SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ROBERT KULPERGER, **Plaintiff,** **vs.** **NOMURA SECURITIES INTERNATIONAL, INC., NOMURA SECURITIES CO., LTD., MR. YOSHIKAZU YASUOKA, MR. KEI YUGUCHI, JOHN DOES 1-10, AND XYZ CORP. 1-10,** **Defendants.**	INDEX NO.: 01-100084

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND PLAINTIFF'S CROSS MOTION FOR ATTORNEYS' FEES AND COSTS

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STATEMENT OF FACTS

Plaintiff, Robert Kulperger ("Kulperger") is a Caucasian American born local hire employee of the corporate Defendants and performed duties as the Co-Head of the Alternative Investment Group of Nomura Securities International, Inc. ("NSI"), 2 World Financial Center, Building B, New York, NY 10281, which is a subsidiary of Nomura Securities Co., Ltd., Tokyo, Japan ("NSC").

Yoshikazu Yasuoka ("Yasuoka") is a high level Managing Director who was in charge of the Financial Engineering Dept. (composed of Structured Products Group and Alternative Investment Group) for NSI. Additionally, Yasuoka was a high-level supervisor of Kulperger who had direct ties to NSC and who was involved in the adverse employment actions against Kulperger.

Kei Yuguchi ("Yuguchi") was a Vice President of NSI and thus a high level management employee of NSI. Additionally, he had direct ties to NSC to discuss employment decisions as they pertained to Kulperger.

Kulperger commenced his employment with NSI on April 1997. In November 1999, Yuguchi joined the Group as a Vice President and soon thereafter made numerous comments to show a dislike for Plaintiff based upon discriminatory animus of Plaintiff's race, color, and national origin. Many of these comments were openly made and ratified by other high ranking management employees of NSI and NSC. Additionally, high ranking management employees of NSI and NSC took discriminatory actions such as freezing Plaintiff out of making decisions commensurate with his position. Although NSI and NSC were on notice of the discriminatory actions of their management and supervisory level employees, the companies allowed these

individuals to continue as employees and supervisors of Plaintiff. In September 2000, Plaintiff discovered that the Group, of which he was co-head, had hired two new employees without discussing such hiring with him. One of the new hires was an attorney, even though Defendants were well aware that Plaintiff is an attorney and that there was not enough work for two lawyers in the Group. The other hire was a senior administrative employee. Both of the new hires are Japanese. These actions compounded by the almost daily discrimination of all defendants resulted in Plaintiff being constructively discharged from his place of employment.

Due to the illegal actions of Defendants, Kulperger filed his complaint alleging that Defendants harassed and discriminated against him seeking equitable and legal relief for (1) national origin discrimination; (2) racial discrimination; (3) color discrimination; (4) retaliation; (5) negligent hiring, supervision, training, and retention; (6) constructive discharge; (7) breach of implied contract; (8) breach of the implied covenant of good faith and fair dealing; and (9) interference with business relations. Kulperger specifically alleged that his constitutional rights flowing from the State and City Human Rights Law and the New York State and City Civil Rights Law were violated.

ARGUMENT

STANDARD OF REVIEW

The standards for review on a CPLR 3211(a)(7) motion to dismiss are well settled. The court must accept the allegations of the complaint as true and "determine simply whether the facts alleged fit within any cognizable legal theory." Polonetsky v. Better Homes Depot, Inc., 712 N.Y.S.2d 801 (N.Y.Sup.)(2000) (*citing* Morone v. Morone, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980)). The Court should thus accept the facts as alleged by Kulperger to be true. Missionary Sisters of Sacred Heart, Inc. v. Dowling, 703 N.Y.S.2d 362 (N.Y.City Civ.Ct.)(1999). Therefore, in deciding Defendants' motion to dismiss for facial insufficiency, the Court must consider Kulperger's allegations asserted, both in the Complaint and in his and any accompanying affidavits submitted in opposition to the motion, as true and must resolve all inferences which reasonably flow therefrom in favor of the plaintiff. Joel v. Weber, 166 A.D.2d 130, 135-136, 569 N.Y.S.2d 955; *see also*, Sanders v. Winship, 57 N.Y.2d 391, 394, 456 N.Y.S.2d 720, 442 N.E.2d 1231. If the "plaintiff is entitled to a recovery upon any reasonable view of the stated facts," the complaint must be declared legally sufficient. 219 Broadway Corp. v. Alexander's, Inc., 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205 (1979). Accordingly, Defendants implied suggestions that the Court should concern itself with the ability of plaintiff to prove any allegation contained in the Complaint is misplaced.

