To be argued by Stephen Bergstein
Time requested: 10 minutes

Supreme Court of the State of New York
Appellate Division First Department

Andowah Newton,

Plaintiff-Respondent,

Dkt No. 2020-03198

v.

LVMH Moet Hennessy Louis Vuitton Inc.,

Defendant-Appellant.

Brief of Plaintiff-Respondent

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Introduction

Plaintiff Andowah Newton, currently Vice President, Legal Affairs at LVMH Moët Hennessy Louis Vuitton ("LVMH"),[1] suffered sexual assault and extensive sexual harassment from a senior-level management employee who was approximately 30 years her senior, had worked for LVMH for many years longer than Ms. Newton, and reported directly to a Senior Vice President of LVMH. Despite Ms. Newton's complaints about the hostile work environment, LVMH ignored and dismissed her complaints, failed to take remedial action, tried to intimidate her into silence, instructed her to confront the harasser herself, and once she followed LVMH's instructions, repeatedly retaliated against her.

When, as permitted by New York law and LVMH's Amended Policy, Ms. Newton filed this action in State Supreme Court, New York County, alleging that LVMH violated the New York State and New York City Human Rights laws, Defendant moved to compel arbitration, relying on an arbitration clause in Ms.

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[1] LVMH's subsidiaries, brands, and affiliates include Louis Vuitton, Christian Dior, DFS, Le Bon Marché, La Grande Épicerie, Fendi, Marc Jacobs, Fenty Beauty by Rihanna, Givenchy, Sephora, Starboard Cruise Services, Berluti, Charles & Keith, Bulgari, Céline, Emilio Pucci, House of Bijan, Kenzo, Loewe, Loro Piana, Moynat, Nicholas Kirkwood, Rimowa, Thomas Pink, Chaumet, FRED, Guerlain, Kenzo, Fresh, Make Up For Ever, Hublot, TAG Heuer, Zenith, Acqua di Parma, Benefit Cosmetics, Givenchy Parfums, Kenzo Parfums, Make Up For Ever, Parfums Christian Dior, Perfumes Loewe, Maison Francis Kurkdjian, Marc Jacobs Beauty, Kat Von D Beauty, Cheval Blanc (hotels), Caffe-Pasticceria Cova, Feadship, Les Échos, Hennessy, Belvedere, Veuve Clicquot, Dom Pérignon, Krug, Ruinart, and Moët & Chandon, among others.

Newton's employment agreement with the company. Supreme Court denied that motion, holding that (1) CPLR 7515 renders "null and void" any contractual provision mandating arbitration of "any allegation or claim of discrimination," (2) CPLR 7515 applies retroactively, (3) the court, and not an arbitrator, determines the threshold question of arbitrability where, as here, strong New York policy is at stake, (4) the Federal Arbitration Act does not apply to the claims in this action, and (5) the arbitration agreement was superseded by LVMH's 2018 revised employee policy, which contains an addendum that expressly allows employees to litigate their sexual harassment claims in court.

In its continued effort to silence Ms. Newton and force her to arbitrate her claims, LVMH challenges Supreme Court's ruling. That challenge must fail. Supreme Court's thorough ruling is faithful to the public policy recently expressed by the New York State Legislature in the wake of numerous high-profile sexual harassment and assault cases that were adjudicated behind closed doors in forced arbitration, enabling perpetrators to continue their harassment and assault, undeterred, against others.

Statement of Facts

1. Ms. Newton's professional background.

Andowah Newton is a Black and Latina woman who graduated from Georgetown University with a Bachelor of Science in Business Administration

with a minor in French. She also received a diploma for her studies in Business from Université de Lyon III (Jean Moulin) in France. During college, Ms. Newton interned at Johnson & Johnson, working in its Paris offices. (R. 10 ¶ 10). After earning her license as a Certified Public Accountant and working for four years as a senior associate and auditor for PricewaterhouseCoopers and as an auditor at Estée Lauder, Ms. Newton earned dual law degrees in U.S. and French law from Cornell Law School and Université de Paris I Panthéon-Sorbonne, a.k.a. La Sorbonne. (R. 26 ¶ 11). After law school, Ms. Newton clerked for the First Vice President Judge at the International Criminal Court before spending eight years as an attorney at major law firms in New York City. (*Id.* at ¶ 12).

2. Ms. Newton's employment at LVMH.

Ms. Newton began working for LVMH in 2015 as Director, Litigation Counsel, where she manages litigations and legal disputes for more than 25 luxury brands, directs legal strategy, and advises senior executives and general counsel in the United States, Europe, and Asia on U.S. legal disputes and litigations. (*Id.* at ¶¶ 14-15).

In March 2017, Ms. Newton was eventually promoted to Vice President, Legal Affairs. (R. 27 ¶ 18). In that role, she manages all non-employment

litigations on behalf of LVMH and most of its U.S. subsidiaries and affiliates. (*Id.* at ¶ 19). Plaintiff was also selected by her supervisor, the General Counsel, to spearhead LVMH's first pro bono program, which she continues to do. (*Id.*) Throughout her employment, until she formally raised sexual harassment and assault claims, Plaintiff had received excellent performance reviews, and LVMH's General Counsel had described her as "a client's dream; she is attentive to their needs, handles all matters efficiently with a calm demeanor, yet she is tough with outside counsel on her clients' behalf. . . . [Ms. Newton] reflects the highest degree of honesty and ethics in all she does." (R. 26 ¶ 17).

3. The hostile work environment at LVMH.

Despite her educational credentials and professional accomplishments, Ms. Newton has endured unwanted sexual assault and pervasive sexual harassment at LVMH. From almost the start of her employment with the company, a senior-level management employee 30 years Ms. Newton's senior, who had a decade-long tenure at the company, was not a subordinate, and who reported directly to a Senior Vice President, engaged in a persistent and invasive campaign of sexual harassment against her. (R. 27 ¶ 20). He also assaulted Ms. Newton. (*Id.*) In Ms. Newton's first encounter with the harasser in May 2015, upon arriving at her office to discuss making repairs and

hanging framed artwork, the harasser lingered in the hallway, stared at her and said, "You are so pretty. And that beautiful smile . . . I just can't get enough of it." (R. 27-28 ¶ 22). After this initial encounter, "the harasser began to linger outside of Ms. Newton's office regularly despite the fact that his office was on a different floor (though in the same building). At these times, he would leer at [Ms.] Newton in a manner that made Ms. Newton feel as though he was undressing her with his eyes." (R. 28 ¶ 23).

A few months later, without warning and while Ms. Newton was seated at her desk, the harasser lunged at her in her office, "thrusting his pelvis and genitals into her face and pressing his body firmly against hers," pinning her against her chair. (*Id.* at ¶ 24). Despite her rebuke, following this incident, the harasser would lurk near Ms. Newton's office, leer at her, strategically enter and invade her space at company events and around the building, sometimes in full view of other employees, and expressed disappointment when she rejected his attempts to kiss her at a company event in late 2015 or early 2016. (R. 28-29 ¶¶ 25-29). On one occasion, when the LVMH headquarters flooded and Ms. Newton joined other employees in rushing to protect important business documents from destruction, the harasser leered at Ms. Newton without offering to provide any assistance. (R. 29 ¶ 31). Although Ms. Newton

repeatedly rejected the harasser's advances and recoiled at his invasive behavior, he continued this harassment, forcing Ms. Newton to spend less time at her office building and in her office, close her office door more frequently, and devise ways to avoid seeing or interacting with him in the office building. (*Id.* at ¶ 30).

