Case No. 18-11869

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

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TROY HUBBARD, MARCUS JOHNSON, ANIBAL ALCANTARA, DEBBIE CORT, GERARD McCARTHY, JULIO LEATY and MARTIN CONROY,

Defendants-Appellants,

v.

AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS,

Plaintiff-Appellee.

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On Appeal from the United States District Court
for the Middle District of Georgia

# APPELLANTS' REPLY BRIEF

Dimitry Joffe
(admitted *pro hac vice*)
JOFFE LAW P.C.
765 Amsterdam Avenue, 2C
New York, NY 10025
917-929-1964
Dimitry@joffe.law
*Counsel for Appellants*

# CERTIFICATE OF INTERESTED PERSONS

Pursuant to the 11th Circuit Rule 26.1-1, Appellants provide the following certificate of interested persons ("CIP"):

Aflac Incorporated (NYSE: AFL)
Alcantara, Anibal
Alston & Bird LLP
American Family Life Assurance Company of Columbus
American Family Life Assurance Company of New York
Cassilly, Lisa
Conroy, Martin
Cort, Debbie
Davis Gillett Mottern & Sims LLC
Harris, St. Laurent & Chaudhry LLP
Hubbard, Troy
Joffe Law P.C.
Joffe, Dimitry
Land, Clay (U.S.D.J.)
Leaty, Julio
Lexstone Fund II L.P.
McCarthy, Gerard
Sims, Jerry
St. Laurent, Andrew
Suttle, Brooks
Versus Funding Partners L.P

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### PRELIMINARY STATEMENT

The record on appeal demonstrates that Appellee commenced this Action by (a) making false factual statements in its verified state court complaint -- then withdrawing them after admitting their falsity; (b) filing court papers in direct breach of the Arbitration Agreement itself – then admitting that breach; (c) obtaining a facially suspect *ex parte* TRO – then justifying it by making false statements to the District Court about a non-existing "transference order."

Appellee has made all those missteps in the space of just 24 days in December 2017, in a rush to enforce its unconscionable Arbitration Agreements against Appellants. Appellee's high-pressure tactics and/or deceptive conduct in enforcing its Agreement mirror the high-pressure tactics and/or deceptive conduct Appellee had used in coercing Appellants to accept its unconscionable Agreement in the first place.

Appellants, for their part, have consistently challenged the Arbitration Agreement's unconscionability before the District Court in the proceedings below, and have now appealed the District Court's resolution of that sole issue (among several argued below) to this Court for a *de novo* review of their arguments.

For procedural unconscionability, Appellants principally argue that high pressure tactics and/or deceptive conduct used by Appellee, the stronger bargaining

party, left Appellants, the weaker parties, with no meaningful choice but to accept Appellee's Arbitration Agreement without any reasonable opportunity to review, understand, or negotiate its onerous terms.

For substantive unconscionability, Appellants principally argue that (a) Appellee's prohibitive fee allocation scheme impermissibly saddles Appellants with high arbitration costs and forecloses any opportunity for them to effectively vindicate their federal statutory rights, and (b) the severe one-sidedness of the Agreement uniformly favoring Appellee in substantive dimensions renders it unconscionable. The one-sided features of the Arbitration Agreement include:

- a carve-out of all material claims by Aflac against the associate from the scope of the arbitration agreement (paragraph 10.1); *See, e.g.*, Appx. Vol. I, Doc. 10-2, Ex. 1, p. 21;

- contractual language making clear that Appellee is not a "Complaining Party" initiating arbitration under the Agreement (paragraph 10.2); *Id*. at pp. 21-22;

- a one-sided obligation of Appellants to arbitrate all disputes not only with Aflac but also with Aflac's numerous affiliates regardless of whether Aflac itself is a party (paragraph 10.2); *Id*. at pp. 21-22;

- a one-sided limitation on Appellee's and its affiliates' liability, leaving Appellants' liability unlimited (paragraph 10.7.1, 2); *Id*. at p. 23; and

- a strict confidentiality provision favoring Appellee as a repeat arbitration player (paragraph 10.2). *Id*. at p. 22.

