APPENDIX A

S.D.N.Y.-N.Y.C.
17-cv-1845
Torres, J.
Netburn, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of February, two thousand nineteen.

Present:

Barrington D. Parker,
Denny Chin,
Richard J. Sullivan,
Circuit Judges.

Seth Mitchell,

Plaintiff-Appellant,

v.

American Arbitration Association (AAA), et al.,

Defendants,

Macy's, Inc., et al.,

Defendants-Appellees.

18-1504 (L),
18-1743 (Con),
18-1861 (Con),
18-2861 (Con)

Appellant, pro se, moves for partial summary judgment, to disqualify judges, for a new trial, for an expedited appeal, for default judgment, and to substitute a party. Upon due consideration, it is hereby ORDERED that the motions for partial summary judgment and for a default judgment are DENIED, the appeals are DISMISSED because they "lack[] an arguable basis either in law or in fact," and the motions are otherwise denied as moot. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

APPENDIX A

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SETH MITCHELL,

Plaintiff,

-against-

MACY'S, INC.; BLOOMINGDALE'S, INC.; BANK OF AMERICA CORPORATION; CIGNA CORPORATION; LOCAL 3 RWDSU/UFCW UNITED STOREWORKERS UNION; TERRANCE P. LAUGHLIN; KAREN HOGUET; JEFFREY KANTOR; TONY SPRING; ELISA GARCIA, ESQ.; NICOLE JONES, ESQ.; STEPHEN VON WAHLDE, ESQ.; MICHELLE RONQUILLO; SUSAN WRIGHT; RICHARD LAW; SANTIAGO FERNANDEZ, ESQ.; SUSAN SCHILLER; ELYSE VOGEL; ARIANA STARACE; BRITTANY PRESSNER; ROBIN GOODELL; SUSAN SHEKERCHI; CYNTHIA CLEMMONS; SHAREN FREELING; BRENDA MOSES; PAULA SABATELLI; AAHREN DEPALMA, ESQ.; BERNARD MANNING; JOHN & JANE DOES 1-1000,

Defendants.

17 Civ. 1845 (AT) (SN)

ORDER

ANALISA TORRES, District Judge:

Plaintiff, Seth Mitchell, was employed by Defendant Bloomingdale's, Inc. as a sales associate from March 2015 until he was fired in February 2017. Second Am. Compl. ("SAC") at 6–7, 9, ECF No. 16. He brings claims arising out of his employment and termination for, *inter alia*, hostile work environment and retaliation. He seeks $130,100,000.00 in damages. *Id.* at 37. Defendants move to dismiss all claims by way of four motions to dismiss. ECF Nos. 89, 101, 116, 126. For the reasons stated below, the action is DISMISSED in its entirety.

BACKGROUND

The second amended complaint consists in large part of a stream of incoherent insults directed at Plaintiff's former colleagues and other individuals, and includes as an exhibit a

APPENDIX B

photograph of a serial killer unrelated to this matter. SAC at Ex. A. It is unclear what legal claim Plaintiff is asserting against which Defendant. The Court nevertheless organizes Plaintiff's allegations by the group of Defendants to which they appear to apply.

I. Allegations Against the Macy's Defendants[1]

Plaintiff was hired as a sales associate at a Bloomingdale's retail store on March 2, 2015. SAC at 6–7. He is "a Caucasian Jewish male over 45 years of age." *Id.* at 10. He claims that his co-workers subjected him to a litany of slights and humiliations. For example, he alleges that one "would position her body in an obstructive fashion" between himself and customers on the sales floor and that she "would constantly scowl in [a] menacing, deranged fear-inducing fashion" which made him uncomfortable. *Id.* at 11. Another would "rudely interject" herself into his conversations with customers and "caus[e] great confusion, humiliation, embarrassment, and poisoning" of his interactions. *Id.* at 12. Another rang up sales he was responsible for under her own employee identification number. Id. at 13. Another "attempted to literally force him to stop working" for no reason, *id.* at 16; and yet another once ordered him to "get on his hands and knees and clean the floor," *id.* Additionally, Plaintiff alleges that on one occasion, a co-worker made an anti-Semitic comment to him, although he also states that the co-worker "didn't know that Plaintiff himself is Jewish." *Id.* at 14. He also alleges that a female co-worker "purposefully exposed her bare breasts to Plaintiff on the salesfloor" on three separate occasions over a series

