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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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CHAIM A. LEVIN,

Plaintiff,

- against - Index No. 100773/2005

GFI SECURITIES, L.L.C., GFI GROUP INC., GFI BROKERS L.L.C., INTER-DEALER BROKER, L.L.C., JERSEY PARTNERS INC., MICHAEL GOOCH, COLIN HEFFRON, STEPHEN McMILLAN, and DONALD P. FEWER,

Defendants.

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JOAN A. MADDEN, J.:

In this action alleging religious discrimination and retaliatory discharge, defendants move for an order: (1) pursuant to CPLR 7503 (a), staying this action and compelling arbitration of plaintiff's claims; and (2) pursuant to 22 NYCRR 130-1.1, imposing sanctions upon plaintiff and his counsel, awarding defendants their costs and attorneys' fees. Plaintiff cross-moves for an order: (1) disqualifying defendants' counsel; and (2) pursuant to 22 NYCRR 130-1.1, imposing sanctions upon defendants and their counsel, awarding plaintiff his costs and attorneys' fees.

FACTUAL ALLEGATIONS AND BACKGROUND

Plaintiff Chaim Levin and defendant GFI Group Inc., an inter-dealer brokerage firm (individually, or collectively with defendants GFI Securities, L.L.C., GFI Brokers L.L.C., Inter-Dealer Broker, L.L.C., and Jersey Partners Inc., GFI), entered into an employment agreement, effective as of July 19, 1999 (the Employment Agreement), pursuant to which GFI agreed to employ Levin as its general counsel and chief legal officer for a term of five years. GFI suspended Levin on April 15, 2002, and terminated his employment on May 6, 2002.

The Employment Agreement contains an arbitration provision which states:

> Arbitration. Any disputes or controversies arising under or in connection with this Agreement shall be settled by NASD arbitration if the matter is eligible for such arbitration and the NASD agrees to arbitrate [*sic*] otherwise all disputes or controversies arising under or in connection with this Agreement shall be settled by arbitration conducted before a panel of three arbitrators in New York, New York, under the auspices and in accordance with the rules of the American Arbitration Association then in effect.

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(Employment Agreement, ¶ 15.) On or about June 28, 2002, Levin commenced an arbitration proceeding (the NASD Arbitration) before the National Association of Securities Dealers (NASD) against four GFI-affiliated entities (the NASD Respondents), including defendants Jersey Partners Inc. and Inter-Dealer Broker, L.L.C.

Levin's statement of claim (Statement) in the NASD Arbitration alleges that Levin performed his duties as a senior executive of GFI in an exemplary manner, but that he was the innocent victim of a power struggle which developed among three senior executives -- defendants Stephen McMillan, Colin Heffron, and Donald Fewer -- who reported directly to GFI's chief executive officer, defendant Michael Gooch. In the course of that power struggle, McMillan allegedly engaged in a secret campaign to discredit and isolate Levin, and to terminate his employment, because: Levin was too close to Gooch and/or to McMillan's rivals; Levin had become aware of certain improprieties committed by McMillan, and McMillan was concerned that Levin might disclose those improprieties to outside investors or regulators; and McMillan wanted exclusive control over decisions and responsibilities which had previously been assigned to Levin.

The Statement alleges that the Employment Agreement was amended by a hand-written addendum, which was initialed by Gooch on the same day that he and Levin executed the Employment Agreement. According to the Statement, McMillan succeeded in his secret campaign against Levin, to the extent that Levin was deprived of certain of the rights and responsibilities guaranteed to him under the Employment Agreement and the purported addendum. The Statement alleges that McMillan successfully pressured GFI into suspending Levin, and terminating his employment, without any legitimate cause. According to the Statement, GFI originally suspended Levin on the basis of tardiness and other attendance-related issues. Only later, the Statement alleges, did GFI claim that Levin had been suspended, and was being terminated, because Gooch's initials on the purported addendum to the Employment Agreement were forged, and because Levin was seeking to enforce contractual rights, derived from the purported addendum, which he did not actually have. The Statement asserts claims for breach of contract, conspiracy, tortious interference

with contract, and intentional infliction of emotional distress.