Finally, Appellants argue that these unconscionable features pervade the Agreement and collectively represent an integrated scheme to deny Appellants any

opportunity to vindicate their federal statutory rights, to deter them from challenging Aflac's unlawful practices, and to shield those unlawful practices from judicial or public scrutiny. These features "taint the entire arbitration agreement, rendering the agreement completely unenforceable, not just subject to judicial reformation" as an "integrated scheme to contravene public policy." *Paladino v. Avnet Comp. Tech., Inc.*, 134 F.3d 1054, 1058 (11th Cir. 1998).

In response, Appellee predominantly argues that Appellants have waived their arguments on procedural grounds, either because Appellants purportedly failed to include the District Court's order compelling arbitration in their Notice of Appeal, and/or because they supposedly did not raise these challenges before the District Court and did not preserve them for appellate review. These arguments are refuted in Parts I and II below, respectively.

As to the merits of Appellants' arguments, Appellee mostly ducks the hard questions and key concerns about its Arbitration Agreement. *See* Part III below.

## I. The Court has jurisdiction to review the January 3rd Order *de novo* because it is included in the Notice of Appeal.

Contrary to the Appellee's contention, this Court has jurisdiction to review the January 3rd Order on several grounds.

*First*, Appellants did include the January 3rd Order in their Notice of Appeal, which expressly references "an order compelling arbitration entered on January 3, 2018." Doc. 24. The reference, Appellants admit, might have been

worded better, but their intent to appeal the issue of the Agreement's enforceability decided by that Order is clear; indeed, Appellants appealed solely the issue of the unconscionability, and their Initial Brief is dedicated exclusively to that issue. *See KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1260 (11th Cir. 2006) ("Although the second notice of appeal could have been more artfully drawn, a liberal construction of that notice requires us to conclude that the city has effectively appealed the district court's determination . . . .").

Indeed, while Rule 3(c)(1)(B) of the Federal Rules of Appellate Procedure requires the appellant to "designate the judgment, order, or part thereof being appealed," the Supreme Court requires the Courts of Appeals to "liberally construe the requirements of Rule 3." *Smith v. Barry*, 502 U.S. 244, 248, 112 S. Ct. 678, 116 L. Ed. 2d 678 (1992). "[I]n this circuit, ***it is well settled that an appeal is not lost if a mistake is made in designating the judgment appealed from where it is clear that the overriding intent was effectively to appeal***." *KH Outdoor*, 465 F.3d at 1260 (emphasis added throughout). The liberal construction mandate "has resulted in the liberal allowance of appeals from orders not expressly designated in the notice of appeal, at least where the order that was not designated was entered prior

to or contemporaneously with the order(s) properly designated in the notice of appeal." *McDougald v. Jenson*, 786 F.2d 1465, 1474 (11th Cir. 1986). [1]

*Second*, the Notice of Appeal explicitly states that the appeal is "from . . . the final judgment entered on January 4, 2018." Doc. 24. Appellants' appeal from the final judgment brings up for the appellate review the January 3rd Order that produced it. "***[T]he appeal from a final judgment draws in question all prior non-final orders and rulings which produced the judgment***." *Barfield v. Brierton*, 883 F.2d 923, 930-931 (11th Cir. 1989); *see also Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1438 n.1 (11th Cir. 1987) (when reviewing an appeal from a final judgment, this court can review rulings on previous interlocutory orders); *Osterneck v. E.T. Barwick Indus., Inc.*, 825 F.2d 1521, 1530 (11th Cir. 1987) (same).[2]

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[1] *See also Green v. DEA*, 606 F.3d 1296, 1299 (11th Cir. 2010) ("When it is abundantly clear that the party intended to appeal an order not explicitly referenced in the notice of appeal, we will consider that order"); *Campbell v. Wainwright*, 726 F.2d 702, 704 (11th Cir. 1984) (noting that the Court liberally construes the notice of appeal in favor of the appellant "where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party"); *Lynn v. Sheet Metal Workers' Int'l. Assoc.*, 804 F.2d 1472, 1481 (9th Cir. 1986) ("[A] mistake in designating the judgment appealed from should not bar appeal as long as the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake.").

