APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10944

D.C. Docket No. 1:16-cv-00378-KD-C

OUTOKUMPU STAINLESS USA, LLC,
SOMPO JAPAN INSURANCE COMPANY OF AMERICA,
as subrogee of Outokumpu Stainless USA, LLC,
POHJOLA INSURANCE LIMITED,
AIGEL EUROPE LIMITED,
as subrogee of Outokumpu Oyj,
TAPIOLA GENERAL MUTUAL INSURANCE COMPANY,
as subrogee of Outokumpu Oyj,
AXA CORPORATE SOLUTIONS ASSURANCE SA UK BRANCH,
as subrogee of Outokumpu Oyj,
HDI GERLING UK BRANCH,
as subrogee of Outokumpu Oyj,
MSI CORPORATE CAPITAL LTD.,
as sole Corporate Member of Syndicate 3210,
as subrogee of Outokumpu Oyj,
ROYAL & SUN ALLIANCE, PLC,
as subrogee of Outokumpu Oyj,

Plaintiffs – Appellants,

SOMPO JAPAN INSURANCE COMPANY OF AMERICA, et al.,

Plaintiffs,

versus

CONVERTEAM SAS,
a foreign corporation now known as
GE Energy Power Conversion France SAS, Corp.,

Defendant – Appellee

Appeals from the United States District Court
for the Southern District of Alabama

(August 30, 2018)

Before TJOFLAT and JULIE CARNES, Circuit Judges, and BLOOM,* District Judge.

BLOOM, District Judge:

This appeal requires us to examine seemingly interrelated—but actually quite separate—questions under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"): (1) whether an action between a buyer and a sub-contractor of a seller

* Honorable Beth Bloom, United States District Judge for the Southern District of Florida, sitting by designation.

"relates to" an arbitration agreement signed by the buyer and seller sufficient to establish federal subject matter jurisdiction, and (2) whether a non-signatory sub-contractor may compel arbitration against the buyer under that arbitration agreement. In following our sister circuits, we conclude that these inquiries require a bifurcated analysis. *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005). Where jurisdiction is challenged on a motion to remand, the district court shall first perform a limited inquiry on the face of the pleadings and the removal notice to determine whether the suit "relates to" an arbitration agreement falling under the Convention under the factors articulated in *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 n.7 (11th Cir. 2005). On a motion to compel arbitration, the district court must engage in a more rigorous analysis of the *Bautista* factors to determine whether the parties before the district court entered into an agreement under the meaning of the Convention to arbitrate their dispute.

I. FACTUAL BACKGROUND

Plaintiff Outokumpu Stainless, LLC ("Outokumpu") operates a steel plant in Calvert, Alabama. The facility contains three "cold rolling mills," or CRMs, required for manufacturing and processing certain steel products. In November 2007, while the plant was still under construction, Outokumpu's predecessor ThyssenKrupp Stainless USA LLC entered into three contracts with Fives (then F.L. Industries, Inc.) to provide three different sized CRMs ("Outokumpu-Fives Contracts" or the "Contracts"). The Outokumpu-Fives Contracts each contain an arbitration clause:

> All disputes arising between both parties in connection with or in the performance of the Contract shall be settled through friendly consultation between both parties. In case no agreement can be reached through consultation after a maximum period of 30 days or as soon as one of the parties involved appeals for the arbitration tribunal the dispute shall be considered as failed and any such dispute shall be submitted to arbitration for settlement.

The arbitration clause further requires that the arbitration take place in Dusseldorf, Germany in accordance with the Rules of Arbitration of the International Chamber of Commerce and that the forum apply the substantive law of Germany.

The Contracts define Outokumpu as the "Buyer" and Fives as the "Seller," and state that "Buyer and Seller [are] also referred to individually as 'Party' and collectively as 'Parties.'" The Contracts further provide that: "When Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise." The Contracts define "Sub-contractor" as "any person (other than the Seller) used by the Seller for the supply of any part of the Contract Equipment, or any person to whom any part of the Contract has been sub-let by the Seller[.]" Appended to each Contract is a subcontractor list that enumerates the "Preferred Brands or Manufacturers" for Outokumpu and Fives; Defendant GE Energy Conversion France SAS ("GE Energy"), formerly known as Converteam SAS, is on that list.

Each CRM requires three motors, and Fives subcontracted with GE Energy to supply all nine motors. The motors were manufactured in France and delivered and installed in Alabama between 2011 and 2012. However, by June 2014, the motors began to fail. Despite inspections and emergency repairs, motors from all three of the CRMs failed by August 2015.

Outokumpu approached Fives about replacing or repairing the motors. Through correspondence between GE Energy and Fives, Outokumpu discovered that GE Energy, Fives, and a third company, DMS SA, had entered into a subcontractor agreement, the "Agreement for Consortial Cooperation," three weeks after the Outokumpu-Fives contracts were executed. The Consortial Agreement had "the aim of optimizing the chances of the parties to be awarded the project." Under the Consortial Agreement, GE Energy, Fives, and DMS agreed that "[a]ny and all stipulations of the [Outokumpu-Fives Contracts] shall apply *mutatis mutandis* to each party for its own scope of supply and services."

The Consortial Agreement in turn contains its own arbitration clause as follows:

> The PARTIES shall endeavor to settle any dispute, controversy or claim arising out of or in connection with this AGREEMENT or with the [Outokumpu-Fives Contracts] or the breach, interpretation or validity of this Agreement amicably.
>
> If not agreement settlement can be reached within a reasonable time, either PARTY may commence arbitration after serving a 15 days

> written notice to the other PARTY. Such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Paris.
>
> . . .
>
> In the event a dispute occurs between [Outokumpu] and [Fives], which results in an arbitration proceeding under the [Outokumpu-Fives Contracts], [Fives] shall have the right to join the other PARTY into the arbitration proceedings with [Outokumpu] and the PARTY so joined hereby agrees that it shall be bound by the arbitral award, as long as the latter is given the opportunity to defend its interest in the arbitration procedure held under the [Outokumpu-Fives Contracts].

Under the Consortial Agreement, Fives was designated the "Leading Party" of the consortium and was tasked with representing the interests of the consortium.

II. THE DISTRICT COURT PROCEEDINGS

When Outokumpu was unable to resolve the issues related to the motors with GE Energy, Outokumpu and its insurers filed suit in the Circuit Court of Mobile, Alabama on June 10, 2016. GE Energy timely removed based on federal subject matter jurisdiction under 9 U.S.C. § 205 and diversity jurisdiction based on fraudulent joinder of Outokumpu's insurers. Outokumpu and the insurers moved to remand, and

GE Energy moved to dismiss and compel arbitration. Outokumpu also sought limited discovery regarding the Consortial Agreement. The district court denied the motion to remand and the motion for limited discovery, and granted the motions to compel and dismiss.

As to the motion to remand, the district court, adopting the magistrate's report and recommendation, found removal proper under the New York Convention and the Federal Arbitration Act ("FAA") since this case "relates to" the arbitration agreement found in the Outokumpu-Fives Contracts and that arbitration agreement "fall[s] under the Convention." As to the motion to compel arbitration, the district court found that each of the four jurisdictional prerequisites under *Bautista* was met and no affirmative defense applied. Specifically, as to the first prerequisite, the district court found there was an "agreement in writing," signed by the Outokumpu and GE Energy, since Outokumpu signed the Contracts and GE Energy, as a sub-contractor, was not expressly excluded from the arbitration provision. The second prerequisite was not contested by the parties. As to the third and fourth prerequisite, the district court found that the arbitration agreement arose out of a legal commercial relationship between Outokumpu and Fives and that that relationship had some reasonable relationship with a foreign state. Accordingly, the district court granted the motion to compel and dismissed the action.

III. STANDARD OF REVIEW

We review *de novo* both the district court's denial of the motion to remand and the district court's grant of

the motion to compel arbitration and dismiss. *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1283 (11th Cir. 2015) (citing *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1204 (11th Cir. 2008) and *Bautista*, 396 F.3d at 1294). The same *de novo* standard applies to the district court's interpretation of treaties and federal law. *In re Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007). We review the district court's denial of Outokumpu's request for discovery for abuse of discretion. *Holloman v. Mail–Well Corp.*, 443 F.3d 832, 837 (11th Cir. 2006).

IV. THE MOTION TO REMAND

Federal policy favors arbitral dispute resolution. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). Congress enacted the FAA to counter widespread hostility to arbitration and encourage the recognition and enforcement of arbitration awards. *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1284 (11th Cir. 2015) (citing *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308–09 (2013)). In 1970, Congress amended the FAA to incorporate the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. *See* 9 U.S.C. §§ 201 *et seq*. These amendments provide for the recognition of foreign arbitration agreements and arbitral awards. 9 U.S.C. §§ 201 *et seq*.

In amending the FAA, Congress further sought to promote the development of a uniform body of federal law under the Convention. *Beiser v. Weyler*, 284 F.3d 665, 672 (5th Cir. 2002). Section 203 provides that

district courts have original jurisdiction over an action falling under the Convention. Congress also included broad grounds for removal "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. § 205.

The phrase "falling under the convention" is defined in Section 202:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

9 U.S.C. § 202. "Relates to," however, is not defined in the FAA or the Convention, and we have yet to examine its meaning.

Our sister circuits, however, have had occasion to interpret this phrase. In *Beiser*, a consulting company's principal sued in his individual capacity regarding an oil investment. 284 F.3d at 666. The investment was financed by an agreement between the consulting company and a non-party which contained an arbitration provision. The plaintiff challenged jurisdiction as he did not sign the

arbitration agreement. The Fifth Circuit, after noting that the plain meaning of " 'relates to' sweeps broadly," held that "whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff's case, the agreement 'relates to' to the plaintiff's suit" sufficient for removal jurisdiction. *Id.* at 669 (emphasis in original).

Both the Eighth and Ninth Circuits have followed the Fifth Circuit. *Reid v. Doe Run Res. Corp.*, 701 F.3d 840, 844 (8th Cir. 2012) ("Joining the Fifth and Ninth Circuits, this court holds that a case may be removed under § 205 if the arbitration could conceivably affect the outcome of the case."); *Infuturia Glob. Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133, 1137–38 (9th Cir. 2011) (noting that the Fifth Circuit "construed this language to mean that '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.' We agree with this interpretation" (emphasis in original) (quoting *Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002))).

We join the Fifth, Eighth, and Ninth Circuits and agree that the "relates to" language of Section 205 provides for broad removability of cases to federal court. While the link between the arbitration agreement and the dispute is not boundless, the arbitration agreement need only be sufficiently related to the dispute such that it conceivably affects the outcome of the case. Thus, as long as the argument that the case "relates to" the arbitration agreement is not immaterial, frivolous, or made solely to obtain jurisdiction, the relatedness requirement is met for purposes of federal subject matter jurisdiction.

This initial jurisdictional inquiry is distinct from a determination of whether the parties are bound to arbitrate. *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *see also Sarhank*, 404 F.3d 660, *Beiser v. Weyler*, 284 F.3d 665, 671 (5th Cir. 2002). As we have noted, "Section 205 does not require a district court to review the putative arbitration agreement—or investigate the validity of the signatures thereon—before assuming jurisdiction: 'The language of § 205 strongly suggests that Congress intended that district courts continue to be able to assess their jurisdiction from the pleadings alone.'" *Bautista*, 396 F.3d at 1301 (quoting *Beiser*, 284 F.3d at 671). Thus, in determining jurisdiction the district court need not—and should not—examine whether the arbitration agreement binds the parties before it. Rather, the "relates to" inquiry requires the court to determine whether, on the face of the pleadings and the removal notice, there is a nonfrivolous claim that the lawsuit relates to an arbitration agreement that "falls under the Convention."

Accordingly, upon removal the district court shall engage in a two-step inquiry to determine jurisdiction, limiting its examination to the pleadings and the removal notice. 9 U.S.C. § 205. First, the district court should determine whether the notice of removal describes an arbitration agreement that may "fall[] under the Convention." To do so, the district court employs the test articulated in *Bautista* to the four corners of the arbitration agreement and asks whether the removing party has articulated a non-frivolous basis (1) that there is an agreement in writing, that is, an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an

exchange of letters or telegrams; (2) that the agreement provides for arbitration in the territory of a signatory of the Convention; (3) that the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) that 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. *See Bautista*, 396 F.3d at 1295–96 n.7 & 9. Second, the district court must determine whether there is a non-frivolous basis to conclude that agreement sufficiently "relates to" the case before the court such that the agreement to arbitrate could conceivably affect the outcome of the case.