In their answer to Levin's Statement, the NASD Respondents assert that GFI was entitled to terminate Levin "for cause," under subparagraph 10 (B) (iii) of the Employment Agreement, because Levin: (1) acted dishonestly, by (a) forging Gooch's initials on the purported addendum, (b) falsely representing that the purported addendum and a second addendum were valid amendments to his Employment Agreement, and (c) falsely representing that the purported addendums guaranteed him, inter alia, the right to select GFI's outside counsel, a bonus of between $100,000 and $200,000 for 2001, and larger bonuses in 2002 and 2003; and (2) refused to follow Gooch's instruction to complete a questionnaire, attached to the letter notifying Levin of his suspension, which was intended to aid GFI in its investigation of Levin's conduct. The NASD Respondents' answer in the NASD Arbitration asserts counterclaims against Levin for breach of fiduciary duty, breach of the duty of loyalty, fraud, breach of contract, and unjust enrichment.

The NASD Arbitration has apparently been adjourned several times, and, according to defendants' counsel, hearings in that proceeding are scheduled to continue at least until mid-November 2005 (*see* Asen Reply Affid., ¶ 3).

On or about August 5, 2002, Levin filed suit against GFInet inc., another GFI affiliate, in the United States District Court for the Southern District of New York, seeking to enforce the terms of a stock option agreement. The complaint in that action alleges, again, that GFI terminated Levin without justification, and despite his excellent job performance, because he was the victim of an internal power struggle. The judge in the federal action transferred the case to a suspense docket, finding that the action could neither be tried, nor otherwise terminated, pending resolution of the NASD Arbitration (*see Levin v GFInet inc.*, US Dist Ct, SD NY, Apr. 1, 2003, Cedarbaum, J., 02 Civ 6242).

Levin commenced this action on January 19, 2005. The complaint alleges that, beginning in the spring of 2000 and continuing until the termination of Levin's employment, defendants discriminated against him on the basis of his Jewish religious affiliation by: (1) excluding Levin

from meetings of GFI's senior executive committee, in that defendants allegedly scheduled the meetings for times that would interfere with Levin's observance of Jewish religious holidays, and rejected his requests to reschedule the meetings[1]; (2) failing to respond to his objection, at a senior committee meeting in December 2000, to the use of the terminology "Christmas party," rather than "holiday party"; (3) making no attempt to address the religious observance of Chanukah, or of any holiday other than Christmas; (4) maliciously interfering with his religious observance of Rosh Hashanah, in September 2001, by "beeping" his pager, merely to convey non-emergency information, while he was praying at his synagogue; (5) maliciously interfering with his religious observance of Yom Kippur, approximately one week later, by again "beeping" his pager, merely to convey non-emergency information, while he was praying at his synagogue; and (6) failing, in response to several complaints filed by him with GFI's human resources department, and in violation of GFI's own stated policies, to undertake any investigative or corrective action whatsoever regarding the two preceding incidents.

Defendants allegedly further discriminated against Levin because of his Jewish religion, and retaliated against him for his objections to their discriminatory actions, by repeatedly excluding him from senior executive committee meetings, excluding him from participation in a number of significant corporate transactions, preventing him from participating meaningfully in the selection of outside counsel for one of the most important transactions in GFI's history, preventing him from attending any GFI board of directors meetings, and reducing the amount of his bonuses. According to the complaint, defendants terminated Levin's employment, among other things, because he missed work to observe Jewish holidays, and as a means of retaliating against him for complaining about GFI's discriminatory conduct.

The complaint asserts five causes of action, alleging: (1) discrimination on the basis of religion, in violation of the New York State Human Rights Law (the NYSHRL) (Executive Law §

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[1]The senior executive committee was allegedly comprised of Gooch, Heffron, McMillan, Fewer, and Levin.

290 *et seq.*); (2) retaliation, in violation of the NYSHRL; (3) the aiding and abetting of religious discrimination, in violation of the NYSHRL; (4) discrimination on the basis of religion, in violation of the New York City Human Rights Law (the NYCHRL) (Administrative Code of City of NY § 8-101 *et seq.*); and (5) retaliation, in violation of the NYCHRL. The claims seek back pay, reinstatement or "front pay," punitive damages, and the appointment of a monitor to review GFI's practices relating to discrimination and retaliation, and to implement practices reasonably necessary to remedy past, and prevent future, discriminatory and retaliatory practices.

DISCUSSION

The branch of defendants' motion which seeks to compel Levin to arbitrate the claims asserted by him in this action is granted.

