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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN SULLIVAN, an individual and  
WHOLESALE WOODFLOOR  
WAREHOUSE, a Nevada corporation,

Plaintiffs,

v.

LUMBER LIQUIDATORS, INC. a Delaware  
corporation,

Defendant.

No. C-10-1447 MMC

**ORDER DENYING DEFENDANT’S  
MOTION TO DISMISS; GRANTING  
DEFENDANT’S ALTERNATIVE MOTION  
TO STAY; STAYING ACTION PENDING  
RESOLUTION OF ARBITRATION;  
VACATING MAY 28, 2010 HEARING**

Before the Court is defendant Lumber Liquidators, Inc.’s (“Lumber Liquidators”),  
Motion to Dismiss or, in the Alternative, to Stay Pending Arbitration, filed April 22, 2010.  
Plaintiffs Kevin Sullivan (“Sullivan”) and Wholesale Woodfloor Warehouse have filed  
opposition, to which Lumber Liquidators has replied. Having read and considered the  
papers filed in support of and in opposition to the motion, the Court deems the matter  
appropriate for determination on the parties’ written submissions, hereby VACATES the  
May 28, 2010 hearing, and rules as follows.

**BACKGROUND**

This case involves a dispute over a family business. Sullivan’s eldest brother, Tom  
Sullivan, is the founder and chairman of Lumber Liquidators, a publicly traded company

1 with approximately 195 retail stores located throughout the United States. (See FAC ¶ 5.)  
2 Sullivan was an employee of Lumber Liquidators from 1997 until December 11, 2008. (See  
3 Declaration of Kevin H. Sullivan (“Sullivan Decl.”) ¶ 2.)

4 In 1998, Sullivan and Lumber Liquidators executed a stock option agreement. (See  
5 FAC ¶ 8.) A dispute over the terms of the 1998 stock option agreement resulted in a  
6 mediation between the parties in 2005. (See FAC ¶ 8). The mediation, in turn, resulted in  
7 Sullivan and Lumber Liquidators’ entering into a Confidential Release and Settlement  
8 Agreement (“the Settlement Agreement”) on August 1, 2005. (See id.; see also Declaration  
9 of Farhad Aghdami (“Aghdami Decl.”) ¶ 2.) In conjunction with the Settlement Agreement,  
10 Sullivan and Lumber Liquidators also entered into (1) an Employment, Confidentiality, and  
11 Non-Competition Agreement (the “Employment Agreement”) (see Declaration of E.  
12 Livingston B. Haskell, filed April 22, 2010, (“Haskell Decl.”) ¶ 3, Ex. 1A ) and (2) a Stock  
13 Option Agreement (the “Option Agreement”) (see Haskell Decl. ¶ 3, Ex. 1B). The  
14 Settlement Agreement, the Employment Agreement, and the Option Agreement all contain  
15 choice-of-law provisions, selecting the law of the Commonwealth of Massachusetts, and  
16 provide for arbitration in Boston, Massachusetts. (See Haskell Decl. ¶ 5, Ex. 1 ¶¶ 9, 10; id.  
17 Ex. 1A ¶ 18, Ex. 1B ¶ 17.)

18 The Employment Agreement prohibits Sullivan from (1) competing directly with  
19 Lumber Liquidators for a period of two years following the end of his employment with  
20 Lumber Liquidators (see Haskell Decl. Ex. 1A ¶ 7), (2) inducing Lumber Liquidators’  
21 employees to terminate their relationships with Lumber Liquidators (see Haskell Decl. Ex.  
22 1A ¶ 6(b)), and (3) using, disclosing, or copying confidential information (see Haskell Decl.  
23 Ex. 1A ¶ 8). Additionally, the Employment Agreement contains an express provision (“the  
24 Arbitration Provision”) that all disputes “arising out of or concerning the interpretation or  
25 application of” said Agreement “shall be resolved timely and exclusively by final and binding  
26 arbitration.” (See Haskell Decl. Ex. 1A ¶ 18.) Sullivan was represented by his own counsel  
27 for the mediation as well as the negotiation and execution of the Settlement Agreement, the  
28 Employment Agreement, and the Option Agreement. (See Affidavit of E. Livingston B.

1 Haskell, filed May 14, 2010 (“Haskell Aff.”) ¶ 5; see also Aghdami Decl. ¶¶ 6-11, Exs. 1, 2.)

2 In December 2007, after Lumber Liquidators’ initial public offering of its stock,  
3 Sullivan demanded arbitration with Lumber Liquidators in Boston, Massachusetts, over a  
4 dispute regarding the amount of compensation he was due under the Option Agreement.  
5 (See Haskell Aff. ¶ 7.) In 2008, Sullivan filed a civil lawsuit against Lumber Liquidators and  
6 several of its executives in Massachusetts Superior Court. (See Haskell Aff. ¶ 8.) The  
7 substance of Sullivan’s civil suit was later added to the arbitration. (See id.) At the  
8 conclusion of the arbitration, the arbitrator awarded Sullivan an after-tax total of 529,027  
9 shares of Lumber Liquidators stock, which shares are currently worth over \$15 million.  
10 (See Haskell Aff. ¶ 9.)

11 On December 11, 2008, Lumber Liquidators terminated Sullivan’s employment.  
12 (See Declaration of Robert Morrison (“Morrison Decl.”) ¶¶ 13-15.) On the day of his  
13 termination, Sullivan refused to return his company-issued laptop. (See Morrison Decl. ¶¶  
14 16-21.) According to Lumber Liquidators, Sullivan later returned the laptop but copied its  
15 contents before doing so. (See Morrison Decl. ¶ 23.) Thereafter, on January 20, 2009,  
16 Sullivan founded a retail flooring business known as Wholesale Woodfloor Warehouse,  
17 which directly competes with Lumber Liquidators. (See Sullivan Decl. ¶ 7, Exs. B, C).  
18 Wholesale Woodfloor Warehouse is a Nevada Corporation that presently operates retail  
19 stores in Long Beach and Sacramento, California. (See FAC ¶ 3.)

20 On March 5, 2010, Lumber Liquidators filed an arbitration demand with the American  
21 Arbitration Association (“AAA”), seeking damages for alleged breach of the Employment  
22 Agreement based on the above-referenced actions on the part of Sullivan (“the  
23 Arbitration”). (See Sullivan Decl. ¶ 9; see also Haskell Decl. Ex. 4.) Thereafter, on March  
24 15, 2010, Lumber Liquidators filed a civil action in Massachusetts Superior Court, seeking  
25 interim relief pending resolution of the Arbitration. (See Sullivan Decl. ¶ 10, Ex. E; see also  
26 Haskell Decl. Ex. 6.) On April 1, 2010, Sullivan filed in California, in San Francisco  
27 Superior Court, a complaint for injunctive relief, seeking to enjoin Lumber Liquidators from  
28 enforcing the non-competition clause contained in the Employment Agreement, and, on

1 April 5, 2010, a First Amended Complaint (“FAC”) was filed, adding Sullivan’s corporation,  
2 Wholesale Woodfloor Warehouse, as a party plaintiff to said action. (See Declaration of E.  
3 Livingston B. Haskell in Support of Removal, filed April 6, 2010, Ex. A.) On April 6, 2010,  
4 Lumber Liquidators removed the action to federal district court on the basis of diversity  
5 jurisdiction, pursuant to 28 U.S.C. § 1332. (See id.)

## 6 **LEGAL STANDARD**

7 Under the Federal Arbitration Act (“FAA”), arbitration agreements “shall be valid,  
8 irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the  
9 revocation of any contract.” See 9 U.S.C. § 2. The FAA “not only placed arbitration  
10 agreements on equal footing with other contracts, but established a federal policy in favor  
11 of arbitration.” See Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002).

12 In determining the validity of an arbitration agreement, federal courts “apply ordinary  
13 state-law principles that govern the formation of contracts.” See id. at 892 (quoting First  
14 Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)). Thus, “general contract  
15 defenses such as fraud, duress, or unconscionability, grounded in state contract law, may  
16 operate to invalidate arbitration agreements.” Circuit City, 279 F.3d at 892.

## 17 **DISCUSSION**

18 Sullivan does not dispute that he is a party to the Employment Agreement or that his  
19 claims fall within the scope of the Arbitration Provision contained therein. Rather, Sullivan  
20 argues, the Arbitration Provision is unenforceable. Specifically, Sullivan argues that the  
21 choice-of-law provision contained in the Employment Agreement is, by its terms, applicable  
22 only in the context of an arbitration or, at best, is ambiguous in that respect, and that even if  
23 the choice-of-law provision is deemed applicable to the entire agreement, California law  
24 applies to the instant action and the Arbitration Provision is unenforceable under California  
25 law as unconscionable and in violation of California public policy. Lumber Liquidators, by  
26 contrast, argues that Massachusetts law governs the Employment Agreement in its entirety  
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1 and that, in any event, the Arbitration Provision is enforceable under California law.<sup>1</sup>

2 As discussed below, even assuming California law applies, Sullivan fails to show  
3 the Arbitration Provision is unconscionable or otherwise unenforceable thereunder.

4 **A. Unconscionability**

5 “California law, like federal law, favors enforcement of valid arbitration agreements.”  
6 See Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 97 (2000).

7 “[U]nder both federal and California law, arbitration agreements are valid, irrevocable, and  
8 enforceable, save upon such grounds as exist at law or in equity for the [rescission] of any  
9 contract.” See id. at 98 & n.4.

10 A party moving for arbitration “bears the burden of proving the existence of a valid  
11 arbitration agreement by the preponderance of the evidence, and a party opposing the  
12 [motion] bears the burden of proving by a preponderance of the evidence any fact  
13 necessary to its defense.” See Bruni v. Didion, 160 Cal.App. 4th 1272, 1282 (2008)  
14 (internal quotation and citation omitted). Unconscionability is one of several grounds upon  
15 which a contract, including a contract to arbitrate, may be found unenforceable. See Cal.  
16 Civ.Code § 1670.5(a); see also Szetela v. Discover Bank, 97 Cal.App. 4th 1094, 1099  
17 (2002). Consequently, the party opposing arbitration has the burden of proving the  
18 arbitration provision is unconscionable. See id.

19 Unconscionability includes both a “procedural” and a “substantive” element. See  
20 Armendariz, 24 Cal. 4th at 114. The focus of the procedural element is on “oppression” or  
21 “surprise.” See id. “‘Oppression’ arises from an inequality of bargaining power which  
22 results in no real negotiation and ‘an absence of meaningful choice.’” A & M Produce Co.  
23 v. F.M.C. Corp., 135 Cal.App. 3d 473, 486 (1982) (internal quotation and citation omitted).  
24 “‘Surprise’ involves the extent to which the supposedly agreed-upon terms are hidden in a  
25 prolix printed form drafted by the party seeking to enforce them.” Id. “The procedural  
26 element of an unconscionable contract generally takes the form of a contract of adhesion.”

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27  
28 <sup>1</sup> Sullivan makes no argument that the Arbitration Provision would be considered  
unconscionable or otherwise unenforceable under Massachusetts law.

1 See Discover Bank v. Superior Court of L.A., 36 Cal. 4th 148, 160 (2005). Substantive  
2 unconscionability focuses on whether the contract or provision thereof leads to “overly  
3 harsh” or “one-sided” results. See Armendariz, 24 Cal. 4th at 114. To be unenforceable, a  
4 contract must be both procedurally and substantively unconscionable. See id.

5 California courts apply a “sliding scale” analysis in making determinations of  
6 unconscionability: “the more substantively oppressive the contract term, the less evidence  
7 of procedural unconscionability is required to come to the conclusion that the term is  
8 unenforceable, and vice versa.” See Davis v. O'Melveny & Myers, 485 F.3d 1066, 1072  
9 (9th Cir.2007) (quoting Armendariz, 24 Cal. 4th at 99). Thus, although both procedural and  
10 substantive unconscionability must be present for the contract to be declared  
11 unenforceable, they need not be present to the same degree. See Harper v. Ultimo, 113  
12 Cal.App. 4th 1402 (2003).

13 The validity of an arbitration clause, absent an express agreement “clearly and  
14 unmistakably” reserving such issue for the arbitrator, is a question of law to be resolved by  
15 the court. See Howsam v. Dean Whitter Reynolds, Inc., 537 U.S. 79, 83 (2002); Bruni, 160  
16 Cal.App. 4th at 1283, 1286-88. Here, neither party has identified such an agreement.  
17 Accordingly, the Court next turns to the question of unconscionability. In determining that  
18 issue, the Court “sits as a trier of fact, weighing all the affidavits, declarations, and other  
19 documentary evidence, as well as oral testimony received at the court’s discretion, to reach  
20 a final determination.” See id. (citing Engalla v. Permanente Medical Group, Inc., 15 Cal.  
21 4th 951, 972 (1997).

### 22 **1. Procedural Unconscionability**

23 Sullivan argues the Arbitration Provision of the Employment Agreement is  
24 procedurally unconscionable (1) because Sullivan was required by Lumber Liquidators to  
25 execute the agreement “as a condition of continued employment and to receive deferred  
26 compensation” (see Pl.’s Opp’n at 9:15-22) and (2) because the Arbitration Provision  
27 “incorporates by reference the National Rules for the Resolution of Employment Disputes of  
28 the American Arbitration Association (“AAA Rules”) and fails to attach the rules for

1 Sullivan’s review, or to specify which version of the rules will apply.” (See Pl.’s Opp’n at  
2 9:14-10:2). The Court finds Sullivan’s arguments unpersuasive.

3 First, Sullivan fails to aver or otherwise offer evidence to demonstrate he had no  
4 opportunity to negotiate the terms of the Arbitration Provision. Rather, he states he “did not  
5 negotiat[e] the terms of the arbitration clause in paragraph 18.” (See Sullivan Decl. ¶ 6.)  
6 Such statement is, at best, ambiguous, particularly in light of the uncontroverted evidence  
7 that Sullivan was represented by counsel in the negotiation and execution of all three of the  
8 related agreements. (See Haskell Aff. ¶ 5; Aghdami Decl ¶ 6. ) Indeed, Lumber  
9 Liquidators has offered evidence that Sullivan’s counsel “drafted portions of the  
10 Employment Agreement on Sullivan’s behalf [and] made comments and negotiated  
11 changes to the Employment Agreement on Sullivan’s behalf.” (See Aghdami Decl. ¶¶ 7-10,  
12 Exs. 1, 2). Sullivan has submitted no evidence in contradiction thereof.

13 Moreover, even if Lumber Liquidators insisted on inclusion of the Arbitration  
14 Provision, the taking of such position under the circumstances pertaining, namely, in the  
15 course of negotiations over a global resolution of the parties’ disputes concerning their past  
16 and continuing relationship, would not serve to render such provision unconscionable or  
17 otherwise unenforceable under California law. Clearly, neither the Employment Agreement  
18 nor any provision therein constitutes a contract of adhesion. See Circuit City Stores v.  
19 Adams, 279 F.3d 889, 893 (2002) (defining contract of adhesion, under California law, as  
20 “standard-form contract, drafted by the party with superior bargaining power, which  
21 relegates to the other party the option of either adhering to its terms without modification or  
22 rejecting the contract entirely”); see, e.g., Szetela, 97 Cal.App. 4th at 1100 (finding  
23 arbitration clause contained in amendment to cardholder agreement constituted  
24 procedurally unconscionable “bill stuffer”). Sullivan cites to no authority in which a party’s  
25 insistence on the inclusion of any particular term in a negotiated agreement, whether such  
26 term concerns arbitration or otherwise, has resulted in a finding of procedural  
27 unconscionability. Cf. Pokorny v. Quixtar, 601 F.3d 987, 991, 997 (9th Cir. 2010)  
28 (upholding finding of procedural unconscionability where form “registration agreement”

1 contained form arbitration clause; citing prior authority finding “standardized contract”  
2 unconscionable).

3 Sullivan’s argument that the Arbitration Provision is procedurally unconscionable  
4 because it “merely incorporates by reference” the AAA Rules (see Pl.’s Opp’n at 9:7-13)  
5 likewise finds no support in the authority on which Sullivan relies, in this instance, Harper v.  
6 Ultimo, 113 Cal.App. 4th 1402, 1406-07 (2003). As Lumber Liquidators points out, the  
7 rules at issue in Harper not only were incorporated by reference but also limited the  
8 substantive remedies available to the plaintiffs therein, precluding those plaintiffs from  
9 “obtaining tort damages, punitive damages, or any other damages otherwise appropriate in  
10 a court of law.” See id. at 1405. Here, by contrast, Sullivan has made no showing that the  
11 AAA Rules referenced by the Employment Agreement limit his available remedies or  
12 otherwise restrict the scope of his claims. Nor, as distinguished from Harper, is there any  
13 element of surprise. See id. at 1405-06 (noting where customer given “preprinted” contract  
14 providing that controversies thereunder were to be settled in accordance with Better  
15 Business Bureau Arbitration Rules, “customer must inevitably receive a nasty shock when  
16 he or she discovers that no relief is available even if out and out fraud has been  
17 perpetrated”); see also Sullenberger v. Titan Health Corp., 2009 WL 1444210, at \*8 (E.D.  
18 Cal. 2009) (rejecting argument that arbitration agreement was procedurally unconscionable  
19 because it “provide[d] that the rules of the American Arbitration Association [would] govern,  
20 but [did] not provide a copy of those rules”; noting “plaintiff ha[d] not shown that the [AAA  
21 rules], referenced in the arbitration agreement, contain provisions that are unfair or  
22 inequitable”).

23 Nor is the Court persuaded by Sullivan’s argument that the Arbitration Provision is  
24 unenforceable because it does not specify whether the AAA Rules to be applied are to be  
25 those in effect at the time of execution or those in effect at the time of any claimed breach.  
26 Although the Harper court did find the unfairness resulting from the above-referenced  
27 “artfully hidden” limitation on relief was compounded by the potential that the Better  
28 Business Bureau’s rules might change, the Ninth Circuit, in so finding, observed that those

1 rules were “not just procedural ones” but, rather, had “the effect of substantively limiting the  
2 defendant’s exposure.” See id. at 1406-07 (emphases in original).

3 Lastly, Sullivan’s argument that the Arbitration Provision is procedurally  
4 unconscionable because “there was [no] clear communication” that opting out of the  
5 Arbitration Provision “would have no effect on his employment relationship” (see Pl.’s Opp’n  
6 at 9:20-22) fares no better. The case on which Sullivan appears to rely for such proposition,  
7 Circuit City Stores, Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002), is distinguishable, as the  
8 contract at issue therein was not negotiated. See id. at 1106 (noting employer “distributed  
9 packet of materials to the stores employees which included a Dispute Resolution  
10 Agreement” containing arbitration clause).

## 11 **2. Substantive Unconscionability**

12 Sullivan offers no evidence of any overly-harsh or one-sided result arising from the  
13 enforcement of the Arbitration Provision. Instead, Sullivan argues that the Arbitration  
14 Provision fails to comply with certain requirements established by the California Supreme  
15 Court in Armendariz. See Armendariz, 24 Cal. 4th at 102.<sup>2</sup> Sullivan’s reliance on such  
16 authority is unavailing, however, as Armendariz concerned the arbitration of nonwaivable  
17 “statutory civil rights.” See id. As discussed therein, when a plaintiff seeks to vindicate  
18 nonwaivable statutory rights, such as those created by such anti-discrimination statutes as  
19 California’s Fair Employment and Housing Act (“FEHA”), the above-referenced  
20 requirements serve to ensure that those rights and protections are not dissipated by the  
21 lack of a judicial forum. See id. (noting “beneficiaries of public statutes are entitled to the  
22 rights and protections provided by law”) (internal quotation and citation omitted); see also  
23 Mercuro v. Superior Court, 96 Cal.App. 4th 167, 179 (2002) (applying Armendariz

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25 <sup>2</sup> As set forth in Armendariz, in accordance with the “basic principle of nonwaivability  
26 of statutory civil rights,” an arbitration agreement applicable to a statutory claim of such  
27 nature “is lawful if it (1) provides for neutral arbitrators, (2) provides for more than minimal  
28 discovery, (3) requires a written award, (4) provides for all types of relief that would  
otherwise be available in court, and (5) does not require employees to pay either  
unreasonable costs or any arbitrators’ fees or expenses as a condition of access to the  
arbitration forum.” See id. (quoting Cole v. Burns Intern. Security Services, 105 F.3d 1465  
(D.C. Cir. 1997).

1 requirements to arbitration of claims brought under California Labor Code §§ 230.8 and  
2 970). Sullivan cites to no authority holding such requirements are more broadly applicable.  
3 Moreover, as set forth below, not only has Sullivan failed to provide legal authority in  
4 support of his argument, two of the three factual underpinnings thereof find no support in  
5 the instant record.

6 Sullivan argues the Arbitration Provision (1) “does not require a written award,” (2)  
7 “does not provide for all types of relief that would otherwise be available in court,” and (3)  
8 “requires [Sullivan] to ‘share equally all costs of arbitration.’” (See Pl.’s Opp’n at 10:21-24.)  
9 In that regard, the Court first notes that Sullivan, in support of his first two assertions,  
10 neither provides nor cites to any part of the AAA Rules in effect either in 2005<sup>3</sup> or at  
11 present. Moreover, the relevant AAA rules, available for judicial notice, require that the  
12 arbitrator’s award be in writing. See AAA National Rules for the Resolution of Employment  
13 Disputes, effective January 1, 2004 (“2004 Rules”), Rule 34.c, available at  
14 <http://www.adr.org/sp.asp?id=26405#n34> (providing “[t]he award shall be in writing”); AAA  
15 Employment Arbitration Rules and Mediation Procedures, effective November 1, 2009  
16 (“2009 Rules”), Rule 39.d, available at <http://www.adr.org/sp.asp?id=32904#39>, (providing  
17 “[t]he award shall be in writing”). Next, Sullivan offers no evidence to support his assertion  
18 that the AAA Rules either did not or currently do not provide for all types of relief that  
19 otherwise would be available in district court. Indeed, to the contrary, the relevant AAA  
20 rules provide for all relief available under the law. See 2004 Rules, Rule 34.d (providing  
21 “[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable,  
22 including any remedy or relief that would have been available to the parties had the matter  
23 been heard in court”); 2009 Rules, Rule 39.d (providing “[t]he arbitrator may grant any  
24 remedy or relief that would have been available to the parties had the matter been heard in  
25 court including awards of attorney's fees and costs, in accordance with applicable law”).  
26 Lastly, although the Arbitration Provision requires the parties to “share equally in all costs of  
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28 <sup>3</sup> As noted, the Employment Agreement was executed in August 2005.

1 arbitration” (see Haskell Decl. Ex. 1A at ¶ 18), Sullivan offers no argument or evidence  
2 indicating how such provision would be substantively unconscionable under the  
3 circumstances pertaining. See Armendariz, 24 Cal. 4th at 102 (precluding enforcement of  
4 arbitration agreement where employee required to pay “unreasonable costs”).

### 5 **3. Conclusion as to Unconscionability**

6 Accordingly, for the reasons stated above, Sullivan has failed to show the Arbitration  
7 Provision in the Employment Agreement is unenforceable as unconscionable.

#### 8 **B. Waiver**

9 Sullivan next argues the Arbitration Provision is unenforceable because Lumber  
10 Liquidators has waived its right to arbitration.

11 “[W]here a contract provides that arbitration may be demanded within a stated time,  
12 failure to make demand within that time constitutes a waiver of the right to arbitrate.” See  
13 Platt Pacific, Inc. v. Andelson, 6 Cal. -4th 307, 313 (1993) (denying motion to compel;  
14 finding plaintiff had waived right to arbitration by failing to timely demand arbitration  
15 pursuant to terms of arbitration agreement).

16 Here, Sullivan argues Lumber Liquidators has waived its right to arbitration by not  
17 making its demand for arbitration “within thirty days of the events alleged.” (See Pl.’s Opp’n  
18 at 13:7-9.) Sullivan’s argument is unpersuasive. As Lumber Liquidators points out, the  
19 Arbitration Provision does not require Lumber Liquidators to make a demand for arbitration  
20 within thirty days of the events giving rise to Lumber Liquidators’ claims, but, rather,  
21 requires Lumber Liquidators to make such demand within thirty days of the parties’ failure  
22 to resolve their dispute through mediation. (See Haskell Decl. Ex. 1A at ¶ 18.)

23 Specifically, the Arbitration Provision states, in relevant part:

24 Prior to arbitration of any dispute, the parties agree to attempt to settle the  
25 dispute with the assistance of a mutually agreed upon mediator. If the  
26 parties cannot resolve the dispute through mediation, then arbitration must  
27 be demanded within 30 calendar days or the time when the demanding  
28 party knows or should have known of the event or events giving rise to the  
claim.

(See id.) (emphasis added).

1           The Arbitration Provision thus makes clear that attempted mediation of a known  
2 dispute is a condition precedent to starting the thirty-day clock for filing a demand for  
3 arbitration. Sullivan makes no showing that Lumber Liquidators' demand for arbitration was  
4 made more than thirty calendar days after the parties' failure to resolve their dispute  
5 through mediation.

6           Accordingly, Sullivan has failed to show Lumber Liquidators waived its right to  
7 arbitration under the Employment Agreement.

### 8           **C. Available Relief**

9           Lumber Liquidators seeks an order of dismissal on the ground that “the same issues  
10 . . . are already before the AAA and the state court” in Massachusetts. (See Def.'s Reply at  
11 9:9-13; see also Haskell Decl. Ex. 6.) In particular, Lumber Liquidators, relying on the  
12 Declaratory Judgment Act, 28 U.S.C. § 2201, and Brillhart v. Excess Ins. Co. of America,  
13 316 U.S. 491, 495 (1942), argues, the Court has discretion both to abstain from exercising  
14 jurisdiction over and to dismiss the instant action in its entirety. See id. at 494-95  
15 (recognizing district court's discretion as to whether to exercise jurisdiction under  
16 Declaratory Judgment Act; setting forth relevant considerations and noting “[g]ratuitous  
17 interference with the orderly and comprehensive disposition of a state court litigation should  
18 be avoided”).

19           Lumber Liquidators' reliance on the above-referenced authority is misplaced, as  
20 Sullivan, by the instant action, seeks not only declaratory relief but also an award of  
21 monetary damages. (See FAC at 8:12-14.) Neither the Declaratory Judgment Act nor  
22 Brillhart encompasses claims of such nature. See Brillhart, 316 U.S. at 493, 495  
23 (describing suit therein as one for “declaratory judgment”; noting federal court ordinarily  
24 should not “proceed in a declaratory judgment suit” where parties litigating same state law  
25 issues in state court); see, e.g., Burlington Ins. Co. v. Devdhara, 2009 WL 2901624, at \*4  
26 (N.D. Cal. 2009) (declining to abstain under Brillhart where plaintiffs brought damages  
27 claims; noting Brillhart “only applies to pure declaratory judgment actions”). Rather,  
28 “federal courts may stay actions for damages based on abstention principles, but those

1 principles do not support the outright dismissal or remand of damages actions.” See  
2 Quakenbush v. Allstate Ins. Co., 517 U.S. 706, 707 (1996).

3 Accordingly, the Court declines to dismiss the FAC and will stay the proceedings  
4 pending resolution of the Arbitration in the Commonwealth of Massachusetts.

5 **CONCLUSION**

6 For the reasons stated, defendant’s motion is hereby GRANTED in part and  
7 DENIED in part as follows:

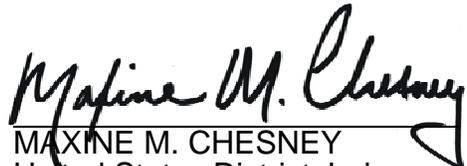
8 1. To the extent Lumber Liquidators seeks an order dismissing the instant  
9 action, the motion is DENIED.

10 2. To the extent Lumber Liquidators seeks in the alternative an order staying  
11 the instant action, the motion is GRANTED and the above-titled action is hereby stayed  
12 pending resolution of the above-referenced Arbitration;

13 3. The parties are directed to file a Joint Status Report no later than  
14 December 3, 2010 and every six months thereafter, apprising the Court as to the status of  
15 the proceedings in the Massachusetts litigation.

16 **IT IS SO ORDERED.**

17  
18 Dated: June 2, 2010

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20 MAXINE M. CHESNEY  
21 United States District Judge  
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