# No. 18-1960

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

AMERICAN FAMILY LIFE ASSURANCE COMPANY OF NEW YORK,

Petitioner-Appellee,

v.

FREDERICK BAKER and LOUIS VARELA,

Respondents-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

**APPELLANTS' INITIAL BRIEF (CORRECTED)**

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## STATEMENT OF JURISDICTION

Appellee American Family Life Assurance Company of New York ("Aflac") initiated this action (the "Action") in the United States District Court for the Eastern District of New York on December 4, 2017, by filing a petition to compel Appellants, Aflac's former sales associates Frederick Baker and Louis Varela ("Associates"), to arbitrate their claims against Aflac pursuant to the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* The District Court had original jurisdiction over this action pursuant to 28 U.S.C § 1331.

On June 4, 2018, the District Court entered an order granting the petition to compel arbitration, and a final judgment on June 5, 2018. Associates filed their Notice of Appeal on July 2, 2018. This Court's jurisdiction to consider this appeal arises under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

The principal issues on appeal are (a) whether Aflac's standard Arbitration Agreement (the "Agreement"), identical for both Appellant Associates, is procedurally unconscionable due to high pressure tactics and/or deceptive conduct Aflac deploys in the making of the Agreement, (b) whether the Agreement is substantively unconscionable due to its prohibitive cost-allocation scheme saddling Associates with full costs of their party arbitrator, one of the three arbitrators mandated by the Agreement, and precluding Associates from effectively

vindicating their federal statutory rights; (c) whether the Agreement is substantively unconscionable due to a host of other unreasonably one-sided terms all favoring Aflac, the stronger party, in substantive dimensions; (c) whether the unconscionable terms pervade the entire Agreement, representing Aflac's integrated scheme to contravene public policy by denying its Associates reasonable access to a neutral forum and by shielding Aflac's allegedly fraudulent business practices from judicial or public scrutiny, making judicial reformation impossible and the entire Agreement unenforceable under the applicable New York state and federal laws; and (d) whether the District Court erred in finding that a valid and enforceable agreement to arbitrate Associates' claims existed between the parties and in granting Aflac's petition to compel arbitration.

## STATEMENT OF THE CASE

This Action was brought on Aflac's petition seeking to compel Associates to arbitrate their state and federal statutory and common law claims alleged in Associates' tentative draft class action complaint (A92-A184) pursuant to the Agreement whose enforcement Associates resisted in the proceedings below due to its unconscionable terms (among other reasons not relevant to this appeal).

The Honorable LaShann DeArcy Hall of the District Court for the Eastern District of New York rendered the appealed from decision granting Aflac's petition and compelling arbitration, entered without an opinion as a docket text on June 4,

2018, and stating in relevant part: "Third, the Court finds wholly without merit Respondents' argument that the arbitration agreement is substantively and procedurally unfair rendering it legally unenforceable. Respondents do not refer the Court to any precedent and the Court is aware of none that supports their argument. Respondents shall arbitrate all claims that are subject to arbitration under the Associate's Agreements." A-5. Associates hereby appeal from the quoted part of the June 4, 2018 order, and from the part of the June 5, 2018 judgment compelling arbitration.

## I. PROCEDURAL HISTORY

Aflac commenced this Action on December 4, 2017 by breaching the very same Agreement it was seeking to enforce, and by making false statements of law and fact in its petition to enforce it. In its petition filed that day, Aflac asked the District Court to compel Associates to arbitrate their claims which they, together with seven other former Aflac sales associates, had alleged in their draft class complaint shared with Aflac's counsel during the parties' confidential settlement discussions conducted pursuant to Rule 408 of the Federal Rules of Evidence and still ongoing at the time when Aflac filed its petition.

Ten days later, on December 14, 2017, Aflac admitted its breach and amended its petition to remove the misstatements identified in Associates' Rule 11

motion served on Aflac's counsel Alston & Bird LLP ("Alston") on December 13, 2017.

Meanwhile, Aflac's parent company American Family Life Assurance Company of Columbus ("Aflac Columbus") commenced a parallel action in the Muscogee County Court in Columbus, Georgia (the "Georgia Action") against the other seven associates who, together with Associates Baker and Varela, had been identified as tentative plaintiffs in the draft class complaint -- by similarly breaching the Agreement and by making similar false statements in its verified complaint, also filed on December 4, 2017, and by obtaining the same-day, facially suspect *ex parte* anti-suit TRO based on a manufactured emergency and on those same false statements -- before admitting their falsity and withdrawing them ten days later, on December 14, 2017.

Aflac and Aflac Columbus made all these missteps in the last few days of 2017 in great hurry to enforce its Agreement, insisting on expedition and requesting two court hearings not four weeks into the action, on December 28, 2017 in the Georgia Action and on December 29, 2017 in this Action -- in the absence of any actual emergency or any intention by the sales associates to file their class action any time soon, and with defendants in both actions represented by the undersigned solo practitioner shuttling between the Columbus, Georgia and Brooklyn courthouses.

As further demonstrated in this brief, Aflac's high-pressure tactics and deceptive conduct in enforcing the Agreement against its former sales associates mirror the high-pressure tactics and deceptive conduct Aflac uses in coercing sale associates to accept its unconscionable terms in the first place.

1. The parties' pre-filing settlement negotiations

On October 30, 2017, a group of Aflac's shareholders represented by the undersigned counsel forwarded Alston their draft derivative complaint against Alston's clients, certain directors and officers of Aflac, Incorporated ("Aflac Inc."), a publicly traded holding company (NYSE: AFL) that owns Aflac and Aflac Columbus, alleging that the defendants had participated in and/or had actual knowledge of a massive fraud perpetrated at the company; covered up that fraud with a whitewash investigation; made false statements in Aflac Inc.'s 2017 Proxy Statement, Annual Report and SOX certifications; and/or engaged in multi-million dollar insider sales of Aflac Inc. stock, all in breach of their fiduciary duties and in violation of federal securities laws; and offered Alston either to engage in settlement discussions on behalf of their clients with respect to those derivative claims, or to proceed to litigate them in court.

On November 10, 2017, Alston responded with an offer of settlement talks. Alston's offer to engage in settlement negotiations expressly stated: "During the 90 day period referenced in the letter, we are open to discussions regarding a

reasonable resolution of these matters. This email (but not the attached letter) and any further communications regarding a possible settlement will be governed by FRCP [sic] 408. Let us know your thoughts." A220-A222 (summarizing the settlement negotiations).

During the conference call with the undersigned counsel next Monday, November 13, 2017, Alston's attorneys Lisa Cassilly and Mary Gill stated that Aflac and the director defendants were interested in a global out-of-court settlement of not only the derivative claims but any other claims that the sales associates have or may have involving Aflac Inc. and affiliates, wholesale and not piecemeal, and invited the sales them to make a settlement offer to achieve such a global settlement. A221.

On November 17, 2017, the sales associates made an offer to settle all of their claims, which included the derivative claims alleged in the draft derivative complaint previously shared with Alston, direct claims also previously shared with Aflac Inc., as well as their draft class action complaint.[1]

[1] The 93-page draft class action complaint alleges in essence that Aflac has been running a fraudulent recruiting scheme to the severe detriment of many thousands of its sales associates whom Aflac recruits year after year with an impossible promise of a "10-year income" unattainable by the vast majority of the sales associates (which promise Aflac knows to be false), to work for Aflac without any salary or any employment benefits, strictly on commission which the sales associates are in constant danger of losing by being cheated out of or having it cutoff by Aflac or clawed back even after termination); to make them buy Aflac insurance for themselves and their family members and to sell it to their friends,

relatives, and near and far acquaintances, and to "recruit, recruit, recruit" (A123) those family members, friends, relatives and acquaintances in Aflac's constant "volume recruiting" drive to replace the prior year's draftees who make little to no money in commission and leave soon after exhausting their contact lists, leaving the few accounts they had managed to open during their short stay as Aflac house accounts. A122-A125.

The draft complaint also alleges that Aflac Inc. misclassifies its sales associates as independent contractors while treating its sales force as *de facto* corporate department with its own executives, managers and rank-and-file employees; a strict hierarchy and well-defined lines of reporting; disciplinary actions; and Aflac's control over nearly every aspect of how associates do their job, where they do it, whom they report to, which accounts they keep, how much commission they get paid, and how and when they get fired by Aflac. A126-149.

Apparently, Aflac's questionable practices have persisted for decades, see similar claims of misrepresentation and misclassification made in the 1992 case of O'Rear v. American Family Life Assur. Co., 784 F. Supp. 1561, 1565-66 (M.D. Fla. 1992), featuring *inter alia* Aflac Columbus, its current counsel Alston, and Aflac's then "agent or employee" Don Land.

The late Don Land and his son Donald Land, Jr., Aflac's Senior Associate Counsel, have family ties to both the Honorable Clay D. Land, the District Judge presiding over the Georgia Action and ruling in Aflac Columbus' favor, and to the Amoses, Aflac's founding family, with Donald Land, Jr., being a grandson of Aflac's founder and its first CEO and Chairman John Amos whose nephew Daniel Amos has been serving as Aflac's second CEO and Chairman since John Amos' death in 1990. See Youngblood-West v. Aflac Inc. et al., No. 4:18-cv-00083, Slip Op. at 23-31 (M.D. Ga. Oct. 10, 2018); see also Southeastern Underwriters v. AFLAC, 210 Ga. App. 444, 445 (Ga. Ct. App. 1993), revealing long-standing family and business ties between the Lands and the Amoses going back at least 40 years: "AFLAC, a company based in Columbus, Georgia, was established in 1955 by John Amos for the purpose of selling various lines of insurance. In 1978, AFLAC entered into an agreement with Underwriters South, Inc., a company owned by ***Mr. and Mrs. Donald Land, the son-in-law and daughter of Amos***." See also fn.4 below.

Prior to that day, the sales associates had not shared the draft of their class action complaint with Aflac or any of its affiliates, and never expressed or implied their intention to file it any time soon, let alone imminently; indeed, the sales associates had only shared it with Alston in response to its call for "global settlement" and as one of the several to-be-released claims in the global settlement purportedly desired by Aflac and its parent companies.

The tentative class action complaint was drafted on behalf of nine former sales associates, including Associates Baker and Varela. Their settlement demand letter carried a header in bold, all-capital letters: "Confidential settlement communications pursuant to Rule 408 of the Federal Rules of Evidence and New York CPLR § 4547." The draft class action complaint provided with the settlement demand carried a red stamp "Settlement Communications, Joffe Law P.C., Harris, St. Laurent & Chaudhry LLP November 17, 2017 Draft."

On November 28, 2017, Alston wrote back, stating that it was disappointed with the settlement demand but asking for elaboration before responding to it. On November 30, 2017, the undersigned counsel for the sales associates provided the requested explanation, including an illustration of the "expected settlement value analysis" on the example of the class action claims (A222):

> By way of illustration, and taking the class claims as an example, we first estimated the value of the fraudulent recruitment nationwide class claim at over $500 million, and preliminarily assigned a similar value to the misclassification

> class claim. We then considered the possibility of the adverse Supreme Court ruling [in *Epic Systems*] on the enforceability of arbitration clauses at 50%, and estimated the consequences of the two outcomes for our claims, considering also (i) that we have alleged certain state claims that will survive regardless of the Supreme Court ruling, and (ii) that we intend to challenge Aflac's arbitration agreement anyway based on its own terms and the manner of its execution. We would then estimate the combined results of these potential outcomes to arrive at the expected settlement value of those claims. I doubt that any of the above could be any news to experienced litigators such as yourselves.

Nowhere in that communication or any other settlement communications with Alston did the sales associates indicate that the draft class complaint was ready for filing -- let alone for imminent filing -- or expressed their intention to challenge the Agreement other than in the above "illustration" of the sales associates' options in case of an unfavorable ruling by the Supreme Court in Epic Systems Corp v. Lewis (Oct. 2017 Term), which eventually came to pass.

In response to the sales associates' November 30, 2017 settlement communication, however, next Monday, December 4, 2017, Alston served the undersigned counsel with over 500 pages of combined pleadings, affidavits, motions and memoranda filed that day in the District Court by Aflac against the Associates Baker and Varela (who happened to have their Associate's Agreements with Aflac), and in the Georgia Action by Aflac Columbus against the other seven associates who had their otherwise substantively identical Associate's Agreements with Aflac Columbus. A222-A223.

2. Aflac and Aflac Columbus file pleadings containing false statements.

Aflac's initial filings in this action included its petition to compel arbitration (A7-A17), an accompanying memorandum of law (A19-A33), and a declaration signed by Jeff Arrington, Vice President of Aflac Columbus (A35-37). The Arrington Declaration exhibits three documents: Associates' Associate's Agreements with Aflac, with identical Arbitration Agreements included Paragraph 10 within (A40-A89), and Associates' draft class action complaint provided by them to Alston in the course of and for purposes of settlement negotiations (A92-A184).

Alston's memorandum of law accompanying Aflac's petition describes Paragraph 10.2 of the Agreement as "a detailed provision setting forth the procedure that will be used in any arbitration pursuant to the Associate's Agreements. (Associate's Agreement at ¶ 10.2)." A-25.

That Paragraph 10.2 of the Agreements provides, *inter alia*: "The parties further agree that all papers filed in court in connection with any action to enforce this Arbitration Agreement or the arbitrators award shall be filed under seal." A60, A86. Aflac, however, did not file its petition and the accompanying papers under seal as it was plainly required to do by the Agreement but placed all those papers in the public domain, including Appellants' draft unfiled 93-page class action

complaint, without even attempting to seek sealing, in violation of Paragraph 10.2 and in breach of the Agreement is sought to enforce.

Notwithstanding its clear breach of the admittedly "detailed provision setting forth the procedure that will be used in any arbitration" (A25), Aflac claimed in its petition that "Aflac New York has fully complied with the arbitration provisions, and has taken no steps that are inconsistent with it" (A14) as a condition precedent to compelling arbitration under New York law. Appellee then urges the District Court to compel arbitration "because all of the requirements for compelling arbitration have been met here," including the full compliance requirement. A31. These factual contentions were all false because of Aflac's own breach of the Agreement.

Moreover, Aflac also presented legal contentions not warranted by law in its papers submitted to the District Court, by claiming that "the arbitration agreement contained in the Associate's Agreement is also clearly enforceable under both New York and federal law." A30. In fact, the federal law at the time of the filing of the Petition was awaiting the Supreme Court's decisive ruling on that very issue in Epic Systems Corp. v. Lewis. As to New York state law, Aflac very clearly ***misstated*** it: contrary to its assertion, the New York Appellate Division, First Department, held in Gold v. New York Life Ins., 2017 NY Slip Op. 05695 (July 18, 2017), that the arbitration provisions like Aflac's Agreement were

unenforceable as contrary to the National Labor Relations Act, 29 U.S.C. §§ 151-169, and that decision was still good law in New York at the time of the petition.

Accordingly, on December 13, 2013, Associates served upon Alston their motion for sanctions pursuant to Rule 11(c)(2), stating that Aflac and its counsel Alston presented to the Court factual statements not supported by evidence and legal contentions contrary to the existing laws in signed pleadings, contrary to Rules 11(b)(2) and 11(b)(3). A230-A233. Pursuant to Rule 11(c)(2), Appellee had 21 days to withdraw or amend the challenged pleadings.

The very next day, December 14, 2013, Aflac filed its amended pleadings and a motion to seal, stating that "[d]ue to the exigencies attendant Plaintiff's initial filing, Plaintiff's counsel inadvertently neglected to request that the record in this case be sealed. Aflac agrees that the record should be sealed consistent with the Associate's Agreements." (A187). As for its amended pleadings, Aflac made the following revealing changes:

- the statement in the initial petition "Aflac New York has fully complied with the arbitration provisions, and has taken no steps that are inconsistent with it" was withdrawn and replaced with the statement "Aflac New York has complied with the Associate's Agreements, and with all conditions precedent set forth in the arbitration provisions therein," compare A14 with A196;

- the statement in the initial motion that "because all of the requirements for compelling arbitration have been met here, the Court should grant Aflac New York's Complaint" was withdrawn altogether, compare A31 with A212;

- the phrase "under both New York and federal law" was stricken from the sentence "The arbitration provision contained in the Associate's Agreements is enforceable under both New York and federal law," compare A30 with A196.

Aflac also moved to seal the docket at that time (A186-A187), which Associates opposed by arguing that Appellee's "attempted cure -- post-factum sealing of the public record -- neither remedies that breach, nor puts Petitioner in compliance with the Arbitration Agreements, nor eliminates the prejudice to Respondents from having their work product irrevocably and wrongfully placed in the public domain. Indeed, it is no more effective than shutting the barn doors after the horse has bolted." A220. On December 28, 2017, the Court denied Appellee's motion to seal on other grounds.

3. The District Court compels arbitration without a reasoned opinion addressing the unconscionability arguments.

On December 29, 2017, the District Court held oral arguments on Aflac's petition, in the course of which the Court granted Appellants' request for additional briefing on the unconscionability issues, albeit limiting Appellants to a 3-page letter brief to be filed prior to January 9, 2018. A284.

Associates filed their 3-page supplemental brief on January 8, 2018 (A247-A249), arguing that the Agreement was procedurally and substantively unconscionable under New York law, and stating *inter alia*: "Defendants filed affidavits in [the Georgia] action demonstrating that Aflac had not given them any

meaningful choice as to the terms of the Agreement or any meaningful opportunity to even review it before signing or clicking on it; and that they would not be able to afford the prohibitive costs of arbitration that the Agreement saddles them with. The 3-page limit does not allow Defendants to file these affidavits here; accordingly, Defendants seek leave to file those affidavits for the record and in the meantime respectfully invite the Court to take judicial notice of these affidavits filed in Aflac v. Hubbard, No. 4:17-cv-00246, ECF Nos. 18-1 – 18-5, pursuant to Rule 201 of the FRE." A247. Appellee filed its opposition letter-brief on January 9. 2018. A252-A254.

On June 4, 2018, following the Supreme Court's ruling in Epic Systems that the class action bar in mandatory arbitrations was not contrary to the National Labor Relations Act and therefore enforceable, the District Court entered an order (without a reasoned opinion) dismissing Associates' unconscionability arguments summarily as "wholly without merit," stating that the Court was unaware of any precedents supporting those arguments, and compelling arbitration. Associates are now appealing the part of the order compelling arbitration pursuant to the unconscionable terms of Aflac' Agreement. [2]

[2] Since the District Court issued its order without a reasoned opinion, Appellants are not certain whether the Court took the requested judicial notice of the affidavits filed in the Georgia Action, including by Appellant Varela. Pursuant to Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of adjudicative facts at any stage of the proceeding, and Appellants respectfully ask the Court to

4. The parallel Georgia Action follows the same trajectory.

The parallel Georgia Action had followed the same trajectory as this Action. Aflac Columbus filed its action in its home town Columbus, on the public docket of the Muscogee County Court, in breach of its own Arbitration Agreement while falsely *verifying* in its complaint that "Aflac has fully complied with the Associate's Agreements, and has taken no steps that are inconsistent with the arbitration provisions therein." A224-A226. And just like in this Action, the next day after Associates served their Rule 11 motion, Aflac Columbus admitted the breach and withdrew its false factual statements made in its pleadings, blaming exigencies too.[3]

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take judicial notice of these filings in American Family Life Assur. Co. v. Hubbard et al., No. 4:18-cv-00246 (M.D. Ga.), ECF Nos. 18-1 – 18-5.

[3] Before admitting the falsity, Aflac Columbus in the Georgia Action had first managed to obtain, on the December 4, 2017 filing day, an *ex parte* anti-suit TRO against the sales associates based on the subsequently admitted false statements made in Aflac Columbus' original verified complaint. The TRO itself appears highly irregular, too, with the "Muscogee County Court" caption appearing on its title page, a signature block of a "Gwinnett County Court" judge on the next page numbered "3," and nothing in between these two mismatched pages. When the undersigned pointed out the discrepancy to the U.S. District Court for the Middle District of Georgia (where defendants removed the Georgia Action from the state court based on diversity), Aflac's counsel Alston falsely advised the Court about a non-existing "transference order." Aflac Columbus also obtained the *ex parte* TRO by misrepresenting the sales associates' illustrative, hypothetical and contingent example in their November 30, 2017 settlement letter quoted on pp. 8-9 above as an "imminent" threat of "irreparable" harm to Aflac.

The District Court in the Georgia Action held oral arguments on December 28, 2017, issued an order granting Aflac Columbus' motion to compel arbitration on January 3, 2018, American Family Life Assur. Co. v. Hubbard, No. 4:18-cv-00246, ECF No. 16 (M.D. Ga. Jan. 3, 2018) and denied defendants' motion for reconsideration based on the Agreement's unconscionability on January 25, 2018, without addressing defendants' arguments on the merits. Hubbard, No. 4:18-cv-00246, ECF No. 23 (M.D. Ga. Jan. 25, 2018). That decision is now on appeal to the Eleventh Circuit Court of Appeals, Appeal No. 18-11869, advancing similar arguments under Georgia law and the Eleventh Circuit's authorities, including its recent ruling in Larsen v. Citibank FSB, 871 F.3d 1295 (11th Cir. 2017) finding the arbitration confidentiality provision unconscionable while upholding the fee-allocation scheme due to its low-cost arbitration option.[4]

[4] In another Eleventh Circuit appeal from Conroy et al. v. Amos et al., No. 4:18-cv-00033 (M.D. Ga.), Appeal No. 18-13834, where the undersigned represents Aflac shareholders in a derivative action against the company directors and executives, appellants alleged that the Honorable Clay D. Land presiding over that action (as well as over Aflac's Georgia Action), should have recused himself pursuant to 28 U.S.C. § 455(a) because of his longstanding family and social ties to the Amos family, the founders and top executives of Aflac and defendants in that action, but did not recuse himself in favor of a "solemn duty to remain," which duty Section 455 itself did away with long time ago. See the "Fish and Family" part of the District Judge's order dismissing the derivative complaint in Conroy et al. v. Amos et al., No. 4:18-cv-00033, ECF No. 63 at pp. 2-5 (M.D. Ga. Aug. 31, 2018).

Moreover, in his recent decision refusing recusal in Youngblood-West v. Aflac et al., No. 4:17-cv-00083, Slip Op. (M.D. Ga. Oct. 16, 2018) (sealed/restricted), an unrelated RICO/fraud action save for the related defendants Aflac and Daniel

In sum, Aflac's precipitously filed actions to enforce its Arbitration Agreement have now led to two appeals from two District Courts' rulings that enforced the Agreement without addressing the unconscionability arguments on

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Amos and the undersigned counsel for the plaintiff, brought against Aflac Inc., its CEO and Chairman Daniel Amos, and William L. Amos, Jr., among others (see Youngblood-West, ECF No. 65-1 at p. 7 n.2 referring to "Youngblood-West v. AFLAC et al., No. 4:18-CV-83 (Youngblood-West's RICO/fraud action)"), the District Judge acknowledges objective facts raising significant doubts about the Judge's impartiality due to his longstanding family and social ties to the Amos family that might reasonably be construed by an objective observer as creating an appearance of "a deep-seated favoritism that would make fair judgment impossible," Liteky v. United States, 510 U.S. 540, 555 (1994), requiring recusal under Section 455(a).

These objective facts, referred to in the District Court's order refusing recusal and drawn from Plaintiff Youngblood-West's 18-page Section 144 affidavit supporting her motion for recusal (No. 4:18-cv-00083 ECF No. 84-1), included the aforementioned longstanding family, business and social ties between the Land and the Amos families, and additionally the District Judge's spouse being one of the releasees under William L. Amos, Jr.'s release and confidentiality agreement whose alleged invalidity, unenforceability, illegality and immorality is the threshold issue in that action, as well as other facts requiring recusal under Sections 144, 455(a) and/or 455(b).)

The District Judge, however, proceeded to deny plaintiff's motion, notwithstanding Section 144's clear requirement that "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

These objective facts creating an appearance of the District Judge's "deep-seated favoritism making fair judgment impossible" in matters involving the Amos family or Aflac, had existed at the time of the District Judge's ruling in the Georgia Action, albeit unbeknownst to the associates nor disclosed by either Aflac Columbus, its counsel Alston, or the District Judge at the time.

their merits. While this and the Eleventh Circuit appeals were pending, the New York Supreme Court ruled in Laka v. Aflac, No. 651809/2018 (N.Y. Sup. July 27, 2018), that Aflac can enforce its Arbitration Agreement and compel arbitration "***on the express condition that Aflac pay all arbitration costs for both parties***."[5]

## II. FACTUAL BACKGROUND

### 1. Facts of procedural unconscionability

Aflac uses the same high pressure and/or deceptive approach in rushing its sales associates into the Agreement as the procedural history of this Action shows Aflac to deploy in enforcing it, leaving the associates with no meaningful choice as to its oppressive terms or even a meaningful opportunity to review and understand them.

As a threshold matter, as Associates' draft class action complaint (A92-A184) alleges in detail, Aflac's fraudulent recruitment scheme is such that the company first lures new recruits with an irresistible albeit false 6-figure first-year, no-prior-experience-necessary income promise during group "information

[5] That ruling is currently on reconsideration on plaintiff's motion arguing that the Court had improperly redlined the Agreement by accepting Aflac's belated offer to pay plaintiff's arbitration costs, which offer had not been made years ago when the dispute had commenced and while plaintiff's federal statutory claims for age and disability discrimination and for retaliation had not yet expired; and as contrary to this Court's waiver analysis in Ragone v. Atlantic Video, 595 F.3d 115, 122 (2d Cir. 2010). See Part 6 below.

sessions," and then requires the candidates to take insurance classes, pass the test, and obtain state insurance license -- all on their own time and dime and all prior to presenting them with its standard Associate's Agreement for execution.

The substantial efforts already invested by the candidates, and the considerable costs they incur in terms of time, money and foregone opportunities, all in detrimental reliance upon Aflac's false and fraudulent promises of an incredible income awaiting them once they become Aflac associates, and all prior to laying their eyes on the Agreement when Aflac first presents it to them on a take-it-or-leave-it basis – all that leaves the candidates with little real choice but to take it.

Nor does Aflac permit much eye-laying on the Agreement by the candidates executing it. As shown in the sales associates' affidavits, whichever manner of the contract execution Aflac chooses to employ – whether on paper; online through its "producerexpress" platform; on electronic touchscreens; or on electronic touchpads – Aflac conducts it invariably in a high pressure, rushed and/or deceptive manner, taking clear advantage of its associates. Here is how one of the associates, a defendant-appellant in the Georgia Action Debbie Cort, describes her experience, Aflac Columbus v. Hubbard et al., No. 4:17-cv-00246, ECF No. 18-1 at pp. 1-3:

> I was recruited to join Aflac in the Spring of 2015 as its sales associate in New York. I was working at a law firm at that time but was enticed by Aflac's promises of high income potential and decided to join it as its sales associate.

> I had first to pay for and take courses to prepare for my insurance license test; I then had to pass the test and obtain state insurance license before signing a contract with Aflac.
>
> Once I had completed my studies and tests and obtained the license, on May 20, 2015, I received an automatic email from "producerexpress@sircon.com," which was titled "Your invitation to contract with Aflac," and stated: "You'll soon be contracted to work with Aflac and represent our company to businesses and customers in your area. Congratulations on making it this far! To begin the contracting process, click the link below. . . ." The link below said "Start Contracting"; I clicked on the link and had to go through several more screens, where I had to answer questions about my personal information, criminal background and the like, and when I competed that questionnaire my online application was finished.
>
> I was not sure that I had actually accepted any agreement while clicking through the screens – indeed, I did not have to sign anything at the end, and the cover email specifically said that I would only "*begin the contracting process*" by completing this contracting packet, and I did not understand it at the time to mean that I was signing the actual contract by clicking through the "Start Contracting" link.
>
> Note that my Associate's Agreement with Aflac Columbus submitted as Exhibit 4 to the Arrington Affidavit in the Georgia action is ***unsigned*** – it only has my printed name instead of my signature.

Another recent Aflac associate, defendant-appellant in the Georgia Action Troy Hubbard, described his experience as follows (id., ECF No. 18-5, p. 2):

> On or about February 17, 2016, I came to Aflac's office in Manteca, CA, for a mandatory class we were told we had to attend every week prior to being licensed. I was pulled out of the class by my manager's assistant, who told that I had to sign the contract and return to finish the class. (This was due to the fact that I just received my insurance license and was now eligible to receive a writing number for Aflac.)

> This was done in a very rushed manner. I was feeling like I needed to hurry to get back in the class. In fact, the manager's assistant rushed me through this process, so I could return to the class as soon as possible. I was not even aware that I had to pay an application fee for the writing number to have the ability to write business with Aflac. This news of the requirement – that I had to pay Aflac for the writing number -- was presented to me only at the time of the contract signing. I had minimal funds in my account at the time, and I had already had to pay and did pay for my training course, state licensing fees, finger printing, and background checks.
>
> The contract signing was rushed, no doubt. The contract execution and the fee for the writing number fee was all that separated me from the six-figure income Aflac so confidently bombarded in my mind every week, and I was pressured by Aflac (and my own desire to start making the promised income as soon as possible – I did not know at the time that the income promised by Aflac was a complete lie.)

Louis Varela, another former sales associate and Appellant Associate in this Action, likewise stated in his affidavit (id., ECF No. 18-4):

> I was recruited to join Aflac in the Spring of 2014 as its sales associate in New York. I was terminated by Aflac in May 2017, soon after I had made claims against Aflac and reported its fraudulent practices to the New York City Comptroller's office investigators.
>
> I was first contacted by Aflac's recruiter Jason Pastore, who saw my resume online and invited me for an interview on or about March 17, 2014. (As I've learned later, Mr. Pastore was an ex-felon convicted for tax fraud). The interview turned out to be a group informational session in which the fantastical income potential was presented to us, including the so-called "10-year income example" with a promised 6-figure first-year income for associates with no experience in insurance sales, like myself.
>
> On March 18, 2014, I was invited for a second interview with Jason Pastore and Trevor Fennell, who offered me to join their

> "prestigious team" at Aflac, and informed me that I would have first to take courses and obtain a New York State insurance license.
>
> In particular, I first had to take an on-line License Coach course; I then had to take -- and pay for with my own money -- a Review Class for the New York State Exam; then I had to take a proctored test (also paid for with my own funds) for the license, pass it, and obtain my New York License.
>
> This process took me from mid-March 2014 until April 4, 2014, when I obtained my New York license and informed Aflac about it. Jason Pastore of Aflac then called me to say that I had been selected to be contracted and invited me to Aflac's office at 199 Water Street.
>
> When I met with Mr. Pastore in Aflac's office on or around April 15, 2014, he showed me the last page of the contract and told me to sign it, and said that I would get my copy once it was executed by Aflac. That was it – no explanation or review of any of the contractual terms or provisions.

The sales associates' affidavits show that Aflac's methods of having its candidate associates execute the Agreement do not give them any meaningful choice as to the terms of the Agreement or any meaningful opportunity to even review those terms regardless of the particular execution method used.

2. Facts of substantive unconscionability

The Agreement is Aflac's standard arbitration agreement that has remained unchanged in at least the last ten years, and which appears as Paragraph 10, titled "Arbitration and Other Legal Proceedings," in Aflac's equally immutable standard Associate's Agreement. A59-A61; A85-A87. The Agreement contains at least the following ***seven substantively unconscionable features*** all favoring Aflac, the

incomparably stronger bargaining party, listed below in order of their appearance in the Agreement:

*First*, Paragraph 10.1 of the Agreement requires Associates 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 Associates. A59, A85 ("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*, Paragraph 10.1 also requires 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." A59, A85. Aflac's officers and other affiliates, however, are not similarly bound to arbitrate any of their claims against the associate.

*Third*, Paragraph 10.2 includes language plainly demonstrating that the Agreement does not even contemplate Aflac as the party initiating any arbitration against Associates. Thus, Paragraph 10.2 defines the "Complaining Party" as "the party initiating the Dispute" in the first subparagraph, but in the very next subparagraph proceeds to juxtapose the "Complaining Party" against Aflac,

demonstrating that the latter is not contemplated to ever be the former under the Agreement: "The Complaining Party and AFLAC may each name an arbitrator," and so on for the remainder of the Paragraph. A59; A85.

*Fourth*, Paragraph 10.2 provides 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." A59; A85. Further, "if the Party Arbitrators are unable to agree on a Neutral Arbitrator, then either the Complaining Party or AFLAC may request a panel of qualified arbitrators from the headquarters of the American Arbitration Association. . . . The Complaining Party shall have the choice of having AFLAC pay the fees of the Neutral Arbitrator or, if the Complaining Party prefers, AFLAC and the Complaining Party will equally divide the expenses and fees for the Neutral Arbitrator." A59-A60; A85-A86.

In their affidavits, Aflac's sales associates testified that they could not afford the arbitration costs imposed by the Agreement, which are commonly known to run into many thousands of dollars and are prohibitive to sales associates whom Aflac's misconduct leaves in financial distress if not ruin.

*Fifth*, Paragraph 10.2 further provides that "any party may request that the arbitration proceeding, including communications between or among the parties and the arbitrators, information and documents produced by any party, hearing and deposition transcripts and all rulings and decisions of the arbitrators, be kept

strictly confidential. In the event that any of the parties elect to keep the arbitration proceedings confidential, all parties agree to enter into an appropriate confidentiality agreement. The parties further agree that all papers filed in court in connection with any action to enforce this Arbitration Agreement or the arbitrators' award shall be filed under seal." A60; A86.

The strict confidentiality of arbitration proceedings and outcomes also undoubtedly favors Aflac as a repeat arbitration player, providing it with an informational advantage while leaving Associates without any insight into the confidential arbitration awards and their reasoning and outcomes, no precedent in that respect and giving Aflac a significant edge in any adversarial proceeding.

Moreover, taking Alston's professed cases of "exigencies" as read, they would still be not inconsistent with Aflac's strategic objective of broadcasting its readiness, willingness and ability to enforce the Agreement through swift court actions, injunctions and TROs, to deter its associates from bringing them in the first place.

*Sixth*, Paragraph 10.7.1 of the Agreement, "Limitation of Claims and Remedies," provides that "[w]ith the exception of a claim that is based upon misconduct by Aflac that is willful, malicious or fraudulent, any claim or action by Associate based upon any act, error or omission 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." A61; A87. Not only is this provision one-sided as Aflac has no reciprocal limits on the claims it may assert against the associates, but also on its face this clause purports to prohibit sales associates from bringing any state or federal statutory claims, including claims under Title VII, FLSA, SOX, and other federal claims common in employment context, since these statutory claims neither constitute contract claims nor necessarily require the showing of willfulness, malice or fraud.

*Seventh*, Paragraph 10.7.2, "Limitation of Liability for the Acts of Others" not merely limits but purports to insulate Aflac from any vicarious-type liability totally: "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." A61; A87. Nothing in the Agreement similarly limits Appellants' liability to Appellee or its affiliates, and this one-sided limitation on Appellee's liability obviously favors Appellee.

Moreover, by misclassifying virtually all of its sales force as independent contractors (A92-A184), and then by insulating itself from liability arising from the acts of those independent contractors by virtue of the Agreement's Paragraph 10.7.2, Aflac effectively puts itself in a position of total unaccountability for its own sales associates.

## III. STANDARD OF REVIEW

The District Court's order compelling arbitration is reviewed *de novo*. See Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F. 2d 840, 846 (2d Cir. 1987).

## SUMMARY OF ARGUMENT

High-pressure tactics and deceptive conduct that have marked Aflac's enforcement of its Agreement in this and the parallel Georgia Actions described in the Procedural History above echoes the high-pressure tactics and deceptive conduct Aflac deploys in the making of the Agreement and in rushing its sales associates into accepting its unconscionable terms in the first place, leaving its sales associates, including Appellants, with no meaningful choice as its many onerous and extremely one-sided substantive terms invariably favoring Aflac, the stronger bargaining party.

These substantively unconscionable features, set out in the Factual Summary above, pervade the entire Agreement and represent an integrated scheme to contravene public policy by denying Aflac's associates a neutral forum to effectively vindicate their federal statutory rights, and by shielding Appellee's allegedly fraudulent practices from any public or judicial scrutiny. Because these unconscionable features taint the entire Agreement, the Agreement is not subject to judicial reformation and should be invalidated in its entirety.

# ARGUMENT

## 1. The FAA permits arbitration agreements to be invalidated for unconscionability under state law.

The Supreme Court has consistently ruled that the FAA saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" AT&T Mobility LLC v. Concepcion, 563 U. S. 333, 339 (2011); Doctor's Associates, Inc. v. Casarotto, 517 U. S. 681, 687 (1996) (same).

Most recently in Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018), the Supreme Court reaffirmed that "[t]he FAA saving clause by its terms allows courts to refuse to enforce arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract,'" while upholding a class action waiver in employment arbitration agreements as not contrary to the NLRA.

Under the FAA, an agreement may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67-68 (2010), citing Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

"Whether or not the parties have agreed to arbitrate is a question of state contract law." Schnabel v. Trilegiant Corp., 697 F.3d 110, 119 (2d Cir. 2012). "The party seeking arbitration has the burden of establishing an agreement to arbitrate." Resorb Networks, Inc. v. YouNow.com, 30 N.Y.S.3d 506, 510 (N.Y.

Sup. Ct. 2016) (citing Seneca Ins. Co. v. Secure-Southwest Brokerage, 741 N.Y.S.2d 690 (N.Y. App. Div. 2002); Allstate Ins. Co. v. Roseboro, 667 N.Y.S.2d 914 (N.Y. App. Div. 1998)). "[T]he court must draw all reasonable inferences in favor of the non-moving party." Nicosia v. Amazon.com, Inc., 834 F.3d 220, 229 (2d Cir. 2016). If there is a genuine dispute of material fact regarding the making of an agreement to arbitrate, then a trial is necessary. Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003) (citing 9 U.S.C. § 4).

"Although 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 v. Bally Total Fitness ("Brennan I"), 153 F. Supp. 2d 408, 416 (S.D.N.Y. 2001). See also Zhu v. Hakkasan, 291 F. Supp. 3d 378, 387 (S.D.N.Y. 2017) ("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).

The New York Court of Appeals stated in Brady v. The Williams Capital Group, 14 N.Y.3d 459, 467 (N.Y. 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."

Furthermore, 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).

2. The applicable unconscionability test

"Courts do not enforce terms of agreements that are unconscionable," which requires "a showing that the contract was both procedurally and substantively unconscionable when made -- i.e., some showing of ***an absence of meaningful choice*** on the part of one of the parties together with contract terms which are ***unreasonably favorable*** to the other party." Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015). 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)).

In Ragone v. Atlantic Video, 595 F.3d 115, 122 (2d Cir. 2010), this Court stated in applying New York law: "'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 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) ("Brennan II").

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 A.D.2d 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.

Here, both procedural and substantive aspects of unconscionability are present, rendering the Agreement unenforceable; moreover, the Agreement is so severely and unreasonably one-sided substantively in Aflac's favor that "even moderate procedural unconscionability" -- or even substantive unconscionability "alone" -- renders it unenforceable.

3. The Agreement is procedurally unconscionable.

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 In re Estate of Friedman, 64 A.D.2d 70, 85 (2d Dep't 1978) ("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).[6]

In Brennan I, 153 F. Supp. 2d at 416, 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

[6] As far as unequal bargaining positions, Aflac is a Fortune 150 company with a $30 billion market capitalization, and a Wall Street "Dividend Aristocrat" with a studiously polished public image of "the most ethical company globally," among "America's most admired companies" and the "best U.S. companies to work for." ("According to a 2013 Business Insider survey," however, "Aflac [Inc.] has the second-highest attrition rate among all Fortune 500 companies, http://www.businessinsider.com/companies-ranked-by-turnover-rates-2013-7. A-106.") A106. Associates Baker and Varela are among the thousands of associates Aflac churns every year.

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 at 378, 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 Brennan court found the lack of a meaningful choice where "[t]he evidence shows that [Defendant's manager] used high pressure tactics to coerce the employees into signing the Agreement," giving them no more than fifteen minutes to review it and telling them that they had to sign it or risk losing promotions, and

"[a]s 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." Brennan II, 198 F. Supp. 2d at 383.

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.

"Whether procedural unconscionability exists is determined by what led to the formation of the contract. 'Procedural unconscionability involves questions about the manner in which the agreement was reached: Did one party adequately explain the content of the agreement to the other? . . . Were there sharp practices or overreaching? Did one party take advantage of the other's lack of experience or naivete?" Berkson, 97 F. Supp. 3d at 391. "Procedural unconscionability is broadly conceived to encompass . . . a lack of understanding and inequality of bargaining power." Id. (internal citations omitted).

As shown above, Aflac, the stronger bargaining party, does not give its associates any "meaningful choice" as to the terms of the Agreement or any meaningful opportunity to so much as review the Agreement before signing or clicking on it, making the Agreement procedurally unconscionable. Cf. 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.").

4. The Agreement is substantively unconscionable.

"Substantive unconscionability involves questions about the fundamental fairness of the agreement or clauses within the agreement." Berkson, 97 F. Supp. 3d at 391-92. In discussing the substantive unconscionability test, Judge Weinstein in Berkson relied on Trompeter, 914 F. Supp. 2d at 1073-76, for its holding that 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."[7]

[7] In Trompeter, the Court has found that (a) "the standardized nature of the contract and its presentation on a 'take it or leave it' basis establish a limited degree of procedural unconscionability in the present case"; and (b) "Trompeter has established that the imposition of substantial fees and costs in pursuit of an appeal under the arbitration agreement contributes to a finding of substantive unconscionability" -- even though the employer there was required to "advance up to a maximum of $1,500 for a party's [fees]." 914 F. Supp. 2d at 1076. Here, all of these factors are present -- and more.

As shown below, Aflac's Agreement is rife with unconscionable provisions, all favoring Aflac in substantive dimensions and putting Associates at a severe disadvantage. In short, Aflac plays with a loaded dice.

a. The cost-prohibitive fee allocation makes the Agreement unconscionable.

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." The Supreme Court explained that by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute "***[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum***" (quoting Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

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***." See also Am. Express Co. v. Italian Colors Rest., 133 S.Ct. 2304, 186 L.E.2d 417 (2013) (recognizing the "effective vindication" exception to the FAA).

In Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144, 150 (2d Cir. 2004), this Court recognized 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 Nesbitt v. FCNH, 811 F.3d 371 (10th Cir. 2016), the Tenth Circuit Court of Appeals invalidated an arbitration agreement based on the "effective vindication exception" to the FAA because of the prohibitive costs of arbitration. The agreement required an employee to arbitrate her Fair Labor Standards Act and state wage claims and bear at least $2,520.50 in arbitration fees, an amount she could not afford. The Court found that the fee-splitting provision substantially deterred vindication of federal statutory rights. See also 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).

In Brady v. Williams Capital Group, 14 N.Y.3d 459, 467, 14 N.Y.3d 459 (N.Y. 2010), the New York Court of Appeals, guided by the federal "effective vindication exception," likewise held that 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." In Brady, the court found that an obligation to bear approximately $21,150 in costs might render the cost allocation provision unenforceable, even though the employee earned over $1.5 million in her prior six years of employment, and remanded the case to the lower court to evaluate the cost-sharing provision under the three-factor test.

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).

In Brown, plaintiff's arbitration agreement provided for a low-cost JAMS arbitration: "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. The same low-cost JAMS arbitration option also saved the arbitration

agreement recently in Larsen v. Citibank FSA, 871 F.3d 1295 (11th Cir. 2017) (invalidating confidentiality provision as unconscionable but upholding the fee-allocation provision because of the JAMS low-cost option).

Here, by contrast, there is no low-cost arbitration option in the Agreement. 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." A59; A85. Accordingly, Associates are required to pay their share of arbitration costs -- which are, notably, twice as high as what a fee-splitting provision in a more typical single-arbitrator agreement would require an employee to bear.

There is nothing speculative, contingent, uncertain, or remote about the likelihood of incurring such fees and expenses by Associates, and no promise of any reimbursement or refund of those fees. See also Schreiber v. K-Sea Transp. Corp., 9 N.Y.3d 331, 340-41 (N.Y. 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.").

In Cole, 105 F.3d at 1468, the D.C. Circuit held that "because public law confers both the substantive rights and a reasonable right of access to a neutral

forum in which those rights can be vindicated . . . employees cannot be required to pay for the services of a 'judge' in order to pursue their statutory rights."

In Ting v. AT&T, 319 F.3d 1126, 1151 (9th Cir. 2003), the Ninth Circuit held (applying California law) that the arbitration fee-allocation scheme was "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."

Here, the Agreement saddles its sales associates with prohibitively high arbitration costs. The Agreement on its face provides that disputes "shall be resolved by a panel of three arbitrators" and each party "shall pay all expenses and fees of its selected Party Arbitrator," (A59; A85), making it exactly the case where "the existence of large arbitration costs . . . preclude[s] a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum" contemplated by the Supreme Court in Green Tree, 531 U.S. at 90.