The arbitration provision contained in the Employment Agreement is governed by the Federal Arbitration Act (the FAA) (9 USC § 1 *et seq.*), because the FAA applies to "any contracts involving interstate commerce, including employment contracts other than those involving federal transportation workers" (*Matter of Ayco Co., L.P. v Walton*, 3 AD3d 635, 636 [3d Dept 2004] [citations omitted]; *see also Equal Empl. Opportunity Commn. v Waffle House, Inc.*, 534 US 279, 289 [2002] [stating that "[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the FAA"]; *Matter of Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 NY2d 173, 180 [1995] [stating that "[u]nder settled law, the arbitration of disputes concerning employment in the securities industry ... are governed by the [FAA]").

The FAA creates a "body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]" (*Moses H. Cone Mem. Hosp. v Mercury Constr. Corp.*, 460 US 1, 24 [1983]), which "governs [the] issue [of arbitrability] in either state or federal court" (*Blimpie Intl., Inc. v D'Elia*, 277 AD2d 69, 70 [1st Dept 2000] [citation and internal quotation marks omitted]). "Whether a dispute is arbitrable comprises two questions: (1) whether there exists a valid agreement to arbitrate at all under the contract in question and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement"

(*Hartford Acc. and Indem. Co. v Swiss Re. Am. Corp.*, 246 F3d 219, 226 [2d Cir 2001] [citation and internal quotation marks omitted]). Levin does not dispute that the Employment Agreement contains a valid arbitration agreement. Thus, the only question before this court is whether Levin's claims fall within the scope of the arbitration provision.

Although the FAA does not require parties to arbitrate when they have not agreed to do so, "federal policy strongly favors arbitration as an alternative dispute resolution process" (*David L. Threlkeld & Co., Inc. v Metallgesellschaft Ltd. (London)*, 923 F2d 245, 248 [2d Cir 1991]). Accordingly, courts should "construe arbitration clauses as broadly as possible" (*id.* at 250 [citation and internal quotation marks omitted]), and any doubt or ambiguity as to the scope of an arbitration clause should be resolved in favor of arbitration (*see Mastrobuono v Shearson Lehman Hutton, Inc.*, 514 US 52, 62 n 8 [1995]; *Matter of PricewaterhouseCoopers LLP v Rutlen*, 284 AD2d 200, 200 [1st Dept 2001]). Where an arbitration clause is broad, rather than narrow, there is a "presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" (*Bank Julius Baer & Co., Ltd. v Waxfield Ltd.*, 424 F3d 278, 284 [2d Cir 2005] [citation and internal quotation marks omitted]); "arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it" (*Vera v Saks & Co.*, 335 F3d 109, 117 [2d Cir 2003] [citation and internal quotation marks omitted]; *see also Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 126 [1st Dept 2002]).

The arbitration provision contained in the Employment Agreement, which provides for the arbitration of "[a]ny [and all] disputes or controversies arising under or in connection with this Agreement," is a "prototypical broad arbitration provision" (*see Oldroyd v Elmira Sav. Bank, FSB*, 134 F3d 72, 76 [2d Cir 1998]). Accordingly, "[i]n determining whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the factual allegations in the complaint rather than the legal causes of action asserted," and "[i]f the allegations underlying the claims 'touch matters' covered by the parties' [contract], then those claims must be arbitrated,

whatever the legal labels attached to them" (*id.* at 77 [citation and internal quotation marks omitted]; *see also Paramedics Electromedicina Comercial, Ltda. v GE Medical Sys. Info. Tech., Inc.*, 369 F3d 645, 654 [2d Cir 2004]).

Levin's claims in this action clearly fall within the scope of the broad arbitration clause contained in the Employment Agreement, and must be arbitrated, because the allegations underlying those claims "touch matters" covered by the Employment Agreement (*see e.g. Oldroyd v Elmira Sav. Bank, FSB*, 134 F3d at 76-77 [holding that the plaintiff's retaliatory discharge claim fell within the scope of a clause which made arbitrable "[a]ny dispute, controversy or claim arising under or in connection with" the plaintiff's employment agreement]; *Gateson v ASLK-Bank, N.V./CGER-Banque S.A.*, 1995 WL 387720, *2, *5 [SD NY, June 29, 1995] [holding that the plaintiff's discrimination claims, including those alleging violations of the NYSHRL and the NYCHRL, fell within the scope of a clause which made arbitrable "[a]ny controversy arising out of or relating to [the plaintiff's employment agreement] or the breach [thereof]"]).