In reviewing the Complaint, the Court should deem it to allege whatever may be implied from its statements by reasonable intendment. Foley . D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964). Furthermore, plaintiff is entitled to every reasonable inference of fact in a generous and hospitable approach to the plaintiff. Westhill Exports, Ltd. v. Pope, 12 N.Y.2d 491, 240 N.Y.S.2d 961, 191 N.E.2d 447 (1963). Additionally, as plaintiff has alleged several sufficient claims, defendants' motion aimed at striking the whole pleading should be denied in its entirety. *See* Griefer v. Newman, 22 A.D.2d 696, 253 N.Y.S.2d 791 (2d Dep't 1964); Commentary C3211:26 on McKinney's CPLR 3211.

However, should the Court find that a motion to dismiss should issue on the claim for insufficiency, Kulperger respectfully requests leave to replead. Cushman & Wakefield, Inc. v. John David, Inc., 25 A.D.2d 133, 267 N.Y.S.2d 714 (1st Dep't 1966); *See* Young v. Nelson, 23 A.D.2d 531, 256 N.Y.S.2d 649 (4th Dep't 1965).

POINT I

THE LANGUAGE OF THE MARCH 7, 1997 LETTER DOES NOT AFFECT THIS ACTION

A. Standard for Waiver of Right to Litigate Before the Courts

The March 7, 1997 letter that was drafted by corporate Defendants is a four (4) page letter called a "compensation agreement" that contains a mere two sentences pertaining to arbitration hidden within the body of a continuing paragraph from pages 3 to 4 of said document (the "letter"). (Block Aff., Exhibit B). This was intentionally done to hide the arbitration language which should have been highlighted. (Kulperger ¶¶ 29-30).

This language states in regular font with no heading the following: "You agree that any dispute or disagreement arising out of your employment or this compensation agreement, including discrimination claims, shall be submitted to arbitration before the New York Stock Exchange in the city and state of New York. Your agreement to submit such claims to arbitration precludes your right to litigate these claims in any other forum of competent jurisdiction." (Block Aff., Exhibit B)

Defendants' poor choice of wording in characterizing the letter they drafted as a "compensation agreement" rather than an employment agreement did nothing to highlight that they intended the document to strip and deprive Kulperger the right to litigate employment disputes not related to wage claims as is contained in his Complaint. (Block Aff., Exhibit A). In fact, Kulperger was under the impression that the letter pertained only to compensation issues for his first year of employment. (Kulperger ¶ 5).

Further, Defendants' Letter does not even mention the words Federal Court or State Court to purposefully not draw any attention to the sentencing referencing arbitration. (Kulperger ¶¶ 30, 33).

Further, Defendants failure to even mention or make reference of any employment statutes such as Title VII, the ADA, the ADEA, the New York City Human Rights Law, or the New York State Civil Rights Act, explains why Kulperger was not adequately put on notice of any waiver of his right to litigate statutorily protected rights such as his right to be free from discrimination. (Block Aff., Exhibit B). (Kulperger ¶ 34). It is of interest that Defendants' fail to include any affidavit in their moving papers from Ms. Skrobisch that even purports to state that she discussed

the subject of arbitration or waiver of litigating discrimination claims with Kulperger -- in direct contrast to Kulperger's affidavit. (Kulperger ¶¶ 3-4, 6).