4. LVMH reluctantly conducts wholly deficient "investigations."

From 2015 through 2018, Ms. Newton reported the sexual harassment to LVMH senior management, including to the company's in-house Vice President, Legal Affairs, Employment Counsel. (R. 30 ¶ 33). LVMH ignored, dismissed, and failed Ms. Newton every time. (*Id.* at ¶ 34). When Ms. Newton again told Employment Counsel about the harassment following an incident in May 2018 when the harasser lingered outside her office and leered at her, Employment Counsel falsely (and contrary to company policy that he had created), told Ms. Newton that he could not report the conduct because he worked for the legal department. (R. 30-31 ¶¶ 34, 36). Instead, he instructed Ms. Newton to tell the harasser "in no uncertain terms" to stop his behavior and stay away from her. (*Id.*) Following this advice, Ms. Newton sent the harasser an email that recounted some of his past incidents and told him to stop his inappropriate conduct. (R. 31 ¶ 38). After Ms. Newton forwarded this email to Vice President, Legal Affairs, Employment Counsel, he called Ms. Newton

in a state of rage, stating repeatedly that he now "ha[d] to report this," initially denying but then later admitting that he had advised her to confront the harasser, "but not in writing." (R. 31-32 ¶ 41).

In response to Ms. Newton's email to the harasser, LVMH commenced an internal investigation into Ms. Newton rather than the perpetrator or the sexual harassment and assault that Ms. Newton had experienced. The investigation was targeted to place blame on Ms. Newton rather than the perpetrator. Ms. Newton was summoned to the senior executives' floor and made to wait for the Director of Talent outside the CEO and SVP HR's offices for an extended period of time. In conducting the investigation, the Director of Talent was uninterested in hearing Ms. Newton's complaints and asked her no follow-up questions about the harassment. (R. 32 ¶¶ 42-44). Instead, the Director of Talent was more concerned about how Ms. Newton's email could reflect on LVMH's "branding" and reprimanded her for having emailed the perpetrator. (*Id.* at ¶ 44). The next day, the Director of Talent told Ms. Newton that she had spoken to the harasser and another employee who had witnessed some of the harassment and had concluded that this was all just a "misunderstanding" or "miscommunication." (R. 32-33 ¶ 45). Not only did the Director of Talent describe the harasser's conduct as "mere flirting," referring to the incident where the harasser tried to kiss Ms. Newton, she said this was

"what executives do in a French company." (R. 33, 42 ¶¶ 46, 86). The Director of Talent ignored the witness's comments and other instances of harassment, including when the harasser had physically assaulted Ms. Newton in her office shortly after she began working for LVMH. (*Id.*) The Director of Talent instead reprimanded Ms. Newton for the email that she sent to the harasser pursuant to the Employment Counsel's instructions, and suggested that Ms. Newton apologize to the harasser. (R. 33 ¶ 47). Echoing the Employment Counsel's comments to Ms. Newton the preceding day, the Director of Talent also said (1) the email placed the company in a bad light, (2) Ms. Newton needed to understand how the harasser feels, (3) the harasser cannot sleep and fears losing his job, and (4) the email had unjustifiably "attacked" him. (*Id.*)

During the investigation, the Director of Talent expressed no concern for Ms. Newton, who said the harasser's conduct had disrupted her sleeping and eating and her ability to work and concentrate. (*Id.* at ¶ 48). And, when Ms. Newton asked if the harasser could be instructed to stay away from her, the Director of Talent said the harasser had to perform his job as he saw fit. (R. 34 ¶ 49).

The investigative report prepared by the Director of Talent was riddled with inaccuracies and altered Ms. Newton's statement to suit LVMH's narrative, reprimanding and shaming Plaintiff and describing her conduct as

unprofessional. (*Id.* at ¶¶ 51-52). Equally disturbing, LVMH's General Counsel, Employment Counsel, and the company's outside counsel wanted Ms. Newton to apologize to the harasser for sending him the email requesting that he stop harassing her (*id.* at ¶ 53), even though it was Employment Counsel who had instructed Ms. Newton to confront the harasser "in no uncertain terms" after he had repeatedly declined to report or investigate the sexual harassment.

On June 3, 2018, Ms. Newton filed a formal sexual harassment complaint with Human Resources, requesting that LVMH hire an unbiased, outside investigator. (R. 35 ¶ 56). LVMH's General Counsel took offense at Ms. Newton's request, insisting that (1) the Director of Talent's investigation proved there was no violation of company policy or the law, (2) it was Ms. Newton's fault that Director of Talent did not conduct a better investigation, (3) women had to expect these types of incidents at work, and (4) an outside investigation would be waste of time. (*Id.* at ¶ 58).

LVMH reluctantly and eventually proceeded to hire an outside investigator. But the investigator tried to intimidate Ms. Newton into abandoning her claims and (1) suggested that Ms. Newton's claims could affect her employment and she might be viewed as a "trouble-maker" and a "son of a bitch" who got the harasser fired, (2) minimized the nature of the

harassment and said Ms. Newton was assaulted only once, (3) suggested that Ms. Newton should have been "flattered" by the harasser's attention, (4) said LVMH is part of "a French company" and they "look at things differently," and (5) the "#MeToo movement reminded [her] of McCarthyism." (R. 36-37 ¶¶ 63-64). Not surprisingly, the investigator identified no violation of company policy or the law, and the company refused to provide Ms. Newton with a copy of the investigator's report. (R. 37 ¶¶ 65-66). Contrary to LVMH's assertions, the investigator did not find Ms. Newton's claims "meritless" or "baseless." Rather, the investigator asked Ms. Newton during the investigation whether she would be satisfied with an internal cease and desist letter.

LVMH promoted the harasser and publicly announced the harasser's promotion to all employees at a company event in late June 2018, in the midst of the investigation, before it had even communicated the investigator's findings to Ms. Newton.

5. LVMH retaliates against Ms. Newton.

After Ms. Newton complained about the sexual harassment, LVMH's General Counsel, Plaintiff's supervisor, began treating her differently than other employees, chipped away at her autonomy in the office, and tried to take control of her cases. (R. 38 ¶¶ 69-71). After several years of glowing performance reviews that championed Ms. Newton's judgment, organizational

skills, teamwork, and litigation judgment, in March 2019, General Counsel falsely accused her of poor performance, criticizing her for actions and professional relationship strategies that General Counsel had previously encouraged her to undertake. (R. 40-41 ¶¶ 77-83). These negative reviews, repeated in March 2020, were false and retaliatory. (R. 41 ¶ 84).

6. Procedural history.

Pursuant to the New York City and the New York State Human Rights Laws, and the company's policy, on April 23, 2019, Plaintiff filed this action in Supreme Court, New York County, seeking a trial by jury. The complaint details "severe distress and anxiety" caused by the sexual harassment and retaliation, including uncontrollable shaking, tightness in Ms. Newton's chest, panic, and disrupted sleeping and eating patterns, which required her to seek therapy and caused a pre-existing medical condition, as well as another medical condition, to resurface. (R. 43-44 ¶¶ 90-94).

LVMH immediately filed a motion to compel arbitration and moved for sanctions against Ms. Newton personally. (R. 49-50). In support of their motion, Defendant cited the arbitration clause in her employment agreement with the company, which reads, in part:

> [A]ll disputes and claims of any nature that Employee may have against Company, or any of its . . . employees . . . in their capacity as such, . . . including any and all statutory, contractual, and common law claims (including all employment discrimination claims) . . . will

> be submitted exclusively to mandatory arbitration in New York. . . . Absent agreement to the contrary, the mandatory arbitration will be conducted under the JAMS Employment Arbitration Rules & Procedures ("JAMS Rules") and will be submitted before a single arbitrator selected in accordance with the JAMS Rules. The arbitrator shall have the same authority to award remedies and damages as a judge and/or jury under state or federal law.

(R. 60).