[1] Bloomingdale's, Inc. ("Bloomingdale's") is a subsidiary of nonparty Macy's Retail Holdings, Inc., which is a subsidiary of Macy's, Inc. ("Macy's). ECF No. 100. The "Macy's Defendants" are Macy's, Bloomingdale's, Karen N. Hoguet, Jeffrey A. Kantor, Tony Spring, Elisa D. Garcia, Stephen Von Wahlde, Santiago Fernandez, Elyse Vogel, Michelle Ronquillo, Susan Wright, Richard Law, Aahren DePalma, Sharen Freeling, Cynthia Clemons, Susan Shekerchi, Paula Sabatelli, Brenda Moses, Brittany Pressner, Susan Schiller, Bernard Manning, Ariana Starace, and Robin Goodell. Because of the number of individual Macy's Defendants, the Court does not identify any individual by name.

of months. *Id.* at 12–13. Regarding this last incident, Plaintiff alleges that he filed a formal complaint with human resources, but no action was taken. *Id.* at 13.

Plaintiff states that he has a "permanent physical disability," *id.* at 9, but does not specify what it is. He alleges that in January 2016, he made a request for four accommodations: (1) use of a cell phone at work instead of the store's landlines, which he considered to be dirty; (2) additional breaks "when necessary" to alleviate foot and leg pain; (3) a transfer to a managerial or sales "desk job" to avoid standing; and (4) the elimination of "harassment, hostile work environment, and discrimination" in his job. *Id.* at 8–9. These accommodations were not provided. *Id.* at 9.

On December 7, 2016, Plaintiff filed a complaint against Macy's and Bloomingdale's alleging discrimination and retaliation, with both the Equal Employment Opportunity Commission (the "EEOC") and the New York State Division of Human Rights ("NYSDHR"). Compl. at 9, ECF No. 2. The charge was dismissed on February 24, 2017. *Id.* at 20. Plaintiff filed another complaint with the EEOC and the NYSDHR on March 22, 2017, which was also dismissed. SAC at Ex. F.

Plaintiff was fired on February 6, 2017. *Id.* at 8.

II. Allegations Against the Cigna Defendants[2]

On January 24, 2017, while still employed at Bloomingdale's, Plaintiff received a medical diagnosis which he does not specify. *Id.* at 23. He alleges that within the next few hours, Cigna Corporation ("Cigna") disclosed his diagnosis to Defendant Tony Spring, the Chairman and CEO of Bloomingdale's. *Id.* at 23–24. On February 6, 2017, following Plaintiff's

[2] The "Cigna Defendants" are Cigna Corporation and Nicole Jones, Esq., its general counsel.

termination, he learned that his medical coverage through Cigna had been terminated. *Id.* at 24. Plaintiff makes no allegations with respect to Defendant Nicole Jones, Cigna's general counsel.

III. Allegations Against the Bank of America Defendants[3]

Plaintiff alleges that an entity he calls "Bank of America Merrill Lynch Wealth & Investment Management Unit" ("BAML") was the administrator of his 401(k) retirement plan while he was employed by Bloomingdale's. *Id.* at 20. On June 7, 2016, Plaintiff submitted a request for an emergency hardship withdrawal from his 401(k) account, which was denied. *Id.* at 20. He requested "private conflict resolution" with BAML, but withdrew his request a few days later. *Id.* at 20. Plaintiff then informed Bloomingdale's that he would file a federal lawsuit. *Id.* at 21.

Plaintiff alleges that in April and May 2017, after he was terminated from Bloomingdale's, he interviewed with BAML for a position as a financial advisor. *Id.* at 21. He was offered the job, and BAML requested information from him for a background check concerning, *inter alia*, his prior employers, a limited liability company he manages, and past lawsuits he had filed. *Id.* at 22. He provided the information, and the job offer was rescinded a few weeks later. *Id.* at 23.

The only explanation Plaintiff offers for naming Defendant Terrance Laughlin, an executive at Bank of America, is that "[g]iven the long standing, buffet table of wrongs committed by BAML against [Plaintiff] . . . in this [c]ase, the liability goes all the way to the top at BAML." *Id.* at 23.

[3] The "Bank of America Defendants" are Bank of America Corporation ("Bank of America") and Terrance P. Laughlin, its Vice Chairman and Head of Global Wealth and Investment Management.