The Courts have consistently ruled that an employee could not be bound to to arbitrate employment discrimination claims unless they knowingly agreed to arbitrate such claims." Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994) agreeing with the United States Supreme Court in to Gilmer v. Interstate Johnson Lane Corp., 500 US 20, 111 S. Ct. 1647 (1991). The Ninth Circuit held that Congress intended that there be "a knowing agreement to arbitrate employment disputes **before** an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes. Such congressional intent, which has been noted in other judicial decisions, is apparent from the text and legislative history of Title VII." Prudential Ins. Co. of America v. Lai. *supra* at 1304 (emphasis added). The New York Courts have also been loathe to enforce arbitration clauses unless the agreement to arbitrate is "clear, explicit and unequivocal" and "must not depend upon implication or subtlety." Crespo v. 160 West End Ave. Owners Corp., 253 A.D.2d 28 (N.Y.A.D.) (1999) *citing* (Matter of Waldron [Goddess], 61 NY2d 181, 183, 184). This waiver requirement has been heightened to a requirement that it be "particularly clear" in agreements to arbitrate statutory claims of employment discrimination and such waivers of an "employees' statutory right to a judicial forum for claims of employment discrimination" must be 'clear and unmistakable'." Wright v Universal Mar. Serv. Corp., 525 US 70,119 S. Ct. 391 at 396. The actions taken by Defendants have been aimed at hiding the fact that they were trying to get Kulperger to waive his right to litigate his employment discrimination claim. Thus, their motion must fail.

Such a restrictive reading of arbitration agreements is necessary as discrimination statutes such as the Civil Rights Act of 1964 which set the policy against discrimination was stated by Congress to be "the highest priority". Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968), EEOC v. Children's Hospital Med. Ctr., 719 F.2d 1426, 1431 (9th Cir. 1983) (*en banc*) (relying on Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974)). Based on this analysis, the Ninth Circuit has concluded that a plaintiff may only be forced to forgo statutory remedies and arbitrate discrimination and harassment claims if the plaintiff knowingly agreed to submit such disputes to arbitration. Lai at 1305 (citing to Civil Rights Act of 1991); *c.f.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52 (1974); Gilmer, *supra*, 500 U.S. 20; Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992);

Spellman v. Securities Annuities and Ins. Svcs, Inc., 8 Cal. App. 4th 452 (Cal. App. 1992). Thus, the Supreme Court has clearly held that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418 (1986) (*quoting* United Steelworkers of America v. Warrior and Gulf Nav. Co., 363 U.S. 574, 582 (1960)).

Additionally, the New York courts have consistently held that "we stress that there is no disagreement among the members of this Court about the general proposition that racial, gender, and all other forms of invidious discrimination, are ugly realities that cannot be countenanced and that should be redressable through the widest possible range of remedies." Fletcher v. Kidder, Peabody & Company, Inc., 81 N.Y.2d 623, 636, 619 N.E.2d 998 (1993). This is supported by the fact that many courts have held the private right of action remains an essential means of obtaining judicial enforcement of Title VII, 42 U.S.C. s 2000e--5(f)(1) (1970 ed., Supp. II). In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices. Hutchings v. United States Industries, Inc., 428 F.2d 303, 310 (CA5 1970); Bowe v. Colgate- Palmolive Co., 416 F.2d 711, 715 (CA7 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (CA5 1968). *See also* Newman v. Piggie Park Enterprises, Inc., *supra*.

This explains why, even in a commercial transaction, it has long been the rule in New York that parties "will not be held to have chosen arbitration as the forum for the resolution of their disputes in the absence of an express, unequivocal agreement to that effect; absent such an explicit commitment neither party may be compelled to arbitrate" Marlene Industries Corp. v. Carnac

Textiles, Inc.**,** 45 N.Y.2d 327, 380 N.E.2d 239, 408 N.Y.S.2d 410 (1978),citing, Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Assn.), 42 N.Y.2d 509, 512, 399 N.Y.S.2d 189, 191, 369 N.E.2d 746, 748; *accord* Gangel v. De Groot, 41 N.Y.2d 840, 841, 393 N.Y.S.2d 698, 362 N.E.2d 249, 250; Matter of Riverdale Fabrics Corp. (Tillinghast-Stiles Co.), 306 N.Y. 288, 289, 118 N.E.2d 104-105; Matter of Lehman v. Ostrovsky, 264 N.Y. 130, 132, 190 N.E. 208, 209). The New York Courts have clearly articulated that the "reason for this requirement, quite simply, is that by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent." Marlene Industries Corp., *supra* at 333-334 *citing, see,* Matter of Riverdale Fabrics Corp. (Tillinghast-Stiles Co.), *supra*, 306 N.Y. p. 289, 118 N.E.2d pp. 104-105; Siegel, New York Practice, s 588, p. 835).

