No. 19-2240

In the United States Court of Appeals

FOR THE FIRST CIRCUIT

KETLER BOSSE

Plaintiff-Appellee

v.

NEW YORK LIFE INSURANCE COMPANY; NEW YORK LIFE INSURANCE & ANNUITY CORPORATION; NEW YORK LIFE INSURANCE COMPANY OF ARIZONA

Defendants-Appellants

On Appeal from the U.S. District Court for the District of New Hampshire
No. 1:19-cv-016 (Hon. Steven J. McAuliffe)

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

New York Life Insurance Company is a mutual life insurance company organized under the laws of the State of New York. New York Life Insurance Company has no parent corporation. New York Life Insurance and Annuity Corporation and New York Life Insurance Company of Arizona are wholly owned subsidiaries of New York Life Insurance Company.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

This case presents two important questions about the enforceability of arbitration agreements. First, this Court must consider whether the District Court improperly resolved the question of arbitrability in derogation of the parties' written agreement to have that question decided by the arbitrator. The District Court acknowledged that the contract between the parties delegated any decision on arbitrability to the arbitrator, but it concluded that the actual dispute did not grow out of that contract, and, therefore, the delegation provision did not apply. New York Life submits that the decision below is inconsistent with the Supreme Court's holding last year in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). As the Supreme Court stated in a rather cut-and-dry mandate, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." *Id.* at 529. New York Life is unaware of any other decision by a federal court limiting *Henry Schein* in the manner suggested by the District Court, and it submits that the question is sufficiently important as to warrant oral argument.

Second, if this Court concludes that the District Court had the authority to decide whether this case is subject to compulsory arbitration, it must consider whether the decision below improperly disregarded a "survival" provision that

required the arbitration of disputes arising after that particular contract ended. New York Life presented uncontested evidence showing that the contract at issue was specifically drafted to address precisely this scenario: the movement of an individual between employee and independent contractor/agent status as that individual's career progressed, with the arbitration of any disputes that arise at any stage of the relationship. The District Court concluded, however, that survival provisions in this context contravene public policy and are anathema to statutes of limitation. That holding, if allowed to stand, will diminish the viability of arbitration provisions, which, like the one at issue here, are designed specifically to address future disputes arising out of ongoing employment, commercial and other relationships. That issue, too, is sufficiently important to warrant oral argument.

INTRODUCTION

Plaintiff-Appellee Ketler Bossé ("Mr. Bossé") alleges that his contract as a New York Life agent was terminated because of his race. New York Life contends, however, that Mr. Bossé was terminated because he falsified an application for life insurance that he submitted on behalf of his ex-wife. The question presented on this appeal is whether Mr. Bossé's claims are subject to compulsory arbitration under an agreement signed by the parties. The District Court erroneously denied New York Life's Motion To Dismiss Or, In The

Alternative, Stay Proceedings And Compel Arbitration ("Motion to Compel Arbitration").

In 2001, Mr. Bossé and New York Life Insurance Company, New York Life Insurance and Annuity Corporation, and New York Life Insurance Company of Arizona (collectively, "New York Life") entered into an ongoing business relationship that lasted for fifteen years. At various times, Mr. Bossé served as an agent, a partner, and a district agent. He transitioned seamlessly during this time from independent contractor to employee and, ultimately, back to independent contractor.

While he was a partner (*i.e.*, a manager/employee of New York Life who was responsible for recruiting and overseeing agents who sold life insurance), Mr. Bossé entered into an agreement that required the arbitration of any disputes with New York Life. The contract stated that even future disputes arising after the expiration of that particular agreement were subject to compulsory arbitration, and it provided further that any disagreement about arbitrability was to be resolved exclusively by the arbitrator. The survival provision in the arbitration agreement was intended to address the evolving business relationship that many individuals, like Mr. Bossé, enjoyed with New York Life as they moved between employee and independent contractor roles.

The District Court declined to apply both the "delegation" and "survival" provisions. In deciding the arbitrability question, it contravened the Supreme Court's 2019 mandate in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019), which requires that such decisions be made by the arbitrator. It also disregarded the plain contractual language and the only evidence before it as to the purpose of the "survival" provision, which was intended to cover precisely the situation faced by Mr. Bossé as he moved between positions at New York Life.

STATEMENT OF JURISDICTION

The District Court had original subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 because Mr. Bossé alleged race discrimination and civil rights claims under 42 U.S.C. §§ 1981 and 1985. The District Court had supplemental jurisdiction over Mr. Bossé's related state law claims under 28 U.S.C. § 1367(a).

This Court has appellate jurisdiction under 9 U.S.C. § 16(a)(1)(B), which permits appeal of "an order … denying a petition under [9 U.S.C. § 4] to order arbitration to proceed." The District Court issued an order denying New York Life's request to compel arbitration under Section 4, and this Court's appellate jurisdiction extends to all issues that were disposed of in that order. *See Omni Tech Corp. v. MPC Sols. Sales, LLC*, 432 F.3d 797, 800 (7th Cir. 2005) (citing *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996)).

The District Court entered its order on November 13, 2019. (ADD. 1–23.) New York Life filed a notice of appeal on November 27, 2019. (JA at 5.) This appeal is timely under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

I. Under *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019), "when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possess no power to decide the arbitrability issue." Here, the parties' contract delegates the arbitrability question to an arbitrator, but the District Court nevertheless decided the issue. Did the District Court err?

II. Pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, arbitration must be compelled if: (1) there exists a written agreement to arbitrate; (2) the dispute falls within the scope of the arbitration agreement; and (3) the party seeking an arbitral forum has not waived its right to arbitrate. Here, the parties entered into a written agreement to arbitrate, the dispute falls within the broad scope of the agreement, and New York Life did not waive its right to arbitrate. Did the District Court err in denying New York Life's Motion to Compel Arbitration?

STATEMENT OF THE CASE

Mr. Bossé began his affiliation with New York Life as a sales agent in New York Life's New Hampshire General Office in 2001. (JA at 70, 91.) During the course of his uninterrupted fifteen-year relationship with New York Life, Mr. Bossé transitioned between three distinct roles (agent, partner, and district agent). At times he was an employee, and at other times he was an independent contractor. (JA at 70, 72, 94, 100.) For New York Life's agents and managers, this transition is quite common. (JA at 70.) Independent contractor agents frequently become partners (managers) at some point in their careers, and managers often transition back to positions as agents selling life insurance.

On March 25, 2004, Mr. Bossé signed a Partner's Employment Agreement ("Partner's Agreement") with New York Life. (JA at 72–76.) The Partner's Agreement contains an arbitration provision ("arbitration agreement") that provides in relevant part:

5. Arbitration

> a. The Partner [Mr. Bossé] and New York Life agree that any dispute, claim or controversy arising between them, including those alleging employment discrimination (including sexual harassment and age and race discrimination) in violation of a statute (hereinafter "the Claim"), as well as any dispute as to whether such claim is arbitrable, shall be resolved by an arbitration proceeding administered by the NASD in accordance with its arbitration rules.

> b. In the event that the NASD refuses to arbitrate the Claim, the Partner and New York Life agree that the Claim, as well as any dispute as to whether such Claim is arbitrable, shall be resolved by an arbitration proceeding administered by the American Arbitration Association (hereinafter "AAA") in accordance with its National Rules for the Resolution of Employment Disputes (hereinafter "NRRED").

(JA at 74–75.) The agreement mandates binding arbitration of "***any dispute, claim or controversy***" arising between Mr. Bossé and New York Life, including claims for "race discrimination." (JA at 74.) It provides further that any disagreement as to whether a Claim is arbitrable is to be resolved by the arbitrator, not a court. (JA at 74.)

The arbitration agreement incorporates the rules of two arbitral forums: the Financial Industry Regulatory Authority ("FINRA")[1] and the American Arbitration Association ("AAA"). (JA at 74–75.) FINRA Rule 13413, entitled "Jurisdiction of Panel and Authority to Interpret the Code," affords FINRA arbitrators the authority to interpret and determine the applicability of its Code of Arbitration Procedure. *See* FINRA Rule 13413, *available at* https://www.finra.org/rules-guidance/rulebooks/finra-rules/13413 ("The panel has the authority to interpret and

[1] The Agreement actually refers to the "NASD" (the National Association of Securities Dealers) as the forum for compulsory arbitration. (JA at 74.) FINRA, "a government-authorized … organization" that ensures "the broker-dealer industry operates fairly and honestly[,]" *see* https://www.finra.org/about, is a successor to the NASD. For the sake of clarity, New York Life will refer to FINRA in the remainder of this brief.

determine the applicability of all provisions under the Code [of Arbitration Procedure for Industry Disputes].").

The arbitration agreement also provides that, "[i]n the event that [FINRA] refuses to arbitrate the Claim," then the claim, "as well as any dispute as to whether such claim is arbitrable, shall be resolved by an arbitration proceeding administered by [AAA] in accordance with its National Rules for the Resolution of Employment Disputes[.]" (JA at 74.) AAA Rule 6, entitled "Jurisdiction," provides that the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Rule 6(a), *available at* https://www.adr.org/sites/default/files/EmploymentRules_Web2119.pdf.

The Partner's Agreement contains a survival provision, which states that the arbitration agreement "shall survive termination of this Partner's Employment Agreement by either party for any reason[.]"[2] (JA at 76.) In 2005, the year after Mr. Bossé signed the Partner's Agreement, Mr. Bossé transitioned back to a role as an agent (and independent contractor) of New York Life. (JA at 70.) Mr. Bossé was terminated from his position as an agent on January 15, 2016, at which time his relationship and affiliation with New York Life ceased. (JA at 29.) He was

[2] The survival provision also applies to paragraph 3 (Confidential Information), paragraph 4 (Non-Compete), and paragraph 8 (Construction and Venue) of the Partner's Agreement. (JA at 72–76.)

advised that he was terminated because of his actions in falsifying an application for insurance on behalf of his ex-wife.[3] (JA at 8, 28–29.)

In support of its Motion to Compel Arbitration, New York Life submitted a declaration from Albert Marquez, the Agency Standards Officer for the Northeastern Zone Office of New York Life. (JA at 4, 69–71.) Mr. Marquez is familiar with New York Life's use of arbitration agreements with managers and agents who move back and forth between positions. (JA at 69–71.) Mr. Marquez explained that:

> Mr. Bossé's transition from Agent to Partner and then back to Agent is not uncommon at New York Life. Most New York Life Partners started as Agents, and many successful managers hold a number of different positions over time. Indeed, when an individual becomes an Agent with New York Life, there is frequently an understanding that the individual's affiliation with the company may evolve over time.
>
> The possibility exists for an Agent to become a Partner, a District Agent, a Sales Manager, a Registered Representative, or a corporate employee. Similarly, it is not uncommon for Partners and other managerial employees to transition back to their roles as Agents after a period of time, as Mr. Bossé did in 2005.
>
> Partner Agreements, like the one signed by Mr. Bossé, typically have language providing for the arbitration of disputes with New York Life. Such agreements often have a provision stating that the agreement to arbitrate claims survives the termination of that particular relationship or status.

[3] Specifically, New York Life terminated Mr. Bossé after it "determined that he provided inaccurate information regarding the processing of an electronic life insurance application." *See* BrokerCheck by FINRA, *available at* https://brokercheck.finra.org/individual/summary/4475485.

(JA at 70.)

Three years after his termination, Mr. Bossé filed suit against New York Life. (JA at 2.) He asserted various claims arising out of his business relationship—and the termination of that business relationship—with New York Life, including claims for race discrimination. (JA at 36–51.) New York Life moved to compel the arbitration of Mr. Bossé's claims, relying on the agreement that Mr. Bossé had signed and the Marquez Declaration, both of which it attached to its motion. (JA at 4.)

Mr. Bossé opposed the motion on April 26, 2019, but:

- he offered no evidence in support of his opposition;
- he did not attempt to rebut or controvert the Marquez Declaration;
- he did not challenge the validity of the arbitration agreement, and instead argued that it did not apply to his claims; and
- he did not challenge the validity of the survival provision, but argued that it was irrelevant because the dispute did not fall within the scope of the arbitration clause.

(JA at 4, 77–90.)

On November 13, 2019, the District Court denied New York Life's Motion to Compel Arbitration, finding that the Partner's Agreement did not require the arbitration of Mr. Bossé's claims or of the preliminary issue of arbitrability. (ADD. at 16–17, 23.) New York Life filed its notice of appeal under 9 U.S.C.

§ 16(a) on November 27, 2019. (JA at 5.) This Court docketed this timely appeal on December 5, 2019.

SUMMARY OF THE ARGUMENT

The District Court erred in two respects. First, by denying the Motion to Compel Arbitration and refusing even to send the preliminary question of arbitrability to an arbitrator, it failed to follow *Henry Schein.* The District Court conflated the ultimate question of arbitrability with the preliminary question of whether arbitrability was to be decided by an arbitrator or the Court. The District Court wrongly concluded that the contractual delegation of the arbitrability decision would not be enforced because the instant dispute did not arise out of the same agreement that contained the arbitration agreement. But the Supreme Court has been crystal clear in requiring arbitration of such preliminary disputes if the parties have agreed to that method of resolution. *See generally Henry Schein*, 139 S. Ct. 524; *see also Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 69–70 (2010) (collecting cases). Furthermore, by wading into the question of whether the express terms of the arbitration agreement and "survival" provision should be enforced, the District Court applied an exception to compulsory arbitration that the Supreme Court rejected in *Henry Schein.* In light of the delegation provision present here, it was not for the District Court to make that determination.

Second, even if the question of arbitrability were for the District Court to decide, notwithstanding the Supreme Court's mandate in *Henry Schein*, the denial of the Motion to Compel Arbitration was legally flawed. There is no question that Mr. Bossé and New York Life agreed to arbitrate all disputes between them, including disputes that arose long after the contract at issue expired. Indeed, the only evidence on the purpose underlying the contractual "survival" provision—the Marquez Declaration—made it abundantly clear that the survival provision was intended to cover this precise scenario, in which Mr. Bossé maintained an ongoing business relationship with New York Life over a period of years, albeit in different capacities. The broad scope of the arbitration agreement, which applies to "any dispute, claim or controversy arising between" the parties, plainly covers the claims advanced by Mr. Bossé. (JA at 74.) Consistent with binding precedent from the Supreme Court and this Court, as well as the strong public policy mandate in favor of alternative dispute resolution, the District Court should have compelled arbitration of this dispute in its entirety.

STANDARD OF REVIEW

This Court reviews ***de novo*** a district court's denial of a motion to compel arbitration. *Conduragis v. Prospect Chartercare, LLC*, 909 F.3d 516 (1st Cir. 2018) (emphasis added). "[T]he party resisting arbitration bears the burden of

proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

ARGUMENT

I. The Valid Arbitration Agreement Clearly And Unmistakably Delegates The Preliminary Issue Of Arbitrability To An Arbitral Forum

Mr. Bossé's challenge to the contractual "delegation" provision in the arbitration agreement requires the Court to answer just two questions: (1) was there a valid agreement; and (2) was there clear and unmistakable evidence that the parties agreed to delegate questions of arbitrability to the arbitrator? *See Henry Schein*, 139 S. Ct. at 530 ("[I]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, ***a court may not decide the arbitrability issue***.") (emphasis added). When "there is a delegation clause, the motion to compel arbitration should be granted in almost all cases." *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 (5th Cir. 2016).

These two questions are easily answered here. As discussed below, Mr. Bossé and New York Life entered into a valid arbitration agreement that clearly and unmistakably delegated the preliminary question of arbitrability to the arbitrator.

A. The Arbitration Agreement Is Valid.

On March 25, 2004, Mr. Bossé signed the Partner's Agreement with New York Life. (JA at 76.) The contract contained an express agreement to arbitrate all

disputes, including arbitrability. (JA at 74.) The agreement to arbitrate was not limited to the duration of the Partner's Agreement, or the time in which Mr. Bossé would be working as a Partner (a manager supervising other agents). On the contrary, Mr. Bossé and New York Life agreed that the arbitration requirement, along with several other provisions, "shall survive termination of th[e] Partner's Employment Agreement by either party for any reason[.]" (JA at 74, 76.) According to the District Court, "the Partner's Agreement is unambiguous in providing that the arbitration clause ***survives*** termination of that agreement."[4] (ADD. at 7 (emphasis in original).)

There seems to be no disagreement as to what the contract required on its face. There is also no dispute that the agreement evidences a transaction involving commerce, is valid, and is subject to the FAA. *See* 9 U.S.C. §§ 1–2. Indeed, in the proceedings below, Mr. Bossé did not argue to the contrary. He did not argue that the arbitration agreement was procured by fraud or procedurally defective, nor did he argue that the arbitration agreement was substantively unconscionable. Instead, he argued that:

[4] In his uncontested declaration, Mr. Marquez explained why. He stated that "Partner Agreements, like the one signed by Mr. Bossé, typically have language providing for the arbitration of disputes with New York Life." (JA at 70.) "Such agreements," moreover, "often have a provision stating that the agreement to arbitrate claims survives the termination of that particular relationship or status." (JA at 70.) This is because "when an individual becomes an Agent with New York Life, there is frequently an understanding that the individual's affiliation with the company may evolve over time." (JA at 70.) That is what happened here.

- "[T]he arbitration clause does not apply to this dispute[.]"
- "[T]he arbitration clause in his employment agreement from over a decade ago does not cover this dispute."
- "The fact that [New York Life] contend[s] the arbitration clause survived the termination of the Employment Agreement is irrelevant; the dispute must still be covered by the arbitration clause in order to be arbitrable."
- "Mr. Bossé's claims are not covered by the arbitration clause in the Employment Agreement[.]"

(JA at 78, 84.)