In denying LVMH's motion to compel arbitration, Supreme Court stated, "[w]ere this court to stay this action and remit the parties to binding arbitration, Ms. Newton would lose her right to trial by jury. She would also be unable to avail herself of the rules of evidence governing actions at law in this state, by virtue of Rule 22 of the JAMS Rules which provides that '[s]trict conformity to the rules of evidence is not required.'" (R. 6-7). The Court held as follows:

1. CPLR 7515, enacted by the State Legislature in 2018, renders "null and void" any contractual provision mandating arbitration of "any allegation or claim of discrimination," precisely the contractual provision invoked by LVMH on the motion to compel arbitration. (R. 7) (citing CPLR 7515(a)(2), (b)(iii)).

2. The Court, and not an arbitral tribunal, determines the threshold question of arbitrability in this case. (R. 8-9) (citing *Merrill Lynch, Pierce, Fenner & Smith v. Benjamin*, 1 A.D.3d 39, 43-44 (1st Dept. 2003), and *Dr. Alex Greenberg, DDS, PC v. SNA Consultants, Inc.*, 55 A.D.3d 418, 418 (1st Dept. 2008)).

3. CPLR 7515 retroactively renders the arbitration provision null and void. (R. 14-15). Applying traditional principles of statutory construction, Supreme Court stated,

> unlike subdivision (b) (i) of [CPLR 7515], where the language specifically provides that the prohibition applies only to contracts "entered into on or after the effective date," subdivision (b) (iii) of the statute contains no such limitation. Rather, that subdivision broadly states that "any clause or provision in *any* contract" that forces sexual harassment victims to arbitrate their claims "shall be null and void." Thus, the statute's plain language indicates that the "null and void" clause also applies to arbitration clauses already in existence.

(R. 15) (emphasis in original).

4. While CPLR 7515 prohibits mandatory discrimination-related arbitration clauses "[e]xcept where inconsistent with federal law," the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, does not govern claims asserted in this action because the FAA only applies to "a transaction involving commerce." (R. 10). Supreme Court reasoned,

> Because claims for sexual harassment, or other discrimination-based claims, cannot reasonably be characterized as claims concerning or "arising out of" "a transaction involving commerce," and additionally because the instant case involves purely intrastate activity, the FAA cannot reasonably be said to apply to the Arbitration Agreement's reference to arbitration of sexual harassment or other discrimination-based claims. Nor can the Arbitration Agreement itself be reasonably characterized as "a contract evidencing a transaction involving commerce," particularly insofar as it seeks application to sexual harassment or other discrimination-based claims. Thus, we are left with the express and unambiguous provisions of CPLR 7515, which prohibit and nullify clauses mandating arbitration of such claims.

(R. 10-11).

5. In November 2018, subsequent to the parties' 2014 arbitration agreement, and after the State Legislature enacted CPLR 7515, LVMH published and distributed to its employees, including Ms. Newton, a "Non-discrimination and Anti-Harassment Policy" stating that employees with sexual harassment claims could "fil[e] a complaint in state court." (R. 17). This language reflects the policies promoted under § 7515. The revised policy, which Ms. Newton signed and dated pursuant to LVMH's request, states that "[t]hese policies fully replace and supersede any and all written Company policies on these subjects." (R. 18). Supreme Court concluded that "the foregoing circumstances, involving the timing and promulgation of the Company's November 2018 policy, allowing – indeed, encouraging – an option of plenary New York State Supreme Court litigation of sexual harassment and workplace discrimination claims, compel the conclusion that the 2014 Arbitration Agreement's mandate of arbitration of such claims became nullified of the Company's own accord." (*Id.*)

Argument

Point I

Supreme Court properly determined the threshold issue that statutory, constitutional, and public policy precludes arbitration of this case

"[T]he courts play the 'gatekeeping' role of deciding certain 'threshold' issues before compelling or staying arbitration." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin*, 1 A.D.3d 39, 43 (1st Dept. 2003) (citing CPLR 7503). While the CPLR provides that these gatekeeping issues include (1) whether a valid agreement was entered into, (2) whether the agreement was complied with, and (3) whether the claim is time-barred, "while not specifically enumerated in the statute, there is another threshold issue which is reserved for decision by the court -- that is, whether public policy precludes arbitration of the subject matter of a particular dispute." *Id.* at 43-44 (citing *Matter of City of New York v. Uniformed Fire Officers Assn.*, 95 N.Y.2d 273, 281 (2000) ("We have recognized limited instances where arbitration is prohibited on public policy grounds alone")); *see generally Matter of Cnty. of Chautauqua v. Civil Service Employees Local 1000*, 8 N.Y.3d 513, 519 (2007) ("The threshold determination of whether a dispute is arbitrable is well settled . . . [W]e first ask whether the parties may arbitrate the dispute by inquiring if 'there is any statutory, constitutional or public policy prohibition against arbitration of the grievance'"); *id.* ("[a] dispute is [] nonarbitrable, if a court can

conclude without engaging in any extended factfinding or legal analysis that a law prohibits, in an absolute sense, the particular matters to be decided by arbitration"); *Matter of Wertheim & Co. v. Halpert*, 48 N.Y.2d 681, 683 (1979) ("Although arbitration is a favored method of dispute resolution, arbitration agreements are unenforceable where substantive rights, embodied by statute, express a strong public policy which must be judicially enforced . . . This is especially true in the area of discrimination").

In *Merrill Lynch*, this Court identified some of the compelling public policy areas that courts, and not arbitrators, should resolve, including "the disqualification of an attorney from representing a client" and "the enforcement of state antitrust law." *Id.* at 44 (citing *Bidermann Indus. Licensing v. Avmar N.V.*, 173 A.D.2d 401, 402 (1st Dept. 1991), and *Matter of Aimcee Wholesale Corp.*, 21 N.Y.2d 621, 625 (1968)). The interpretation of a landmark state law that prohibits arbitration in employment discrimination cases is comparable to the exceptions in *Merrill Lynch*. As Supreme Court observed, New York maintains a strong public policy against sexual harassment (R. 7), as demonstrated by the State Legislature's comprehensive overhaul of the hostile work environment standards in 2019, which brought the liability tests in line with the remedial New York City Human Rights Law, rejecting Title VII's "severe or pervasive" threshold in favor of the definition that includes any differential conduct based on sex that rises above the level of

"petty slights or trivial inconveniences." Exec. Law § 296(1)(h). Recent amendments to the State HRL also cover all employers, not just those with more than four employees; protect independent contractors and domestic workers; authorize mandatory attorneys' fees for prevailing parties; eliminate the *Faragher-Ellerth* affirmative defense under Title VII; prohibit employers from entering into certain nondisclosure provisions in settlements of sexual harassment claims; require management to provide employees with written notice of its sexual harassment policy and sexual harassment training; and enlarge the statute of limitations for sexual harassment claims. As Supreme Court stated, "[b]ecause of the profound policy interest underlying the enactment of CPLR 7515, . . . this court concludes that the threshold question of arbitrability of the claims in this lawsuit rests within the exclusive province of this New York State court, and is not referable to JAMS or any other arbitral forum that is not a constitutionally established court of record of the State of New York." (R. 9) (citing *Alex Greenberg, DDS, PC v. SNA Consultants, Inc.*, 55 A.D.3d 418, 418 (1st Dept. 2008) ("In New York, any threshold issue of arbitrability is a matter for the court") (citing *Cheng v. Oxford Health Plans, Inc.*, 15 A.D.3d 207, 208 (1st Dept. 2005)); *see also Brown & Williamson Tobacco Corp. v. Chesley*, 7 A.D.3d 368, 372–73 (1st Dept. 2004) ("The initial question of arbitrability is reserved to the judiciary") (citing *Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co.*, 37 N.Y. 91, 95

(1975) (citing in turn, *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960) (Brennan & Harlan, JJ., concurring)).