B. Kulperger worked in International Commerce

Kulperger worked in international securities and was actively traveling between the US and Tokyo offices of Defendant corporations. (Kulperger ¶7). Thus, the Federal Arbitration Act should not apply to employment contracts for employees such as Plaintiff. *See* Federal Arbitration Act, 9 U.S.C. sec.1 (enforcement of arbitration agreements do not "apply to employees engaged in foreign commerce). In such a situation, one should arguably defer to the Court's stance in Matter of Wertheim & Co., wherein the New York Court of Appeals held arbitration agreements are

unenforceable with regard to claims of unlawful discrimination. Matter of Wertheim & Co. v. Halpert, 48 N.Y. 2d 681, 421 N.Y.S.2d 876, 397 N.E.2d 386 (1979).

C. The Letter is completely inadequate in that it does not address the issue of Costs and Fees for the Prevailing Party.

In Armendariz v. Foundation Health Psych. Care Services, Inc., 24 Cal 4th 83, 6 P. 3d 669, 99 Cal. Rptr.2d 745 (Aug. 24, 2000), the California Supreme Court set forth an exhaustive opinion on the arbitrability of discrimination disputes. Much of what the Court discussed applies to the facts *sub judice*. The court found it critical that an "agreement to arbitrate a statutory claim implicitly incorporates 'the substantive and remedial provisions of the statute' so that parties to the arbitration would be able to vindicate their 'statutory cause of action in the arbitral forum'." Armendariz, *supra* at 103, *citing* Broughton, *supra*, 21 Cal.4th at p. 1087, 90 Cal.Rptr.2d 334, 988 P.2d 67. The Court made direct reference to an earlier decision to refuse to enforce an arbitration agreement between a petroleum franchiser and franchisee that did not allow for the punitive damages and attorney fees remedies available under the Petroleum Marketing Practices Act, because both of these remedies are "important to the effectuation of the PMPA's policies." Armendariz, *supra* at 103, *citing* Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244, 1248 (9th Cir.1995) (Graham Oil).

The letter does not address this point of the provision of costs and fees to prevailing party. However, certainly, if Kulperger were to prevail in his statuatory claim, he would be entitled to costs and fees. (Kulperger ¶9).

D. The letter is completely inadequate in that it does not address the issue of who pays for the costs of arbitration In Armendariz, *supra* at 107-108, the Court agreed with the

decision in Cole that "it was unlawful to require an employee who is the subject of a mandatory employment arbitration agreement to have to pay the costs of arbitration." Cole v. Burns Intern. Security Services, 105 F.3d 1465, 1483-1485 (D.C. Cir. 1997).This reasoning emanating from a Gilmer analysis as "[i]n Gilmer [supra, 500 U.S. 20, 111 S.Ct. 1647], the Supreme Court endorsed a system of arbitration in which employees are not required to pay for the arbitrator assigned to hear their statutory claims. Armendariz, *supra* at 108. There is no reason to think that the Court would have approved arbitration in the absence of this arrangement. Id. Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case. Id. The Court was so concerned about this point due to the "significant risk that employees will have to bear large costs to vindicate their statutory right against workplace discrimination, and therefore chills the exercise of that right. Because we conclude the imposition of substantial forum fees is contrary to public policy, and is therefore grounds for invalidating or 'revoking' an arbitration agreement and denying a petition to compel arbitration under Code of Civil Procedure sections 1281 and 1281.2 ..." Armendariz, *supra* at 110-111. Thus, the Court held that where "an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." Id.