IV. Allegations Against Local 3–United Storeworkers, Retail, Wholesale & Department Store Union United Food and Commercial Workers ("Local 3")

Plaintiff alleges that following his termination from Bloomingdale's, his union, Local 3, agreed to advocate on his behalf and scheduled a "grievance meeting" with Bloomingdale's. SAC at 28–29. Local 3 invited Plaintiff to the meeting, which was to be held on March 1, 2017, but he did not attend. *Id.* at 29. He states that he does not know whether the meeting was held and does not make any further allegations about the grievance process. *Id.* at 29. He also implies that Local 3 conspired with the Macy's Defendants in "purposefully failing to correct" discrimination he faced at Bloomingdale's. *Id.* at 11–12.

V. Procedural History

On March 13, 2017, Plaintiff filed his initial complaint. ECF No. 2. On May 3, 2017, the Honorable Colleen McMahon held that the complaint failed to state a plausible claim for relief and ordered Plaintiff to amend his complaint and explain "*who* deprived Plaintiff of his rights; *what* facts show that he was deprived of his rights; *when* such deprivations occurred; *where* such deprivations occurred; and *why* Plaintiff is entitled to relief." ECF No. 8 at 9–10. She also dismissed any HIPAA claims *sua sponte*, noting that "[t]here is no private right of action under HIPAA." *Id.* at 8 (citing *Rosado v. Herard*, No. 12 Civ. 8943, 2014 WL 1303513, at *4 (S.D.N.Y. Mar. 25, 2014)).

On July 15, 2017, Plaintiff filed his first amended complaint, ECF No. 11, and on September 25, 2017, he filed his second amended complaint. *See* SAC. On October 2, 2017, the Honorable Lorna G. Schofield issued an order interpreting the second amended complaint as asserting claims under Title VII of the Civil Rights Act, the Americans with Disabilities Act (the "ADA"), the Earned Retirement Income Security Act ("ERISA"), the Labor Management Relations Act (the "LMRA"), the National Labor Relations Act (the "NLRA"), the New York

State Human Rights Law (the "NYSHRL"), the New York City Human Rights Law (the "NYCHRL"), and other state laws. ECF No. 20.[4]

Motions to dismiss have been filed separately by the Bank of America Defendants, ECF No. 90; the Macy's Defendants, ECF No. 102; the Cigna Defendants, ECF No. 117; and Local 3, ECF No. 126.

DISCUSSION

I. Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court must accept the allegations in the complaint as true and draw all reasonable inferences in favor of the non-movant. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). A plaintiff is not required to provide "detailed factual allegations," but must assert "more than labels and conclusions." *Twombly*, 550 U.S. at 555. Ultimately, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* Pleadings cannot survive by making "naked assertions devoid of further factual enhancement," and a court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678.

Pro se plaintiffs receive special solicitude from courts. Courts must "liberally construe pleadings and briefs submitted by *pro se* litigants, reading such submissions to raise the strongest arguments they suggest." *Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007) (internal quotation marks and citations omitted). Even for *pro se* plaintiffs, however, a court should reject

[4] Judge Schofield also interpreted the SAC as asserting claims under the Family and Medical Leave Act (the "FMLA"). ECF No. 20. Plaintiff does allege that he requested FMLA leave in January 2017, SAC at 26–27, but this Court respectfully disagrees that any claim predicated on the FMLA is alleged in the complaint.

"bald assertions of discrimination and retaliation" lacking details which are needed to meet the minimum pleading requirements. *Jackson v. Cty. of Rockland*, 450 F. App'x 15, 19 (2d Cir. 2011).

Finally, "the court should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

II. Analysis

A. Claims Against Macy's Defendants

1. Hostile Work Environment

Plaintiff alleges that he was subject to a hostile work environment during his employment at Bloomingdale's. To allege a hostile work environment under Title VII and the NYSHRL, a plaintiff must allege that his workplace was "permeated with discriminatory intimidation, ridicule, and insult, that [was] sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment." *Bermudez v. City of New York*, 783 F. Supp. 2d 560, 578 (S.D.N.Y. 2011) (internal quotation marks and citation omitted). A court considers "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). Additionally, the hostile work environment must be caused by animus as a result of the plaintiff's membership in a protected class. *Bermudez*, 783 F. Supp. 2d at 578–79. The bar for stating a claim under the NYCHRL is lower, but the hostile work environment must still be caused by animus as a result of the plaintiff's membership in a protected class, and "petty, slight, or trivial inconveniences are not actionable." *Id.* at 579.

