

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: DAIMLERCHRYSLER AG :  
SECURITIES LITIGATION :

---

TRACINDA CORPORATION, :  
a Nevada Corporation, :

Plaintiff, :

v. : Civil Action No. 00-993-JJF

DAIMLERCHRYSLER AG, a Federal :  
Republic of Germany :  
corporation; DAIMLER-BENZ AG, :  
a Federal Republic of Germany :  
corporation; JÜRGEN SCHREMPP, :  
a citizen of the Federal :  
Republic of Germany; and :  
MANFRED GENTZ, a citizen of :  
the Federal Republic of :  
Germany, :

Defendants. :

---

A. Glichrist Sparks, III, Esquire, Alan J. Stone, Esquire, and Brian J. McTear, Esquire of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware.

Of Counsel: William G. McGuinness, Esquire and Julie E. Kamps, Esquire of FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, New York, New York. Terry Christensen, Esquire, Mark G. Krum, Esquire of CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO, LLP, Los Angeles, California.

Attorneys for Plaintiff Tracinda Corporation.

Thomas J. Allingham II, Esquire, Robert S. Saunders, Esquire, and Stephen D. Dargitz, Esquire of SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware.

Of Counsel: Jonathan J. Lerner, Esquire, Lea Haber Kuck, Esquire, Joseph N. Sacca, Esquire and Jacob E. Hollinger, Esquire of SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, New York, New York.

Attorneys for Defendants DaimlerChrysler AG, Daimler-Benz AG, Jürgen Schrempp and Manfred Gentz.

---

**MEMORANDUM OPINION**

November 19, 2003

Wilmington, Delaware

**Farnan, District Judge.**

Defendants DaimlerChrysler AG, Daimler-Benz AG, Jürgen Schrempp and Manfred Gentz (collectively, "Defendants") have filed a Motion To Strike Tracinda's Jury Demand (D.I. 802) pursuant to Federal Rule of Civil Procedure 39(a)(2) requesting that the jury trial demanded by Plaintiff Tracinda Corporation ("Tracinda") be stricken as it pertains to its claims against the Individual Defendants, Defendants Schrempp and Gentz, and the Corporate Defendants, Defendants DaimlerChrysler AG ("DaimlerChrysler") and Daimler-Benz AG ("Daimler-Benz"). For the reasons discussed, I will grant Defendants' Motion and strike Tracinda's jury demand.

**I. The Parties' Contentions**

By their Motion, Defendants contend that Tracinda waived, expressly and in writing, any rights it may have had to a jury trial in connection with claims arising out of the merger between Daimler-Benz and Chrysler Corporation ("Chrysler") to form DaimlerChrysler. Defendants' argument is rooted in the provisions of the Stockholder Agreement entered into by Daimler-Benz, Chrysler, Tracinda and Kirk Kerkorian in connection with the Business Combination Agreement ("BCA") which effectuated the merger. The Stockholder Agreement specifically recites that Tracinda and Kerkorian entered into the Stockholder Agreement to induce Daimler-Benz to enter into the BCA and waives the parties'

rights to a jury trial "with respect to any claim, counterclaim or action arising out of or in connection with [the Stockholder Agreement] or the transactions contemplated hereby." Stockholder Agreement § 4.7.

Defendants contend that the jury waiver provision of the Stockholder Agreement is valid and enforceable and that Tracinda has recognized the validity of this provision because it demanded a jury trial against the Individual Defendants, and not against the Corporate Defendants. Defendants also contend that the express language of the waiver is broad and encompasses all of Tracinda's claims in this action. Although Defendants recognize that the Individual Defendants did not sign the Stockholder Agreement, Defendants contend that the Individual Defendants are entitled to enforce the waiver clause as agents of the Corporate Defendants and third party beneficiaries of the Stockholder Agreement. In addition, Defendants contend that Tracinda is equitably estopped from denying the scope of the waiver clause.

In response, Tracinda contends that Defendants Schrempp and Gentz cannot invoke the jury waiver provision of the Stockholder Agreement, because they were not parties to that agreement. Tracinda contends that, in order to effectuate the right to a jury trial guaranteed by the Seventh Amendment of the United States Constitution, every reasonable presumption against waiver should be indulged and the waiver provision should be narrowly

construed. Tracinda further contends that if it is entitled to a jury trial with respect to its claims against Defendants Schrempp and Gentz, then the entire case should be tried to a jury to prevent any conflict with Tracinda's Seventh Amendment rights which may arise as a result of a simultaneous bench and jury trial.