The letter does not provide for the employer to pay for the costs of arbitration even though the employer seeks to mandate the arbitration of this claim of discrimination. (Simon Aff. Exhibit B) (Kulperger Aff. ¶21).

E. The letter is completely inadequate in that it sets no terms for the conducting of discovery.

The discussion above clearly sets forth the import of rooting out invidious discrimination. In fact, the Armendariz Court agreed "that adequate discovery is indispensable for the vindication of FEHA (discrimination) claims." Armendariz, *supra* at 105.

It is beyond question that Kulperger would be entitled to pursue discovery if he were allowed to litigate this matter to include, subpoenaing witnesses outside the boundaries of New York and the United States (many of whom possess critical information and are employees of Defendant corporations) (Kulperger Aff. ¶¶11-12). Kulperger would be severely prejudiced if he were not allowed to compel the testimony of such witnesses as well as witnesses in New York. (Kulperger Aff. ¶12).

E. The Letter is completely inadequate in that it does not for Motions, Written Decisions, or Appeals.

The Letter sets forth no provision for Kulperger to file Letters Rogatory or other motions that would be critical to him pursuing his causes of action as they are set forth in his Complaint. (Kulperger Aff. ¶14). Further, the letter does not even address the critical issue of written decisions and appeal rights. (Kulperger Aff. ¶13).

The petitioners in Armendariz argued that a "lack of judicial review of arbitration awards makes the vindication of FEHA rights in arbitration illusory." Armendariz, *supra* at 106-107. Their argument was premised on the possibility that an arbitration award may not be vacated for

errors of law on the face of the decision, even if these errors would cause substantial injustice. Thus, arbitration would be an inequitable remedy to the litigation of rights that are among the "highest priority" of this nation. *See* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968), EEOC v. Children's Hospital Med. Ctr., 719 F.2d 1426, 1431 (9th Cir. 1983) (*en banc*) (relying on Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-48 (1974)). Of course, it should go without saying that for judicial review to be successfully accomplished, an arbitrator must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based. Of course, the Letter does not provide for such a requirement thus depriving Kulperger of critical appeal rights which renders the purported Arbitration clause invalid. (Kulperger Aff. ¶13). *See* Fletcher v. Kidder, Peabody & Company, Inc., 81 N.Y.2d 623, 636, 619 N.E.2d 998 (1993).

F. The Letter is oppressive, unconscionable, and unenforceable in that it provides for no bilaterality

The Letter was drafted by the corporate Defendants and must possess a"modicum of bilaterality" to be valid. The Letter possesses no such bilaterality and thus must fail. (Kulperger Aff. ¶15). Armendariz *citing* Stirlen v. Supercuts, Inc., 51 Cal.App.4th 1519, 60 Cal.Rptr.2d 138 (1997); Kinney v. United HealthCare Services, Inc. 70 Cal.App.4th 1322, 83 Cal.Rptr.2d 348 (1999. Most glaringly, the Letter requires that only employees such as Kulperger to submit employment disputes to arbitration. (Kulperger Aff. ¶15) However, the employer has no such restriction and can pick whatever venue in whatever city or state it feels is appropriate to its best advantage. (Kulperger Aff. ¶¶16-18).

The Court in Armendariz sets the argument forth in a straightforward manner:

> Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on "business realities." As has been recognized " 'unconscionability turns not only on a "one-sided" result, but also on an absence of "justification" for it.' " (A & M Produce Co., supra, 135 Cal.App.3d at p. 487, 186 Cal.Rptr. 114.) If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose. (See Engalla, supra, 15 Cal.4th at p. 976, 64 Cal.Rptr.2d 843, 938 P.2d 903.) ...
>
> We agree with the Stirlen court that the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context. One such form is an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party. The application of this principle to arbitration does not disfavor arbitration. It is no disparagement of arbitration to acknowledge that it has, as noted, both advantages and disadvantages. The perceived advantages of the judicial forum for plaintiffs include the availability of discovery and the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to "split the difference" between the two sides, thereby lowering damages awards for plaintiffs. (See Haig, Corporate Counsel's Guide: Development Report on Cost-Effective Management of Corporate Litigation (July 1999) 610 PLI/Lit. 177, 186-187 ["a company that believes it has a strong legal and factual position may want to avoid arbitration, with its tendency to 'split the difference,' in favor of a judicial forum where it may be more likely to win a clear-cut victory"]; see also Schwartz, supra, 1997 Wisc.L.Rev. at pp. 64-65.) *120 An employer may accordingly consider courts to be a forum superior to arbitration when it comes to vindicating its own contractual and statutory rights, or may consider it advantageous to have a choice of arbitration or litigation when determining how best to pursue a claim against an employee. It does not disfavor arbitration to hold that an employer may not impose a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee's expense. On the contrary, a unilateral arbitration agreement imposed by the employer without reasonable justification reflects the very mistrust of arbitration that has been repudiated by the United States Supreme Court in Doctors' Associates, Inc. v. Casarotto, supra, 517 U.S. 681,

> 116 S.Ct. 1652, 134 L.Ed.2d 902, and other cases. We emphasize that if an employer does have reasonable justification for the arrangement -- i.e., a justification grounded in something other than the employer's desire to maximize its advantage based on the perceived superiority of the judicial forum -- such an agreement would not be unconscionable. Without such justification, we must assume that it is. ... Obviously, the lack of mutuality can be manifested as much by what the agreement does not provide as by what it does.
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> But an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences. The arbitration agreement in this case lacks mutuality in this sense because it requires the arbitration of employee--but not employer--claims arising out of a wrongful termination. An employee terminated for stealing trade secrets, for example, must arbitrate his or her wrongful termination claim under the agreement while the employer has no corresponding obligation to arbitrate its trade secrets claim against the employee.
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> Armendariz, *supra* at 117-120.

Thus, for the reasons stated above, the Defendants attempt to move to dismiss this action must fail as the clause purported to require arbitration is insufficient, inequitable, and unconscionable.

G. The Letter is completely inadequate in many other matters to render it an invalid arbitration clause.

The Letter contains no information as to the number of arbitrators, the selection process of arbitrators, the process of objecting to arbitrators, whether arbitration is mandatory or voluntary, whether arbitration is binding or non-binding. (Kulperger Aff. ¶¶19,20,22).

The letter states that disputes must be brought before the New York Stock Exchange. (Block Aff. Exhibit B). Kulperger alleges discrimination causes of action which cannot adequately be heard before the NYSE which is best suited to hear licensing disputes or disputes pertaining to securities issues or investment issues. (Kulperger Aff. ¶¶23-25). The Complaint includes no dispute over licensing issues, securities, investments, or anything related to Kulperger performing actions pertaining directly to the Stock Exchange. (Block Aff. Exhibit A) Discrimination suits would be better heard before the American Arbitration Association; however, no such provision exists in the Letter. (Block Aff. Exhibit B).

H. Should the Court compel arbitration, then it should severe the action.

Under New York law, an arbitrator has no power to award punitive damages on claims brought under New York law. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976). Under federal law, and on federal claims, there is no such prohibition against an arbitrator's award of punitive damages. See Kerr-McGee Refining Corp. v. M/T Triumph, 924 F.2d 467, 470 (2d Cir.), cert. denied, 502 U.S. 821, 112 S.Ct. 81, 116 L.Ed.2d 54 (1991). This is also true on the New York discrimination statutes. (Kulperger Aff. ¶8).

In such a situation, the Court should simply sever the arbitrable claims and order them submitted to arbitration. *See, e.g.*, Chisolm v. Kidder, Peabody Asset Mgmt., Inc., 92 Civ. 0774,

1992 WL 135587, at *6-7, 1992 U.S. Dist. LEXIS 7648, at *19-20 (S.D.N.Y. June 2, 1992). This is in keeping with the Supreme Court's holding in Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217-18, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985), that the FAA "requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." DiCrisci v. Lyndon Guar. Bank of New York, a Div. of ITT Consumer Financial Corp., 807 F.Supp. 947 (W.D.N.Y., 1992) *citing* Byrd at 470, U.S. at 217, 105 S.Ct. at 1241. Thus, the court should sever and stay further proceedings on the claim for punitive damages under N.Y.Exec.L. §§ 296, pending the completion of arbitration.

