UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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| DANIEL BUSHEY,<br><br>Plaintiff,<br><br>v.<br><br>RBC CAPITAL MARKETS, LLC and AARON SCOTT,<br><br>Defendants. | ) | Case No. 2:14-cv-00237 |

**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR AN ORDER TO SHOW CAUSE AND GRANTING DEFENDANTS' REQUEST FOR A STAY**
(Doc. 3)

On November 5, 2014, Plaintiff Daniel Bushey brought this action against his former employer, Defendant RBC Capital Markets, LLC ("RBC"), and his former supervisor, Defendant Aaron Scott (collectively "Defendants"), alleging violations of Vermont's labor laws.[1] Defendants seek an order to show cause why this case should not be dismissed, or in the alternative stayed, on the grounds that Plaintiff's claims are subject to a stipulation for dismissal without prejudice (the "Stipulation") that requires Plaintiff to arbitrate his claims before the Financial Industry Regulatory Authority

[1] Although not set forth in the Complaint as separate causes of action, Plaintiff appears to assert: a violation of 21 V.S.A. § 201(a) for failure to create a safe work environment; a violation of 21 V.S.A. § 223(a) for failing to provide a hazard-free work environment; a violation of 21 V.S.A. § 231 for discriminating against Plaintiff for his health-related complaints; a violation of 21 V.S.A. § 495 for "discriminating against [Plaintiff for] a disability, or perceived disability, which occurred as a result of his workplace exposure and environmental contamination illness by failing to provide him with reasonable accommodations[,]" (Doc. 1 at 12, ¶ 61); and a violation of 21 V.S.A. § 710 for discriminating against Plaintiff "because he suffered from injuries which he received at work and for which he could potentially file a claim for worker's compensation benefits." *Id.* at 12, ¶ 62. Plaintiff seeks an award of compensatory damages, back pay, and punitive damages.

("FINRA") Dispute Resolution Panel (the "FINRA Panel"). Plaintiff opposes the motion, arguing that he is not required to arbitrate his statutory discrimination claims before the FINRA Panel.

On November 24, 2014, after oral argument, the court took the motion under advisement. Since that time, the parties have filed statements regarding the proceedings before the FINRA Panel in which they dispute what has occurred with regard to Plaintiff's pending FINRA counterclaims.

Plaintiff is represented by Robert Manchester, Esq., Nicole Killoran, Esq., and Thomas Nuovo, Esq. Defendants are represented by Joel Davidson, Esq. and Thomas McCormick, Esq.

## I. Factual and Procedural Background.

### A. The Agreement to Arbitrate.

Plaintiff worked for RBC from July 21, 2008 through November 2010 as a registered stock broker and branch manager. When he commenced employment with RBC, Plaintiff signed a "Disclosure to Associated Persons Regarding Arbitration Information" (the "Disclosure"). (Doc. 4-6 at 2.) The Disclosure states:

> 1) You are agreeing to arbitrate any dispute, claim or controversy that may arise between you and your firm, or a customer, or any other person that is required to be arbitrated under the rules of the self-regulatory organizations with which you are registering. This means you are giving up the right to sue a member, customer, or another associated person in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.
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> 2) A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated under FINRA rules. Such a claim may be arbitrated at the FINRA [Panel] only if the parties have agreed to arbitrate it, either before or after the dispute arose. The rules of other arbitration forums may be different.

*Id.*

On July 21, 2008, Plaintiff signed a Form U-4, which contains an arbitration agreement stating:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my *firm*, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the *SROs* [(self-regulatory organizations)] indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction.*

*Id.* at 4, ¶ 5. Section 4 of the Form U-4 lists FINRA as one of the self-regulatory organizations with which Plaintiff registered.

**B. The Arbitration Proceedings and Plaintiff's FINRA Counterclaim.**

In 2011, RBC commenced arbitration proceedings against Plaintiff before the FINRA Panel, seeking to collect the balance due on a 2008 promissory note pursuant to which RBC loaned Plaintiff $472,370 in the course of Plaintiff's employment. On or about April 26, 2012, Plaintiff responded to RBC's arbitration action by filing a counterclaim before the FINRA Panel in which he addresses the amounts due under the promissory note and alleges that RBC had failed to pay him a "so-called 'cumulative back-end bonus.'" (Doc. 10-4 at 10, ¶ 21.) Plaintiff further alleges that he was constructively discharged as a result of RBC and Defendant Scott's response to allegedly intolerable workplace conditions.

