New York Supreme Court

Appellate Division—First Department

ANDOWAH NEWTON,

Plaintiff-Respondent,

Appellate Case No.: 2020-03198

– against –

LVMH MOËT HENNESSY LOUIS VUITTON INC.,

Defendant-Appellant.

AMICUS CURIAE OF BRIEF PUBLIC JUSTICE, P.C. AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION-NEW YORK

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STATEMENT OF AMICI CURIAE

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory, pre-dispute binding arbitration.

Through its work on this project, Public Justice is well-acquainted with the law surrounding delegation to arbitrators of the authority to resolve threshold questions of arbitrability. Public Justice attorneys have argued cases involving issues of delegation before state and federal courts, including the California Supreme Court in *Sandquist v. Lebo Automotive*, 1 Cal.5th 233 (2016), a case about whether courts or arbitrators should decide if an agreement permits class arbitration, and the U.S. Supreme Court in *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), a case involving whether courts or arbitrators should decide whether the Federal Arbitration Act's exemption for workers engaged in foreign or interstate commerce applied to truck drivers classified as independent contractors.

The National Employment Lawyers Association (NELA) is a national bar association dedicated to the vindication of individual employees' rights. **NELA-NY**, incorporated as a bar association under the laws of New York State, is

NELA's New York affiliate, with more than 300 members. NELA-NY's activities and services include continuing legal education and a referral service for employees seeking legal advice and/or representation. NELA-NY also seeks to promote more effective legal protections for employees, including employees victimized by sexual harassment and assault in the workplace, contrary to the strong and expressed public policy of the State of New York in preventing such harassment and providing redress when it occurs.

INTRODUCTION

This matter raises important issues fundamental to New York public policy: the threshold question of who decides whether a sexual harassment claim is subject to mandatory arbitration; and whether an agreement to arbitrate was superseded by a revised employee handbook that specifically advised employees they could file claims of sexual harassment in state court. While who decides threshold issues of arbitrability like these is important as a legal question in every case in which it arises, the stakes in a case like this—involving allegations of underlying conduct expressly and strongly prohibited by the laws and policies of the State of New York—underscore the need to adhere to the precedents requiring the court to decide questions of arbitrability in the first instance when contract formation is at issue. Here, the motion court denied Appellant LVMH's motion to compel arbitration on two independent grounds, which that court itself identified as

"separate and distinct." R. 18. The court was correct to reach, not delegate, the threshold question of arbitrability and to answer it in Respondent's favor.

The court's first ground turned on CPLR 7515 and whether or not it could apply retroactively to nullify arbitration agreements already in effect at the time it was enacted. That ground focused on whether the arbitration agreement has been invalidated by state law, CPLR 7515. The court's second ground involved LVMH's undisputed amendments to its employment handbook and whether or not they superseded the agreement LVMH entered into with Ms. Newton in 2014. That second ground focused on whether one of the parties to the original contract sought to modify its terms with a new, superseding offer that the other contracting party accepted.

Notably, this second ground presents a core threshold issue of whether an agreement between the parties, or more specifically, which of two conflicting agreements, "was ever concluded." *Rent-A-Center, W. v. Jackson*, 561 U.S. 63, 70 n.2 (2010). Federal and state courts hold that such questions of contract formation are "always" for courts to decide and cannot be delegated to an arbitrator, even if the Federal Arbitration Act ("FAA") rather than New York procedural law applies here as Appellant contends. *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287, 297 (2010) (issues for judicial, rather than arbitral, determination "always include whether the [arbitration] clause was agreed to"). Because contract

formation questions cannot be delegated to an arbitrator, and because whether the 2018 LVMH handbook amendments superseded LVMH's 2014 arbitration agreement with Ms. Newton is a question of contract formation, it was proper for the motion court to reach and decide that question, and to hold that the actual, operative contract formed between Ms. Newton and LVMH did not require arbitration of her discrimination and retaliation claims.

LVMH's argument, that *all* the questions in this case should be sent to an arbitrator, is thus revealed to be extreme as well as untenable under the circumstances here. Appellant Br. 12-15. Not only has New York State expressed a strong public policy against sexual harassment and in support of allowing victims to remedy violations in court, codified in CPLR 7515 (prohibiting arbitration of harassment claims), but the 2018 employer policy itself permits Respondent to avail herself of a judicial remedy for the harassment she suffered. Notwithstanding these facts, and the law summarized in the previous paragraph, Appellant seeks to send this entire dispute—including whether *any* part of it is arbitrable—to arbitration. The court was correct to reject that position.

The motion court's second basis for denying LVMH's motion to compel arbitration—that the 2018 handbook amendments superseded the 2014 agreement and nullified it "of the company's own accord"—R. 19, can end this Court's inquiry on appeal. Federal and state courts applying both the FAA and CPLR 7503

are all in accord that it was appropriate for the motion court to decide that contract formation question in the first instance, and for the reasons stated in Point V of Respondent's brief, the motion court decided it correctly. Respondent BR. 38-45. The decision below should accordingly be affirmed.

ARGUMENT

I. NEW YORK COURTS APPLYING CPLR 7503 AND FEDERAL AND STATE COURTS APPLYING THE FAA AGREE THAT COURTS AND NOT ARBITRATORS MUST DECIDE QUESTIONS OF CONTRACT FORMATION.

New York courts have long held that, pursuant to CPLR 7503, courts have the duty of deciding the threshold questions of whether a binding agreement to arbitrate exists between the parties and whether that agreement's scope covers the dispute at issue. *Rockland County v. Primiano Const. Co., Inc.*, 51 N.Y.2d 1, 7 (1980); *Housekeeper v. Lourie*, 39 A.D.2d 280, 283-84 (1st Dep't 1973). Even when the agreement at issue, like LVMH's 2014 agreement with Ms. Newton, invokes the Federal Arbitration Act, this does not alter the fact that New York courts consider questions of the arbitration clause's formation to be threshold questions for a court to decide. *See Schreiber v. K-Sea Transp. Corp.*, 9 N.Y.3d 331, 340-41 (2007) (after determining that FAA applied to dispute, remanding for Supreme Court to hold evidentiary hearing on whether agreement to arbitrate was result of fraud).

Nor does the presence of a delegation clause in the 2014 agreement affect

this analysis. For one thing, LVMH makes much of the state and federal caselaw that any doubts about whether a dispute is arbitrable are to be resolved in favor of arbitration, Appellant Br. 11-12, without ever acknowledging that this presumption is reversed where questions of delegation are concerned. *Smith Barney, Inc. v. Hause*, 238 A.D.2d 104, 105 (1st Dep't 1997) (court is divested of its obligation to decide threshold issues of arbitrability only where there is "clear and unmistakable evidence" that parties intended arbitrators to decide them instead); *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995) (same).

Moreover, even purportedly clear and unmistakable evidence of an intent to arbitrate threshold issues of arbitrability will not permit an arbitrator instead of a court to decide whether the parties agreed to arbitrate in the first place. If, for example, an arbitration agreement includes a clearly written delegation clause but one party claims that he was misled about the nature of what he was signing so that his signature to that arbitration agreement was procured by fraud, or that the agreement lacked consideration or that he never saw it or agreed to its terms, the delegation clause in the agreement whose formation is in question cannot be enforced to give an arbitrator authority where such authority derives from the consent of the contracting parties, and that consent is the matter in dispute.

The Second Circuit recently joined a growing federal appellate consensus that contract formation questions stand outside the universe of issues that parties

may delegate to an arbitrator to decide. *Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 251 (2d Cir. 2019) (citing *Granite Rock Co. v. Int'l Bhd. of Teamsters* for proposition that questions of an arbitration clause's scope or enforceability may be delegated to an arbitrator while questions of its formation may not); *see also Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1105-07 (10th Cir. 2020) (using Supreme Court precedents of *Granite Rock* and *Rent-A-Center, W. v. Jackson* to explain why questions of contract formation cannot be delegated); *MZM Constr. Co., Inc. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 392 (3d Cir. 2020) ("questions about the 'making of the agreement to arbitrate' are for the courts to decide unless the parties have clearly and unmistakably referred those issues to arbitration in a written contract whose formation is not in issue"); *Bowles v. OneMain Fin. Grp., LLC*, 954 F.3d 722, 726-27 (5th Cir. 2020) (question of mutual assent to arbitration was for court to decide because it went to contract formation, whereas question of contract's enforceability was properly delegated to arbitrator).

None of the cases cited by LVMH undermine this consensus. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), on which LVMH principally relies, takes as a given that "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Id.* at 530. And the New York cases put forward by LVMH are inapposite, for they do not involve

questions of contract formation exempt from delegation. *E.g., Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co.*, 26 N.Y.3d 659, 675 (2016) (enforceability challenge based on failure to file workers compensation insurance policies with California regulators); *In re Smith Barney Shearson*, 91 N.Y.2d 39, 46 (1997) (six-year time limit for initiating arbitration); *WN Partner, LLC v. Baltimore Orioles Ltd. P'ship*, 179 A.D.3d 14, 16 (1st Dep't 2019) (whether league had financial interest in the partnership or any of the partners at time dispute arose); *Arb. of Certain Controversies Between Gramercy Advisors LLC v. J.A. Green Dev. Corp.*, 134 A.D.3d 652, 653 (1st Dep't 2015) (whether Texas or New York courts had jurisdiction over motion to compel arbitration).

Here, Ms. Newton specifically challenged, before the motion court, the delegation provision in the 2014 arbitration agreement, noting that it did not apply to questions of contract formation. R. 139-140 (citing *Granite Rock*). And the second ground on which the motion court denied LVMH's motion, regarding the superseding effect of the 2018 handbook amendments, is such a contract formation question.

II. WHETHER THE 2018 HANDBOOK AMENDMENTS SUPERSEDED THE 2014 ARBITRATION AGREEMENT IS A NONDELEGABLE QUESTION OF CONTRACT FORMATION.

In 2018, the New York legislature enacted several reforms intended to strengthen protections for victims of sexual harassment in the workplace and

ensure that all employers in the state made prevention of sexual harassment a top priority. *See* *https://www.ny.gov/combating-sexual-harassment-workplace/employers* (listing minimum requirements for all employer sexual harassment policies and required training that must be provided annually to all workers in New York beginning in October 2018).

Pursuant to these new state laws, LVMH updated its employee handbook on November 26, 2018 with policies on sexual harassment and discrimination that "supersede and fully replace" its previous policies on the same subjects. R. 96-110. LVMH suggests that these amendments simply describe, using permissive language, additional avenues that someone experiencing sexual harassment in the workplace may be able to pursue. Appellant BR. 28-29. But any additional avenues that involve going to court directly contradict the 2014 arbitration agreement, which described arbitration as the "exclusive" method for resolving disputes, "including all discrimination claims." R. 60.

The U.S. Court of Appeals for the Third Circuit recently confronted a factually analogous situation where an employer took action to supersede a pre-existing arbitration agreement based on an intervening law, in that case the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. *Jaludi v. Citigroup*, 933 F.3d 246, 248 (3d Cir. 2019). The Dodd-Frank Act, among other things, outlawed arbitration of Sarbanes-Oxley whistleblower claims. *Id.* The year

after this law went into effect, Citigroup issued a new employee handbook that purported to "supersede any prior, inconsistent policies or handbooks" and removed Sarbanes-Oxley claims from a list of arbitrable disputes. *Id.* at 250. When Mr. Jaludi subsequently sought to bring Sarbanes-Oxley whistleblower claims against Citigroup, Citigroup sought to enforce the pre-Dodd Frank version of its arbitration agreement, arguing, like LVMH argues here, that the amended handbook did not modify the earlier arbitration agreement because it only spoke of superseding prior handbooks and policies. *Id.* at 252.

Rejecting Citigroup's argument, the Third Circuit found the earlier agreement to directly contradict the 2011 handbook amendments, and to be superseded by them. *Id.* at 254. And notably for the delegation inquiry in this case, the Third Circuit followed the lead of other federal courts before it in concluding that the question of whether the handbook amendments superseded the earlier arbitration clause was a question of contract formation to be decided under state law, not a question of the contract's scope subject to the federal policy favoring arbitration. *Id.* at 254-55 (citing, among others, *Applied Energetics, Inc. v. NewOak Capital Mkts., LLC*, 645 F.3d 522, 526 (2d Cir. 2011) (reaching same conclusion under New York law)).

Although neither *Jaludi* nor *Applied Energetics* involved delegation provisions, both are instructive as confirming that the effect of a superseding

amendment is a question of contractual existence, not contract scope. Moreover, state and federal courts have refused to delegate questions about superseding agreements to arbitrators under the same logic that these questions go to whether an agreement to arbitrate existed between the parties at the time the dispute arose, and that such questions cannot be delegated. *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 781 (10th Cir. 1997); *Duenas v. Life Care Ctrs. of Am., Inc.*, 336 P.3d 763, 773 (Ariz. App. 2014); *Midwest Neurosciences Associates, LLC v. Great Lakes Neurosurgical Associates, LLC*, 920 N.W.2d 767, 771 (Wis. 2018).

III. THE 2018 HANDBOOK PERMITTED MS. NEWTON TO BRING THIS CLAIM IN COURT, A RESULT CONSISTENT WITH RECENTLY-ARTICULATED NEW YORK PUBLIC POLICY.

Not only was the motion court correct to reach the question of the effect of the 2018 handbook amendments, it also reached the correct conclusion about their effect. Appellant's attempts to evade the language of its own handbook are unavailing.

For one thing, Appellant suggests that the permissive language in its handbook is more like the jurisdictional language in *Bank Julius Baer & Co. v. Waxfield Ltd.*, 424 F.3d 278, 284 (2d Cir. 2005) than the superseding language in *Goldman, Sachs & Co. v. Golden Empire Schools Funding Auth.*, 764 F.3d 210 (2014) because it is permissive rather than mandatory. But this comparison falls

apart upon a closer reading of the Second Circuit's opinion in *Golden Empire*. In describing the earlier *Bank Julius* case and why the language there did not supersede the earlier arbitration agreement, the *Golden Empire* court noted that the later agreement simply recognized the jurisdiction of the New York courts over "any action," a statement not inconsistent with the earlier agreement to arbitrate all disputes. *Golden Empire*, 764 F.3d at 215 ("this agreement should be read 'as complementary. . . such that "[the parties] are [still] required to arbitrate their disputes, but that to the extent the Bank files a suit in court in New York [such as] to enforce an arbitral award ... [the customer] will not challenge either jurisdiction or venue.'" (quoting *Bank Julius*, 424 F.3d at 285).

No such complementary reading is possible here. The 2018 handbook doesn't talk in general terms about the courts having jurisdiction over "actions" but specifically authorizes employees to bring such actions. R. 101 ("You may also file a complaint in state court.").

And this specificity is fatal to Appellant's arguments in another respect. LVMH suggests that a handbook disseminated to all employees, because it is general in nature, could not amend an earlier agreement made with Ms. Newton specifically. Appellant Reply Br. 23. But the handbook amendments did not purport to change any other terms of Ms. Newton's employment agreement, such as her rate of pay or duties. The handbook amendments had a specific purpose: to

communicate LVMH's new policies regarding equal employment opportunity, nondiscrimination, and anti-harassment, and to ensure through a signed acknowledgment that all employees understood and agreed to those new policies. One aspect of those new policies, which conflicts with one specific aspect of Ms. Newton's 2014 arbitration agreement, is the policy allowing discrimination claims to be filed in court.

Thus while the policy changes were not unique to Ms. Newton, neither did they exclude her. They did not state, for example, that all employees may pursue claims for sexual harassment in state court except for those employees who previously signed a mandatory arbitration agreement. Instead, the option of filing a complaint in state court, alongside other options of filing complaints internally or with state or federal government agencies, was expressly offered to all LVMH employees, interns, and contractors, R. 101, a group that certainly included Ms. Newton.

This Court need not address whether CPLR 7515 is pre-empted by the Federal Arbitration Act in order to decide this matter in Respondent's favor, because no operative binding agreement to arbitrate discrimination and retaliation claims exists between LVMH and Ms. Newton. But the laws passed by the New York legislature in 2018, including CPLR 7515, do provide an important backdrop to this litigation. They reflect the state's public policy that sexual harassment in the

workplace is a scourge that must be taken seriously and that multiple avenues for seeking redress must be made available to affected workers. LVMH responded by amending its employee handbook, and so applying well-established contract formation principles to give effect to that new handbook language generates a result that is also consistent with New York State public policy.

CONCLUSION

For these reasons, *amici* urge the Court to affirm the decision below.

Dated: December 23, 2020

Respectfully submitted,

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