SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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KILGOUR WILLIAMS GROUP INCORPORATED, DANIEL WILLIAMS and COLIN KILGOUR,

Plaintiffs,

- against -

ERIC BEN-ARTZI and MODEL RISK LLC,

Defendants.

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Index No. 654091/2018 (Ostrager, J.)

Mot. Seq. No. 009

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

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Of Counsel:

Stuart L. Melnick

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Defendants Eric Ben-Artzi ("Ben-Artzi") and Model Risk LLC ("Model Risk"), through their attorneys, Law Offices Stuart L. Melnick, LLC, submit this memorandum of law (a) in opposition to plaintiffs' motion for summary judgment, pursuant to CPLR 3212 ("Plaintiffs' Motion"), and (b) in support of defendants' cross-motion for partial summary judgment, pursuant to CPLR 3212 ("Defendants' Cross-Motion"). For all of the reasons set forth herein, in the affidavit of Eric Ben-Artzi, sworn to August 19, 2020 (and the exhibits thereto) (the "Ben-Artzi Affidavit"), in the affirmation of Stuart L. Melnick, dated August 20, 2020 (and the exhibits thereto) (the "Melnick Affirmation"), and in other related submissions, Plaintiffs' Motion should be denied and Defendants' Cross-Motion should be granted.

COUNTER-STATEMENT OF FACTS

Introduction

During the period from June 1, 2010, through November 14, 2011, Ben-Artzi was employed as a quantitative risk officer at Deutsche Bank, AG ("Deutsche Bank"), in New York. (Ben-Artzi Affidavit at ¶ 2.) In that capacity, Ben-Artzi developed various mathematical models to assess trading risks. (Id.)

During the course of his employment with Deutsche Bank, Ben-Artzi discovered severe accounting and risk irregularities, principally respecting the valuation of a very large portfolio of derivatives he was tasked with assessing. These derivatives were known as Leveraged Super Senior swaps (or, "LSS"). (Ben-Artzi Affidavit at ¶ 3.) In addition, he also discovered accounting and risk irregularities pertaining to Deutsche Bank products other than LSS derivatives. (Id.)

These irregularities were a serious source of concern to Ben-Artzi and he commenced to discuss them internally at Deutsche Bank, initially, with colleagues and supervisors, and, thereafter, with various internal departments, including Deutsche Bank's Finance Division. (Ben-Artzi Affidavit at ¶ 4.) Eventually, Ben-Artzi went to Deutsche Bank's Compliance Hotline, and, ultimately, in or about March 2011, to the Securities and Exchange Commission (the "SEC"). (Id.) Ben-Artzi's employment with Deutsche Bank was terminated approximately eight (8) months later. (Id.)

Ben-Artzi's Whistleblower Claim

In or about early August 2011, Ben-Artzi retained the law firm of Labaton Sucharow LLP ("Labaton") to investigate, prepare and file whistleblower submissions with the SEC. (Ben-Artzi Affidavit at ¶ 5.) In connection therewith, among other things, Labaton

commenced a proceeding before the SEC for a whistleblower award on Ben-Artzi's behalf by filing a Form TCR, which was assigned claim number TCR #13208554589509 (the "Whistleblower Claim"). (Id.)

Following the submission of the Whistleblower Claim, and upon consultation with Labaton, it was determined that, in order to properly present and advance the Claim, the services of experts, principally, those with knowledge of LSS, the asset backed commercial paper market, gap risk and the Canadian markets, would be required. (Ben-Artzi Affidavit at ¶ 6.) One of the firms identified as possessing such knowledge and expertise was plaintiff Kilgour Williams Group Incorporated ("KWG"), and its two (2) principals, plaintiffs Colin Kilgour ("Kilgour") and Daniel Williams ("Williams"). (Id.) Accordingly, and with the approval of Labaton, Ben-Artzi decided to engage KWG, Kilgour and Williams to act as experts in connection with the Whistleblower Claim. (Id.)