In challenging Supreme Court's holding, LVMH glosses over the cases holding that "profound public policy" concerns require the court, and not an arbitrator, to determine the question of arbitrability. Nor does LVMH address cases holding that, "[i]n New York, any threshold issue of arbitrability is a matter for the court." (R. 9). Instead, LVMH relies on *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), which states that "parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.'" *Id.* at 529 (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010)). But these cases addressed specific exceptions to the threshold rule governing arbitrability, such as whether that rule applies when a party makes a "wholly groundless" demand for arbitration (*Henry Schein, Inc.*). These cases do not address the "strong public policy" exception that applies in New York, and the bright-line rule that LVMH proposes cannot upend settled New York cases that apply that exception.

Even the New York cases cited by LVMH do not undercut Supreme Court's reasoning. LVMH's reliance on *Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 26 N.Y.3d 659 (2016), is misplaced. That case states that "where

a contract contains a valid delegation to the arbitrator of the power to determine arbitrability, such a clause will be enforced absent a specific challenge to the delegation clause by the party resisting arbitration." *Id.* at 675-76. But that general language does not address the policy exceptions in the cases cited above, including *Alex Greenberg*. As these cases demonstrate that New York does not apply a bright-line rule guiding which tribunal initially determines arbitrability, this Court should affirm Supreme Court's analysis.

Point II

New York has prohibited mandatory arbitration in sexual harassment cases and directed that all pre-existing arbitration clauses in these cases are "null and void."

A. The State Legislature has prohibited mandatory arbitration of sexual harassment cases.

In 2018, in the wake of high-profile sexual harassment cases where victims were forced to adjudicate their claims in secret, thereby enabling perpetrators to continue to harass multiple victims, New York prohibited the formation of new contracts mandating arbitration of sexual harassment claims, and declared existing mandatory arbitration clauses "null and void." CPLR 7515.

"Except where inconsistent with federal law, no written contract, entered into on or after the effective date of this section shall contain a prohibited clause as defined in paragraph two of subdivision (a) of this section." CPLR 7515(b)(i). Subdivision (a) defines "prohibited clause" as "any clause or provision in any

contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law." CPLR 7515(a)(2). The statute also renders all such pre-existing arbitration clauses "null and void." CPLR 7515(b)(iii).

As Supreme Court noted, CPLR 7515 is consistent with "a well-defined and dominant public policy" in New York "against sexual harassment in the work place." (R. 7) (citing *Phillips v. Manhattan & Bronx Surface Transit Operating Auth.*, 132 A.D.3d 149, 155 (1st Dept. 2015)). In *Phillips*, this Court vacated a CBA arbitration award that prohibited the Transit Authority from disciplining an employee who had undisputedly created a hostile work environment. *Id.* at 155-57. "It is against this public policy backdrop that our Legislature enacted CPLR 7515 in 2018, eradicating mandatory arbitration of sexual harassment claims." (R. 7-8); *see generally Matter of Cnty. of Chautauqua,* 8 N.Y.3d at 519; *Matter of Wertheim & Co.*, 48 N.Y.2d at 683.

In passing this law, legislators observed that "victims of sexual harassment have been forced to remain silent for far too long" and that there "is no place in our government, or society as a whole, for sexual assault or harassment." *See* New York State Senate, *Senate Passes Comprehensive Strengthening of New York's*

Sexual Harassment Laws (March 12, 2018).[2] The senators explained that "bans [of] secret settlements" and "prohibit[ion] [of] mandatory arbitration for sexual harassment complaints" further the societal goal of "giv[ing] [victims] a voice" because when an individual faces a hostile work environment, "laws and policies must be in place to empower individuals to speak out and to hold offenders accountable for their wrongdoing." (*Id.*) Victims must "not only feel safe enough to come forward, but also to ensure their voice will be heard." (*Id.*)

These concerns are reflected in the position taken by the National Association of Attorneys General, which stated in 2018 that "[a]ccess to the judicial system, whether federal or state, is a fundamental right of all Americans" and "should extend fully to persons who have been subjected to sexual harassment in the workplace." National Association of Attorneys General, February 12, 2018 Letter to Congressional Leadership, Re: Mandatory Arbitration of Sexual Harassment Disputes.[3] The Attorneys General further explained why society cannot tolerate mandatory arbitration of sexual harassment claims:

> While there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims. Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified

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[2] https://www.nysenate.gov/newsroom/articles/2018/senate-passes-comprehensive-strengthening- new-yorks-sexual-harassment-laws.

[3] https://tinyurl.com/yxfgr49h

> to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.
>
> Additional concerns arise from the secrecy requirements of arbitration clauses, which disserve the public interest by keeping both the harassment complaints and any settlements confidential. This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief. Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.

Id. at 2.

New York's commitment to preventing and remedying sexual harassment is unmistakable and reflected in the Legislature's enactment of CPLR 7515. As the arbitration agreement violates § 7515, Supreme Court properly denied LVMH's motion to compel arbitration.

B. CPLR 7515 applies retroactively to nullify pre-existing mandatory arbitration clauses in sexual harassment cases.

LVMH cannot dispute that CPLR 7515 codifies state policy against mandatory arbitration of sexual harassment claims. Instead, it argues that, even if the FAA does not preempt § 7515, Supreme Court improperly held this provision applies retroactively. Since Ms. Newton signed the arbitration agreement in December 2014, effective February 2015, and CPLR 7515 "was signed in April 2018 and became effective on July 11, 2018," LVMH argues that Supreme Court should not have applied it in this case at all. (Def. Br. at 22-23). LVMH's argument

ignores settled principles of statutory construction that require the courts to interpret statutes as a whole to determine legislative intent. Under that interpretative model, the arbitration agreement is a nullity.

The "literal language of a statute" is generally controlling unless "the plain intent and purpose of a statute would otherwise be defeated." *Anonymous v. Molik*, 32 N.Y.3d 30, 37 (2018). In *Friedman v. Connecticut Gen. Life Ins. Co.*, 9 N.Y.3d 105 (2007), the Court of Appeals restated black-letter law in this area: "A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent and, where possible, should 'harmonize[ ] [all parts of a statute] with each other . . . and [give] effect and meaning . . . to the entire statute and every part and word thereof.'" *Id.* at 115 (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 97-98 and *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199 (1979) ("It is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other")).

CPLR 7515 contains separate provisions guiding the enforceability of mandatory arbitration provisions in sexual harassment cases. First, "no written contract, *entered into on or after the effective date of this section* [July 11, 2018] shall contain a prohibited clause as defined in paragraph two of subdivision (a) of this section." CPLR 7515(b)(i) (emphasis supplied). Subdivision (a) refers to

mandatory arbitration clauses to resolve any allegation or claim of employment discrimination. Had the Legislature intended that § 7515 only apply prospectively and not retroactively, it would not have enacted a second provision, § 7515(b)(iii), entitled "Mandatory arbitration clause null and void." Under (b)(iii), "the provisions of such prohibited clause as defined in paragraph 2 of subdivision (a) of this section shall be null and void." This provision incorporates the definition of "prohibited clause": "*any* clause or provision in *any* contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of [employment] discrimination." CPLR 7515(a)(2) (emphases supplied). The question is what effect § 7515(b)(iii) has on the statute in light of the mandatory arbitration prohibition set forth under § 7515(b)(i).