[2] The cases cited by Appellee on pages 17-18 of its brief are distinguishable because the appellants there did not include the final judgment in their notices of appeal. In addition, the facts underlying the cases are different because here, as discussed below, "the overriding intent" to appeal the January 3rd Order is apparent on the face of the Notice of Appeal.

*Third*, the Notice of Appeal also designates the District Court's January 25th Order denying Appellants' Motion for Reconsideration of the January 3rd Order, and "when an appellant designates an order denying a ***post-judgment motion*** in the notice of appeal, ***the scope of appeal may extend to the underlying judgment or order***." *United States v. Fawcett*, 522 F. App'x 644, 649 (11th Cir. 2013).

Here, Appellants clearly intended to appeal the January 3rd Order that the Arbitration Agreement is enforceable – it is the only ground for their appeal (among several advanced below), and Appellants' Initial Brief is devoted exclusively to that issue as the Notice of Appeal, liberally construed, had adequately noticed for purposes of Rule 3. Thus, even assuming that the January 3rd Order was not mentioned in the Notice of Appeal (which it was), Appellants' manifest intent was to appeal that Order. Moreover, Appellee did not show (nor could it show) any prejudice from that purported omission as it had full opportunity to challenge these arguments in its response brief.

Thus, the Court has jurisdiction to review Appellants' unconscionability arguments *de novo*. *See Larsen v. Citibank FSB*, 871 F.3d 1295, 1308-09 (11th Cir. 2017) ("We review each argument [that the arbitration agreement is unconscionable] *de novo*.").

## II. Appellants preserved their arguments for the appellate *de novo* review by raising them below.

The Appellee's contention that Appellants failed to preserve their arguments before the District Court that arbitration provision is "unenforceable on grounds it is unconscionable" is belied by the record, which manifestly shows that Appellants had consistently raised and preserved the unconscionability issue below for this Court's *de novo* review.

*First*, in their brief to the District Court (Doc. 13 at pp. 17-18), Appellants argued -- among other grounds for opposing Appellee's motion – that "they have good grounds to challenge Aflac's Arbitration Agreement on substantive and procedural unconscionability":

> Aflac's arbitration agreement (i) is unconscionably one-sided as it carves out from its scope most of the claims by Aflac against the associate -- but the associate must arbitrate any and all of her own disputes (*see* paragraph 10.1, which carves out all the material claims by Aflac ("Except for an action by Aflac to enforce the provisions contained in Paragraphs 1.4, 3, 8, 10.5 or 10.6,"); (ii) saddles the associate with arbitration costs, making arbitration financially burdensome for the associate (*see* paragraph 10.2); and (iii) is signed electronically and may have never been seen by the associate signing it, among other things. *See*, *e.g.*, *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 390-92 (E.D.N.Y. 2015). Defendants further respectfully submit that the Complaint should be dismissed based on Plaintiff's own non-compliance with the Arbitration Agreements as a threshold matter; should the Court reach the issue of the unconscionability of the Arbitration Agreements themselves, Defendants respectfully submit that its resolution should await the Supreme Court's ruling in *Epic Systems*, which may as well obviate any need to decide this issue.

*Second*, Appellants raised these very issues of unconscionability during oral argument on Appellee's motion to compel, and offered to provide the District Court with more authorities supporting their position (Doc. 21 at pp. 6-9):