Although, this may not be an efficient manner of litigating this matter, Plaintiff 's ability to pursue separate claims in separate forums is clearly consistent with federal and state case law. *See* Gilmer v. Interstate Johnson Lane Corporation, 500 U.S. 20, 27, 111 S. Ct. 1647, 1653 (1991*);* Coventry v. United States Steel Corp., 856 F. 2d 514, 522 (3rd Cir. 1988); Moore v. McGraw Edison Co., 804 F. 2d 1026, 1033 (8th Cir. 1986)(c*ompare with* Older Workers Benefits Protection Act (OWBPA), 29 USC _ 626(f) (provided standard for waiver of ADEA in release agreements); Runyan v. National Cash Register Corp., 787 F. 2d 1039, 1045 (6th Cir.), *cert. denied*, 479 U.S. 850, 107 S. Ct. 178 (1986); *see also*, Rodriguez de Quijas v. Sheerson/American Express Inc., 490 U.S. 477 (1989); Sheerson/American Express Inc. v. McMahon, 482 U.S. 220 (1987).

Accordingly, if the Court intends to dismiss the action to arbitration, Plaintiff respectfully requests that the Court retain jurisdiction to determine punitive damages and any other damages he

would be entitled to at trial that he would be precluded from attaining in arbitration. Further, he requests the right to appeal any arbitration award to the Courts. (Kulperger Aff. ¶28).

POINT II

PLAINTIFF'S COMPLAINT IS MORE THAN ADEQUATE TO FULFILL THE REQUIREMENTS OF NOTICE PLEADING

New York Courts follow the theory of "notice pleading" embodied in CPLR Article 30. Thus, a pleading need only "give 'notice' of the event out of which the grievance arises." Siegel, N.Y. Prac § 208, at 301 (2d ed). Under the Civil Practice Act ("CPA"), precursor to the CPLR, a pleader had to state "facts", but not "evidence." The drafters of the CPLR intentionally omitted the word "facts" from pleading requirements, id § 207, at 300-301 to take away this burden. State of New York v. Maricopa Products, Inc., et al., 1999 WL 1042313 (N.Y.Sup. Sept. 3, 1999) (NOT APPROVED BY REPORTER OF DECISIONS FOR REPORTING IN STATE REPORTS. NOT REPORTED IN N.Y.S.2d.).

A. Individual Defendants are properly included as Party Defendants.

For defendants to even suggest that Yasuoka and Yuguchi are not high ranking employees is disingenuous. It is noteworthy, the Defendants start this section of their brief by quoting that individuals are subject to employment discrimination suits if they have "an ownership interest in the corporate employer or has the authority to do more than carry out personnel decisions made by others." (*emphasis added*) Patrowich v. Chemical Bank, 63 N.Y.2d 541, 542, 483 N.Y.S.2d 659,

660 (1984); Young v. Geoghegan, 250 A.D.2d 423, 424, 673 N.Y.S.2d 89, 89-90 (1st Dep't 1988) (*citing* Patrowich); Brotherson v. Modern Yachts, Inc., 272 A.D.2d 493, 494, 708 N.Y.S.2d 900, 900-01 (2d Dep't 2000) (*citing* Patrowich).

Defendants tellingly omit Plaintiff's Complaint that states that Yasuoka is a Japanese rotational supervisory and managerial employee of Nomura who performs supervisory duties in Defendant's facility located in New York City, New York. (Block Aff. Exhibit A Complaint ¶8). Additionally, Defendants omit Plaintiff's Complaint that states that Yuguchi is a Japanese rotational supervisory and managerial employee of Nomura who performs supervisory duties as a Vice President in Defendant's facility located in New York City, New York. (Block Aff. Exhibit A Complaint ¶9). Further, Plaintiff's affidavit makes clear that these individuals had authority to make decisions were involved in the decisions that led to his constructive discharge, and/or had supervisory authority over Plaintiff. (Kulperger ¶35-38).

B. Complaint states cause of action for Retaliation

Plaintiff's Complaint makes clear that he complained repeatedly to Defendants and Defendants failed to take his Complaints seriously and subsequently he was forced to resign. Plaintiff's pleading should put Defendants on notice of his cause of action in accordance with CPLR 3013. Further, as pleadings are to be liberally construed, it is surprising that Defendants would even make such an argument. Foley . D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964); Barrick v. Barrick 24 A.D.2d 895, 264 N.Y.S.2; CPLR 3211(a)(7) However, out of an abundance of caution, Plaintiff's affidavit clarifies this cause of action (Kulperger ¶39).

C. Complaint states cause of action for Negligent, Hiring Retention and Training.

Plaintiff's Complaint makes clear this cause of action. However, out of an abundance of caution, Plaintiff's affidavit clarifies this cause of action (Kulperger ¶40).

D. Constructive Discharge claim is appropriate.

A constructive discharge claim occurs when an employer "deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." Pena v. Brattleboro Retreat, 702 F.2d at 325 (*quoting* Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir.1977); Young v. Southwestern Savings & Loan Ass'n, 509 F.2d 140, 144 (5th Cir.1975). Further, "a constructive discharge may be found on the basis of evidence that an employer deliberately sought to place an employee in a position that jeopardized his or her health." *See,* e.g., Meyer v. Brown & Root Construction Co., 661 F.2d 369, 371-72 (5th Cir.1981) (constructive discharge in violation of Title VII where pregnant employee transferred to position requiring heavy manual labor). This is precisely what occurred to Kulperger as stated in the Complaint and his affidavit. (Block Aff. Exhibit A). (Kulperger ¶¶ 41-44).

CROSS MOTION

A. Plaintiff should be awarded attorneys' fees and costs in having to contest this motion.

As clearly demonstrated above, Defendants Motion to Dismiss does not meet the standards of a good faith pleading. Plaintiff's counsel requested Mr. Simon Block, counsel for the moving Defendants to withdraw, at the very least, Point II of its Motion. However, Mr. Block, after consultation, refused to so move. Not only is Point II devoid of merit, but Point I also lacks merit. Unfortunately, Plaintiff has had to endure unnecessary expense due to Defendants' actions.

Thus, for the reasons stated above and in Plaintiff's Opposition papers, incorporated herein, Plaintiff cross-moves for attorneys' fees and costs as appropriate sanctions.

CONCLUSION

If Defendants had intended that Kulperger should waive his public policy and statutory right to pursue a discrimination claim in the Courts, then Defendants should have clearly put him on notice of this fact rather than try to hide language in a Letter Agreement. Defendants' choice to not draft a clear or complete arbitration clause cannot be interpreted to the detriment of Mr. Kulperger. Additionally, as the Complaint and affidavit clearly puts Defendants on notice of Kulperger's causes of action, their Motion to Dismiss must fail in its entirety **and Plaintiff's Cross Motion should be granted**.

Further, Plaintiff respectfully requests that Mr. Ty Hyderally, whose application to be admitted pro hac vice is currently pending, be allowed to argue this motion should this Court desire to entertain oral argument.

MARC SAPERSTEIN, ESQ.
TY HYDERALLY, ESQ. (PRO HAC VICE MOTION PENDING)
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Attorney for Plaintiff

AFFIRMATION OF SERVICE

I, MARC SAPERSTEIN, an attorney at law duly admitted to practice before the courts of the State of New York, hereby affirm under penalty of perjury that on February 5, 2001, I caused a true and correct copy of the foregoing pleading and enclosures to be served by facisimile and regular mail to counsel for the moving defendants addressed as follows:

Nancy Prahofer, Esq.
Dechert, Price & Rhoads
30 Rockefeller Plaza
New York, New York 10112

Dated: New York, New York

February 3, 2001

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Marc Saperstein, Esq.