If, as LVMH argues, CPLR 7515 only applies prospectively, then the language in § 7515(b)(iii) is superfluous, merely restating what the Legislature had already prohibited under § 7515(b)(i). Yet, as demonstrated above, courts presume that no statutory provision is superfluous, and statutes must be analyzed as a whole to divine legislative intent. When used in a contract or statute, "null and void" is "often construed as meaning 'voidable.' 'Null and void' means that which binds no one or is incapable of giving rise to any rights or obligations under any circumstances, or that which is of no effect." Blacks's Law Dictionary, Abridged

Fifth Edition, at 553 ("null"). "Void" means "Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended." *Id.* at 812 ("void"). Applying that meaning, § 7515(b)(iii)'s "null and void" provision can only mean that pre-existing mandatory arbitration clauses in employment discrimination cases are not enforceable. Not only does the plain meaning of "null and void" compel this result, but § 7515(a)(2) refers to "any" mandatory arbitration provision in "any" contract in employment discrimination claims. As Supreme Court stated,

> Thus, unlike subdivision (b) (i) of the statute, where the language specifically provides that the prohibition applies only to contracts "entered into on or after the effective date," subdivision (b) (iii) of the statute contains no such limitation. Rather, that subdivision broadly states that "any clause or provision in *any* contract" (emphasis added) that forces sexual harassment victims to arbitrate their claims "shall be null and void." Thus, the statute's plain language indicates that the "null and void" clause also applies to arbitration clauses already in existence.

(R. 15) (emphasis in original).

If the Legislature had intended to make § 7515 prospective only, the provision would not have protected most employees, many of whom already have employment agreements. The statute would in effect take years to apply to most employees because they would have to change jobs and sign a new employment agreement in order to avail themselves of § 7515. If 90% of employees cannot avail themselves of the statute, that result would be inconsistent with the

Legislature's intent to prevent the perpetuation of harassment and assault against other employees.

Interpreting the statute as LVMH proposes would also create an unusual dichotomy in within the same company: only newer employees could sue for sexual harassment, but those who had been working there prior to November 2018 could not sue for these civil rights violations.

LVMH argues that Supreme Court's reasoning is "at odds with several other opinions on the matter," including *Murphy v. Citigroup Glob. Mkts.*, 185 A.D.3d 486 (1st Dept. 2020), and *Rodriguez v. Perez*, No. 158376/2019, 2020 WL 888485 (Sup. Ct. N.Y. Co. Feb. 19, 2020). (Def. Br. at 23). In *Murphy*, this Court stated in a footnote that "Effective October 11, 2019, well after the facts of plaintiff's discrimination claims were adjudicated in arbitration, the New York State Discrimination Laws were amended to prospectively prohibit mandatory arbitration clauses, except where inconsistent with federal law." 185 A.D.3d at 487 n.1. This language is *dicta*, buttressing this Court's primary holding that res judicata precluded the plaintiff's discrimination claims because he asserted claims that a prior arbitration had already resolved. *Id.* at 560. The footnote engages in no statutory analysis. Nor does *Rodriguez* compel a different result. As Justice Nock held in distinguishing *Rodriguez*, that case focused solely on § 7515(b)(i) "without

targeted analysis of subdivision (b)(iii) -- the 'null and void' subdivision of the statute." (R. 16).

In November 2020, this Court decided *Altman v. Salem Media of New York, LLC*, __ A.D.3d ___, 2020 WL 6731859 (1st Dept. Nov. 17, 2020), holding that CPLR 7515 only applies prospectively. *Id.* at *1. But, like *Murphy*, upon which *Altman* relies, this Court did not engage in the extended statutory analysis that Justice Nock provided in denying LVMH's motion to compel arbitration.

LVMH relies on the executive branch interpretation of CPLR 7515's retroactivity. But, as Supreme Court noted, "[a]part from the somewhat doubtful implication proffered by defendant's counsel that such entries enjoy the force of law, this court observes that said question and answer do not address the 'null and void' subdivision of CPLR 7515(b)(iii)." (R. 16 n. 11). While LVMH also cites a floor comment from Sen. Krueger, who stated that "[t]he new law would ban the use of mandatory arbitration clauses signed after the effective date except where inconsistent with federal law" (Def. Br. at 23-24),[4] that was an offhand comment in which Sen. Krueger was asking about an entirely different matter: federal preemption. *See id.* ("So there are many sections of Part B addressing sexual harassment. The new law would ban the use of mandatory arbitration clauses signed after the effective date except where inconsistent with federal law. In what

[4] Citing https://legislation.nysenate.gov/pdf/transcripts/033018.txt/

ways would these prohibitions against mandatory arbitration clauses be inconsistent with federal law?"). Such a comment cannot govern the careful statutory interpretation that this case requires in light of the strong statutory, constitutional, and public policy at stake.

The retroactive denunciation of mandatory arbitration in sexual harassment cases is not only consistent with the statutory construction of CPLR 7515, it also dovetails with the legislative intent to eliminate such arbitration root and branch, and to prevent the further enabling of perpetrators through the lack of accountability resulting from forced arbitrations. This Court should affirm Justice Nock's reasoning.

Point III

As sexual harassment and assault claims are distinct from traditional employment discrimination claims, the parties did not reasonably contemplate these claims would be arbitrated

LVMH argues that Supreme Court ignored and otherwise misapplied U.S. Supreme Court precedents governing the Federal Arbitration Act, as well as the Act's plain language that, if the parties agree to an arbitration clause, disputes arising from employment contracts that affect interstate commerce must be arbitrated. LVMH further argues that Justice Nock "misread the FAA to require that *the allegations being arbitrated* must involve commerce." (Def. Br. at 19) (citing 9 U.S.C. § 2) (emphasis supplied).

Defendant's argument would render CPLR 7515 a nullity. It also overlooks how sexual harassment and assault claims, while often brought against employers, are not traditional "employment claims" and should not be treated as such. For example, in *Lichon v. Morse*, 327 Mich. App. 375 (Ct. App. 2019), *lv. to appeal granted*, 504 Mich. 962 (2019), applying two dispute resolution agreements that mandated arbitration for all employment-related disputes, including discrimination claims, *id.* at 381-82, 386, the Michigan Court of Appeals noted the general rule that "an agreement to arbitrate presents a contractual matter between parties." *Id.* at 390. However, the Court stated, "those parties are not required to submit matters [to arbitration] any dispute which he has not agreed so to submit." *Id.* (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). Moreover, "[i]n this endeavor, as with any other contract, the parties' intentions control." *Id.* (quoting *Stolt-Neilson S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010)). The Court in *Lichon* concluded,

> Despite the fact that the sexual assaults may not have happened but for plaintiffs' employment with the Morse firm, we conclude that claims of sexual assault cannot be related to employment. The fact that the sexual assaults would not have occurred but for Lichon's and Smits's employment with the Morse firm does not provide a sufficient nexus between the terms of the MDRPA and the sexual assaults allegedly perpetrated by Morse. To be clear, Lichon's and Smits's claims of sexual assault are unrelated to their positions as, respectively, a receptionist and paralegal. Furthermore, under no circumstances could sexual assault be a foreseeable consequence of employment in a law firm. Accordingly, the circuit courts erroneously granted defendants' motions to dismiss these actions and compel

> arbitration of plaintiffs' claims. Both Lichon and Smits shall be permitted to litigate their claims in the courts of this state because the claims fall outside the purview of the MDRPA.

Id. at 393-94.

The Court further held that, in the absence of any authority directly on point, "central to our conclusion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault." *Id.* at 394. While "[t]he general policy of this State is favorable to arbitration, . . . the idea that two parties would knowingly and voluntarily agree to arbitrate such a dispute over such an egregious and possibly criminal act is unimaginable." *Id.* at 394-95. The Court added, "[t]he effect of allowing defendants to enforce the MDRPA under the facts of this case would effectively perpetuate a culture that silences victims of sexual assault and allows abusers to quietly settle these claims behind an arbitrator's closed door. Such a result has no place in Michigan law." *Id.* at 395. As demonstrated above, this reasoning mirrors New York's strong policy against sexual harassment, and its determination to prohibit mandatory arbitration in sexual harassment cases.