## **II. DISCUSSION**

The right to a jury trial is a fundamental right guaranteed by the Seventh Amendment of the United States Constitution and governed by federal law. Simler v. Conner, 372 U.S. 221, 221-222 (1963). However, this right can be waived by contract if the waiver is knowing, voluntary and intelligent. See e.g. Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837 (10th Cir. 1988) (recognizing that "[a]greements waiving the right to trial by jury are neither illegal nor contrary to public policy"); First Union Nat'l Bank v. United States, 164 F. Supp. 2d 660, 663 (E.D. Pa. 2001). As a general matter, courts construe jury trial waivers narrowly and "indulge every reasonable presumption against waiver." Collins v. Government of Virgin Islands, 366 F.2d 279, 284 (3d Cir. 1966). Nevertheless, courts routinely enforce jury trial waivers. See e.g. Wechsler v. Hunt Health Sys., Ltd., 2003 WL 21878815, \*2 (S.D.N.Y. Aug. 8, 2003); Today's Man, Inc. v. Nationsbank, N.A., 2000 WL 822500, \*4 (E.D. Pa. June 23, 2000).

Examining the jury trial waiver provision of the Stockholder Agreement in light of these principles and the facts and circumstances of this case, I conclude that Tracinda waived its right to a jury trial. In pertinent part, Section 4.7 of the Stockholder Agreement provides:

Each of the parties hereto . . . agrees to waive any right to a trial by jury with respect to any claim, counterclaim or action arising out of or in connection with this Agreement or the transactions contemplated hereby.

(emphasis added). Reading the plain and unambiguous language of the Stockholder Agreement, I find, without question, that the jury trial waiver is enforceable as to the Corporate Defendants. With regard to the Individual Defendants, I am likewise persuaded that the plain language of the Stockholder Agreement supports Tracinda's waiver of its right to a jury trial. The waiver is broadly worded and applies to any claim or any action "arising out of or in connection with this Agreement or the transactions contemplated hereby" without limitation as to whom that action is brought against. See e.g. Curtis Center L.P. v. Sumitomo Trust & Banking Co., 1995 WL 365411, \*2 (E.D. Pa. June 15, 1995)

(recognizing that waiver of all claims "arising out of or relating to this Agreement or the transactions contemplated hereby" was "sweeping" waiver which encompassed claims for fraud, bad faith, tortious interference and misappropriation of trade secrets). Because Tracinda's claims against the Individual

Defendants arise out of and in connection with the Stockholder Agreement and the merger, which is the major transaction contemplated by the Stockholder Agreement, I conclude that they are encompassed by the plain language of the waiver.

Tracinda suggests that Defendants have offered no proof that Tracinda knowingly, voluntarily or intelligently waived its right to a jury trial against Defendants Schrempp and Gentz. In the circumstances of this case, I am not persuaded by Tracinda's argument. In determining whether a waiver was entered into knowingly, intentionally and voluntarily, courts consider such factors as: (1) the negotiability of the contract terms; (2) any disparity in bargaining power between the parties; (3) the business acumen of the party opposing the waiver; and (4) the conspicuousness of the jury waiver provision. See e.g., Wechsler v. Hunt Health Systems, Ltd., 2003 WL 21878815 at \*3 (citations omitted). Tracinda is a sophisticated and experienced business entity that was represented by sophisticated counsel during the negotiation of the Stockholder Agreement. The jury waiver clause is plainly worded and there is no suggestion that Tracinda lacked any bargaining power during the negotiations. Accordingly, I cannot find that Tracinda entered into the jury trial waiver unknowingly, unintelligently or involuntarily. See e.g. Telum, 859 F.2d at 838; Russell-Stanley Holdings, Inc. v. Buonanno, 2002 WL 655162, \*4 (S.D.N.Y. Apr. 22, 2002); Phoenix Four Grantor

Trust #1 v. 642 N. Broad St. Assocs., 2000 WL 1717261, \*2 (E.D. Pa. Nov. 15, 2000).

Tracinda also contends that the waiver is unenforceable as to Defendants Gentz and Schrempp, because they are not parties to the Stockholder Agreement. In support of its position, Tracinda advances the Third Circuit's decision in Dayhoff, Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1296 (3d Cir. 1996), a case involving an arbitration clause. In Dayhoff, the Third Circuit held that arbitration clauses "can be enforced only by the signatories to those agreements." Id. at 1296. However, the Third Circuit also recognized the continuing validity of its decision in Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110 (3d Cir. 1993) that "[b]ecause a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements.'" Dayhoff, 86 F.3d at 1296-1297 (citing Pritzker, 7 F.3d at 1121).

In this case, I am persuaded that the jury trial waiver is enforceable as to Defendants Schrempp and Gentz. Defendants Schrempp and Gentz are agents of the Corporate Defendants, and Tracinda's Complaint is based upon the actions of those Defendants as agents of the Corporate Defendants. See e.g. Pritzer, 7 F.3d at 1121; Arnold v. Arnold Corp., 920 F.2d 1269, 1281 (6th Cir. 1990) (applying arbitration clause to securities

claims against nonsignatory officers of corporation). In addition, Tracinda has alleged that all Defendants acted in concert with each other, and therefore, I conclude that Tracinda is equitably estopped from arguing that the jury waiver applies to only certain defendants. See e.g. MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947-948 (11th Cir. 1999) (acknowledging in context of arbitration provision that equitable estoppel applies where signatory to contract raises allegations of substantially interdependent and concerted misconduct by both nonsignatories and signatories to contract and holding that non-signatory could enforce arbitration agreement); Hoffman v. Deloitte & Touche, LLP, 143 F. Supp. 2d 995, 1004 (N.D. Ill. 2001) (holding that plaintiffs were equitably estopped from avoiding arbitration where they raised "allegations of substantially interdependent and concerted misconduct by both the signatory . . . and the non-signatories").

Tracinda disputes the applicability of the aforementioned cases on the basis that those cases involve arbitration clauses and not jury trial waiver clauses. However, Tracinda itself raises Dayhoff, a case which involves an arbitration clause. While there are certainly differences between arbitration clauses and jury waiver clauses, courts have also recognized the interrelatedness of arbitration and jury waiver clauses, because an agreement to arbitrate necessarily results in the loss of the



right to a jury trial. See e.g. Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638 (4th Cir.) (rejecting argument that an agreement to arbitrate did not constitute a jury waiver), cert. denied, 537 U.S. 1987 (2002); In re Currency Conversion Fee Antitrust Litig., 265 F. Supp. 2d 385, 414 (S.D.N.Y. 2003) (holding that plaintiff who enters into arbitration agreement is deemed to have forgone right to jury trial). Thus, courts have found cases involving arbitration clauses to be instructive in matters pertaining to jury waiver clauses. See Telum, 859 F.2d 838 (analogizing jury waiver clauses to arbitration clauses); Gurfein v. Sovereign Group, 826 F. Supp. 890, 921 (E.D. Pa. 1993) (recognizing the propriety of analogy to arbitration clauses in context of cases involving jury waiver provisions).

In this case, I find that the above-referenced arbitration cases have particular relevance here, because of the position of Defendants as agents of the Corporate Defendants involved in an action which directly relates to the Stockholder Agreement and the merger transaction expressly contemplated by the Agreement. To allow the Individual Defendants to be subject to a jury trial on the same claims and issues related to the Corporate Defendants would, in my view, deprive the Corporate Defendants of the benefit that the jury trial waiver provision of the Stockholder Agreement was intended to provide. This view is not inconsistent with the law as it pertains to jury trial waivers, despite the

legal differences between jury waiver provisions and arbitration provisions. See Okura & Co. v. Careau Group, 783 F. Supp. 482, 488-490 (C.D. Cal. 1991) (holding that contractual jury waiver clause applied to counterclaims against non-signatories of contract where counterclaims were related to or derived from agreement in question); Leav v. Weitzner, 51 N.Y.S.2d 775, 777 (N.Y. App. Div. 1944) (holding that jury trial waiver in lease agreement applied to nonsignatory defendants where action arose out of lease agreement).

In sum, I conclude that the jury demand should be stricken as it pertains to the Individual Defendants, as well as the Corporate Defendants. Tracinda has recognized the validity of the jury waiver clause as it pertains to the Corporate Defendants, and I conclude that Defendants Schrempp and Gentz as agents of the Corporate Defendants should be encompassed in that waiver. The waiver is broadly worded and applies without restriction to all claims and actions relating to the Stockholder Agreement and the merger contemplated by the Stockholder Agreement.

### **III. CONCLUSION**

For the reasons discussed, Defendants' Motion To Strike Tracinda's Jury Demand will be granted.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: DAIMLERCHRYSLER AG :  
SECURITIES LITIGATION :

\_\_\_\_\_  
TRACINDA CORPORATION, :  
a Nevada Corporation, :

Plaintiff, :

v. :

Civil Action No. 00-993-JJF

DAIMLERCHRYSLER AG, a Federal :  
Republic of Germany :  
corporation; DAIMLER-BENZ AG, :  
a Federal Republic of Germany :  
corporation; JÜRGEN SCHREMPP, :  
a citizen of the Federal :  
Republic of Germany; and :  
MANFRED GENTZ, a citizen of :  
the Federal Republic of :  
Germany, :

Defendants. :

**ORDER**

At Wilmington, this 19th day of November 2003, for the  
reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendants' Motion To Strike  
Tracinda's Jury Demand (D.I. 802) is GRANTED.

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE