Appendix Part 1 (p 1a to p 37a)

APPENDIX

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION ON THE REINSTATEMENT OF CASE NO. 1:20-cv-04507

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

April 02,2024, Jesse M. Furman, United States District Judge:

This case is assigned to the undersigned, not to Chief Judge Swain. Be that as it may, Plaintiff's motion is DENIED as frivolous. The Court certifies, pursuant to Title 28, United States Code, Section 1915(a)(3), that any appeal from this Order would not be taken in good faith, and in forma pauperis status is thus denied. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962). The Clerk of Court is directed to terminate ECF No. 244 and to mail this to Plaintiff. So, Ordered. April 02,2024, New York, NY.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECISION ON THE MOTION FOR RECONSIDERTION OF APPEAL CASE NO. 23-920

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 23-920

December 08, 2023, it is hereby Ordered that the motion to reconsider (docket entry 131) and motion for unrestricted access to PACER and waiver of PACER fees (docket entry 140) are DENIED as moot in light of the mandate issued on December 7, 2023, For the Court, Catherine O'Hagan Wolfe, Clerk of Court.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECISION ON THE CASE NO. 23-920

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 23-920

November 07, 2023, Amalya L. Kearse, Susan L. Carney, Myrna Perez, Circuit Judges, Appellant, pro se, moves for in forma pauperis status, appointment of counsel, an initial hearing en banc, a summary remand, and an award of costs for the appeal. Upon due consideration, it is hereby ORDERED that the motions are DENIED, and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); see 28 U.S.C. § 1915(e). For the Court: Catherine O'Hagan Wolfe, Clerk of Court.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE DISTRICT JUDGE IN CASE NO. 1:20-cv-04507 DENYING MOTION FOR RECONSIDERATION

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

June 08, 2023, Jesse M. Furman, United States District Judge,

On June 6, 2023, the Court issued an Opinion and Order granting Defendants' motion to dismiss. ECF No. 236. The next day, Plaintiff filed a motion for reconsideration. ECF No. 238. As Plaintiff presents no valid grounds for reconsideration, the motion is DENIED. *See, e.g., Analytical Surys., Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) ("It is well-settled that [a motion for reconsideration] is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple. Rather, the standard for granting a . . . motion for reconsideration is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court

overlooked." (cleaned up)). The Court certifies, pursuant to Title 28, United States Code, Section 1915(a)(3), that any appeal from this Order would not be taken in good faith, and *in forma pauperis* status is thus denied. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962). The Clerk of Court is directed to terminate ECF No. 238. As Plaintiff has consented to electronic service, ECF No. 23, there is no need to mail a copy of this Order to Plaintiff. June 8, 2023, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE DISTRICT JUDGE IN CASE NO. 1:20-cv-04507 ON DISMISSING SECOND AMENDED COMPLAINT; NAMING PREMLINARY INJUNCTION MOTION MOOT

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

June 06, 2023, Jesse M. Furman, United States District Judge,

Plaintiff Mahfooz Ahmad, proceeding without counsel, brings this case against iCIMS, Inc. ("iCIMS" or "the Company"), iCIMS Chief Executive Officer Colin Day, and iCIMS Deputy General Counsel Courtney Dutter (collectively, "Defendants"), asserting a host of federal and state causes of action arising from events during and after his employment with iCIMS. The Second Amended Complaint makes passing reference to a dozen or so federal and state statutes, but — liberally construed — it alleges three causes of action. *See* ECF No. 188 ("SAC"), 4-8, ¶¶ 1-25. First, Ahmad alleges employment discrimination on the basis of race, religion, and national origin, in violation of Title VII of the Civil Rights Act of 1964

("Title VII"), 42 U.S.C. § 2000e *et seq.*, Section 1981 of the 1866 Civil Rights Act ("Section 1981"), 42 U.S.C. § 1981; New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*; and New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et seq.* SAC 4-5, ¶¶ 1-4. Second, Ahmad alleges wage and hour violations under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* SAC 5, ¶ 6. Finally, Ahmad alleges that Defendants misappropriated his intellectual property and violated the Defend Trade Secrets Act ("DTSA"), 18 U.S.C. § 1836 *et seq.* SAC 7, ¶¶ 16, 22-23. Defendants now move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaint for failure to state a claim. ECF No. 197.[1]

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[1] While the parties do not address the issue, the Court notes that Defendants previously filed an answer to the First Amended Complaint. See ECF No. 78 ("Defs.' Answer"). Although Rule 12(b) requires that a party move to dismiss before filing a responsive pleading, courts have generally held that a party may move to dismiss an amended complaint, notwithstanding a prior answer to an earlier complaint, if the amendment added new factual allegations. See, e.g., Coppelson v. Serhant, No. 19-CV-8481 (LJL), 2021 WL 148088, at *3 (S.D.N.Y. Jan. 15, 2021); Kalin v. Xanboo, Inc., 526 F. Supp. 2d 392, 398 (S.D.N.Y. 2007). This is especially true when, as here, the earlier answer alleged failure to state a claim as an affirmative defense. See Doolittle v. Ruffo, 882 F. Supp. 1247, 1257 n.9 (N.D.N.Y. 1994); Wright & Miller, Federal Practice and Procedure § 1361 (3d ed. 2020); see also Defs.' Answer 5, ¶ 1. In any event, to the extent that Defendants' motion is untimely under Rule 12(b)(6), the Court may and does treat it as a motion for judgment on the pleadings under Rule 12(c). See, e.g., Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001) (holding that conversion "makes eminently good sense" under such circumstances and citing cases).

For the reasons that follow, Defendants' motion to dismiss is GRANTED.[2]

BACKGROUND

The following facts, which are taken from the Second Amended Complaint, are deemed to be true for purposes of this motion and construed in the light most favorable to Ahmad. *See, e.g.*, *Kleinman v. Elan Corp., PLC*, 706 F.3d 145, 152 (2d Cir. 2013). Ahmad was hired by iCIMS as a Data Migration Specialist in February 2016. SAC 12, ¶ 10. He was promoted twice but received only minimal salary increases; his employment later transitioned from in-person to remote. *Id.* at 12, ¶¶ 10-11. Sometime thereafter, Ahmad's responsibilities increased: He was required to commute to headquarters periodically without reimbursement and often worked more than forty hours per week without overtime compensation. *Id.* at 12-13, ¶¶ 12-15, 17. Additionally, despite knowing that Ahmad is a practicing Muslim, iCIMS managers did not order halal or kosher food on occasions that he visited headquarters with other employees and scheduled calls during compulsory Friday prayer on multiple occasions. *Id.* 13-14, ¶¶ 13, 18. Ahmad alleges that, on one occasion, he "was spoken to harshly" after he explained that he needed to reschedule a meeting due to Friday prayers. *Id.* at 14, ¶ 18. On May 30, 2018, Ahmad submitted to Day "as an investment opportunity" a pitch deck business plan for a web-based social networking platform he

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[2] In light of that disposition, Ahmad's motions for a preliminary injunction, see ECF No. 212, for appointment of pro bono counsel, see ECF No. 232, to file certain documents under seal, see ECF No. 233, and to waive any injunction bond, see ECF No. 234, are denied as moot.

had developed called Jobtrail; after Ahmad did so, iCIMS scheduled meetings to review the business plan. *Id.* 14, ¶¶ 19-20. On June 7, 2018, however, his employment was terminated, allegedly in order to deprive him of his intellectual property. *Id.* at 15, ¶¶ 22-25.

Ahmad alleges that, following his termination, iCIMS "and their affiliates" launched a complex retaliatory scheme to cover up their "illegal and deceptive copying of [his] novel intellectual property invention." *Id.* at 17, ¶ 33. The Second Amended Complaint is somewhat fuzzy on the particulars of this plan, making allegations only as to former Defendants naviHealth, Inc. ("naviHealth") and Beacon Hill Staffing Group ("Beacon Hill"), styled as "affiliates" of iCIMS.[3] *Id.* at 17, ¶ 35. In essence, Ahmad alleges that in June 2019, a year after he was terminated from iCIMS, he received unsolicited emails from Beacon Hill encouraging him to apply for a position with naviHealth. *Id.* Ultimately, he got a job with naviHealth as a Senior Configuration Engineer, a role that required him to implement iCIMS software. *Id.* Ahmad claims that, as a condition of employment, he was "deceptively lured and

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[3] Ahmad's First Amended Complaint added naviHealth and Beacon Hill as defendants. *See* ECF No. 76. On June 2, 2022, Magistrate Judge Gorenstein issued a Report and Recommendation recommending dismissal of the Amended Complaint against naviHealth and Beacon Hill for lack of personal jurisdiction and Article III standing, which the Honorable Analisa Torres — to whom this case was previously assigned — adopted shortly thereafter. *See Ahmad v. Day*, No. 20-CV-4507 (AT), 2022 WL 1814905 (S.D.N.Y. June 2, 2022), *adopted* 2022 WL 2452231 (S.D.N.Y. Jul. 6, 2022).

induced" into signing an "Invention Assignment Agreement," after which iCIMS apparently "reverse-engineer[ed]" Ahmad's intellectual property for its own purposes. *Id.* at 18, 20, ¶¶ 36, 43-44.

STANDARD OF REVIEW

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), a court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Giunta v. Dingman*, 893 F.3d 73, 79 (2d Cir. 2018). A court will not dismiss any claims unless the plaintiff has failed to plead sufficient facts to state a claim to relief that is facially plausible, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) — that is, one that contains "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). More specifically, a plaintiff must allege facts showing "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A complaint that offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Further, if the plaintiff "ha[s] not nudged [his] claims across the line from conceivable to plausible, [those claims] must be dismissed." *Id.* at 570. Where, as here, a plaintiff brings claims of employment discrimination, however, the facts "alleged in the complaint need not give plausible support to the ultimate question of whether the adverse employment action was attributable to discrimination. They need only give plausible support to a minimal inference of discriminatory motivation." *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015); *see also Vega*

v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 86-87 (2d Cir. 2015). Ahmad is proceeding *pro se* — that is, he is proceeding without counsel. It is well established that a court is "obligated to afford a special solicitude to *pro se* litigants." *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010); *accord Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009). Thus, when considering Ahmad's submissions, the Court must interpret them "to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (internal quotation marks omitted). Nevertheless, "to survive a motion to dismiss, a *pro se* plaintiff must still plead sufficient facts to state a claim that is plausible on its face." *Bodley v. Clark*, No. 11-CV-8955 (KBF), 2012 WL 3042175, at *2 (S.D.N.Y. July 23, 2012); *accord Green v. McLaughlin*, 480 F. App'x 44, 46 (2d Cir. 2012) (summary order).

DISCUSSION

As noted, the Court liberally construes the Second Amended Complaint to allege three sets of claims: employment discrimination claims under federal, state, and local law; wage and hour claims under the FLSA; and misappropriation of intellectual property claims.[4] The Court will discuss each set of

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[4] The Court declines to consider claims raised in the Second Amended Complaint that are wholly without factual support and not addressed in Ahmad's opposition to Defendants' motion to dismiss. See, e.g., White v. Gutwein, No. 20-CV-4532 (NSR), 2022 WL 2987554, at *2 (S.D.N.Y. July 28, 2022) ("The Court's duty to construe [a pro se] Complaint liberally and favorably is not the equivalent of a duty to re-write it." (internal quotation marks omitted)). The Court also declines to consider claims raised for the first time in Ahmad's opposition, including his First Amendment claims. See ECF No. 215 ("Pl.'s Opp'n"), at 26; see

claims in turn, but will leave the NYCHRL claims for last.

A. Employment Discrimination Claims

First, Ahmad brings employment-discrimination claims under Title VII, Section 1981, and the NYSHRL. Courts examine claims under Title VII, Section 1981, and the NYSHRL using the same general standards. *See Torre v. Charter Commc'ns., Inc.*, 493 F. Supp. 3d 276, 285 (S.D.N.Y. 2020) (Title VII and NYSHRL); *Awad v. City of New York*, No. 13-CV-5753 (BMC), 2014 WL 1814114, at *5 (E.D.N.Y. May 7, 2014) (Section 1981, Title VII, and NYSHRL). Under these statutes, "[t]o survive a motion to dismiss, a plaintiff need only establish a *prima facie* case of . . . discrimination by demonstrating that (1) he was within the protected class; (2) he was qualified for the position; (3) he was subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination." *Menaker v. Hofstra Univ.*, 935 F.3d 20, 30 (2d Cir. 2019) (cleaned up). At this early stage of the litigation, Ahmad must "only give plausible support to a minimal inference of discriminatory motivation"; he need not plausibly allege that "the adverse employment action was attributable to discrimination." *Littlejohn*, 795 F.3d at 311. Unlike the other three statutes, however, Section 1981 applies only to claims of intentional

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also, e.g., Davila v. Lang, 343 F. Supp. 3d 254, 267 (S.D.N.Y. 2018) (noting that a court may consider new facts raised by a pro se plaintiff in opposition "to the extent that they are consistent with the complaint" but that a plaintiff may not raise "entirely new causes of action for the first time" (internal quotation marks omitted)).

racial discrimination. *See Patterson v. Cnty. of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004).

Measured against these standards, Ahmad's claims of employment discrimination —which are based on three categories of allegations — fall short.[5] The first category of allegations is that he was denied a salary increase despite being assigned the "worst job duties" and "worst work responsibilities." SAC 12-13, ¶¶ 10-14. As Defendants correctly point out, however, the Second Amended Complaint is bereft of any allegation that he was paid less well *because* of his race, national origin, or religion. Defs.' Mem. 21. Ahmad merely asserts in conclusory fashion that he did not receive as large a raise as other employees, the majority of whom were white. SAC 12, ¶ 10; *see also* Pl.'s Opp'n 22. But he fails to plead any facts relating to the conduct and responsibilities of other employees, differences in compensation, or other circumstances tending to demonstrate that he was paid less by reason of his race, religion, or national origin.

Accordingly, Ahmad's claims based on a pay disparity fail as a matter of law. *See, e.g., Servello v. N.Y. State Office of Child. & Fam. Servs.*, No. 18-CV-0777, 2019 WL 974972, at *5 (N.D.N.Y. 2019) (holding

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[5] To the extent that the Second Amended Complaint alleges claims under the Age Discrimination in Employment Act or discrimination based on membership in any other protected class, such claims were not included in, or reasonably related to the claims that were included in, Ahmad's Equal Employment Opportunity Commission complaint, *see* ECF No. 201-2 (noting specifically that the bases for discrimination were creed, national origin, and race/color), and thus would be subject to dismissal for failure to exhaust administrative remedies, *see Williams v. N.Y.C. Hous. Auth.*, 458 F.3d 67, 70 (2d Cir. 2006); *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003).

that by "fail[ing] to plausibly allege that [his] and [other] employees' duties required substantially equal responsibility, Plaintiff fails to make out an unequal pay claim under . . . Title VII"); *Hughes v. Xerox Corp.*, 37 F. Supp. 3d 629, 645 (W.D.N.Y. 2014) (dismissing an unequal pay claim for failure to identify similarly situated co-workers who were paid more than the plaintiff); *accord Matthew v. Tex. Comptroller of Pub. Accts.*, No. 21-CV- 5337 (JPC), 2022 WL 4626511, at *7-8 (S.D.N.Y. Sept. 30, 2022); *Jong-Fwu v. Overseas Shipholding Grp., Inc.*, No. 00-CV-9682 (DLC), 2002 WL 1929490, at *6 (S.D.N.Y. Aug. 21, 2002).

Ahmad's next category of allegations sounds in the hostile work environment arena. To establish a hostile work environment under Title VII, Section 1981, or the NYSHRL, "a plaintiff must show that 'the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Littlejohn*, 795 F.3d at 320-21 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)); *accord Lenart v. Coach, Inc.*, 131 F. Supp. 3d 61, 66(S.D.N.Y. 2015) (applying the same standards to the NYSHRL claim). Ahmad's allegations, even taken together, fall short of this rigorous standard. He contends that his job duties were more burdensome than those of other employees, SAC 12-13, ¶¶ 12, 14-15; *see also* Pl.'s Opp'n 22; that iCIMS failed to provide halal (or kosher) meals when he came into the office and, further, that iCIMS refused to take into consideration his mandatory prayer times when scheduling calls, SAC at 13-14, ¶¶ 13, 18; and that, on one occasion, he was spoken to harshly after he

explained that he needed to reschedule a call, *id.* at 14, ¶ 18. Once again, however, what dooms Ahmad's claims is what is missing: any allegation that this treatment was "*because* of his race, national origin, or religion." *Farooq v. N.Y.C. Health & Hosps. Corp.*, No. 19-CV-6294 (JMF), 2020 WL 5018387, at *9 (S.D.N.Y. Aug. 25, 2020). Moreover, Ahmad offers only "[o]ffhand and isolated incidents of offensive conduct," which "will not support a claim of discriminatory harassment." *Salas v. N.Y.C. Dep't of Investigation*, 298 F. Supp. 3d 676, 683 (S.D.N.Y. 2018) (internal quotation marks omitted); *see, e.g.*, *Harris v. NYU Langone Med. Ctr.*, No. 12-CV-0454 (RA), 2013 WL 3487032, at *15 n.19 (S.D.N.Y. July 9, 2013) (noting that the plaintiff's claim that she "spoke a prayer at work in the presence of her supervisor . . . resulting in inhumane discipline and discharge," without more, is insufficient to survive a motion to dismiss), *adopted as modified* 2013 WL 5425336 (S.D.N.Y. Sept. 27, 2013); *Brodt v. City of New York*, 4 F. Supp. 3d 562, 569 (S.D.N.Y. 2014) ("Courts also dismiss religious discrimination claims when the allegations are too vague to plausibly allege animus.").

Finally, Ahmad asserts in conclusory fashion that iCIMS "discriminatorily and unlawfully terminated" his employment. SAC at 14, ¶ 21. But, as Defendants point out, *see* Defs.' Mem. 20, the very same paragraph of the Second Amended Complaint explicitly alleges that the reason for Ahmad's termination was his proffering of the pitch deck to Day, *see* SAC 14, ¶¶ 20-21. That is, Ahmad's own allegations undermine any claim that his termination was caused by discrimination on the basis of race, national origin, or religion. *See, e.g.*, *Soloviev v.*

Goldstein, 104 F. Supp. 3d 232, 249 (E.D.N.Y. 2015) (granting a motion to dismiss where the plaintiff had "shown no connection between his termination and his gender, race, or national origin"); *see also, e.g.*, *Nationwide Mut. Ins. Co. v. Morning Sun Bus. Co.*, No. 10-CV-1777 (ADS), 2011 WL 381612, at *6 (E.D.N.Y. Feb. 2, 2011) ("[Where a plaintiff's] own pleadings are internally inconsistent, a court is neither obligated to reconcile nor accept the contradictory allegations in the pleadings as true in deciding a motion to dismiss.").

Thus, Ahmad's Title VII, Section 1981, and NYSHRL claims must be and are dismissed.

B. FLSA Claims

Ahmad's FLSA claims are almost all time-barred and, regardless, fail to state a claim. In general, a statute of limitations is "an affirmative defense that must be raised in the answer." *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 798 n.12 (2d Cir. 2014). It is well established, however, that "a statute of limitations defense may be decided on a Rule 12(b)(6) motion if the defense appears on the face of the complaint." *Id.* (citing *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008)). That is the case here for nearly all of Ahmad's FLSA claims. In general, the statute of limitations for an FLSA claim is two years. *See* 29 U.S.C. § 255(a); *see also, e.g.*, *Alvarez v. Michael Anthony George Const. Corp.*, 15 F. Supp. 3d 285, 296 (E.D.N.Y. 2014). Ahmad filed his initial Complaint — in which he did arguably plead an FLSA violation, *see* ECF No. 2, at 5 ("On many occasions I was expected to work 60+ hours/wk., with no overtime pay.") — on June 11, 2020. Accordingly, any FLSA claim based on

paychecks prior to June 11, 2018, is time-barred. *See Nakahata v. N.Y.-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 198-99 (2d Cir. 2013) ("The cause of action for FLSA . . . claims accrues on the next regular payday following the work period when services are rendered[, and] each paycheck represents a potential cause of action."). Ahmad was terminated on June 7, 2018, SAC 14, ¶ 21, so, at most, his final pay period would be within the applicable statute of limitations; any claims based on earlier pay periods are time-barred.

It is true that the statute of limitations for an FLSA claim is "extended to three years" where the violation was willful. *Alvarez*, 15 F. Supp. 3d at 296 (internal quotation marks omitted); *see* 29 U.S.C. § 255(a). But Ahmad does not allege facts in any of his complaints, let alone the operative Second Amended Complaint, to suggest that the alleged FLSA violation was willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-33 (1988) (defining "willful" within the context of the FLSA to mean that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute"); *Whiteside v. Hover-Davis, Inc.*, 995 F.3d 315, 320 (2d Cir. 2021) ("[A] plaintiff must allege facts at the pleadings stage that give rise to a plausible inference that a defendant willfully violated the FLSA for the three-year exception to apply."). In the Second Amended Complaint, Ahmad merely states that he had to work over sixty hours a week and/or on weekends with no overtime pay; he does not attribute this extra work or lack of pay to any Defendant, let alone allege that any Defendant was knowingly or recklessly disregarding the FLSA's overtime pay

requirements. *See* SAC 13-14, ¶¶ 14, 17. Thus, the two-year statute of limitations applies to Ahmad's FLSA claims.

In any event, substantially for the reasons articulated by Defendants, *see* Defs.' Mem. 10, Ahmad's FLSA claims are wholly conclusory and fail as a matter of law. He alleges that he often worked over sixty hours a week, including on weekends, without overtime pay, SAC 13- 14, ¶¶ 14, 17, but he does not provide any specific factual details from which "the Court can reasonably infer that there was indeed one or more particular workweek(s) in which the plaintiff suffered an overtime violation." *Bustillos v. Acad. Bus, LLC*, No. 13-CV-565 (AJN), 2014 WL 116012, at *4 (S.D.N.Y. Jan. 13, 2014); *accord Lundy v. Cath. Health Sys. of Long Island Inc.*, 711 F.3d 106, 114 (2d Cir. 2013) ("[I]n order to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours."). The conclusory nature of his FLSA claims thus provides an independent basis for dismissal.

C. Misappropriation of Intellectual Property Claims

Next, Ahmad brings claims against Defendants for allegedly misappropriating a social networking platform, Jobtrail, that Ahmad allegedly created. *See* SAC 14, 20-21 ¶¶ 19-21, 44- 45, 48. What claim Ahmad asserts is not entirely apparent from the Second Amended Complaint, but the most natural fit is for violation of the DTSA.[6] To state a claim under

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[6] To the extent that the Second Amended Complaint could be construed to allege claims for copyright, patent, or trademark infringement, the claims would fail as a matter of law for failure to allege ownership of a valid copyright, patent, or trademark.

the DTSA, a plaintiff must allege "(1) the existence of a trade secret, defined broadly as information with independent economic value that the owner has taken reasonable measures to keep secret, and (2) misappropriation of that secret, defined as the knowing improper acquisition and use or disclosure of the secret." *Danping Li v. Gelormino*, No. 18-CV-442, 2019 WL 1957539, at *8 (D. Conn. May 2, 2019) (internal quotation marks omitted). Ahmad fails to allege either. First, Ahmad fails to allege the existence of a trade secret. Under the DTSA, the term "trade secret" includes "all forms and types of financial, business, scientific, technical, economic, or engineering information" if (1) "the owner thereof has taken reasonable measures to keep such information secret" and (2) "the information derives independent economic value . . . from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information." 18 U.S.C. § 1839(3). Ahmad's admission that he voluntarily shared the relevant information with Defendants without any reasonable measures to protect the secrecy of the information — such as a

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See Defs.' Mem. 26-28; see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (holding that a plaintiff must prove, inter alia, "ownership of a valid copyright" in order to establish copyright infringement); Markman v. Westview Instruments, Inc., 517 U.S. 370, 384 (1996) (noting that the first element of most patent infringement cases is "construing the patent," thus presupposing the existence of a patent); 1-800 Contacts, Inc. v. WhenU.Com, Inc., 414 F.3d 400, 406-07 (2d Cir. 2005) ("In order to prevail on a trademark infringement claim . . . a plaintiff must establish that . . . it has a valid mark that is entitled to protection.").

confidentiality or non-disclosure agreement — is thus fatal to his claim. SAC 14, ¶ 19; *see, e.g.*, *Zabit v. Brandometry, LLC*, 540 F. Supp. 3d 412, 424 (S.D.N.Y. 2021) (granting a motion to dismiss a DTSA claim where "Plaintiffs' own allegations in the [complaint] make plain that they failed to take reasonable measures to protect the secrecy of" their trade secrets). Moreover, Ahmad's purported trade secret is too "vague and indefinite" to be protected. *Broker Genius, Inc. v. Zalta*, 280 F. Supp. 3d 495, 515 (S.D.N.Y. 2017) (internal quotation marks omitted). He describes it as a "web based social networking pre release platform," SAC 14, ¶ 20, but does not provide any details as to the actually secret information within his job pitch. Without that, the operative complaint merely alleges a trade secret "at the highest level of abstraction," which is insufficient to plead a misappropriation claim. *Lawrence v. NYC Med. Prac., P.C.*, No. 18-CV-8649 (GHW), 2019 WL 4194576, at *5 (S.D.N.Y. Sept. 3, 2019); *see also Elsevier Inc. v. Dr. Evidence, LLC*, No. 17-CV-5540 (KBF), 2018 WL 557906, at *6 (S.D.N.Y. Jan. 23, 2018) ("[A]lleging that a trade secret exists requires much more specificity as to the information owned by the claimant.").

Second, Ahmad fails to allege misappropriation, as the Second Amended Complaint alleges only that Defendants came into possession of the purported trade secret because Ahmad voluntarily shared it as a purported investment opportunity. SAC 14, ¶ 19; *see also Kairam v. W. Side GI, LLC*, 793 F. App'x 23, 28 (2d Cir. 2019) (summary order) (affirming dismissal of a DTSA claim where the complaint "lacks any allegation about the

circumstances under which" an alleged trade secret was misappropriated); *Principia Partners LLC v. Swap Fin. Grp., LLC*, No. 18-CV-7998 (AT), 2019 WL 4688711, at *3 (S.D.N.Y. Sept. 26, 2019) (dismissing a DTSA claim where plaintiff fails to plead a breach of a duty of secrecy or confidentiality). Moreover, Ahmad relies heavily on allegations about the actions of now-dismissed parties — naviHealth and Beacon — to support his misappropriation claim. *See* SAC 19-21, ¶¶ 42-45, 48, 50. Ahmad claims without support that these entities are affiliates of iCIMS, but without allegations tending to show some coordination between Defendants and the dismissed parties, this Court is not bound by his conclusory allegation of an affiliate relationship. *See, e.g., Lopez v. Bonanza.com, Inc.*, No. 17-CV-8493 (LAP), 2019 WL 5199431, at *17 (S.D.N.Y. Sept. 30, 2019) (refusing to credit a plaintiff's "generalized conclusory allegations lumping all 'Defendants' together").

Accordingly, Ahmad's claim under the DTSA must be and is dismissed.

D. NYCHRL Claims

Finally, Ahmad brings employment-discrimination claims under the NYCHRL. Claims brought under the NYCHRL are subject to a more liberal standard than claims under Title VII and the NYSHRL and, thus, must be analyzed separately. *See Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 (2d Cir. 2013). For instance, "the adverse action need not be material; instead, a plaintiff need only demonstrate differential treatment that is more than trivial, insubstantial, or petty." *Torre*, 493 F. Supp. 3d at 285 (internal quotation marks omitted). In light of the distinct standards for

NYCHRL claims, and "because the law governing claims under the NYCHRL is still developing, [Ahmad's] NYCHRL claims present questions best left to the courts of the State of New York." *Maragh v. Roosevelt Island Operating Corp.*, No. 16-CV-7530 (JMF), 2021 WL 3501238, at *10 (S.D.N.Y. Aug. 5, 2021) (internal quotation marks omitted). Accordingly, Ahmad's NYCHRL claims — for discrimination and hostile work environment — are dismissed without prejudice to him refiling them in state court.[7]

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss must be and is GRANTED, and the Second Amended Complaint is dismissed, without prejudice to refiling the NYCHRL claims in state court. Ahmad's motions for a preliminary injunction, *see* ECF No. 212, for appointment of *pro bono* counsel, *see* ECF No. 232, to file certain documents under seal, *see* ECF No. 233, and to waive any injunction bond, *see* ECF No. 234, are therefore DENIED as moot. Further, because the Court previously granted Ahmad leave to amend, *see* ECF No. 187, and Ahmad

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[7] The Court notes that there is diversity of citizenship between the parties. See SAC 3, 8-9,¶ 7. That said, Ahmad alleges only federal-question jurisdiction, see id. at 4-5, ¶¶ 1-2; id. at 8,¶ 1, and does not include any allegations regarding the amount in controversy, let alone that it exceeds the sum or value of $75,000. Accordingly, the Court cannot exercise diversity jurisdiction over this case. See Mavrommatis v. Carey Limousine Westchester, Inc., 476 Fed. App'x 462, 467 (2d Cir. 2011) (summary order) (affirming the district court's refusal to exercise jurisdiction over state-law claims because, among other defects, the complaint "fail[ed] to allege any amount in controversy, let alone that it exceeds the sum or value of $75,000").

neither suggests that he has additional facts that would cure the defects discussed above (some of which could not be cured), nor requests leave to amend again, the Court declines to *sua sponte* grant him another opportunity to amend, *see, e.g.*, *Roundtree v. NYC*, No. 19-CV- 2475 (JMF), 2021 WL 1667193, at *6 (S.D.N.Y. Apr. 28, 2021) (citing cases); *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) ("A plaintiff need not be given leave to amend if it fails to specify . . . how amendment would cure the pleading deficiencies in its complaint.").

Finally, the Court certifies, pursuant to Title 28, United States Code, Section 1915(a)(3), that any appeal from this decision would not be taken in good faith, so *in forma pauperis* status is denied. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962). The Clerk of Court is directed to terminate ECF Nos. 197, 212, 232, and 233; to enter judgment in Defendants' favor consistent with this Opinion and Order; and to close the case. June 6, 2023, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE DISTRICT JUDGE IN CASE NO. 1:20-cv-04507 ON WITHDRAWL OF CASE FROM MAGISTRATE JUDGE

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

February 13, 2023, Jesse M. Furman, United States District Judge,

On January 19, 2022, the Court referred this case to Magistrate Judge Gorenstein for General Pretrial and for two prior dispositive motions, which have now been decided. *See* Docket No. 120. It is hereby Ordered that the reference is Withdrawn. New York, New York

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON MOTION TO AMEND THE COMPLAINT GRANTED IN PART AND DENIED IN PART

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

December 28, 2022, Gabriel W. Gorenstein, United States Magistrate Judge,

Pro se plaintiff Mahfooz Ahmad brought this case alleging claims relating to his employment and the alleged theft of his intellectual property. See First Amended Complaint, filed Aug. 25, 2021 (Docket # 76) ("FAC"). Following a partial dismissal of his first amended complaint, Ahmad moves for leave to file a new complaint.[1] In the proposed second amended

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[1] See Notice of Motion for Proposed Amended Complaint, filed July 13, 2022 (Docket # 168) ("Pl. Mot."); Memorandum in Support of Motion for Proposed Amended Complaint, filed July 13, 2022 (Docket # 168) ("Pl. Mem."); Proposed Second Amended Complaint, attached to Pl. Mem. (Docket # 168-1) ("PSAC"); Letter, filed July 25, 2022 (Docket # 172) ("July 25 Letter"); Memorandum of Law in Opposition, filed July 27, 2022 (Docket # 173) ("iCIMS Opp."); Memorandum of Law in Opposition, filed

complaint ("PSAC"), Ahmad names as defendants iCIMS Inc. ("iCIMS") and associated individuals Colin Day and Courtney Dutter (collectively, the "iCIMS defendants"); Beacon Hill Staffing Group ("Beacon"); naviHealth Inc. ("naviHealth") and Clay Richards; Vista Equity Partners ("Vista"); Susquehanna Growth Equity ("Susquehanna"); and Comcast Corporation ("Comcast"). See PSAC. For the reasons that follow, the motion for leave to amend is granted in part and denied in part.

I. BACKGROUND

A. Allegations in the Proposed Amended Complaint

The proposed amended complaint makes the following allegations, which we assume to be true for purposes of ruling on this motion to amend. Ahmad worked in a contract position for NBCUniversal beginning September 30, 2013. PSAC ¶ 3;[2] July 25 Letter at 2. In February 2014, Ahmad launched a social networking website called "Keepup," and, a month later, he applied for funding from an investment firm called DreamIt Ventures, a New York state based firm backed by Comcast. PSAC ¶¶ 4-

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July 27, 2022 (Docket # 174) ("naviHealth Opp."); Memorandum of Law in Opposition, filed July 27, 2022 (Docket # 175) ("Vista Opp."); Memorandum of Law in Opposition, filed July 27, 2022 (Docket # 176) ("Beacon Opp."); Reply Memorandum in Support, filed Aug. 24, 2022 (Docket # 183) ("Pl. Reply"); Letter, filed Sept. 13, 2022 (Docket # 184) ("September 13 Letter").

[2] The PSAC restarts paragraph numbering at various points. Our citations to paragraph numbers are to the paragraphs in the section entitled "Amended Complaint," beginning on page 10 of the document. Where we cite to other portions of the PSAC, we use page numbers followed by a parenthetical indicating the paragraph number.

5. Ahmad found out later that year that two New York state entrepreneurs, Angel Davis and Lauren Washington, won $250,000 in a startup competition for a social networking application also named "Keepup." PSAC ¶ 6. Davis, Washington, "and their affiliates" trademarked Keepup with the U.S. Patent and Trademark Office ("USPTO"). PSAC ¶ 6. Ahmad sent them a cease-and-desist letter, and in December 2015, he filed a request to extend time to oppose this trademark with the USPTO, which denied the request. PSAC ¶ 6. Ahmad later applied for a job at iCIMS and was hired. PSAC ¶¶ 7-10. iCIMS hired Ahmad at Comcast's order, "so that iCIMS and its affiliates could easily and closely monitor Plaintiff." PSAC ¶ 9. Ahmad began working for iCIMS on February 1, 2016. PSAC ¶ 10. Although Ahmad had "great work performance" while at iCIMS, he received worse pay and more burdensome responsibilities than his colleagues. PSAC ¶¶ 10, 12. A majority of iCIMS employees "were of white race." PSAC ¶ 10. iCIMS forced Ahmad to work through weekends and occasionally well over 60 hours a week without requisite pay. PSAC ¶¶ 14, 17. Even though iCIMS was aware that Ahmad is Muslim and observes a compulsory Friday prayer, his managers scheduled calls during Friday prayers and spoke to him harshly when he explained why he was rescheduling a Friday call. PSAC ¶ 18. On some occasions, iCIMS would order food for employees, but did not order kosher or halal food that Ahmad could eat, consistent with his religious practices. PSAC ¶ 13.

On May 30, 2018, Ahmad submitted a "pdf pitch deck business plan" of "novel intellectual property" named "Jobtrail" to the CEO of iCIMS,

Colin Day, as an investment opportunity. PSAC ¶ 19. On June 5, 6, and 7, 2018, iCIMS scheduled meetings to learn and review Jobtrail's "pre[-]release platform." PSAC ¶ 20. Having "fully understood Jobtrail's trade secrets, business model, application and use case of the novel intellectual property," iCIMS then terminated Ahmad's employment on June 7, 2018, "acting in discrimination." PSAC ¶¶ 21-22. The complaint alleges that iCIMS "acted deceptively and illegally to acquire intellectual property that Plaintiff had been creating even prior to joining iCIMS as an employee." PSAC ¶ 27. On August 17, 2018, about two months after Ahmad's termination from iCIMS, Vista invested $1.2 billion in iCIMS. PSAC ¶ 32.

In June 2019, Beacon contacted Ahmad about a job opportunity, initially stating that Ahmad would be a "contractual employee" of Beacon and would work with naviHealth to implement iCIMS' software. PSAC ¶ 35. After Ahmad expressed "great hesitance," Beacon and naviHealth stated that naviHealth was seeking someone full time for a role as "Senior Configuration Engineer." Id. Beacon and naviHealth said "this role will be made direct hired full time with naviHealth and that will happen after Plaintiff initiates the contract." Id. At some point in July 2019, Ahmad accepted the role Beacon offered, induced by "false statements of [a promising career with naviHealth." PSAC ¶ 36. As part of this acceptance, Ahmad also signed the first and last page of the agreements titled "Invention Assignment Agreement" and "Business Associate Addendum." Id. Despite a "remote employment understanding," Beacon and naviHealth demanded Ahmad travel to Brentwood, Tennessee, which cost him time and money. PSAC ¶

40. During his employment, Beacon and naviHealth "improperly" reported Ahmad's wages as earnings in Tennessee. PSAC ¶ 41. Because of this, Ahmad was not able to qualify or was delayed in qualifying for unemployment benefits during the pandemic, "resulting in financial harm in New York." Id. Around June 2020, iCIMS, "as backed by" both Vista and Susquehanna, was "able to engineer and reverse-engineer Plaintiff[']s novel intellectual[] property and began to offer it as services to its clients." PSAC ¶ 44.

The complaint also contains (1) allegations claiming various conspiracies among the defendants to harm plaintiff; (2) allegations that some action was taken by the "defendants" without specifying which defendants are at issue or the role of each defendant; and (3) allegations that cite a statute or legal principles that are conclusory insofar as they do not detail the specific acts demonstrating that the defendants violated those laws or legal principles. See, e.g., PSAC ¶¶ 25, 29, 33-34, 37-39, 43-46, 49-51, 54-59, 61-62. For the reasons explained below, we do not consider these allegations.[3]

B. Procedural History

Ahmad filed his original complaint in this action on June 11, 2020, naming the iCIMS defendants and describing for the most part an employment discrimination claim. Complaint filed June 11, 2020 (Docket # 2) ("Compl."). The iCIMS defendants, originally the only defendants in the case, moved to

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[3] We also ignore an allegation that makes references to other filings in this case, see PSAC ¶ 52, as such an allegation is inconsistent with the requirements of Fed. R. Civ. P. 10, which provides pleadings shall refer to paragraphs of an earlier pleading, not to memoranda of law.

compel arbitration shortly thereafter on the ground that the claim in the complaint arose out of confidentiality agreement Ahmad had executed with iCIMS. See Ahmad v. Day, 556 F. Supp. 3d 214, 215 (S.D.N.Y. 2021). The Court denied the motion to compel arbitration on the ground that the complaint made claims of employment discrimination and did not arise out of the confidentiality agreement. Id. Ahmad filed the FAC on August 25, 2021, adding naviHealth, Beacon Hill, and Vista as defendants and adding intellectual property claims. See FAC. The iCIMS defendants answered the FAC on September 15, 2021. Answer, filed Sept. 15, 2021 (Docket # 78). naviHealth, Beacon, and Vista each filed a motion to dismiss. See Motion to Dismiss, filed Jan. 14, 2022(Docket # 104); Motion to Dismiss, filed Jan. 18, 2022 (Docket # 109); Motion to Dismiss, filed Jan. 18, 2022 (Docket # 117). The Court granted naviHealth and Beacon's motions on the ground that plaintiff lacked standing to sue them because he had shown no injury traceable to their conduct and granted Vista's motion to dismiss for lack of personal jurisdiction. See Ahmad v. Day, 2022 WL 1814905, at *5-6 (S.D.N.Y. June 2, 2022), adopted, 2022 WL 2452231 (S.D.N.Y. July 6, 2022). Ahmad was given permission to move to file an amended complaint. See Ahmad, 2022 WL 2452231, at *3.

Ahmad filed the instant motion on July 13, 2022. See Pl. Mem. Attached to the motion is a proposed amended complaint that realleges claims against the previous defendants and adds as new defendants Susquehanna, Clay Richards (who is associated with naviHealth), and Comcast. PSAC at 1. The proposed complaint lists a host of federal and state statutes and

common law claims. See PSAC at 5-8. Some relate to employment discrimination or mistreatment during his employment, and others appear to relate to his claims of theft of his intellectual property. Id.

Additionally, Ahmad filed documents in which he seeks to challenge the constitutionality of the Federal Arbitration Act. See Notice of Constitutional Question, filed July 13, 2022 (Docket # 167) ("Not."); Supplement to ECF Docket # 167, filed July 18, 2022 (Docket # 171) ("Supp. to Not.").

II. LAW GOVERNING MOTIONS FOR LEAVE TO AMEND

Rule 15(a) provides that a "court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). The policy behind this rule is that "[l]iberal amendment promotes judicial economy by making it possible to dispose of all contentions between parties in one lawsuit." Bilt-Rite Steel Buck Corp. v. Duncan's Welding & Corr. Equip., Inc., 1990 WL 129970, at *1 (E.D.N.Y. Aug. 24, 1990) (citing JennAir Prods. v. Penn Ventilator, Inc., 283 F. Supp. 591, 594 (E.D. Pa. 1968)). The decision to grant or deny leave to amend under Rule 15(a)(2) is "within the discretion of the trial court." See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971) (citation omitted). The court may deny leave to amend for "good reason," which normally involves an analysis of the four factors articulated in Foman v. Davis, 371 U.S. 178, 182 (1962): undue delay, bad faith, futility of amendment, or undue prejudice to the opposing party. McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007) (citing Foman, 371 U.S. at 182).

"Futility is a determination, as a matter of law, that proposed amendments would fail to cure prior deficiencies or to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure." Empire Merchs., LLC v. Reliable Churchill LLLP, 902 F.3d 132, 139 (2d Cir. 2018) (citations omitted).

III. DISCUSSION

In reviewing the complaint, we are mindful that "[a] document filed pro se is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (citations and internal quotation marks omitted); accord McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir.1999) (A pro se party's pleadings should be construed liberally and interpreted "to raise the strongest arguments that they suggest[.]") (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir.1994)). However, even pro se pleadings must contain factual allegations that "raise a right to relief above the speculative level." Dawkins v. Gonyea, 646 F.Supp.2d 594, 603 (S.D.N.Y.2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545, (2007)). We address each defendant or set of defendants in turn.

A. Vista

The Court previously granted Vista's motion to dismiss the First Amended Complaint based on lack of personal jurisdiction. Ahmad, 2022 WL 1814905, at *5-6. The Court found that the FAC did not establish that Vista "committed a tortious act merely by investing money in iCIMS" and did not meet the requirements for specific jurisdiction under New York

Appendix Part 2 (p 38a to p 74a)

law. Ahmad, 2022 WL 1814905, at *6, adopted, 2022 WL 2452231, at *2.

In examining the proposed amended complaint, we ignore the paragraphs that make allegations against all or some defendants in an undifferentiated manner as a group, including those with conclusory allegations of conspiracy. See, e.g., Appalachian Enterprises, Inc. v. ePayment Sols., Ltd., 2004 WL 2813121, at *7 (S.D.N.Y. Dec. 8, 2004) ("A plaintiff fails to satisfy rule 8, where the complaint lumps all the defendants together and fails to distinguish their conduct because such allegations fail to give adequate notice to the defendants as to what they did wrong.") (citations and internal punctuation omitted); Stutts v. De Dietrich Grp., 2006 WL 1867060, at *14 (E.D.N.Y. June 30, 2006) ("Conspiracy claims premised upon conclusory, vague or general allegations will not withstand a motion to dismiss.") (citation and internal punctuation omitted). We also ignore conclusory allegations regarding Vista's presence in New York. See PSAC at 9 (¶ 7) (alleging that all defendants have "significant presence in the Sate [sic] of New York" and "generate a significant amount of revenue and have large presence in the state.").

The only specific allegations regarding Vista are that on August 17, 2018, it "invested hundreds of millions of dollars (approximately $1.2 Billion) in iCIMS, . . . two months after Plaintiff's unlawful termination." PSAC ¶ 32. The complaint alleges that Vista sold "close to half its stake in iCIMS" in June 2022. PSAC ¶¶ 47, 53.

Nothing else in the complaint describes any specific acts by Vista. While the complaint contains a number of allegations lumping Vista in with various

other defendants, see e.g., ¶¶ 44-49, no description is given of any acts undertaken by Vista itself. The claims that the defendants as a group harmed plaintiff are entirely conclusory.

As the Court noted previously, Ahmad, 2022 WL 1814905, at *5 n.8, general jurisdiction over a nonresident corporation based on the corporation's in-state presence is constitutional only if the corporation's in-state contacts "are so continuous and systematic as to render it essentially at home in the forum State." Daimler AG v. Bauman, 571 U.S. 117, 139 (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)) (punctuation omitted). Ahmad's proposed complaint contains no non-conclusory allegations showing such contacts, and thus subjecting Vista to general personal jurisdiction would violate the Due Process Clause. See Ahmad, 2022 WL 1814905, at *5 n.8.

As to specific jurisdiction, which in New York is codified at C.P.L.R. § 302(a), the proposed complaint does not cure the defects of the original complaint. Section 302(a) authorizes the exercise of specific personal jurisdiction over a nonresident defendant in four circumstances: (1) if the defendant "transacts any business within the state or contracts anywhere to supply goods or services in the state," id. § 302(a)(1); (2) if the defendant "commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act," id. § 302(a)(2); (3) if the defendant "commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent

course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce," id. § 302(a)(3); or (4) if the defendant "owns, uses or possesses any real property situated within the state," id. § 302(a)(4). There are no non-conclusory allegations that show that Vista engaged in any of these acts. The only specific allegation about Vista's activity is a business transaction with iCIMS two months after Ahmad's termination. That transaction has no nexus to whatever harm Ahmad is alleging (or any other claim in the proposed complaint) and thus cannot satisfy §302(a)(1). See, e.g., Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC, 450 F.3d 100, 103 (2d Cir. 2006) ("A connection that is 'merely coincidental' is insufficient to support jurisdiction.") (citation omitted). As to the remaining allegations referring to defendants as a group, they are all conclusory, and "a plaintiff may not rely on 'conclusory non-fact-specific jurisdictional allegations' to overcome a motion to dismiss[.]" Doe v. Delaware State Police, 939 F. Supp. 2d 313, 321 (S.D.N.Y. 2013)(quoting Jazini v. Nissan Motor Co., 148 F.3d 181, 185 (2d Cir. 1998)). Accordingly, the Court will not grant leave to amend to include Vista as a defendant.

B. Defendants Beacon Hill and naviHealth

1. Intellectual Property Claims

The Court previously granted the motion to dismiss claims against naviHealth and Beacon because of a lack of standing. Ahmad, 2022 WL 1814905, at *4-5, adopted, 2022 WL 2452231, at *2-3.

The PSAC appears to assert claims about the theft of intellectual property by iCIMS, roping naviHealth and Beacon into these claims in an entirely conclusory manner, again without showing how their actions had any relation to those claims. See, e.g., PSAC ¶ 33. Thus, plaintiff lacks standing to sue Beacon and naviHealth to remedy any harm caused to him by iCIMS, given that he continues to show no connection between the actions of Beacon and naviHealth and any allegedly improper action by iCIMS. See, e.g., Rothstein v. UBS AG, 708 F.3d 82, 91 (2d Cir. 2013) (to satisfy standing requirement, plaintiff must "demonstrate a causal nexus between the defendant's conduct and the injury") (citation omitted).

2. Employment-Related Allegations

The proposed complaint includes entirely new allegations regarding plaintiff's employment that name naviHealth and Beacon Hill. We discern two separate factual circumstances. First, plaintiff alleges that Beacon and/or naviHealth did not fulfill a promise to provide him with a "full time career" and to be hired by naviHealth. PSAC ¶ 35. Second, the proposed complaint alleges that Beacon and naviHealth "improperly reported Plaintiff[']s wages in the State of Tennessee" and that this misreporting meant he later was not "able to qualify for Regular Unemployment Benefits" or was otherwise delayed in receiving benefits. PSAC ¶ 41 In its opposition, Beacon Hill disputes making any such promise to Ahmad and cites to emails and documents Ahmad previously placed in the record along with language from their employment contract in an apparent effort to argue that the motion to amend would be futile. Beacon Opp. at 18-19. naviHealth similarly points to

materials outside the record to refute Ahmad's allegations. naviHealth Opp. at 5 n.2. But materials outside the pleadings are not properly considered on a motion to amend, see Kiarie v. Dumbstruck, Inc., 473 F. Supp. 3d 350, 355-56 (S.D.N.Y. 2020). As one court has noted, the fact that futility may sometimes constitute a reason for denial of a motion to amend is not a general invitation to explore the merits of novel proposed claims or to raise defenses that require analysis of matters outside the pleadings. The futility defense to a motion to amend is not, in short, a substitute for a motion to dismiss or a motion for summary judgment. Livingston v. Trustco Bank, 2021 WL 6199655, at *2 (N.D.N.Y. Apr. 23, 2021) (citation omitted). Accordingly, we consider only the allegations in the complaint. With respect to the claim made that plaintiff was falsely given the "promise of [a] full time career," PSAC ¶ 35, if we were to construe this claim as one of fraud, it plainly does not satisfy the pleading standards of Fed. R. Civ. P. 9(b) inasmuch as Ahmad's allegations "fail[] to state with particularity the circumstances constituting fraud" Indeed, the circumstances of the alleged promise are utterly garbled and no particular speaker or statement is identified. See PSAC ¶ 35. To the extent the proposed amended complaint could be construed as attempting to state a breach of contract claim, it fails because it is does not allege with any specificity what the actual promise was, who made the promise, and in what form it was made. See, e.g., Wolff v. Rare Medium, Inc., 210 F. Supp. 2d 490, 494 (S.D.N.Y. 2002) ("a plaintiff must identify the specific provision of the contract that was breached as a result of the acts at issue"), aff'd, 65 F.App'x. 736 (2d Cir. 2003);

Sud v. Sud, 211 A.D.2d 423, 424 (1st Dep't 1995) (A breach of contract claim is "properly dismissed" where plaintiff fails "to allege, in nonconclusory language, as required, the essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated.").

The other employment-related claim is that Beacon and naviHealth "improperly reported Plaintiff[']s wages in the State of Tennessee" and that this misreporting meant he later was not "able to qualify for Regular Unemployment Benefits" or was otherwise delayed in receiving benefits. PSAC ¶ 41. The proposed complaint, however, does not explain why or how naviHealth would be responsible for the misreporting. According to the proposed complaint, Ahmad accepted a job offer from Beacon for a project at naviHealth, and there is no factual allegation that he worked for naviHealth. PSAC ¶¶ 35-36. Thus, the proposed complaint does not show that Ahmad has standing to assert this claim with respect to naviHealth because he has not shown how naviHealth caused the alleged injury.

As for the claim with respect to Beacon, Ahmad's allegations are meager and vague. There is an unclear reference to a "remote employment understanding," PSAC ¶ 40, with no specifics as to the basis for this "understanding." Additionally, Ahmad's factual allegations concede that the work was at a Tennessee-based business and that he repeatedly traveled to Tennessee for this work. PSAC ¶ 40. More importantly, Ahmad has not alleged how his wages were misreported, and it is unclear what statutory or common law claim he would have against Beacon. Whatever supposed right this claim draws from, the

complaint does not provide allegations that show the claim could survive a motion to dismiss.

The proposed complaint also alleges repeatedly that different defendants alone or in tandem breached a fiduciary responsibility owed to Ahmad. PSAC ¶¶ 38, 49, 56. Putting aside the conclusory nature of the allegations, a claim for breach of fiduciary duty requires "the existence of a fiduciary relationship[.]" Yukos Cap. S.A.R.L. v. Feldman, 977 F.3d 216, 241 (2d Cir. 2020) (quoting United States Fire Ins. Co. v. Raia, 94, A.D.3d 749 (2d Dep't 2012)). A fiduciary relationship is a specific arrangement grounded in trust and confidence, which may be express or implied. N. Shipping Funds I, LLC v. Icon Cap. Corp., 921 F. Supp. 2d 94, 104-105 (S.D.N.Y. 2013). Ahmad has alleged no facts to show the existence of a fiduciary relationship with naviHealth or Beacon. At times, he asserts instead that employers owe such a duty to their employees. See, e.g., PSAC ¶ 38. But, in fact, case law holds otherwise. See, e.g., Kavitz v. Int'l Bus. Machines Corp., 2010 WL 11507447, at *10 (S.D.N.Y. Aug. 27, 2010), aff'd, 458 F. App'x 18 (2d Cir. 2012) ("[T]here is no fiduciary relationship between an employee and his employer."); BGC Partners, Inc. v. Avison Young (Canada) Inc., 160 A.D.3d 407, 407-08 (1st Dep't 2018) ("[N]o fiduciary relationship arises from an employment relationship[.]"). Thus, the complaint does not state a claim against naviHealth and Beacon based on breach of fiduciary duty.

Finally, while neither party has raised it, we are not convinced that there is subject matter jurisdiction over any claims against naviHealth and Beacon. The Court will not list the many federal

statutes listed in the complaint, see Compl. at 5-8, as it is enough to say there are no factual allegations in the complaint against naviHealth or Beacon that fit within any of these federal statutes. With the federal claims gone from the complaint, there is no indication that the Court has subject matter jurisdiction over any state law claims inasmuch as there are no non-conclusory allegations (or indeed any allegations) that show the jurisdictional amount in 28 U.S.C. § 1332 has been satisfied with respect to any employment-related claims.

3. Clay Richards

The proposed complaint would add Clay Richards as a defendant to the case. Id. at 4. While it appears that Clay Richards is associated with naviHealth, see PSAC at 3-4 (showing same address for Richards as naviHealth),[4] the only reference the proposed complaint makes to Richards specifically is that "Defendants collectively including Clay Richards, conspired to create an illegal plan of a misrepresented contract." PSAC ¶¶ 34. Such a vague and conclusory allegation of a conspiracy is insufficient to state a claim against Richards.

For the above reasons, the motion to amend as to Beacon, naviHealth and Clay Richards is denied.

C. The iCIMS Defendants

The original complaint and FAC contained claims against the iCIMS defendants for employment discrimination. See Compl. at 5; FAC 9-11. The new complaint adds a number of other claims relating to

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[4] In its opposition memorandum, naviHealth identified Richards as the former CEO of naviHealth. naviHealth Opp. at 6.

employment discrimination and intellectual property. See, e.g., PSAC ¶¶ 7-38.

The iCIMS defendants first argue that the entire proposed amended complaint as it concerns them is improper because the Court in its July 6, 2022 Order did not permit Ahmad to seek leave to amend with respect to the iCIMS defendants. iCIMS Opp. at 2-3; see also Ahmad, 2022 WL 2452231, at *3. We disagree that Ahmad is barred from making a motion to amend.

While the rulings in the July 6, 2022 Order are certainly the law of the case, its grant of permission to file a leave to amend does not speak to any future motion to amend with respect to the iCIMS defendants. As iCIMS itself recognizes, iCIMS Opp. at 2, Fed. R. Civ. P. 15(a)(2) allows a party to seek leave to amend. iCIMS selectively quotes from that rule to omit the portion that states that leave to amend should be "freely" given when "justice so requires." In a perhaps related argument, iCIMS argues that the new allegations in the complaint "should have been included in either [Ahmad's] Original or First Amended complaint" and that there is some burden in responding to allegations two years after the filing of the original complaint. Id. at 5. But iCIMS makes no effort to show any prejudice resulting from the new allegations, and it is settled that in the absence of prejudice or bad faith, undue delay is not in itself a basis to reject a motion to amend. See State Tchrs. Ret. Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981); accord Contrera v. Langer, 314 F. Supp. 3d 562, 575 (S.D.N.Y. 2018).

iCIMS also argues that the complaint violates Rule 8 of the Federal Rules of Civil Procedure in that

it fails to contain a "short and plain statement of the claim showing the pleader is entitled to relief." iCIMS Opp. at 3. It argues that the complaint is so "confusing, ambiguous, and unintelligible" that the defendants cannot respond. Id. at 4. We disagree. While, as we have noted, there are a number of allegations that are improper, vague, and conclusory, we believe that they are of a character that iCIMS should be able to admit or deny (or deny knowledge or information about) the allegations without great difficulty. In other words, the complaint passes muster under Rule 8 even if the allegations may fail to state a claim under Rule 12(b)(6).

Finally, iCIMS argues that "many of the allegations are meritless or time-barred." iCIMS Opp. at 4. iCIMS' brief, however, confines its arguments as to the merits of the claims to a single, brief paragraph and provides only the most cursory argument on this point. See id. As to one claim, it improperly relies on material outside the pleadings. See, e.g., id. (asserting that plaintiff was under 40 years old and thus cannot state a claim for age discrimination). iCIMS also states that its brief gives a "mere sampling" of the deficiencies in the proposed complaint. Id. In light of the cursory and undeveloped manner in which iCIMS presents its arguments as to the merits of any potential motion to dismiss (and thus as to the "futility" of accepting the proposed complaint), we do not find it appropriate to deny leave to amend to add allegations against the iCIMS defendants on the ground of futility. The iCIMS defendants will be free to make such arguments in a future motion, such as a motion to dismiss, or perhaps more efficiently, a motion for summary judgment.

D. Newly Added Defendants

The proposed complaint would add Comcast and Susquehanna as defendants if allowed. PSAC at 4. While these defendants have not yet been served or appeared, it is plain from the face of the complaint that it states no claims against them and thus the plaintiff should not be permitted to amend the complaint to add these defendants. This is one of those instances where, if the complaint were filed, the Court could appropriately dismiss it immediately upon filing under 28 U.S.C. § 1915(e)(2)(B) on the ground that plaintiff is proceeding in forma pauperis and it is "unmistakably clear that the . . . complaint lacks merit or is otherwise defective." Catzin v. Thank You & Good Luck Corp., 899 F.3d 77, 82 (2d Cir. 2018) (citation omitted).

As to Comcast, the only non-conclusory and specific allegations are that it was involved with "DreamIt Ventures" in the period of 2012-2014. PSAC ¶¶ 1-6. Ahmad alleges only that Comcast "backed" DreamIt. PSAC ¶ 5. He does not make any allegations showing that Comcast actually caused him any injury, let alone within any possible period that would not be barred by a relevant statute of limitations. Ahmad does allege that iCIMS hired plaintiff "on the orders of its affiliates [sic] Comcast so that iCIMS and its affiliates could easily and closely monitor Plaintiff." PSAC ¶ 9. These allegations, however, do not state any claim for relief against Comcast. See generally United States ex rel. Hussain v. CDM Smith, Inc., 2018 WL 11217206, at *1 (S.D.N.Y. Jan. 31, 2018) ("[T]he substance of Relator's contemplated amendments is so vague as to preclude application of the Rule 15 standard, thereby rendering amendment

futile."). Moreover, it appears that Ahmad lacks standing to assert any claim against Comcast as he has not shown "a causal connection" between any injury to Ahmad "and the conduct complained of." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). Thus, the Court lacks subject matter jurisdiction over any claim against Comcast. Finally, there are no non-conclusory allegations that there is personal jurisdiction over Comcast.

As to Susquehanna, the complaint's allegations that mention it are entirely conclusory and/or made in conjunction with allegations against other defendants or unsupported claims of conspiracy that fail to specify what acts Susquehanna specifically engaged in. See PSAC ¶¶ 44, 46, 48-49. It is similarly the case that Ahmad lacks standing to assert any claim against Susquehanna because he has not shown "a causal connection" between any injury to Ahmad "and the conduct complained of." Lujan, 504 U.S. at 560. Thus, the Court would lack subject matter jurisdiction over this claim. Additionally, there are no non-conclusory allegations that there is personal jurisdiction over Susquehanna.

E. FAA Notice

Finally, Ahmad has filed a document seemingly in conjunction with the briefing of this motion that seeks to challenge the constitutionality of the Federal Arbitration Act ("FAA"). See Not.; Supp. to Not. There is no claim involving the FAA in this case, however. While iCIMS at one point sought to dismiss the complaint on the ground that it was covered by an arbitration agreement, the Court denied that motion. See Ahmad, 556 F. Supp. 3d at 215. As a result, this Court has no reason to make any ruling regarding the

FAA inasmuch as federal courts may only "determine actual controversies arising between adverse litigants." Muskrat v. United States,219 U.S. 346, 361 (1911); accord Whole Woman's Health v. Jackson, 142 S. Ct. 522, 532 (2021).

CONCLUSION

For the above reasons, the motion for leave to amend (Docket # 168) is granted in part and denied in part. Ahmad is given leave to file the proposed amended complaint as long as he deletes from the caption and from the list of defendants (on pages 3 and 4) the following defendants: Beacon Hill Staffing Group, naviHealth Inc., Vista Equity Partners, Clay Richards, Susquehanna Growth Equity, and Comcast Corporation. In other words, plaintiff may file the proposed amended complaint as long as the only defendants named are iCIMS Inc., Colin Day, and Courtney Dutter. Also, this proposed amended complaint must be filed on or before January 6, 2023. So, Ordered, December 28, 2022, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE DISTRICT JUDGE IN CASE NO. 1:20-cv-04507 ON REASSIGNMENT OF THE CASE

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

November 7, 2022, Jesse M. Furman, United States District Judge,

This case has been reassigned to the undersigned.....
.....as Plaintiff has consented to electronic service, there is no need to mail a copy of this Order to Plaintiff, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE DISTRICT JUDGE IN CASE NO. 1:20-cv-04507 ON ADOPTION OF REPORT & RECCOMENDATION OF THE MAGISTRATE JUDGE

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

July 06, 2022, Analisa Torres, District Judge,

Plaintiff pro se, Mahfooz Ahmad, brings this action raising claims of employment discrimination and unlawful termination against Defendants Colin Day, Courtney Dutter, and iCIMS Inc., his former employer; and what the Court construes to be claims of intellectual property infringement, fraud, and misrepresentation against Defendants naviHealth Inc. ("naviHealth"), Beacon Hill Staffing Group ("Beacon"), and Vista Equity Partners ("Vista," and together with naviHealth and Beacon, "Movants"). Am. Compl., ECF No. 76. Movants each filed a motion to dismiss the claims against them under Federal Rule of Civil Procedure 12(b)(2) and 12(b)(6), and for lack of Article III standing. See naviHealth Mot., ECF No. 104; Beacon Mot., ECF No. 109; Vista Mot., ECF

No. 117. On January 19, 2022, this Court referred the motions to the Honorable Gabriel W. Gorenstein for a report and recommendation. ECF No.120.

Before the Court is Judge Gorenstein's Report and Recommendation (the "R&R"), which recommends that Movants' motions be granted, and that Plaintiff's claims against Movants be dismissed. R&R, ECF No. 155. Plaintiff timely filed objections to the R&R, Pl. Objs., ECF No. 161, and each Movant filed a response, *see* Beacon Reply, ECF No. 162; Vista Reply, ECF No. 163; naviHealth Reply, ECF No. 164. For the reasons stated below, Plaintiff's objections are OVERRULED, and the Court ADOPTS the R&R in its entirety. Movants' motions to dismiss Plaintiff's claims against them are GRANTED.

DISCUSSION [1]

I. Standard of Review

A district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). When a party makes specific objections, the court reviews *de novo* those portions of the R&R to which objection is made. *Id.*; Fed. R. Civ. P. 72(b)(3). However, "when a party makes only conclusory or general objections, or simply reiterates [their] original arguments," the court reviews the R&R strictly for clear error. *Wallace v. Superintendent of Clinton Corr. Facility*, No. 13 Civ. 3989, 2014 WL 2854631, at *1 (S.D.N.Y. June 20, 2014); *see also Bailey v. U.S. Citizenship & Immigr. Servs.*, No. 13 Civ. 1064, 2014

[1] The Court presumes familiarity with the facts and procedural history of this matter as detailed in the R&R, see R&R at 2–4, and does not summarize them here.

WL 2855041, at *1 (S.D.N.Y. June 20, 2014) ("[O]bjections that are not clearly aimed at particular findings . . . do not trigger *de novo* review."). And, the Court may adopt those portions of the R&R to which no objection is made "as long as no clear error is apparent from the face of the record." *Oquendo v. Colvin*, No. 12 Civ. 4527, 2014 WL 4160222, at *2 (S.D.N.Y. Aug. 19, 2014) (citation omitted). An order is clearly erroneous if the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citation omitted).

"*Pro se* parties are generally accorded leniency when making objections." *Pinkney v. Progressive Home Health Servs.*, No. 06 Civ. 5023, 2008 WL 2811816, at *1 (S.D.N.Y. July 21, 2008) (citation omitted). "Nonetheless, even a *pro se* party's objections to a [r]eport and [r]ecommendation must be specific and clearly aimed at particular findings in the magistrate's proposal, such that no party be allowed a 'second bite at the apple' by simply relitigating a prior argument." *Id.* (citation omitted). And, "new arguments and factual assertions cannot properly be raised for the first time in objections to the report and recommendation, and indeed may not be deemed objections at all." *Razzoli v. Fed. Bureau of Prisons*, No. 12 Civ. 3774, 2014 WL 2440771, at *5 (S.D.N.Y. May 30, 2014).

II. Plaintiff's Objections

A. Jurisdiction

The R&R recommends dismissal of Plaintiff's claims against Vista under Federal Rule of Civil Procedure 12(b)(2), because this Court lacks jurisdiction over Vista as to Plaintiff's claims. R&R at

9–12. Specifically, the R&R finds that Plaintiff's limited factual allegations with respect to Vista failed to establish either general or specific jurisdiction under New York law. *See generally id.* Plaintiff's objections raise several new factual allegations, asserting, among other things, that Vista allegedly acquired a start-up in New York under false pretenses to "illegitimately cover up and copy . . . [P]laintiff's invention," and that Vista's actions caused him to lose his home and marriage. Pl. Objs. at 6, 10–11.

Construing Plaintiff's claims liberally, Plaintiff appears to argue that these new allegations establish that Vista committed a tort in New York, which would provide a basis for specific jurisdiction under New York law. *See* N.Y. C.P.L.R. § 302 (establishing specific jurisdiction for defendant who commits a "tortious act" within the state and either regularly does or solicits business in New York, or reasonably expects the act to have consequences in the state and derives substantial revenue from interstate or international commerce). But, Plaintiff does not raise any of these allegations in the Amended Complaint. Indeed, as the R&R notes, Plaintiff's factual allegations as to Vista are limited to asserting that Vista invested in iCIMS Inc., Plaintiff's former employer, shortly after his termination. *See* R&R at 11–12 (citing Am. Compl. at 11). And, new factual assertions "cannot properly be raised for the first time" in Plaintiff's objections, and "indeed may not be deemed objections at all." *Razzoli*, 2014 WL 2440771, at *5.

The Court, accordingly, reviews this portion of the R&R for clear error only, and finds none. The R&R correctly concludes that Plaintiff's limited factual

allegations do not establish that Vista "committed a tortious act merely by investing money in iCIMS. " R&R at 12. It further finds that Plaintiff failed to plead the other statutory requirements necessary for specific jurisdiction under New York law. *See id.* at 11–12. Plaintiff's objections as to his claims against Vista are, therefore, OVERRULED.

B. Standing

The R&R next recommends dismissal of Plaintiff's claims against naviHealth and Beacon on the ground that Plaintiff lacks standing, because Plaintiff fails to plead that his alleged injuries are "traceable to the conduct he alleges [by naviHealth and Beacon] in the Amended Complaint." *See* R&R at 6–9. In his objections, Plaintiff again adduces new factual allegations—alleging that naviHealth and Beacon made "false statements" and "promises" to Plaintiff of permanent employment to entice him into accepting a job offer; and that Plaintiff's "bad financial situation" and the loss of his home and marriage are, again, attributable to naviHealth and Beacon's actions. Pl. Objs. at 9–11. As stated, new factual allegations "may not be deemed objections," *see Razzoli*, 2014 WL 2440771, at *5, and the Court again reviews this portion of the R&R for clear error only. Again, the Court finds no clear error in the R&R's conclusions. As the R&R correctly notes, in the Amended Complaint, Plaintiff alleges that he received an "unsolicited" communication from Beacon to work with naviHealth, and that he was "lured into accepting this new (misrepresented) job offer along with signing of a (misrepresented) agreement." R&R at 3– 4, 7 (citing Am. Compl. at 11–12). Plaintiff further alleges that the "new job was a scam." Am.

Compl. at 4. Even if the Court credits Plaintiff's new factual allegations that Beacon and naviHealth somehow tricked Plaintiff into signing the agreements at issue with the promise of permanent employment, the defect remains the same. There is no discernible causal connection between these actions, and Plaintiff's claimed injury—the misappropriation of his invention by his former employer, iCIMS. *See id.* at 7–9. For these reasons, Plaintiff cannot show that his injury is "fairly [] traceable to the challenged action of the defendant[s], " and has not established standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). Plaintiff's objections as to his claims against naviHealth and Beacon are, therefore, OVERRULED.

The Court has reviewed the remainder of the thorough and well-reasoned R&R and finds no clear error. Accordingly, Plaintiff's objections are OVERRULED, and the Court ADOPTS the R&R in its entirety.

Plaintiff seeks leave to file a second amended complaint, *see* Pl. Objs. at 11–13. "A *pro se* complaint should not be dismissed without the [c]ourt granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) (citation omitted). It is possible that Plaintiff may be able to cure some of the deficiencies outlined above in an amended pleading, particularly because he named Movants as defendants for the first time in filing the Amended Complaint, and has not had an opportunity to cure any pleading deficits as to the Movants. Accordingly, by July 27, 2022, Plaintiff shall file a motion for leave to amend the complaint,

returnable before Judge Gorenstein, and attaching his proposed second amended complaint as an exhibit to his motion. If Plaintiff fails to do so, his claims against Movants shall be dismissed with prejudice.

For the reasons stated above, Plaintiff's objections are OVERRULED and ADOPTS the R&R in its entirety. Movants' motions to dismiss Plaintiff's claims against them are GRANTED. By July 27, 2022, Plaintiff shall file any motion for leave to amend the complaint. Failure to do so shall result in the dismissal of Plaintiff's claims against Movants with prejudice. The Clerk of Court is directed to terminate the motions pending at ECF Nos. 104, 109, and 117, July 6, 2022, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE DISTRICT JUDGE IN CASE NO. 1:20-cv-04507 ON REPORT AND RECCOMENDATION OF THE MAGISTRATE JUDGE

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

June 13, 2022, Analisa Torres, District Judge,

The Court has reviewed Plaintiff's motion seeking to file an amended complaint, ECF No. 156. That motion is DENIED pending the Court's review of any objections filed to the Report and Recommendation (the "R&R") of the Honorable Gabriel W. Gorenstein, ECF No. 155. Further, the Court has reviewed Plaintiff's request for an extension of time to file objections to the R&R until August 12, 2022. ECF No. 159. That request is GRANTED in part and DENIED in part. Plaintiff has not shown good cause for requiring such an exceptionally long time to file objections; accordingly, Plaintiff must file any objections to the R&R no later than June 23, 2022. The Clerk of Court is directed to terminate the motion pending at ECF No. 156. So,

Ordered, June 13, 2022, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON SUMMARY JUDGEMENT

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

February 24, 2022, Gabriel W. Gorenstein, U.S. Magistrate Judge,

In setting up the schedule for the adjudication of the motions to dismiss (e.g., Docket ## 114, 121), the Court did not intend to allow any summary judgment briefing. The reason for this is because, before anything else can occur in this case, the Court must determine whether the existing complaint should be dismissed or not. Thus, plaintiff's motion for summary judgment (Docket # 136) is deemed withdrawn.

Plaintiff of course needs to file a memorandum of law that addresses the three pending motions to dismiss. The only document other than a memorandum of law that is permitted at this stage is any affidavit or other evidence that plaintiff wishes to offer to dispute solely the statements made in

paragraphs 2 through 10 of the Declaration of Megan Goggans Perry, filed Jan. 14, 2022 (Docket # 106), inasmuch as these appear to be the only contested facts outside the pleadings that any defendant has raised in their motions to dismiss.[1] Plaintiff is free to file an affidavit addressing any paragraph in the Perry declaration as long as he also files a memorandum of law.[2]

For purposes of filing his memorandum of law in opposition to the motion to dismiss, plaintiff is free to rely on his existing memorandum of law (Docket # 137) if he wishes. In fact, unless plaintiff states otherwise, the Court will assume that Docket # 137 constitutes his filing in opposition to the three motions to dismiss. If plaintiff wishes instead to file a new memorandum of law, he has leave to do so provided the new memorandum of law is filed by March 15, 2022.

Plaintiff is cautioned that if he files a new memorandum of law, it will replace, not supplement, any prior filings. Thus, if a new memorandum of law is filed, plaintiff must include all arguments he has in opposition to the motions to dismiss. Any reply to plaintiff's opposition is due by March 29, 2022. So, Ordered, February 24, 2022, New York, New York.

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[1] We note that some defendants have referenced exhibits filed by plaintiff with his Opposition to Motion to Compel Arbitration (Docket # 54). See, e.g., Memorandum of Law in Support of Navi Health's Partial Motion to Dismiss, filed Jan. 14, 2022 (Docket # 105), at 1-8, 12, 16. The Court does not view these facts, originally introduced by plaintiff, as being contested for purposes of the defendants' motions to dismiss.

[2] Plaintiff may also file an affidavit that complies with the Court's Order of January 25, 2022 (Docket # 125).

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON TAKING JUDICIAL NOTICE OF COURT FILINGS

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

February 07, 2022, Gabriel W. Gorenstein, U.S. Magistrate Judge,

This application and the application in Docket # 129 are denied. This request could only be made in relation to the pending motions to dismiss. However, whatever arguments or requests plaintiff has to make in opposition to the motions to dismiss, including any requests to take judicial notice, must be included in the memorandum (or memoranda) of law plaintiff will file in opposition to the motions, not in a separate filing. So, Ordered, February 07, 2022.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON SERVICE OF PROCESS

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

January 19, 2022, Gabriel W. Gorenstein, U.S. Magistrate Judge,

The applications for relief are denied. If plaintiff is seeking the USM-285 forms to verify that service was properly made, that is not necessary. None of the defendants has raised insufficient service of process as a defense under Fed. R. Civ. P. 12(b)(5) and they have therefore waived their ability to raise such a defense. If plaintiff is seeking the USM-285 forms to verify that defendants timely responded to the complaint, that too is unnecessary as the Court would not find that entry of default was appropriate against any defendant in light of the relatively short time frame between the filing of the amended complaint and the defendants' responses. See New York v. Green, 420 F.3d 99, 104 (2d Cir. 2005)

(expressing a "strong preference for resolving disputes on the merits" rather than by default). Finally, the Court was aware of plaintiff's opposition to the approval of the pro hac vice status of an attorney in this case and granted the application notwithstanding plaintiff's opposition.

As for the motion to dismiss filed by Vista Equity Partners, plaintiff's opposition to this motion shall be filed by February 15, 2022. Any reply by Vista Equity Partners shall be filed on or before March 1, 2022. So, Ordered, January 19, 2022.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON PLAINTIFFS MOTION TO STRIKE

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507 Case Filed: June 11, 2020

January 18, 2022, Gabriel W. Gorenstein, U.S. Magistrate Judge,

Plaintiff's motion to strike (Docket # 108) is denied. Fed. R. Civ. P. 12(f) provides for the striking of a "pleading" but a memorandum of law is not a pleading, see Fed. R. Civ. P. 7(a). The relief requested in Docket # 112 is denied as the Court has no authority to involve the U.S Attorney's Office or the United States in this matter.

Plaintiff expresses reasons in his motion to strike why the Navi Health Inc.'s motion (Docket ## 104, 105, 106, 107) should be denied. Any arguments plaintiff has in opposition to this motion shall be filed in a new document clearly identified as the plaintiff's opposition to the Navi Health Inc.'s motion. Plaintiff's opposition shall be filed on or before February 11,

2022. Any reply by Navi Health, Inc. shall be filed on or before February 25, 2022.

Separately, the Court notes that Beacon Hill Staffing Group has filed a motion to dismiss (Docket ## 109, 110). Plaintiff's opposition to this motion shall be filed by February 15, 2022. Any reply by Beacon Hill Staffing Group shall be filed on or before March 1, 2022. So, Ordered, January 18, 2022, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON PRE-MOTION CONFERENCE

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

January 04, 2022, Gabriel W. Gorenstein, U.S. Magistrate Judge,

As plaintiff correctly notes (Docket # 92), Judge Torres does not have a pre-motion conference requirement for motions in pro se cases. It is unclear when Beacon Hill's response to the complaint is due but the Court is prepared to accept that the date may appropriately be fixed at January 18, 2022. Accordingly, the defendant shall file its motion by January 18, 2022. The motion is returnable before Judge Torres and should comply with her Individual Rules of Practice in Pro Se Cases. So, Ordered, January 04, 2022.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON DEFAULT JUDGEMENT

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

December 22, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

Plaintiff has filed a motion that he entitles "motion for default judgment." (Docket # 86) In fact, no motion for a default judgment is permitted unless a party obtains a certificate of default. See Local Civil Rule 55.2(b)(1). We thus construe Docket # 86 as an application for a certificate of default under Local Civil Rule 55.1. While normally, we would refer such an application to the Clerk, that is unnecessary here inasmuch as the document allegedly showing default (Docket # 85) does not if fact show that any response to the Frist Amended Complaint is yet due. Rather, Docket # 85 shows only that Beacon Hill Staffing

Group acknowledged receipt of the summons and Frist Amended complaint on November 18, 2021.

When service is properly made under Fed. R. Civ. P. 4(d), the deadline to respond is 60 days from the time the request was sent. Fed. R. Civ. P. 4(d)(3). There is no information in the record as to when the request was sent and thus no default can be entered. The docket entry accompanying Docket # 85, indicating that the answer was due on December 9, 2021, is thus incorrect. Thus, any application for a certificate of default is denied.

The Clerk is directed to terminate the motion at Docket # 86. So, Ordered. December 22, 2021, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON THE JOINDER OF DEFENDANTS AND STAY ON DISCOVERY

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507 Case Filed: June 11, 2020

October 11, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

At the time the Court issued its order of September 17, 2021, it had not realized that the plaintiff had added three new defendants in the amended complaint. Accordingly, this Order is being issued arrange for service on these defendants. In order to avoid duplication of discovery efforts, discovery shall not proceed until all the defendants are served. Accordingly, discovery is stayed until further order of the Court. The parties should propose a new discovery schedule once all the defendants have answered the amended complaint. The Clerk is directed to issue summonses as to the three newly named defendants: Beacon Hill Staffing Group, Vista Equity Partners and Navi Health Inc., using the

addresses below. The Court extends the time to serve until 90 days after the date the summonses are issued. If the complaint is not served within that time, plaintiff should request an extension of time for service.

To allow plaintiff to effect service on defendants Colin Day, Courtney Dutter, and iCIMS, Inc., through the U.S. Marshals Service, the Clerk of Court is instructed to fill out a U.S. Marshals Service Process Receipt and Return form ("USM-285 form") for Beacon Hill Staffing Group, Vista Equity Partners and Navi Health Inc., using the addresses below. The Clerk of Court is further directed to deliver to the Marshals Service all the paperwork necessary for the Marshals Service to effect service upon Beacon Hill Staffing Group, Vista Equity Partners and Navi Health Inc. So, Ordered, October 11, 2021, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 DENYING DEFENDANTS MOTION TO COMPEL ARBITRATION

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

August 20, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

Pro se plaintiff Mahfooz Ahmad brings this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, New York State Human Rights Law, N.Y. Exec. Law §§ 290-97 and New York City Humans Rights Law, N.Y. City Admin. Code §§ 8-101 to -31 alleging his former employer, iCIMS Inc. ("iCIMS"), and two individual defendants, Colin Day and Courtney Dutter, discriminated against him because of his race, color, religion and national origin. Before the Court is defendants' motion to compel arbitration under the

Federal Arbitration Act ("FAA").[1] For the following reasons, defendants' motion is denied.[2]

I. BACKGROUND

A. Facts

Ahmad started working at iCIMS in February 2016. See Complaint, filed June 11, 2020 (Docket # 2), at *6[3] ("Comp."); Griffith Decl. ¶ 4; Letter from M. Ahmad, filed May 21, 2021 (Docket # 64). He began "as a Junior Project Specialist" but, according to Ahmad, his title changed twice "[d]ue to [his] great work performance." Comp. at *6. In January 2016, before his employment began, defendants informed Ahmad

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[1] Motion to Compel Arbitration, filed January 8, 2021 (Docket # 24) ("Def. Mot."); Declaration of Lisa M. Griffith in Support, filed January 8, 2021 (Docket # 24-1) ("Griffith Decl."); Memorandum of Law in Support, filed January 8, 2021 (Docket # 25) ("Def. Mem."); Opposition to Motion to Compel Arbitration, filed May 3, 2021 (Docket # 54) ("Pl. Opp."); Reply Memorandum of Law in Support, filed June 10, 2021 (Docket # 65) ("Def. Reply"); Affidavit of Douglas Kersten in Support, filed June 10, 2021 (Docket # 66); Affidavit of Brandon Sosnoskie in Support, filed June 10, 2021 (Docket # 67) ("Sosnoskie Aff."); Reply Memorandum of Law in Support, filed June 10, 2021 (Docket # 68); Sur-Reply in Opposition to Motion to Compel Arbitration, filed June 13, 2021 (Docket # 69) ("Pl. Sur-Reply"); Sur-Sur-Reply Memorandum of Law in Support, filed June 24, 2021 (Docket # 70).

[2] "District courts in this Circuit regularly have concluded that a motion to compel arbitration and stay litigation pending arbitration is non-dispositive and therefore within a Magistrate Judge's purview to decide without issuing a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b)." Chen-Oster v. Goldman, Sachs & Co., 449 F. Supp. 3d 216, 227 n.1 (S.D.N.Y. 2020) (collecting cases).

[3] *___ refers to pages assigned by the ECF system.

Appendix Part 3 (p 75a to p 112a)

that his acceptance of the offer of employment was contingent upon the "execution of the . . . Employee Confidentiality and Proprietary Rights Agreement." Exh. D of Griffith Decl. In December 2016 and May 2018, when his title at iCIMS changed, defendants sent emails to Ahmad similarly stating that acceptance of the offer for these new titles was contingent upon his execution of the Employee Confidentiality and Proprietary Rights Agreement (the "Confidentiality Agreement"). See Exh. A of Pl. Opp.; Exh. B of Pl. Opp. The Confidentiality Agreement, at least in its most recent form, contains an arbitration clause. See Exh. A of Griffith Decl. ¶ 11.3 ("Confidentiality Agreement").

In the defendants' view, "[t]he [Confidentiality] Agreement is part of the offer and acceptance process at iCIMS." Sosnoskie Aff. ¶ 6. According to defendants, Ahmad accepted the Confidentiality Agreement "by entering his internal credentials and clicking on a check box marked 'I ACCEPT.'" Id. ¶ 7. Ahmad denies ever receiving or signing the Confidentiality Agreement. See Declaration of Mahfooz Ahmad, annexed as Exh. 11 to Pl. Opp. ¶¶ 1-2; Pl. Opp. at 4.

According to Ahmad's complaint, notwithstanding his allegedly excellent work, "[w]hen it came to increasing [his] salary, nothing was done" and he was eventually given a "really low salary increase of mere [sic] few dollar per week." Comp. at *6. He was told that he was not getting a pay increase because others in the company had gotten one. Id. Ahmad points out that, at the time, the "majority of the employees [at iCIMS] were white people." Id.

In May 2018, Ahmad "submitted a business plan for a new business model to iCIMS CEO 'Colin Day.'" Comp. at *6. Five days after submitting this business plan, Ahmad was fired. Id. The explanation he was given for the firing was that he had "violated company policy." Id. Ahmad alleges that he did not in fact violate company policy and thus that his employer's contention otherwise was a "complete lie." Id. (emphasis omitted).

Ahmad alleges that, during his employment, he "was a victim of many instances of discrimination" including being "expected to work 60+ hours" per week "with no overtime pay," being the only person asked to work on weekends, that he was not "paid for work done on weekends," that multiple calls were scheduled during his "compulsory Friday prayer" timedespite "iCIMS management [being] aware that [he is] a Muslim," that Halal food was never ordered when food was ordered for employees, and that generally he was "given the worst . . .responsibilities on the lowest possible salary," despite receiving praise for his work. Comp. at *6-7.

At his termination, iCIMS offered Ahmad a severance payment but "[t]he money offered by iCIMS was nothing compared to the discrimination" he faced. Comp. at *7. Ahmad asserts that "[t]his complaint is only about the discrimination I faced during my employment with iCIMS and I think other employees of color are continuing to face due to their color, race, religious beliefs and ethnic background." Id.

In the section titled "Cause of Action," the complaint lists claims of employment discrimination under Title VII and other federal and state employment discrimination laws. Comp. at 3-4. It

lists no other claims. Under "Adverse Employment Action," Ahmad lists a number of adverse actions including the termination of his employment, failure to promote, unequal terms and conditions of employment, and "discrimination in job advertisement and paid me lower salary." Id. at 5. As the basis for his Title VII claim, he asserts that the defendants discriminated against him based on his race ("Asian"), color ("Brown"), religion ("Islam") and national origin ("Pakistani"). Id. at 3. In the summary of facts, Ahmad states that the defendants "performed no investigation of my complaint of discrimination on bases [sic] of color, race, religious beliefs and ethnic background." Id. at 5.

B. Procedural Background

Ahmad, proceeding pro se, filed the complaint in this action on June 11, 2020. See Comp. Although an attorney filed a notice of appearance on behalf of Ahmad on December 1, 2020 (Docket # 17), the attorney quickly withdrew (Docket # 22), and Ahmad resumed his pro se status.

Defendants filed the instant motion on January 8, 2021. Ahmad then filed a letter seeking an extension of time to respond to the motion and expedited discovery. See Letter from M. Ahmad, dated January 13, 2021 (Docket # 26). Ahmad made several discovery requests in this letter including requesting the metadata of his alleged signing of the Confidentiality Agreement. See id. ¶ 13. Defendants opposed this request, and sought "a stay of discovery pending the Court's determination on Defendants' Motion to Compel Arbitration." Letter Motion to Stay, filed January 19, 2021 (Docket # 28), at 1. On February 22, 2021, this Court granted defendants'

motion for a stay of discovery "except with respect to plaintiff's request for discovery regarding the metadata of the alleged acceptance of the confidential agreement." (Docket # 34 at 3) (punctuation omitted). A number of disputes ensued regarding the defendants' provision of the metadata (Docket ## 37-39, 42, 44-45, 51, 53). The Court ultimately ruled that defendants had satisfied their production obligation. See Order, filed May 7, 2021 (Docket # 57), at 2. The parties thereafter completed briefing on the motion to compel arbitration.

I. GOVERNING LAW

The FAA reflects "a strong federal policy favoring arbitration as an alternative means ofdispute resolution." Ross v. Am. Express Co., 547 F.3d 137, 142 (2d Cir. 2008) (punctuation omitted). Section 2 of the FAA provides in pertinent part:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Section 4 of the FAA permits a party to obtain from a federal district court "an order directing that [an] arbitration proceed in the manner provided for" in an arbitration agreement. 9 U.S.C. §

4. As the Second Circuit has held, "'[t]he Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (1988), requires the federal courts to enforce arbitration agreements, reflecting Congress' recognition that arbitration is to be encouraged as a means of reducing the costs and delays associated with litigation.'" Vera

v. Saks & Co., 335 F.3d 109, 116 (2d Cir. 2003) (quoting Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993)).

The Second Circuit has held that a court considering a motion to compel arbitration of a dispute first must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be no arbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending arbitration.

JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 169 (2d Cir. 2004). "[U]nder the FAA, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'" Id. at 171 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

When a motion to compel arbitration is brought, a "court applies a standard similar to that applicable for a motion for summary judgment," in that it must determine whether "there is an issue of fact as to the making of the agreement for arbitration ." Bensadoun v. Jobe-Riat, 316 F.3d 171, 175 (2d Cir. 2003). "If undisputed facts in the record required the issue of arbitrability to be resolved against the Plaintiff as a matter of law," the motion to compel arbitration must be granted. Id. If, however, the party opposing arbitration can show "there is an issue of

fact as to the making of the agreement for arbitration, then a trial is necessary." Id. (citing 9 U.S.C. § 4).

Because, as discussed below, we find defendants have not proven that the claims made in the complaint in this case are within the scope of the arbitration clause, it is unnecessary to reach any of the other issues raised.

III. DISCUSSION

A. Law Governing the Scope of Arbitration Clauses On the issue of scope, the Second Circuit has held:

To determine whether a particular dispute falls within the scope of an agreement's arbitration clause, a court should undertake a three-part inquiry. First, recognizing there is some range in the breadth of arbitration clauses, a court should classify the particular clause as either broad or narrow. See Mehler v. Terminix Int'l Co., 205 F.3d 44, 49 (2d Cir. 2000); Peerless Imps., Inc. v. Wine, Liquor & Distillery Workers Union Local One, 903 F.2d 924, 927 (2d Cir. 1990); McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co., 858 F.2d 825, 832 (2d Cir. 1988). Next, if reviewing a narrow clause, the court must determine whether the dispute is over an issue that "is on its face within the purview of the clause," or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. Rochdale Vill., Inc. v. Pub. Serv. Employees Union, 605 F.2d 1290, 1295 (2d Cir. 1979); see also Prudential Lines, Inc. v. Exxon Corp., 704 F.2d 59, 64 (2d Cir. 1983). Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. See Cornell Univ. v. UAW Local 2300, 942 F.2d 138, 140 (2d Cir. 1991). Where the arbitration

clause is broad, "there arises a presumption of arbitrability" and arbitration of even a collateral matter will be ordered if the claim alleged "implicates issues of contract construction or the parties' rights and obligations under it." Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 23 (2d Cir. 1995).

Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir 2001), cert. denied, 534 U.S. 1020 (2001).

Notwithstanding the presence of a "broad" arbitration clause, the Second Circuit has since made clear that the FAA's liberal policy in favor of arbitration is limited by the principle that "arbitration is a matter of consent, not coercion. Specifically, arbitration is a matter of contract, and therefore a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit." JLM Indus., 387 F.3d at 171 (alteration in original) (citations and internal quotation marks omitted). It is axiomatic that "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control." Stolt–Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 682, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (citations and internal quotation marks omitted). Holick v. Cellular Sales of New York, LLC, 802 F.3d 391, 395 (2d Cir. 2015).

Thus, the "presumption of arbitrability" that accompanies a broad arbitration clause must be viewed in this context. Emphasizing the importance of effectuating the parties' intentions, the

Second Circuit has noted in dicta, if an arbitration clause is best construed to express the parties' intent not to arbitrate certain disputes, that intent controls and cannot be overridden by the presumption of arbitrability. Granite Rock [Co. v. Int'l Broth. Of Teamsters], 561 U.S. [287,] 302, 130 S.Ct. 2847 [(2010)]; see also Allstate Ins. Co. v. Mun, 751 F.3d 94, 97 (2d Cir. 2014). The presumption is a soft one, and has effect "only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate . . . [is] best construed to encompass the dispute." Granite Rock, 561 U.S. at 303, 130 S.Ct. 2847 (emphasis added). The presumption may tip the scale if an agreement is truly ambiguous, see Allstate, 751 F.3d at 97, but it does not alter the controlling question: is the arbitration agreement "best construed to encompass the dispute"? Lloyd v. J.P. Morgan Chase & Co., 791 F.3d 265, 270 (2d Cir. 2015) (some alteration in original).

B. Analysis

In accordance with these directives, our task is to determine whether the arbitration clause reflects an intention to arbitrate the claims in Ahmad's complaint. "When considering whether claims fall within the scope of an arbitration clause, . . . we analyze the factual allegations made in the plaintiff's complaint." Holick, 802 F.3d at 395. As summarized previously, those allegations describe Ahmad's claim that, during the course of his employment, he was the victim of discrimination on the basis of race, color, religion and national origin in numerous ways, including his termination. Although the complaint

describes how, at the time of the termination, iCIMS asserted that the reason for his termination was that Ahmad had violated the Confidentiality Agreement, see Comp. at *6, Ahmad seeks no relief under that Agreement. Instead, the complaint adverts to the Confidentiality Agreement, which Ahmad refers to as the "company policy handbook," solely to make clear that Ahmad believes that iCIMS's claimed justification for his termination — that he violated the Confidentiality Agreement — was a "complete lie." Id. (emphasis omitted). In other words, Ahmad claims that defendants' invocation of the Confidentiality Agreement to justify his termination was pretextual.

Turning to the arbitration clause itself, we note that, unlike cases cited by defendants, the clause does not state that any claims arising out of Ahmad's "employment" would be subject to arbitration. See, e.g., E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 282 (2002) (cited in Def. Mem. at 11). This is also not a case where there was an "employment contract" that contained a provision providing for arbitration of disputes "arising under . . . this Agreement" (that is, under the employment contract). See Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 74 (2d Cir. 1998) (cited in Def. Mem. at 10). Instead, the arbitration clause appears in a document entitled "Employee Confidentiality & Propriety Rights Agreement." This Confidentiality Agreement is not an employment contract and indeed explicitly states as much. See Confidentiality Agreement ¶ 7 ("this Agreement is not a contract of employment"). Instead, the Confidentiality Agreement recites a series of duties and other obligations that are imposed on the employee. The main provisions are: (1) the employee

must keep company information confidential and not misuse it, id. ¶¶ 2.1, 2.2; (2) the employee must keep information belonging to prior employers confidential, id. ¶ 2.3; (3) the employee acknowledges that any work by the employee belongs to the company, id. ¶¶ 3.2, 3.3; (4) the employee must inform the company of the development of certain information, id. ¶ 3.6; (5) the employee must not take certain actions during his employment or for one year after leaving employment to interfere with the defendants' business, id. ¶ 5.1; and (6) the employee must not provide certain services to others during his employment, id. ¶ 5.3. There is also a provision entitled "Remedies" that gives only iCIMS (not the employee) the right to obtain certain forms of relief in any action to enforce the Confidentiality Agreement. See id. ¶ 8. The arbitration clause states that the parties agree to arbitrate "[a]ny dispute, controversy or claim arising out of or related to this Agreement or any breach of this Agreement." Id. ¶ 11.3

The question before us is therefore whether Ahmad's complaint of discrimination in employment "arise[s] out of" or is "related to" the Confidentiality Agreement. While these phrases are "broad" in relation to the Confidentiality Agreement, Ahmad makes no claims seeking to enforce any provision of the Confidentiality Agreement. More to the point, no reasonable person reading the arbitration clause in the Confidentiality Agreement could conclude that it was intended to cover claims of employment discrimination given that the obligations in the Agreement do not involve the overall terms and conditions of employment. Instead, the obligations involve specific enumerated conditions, largely

relating to confidentiality, that are placed on an employee's continued employment.

It appears defendants recognize the scope of the arbitration clause to some degree because they strain to characterize the complaint not as one involving employment discrimination at all, but rather as a suit about the Confidentiality Agreement. See Def. Mem. At 11; Def. Reply at 9-10. In essence, defendants contend that, because they claim to have fired Ahmad for breaching the Confidentiality Agreement, it follows that Ahmad's lawsuit "arises out of" or is "related to" the Confidentiality Agreement. See id.

We reject this argument. First, and most obviously, the argument ignores the fact that Ahmad does not complain merely about his termination but also complains about his treatment while he worked at iCIMS — alleging that he was the subject of discrimination during his employment in various ways. See Comp. at *6-7. Defendants do not even argue that Ahmad's complaints about employment discrimination during his employment before his termination come within the terms of the arbitration clause.

Second, with regard to the termination itself, Ahmad's complaint is fairly read to complain that his firing — including the reason given for his firing — was discriminatory inasmuch as he alleges that the complaint is "only" about the discrimination he was subjected to by iCIMS.[4] Comp. at *7. Notwithstanding

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[4] We believe the complaint is reasonably clear that Ahmad is asserting that his termination was the result of discrimination. For what it is worth, Ahmad has made this point unmistakable in papers filed in opposition to this motion. See Pl. Sur-Reply at6

defendants' suggestion to the contrary, see Def. Reply at 10 (plaintiff has brought a "wrongful termination claim sounding in breach of contract"); accord Def. Mem. at 11, Ahmad does not purport to assert a breach of contract claim in the complaint. Indeed, the Confidentiality Agreement was explicitly not an employment contract and provides no promise of continued employment. Thus, Ahmad could not bring a breach of contract claim under the Confidentiality Agreement to obtain a remedy for his termination.

Certainly, Ahmad cites to the Confidentiality Agreement in his complaint, but its only purpose is to assert that the claimed reason for his termination was "false," Comp. at *6, thus suggesting that iCIMS's reliance on the Confidentiality Agreement was a pretext for invidious employment discrimination. While the defendants' invocation of the Confidentiality Agreement will presumably figure in their defense, it is not the case that Ahmad's claim against iCIMS in any way "arises out of" or is "related to" this Agreement in any rational understanding of those terms. Contrary to defendants' assertion, Ahmad's complaint is not "premised around Plaintiff's. . . contention that he did not violate" the Confidentiality Agreement. Def. Mem. at 6. Instead, it is premised on his contention that the actions taken against him in the course of his employment, including his termination, were the result of invidious discrimination. It is iCIMS's planned defense, not

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(describing his "[w]rongful termination" complaint as "[b]iased actions towards plaintiff due to his race, religion, and ethnicity" and alleging that "a Caucasian worker would not be wrongfully terminated and harassed for his novel invention and have his invention illegally copied/stolen").

Ahmad's claim, that "arises out of" or is "related to" the Confidentiality Agreement.[5]

The Second Circuit has cautioned that, notwithstanding any ability to characterize an arbitration clause as "broad," it is the parties' "intention" that controls, Holick, 802 F.3d at 395, and thus in this case we must determine whether the arbitration clause is "best construed to encompass" plaintiff's employment discrimination complaint, Lloyd, 791 F.3d at 270 (emphasis omitted). Here, no such reading can be given to the arbitration clause.

V. CONCLUSION

For the foregoing reasons, defendants' motion to compel arbitration (Docket # 24) is denied. So, Ordered, August 20, 2021,New York, New York.

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[5] In making this determination we of course only address those claims made in the complaint, not any proposed amended complaint.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON AMENDING THE ORIGINAL COMPLAINT

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507 Case Filed: June 11, 2020

August 20, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

In an Opinion and Order issued today, this Court denied defendants' motion to compel arbitration (Docket # 24). Plaintiff's opposition to this motion mentions various claims not included in plaintiff's complaint and requests "that if the court believes that plaintiff complaint [sic] is not sufficient court [sic] should permit the pro se plaintiff to amend his complaint." (Docket # 54 at 19). While we make no determination regarding the sufficiency of the complaint, we note that plaintiff is not required to seek permission from the Court to file an amended complaint at this time. Under Rule 15(a) of the Federal Rules of Civil Procedure, a plaintiff may file an amended pleading within 21 days of the filing of a

"responsive pleading," or within 21 days of "service of a motion under Rule 12(b), (e), or (f), whichever is earlier. " Neither of these events has yet occurred, however. Defendants responded to the complaint only with a motion to compel arbitration. Such a motion is not a "pleading," see Fed. R. Civ. P. 7(a), and was not brought under Fed. R. Civ. P. 12 (see Docket # 24).

To ensure the orderly progress of this case, the Court directs that if plaintiff intends to file an amended complaint, he shall do so by September 10, 2021. If the amended complaint adds claims other than those of employment discrimination, defendants are free to make another motion to compel arbitration (returnable before the undersigned) if they wish. If plaintiff adds no new claims, however, they must either file an answer or a motion to dismiss (returnable before Judge Torres) within 21 days of the filing of any amended complaint.

If plaintiff does not intend to file an amended complaint, he shall file a letter by September 10, 2021, so stating. In such event, defendants shall file any answer or motion to dismiss (returnable before Judge Torres) with respect to the existing complaint within 21 days of the filing of the letter.[1]

If defendants seek to continue the stay of discovery, they shall file any such motion (returnable before the undersigned) at the time they file any motion to compel arbitration or motion to dismiss. Any motion

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[1] If defendants file an answer or a motion under Rule 12(b), (e), or (f) in response to any amended complaint (or the existing complaint), plaintiff will still be free to file an amended complaint without court order as long as he does so within 21 days of the defendants' filing.

to stay may incorporate by reference papers filed in support of any motion to dismiss or motion to compel arbitration. So, Ordered, August 20, 2021, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON APPOINTMENT OF COUNSEL FOR THE PRO SE PLAINTIFF

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

August 19, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

The pro se plaintiff in this matter has made an application for the Court to request counsel (see Docket # 71). Applying the factors set forth in Cooper v. A. Sargenti Co., 877 F.2d 170 (2d Cir. 1989), the Court denies the request on the ground that the application together with the other papers filed in this action do not at this time demonstrate that plaintiff's claim is likely to be of sufficient substance to warrant seeking volunteer counsel. In addition, the case is not of such a character that plaintiff will be unable to address relevant facts or deal with other issues that may be expected to be raised. The Court notes that attorney's fees are available for claims such as plaintiff's, thus providing readily available counsel in meritorious cases.

The Court will seek the appointment of counsel without further request by plaintiff if future review of this matter demonstrates that the appointment of counsel is warranted. So, Ordered, August 19, 2021, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON CONSIDERATION OF FILINGS FOR THE PURPOSES OF DECIDING THE MOTION TO COMPEL ARBITRATION

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

May 13, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

There have been a number of recent filings that reflect confusion as to which judge will decide the motion to compel arbitration (see Docket # 55-56, 58-61). Because this case was referred for "general pretrial" (Docket # 7), the motion to compel arbitration will be decided by the undersigned. See Chen-Oster v. Goldman, Sachs & Co., 449 F. Supp. 3d 216, 227 n.1 (S.D.N.Y. 2020) ("District courts in this Circuit regularly have concluded that a motion to compel arbitration and stay litigation pending arbitration is non-dispositive and therefore within a Magistrate Judge's purview to decide without issuing a report and

recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b)") (collecting cases).

Defendants have filed a motion to strike plaintiff's opposition to the motion to compel arbitration. See First Motion to Strike Document, dated May 5, 2021 (Docket # 55) ("Mot. To Strike"); Letter, filed May 9, 2021 (Docket # 58). The motion to strike was premised on the assumption that Judge Torres would be deciding the motion and thus that her page limits would apply. See Mot. to Strike at 1. Because the undersigned's Individual Practices (¶ 2.D) do not impose page limits, defendants' motion to strike (Docket # 55) is denied. That being said, the Court agrees that some of plaintiff's submission (Docket # 54) is completely irrelevant to the motion to compel arbitration. Obviously, defendant need not (and should not) respond to any arguments unrelated to that motion.

The defendants also seek an extension of time to respond to the opposition (Docket ## 55, 60), based at least in part on defendants' assertion that the opposition contains irrelevant information or argument. While defendants need not address anything in plaintiff's opposition that is not related to the motion to compel arbitration, the plaintiff has raised a number of factual disputes inasmuch as he has denied receiving or acceding to the agreement which contained the arbitration provision and provides a number of affidavits purporting to show as much. See, e.g., Docket # 54 at 4; Docket # 54-1 at 3, 51. Plaintiff has also submitted documentary evidence on this question. Defendants are permitted, and indeed are expected, to submit one or more sworn statements addressing this issue with their reply

papers – particularly given that the declaration already submitted (Declaration of Lisa M. Griffith, dated January 8, 2021) (Docket # 24-1) did not come from an individual with personal knowledge of some of the factual circumstances that allegedly show plaintiff's alleged agreement to arbitrate. In light of defendants' apparent need to supply factual materials in response to plaintiff's sworn denial, the Court will grant defendants' request for an extension of their time to make a reply submission until June 10, 2021.

Additionally, since defendants will be submitting one or more new affidavits in their reply, plaintiff is given leave to file a sur-reply to defendants' reply as long as (1) plaintiff's sur- reply addresses only matters that were raised for the first time in the defendants' reply and (2) plaintiff files the sur-reply by June 17, 2021. Defendants may file a sur-sur-reply in response to any newly-raised sur-reply arguments by June 24, 2021. These deadlines will not be extended.

Also, each side may make only one filing (or set of filings) on these dates. Filings shall not be spread among several dates.

As to plaintiff's Letter of Financial Hardship (Docket # 62), the Court has no power to affect charges incurred on his PACER account. Also, the fact that he was granted in forma pauperis status does not permit the Court to provide plaintiff a free PACER account. Accordingly, to the extent plaintiff seeks to have the undersigned order the Clerk of Court to pay the balance of plaintiff's PACER account, that request is denied. The Court is unaware if the disabling of the PACER account will affect plaintiff's ability to access new filings made available to him as a result of his

previous consent to electronic service. If it does, plaintiff should file a letter so stating and arrangements will be made either to mail Court orders to plaintiff or, possibly, to see if defendants' counsel can email such orders to plaintiff.

In any event, defendants should contact plaintiff by email when they file the papers required by this Order to ensure they have been received.

Finally, the Court reminds the parties that the only papers the Court will consider for purposes of deciding the motion to compel arbitration are the original motion papers filed January 8, 2021 (Docket ## 24, 25), plaintiff's May 3, 2021 filing (Docket # 54), and any future filings compliant with this Order. See Docket # 48. So, Ordered, May 13, 2021, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON THE DENIAL OF FURTHER DISCOVERY

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

May 7, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

Plaintiff filed this lawsuit on June 11, 2020, alleging employment discrimination.(Docket # 2). On January 8, 2021, defendants filed a motion to compel arbitration and, if arbitration were ordered, to either stay or dismiss the case. (Docket # 24). After plaintiff made a motion for expedited discovery, see Request for Extension of Time, dated January 12, 2021 (Docket # 26), defendants filed a motion to stay discovery pending the resolution of their motion to compel arbitration, see Letter Motion to Stay, dated January 19, 2021 (Docket # 28). On February 22, 2021, the Court granted defendants' motion to stay discovery pending the disposition of their motion to compel arbitration, except that it granted plaintiff's

motion to obtain discovery as to the metadata associated with plaintiff's alleged acceptance of the agreement that contained the arbitration clause. See Order, filed February 22, 2021 (Docket # 34) ("February 22 Order"). Plaintiff thereafter alleged that defendants had failed to comply with the February 22 Order. See Plaintiff's Memorandum of Law in Support to Dismiss Defendants' Request for Arbitration (Surrejoinder), dated March 10, 2021 (Docket # 37). This began a dispute over whether defendants complied with the Court's February 22 Order and resulted in several Orders issued regarding the production of the metadata (Docket ## 40, 43, 46).

The parties have now made multiple filings regarding defendants' production of the metadata (Docket ## 37-39, 42, 44-45, 51, 53) which have included arguments regarding whether the defendants' production is sufficient or necessary for it to prevail on its motion to compel arbitration. As the Court has explained, the only issue before the Court with regard to discovery is "whether defendants have provided to plaintiff whatever metadata is available to defendants on the acceptance issue and whether the metadata has been provided in the appropriate form." Order entered April 6, 2021 (Docket # 46) (emphasis omitted) ("Apr. 6 Order"), at 1.

Plaintiff now argues that defendants have "faile[ed] to produce responsive metadata." Letter dated April 22, 2021 (Docket # 51) ("Apr. 22 Let."), at *6.[1] He also suggests that defendants have objected to his

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[1] *__ refers to pages assigned by the ECF system.

discovery requests and are opposing the production of the metadata. See Apr. 22 Let. at *7-9.

For their part, defendants have consistently stated that they have produced the metadata available to them. (See Docket ## 38, 42, 45, 53). While plaintiff has communicated "11 points identifying . . . significant deficiencies in [defendants'] responses to the discovery requests," Apr. 22 Let. at *3, defendants have "explained to Plaintiff several times that he incorrectly believes that the form of metadata available for Microsoft Word documents exists for the" metadata at issue here, Letter at *1, dated April 28, 2021 (Docket # 53). Instead, the agreement at issue "exist[s] in a system-based program and therefore, the metadata for such electronic documents does not exist in the form that Plaintiff is demanding; it exists in the form that was produced to Plaintiff." Id. Defendants again explain that they "have fully and completely done everything possible to comply with" the Court's Orders "requiring Defendants to produce all metadata available to Defendants on the acceptance issue." Id.

We have carefully reviewed plaintiff's submissions. While plaintiff is certainly insistent that there must be unproduced metadata in defendants' possession, he simply does not supply competent evidence that would allow this Court to make that factual finding. As we have previously noted, "defendants can only supply the metadata actually available to them." Apr. 6 Order at 1. Thus, we cannot order the defendants to provide material that they do not have — or, more precisely, we cannot order the defendants to provide the material plaintiff seeks when we do not have a basis for making a factual

finding that they are withholding such material. Accordingly, plaintiff's request for further discovery is denied.[2] So, Ordered, May 7, 2021, New York, New York.

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[2] Plaintiff also mentions that defendants have "refused to respond to any. . . interrogatories," Apr. 22 Let. at *5. But the Court in its February 22 order intended only to order the production of the metadata, not to allow any other form of discovery. Discovery has otherwise been stayed.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON SUFFICIENT METADATA PROOF

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

April 06, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

With regard to the parties' recent filings (Docket ## 44, 45), both sides are making the same mistake. They are each conflating the issue of what is sufficient proof to show that plaintiff accepted the agreements with the issue of what defendants must produce in discovery. These are two separate questions.

The first issue – sufficient proof -- is not yet being considered by the Court. The only issue the parties should be discussing at this time is whether defendants have provided to plaintiff whatever metadata is available to defendants on the acceptance issue and whether the metadata has been provided in the appropriate form. The parties should not be discussing (or addressing to the Court at this time)

whether the defendants' metadata is sufficient or insufficient to show acceptance.

Defendants need to understand that they must supply all relevant metadata to plaintiff if it is available to them. Plaintiff needs to understand that defendants can only supply the metadata actually available to them. This should not be a complex issue. The parties are directed to re-read the Court's orders on this point (Docket ## 40, 43). It is simply unclear if these orders have been complied with.

It appears that defendants plan to obtain more information from their "IT department" tomorrow. See Docket # 45 at 3. It is unclear if plaintiff will be permitted to participate. In any event, the parties are directed to confer by telephone again. If there is a dispute as to the provision of the metadata, they shall each file a letter by April 14, 2021, explaining exactly what the dispute is. These letters shall make no reference to the sufficiency of proof. Also, the letters shall not attach any correspondence or emails between the parties.

The plaintiff's deadline to respond to the motion to compel arbitration is extended to April 28, 2021. While plaintiff has made a number of filings already that reflect his opposition, he must understand that none of them will be considered on the motion to compel arbitration. Instead, he should put all of his arguments opposing the motion to compel arbitration into a single filing.

Defendants may reply to plaintiff's opposition to the motion to compel arbitration within 14 days thereafter. So, Ordered, April 6, 2021, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON THE DISCOVERY OF METADATA RELATED TO A PURPORTED AGREEMENT

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

March 22, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

The Court is in receipt of the parties' filings regarding defendants' compliance with the Court's February 22, 2021 Order (Docket # 34). See Docket ## 37-39. Defendants are ordered to investigate the formats they can use to provide metadata. The parties are further ordered to confer by telephone on or before March 24, 2021, to attempt to resolve the dispute amongst themselves. The defendants are encouraged to have a person with technical expertise on the line during this conference. If the material cannot be provided in a format requested by plaintiff, defendants

must explain the reasons to plaintiff in detail. If the parties are unable to resolve the dispute, the parties shall write letters to the Court on or before March 26, 2021, explaining exactly what the issue is. The plaintiff's deadline to respond to the motion to compel arbitration is extended to April 9, 2021. Any reply is due 14 days later.

March 22, 2021, New York, New York

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON STAY OF DISCOVERY

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

February 22, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

Defendants have moved to compel arbitration and, if the arbitration is ordered, to either stay or dismiss the case. See Motion to Compel Arbitration, filed January 8, 2021 (Docket # 24). The plaintiff has moved for expedited discovery. See Request for Extension of Time, filed January 13, 2021 (Docket # 26) ("Pl. Let."). Defendants have opposed that request and also moved to stay any discovery pending the resolution of their motion to compel arbitration. See Letter Motion to Stay, filed January 19, 2021 (Docket # 28). Plaintiff responded to the defendants' motion to stay by arguing that he requires expedited discovery. See Plaintiff Reply in Support of Expedited Discovery,

filed February 12, 2021 (Docket # 33) ("Pl. Reply Let.").

We begin by addressing defendants' motion to stay discovery.

"[U]pon a showing of good cause a district court has considerable discretion to stay discovery pursuant to Fed. R. Civ. P. 26(c)." Hong Leong Fin. Ltd. (Singapore) v. Pinnacle Performance Ltd., 297 F.R.D. 69, 72 (S.D.N.Y. 2013) (citation and quotation marks omitted). In deciding whether good cause has been shown pending a dispositive motion, courts consider: "(1) the breadth of discovery sought, (2) any prejudice that would result, and (3) the strength of the motion." Id.; accord Al Thani v. Hanke, 2021 WL 23312, at *1 (S.D.N.Y. Jan. 4, 2021) (applying the three-part test as to a motion to stay pending arbitration).

These factors arguably should be evaluated differently where a motion to compel arbitration is involved rather than a motion to dismiss. As one court has noted:

When a dispositive motion would remove the litigation to another forum, good cause may require a stay. See Transunion Corp. v. PepsiCo, Inc., 811 F.2d 127, 130 (2d Cir. 1987) (upholding trial court's decision to stay discovery pending decision on forum non conveniens motion, because permitting discovery would defeat the purpose of the motion). Motivated by this same concern, courts in this Circuit have stayed discovery pending the resolution of a motion to compel arbitration without even investigating the three-part test cited above. . . . Citing . . . concern for judicial economy, many other courts have followed suit, one going so far as to observe that "the general practice of district courts," is to impose "a stay of discovery . . .

while the motion to compel arbitration [i]s pending." Intertec Contracting Turner Steiner Int'l, S.A., No. 98 CIV. 9116 (CSH), 2001 WL 812224, at *7 (S.D.N.Y. July 18, 2001) . . .

Dome Tech., LLC v. Golden Sands General Contractors, Inc., 2017 WL 11577923, at *1-2 (D. Conn. July 24, 2017); accord Stiener v. Apple Computer, Inc., 2007 WL 4219388, at *1 (N.D. Cal. Nov. 29, 2007) ("In the interests of conserving the resources of the parties, a short stay of . . . discovery pending the determination of the motion to compel arbitration is . . . prudent. Indeed, this is a common practice while motions to compel [arbitration] are pending.") (citations omitted); see also Ross v. Bank of America, N.A. (USA), 2006 WL 36909, at *1 (S.D.N.Y. Jan. 6, 2006) (granting a stay of discovery merely because there were "threshold issues concerning arbitration"). In other words, there is a strong case to be made that a motion to stay discovery pending a motion to compel arbitration — unlike a motion to stay discovery pending a motion to dismiss — should be granted absent compelling reasons to deny it.

It is not necessary to parse the proper standard further, however because the plaintiff has not countered defendants' arguments on the merits with respect to the effect of the arbitration provision. And having examined defendants' motion, it presents for the most part "substantial arguments for dismissal," which is sufficient to meet the first good cause factor. See Hong Leong Fin., 297 F.R.D. at 72 (citation and quotation marks omitted).

There is one aspect of the defendants' motion, however, that is directly challenged by plaintiff and, if factually true, would potentially defeat it. The

defendants' motion depends of course on its proffer of evidence showing that the plaintiff in fact agreed to arbitrate. Specifically, defendants assert that plaintiff agreed to an "Employee Confidentiality & Proprietary Rights Agreement" (the "Employee Confidentiality Agreement"), which contains an arbitration clause. See Memorandum of Law in Support of Motion to Compel Arbitration at 8-9, filed January 8, 2021 (Docket # 25). Defendants contend that plaintiff signed this Employee Confidentiality Agreement before he began work and three times during the course of his employment. Id. at 5. The defendants annex the most recent Employee Confidentiality Agreement, which shows that plaintiff signed it electronically. See Employee Confidentiality & Proprietary Rights Agreement, annexed as Exhibit A to Declaration of Lisa M. Griffith in Support of Defendants' Motion to Compel Arbitration, annexed to Notice of Motion ("Griffith Decl."). They also submit plaintiff's offer of employment, which states his offer was contingent on the "execution of the . . . Employee Confidentiality and Proprietary Rights Agreement prior to[his] [s]tart [d]ate[.]" Employment Agreement at 4, annexed as Exhibit D to Griffith Decl.

Plaintiff, however, argues that iCIMS falsified the "Confidentiality Agreement[,]" Pl. Reply Let. at 4, and used other companies to "illegally gain Plaintiff signatures on a misrepresented employment agreement[,]" id. at 3. He also states that the agreement was "never discussed and never provided [to] Plaintiff[.]" Id. at 6. Because the Employee Confidentiality Agreement is a critical underpinning of defendants' motion to compel arbitration, plaintiff's

contention that iCIMS falsified his electronic signature on the Employee Confidentiality Agreement potentially lessens the strength of their motion.

The remaining stay factors, the breadth of discovery and any prejudice that would result, weigh in favor of granting a stay. While plaintiff seeks wide-ranging discovery on the merits of the lawsuit, Pl. Let. at 2-4, the only discovery he seeks as to his agreement to arbitrate is narrow: specifically, the "[m]etadata of the alleged acceptance of [the] confidential agreement[.]" Pl. Let. at 3. It presumably will not be burdensome for defendants to respond to this discovery request and thus they can show no prejudice from being required to do so.

Accordingly, the pending motion for a stay of discovery (Docket # 28) is granted except with respect to plaintiff's request for discovery regarding the "[m]etadata of the alleged acceptance of [the] confidential agreement." Defendants shall respond to this request by March 9, 2021.

Plaintiff's motion to expedite discovery (Docket # 26) is otherwise denied as moot in light of the stay of discovery.

The deadline for plaintiff to file his opposition to the motion to compel arbitration is extended to March 23, 2021. Any reply shall be filed within 14 days after the filing of plaintiff's opposition. So, Ordered, February 22, 2021, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK DECISION OF THE MAGISTRATE JUDGE IN CASE NO. 1:20-cv-04507 ON DISCOVERY

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507 Case Filed: June 11, 2020

January 14, 2021, Gabriel W. Gorenstein, U.S. Magistrate Judge,

With regard to plaintiff's letter of January 12, 2021 (Docket # 26), the defendants are directed to respond to this letter by January 19, 2021. If defendants are seeking a stay of discovery pending the motion to compel arbitration, they shall file a letter on that date giving the basis for their motion. Plaintiff may respond to any such letter by January 22, 2021. So, Ordered, New York, New York.

UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT COURT OF NEW YORK ORDER OF REFERENCE TO A MAGISTRATE JUDGE CASE NO. 1:20-cv-04507

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 1:20-cv-04507

August 13, 2020, Analisa Torres, District Judge,

The above-entitled action is referred to the Honorable Gabriel W. Gorenstein for the following purposes: General Pretrial (includes scheduling, discovery, non-dispositive pretrial motions, and settlement). So, Ordered, New York, New York.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECISION ON THE CASE NO. 24-856

Mahfooz AHMAD,
Plaintiff-Appellant,

v.

Colin DAY, et al.,
Defendants-Appellees.

No. 24-856

August 05, 2024, Eunice C. Lee, Beth Robinson, Maria Araújo Kahn, Circuit Judges, Appellant, proceeding pro se, moves for a writ of habeas corpus, to hold the appeal in abeyance, for an injunction, for summary judgment, and to withdraw the habeas, abeyance, and summary judgment motions. Appellees, through counsel, move for imposition of a leave-to-file sanction against Appellant. Upon due consideration, it is hereby ORDERED that Appellant's motions are DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see Pillay v. INS*, 45 F.3d 14, 17 (2d Cir. 1995) (per curiam) (holding that this Court has "inherent authority" to dismiss a frivolous appeal). It is further ORDERED that Appellees' motion is DENIED. For the Court, Catherine O'Hagan Wolfe, Clerk of Court.