Other courts have adopted similar reasoning. In *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009), the Court held that an employee's claims of assault, battery, and negligent supervision by her employer were not "related to" her employment and could not be forced into arbitration. *Id.* at 236 (citing *Smith v.*

Captain D's, LLC, 963 So. 2d 1116 (Miss. 2007) (plaintiff's claim against her employer for negligent hiring, supervision, and retention of her manager, who allegedly sexually assaulted plaintiff, was "unquestionably" beyond the scope of the arbitration clause, which provided that all "claims, disputes, or controversies arising out of or relating to [her] . . . employment" would be resolved through arbitration); *see also Hill v. Hilliard*, 945 S.W.2d 948, 950, 952 (Ky. Ct. App. 1996 (holding that assault and battery and false imprisonment claims were not covered under the arbitration clause and that "[t]he only connection those torts and crimes have with [plaintiff]'s employment is that they were committed by a co-worker and occurred while on a business trip," and "[t]he mere fact that these tort claims might not have arisen but for the fact that the two individuals were together as a result of an employer-sponsored trip cannot be determinative. What [the supervisor] is accused of doing is independent of the employment relationship")); *Washington v. CentraState Healthcare Sys., Inc.*, Civ. No. 10-6297, 2011 WL 1402765, at *4-5 (D.N.J. Apr. 13, 2011) (notwithstanding the FAA, and noting the "strong federal policy in favor of the resolution of disputes through arbitration," holding an arbitration provision within the employment agreement which covered "any dispute . . . arising out of or relating to this Agreement" could not reasonably be read to include a state law discrimination claim as it did not arise out of or relate to the employment); *Arnold v. Burger King*, 48 N.E.3d 69, 84 (Ohio Ct. App. 2015)

(plaintiff's claims arising from the sexual assault existed independent of the employment relationship, in part because (1) they could be "maintained without reference to the contract or relationship at issue," and (2) "ongoing verbal and physical contact culminating in sexual assault as well as retaliation, harassment, or other detrimental acts against Arnold based on the unlawful conduct is not a foreseeable result of the employment"); *Deering v. Graham*, 14-cv-3435 (NLH/JS), 2015 WL 424534, at *9 (D.N.J. Jan. 30, 2015) ("The reference to 'all claims' within the subject arbitration provision cannot be reasonably interpreted to include plaintiff's claims of assault and sexual battery"); *Abou–Khalil v. Miles,* 2007 WL 1589456, at *2 (Cal. Dist. Ct. App. June 4, 2007) (unpublished) (noting that "sexual assault is not normally within the course and scope of employment"). These types of arbitration agreements are therefore not "employment agreements" that fall under the FAA. Instead, they constitute agreements to arbitrate gender-based violence and harassment that have no relationship to interstate commerce.

Relatedly, sexual harassment and assault claims are not subject to arbitration because the parties could not have contemplated that these claims might arise in the course of the employment relationship. Defendant cites *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), in asserting that "[e]mployment contracts, except for those covering workers engaged in transportation, are covered by the FAA." *Id.* at 289 (Def. Br. at 19). But that reasoning does not address whether claims of

sexual harassment and assault are the kind of employment "disputes" that fall under the FAA. The other U.S. Supreme Court cases cited in Defendant's brief, including *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), do not address this issue. *Circuit City* held only that employment contracts are not exempt from the FAA. 532 U.S. at 119. *Gilmer* held that federal age discrimination claims may be subjected to mandatory arbitration. 500 U.S. at 27-28. But statutory discrimination cases involving adverse personnel decisions, such as demotions, terminations, and promotion denials, which directly implicate the employment relationship, are quite unlike sexual harassment and assault claims, in which the offending supervisors and co-workers are not advancing the employer's interests, and for which the employer cannot assert any legitimate, nondiscriminatory, business-related justification. While it might be foreseeable that an employment dispute will turn on whether management harbored discriminatory intent in assignments or even termination, the same cannot be said about sexual harassment and assault claims, which cannot implicate any of the business justifications that management might assert in defending a traditional disparate treatment claim. Employment discrimination claims that arise from tangible personnel actions may directly implicate the formal employment relationship. But sexual harassment and assault claims are another matter entirely.

The nonbinding trial court cases in Defendant's brief that hold the FAA preempts CPLR 7515 only further highlight the need for this Court to clarify that § 7515 is not a dead-letter law in sexual harassment cases. (Def. Br. at 16-17). For example, Defendant cites *Latif v. Morgan Stanley & Co.*, No. 18-cv-11528, 2019 WL 2610985 (S.D.N.Y. June 26, 2019), where the Court stated that § 7515 applies "[e]xcept where inconsistent with federal law" as evidence the statute is purportedly preempted by the FAA. Defendant cites other nonbinding cases for the same proposition. (Def. Br. at 16-17). Yet, as Supreme Court observed, this argument would implausibly suggest that the Legislature included this language intending to nullify the statute. (R. 12). This Court cannot presume that the Legislature "knowingly engaged in a futile exercise by enacting its statute nullifying mandatory arbitration for discrimination claims and then, in the same breath, eviscerated it with the words '[e]xcept where inconsistent with federal law.'" (*Id.*); *see also* R. 13 ("to suggest that the Legislature toiled to promulgate the general rule of CPLR 7515 only to have it immediately swallowed up by a 'federal law' exception, would be to suggest an 'objectionable, unreasonable or absurd consequence[]") (citing *Roberts v. Tishman Speyer Properties, L.P.*, 62 A.D.3d 71, 80-81 (1st Dept. 2006)). Instead, as Supreme Court noted, courts are authorized to interpret state laws to effectuate legislative intent. (R. 12). In this instance, the Legislature intended that sexual harassment cases cannot be the

subject of mandatory arbitration. As for the proviso that § 7515 applies "[e]xcept where inconsistent with federal law," the Legislature likely included this language to preserve the statute even if a plaintiff's claims fall within the ambit of the FAA. But, since Ms. Newton's claims occurred wholly intrastate (as further demonstrated in Point IV, *ante*), they had no relationship to commerce, and they fall outside the scope of the FAA, the arbitration agreement is not enforceable as to her sexual assault and harassment claims.

Point IV

As sexual harassment and assault claims do not arise from interstate commerce, the Federal Arbitration Act does not govern this dispute

LVMH argues that CPLR § 7515 cannot override the arbitration agreement because the statute is preempted by the Federal Arbitration Act. This argument would eviscerate a state law that promotes a policy objective of the highest order: protecting employees from private sexual harassment arbitrations. But as Supreme Court properly held, § 7515 is not preempted by the FAA because it applies to contracts forcing sexual harassment victims to arbitrate claims that are not "transactions involving commerce." 9 U.S.C. § 2. The agreement to arbitrate sexual harassment claims here, and any similar agreements contemplated by § 7515, do not fall under the FAA's umbrella. No appellate court has examined § 7515 in a reported opinion, and Justice Ginsburg cited the statute as one that is intended to "safeguard employees' opportunities to bring sexual harassment suits

in court." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1422 (2019) (Ginsburg, J., dissenting).

Under 9 U.S.C. § 2, the FAA applies to contracts "evidencing a transaction involving commerce." Supreme Court recognized that an agreement to arbitrate sexual harassment claims, however, is not such a contract. Such an agreement is instead governed by CPLR 7515, which prohibits pre-dispute agreements forcing sexual harassment victims to arbitrate their claims. This is because, as Supreme Court recognized, sexual harassment has no effect on, and nothing to do with, interstate commerce. (R. 10). Ms. Newton's claims relate to the sexual assault and harassment that she experienced in New York, and all conduct relating to her claims occurred in New York. The sexual harassment therefore "involves purely intrastate activity." (*Id.*) To the extent Ms. Newton's arbitration agreement requires forced arbitration of her sexual harassment and assault claims, it is outside the scope of the FAA.

Although federal courts have interpreted "involving [interstate] commerce" broadly to mean "affecting [interstate] commerce," *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003), "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *United States v. Morrison*, 529 U.S. 598, 608 (2000); *see also Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474

(1989) (the FAA's policy in favor of arbitration "does not confer a right to compel arbitration of any dispute at any time"). In *Morrison*, the Supreme Court held that Congress exceeded its authority under the Commerce Clause in attempting to regulate "[g]ender-motivated crimes of violence" which "are not, in any sense of the phrase, economic activity." 529 U.S. at 613. The Court further explained that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613-18 (rejecting "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States").

Assault and harassment, particularly when they occur exclusively in one state, do not involve interstate commerce, and are "not, in any sense of the phrase, economic activity." Nor are they activities directed at the "instrumentalities, channels, or goods involved in interstate commerce." (*Id.*) Rather, they evidence transactions involving sexual violence and harassment wholly unrelated to commerce. As § 7515 differs from other state laws that have been found to be preempted by the FAA, in that it governs arbitration agreements related to entirely

non-economic activity, *i.e.*, sexual harassment, the FAA does not preempt this provision.

Point V

As revised in 2018, LVMH's policy supersedes the 2014 arbitration agreement

Even if this Court determines that CPLR 7515 is a nullity and that the Legislature knowingly engaged in a futile effort to bar mandatory arbitration of sexual harassment claims, this case remains unsuitable for arbitration for another reason: management repudiated the mandatory arbitration provision in 2018, when its new policy told employees they can litigate their sexual harassment disputes in State Supreme Court.

The 2014 arbitration provision in this case states that "[t]his agreement may not, on behalf of the Company, be changed, modified, amended, waived, released, discharged, abandoned or otherwise terminated, in whole or in part, except by an instrument in writing signed by the Company." (R. 58). However, while the arbitration agreement was executed before New York enacted its policy against mandatory arbitration of discrimination claims in July 2018, LVMH distributed a revised employee policy, dated November 26, 2018. The revisions are fatal to LVMH's arguments.

The policy revisions comprise company policy; they are not mere guidelines or traditional, nonbinding handbook language. The revisions note that "the

following policies supersede and fully replace the policies of the same name or that address the same subject matter" set forth in the policy dated April 1, 2015. (R. 96). This document further outlines the "Non-Discrimination and Anti-Harassment Policy." (*Id.*) The subsections also refer to "this policy" *See e.g.* R. 97 ("As used in this policy, harassment is defined as disrespectful or unprofessional conduct"). All the revisions relevant to this appeal are set forth under this policy.

Not only do the provisions in the 2018 policy statement "supersede and fully replace the polices of the same name or that addresses the same subject matter as contained in the LVMH Moet Hennessy Louis Vuitton Inc. Employee Handbook dated April 1, 2015" (R. 96), but "[a]ll Company employees and applicants are covered under this policy, whether related to conduct engaged in by co-workers supervisors, managers, or someone not directly connected to the Company[.] . . . This policy extends to conduct with a connection [to] an employee or applicant's work, even when the conduct takes place away from the Company's premises such as a business trip or business-related social function." (R. 97). This statement alone demonstrates the company's commitment to preventing sexual harassment in every context that relates to the workplace, buttressed by the robust and comprehensive definition of "sexual harassment" set forth in the policy. (R. 97-98).

The policy goes beyond ensuring that women can work in peace without unwanted sexual advances, offensive sexual talk, touching, and other forms of

harassment that Ms. Newton herself experienced while employed by LVMH. The policy also advises employees how to enforce their right to work in a harassment-free environment. In addition to notifying the company about the harassment (which Ms. Newton did) so the company can undertake a thorough and good-faith investigation (which LVMH did not do and its Employment Counsel refused to do) (R. 99-100), "employees and applicants may file formal complaints of discrimination, harassment, or retaliation with federal or state agencies," including the EEOC, which "investigates and prosecutes complaints of prohibited harassment, discrimination, and retaliation in employment." (R. 101). In addition, the policy states, "[y]ou may also file a complaint in state court." (*Id.*) Under the policy, employees may also file a complaint with a government agency or in court under federal, state or local antidiscrimination laws. (*Id.*) Moreover, "[t]he . . . Policy applies to all employees" (*id.*), including Ms. Newton. While employees may now comply with "the internal process at the Company," employees "may choose to pursue legal remedies with the following governmental entities." (R. 106). Those entities include the State Division of Human Rights, which has authority to hold a "public hearing" into the allegations and impose civil fines (*id.*), the EEOC, which may "pursue cases in federal court on behalf of complaining parties" (R. 107), and the New York City Commission on Human Rights, a public agency. (*Id.*) The policy also states that sexual harassment and retaliation victims

may file suit "in New York State Supreme Court." (R. 106). That is what Ms. Newton did.

While the company amended its sexual harassment policies in 2018 to comply with state law, comprehensively promising employees that sexual harassment will not be tolerated and they can bring suit in State Supreme Court, the company is now running away from that policy. The company is also repudiating its training issued in 2019 and 2020 informing employees of the same, claiming that it does not apply in this case because of the 2014 arbitration provision that, the company says, mandates the private arbitration of this dispute. Not only is this position contrary to state policy as expressed in § 7515, but it signals to LVMH employees that the 2018 employee policy revisions – laudatory as they are – are meaningless and unenforceable. The majority of employees who joined the company before November 2018 would not be able to avail themselves of these options.

Recognizing the anomaly presented by LVMH's argument that the 2018 policy language cannot circumvent the 2014 arbitration provision in Newton's employment agreement, Justice Nock concluded that "the parties' Arbitration Agreement was superseded and replaced by the Company's subsequent 'Non-Discrimination and Anti-Harassment Policy' and 'New York Sexual Harassment Prevention Policy' insofar as the Arbitration Agreement sought to remit the parties

to binding arbitration in connection with the claims asserted in this lawsuit." (R. 19-20). On this basis alone, Supreme Court ruled, LVMH cannot compel arbitration.

LVMH challenges Supreme Court's holding on the basis that the November 2018 employee policy revisions "do not specifically reference the Arbitration Agreement or expressly revoke any prior arbitration clause." (Def. Br. at 26). However, the cases that LVMH cites for this proposition, *Ecopetrol S.A. v. Offshore Expl. & Prod., LLC*, 46 F. Supp. 3d 327 (S.D.N.Y. 2014), and *Jamieson v. Sec. Am., Inc.*, No. 19 CV 1817, 2019 WL 6977126 (S.D.N.Y. Dec. 20, 2019), are consistent with Supreme Court's analysis. As the Court noted in *Jamieson*, "[a]n obligation to arbitrate may of course be superseded and displaced by a subsequent agreement between the parties." *Id.* at *6 (citing *Ruiz v. New Avon LLC*, 2019 WL 4601847, at *8 (S.D.N.Y. Sept. 22, 2019)). This reflects Second Circuit law. In *Goldman Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210 (2d Cir. 2014), the Court stated, "[i]n this Circuit, an agreement to arbitrate is superseded by a later-executed agreement containing a forum selection clause if the clause 'specifically precludes' arbitration, *but there is no requirement that the forum selection clause mention arbitration.*" *Id.* at 215 (emphasis supplied). Accordingly, contrary to LVMH's argument, the policy revisions in the 2018 policy did not have to expressly reference the 2014 arbitration agreement in order

for them to repudiate it. Moreover, as demonstrated above, the 2018 policy contains a forum selection clause, allowing employees to litigate their claims in court. For this reason, *Ecopetrol* also supports Ms. Newton's position, as the Court noted that "courts determining 'whether an agreement to arbitrate has been supplanted by a later accord . . . look to whether the subsequent agreement specifically preclude[s] or provides positive assurance that a dispute is no longer subject to arbitration.'" *Ecopetrol S.A.*, 46 F. Supp. 3d at 342.

LVMH further argues that Supreme Court overlooked how "Plaintiff's employment agreement states that it can only be 'changed, modified, amended, waived, released, discharged, abandoned, or otherwise terminated . . . by an instrument signed in writing by the Company.'" (Def. Br. at 26) (citing R. 58). This argument elevates form over substance. There was no reason for LVMH to formally sign-off on the policy revisions adopted in November 2018, in which the company repudiated the arbitration agreement between the parties. Indeed, the company twice requested that Ms. Newton sign the policy revisions. (R. 110). There is no doubt that LVMH endorsed the policy revisions, as they bear the company's imprimatur throughout the document.

As LVMH notes, when "the subsequent writing can be construed in harmony with the original contract, there is no need to alter the original." (Def. at 28) (citing *Intercontinental Packaging Co. v. China Nat. Cereals, Oils & Foodstuff Imp. &*

Exp. Corp., Shanghai Foodstuffs Branch, 159 A.D.2d 190, 195 (1st Dept. 1990)). The 2018 policy revisions replace the 2014 arbitration provisions because they cannot be reconciled. Reconciliation is impossible because the 2018 language tells the employee that her sexual harassment and assault complaints may be litigated in Supreme Court and, as demonstrated above, LVMH designated the revisions as company policy.

Defendant's reliance on *Zendon v. Grandison Mgt., Inc.*, No. 18 CV 4545, 2018 WL 6427636 (E.D.N.Y. Dec. 7, 2018), is misplaced. Defendant claims this case supports their position because it holds that the second employment agreement did not contain any arbitration provision and "makes no mention of arbitration or dispute resolution[.]" (Def. Br. at 29) (citing *id.* at *2). However, the 2018 LVMH policy revisions make reference to dispute resolution, allowing employees to litigate their disputes in court. (R. 106). Moreover, in *Zendon*, the arbitration agreement remained in effect because "the 2017 Agreement does not specifically preclude arbitration and can be read as complementary to the 2015 Agreement's arbitration provision[.]" 2018 WL 6427636, at *2. That is not the case here. As demonstrated above, the 2014 arbitration provision and 2018 policy revisions are not complementary and cannot be reconciled. LVMH adopted the revised language in 2018 for a reason. The company should embrace its own policy revisions, not repudiate them.

Point VI

The arbitration provision is substantively unconscionable

Clauses mandating arbitration of sexual harassment claims have been rejected by society at large, and they are illegal under state law. The parties' purported agreement that Ms. Newton mandatorily arbitrate claims of sexual harassment is substantively unconscionable, and its outrageous and immoral terms are sufficient by themselves to find that an agreement to arbitrate sexual harassment and assault claims was never formed, even without a showing of procedural unconscionability.

Courts must perform "an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged." *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 12 (1988). An unconscionable contract is "one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforc[ea]ble according to its literal terms." *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377, 381 (S.D.N.Y. 2002) (quoting *Gillman*, 73 N.Y.3d at 10).

The arbitration provision in Ms. Newton's contract, silencing her claims of sexual harassment and assault and forcing her to adjudicate such harm outside of the courts, is substantively unconscionable. Requiring victims of sexual harassment

to maintain confidentiality over their claims and waive their constitutional right to trial before a jury of their peers is unreasonably favorable to employers and the harassers employed by the employers, both of whom avoid public disclosure of their mistreatment, neglect and abuse of employees, permitting continued harassment by the harassers. *See Brennan*, 198 F. Supp. 2d at 384 (holding a contract was unreasonably favorable to an employer because it "denied [the employee] the right to proceed in court on her pending sexual harassment claim against the company"). Victims of sexual harassment whose claims are forced into arbitration also do not receive an equivalent process as they would in the court system.[5]

In fact, these terms are not just favorable to LVMH, but benefit only LVMH. Although the arbitration agreement claims valid consideration due to mutuality—as the company also agrees to arbitrate any disputes it may have against Ms. Newton—there is no mutuality. LVMH is a corporation that will never be the victim of sexual harassment and will never have to experience an assault on its

[5] The Economic Policy Institute estimates that workers subject to mandatory arbitration win just 38 percent as often as they would in state court, and 59 percent as often as they would in federal court. Even when workers do win, they only get a fraction of the damages, with the median or typical award in mandatory arbitration being only 21 percent of the median award in the federal courts and 43 percent of the median award in the state courts. Economic Policy Institute, *The arbitration epidemic* (Dec. 7, 2015). https://www.epi.org/publication/the-arbitration-epidemic/.

person. There is nothing mutual about an agreement in which Ms. Newton is forced to remain silent and lose her right to be heard by the courts regarding a harm that she has suffered but that LVMH can never experience and will never be forced to arbitrate.

It is also apparent that mandatory arbitration of sexual harassment is in direct contravention of societal "mores" and is no longer standard business practice. As demonstrated above, New York has a longstanding and "strong public policy against sexual harassment in the workplace." *See Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA, AFL-CIO.*, 915 F.2d 840, 845 (2d Cir. 1990) ("[T]here is an explicit, well-defined, and dominant public policy against sexual harassment in the work place"); *Phillips*, 132 A.D.3d at 155 (vacating an arbitration award reinstating an employee accused of sexual harassment because the arbitrator interpreted the collective bargaining agreement "in a manner that conflicts with a well-defined and dominant public policy. The public policy against sexual harassment in the workplace"). This longstanding policy corresponds with societal interest in giving victims of sexual harassment a voice and ensuring that victims have access to the courts. *Johnson v. Medisys Health Network*, No. 10-CV-1596 (ERK) (WP), 2011 WL 5222917, at *29 (E.D.N.Y. June 1, 2011) ("[T]he interest in public access to court records militates against sealing the entire record, especially where plaintiff has asserted serious

claims of defamation and sexual harassment that do not rest on confidential information"). Consistent with these principles, as Justice Ginsburg recently noted,

> Recent developments outside the judicial arena ameliorate some of the harm this Court's decisions have occasioned. Some companies have ceased requiring employees to arbitrate sexual harassment claims, *see* McGregor, Firms May Follow Tech Giants on Forced Arbitration, Washington Post, Nov. 13, 2018, p. A15, col. 1, or have extended their no-forced-arbitration policy to a broader range of claims, *see* Wakabayashi, Google Scraps Forced Arbitration Policy, N.Y. Times, Feb. 22, 2019, p. B5, col. 4. And some States have endeavored to safeguard employees' opportunities to bring sexual harassment suits in court. *See, e.g.*, N. Y. Civ. Prac. Law Ann. § 7515 (West 2019) (rendering unenforceable certain mandatory arbitration clauses covering sexual harassment claims). These developments are sanguine, for "[p]lainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights . . . to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

Lamps Plus, 139 S. Ct. at 1422 (Ginsburg, J., dissenting).

Conclusion

This Court should affirm Supreme Court's order denying LVMH's motion to compel arbitration and remand this case for discovery under the CPLR.

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Respectfully submitted,

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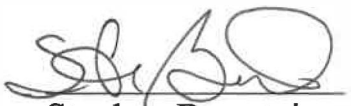

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