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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X

MILANA DRAVNEL,

Plaintiff,

-against-

OSCAR DE LA HOYA, and
JOHN and/or JANE DOES 1 & 2,

Defendants.
-----X

Case No.: 07-cv-10406

Hon. Laura T. Swain

ORAL ARGUMENT REQUESTED

**MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT OSCAR DE LA HOYA'S MOTION TO COMPEL
ARBITRATION OR, IN THE ALTERNATIVE, TO DISMISS THE
COMPLAINT FOR FAILURE TO STATE A CLAIM UPON
WHICH RELIEF CAN BE GRANTED**

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Plaintiff Milana Dravnel submits this Memorandum of Law in opposition to
defendant Oscar De La Hoya's Motion to Compel Arbitration.

Because Plaintiff has filed an Amended Complaint, the majority of the grounds
upon which Defendants moved to dismiss have been rendered moot by the changes to the
Complaint by the Amended Complaint, filed January 2, 2008, pursuant to Fed. R. Civ. P.
Rule 15(a)(1)(A).

The sole remaining issue within Defendant's Motion to Dismiss is whether Ms.
Dravnel entered into a valid agreement – which included an arbitration clause – through

which she gave up her right to litigate in a judicial forum, and instead compelled her to arbitration.

Simply put, since the arbitration clause Defendant seeks to enforce was within an agreement that was never formed, the arbitration provision contained in the agreement is not valid or enforceable, and the motion to compel Plaintiff to arbitration should be denied.

STATEMENT OF FACTS

Plaintiff Milana Dravnel filed an Amended Complaint in this matter on January 2, 2007, charging Defendant with Tortious Interference with Business Opportunities, Tortious Interference with Contract, Intentional Infliction of Emotional Distress, Defamation, Defamation by Compelled Self-publication, and Product Libel.

The facts relevant to the sole issue in Defendant's Motion to Dismiss that remains in light of the amendments to the Complaint, are as follows: After deflecting Defendant's various and aggressive efforts to contact and send messages to her, both directly and through her work and friends, Plaintiff Milana Dravnel agreed to meet with two representatives of the champion boxer and businessman, Oscar De la Hoya. Thus, Stephen Espinoza, an attorney, and Glen Bunting, a publicist with Sitrick and Company – both from California – met with Ms. Dravnel in Bunting's New York City offices in midtown on the Sunday afternoon of September 23, 2007. A friend of Ms. Dravnel's, Richard Rubino, accompanied Ms. Dravnel to the meeting. There, De La Hoya's agents

focused the meeting both on photographs that Ms. Dravnel possessed of Mr. De La Hoya, and Ms. Dravnel's relationship with him. (Dravnel Dec. ¶ 3; Rubino Dec. ¶ 3.)¹

Within that meeting, pursuant to discussions between those present as well as with Mr. De la Hoya by telephone, Espinoza drafted an agreement for Ms. Dravnel and for Mr. De la Hoya (through his representative(s)) to sign (hereinafter "the Agreement"). In brief, the Agreement focused generally on Ms. Dravnel's assent to disavow publicly both the authenticity of the photographs of Mr. De la Hoya that she possessed, as well as her previous statements about those photographs.

Ms. Dravnel informed Espinoza more than once that she would not sign the Agreement without her attorneys' approval, and at one point, Ms. Dravnel and Mr. Rubino left the offices to consider the Agreement – and it remained unsigned. (Dravnel Dec. ¶¶ 9, 13).

It is also notable that compared to both of De la Hoya's representatives who are experienced professionals, and Ms. Dravnel, on the other hand, is a 22-year-old woman whose only education consisted of some high school. Her friend, Mr. Rubino, is a retired police officer with an automotive business in New York City.

Because it was a Sunday, Ms. Dravnel was unable to contact her attorney. At the same time, Espinoza and Bunting were pressuring Ms. Dravnel to sign the Agreement

¹ See Declaration of Milana Dravnel dated January 2, 2008, and Declaration of Richard Rubino dated January 2, 2008.

because – they told her – they had to return to California by the following day. (Dravnel Dec. ¶ 12).

Consequently, Ms. Dravnel, again with Mr. Rubino, went back to meet Espinoza, and only agreed to sign the Agreement with the following, additional provision:

“SUBJECT TO REVIEW BY MD’S [Milana Dravnel’s] ATTORNEY.” She only then signed, directly below that provision. The parties agreed that the Agreement would not

be valid or enforceable unless and until Ms. Dravnel’s attorneys reviewed and approved it. *See* Agreement, as EXHIBIT 1, attached to Dravnel and Rubino Declarations.