*First*, there is nothing speculative, contingent, uncertain, or remote about the likelihood of incurring such fees and expenses by plaintiffs. The Aflac associate's obligation to pay "all expenses and fees" of the arbitrator is a certainty, according to the plain language of the Arbitration Agreement. Aflac's sales associates are required to pay those costs to pursue their claims, including federal statutory claims – or else they must abandon those claims, according to Aflac's Agreement.

*Second*, these costs are well known to be significant, see, e.g., Lisa A. Nagele-Piazza, Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker, 23 U. Miami Bus. L. Rev. 39, 46 (2014):

> In arbitration, the employee may be required to pay fees in advance of the proceedings, as well as substantial costs at the conclusion of the process, which would be unheard of in a courtroom. For example, arbitrators charge the parties an hourly rate or per diem fee, whereas a judge's salary would never be invoiced to the parties. In addition to the arbitrator's fees, parties to an arbitration proceeding are required to pay for room rentals, stenography, administrative fees, and the arbitrator's travel expenses. By the time the matter is resolved, arbitration costs and fees can amount to thousands of dollars, as one estimate shows the average cost of arbitrating an employment claim is approximately $20,000.00. In contrast, while litigation can be expensive, there are no required fees beyond the initial filing fee, and thus employee-claimants likely will not experience the same cost barriers in litigation as they may in arbitration.

See also Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011) (finding that an employee utilizing Ernst & Young's arbitration program would likely have to spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent amount in liquidated damages; "Only a 'lunatic or a fanatic' would undertake such an endeavor.") (cited in Justice Ginsburg's dissent in Epic Systems); Cole, 105 F.3d at 1480 ("The parties stipulated that arbitrators' fees are commonly $500 to $1000 or more per day.").

Indeed, in the recent New York Supreme Court case of Laka v. Aflac, No. 651809/2018, ECF No. 53 at p.9 (N.Y. Sup. Ct. July 27, 2018), Alston on behalf of

Aflac on the record offered to pay its former associate, plaintiff there, "***up to $500 an hour for his arbitrator***" to enforce its Agreement, manifestly conceding the prohibitively high arbitration costs that its Agreement imposes on its associates.

*Third*, Aflac's sales associates, including Appellant Varela, submitted affidavits in the Georgia Action (which affidavits Associates asked the District Judge below to take judicial notice of, and for leave to file them in this Action) attesting that they would not be able to afford the arbitration costs which could run into many thousands of dollars. Indeed, Appellants are former Aflac sales associates complaining about Aflac's fraudulent recruitment and employment misclassification practices that left them in financial distress or even ruin after their careers with Aflac, and it is entirely plausible and probable that arbitrator's fees and expenses running into thousands of dollars are unaffordable and prohibitive for them, and for many other former Aflac and Aflac Columbus sales associates.

Here, the Agreement's fee allocation scheme spells out **unaffordable justice** for its associates in no uncertain terms. Accordingly, Associates have satisfied their burden of showing a high likelihood – indeed, a certainty – of incurring prohibitively large arbitration costs (conceded by Aflac to be as high as "$500 an hour") and, therefore, substantive unconscionability of the Arbitration Agreement. The District Court's order enforcing the Agreement with its prohibitive fee allocation scheme therefore constitutes a clear error of law under

the precedents applying the "effective vindication exception" to arbitration, and ought to be reversed for that reason alone without more (and there is much more, as shown below).

b. The Agreement is unconscionably one-sided in Aflac's favor in many substantive dimensions.

In Brennan II, 198 F. Supp. 2d at 384, the 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."[8]

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

[8] 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.").

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." Id. (citations omitted).

In Desiderio v. NASD, 191 F.3d 198, 207 (2d Cir. 1999), this Court held that where the parties' agreement "binds ***both*** parties to mandatory arbitration," such an agreement "may not be said to favor the stronger party unreasonably." Here, by contrast, the Agreement does not even contemplate Aflac to be a "Complaining Party" initiating any arbitrations and only requires Associates to arbitrate all of their claims, while also leaving them with a narrow subset of those claims remaining under the liability limitation and claims exclusion provisions of Paragraph 10.7 (A61, A87), clearly "favor[ing] the stronger party unreasonably." Desiderio, 191 F.3d at 207. Accordingly, as in Trompeter, 914 F. Supp. 2d at 1073-76, "substantive unconscionability is apparent due to arbitration requirement that leaves parties unequal in their ability to pursue their respective claims."

Not only is Paragraph 10.7.1 one-sided as it sets no reciprocal limits on the claims that Aflac can bring against its associates, but also on its face this clause ostensibly excludes any state or federal statutory claims, including claims under Title VII, FLSA, SOX, and other statutory claims commonly arising in the

employment context, included Associates' claims alleged in their draft class action complaint arising out of "29 U.S.C. § 1132(a)(1)(B) (ERISA); 26 U.S.C. § 3101 et seq. (FICA); and 26 U.S.C. § 3301 (FUTA)," (A96), since these statutory claims neither constitute "breach of contract" claims nor necessarily require the showing of "willfulness, malice or fraud" – the only types of claims ostensibly permitted by Paragraph 10.7.1.

The Second Circuit in Ragone 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 Ragone 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 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 Appellee attempts to enforce its Arbitration Agreement whose Paragraph 10.7.1 excludes the sales associates' statutory claims as a matter of contract, while the prohibitive cost allocation scheme in Paragraph 10.2 effectively forecloses their vindication as a practical

matter. See also Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998) ("[I]n Gilmer, when the Supreme Court ruled that an employee could be forced to assert an ADEA claim in an arbitral forum, the Court did so on the ***assumptions that the claimant would not forgo the substantive rights afforded by the statute***, that the arbitration agreement simply changed the forum for enforcement of those rights and that a claimant could effectively vindicate his or her statutory rights in the arbitration. 500 U.S. at 26, 28, 111 S.Ct. 1647.").[9]

In sum, Paragraph 10.7.1's limitation of claims and remedies and Paragraph 10.2's prohibitive cost-allocation scheme each operates as such a "perspective waiver of [Associate's] right to pursue statutory remedies," and together confirm Aflac's "integrated scheme to contravene public policy" (Farnsworth on Contracts § 5.8, at 70) and should be condemned as such under Mitsubishi Motors and Ragone.

Finally, the Agreement insulates Aflac from any liability for wrongs committed by its contractors. Paragraph 10.7.2 ("limitation of liability for the acts of others"), 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

[9] In Ragone, the Court ultimately ruled 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.

associates, coordinators, agents or brokers." A67; A87. As the Supreme Court explained in Lawson v. FMR LLC, 134 S. Ct. 1158, 1169 (2014):

> It is common ground that Congress installed whistleblower protection in the Sarbanes-Oxley Act as one means to ward off another Enron debacle. S. Rep., at 2-11. And, as the ARB observed in Spinner, "Congress plainly recognized that outside professionals -- accountants, law firms, contractors, agents, and the like -- were complicit in, if not integral to, the shareholder fraud and subsequent cover-up [Enron] officers . . perpetrated." ALJ No. 2010-SOX-029, pp. 12-13. Indeed, the Senate Report demonstrates that Congress was as focused on the role of Enron's outside contractors in facilitating the fraud as it was on the actions of Enron's own officers.

By including Paragraph 10.7.2 in its Arbitration Agreement, Aflac attempts to insulate itself from the wrongs committed or facilitated by its *de jure* independent contractors, or by Aflac itself through its contractors – insulation that Congress intended to remove at least in cases of whistleblower retaliation under SOX, also alleged in the draft class action complaint, see, e.g., A99.

c. The confidentiality provision is unconscionable.