Plaintiff states that on one occasion, a co-worker made an anti-Semitic comment to him, but also that the co-worker was unaware that Plaintiff is Jewish. Plaintiff does not allege that he was the object of anti-Semitic comments that were frequent, physically threatening, or humiliating enough to arise to a hostile work environment, or that they unreasonably interfered with his work performance. *Harris*, 510 U.S. at 23. Moreover, because the co-worker who made the anti-Semitic comment was unaware that Plaintiff was Jewish, Plaintiff has not alleged that the co-worker's animus was motivated by Plaintiff's membership in a protected class. *Bermudez,* 783 F. Supp. at 578–79. His other interactions with his co-workers merely amount to "petty, slight, or trivial inconveniences." *Id.* at 579. Accordingly, these claims must fail.

2. Sexual Harassment

Plaintiff also asserts claims of sexual harassment. There are two theories under which sexual harassment cases may proceed: (1) *quid pro quo* (*e.g.*, favorable or adverse treatment in return for sought sexual favors), and (2) hostile work environment. *Adeniji v. Admin. for Children Servs.*, 43 F. Supp. 2d 407, 430 (S.D.N.Y. 1999). Plaintiff does not assert a claim under the *quid pro quo* theory. The Court, therefore, will only address whether he has stated a claim under a hostile work environment theory.

Like claims of a hostile work environment on a basis other than sexual harassment, a plaintiff must allege that the sexual harassment was "sufficiently severe or pervasive so as to alter the conditions of [his] employment and create an abusive working environment." *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1042 (2d Cir. 1993). Under Title VII, "isolated incidents (unless extremely serious) will not amount to" a hostile work environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). The standard is the same for claims under the NYSHRL. *Bermudez v. City of New York*, 783 F. Supp. 2d 560, 586 (S.D.N.Y. 2011). There is no sexual

harassment provision of the NYCHRL, *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 37 (1st Dep't 2009), so a plaintiff may only allege "differential treatment of any degree based on a discriminatory motive," *Green v. Jacob & Co. Watches*, 248 F. Supp. 3d 458, 470 (S.D.N.Y. 2017).

Plaintiff's only allegation that might amount to a sexual harassment claim is that a female co-worker "exposed her bare breasts to [him] on the salesfloor" three times over a series of months. SAC at 12–13. Plaintiff offers no allegations to support the conclusion that these isolated incidents "alter[ed] the conditions of [his] employment and create[d] an abusive working environment," *Cosgrove*, 9 F.3d at 1042, nor has he alleged that he suffered any differential treatment as a result of them, *Green*, 248 F. Supp. 3d at 470. Accordingly, his sexual harassment claim is DISMISSED.

3. Failure to Accommodate

Plaintiff also claims that the Macy's Defendants failed to accommodate his disability during his employment in violation of the ADA. To plead a *prima facie* case of a failure to accommodate under the ADA, a plaintiff must allege that (1) he is a person with a disability as defined under the ADA; (2) an employer covered by the statute had notice of his disability; (3) with reasonable accommodation, the plaintiff could perform the essential functions of the job at issue; and (4) the employer refused to make such accommodations. *McMillan v. City of New York*, 711 F.3d 120, 125–26 (2d Cir. 2013). Claims under the NYSHRL and the NYCHRL have these same requirements, although their definition of "disability" is broader than that of the ADA. *Pagan v. Morrisania Neighborhood Family Health Ctr.*, No. 12 Civ. 9047, 2014 WL 464787, at *6 (S.D.N.Y. Jan. 22, 2014).

Plaintiff does not allege facts supporting his claim for a failure to accommodate. He does not identify any disability, or allege that his requested accommodations were related to it. Plaintiff also fails to assert nonconclusory allegations that his requested accommodations—including a promotion to a managerial role and breaks "when necessary"—were reasonable. In any event, a defendant is "only required to offer a reasonable accommodation, not the exact accommodation" that a plaintiff demands. *Martinez v. Mount Sinai Hosp.*, 670 F. App'x 735, 736 (2d Cir. 2016). Accordingly, these claims are DISMISSED.

