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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HAROLD BEELER J.S.C. Justice

PART 6 (BHB)

Mark Boss

- v -

American Express

INDEX NO. 127702/02

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED OCT 07 2003

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion to dismiss is granted, see annexed Order.

Dated: 9/29/03

HAROLD BEELER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

At IAS Part 9 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 29th of September, 2003.

PRESENT: **HON. HAROLD B. BEELER,**
Justice

MARK J. BOSS, ARDAN N. SCPIONE AND JOHN SCPIONE, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs,

-against-

AMERICAN EXPRESS FINANCIAL ADVISORS, INC. and **IDS** LIFE INSURANCE COMPANY,

Defendants.

INDEX NUMBER 127962/02
Motion Sequence 001 & 004
DECISION & ORDER

Defendant American Express Financial Advisors, Inc. ("AEFA") moves by MS001 to dismiss the complaint because this Court is an inconvenient forum, and because of the documentary evidence of employment agreements signed by plaintiffs, a release by one of the plaintiffs resulting from a prior action, and failure to state a cause of action. Defendant IDS Life Insurance Company **("IDS")** moves for identical relief by MS004. Plaintiffs oppose both motions on the same basis and they will be addressed together below.

Plaintiffs were and represent first-year financial advisors residing in New York State employed by AEFA from Fall 1996 through Spring 2000. AEFA succeeded IDS Financial Services Inc. **("IDS** Financial"), a subsidiary of IDS.

After one year, financial advisors entered into an independent contractor's agreement with **IDS** Life Insurance Company of New York, another IDS company. Plaintiffs were allegedly paid $2,000 monthly in the first year, $1,100 designated by defendants as basic salary (taxable earnings) and $900 as "expense allowance" (non-taxable) from which defendants deducted a large variety of items, such as share of office rent, share of office maintenance, telephone charges, postage fees, share of newsletters, share of office computer and copier equipment, wire transfer fees, business cards, and use of software support staff. Plaintiffs claimed defendants "often deducted such charges from the portion" of the compensation designated as salary. If, on the other hand, the monthly expenses were less than $900, the difference would be paid as taxable earnings.

Plaintiffs charged violation **of** NY Labor Law § 193 by deducting expenses from wages and 12 NYCRR § 195.1 by deducting expenses in excess of 10% of wages.

Defendants are Delaware corporations each with a principal place of business (home office) in Minneapolis, MN. First-year financial advisors attended 6-10 days training in Minnesota, toured the downtown Minneapolis AEFA branch, had frequent interactions by 800 telephone numbers with home office employees, submitted all requests for new client accounts and all transactions for approval to home office employees, and received training in the field by home office employees. All hiring was approved and employment paperwork stored in Minneapolis. All paychecks for first-year financial advisors were processed and issued in Minneapolis. Virtually all policies, procedures and guidelines were developed and enforced by home office employees. Most of the documents relevant to this case are stored or located in Minnesota. Most witnesses to AEFA's compensation practices live or work in Minnesota.

Additionally, each plaintiff signed an agreement with defendants. The **IDS** Personal Financial Planner's Agreement and the AEFA Personal Financial Planner's Agreement, essentially identical ("the Agreement"), expressly state at § VII(2):

> This Agreement is a Minnesota contract, governed by Minnesota law. All of the payments you make to AEFA are payable in Hennepin County, Minnesota. **You** expressly waive any privileges contrary to this provision. You agree to the jurisdiction of State of Minnesota courts for determining any controversy in connection with this Agreement.

New York courts routinely enforce mandatory forum selection clauses. ***Fidelity & Deposit Co. v. Altman,*** 209 AD2d 195 (1st Dep't 1994) ("Forum selection clauses are prima facie valid and will not be set aside except for fraud or overreaching or if enforcement would be ***so*** unreasonable and unjust as to make a trial in the selected forum 'so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court' [citation omitted]").

Plaintiffs argue that the language of the Agreement's forum selection clause **is** permissive not mandatory citing ***Cent. National-Gottesman, Inc. v. M.V. Gertrude Oldendor-,*** 204 F Supp 2d **675,678 (SDNY** 2002) ("For a forum selection clause to be deemed mandatory, jurisdiction and venue must be specified with mandatory or exclusive language").' Plaintiffs interpret the Agreement as inclusive of Minnesota courts, not necessarily exclusive of other

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'Examples of language held to be mandatory include: Di Ruocco ***v. Flamingo Beach Hotel & Casino, Znc.,*** 163 AD2d 270,271 (2d Dep't 1990) ("All claims against the company arising under this agreement shall be determined according to the laws of the Netherlands Antilles and of the Island of Bonaire and shall be adjudicated in the courts of Bonaire to the exclusion of all other courts"); ***Bell Constructors v. Evergreen Caissons, Inc.,*** 236 AD2d 859,860 ("This Agreement shall be construed in accordance with the Laws of the State of New York and shall be enforced only in the Courts of New York"); ***Micro Balanced Prods. Corp. v. Hlavin Indus.,*** 238 AD2d 284,285 (1st Dep't 1997) ("The courts of Tel-Aviv shall have jurisdiction over any matter arising from or concerning this agreement").

forums. If the language is ambiguous, they assert it "must be construed most strongly against the party who prepared it and favorably to a party who had no voice in the selection of its language." 67 ***Wall Street** Co. **v. Franklin Nat'l Bank,** **37** NY2d **245,249 (1975).**

This permissive theory of forum selection argued by plaintiffs is found in Federal cases, such as ***Cent. National-Gottesman, Inc. v. M.V. Gertrude Oldendorff, supra,*** not in New York cases. In ***Micro Balanced Prods. Corp. v. Hlavin Indus., supra,*** plaintiff argued that forum selection language must explicitly restrict jurisdiction to a foreign tribunal citing ***Boutari and Son v. Attiki Importers & Distribs.,*** **22** F3d **51** (2d Cir **1994),** a case the instant plaintiffs also rely on. The First Department rejected this argument and held: "Where, as here, the parties' designation of a forum for the resolution of disputes is apparent fiom the face of their agreement, they will be directed to litigate before the specified tribunal." ***Micro Balanced Prods. Corp. v. Hlavin Indus.,*** **238** AD2d at **285.**

Specifically, in a case involving **IDS** Financial and the exact same language at issue here, the First Department held:

> The parties in this case have provided that their employment agreement is governed by Minnesota law and have consented to the jurisdiction **of** its courts "for determining any controversy in connection with this agreement." This Court will not require a more explicit expression of consent to the jurisdiction of the courts of a particular State, especially where the law of the designated forum is exclusively applicable to the controversy.

***Koob v. IDS Fin. Servs.*, 213** AD2d **26, 33-34 (1st** Dep't **1995).**

The Agreement's forum selection language not only affirms Minnesota jurisdiction, it includes a waiver of any contrary privileges. No alternative is permitted.

There are no allegations of fraud or overreaching here; there is no evidence plaintiffs will be denied their day in court in Minnesota.

Plaintiffs request, even if the forum selection clause is found to be binding, that the Court keep the case for public policy reasons. They claim that this action is about New York residents earning wages in New York interpreted by New York wage statutes. This position is not supported by case law, however. Rather ***Finucane v. Interior Constr. Corp.***, 264 AD2d 618, 620-21 (1st Dep't 1999) states that "'resort to the public policy exception should be reserved for those foreign laws that are truly obnoxious' to the laws of our State" (quoting *Cooney v. Osgood* ***Mach., Inc.***, 81 NY2d 66, 79 (1993)). Plaintiffs make no argument that Minnesota's laws descend to such a level.

Accordingly, the Court grants defendants' motions to dismiss the complaint against them because of the parties' agreement to forum selection and does not reach the other issues raised in defendants' motions.

DATE: **September 29,2003**

ENTER:

HAROLD B. BEELER, J.S.C.

HAROLD BEELER
J.S.C.