The complaint alleges that defendants discriminated and retaliated against Levin, inter alia, by: (1) excluding him from senior executive committee meetings; (2) preventing him from participating in the selection of GFI's outside counsel; (3) preventing him from supervising legal personnel and others assigned to GFI's law division; and (4) reducing the amount of his bonuses (*see* Complaint, ¶ 114). Yet Levin sent an e-mail to Gooch, dated January 30, 2002, in which he represented that his contract with GFI -- which Levin claimed consisted of the Employment Agreement and the two purported addenda -- provided: (1) "'Part of Executive/Mgmt'. This provision was to ensure that I participate in all senior executive committees and meetings"; (2) "responsible for selection of outside counsel ..."; (3) "supervise ... all legal work and legal related personnel globally"; and (4) "Bonus is $50,000 guaranteed plus 'Bonus guaranteed @ 100-200 for first 3 yrs, last 2 yrs higher ... In other words during the first 3 years the average year-end bonus (excluding the $50,000 paid at the mid-year anniversary date) is to be $100-200,000 ..." (Pintoff Affid., Ex. B; *see also* Complaint, ¶¶ 80-82). Thus, the complaint alleges that defendants

discriminated and retaliated against Levin many instances, precisely by violating or infringing upon rights which he claims were guaranteed to him under his Employment Agreement, as allegedly amended by one or both of the purported addenda.

Accordingly, the question of whether defendants discriminated against Levin cannot be resolved apart from the issues of whether he had any entitlement to the allegedly violated rights under the Employment Agreement and the purported addenda, and whether the Employment Agreement was, in fact, amended by either or both of the purported addenda. Whether defendants' conduct had a discriminatory and retaliatory animus cannot be resolved without consideration of defendants' alternative explanation for their conduct, i.e., that Levin exhibited attendance-related problems, disobeyed his superior, and engaged in dishonest conduct which entitled them to terminate his employment "for cause," under subparagraph 10 (B) (iii) of the Employment Agreement.[2] Indeed, if Levin's allegations of discrimination and retaliation are valid, GFI would presumably have breached paragraphs 2, 3, 6, and 10 of the Employment Agreement, by terminating his employment without cause, and by refusing to pay him the remainder of the compensation and benefits due him under the five-year agreement.

Finally, even the various forms of relief sought in the complaint -- including back pay, "front pay," and/or reinstatement -- clearly "touch matters" covered by the Employment Agreement. Any monetary damages of the types specified could only be calculated based upon the provisions of paragraph 3 of the Employment Agreement, which is labeled "Compensation." Levin's entitlement to any such damages, and/or to reinstatement, would require a determination as to whether GFI was entitled to terminate his employment "for cause" under the Employment Agreement.

Levin asserts various arguments in support of his contention that the claims alleged in the

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[2]Even the question of whether Levin's attendance was satisfactory would appear to "touch matters" covered by the Employment Agreement, since Levin represented, in his January 30, 2002 e-mail to Gooch, that the Employment Agreement, as amended by the two purported addenda, provided for "'hrs: 10-6' (Working day to start at 10am and to conclude at or after 6pm as ... warranted" (Pintoff Affid., Ex. B).

complaint do not fall within the scope of the arbitration clause contained in the Employment Agreement, but all of those arguments are without merit. First, Levin argues that his statutory claims based upon discrimination and retaliation are not encompassed within the scope of the arbitration clause because the clause does not expressly state that such claims must be arbitrated. However, broad arbitration clauses have repeatedly been held to encompass statutory claims, based upon discrimination and retaliation, which were not specifically referred to in those arbitration clauses (*see Rajjak v McFrank and Williams*, 2001 WL 799766, *2-*3 [SD NY, July 13, 2001] [collecting cases]).

Second, as a corollary to the foregoing argument, Levin argues that his statutory discrimination and retaliation claims cannot be arbitrated by the NASD, because: (1) the arbitration clause provides that an otherwise arbitrable dispute shall be arbitrated by the NASD only "if the matter is eligible for such arbitration and the NASD agrees to arbitrate"; (2) NASD Rule 10201 (b) provides that a claim alleging employment discrimination in violation of a statute "may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose"; and (3) the rule has been construed to require an express and specific agreement to arbitrate such discrimination claims, whereas the arbitration clause contained in the Employment Agreement makes no express or specific reference to discrimination claims. However, even assuming the truth of Levin's contentions with respect to NASD Rule 10201 (b), merely arguendo, Levin has articulated no reason why arbitration of his discrimination claims would not still be required, pursuant to the second part of the parties' arbitration provision, which provides that, "otherwise" -- i.e., with respect to disputes or controversies which do not satisfy the aforementioned conditions for NASD arbitration -- "all disputes or controversies arising under or in connection with this Agreement shall be settled by arbitration conducted before a panel of three arbitrators in New York, New York, under the auspices and in accordance with the rules of the American Arbitration Association [the AAA] then in effect."[3]

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[3]Levin asserts that consolidation of this proceeding with the NASD Arbitration would be inappropriate on several other grounds, as well, but none of those grounds presents a reason for disregarding the arbitration provision's contemplation of the possibility that arbitration might take

Third, Levin argues that the general arbitration provision contained in the Employment Agreement cannot be construed to encompass statutory discrimination claims, because any agreement to waive the right to litigate such claims in a judicial forum must be clear and unequivocal, and because a general arbitration clause does not constitute such a clear and unequivocal waiver. However, Levin's argument based upon a "clear and unequivocal" standard is ill-founded. It has been held, in cases involving union-negotiated collective bargaining agreements, that a general arbitration clause does not automatically waive an employee's right to bring statutory discrimination claims in a judicial forum, because the waiver of such a right "must be 'clear' and 'unequivocal' in order to be enforceable" (*Ahing v Lehman Bros.*, 2000 WL 460443, *5 [SD NY, Apr. 18, 2000]; *see e.g. Wright v Universal Mar. Serv. Corp.*, 525 US 70, 80 [1998]; *Conde v Yeshiva Univ.*, 16 AD3d 185, 186 [1st Dept 2005]). However, where an individual personally negotiates and executes an agreement containing an arbitration clause, as in the present case, the "clear and unequivocal" standard -- or, as it has also been called, the "clear and unmistakable" standard -- does not apply, and the arbitration clause need not specifically refer to statutory discrimination claims in order to encompass, and be enforceable as to, such claims (*see Ahing v Lehman Bros.*, 2000 WL 460443, at *5; *see also Wright v Universal Mar. Serv. Corp.*, 525 US at 80-81 [distinguishing that Court's prior holding in *Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20 (1991), on the ground that that case had "involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees, and hence the 'clear and unmistakable' standard was not applicable"]; *Interstate Brands Corp. v Bakery Drivers & Bakery Goods Vending Machs., Local Union No. 550*, 167 F3d 764, 767 [2d Cir], *cert denied* 528 US 822 [1999]).

Fourth, Levin argues that the individual defendants -- Gooch, Heffron, McMillan, and Fewer

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place before either the NASD or the AAA. For their part, defendants profess to be willing to arbitrate Levin's discrimination and retaliation claims in either forum, at Levin's option (*see* Def. Reply Mem. of Law, at 4, 5, 9). Levin's agreement with GFI to arbitrate his claims before the NASD, if he chose to so agree, would presumably remove the obstacle to arbitration in that forum which, he claims, is presented by NASD Rule 10201 (b).

-- are not entitled to the benefit of the arbitration provision, so as to be entitled to compel arbitration of Levin's claims against them. However, in cases dealing with arbitration agreements governed by the FAA, "Federal courts have consistently afforded agents the benefit of arbitration agreements entered into by their principals to the extent that the alleged misconduct relates to their behavior as officers or directors or in their capacities as agents of the corporation" (*Hirschfeld Prods., Inc. v Mirvish*, 88 NY2d 1054, 1055-1056 [1996]). Accordingly, Gooch, Heffron, McMillan, and Fewer are entitled to demand arbitration of Levin's claims against them, although they were not named parties or signatories to the Employment Agreement, because the claims against them arise both: (1) under or in connection with the Employment Agreement, "thus falling squarely within the scope of the arbitration clause"; and (2) out of their actions as GFI's officers and/or agents in connection with the Employment Agreement (*Gateson v ASLK-Bank, N.V./CGER-Banque S.A.*, 1995 WL 387720, at *5; *see also Brener v Becker Paribas, Inc.*, 628 F Supp 442, 451 [SD NY 1985]).