4. Retaliation

Plaintiff alleges that his termination was an act of retaliation for filing his December 7, 2016 charge of discrimination with the EEOC and NYSDHR. To establish a *prima facie* case of retaliation under Title VII and the ADA, Plaintiff must allege that "(1) [he] engaged in a protected activity; (2) [his] employer was aware of this activity; (3) the employer took adverse employment action against [him]; and (4) a causal connection exists between the alleged adverse action and the protected activity." *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 608 (2d Cir. 2006); *Corrigan v. Labrum & Doak*, No. 95 Civ. 6471, 1997 WL 76524, at *9 (S.D.N.Y. Feb. 21, 1997) (same standard under NYSHRL); *see also Mi-Kyung Cho v. Young Bin Cafe*, 42 F. Supp. 3d 495, 506 (S.D.N.Y. 2013) (although NYCHRL claims are reviewed "more liberally," they also require that the employer is aware of a protected activity and that there is a causal connection between it and an adverse employment action). However, Plaintiff makes no nonconclusory allegations that the filing of his EEOC complaint was the reason for his termination. He does not allege that anyone in his workplace was aware that he filed it—much less anyone with the power to fire him—or set forth facts suggesting a causal connection between his filing of the complaint and his termination. Indeed, most of his allegations relating

to his EEOC complaint concern a disagreement he had with the EEOC over its provision of documents to him. SAC at 17–19. Accordingly, his claim of retaliation is DISMISSED.

5. Other Claims

Plaintiff brings numerous additional claims against the Macy's Defendants, including quantum meruit, *id.* at 7, "failure to promote," *id.* at 10, "illegal employment separation," *id.* at 25, defamation, *id.* at 28, breach of contract, *id.* at 29, fraud, *id.*, criminal mail fraud, *id.*, and a claim against the Macy's Defendants' in-house legal team for failure to settle, *id.* at 34. As Plaintiff observes in his opposition brief, "outside of actual murder, there may not be any additional [c]laims possible to assert against Macy's Inc. and its [] agents and employees." Pl. Opp. at 26, ECF No. 140. To the extent that any of Plaintiff's claims against the Macy's Defendants is not addressed above, the Court finds that it is not plausibly alleged, and that it is frivolous. *See Livingston v. Adirondack Beverage Co.*, 141 F.3d 434, 437 (2d Cir. 1998) ("An action is 'frivolous' when either: (1) 'the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy;' or (2) 'the claim is based on an indisputably meritless legal theory.'" (citation omitted)).

Accordingly, the Macy's Defendants' motion to dismiss all claims against them is GRANTED.

B. Claims Against the Cigna Defendants

Plaintiff appears to assert claims against the Cigna Defendants based on their alleged violation of HIPAA. However, the HIPAA claims in Plaintiff's original complaint were dismissed by the Honorable Colleen McMahon, who instructed Plaintiff that "[t]here is no private right of action under HIPAA." ECF No. 8 at 8; *see also Bond v. Conn. Bd. of Nursing*, 622 F. App'x 43, 44 n.2 (2d Cir. 2015) ("The Circuits that have considered the issue agree that

HIPAA creates no private right of action."). Plaintiff, in fact, acknowledges this in his second amended complaint, but states that he wishes to assert "public" causes of action on behalf of the United States and that he "awaits instruction from Court as to the practicalities surrounding the assertion of such public claims." SAC at 24 (emphasis omitted). Plaintiff, however, may not bring such a suit. *See Mascetti v. Zozulin*, No. 09 Civ. 963, 2010 WL 1644572, at *4 (D. Conn. Apr. 20, 2010) ("Enforcement of [HIPAA] and its regulations is limited to the Secretary of Health and Human Services.").

As stated, Plaintiff asserts no allegations against Defendant Jones, Cigna's general counsel. "When a complaint names defendants in the caption but makes no substantive allegations against them in the body of the pleading, the complaint does not state a claim against these defendants." *Ho Myung Moolsan Co. v. Manitou Mineral Water, Inc.*, 665 F. Supp. 2d 239, 251 (S.D.N.Y. 2009). Accordingly, the Cigna Defendants' motion to dismiss all claims against them is GRANTED.

C. Claims Against Local 3

Plaintiff alleges that Local 3, his union while he was employed by Bloomingdale's, breached its duty of fair representation to him. SAC at 29. A union has a duty of fair representation to its members that is implied under the NLRA. *Acosta v. Potter*, 410 F. Supp. 2d 298, 308 (S.D.N.Y. 2006). To breach this duty, there are two requirements. First, the union must act in a way that is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). For this requirement, a court is "highly deferential" to unions, "recognizing the wide latitude that [they] need for the effective performance of their bargaining responsibilities." *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 709 (2d Cir. 2010) (internal quotation marks and citation omitted). Further, a plaintiff "must set forth concrete specific facts from which one

can infer a union's discrimination, bad faith or arbitrary exercise of discretion," and "[c]onclusory allegations, without supporting facts, fail to state a valid claim." *Dillard v. SEIU Local 32BJ*, No. 15 Civ. 4132, 2015 WL 6913944, at *4 (S.D.N.Y. Nov. 6, 2015). Second, there must be a causal connection between the union's wrongful conduct and the plaintiff's injuries. *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 126 (2d Cir. 1998).

Here, Plaintiff alleges that Local 3 agreed to grieve his termination, but that Plaintiff did not show up to the grievance meeting, does not know if the meeting was held, and has not received any communication from Local 3 since February 2017. SAC at 28–29. These allegations fall far short of the specific facts "from which one can infer a union's discrimination, bad faith or arbitrary exercise of discretion." *Dillard*, 2015 WL 6913944, at *4. To the extent Plaintiff brings a claim against Local 3 under the LMRA for breach of the collective bargaining agreement, this claim is also DISMISSED. *See Acosta*, 410 F. Supp. 2d at 309 (a breach of a duty of fair representation "is a prerequisite to consideration" of a claim for breach of a collective bargaining agreement). Accordingly, Local 3's motion to dismiss all claims against it is GRANTED.[5]

D. Claims Against Bank of America Defendants

Plaintiff brings two claims against the Bank of America Defendants: (1) while he was employed by Bloomingdale's, they violated ERISA by denying his request for an emergency hardship withdrawal; and (2) after his termination, they committed "employment fraud" by rescinding a job offer.

[5] Plaintiff also appears to allege that Local 3 conspired with the Macy's Defendants in "purposefully failing to correct" the discrimination he faced at Bloomingdale's. SAC at 11. "Allegations of conspiracy must be pleaded with particularity or they will not survive a motion to dismiss." *Nweke v. Prudential Ins. Co. of Am.*, 25 F. Supp. 2d 203, 219 (S.D.N.Y. 1998). Any claims of conspiracy against Local 3 are, therefore, DISMISSED.

At a January 26, 2018 conference held by the Honorable Sarah Netburn, Plaintiff stated that he sued Bank of America because it is BAML's parent company. ECF No. 161 at 7. However, in order to bring suit against a parent company for the liability of one of its subsidiaries, a plaintiff must "pierce the corporate veil" by proving that the parent "exercised complete domination over the corporation with respect to the transaction at issue" and "that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil." *Beck v. Consol. Rail Corp.*, 394 F. Supp. 2d 632, 637–38 (S.D.N.Y. 2005) (internal quotation marks and citations omitted). Plaintiff makes no such allegations.

Even if Plaintiff had sued the proper entity, his claims would fail. Plaintiff appears to allege that he is entitled to benefits due to him under the terms of his 401(k) plan pursuant to 29 U.S.C. § 1132(a)(1)(B). His claim must be dismissed, however, because he does not allege that he exhausted his administrative remedies, a prerequisite to filing suit. *Niblo v. UBS Glob. Asset Mgmt. (Ams.) Inc.*, No. 11 Civ. 4447, 2012 WL 995276, at *4 (S.D.N.Y. Mar. 21, 2012) ("[I]t is established law in the Second Circuit that the exhaustion of the administrative review procedures detailed in an ERISA plan is a prerequisite to a suit to recover benefits."), *aff'd*, 489 F. App'x 518 (2d Cir. 2012).[6]

Although it is unclear what legal basis Plaintiff asserts for his "employment fraud" claim arising out of the rescission of his job offer with BAML, the second amended complaint alleges only that he was offered a job subject to a background check, and that the offer was revoked after he provided information about his prior employment, past lawsuits he had filed, and a limited liability company he manages. SAC at 21–23. When a job offer "did not provide for any

[6] To the extent that Plaintiff brings an ERISA claim for benefits against the Macy's Defendants, it is DISMISSED for this reason as well.

definite term of employment, nor did any representative of the defendant promise that the employment would have a specific duration," a plaintiff's claim "that he was fraudulently induced to accept the position" based on his belief that he would not be terminated is "legally unsupportable." *Montchal v. Ne. Sav. Bank*, 663 N.Y.S. 64, 65 (2d Dep't 1997).

As stated, Plaintiff asserts no allegations against Defendant Laughlin, outside of his conclusion that "the liability goes all the way to the top at BAML." SAC at 23. As this conclusory sentence is not a substantive allegation, it fails to state a claim against Laughlin. *See Ho Myung Moolsan Co.*, 665 F. Supp. 2d at 251.

Accordingly, the Bank of America Defendants' motion to dismiss all claims against them is GRANTED.

E. John & Jane Does 1–1000

Plaintiff also names "John & Jane Does 1–1000" as Defendants, but makes no allegations about them in his complaint. Accordingly, these claims are DISMISSED.

F. Claims Asserted for the First Time in Plaintiff's Opposition Brief

In Plaintiff's opposition brief, he appears to bring several new claims against Defendants, including criminal conspiracy, lack of good faith and fair dealing, intentional infliction of emotional distress, and tortious interference with contract, as well as claims against new defendants who were not previously identified. Pl. Opp. at 24–25. The Court is not required to consider new allegations made in an opposition brief, even in cases involving *pro se* plaintiffs. *See Jean-Laurent v. Wilkerson*, 461 F. App'x 18, 21 (2d Cir. 2012). In any event, the Court finds that Plaintiff has not plausibly stated these additional claims and that they are frivolous.

III. Leave to Amend

Plaintiff has already amended his complaint twice. Because even "a liberal reading of the complaint" does not give "any indication that a valid claim might be stated," the Court denies Plaintiff leave to amend the complaint. *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000). "The problem with [the complaint's] causes of action is substantive; better pleading will not cure it." *Id.*

CONCLUSION

For the reasons stated above, Defendants' motions to dismiss all claims against them are GRANTED. The Clerk of Court is directed to mail a copy of this order to Plaintiff *pro se*, terminate the motions at ECF Nos. 89, 101, 116, and 126, and close the case.

SO ORDERED.

Dated: September 25, 2018
New York, New York

ANALISA TORRES
United States District Judge

APPENDIX C

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of March, two thousand nineteen.

Seth Mitchell,

Plaintiff - Appellant,

v.

American Arbitration Association (AAA), Ann Lesser, Esq., Heather Santo, Lazare Potter Giacovas & Moyle LLP, The Travelers Companies, Linda Nielsen, Tiffany Chamberlin, Michael Rashbaum, Harvey Aloni, Wayne Rogers, Jeannine Cavallaro, Yale H. Glazer,

Defendants,

Macy's Inc., Bloomingdale's, Prudential Financial, Inc., Cigna, Local 3 RWDSU/UFCW United Store workers Union, Karen Hoguet, Jeffrey Kantor, Tony Spring, Esq. Elisa Garcia, Esq. Nicole Jones, Stephen Von Wahlde, Esq., Michelle Ronquillo, Susan Wright, Richard Law, Santiago Fernandez, Esq., Sarah Dubuc, Susan Schiller, Ariana Starace, Brittany Pressner, Robin Goodell, Susan Shekerchi, Cynthia Clemmons, Sharen Freeling, Brenda Moses, Paula Sabatelli, John & Jane Does 1-1000, Bank of America, Terrance Laughlin, Elyse Vogel, Aahren DePalma, Esq., Bernard Manning, Tony Spring, New York University, Thomas K. Montag, Andrew D. Hamilton, Terrance J. Nolan, Martin S. Dorph, Anal Shah, U.S. Trust Bank of America Private Wealth Management, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Dorothy S. Oertel-Albright, Cassandra Berrocal, Shaun Kavanagh, Dennis Di Lorenzo, Clare Coughlin,

Defendants - Appellees.

ORDER

Docket Nos: 18-1504 (Lead),
18-1743 (Con),
18-1861 (Con),
18-2861 (Con)

APPENDIX C

Appellant, Sean Mitchell, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk