IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

HUNTER DRAGON, Plaintiff, v. **SCA PHARMACEUTICALS, LLC.** Defendant.	**03:23-cv-188 (RNC)** **May 25, 2023**

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DEFENDANT'S MOTION TO DISMISS CONSTRUCTIVE DISCHARGE CLAIMS

I. Introduction/Summary of Argument

Plaintiff, Hunter Dragon, hereby opposes Defendant's Motion to Compel Arbitration and Motion to Dismiss Plaintiff's Constructive Discharge Claims. SCA's Policies and Procedures and Business Conduct Handbook, as well as the Acknowledgement of Receipt of same, explicitly and indisputably demonstrate that there was no contract governing arbitration or any other term of employment, and therefore, no contractual agreement existed that could be enforced under the Federal Arbitration Act. Even if there were, the End Forced Arbitration Act (EFAA) would override such an arbitration agreement, because SCA created a hostile work environment that persisted and therefore accrued after March 3, 2022, the effective date of the EFAA; retaliation occurred after March 3; and SCA constructively discharged Plaintiff after March 3. Retaliation and constructive discharge are related to Plaintiff's sexual harassment claim. Because the claims accrued after March 3 and are related, pursuant to the EFAA

Defendant's motion to compel arbitration must be denied even if a contract to arbitrate had existed, which it never did.

Defendant's motion to dismiss Plaintiff's constructive discharge claims should also be denied because a reasonable jury could find that SCA deliberately created a hostile work environment by permitting harassment including but not limited to the harasser entering the locker room while Plaintiff was undressing there, and staring at him while he worked, which never ceased up to the time of Plaintiff's resignation despite multiple reports; by informing Plaintiff, in essence, that he had to decide between staying in his job and continuing to experience harassment, or leaving on his own; by retaliating against him; and by failing to prevent or address harassment against another co-worker, such that a reasonable person in Plaintiff's position would feel compelled to resign.

II. Statement of Relevant Facts

A. Defendant's Documents Affirmatively Disclaim the Existence of a Contract

The Employee Acknowledgment Form of receipt of the SCA Policies, Procedures and Business Code Handbook, on which SCA relies in support of its motion, states: "This handbook is not an employment contract; either expressed [sic] or implied and **is not intended to create contractual obligations of any type**. … I acknowledge that these policies and procedures are **neither a contract of employment nor a legal document**." See Exh. A (emphasis supplied). Further, the language in the Handbook *immediately preceding* the arbitration language cited by Defendant states: "This Handbook does not cover every aspect of the employment relationship, and **it is not contractual in nature**." Exh. B (emphasis supplied). Moreover, the language expressly reserved to SCA the right to alter or amend the policies and procedures at any time,

without notice. Exh. A. Defendant's documents could not be clearer: no contract to arbitrate was formed.

B. Plaintiff's Claims "Accrued" After March 3, 2022 and are All Related to Sexual Harassment

Plaintiff commenced working at SCA on August 20, 2020. Dkt. 26, ¶12. F.M. began sexually harassing him and creating a hostile work environment for him soon after, making frequent derogatory and offensive sexual and sexual orientation-based remarks, on a daily or near daily basis. Id., ¶¶16-36. Co-workers observed the harassment. Id., ¶¶ 38-40. Plaintiff reported the hostile work environment, including that F.M. had threatened to kill Plaintiff if Plaintiff disclosed they had a [single] sexual encounter, identifying witnesses to Human Resources. Id., ¶¶42-45. These witnesses corroborated the harassment, but SCA refused to move or fire F.M., requiring *Plaintiff* to switch positions if he did not want to work with F.M. Id., ¶¶46-51.

The harassment continued. Id., ¶¶52-58. Plaintiff again reported it, and although SCA determined F.M. was in places he should not have been, it failed to take action against F.M. Id., ¶¶ 52-62. Unsurprisingly, as a result of SCA's failure, F.M. *still* maintained his campaign of harassment. Id., ¶¶63-68. On November 22, 2021, Plaintiff reported F.M. again, for entering the Clean Room while Plaintiff worked, where he should not have been, and for continuing to watch Plaintiff almost daily while Plaintiff changed his clothes (which Plaintiff's coworker corroborated). Id., ¶¶69-73.

Plaintiff reported harassment to Human Resources on at least four occasions between July 2021 and February 2022. SCA retaliated against him for the reports, disciplining him for attendance "violations" even though he suffered stress-related illnesses due to the harassment, and disciplining him even when he had a doctor's note, or had a medical procedure. Id., ¶¶89-91.

SCA also harassed him in retaliation for his complaints: his Team Lead made his attitude explicit, calling Plaintiff "a little bitch" or similar, for complaining to Human Resources. Id., ¶93. Indeed, the Team Lead admitted to HR that he "gave [Dragon] a piece of his mind and called Hunter a Douche." Id., ¶96. Co-workers who participated in harassing Plaintiff along with F.M. retaliated as well, for allegedly getting F.M. "in trouble," and refused to help Plaintiff with work lifting heavy items, leading to a shoulder injury for Plaintiff. Id., ¶97.

Plaintiff was medically restricted from lifting as a result of the injury. When he requested an accommodation, SCA further retaliated, telling him to "gown up for work or go home." Consequently, Plaintiff lost three weeks of pay, from February 24 through approximately March 13-17, 2022. Id., ¶¶98-99. On his return, SCA continued to require Plaintiff to engage in physically demanding work that caused pain to his shoulder. Id., ¶101.

Plaintiff filed an EEOC/CHRO charge alleging a hostile environment and retaliation, on March 18, 2022. Exh. C. Less than two months later, on May 5, 2022, SCA issued "litigation holds" that were retaliatory in nature: they improperly prohibited recipients from speaking with Plaintiff – stating "you must refrain from any communication with [plaintiff] and/or any other current or former employees concerning … any allegations made by and/or relating to [plaintiff]." Id., ¶102. Unsurprisingly, the threatening nature of the holds chilled witness cooperation. Id., ¶103, 106. The litigation holds also were retaliatory because they implied that the reason for them was due to job performance, listing Plaintiff's job performance as the first type of information to preserve. Id., ¶104. They further disclosed that Plaintiff had brought a discrimination claim and described the claim, unnecessarily sharing private information about Plaintiff. Id., ¶105.

Not only did SCA retaliate against Plaintiff, but the hostile work environment never ended during his employment: in January 2022, an HR Generalist forced Plaintiff to speak with the Head of Human Resources, Dufort, who reported directly to the President. Plaintiff explained that his harassment complaints were not helping, that the hostile work environment continued despite each one. In direct response, Dufort made plain that SCA would not take the steps needed to actually address the harassment, telling Plaintiff he would have to "deal with" having his own shift changed and see F.M. at work. Dufort continued, explaining, "you have to decide what you want to do", which meant to continue under the same conditions (including sexual harassment) or resign. Id., ¶¶107-108.

Plaintiff did not resign right away, the harassment continued, and the retaliation grew. Between January 2022, and May 2022 when SCA constructively discharged Plaintiff, F.M. continued his campaign of harassment, coming into the locker room when Plaintiff was supposed to change, discussing Plaintiff in his presence in the bathroom with F.M.'s friends, laughing at him, and staring at him in an uncomfortable way in the Clean Room. Id., ¶109. When Plaintiff learned in May 2022 that F.M. was harassing yet another coworker, including creating a threatening and intimidating environment, Plaintiff knew without a doubt that SCA would never take appropriate steps to protect him or others; he could no longer tolerate the environment, and was forced to resign. Id., ¶¶109-114.

III. Defendant's Motion to Compel Arbitration Should Be Denied

In 2022, the Supreme Court clarified the so-called federal "policy favoring arbitration":

> But the FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules. *Moses H. Cone*, 460 U. S., at 24, 103 S. Ct. 927, 74 L. Ed. 2d 765. Our frequent use of that phrase connotes something different. "Th[e] policy," we have explained, "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same

> footing as other contracts." *Granite Rock Co. v. Teamsters*, 561 U. S. 287, 302, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (internal quotation marks omitted). Or in another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U. S. 395, 404, n. 12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022). Consequently, Defendant's repeated citations and references to public policy and law "strongly favor[ing]" arbitration overstate the case. See Dkt. 22-1, pp. 6-9.

Fundamentally, there must be a valid contractual agreement to arbitrate, and the evaluation of the alleged "agreement" is on the same footing as the evaluation of any other alleged contract: "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan* at 1713, *citing National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.,* 821 F.2s 772, 774 (C.A. D. C. 1987). Here, it is manifestly clear there is no valid contractual agreement to arbitrate, based on the unmistakable and express language written by SCA—language that SCA deliberately avoids[1] acknowledging or referencing in its motion. Pretending the language does not exist does not make it disappear.

A. Standards Governing Motions to Compel Arbitration

Under the Federal Arbitration Act, if "the making of the arbitration agreement . . . [is] in issue, the court shall proceed summarily to the trial thereof." 9 U.S.C. § 4. To determine whether to compel arbitration, the Court must consider: "(1) whether the parties entered into a contractually valid arbitration agreement, and (2) whether the dispute falls within the scope of

[1] In its moving papers, SCA could have addressed the express language in the handbook and "acknowledgement" stating that no contract was created; it was aware that Plaintiff contends no contractual agreement to arbitrate exists. Should Defendant raise unanticipated arguments in its Reply, Plaintiff may seek permission to submit a sur-reply.

the arbitration agreement." *Murphy v. Glencore Ltd.*, 2019 U.S. Dist. LEXIS 21930 (D. Conn. Feb. 11, 2019), *citing Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016). The question whether parties have agreed to arbitrate is governed by state law principles of contract formation. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Schnabel v. Trilegiant Corp*., 697 F.3d 110, 119 (2d Cir. 2012) ("Whether or not the parties have agreed to arbitrate is a question of state contract law.").

The standard the Court "must apply when reviewing a motion to compel arbitration is essentially the same standard that the Court applies when it reviews a motion for summary judgment." *D'Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308, 319 (D. Conn. 2011) (citations omitted). That is, "[t]he party seeking an order to compel arbitration must substantiate [its] entitlement [to arbitration] by a showing of evidentiary facts that support its claim that the other party agreed to arbitrate." *Castro v. Loanpal, LLC*, 2022 U.S. Dist. LEXIS 113779, *18 (D. Conn. June 28, 2022) (quotes and cites omitted). If a sufficient showing is made, the party opposing arbitration must "submit evidentiary facts showing that there is a dispute of fact to be tried as to the making of the arbitration agreement." *Id*. (quotes omitted). "If there is an issue of fact as to the making of the agreement for arbitration, then a trial [on that issue] is necessary[,]" but where there is no genuine issue of fact, the court should "decide as a matter of law that the parties did or did not enter into such an agreement." *Id*. (quotes and cites omitted).

B. No Contract To Arbitrate Exists

As Defendant acknowledges, only when there is a contract to arbitrate will courts then assess whether a particular controversy falls within any such contract. *See* Dkt. 22-1, p. 10, citing *Daly v. Citigroup Inc.*, 939 F.3d 415, 421 (2d Cir. 2019). Courts—both federal and state—regularly find that an arbitration clause in an employee handbook is not enforceable where the

handbook itself, or an employee-signed acknowledgment of receipt of the handbook, expressly provides that it is not a contract, which is the exact situation here. For instance, in *Meeg v. Heights Casino*, 2020 U.S. 56387 (E.D.N.Y. March 27, 2020), the plaintiff signed an employee handbook receipt stating that she "certif[ied]" that she "under[stood] . . . that nothing in the Employment Handbook is to be interpreted . . . as conferring any contractual rights upon me." *Meeg* at *10. The court held that "the wording of the receipt invalidates [defendant's] argument" that a binding arbitration agreement existed, because "Defendants' 'expressed words and deeds,....reveal that Defendants intended the 2013 Handbook to confer no contractual rights upon Plaintiff and to ensure that Plaintiff certified her understanding of the same." *Id*. at *11 (citation omitted).

Similarly, in *United States ex rel. Harris v. EPS, Inc.*, 2006 U.S. Dist. LEXIS 30012 (D. Vt. May 16, 2006), the employee handbook at issue stated: "This Handbook does not constitute an employment contract and is not intended to create contractual obligations of any kind." *Harris* at *13. Along the same lines, the form signed by the plaintiff stated: “this Handbook is neither a contract of employment nor a legal document.” *Id.* The court held this did not create an enforceable arbitration clause, noting that “[h]aving inserted these disclaimers in an apparent effort to avoid vesting [plaintiff] with contractual rights, [defendant] cannot conveniently choose to ignore them and argue that the Handbook imposed contractual obligations on [plaintiff].” *Id.* at *13-14. Numerous other cases hold similarly. *See, e.g., Lorenzo v. Prime Communs., L.P.*, 2014 U.S. Dist. LEXIS 93126, *7-8 (E.D.N.C. Mar. 31, 2014) (holding there was no binding arbitration agreement where employee handbook acknowledgment signed by plaintiff included language stating: “I understand that the Prime Communications' Employee Handbook is not a contract of employment and does not change the employment-at-will status of employees.

Moreover, no provision should be construed to create any bindery [sic] promises or contractual obligations between the Company and the employees (management or non-management)", because such language makes "evident that an employee is not forming a contract with Prime as to the contents of the employee handbook"); *Bradley v. Wolf Retail Sols. I, Inc.*, 443 F. Supp. 3d 959 (N.D. Ill. Nov. 26, 2019) (holding that where employee "clicked on an acknowledgment stating, 'I have read, understood and accept the terms and conditions stated in this handbook,'....and among those terms and conditions were several explicit provisos that the Handbook was not a contract and created no contractual obligations of any kind[,]" there was no enforceable arbitration agreement, and noting "[i]t is axiomatic that a document stating that it is not a contract and that it creates no contractual obligations of any kind is not a contract that creates a contractual obligation to engage in arbitration"); *Heurtebise v. Reliable Bus. Computers*, 452 Mich. 405 (Mich. Sup. Ct. July 16, 1996) (holding there was no binding arbitration agreement where employee handbook included language stating: "It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied[,]" and explaining the handbook language "demonstrates that the defendant did not intend to be bound to any provision contained in the handbook. Consequently, we hold that the handbook has not created an enforceable arbitration agreement").

Here, the Acknowledgment and Handbook contain disclaimer language directly paralleling the language in the cases above. Compare the language here, "This handbook is not an employment contract; either expressed [sic] or implied and is **not intended to create contractual obligations of any type**. … I acknowledge that *these policies and procedures* are **neither a contract of employment nor a legal document**" (Exh. A, emphasis added), with the above cases: "[t]his Handbook does not constitute an employment contract and is **not intended**

to create contractual obligations of any kind" (*Harris* at *13, emphasis added); "this Handbook is **neither a contract of employment nor a legal document**" (Harris at *13, emphasis added); "nothing in the Employment Handbook is to be interpreted . . . as **conferring any contractual rights upon me**" (*Meeg* at *10, emphasis added); "**no provision** should be construed to **create any bindery [sic] promises or contractual obligations** between the Company and the employees" (*Lorenzo* at *7-8). By their own express language, the Acknowledgment and Handbook written by SCA make clear no contract to arbitrate could exist nor ever existed, and Defendant's motion to compel arbitration can and should be denied on this basis alone.

Cases that may at first glance appear to conflict with the above rule, which is consistent across the federal courts, are factually distinguishable. For instance, in *Isaacs v. OCE Bus. Servs.,* 968 F.Supp.2d 564 (S.D.N.Y. Sept. 4, 2013), a handbook containing an arbitration clause existed, and the court compelled arbitration—however, in that case the plaintiff had earlier signed a separate, stand-alone arbitration agreement that was not part of any handbook, and that contained no disclaimer; the handbook arbitration language was merely an update to that earlier agreement. *See Isaacs*, 968 F. Supp. at 572-573 (noting that the "terms of the Revised policy additionally reference its **1995 effective date**, providing sufficient notice to employees that the Policy **stands apart from the 2011 Employee Handbook**") (emphasis added). No such earlier stand-alone agreement exists in the instant case, so *Isaacs* does not suggest a different result than the above cases. Along the same lines, in a case where the plaintiff had signed a "Pre-Dispute Resolution Employee Acknowledgment Form" stating that he agreed to the employer's arbitration policy and containing no disclaimer, this contractual agreement was not negated when the plaintiff later signed an acknowledgment of receipt of an employee handbook that stated it

did not create a contract with the company. *Graham v Command Sec. Corp.*, 46 Misc. 3d 1224(A) (Westchester Cty. Sup. Ct. Sept. 29, 2014). Other cases are similarly distinguishable due to additional documents signed by the plaintiff evidencing agreement to arbitrate and not containing disclaimers. *See, e.g., Curry v. Volt Info. Scis., Inc.*, 2008 U.S. Dist. LEXIS 20910 (S.D.N.Y. Mar. 18, 2008) (compelling arbitration where handbook contained disclaimer language, but where employee also signed an Acknowledgment form "independently set[ting] forth an arbitration requirement" separate from the arbitration language in the handbook).[2] SCA's own language is clear. Here, the Handbook disclaims forming a contract, and additionally, the separate Acknowledgment of the Handbook, including all its policies, specifically and independently affirmatively state that *nothing* in the Handbook creates a contract "of any type". Exh. A. There is no contractual agreement to arbitrate, and Defendant's motion should be denied.

Moreover, any contract would have been illusory and therefore, unenforceable. *See Adult Choices, Inc. v. Post Publ'g Co.*, No. CV92 029 46 94, 1993 Conn. Super. LEXIS 1237, at *7 (Super. Ct. May 21, 1993) ("Generally, if a party can terminate a contract at any time at will, without more, the promise will be held to be illusory. Farnsworth, Contract, § 2.14."); *see also Quiello v. Reward Network Establishment Servs.*, 420 F. Supp. 2d 23, 30-31 (D. Conn. 2006) ("Words of promise do not constitute a promise if they make performance entirely optional with the purported promisor . . . where the apparent assurance of performance is illusory it is not consideration for a return promise.")(citations and quotations omitted). The

[2] None of these New York cases, state nor federal, control the outcome of the instant case in any event, since Connecticut contract law applies here. *See Schnabel,* 697 F.3d 110, *supra*. Nonetheless, they are discussed as illustrative examples of distinguishable fact patterns.

Fifth Circuit has held arbitration agreements to be unenforceable under Texas law where the employer's promise to arbitrate was illusory because the employer retained the right to alter the terms of arbitration agreement without notice. *Nelson v. Watch House Int'l, L.L.C.*, 815 F.3d 190, 196 (5th Cir. 2016) ("Watch House's retention of this unilateral power to terminate the Plan without advance notice renders the Plan illusory under a plain reading of *Lizalde*, which is supported by recent decisions from Texas intermediate courts."); *see also Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 293 (4th Cir. 2022) (finding that Acknowledgement Receipt was appropriately evaluated in assessing validity of Arbitration Agreement, and Receipt's Modification Clause, which permitted alteration or amendment of agreement at any time by employer applied to the Agreement, rendering its promise to arbitrate illusory and unenforceable under Maryland law). Here, even if SCA had not specifically and repeatedly disclaimed entering into any contractual agreement, it nevertheless could not have an enforceable contract where SCA's Acknowledgement form expressly gave to SCA the right to amend the policies contained in the handbook, at any time. "Because the information, policies and benefits described in this SCA handbook are subject to change, I acknowledge that revision to this handbook may occur, with *or without prior notice*. I understand revised information may supersede, modify or eliminate existing policies." Exh. A (emphasis added). SCA's retention of the right to eliminate or change any aspect of the handbook, including the arbitration language, renders any "promise" by SCA illusory, and is yet another basis to deny Defendant's motion. *Cf Byrne v. Charter Communs., Inc.*, 581 F. Supp. 3d 409, 418 (D. Conn. 2022) (enforcing arbitration for customers because it did not confer "the *unlimited* or *unfettered* right to change the terms of the services it renders to customers. On the contrary: Section 9 first mandates that Charter give customers notice of intended changes to the terms, and it then gives customers the option of agreeing to the

changes (by continuing to accept Charter's services) or rejecting the changes (by ceasing to use the services in accordance with the procedures set forth in the General Terms).")

C. The End Forced Arbitration Act Also Requires that Defendant's Motion be Denied

Independent of the fact that the express language of the documents here creates no arbitration agreement—which is, in itself, sufficient to deny the motion to compel arbitration—Defendant's motion must also be denied because the EFAA exempts this action from any pre-dispute arbitration agreement, had one ever existed. On March 3, 2022, the Ending Forced Arbitration Act was signed into law. Under the Act, pre-dispute arbitration agreements for any case that "relates to [a] sexual assault dispute or the sexual harassment dispute" are invalid and unenforceable. 9 U.S.C. § 402. The Act "shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." Pub. L. No. 117-90, §3, 136 Stat. 26, 28 (2022) (emphasis added). Determination of the Act's applicability to specific cases is a consideration for courts, rather than arbitrators. 9 U.S.C. § 402b.

Defendant concedes, implicitly, that the EFAA precludes enforcement of Plaintiff's claims to the extent they arise after March 3, instead arguing that Plaintiff's constructive discharge claim is legally infirm, and ignoring the allegations supporting his retaliation claim. Further, it ignored Plaintiff's original Complaint wherein Plaintiff had alleged that even after January 2022, the "harassment continued." Dkt. 1 para. 108. Nevertheless, Plaintiff filed an Amended Complaint which mooted Defendant's original 12(b)(6) motion to dismiss Dragon's constructive discharge claim, and which made explicit that the hostile work environment continued specifically after March 3, 2022, as did retaliation (along with his May 23, 2022 discharge)—making clear that the sexual harassment claim accrued after the EFAA effective date. Consequently, even if Defendant had shown that an effective arbitration agreement existed

– which it did not – Defendant's motion would nevertheless be denied because the EFAA precludes arbitration.

1. Plaintiff's Claims Accrued After March 3, 2022 For Purposes of the EFAA

Plaintiff's allegation that harassment continued after March 3, 2022 is sufficient to show that his claim accrued after the EFAA became effective, and therefore that the EFAA precludes arbitration. For federal causes of action like those in the instant case, "the time at which [the] claim accrues is a question of federal law, conforming in general to common-law tort principles." *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019). Those common-law principles hold that for continuing torts, the claim continues to accrue as long as tortious conduct continues. *Hoery v. United States*, 324 F.3d 1220 (10th Cir. 2003). A hostile work environment constitutes such a continuing violation, and it is "well-settled that those claims accrue on the day of the last act in furtherance of the violation." *Olivieri v. Stifel*, 2023 U.S. Dist. LEXIS 57001, *12 (E.D.N.Y. Mar. 31, 2023) (collecting cases); *see also Patterson v. Cnty. of Oneida, N.Y.*, 375 F.3d 206, 220 (2d Cir. 2004) ("A claim of hostile work environment is timely so long as one act contributing to the claim occurred within the statutory period."). A court in this Circuit has now confirmed that "the term 'accrue' [in the EFAA] should be interpreted in accordance with these well-settled accrual principles that apply to harassment claims—the very claims that are the heart of the EFAA." *Olivieri*, 2023 U.S. Dist. LEXIS 57001 at *13. That court therefore held that where a plaintiff's hostile work environment claims "continued to accrue after the EFAA's March 3, 2022 enactment, by virtue of Defendants' alleged ongoing conduct[,]" the EFAA applied to the plaintiff's claims and precluded arbitration. *Id*.

The instant case involves precisely the same scenario as in *Olivieri*: as made explicit in Plaintiff's First Amended Complaint, the sexual harassment began earlier and then continued

after March 3, 2022, including by the harasser coming into the locker room when Plaintiff was supposed to change his clothes, discussing Plaintiff in his presence in the bathroom with the harasser's friends, laughing at him, and staring at him in an uncomfortable way in the Clean Room. Dkt. 26 ¶109. Because the "last act in furtherance of the violation" took place after the EFAA effective date, Plaintiff's sexual harassment claim "accrued" after that date, and the EFAA precludes arbitration of the claim. *See Olivieri*, 2023 U.S. Dist. LEXIS 57001 at *12; *see also Walters v. Starbucks Corp.*, 2022 U.S. Dist. LEXIS 153228, *6-7 (S.D.N.Y. Aug. 25, 2022) (noting that each of the harassment plaintiff's claims "accrued at the time she experienced discrimination, harassment, or retaliation, and at the latest by December of 2021, when she left her job[,]" and citing authority holding statute of limitations for hostile work environment claims begins to run at the "last act that is part of the hostile work environment").

Oddly, Defendant omits any mention of *Olivieri*—which is the sole federal case to address the question at hand, to date, and which was published well prior to Defendant's briefing—and relies solely on a non-controlling New York state case, *O'Sullivan v. Jacaranda Club, LLC*, 2023 WL 2949512 (N.Y. Sup. April 13, 2023). The state court in *O'Sullivan* conceptualized the harassment plaintiff as having "two claims:" a pre-March 3, 2022 harassment claim, and a post-March 3, 2022 harassment claim. *See O'Sullivan*, 2023 WL 2949512 at *3 (noting EFAA applies only to "those claims arising from the sexual assault and harassment she experienced from April through June of 2022"). Nowhere does the court address the concept that a hostile work environment claim is a "continuing violation" in which the entire course of conduct constitutes one single claim—nor does anything in the decision indicate that the parties brought this doctrine to the court's attention. The decision therefore says nothing about when any claim at issue "accrued" according to well-settled principles, which is the key inquiry here in

determining applicability of the EFAA. *See Olivieri* and *Walters, supra.* Respectfully, Plaintiff suggests that these omissions reveal that the reasoning of *O'Sullivan* was flawed, and that the Court should follow the well-reasoned federal precedent set by *Olivieri*: where, as here, a sexual harassment claim accrued after the EFAA effective date, that claim cannot be subject to arbitration. *See also AMTRAK v. Morgan*, 536 U.S. 101, 117 (2002)("entire hostile work environment encompasses a single unlawful employment practice" such that claim is timely filed if one act falls within the 180- or 300-day filing period, in which case employer may be liable for all acts comprising the hostile environment).

2. Plaintiff's Retaliation and Constructive Discharge Claims Are Part of the "Case" Relating to the Sexual Harassment Dispute Under EFAA

As the text of the EFAA mandates, Plaintiff's case as a whole cannot be compelled to arbitration because the EFAA applies to his sexual harassment claim. Where the EFAA applies, it makes a pre-dispute arbitration agreement unenforceable "with respect to a case which is filed under Federal, Tribal, or State law and relates to the . . . sexual harassment dispute." 9 U.S.C. § 402(a) (emphasis added). A court in this Circuit has explained: "[t]his text is clear, unambiguous, and decisive as to the issue here. It keys the scope of the invalidation of the arbitration clause to the entire 'case' relating to the sexual harassment dispute. It thus does not limit the invalidation to the claim or claims in which that dispute plays a part." *Johnson v. Everyrealm, Inc.*, 2023 U.S. Dist. LEXIS 31242, *41 (S.D.N.Y. Feb. 24, 2023). Distinguishing the familiar term "case" from the alternative terms "claim" or "cause of action," and collecting caselaw in accord with that distinction, the *Johnson* court held that "the text of [the EFAA] § 402(a) makes clear that its invalidation of an arbitration agreement extends to the entirety of the case relating to the sexual harassment dispute, not merely the discrete claims in that case that themselves either allege such harassment or relate to a sexual harassment dispute (for example, a claim of unlawful retaliation

for a report of sexual harassment)." *Johnson* at *43 (further noting Congress's use of the term "claim" in a surrounding EFAA section, indicating its awareness of the distinction); *see also Olivieri*, 2023 U.S. Dist. LEXIS 57001 at *2 (holding EFAA precluded claims of, *inter alia*, retaliation from being arbitrated).

Indisputably, the retaliation and constructive discharge claims here are part of the "case" relating to Plaintiff's sexual harassment dispute. These claims relate even more closely to sexual harassment than *Johnson* requires: Plaintiff alleges retaliation for complaining about sexual harassment, and constructive discharge as a result of ongoing sexual harassment and retaliation. *See Johnson* at *43 (invalidation of arbitration agreement extends to "entirety of the case" relating to sexual harassment dispute, not only claims related to harassment such as "a claim of unlawful retaliation for a report of sexual harassment"). Therefore, there is no question that here, where EFAA exempts Plaintiff's sexual harassment claim from any purported arbitration agreement (that did not in fact exist), EFAA also exempts the remainder of Plaintiff's claims from arbitration.

Defendant relies upon a line of cases holding that where a case comingles arbitrable and non-arbitrable claims, a court may stay judicial proceedings pending completion of the arbitration. See Dkt. 29-1 at 17-18. These cases are simply irrelevant, because here, under the express language of the EFAA, there are no non-arbitrable claims in this case—EFAA applies to every claim in a case related to a sexual harassment dispute. 9 U.S.C. § 402(a) (pre-dispute arbitration agreement unenforceable "with respect to a case which is filed under Federal, Tribal, or State law and relates to the . . . sexual harassment dispute." (emphasis added). All the cases Defendant cites to support its argument predate, and do not speak to, the EFAA, with the sole

exception of *O'Sullivan*, which employs flawed logic and should be disregarded for the reasons explained above.

Defendant's motion to compel arbitration therefore fails for two independent reasons: no contract to arbitrate ever existed, in light of the explicit language of SCA's Acknowledgment and Handbook disclaiming the creation of any such contract; and even had such a contract existed, the EFAA would invalidate it, because Plaintiff's harassment claim accrued after the EFAA effective date, and the text of the EFAA mandates that its bar on pre-dispute arbitration agreements must apply to all claims in the case. Defendant's motion should therefore be denied.

IV. Defendant's Motion to Dismiss Plaintiff's Constructive Discharge Claims Should Be Denied

While moving to compel arbitration, Defendant simultaneously seeks to take advantage of the litigation process by seeking dismissal of Plaintiff's constructive discharge claims. In any event, its arguments fail: there is no Second Circuit requirement to show an employer's specific intent that the employee quit, but in any event Plaintiff's allegations sufficiently plead not only the employer's intentional conduct, but even an intention for Plaintiff to quit his job; further, there is no gap in time between the offensive sexually harassing conduct and Plaintiff's resignation. Plaintiff's constructive discharge claims are sufficiently pled at the Rule 12(b)(6) stage, and Defendant's motion should be denied.

A. Motion to Dismiss Standard

Under Rule 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When deciding a motion to dismiss under Rule 12(b)(6), the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012). A claim for relief must only be "plausible on its face[,]" and is facially plausible

"when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

B. Plaintiff Has Sufficiently Pled Intentional Conduct to Create Intolerable Conditions, and Showing Specific Intent to Force a Quit is Not Required

Quoting a case from 1987, Defendant implies that Plaintiff must show SCA had the specific intent to force him to quit—but this misstates the Second Circuit standard, which requires only that the employer must have engaged in deliberate conduct creating intolerable conditions. "An employee is constructively discharged when his employer, rather than discharging him directly, intentionally creates a work atmosphere so intolerable that he is forced to quit involuntarily." *Terry v. Ashcroft*, 336 F.3d 128, 151-52 (2d Cir. 2003). Defendant quotes language that "[d]eliberateness exists only if the actions complained of were intended by the employer as an effort to force the employee to quit[,]" *Lombardo v. Oppenheimer*, 701. F.Supp. 29, 30 (D. Conn. 1987) (emphasis added). However, no such specific intent requirement exists: "[t]he Second Circuit has not 'expressly insisted on proof of [an employer's] specific intent' to force an employee to quit to demonstrate constructive discharge; rather a plaintiff needs to 'at least demonstrate that the employer's actions were 'deliberate' and not merely 'negligent or ineffective.''....Therefore, Plaintiffs need only establish for the first part of the constructive-discharge test that there remains a genuine issue of material fact as to whether the Defendants acted deliberately in engaging in conduct that created the workplace conditions at issue. Plaintiffs need not demonstrate that Defendants specifically intended for [plaintiff] to quit." *Corfey v. Rainbow Diner of Danbury*, 746 F. Supp. 2d 420 (D. Conn. Oct. 15, 2010), *quoting Petrosino v. Bell Atl.*, 385 F.3d 210 (2d. Cir. Sept. 29, 2004). Of course, requiring a specific intent that an employee quit would run contrary to the language of *Green v. Brennan,* 136 S. Ct.

1769, 1779-1780 (2016):"The whole point of allowing an employee to claim 'constructive' discharge is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee's resignation as though the employer actually fired him...We do not also require an employee to come forward with proof—proof that would often be difficult to allege plausibly—that not only was the discrimination so bad that he had to quit, but also that *his quitting was his employer's plan all along*." (citation omitted) (emphasis added).

At the motion to dismiss stage, Plaintiff has sufficiently alleged that Defendant's conduct was intentional—and ironically, the most significant allegation that Defendant's conduct was deliberate does even rise to the level of demonstrating a specific intent that Plaintiff quit: Plaintiff alleges that when he explained to the Head of Human Resources, Dufort, that his harassment complaints were not helping, and that the hostile work environment continued despite each one, Dufort made plain that SCA would not take the steps needed to actually address the harassment, telling Plaintiff he would have to "deal with" having his own shift changed and seeing F.M. at work. Dufort continued, explaining, "you have to decide what you want to do", which meant to continue under the same conditions (including sexual harassment) or resign. Dkt. 26 at ¶¶106-108. A reasonable jury can conclude that Defendant directly stated it had no intention of stopping the harassment, and that Plaintiff should quit if he wanted it to stop. Even to the extent Defendant claims there is any ambiguity in the interpretation of this statement, that is certainly a question of fact that cannot be resolved on a 12(b)(6) motion.

Moreover, Plaintiff has made other allegations showing that Defendant's conduct was intentional, because he has pled that Defendant deliberately failed to take actions calculated to stop the harassment despite his repeated complaints—even after the harasser threatened to kill Plaintiff. For instance, in *Creacy v. BCBG Max Azria Grp., LLC*, 2017 U.S. Dist. LEXIS 49523

(S.D.N.Y. Mar. 31, 2017), the court found a genuine issue of material fact existed on the question whether defendant acted deliberately where it "deliberately failed to take actions calculated to remediate the workplace conditions to which [plaintiff] was subjected, including failing to ban [the harasser] from the store and failing to investigate the incidents as required by its policy." Similarly here, SCA deliberately failed to take actions to stop the harassment, including failing to keep the harasser separated from Plaintiff, particularly while he was undressing to his underwear (dkt. 26 paras. 53-56); failing to discipline the harasser for entering Plaintiff's workspace while he was not supposed to be present (id. para. 62); intentionally scheduling F.M. to work with Plaintiff (dkt. 26 para. 71); failing to even interview the harasser when Plaintiff complained he was still engaging in "peeping tom" conduct almost daily (id. para. 76), and numerous other failures. Even without the express statement of Defendant's own Human Resources Head, these allegations are sufficient to plead Defendant's intentional conduct for purposes of the constructive discharge. *See also Benitez v. Jarvis Airfoil, Inc.*, 2020 U.S. Dist. LEXIS 54786 (D. Conn. Mar. 30, 2020) (where harasser was not fired even after making a "thinly veiled threat of physical violence[,] holding that a "reasonable jury could find that the refusal to undertake protective measures amounted to a deliberate effort to compel [plaintiff's] resignation"); *Corfey*, 746 F. Supp. 2d at 429 (finding a "genuine issue of material fact as to whether the Defendants acted deliberately" where they, inter alia, "deliberately refused to discipline [the harasser] or prevent him from engaging in further harassment").

C. There is No Gap in Time Between the Intolerable Conduct and Plaintiff's Resignation

Defendant cites caselaw holding that a constructive discharge claim "fails as a matter of law if there is a sufficient gap in time between the alleged misconduct and the plaintiff quitting" (Dkt. 29-1 at 22), and argues that "the four-month gap in time between" its Human Resource

head's statement "you have to decide what you want to do"[,] and Plaintiff's resignation in May 2022, "does not reasonabl[y] support the contention plaintiff felt compelled by the January 2022 comment to resign due to dangerous or intolerable work conditions." Dkt. 29-1 at 23-24. While it is somewhat unclear which aspect of Plaintiff's pleading Defendant believes to be insufficient here, any argument based on a "gap in time" between the misconduct and Plaintiff's resignation fails—because *there was no gap* between the harassment and Plaintiff's resignation.

It appears Defendant may be arguing that Plaintiff cannot make out a constructive discharge claim unless he quit at the first moment conditions became intolerable. To the extent this is Defendant's claim, Supreme Court has held this is not required. *Green*, 136 S.Ct. at 1778 ("[a]n employee who suffered discrimination severe enough that a reasonable person in his shoes would resign might nonetheless force himself to tolerate that discrimination for a period of time. He might delay his resignation until he can afford to leave. Or he might delay in light of other circumstances…"). Such an argument would fail.

If Defendant is instead arguing that the time between its Head of Human Resource's statement that Plaintiff must "decide what he wants to do" and Plaintiff's resignation indicates that conditions were no longer intolerable when Plaintiff quit, Defendant has missed the point: under the precise caselaw Defendant cites, what matters is whether there is a "sufficient gap in time between the alleged misconduct and the plaintiff quitting." *Brandenburg v. Greek Orthodox Diocese of N. Am.*, 2023 U.S. Dist. LEXIS 30574 (Feb. 23, 2023) (emphasis added). In *Brandenburg*, the court held there was a "lengthy gap in time" defeating constructive discharge where sexual harassment ended in October 2017, and plaintiffs did not resign until November 18, over a year later. *Id*. at *21. By contrast, here Plaintiff alleges that sexual harassment continued up to his resignation. Dkt. 26 at paras. 109, 114 (alleging the "harassment never ended" and

specifying acts of harassment "from January through May 2022" followed by resignation "[o]n May 23, 2022"). And Plaintiff alleged ongoing retaliation, including a mere few weeks before Plaintiff's constructive discharge, when on May 5, Defendant issued retaliatory litigation hold letters. Id., at paras. 102-106. These letters implied Plaintiff's performance was lacking, disclosed he brought a discrimination complaint and prohibited witnesses from cooperating with him (or implicitly his counsel), stating "you must refrain from any communication with [plaintiff] and/or any other current or former employees concerning… any allegations made by and/or relating to [plaintiff]." Id., at 102. The time between SCA's Human Resources Head's statement and Plaintiff's resignation is beside the point, because the continuing sexual harassment and retaliation was a part of "the alleged misconduct" that forced Plaintiff to quit, and that misconduct never stopped.

V. Conclusion

Defendant's own documents make clear that no contract to arbitrate ever existed in this case; even if one had, it would be unenforceable because Plaintiff's sexual harassment claim continued to accrue after the EFAA's effective date, and consequently the EFAA applies to all claims in this case. Moreover, Plaintiff has sufficiently pleaded that Defendant engaged in intentional conduct for purposes of his constructive discharge claim, and no gap in time exists between the misconduct and Plaintiff's resignation. Therefore, for the reasons set forth above, Plaintiff respectfully requests that Defendant's motion be denied in full.

Dated: May 25, 2023

Respectfully Submitted,

By: */S/ Rebecca Houlding*

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Certificate of Service

This is to certify that on this 25th day of May, 2023, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Rebecca Houlding
Rebecca Houlding