

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

-----X
:
EUGENE J. LAKA, :
:
Plaintiff, :
:
-against- :
:
AFLAC NEW YORK and KENNETH MEIER, :
:
Defendants. :
:
-----X

Index No. 651809/2018
Motion Sequence No. 001
Hon. Justice Ostrager

**PLAINTIFF'S SUR-REPLY MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO COMPEL ARBITRATION**

July 20, 2018

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PRELIMINARY STATEMENT

The Arbitration Agreement that Aflac required Plaintiff to enter into as a condition of his employment, and which it now seeks to enforce, is procedurally unconscionable under New York law because Aflac's superior bargaining power coupled with its high-pressure tactics left Plaintiff with no meaningful choice but to accept the Agreement.

The Agreement is also substantively unconscionable because of its (a) severe one-sidedness in Aflac's favor; (b) prohibitive fee-allocation scheme that precludes effective vindication of Plaintiff's statutory rights; and (c) strict confidentiality giving Aflac an obvious informational advantage over its associates as a "repeat player."

ARGUMENT

The New York Court of Appeals stated in Brady v. The Williams Capital Group, 14 N.Y.3d 459, 467 (2010): "we are mindful of the strong state policy favoring arbitration agreements and ***the equally strong policy requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum.*** We believe that the case-by-case,

fact-specific approach employed by the federal courts, as well as the principles set forth in Gilmer and Green Tree, properly acknowledges and balances these competing policies" (emphasis added throughout). In Wework Cos. v. Zoumer, No. 16-cv-457, 2016 WL 1337280 (S.D.N.Y. Apr. 5, 2016), the court stated that "the presumption of arbitrability 'does not apply to disputes concerning whether an agreement to arbitrate has been made'" (internal citations omitted).

"In determining whether a contract is unconscionable, a court should take a 'flexible' approach, examining 'all the facts and circumstances of a particular case.' In re Estate of Friedman, 64 A.D.2d 70, 407 N.Y.S.2d 999, 1008 (2d Dep't 1978)." Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377, 382 (S.D.N.Y. 2002).

In Ragone v. Atlantic Video, 595 F.3d 115, 122 (2d Cir. 2010), the Second Circuit applying New York law stated: "'While determinations of unconscionability are ordinarily based on a conclusion that both the procedural and substantive components are present, there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone.' Gillman v. Chase Manhattan Bank N.A., 73 N.Y.2d 1, 12, 537 N.Y.S.2d 787, 534 N.E.2d 824 (1988) (internal citation omitted)."

In State v. Wolowitz, 96 A.D.2d 47, 68 (2d Dep't 1983), the court stated:

In determining the conscionability of a contract, no set weight is to be given any one factor; each case must be decided on its own facts (Matter of Friedman, 64 AD2d 70, 85). However, in general, it can be said that procedural and substantive unconscionability operate on a "sliding scale"; the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa While there may be extreme cases where a contractual term is so outrageous and oppressive as to warrant a finding of unconscionability irrespective of the contract formation process (see, e.g., Jones v. Star Credit Corp., 59 Misc. 2d 189, 192), such cases are the exception. Generally, there must be a showing of both a lack of a meaningful choice and the presence of contractual terms which unreasonably favor one party (Matter of State of New York v Avco Fin. Serv., supra).¹

Here, both procedural and substantive aspects of unconscionability are present, rendering the Arbitration Agreement unenforceable.

¹ See also Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015) ("[C]ourts evaluate procedural and substantive unconscionability on a 'sliding scale.'" An arbitration clause is "unenforceable . . . where minimal procedural unconscionability is present - 'based on the adhesive nature of the form arbitration agreement and the lack of opportunity. . . to negotiate its terms' -- and substantive unconscionability is apparent due to arbitration requirement that leaves parties unequal in their ability to pursue their respective claims." Id. at 392 (quoting Trompeter v. Ally Financial, 914 F. Supp. 2d 1067, 1073-76 (N. D. Cal. 2012)). If "the arbitration provision [is] severely one-sided in the substantive dimension, even moderate procedural unconscionability renders the arbitration agreement unenforceable." Berkson, 97 F. Supp. 3d at 392 (quoting Bragg v. Linden Research, 487 F. Supp. 2d 593 (E. D. Pa. 2007)).

A. Procedural unconscionability

The New York Court of Appeals in Sablosky v. Gordon Co., 73 N.Y.2d 133, 137 (N.Y. 1989), stated that "claims [of procedural unconscionability] are judged by whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties." See also Friedman, 64 A.D.2d at 85 ("High pressure sales tactics, misrepresentation and unequal bargaining position have been recognized as procedurally unconscionable."); Wework Cos. v. Zoumer, No. 16-cv-457, 2016 WL 1337280 (S.D.N.Y. Apr. 5, 2016) (stating that "evidence of high pressure or deceptive tactics coupled with inequality in bargaining positions 'may be sufficient to show that an employee lacked a meaningful choice.'" (internal citations omitted)).

In Brennan v. Bally Total Fitness, 153 F. Supp. 2d 408, 416 (S.D.N.Y. 2001) ("Brennan I"), decided under New York law, the court denied a motion to compel arbitration "pending further discovery and a possible jurisdictional hearing." The Court reasoned: "In order to compel arbitration, this Court must find that the EDRP [Employee Dispute Resolution Procedure] was a valid contract. An unconscionable contract of adhesion is not a valid contract. Limited discovery is required so that the Court can determine whether the EDPR was an unconscionable contract of

adhesion. See In re Estate of Friedman, 64 A.D.2d 70, 407 N.Y.S.2d 999, 1008 (2d Dep't 1978)(Unconscionability must [be] determined in light of 'the facts and circumstances of a particular case.') In additional, a jurisdictional hearing may be necessary if the 'proffered evidence is so conflicting and the record is rife with contradictions." See also State v. Wolowitz, 96 A.D.2d 47, 69 (2d Dep't 1983) ("The rule is that if it appears from the record before the court that unconscionability may exist, and the issue is not free from doubt, then the court must hold a hearing where the parties may present evidence with regard to the circumstances of the signing of the contract, and the disputed terms' setting, purpose and effect. . . . In our view a hearing is required. The record indicates the possible existence of both the procedural and substantive elements of unconscionability."); Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003) ("If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary."). Here, such issues are galore.

In Brennan II, 198 F. Supp. 2d 377, 378 (S.D.N.Y. 2002), decided "[a]fter the parties conducted discovery and presented witnesses along with other evidence at a jurisdictional hearing," the court concluded that "the agreement to arbitrate was unconscionable and therefore unenforceable." The court stated that "[w]hile inequality in bargaining power between

employers and employees is not alone sufficient to hold arbitration agreements unenforceable, such inequality, when coupled with high pressure tactics that coerce an employee's acceptance of onerous terms, may be sufficient to show that an employee lacked a meaningful choice." Id. at 382.

The Court found the lack of a meaningful choice where "[t]he evidence shows that [Defendant's manager] Infante used high pressure tactics to coerce the employees into signing the Agreement," id. at 383:

During the 1998 Meeting, Infante gave the employees no more than fifteen minutes to review a sixteen-page single-spaced document, and never mentioned or suggested that the employees could review the Agreement at home or with an attorney. He threatened the employees that those who did not sign the document would not be promoted. He did not address the impact the EDRP would have on pending complaints against the company. At the end of the Meeting, he asked aloud whether each employee, including Brennan, had signed the Agreement. As a result of these pressure tactics, Brennan reasonably felt that she had no choice but to sign the EDRP or she would lose her job.

This evidence of high pressure tactics coupled with "the considerable disparity in bargaining power between Brennan and Bally" led the Court in Brennan II to conclude that "Brennan lacked a meaningful choice in deciding whether or not to sign the Agreement," and the Agreement was therefore procedurally unconscionable. Id. at 383-84.

So too is here, where Plaintiff was pressured into signing the Agreement by his Aflac sales coordinator in strikingly similar circumstances (see Affidavit of Eugene J. Laka sworn to June 7, 2018 ("Laka Aff."), ¶ 6):

Defendants' Reply Brief is also wrong in Part B.1 to the extent they argue that I was not forced, pressured or strongly encouraged to sign the agreement. That is precisely what happened and is alleged in the Complaint: I was pulled from Aflac's training event and expressly told by Aflac's sales coordinator that I had to sign the Agreement in order to become an Associate; that it was merely a formality; and I was not allowed to read the Agreement, or to make a copy of the Agreement for myself, because I was told there was no time for that. I was given no choice in the matter whatsoever.

Indeed, in Brennan, Plaintiff was specifically told that the document she was pressured to sign was an "Employment Dispute Resolution Procedure"; here, Plaintiff was given a 12-page single-spaced Associate's Agreement, with the Arbitration Agreement as one of its many provisions (10th out of 11) dealing with numerous other issues, with no time to review or understand the terms, let alone to negotiate them.²

Moreover, Defendants' argument based on Defendant Meier's affidavit (ECF No. 25) that "there was no inequality of bargaining power" between a Fortune 500 company and Plaintiff is

² Indeed, Aflac's Arbitration Agreement has not changed during over 9 years of Plaintiff's service, compare paragraph 10 of Laka's Associate's Agreement of 2005 with Varela's of 2014, Exs. A and B respectively to the Second Declaration of Dimitry Joffe dated July 20, 2018 ("Joffe Decl.").

not credible. First, Plaintiff in his affidavit disputes many of Defendant Meier's statements underlying this contention as false. See Laka Aff. at ¶¶ 2-4. Second, while Plaintiff is indeed a Columbia University graduate and had had a career at Citibank, that career ended in 1981, more than 30 years before the events in question, and Plaintiff was essentially self-employed since that big career break. See ECF Nos. 26-27. Third, a "seasoned and sophisticated businessman," as Defendants portray Plaintiff in an effort to equalize their obviously unequal bargaining positions, is unlikely to take up a new career of an Aflac insurance salesman at the age of 61, as Plaintiff did in 2014, or to continue selling insurance until they are 71 and suffering from cancer.

B. Substantive unconscionability.

1. Severe one-sidedness in Aflac's favor

The Brennan II Court also held that "[t]he EDRP is substantively unconscionable because its terms unreasonably favor Bally," and concluded: "Judging the contract in light of 'all the facts and circumstances of [this] particular case' as I must, Friedman, 407 N.Y.S.2d at 1008, I conclude that the agreement to arbitrate was unconscionable, and is therefore

unenforceable. As a result, there was no agreement to arbitrate."³

The Court in Sablosky, 73 N.Y.2d 133, 137 (N.Y. 1989), citing "decisions which have repudiated the necessity of mutuality of remedy in contracts" and stating that "there is no reason for a different mutuality rule in arbitration cases," held that "[m]utuality of remedy is not required in arbitration contracts."

However, the Sablosky court also expressly held that the arbitration agreement is subject to invalidation pursuant to the doctrine of unconscionability whereby the "courts consider whether one of more key terms are unreasonably favorable to one party." Id. at 138. "Indeed, some courts have invalidated unilateral arbitration clauses for want of mutuality although their decisions might as well rest on the doctrine of unconscionability or public policy (see, e.g., Deutsch v. Long Is. Carpet Cleaning Co., 5 Misc.2d 684 [1st Dept. 1956], affd no opn. 3 A.D.2d 1002; Dwyer v. Biddle, 274 App. Div. 903; and see,

³ Cf. Isaacs v. OCE Business Servs., 968 F. Supp. 2d 564, 569-70 (S.D.N.Y. 2013) ("When both an employer and its employees are bound to an agreement to arbitrate, when the terms of the agreement are equally applicable to both parties, and when the employer bears any unreasonable cost of the arbitration, the arbitration agreement is not unreasonably favorable to employer"; upholding the agreement where "by its own terms, the Policy applies equally to both OBS and its employees," and there was no "deception" or "high pressure tactics."); Gillman v. Chase Manhattan, 73 N.Y.2d 1, 11 (N.Y. 1988) ("Nor is there any suggestion that the application was signed as a result of high-pressured tactics. On the contrary, Frohlich signed the instrument in his own office where he had time to study it and, if necessary, to discuss it with a lawyer."). The opposite is true here.

Miner v. Walden, 101 Misc. 2d 814 (expressly finding clause unconscionable and against public policy))." Id.⁴

Here, Plaintiff does not rely on the repudiated contractual doctrine of the "mutuality of remedies"; Plaintiff rather relies on the unconscionability of the Agreement that unreasonably favors the stronger party, which argument the Sablosky Court expressly preserved.

First, Paragraph 10.1 of the Arbitration Agreement requires the associate to arbitrate "any dispute arising under or relating in any way to this [Associate's] Agreement," while expressly carving out from its scope virtually all material contractual claims that Aflac itself may have against its associates. See id. ("Except for an action by Aflac to enforce provisions contained in Paragraphs 1.4 ["Aflac Intellectual Property"], 3 ["Confidential and Protected Information"], 8 ["Restricted Conduct"], 10.5 ["Injunctive Relief"] or 10.6 [Covenant Not to Sue]"). Second Joffe Decl. Ex. A.

Second, paragraph 10.2 itself includes language that plainly demonstrates that the Arbitration Agreement does not contemplate Aflac as the party that will be initiating any arbitration against its associates. Thus, paragraph 10.2 defines

⁴ In Miner, the court held that "the classic elements of unconscionability are present in this case: unequal bargaining power, resulting in a contract more favorable to the defendant and for the sole benefit of the defendant." 101 Misc. 2d 814, 818 (N.Y. Sup. Ct. 1979). So is the case here.

"Complaining Party" as "the party initiating the Dispute," but then proceeds to juxtapose the "Complaining Party" against Aflac, demonstrating that the latter is not contemplated to be the former under the Arbitration Agreement: "The Complaining Party and AFLAC may each name an arbitrator," and so on for the remainder of the paragraph. (Had Aflac ever initiated an arbitration against its associate under the Agreement, these provisions would have made no sense whatsoever.)

Third, Aflac's Arbitration Agreement also requires the associates to arbitrate any dispute not only with Aflac but also with any of Aflac's "past and present officers, stockholders, employees, associates, coordinators, agents and brokers of Aflac" and "regardless of whether Aflac is a party." Aflac's officers and other affiliates, however, are not similarly bound to arbitrate any of their claims against the associate.

Fourth, the Arbitration Agreement severely limits liability of Aflac and its affiliates while leaving associates' liability unlimited, further contributing to the one-sidedness of the Agreement in Aflac's favor and to its substantive unconscionability. Thus, paragraph 10.7.1 of the Agreement provides that "with the exception of a claim that is based upon misconduct by AFLAC or any of its past or present officers, directors, employees, associates, coordinators, agents or brokers shall be limited to a claim for breach of contract and

the remedies and liabilities arising thereunder." Paragraph 10.7.2 provides that the associate "shall have no right to assert any claim or action against AFLAC . . . based upon any act, error or omission of other AFLAC associates, coordinators, agents or brokers." Nothing in the Agreement similarly limits the associate's liability to AFLAC or its affiliates.

In Desiderio v. NASD, 191 F.3d 198, 207 (2d Cir. 1999), the Second Circuit held that "Form U-4 binds **both** parties to mandatory arbitration and may not be said to favor the stronger party unreasonably" (emphasis original). Here, Aflac's Arbitration Agreement, which does not even contemplate Aflac to be "the party initiating the Dispute" and only requires the associates are bound to arbitrate, clearly "favor[s] the stronger party unreasonably."

2. Prohibitive cost-allocation scheme preventing Plaintiff from vindicating his statutory rights.

In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991), the U.S. Supreme Court held that mandatory arbitration is enforceable "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum. In Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90 (2000), the Supreme Court in turn recognized that "the existence of large arbitration costs could preclude a

litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."

In Brown v. Twenty-First Century Fox, Inc., 2017 N.Y. Slip Op. 51988(U) (N.Y. Sup. Ct. Nov. 13, 2017), the court stated that "[t]he effective vindication doctrine bars the enforcement of an arbitration clause when doing so would preclude a litigant from vindicating his or her statutory rights in the arbitral forum. The existence of excessive arbitration costs could invoke the effective vindication doctrine thus rendering the arbitration provision unenforceable" (internal citations omitted). See also Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144, 150 (2d Cir. 2004) ("We recognize that there may be circumstances under which courts will not enforce pre-dispute mandatory arbitration agreements with regard to statutory employment claims. See, e.g., Halligan, 148 F.3d at 204 (noting that arbitration was mandatory only where claimant could effectively vindicate her statutory rights in arbitration).").

In Brown, just like in Larsen v. Citibank FSB, 871 F.3d 1295 (11th Cir. 2017), plaintiff's arbitration agreement provided for a low-cost JAMS arbitration: "the arbitration clause at issue arises out of an employment agreement, and therefore according to JAMS rules, [plaintiff] could only be required to pay a \$400 fee to arbitrate his claims, which is not substantially different from the \$275 court fee. Accordingly,

[plaintiff] has failed to show the likelihood that he would incur prohibitive costs and fees that would deter him from arbitrating his claims." Id.

Here, by contrast, there is no low-cost arbitration option in Plaintiff's Arbitration Agreement. See Second Joffe Decl., Ex. A. The Agreement provides in paragraph 10.2 that disputes "shall be resolved by a panel of three arbitrators," and that each party "shall pay all expenses and fees of its selected Party Arbitrator." There is nothing speculative, contingent, uncertain, or remote about the likelihood of incurring such fees and expenses by Plaintiff. See also Schreiber v. K-Sea Transp. Corp., 9 N.Y.3d 331, 340-41 (2007) (noting "one troubling aspect of the agreement itself: the statement that K-Sea would advance any filing fee 'up to \$750.00' . . . but the fee actually demanded by the AAA was \$10,000," and stating that plaintiff "should not be compelled to bear costs which would effectively preclude him from pursuing his claims.").

Indeed, the Complaint alleges that the prohibitive costs of arbitration did in fact deter Plaintiff from arbitrating his statutory claims in 2014 (ECF No. 2 ¶¶ 59-60):

Defendant AFLAC did not offer Plaintiff to pay for the arbitrator, or to advance or reimburse arbitration costs, making the arbitration process prohibitively expensive and burdensome for the 71-year-old cancer survivor whom Defendant AFLAC had ruthlessly and viciously fired after almost 10 years of impeccable service, and whom it further

impoverished by cutting off his income stream from his earned renewal commissions. Plaintiff did not have the resources required to pay attorneys' fees and the prohibitive arbitration costs, including arbitrator's fees, and did not pursue arbitration because he could not afford to do so, both financially, physically, and emotionally particularly in Columbus, GA, where he was told and understood the arbitration to take place, and particularly considering his age and the chemotherapy-induced peripheral neuropathy he was suffering from that prohibited him from walking normally or traveling.

See also Laka Aff. ¶¶ 7-8, attesting to his inability to afford arbitration costs. See Brady 928 N.E.2d at 467 (holding that "the issue of a litigant's financial ability is to be resolved on a case-by-case: (1) whether the litigant can pay the arbitration costs and fees; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum," and remitting the case for a hearing regarding plaintiff's financial ability).

Indeed, this is exactly the situation where "the existence of large arbitration costs . . . preclude[d] a litigant . . . from effectively vindicating [his] federal statutory rights in the arbitral forum" contemplated by the Supreme Court in Green Tree, 531 U.S. at 90. As the Complaint alleges, Plaintiff "was deprived of his proprietary claims for retaliation and other causes of action [including for discrimination on the basis of

age and disability], which are now past their short statutes of limitations." ECF No. 2 at ¶ 88.

In Ting v. AT&T, 319 F.3d 1126, 1151 (9th Cir. 2003), the Ninth Circuit held (applying California law):

The CSA [Consumer Services Agreement] requires customers to split the arbitrator's fees with AT&T. In enjoining the provision as unconscionable, the district found that while the majority of complainants would be handled satisfactorily either by customer service representatives or subsidized arbitration, some complainants would hypothetically face prohibitive arbitration costs, effectively deterring them from vindicating their statutory rights.

In Circuit City, 279 F.3d 889, we recently applied California law in declaring a similar fee-splitting scheme unenforceable. Id. at 894. That case is indistinguishable from the one at bench. Here, the scheme is unconscionable because it imposes on some consumers costs greater than those a complainant would bear if he or she would file the same complaint in court. See Armendariz, 99 Cal.Rptr.2d 745, 6 P.3d at 687 ("[T]he arbitration process cannot generally require the employee to bear any type of expenses that the employee would not be required to bear if he or she were free to bring the action in court.") (emphasis in original). A number of other courts have arrived at the same conclusion. See Shankle v. B-G Maint., Inc., 163 F.3d 1230, 1235 (10th Cir. 1999) (holding unenforceable a fee-splitting provision that would cost an employee between \$1,875 and \$5,000 to resolve a particular claim); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997) (upholding a fee-splitting agreement, but only after the court construed the agreement to require the employer to pay all the arbitrator's fees). Consistent with our decision in Circuit City, we affirm the district court's conclusion that the CSA's fee splitting scheme is unconscionable.

Our decision is also consistent with the FAA. AT&T contends that the district court "singled out" arbitration agreements for special treatment by declaring the provision unconscionable simply because it would require customers to share some of the costs. However, parties that agree to arbitrate statutory claims still are entitled to basic procedural and remedial protections so that they can effectively realize their statutory rights. Circuit City, 279 F.3d at 895 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)); Cole, 105 F.3d at 1482. Among these protections is the assurance that an individual need not "pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." Cole, 105 F.3d at 1482(emphasis in the original) (listing five basic requirements that arbitration forum must meet). Additionally, because unconscionability is a defense to contracts generally and does not single out arbitration agreements for special scrutiny, it may be raised consistent with § 2 of the FAA. Doctor's Assocs., 517 U.S. at 688, 116 S. Ct. 1652.

Defendants' purported offer to pay Plaintiff's arbitration costs, made **after** Plaintiff's federal statutory claims under Title VII had already expired, was too little too late.⁵ In this respect, Defendants' argument that "Plaintiff is not seeking to vindicate any statutory rights in this case" ignores the fact that he had been deterred from bringing those claims by the high arbitration costs and other unconscionable features of the Arbitration Agreement, and those claims have now expired.⁶

⁵ As demonstrated in the Second Joffe Decl. ¶¶ 5-8, this offer never became concrete, and was never accepted by Plaintiff.

⁶ See Complaint, ECF No. 2 at ¶ 88 ("Plaintiff was deprived of his proprietary claims for retaliation and other causes of action, which are now past their short statutes of limitations.") Plaintiff does, however, bring a claim under

Defendants have not waived or offered to waive their statute of limitation defenses to Plaintiff's Title VII and/or ADA claims for age and disability discrimination.

In Ragone, defendants waived arbitration agreements' statute of limitations and fee-shifting provisions, and the court stated that "we can enforce an agreement that modifies a provision that otherwise might be unconscionable." 595 F.3d at 125. The Court, however, sounded a "Note of Caution," stating that "[w]hile we affirm the district court's holding that the arbitration agreement is enforceable as modified by the defendants' waivers, we emphasize that we do so with something less than robust enthusiasm." The Court cited Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985), for the proposition that "if certain terms of an arbitration agreement served to act 'as a perspective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy." Ragone, 595 F.3d at 125. The Court further noted that "[h]ad the defendants attempted to enforce the arbitration agreement as originally written it is not clear that we would hold in their favor" because in that case "it is at least possible that Ragone would be able to demonstrate that these

NYGBL §349, which affords a statutory remedy under New York law to victims of deceptive business practices. Id. at ¶¶ 90-95.

provisions were incompatible with her ability to pursue her Title VII claims in arbitration, and therefore void under the FAA." This is exactly the case here, where Aflac attempted to enforce its Arbitration Agreement and its unconscionable provisions in 2014, deterring Plaintiff from pursuing his Title VII claims until the statutes of limitations on those claims had expired.

The Ragone Court also took note of plaintiff's argument that "waiver of the suspect provisions should not save the arbitration agreement because enforcement of the agreement, less the waived provisions, 'create[s] highly undesirable incentives to employers' because it 'teaches employers to create as oppressive and one-sided arbitration agreements as possible (with the hopes of chilling employment discrimination actions) while maintaining the expectation that [they] can still enforce arbitration by simply stating 'Never Mind' to all the unenforceable provisions that never should have been included in the first place.'" Indeed, the waiver argument appears wholly incompatible with the rule that a contract provision is unconscionable where it is "both procedurally and substantively unconscionable *when made*." Gillman, 73 N.Y.2d at 10. Indeed, Defendants themselves cite Gillman for this very proposition, in arguing that "*[t]he relevant time for assessing procedural unconscionability of a contract is when the agreement is entered*

into by the party challenging its enforceability, not thereafter." Reply Brief, ECF No. 24 at p. 10.

The Court ultimately ruled in Ragone that "[b]ecause Ragone herself has not been chilled in asserting her Title VII rights . . . we do not accept this claim," but it considered these issues to be "far from insubstantial." 595 F.3d at 126. Here, by contrast, Plaintiff himself had been chilled in asserting his Title VII claims - indeed, he had been deterred from bringing them altogether precisely because Aflac in 2014 sought to enforce its unconscionable arbitration agreement without any of the Ragone waivers or modifications.

3. Broad confidentiality provision

The Court in Zhu v. Hakkasan NYC LLC, 291 F. Supp. 3d 378 (S.D.N.Y. 2017) considered a confidentiality clause in the arbitration agreement as insufficient to show that the agreement was substantively unconscionable because:

[C]onfidentiality requirements apply equally to Plaintiffs and Defendants, and the terms of the Agreement are not one-sided. Courts in this District have repeatedly held that, "when both an employer and its employees are bound to an agreement to arbitrate, when the terms of the agreement are equally applicable to both parties, and when the employer bears any unreasonable cost of the arbitration, the arbitration agreement is not unreasonably favorable to the employer." See, e.g., Isaacs, 968 F. Supp. 2d at 569 (collecting cases). Here, all of the terms of the Arbitration Agreement - including those in the confidentiality clause - apply equally to Plaintiffs and Defendants, and Defendants bear all of the arbitration costs.

For this reason, the confidentiality clause cannot be said to render the Arbitration Agreement substantively unconscionable.

The exact opposite is true here: Aflac itself is not required to arbitrate its claims against the associates, is not even contemplated to be a "complaining party" thereunder, and is free to bring its claims in open court whereas Plaintiff is required to arbitrate his claims confidentially, and Plaintiff is required to "pay all expenses and fees of its selected Party Arbitrator."

In Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1377 (11th Cir. 2005), relied upon by Defendants, the Court found that "[although there is some bargaining disparity here, as often in the employment context, the plaintiffs have failed to show that the DRP [Dispute Resolution Policy] and its making is so one-sided as to be unconscionable. Its terms are clear and when presented to employees with a cover letter reflecting the importance of the policy, and its terms are not oppressive." With respect to the confidentiality provision, the Court stated:

The plaintiffs next argue that the DRP unconscionably requires that the parties not disclose transcripts from the arbitration or the arbitrator's award. In many employment claims, both sides might well prefer confidentiality. See Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 8 n. 4 (1st Cir.1999)(observing that both sides might desire confidentiality); see also Iberia, 379 F.3d at 175 (same, in cellular customer-provider context). We thus agree with the Fifth Circuit that while the confidentiality

agreement might be more favorable to employers (as "repeat players") than to individual employees, it is not so offensive as to be invalid. Iberia, 379 F.3d at 175.⁷

But see Larsen, 871 F.3d at 1319 ("the obvious informational advantage KeyBank holds at the outset of a dispute may therefore have the effect of discouraging consumers from pursuing valid claims," and holding the confidentiality provision unconscionable). See also Ting, 319 F.3d at 1151-52, where the Ninth Circuit applying California law stated:

Although facially neutral, confidentiality provisions usually favor companies over individuals. In Cole, 105 F.3d 1465, the D.C. Circuit recognized that because companies continually arbitrate the same claims, the arbitration process tends to favor the company. *Id.* at 1476. . . . AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract. Further, the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T. For these reasons, we hold that the district court did not err in finding the secrecy provision unconscionable.

⁷ Defendants argue that Caley was decided under Georgia law; in its ruling on confidentiality, however, the Court did not cite any Georgia cases but relies on the Fifth Circuit's reasoning in Iberia, which applied Louisiana law. And while Larsen was indeed decided under the Washington precedent of Zuver v. Airtouch Communications, Inc., 153 Wash.2d 293, 103 P.3d 753 (2004), the Larsen Court also stated that even though Zuver was not perfectly analogous to the case at bar, "[t]he court's reasoning in Zuver does . . . highlight a core public-policy concern that applies with equal force to this case," Larsen, 871 F. 3d at 1319; Plaintiff respectfully submits that the same concern applies to his case with no lesser force. (This very issue is now on appeal to the Eleventh Circuit Court of Appeals, Hubbard et al. v. American Life Assur. Co., No. 18-11869, see Second Joffe Decl. ¶9.

See also Cole, 105 F.3d at 1477 (“[A] lack of public disclosure may systematically favor companies over individuals. Judicial decisions create binding precedent that prevents a recurrence of statutory violations; it is not clear that arbitral decisions have any such preventive effect. The unavailability of arbitral decisions also may prevent potential plaintiffs from locating the information necessary to build a case of intentional misconduct or to establish a pattern or practice of discrimination by particular companies.”).

C. Defendants’ authorities are readily distinguishable.

Defendants’ authorities compelling arbitration are readily distinguishable.

Defendants rely on Patterson v. Somerset Investors Corp., 96 A.D.3d 817 (2d Dep’t 2012), for the proposition that a party who signs a document is conclusively bound by its terms. ECF No. 24 at p. 10. However, “[a]lthough it is true that ‘one who signs an agreement without full knowledge of its terms might be held to assume the risk that she has entered a one-sided bargain,’ ***this rule does not apply if plaintiff is able to demonstrate the requisite ‘absence of meaningful choice.’***” Brennan I, 153 F. Supp. 2d at 416. See also Zhu v. Hakkasan, 291 F. Supp. 3d 378 (“A party that has signed a contract may be relieved from its attendant obligations if a court finds . . . that the contract is unconscionable. . . .” (internal citations omitted).”).

In Crewe v. Rich Dad Educ. LLC, 884 F. Supp. 2d 60, 82 (S.D.N.Y. 2012), the court held that plaintiff who was given an arbitration agreement to sign during a training workshop had "an amply 'meaningful choice' whether to bind himself to the Agreement" because he "was given three days to cancel his Agreement. . . . [Plaintiff] thus had every opportunity to read the Agreement and Terms and Conditions after leaving the workshop, to reflect on the arbitration clause, and to decide to back out." Plaintiff here did not have the opportunity to read, reflect on or back out of the Agreement, and thus had not had the meaningful choice like plaintiffs in Crewe.

In Wework, No. 16-cv-457, 2016 WL 1337280, the Court held that plaintiff had failed to establish procedural unconscionability where plaintiff did not allege any high pressure tactics; the agreement was not complex or confusing (and only 2 pages long), and defendant "did not demand a response in an unreasonably short period of time, which may have prevented respondent from truly contemplating or fully understanding the Agreement." Here, Plaintiff does allege high pressure tactics that prevented him from reviewing the agreement or even retaining a copy of it.

The Wework court also held that a limited carve-out of claims related to "respondent's 'invention, Non-Disclosure, Non-Competition and Non-Solicitation Agreement" was not enough to

amount to substantive unconscionability because they did not "favor the stronger party unreasonably." Here, by contrast, Aflac is not even contemplated to be the "party initiating the Dispute" under the Arbitration Agreement.

In Zhu v. Hakkasan NYC LLC, 291 F. Supp. 3d 378 (S.D.N.Y. 2017), there was "no evidence that high pressure tactics were used to cause the Plaintiffs to feel that they had no choice but to sign on the spot without reviewing the terms" - here, there is such evidence in the form of Plaintiff's affidavit and the affidavits of other Aflac sales associates, all attesting to the "high pressure tactics" Aflac had used to have its sales associates, including Plaintiff, to sign the Agreement.

Here, the Arbitration Agreement requires Aflac associates to arbitrate any and all of their disputes against Aflac, to do so in strict confidence, and to bear all the expenses and fees of their arbitrators - while leaving Aflac free to pursue its claims against associates in court, unshackled by confidentiality provisions, and without incurring any arbitration costs. The Agreement thus unequivocally and unreasonably favors the stronger party in all substantive dimensions.

In Sablosky, plaintiff's claim of procedural unconscionability related "almost exclusively to the fact that the employment agreement was prepared by the employer," which,

as the Court noted, was almost always true and did not render the arbitration clause unconscionable. 73 N.Y.2d at 137 ("Such claims are judged by whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties.").

CONCLUSION

The Complaint here alleges high pressure tactics and inequality of bargaining power as the basis for procedural unconscionability. The Complaint also alleges a number of substantive provisions in the Agreement recognize by New York law as unconscionable. Accordingly, as in Brennan II, "[j]udging the contract in light of 'all the facts and circumstances of [this] particular case' . . . the agreement to arbitrate was unconscionable, and is therefore unenforceable. As a result, there was no agreement to arbitrate," and Defendants' motion should therefore be denied.

Respectfully Submitted,



Dated: July 20, 2018

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CERTIFICATE OF SERVICE

I, Dimitry Joffe, hereby certify that on this 20th day of July 2018, I caused a copy of Plaintiff's sur-reply memorandum of law, and the second declaration of Dimitry Joffe dated July 20, 2018, with exhibits, and the affidavit of Eugene J. Laka sworn to July 7, 2018, to be served electronically upon the registered participants in this case through the ECF system.



Dimitry Joffe
Counsel to Plaintiff