The Eleventh Circuit recently invalidated as unconscionable the requirement to "keep confidential any decision of an arbitrator," which it found to give "obvious information advantage" to the company in Larsen, 871 F. 3d at 1319:

> We agree that under Washington law, KeyBank's confidentiality clause would likely be considered substantively unconscionable under the reasoning of Zuver v. Airtouch Communications, Inc., 153 Wash.2d 293, 103 P.3d 753 (2004). In that case, the Washington Supreme Court invalidated a confidentiality clause

> covering "[a]ll arbitration proceedings" between an employer and its employees. Id. at 765, 765 n.9. We acknowledge that Zuver is not perfectly analogous to the case at hand. First, Zuver dealt with arbitration of an employment discrimination claim, rather than a consumer dispute in the commercial context. Second, the clause at issue in Zuver purported to shroud the entire arbitral process in secrecy. By contrast, KeyBank's clause prohibits disclosure only of ultimate decisions by an arbitrator. KeyBank's clause "does not prevent consumers from sharing discovery, fact patterns, or briefing from other similar arbitrations." Thus, the provision at issue in Zuver ensured far more secrecy than the provision here. The court's reasoning in Zuver does, however, highlight a core public-policy concern that applies with equal force to this case. The court explained: "The effect of the provision here benefits only [the employer]. As written, the provision hampers an employee's ability ... to take advantage of findings in past arbitrations. Moreover, keeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process and thus, potentially discourages that employee from pursuing a valid [] claim. . . ."
>
> The obvious informational advantage KeyBank holds at the outset of a dispute may therefore have the effect of discouraging consumers from pursuing valid claims. We thus conclude that under Washington law, the confidentiality clause here is substantively unconscionable. See Zuver, 103 P.3d at 765.[10]

In Ting, 319 F.3d at 1151-52, the Ninth Circuit observed:

> Although facially neutral, confidentiality provisions usually favor companies over individuals. . . . ***AT&T has placed itself in a far superior legal posture by ensuring that none of its potential***

[10] Compare the confidentiality provision found unconscionable in Larsen, 871 F.3d at 1320 ("The confidentiality clause in this case is limited in its scope: it purports only to shield arbitrators' decisions from disclosure, while other information concerning the arbitral process may be disclosed. Severing this clause will not 'significantly alter' the tone or nature of arbitration between Johnson and KeyBank."), with Aflac's much stricter version imposing a total blackout over its arbitration proceedings (A60; A86).

> ***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***.

The Ting decision in turn cited the D.C. Circuit Court's ruling in Cole, 105 F.3d at 1477, stating that "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."

It also stands to reason that Aflac's filing of this Action and the Georgia Action to enforce its Agreement publicly rather than under seal, in breach of the Agreement, brings additional informational advantage to Aflac, as it broadcasts Aflac's willingness, readiness and ability to enforce its Arbitration Agreement with swift legal actions and TROs, further deterring its associates from resorting to courts to challenge Aflac's employment and business practices.

5. The unconscionable terms pervade the Agreement.

The unconscionable aspects of the Agreement -- both procedural, such as the lack of a meaningful choice or an opportunity to review the Agreement; disparity of the bargaining powers of the parties; and the mandatory nature of the agreement as a condition of employment; as well as substantive, including its fee allocation scheme imposing the prohibitive "$500 an hour" arbitration costs on the associates; its severe one-sidedness in Aflac's favor and in favor of Aflac's affiliates; and its strict confidentiality, each one heavily favoring Aflac -- "'pervade an arbitration agreement such that severance would 'significantly alter' the tone and nature of arbitration," and the Court should thus "declare the entire agreement void." Larsen, 871 F. 3d at 1320.

"[T]he presence of an unlawful provision in an arbitration agreement may serve to taint the entire arbitration agreement, rendering the agreement completely unenforceable, not just subject to judicial reformation." Paladino v. Avnet Comp. Tech., Inc., 134 F.3d 1054, 1058 (11th Cir. 1998) (citing E. Allan Farnsworth, Farnsworth on Contracts § 5.8, at 70 (1990) (severance is inappropriate when the entire provision represents an "***integrated scheme to contravene public policy***")).

"Taken together, the lack of the mutuality, the costs of arbitration, the forum selection clause, and the confidentiality provision that Linden unilaterally imposes . . . demonstrate that the arbitration clause is not designed to provide . . . an

effective means of resolving disputes . . . . Rather, it is a one-sided means which tilts unfairly, in almost all situations, in Linden's favor. Through the use of an arbitration clause, Linden 'appears to be attempting to insulate itself contractually from any meaningful challenge to its alleged practices.'. . . Finding that the arbitration clause is procedurally and substantively unconscionable, the Court will refuse to enforce it." Bragg, 487 F. Supp. 2d 593 at 611.

Indeed, it strongly appears that Aflac has likewise insulated its fraudulent practices from any meaningful challenge, and from any judicial and public scrutiny, by the expedient of its unconscionable Agreement.

6. The New York Supreme Court redlined the Agreement's fee-splitting scheme.

On a recent motion to compel arbitration brought by Appellee against another sales associate represented by the undersigned, the New York Supreme Court granted the motion "***on the express condition that Aflac pay all arbitration costs for both parties***" Laka v. Aflac New York, No. 651809/2018 (N.Y. Sup. Ct. July 27, 2018) while accepting Aflac' offer to pay up to "$500 an hour" for plaintiff's arbitrator overruling plaintiff's objection that it was a palliative contrary to this Court's ruling in Ragone v. Atlantic Video, 595 F.3d 115, 125 (2d Cir. 2010).

In Ragone, defendants waived arbitration agreements' statute of limitations and fee-shifting provisions, and this Court stated that "we can enforce an

agreement that modifies a provision that otherwise might be unconscionable." The Court, however, sounded a "***Note of Caution***," stating that "we do so with something ***less than robust enthusiasm***."

After discussing the effective vindication issue (see p. 37 above), the Ragone Court also took note of plaintiff's argument that the waiver option "'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.'"

Appellants agree and would add that the waiver in this context is difficult to reconcile with the general rule that a contract provision is unconscionable where it is "both procedurally and substantively unconscionable ***when made***." Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 10 (1988).

## CONCLUSION

The appealed-from Order compelling arbitration enforces Aflac's Agreement that imposes prohibitive arbitration costs on Associates, limits the types of claims Associates can bring, perpetuates Aflac's considerable informational advantage as a repeat arbitration player, and thereby prevents Associates from effectively vindicating their federal statutory rights.

This Action and Aflac's parent's Georgia Action starkly demonstrate that the Agreement, brimming as it is with unconscionable features, is a part of Aflac's integrated scheme to contravene public policy by denying its associates a forum in which to vindicate their statutory rights violated by the company, and by shielding the alleged violations from any judicial, public or media scrutiny. They also reveal the impressive litigation arsenal Aflac is willing, ready and able to deploy against any associate who disobeys its own unconscionable terms, sending a powerful and loud message to the thousands and thousands of its silenced and cowered victims who cannot bring their claims because Aflac's Arbitration Agreement makes it impossible for the vast majority if not all of them by design. Appellants respectfully submit that the District Court's order and judgment ought to be reversed on these grounds.

October 30, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE AND TYPE-STYLE REQUIREMENTS

I, Dimitry Joffe, counsel for Appellants, certify that this document complies with the word limit requirements of FRAP 32 because it contains 13,594 words, and complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

Dated: October 30, 2018

/s/ Dimitry Joffe
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CERTIFICATE OF SERVICE

I, Dimitry Joffe, hereby certify that on this 30th day of October 2018, I caused a copy of Appellants' Initial Brief (Corrected) to be sent electronically to the registered participants in this case through the ECF system.

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