The district court held that Outokumpu's claims relate to an arbitration agreement falling under the Convention. The parties concede that the second and third *Bautista* factors are met, and thus we need only examine the first and fourth factors. As to the first factor, GE Energy has identified the arbitration clauses in the Outokumpu-Fives Contracts. Because the Contracts are signed by Outokumpu and Fives, the Contracts satisfy the first factor.

As to the fourth factor, on the face of the complaint and removal notice, the Outokumpu-Fives Contracts govern a commercial relationship that has a reasonable relation to one or more foreign states. The Contracts contemplate performance by certain foreign subcontractors in foreign states. Moreover, the initial negotiations regarding the Outokumpu-Fives Contracts occurred in Germany. While these arguments may not prevail on a motion to compel arbitration between the parties before the district

court, they are sufficient to meet GE Energy's burden opposing remand.

And this lawsuit sufficiently "relates to" the arbitration agreement in the Outokumpu-Fives Contracts. As alleged in the pleadings, the present lawsuit against GE Energy concerns the performance of the Outokumpu-Fives Contracts, and the arbitration agreement contained in those Contracts is sufficiently related to the instant dispute such that it could conceivably affect the outcome of this case.

This approach is consistent with our removal jurisprudence, which confines its analysis to the face of the pleadings. *Bautista*, 396 F.3d at 1301. Nothing in 9 U.S.C. § 201 *et seq*. expresses an intent of Congress for the courts to engage in a uniquely rigorous inquiry upon removal of cases on the basis of the Convention, and in fact, that FAA explicitly states that the "procedure for removal of causes otherwise provided by law shall apply." *Id.* § 205. Accordingly, we decline to read such a standard into the statute.

V. THE MOTION TO COMPEL ARBITRATION

Having found that the district court properly exercised jurisdiction, we now turn to the question of whether Outokumpu may be compelled to arbitrate its dispute with GE Energy. Under 9 U.S.C. § 206, a "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." While only a "very limited inquiry" is required to determine whether to compel arbitration, *Bautista*, 396 F.3d at 1295, this inquiry is necessarily more rigorous than on a motion to remand because the

district court must determine whether the parties before the court agreed to arbitrate their dispute.

Again, a party may compel arbitration under the Convention only if:

> (1) there is 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. Here, our inquiry starts and ends with the first factor because we find that there is no agreement in writing within the meaning of the Convention. Under the New York Convention, "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." New York Convention, Article II, ¶ 1. Article II further states that "[t]he 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." New York Convention, Article II, ¶ 2. The requirement that the agreement to arbitrate be "signed by the parties"

applies to both an arbitral clause and an arbitration agreement. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017); *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003); *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999), *partially abrogated on other grounds by Sarhank*, 404 F.3d at 660 n.2. *But see Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1994) (reading "signed by the parties" to only modify "an arbitration agreement" and not "an arbitral clause in a contract" and finding a signature was not required to compel arbitration under an arbitration provision of an insurance contract).

The district court determined that GE Energy and Outokumpu were parties to the Contracts by tracing the definitions of "Buyer" and "Seller," which included subcontractors unless explicitly stated otherwise, and the definition of "parties" as "Buyer" and "Seller." Inserting these definitions into the arbitration clause, the district court found that there was an agreement in writing under the meaning of the Convention which required Outokumpu and GE Energy to arbitrate.

However, GE Energy is undeniably not a signatory to the Contracts. At the time the Contracts were signed by Outokumpu and Fives, GE Energy was a stranger to the Contracts and, at most, a potential subcontractor. Private parties—here Outokumpu and Fives—cannot contract around the Convention's requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration. New York Convention, Article II, ¶ 1; *see also Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004) (finding sample wording, not signed by the parties, did not satisfy the

"agreement in writing" requirement); *Yang*, 876 F.3d at 1001 (finding "agreement in writing" requirement not satisfied to compel arbitration between a non-signatory company and signatory employee). Accordingly, we hold that, to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities.[1]

This requirement is consistent with our prior decisions. *In Czarina*, 358 F.3d at 1289, 1293, we found on a motion to confirm an arbitration award that an unsigned, unexecuted "sample wording" containing an arbitral clause could not satisfy the "agreement in writing" requirement, even when the arbitration panel found the sample wording sufficient. We held that the parties in *Czarina* could not avoid the "agreement in writing" requirement based on an erroneous arbitration finding "because accepting it would eviscerate an important principle of United States and international arbitration law." *Id.* at 1293. So too here: GE Energy cannot avoid U.S. and international arbitration law that require that the parties sign an agreement to arbitrate the dispute between them.

The fact that non-signatory GE Energy, and not signatory Outokumpu, seeks to enforce the arbitration provision does not alter our analysis. While the FAA "places arbitration agreements on equal footing with

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[1] Nothing in this opinion disturbs our holdings that an arbitration agreement is "signed by the parties" when signed by a party's privy or incorporated by reference in an arbitration agreement. *Bautista v. Star Cruises*, 396 F.3d 1289, 1293 (11th Cir. 2005); *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1213 (11th Cir. 2011).

all other contracts and sets forth a clear presumption—'a national policy'—in favor of arbitration," *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1146 (11th Cir. 2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)), the Convention, as codified in Chapter 2 of the FAA, only allows the enforcement of agreements in writing signed by the parties and Congress has specified that the Convention trumps Chapter 1 of the FAA where the two are in conflict. *See* 9 U.S.C. § 208 ("Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."). Although parties can compel arbitration through estoppel under Chapter 1 of the FAA, estoppel is only available under Chapter 1 because Chapter 1 does not expressly restrict arbitration to the specific parties to an agreement. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31, 129 S. Ct. 1896, 1902 (2009). But the Convention imposes precisely such a restriction. New York Convention, Article II, ¶ 2 (requiring that an "agreement in writing" be "signed by the parties or contained in an exchange of letters or telegrams"). Thus, GE Energy cannot compel Outokumpu to arbitrate through estoppel. For this same reason, GE Energy also cannot compel arbitration through a third-party beneficiary theory because, again, the Convention requires that the agreement to arbitrate be signed by the parties (or exchanged in letters or telegrams).

GE Energy's argument that it may compel arbitration based on the Consortial Agreement fares no better. Even if GE Energy had agreed with Fives

and the third subcontractor DMS that it would arbitrate any disputes arising out of the Consortial Agreement or the Contracts, or that GE Energy would be bound to any arbitration agreement in the Contracts, these agreements were entered into unbeknownst to Outokumpu. GE Energy's unilateral acquiescence to arbitrate with Outokumpu is not an agreement "signed by [ ] parties" Outokumpu and GE Energy. And though the Consortial Agreement may have established that Fives could act as an agent of GE Energy in its dealings with Outokumpu, Fives did not become GE Energy's agent until *after* Fives and Outokumpu had already signed the Outokumpu-Fives Contracts. As such, Fives did not sign the Contracts on behalf of GE Energy as GE Energy's agent. Altogether, in the absence of a signed agreement, Outokumpu cannot be compelled to arbitrate its dispute with GE Energy under the Convention.

In its supplemental briefing on appeal, GE Energy raises for the first time the argument that it is entitled to compel arbitration under Chapter 1 of the FAA. This issue was not raised before the district court and was not presented in the parties' initial appellate briefing. Accordingly, we decline to consider it now.

VI. MOTION FOR LIMITED DISCOVERY

Outokumpu also appeals the district court's denial of its motion for limited discovery into the corporate relationship between GE Energy, Converteam, and the Consortial Agreement. "[A] district court is allowed a range of choice in such matters, and we will not second-guess the district court's actions unless they reflect a clear error of judgment." *Holloman v. Mail–Well Corp.*, 443 F.3d 832, 837 (11th Cir. 2006)

(internal quotation marks omitted). We find no clear error in the district court's determination that such discovery was unnecessary given the allegations in the complaint and the agreement under which GE Energy sought to compel arbitration.

VII. CONCLUSION

Based on the foregoing, we AFFIRM the district court's denial of the motion to remand and denial of limited discovery, but REVERSE and REMAND the district court's order compelling arbitration for further proceedings consistent with this opinion.

SO ORDERED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10944-AA

OUTOKUMPU STAINLESS USA, LLC,
SOMPO JAPAN INSURANCE COMPNAY OF AMERICA,
as subrogee of Outokumpu Stainless USA, LLC,
POHJOLA INSURANCE LIMITED,
AIGEL EUROPE LIMITED,
as subrogee of Outokumpu Oyj,
TAPIOLA GENERAL MUTUAL INSURANCE COMPANY,
as subrogee of Outokumpu Oyj,
AXA CORPORATE SOLUTIONS ASSURANCE SA UK BRANCH,
as subrogee of Outokumpu Oyj,
HDI GERLING UK BRANCH,
as subrogee of Outokumpu Oyj,
MSI CORPORATE CAPITAL LTD.,
as sole Corporate Member of Syndicate 3210,
as subrogee of Outokumpu Oyj,
ROYAL & SUN ALLIANCE, PLC,
as subrogee of Outokumpu Oyj,

Plaintiffs – Appellants,

SOMPO JAPAN INSURANCE COMPANY OF AMERICA, et al.,

Plaintiffs,

versus

CONVERTEAM SAS,
a foreign corporation now known as
GE Energy Power Conversion France SAS, Corp.,

Defendant – Appellee

Appeals from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT and JULIE CARNES, Circuit Judges, and BLOOM,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

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* Honorable Beth Bloom, United States District Judge for the Southern District of Florida, sitting by designation.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

OUTOKUMPU STAINLESS USA LLC, *et al.*,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 16-00378-KD-C**
CONVERTEAM SAS, a foreign corporation now known as GE ENERGY POWER CONVERSION FRANCE SAS, CORP.,	)	
Defendant.	)	

ORDER

This action is before the Court on the motion to compel arbitration and to dismiss filed by Defendant GE Energy Power Conversion France SAS, Corp., formerly known as Converteam SAS (GE); the response filed by Pohjola Insurance Limited, AIG Europe Limited, Tapiola General Mutual Insurance Company, AXA Corporate Solutions Assurance SA UK Branch, HDI

Gerling UK Branch, MSI Corporate Capital Ltd., and Royal & Sun Alliance PLC (the Insurers); the response filed by Outokumpu Stainless USA, LLC (OTK); and GE's reply (docs. 62, 64, 66, 67). Upon consideration, and for the reasons set forth herein, GE's motion to compel arbitration (doc. 62) is **GRANTED** and the claims of the Insurers are referred for arbitration in accordance with the terms of the Supply Agreements. Accordingly, GE's motion to dismiss is **GRANTED**. The Clerk of the Court is directed to close this action.

I. Background

On November 25, 2007, Thyssenkrupp Stainless USA, LLC (TK Stainless) entered into three separate contracts, Supply Agreements 1001, 1002, and 1003, with F.L. Industries Inc. now known as Fives St Corp. (FLI), for the purchase of three Cold Rolling Mills for its stainless steel manufacturing facility in Calvert, Alabama (docs. 5-1, 5-2, 5-3, under seal). Each Supply Agreement identifies TK Stainless as the "Buyer" and FLI as the "Seller" and refers to them "collectively as 'Parties'" (Docs. 5-1, 5-2, 5-3, p. 5). The Supply Agreements further provide an agreed interpretation that "[w]hen Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise." (Docs. 5-1, 5-2, 5-3, p. 9, § 1.2. "Interpretations") "Sub-contractor" is defined as "any person (other than the Seller) used by the Seller for the supply of any part of the Contract Equipment, or any person to whom any part of the Contract has been sub-let by the Seller[.]" (Id., §1.1 "Definitions"). "Contract Equipment" means the mill and "all equipment, machines, parts, components and/or spare parts, to be delivered as stipulated within the Seller's scope of supply." (Id. at p. 7).

Pursuant to the Supply Agreements, FLI was to engage subcontractors and suppliers necessary for the completion of the work and the supply of equipment, etc. To that end, the Supply Agreements set out, in Annex A3, a list of "mandatory" vendors identified by TK Stainless from which FLI could select as suppliers of services and equipment, including, inter alia, Converteam, now GE (docs. 5-1, 5-2, 5-3, p. 91, under seal). Subsequently, FLI entered into an Agreement for Consortial Cooperation (the Consortial Agreement) with GE and a third company, DMS SA (DMS) under which GE was to provide electrical equipment for the Cold Rolling Mills. The Consortial Agreement states that GE was "acting as subcontractor[] of FLI" (doc. 5-4, p. 2). GE designed, engineered and manufactured the motors in France, which were then shipped to and installed in TK Stainless's facility in Alabama.

Relevant to GE's motion to compel arbitration, Section 23.1 of the Supply Agreements provides, in pertinent part, as follows:

> All disputes arising between both parties in connection with or in the performances of the Contract shall be settled through friendly consultation between both parties. In case no agreement can be reached through consultation ... any such dispute shall be submitted to arbitration for settlement.

(Docs. 5-1, 5-2, 5-3, under seal, at § 23.1) The Supply Agreements further provide that arbitration shall take place in Dusseldorf, Germany, be "conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce" and that the

"substantive law of Federal Republic of Germany shall apply" (*id.* at § 23.2, 23.5).

In 2014, after OTK acquired the facility from TK Stainless, one of the motors supplied by GE (formerly Converteam) failed. Inspection of the other motors supplied by GE showed similar issues as the failed motor.

On June 10, 2016, OTK and the Insurers filed this action against GE in the Circuit Court of Mobile County, Alabama. OTK asserted causes of action for negligence, breach of professional design and construction warranties, breach of implied warranties, and product liability under the Alabama Extended Manufacturer's Liability Doctrine arising from the alleged failure of the motors supplied by GE (doc. 1-2). The Insurers alleged that they paid OTK and its corporate parent Outokumpu Oyj under the policies for the losses claimed for the motors' failures. The Insurers assert that they are equitably and contractually subrogated to the rights of OTK and Outokumpu Oyj, to the extent insurance payments were made (*id.*).

On July 18, 2016, GE removed the action to this Court. GE alleged two jurisdictional grounds: (1) federal subject matter jurisdiction pursuant to 9 U.S.C. § 205, which authorizes removal of an action where the subject matter of the suit "relates to" an arbitration agreement "falling under" the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention); and (2) diversity jurisdiction based upon the fraudulent joinder of the Insurers as plaintiffs. After removal, GE moved to compel arbitration as to OTK and Insurer Sompo Japan

Insurance Company of America (Sompo) and moved to dismiss the remaining Insurers (docs. 6,7). GE argued that the Insurers had failed to state a claim because they alleged they were subrogees of Outokumpu Oyj, the parent company for Outokumpu Americas, Inc., the sole member of OTK, but not subrogees of OTK, the plaintiff. GE argued that since OTK Oyj had not been damaged by the failure of the motors, it had no claim against GE. The Insurers assert that "the rights of the OTK Oyj Subrogees are derivative of and dependent upon the rights of OTK Oyj, and because OTK Oyj has no claim against GE Energy, neither do they" (doc. 7, p. 6).

On August 17, 2016, OTK and the Insurers moved to remand (docs. 34 and 35). The motions to remand and GE's motion to dismiss the claims of the Insurers were denied (doc. 57, Order adopting Report and Recommendation). On January 30, 2017, GE's motion to compel arbitration was granted and GE, OTK and Sompo were referred to arbitration as provided in the Supply Agreements (doc. 68). GE's motion to compel the remaining Insurers is now pending before the Court (doc. 62).

II. Statement of the law

"The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York 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. The United States, as a signatory to the Convention, enforces this treaty through Chapter 2 of the U.S. Federal Arbitration Act (FAA), which incorporates the

terms of the Convention[.]" *Thomas v. Carnival Corp*., 573 F.3d 1113, 1116 (11th Cir. 2009) (*abrogation on other grounds recognized by Williams v. NCL (Bahamas) Ltd.,* 686 F. 3d 1169 (11th Cir. 2009)). The Court of Appeals for the Eleventh Circuit, quoting the Supreme Court, "has explained that 'the principal purpose' behind the adoption of the Convention 'was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.'" *Suazo v. NCL (Bahamas), Ltd*., 822 F.3d 543, 545 (11th Cir. 2016) (quoting *Scherk v. Alberto Culver Co.,* 417 U.S. 506, 520 n. 15, 94 S. Ct. 2449 1974)).

"To implement the Convention, Chapter 2 of the FAA provides two causes of action in federal court for a party seeking to enforce arbitration agreements covered by the Convention: (1) an action to compel arbitration in accord with the terms of the agreement, 9 U.S.C. § 206, (2) and at a later stage, an action to confirm an arbitral award made pursuant to an arbitration agreement, 9 U.S.C. § 207." *Lindo v. NCL (Bahamas), Ltd*., 652 F.3d 1257 (11th Cir. 2011).

"In determining whether to compel arbitration under the Convention Act, a district court conducts 'a very limited inquiry.'" *Escobar v. Celebration Cruise Operator, Inc*., 805 F.3d 1279, 1285 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1158 (2016) (internal quotations and citation omitted) (quoting *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005)). "An arbitration agreement falls within the jurisdiction of the New York Convention if: (1) the agreement is 'in writing within the meaning of the [New York]

Convention'; (2) 'the agreement provides for arbitration in the territory of a signatory of the [New York] 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 the commercial relationship has some reasonable relation with one or more foreign states." *Suazo*, 822 F.3d at 546 (quoting *Bautista*, 396 F.3d at 1294 n. 7) (bracketed text in original). The Eleventh Circuit has held that "the Convention requires that a motion to compel arbitration must be granted 'so long as (1) the four jurisdictional prerequisites are met and (2) no available affirmative defense under the Convention applies.'" *Suazo,* 822 F. 3d at 546 (quoting *Lindo,* 652 F.3d at 1276). "If these prerequisites are met, then the court should compel arbitration pursuant to the agreement unless the agreement is 'null and void, inoperative or incapable of being performed,' pursuant to Article II of the Convention." *Clair v. NCL (Bahamas), Ltd*., 2013 WL 12128723, at *1 (S.D. Fla. June 5, 2013) (citing Convention, art. II (3); *Bautista*, 396 F.3d at 1301)) (footnote omitted). Overall, "a district court must be mindful that the Convention Act generally establishes a strong presumption in favor of arbitration of international commercial disputes." *Escobar v. Celebration Cruise Operator, Inc.,* 805 F. 3d 1279, 1286 (11th Cir. 2015) (internal quotations and citation omitted).

"Notwithstanding this strong federal policy, 'an agreement to arbitrate, just like any other contract, may be waived.'" *Grigsby & Associates, Inc. v. M Securities Investment*, 635 Fed. Appx. 728, 731 (11th Cir. 2015)(quoting *Ivax Corp. v. Braun of America,*

Inc., 286 F.3d 1309, 1315 (11th Cir. 2002)). "'A party has waived its right to arbitrate if, under the totality of the circumstances, the party has acted inconsistently with the arbitration right and, in so acting, has in some way prejudiced the other party.'" *Grigsby & Associates, Inc.,* 635 Fed. Appx. at 731 (quoting *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990)). "There is no set rule ... as to what constitutes a waiver ... of the arbitration agreement." *Id.* (citing *Burton-Dixie Corp. v. Timothy McCarthy Constr. Co.,* 436 F.2d 405, 408 (5th Cir. 1971)). "Whether waiver has occurred 'depends upon the facts of each case.'" *Id.*

The Eleventh Circuit "'recognized that a party who substantially invokes the litigation machinery prior to demanding arbitration may waive its right to arbitrate.'" *Grigsby & Associates, Inc.,* 635 Fed. Appx. at 731 (quoting *S & H Contractors, Inc.*, 906 F.2d at 1514); *Morewitz v. West of England Ship Owners Mutual Protection & Indemnification Ass'n*, 62 F.3d 1356, 1366 (11th Cir. 1995) (waiver "occurs when a party seeking arbitration substantially participates in litigation to a point inconsistent with an intent to arbitrate and this participation results in prejudice to the opposing party."). "Prejudice exists when the party opposing arbitration 'undergo[es] the types of litigation expenses that arbitration was designed to alleviate.'" *In re Checking Account Overdraft Litigation*, 754 F.3d 1290, 1294 (11th Cir. 2014) "Additionally, in determining whether there is prejudice to the other party, [the district courts] may consider the length of delay in demanding arbitration and the expense incurred by that party from participating in the litigation process." *Grigsby &*

Associates, Inc., 635 Fed. Appx. at 731–732 (quoting *S & H Contractors, Inc.*, 906 F. 2d at 1514) (bracketed text added). Overall, the party who asserts waiver bears the burden of proof. *Grigsby & Associates, Inc.,* 635 Fed. Appx. at 732.

III. Analysis

GE moves the Court to compel the Insurers to arbitrate their claims against GE and to dismiss those claims without prejudice (doc. 62). In support, GE adopts and incorporates the arguments from its earlier motion to compel arbitration as to OTK and Sompo (doc. 6) and its reply (doc. 38). In addition, GE argues that the remaining Insurers are subrogated to the rights of the insured OTK, and therefore, they too must arbitrate their claims against GE.

The Insurers argue that GE waived its right to arbitrate by filing the motion to dismiss for failure to state a claim, instead of a motion to compel arbitration, and then waiting until the motion to dismiss was denied five and one-half months later to file the motion compel arbitration. The Insurers argue that GE acted inconsistently with the right to arbitration by substantially invoking the litigation process. The Insurers also argue that they were prejudiced because of the expenditure of resources to respond to the motion to dismiss and attend oral argument, and then after the Magistrate Judge issued the Report and Recommendation, to respond to GE's partial objection to the Recommendation. Alternatively, the Insurers adopt and incorporate their prior arguments in opposition to GE's motion to compel arbitration as to OTK and Sompo (docs. 34, 41).

As to waiver, the Court finds that under the totality of the circumstances, GE has not waived its right to arbitrate. Although GE moved to dismiss the Insurers' claims for failure to state a claim, the argument was limited to whether the Insurers were subrogees of OTK such that they too were parties to the action and could state a claim against GE. The parties did not address the merits of the claims raised in the complaint. The Magistrate Judge succinctly stated GE's argument as follows: "GE Energy contends that the Foreign Insurers have no claim against GE Energy because their principal, Outokumpu OYJ, the Finnish parent of OTK Stainless, has no cause of action against GE Energy." (Doc. 50, p. 21) Thus while OTK and the Insurers briefed and argued the issue, and responded to GE's objections to the Report and Recommendation, the totality of the circumstances indicates that GE did not substantially litigate to a point inconsistent with invoking its right to arbitration before moving to compel arbitration as to the Insurers. *See Grigsby & Associates, Inc.,* 635 Fed. Appx. at 733–734 (finding that incurring minimal time and resources "in responding to [placeholder] lawsuits is insufficient to establish prejudice supporting a finding of waiver.") (citations omitted).

One other factor weighs in favor of finding that GE has not waived its right to arbitrate. The parties do not appear to have engaged in any discovery. Review of the docket indicates that the action was removed on July 18, 2016 and that July 25, 2016 was the deadline for GE to answer. GE timely filed the motion to dismiss and the motion to compel arbitration before the deadline. GE did not file an answer. Therefore, the Court did not enter a preliminary scheduling

order. The parties did not meet and file a report of parties' planning meeting and consequently, no Rule 16(b) Scheduling Order has been entered. Since there has been no pre-trial discovery, the Insurers' "legal position" has not been prejudiced. *Garcia*, 699 F.3d at 1278. Nor have they been prejudiced by the expense of discovery, *i.e.*, a type of litigation expense that arbitration was meant to alleviate. *Id.*

Moreover, the motion to dismiss did not address the merits of the Insurers' claims against GE, but instead challenged their capacity as subrogees of OTK and Outokumpu Oyj to sue GE. Therefore, the Insurers and OTK have not been prejudiced by a contest of the merits that occurred before the motion to compel arbitration was filed. *See Zimmer v. CooperNeff Advisors, Inc.,* 523 F.3d 224, 231–32 (3d Cir. 2008) (including "the degree to which the merits of the nonmovant's claims have been contested by the party moving for arbitration" as a factor "relevant to the prejudice inquiry").

The parties adopted and incorporated their respective arguments raised in the motion to compel arbitration as to OTK and Sompo, the responses, and the reply. The Court has now addressed those arguments and found that the prerequisites set forth in *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005) have been met. The Court ordered OTK and Sompo to arbitrate their claims against GE (doc. 68). Thus, for the reasons set forth in the Court's order granting the motion to compel arbitration as to OTK and Sompo, and the reasons in support of the decision that Sompo, as OTK's subrogee was bound by the same arbitration provisions in the Supply Agreements as its insured, the Court finds that the Insurers as

subrogees of OTK are also bound by the same arbitration provisions in the Supply Agreements, and therefore, must submit to arbitration. *See Alstom Brasil Energia e Transporte Ltda. v. Mitsui Sumitomo Seguros S.A.*, 2016 WL 3476430, at *4–5 (S.D.N.Y. June 20, 2016) (finding that the "Mitsui-Alunorte insurance contract gave Mitsui a clear subrogation right" and that "[b]y pursuing Alunorte's contract claim against Alstom, Mitsui was bound by the arbitration clause that would have bound Alunorte.") (collecting cases).

IV. Conclusion

Upon consideration of the foregoing, GE's motion to compel arbitration (doc. 62) is **GRANTED** and the claims of the remaining Insurers are referred for arbitration in accordance with the terms of the Supply Agreements. Accordingly, the motion to dismiss is **GRANTED.**

DONE and ORDERED this the 3rd day of February 2017.

/s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

OUTOKUMPU STAINLESS USA LLC, *et al.*,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 16-00378-KD-C**
CONVERTEAM SAS, a foreign corporation now known as GE ENERGY POWER CONVERSION FRANCE SAS, CORP.,	)	
Defendant.	)	

ORDER

This action is before the Court on the motion to compel arbitration and to dismiss filed by Defendant GE Energy Power Conversion France SAS, Corp., formerly known as Converteam SAS (GE); the response filed by Sompo Japan Insurance Company of America, Pohjola Insurance Limited, AIG Europe Limited, Tapiola General Mutual Insurance Company,

AXA Corporate Solutions Assurance SA UK Branch, HDI Gerling UK Branch, MSI Corporate Capital Ltd., and Royal & Sun Alliance PLC (the Insurers); the response filed by Outokumpu Stainless USA, LLC (OTK); GE's reply; the Insurers' reply; and OTK's reply (docs. 6, 34, 35, 38, 41, 42). Upon consideration, and for the reasons set forth herein, the motion to compel arbitration (doc. 6) is **GRANTED** and this action is referred for arbitration in accordance with the terms of the Supply Agreements. Accordingly, the motion to dismiss is **GRANTED.**[1]

I. Background

On November 25, 2007, Thyssenkrupp Stainless USA, LLC (TK Stainless) entered into three separate contracts, Supply Agreements 1001, 1002, and 1003, with F.L. Industries Inc. now known as Fives St Corp. (FLI), for the purchase of three Cold Rolling Mills for its stainless steel manufacturing facility in Calvert, Alabama (docs. 5-1, 5-2, 5-3, under seal). Each Supply Agreement identifies TK Stainless as the "Buyer" and FLI as the "Seller" and refers to them "collectively as 'Parties'" (Docs. 5-1, 5-2, 5-3, p. 5). The Supply Agreements further provide an agreed interpretation that "[w]hen Seller is mentioned it shall be understood as Subcontractors included, except if expressly stated

[1] This action is also before the Court on GE's motion to supplement, OTK's response, the Insurer's response, GE's reply and OTK's supplemental response (docs. 58, 59, 60, 61, 65). GE moved to supplement its motion to compel arbitration by adopting and incorporating by reference the facts and arguments regarding equitable estoppel in its reply. The motion (doc. 58) is DENIED. The Court has determined that OTK and GE are parties to the Supply Agreements and therefore, need not address GE's equitable estoppel argument.

otherwise." (Docs. 5-1, 5-2, 5-3, p. 9, § 1.2. "Interpretations") "Sub-contractor" is defined as "any person (other than the Seller) used by the Seller for the supply of any part of the Contract Equipment, or any person to whom any part of the Contract has been sub-let by the Seller[.]" (Id., §1.1 "Definitions"). "Contract Equipment" means the mill and "all equipment, machines, parts, components and/or spare parts, to be delivered as stipulated within the Seller's scope of supply." (Id. at p. 7).

Pursuant to the Supply Agreements, FLI was to engage subcontractors and suppliers necessary for the completion of the work and the supply of equipment, etc. To that end, the Supply Agreements set out, in Annex A3, a list of "mandatory" vendors identified by TK Stainless from which FLI could select as suppliers of services and equipment, including, inter alia, Converteam, now GE (docs. 5-1, 5-2, 5-3, p. 91, under seal). Subsequently, FLI entered into an Agreement for Consortial Cooperation (the Consortial Agreement) with GE and a third company, DMS SA (DMS) under which GE was to provide electrical equipment for the Cold Rolling Mills. The Consortial Agreement states that GE was "acting as subcontractor[] of FLI" (doc. 5-4, p. 2). GE designed, engineered and manufactured the motors in France, which were then shipped to and installed in TK Stainless's facility in Alabama.

Relevant to GE's motion to compel arbitration, Section 23.1 of the Supply Agreements provides, in pertinent part, as follows:

> All disputes arising between both parties in connection with or in the performances of the Contract shall be settled through friendly

> consultation between both parties. In case no agreement can be reached through consultation ... any such dispute shall be submitted to arbitration for settlement.

(Docs. 5-1, 5-2, 5-3, under seal, at § 23.1) The Supply Agreements further provide that arbitration shall take place in Dusseldorf, Germany, be "conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce" and that the "substantive law of Federal Republic of Germany shall apply" (*id.* at § 23.2, 23.5).

In 2014, after OTK acquired the facility from TK Stainless, one of the motors supplied by GE (formerly Converteam) failed. Inspection of the other motors supplied by GE showed similar issues as the failed motor.

On June 10, 2016, OTK and the Insurers filed this action against GE in the Circuit Court of Mobile County, Alabama. OTK asserted causes of action for negligence, breach of professional design and construction warranties, breach of implied warranties, and product liability under the Alabama Extended Manufacturer's Liability Doctrine arising from the alleged failure of the motors supplied by GE (doc. 1-2). The Insurers alleged that they paid OTK and its corporate parent Outokumpu Oyj under the policies for the losses claimed for the motors' failures. The Insurers assert that they are equitably and contractually subrogated to the rights of OTK and Outokumpu Oyj, to the extent insurance payments were made (*id.*).

On July 18, 2016, GE removed the action to this Court. GE alleged two jurisdictional grounds: (1)

federal subject matter jurisdiction pursuant to 9 U.S.C. § 205, which authorizes removal of an action where the subject matter of the suit "relates to" an arbitration agreement "falling under" the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention); and (2) diversity jurisdiction based upon the fraudulent joinder of the Insurers as plaintiffs. After removal, GE moved to compel arbitration as to OTK and Insurer Sompo and moved to dismiss the remaining Insurers (docs. 6,7).

On August 17, 2016, OTK and the Insurers moved to remand (docs. 34 and 35). The motions to remand and GE's motion to dismiss the claims of the Foreign Insurers were denied (doc. 57, Order adopting Report and Recommendation). GE's motion to compel arbitration is now pending before the Court.

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"The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York 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. The United States, as a signatory to the Convention, enforces this treaty through Chapter 2 of the U.S. Federal Arbitration Act (FAA), which incorporates the terms of the Convention[.]" *Thomas v. Carnival Corp*., 573 F.3d 1113, 1116 (11th Cir. 2009) (*abrogation on other grounds recognized by Williams v. NCL (Bahamas) Ltd.,* 686 F. 3d 1169 (11th Cir. 2009)). The Court of Appeals for the Eleventh Circuit, quoting the Supreme Court, "has explained that 'the principal purpose' behind the adoption of the Convention 'was to

encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.'" *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 545 (11th Cir. 2016) (quoting *Scherk v. Alberlo Culver Co.,* 417 U.S. 506, 520 n. 15, 94 S. Ct. 2449 1974)).

"To implement the Convention, Chapter 2 of the FAA provides two causes of action in federal court for a party seeking to enforce arbitration agreements covered by the Convention: (1) an action to compel arbitration in accord with the terms of the agreement, 9 U.S.C. § 206, and (2) at a later stage, an action to confirm an arbitral award made pursuant to an arbitration agreement, 9 U.S.C. § 207." *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257 (11th Cir. 2011).

"In determining whether to compel arbitration under the Convention Act, a district court conducts 'a very limited inquiry.'" *Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1285 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1158 (2016) (internal quotations and citation omitted) (quoting *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005)). "An arbitration agreement falls within the jurisdiction of the New York Convention if: (1) the agreement is 'in writing within the meaning of the [New York] Convention'; (2) 'the agreement provides for arbitration in the territory of a signatory of the [New York] 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 the commercial relationship has some reasonable relation

with one or more foreign states." *Suazo,* 822 F.3d at 546 (quoting *Bautista*, 396 F.3d at 1294 n. 7) (bracketed text in original). The Eleventh Circuit has held that "the Convention requires that a motion to compel arbitration must be granted 'so long as (1) the four jurisdictional prerequisites are met and (2) no available affirmative defense under the Convention applies.'" *Suazo,* 822 F. 3d at 546 (quoting *Lindo,* 652 F.3d at 1276). "If these prerequisites are met, then the court should compel arbitration pursuant to the agreement unless the agreement is 'null and void, inoperative or incapable of being performed,' pursuant to Article II of the Convention." *Clair v. NCL (Bahamas), Ltd*., 2013 WL 12128723, at *1 (S.D. Fla. June 5, 2013) (citing Convention, art. II (3); *Bautista*, 396 F.3d at 1301)) (footnote omitted). Overall, "a district court must be mindful that the Convention Act generally establishes a strong presumption in favor of arbitration of international commercial disputes." *Escobar v. Celebration Cruise Operator, Inc.,* 805 F. 3d 1279, 1286 (11th Cir. 2015) (internal quotations and citation omitted).

III. Analysis

GE argues that OTK's claims are subject to the arbitration provision in the Supply Agreements. GE argues that all four prerequisites for compelling arbitration as set forth in *Bautista* are met and therefore, the Court must compel arbitration.

Taking the prerequisites out of numerical order, GE, OTK and the Insurers do not dispute that Germany is a signatory to the Convention. Therefore, the second prerequisite, that the arbitration agreement should provide for arbitration in the

territory of a signatory to the Convention, is met. *Bautista*, 396 F.3d at 1294 n. 7.

As to the first prerequisite, GE argues that the Supply Agreements are agreements in writing that include arbitration provisions, which fall within the meaning of the Convention. GE asserts that the Supply Agreements were signed by TK Stainless, the predecessor to OTK, as the "Buyer" and FLI as the "Seller" and that "Seller" as interpreted in §1.2 of the Supply Agreements includes GE, as FLI's sub-contractor. GE argues that use of the phrase "both parties" in the arbitration provisions, means the "Buyer" and "Seller", because the arbitration agreement specifically provides that "Buyer" and "Seller" will be referred to collectively as the "parties".

In response, OTK and the Insurers argue that use of the phrase "both parties" in the arbitration provisions limits the signers to only two parties – TK Stainless as "Buyer" and FLI as "Seller" – and operates to expressly exclude subcontractors like GE from the interpretation of "Seller". OTK and the Insurers assert that since neither GE nor OTK signed the Supply Agreements, they were not signed by the parties to the litigation as contemplated under the Convention. Therefore, they argue that GE cannot enforce the arbitration provisions.

"The term 'agreement in writing'" is defined by the Convention as "an arbitral clause in a contract or an arbitration agreement, signed by the parties[.]" Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article 2, § 2. The parties are identified in the Supply Agreements as TK

Stainless, now known as OTK,[2] the "Buyer" and FLI, the "Seller" and that they may be referred to individually as "Party" or "collectively as 'Parties'" (docs. 5-1, 5-2, 5-3, p. 5) ("(Buyer and Seller also referred to individually as "Party" and collectively as "Parties")") (parenthetical in original). The Supply Agreements also provide that "[w]hen Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise." (Docs. 5-1, 5-2, 5-3, p. 9, § 1.2. "Interpretations"). Thus, in order for GE to be excluded from "Seller" or "Party" when referring to "Seller", or "Parties" when referring to both "Seller" and "Buyer", the Supply Agreement must "expressly state[] otherwise." (Id.)