Mr. Bossé's arguments below are important, not so much because of what they say but because of what they concede implicitly. By arguing that the instant dispute is beyond the scope of the arbitration agreement, Mr. Bossé acknowledges that the arbitration agreement was otherwise valid. *See Gove v. Career Sys. Dev. Corp.*, 689 F.3d 1, 5 (1st Cir. 2012) (finding that by arguing "that the agreement is enforceable in certain circumstances," the plaintiff-appellee conceded the validity of the agreement).

The District Court also concluded that the arbitration agreement was valid. It concluded, however, that the arbitration agreement did not cover the specific claims brought by Mr. Bossé. (ADD. at 8 ("There is not an enforceable agreement to arbitrate ***the claims brought in this case***.") (emphasis added).) That is where the District Court strayed from the Supreme Court's dictates in *Henry Schein.* The question of whether the arbitration agreement applied to this particular dispute was

for the arbitrator—not the District Court—to decide. The District Court was not permitted to short-circuit the delegation provision simply because it was unwilling to accept that the parties intended to arbitrate claims that arose in any phase of Mr. Bossé's ongoing relationship with New York Life.

Essentially, the District Court concluded that it was "wholly groundless" for New York Life to contend that Mr. Bossé's substantive claims grew out of the Partner's Agreement that was executed years earlier. But that conclusion is contrary to the mandate in *Henry Schein*, which held that such an analysis is to be conducted solely by the arbitrator when the agreement contains a "delegation" provision.

> Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.' … The [FAA] does not contain a 'wholly groundless' exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision in the contract.

Henry Schein, 139 S. Ct. at 527–28.

Of course, this does not mean that an arbitrator will be powerless to question the validity of the arbitration agreement between Mr. Bossé and New York Life. "Like other contracts," the Supreme Court has held, arbitration agreements "may be invalidated by generally applicable contract defenses, such as fraud, duress, or

unconscionability." *Rent-A-Center, W., Inc. v. Jackson,* 561 U.S. 63, 68 (2010) (internal quotation marks and citations omitted). In *Rent-A-Center, W., Inc.*, the respondent argued that the arbitration agreement, which governed claims arising out of an employment relationship, was unenforceable ***as a whole*** because it was unconscionable. *Id.* at 66. But if the parties have agreed to delegate such decision-making, that aspect of the agreement must be enforced, and the review is conducted by the arbitrator. *Id.* at 70–71.

Here, it bears repeating that Mr. Bossé offered no evidence and made no argument that the arbitration agreement as a whole—let alone the specific agreement to send questions of arbitrability to the arbitrator—was invalid due to fraud, duress, unconscionability, or some other defense at law or equity. He also did not suggest that the "unambiguous" survival provision included in the arbitration agreement created a legal impossibility or substantively unconscionable term of contract. Nor could he have made such an argument, as courts routinely enforce survival provisions tethered to arbitration agreements. *See, e.g.*, *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.,* 501 U.S. 190, 201 (1991) ("[If] parties who favor labor arbitration during the term of a contract also desire it to resolve postexpiration disputes, the parties can consent to that arrangement by explicit agreement."); *Chang v. Warner Bros. Entm't Inc.*, No. 19 Civ. 2091, 2019 WL 5304144, at *3 (S.D.N.Y. Oct. 21, 2019) (holding arbitration

agreement remained in effect due to survival provision despite termination of employment agreement); *Toddle Inn Franchising, LLC v. KPJ Assocs., LLC*, No. 2:18-cv-00293, 2018 WL 6515129, at *3 (D. Me. Dec. 11, 2018) ("The Survival Clause indicates the parties' intent that contractual obligations would extend beyond the expiration of the Agreement itself, and the broad language of the Arbitration Clause signals that arbitration is one of those obligations."); *Milfort v. Comcast Cable Commc'ns. Mgmt. LLC*, 309 F. Supp. 3d 1268, 1272 (S.D. Fla. 2018) ("[T]he Subscriber Agreement contains a survivability clause … There is no support for the proposition that the arbitration provision was negated expressly or by clear implication following termination of the Subscriber Agreement."); *Treinish v. BorrowersFirst, Inc.*, No. 1:17-CV-1371, 2017 WL 3971854, at *5 (N.D. Ohio Sept. 8, 2017) ("Here … [the] arbitration provision contains an explicit survival clause. For that reason, this contract is not completely expired, and the full presumption in favor of arbitration applies.").

Perhaps if this case is sent to an arbitrator, Mr. Bossé will assert such a challenge to arbitrability, even though he did not make those arguments in response to New York Life's motion. If he does, his arguments will have to be evaluated by the arbitrator, rather than by the court.

B. The Arbitration Agreement Clearly And Unmistakably Delegates The Preliminary Question Of Arbitrability To The Arbitral Forum.

"[P]arties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by clear and unmistakable evidence." *Henry Schein*, 139 S. Ct. at 530. When a party such as Mr. Bossé challenges the application of his written agreement to arbitrate disputes, the analysis centers on the text of the agreement at issue. *See Rent-A-Center, W., Inc.*, 561 U.S. at 68–69. Any ambiguities in the text are resolved in favor of arbitration. *See PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 15 (1st Cir. 2010) ("[F]ederal law undeniably includes a policy favoring arbitration. At a minimum, this policy requires that ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration.") (internal citation omitted).

1. *The Plain Language Of The Agreement Demonstrates The Parties' Intent To Delegate Arbitrability Determinations To The Arbitrator.*

The agreement between Mr. Bossé and New York Life contained an unambiguous delegation provision:

> The Partner and New York Life agree that any dispute, claim or controversy arising between them … ***as well as any dispute as to whether such Claim is arbitrable***, shall be resolved by an arbitration proceeding administered by the NASD in accordance with its arbitration rules.

(JA at 74 (emphasis added).) Several courts have enforced delegation provisions like this one. *See, e.g.*, *Rent-A-Center, W., Inc.*, 561 U.S. at 68 ("The Arbitrator …

shall have exclusive authority to resolve any dispute relating to the … enforceability … of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."); *Fed. Ins. Co. v. Metro. Transp. Auth.*, 785 F. App'x 890, 892 (2d Cir. 2019) ("The Contract uses 'any and all' language when it states 'parties to this Contract hereby authorize and agree to the resolution of all disputes arising out of, under, or in connection with, the Contract' through arbitration. That language indicates that Federal and NYCTA 'clearly and unmistakably' required the issue of arbitrability to be decided by the arbitrator, not the court.") (internal citations omitted); *Danley v. Encore Capital Grp., Inc.*, 680 F. App'x 394, 398 (6th Cir. 2017) ("[A]ll claims relating to your account, a prior related account, or our relationship are subject to arbitration, ***including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision***") (emphasis in original); *Doe v. Déjà vu Consulting Inc.*, No. 3:17-cv-00040, 2017 WL 3837730, at *8 (M.D. Tenn. Sept. 1, 2017) ("[T]he arbitrator shall have exclusive authority to resolve any disputes over the interpretation, validity and/or enforceability of any part of this contract, including the arbitration provisions in this paragraph."). Simply stated, this contractual language is sufficient to show that the Mr. Bossé and New York Life delegated the preliminary question of arbitrability to the arbitrator.

2. *The Rules-Incorporation Language In The Delegation Provision Confirms The Parties' Intent To Delegate The Arbitrability Determination.*

The arbitration agreement in this case goes a step further than simply delegating the question of arbitrability. It actually incorporates by reference the arbitral forum's rules—FINRA rules in the first instance, and AAA rules as a backstop in the event FINRA will not hear the claims. (JA at 74.) The rules of these independent arbitral forums explicitly confer on arbitrators the power to decide whether and how to exercise jurisdiction over a case.[5] This incorporation of arbitration rules is yet another piece of persuasive evidence that the parties agreed to delegate the preliminary issue of arbitrability to the arbitrator. "[V]irtually every circuit to have considered the issue has determined that the incorporation of the arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Oracle Am., Inc. v. Myriad Grp., A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (collecting cases); *see also Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) ("Rule 7(a) says plainly that the arbitrator may 'rule on his or her own jurisdiction' including any objection to the 'existence, scope or validity of the arbitration agreement.' This is about as 'clear and unmistakable' as language can get, meeting the standard we have followed.").

[5] *See* FINRA Rule 13413 and AAA Rules 6(a)–(b).

Even the District Court recognized that, on its face, the contract between Mr. Bossé and New York Life "vests the arbitrator with the authority to determine what particular claims arising out of the contract are subject to arbitration[.]"[6] (ADD. at 8.) Where the District Court erred, though, was in proceeding further with its own analysis of how to interpret the contractual arbitration provision. Instead, it should have recognized that "a court possess no power to decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 529; *see also Clough v. Brock Servs., LLC*, No. 2:19-cv-00050, 2019 WL 3806372, at *7 (D. Me. Aug. 13, 2019) ("[I]f the Court determines that the parties evidenced a clear and unmistakable intent to submit certain gateway issues to the arbitrator such as whether the Arbitration Agreement is valid, the Court ***must*** enforce the parties' intent.") (emphasis added).

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[6] Though hedging a bit, Mr. Bossé also acknowledged the authority of the arbitral forum to decide the basic question of arbitrability:

> [W]hile there may be "clear and unmistakable" evidence that the parties intended that the issue of whether the arbitration clause applies to disputes, claims or controversies arising out of Mr. Bossé's prior employment relationship … is an arbitrability issue that must be decided in arbitration, there is no such evidence that the issue of whether the clause applies to disputes, claims, or controversies arising out of Mr. Bossé's subsequent independent contractor relationship … is an arbitrability issue that must be decided in arbitration.

(JA at 86.) Mr. Bossé's purported distinction, however, slices the matter too thinly. The very point of the delegation provision is to allow an arbitral forum, not a court, to decide whether the "agreement covers a particular controversy." *Rent-A-Center, W., Inc.*, 561 U.S. at 69.

C. The District Court's Application Of The Law Is Indefensible And Stands Alone In The Wake of Henry Schein.

New York Life is unaware of any other decision by a federal court limiting *Henry Schein* in the manner submitted by the District Court. This makes sense, particularly given the Supreme Court's clear mandate: "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *Henry Schein*, 139 S. Ct. at 526.

At least one district court has confronted circumstances analogous to the instant case and followed the holding of *Henry Schein*. *See Clough*, 2019 WL 3806372, *8–9 (granting motion to compel arbitration of gateway question of arbitrability). In *Clough*, the issue was whether the parties, in entering into a new and superseding employment agreement that was silent on arbitration, invalidated a prior, stand-alone arbitration agreement. *Id.* at *5. The Court found it possessed no power to decide the issue, because the parties delegated that question to the arbitral forum.[7] *Id.* at *8 ("The Court concludes the parties delegated the issue of

[7] The broad arbitration provision in *Clough* provided in relevant part:

> Each, every, any and all claims, disputes and/or controversies now existing or later arising between or among the Parties, or between or among the employees of The Brock Group ... whether now known or unknown, arising out of or related to employment or termination of employment with The Brock Group shall be resolved only through final and binding arbitration .... Such claims, disputes, and/or controversies, without limitation, include those arising out of or relating to: ***all issues of arbitrability***, including but not limited to

whether the Arbitration Agreement remains valid in light of the Employment Agreement to arbitration, and because this delegation provision operates as an additional, antecedent agreement, the Court must enforce it.").

Nevertheless, the District Court here, guided by a "presuppos[ition]" that no other court has adopted, charted a contrarian course. It held that "*Schein* presupposes a dispute ***arising out of the contract or transaction*** – i.e. some minimal relationship or connection between the contract and the dispute." (ADD. at 14–15 (emphasis in original).) Doubling down, it concluded that the FAA "does not provide for enforcement" of arbitration delegation clauses "with respect to disputes plainly ***not*** arising out of such contract." (ADD. at 15 (emphasis in original.) That is error, because it conflates the determination of whether the dispute is arbitrable with the determination of whether the court should simply enforce the delegation clause—a separate and distinct matter.

Kubala v. Supreme Prod. Servs., Inc., is instructive. There, the Fifth Circuit reasoned:

> Enforcement of an arbitration agreement involves two analytical steps. The first is contract formation—whether the parties entered

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-Continued

> unconscionability and all grounds as may exist at law or in equity for the revocation of any contract, the interpretation or application of this Dispute Resolution Policy … .

Id. at *7 (emphasis added).

> into any arbitration agreement at all. The second involves contract interpretation to determine whether this claim is covered by the arbitration agreement. Ordinarily both steps are questions for the court. ***But where the arbitration agreement contains a delegation clause giving the arbitrator the primary power to rule on the arbitrability of a specific claim, <u>the analysis changes</u>***.

830 F.3d at 201 (emphasis added). When a party seeking to compel arbitration identifies an arbitration delegation provision, "the court's analysis is limited." *Id.* ("It performs the first step—an analysis of contract formation—as it always does. But the only [pertinent] question … is whether the purported delegation clause is in fact a delegation clause[.]"); *see also De Angelis v. Icon Entm't Grp. Inc.*, 364 F. Supp. 3d 787, 795 (S.D. Ohio 2019) ("When there is a delegation clause, challenges to the overall contract or to the arbitration agreement do not pertain to the validity of the delegation clause and must be submitted to arbitration.").

The District Court here reached well beyond this limited mandate and rehabilitated the "wholly groundless" exception to enforceability of delegation provisions that the Supreme Court left for dead in *Henry Schein*. *See* 139 S. Ct. at 531 ("The [wholly groundless] exception is inconsistent with the statutory text and with our precedent. It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability."). The District Court's holding is contrary to *Henry Schein* and usurps the province of the arbitral forum. *Id.* at 531 ("An arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious.").

II. Alternatively, This Court Should Reverse The District Court Because The Parties Agreed To Arbitrate This Dispute In Its Entirety.

If this Court concludes that the question of arbitrability was properly considered by the District Court, then it should reverse the decision below and compel arbitration. Based on the plain language of the arbitration agreement and the only other evidence in the record—the Marquez Declaration—it is beyond doubt that the arbitration agreement between Mr. Bossé and New York Life was specifically intended to cover claims such as those asserted in this case.

The FAA applies to any "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. § 2. The test under the FAA requires an examination of whether: (i) there exists a written agreement to arbitrate, (ii) the dispute in question falls within the scope of the arbitration agreement, and (iii) the party seeking an arbitral forum has not waived its right to arbitrate. *Lenfest v. Verizon Enter. Sols.*, LLC, 52 F. Supp. 3d 259, 263 (D. Mass. 2014) (citations omitted). As discussed above, there is clearly a written agreement to arbitrate that is valid and enforceable, and no serious argument can be made that New York Life waived its right to compel arbitration.[8]

[8] New York Life moved promptly to compel arbitration and to stay discovery pending a ruling and, ultimately, a decision on this appeal. (JA at 4–5.)

Mr. Bossé contends, however, that his particular claims do not fall within the scope of the arbitration agreement. He is mistaken. The agreement that he signed mandates the arbitration of "***any*** dispute, claim or controversy arising between" Mr. Bossé and New York Life, "including those alleging … race discrimination." (JA at 74.) The arbitration agreement contains no sunset or expiration provision. In fact, it is just the opposite: a survival provision extends the viability of the arbitration agreement past the termination of the Partner's Agreement in which it is contained and into any later relationships that may have been formed between Mr. Bossé and New York Life.[9] (JA at 76.) This broad, relationship-centered arbitration agreement covers Mr. Bossé's current dispute with New York Life, and gives rise to a presumption in favor of arbitrability. *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001) ("Where the

[9] Pointedly, ***Mr. Bossé submitted no evidence*** that this dispute is beyond the scope of his arbitration agreement, and certainly no evidence to rebut or controvert Mr. Marquez's declaration. A sophisticated party who, by his own account, "broke records … was a top case writer … and a member of the 'Million Dollar Round Table,'" (JA at 7), he did not introduce facts suggesting that he did not understand the terms of the Partner's Agreement, generally, or the terms of the arbitration agreement and survivability provision, specifically. Likewise, he did not submit evidence to suggest there was fraud in the procurement of his signature on the Partner's Agreement. *See United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 584–85 (1960) ("In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here … the arbitration clause [is] quite broad."); *see also Openheimer & Co., Inc. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir. 1995) (holding opponent to arbitrability "may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried.").

arbitration clause is broad, there arises a presumption of arbitrability and 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.") (internal citation omitted). *Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 8 (1st Cir. 2014) ("This presumption is particularly appropriate where, as here, the arbitration clause is broadly worded.").

Courts regularly enforce broadly worded, relationship-centered arbitration agreements like this one. *See, e.g.*, *Guglielmo v. LG&M Holdings LLC*, No. CV-18-03718, 2019 WL 3253190, at *8 (D. Ariz. July 19, 2019) (enforcing arbitration agreement that applied to "[a]ny and all controversies between the [plaintiff] and [Defendant Company] ..., regardless of whether such claims sound in contract, tort, and/or are based upon a federal or state statute") (alteration in original); *First Sealord Sur., Inc. v. TLT Const. Corp.*, 765 F. Supp. 2d 66, 71 (D. Mass. 2010) (enforcing arbitration agreement that applied to "any claim, controversy or dispute involving subcontractor"); *Gibbs v. PFS Invs., Inc.*, 209 F. Supp. 2d 620, 623 (E.D. Va. 2002) (enforcing arbitration agreement where the parties defined dispute as "any type of dispute in any way related to your relationship with a PFS Company that under law may be submitted by agreement to binding arbitration, including allegations of breach of contract, personal or business injury or property damage, fraud and violation of federal, state or local statutes, rules or regulations.");

Bosinger v. Phillips Plastics Corp., 57 F. Supp. 2d 986, 988 (S.D. Cal. 1999) (enforcing arbitration of "[a]ny dispute, controversy, or claim arising out of or relating to this Agreement or the relationship between the parties").

The broad scope of the arbitration agreement in this case reflects the evolving nature of Mr. Bossé's ongoing business relationship with New York Life. As Mr. Marquez explained, it is common that employees become independent contractor agents and transition between different jobs and relationships, just as Mr. Bossé did, and that is why the agreement had a survival provision. The survival provision was neither arbitrary nor without a purpose; rather, it was a fundamental feature of the agreement, and it must be enforced as written as the parties consented. *Cf. Lamps Plus, Inc., v. Varela*, 139 S. Ct. 1407, 1416 (2019) ("Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes. Whatever they settle on, the task for courts … remains the same: to give effect to the intent of the parties.") (internal citations and quotations omitted).

The District Court did not do that here. Instead, it made findings of fact that were unsupported by the record and offered a parade of inapposite hypotheticals in support of its erroneous conclusion that the arbitration agreement was not intended to cover this dispute. That is error, both because it was unduly speculative and

because it was inconsistent with the record evidence presented on New York Life's motion.

For example, without the benefit of any evidentiary submissions by Mr. Bossé or even a limited, fact-finding hearing, the District Court *sua sponte* found that "no reasonable person … would have understood the 2004 Partner's Agreement arbitration provision (and survival provision) to require arbitration of any and all future claims[.]" (ADD. at 11.) But this finding runs headlong into the uncontested declaration submitted by New York Life, in which Mr. Marquez explained how Mr. Bossé's situation is precisely what was contemplated by the survival provision. As Mr. Marquez stated, "when an individual becomes an Agent with New York Life, there is frequently an understanding that the individual's affiliation with the company ***may evolve over time***."[10] (JA at 70 (emphasis added).) Employees become managers/employees, and then sometimes return to status as agents, just as Mr. Bossé did.

[10] The district court, without any evidence offered by Mr. Bossé, seems to question Mr. Marquez's declaration. (*See* ADD. at 3 ("It is not clear why, given that explanation, the earlier 2001 Agent's Contract did not include an obligation to arbitrate any disputes that may arise in later stages of an anticipated ongoing relationship.").) To the extent there exists any questions or doubt concerning Mr. Marquez's declaration, it is for FINRA or AAA, not the court, to raise and answer such questions. *See Henry Schein*, *supra*.

The District Court also speculated about the impact of requiring the arbitration of claims arising "generations in the future."[11] (ADD. at 12.) Yet that is not what happened here. This dispute arose twelve years after Mr. Bossé agreed to arbitrate any and all disputes, in the course of an uninterrupted, continuous period of service in varying capacities as an agent, then as a manager, and then again as an agent. That is a far cry from "generations in the future." Courts have not hesitated to enforce arbitration agreements in similar circumstances when claims have arisen years after the agreement was signed, but in the course of an ongoing employment or business relationship.[12] *See, e.g.*, *Schwartz v. Ritz-Carlton Hotel Co., LLC*, No. 17-03751, 2018 WL 3661447 (E.D. Pa. Aug. 2, 2018) (13 years); *Reichner v. McAfee, Inc.*, No. 11-6471, 2012 WL 959365 (E.D. Pa. Mar. 21, 2012) (10 years); *Soto v. State Chem. Sales Cp. Int'l, Inc.*, 719 F. Supp. 2d 189 (D. P.R. 2010) (14 years); *Homestead Ins. Co. v. Wachovia Bank, N.A.*, No. 1:07-cv-2821, 2008 WL 11334469 (N.D. Ga. June 23, 2008) (19 years). Indeed, the fact that Mr. Bossé continued to work for New York Life, in one form or another, from the date he signed the arbitration agreement (2004) until the date of his termination (2016), demonstrates his intent to be bound by the arbitration agreement with its

[11] Mr. Bossé is a natural person. No party has argued that his arbitration agreement with New York Life extends to his heirs or assigns.

[12] Neither the Supreme Court nor Congress has fastened by operation of law an expiration date or maximum duration provision to arbitration agreements.

delegation and survival provisions. *Cf. Reichner*, 2012 WL 959365, at *3 (reasoning that a plaintiff who worked for a defendant "from 1999 to 2009 demonstrated his intent to be bound by the terms of his contract[,]" notwithstanding the introduction of an employee handbook in 2008 that made "no reference to arbitration.").

The District Court also hypothesized the arbitration of potential claims that could not have been contemplated at the time of the agreement, such as "slip and fall injury" disputes arising "30 years in the future." (ADD. at 12.) But, once again, that is not what happened here. Mr. Bossé did not experience a random slip and fall or car accident that gave rise to his claims. On the contrary, his claims grew out of the very scenario that Mr. Marquez described: an evolving, multi-faceted relationship in which Mr. Bossé continued to perform services for New York Life but in a changing capacity.

Ultimately, even if the claims in this case had arisen more fortuitously, the agreement to arbitrate still would not have been so easily avoided. The FAA "requires courts rigorously to enforce arbitration agreements according to their terms[.]" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). And other courts have done just that. *See, e.g.*, *Steigerwalt v. Terminix Int'l Co., L.P.*, 246 F. App'x 798, 801 (3d Cir. 2007) ("The Agreement's scope is broad, and comfortably includes [the plaintiff's] allegations; the Arbitration Agreement quite simply

applies to '***all claims***.'") (emphasis added); *Hassbroek v. Princess Cruise Lines, Ltd.*, 286 F. Supp. 3d 1352, 1358–59 (S.D. Fla. 2017) ("[I]ndependent torts—including those involving rape—do not necessarily fall outside the scope of an arbitration clause in an employment agreement."); *Garcia-Clara v. AIG Ins. Co. Puerto Rico*, No. CV 15-1784, 2016 WL 1261058, at *5 (D.P.R. Mar. 30, 2016) ("This definition of 'dispute' … gives clear notice that arbitration was required as to 'all claims or disputes arising out of the interpretation or enforcement of any duties, rights, or obligations of the Parties set forth in any employment agreement, all claims amounting to a common law tort, and all claims under any federal, state, or local human rights or employment rights statutes and regulations or wage and hour statutes and regulations [. . .].'"). Indeed, this Court has enforced arbitration agreements that cover retroactively "claims or disputes that do not arise 'out of th[e] agreement' and hence are not limited by the time frame of the agreements." *Kristian v. Comcast Corp.*, 446 F.3d 25, 33 (1st Cir. 2006).

Whatever distant and hypothetical situations may be conjured to test the limits of an arbitration agreement, though, we need not explore those outer boundaries here. Mr. Bossé's claims, while arising during his service as an agent rather than during his time as a partner twelve years earlier, were subject to a broad arbitration agreement that was specifically intended to survive into future facets of an ongoing relationship. The District Court should not have injected hypothetical

facts that bore no relationship to the matters at hand as a basis to void the dispute resolution mechanism on which the parties had agreed. *Richmond, F. & P.R. Co. v. Louisa R. Co.*, 54 U.S. 71, 82 (1851) ("[H]owever … probable this dispute or contest may be, it is not for this court to anticipate it, and volunteer an opinion in advance."); *Teva Pharma USA, Inc. v. Novartis Pharma Corp.*, 482 F.3d 1330, 1338 (Fed. Cir. 2007) ("[T]he Supreme Court maintains the necessity of avoiding issuing advisory opinions based upon hypothetical facts.").

The District Court's related exposition on statutes of limitation is equally confounding, and unavailing as a basis for its holding. According to the District Court, "Defendants' position also contravenes the public policy underlying statutes of limitations. Courts have generally refused to permit parties to extend the limitations period beyond [those] legislatively determined by means of contractual provisions." (ADD. at 15–16 (internal quotation marks omitted).) But neither party to this dispute has sought to extend any "limitations period," and neither party to this dispute has "in advance" made a "promise that a statute founded in public policy shall be inoperative." (ADD. at 16.) Statutes of limitations typically do not begin to accrue until a cause of action arises, rather than at the time an applicable contract is signed. Indeed, parties may operate under a written contract for many years without implicating the accrual of a limitations period. As

discussed above, arbitration agreements have been enforced consistently when disputes arose ten or more years after agreements were signed.[13]

Lastly, New York Life has not waived its right to compel arbitration. "As federal policy strongly favors arbitration of disputes, a waiver is not to be lightly inferred, thus reasonable doubts as to whether a party has waived the right to arbitrate should be resolved in favor of arbitration." *In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 44 (1st Cir. 2005). Here, there are no reasonable doubts because New York Life moved swiftly to compel arbitration of this dispute. After reaching agreement with Mr. Bossé's counsel on the waiver of service of a summons on March 1, 2019, New York Life filed its motion compelling arbitration on April 9, 2019. (JA at 4.) The parties have not engaged in any discovery, and they have not utilized other steps in the litigation process. In fact, New York Life moved, and the District Court granted, a continuance of the pretrial conference pending resolution of the arbitration motion. (JA at 4.)

In sum, a valid, written agreement to arbitrate exists, its broad scope comfortably covers the dispute at issue, and New York Life has not waived its

[13] *See also Cason v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1309, 1330 (D. Okla. 2003) (finding certain property claims subject to 73-year-old arbitration agreement in easement).

right to arbitrate. This Court should therefore reverse the District Court and remand with instructions to order arbitration of the dispute in its entirety.

CONCLUSION

For all these reasons, this Court should reverse the District Court's order denying New York Life's Motion to Compel Arbitration.

Dated: January 21, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 8,230 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared using Microsoft Word 2016 in Times New Roman, a proportionally spaced typeface.

Dated: January 21, 2020

/s/ David C. Dziengowski
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Counsel New York Life Ins. Co.,
New York Life Ins. and Annuity Corp., and
New York Life Ins. Co. of Arizona

CERTIFICATE OF SERVICE

I hereby certify that, on January 21, 2020, I electronically filed the foregoing Brief of Appellants with the Clerk of the Court of the United States Court of Appeals for the First Circuit by using the Court's CM/ECF system.

I hereby further certify that, on January 21, 2020, I served the following counsel by agreement pursuant to Fed. R. App. P. 25(c)(2)(B) via email:

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ADDENDUM

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UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Ketler Bossé,
Plaintiff

v.

Case No. 19-cv-016-SM
Opinion No. 2019 DNH 190

New York Life Insurance Company, New York Life Insurance and Annuity Corp., and New York Life Insurance Company of Arizona,
Defendants

O R D E R

Plaintiff Ketler Bossé filed suit against defendants, New York Life Insurance Company, New York Life Insurance and Annuity Corp., and New York Life Insurance Company of Arizona (collectively, "New York Life"), asserting various federal and state employment-related claims arising out of Bossé's 14-year affiliation with New York Life. New York Life demands that the claims be arbitrated, based on an arbitration clause found in a 2004 employment contract. Pending arbitration, New York Life seeks to have this case dismissed or stayed. Failing that, New York Life moves to dismiss Count III of Bossé's complaint (conspiracy to interfere with Bossé's civil rights) for failure to state a claim. Bossé objects.

BACKGROUND

Bossé was affiliated with New York Life in a variety of capacities for well over a decade. He began working as a soliciting agent in the company's New Hampshire office in 2001. At that time, Bossé signed an Agent's Contract, which authorized him to "solicit applications for individual life insurance policies, individual annuity policies, individual health insurance policies, group insurance policies, and group annuity policies" on the company's behalf. Compl., Exh. C. As an "agent," Bossé was an independent contractor. He earned commissions based on a percentage of first-year and renewal premiums generated from his sales of New York Life insurance products. The Agent's Contract did not include an agreement to arbitrate any disputes that might arise out of that contractual relationship.

In 2004, Bossé became an employee of the company, entering into a "Partner's Employment Agreement" with New York Life ("Partner's Agreement"). Paragraph Five of the Partner's Agreement is an arbitration clause that reads as follows:

> The Partner and New York Life agree that any dispute, claim or controversy arising between them, including those alleging employment discrimination (including sexual harassment and age and race discrimination) in violation of a statute (hereinafter "the Claim"), as well as any dispute as to whether such Claim is arbitrable, shall be resolved by an arbitration

> proceeding administered by the NASD in accordance with its arbitration rules.

Marquez Decl., Exh. A, at ¶ 5(a). The Partner's Agreement also provides that the arbitration obligation survives termination of the agreement itself. Id. at ¶ 10.

New York Life says the arbitration provision was specifically drafted to take into account the "history between New York Life and its many employees and agents." Defs.' Mem. in Supp. of Mot. to Dismiss at 6. New York Life explains that the company and its employees "contemplate an ongoing relationship" at the outset, that over the years "may take a variety of forms: agent, district agent, sales manager, registered representative, corporate employee." Id. So, say defendants, to avoid a "patchwork resolution system," the Partner's Agreement provides for arbitration of all claims, including those claims that may arise in a later stage of the anticipated relationship. (It is not clear why, given that explanation, the earlier 2001 Agent's Contract did not include an obligation to arbitrate any disputes that may arise in later stages of an anticipated ongoing relationship.)

In 2005, Bossé transitioned back to an Agent's position (no arbitration agreement). In 2013, Bossé became a District Agent and, again, his contract with New York Life contained no

arbitration agreement. As a District Agent, Bossé could establish his own firm separate from the New Hampshire New York Life office, and hire his own agents. Whether the District Agent Agreement Bossé signed was ever executed by New York Life is unclear at this point.

As a District Agent, Bossé opened his own office, at significant personal cost, and hired several other agents. Bossé was New York Life's first African-American District Agent. The agents he hired were racially diverse. According to Bossé, that racial diversity provoked a strong reaction of racial animus and discrimination from some New York Life associates. As a result, Bossé alleges that the company: failed to process and underwrite insurance applications submitted by Bossé and his agents; engaged in back billing that undermined Bossé and his agents; and "stole or drove away" agents Bossé hired to work in his office. Compl. ¶ 41. Bossé further alleges that the company treated him differently than similarly situated New York Life District Agents who were white, and failed to investigate the disparate treatment complaints he made.

On January 15, 2016, New York Life terminated Bossé's District Agent Contract, purportedly based on inaccuracies found in the electronic application process related to a particular client. Bossé contends that the termination was retaliatory,

that the reasons given by New York Life for termination were pretextual, and that his contract was actually terminated based on racial discrimination. He further contends that, following termination, New York Life defamed him to his New York Life clients, many of whom then ceased doing business with him.

Bossé filed this suit, asserting claims for discrimination and retaliation under 42 U.S.C. § 1981, conspiracy to interfere with civil rights under 42 U.S.C. § 1985, and breach of contract under 42 U.S.C. § 1981. He also asserts a host of state law claims, including claims for breach of the covenant of good faith and fair dealing, fraud, wrongful termination, tortious interference with economic advantage, violation of New Hampshire's Consumer Protection Act (RSA 358-A), breach of fiduciary duty, unjust enrichment, quantum meruit, conversion, defamation per quod, and defamation per se.

I. Motion to Compel Arbitration

Relying on the 2004 Partner's Agreement, New York Life insists that Bossé's current claims be dismissed in favor of arbitration because, under the terms of that Agreement, and provisions of the Federal Arbitration Act, he is obligated to arbitrate all claims he might have against New York Life before the Financial Industry Regulatory Authority ("FINRA").

A. Discussion

The Federal Arbitration Act "establishes 'a liberal federal policy favoring arbitration agreements.'" Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (quoting Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)) (additional citations omitted). Accordingly, the Act "requires courts to enforce covered arbitration agreements according to their terms." Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019) (citations omitted).

Because arbitration "is a matter of contract," "a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit." Hogan v. SPAR Grp., Inc., 914 F.3d 34, 38 (1st Cir. 2019) (quoting McCarthy v. Azure, 22 F.3d 351, 354 (1st Cir. 1994)) (further quotations omitted). Thus, "[i]n deciding a motion to compel arbitration, a court must ascertain whether: '(i) there exists a written agreement to arbitrate' . . ." Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 4 (1st Cir. 2012) (quoting Combined Energies v. CCI, Inc., 514 F.3d 168, 171 (1st Cir. 2008)). Finally, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of

contracts." Cullinane v. Uber Techs., Inc., 893 F.3d 53, 61 (1st Cir. 2018).

When, as here, a motion to compel arbitration is made "in connection with a motion to dismiss or stay," the court "draw[s] the relevant facts from the operative complaint and the documents submitted . . . in support of the motion to compel arbitration." Hogan, 914 F.3d at 36 (quoting Cullinane, 893 F.3d at 55).

The Partner's Agreement upon which defendants rely was terminated in 2005 when Bossé transitioned back to an Agent's position. However, the Partner's Agreement is unambiguous in providing that the arbitration clause survives termination of that agreement. Bossé notes that the facts and circumstances that gave rise to this suit occurred over 12 years after the Partner's Agreement expired, while he was working as an independent contractor under two different agreements with the defendants, neither of which included an arbitration obligation. He argues that, even if the arbitration clause "survived termination" of the Partner's Agreement, it cannot reasonably be applied to these claims because they are completely unrelated and unconnected to the Partner's Agreement, and because they arose so long after termination of that contract.

Under the FAA, "principles of state contract law control the [court's] determination of whether a valid agreement to arbitrate exists." Campbell v. General Dynamics Govt. Sys. Corp., 407 F.3d 546, 552 (1st Cir. 2005).[1] The first issue the court must resolve – indeed, the only issue the court must resolve, since the arbitration agreement vests the arbitrator with the authority to determine what particular claims arising out of the contract are subject to arbitration – is just that: whether, under the FAA, a valid agreement to arbitrate exists. The answer to that question in this case is "no." There is not an enforceable agreement to arbitrate the claims brought in this case.

Arbitration "is a matter of consent, not coercion." Volt Info. Scis., Inc. v. Board of Trustees of Leland Stanford Univ., 489 U.S. 468, 479 (1989). Accordingly, arbitration of a claim is appropriate "only where the court is satisfied that the parties agreed to arbitrate that dispute." Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 297 (2010) (citations

[1] The Partner's Agreement states that it will be "governed by and interpreted in accordance with the laws of the State of New York without regard to conflict of law rules." Marquez Decl., Exh. A, at ¶ 8. Neither party directly confronts the choice-of-law question. (Plaintiff at least acknowledges the contractual provision. See, e.g., Obj. to Mot. to Dismiss at 9.) But, whether the law of New Hampshire (forum state) or New York is applied, the result would be the same.

omitted) (emphasis in original). "An arbitration agreement is logically and necessarily tied to the underlying contract that specifies arbitration as the agreed upon method of dispute resolution." Tillman v. The Hertz Corp., No. 16 C 4242, 2016 WL 5934094, at *2 (N.D. Ill. Oct. 11, 2016) (citing Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, 1516 (10th Cir. 1995) (a party cannot be compelled to arbitrate an unrelated dispute where "it is simply fortuitous that the parties happened to have a contractual relationship"). Cf., Breda v. Cellco Partnership, 934 F.3d 1, 7(1st Cir. 2019) ("Claims arising after the expiration of a contract containing an arbitration provision . . . are only presumed to be subject to arbitration if the 'dispute has its real source in the contract.'") (quoting Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 205 (1991)). When arbitration provisions "are read as standing free from any [underlying] agreement," "absurd results ensue." Smith v. Steinkamp, 318 F.3d 775, 777 (7th Cir. 2003).

Turning to the applicable state law, it is well-settled that "there must be a meeting of the minds in order to form a valid contract," which "is present when the parties assent to the same terms." Chisholm v. Ultima Nashua Indus. Corp., 150 N.H. 141, 145 (2003) (citations omitted). See also Kowalchuk v. Stroup, 61 A.D.3d 118, 121 (N.Y. App. Div. 1st Dept. 2009)

("That meeting of the minds must include agreement on all essential terms.")(citations omitted). "The intent of the parties is determined by an objective standard, and not by actual mental assent." Int'l Bus. Machines Corp. v. Khoury, 170 N.H. 492, 500 (2017) (quoting Tsiatsios v. Tsiatsios, 140 N.H. 173, 178, (1995)). Cf., Starke v. SquareTrade, Inc., 913 F.3d 279, 289 (2d Cir. 2019) ("Generally, courts look to the basic elements of the offer and the acceptance to determine whether there was an objective meeting of the minds sufficient to give rise to a binding and enforceable contract.") (citing Express Indus. & Terminal Corp. v. N.Y. Dept. of Transp., 715 N.E. 1050 (N.Y. 1999)). "An objective standard places a reasonable person in the position of the parties, and interprets [contractual terms] according to what a reasonable person would expect [them] to mean under the circumstances." Int'l Bus. Machines Corp., 170 N.H. at 500 (quoting Behrens v. S.P. Constr. Co., 153 N.H. 498, 502 (2006)). See also Ashwood Capital, Inc. v. OTG Mgmt., Inc., 99 A.D.3d 1, 6, (N.Y. App. Div. 2012) ("to determine the contracting parties' intent, a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it.").

Given the unrestrained language used in the arbitration clause, one might take the view – and defendants seemingly do –

that the arbitration clause is so expansive that it literally covers any conceivable dispute that might arise between the contracting parties at any time in the future, and under any set of facts or circumstances. Under that reading, Bossé's current claims would be covered. They are, after all, disputes with New York Life, and they have arisen in time, and both the nature of the disputes and the time of accrual, or assertion, are unimportant given the expansive language used. The language used also excludes any "relatedness" requirement. That is, there are no words used that explicitly limit the clause's application to only those disputes bearing some relationship to or having some connection to the contract in which it is found. The arbitration provision, by its terms, purports to apply to "any dispute, claim or controversy arising between" the parties.

Such a broad interpretation, however, is problematic for several reasons. First, as the Supreme Court has noted, "[t]he object of an arbitration clause is to implement a contract, not to transcend it." Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B., 501 U.S. 190, 205 (1991). No reasonable person in either Bossé's position or New York Life's position would have understood the 2004 Partner's Agreement arbitration provision (and survival provision) to require arbitration of any and all future claims of whatever nature or

type, no matter how unrelated to the Partner's Agreement, and no matter how distant in the future the claim arose. For example, a reasonable person signing the Partner's Agreement would hardly think that a slip and fall injury suffered by plaintiff on New York Life property 30 years in the future, and 25 years after any work or other relationship terminated, would be subject to arbitration under that particular clause. Defendants' current position – that the Partner's Agreement obligates the parties to arbitrate any and every dispute between them, no matter what it is and no matter when it arises – is unbounded to the point of absurdity. Defendants' proffered construction of the arbitration clause would not only transcend the purpose and terms of the Partner's Agreement, but would operate to deprive employees of all future rights to either a jury trial or court resolution of completely unrelated matters arising generations in the future.

Wexler v. AT&T Corp., 211 F. Supp.3d 500, 503 (E.D.N.Y. 2016), applying New York law, is not only instructive, but particularly relevant here, given the parties' election to adhere to New York's law. In Wexler, plaintiff filed a Telephone Consumer Protection Act claim against AT&T, and AT&T moved to moved to compel arbitration based on a Service Agreement, under the terms of which plaintiff agreed to

arbitrate "all disputes and claims" between the parties. Although that Service Agreement had expired, AT&T argued that the arbitration provision survived. The court was unpersuaded, finding "an arbitration clause that is unlimited in scope presents a question of contract formation." Id. at 504. The court explained that, under New York law, a contract's language:

> must be judged according to "what an objective, reasonable person would have understood [them] to convey." Leonard v. PepsiCo, Inc., 88 F. Supp.2d 116, 127 (S.D.N.Y. 1999) (citing Kay–R Elec. Corp. v. Stone & Webster Constr. Co., 23 F.3d 55, 57 (2d Cir. 1994)). Notwithstanding the literal meaning of the clause's language, no reasonable person would think that checking a box accepting the "terms and conditions" necessary to obtain cell phone service would obligate them to arbitrate literally every possible dispute he or she might have with the service provider, let alone all of the affiliates under AT&T Inc.'s corporate umbrella – including those who provide services unrelated to cell phone coverage. Rather, a reasonable person would be expressing, at most, an intent to agree to arbitrate disputes connected in some way to the service agreement with [defendant]. As explained above, [plaintiff's] claims are not so connected. If a company wishes to bind its customers to something broader, it must take steps to secure something that a reasonable person would understand as an objective expression of his or her agreement. Whether framed in terms of unconscionability or contract formation, the end result is the same: the arbitration clause is not enforced.

Wexler, 211 F. Supp. 3d at 504–05 (alterations in original). See also Hearn v. Comcast Cable Comm., LLC, No. 1:19-CV-1198-TWT, 2019 WL 5305460 (N.D. Ga. Oct. 21, 2019) (same). The Wexler court also noted that the "FAA explicitly limits itself

to agreements 'to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof.'" Id. at 505 (quoting 9 U.S.C. § 2 (emphasis added)). That is, the Federal Arbitration Act itself requires that an arbitration clause have some relationship to, some connection with, the agreement or contract, as a condition of federal enforcement.

Defendants rely upon the recent Supreme Court decision in Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (U.S. 2019), in arguing that, essentially, only an arbitrator can determine whether the arbitration clause should be enforced, and what its reach might be. But, that decision does not address the preliminary issue in this case.

In Schein, the Supreme Court clarified a specific point. When a contract includes an arbitration clause, and the scope of that clause – i.e, whether a particular dispute arising out of that contract is subject to arbitration – is a matter committed to the arbitrator, then a court must defer to the arbitrator with respect to the clause's reach. That is so even if, in the court's view, a claim that the arbitration agreement applies to a particular contractual dispute is "wholly groundless," or even frivolous. Id. at 530. But, consistent with the FAA, Schein presupposes a dispute arising out of the contract or transaction

– i.e. some minimal relationship or connection between the contract and the dispute. That is because, under the Federal Arbitration Act, contractual arbitration clauses are "valid, irrevocable, and enforceable" if they purport to require settlement by arbitration of any "controversy thereafter arising out of such contract." 9 U.S.C. § 2. The Supreme Court, in Schein, plainly understood that the Act requires enforcement of arbitration clauses with respect to disputes "thereafter arising out of such contract." Schein, 139 S. Ct. at 530 (quoting 9 U.S.C. § 2) (emphasis added). The Act does not provide for enforcement of arbitration clauses with respect to disputes plainly not "arising out of such contract."

The additional notion proposed by defendants – that an arbitration survival clause creates a perpetual obligation to arbitrate any conceivable legal or equitable claim of any nature that plaintiff might ever have against the company, to include the myriad of potential disputes that unarguably do not "thereafter aris[e] out of such contract," id., – is plainly inconsistent with the Act's explicit relatedness requirement, and is otherwise unenforceable either due to lack of contract formation (meeting of the minds), or unconscionability.

Defendants' position also contravenes the public policy underlying statutes of limitations. Courts have generally

refused "to permit parties to extend the limitations period beyond [those] legislatively determined" by means of contractual provisions. GRT, Inc. v. Marathon GTF Tech., Ltd., No. CIV.A. 5571-CS, 2011 WL 2682898, at *15 (Del. Ch. July 11, 2011) (survival clause that "provides that the representations and warranties will survive indefinitely[] is treated as if it expressly provided that the representations and warranties would survive for the applicable statute of limitations."). See W. Gate Vill. Ass'n v. Dubois, 145 N.H. 293, 298–99 (2000) ("[plaintiff] is seeking to circumvent the legislature's declaration of public policy in RSA 508:4, I, by contractually extending the three-year statute of limitations before any cause of action exists. Such an agreement 'is unenforceable because a party cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative.'") (quoting John J. Kassner & Co. v. City of New York, 46 N.Y.2d 544, 415 N.Y.S.2d 785, 389 N.E.2d 99, 103 (1979)). Thus, defendants' proposed construction of the parties' arbitration obligation as eternal and unrestrained is also unpersuasive because it is contrary to public policy.

Bossé's current claims are not tethered to, or related in any way to, the 2004 Partner's Agreement or the relationship established by that agreement, and New York Life does not claim

otherwise. Accordingly, for the reasons given, defendants' motion to compel arbitration is denied.

II. Motion to Dismiss Count III

A. Standard of Review

When ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court must "accept as true all well-pleaded facts set out in the complaint and indulge all reasonable inferences in favor of the pleader." SEC v. Tambone, 597 F.3d 436, 441 (1st Cir. 2010). Although the complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), it must allege each of the essential elements of a viable cause of action and "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation and internal punctuation omitted).

B. Discussion

Defendants have moved to dismiss Count III of Bossé's complaint, conspiracy to interfere with civil rights. To state a claim for a civil rights conspiracy, "[f]irst, the plaintiff must allege a conspiracy; second, [he] must allege a conspiratorial purpose to deprive the equal protection of the laws; third, [he] must identify an overt act in furtherance of

the conspiracy; and finally, [he] must show either injury to person or property, or a deprivation of a constitutionally protected right." Parker v. Landry, 935 F.3d 9, 18 (1st Cir. 2019) (quoting Pérez-Sánchez v. Pub. Bldg. Auth., 531 F.3d 104, 107 (1st Cir. 2008)).

Bossé alleges that James Robbins, New York Life's Director of Operations for the New Hampshire Office, used his position to influence other New York Life employees, including, but not limited to, New York Life Compliance Office and Senior Associate, Nicholas Inglese, past Managing Partner of New York Life's New Hampshire Office, Steven Irish, and others, in a civil conspiracy to intentionally deprive Bossé of his right to equal protection under the law." Compl. ¶ 132. In support of that allegation, Bossé asserts that Robbins, Irish and Inglese:

> (1) delay[ed] processing orders for Mr. Bossé and his new agents who depended on that income; (2) maliciously den[ied] Mr. Bossé advance commissions, thereby taking away his income and livelihood; (3) allow[ed] New York Life agents working out of the New Hampshire office to take clients from Mr. Bossé to give [the white agents] a chance, and/or forcing Mr. Bossé to share his commissions with white agents;" (4) attribute[ed] the credit of hiring new and experienced agents groomed by Mr. Bossé to white agents; (5) causing multiple withdrawals from client accounts without Mr. Bossé's advance knowledge, causing those clients to cut ties with Mr. Bossé; and (6) publicly and privately disparaging or allowing others to publicly and privately disparage Mr. Bossé's diverse ethnic agents, including but not limited to, using racial slurs when referring to them.

Compl. p. 3. Throughout his complaint, Bossé details multiple instances of the conduct he alleges. See, e.g., ¶ 41 – 45, 46, 49, 51, 54, 57.

Defendants argue that Count III must be dismissed for two reasons. First, defendants say, Bossé's pleadings fail to implicate two or more defendants, instead mentioning only three of New York Life's individual employees, each of whom acted as an agent of one company – New York Life. Defendants invoke the "intracorporate-conspiracy doctrine," which holds that "an agreement between or among agents of the same legal entity, when the agents act in their official capacities, is not an unlawful conspiracy." Ziglar v. Abbasi, ____ U.S. ____, 137 S. Ct. 1843, 1867 (2017) (citations omitted). That is because "[w]hen two [or more] agents of the same legal entity make an agreement in the course of their official duties, ... as a practical and legal matter their acts are attributed to their principal." Id. "And it then follows that there has not been an agreement between two or more separate people," as required to establish a conspiracy. Id.

The Supreme Court recently considered, but did not resolve, the proper application of the intracorporate conspiracy doctrine

to civil rights conspiracy claims brought under Section 1985(3). Ziglar, 137 S. Ct. at 1867. It noted:

> To be sure, this Court has not given its approval to this doctrine in the specific context of § 1985(3). There is a division in the courts of appeals, moreover, respecting the validity or correctness of the intracorporate-conspiracy doctrine with reference to § 1985 conspiracies. Nothing in this opinion should be interpreted as either approving or disapproving the intracorporate-conspiracy doctrine's application in the context of an alleged § 1985(3) violation. The Court might determine, in some later case, that different considerations apply to a conspiracy respecting equal protection guarantees, as distinct from a conspiracy in the antitrust context.

Id. at 1868 (internal citations omitted).

Whether and how the intercorporate-conspiracy doctrine might apply to Section 1985(3) claims remains unsettled then – at least on a national level. Our court of appeals, however, has expressed doubt about applying the doctrine outside the antitrust context. See, Stathos v. Bowden, 728 F.2d 15, 20-21 (1st Cir. 1984) ("We doubt that this 'intracorporate' exception should be read broadly. The cases employing it have rested in large part on precedent drawn from the antitrust field."). On the other hand, however, the court has applied the principle in a case not much different than this one. See, Rice v. President & Fellows of Harvard Coll., 663 F.2d 336, 338 (1st Cir. 1981) ("The fatal defect in this claim is that [plaintiff] has sued

only the President and Fellows of Harvard College, which is a single corporate entity and, therefore, unable to conspire with itself in violation of [Section] 1985(3).").

In Stathos, 728 F.2d at 17, plaintiff brought a sex discrimination action against a governmental body and several of its agents. The court upheld a jury verdict of liability under Section 1985(3), stating:

> Where "equal protection" is at issue, however, one cannot readily distinguish in terms of harm between the individual conduct of one enterprise and the joint conduct of several. Nor can one readily identify desirable social conduct as typically engaged in jointly by the officers of a single enterprise. Thus, the boundaries of an "intracorporate" exception to the § 1985(3) conspiracy provision should be narrower than in antitrust. Indeed, we do not see why they should extend — if at all — beyond the ministerial acts of several executives needed to carry out a single discretionary decision.

Stathos, 728 F.2d at 21 (citations omitted). The defendants' conduct in Stathos "involved a series of acts over time going well beyond simple ratification of a managerial decision by directors. It consisted of joint discretionary activity – with many words and several deeds – engaged in by each of the Commissioners." Id. at 21 (citations omitted). Given that circumstance, the court held that the intracorporate exception did not apply. Id.

Stathos's analysis has been criticized. See, e.g., Johnson v. Nyack Hosp., 954 F. Supp. 717, 724 (S.D.N.Y. 1997) ("such a line responds neither to the text nor to the objectives of Section § 1985. Section 1985 depends on multiple actors, not on multiple acts of discrimination or retaliation.") (quoting Travis v. Gary Community Mental Health Ctr., Inc., 921 F.2d 108, 110 (7th Cir. 1990)). But, it remains the law in this Circuit, and it seems to contradict Rice. Defendants have not offered a convincing argument as to why the later Stathos decision should not apply in this case. In his complaint, Bossé does plausibly allege a series of acts over time involving several individuals well beyond the ministerial acts of several people needed to carry out a single discretionary corporate decision. Accordingly, for now, at this early stage, the intracorporate conspiracy doctrine will not be applied at Bossé's civil rights conspiracy claim.[2]

Defendants' additional arguments in favor of dismissal of Bossé's civil rights conspiracy claim are similarly unavailing. Bossé's factual allegations are somewhat meagre, but they are sufficient at this stage to withstand the defendants' motion to

[2] The court is willing to reconsider the applicability of the doctrine at summary judgment with the benefit of a fully developed record.

dismiss. Defendants' motion to dismiss Count III of the complaint is therefore denied.

CONCLUSION

For the foregoing reasons, as well as those stated in plaintiff's briefing, defendants' motion to compel arbitration, and stay these proceedings (document no. 9) is **DENIED**, and defendants' motion to dismiss (document no. 9) is **DENIED**.

SO ORDERED.

Steven J. McAuliffe
United States District Judge

November 13, 2019

cc: All counsel of record

9 U.S.C. § 1

§ 1. “Maritime transactions” and “commerce” defined; exceptions to operation of title

“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 16

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.