> MR. JOFFE: The other argument was that the arbitration agreement itself is substantively and procedurally unconscionable. We made the point on pages 17 and 18 of our memorandum of law in footnote. So this is an additional argument that the agreement, arbitration agreement, in AFLAC's associates agreement is -- first of all, it's one-sided because it actually carves out most of the claims by AFLAC against the associate, those expressly carved out of arbitration, but the associate herself must bring all of the disputes against AFLAC through arbitration. So this is one reason it's very one-sided. Secondly --
> THE COURT: Well, let me make sure I understand that. Are you suggesting that there are claims that an associate, an AFLAC associate, would have against AFLAC that they have to bring through arbitration and through no other process, and yet the arbitration procedures do not recognize that as a viable claim?
> MR. JOFFE: No. What I'm saying is: An associate must bring any and all of associate's disputes with AFLAC to arbitration according to the arbitration agreement. AFLAC, however, doesn't have to. All of the material claims by AFLAC against associates are carved out. So the associate agreement is one – the arbitration agreement is one-sided.
> THE COURT: But you agree that there is a remedy for -- potential remedy for any claim that an associate may have in the arbitration forum.
> MR. JOFFE: Yes. The associate is limited to the arbitration forum while AFLAC is not limited --
> THE COURT: All right.
> MR. JOFFE: -- to arbitration. And there are other couple of --
> THE COURT: Have you cited any cases that support your argument of unconscionability based upon the arbitration

> agreement requiring one side to arbitrate all the claims and yet giving the other side the option not to arbitrate certain claims?
> MR. JOFFE: Your Honor, I cited one, a recent decision by Eastern District of New York. It's *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359. It's a decision by Jack Weinstein where he goes through the factors that would make an arbitration agreement substantively and procedurally unconscionable. And it deals with onesidedness[,] with the burdensome financial burden on the associate who have to pay for the arbitrator and as well as the process of signing the arbitration agreement, because now --
> THE COURT: No. I'm asking whether you have any authority on the specific question of when an arbitration agreement requires one side to arbitrate all of their claims and on the other side it allows the other party to arbitrate some claims and not arbitrate others. Do you have a case addressing that particular complaint of unconscionability?
> MR. JOFFE: Your Honor, again, I'm fairly certain that *Berkson v. Gogo* deals with that issue as well. I would be happy to provide more authorities because I know there are authorities on this issue. However, you know, I believe that this is the issue that we should reach last, because our prime argument right now is that because of the breach that AFLAC admitted, there is a technical -- well, there is a violation of the terms of the arbitration agreement itself, which disqualifies AFLAC from enforcing it.

Appellants' counsel also summed up the unconscionability argument as follows (Doc. 21 at p. 48):

> MR. JOFFE: Yes, Your Honor. Just to pick up on the last point by Ms. Cassilly, the agreement on its face carves out that AFLAC's, you know, claims against the associate under several provisions. And some of them are material. Like Ms. Cassilly mentioned, intellectual property. That's what AFLAC cares about, what else the associate could do, you know. That's the provisions, material provisions, that AFLAC doesn't have to arbitrate. And the associate has to arbitrate all the disputes, any and all. So that's one-sidedness. The other part that makes it unconscionable is that an associate has to pay arbitrator's fees.

> And then the procedural unconscionability is because the signature on it comes from electronic wrap-up contract, and the associates don't see the arbitration agreement. That is the point that we actually make in the brief.

*Third*, on their Motion for Reconsideration, Appellants focused ***solely*** on the issue of the Agreement's unconscionability and provided additional authorities supporting their positions that the Agreement is unconscionable under this Court's and other courts' precedents, including the recent *Larsen* case. *See* Doc. 18, pp. 1-5.

Appellee in response contends that to be preserved for the appellate review, arguments on appeal should mirror those at the district court level. But this is not the rule, and Appellee is simply wrong: an appellant is required to preserve the issues -- not the precise arguments. As this Court explained in *Bradshaw v. Reliance Std. Life Ins. Co.*, 707 F. App'x 599, 605 (11th Cir. 2017):

> While the manner in which Bradshaw presents her arguments on appeal is not precisely the same as it was at the district court level, ***it need not be***. ***A party may take a "new approach" to an issue preserved for appeal; she may improve how she articulated the same arguments when she was before the district court, and a good attorney often does***. "Once a federal claim is properly presented, a party can make any argument in support of that claim; ***parties are not limited to the precise arguments they made below***." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (citations omitted). ***While new claims or issues may not be raised for the first time on appeal, new arguments relating to preserved claims may***. *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 n.3

> (11th Cir. 2008) (citing *Yee*, 503 U.S. at 534). . . . ***A party is entitled to rely on new cases as long as the issues on appeal were preserved***.

*See also Tatum v. SFN Group Inc.*, 698 F. App'x 1000, 1005, n.2 (11th Cir. 2017) ("[N]ew arguments relating to preserved claims may be reviewed"); *Bartley v. Kim's Enter. of Orlando*, 568 F. App'x 827, 835, n.6 (11th Cir. 2014) (same).[3]

Moreover, the decision whether to consider an argument first made on appeal is flexible and is "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 989 (11th Cir. 1982). "In the exercise of that discretion, we may pass on issues not raised below if 'the ends of justice will best be served by doing so.'" *Id.* at 989-90 (noting that "[a]ny wrong result resting on the erroneous application of legal principles is a miscarriage of justice in some degree"). This Court has ruled that its "reluctance to consider waived legal arguments is 'merely a rule of practice,' however, and is not absolute." *Ramirez v. Secretary*, 686 F.3d 1239, 1250 (11th Cir. 2012). And the rule does not apply here, where the issues for the appellate consideration were properly preserved.

[3] Appellee's reliance on *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004) and *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) is misplaced because, unlike in those cases, Appellants here do not "argue a different case from the case . . . presented to the district court," and the district court here "had a chance to examine" the issues raised by Appellants.

Even assuming that Appellants had failed adequately to preserve their issues for the appellant review, this Court still may consider those arguments under certain circumstances. *See, e.g.*, *Reliance Std. Life Ins. Co.*, 707 F. App'x at 605 n.7 ("Even if [Appellant] had failed to properly preserve the issues she raises on appeal, we could still exercise our discretion to consider them because they involve a pure question of law"). The Court held that "[w]here an appeal involves a pure question of law, we may consider that question if we determine that a refusal to do so could result in a miscarriage of justice, that 'the proper resolution is beyond any doubt,' or that the issue involves 'significant questions of general impact or of great public concern.'" *Id*. *See also Ramirez*, 686 F3d at 1250 ("where the party seeking consideration of an argument not raised in the district court 'has raised no new factual questions' and the record 'supports its legal argument,' we have held that 'refusal to consider that argument could result in a miscarriage of justice'"). Finally, "it may be appropriate to consider an issue first raised on appeal if that issue presents significant questions of general impact or of great public concern." *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 361 (11th Cir. 1984).

Here, Appellants did not raise new factual questions in their appeal, and the record supports their legal arguments; moreover, the underlying complaint involves hundreds of thousands of Aflac's former and current sales associates subject to the same Arbitration Agreement challenged here, and the issues on appeal present

significant questions of general impact and of great public concern. Therefore, this Court should consider all Appellants' arguments concerning enforceability of Aflac's Arbitration Agreement on their merits on a *de novo* review.

## III. Appellee mostly ducks the hard questions and key concerns about the Arbitration Agreement.

Appellants argue the same procedural and substantive unconscionability issues on this appeal, with essentially the same arguments amplified by additional authorities and additional factors of the Agreement's unconscionability. In addition to those factors identified in Appellants' Initial Brief, the Agreement also severely restricts Appellants' ability to recover from Appellee (or its affiliates) in arbitration by limiting the latter's liability while leaving Appellants' own potential liability to Appellee unlimited.[4]

In *Desiderio v. NASD*, 191 F.3d 198, 207 (2d Cir. 1999), the Second Circuit 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

[4] Paragraph 10.7.1 of the Agreement provides that "with the exception of a claim that is based upon misconduct by AFLAC or any of its past or present officers, directors, employees, associates, coordinators, agents or brokers shall be limited to a claim for breach of contract and the remedies and liabilities arising thereunder." *See, e.g.*, Appx. Vol. I, Doc. 10-2, Ex. 1, p. 23. Paragraph 10.7.2 provides that the associate "shall have no right to assert any claim or action against AFLAC . . . based upon any act, error or omission of other AFLAC associates, coordinators, agents or brokers." *Id*. Nothing in the Agreement similarly limits the Appellants' liability to Appellee or its affiliates.

Appellee to be a "Complaining Party" initiating any arbitrations and only requires Appellants to arbitrate, while also leaving Appellants with a narrow subset of claims remaining under the liability limitation provisions, clearly "favor[ing] the stronger party unreasonably."

On a recent motion to compel arbitration brought by Appellee's New York subsidiary under a substantively identical Arbitration Agreement, 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). The express condition ordered by the New York Supreme Court is directly contrary to cost-allocation provision of the Arbitration Agreement itself, effectively ruling that provision unenforceable and severing it while upholding the rest of the Agreement. The New York Court's order is premised on the clear judicial recognition that the fee allocation provision of the Agreement is unenforceable as written. Nevertheless, the New York plaintiff, represented by the undersigned, intends to appeal that order as not going far enough, for several reasons.

*First*, the post-factum waiver option 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).

*Second*, in *Ragone v. Atlantic Video*, 595 F.3d 115, 125 (2d Cir. 2010), defendants waived arbitration agreements' statute of limitations and fee-shifting provisions, and the Second Circuit 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***." The Court cited *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 (1985), for the proposition that "if certain terms of an arbitration agreement served to act 'as a perspective waiver of a party's right to pursue statutory remedies . . ., we would have little hesitation in condemning the agreement as against public policy." *Ragone*, 595 F.3d at 125. The Court further noted that "[h]ad the defendants attempted to enforce the arbitration agreement as originally written it is not clear that we would hold in their favor" because in that case "it is at least possible that Ragone would be able to demonstrate that these provisions were incompatible with her ability to pursue her Title VII claims in arbitration, and therefore void under the FAA." *Id*. This is exactly the case here, where Appellee seeks to enforce its Arbitration Agreement against Appellants unconditionally and without any waivers, deterring them from effectively vindicating their federally guaranteed rights.

*Third*, 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.'"

*Finally*, the unconscionability analysis should take into account all the facts and circumstances of a particular case without focusing on one specific factor, whereas the New York Supreme Court in *Laka* focused on one particular feature of the Agreement – its fee allocation – and erroneously ignored the others. *See, e.g.*, *Brennan v. Bally Total Fitness ("Brennan II")*, 198 F. Supp. 2d 377, 384 (S.D.N.Y. 2002) ("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.").

As shown in Appellants' Initial Brief, the appealed-from decision enforced the Arbitration Agreements unconditionally, thus imposing arbitrator's fees and costs on Appellants and preventing them from effectively vindicating their federal statutory rights. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (mandatory arbitration is enforceable "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral

forum"); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000), ("[T]he existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.")

In its Response Brief, Appellee ducks the hard questions and fights with strawpersons instead, misrepresenting the facts and the law in the process. With respect to procedural unconscionability, Appellee firstly claims that "it is undisputed that Appellants signed their Associate's Agreements." Br. at 56, n.14. This claim is incorrect as a matter of fact. *Cf.* Doc. 18-1, p. 2, where Appellant Debbie Cort testified that she had never signed the Agreement: "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."

Appellee goes on to argue that Appellants' execution of the Agreements resolves all enforceability concerns, which is incorrect as a matter of law. "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 at 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); *Clotfelter v. Cabot Inv. Props., LLC*, No. 5:10-cv-235-Oc-10GRJ , 2011 U.S. Dist. LEXIS 33777, at *26 (M.D. Fla. Mar. 29, 2011) (citing *NEC Technologies v. Nelson*, 267 Ga. 390, 478 S.E. 2d 769, 771-72 (1996)) ("Procedural unconscionability addresses the process of making the contract . . . .").

Appellee's further claims that "Appellants' assertions that they were 'rushed' into signing [the Agreement] . . . are ***legally irrelevant at best***," which claim also clearly misrepresents the law. In fact, "***high pressure tactics***" coupled with superior bargaining position have been held by the courts not only as a relevant but as a determinative factor in the procedural unconscionability analysis.[5]

[5] As far as Appellee's superior bargaining position, "[t]he court will assume that the Employment Agreement was presented to plaintiff on a take-it-or-leave-it basis, with no opportunity for negotiation on plaintiff's part. Furthermore, ***employment contracts inherently involve parties of unequal bargaining power***." *Jackson v. Cintas Corp.*, No. 1:03-CV-3104-JOF, 2004 US Dist. LEXIS 31423, at *27 (N.D. Ga. Aug. 13, 2004) (citing *Watson v. Waffle House*, 253 Ga. 671, 672, 324 S.E.2d 175 (1985)). Here, this assumption is well justified: Appellee, a Fortune 150 company with a $30 Billion market capitalization, is known as "the most ethical company globally," one of "America's most admired companies," one of the "best U.S. companies to work for," and a Wall Street "Dividend Aristocrat." (In fact, this blue-chip icon derives 75% of its income from Japan, and ranks among the highest in employee attrition rate among all Fortune 500 companies. The *Business Insider* issue of July 25, 2013, reports that Aflac ranks among the highest in employee attrition rate among all of the Fortune 500 companies, second only to Mass Mutual, with Aflac's median employee tenure of 1 year (9 months at Mass Mutual). Aflac shares the second place with Amazon; however, the reported median pay at Amazon is $93,200 (and $60,000 at Mass Mutual), compared to $38,000 at Aflac.)

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

In *Brennan II*, 198 F. Supp. 2d 377, 378 (S.D.N.Y. 2002), the court concluded that "the agreement to arbitrate was unconscionable and therefore unenforceable." The court stated that "[w]hile inequality in bargaining power between employers and employees is not alone sufficient to hold arbitration agreements unenforceable, such inequality, when ***coupled with high pressure tactics that coerce an employee's acceptance of onerous terms***, may be sufficient to show that an employee lacked a meaningful choice." *Id*. at 382.

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

> During the 1998 Meeting, Infante gave the employees no more than fifteen minutes to review a sixteen-page single-spaced document, and never mentioned or suggested that the employees could review the Agreement at home or with an attorney. He threatened the employees that those would did not sign the document would not be promoted. He did not address the impact the EDRP would have on pending complaints against the company. At the end of the Meeting, he asked aloud

> whether each employee, including Brennan, had signed the Agreement. As a result of these pressure tactics, Brennan reasonably felt that she had no choice but to sign the EDRP or she would lose her job.

In this Circuit recently, the District Court in *Branco v. S. Operations LLC*, No. 17-23289-CIV, 2018 US Dist. LEXIS 121784, at *28-29 (S.D. Fla. July 19, 2018), discussed the same high-pressure tactic as a factor in the procedural unconscionability analysis there: "Although Ms. Hacker testified that she felt ***rushed*** and that Mr. Puglia told her she needed to sign the documents ***as soon as possible***, she was nonetheless provided with a week or two before she had to return the signed papers. Ms. Hernandez similarly testified that she felt ***rushed to sign*** the arbitration agreement. Mr. Puglia indicated to her she needed to sign the forms on her way out and did not give her time to read the documents. However, she did not sign the arbitration agreement right away. It was not until the day after or two days after, on March 31, 2017, that Ms. Hernandez signed the arbitration agreement. This was sufficient time for Ms. Hernandez to familiarize herself with the terms of the arbitration agreement or seek independent counsel." *See also Sierra v. Isdell*, No. 6:09-cv-124-Orl-19KRS, 2009 U.S. Dist. LEXIS 66148, at *15 (M.D. Fla. July 21, 2009) ("[T]he fact that Sierra claims to have been hurried through his review of the document is limited, but not compelling, evidence of procedural unconscionability"). Accordingly, Appellee's contention that this factor is "legally irrelevant at best" is plainly erroneous.

Moreover, Appellee pressured Appellants here into entering into the Arbitration Agreements in the same rushed manner as in *Brennan*, and did not give them the luxury of several days' worth of consideration as in *Branco*. *See*, *e.g.*, Hubbard's Affidavit at ¶¶ 6-7 (Doc. 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.)

The evidence of high pressure tactics coupled with "the considerable disparity in bargaining power" led the Court in *Brennan II* to conclude that "Brennan lacked a meaningful choice in deciding whether or not to sign the

Agreement." 198 F. Supp. 2d. at 383-84. *See also Sablosky v. Gordon Co.*, 73 N.Y.2d 133, 137 (N.Y. 1989) ("[C]laims [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.").

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

> The plaintiffs next argue that the DRP unconscionably requires that the parties not disclose transcripts from the arbitration or the arbitrator's award. In many employment claims, both sides might well prefer confidentiality. *See Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 8 n. 4 (1st Cir.1999) (observing that both sides might desire confidentiality); *see also Iberia*, 379 F.3d at 175 (same, in cellular customer-provider context). We thus agree with the Fifth Circuit that while the confidentiality agreement might be more favorable to employers (as "repeat players") than to individual employees, it is not so offensive as to be invalid. *Iberia*, 379 F.3d at 175.[6]

[6] Defendants argue that *Caley* was decided under Georgia law; in its ruling on confidentiality, however, the *Caley* Court did not cite any Georgia cases but relied on the Fifth Circuit's reasoning in *Iberia*, which applied Louisiana law. And while

*But see Larsen*, 871 F.3d at 1319 (stating that "the obvious informational advantage KeyBank holds at the outset of a dispute may therefore have the effect of discouraging consumers from pursuing valid claims," and holding the confidentiality provision unconscionable). *See also Ting v. AT&T,* 319 F3d 1126, 1151-52 (9th Cir. 2003), where the Ninth Circuit applying California law stated:

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

Appellee also argues that the "mutuality of remedy" is not required for the arbitration agreements. However, the fact that the discredited "mutuality of remedy" doctrine no longer applies to any contracts, including arbitration

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*Larsen* was indeed decided under the Washington precedent of *Zuver v. Airtouch Communications, Inc.*, 153 Wash.2d 293, 103 P.3d 753 (2004), the *Larsen* Court also stated that even though *Zuver* was not perfectly analogous to the case at bar, "[t]he court's reasoning in *Zuver* does . . . highlight a ***core public-policy concern that applies with equal force to this case***," 871 F. 3d at 1319. Appellants respectfully submit that the same concern applies to his case with no lesser force.

agreements, does not foreclose the Court's consideration of that factor in the unconscionability inquiry. As the court explained in *Cannon v. S. Atlanta Collision Ctr., LLC*, No. 1:11-CV-1030-TWT-ECS, 2012 U.S. Dist. LEXIS 39979, at *21-23 (N.D. Ga. Feb. 27, 2012), under Georgia law:

> Finding that this provision does not lack mutuality (or consideration), however, does not mean that the agreement is not defective. As previously discussed, the agreement's terms are oppressive and misleading and require that Plaintiff, the vastly weaker party in the employer-employee relationship, accept a biased dispute resolution process on a take it or leave it basis as a condition of her employment.

*See also* the New York Court of Appeals' ruling in *Sablosky*, 73 N.Y.2d at 137 (same).

## CONCLUSION

For the reasons stated in the opening brief and above, Appellants respectfully submit that the Arbitration Agreement should be invalidated in its entirety and the judgment dismissing the case should be reversed.

August 8, 2018

Respectfully Submitted,

Dimitry Joffe
(admitted *pro hac vice*)
JOFFE LAW P.C.
765 Amsterdam Ave, 2C
New York, NY 10025
917-929-1964
Dimitry@joffe.law
*Counsel for Appellants*

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 (a)(7)(B)(ii) because it contains 6,424 words, and complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). The foregoing brief was prepared using Times New Roman (14 point) proportional type.

Dated: August 8, 2018

/s/ Dimitry Joffe
Dimitry Joffe
*Counsel for Appellants*

CERTIFICATE OF SERVICE

I, Dimitry Joffe, hereby certify that on this 8th day of August 2018, I caused a copy of the Appellant's Reply Brief, accompanied by a motion for leave to file, to be sent electronically to the registered participants in this case through the ECF system.

/s/ Dimitry Joffe
Dimitry Joffe
JOFFE LAW P.C.
*Counsel for Appellants*