Viewing the Supply Agreements as a whole and construing any ambiguities against TK Stainless as the drafter,[3] the Court finds that the plain language of

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[2] OTK did not sign the Supply Agreements. However, in the state court action wherein OTK seeks to enforce a breach of contract action against the Seller FLI based on these same Supply Agreements, OTK identified itself as "Plaintiff[] Outokumpu Stainless USA, LLC, formerly known as ThyssenKrupp Stainless USA, LLC" (doc. 38-4, p. 2, Complaint, *Outokumpu Stainless USA, LLC and Sompo Japan Insurance Company of America v. Fives St. Corp.*, Civil

[3] *Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1330 (11th Cir. 2011) ("Under general contract principles, the plain meaning of a contract's language governs its interpretation. The court must look at the contract as a whole, the parties, and the purpose of the agreement to best determine the intent of the parties in interpreting the agreement. If no other contract principles (Continued) point to a particular meaning, the court will prefer the reasonable interpretation that operates more strongly against the party who drafted the document.") (citations omitted) (applying general contract principles to a forum selection clause).

the arbitration provisions, supports a reasonable interpretation that subcontractors are not expressly excluded from the meaning of "parties" in the arbitration provisions. There is simply no express statement, as required by the Supply Agreements, whereby the subcontractors are excluded as "Seller" or "parties".[4] *See Interested Underwriters at Lloyd's v. M/T San Sebastian*, 508 F. Supp. 2d 1243, 1251 (N.D. Ga. 2007) (applying generally accepted principles of contract law to find that parties had an agreement in writing within the meaning of the New York Convention); *Sea Bowld Marine Group, LDC v. Oceanfast Pty, Ltd.,* 42 F. Supp. 2nd 1305, 1313 (S.D. Fla. 2006) (explaining that a "number of courts from wide-ranging jurisdictions have also concluded that federal law governs the question of arbitrability regardless of choice-of-law and arbitration clauses referencing foreign law" and applying federal law to determine arbitrability under the New York Convention) (collecting cases); *Morewitz v. W. of England Ship Owners Mut. Prot. & Indem. Ass'n*

[4] OTK arrived at a similar interpretation in its response to FLI/Fives motion to compel arbitration in the state court action - "The language [of the Supply Agreements] reflects the intent that the alleged arbitration clause will only encompass ThyssenKrupp and those who sue ThyssenKrupp after 'friendly consultation.' For instance, in the definition of parties on page 4 of the contract, ThyssenKrupp is the only defined 'buyer' and, therefore, the only party to the Contracts. ... *Not only F.L. Industries, but also any subcontractors of F.L. Industries are defined as 'sellers' and, therefore, are parties to the Contracts.* ... Thus, if a dispute arose under the contract between both parties (ThyssenKrupp and F.L. Industries), ThyssenKrupp could arbitrate in Germany. This is as far as the language of the alleged arbitration clause extends, and the clause should be confined to these parameters." (Doc. 38-1, p. 16) (emphasis added).

(Luxembourg), 62 F.3d 1356, 1364 (11th Cir. 1995) (... "federal law comprising generally accepted principles of contract law controls the question of arbitrability.").[5] Given the directive that the district courts "must be mindful that the Convention Act generally establishes a strong presumption in favor of arbitration of international commercial disputes[,]" *Escobar,* 805 F. 3d at 1286, the Court finds that the first prerequisite has been met.

As to the third prerequisite, that the arbitration agreement arise out of a commercial legal relationship, whether contractual or not, *Bautista*, 396 F.3d at 1294 n. 7, 9 U.S.C. § 202, GE argues that the Supply Agreements arise out of a multi-million dollar legal commercial relationship between OTK and FLI. The Insurers assert that this prerequisite is not met because GE supplied the motors pursuant to the Consortial Agreement and not the Supply Agreements. OTK concedes that "at least as between TK Stainless and F.L. Industries, the legal relationship under the TK/FL Contracts involved a multi-million-dollar purchase of equipment and is undoubtedly commercial." (Doc. 35, p. 11, n. 2)

Pursuant to the Convention, "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is

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[5] 21 Williston on Contracts § 57:56 (4th ed.) ("If a dispute arises under either the maritime or commerce provisions of the Federal Arbitration Act, the arbitration provision is enforceable regardless of the rules of the jurisdiction in which the claim arose. But where a case is in a federal court, and neither a maritime transaction nor a transaction involving commerce within the meaning of § 2 of the Act is at issue, the law of the state in which the case arises governs the arbitration.").

considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202. Thus, the Court looks to whether the legal relationship, giving rise to the arbitration agreement is commercial. As the parties have indicated, the legal relationship exists because FLI supplied motors made by GE to TK Stainless for the construction of multi-million dollar cold steel rolling mills. While the parties may dispute whether GE supplied the motors pursuant to the Consortial Agreement or the Supply Agreements, there is no legitimate dispute that the arbitration agreements arose out of a legal commercial relationship. Therefore, the third *Bautista* prerequisite is met.

As to the fourth *Bautista* prerequisite, that "a party to the agreement is not an American citizen or the commercial relationship has some reasonable relation with one or more foreign states" *Suazo*, 822 F.3d at 546 (quoting *Bautista*, 396 F.3d at 1294 n. 7), GE argues that by virtue of the interpretation of "Seller" to include the subcontractors, it is a party to the Supply Agreements, and it is not an American citizen. GE also argues that the commercial relationship created by the Supply Agreements has a reasonable relation with Germany and France. GE points out that the Supply Agreements were generated by TK Stainless, an American subsidiary to a German parent corporation, as a result of planning and negotiations, which occurred in Germany and France. GE states that the first three design meetings after the Supply Agreements were signed were held in Germany and France. GE also points out that the motors were made in France and sent to Alabama for installation.

OTK and the Insurers again argue that GE is not a party to the Supply Agreements. They also argue that the Supply Agreements do not have a reasonable relation with one or more foreign countries. In support, they point out that the parties signed the Supply Agreements in Alabama, that the parties TK Stainless and FLI were American corporations, and their agreement was for the construction of cold role steel mills in Alabama. OTK assert that having parts supplied by foreign entities such as GE, does not meet the requirement of a reasonable relation with one or more foreign countries.

Pursuant to the New York Convention, "[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. "The question under this fourth inquiry is whether 'there is a reasonable connection between the parties' commercial relationship and a foreign state that is independent of the arbitral clause itself.[6]'" *Armstrong v. NCL (Bahamas) Ltd.*, 998 F. Supp. 2d 1335, 1338 (S.D. Fla. 2013) (citing *Ensco Offshore Company v. Titan Marine L.L.C.*, 370 F.Supp.2d 594, 597 (S.D. Tex.2005) (quoting *Freudensprung v. Offshore*

[6] "[F]oreign arbitration sites and choice of law provisions do not themselves establish a foreign connection." *Smith-Varga v. Royal Caribbean Cruises, Ltd.,* 2013 WL 3119471, at *3 (M.D. Fla. June 18, 2013).

Technical Services, Inc., 379 F.3d 327, 339–340 (5th Cir. 2004)).

Since the Court has determined that GE is a party to the Supply Agreement by virtue of the interpretation of "Seller" as including the subcontractors, the fourth *Bautista* prerequisite is met. Even if GE were not a party, there are sufficient connections with one or more foreign states. While OTK and FLI are American corporations,[7] they are both subsidiaries of foreign parent corporations.[8] Moreover, the planning phase for the cold steel mills appears to have occurred in Germany and the Supply Agreements called for at least the first three design review committee meetings to be held in Germany and France. Also, the Supply Agreements contain a list of mandatory vendors many of which are not U.S. companies. The Court finds that the fourth prerequisite has been met.

IV. Sompo as subrogee of OTK

GE moves to compel Sompo to arbitrate its claims against GE on basis that Sompo is the subrogee of OTK, its insured, and stands in the shoes of OTK (doc. 6, p. 9–10). The parties do not dispute that Sompo insured OTK or that it has certain subrogation rights

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[7] "For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States." 9 U.S.C. § 202.

[8] The parties do not dispute that OTK is a Delaware corporation. Outokumpu Americas, Inc. is the sole member of OTK. However, Outokumpu Oyj of Finland is the ultimate corporate parent for Outokumpu Americas, Inc. (doc. 30, corporate disclosure statement). The parties have identified FLI now known as Fives as the U.S. subsidiary (Delaware) of a French corporation (doc. 38, p. 3, doc. 38-5).

as insurer. Accordingly, the Court finds that Sompo is bound by the same arbitration provisions in the Supply Agreements as its insured, OTK, and therefore, must submit to arbitration. *See Alstom Brasil Energia e Transporte Ltda. v. Mitsui Sumitomo Seguros S.A.*, 2016 WL 3476430, at *4–5 (S.D.N.Y. June 20, 2016) (finding that the "Mitsui-Alunorte insurance contract gave Mitsui a clear subrogation right" and that "[b]y pursuing Alunorte's contract claim against Alstom, Mitsui was bound by the arbitration clause that would have bound Alunorte.") (collecting cases).

V. Limited discovery regarding the Consortial Agreement

OTK argues that before the Court decides GE's motion to compel arbitration, the Court should allow OTK limited discovery on the issue of arbitrability. Specifucally, OTK seeks discovery as to the corporate transactions between Converteam SAS and GE, and the Consortial Agreement between FLI and GE. OTK asserts that "it is certainly plausible that GE Energy might not even have the status of a 'legal successor in title'" to Converteam and that GE "nowhere explains how the entity 'formerly known as Converteam' became GE Energy France" (doc. 35, p. 19, n. 4, p. 27). OTK argues that limited discovery as to the Consortial Agreement would "confirm the nature of the relationship between GE Energy France and the actual signatories" to the Consortial Agreement. (Id.).

However, contrary to this argument, OTK states in its complaint that Converteam changed its name to GE (doc. 1-2, p. 5 ("According to records on file with the Alabama Secretary of State, on or about February

25, 2013, Converteam changed its name to GE Energy Power Conversion France SAS, Corp."). Since only a change of name has been alleged in the complaint, staying this action for limited discovery as to the corporate transactions between Converteam and GE is not necessary. Moreover, although GE relies upon the Consortial Agreement as evidence of its status as a subcontractor to FLI, the operative documents affecting the issue of arbitrability are the Supply Agreements. GE does not seek arbitration based upon the arbitration provision in the Consortial Agreement. Accordingly, the motion for limited discovery is denied.

VI. Conclusion

Upon consideration of the foregoing, the motion to compel arbitration (doc. 6) is **GRANTED.** Accordingly, OTK, Sompo and GE are referred for arbitration in accordance with the terms of the Supply Agreements. Accordingly, the motion to dismiss is **GRANTED**

DONE and ORDERED this the 30th day of January 2017.

/s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

OUTOKUMPU STAINLESS USA LLC, *et al.*,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 16-00378-KD-C**
CONVERTEAM SAS, a foreign corporation now known as GE ENERGY POWER CONVERSION FRANCE SAS, CORP.,	)	
Defendant.	)	

ORDER

This action is before the Court on the Motion to Dismiss filed by Defendant GE Energy Power Conversion France SAS, Corp. (doc 7), the Motion to Remand filed by Sompo Japan Insurance Company of America, Pohjola Insurance Limited, AIG Europe Limited, Tapiola General Mutual Insurance Company, AXA Corporate Solutions Assurance SA UK Branch,

HDI Gerling UK Branch, MSI Corporate Capital Ltd., and Royal & Sun Alliance PLC (doc. 34), the Motion to Remand filed by Plaintiff Outokumpu Stainless, USA (doc. 35), the parties' responses and replies (docs. 38, 41, 42), the Report and Recommendation (doc. 50), and the parties' objections and responses to objections (docs. 51-56).

After due and proper consideration of the issues raised, and a *de novo* determination of those portions of the recommendation to which objections were made, the recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(l)(B) and dated November 22, 2016 (doc. 50) is **ADOPTED** as the opinion of this Court.

Accordingly, the Motions to Remand (docs. 34, 35) are **DENIED** and the Motion to Dismiss (doc. 7) is **DENIED**.

DONE this 22nd day of December 2016.

s/ Kristi K. DuBose
KRISTI K. DuBOSE
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

OUTOKUMPU STAINLESS USA, LLC, et al.	)	
Plaintiffs,	)	
v.	)	
CONVERTEAM SAS, a foreign corporation now known as GE ENERGY POWER CONVERSION FRANCE SAS, CORP,	)	CA 16-0378-KD-C
Defendant.	)	

REPORT AND RECOMMENDATION

This matter is before the undersigned on Motions to Remand filed by Plaintiffs Outokumpu Stainless USA, LLC, formerly known as Thyssenkrupp Stainless USA, LLC ("OTK Stainless") and by Sompo Japan Insurance Company of America ("Sompo"), Pohjola Insurance Limited, AIG Europe Limited, Tapiola General Mutual Insurance Company, AXA Corporate Solutions Assurance SA UK Branch, HDI Gerling UK Branch, MSI Corporate Capital Ltd., and Royal & Sun

Alliance PLC (collectively, the "Plaintiff Insurers") (Docs. 34 and 35). Also before the undersigned is Defendant GE Energy Power Conversion France SAS, Corp.'s ("GE Energy"), formerly known as Converteam SAS ("Converteam"), Motion to Dismiss as to Plaintiffs Pohjola Insurance Limited, AIG Europe Limited, Tapiola General Mutual Insurance Company, AXA Corporate Solutions Assurance SA UK Branch, HDI Gerling UK Branch, MSI Corporate Capital Ltd., and Royal & Sun Alliance PLC (collectively, the "Foreign Insurers") (Doc. 7).[1] In reaching its decision, the Court has considered the Notice of Removal (Doc. 1), and exhibits thereto, including the Complaint, Defendant's Motion to Dismiss (Doc. 7), the Motions to Remand (Docs. 34 and 35), Defendant's Response in Opposition (Doc. 38), Plaintiffs' Replies in Support (Docs. 41 and 42), and all exhibits thereto.

Oral argument on these motions was held before the undersigned on November 3, 2016. Upon consideration, and for the reasons stated herein, the undersigned **RECOMMENDS**, pursuant to 28 U.S.C. § 636(b) and General Local Rule 72(a)(2)(S), that the Motions to Remand (Docs. 34 & 35) be **DENIED** and that the Motion to Dismiss (Doc. 7) be **DENIED**.

I. Background and Procedural History

Plaintiff OTK Stainless owns a stainless steel manufacturing facility in Calvert, Alabama. Doc. 38-2. On November 25, 2007, OTK Stainless (then, Thyssenkrupp Stainless) entered into Contracts 1001, 1002, and 1003 (the "Contracts") with F.L. Industries

[1] What is not before the undersigned for decision, and a matter about which the undersigned offers no opinion, is GE Energy's motion to compel arbitration and dismiss (Doc. 6).

Inc. ("FLI"), now known as Fives St Corp. ("Fives"), for the purchase of three Cold Rolling Mills ("CRMs") for the facility. Doc. 1-1 (A). Pursuant to the Contracts, FLI was to engage subcontractors necessary for the completion of the work. *See id.* (§ 1.1). To that end, the Contracts set out, in Annex A3, a list of "mandatory" vendors from which FLI could select to supply services and equipment under the Contracts, including, *inter alia*, Converteam, which is now GE Energy. *See id.* (Annex A3). Subsequently, FLI entered into an Agreement for Consortial Cooperation (the "Consortial Agreement") with GE Energy and a third company, DMS SA ("DSM"), under which GE Energy was to provide electrical equipment for the Cold Rolling Mills. *See* Doc. 1-1 (D). The Consortial Agreement states that GE Energy was "acting as sub-contractor[] of FLI." *Id.*

Section 23.1 of the Contracts provides, in pertinent part:

> All disputes arising between both parties in connection with or in the performances of the Contract shall be settled through friendly consultation between both parties. In case no agreement can be reached through consultation ... any such dispute shall be submitted to arbitration for settlement.

See Doc. 1-1(A) (§ 23.1). This provision further states that arbitration shall take place in Germany, *id.* (§ 23.2), and that the "substantive law" of Germany "shall apply", *id.* (§ 23.5).

On June 10, 2016, OTK Stainless commenced this action against GE Energy in the Circuit Court of Mobile County, Alabama, alleging various state law

tort and warranty claims arising from the alleged failure of motors GE Energy supplied to the Calvert facility. *See* Doc. 1-2. On July 18, 2016, GE Energy timely removed this action to this Court on two grounds: (1) federal subject matter jurisdiction pursuant to 9 U.S.C. § 205, which authorizes removal of an action where the subject matter of the suit "relates to" an arbitration agreement "falling under" the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter, the "New York Convention" or the "Convention"); and (2) diversity jurisdiction based upon the fraudulent joinder of the Foreign Insurers, *see* Doc. 1. GE Energy also moved to compel arbitration as to OTK Stainless and Sompo, *see* Doc. 6, and to dismiss the Foreign Insurers, *see* Doc 7.

On August 17, 2016, OTK Stainless and the Plaintiff Insurers separately moved to remand, although their arguments are largely the same, *see* Docs. 34 and 35. With respect to removal under § 205, plaintiffs argue that GE Energy's Notice of Removal is facially deficient because GE Energy is not a party to the Contracts; thus, plaintiffs assert, because there is no agreement to arbitrate between OTK Stainless and GE Energy, removal under 9 U.S.C. § 205 is improper. *See* Doc. 35, pp. 5–6; Doc. 34, pp. 3–4. With respect to the alleged fraudulent joinder of the Foreign Insurers, plaintiffs argue that the theory of fraudulent joinder of a plaintiff has not been adopted in the Eleventh Circuit and even if it did apply, GE Energy has not met its "heavy burden" to establish it in this case. Doc. 34, pp. 17–25.

II. Standard of Review

"It is . . . axiomatic that the inferior federal courts are courts of limited jurisdiction." *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999). They can hear "'only those cases within the judicial power of the United States as defined by Article III of the Constitution,' and which have been entrusted to them by a jurisdictional grant authorized by Congress." *Id.*, quoting *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994). Further, "[a] defendant's right to remove an action against it from state to federal court 'is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress.'" *Global Satellite Comm'n Co. v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1271 (11th Cir. 2004) (citation omitted). "'[B]ecause the Constitution unambiguously confers this jurisdictional power to the sound discretion of Congress, federal courts should proceed with caution in construing constitutional and statutory provisions dealing with [their] jurisdiction.'" *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001), quoting *University of South Alabama*, 168 F.3d at 409.

Under 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." The removing defendant bears the burden of demonstrating that federal jurisdiction exists. *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 n. 4 (11th Cir. 1998); *see also McCormick v.*

Aderholt, 293 F.3d 1254, 1257 (11th Cir. 2002) ("[T]he party invoking the court's jurisdiction bears the burden of proving, by a preponderance of the evidence, facts supporting the existence of federal jurisdiction."). "Just as a plaintiff bringing an original action is bound to assert jurisdictional bases under Rule 8(a), a removing defendant must also allege the factual bases for federal jurisdiction in its notice of removal[.]" *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1216–1217 (11th Cir. 2007), *cert.denied sub nom. Hanna Steel Corp. v. Lowery*, 553 U.S. 1080, 128 S.Ct. 2877, 171 L.Ed.2d 812 (2008).

III. Analysis

A. Removal Jurisdiction under 9 U.S.C. § 205.

1. Overview of the New York Convention.

In 1958, the United Nations adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "Convention"). The United States adopted the Convention in 1970 and enacted Chapter 2 of the Federal Arbitration Act ("the Act") to provide for its enforcement in federal court. Pub. L. No. 91-368, 84 Stat. 692 (1970), codified at 9 U.S.C. §§ 201 *et seq*. The United States Supreme Court has explained that the goal of the Convention is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15, 94 S.Ct. 2449, 2457 n.15, 41 L.Ed.2d 270 (1974) (internal citations omitted). In analyzing Convention

cases, this Court is mindful of the "emphatic federal policy in favor of arbitral dispute resolution[,] . . . [which] applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 105 S.Ct. 3346, 3356, 82 L.Ed.2d 444 (1985).

Chapter 2 of the Act indicates Congress's desire to "promote the development of a uniform body of law under the Convention[,]" *Beiser v. Weyler*, 284 F.3d 665, 672 (5th Cir. 2002), which is "'best served by trying all [Convention] cases in federal court unless the parties unequivocally choose otherwise,'" *Acosta v. Master Maintenance & Constr. Inc.*, 452 F.3d 373, 377 (5th Cir. 2006), quoting *McDermott Int'l v. Lloyds Underwriters of London*, 944 F.2d 1199, 1207–1208 (5th Cir. 1991). To this end, "Congress granted the federal courts jurisdiction over Convention cases and added one of the broadest removal provisions, § 205, in the statute books." *Id.* (internal footnote omitted).

The Act provides that an action "falling under the Convention shall be deemed to arise under the laws and treaties of the United States[,]" and district courts "shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203; *see Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir.) ("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.'"), *cert. dismissed*, 545 U.S. 1136, 125 S.Ct. 2954, 162 L.Ed.2d 884 (2005). The Act's broad removal provision allows a defendant to remove an action to federal court, at any time before trial, "[w]here the subject matter of an action or proceeding

pending in a State court relates to an arbitration agreement . . . falling under the Convention[.]" 9 U.S.C. § 205; *see also Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1293 (11th Cir. 2015) (noting that § 205 permits removal "'[w]here the subject matter of an action . . . *relates to an arbitration agreement or award falling under the [New York] Convention*[.]'"), *cert. denied*, 136 S.Ct. 1158, 194 L.Ed.2d 174 (2016). Parties in such an action need not be diverse, since the action arises under federal law, nor is there any amount in controversy requirement. *See Outokumpu Stainless, LLC v. Siemens Industry Inc.*, 2015 WL 6966150, *4 (S.D. Ala. Oct. 20, 2015) (citing 9 U.S.C. § 203), *report and recommendation adopted*, 2015 WL 6964667 (S.D. Ala. Nov. 10, 2015). Further, "the ground for removal provided in [§ 205] need not appear on the face of the complaint but may be shown in the petition for removal." 9 U.S.C. § 205.

At issue in the motions before this Court is whether this action was properly removed pursuant to § 205. Plaintiffs urge this Court to adopt a narrow construction of the Act, arguing that GE Energy cannot avail itself of removal under § 205 because it is not a party or a signatory to the Contracts. In support, plaintiffs cite to *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004) and *Rolls-Royce PLC v. Royal Caribbean Cruises Ltd.*, 2005 U.S. Dist. LEXIS 45416 (S.D. Fla. July 8, 2005). GE Energy, on the other hand, argues that this action "relates to" an arbitration agreement falling under the Convention, whether or not it is a party or a signatory to the agreement, and therefore, the action was properly removed. GE Energy directs this Court's attention to *Beiser, supra, Infuturia Global Ltd. v. Sequus*

Pharmaceuticals, Inc., 631 F.3d 1133 (9th Cir. 2011), and *Reid v. Doe Run Resources Corp.*, 701 F.3d 840 (8th Cir. 2012), all of which have construed the language of § 205 broadly to mean that "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 Infuturia Global*, 631 F.3d at 1138 (same); *Reid*, 701 F.3d at 843 (same). This Court is persuaded by the cases cited by GE Energy and concludes that it properly removed this action pursuant to § 205.

2. Section 205's "relates to" language.

At the outset, this Court notes the lack of binding authority on this specific issue. As acknowledged by both parties, the Eleventh Circuit has not interpreted the phrase "relates to" in the context of § 205. Notwithstanding, a growing number of decisions in other circuits support the broad interpretation urged by GE Energy. In the absence of binding authority in this Circuit, this Court looks to these other decisions as persuasive authority on this issue.

In *Beiser*, *supra*, the plaintiff, Fred Beiser, a consultant in the oil and gas industry, entered into two agreements as agent of his company, Horizon Energy Limited, to consult with defendant Huffington, Inc. on the acquisition of development rights to an oil and gas field. 284 F.3d at 666–667. The agreements contained clauses providing for arbitration of any dispute in London. *Id.* at 667. After Beiser filed suit in state court on various state tort claims, the defendant removed pursuant to § 205, contending that the case "related to" the arbitration clause in the agreements.

Id. Beiser moved to remand the action to state court, insisting that he was not a party to the arbitration agreements because he signed as an agent for Horizon Energy Limited and not in his personal capacity. *Id.* Thus, according to Beiser, Horizon Energy Limited agreed to arbitrate its disputes with the defendant, but individually he did not. *Id.*

As a matter of first impression, the Fifth Circuit reasoned that the "plain meaning of the phrase 'relates to' sweeps broadly" and held that "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[]" such that removal is proper. *Id.* at 669; *see also id.* at 674 ("The use of the broad phrase 'relates to' indicates that Congress's intent in § 205 was to confer jurisdiction liberally."). The *Beiser* court emphasized the "low bar" set by § 205, noting that "the district court will have jurisdiction under § 205 over just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense." *Id.* at 669. "As long as the defendant's assertion is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case. That is all that is required" by § 205. *Id.* Under that standard, the court concluded that even if the plaintiff were "right on the merits that he cannot ultimately be forced into arbitration, his suit at least has a 'connection with' the contracts governing the transaction out of which his claims arise[,]" and removal was therefore proper. *Id.*

Shortly after its decision in *Beiser*, the Fifth Circuit was presented with another opportunity to address

the scope of § 205. *In Acosta v. Master Maintenance& Const. Inc.*, 452 F.3d 373 (5th Cir. 2006), the plaintiffs brought suit against Georgia Gulf Corporation ("GGC") for injuries allegedly stemming from a release of a mustard-gas agent at a GGC facility in Louisiana. *Id.* at 375. Since Louisiana state law allows direct actions against a tortfeasor's insurers, plaintiffs also named as defendants two foreign insurers whose policies included arbitration clauses governing disputes over coverage. *Id.* When plaintiffs amended their complaints to allege intentional tort claims, the foreign insurers notified GGC that they were disputing insurance coverage and later removed the action to federal court pursuant to § 205. *See id.* Plaintiffs moved to remand, arguing that, under *Beiser*, jurisdiction was lacking because Louisiana's direct-action statute overrides the binding effect of the arbitration clauses, and thus, the arbitration proceedings would have no binding effect on the litigation. *See id.* at 377–738.

Although plaintiffs urged the court to narrow the reach of § 205, the Fifth Circuit did just the opposite. The court noted that "the plain and expansive language of [§ 205] embodies Congress's desire to provide the federal courts with broad jurisdiction over Convention Act cases in order to ensure reciprocal treatment of arbitration agreements by cosignatories of the Convention." *Id.* at 376. The court added, "[s]o generous is the removal provision, that we have emphasized 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.'" *Id.* at 377 (citation

and footnote omitted). Building upon its decision in *Beiser*, the court held that the broad language of "relates to" in § 205 encompasses cases that have any "connection, relation, or reference" to an arbitration provision, *id.* at 378, quoting American Heritage Dictionary of the English Language (4th Ed. 2000), and concluded that "a clause determining the forum for resolution of specific types of disputes relates to a lawsuit that seeks the resolution of such disputes." *Id.* at 379; *see also id.* at 378–379 ("It is unarguable that the subject matter of the litigation has some connection, has some relation, has some reference to the arbitration clauses here.").

In *Infuturia Global Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133 (9th Cir. 2011), plaintiff sued the defendants for tortious interference with a licensing agreement it had with Yissum Research and Development Co. ("Yissum"). *Id.* at 1135–1136. This licensing agreement included a provision requiring arbitration of any dispute connected to the agreement, *id.* at 1135, and, although it was not a party to the lawsuit, Yissum sought a stay of the litigation pending arbitration, *id.* at 1136. Following arbitration, the state court lifted the stay, and the defendants removed the action pursuant to § 205. *Id.* The plaintiff moved to remand, arguing that removal was improper because the defendants were not parties to the arbitration agreement between Infuturia and Yissum. *Id.*

The Ninth Circuit emphasized that for purposes of determining whether removal is proper under § 205, "the critical language is 'relates to.'" *Id.* at 1137. Adopting the Fifth Circuit's broad interpretation of this language, the court held that "'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.'" *Id.* at 1138, quoting *Beiser*, 284 F.3d at 669. The court reasoned that the jurisdictional inquiry under § 205 does not hinge on the "relatedness of the *parties*" to the arbitration agreement, but rather "focuses only on the relatedness of the '*subject matter* of [the] action . . . to an arbitration agreement.'" *Id.*, quoting 9 U.S.C. § 205. The court refused to inject any "privity of contract" requirement as a prerequisite for removal jurisdiction and instead noted that "the statute invites removal of cases whose relation to an agreement or award under the Convention is based on an affirmative defense by expressly abrogating the 'well-pleaded complaint' rule." *Id.* (citations omitted); *see also id.* at 1138–1139 ("[N]othing in *Beiser* suggests that only parties privy to an arbitration agreement or award falling under the Convention may seek removal under § 205. Rather, *Beiser* confers removal jurisdiction 'whenever an arbitration agreement . . . could *conceivably* affect the outcome of the plaintiff's case. . . . . .' [] In a case such as this, where the defendant relies on the affirmative defense of collateral estoppel regarding issues already resolved against the plaintiff in arbitration, the arbitral award 'could conceivably affect the outcome' of the case."). Because the arbitration agreement between Infuturia and Yissum could conceivably affect the plaintiff's case, the court held that removal was proper under § 205. *Id.* at 1139.

A year later, the Eighth Circuit joined the growing number of circuit courts adopting the *Beiser* Court's interpretation of § 205. In *Reid v. Doe Run Res. Corp.*,

701 F.3d 840 (8th Cir. 2012), the plaintiffs, children living near the defendants' smelting facility in Peru, brought suit for damages allegedly stemming from environmental contamination by the defendants. *Id.* at 842–843. The defendants removed the action pursuant to § 205 based on the action's relationship to a pending arbitration proceeding with Peru, the previous operator of the smelting facility. *Id.* at 843. The plaintiffs moved to remand, contending that the suit did not "relate to" the arbitration proceeding because it would have no preclusive effect on the lawsuit. *Id.* at 843 & 844.

Like the Fifth and Ninth Circuits, the Eight Circuit embraced the "broad nature" of the phrase "relates to" and concluded that jurisdiction was proper because "the issues in the arbitration could conceivably affect the outcome of th[e] case." *Id.* at 844; *see also id.* at 843. The court rejected the plaintiffs' assertion that the cases were "completely independent and unrelated," reasoning that "either party could conceivably inject portions of the arbitration into this case." *Id.* at 844. "For example," the court noted, "if the arbitration panel found [the defendants] completely liable for all environmental damage and injuries, the [plaintiffs] could conceivably introduce that finding." *Id.*[2]

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[2] The Second Circuit, although not specifically addressing § 205, has also considered the scope of subject matter jurisdiction under the Act and provides further support for the conclusion reached by this Court today. In *Sarhank Group v. Oracle Corp.*, 404 F.3d 657 (2d Cir. 2005), Sarhank Group ("Sarhank") entered into an agreement which contained an arbitration clause with Oracle Systems, Inc. ("Systems"), a wholly owned subsidiary of Oracle Corporation ("Oracle"). *Id.* at 658. Oracle was not a

Plaintiffs acknowledge these decisions but argue that since the Eleventh Circuit has not adopted them, this Court should remand the action to state court under *Czarina* and *Rolls-Royce*, *supra*. In *Czarina*, which was originally filed in district court as an award-confirmation action pursuant to 9 U.S.C. §§ 201–208, the Eleventh Circuit held that the district court lacked subject matter jurisdiction because there was no agreement in writing between the parties. 358 F.3d 1289–1290; *see id.* at 1291 ("Where a party has failed to satisfy the agreement-in-writing prerequisite, courts have dismissed the action for lack of jurisdiction."). Importantly, however, in *Czarina*, there was no underlying agreement in writing *at all*.

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signatory to the agreement and did not execute any other written agreement to arbitrate with Sarhank. *Id.* Sarhank initiated an international arbitration against both Systems and Oracle. *Id.* Oracle objected on the grounds that it was not a signatory to the agreement. *Id.*

Sarhank prevailed in the arbitration and filed suit in federal court to confirm and enforce the arbitration award against Oracle, premising jurisdiction on 9 U.S.C. § 203. *Id.* at 658–660. Oracle argued that the court lacked subject matter jurisdiction because there was no signed written agreement between Sarhank and Oracle. *Id.* at 660. In rejecting this argument, the court reasoned that Oracle's argument "depends entirely upon its view of the merits of the case, and therefore does not involve a lack of subject matter jurisdiction[.]" *Id.* The court concluded that Sarhank had established jurisdiction by "describ[ing] a written agreement between Systems and Sarhank; in effect, alleg[ing] that a legal relationship was created between Oracle and Sarhank because Systems was a shell corporation; and describ[ing] an arbitral award." *Id.* To consider the enforceability of that award against a non-signatory, the Second Circuit reasoned, the district court must assume jurisdiction. *See id.*

Id. at 1290. The plaintiff argued that an agreement existed based on a "Sample Wording" that included arbitration language, but the sample had not been prepared for the transaction in question, and the district court found that the parties had not agreed to it. *See id.* at 1289–1290; *id.* at 1289 ("The 1982 Sample Writing was simply a sample: it was not drafted for the Halvanon-Poe transaction."). Thus, the Eleventh Circuit concluded that because there was no agreement in writing, subject matter jurisdiction was lacking. *Id.* at 1290–1292.

In *Rolls-Royce*, the district court held that it lacked subject matter jurisdiction where there was no agreement to arbitrate signed by the parties before it. *See* 2005 U.S. Dist. LEXIS, at *22. As instructed by *Czarina*, the court looked to the language of the Convention, which it read to restrict subject matter jurisdiction to those cases where the parties before the court had signed a written agreement. *Id.* The court acknowledged *Beiser* and other circuit court decisions "that have interpreted the FAA statutory provision as conferring jurisdiction to claims relating to an arbitration clause in an agreement to which one or more of the parties is not a signatory[]" but concluded that these decisions were not persuasive. *Id.* at 24, n.10.

While this Court acknowledges the decisions cited by plaintiffs, it remains unpersuaded by plaintiffs' argument. First, *Czarina* is distinguishable because there was no written agreement *at all* in that case. *Compare* 358 F.3d at 1290 *with Regent Seven Seas Cruises, Inc. v. Rolls Royce, PLC*, 2007 WL 601992, *5 (S.D. Fla. Feb. 21, 2007) ("*Czarina* involved *no* written agreement, as opposed to a valid, signed written

agreement that was simply not between the litigants[.]"). No party in this action disputes that there must exist an agreement in writing falling under the Convention, and no party disputes that there is an agreement in writing here. Thus, to the extent that *Czarina* is applicable, it is consistent with the decision reached by this Court today.

Second, *Rolls-Royce*, an unpublished opinion in another district, is not binding on this Court, and further, it has been called into doubt by at least one court in its home district. *See Regent Seven Seas Cruises, Inc.*, *supra*, at *5 (noting that *Bautista* suggests that "the Eleventh Circuit would endorse a broader view of its subject matter jurisdiction under the FAA at this time," and reasoning that "clear logic" dictates that a court must first assume jurisdiction before determining whether parties, including non-signatories, are bound by an arbitration agreement).

More importantly, though, this Court concludes *Rolls-Royce* was wrongly decided. While *Czarina*, upon which *Rolls-Royce* heavily relies, holds that a prerequisite to jurisdiction is the existence of an agreement in writing, the *Rolls-Royce* court added as an additional jurisdictional prerequisite that the agreement in writing be "between the parties before the court." *Rolls-Royce*, *supra*, at 22. To reach this conclusion, the *Rolls-Royce* court cited Article II, § 3 of the Convention, which addresses when to *compel* a matter to arbitration. *Id.* In other words, the *Rolls-Royce* court did precisely what the Beiser court cautioned against: it frontloaded a merits inquiry into its examination of jurisdiction. *See Beiser*, 284 F.3d at 670.

The type of analysis engaged in by the *Rolls-Royce* court is inconsistent with purpose and intent of the Federal Arbitration Act and the broad "relates to" language of § 205. It also does not comport with Eleventh Circuit precedent suggesting a broad view of jurisdiction under § 205. *Bautista*, 396 F.3d at 1301 ("Section 205 does not require a district court to review the putative arbitration agreement—or investigate the validity of the signatures thereon—before assuming jurisdiction: 'The language of § 205 strongly suggests that Congress intended that district courts continue to be able to assess their jurisdiction from the pleadings alone.'" (quoting *Beiser*, 284 F.3d at 671)); *see also Escobar*, *supra*, 805 F.3d at 1293 ("[T]he Convention Act permits a defendant to remove a case relating to an arbitration agreement covered by the New York Convention.").

Finally, this Court notes that although the Eleventh Circuit has not expressly adopted the circuit court decisions cited by GE Energy and discussed above in interpreting § 205, this Court recently applied *Beiser's* interpretation of "relates to" in a dispute between OTK Stainless and another European supplier to the same Calvert facility. *Siemens Industry*, *supra*,, at *4 ("An action 'relates to an arbitration agreement' . . . if the agreement could 'conceivably affect the outcome of the plaintiff's case[.]'") (citing and quoting *Beiser*, 284 F.3d at 670; *Reid*, 701 F.3d at 843; *Infuturia Global*, 631 F.3d at 1138). Plaintiffs have not explained why this same interpretation should not apply in the instant case.

In light of the plain language of § 205, as well as the well-reasoned circuit court decisions addressing its scope, this Court concludes that an action "relates to"

an arbitration agreement falling under the Convention if the agreement could "conceivably affect the outcome of the plaintiff's case." *See*, *e.g.*, *Beiser*, 284 F.3d at 670. This interpretation comports with the clear language of the statute and Congress's intent to confer broad federal jurisdiction over Convention Act cases. *See Reid*, 701 F.3d at 843. Further, like the courts in *Sarhank* and *Regent Seven Seas Cruises*, this Court is "persuaded by the clear logic that in order to determine whether litigants are bound by an admittedly existing arbitration agreement, a court must first assume jurisdiction to do so." *Regent Seven Seas Cruises*, *supra*, at *5; *see also Sarhank*, 404 F.3d at 660 ("When a party challenges the court's subject matter jurisdiction based upon the merits of the case, that party is merely arguing that the adversary has failed to state a claim. The court has and must assume subject matter jurisdiction and hear the merits of the case.").

Applying this standard to the instant case, the undersigned finds that this action "relates to" the arbitration agreement in the subject Contracts. The Contracts, whether GE Energy is a party to them or not, underlie the entire project at the Calvert facility, and GE Energy supplied the motors at issue as a subcontractor of FLI, which is a party and a signatory to the Contracts. Further, plaintiffs' complaint borrows language directly from the Contracts in alleging that GE Energy had a duty to "properly engineer, design, manufacture, fabricate, procure, deliver, install, supervise, supply and / or commission" the motors and equipment. *See* Doc. 1-1(A) (§2.1). Section 23.1 of the Contracts requires arbitration of "[a]ll disputes between both parties in connection with

or in the performances of the Contract[.]" *Id.* (§ 23.1). The engineering, design, manufacture, and supply of the motors certainly qualify as a dispute "in connection with or in the performances of the Contract."

Moreover, OTK Stainless (and Sompo as its subrogee) has separately sued Fives (formerly known as FLI) for breach of the Contracts, and Fives has successfully compelled that action to arbitration in Germany pursuant to § 23.1. The subject matter of the two actions is nearly identical. *See Infuturia Global*, 631 F.3d at 1138 (emphasizing that "§ 205 focuses only on the relatedness of the '*subject matter* of the action'" to the arbitration agreement). Both actions arise from the alleged failure of the motors designed and built by GE Energy. Although the theories of liability differ somewhat, the compensatory damages sought are the same. The outcome of any arbitration involving OTK Stainless and Fives could certainly impact the instant dispute, and either party "could conceivably inject portions of the arbitration into this case." *See Reid*, 701 F.3d at 844. In fact, under the Consortial Agreement, Fives could join GE Energy into that arbitration proceeding. *See* Doc. 1-1(D).

GE Energy has presented this Court with an agreement in writing signed by OTK Stainless and FLI, which requires arbitration of "all disputes arising between both parties in connection with or in the performances of the Contract." Although plaintiffs argue that GE Energy is not a party to this agreement, the undersigned finds that it is at least "conceivable" that the outcome of this dispute could be affected by

the arbitration agreement.[3] Nothing more is required by the plain language of § 205. *See Infuturia Glob.*, 631 F.3d at 1139 (declining to add any "prerequisites to removal jurisdiction not expressed in the language of the statute"). So long as that agreement "fall[s] under the Convention," this action was properly removed.

3. The *Bautista* Factors.

Having concluded that this action relates to an arbitration agreement, this Court must determine whether the agreement is one that "fall[s] under the Convention." 9 U.S.C. § 205. The Eleventh Circuit has held that an arbitration agreement falls under the Convention if four jurisdictional prerequisites are met: "(1) there is 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 [] the commercial relationship has some reasonable relation with one or more foreign states." *Bautista*, 396 F.3d at 1294 n.7; *see also Siemens Industry*, *supra*, at *4 ("An arbitration agreement falls under the Convention if [it] meets four jurisdictional [prerequisites set forth in *Bautista*]."). All four *Bautista* factors are met here.

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[3] For the same reasons, the undersigned finds that it is "plausible (as opposed to merely conceivable)" that the outcome of this dispute could be affected by the arbitration agreement. *Siemens Industry*, 2015 WL 6964667, at *1 (adopting report and recommendation).

First, there is an agreement in writing within the meaning of the Convention. The Convention defines an "agreement in writing" to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *See* the New York Convention, *supra*, Art. 2, § 2. Each Contract referenced above contains an arbitration agreement requiring that "[a]ll disputes arising between both parties in connection with or in the performances of the Contract" be arbitrated, and there is no dispute that these contracts were signed by OTK Stainless and FLI. While plaintiffs argue that GE Energy is not a signatory to the Contracts, as discussed above, this argument goes to the merits of GE Energy's motion to compel arbitration and does not undermine this Court's subject matter jurisdiction.

Second, the arbitration agreement provides for arbitration in the territory of a signatory to the Convention. Section 23.1 specifically requires that the arbitration be held in Germany, Doc. 1-1 (A) (§ 23.2), which is a signatory to the Convention. *See* the New York Convention, *supra*.

Third, the arbitration agreement arises out of a commercial, legal relationship. As acknowledged by the parties, the arbitration provision is contained in Contracts governing complex, commercial relationships and the "multi-million-dollar purchase of equipment," *see* Doc. 35, p. 9 n. 2, and thus is "undoubtedly commercial." *See id.*

Fourth, the commercial relationship has some reasonable relationship with one or more foreign states. The Calvert facility was developed by

ThyssenKrupp AG, a German company with its principal place of business in Germany, through a U.S. subsidiary, and the Contracts include a German choice of law provision. Converteam, a French company with its principal place of business in France, supplied the CRM motors, which were designed and manufactured in France. The undersigned also notes that plaintiffs allege that OTK Stainless is the subsidiary of a Finnish conglomerate, Outokumpu Oyj, and that Sompo is an American subsidiary of a Japanese insurer. On these facts, the Court finds that the fourth prerequisite is easily met.

In sum, the undersigned recommends that this Court conclude that GE Energy has met the requirements for removal pursuant to 9 U.S.C. § 205. GE Energy timely removed this action to this Court and clearly articulated the grounds for removal in its Notice of Removal. *See* 9 U.S.C. § 205 ("the ground for removal provided in this section . . . may be shown in the petition for removal"). GE Energy stated that the action was removed pursuant to 9 U.S.C. § 205 based on the arbitration agreement contained in the Contracts, articulated the relationship between this action and the agreement, and satisfied the four *Bautista* factors to establish that the agreement falls under the Convention. Doc. 1, pp. 5–10. Thus, the removal of this action was proper under (and this Court has subject matter jurisdiction over this action pursuant to) 9 U.S.C. § 205 as "the subject matter of [this] action 'relates to an arbitration agreement . . . falling under the Convention[.]'" *Siemens Industry*, *supra*, at *4, quoting 9 U.S.C. § 205.

B. Diversity Jurisdiction based on the Fraudulent Joinder of the Foreign Insurers.

GE Energy also asserts that this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(2). This provision, known as the "alienage provision," provides original jurisdiction over actions between "citizens of a State and citizens or subjects of a foreign state[.]" *Id.* GE Energy correctly acknowledges that the rule of complete diversity, requiring that all plaintiffs have a different citizenship than that of all defendants, applies equally to the alienage provision, *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1557 (11th Cir. 1989) (citation omitted), and thus, the presence of the Foreign Insurers as plaintiffs defeats complete diversity. GE Energy asserts, however, that these plaintiffs have been fraudulently joined.

"Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity." *Triggs*, *supra*, 154 F.3d at 1287. Typically, it arises where a plaintiff improperly joins a non-diverse *defendant* against whom "there is no possibility that the plaintiff can prove a cause of action[.]" *See id.* The Eleventh Circuit has not addressed whether fraudulent joinder applies to the joinder of plaintiffs. However, GE Energy has directed this Court to a number of district court decisions that have recognized that the doctrine applies equally to fraudulently joined plaintiffs. *See*, *e.g.*, *Taco Bell Corp. v. Dairy Farmers of America Inc.*, 727 F.Supp.2d 604, 607 (W.D. Ky. 2010) (adopting the "majority view" and holding that "[t]here is no significant difference between fraudulent joinder of plaintiffs and fraudulent joinder of defendants."); *Miller v. Home Depot, U.S.A., Inc.*, 199 F.Supp.2d 502, 508 (W.D. La.

2001) ("The fraudulent joinder doctrine can be applied to the alleged fraudulent joinder of a plaintiff."); *Sims v. Shell Oil Co.*, 130 F.Supp.2d 788, 796 (S.D. Miss. 1999) ("The principles of the doctrine of fraudulent joinder . . . apply to fraudulently joined defendants as well as fraudulently joined plaintiffs.").

Notwithstanding the intriguing argument put forth by GE Energy, the undersigned declines the invitation to consider this matter of first impression. Having determined that this Court has subject matter jurisdiction pursuant to 9 U.S.C. § 205, this additional ground for jurisdiction is of "no moment." Thus, the undersigned recommends that the Court leave for another day resolution of whether the fraudulent joinder doctrine applies equally to plaintiffs as it does to defendants.

C. GE Energy's Motion to Dismiss.

In a related motion, GE Energy also moves this Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Complaint as to the Foreign Insurers for failure to state a plausible claim against GE Energy (Doc. 7). GE Energy contends that the Foreign Insurers have no claim against GE Energy because their principal, Outokumpu Oyj, the Finnish parent of OTK Stainless, has no cause of action against GE Energy.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.C.t 1937, 1949, 173 L.Ed.2d 868 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The court must construe all

allegations in the complaint in the light most favorable to the plaintiff. *See*, *e.g.*, *Brower v. County of Inyo*, 489 U.S. 593, 598, 109 S.Ct. 1378, 1382, 103 L.Ed.2d 628 (1989). The benchmark for determining whether a complaint's allegations are sufficient to survive a Rule 12(b)(b) motion is established by Rule 8(a)(2), which requires that a pleading contain a "'short and plain statement of the claim showing that the pleader is entitled to relief.'" *See Iqbal*, 556 U.S. at 677–678, 129 S.Ct. at 1949, quoting Fed.R.Civ.P. 8(a)(2). Rule 8 does not require "detailed factual allegations," but mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" are insufficient. *See Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965. Further, "'a legal conclusion couched as a factual allegation'" need not be accepted as true. *Id.* (citation omitted). This standard demands that the factual allegations "raise a right to relief above the speculative level," *id.*, and "nudge[] the[] claims across the line from conceivable to plausible[.]" *Id.* at 570, 127 S.Ct. at 1974. In the final analysis, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 566 U.S. at 679, 129 S.Ct. at 1950.

According to the Complaint, the foreign insurers are "insurance carriers who insured Outokumpu Oyj," the parent company of OTK Stainless, "(and its subsidiaries, including Outokumpu Stainless) under a Master Insurance Policy that covered some of the loss that occurred at the Calvert facility." *See* Doc. 1-2, ¶ 3. In a section entitled "The Insurance Payments," plaintiffs set forth allegations of certain insurance

payments that Sompo and the OTK Oyj insurers made to OTK Stainless and OTK Oyj. *See id.*, ¶¶ 25–31. Thus, plaintiffs allege, Sompo and the OTK Oyj Subrogees are "equitably and contractually subrogated to the rights of OTK [Stainless] and [OTK] Oyj to the extent of the payments made." *Id.*, ¶ 30.

GE Energy counters that while plaintiffs have alleged that certain payments have been made under the Master Policy, the Complaint identifies the Foreign Insurers as subrogated only to the rights of Outokumpu Oyj, not OTK Stainless, and the Complaint is devoid of any allegations to support a claim on the part of Outokumpu Oyj against GE Energy. In the absence of a plausible claim by Outokumpu Oyj, GE Energy argues, the foreign insurers likewise do not have any plausible claim.

The undersigned agrees with GE Energy that the Complaint's subrogation claims suffer from inartful pleading; however, construing the factual allegations in the light most favorable to the plaintiffs, as this Court must, the undersigned finds that the foreign insurers have stated a plausible cause of action. Plaintiffs' complaint asserts various negligence and breach of implied warranty claims based on the alleged failure of motors supplied by GE Energy and alleges that the foreign insurers paid millions of dollars to cover some of the loss suffered at the Calvert facility as a result of these alleged failures. *See* Doc. 1-2, ¶¶ 3, 26, 27, 28, 30, 37, 38, 43, 49, 50, 58, 59. Although it is unclear to whom the foreign insurers paid these amounts, construing these allegations in favor of the foreign insurers, the undersigned recommends that the Court find that the foreign insurers have set forth a plausible subrogation claim

and, therefore, **DENY** GE Energy's motion to dismiss (Doc. 7).

IV. Conclusion

For the reasons stated above, it is hereby **RECOMMENDED** that the Motions to Remand (Doc. 34 & 35) be **DENIED** and that the Motion to Dismiss (Doc. 7) be **DENIED**.

NOTICE OF RIGHT TO FILE OBJECTIONS

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this Court. *See* 28 U.S.C. § 636(b)(1); FED.R.CIV.P. 72(b); S.D.ALA. L.R. 72.4. The parties should note that under Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice." 11th Cir. R. 3-1. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's report and recommendation where the disputed determination is found. An objection that

merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific.

DONE this the 22nd day of November, 2016.

s/WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE