. (*See id.*). Steven was one-third shareholder owner in DG Trading[2] and occupied the position of director. (*See id.*).

To conduct the Angolan diamond business, DG Trading, through Steven, entered into a contract with Angolan company, Angodiam. (*See id.* ¶¶ 26–27). Under the Angodiam contract, DG Trading deposited funds in Angola in the name of Angodiam. (*See id.* ¶ 28). Plaintiffs'

[2] In their Reply, Plaintiffs state "[n]otably . . . neither Steven Neiger nor Dean Neiger admitted or affirmatively represented that they are shareholders of DG Trading in their Notice of Removal." (Reply 4 (alterations added)). For purposes of determining whether remand is appropriate and Defendants satisfy the Court subject matter jurisdiction exists, such admission is unnecessary.

Complaint describes the billing procedures for the purchase of Angolan diamonds between Angodiam, Steven, Global Assets and Plaintiffs. (*See id.* ¶¶ 29–32). Serge and Plaintiffs permitted the sons to run the Angolan diamond business without interference. (*See id.* ¶ 33).

In late 2015, the sons represented to Serge there existed an Angolan banking issue that froze the movement of U.S. dollars and prevented them from withdrawing funds from Angodiam to buy diamonds or return via wire transfer funds to DG Trading or to Plaintiffs. (*See id.* ¶ 36). In early 2016, Serge notified his sons he no longer wanted to conduct the diamond business with them and gave them instructions to wind it down and return DG Trading's remaining assets. (*See id.* ¶ 37). In August 2016, after not having received the funds, Serge traveled to South Florida to meet with his sons, and did so at the Four Seasons Hotel in Palm Beach. (*See id.* ¶ 44). Steven acknowledged being in possession of the funds, but told Serge he would not return them; in fact, he was going to use all of the monies to fund his new business, Sky Organics, and his lifestyle. (*See id.*). Serge terminated the dinner. (*See id.*).

Steven and Dean, along with their mother Hazzan, "conspired to defraud Plaintiffs of millions of dollars of assets from the Angola Diamond Business operations by embezzling, stealing, and converting the Embezzled Funds (hereinafter, the 'Scheme') for their own use and benefit, including, to fund and sustain their lavish lifestyles, and as seed capital for Noadiam's new business, 'Sky Organics.'" (*Id.* ¶ 45). The scheme consisted of Steven and Dean being "paid by Plaintiffs as fiduciaries to oversee the Angola Diamond Business . . . . The payments paid to Defendants Steven Neiger and Dean Neiger were procured by fraud in that these Defendants did not perform or otherwise faithfully discharge their duties as fiduciaries. Defendants . . . received payments as fiduciaries in excess of $900,000, all of which[] were procured by fraud . . . ." (*Id.* (alterations added)). The fraudulent fiduciary payments were made

to Steven and Dean, and indirectly through their companies Noadiam and Global Assets. (*See id.*).

To perpetrate the scheme, legal documents were falsified. (*See id.* ¶ 46). In September 2015, Dean executed a fraudulent Board of Directors resolution for DG Trading (the "fraudulent BOD resolution"). (*See id.* ¶ 47). The resolution purported to confer on Dean, DG Trading Board of Directors' approval for him to act for DG Trading, including the opening and closing of DG Trading's financial institutional accounts and withdrawals and transfers of funds on account in the name of DG Trading. (*See id.*). The Board never convened concerning the grant of authority upon Dean over its financial accounts; the resolution never conferred any legal authority upon Dean to act on behalf of DG Trading's Board of Directors. (*See id.* ¶ 48).

Steven and Dean conspired with Hazzan to launder the embezzled funds by disguising the source and character of the funds. (*See id.* ¶ 49). Dean, acting with Steven and Hazzan, used the fraudulent BOD resolution to transfer funds from the Angolan diamond business out of Angola and to non-U.S. financial institution accounts. (*See id.* ¶ 50). Also, Dean, acting with Steven and Hazzan, used the fraudulent BOD resolution to either monetize the diamond inventory or transfer the cash proceeds through laundering out of Angola, or transfer/export/smuggle the diamond inventory out of that country for future monetization. (*See id.* ¶ 52). Steven and Dean laundered portions of the fraudulent fiduciary payments and embezzled funds to Hazzan through transfers from Dean's account to Hazzan's account at Chase Bank. (*See id.* ¶ 55). The ultimate recipients of the Hazzan fraudulent transfers were Steven, Dean, and Noadiam; the money was used to sustain a lavish lifestyle and as working capital for Noadiam. (*See id.* ¶ 59).