Significantly, Ms. Dravnel’s attorneys have never approved the agreement, and thus no agreement was ever completed.

Accordingly, because no agreement was ever formed, the arbitration provision contained in the Agreement is not valid, and defendant’s motion to compel arbitration must be denied.

POINT I

A CONTRACT BETWEEN THE PARTIES WAS NEVER FORMED; THEREFORE NO AGREEMENT TO ARBITRATE EXISTS

Under both federal and New York law, a party may not be compelled to arbitration unless a valid contract containing an arbitration agreement has been entered

into.² See CPLR § 7503(a); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (1980) (although sales contract contained arbitration clause, providing that any claim arising out of contract or merchandise covered thereby would be submitted to and determined by arbitration, plaintiff buyer's claim that there was never meeting of minds on terms and conditions contained in agreement, accompanied by supporting affidavits, was sufficient to require jury determination as to whether there had been a meeting of minds on the purported agreement to arbitrate); *Sandvik AB v. Advent Intern. Corp.*, 220 F.3d 99, 106 (3d Cir. 2000) (defendant not entitled to arbitration where it disputed very existence of binding contract); *Manos v. Interbank of New York*, 202 A.D.2d 403, 608 N.Y.S.2d 691 (2d Dept. 1994) (CPLR 7503(a) to compel party to arbitrate pursuant to contractual agreement, there must be no substantial question as to whether valid agreement was made or complied with).

This long-settled principle is a straightforward one:

[B]y contending that they never entered into such contracts, plaintiffs also necessarily contest any agreements to arbitrate within the contracts. To require the plaintiffs to arbitrate where they deny that they entered into the contracts would be inconsistent with the 'first principle' of arbitration, that a 'party cannot be required to submit [to arbitration] any dispute which he has not agreed so to submit.'

² Plaintiff notes here that while she does not concede that the agreement at issue relates to interstate commerce, invoking the Federal Arbitration Act (FAA), nonetheless, as demonstrated here, under the FAA and New York State law, the Court -- not an arbitrator -- decides whether the alleged agreement to arbitrate was formed, and if so, whether the arbitration agreement is unconscionable or procured by fraud. Therefore, it does not matter if the alleged agreement falls under the FAA or not -- and this issue will not be addressed.

Three Valleys Mun. Water v. E.F. Hutton, 925 F.2d 1136, 1142 (9th Cir. 1991), citing *AT&T Technologies Inc. v. Communications Workers*, 475 U.S. 643, 648 (1986). See also *Garten v. Kurth*, 265 F.3d 136, 142 (2d Cir. 2001) ("[B]efore the court compels arbitration of a claim, the court must find that a valid agreement to arbitrate exists.")

Moreover, as noted in *Three Valleys*, the Federal Arbitration Act does not confer jurisdiction on arbitrators absent an agreement of the parties to arbitrate. *Id.* at 1142 n.5.

It is a factual question for the Court to decide, applying New York contract principles, whether parties entered into a contract. See *Adams v. Suozzi*, 433 F.3d 220, 226 (2d Cir. 2005) (The court is to determine whether the parties entered into a contract); *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211 (5th Cir.) (The court should apply state-law principles of contract to determine whether an agreement existed); *Brennan v. Bally Total Fitness*, 198 F.Supp.2d 377, 381 (S.D.N.Y. 2002) (State-contract principles of contract are used to evaluate the validity of an agreement to arbitrate).

The case of *Opals on Ice Lingerie v. Bodylines, Inc.*, 320 F.3d 363, 372 (2d Cir. 2003), is worthy of note. There, a New York and a Nevada company drafted various documents which Opals argued should constitute a valid contract - containing an arbitration clause. However, the documents drafted and signed by Opals each called for arbitration in New York, governed by New York law. The only documents undisputedly signed by Bodylines which contain an arbitration clause- two Addendums - each called for arbitration in California, governed by California law. The court found this difference to be significant, indicating that there was **no meeting of the minds** as to an agreement to

arbitrate. Fundamental to every valid, enforceable contract is that the parties have a meeting of the minds and mutually assent to the essential terms and conditions of their agreement. Thus, if no contract was formed, then any arbitration agreement contained in the contract is unenforceable. *Opals, supra*, 320 F.3d 371-72.

In the case here, Ms. Dravnel was unable to obtain the assistance of her attorney in negotiating and evaluating the terms of the Agreement, which defendant and his agents had drafted. At the same time, Defendants' agents were pressuring Plaintiff to sign the Agreement, since they purportedly had to return to California. Accordingly, it was ***explicitly agreed between the parties***³ – **and was included as a handwritten clause within the contract** “SUBJECT TO FURTHER REVIEW BY MD’S ATTORNEY.” - that Ms. Dravnel’s signature would ***not be binding*** as an assent to the Agreement, ***until*** the Agreement was reviewed by her attorney. Thus, her signature had no force and effect as an assent to the Agreement without her attorney’s input.

Thus the agreement, including the arbitration clause, was subject to the approval of Ms. Dravnel’s attorney, and was not a fully formed contract because without the approval of Ms. Dravnel’s attorneys, there was no meeting of the minds or mutual assent between the parties. *Pepitone v. Sofia*, 203 A.D.2d 981, 611 N.Y.S.2d 375, 376 (4th Dept. 1994) (an agreement that is subject to approval by an attorney is not binding and enforceable until such approval is

³ Ms. Dravnel and Mr. Rubino both state that when Ms. Dravnel signed the agreement, they told attorney Espinoza that the agreement would not be binding or enforceable without Ms. Dravnel’s attorneys’ approval. (Dravnel Dec. ¶¶ 15 - 18; Rubino Dec. ¶¶ 14 - 18).

given); *Schreck v. Spinard*, 13 A.D.3d 1027, 1027–28, 788 N.Y.S.2d 214, 214–15 (3d Dept. 2004) (when an agreement is subject to attorney approval, it is not binding and enforceable until it is approved.); *Nelson v. Ring*, 136 A.D.2d 878, 879, 524 N.Y.S.2d 544, 544 – 546 (3d Dept. 1988) (attorney approval clauses are considered an essential part of real property contracts which must be satisfied before a contract is enforceable).

In *Cohn v. Geon Intercontinental Corp.*, 62 A.D.2d 1161, 404 N.Y.S.2d 206 (4th Dept. 1978), a case similar to the one here, the Court found that the defendant’s handwritten words to the effect that the document was subject to legal advice, as well as the defendant’s crossing out of the words “consented to,” vitiated any “intent to bind defendant” to the terms set forth in the document. As a result, the Court found that there was no mutual assent or meeting of the minds sufficient to form a binding contract. *Id.* at 1161–62, 404 N.Y.S.2d at 208-09.

Ms. Dravnel had the right to make her acceptance of the agreement dependent on the approval of her attorney, and she did so. *See Wilhelm v. Wood*, 151 A.D.42, 135 N.Y.S. 930, 932 (2d Dept. 1912) (a party to a contract has the right to make their acceptance dependent upon the approval of their own attorney.) Her attorneys never approved the agreement; therefore, any arbitration provision in the agreement is invalid and unenforceable, and defendant’s motion to compel arbitration should be denied.

POINT II

IF THE COURT FINDS A CONTRACT WAS FORMED, MS. DRAVNEL SHOULD NOT BE COMPELLED TO ARBITRATION AS THE AGREEMENT TO ARBITRATE IS UNCONSCIONABLE

Even if the Court finds a valid contract was formed by the parties on September 23, 2007 – despite Plaintiff’s arguments in POINT ONE, *supra* - the Court should nonetheless find that the arbitration provision is unconscionable, and for that reason also, unenforceable.⁴

In New York, unconscionability generally requires both procedural and substantive elements. *Brennan v. Bally Total Fitness*, 198 F.Supp.2d 377, 382 (S.D.N.Y. 2002). The test for procedural inadequacy in forming a contract is whether, in light of all the facts and circumstances, a party lacked “a meaningful choice” in deciding whether to sign the contract. *Desiderio v. National Ass’n of Sec. Dealers*, 191 F.3d 198, 207 (2d Cir.1999). Although it is true that “one who signs an agreement without full knowledge of its terms might be held to assume the risk that [s]he has entered a one-sided bargain,” this rule does not apply if a plaintiff is able to demonstrate an absence of meaningful choice. *Id.* To determine whether a contract was validly formed, one factor upon which a court should focus is any disparity in experience and education, *i.e.* bargaining power, between the parties. *See Wright v. SFX Entertainment Inc.*, 2001 WL 103433, at *3; *Gillman v. Chase Manhattan Bank, NA*, 73

⁴ The Court must determine whether a valid arbitration provision exists employing New York state law. *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F3d 360, 365 (2d Cir. 2003).

N.Y.2d 1,10-11, 537 N.Y.S.2d 787, 534 N.E.2d 824 (1988); *see also Klos v. Lotnicze*, 133 F.3d 164, 168 (2d Cir.1997) (“Typical contracts of adhesion are standard-form contracts offered by large, economically powerful corporations to unrepresented, uneducated, and needy individuals on a take-it-or-leave-it basis with no opportunity to change the terms”); *Brower v. Gateway 2000*, 246 A.D.2d 246, 676 N.Y.S.2d 569, 573 (1st Dep’t 1998) (describing disparity in bargaining power as turning on the “experience and education of the party claiming unconscionability”).

In this case, Mr. De La Hoya’s attorney and agent drafted the Agreement, which included the arbitration agreement, when Ms. Dravnel had no legal counsel. At the time, Ms. Dravnel, 22-years-old, with just a high school education, did not even know what arbitration was – thus, making it difficult in the extreme for her to agree to be subject to it.

On the other hand, Mr. De La Hoya’s agents drafting and negotiating the Agreement were professionals -- Attorney Espinoza is a member of Ziffren, Brittenham, Branca, Fischer, Gilbert-Lurie, Stiffelman, Cook, Johnson, Lande & Wolf LLP, a leading Southern California transactional entertainment law firm. Glen Bunting is employed by Sitrick and Company, one of the nation’s leading public relations firms.

The power imbalance between Ms. Dravnel and Mr. De La Hoya’s two representatives is so stark that Ms. Dravnel’s participation in negotiating the Agreement could hardly be considered meaningful -- indeed, she recognized and conceded that

imbalance, by requesting that her own legal counsel first review the Agreement before being bound by it

This being so, any arbitration provision obtained on that day is procedurally unconscionable due to the extreme power imbalance between the parties. *See Brennan v. Bally Total Fitness*, 198 F.Supp.2d 377, 382 (S.D.N.Y. 2002).

Additionally, not only is the arbitration agreement procedurally unconscionable, it is substantively unconscionable. The Agreement's arbitration clause unreasonably favors Mr. De La Hoya, and inures totally to his benefit. Mr. De La Hoya, a concededly famous international superstar boxer, has everything to gain by requiring Ms. Dravnel to litigate her disputes with him in confidential arbitration, as compared to a judicial forum.

To permit Mr. De La Hoya to use his power and extensive resources to trick Ms. Dravnel into giving up her rights to litigate her dispute in the judicial forum would be unconscionable and should not be permitted.

POINT III

MS. DRAVNEL DEMANDS A JURY TRIAL DETERMINE WHETHER A LEGALLY ENFORCEABLE ARBITRATION AGREEMENT WAS FORMED

The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration. To prevail on a motion to compel arbitration, Mr. De La Hoya must show that there are no genuine issues of material fact to be tried and that he is entitled to a judgment as a matter of law. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F2d 51, 54 (3d Cir. 1980) (the standard for evaluating a motion to compel

arbitration is the same as that for summary judgment); Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986).

The “attorney approval clause” as a matter of law demonstrates that no valid contract was formed; therefore, no valid arbitration provision exists and defendant’s motion to compel arbitration should be denied. Mr. De La Hoya has not met his burden in proving that a valid, enforceable contract containing an arbitration provision exists.

The words “SUBJECT TO FURTHER REVIEW BY MD’S ATTORNEY” single-handedly demonstrate that at the time Ms. Dravnel signed the document, she did not intend to be bound by the agreement until after her attorneys reviewed and approved it. No issue of fact remains, and the Court should deny defendant’s motion to compel arbitration as a matter of law.

However, in the event that the Court does not deny defendant’s motion to compel arbitration and finds that a material issue of fact exists, then Ms. Dravnel demands pursuant to 9 U.S.C.A. § 4,⁵ that a jury determine whether a contract was formed. *See also Benckiser Consumer Products, Inc. v. Kasday*, WL 677631, *2–3 (S.D.N.Y. 1998).

At trial, the evidence presented will demonstrate the nature of Ms. Dravnel’s relationship with Mr. De La Hoya and the influence he had upon her, as well as the parties’ prior interactions, all of which affected Ms. Dravnel’s state of mind such that she

⁵ Under 9 USCA § 4, the party opposing arbitration may request a jury decide whether an arbitration agreement was made.

would not assent to the Agreement drafted by Defendant's agents and presented to her on September 23, 2007, without advice from her attorneys.

CONCLUSION

The September 23, 2007 document is not a formed contract, as it contains an "attorney approval clause" that was never fulfilled. Because no agreement was ever formed on September 23, 2007, the arbitration provision in the agreement is invalid. The Court should deny defendant's motion to compel arbitration and permit Ms. Dravnel to proceed in the judicial forum.

The remainder of Defendant's motion to dismiss the complaint is moot, as Plaintiff has addressed defendant's issues by filing an amended complaint on January 2, 2008.

Jury Demand

Should the Court not find as a matter of law that no valid Agreement was made,
then plaintiff demands a jury trial on the issue.

Dated: New York, New York
January 2, 2007

Yours, etc.

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