Levin contends that the individual defendants are being sued for their own misconduct, and not for misconduct arising from their role as agents of GFI. However, Levin's claims allege discriminatory and retaliatory conduct by the individual defendants which is employment-related. Accordingly, the alleged misconduct sufficiently relates to the individual defendants' behavior in their capacities as GFI's officers and/or agents, such that the individual defendants are entitled to demand arbitration of the claims against them no less than GFI is entitled to demand arbitration of the claims against it (*see DiBello v Salkowitz*, 4 AD3d 230, 232 [1st Dept 2004]).

Fifth, Levin argues that he should not be compelled to arbitrate his discrimination and retaliation claims before the AAA, because such an arbitration would be prohibitively expensive. However, even assuming that the AAA were the only available arbitral forum (which it is not), Levin has failed to satisfy his burden of making a sufficiently particularized showing that arbitration of his claims before the AAA would be prohibitively expensive. "[W]here, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs" (*Green Tree Fin.*

Corp.-Alabama v Randolph, 531 US 79, [2000]). Levin cites various costs and fees which he would allegedly be required to pay for the arbitration of his claims before the AAA. However, he has failed to offer any evidence concerning his ability to pay those costs and fees, or concerning the expected cost differential between arbitration and litigation in court, which would support a determination that the cost differential was so substantial as to deter his pursuit of his claims in arbitration before the AAA (*see In re Currency Conversion Fee Antitrust Litig.*, 265 F Supp 2d 385, 411 [SD NY 2003]; *Stewart v Paul, Hastings, Janofsky & Walker*, LLP, 201 F Supp 2d 291, 293-294 [SD NY 2002]). In the absence of such a particularized showing that arbitration before the AAA would, in fact, be prohibitively expensive, the mere "'risk' that [Levin] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. To invalidate the agreement on that basis would undermine the 'liberal federal policy favoring arbitration agreements'" (*Tsadilas v Providian Natl. Bank*, 13 AD3d 190, 191 [1st Dept 2004] [quoting *Green Tree Fin. Corp.-Alabama v Randolph*, 531 US at 91]).

Moreover, Levin will not now be heard to complain that a separate proceeding to arbitrate his discrimination and retaliation claims before the AAA would be cost prohibitive -- or to complain, as he also does, that such a proceeding would result in additional delay, inasmuch as he will have to redraft his pleadings to conform with AAA requirements -- when he could presumably have avoided both of those purported difficulties by asserting his discrimination and retaliation claims in a single consolidated proceeding with his other claims before the NASD. Thus, for the foregoing reasons, the branch of defendants' motion which seeks to stay this action and to compel arbitration is granted.

The branch of Levin's cross motion which seeks to disqualify defendants' counsel, Epstein Becker & Green, P.C. (EBG), is denied. Levin argues that EBG should be disqualified from representing defendants in the matter of his discrimination and retaliation claims[4] because EBG

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[4]The papers in support of Levin's cross motion repeatedly ask the court to disqualify EBG from representing defendants in "this matter," without expressly stating what those words are intended to mean. However, a contextual reading indicates that Levin is cross-moving to disqualify

attorneys, including primarily Lauri Rasnick, previously counseled him with respect to issues relating to those claims.

Levin alleges that he first came to know Rasnick when they worked together at the law firm then named Parker Chapin, LLP (Parker Chapin), on matters introduced to that firm by him, and she allegedly became his personal friend and confidant. Rasnick left Parker Chapin to work for EBG and, shortly thereafter, Levin left Parker Chapin to join GFI. GFI allegedly had no relationship with EBG until Levin, as GFI's general counsel, engaged EBG to represent GFI with respect to various employment and labor matters. Levin alleges that his close relationship with Rasnick continued after he joined GFI, and that he sought her counsel and advice with respect to matters including: the interpretation and application of the Employment Agreement and the disputed addendum(s); the allegedly discriminatory practices perpetrated by defendants against him; how to address the inadequacies of GFI's human resources department, which allegedly permitted discriminatory conduct; and how to address defendants' repeated violations of his rights.

Levin alleges that, through Rasnick, he met other attorneys at EBG, including Ronald Green, defendants' lead attorney in this action. Levin further alleges that he sought the advice and counsel of other EBG attorneys, through Rasnick, with respect to the discriminatory practices allegedly perpetrated by defendants against him. According to Levin, his relationship with Rasnick and EBG

EBG from representing defendants in the matter of his discrimination and retaliation claims -- regardless of whether those claims are pursued in a judicial or arbitral forum -- and the court addresses the cross motion as a request for that relief, and not for disqualification of EBG from representing defendants, or entities related to them, in either the NASD Arbitration or the proceeding in the U.S. District Court for the Southern District of New York.

A party seeking to disqualify counsel from representing an opposing party in an arbitration proceeding is, in any event, required to seek that relief in a judicial proceeding rather than before the arbitrator (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Benjamin*, 1 AD3d 39, 44 [1st Dept 2003] [stating that issues of attorney disqualification cannot be left to determination by arbitrators, because they "involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules," and are "intertwined with overriding public policy considerations" (citation and internal quotation marks omitted)]; *Bidermann Indus. Licensing, Inc. v Avmar N.V.*, 173 AD2d 401, 402 [1st Dept 1991]).

became so close that he sought EBG's advice even with respect to personal matters involving his family business. Levin asserts that he had an attorney-client relationship with EBG. However, Levin claims that disqualification is warranted even if no attorney-client relationship existed, because he had a fiduciary relationship with EBG, and because he imparted confidential and secret information to EBG, which was substantially related to the issues that are the subject of this action.

Levin identifies three EBG attorneys by name, including Rasnick, all of whom have submitted statements denying that they were ever advised by Levin that he was subjected to discriminatory treatment during his employment with GFI.

A party moving to disqualify its adversary's attorney on the ground that there is a conflict between the current representation and the attorney's former representation of the movant bears the burden of establishing "that there was an attorney-client relationship between the moving party and opposing counsel, that the matters involved in both representations are substantially related, and that the interests of the present client and former client are materially adverse" (*Jamaica Pub. Serv. Co., Ltd. v AIU Insurance Co.*, 92 NY2d 631, 636 [1998]). Here, notwithstanding Levin's conclusory assertions to the contrary, he has failed to establish that he had a prior attorney-client relationship with EBG, in which EBG represented him with respect to matters substantially related to his discrimination and retaliation claims.

In order to satisfy the "substantial relationship" test, the movant must establish that the issues in the present litigation are "identical to" or "essentially the same as" those involved in the prior representation (*see Lightning Park, Inc. v Wise Lerman & Katz, P.C.*, 197 AD2d 52, 55 [1st Dept 1994]). Thus, in the present case, Levin would need to establish that EBG previously represented him not merely with respect to family business matters, but that EBG represented him specifically in connection with the matter of defendants' allegedly discriminatory and retaliatory conduct. However, it appears that, at the time when defendants allegedly engaged in their discriminatory and retaliatory conduct against Levin, EBG was acting as counsel to GFI.

"Unless ... parties have expressly agreed otherwise in the circumstances of a particular matter,

a lawyer for a corporation represents the corporation, not its employees" (*Talvy v American Red Cross in Greater New York*, 205 AD2d 143, 149 [1st Dept 1994], *affd* 87 NY2d 826 [1995]; *see also Polovy v Duncan*, 269 AD2d 111, 112 [1st Dept 2000]). Levin has offered no evidence: that he ever entered into any retainer agreement with EBG; that he ever paid EBG any fee for its services; that he ever consulted EBG with respect to any contemplated litigation against any of the defendants; or that there was ever any form of express agreement, with respect to any matter whatsoever, that EBG represented him rather than GFI. Any merely subjective and unilateral belief on Levin's part that EBG was representing him did not confer upon him the status of client (*see Jane St. Co. v Rosenberg & Estis, P.C.*, 192 AD2d 451, 451 [1st Dept 1993]). Thus, no attorney-client relationship existed between Levin and EBG, such that disqualification could be warranted on the basis of EBG's prior representation of Levin with regard to a matter substantially related to the present litigation.

Alternatively, Levin asserts that disqualification of EBG is warranted, even in the absence of a formal attorney-client relationship, because he and EBG had a fiduciary relationship, and because he imparted secret and confidential information to EBG which was substantially related to the issues that are the subject of this action. Courts considering whether to disqualify an attorney based upon the attorney's prior receipt of confidential information substantially related to a present litigation have generally required that the prior disclosure of the purportedly confidential information must have been in the context of an attorney-client relationship (*see e.g. Jamaica Pub. Serv. Co., Ltd. v AIU Insurance Co.*, 92 NY2d at 636 [discussing DR 5-108 (A) (2)'s "bar against disclosure or use of a former ***client's*** confidences and secrets," and quoting DR 4-101 (A), which provides that "'[c]onfidence' refers to information protected by the ***attorney-client*** privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the ***client*** has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the ***client***" (emphasis added)]).

In the absence of an attorney-client relationship, courts have ordinarily found disqualification of an attorney to be appropriate, on the ground that the party moving for disqualification had

previously communicated secret or confidential information to that attorney, only where that party had a reasonable basis to expect, at the time when the disclosure was made, that the attorney would maintain the confidentiality of the information (*see generally Blue Planet Software, Inc. v Games Intl., LLC*, 331 F Supp 2d 273, 276-277 [SD NY 2004]). Levin had no such reasonable basis for any expectation of confidentiality under the circumstances here alleged. As an attorney with substantial experience in commercial, employment, and labor matters, Levin could not have been unaware of the fact that EBG represented GFI, his employer. He had no reason to believe that his communications with EBG would not be shared with GFI, the client which was paying for EBG's services. As the Appellate Division, First Department, noted, in denying a motion for attorney disqualification:

> Other courts, faced with similar disqualification motions, based on a former employee's claim that his communications with the employer's counsel, while he was employed, were confidential, thus preventing the employer's counsel from representing it in a matter adverse to the former employee, have routinely rejected such claims. In each case, the court held that the former employee could not reasonably believe that his communications with the employer's attorney would be kept from the employer.

(*Talvy v American Red Cross in Greater New York*, 205 AD2d at 150 [collecting cases].)

Levin has also failed to demonstrate that he communicated to EBG any specific confidential information that is substantially related to the present litigation. Levin declines to identify any such information, asserting that "it would be inappropriate for [him] to divulge the confidential and privileged discussions [he] had with EBG ..." (*see* Levin Reply Affirm., ¶ 4; *see also* Levin Affid., ¶ 14). However, his conclusory and generalized allegations that he has disclosed confidential information to EBG are insufficient to justify disqualification (*see Dillon v Valco Am. Corp.*, 14 AD3d 589, 589-590 [2d Dept 2005]). The branch of Levin's cross motion which seeks to disqualify EBG is accordingly denied, inasmuch as Levin has failed to establish either that there was any attorney-client relationship between him and EBG, or, alternatively, that EBG "received confidential information from [him], substantially related to this action, under circumstances in which [he] had the right to believe that [EBG], as attorneys, would respect such confidences"(*Cutner & Assoc., P.C.*

v Kanbar, 300 AD2d 157, 157 [1st Dept 2C].

The branch of defendants' motion which seeks the imposition of sanctions against Levin and his counsel, and the branch of Levin's cross motion which seeks the imposition of sanctions against defendants and their counsel -- in each case, in the form of an award of costs and attorneys' fees -- are both denied. Defendants assert that sanctions are warranted against Levin and his attorneys because their maintenance of this action is completely without merit in law, is intended merely to harass and maliciously injure defendants, and was continued after defendants' counsel had brought the action's lack of legal merit to the attention of Levin's counsel. Levin asserts that sanctions are warranted against defendants and their counsel because they refused to withdraw their motion after Levin's counsel had advised defendants' counsel of the motion's lack of legal merit, and because they have asserted arguments in support of their motion which are irrelevant to the motion, and both factually and legally incorrect. However, defendants on their motion, and Levin on his cross motion, have failed to establish that the conduct of the opposing party and opposing counsel rises to the level of frivolous conduct, as that term is defined in 22 NYCRR 130-1.1 (c).

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED and ADJUDGED that defendants' application to stay this action and to compel arbitration is granted, this action is stayed, and the parties are directed to proceed to arbitration forthwith-- in accordance with paragraph 15 of the "Employment Agreement," dated and effective as of July 19, 1999, which was entered into by plaintiff Chaim Levin and defendant GFI Group Inc. -- with respect to the claims asserted by plaintiff in this action; and it is further

ORDERED that defendants' application is denied to the extent that it seeks to impose costs and sanctions on plaintiff and his attorneys; and it is further

ORDERED that plaintiff's cross motion to disqualify defendants' counsel and to impose sanctions is denied.

Dated: November 18 ,2005

J.S.C.

Clerk