Hazzan is likely the recipient of all or portions of the embezzled funds from sources other than Dean's Dubai account, and with the fraudulent BOD resolution, the sons transferred the liquid portion of the embezzled funds to foreign accounts opened in the name of DG Trading or in the name of third-parties as proxies for the sons. (*See id.* ¶¶ 61–62). The sons owed Plaintiffs fiduciary duties under UAE and Florida law. (*See id.* ¶¶ 64–71). Noadiam is an alter-ego of Steven, and Global Assets is an alter-ego of Steven and Dean; both have been used to launder the embezzled funds and fraudulent fiduciary payments. (*See id.* ¶¶ 72–79).

On the basis of these allegations, Plaintiffs state seven claims for relief. In Count I, Plaintiffs state a claim of breach of fiduciary duty as to Serge's sons under UAE law. (*See id.* 38). In Count II, Plaintiffs allege breach of fiduciary duty as to Serge's sons under Florida law. (*See id.* 38–39). Count III alleges a conspiracy between the sons, Hazzan, Global Assets and Noadiam. (*See id.* 39–40). Count IV, directed to Steven; Count V, directed to Dean; Count VI directed to Hazzan and Chase; and Count VII, directed to Noadiam and Chase, are each titled "Uniform Fraudulent Transfer Act Claims" and seek creditors' remedies under Florida Statute section 726.108. (*Id.* 40–46).

B. Removal and the Motion to Remand

Defendants Noadiam, Steven, Dean, Hazzan, and Global Assets are the removing parties. (*See* Removal Status Report [ECF No. 6] 4). Nominal Defendant Chase has no position on the removal and has not joined in it. (*See id.*). The bases for removal, as stated, are the Convention and the Convention Act. (*See id.* 3). Defendants assert the parties have an agreement to arbitrate found in certain formation documents of DG Trading, a Memorandum of Association and Articles of Association [ECF No. 1-2], attached to the Notice of Removal. (*See* Notice of Removal ¶ 14).

Section 91 of the Memorandum of Association, titled "Arbitration," provides:

> Whenever any differences arise between the Company on the one hand and any of the shareholders, their heirs, executors, administrators[,] or assigns on the other hand touching the true intent and construction or the incidence or consequences of these Articles, touching anything then or thereafter done or executed, omitted or suffered in pursuance of the Law or touching any breach or alleged breach o[f] these Articles or to any act affecting the Company or to any of the affairs of the Company, such difference shall, unless the parties agree to refer to a single arbitrator be referred to two arbitrators one to be chose by each of the parties to the difference and the arbitrators shall before entering on the reference appoint an umpire. The award of the arbitrator shall be final and binding on all parties concerned.
>
> In the absence of any arbitration rules in the Dubai Multi Commodities Centre, arbitration shall be conducted in accordance with the arbitration and procedures of the Dubai International Arbitration Centre.

(Articles of Association [ECF No. 1-2] 21). A later Memorandum of Association states "[a]nd with regard to the rest of Memorandum of Association, it remains unchanged." (Mem. of Association [ECF No. 1-2] 5 (alteration added)).

The Motion to Remand and for Attorneys' Fees and Costs for Wrongful Removal raises a number of arguments. (*See generally* Mot.). For their first argument, Plaintiffs assert removal is defective because Defendants failed to provide the Court with the complete state court record and Chase did not join in the removal. (*See id.* 4–7). Because, as Defendants correctly argue (*see* Resp. 2–6), Defendants did supply the Court with copies of pleadings and orders from the state action, *see* 28 U.S.C. section 1446(a), and Chase is a nominal party whose consent to removal is not required, *see, e.g.*, *Hernandez v. Ferris*, 917 F. Supp. 2d 1224, 1227 (M.D. Fla. 2012), and *Argo Global Special Situations Fund v. Wells Fargo Bank, N.A.*, 810 F. Supp. 2d 906, 915 (D. Minn. 2011), the Court dismisses this first argument without additional discussion.

Plaintiffs next advance purportedly missing jurisdictional prerequisites under the Convention as bases for remand. (*See* Mot. 7–13). Plaintiffs state the Convention requires an

agreement to arbitrate and here, no such agreement exists. (*See id.* 8–11). Plaintiffs also assert the arbitration clause Defendants rely on fails to specify the venue for any arbitration, thus depriving the Court of jurisdiction under the Convention. (*See id.* 11–13). The Court addresses these two arguments in its discussion below.

Finally, Plaintiffs argue Defendants have waived the right to arbitration by invoking the litigation process in state court for some eight months, and Plaintiffs are prejudiced by Defendants' delay in seeking arbitration in that Plaintiffs expended litigation costs and will likely incur further delay in recovering their misappropriated assets if the Court compels arbitration. (*See id.* 13–20). Defendants make the point nearly three weeks after Plaintiffs served all of the Defendants, defense counsel appeared in the action and removed the case, subsequently filing a motion to compel arbitration (*see* Motion to Compel Arbitration . . . [ECF No. 17]), before any Defendants, other than Chase, had even answered the Complaint in the state court action. (*See* Resp. 17).

A party waives the right to arbitrate when it participates in litigation "to a point inconsistent with an intent to arbitrate" such that the other side is prejudiced. *Morewitz v. West of England Ship Owners Mut. Prot. & Indem. Ass'n.*, 62 F.3d 1356, 1366 (11th Cir. 1995); (*see also* Resp. 16–17). "Waiver is not to be lightly inferred, and mere delay in seeking [arbitration] without some resultant prejudice to a party cannot carry the day." *Pershing LLC v. Curi*, No. 12-62449-Civ, 2013 WL 785990, at *2 (S.D. Fla. Mar. 1, 2013) (internal quotation marks and citation omitted; alteration in original). Under the present record, Defendants certainly did not unduly delay in seeking to enforce their rights to arbitration and have not acted inconsistently with the right to arbitrate. Further, Plaintiffs have not shown the expenses they incurred with regard to a forensic accountant, private investigator and Angolan law expert (*see* Mot. 20),

would not have been necessary in prosecuting their claims before an arbitral tribunal. *See, e.g.*, *Chrysler Fin. Corp. v. Murphy*, No. Civ. A. 97-JEO-2391-S, 1998 WL 34023394, at *6 (N.D. Ala. Aug. 5, 1998) (defendant did not suffer prejudice as a result of motion to compel arbitration where he did not engage in discovery that otherwise would be unavailable during arbitration and his positions and claims in the case were not inimically affected); (Resp. 17 (same)). Thus, the Court does not engage in further consideration of this waiver/prejudice argument.

Given the conclusions reached that remand is not appropriate and subject matter jurisdiction under the Convention exists, the Court also does not address Plaintiffs' request for attorney's fees and costs. (*See* Mot. 20–21).

II. DISCUSSION

The removing Defendants have the burden of establishing the propriety of removal under 28 U.S.C. section 1441 and so must demonstrate federal jurisdiction exists. *See, e.g.*, *Scimone v. Carnival Corp.*, 720 F.3d 876, 882 (11th Cir. 2013) ("[T]he burden of establishing removal jurisdiction rests with the defendant seeking removal." (alteration added)). On a motion to remand, the removing Defendants continue to bear "the burden of showing the existence of federal subject matter jurisdiction." *Conn. State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1343 (11th Cir. 2009). Generally, "all uncertainties as to removal jurisdiction are to be resolved in favor of remand." *Russell Corp. v. Am. Home Assur. Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001) (citation omitted).

District courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "A case covered by the Convention confers federal subject matter jurisdiction upon a district court because such a case is 'deemed to arise under the laws and treaties of the United States.'" *Bautista v. Star Cruises*, 396

F.3d 1289, 1294 (11th Cir. 2005) (quoting 9 U.S.C. § 203)). The Convention is a "multi-lateral treaty that requires courts of a nation state to give effect to private agreements to arbitrate and to enforce arbitration awards made in other contracting states." *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1116 (11th Cir. 2009) (footnote call number omitted). The United States is a signatory to the Convention and enforces it through the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* *See Ruiz v. Carnival Corp.*, 754 F. Supp. 2d 1328, 1330 (S.D. Fla. 2010).

To promote the development of a "uniform body of law under the Convention," *Beiser v. Weyler*, 284 F.3d 665, 672 (5th Cir. 2002), "Congress granted the federal courts jurisdiction over Convention cases and added one of the broadest removal provisions, [section] 205, in the statute books" *Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373, 377 (5th Cir. 2006) (alteration added; footnote call number omitted). According to Title 9 of the United States Code, "[w]here the subject matter of an action or proceeding pending in state court *relates to an arbitration agreement* or award falling under the Convention, the defendant . . . may, *at any time before the trial thereof*, remove such action or proceeding to the district court of the United States." 9 U.S.C. § 205 (alterations and emphases added). The ground for removal "need not appear on the face of the complaint but may be shown in the petition for removal." *Id.* Moreover, "whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff's case, the agreement 'relates to' the plaintiff's suit." *Beiser*, 284 F.3d at 669 (emphasis in original); *see also Reid v. Doe Run Res. Corp.*, 701 F.3d 840, 843 (8th Cir. 2012) (same); *Infuturia Global Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133, 1138 (9th Cir. 2011) (same). "So generous is the removal provision that . . . the general rule of construing removal statutes strictly against removal cannot apply to Convention Act cases because in these instances,

Congress created special removal rights to channel cases into federal court." *Acosta*, 452 F.3d at 377 (alteration added; internal footnotes and citation omitted).

As noted by Defendants, subject matter jurisdiction exists where the parties' dispute "relates to" an arbitration agreement and the agreement falls under the Convention. (*See* Resp. 7 (quoting *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1293 (11th Cir. 2015)). Here, Plaintiffs' claims, including the claims of DG Trading DMCC, sound in breach of fiduciary duty, civil conspiracy, and fraudulent transfer. (*See generally* Compl.). All of these claims relate to the arbitration provision contained in the DG Trading Memorandum of Association. The claims are founded on "differences . . . between the Company on the one hand and any of the shareholders, their heirs, executors, administrators[,] or assigns on the other hand touching . . . the incidence or consequences of these Articles, touching anything then or thereafter done or executed . . . or touching any breach or alleged breach o[f] these Articles or to any act affecting the Company or to any of the affairs of the Company." (Articles of Association 21 (alterations added)). Plaintiffs' claims relate to the DG Trading arbitration provision.

In order for an arbitration agreement to "fall under the Convention" the following four requirements must be satisfied:

> (1) . . . an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

Bautista, 396 F.3d at 1294, n.7 (alteration added; citation omitted). Where an agreement satisfies these four jurisdictional prerequisites, the Court must order arbitration unless the agreement is "'null and void, inoperative[,] or incapable of being performed.'" *Quiroz v. MSC Mediterranean Shipping Co., S.A.*, 522 F. App'x 655, 661 (11th Cir. 2013) (alteration added)

(quoting Convention art. II(3)). As stated, Plaintiffs challenge the first and second requirements, asserting no agreement to arbitrate exists (*see* Mot. 8–11), and the arbitration clause Defendants rely on fails to specify the venue for any arbitration (*see id.* 11–13).

"The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Hodgson v. Royal Caribbean Cruises, Ltd.*, 706 F. Supp. 2d 1248, 1253 (S.D. Fla. 2009) (citing Convention art. II(2)). According to Plaintiffs, the Memorandum of Association is not an agreement in writing within the meaning of the Convention because none of the parties signed the Memorandum or the arbitration provision. (*See* Mot. 8–11; Reply 6–7). Specifically, Plaintiffs assert Ben Kirkland was the only one to execute the Memorandum and the amendments to it do not explicitly incorporate by reference an agreement to arbitrate. (*See* Reply 6). Plaintiffs ask the Court to evaluate foreign law and accept the opinions of U.A.E. licensed attorney Lyudmila O. Yamalova as expressed in her Affidavit (*see* Mot., Ex. D [ECF No. 18-4]), that U.A.E. courts interpreting the "writing" requirement of the U.A.E. civil procedure law find an arbitration clause to be an exceptional clause, that is, a standalone agreement, separate and distinct from the larger agreement, and require the standalone agreement to also be signed by the parties. (*See* Mot. 9–11). Finally, say Plaintiffs, the statement in Amendment 3, the only document signed by Serge and Dean, that "with regard to the rest of the Articles of Association, it remains unchanged," "falls woefully short under U.A.E. law to bind any of the parties here to arbitrate." (*Id.* 10).

Plaintiffs fail to persuade. As noted by Defendants, Serge executed several amendments to the Memorandum of Association, including the Articles of Association, evidencing his acquisition of DG Trading's shares, the increase of the shares, and the transfer of shares to Dean.

(*See* Resp. 9). Serge and Dean signed all of the amendments, including Amendment 3's reference to "the rest of the Articles" "remain[ing] unchanged." (*Id.* (alteration added; citation omitted)).

Serge's declaration (*see* Mot., Ex. E [ECF No. 18-5]) and Kirkland's declaration (*see id.*, Ex. F [ECF No. 18-6]), stating neither Serge nor Kirkland knowingly consented to the arbitration provision of the Memorandum of Association and in any later amendments, are ineffectual in undermining the claimed basis for the Court's subject matter jurisdiction and Defendants' removal. Plaintiffs' strategy is similar to the attempt made by the seaman in *Quiroz*, 522 F. App'x 655. The seaman there sought to "superimpose an additional requirement that the agreement be 'validly formed' in compliance with the Seaman's Convention, the Maritime Labor Convention, and Panamanian law." *Id.* at 661-62. But "the limited jurisdictional inquiry prescribed by the Convention Act" only required the district court "to confirm that there was an agreement in writing in compliance with the Convention." *Id.* at 662 (citing *Bautista*, 396 F.3d at 1301). Similarly, the seaman's argument his agreement was not valid under the Conventions and Panamanian law because he had been denied the ability to consult an attorney before entering the agreement was "essentially the same argument about 'knowledgeable consent'" the court rejected in *Bautista*. *Id.*

Because section 205 "allows district courts to assess their jurisdiction from the pleadings alone, courts must be cautious not to 'conflate the jurisdictional and merits inquiries into a single step.'" *Adams v. Oceaneering Int'l, Inc.*, No. 10-1253, 2010 WL 5437192, at *3 (W.D. La. Dec. 21, 2010) (quoting *Beiser*, 284 F.3d at 670). To the extent Plaintiffs challenge Serge's execution of the arbitration agreement and its amendments, or its enforceability under U.A.E. law, they are asking the Court to engage in a merits inquiry. With regard to the amendments' use of the

phrase "it remains unchanged" rather than a form of the verb "incorporate," parties are not required to "use a rote phrase or some other 'magic words' in order to effect an incorporation by reference." *Microsoft Corp. v. Big Boy Distrib. LLC*, 589 F. Supp. 2d 1308, 1319 (S.D. Fla. 2008) (citation omitted). "[I]t is sufficient if the general language of the incorporation clause reveals an intent to be bound by the terms of the collateral document." *Id.* (alteration added; citation omitted). The inartful expression "with regard to the rest of the Memorandum of Association" or "the Articles of Association," "it remains unchanged," expresses the intent of the parties to bind themselves to the terms of the Memorandum and Articles, except as otherwise amended.

That Ms. Yamalova opines the arbitration provision is not enforceable under U.A.E. law also has no bearing on the Court's subject matter jurisdiction. In *Marchetto v. DeKALB Genetics Corp.*, 711 F. Supp. 936 (N.D. Ill. 1989), plaintiffs resisted defendants' efforts to obtain a dismissal of the case on the basis of an arbitration clause requiring arbitration in Italy on the basis Italian law would not enforce an arbitration agreement where three of the four defendants were not parties to the agreement. *See id.* at 939. The court rejected the argument, as the "possibility that Italian law might divest a panel of Italian arbitrators of jurisdiction is not determinative of this court's duty to enforce an otherwise valid arbitration agreement." *Id.* (citations omitted). The court went on to note "the validity of an arbitration agreement is determined by reference to the Arbitration Act and the federal substantive law of arbitrability." *Id.* (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); other citations omitted). *See also Acosta v. Norwegian Cruise Line, Ltd.*, 303 F. Supp. 2d 1327, 1332 (S.D. Fla. 2003) ("Should arbitration prove unavailable in the Philippines, the parties' arbitration agreement would lose its validity, and this Court would have no choice but to remand the above-

styled cause to state court."); *cf. Zurich Ins. Co. v. Ennia Gen. Ins. Co.*, 882 F. Supp. 1438 (S.D.N.Y. 1995) ("[W]hen parties agree to submit disputes to arbitration, it is presumed that the arbitrator is authorized to determine all issues of law and fact necessary to resolve the dispute." (alteration in original; internal quotation marks and citation omitted)).

Defendants are correct that the enforceability of the arbitration agreement under U.A.E. law is an issue the arbitration panel will decide. (*See* Resp. 12). Should Ms. Yamalova be accurate in her legal interpretations of U.A.E. law and the arbitration agreement be unenforceable, as the district court did in *Acosta v. NCL*, 303 F. Supp. 2d at 1332, the undersigned will be retaining jurisdiction to remand this case to state court upon motion of Plaintiffs.

Plaintiffs' final, substantive argument regarding the absence of subject matter jurisdiction and the need for remand centers around their position the arbitration agreement does not identify the place of arbitration, and so does not satisfy the Convention's second jurisdictional requirement. (*See* Mot. 11–13; Reply 8–9). The closest the arbitration provision comes to satisfying the second jurisdictional requirement, that "the agreement provides for arbitration in the territory of a signatory of the Convention," *Bautista*, 396 F.3d at 1294, n.7, is the provision's last sentence: "In the absence of any arbitration rules in the Dubai Multi Commodities Centre, arbitration shall be conducted in accordance with the arbitration and procedures of the Dubai International Arbitration Centre" (Articles of Association, 21). Plaintiffs assert this sentence is no better than the arbitration clause in *Dr. Byte USA, LLC v. Storex Indus. Corp.*, No. 07-80379, 2008 WL 11333115, at *5 (S.D. Fla. Feb. 21, 2008), which provided the laws of the province of Quebec, Canada governed arbitration, but failed to state the venue for the arbitration and hence was found insufficient to satisfy the second jurisdictional prong. (*See* Mot. 11; Reply 8).

According to Plaintiffs "both agreements point to specific laws to govern, but are silent as to venue, and thus fail the *Bautista* requirement." (Reply 8).

Defendants, not surprisingly, take a different view. Article 20, Section 20.1 of the DIAC rules provides: "The parties may agree in writing on the seat of the arbitration. In the absence of such a choice, the seat of the arbitration shall be Dubai, unless the Executive Committee determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate." (Mot. 12 n.14). These rules or procedures are specifically incorporated in the DG Trading arbitration provision, and as stated, provide for arbitration in Dubai.

Defendants assert the parties' agreement to arbitrate before the DIAC is itself a forum selection clause that must be enforced, relying on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (footnote call number omitted), where the Court held an "agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." (Resp. 14). The Court agrees with Defendants. There is no reason not to allow and give effect to a venue selection clause, any different than any other clause that appears in an arbitration agreement by incorporation. *Cf. Hodgson*, 706 F. Supp. 2d at 1254–55 (seaman's cruise-line sign-on employment agreements, which incorporated by reference a collective bargaining agreement containing an arbitration clause, satisfied the written agreement requirement under the Convention). The agreement to arbitrate before the DIAC is unlike the clause in *Dr. Byte USA*, which merely stated what law was to apply.

III. CONCLUSION

In accordance with the foregoing analysis, it is

ORDERED AND ADJUDGED that the Motion to Remand and for Attorneys' Fees and Costs for Wrongful Removal **[ECF No. 18]** is **DENIED**. Notwithstanding that many of the issues raised in the Motion to Compel Arbitration have, by necessity, been briefed and addressed to resolve the Motion to Remand, and Defendants' position arbitration should be compelled appears well-taken, Plaintiffs have not specifically responded to the Motion to Compel Arbitration. Therefore, Plaintiffs have until September 25, 2017, to file their response to the Motion to Compel Arbitration. Such response is not an opportunity to re-argue the matters briefed and addressed on the present Motion to Remand.

DONE AND ORDERED in Miami, Florida, this 15th day of September, 2017.

Cecilia M. Altonaga

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CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record