In support of his constructive discharge claim, Plaintiff alleges that RBC asked him to be the branch manager of its Manchester, Vermont office, which RBC decided to relocate to a building with a beauty salon with an allegedly defective HVAC system. According to Plaintiff, RBC failed to provide a safe workplace:

> RBC's efforts to renovate and set up and operate a new office in Vermont imposed upon it a duty to provide a safe workplace for its employees. That duty arose at common law and is enforceable in Vermont by an employee against his employer pursuant to the provisions of title 21 Vermont Statutes Annotated section 223(a). That duty required among other things RBC to provide its employees including BUSHEY with "safe and healthful working conditions at their workplace [so that] insofar as practicable no employee shall suffer diminished health, functional capacity or life

> expectancy as a result of his or her work experience" (id. Section 201(a)[])]. The duty to provide a safe workplace is nondelegable by the employer.

*Id.* at 3, ¶ 5.

Plaintiff alleges that he made a series of complaints about the working conditions on his own behalf and on behalf of his employees and that "[f]rom June 6, 2009 until about September 1, 2009 the health complaints stated by employees of the RBC Vermont office continued but gradually diminished in frequency and extent of symptoms over that time." *Id.* at 7, ¶ 14. Plaintiff, however, continued to feel ill and sought medical attention and was advised that his symptoms were likely to continue as long as he was exposed to his work environment. He attempted to work from home and sought guidance from his supervisor, Defendant Scott, who allegedly shouted at him and accused him of "'not sticking it out' and of displaying bad leadership to his co-workers who had similar symptoms." *Id.* at 8, ¶ 16.

Thereafter, Plaintiff alleges the situation continued unabated until "[d]uring the latter part of July 2009, SCOTT telephoned BUSHEY to advise that RBC would accept his resignation as Branch Manager and allow him to work from his home for the time being" but would not allow him to relocate to another RBC branch office on either a temporary or permanent basis, which Plaintiff believed he needed to do in order to properly support his brokerage clients. *Id.* at 9, ¶ 18.

Plaintiff alleges that he subsequently relocated to RBC's Jacksonville, Florida office where he discovered that as of March 2010, Plaintiff "had been placed on 'probation' by RBC for reasons which were never specifically disclosed to him." *Id.* at 10, ¶ 21. He claims he was not given the opportunity to respond to RBC's decision as allegedly required by RBC's policies and regulations.

Although Plaintiff alleges that RBC subsequently thwarted his efforts to remain productive, his overall performance remained within the top twenty percent of RBC's U.S. workforce. On November 1, 2010, Plaintiff decided to resign from RBC after his former regional manager advised him that "you need a quick exit strategy and a [good] friend as they are after you." *Id.* at 11, ¶ 22.

Plaintiff alleges that he was constructively discharged in violation of "Title VII of the Civil Rights Act of 1964 and the 'public policy' doctrine of the State of Vermont (cf. Payne v. Rozendaal et. al., 147 Vt. 488, 491-493 (1986) and the provisions of Title 21 Vermont Statutes Annotated sections 201(a) and 223(a)." *Id.* His counterclaim before the FINRA Panel sets forth six counts: Count I: Liability for Breach of Duty for Failure to Provide Plaintiff With a Safe Workplace Environment; Count II: Liability for Intentional Disruption of Existing Contractual Relationship; Count III: Liability for Constructive Discharge of Employee Due to Intolerable Working Conditions Tantamount to Dismissal; Count IV Liability for Breach of the Implied Covenant of Good Faith and Fair Dealing; Count V: Liability for Intentional Infliction of Emotional Distress; and Count VI: Request for Punitive Damages.