The Expert Agreement

Thus, on or about April 24, 2013, Ben-Artzi's company, Model Risk, entered into an agreement with KWG concerning the Whistleblower Claim (the "Expert Agreement"). (Ben-Artzi Affidavit at ¶ 7.) Pursuant to the Expert Agreement, among other things, KWG agreed to render expert consulting services in support of the Whistleblower Claim in exchange for specified consideration, in the form of a professional fee in an amount equal to Three Percent (3%) of the gross value of any whistleblower award rendered, by the SEC, upon the Whistleblower Claim. (Id.) A true and correct copy of the Expert Agreement is annexed as Exhibit 7 to the Affirmation of Daniel Williams in Support of Plaintiffs' Motion (the "Williams Affirmation").

No expert services were rendered by KWG, Kilgour and Williams in connection with

the Whistleblower Claim other than those provided for in the Expert Agreement. (Ben-Artzi Affidavit at ¶ 9.) The nature and extent of the services rendered by KWG pursuant to the Expert Agreement have been described at length in Affirmation of Daniel Williams in Support of Plaintiffs' Motion (the "Williams Affirmation") (at ¶¶ 10-21.) All of these services, which were discharged faithfully and well, were rendered during the period from late April 2013 through July 2014, at which time they ceased. (Ben-Artzi Affidavit at ¶ 9.)*

The Tri-Party Agreement

Upon completion of the expert services rendered by KWG, Kilgour and Williams, plaintiffs entered into a second agreement with Ben-Artzi's company, Model Risk, known as the "Tri-Party Agreement." The Tri-Party Agreement modified the Expert Agreement by (a) increasing KWG's fee from Three Percent (3%) to Five Percent (5%) of the gross value of any whistleblower award rendered, by the SEC, upon the Whistleblower Claim, and (b) transferring to KWG, Kilgour and Williams the intellectual property that KWG had developed in connection with the rendition of services pursuant to the Expert Agreement. (Williams Affirmation at ¶ 26.) As consideration for the transfer of the intellectual property, which Model Risk owned under the Expert Agreement, Kilgour and Williams agreed to submit their own independent whistleblower claim and pay to Model Risk Sixty Percent (60%) of any award realized upon this claim, which was filed on August 12, 2014. (Id.) A true and correct copy of the Tri-Party Agreement is annexed as Exhibit 12 to the Williams Affirmation.

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* The date upon which plaintiffs, or any of them, ceased to render any expert services on Ben-Artzi's behalf in connection with the Whistleblower Claim appears to have been confirmed by the United States Court of Appeals for the Second Circuit in its decision denying Kilgour and Williams's independent whistleblower claim. (Ben-Artzi Affidavit at ¶ 9.) (See Williams Affirmation, Exh. 16, at p. 9, lines 14-17.)

The Preliminary Determination

On or about July 27, 2016, the SEC issued its Preliminary Determination in connection with the various whistleblower claims, including Ben-Artzi's, filed in connection with the Covered Action (against Deutsche Bank) (the "Preliminary Determination"). (Ben-Artzi Affidavit at ¶ 15.) The Preliminary Determination recommended a whistleblower award for Ben-Artzi (as Claimant # 2), in an amount equal to Fifty Percent (15%) of any sum collected in connection with the Covered Action. (Id.) However, the Preliminary Determination recommended against making any whistleblower award to Kilgour and Williams (identified as Claimants #s 3, 4). (Id.) A true and correct copy of the Preliminary Determination is annexed as Exhibit 13 to the Williams Affirmation.

Kilgour and Williams both were disappointed by the Preliminary Determination. (Ben-Artzi Affidavit at ¶ 16.) Each also felt he was entitled to compensation in excess of that provided for in the Expert and Tri-Party Agreements – which is not in an insubstantial amount. (Id.) When, in or about early August 2016, Ben-Artzi informed Kilgour and Williams of his decision not to accept the award, as well as the reasons therefor, they pounced – asking that Ben-Artzi direct to them any sums ultimately due and payable to him (Id.) This occurred prior to the publication of the article in the Financial Times, a true and correct copy of which is annexed as Exhibit 14 to the Williams Affirmation. (Id.)

The Final Order

On or about November 30, 2017, the SEC rendered a Final Order Determining Whistleblower Award Claims (the "Final Order"). In that Final Order, a true and correct copy of which is annexed as Exhibit 3 to the Williams Affirmation, Ben-Artzi's

Whistleblower Claim (unlike that subsequently submitted by Kilgour and Williams), was approved, in an amount equal to Fifteen Percent (15%) of the monetary sanctions collected in the "Covered Action" (against Deutsche Bank), to wit, Fifty-five Million Dollars ($55,000,000.00), or, Eight Million Two Hundred Fifty Thousand Dollars ($8,250,000.00).*

Five Percent (5%) of that sum, which represents the consideration due and owing to KWG pursuant to both the Expert Agreement and the Tri-Party Agreement, is in an aggregate amount of Four Hundred Twelve Thousand Five Hundred Dollars ($412,500.00), which is the very same amount Kilgour and Williams have testified was due and owing to them from Ben-Artzi and/or Model Risk prior to Ben-Artzi's entry into the so-called "Letter Agreement." (Ben-Artzi Affidavit at ¶ 11.) (See also, Melnick Affirmation, Exhs. A & B, Responses to Supplemental Interrogatory No. 9 – attesting to the amount(s) due and owing from defendants to plaintiffs as of August 1, 2016.)

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* In the Final Order, the SEC discussed the public policy considerations governing independent whistleblower claims submitted by experts, such as Kilgour and Williams, concluding as follows:

> "As a matter of public policy, we believe that where an individual, such as an expert, is retained to perform services on behalf of a whistleblower or in furtherance of another's whistleblowing activities, that individual cannot subsequently claim that the information he or she provided to the whistleblower, and that was correspondingly submitted to the Commission on behalf of the whistleblower, as his or her own information eligible for award consideration. A contrary result could create a perverse incentive in future cases for retained experts (or other professionals retained to assist whistleblowers) to abandon their contractual claims and obligations with whistleblowers in order to pursue an award on their own behalf, and we do not believe that this would be consistent with the proper functioning of our award program because, among other things, it could discourage whistleblowers from retaining professionals to help them refine and supplement their tips."

Final Order at p. 12 (Williams Affirmation, Exh. 3.) The foregoing conclusion was affirmed on appeal by the Second Circuit Court of Appeals. (Decision at p. 9, Lines 14-17.) (Williams Affirmation, Exh. 16.)

Ben-Artzi does not contest plaintiffs' right or entitlement to the aforesaid sum. (Ben-Artzi Affidavit at ¶ 12.) By contrast, for the reasons set forth in the Ben-Artzi Affidavit (at ¶¶ 8-14, 16-24), and as discussed more fully below, defendants do not believe that Kilgour and Williams have any legitimate right or entitlement to the additional aggregate sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00) provided for in the so-called "Letter Agreement" – which sum, in his deposition testimony, Ben-Artzi characterized "as basically invented out of thin air with no meaningful negotiation." (Dep. Tr. at p. 140, Lines 1-3; Harwood Affirmation, Exh. 34.)

The Letter Agreement

A true and correct copy of the Letter Agreement, dated August 24, 2016, is annexed as Exhibit 2 to the Williams Affirmation. Ben-Artzi entered into the Letter Agreement following his public repudiation of the award allocated to him under the Preliminary Determination. (Ben-Artzi Affidavit at ¶ 21.) He did so in circumstances which, fairly construed, may be characterized as duress (Id. at ¶ 23), and as a means of placating Kilgour and Williams, who, upon learning of Ben-Artzi's repudiation of the award, became quite hostile and aggressive, exerting tremendous pressure upon him to give to them whatever portion of the award Ben-Artzi would have realized (but for his repudiation). (Id. at ¶ 24.)

The Letter Agreement obligates Ben-Artzi to make a "request," which he ultimately did, albeit not one acceptable to plaintiffs. (See Williams Affirmation at ¶ 41; Exh. 20.) From Ben-Artzi's perspective, the "request" he agreed to make never was intended to create an affirmative obligation upon him. (Ben-Artzi Affidavit at ¶¶ 21, 22.) The gross disparity in the consideration exchanged by the parties pursuant to the Letter Agreement,

coupled with the fact that Kilgour and Williams, by their own admission, did nothing to earn the additional sum provided for in the Letter Agreement (to wit, $2.5 million), appear to validate this intent.

LEGAL ARGUMENT

PLAINTIFFS' MOTION SHOULD BE DENIED AND DEFENDANTS' CROSS- MOTION SHOULD BE GRANTED

A. Summary Judgment – The Standard.

Summary judgment may be granted only when it is clear that no triable issue of fact exists. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 325 (1986). The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Ayotte v. Gervasio, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. Alvarez, 68 N.Y.2d 324; Zuckerman, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. Martin v. Briggs, 235 A.D.2d 192, 196 (1st Dept. 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. Zuckerman, supra. Upon the completion of the court's examination of all of the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978).

Plaintiffs believe that this is a case for summary judgment. (Pltfs. Mem. of Law at p.

13.) Defendants do not disagree. However, whereas plaintiffs contend that the Letter Agreement is a valid and binding instrument, which purportedly was repudiated and breached by Ben-Artzi (Pltfs. Mem. of Law at pp. 13-18), defendants contend that the Letter Agreement is an unconscionable contract which is so grossly unreasonable as to be unenforceable as a matter of law. Upon the resolution of these competing contentions, this case will be at an end.

B. The Doctrine of Unconscionability.

The doctrine of unconscionability is not new to American jurisprudence. See, e.g., Hume v. United States, 132 U.S. 406 (1889); Scott v. United States, 79 U.S. 443 (1870); An unconscionable contract has been defined as 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 unenforceable according to its literal terms." Gillman v. Chase Manhattan, 73 N.Y.2d 1, 10 (1988); see also, King v. Fox, 7 N.Y.3d 181, 191 (2006); Mandel v. Liebman, 303 N.Y. 88, 94 (1951). The doctrine, which is rooted in equitable principles, is a flexible one and the concept of unconscionability is "intended to be sensitive to the realities and nuances of the bargaining process." Gillman, supra, *quoting* Matter of State of New York v. Avco Fin. Serv., 50 N.Y.2d 383, 389-90 (1980).*

A determination of unconscionability generally requires a showing that the contract, here, the Letter Agreement, was both procedurally and substantively unconscionable when made. i.e., "some showing of an absence of meaningful choice on the part of one of the

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* The New York Court of Appeals has characterized an unconscionable contract as "one which no person in his or her senses and not under any delusion would make on the one hand, and as no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense." Christian v. Christian, 42 N.Y.2d 63, 71 (1977) (internal question marks, brackets and citations omitted).

parties together with contract terms which are unreasonably favorable to the other party." Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); see also, King, supra; Gillman, supra.

The procedural element of unconscionability concerns the contract formation process and the alleged lack of meaningful choice; the substantive element looks to the content of the contract per se. See Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Gillman, 73 N.Y.2d at 10-11; Simar Holding Corp. v. Gsc, 87 A.D.3d 688, 689 (2nd Dept. 2011). Examples of procedural unconscionability include, but are not limited to, high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance of understanding. Id.; see also, New York v. Wolowitz, 96 A.D.2d 47, 67 (2nd Dept. 1983). Examples of unreasonably favorable contractual provisions are "virtually limitless," Wolowitz, supra, but include inflated prices, unfair limitations on consequential damages, and a significant disparity in the consideration exchanged by the parties. Id.; see also, Emigrant Mortgage Co. v. Fitzpatrick, 95 A.D.3d 1169, 1170 (2nd Dept. 2012); Matter of Friedman, 64 A.D.2d 70, 84-85 (2nd Dept. 1978).

A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made. See Gillman, supra; Emigrant Mortgage Co., supra. However, "procedural and substantive unconscionability operate on a 'sliding scale'; the more questionable the meaningfulness of choice, the less imbalance in a contract's terms should be tolerated and vice versa." Emigrant Mortgage Co., supra, *quoting* Wolowitz, 96 A.D.2d at 68; see also, Simar Holding Corp., 87 A.D.3d at 690.

The foregoing notwithstanding, several courts have held that where, as here, the disparity in the consideration exchanged by the parties is overwhelming, that factor alone "may be sufficient to sustain [a finding that the contract is unconscionable]," since the disparity "itself leads inevitably to the felt conclusion that that knowing advantage was taken of [one party.]" Matter of Friedman, 64 A.D.2d at 85, *quoting* Jones v. Star Credit Corp., 59 Misc.2d 189, 192 (1969) (Sup. Ct. Nassau Co.) (Wachtler, J.); see also, Wolowitz, supra; Miner v. Walden, 101 Misc.2d 814, 818 (1979) (Sup. Ct. Queens Co.).

A determination of unconscionability is a matter of law for the court to decide. Gillman, supra; Emigrant Mortgage Co., 95 A.D.3d at 1170-71; Simar Holding Corp., supra. Where the significant facts germane to the unconscionability issue are known and essentially undisputed, the court may determine the issue without a hearing. Id. In the event they are not, a hearing may be necessary. Id.

C. The Letter Agreement is an Unconscionable Contract.

Here, the evidence adduced by Ben-Artzi discloses that the Letter Agreement was both substantively and procedurally unconscionable when made. As a threshold matter, and as Kilgour and Williams both have admitted (see Melnick Affirmation, Exhs. A & B, Responses to Supplemental Interrogatory No. 9), at the time the Letter Agreement was made, plaintiffs had no claims against Ben-Artzi and/or Model Risk apart from those arising out of or founded upon the Expert Agreement and the Tri-Party Agreement. The value of those claims, which Ben-Artzi concedes are legitimate, was in an aggregate amount of Four hundred Twelve Thousand Five Hundred Dollars ($412,500.00). (Id.; see also, Ben-Artzi Affidavit at ¶ 11.)

Yet, following the formation of the Letter Agreement, at which time the value of the

gross whistleblower award was both unknown and unknowable, the value of Ben-Artzi's indebtedness mushroomed from Four Hundred Twelve Thousand Five Hundred Dollars ($412,500.00) to Two Million Seven Hundred Forty-Seven Thousand Five Hundred Dollars ($2,747,500.00), of which the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00) was earmarked for payment to Kilgour and Williams, collectively.

Neither Kilgour nor Williams did anything whatsoever to earn the aforesaid sum. To the contrary, and as Ben-Artzi has testified, no expert services were rendered on his behalf other than those provided for in the Expert Agreement. (Ben-Artzi Affidavit at ¶ 9.) these services were rendered during the period from late 2013 through July 2014, at which time they ceased. (Id.) The SEC reached its settlement with Deutsche Bank on or about May 26, 2015, making plain that plaintiffs did not render and, indeed, could not have rendered, any further services or expended any further "efforts" on Ben-Artzi's behalf after that date. (Id.) The rendition of these services, therefore, could not possibly have formed part of the consideration tendered to Ben-Artzi in exchange for any reciprocal obligation provided for in the Letter Agreement.

Similarly, the releases proffered to Ben-Artzi in connection with the Letter Agreement are not in the nature of good and valuable consideration as, at the time the Letter Agreement was entered into, plaintiffs had no claims against Ben-Artzi and/or Model Risk, other than those arising out of or founded upon the Expert Agreement and the Tri-Party Agreement. (Ben-Artzi Affidavit at ¶ 13.) Nor is there any reasonable basis upon which to conclude that Ben-Artzi's public repudiation of the whistleblower award allocated to him could possibly have "impaired the likelihood of a successful appeal of the

SEC's denial" of Kilgour and Williams's independent whistleblower claim (which Ben-Artzi supported). (Id.; see also, Melnick Affirmation, Exhs. A & B, Responses to Supplemental Interrogatory No. 10.)

To the contrary, the public policy considerations identified by the SEC in the Final Order (Williams Affirmation, Exh. 3), which was affirmed by the Second Circuit on appeal (Id. at Exh. 16, p. 9, at lines 14-17), appear to make plain the Ben-Artzi's acceptance or rejection of the whistleblower award allocated to him had no bearing whatsoever upon the disposition of the appeal taken by Kilgour and Williams. (Ben-Artzi Affidavit at ¶ 14.) As such, the appeal taken was destined to fail, irrespective of Ben-Artzi's acceptance or rejection of the award. (Id.) To attest otherwise, as Kilgour and Williams have done and, further, to attest that, but for Ben-Artzi's rejection of that award, each would have received a sum of One Million Two Hundred Fifty Thousand Dollars ($1,250,000.00) under the Tri-Party Agreement is patently untrue. (Id.; see also, Melnick Affirmation, Exhs. A & B, Responses to Supplemental Interrogatory No. 10.)

Fairly construed, the only consideration Ben-Artzi received for entering into the Letter Agreement was a Two Percent (2%) reduction in the percentage interest due and owing to plaintiffs from defendants pursuant to the parties' underlying agreements. (Ben-Artzi Affidavit at ¶ 12.) The value of that reduction is in an amount of One Hundred Sixty-Five Thousand Dollars ($165,000.00). In exchange for that modest reduction, Ben-Artzi somehow became obligated to arrange for delivery to Kilgour and Williams of the aggregate sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00). This disparity is stark and, without more, may be sufficient to sustain a finding of unconscionability. See Wolowitz, 96 A.D.2d at 68; Matter of Friedman, 64 A.D.2d at 85;

Miner, 101 Misc.2d at 818; Star Credit Corp., 59 Misc.2d at 192. At a minimum, this gross disparity is sufficient to satisfy the substantive element of unconscionability. See Williams, 350 F.2d 449; King, 7 N.Y.3d at 191; Gillman, 73 N.Y.2d at 10.

In his deposition testimony, Ben-Artzi testified that he executed the Letter Agreement under duress. (Dep. Tr. at p. 143, Lines 22-23; Harwood Affirmation, Exh. 34.) He further testified that, at the time he executed the Agreement, he was under a great deal of stress – of which Kilgour and Williams were aware. (Id. at p. 132, Lines 12-19.) Not only had Ben-Artzi taken on Deutsche Bank, the largest bank in the world, but, also, the SEC (in the context of his repudiation of the whistleblower award). (Ben-Artzi Affidavit at ¶ 23.) His ex-wife was trying to destroy him and Ben-Artzi was having a great deal of trouble with the divorce court in Washington State. (Id.) He was attacked in media outlets, including the Wall Street Journal and the New York Times. (Id.) Upon learning of his intention to repudiate the whistleblower award, Ben-Artzi's counsel at Labaton also became adversarial. (Id.) His immediate family also turned on him and curtailed their support. (Id.) Plaintiffs Kilgour and Williams were Ben-Artzi's only allies, or so he thought. (Id.)

However, upon learning of Ben-Artzi's intention to repudiate the whistleblower award, Kilgour and Williams became aggressive and threatening, exerting tremendous pressure upon him to give to them whatever portion of the award he would otherwise have realized (but for his repudiation). (Ben-Artzi Affidavit at ¶ 24.) In the event Ben-Artzi failed to do so, it was made plain to him that there would be serious ramifications, including further adverse media coverage and possible legal action, which, as Kilgour and Williams knew, was the last thing Ben-Artzi wanted or could afford. (Id.) As such, Ben-

Artzi had no choice, or so he thought, other than to acquiesce in the demands made by Kilgour and Williams. (Id.) The Letter Agreement is a product of that acquiescence.

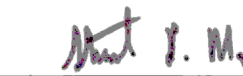
By reason of the foregoing, the procedural element of unconscionability has been satisfied. See Lawrence, 11 N.Y.3d at 595; Gillman, 73 N.Y.2d at 10-1; Simar Holding Corp., 87 A.D.3d at 688; Wolowitz, 96 A.D.2d at 67. As such, the governing standards have been met and Ben-Artzi is entitled to an Order directing that the Letter Agreement is unconscionable as a matter of law and, therefore, not properly enforceable against him according to its terms.

CONCLUSION

For all of the reasons set forth herein, in the Ben-Artzi Affidavit (and the exhibits thereto) (the "Ben-Artzi Affidavit"), in the Melnick Affirmation (and the exhibits thereto), and in other related submissions, Plaintiffs' Motion should be denied and Defendants' Cross-Motion should be granted.

Dated: New York, New York
August 20, 2020

LAW OFFICES STUART L. MELNICK, LLC

By: 

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CERTIFICATION OF WORD COUNT PURSUANT TO COMMERCIAL DIVISION RULE 17

The undersigned counsel for defendants hereby certifies that the number of words contained in this document is 4210.

Dated: New York, New York
August 20, 2020

Stuart L. Melnick