In his FINRA counterclaim, Plaintiff alleges RBC is responsible for Defendant Scott's acts and omissions because "SCOTT's actions . . . were at all times material[ly] undertaken on behalf of RBC which has ratified his conduct and improper actions directed towards BUSHEY. Accordingly, RBC is vicariously liable for all injury and harm to BUSHEY, as stated in this complaint." *Id.*

**C. Plaintiff's 2012 Amended Complaint & the Stipulation of Dismissal.**

On August 30, 2012, Plaintiff filed an amended complaint in this court (the "2012 Amended Complaint") which closely tracks the allegations set forth in his counterclaim before the FINRA Panel, including verbatim allegations regarding RBC's duty to provide "safe and healthful working conditions" under 21 V.S.A. 223(a). Amended Complaint and Demand for Trial by Jury at 4, ¶ 8, *Bushey v. RBC Capital Markets, LLC*, No. 5:12-cv-00103-cr (D. Vt. Aug. 30, 2012), ECF No. 2. The 2012 Amended Complaint alleges the same causes of action as the FINRA counterclaim including an identical claim in Count I for "Liability for Breach of Duty for Failure to Provide Bushey with a Safe Workplace Environment[,]" (*id.* at 12), and an identical claim of vicarious liability based upon Defendant Scott's actions. *Id.*

In October 2012, the parties agreed to dismissal of Plaintiff's 2012 Amended Complaint. Plaintiff's counsel drafted the Stipulation which provides:

> Pursuant to Rule 41(a)[(1)](A)(ii) the parties to this action hereby give notice that the pending action is dismissed without prejudice, and without court order, subject to the following:
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> 1. The parties have agreed to dismiss the pending action before the court without costs to either party and proceed solely with an arbitration of the disputes between the parties before the FINRA DISPUTE [RESOLUTION] PANEL ("FINRA PANEL") pursuant to the terms of the arbitration agreement between the parties.
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> 2. The parties have obtained an order from the FINRA PANEL which provides a schedule for discovery. The FINRA PANEL will decide all discovery disputes that may arise during the course of the arbitration in accordance with the terms of the arbitration agreement between the parties and the FINRA Code of Arbitration for Industry Disputes.
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> 3. Accordingly, each party agrees to prepare and adjudicate the pending dispute before the FINRA PANEL provided however that each party also reserves for himself or itself the right to file in this court a motion and/or petition to vacate or confirm a final arbitration award issued by the FINRA PANEL in accordance with the FINRA Code of Arbitration for Industry Disputes and applicable law.

(Doc. 4-2 at 2.)

**D. Plaintiff's 2014 Complaint.**

On November 5, 2014, while the parties' dispute was proceeding before the FINRA Panel, Plaintiff filed a second complaint in this court entitled "Complaint for Damages Arising Under Vermont Workplace Anti-Discrimination Statutes" (the "2014 Complaint"). The 2014 Complaint contains thirty-nine paragraphs of factual allegations that are nearly identical to the factual allegations set forth in the 2012 Amended Complaint.[2]

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[2] Paragraphs 7-8, 15, 18-21, 25-27, 33, 39-43, 45-47, and 50 of the 2014 Complaint are identical to allegations in the 2012 Amended Complaint, albeit with different numbering. The allegations in paragraphs 6, 9, 12-14, 16-17, 22-24, 28-30, 34-36, 38, and 49 reflect only minimal changes to parallel allegations in the 2012 Amended Complaint—none of which are material. Paragraphs 1-2, 4, 10-11, 31, 44, 48, 51-53, and 64 of the 2014 Complaint contain allegations that track parallel allegations in the 2012 Amended Complaint but with some new language. Paragraph 11 of the 2014 Complaint alleges a violation of 21 V.S.A. § 201(a) whereas paragraph 8 of the 2012 Amended Complaint alleges violations of 21 V.S.A. § 223(a) and 21 V.S.A. § 201(a). The

In the 2014 Complaint, Plaintiff alleges RBC failed to provide a safe and hazard-free work environment in violation of 21 V.S.A. §§ 201, 203. These claims are virtually identical to the ones alleged in his 2012 Amended Complaint. In the 2014 Complaint, however, Plaintiff has alleged three new legal theories of recovery: a violation of 21 V.S.A. § 231 for discriminating against Plaintiff for his health-related complaints; a violation of 21 V.S.A. § 495 for "discriminating against [Plaintiff for] a disability, or perceived disability, which occurred as a result of his workplace exposure and environmental contamination illness by failing to provide him with reasonable accommodations[,]" (Doc. 1 at 12, ¶ 61); and a violation of 21 V.S.A. § 710 for discriminating against Plaintiff "because he suffered from injuries which he received at work and for which he could potentially file a claim for worker's compensation benefits." *Id.* at 12, ¶ 62. Each of these new claims, although dependent upon many of the factual allegations contained in the 2012 Amended Complaint, is also supported by new allegations related to Defendants' alleged failure to provide reasonable accommodations and retaliation based upon Plaintiff's alleged disability and his complaints about his workplace.

**E. The Motion for an Order to Show Cause and Post-Hearing Disputes.**

In their motion for an order to show cause, Defendants argue that Plaintiff's claims as set forth in his 2014 Complaint should be heard by the FINRA Panel pursuant to the Stipulation because Plaintiff's "claim[s] [are] clearly within the scope of the 2012 Stipulation and its agreement to arbitrate[.]" (Doc. 3-2 at 4.) Plaintiff counters that the Form U-4 does not require arbitration of statutory employment discrimination claims, the Stipulation is not an agreement to arbitrate those claims, and Defendant Scott cannot enforce the Stipulation because he was not a party to the 2012 lawsuit. At the court's November 24, 2014 hearing on the motion, the court suggested the parties consider

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allegations in paragraphs 3, 5, 32, 37, and 54-63 are new to the 2014 Complaint. The 2012 Amended Complaint also contains introductory material that is not included in the 2014 Complaint and which is not relevant to the pending motion.

allowing Plaintiff to amend his counterclaim before the FINRA Panel so that his new statutory discrimination claims could be addressed in arbitration.

Subsequent to the court's hearing, Defendants' counsel filed a letter that stated Plaintiff filed a motion to amend his counterclaim before the FINRA Panel to "include[] the very same statutory claim[s] set forth in the [2014 Complaint]." (Doc. 16 at 1.) On December 31, 2014, Plaintiff filed a motion for leave to file a sur-reply and informed the court that he had withdrawn his motion to amend his counterclaim before the FINRA Panel because Defendants would only consent to the amendment if Plaintiff agreed to withdraw his claims before this court.

On January 8, 2015, in opposing Plaintiff's motion to file a sur-reply, Defendants argued that Plaintiff had misrepresented what transpired before the FINRA Panel. According to Defendants' counsel, Plaintiff sought to both amend his claims before the FINRA Panel and preserve his right to bring claims before this court. As a result, Defendants' counsel agreed to permit Plaintiff to amend his counterclaim before the FINRA Panel only if this court ordered Plaintiff to arbitrate all of his claims. Plaintiff's motion to file a sur-reply was subsequently granted.

Because neither Plaintiff's sur-reply nor Defendants' opposition thereto affect the court's determination of the pending motion, the court does not address the parties' competing representations regarding what occurred before the FINRA Panel.

## II. Conclusions of Law and Analysis.

### A. Whether Defendant Scott May Enforce the Form U-4.

In the 2014 Complaint, in addition to raising new statutory employment discrimination claims, Plaintiff adds Defendant Scott as a party. Defendant Scott asks the court to require Plaintiff to arbitrate his claims against him pursuant to the Form U-4 although he concedes he is not a signatory to it. The Second Circuit has

> recognized that under principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where a careful review of the relationship among the parties, the contracts they signed . . ., and the issues that had arisen among them

> discloses that the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.

*JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004) (internal quotation marks omitted). "This does not mean, however, that whenever a relationship of any kind may be found among the parties to a dispute and their dispute deals with the subject matter of an arbitration contract made by one of them, that party will be estopped from refusing to arbitrate." *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 127 (2d Cir. 2010). Where the Second Circuit has permitted enforcement by a non-signatory, the cases "have tended to share a common feature in that the non-signatory party asserting estoppel has had some sort of corporate relationship to a signatory party; that is, this Court has applied estoppel in cases involving subsidiaries, affiliates, agents, and other related business entities." *Ross v. Am. Express Co.*, 547 F.3d 137, 144 (2d Cir. 2008).

The terms of the Form U-4 require Plaintiff to "arbitrate any dispute, claim or controversy that may arise between me and my *firm*, or a customer, or any other person, that is required to be arbitrated under the rules" of FINRA. (Doc. 4-6 at 4, ¶ 5.) During the time period alleged in the 2014 Complaint, Mr. Scott was a stockbroker at RBC and acted as Plaintiff's supervisor and RBC's agent when he committed the acts alleged by Plaintiff. Plaintiff makes no allegation of any act by Defendant Scott that occurred outside the scope of his authority or outside the workplace setting. In such circumstances, as RBC's agent, Defendant Scott may enforce the Form U-4 and require Plaintiff's claims arising thereunder to be submitted to arbitration. *See Finnie v. H & R Block Fin. Advisors, Inc.*, 307 F. App'x 19, 20-21 (8th Cir. 2009) (concluding that a supervisor "was entitled to enforce the arbitration agreement under the circumstances of this case[,]" which included an arbitration agreement between the plaintiff and her company and a suit for "racial discrimination, harassment, and retaliation"); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 48 (1st Cir. 2008) ("The fact that the defendants [(a company and its Chairman)] are not signatories is not a basis on which arbitration may be denied."); *see also Kastner v. Vanbestco Scandanavia, AB*, 2014 WL 6682440, at *7 (D. Vt. Nov. 25, 2014) (ruling that a non-signatory can enforce an

arbitration agreement where the non-signatory is a subsidiary of a signatory corporation and where the opposing party has otherwise consented to arbitration).

Defendants acknowledge that the Form U-4, by its terms, does not apply to Plaintiff's statutory discrimination claims. However, they contend that the 2012 Stipulation governs those claims and requires them to be submitted to arbitration. Plaintiff disagrees and points out that the Stipulation is silent with regard to statutory discrimination claims and thus permits them to be brought in a judicial forum. He further argues that Defendant Scott was not a party to the Stipulation and therefore cannot enforce it.

**B. Whether the Stipulation Requires Arbitration of the 2014 Complaint.**

The Stipulation states in relevant part that: "[t]he parties have agreed to dismiss the pending action before the court without costs to either party and proceed solely with an arbitration of the disputes between the parties before the FINRA DISPUTE [RESOLUTION] PANEL ('FINRA PANEL') pursuant to the terms of the arbitration agreement between the parties." (Doc. 4-2 at 2, ¶ 1.) The parties do not dispute that the "arbitration agreement" referred to in it is the Form U-4 and the Disclosure. However, because the Stipulation does not define "the disputes between the parties" and contains no explicit reference to statutory discrimination claims, they disagree regarding whether the Stipulation governs Plaintiff's new claims as set forth in his 2014 Complaint.

"A contract's construction is a matter of law where the contract is unambiguous, and whether it is ambiguous is also a question of law." *State v. Spitsyn*, 811 A.2d 201, 204 (Vt. 2002). "When construing a written agreement—whether it be a deed, a lease, a contract, or some other written document—'the master rule is that the intent of the parties governs.'" *Hall v. State*, 2012 VT 43, ¶ 21, 192 Vt. 63, 54 A.3d 993 (quoting *Main St. Landing, LLC v. Lake St. Ass'n*, 2006 VT 13, ¶ 7, 179 Vt. 583, 892 A.2d 931). "Interpretation of the parties' intent becomes a question of fact for the factfinder only if the court has made the initial determination that the written document is ambiguous." *Hall*, 2012 VT 43, ¶ 21.

"[C]ontractual terms are to be interpreted based on their plain meaning" and "contract provisions must be viewed in their entirety and read together." *In re Cole*, 2008 VT 58, ¶ 19, 184 Vt. 64, 954 A.2d 1307. "The court may consider limited extrinsic evidence of circumstances surrounding the making of the agreement in determining whether the writing is ambiguous[.]" *Main St. Landing*, 2006 VT 13, ¶ 7 (internal quotation marks omitted). "Ambiguity exists if the extrinsic evidence, in combination with the writing, supports an interpretation that is different from that reached on the basis of the writing alone, and both are reasonable." *Id.* (internal quotation marks omitted).

Here, the Stipulation refers to both "the pending action" and "the disputes between the parties" which are clear and unambiguous references to Plaintiff's 2012 Amended Complaint and the FINRA proceedings. The parties thus unambiguously intended to dismiss the factual allegations and claims set forth in the 2012 Amended Complaint and have them decided solely by the FINRA Panel, which was already presiding over Plaintiff's counterclaim based upon the same facts.

Both Plaintiff's FINRA counterclaim and his 2012 Amended Complaint allege violations of Defendants' duty to provide Plaintiff with a safe workplace environment. These allegations remain substantively unchanged in the 2014 Complaint. Affixing new theories of recovery to them therefore does not remove them from the Stipulation's embrace. *See First Nationwide Bank v. U.S.*, 48 Fed. Cl. 248, 261 (Fed. Cl. 2000) (dismissing the plaintiffs' new "theories of recovery" in the second lawsuit based upon the same allegations that were subject to the parties' agreement to dismiss the first lawsuit). Accordingly, all factual allegations set forth in the 2014 Complaint that are substantially identical to the allegations of the 2012 Amended Complaint are subject to the Stipulation's dismissal. *See State v. Philip Morris USA Inc.*, 2008 VT 11, ¶ 13, 183 Vt. 176, 945 A.2d 887 ("[W]e interpret contracts to give effect to the parties' intent, which we presume is reflected in the contract's language when that language is clear.") (internal quotation marks omitted).

Plaintiff's new factual allegations in the 2014 Complaint, however, present a closer question as they arguably support Plaintiff's new statutory claims of retaliation,

failure to provide reasonable accommodations, and discrimination based upon actual or perceived disability under Vermont law.[3] To the extent Defendants claim that the Stipulation was intended to govern Plaintiff's new allegations because they arise out of the same nucleus of facts, the Stipulation is silent on this point and the parties' representations regarding their intent in drafting the Stipulation are in conflict.[4]

"[I]f an ambiguity exists, the question of what the parties intended becomes a question of fact for the factfinder to resolve." *Dep't of Corr. v. Matrix Health Sys., P.C.*, 2008 VT 32, ¶ 12, 183 Vt. 348, 950 A.2d 1201. In making this determination of intent, the factfinder considers "all of the evidence—not only the language of the written instrument, but also evidence concerning its subject matter, its purpose at the time it was executed, and the situations of the parties.'" *Id.* ¶ 16 (quoting *Main St. Landing*, 2006 VT 13, ¶ 7).

Because Defendants have failed to establish that Plaintiff's retaliation, failure to provide reasonable accommodations, and actual or perceived disability discrimination claims based upon new allegations contained in the 2014 Complaint are unambiguously

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[3] At this juncture, the court need not decide whether the new factual allegations and their associated legal claims are sufficient to withstand a motion to dismiss.

[4] At the November 24, 2014 hearing, Attorney Manchester stated:

> I wrote "and proceed solely with an arbitration of the disputes between the parties pursuant to the terms of the arbitration agreement," well, I knew that agreement included both F4 and also the arbitration disclosure. And I thought if I didn't change the arbitration disclosure to specifically include arbitration of employment claims, I didn't have to worry about that. So I didn't overdo it. I just tried to pass on with that point. . . . I was just trying to keep it open. I wasn't trying to give it up. I wasn't trying to waive it.

(Doc. 21 at 31:12-31:21; 34:7-34:9.) In contrast, Attorney Davidson, argued:

> I think, to anyone reading [the Stipulation], is not truly ambiguous, and sets out the parties' intent. We are not going to be in the Vermont federal court. We came to the Vermont federal court, and he agreed to leave it, and that was clearly the intent of this. That's what we agreed to. We said we'll only come back to vacate or amend, and I think that should be lived up to.

*Id.* at 43:12-43:19.

governed by the Stipulation, they have not established that arbitration of these claims is required.

**C. Whether Defendant Scott May Enforce the Stipulation.**

Plaintiff contends that regardless of how it is interpreted, the Stipulation does not apply to Defendant Scott because he was not named as a defendant in the 2012 Amended Complaint. Defendants respond that Defendant Scott is an intended third-party beneficiary of the Stipulation because his acts and omissions gave rise to many of the allegations set forth in the 2012 Amended Complaint and because Plaintiff seeks to hold RBC vicariously liable for Defendant Scott's conduct.

Under Rule 41(a)(1)(A)(ii) a "plaintiff may dismiss an action without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared." "[A] voluntary, clear, explicit, and unqualified stipulation of dismissal entered into by the parties in court and on the record is enforceable[.]" *Powell v. Omnicom*, 497 F.3d 124, 129 (2d Cir. 2007) (internal quotation marks omitted). Once the parties enter into a stipulation, they are "not generally free to extricate themselves [from the stipulation] . . . unless it becomes apparent that it may inflict a manifest injustice upon one of the contracting parties." *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 32 (1st Cir. 2007) (internal quotation marks and alterations omitted).

"A stipulation is a contract between the parties and is, therefore, governed by the principles of contract law for interpretation and effect." *Trustco Bank N.Y. v. S/N Precision Enters. Inc.,* 650 N.Y.S.2d 846, 848 (N.Y. App. Div. 1996). Generally, a party may not enforce a contract when "[t]here is no privity of contract[.]" *Berlin Dev. Corp. v. Vt. Structural Steel Corp.*, 250 A.2d 189, 192 (Vt. 1968). To enforce a contract, a person who is not named in that contract "must establish that [he] was a third-party beneficiary to the contract rather than an incidental beneficiary." *McMurphy v. State*, 757 A.2d 1043, 1049 (Vt. 2000). "The determination of whether a party may be classified as a third-party beneficiary, as opposed to an incidental beneficiary, is based on the original contracting parties' intention." *Id.* "[A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to

effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement (Second) of Contracts § 302(1)(b) (1981).

It is undisputed Defendant Scott was Plaintiff's supervisor at RBC and acted as RBC's agent. The Stipulation encompasses the pending disputes between the parties, including the disputes Plaintiff had with RBC based on the actions of Defendant Scott. Dismissal of the claims against RBC thus included dismissal of the allegations against its agents. Had Plaintiff sought to retain the right to sue Defendant Scott individually, he could have preserved this right in the Stipulation. The Stipulation, however, contains no such exclusion and reflects the parties' clear and unambiguous intent to submit the factual allegations and claims in the 2012 Amended Complaint to arbitration. Defendant Scott, "as a third-party beneficiary of the stipulation, has standing to enforce the [S]tipulation." *S/N Precision*, 650 N.Y.S.2d at 849.

**D. Whether the Court Should Stay this Matter Pending the Outcome of the Arbitration.**

Defendants request a stay of this matter pending the arbitration of Plaintiff's claims before the FINRA Panel pursuant to 9 U.S.C. § 3 which provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement[.]

Section "3 requires courts to stay litigation of arbitral claims pending arbitration of those claims 'in accordance with the terms of the agreement.'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). Plaintiff does not dispute that he is obligated to arbitrate his common law claims against RBC and admits that a denial of Defendants' motion for an order to show cause will result in piecemeal litigation. *See KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24, (2011) ("The Act has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent

to arbitration even if this will lead to piecemeal litigation."). He therefore does not affirmatively oppose a stay.

"The decision to stay the balance of the proceedings pending arbitration is a matter largely within the district court's discretion to control its docket." *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 856 (2d Cir. 1987) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 20 n.23 (1983)). "A party that moves for a stay pending arbitration in such circumstances must first establish that there are issues common to the arbitration and the courts, and that those issues will finally be determined by the arbitration." *Argus Media Ltd. v. Tradition Fin. Servs. Inc.*, 2009 WL 5125113, at *3 (S.D.N.Y. Dec. 29, 2009) (internal quotation marks omitted). "A stay is usually appropriate where arbitrable and non-arbitrable claims arise out of the same set of facts and arbitration may decide the same facts at issue in the litigation." *Louis Berger Grp., Inc. v. State Bank of India*, 802 F. Supp. 2d 482, 489 (S.D.N.Y. 2011)).

Because the proceeding before the FINRA Panel's decision will address Plaintiff's workplace safety claims and because Plaintiff's new factual allegations overlap with those claims, a stay is appropriate to avoid an unnecessary expenditure of judicial and party resources and the possibility of inconsistent results. Moreover, no undue delay or prejudice will result if arbitration is permitted to proceed first as there is at least some likelihood that it will also resolve Plaintiff's remaining claims. The court therefore STAYS this action pending a final determination by the FINRA Panel.

**CONCLUSION**

For the reasons stated above, the court GRANTS IN PART and DENIES IN PART Defendants' motion for an order to show cause. (Doc. 3.) Plaintiff must arbitrate all of his non-statutory discrimination claims pursuant to the Form U-4 and Disclosure. In addition, all factual allegations set forth in the 2014 Complaint that are substantially identical to the factual allegations of the 2012 Amended Complaint (paragraphs 6-9, 11-30, 33-36, 38-43, 45-47, and 49-50 of the 2014 Complaint) and Plaintiff's workplace safety claims are hereby DISMISSED pursuant to the Stipulation and submitted to

arbitration. All remaining claims are STAYED pending a final determination by the FINRA Panel.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 27th day of January, 2015.

Christina Reiss, Chief Judge
United States District Court