Slavin v Metropolitan Life Ins. Co.
2021 NY Slip Op 31239(U)
April 6, 2021
Supreme Court, New York County
Docket Number: 656905/2017
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

---X

GARY SLAVIN, DENISE HORSFORD, and NANCY ESPOSITO, individually, and on behalf of all others similarly situated,

Plaintiffs,

- v -

METROPOLITAN LIFE INSURANCE COMPANY, METLIFE, INC., MSI FINANCIAL SERVICES, INC. (f/k/a METLIFE SECURITIES, INC.), and METLIFE GROUP, INC.,

Defendants.

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INDEX NO. 656905/2017

MOTION DATE 01/24/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 53, 54, and 55

were read on this motion for DISMISSAL.

Upon the foregoing documents, the motion of defendants Metropolitan Life Insurance Company ("MetLife") and MetLife Group, Inc. (together, "Defendants"), to dismiss the amended complaint is denied, in accord with the following memorandum.[1]

Background

This case is a putative class action for illegal wage deductions under New York Labor Law § 193 brought by plaintiffs Gary Slavin ("Slavin"), Denise Horsford ("Horsford"), and Nancy Esposito ("Esposito"), on behalf of themselves and all other individuals similarly situated (all together, "Plaintiffs") (amended comp ¶ 1).[2] MetLife is an insurance company that sells or

[1] The amended complaint was previously discontinued by stipulation as against defendants MetLife, Inc., and MSI Financial Services, Inc. (f/k/a MetLife Securities, Inc.) (NYSCEF Doc 34).

[2] Leave to amend the complaint was granted by an order dated December 12, 2028 (NYSCEF Doc 33).

previously sold individual life insurance policies, annuities, and other financial products through Financial Services Representatives ("FSRs") (*id.* ¶¶ 2-3; mem in support at 2). The three named Plaintiffs were all employed by Defendants as FSRs and Registered Representatives during the relevant time period (amended complaint ¶ 2). Defendants employed Slavin from 1994 through June or July 2016, Horsford from 2002 until December 2010, and Esposito from 2006 through June or July 2016 (*id.* ¶ 12-14). As pled in the amended complaint, the class includes "all FSRs employed by MetLife in the State of New York at any time between August 22, 2010 and the date when judgment is entered in this action" (amended complaint ¶ 58). Defendants represent that MetLife stopped employing FSRs in June 2016 and sold its retail life insurance business to MassMutual (mem in reply n 2).

Throughout their employment, Plaintiffs were compensated on a commission basis, with no guaranteed salary (amended complaint ¶ 4). Plaintiffs contend that they did not enter into any valid and enforceable compensation agreements with Defendants, but attached two documents that purport to be employment agreements between the parties to the amended complaint, the Financial Services Representative Statutory Employee Agent Agreement (the "FSR Agreement") and the Registered Representative/Investment Adviser Representative Agreement (the "Registered Rep Agreement") (amended complaint, exhibits A-B, NYSCEF Docs 36-37). Both the FSR Agreement and the Registered Rep Agreement indicate they are effective as of December 30, 2013 (*id.*, exhibit A at 8, exhibit B at 8). With respect to compensation, section 15 of the FSR Agreement states, in relevant part, as follows:

> **15. Compensation.**
>
> (a) The Company agrees to compensate Representative and Representative shall accept such payment in accordance with the provisions of the Company's Compensation Plans and Schedules applicable to Representative that are located in the MetLife *Via Compensation* database or at such other database to which the

> Company may designate in the future and to which Representative will be provided access, the terms of which are incorporated herein by reference. These Compensation Plans and Schedules, including the "When You Are No Longer Active" policy, may be issued, amended, modified or terminated by the Company through its authorized officers, and not a principal, manager or other agent of the Company in any of its firms or local offices, at any time, in its sole discretion. Notice of any changes to the Compensation Plans and Schedules may be provided in the form of a general communication delivered electronically or other forms of electronic notification. Any such payments will be subject to any deferred compensation arrangement between the Company and Representative.
>
> (b) By signing this Agreement, Representative acknowledges that he or she understands the Compensation Plans, including the Gross Dealer Concession Schedules and related documents, that they are located in the MetLife *Via Compensation* database or such other database to which Representative has access and that they include a detailed description of Representative's compensation and how it is calculated, earned and payable, Representative also acknowledges that he or she understands that the treatment of Representative's compensation in the event of his or her disability, leave of absence, retirement, and termination of their financial services representative relationship is set forth in the policy entitled 'When You Are No Longer Active", or any successor policies and that Representative has read the policy and understands it. Representative further understands and acknowledges that the complete details, terms and conditions relating to any Company pension or welfare benefits for which Representative may be eligible are contained in the applicable plan documents, summary plan descriptions, or other documents pertaining to those benefits, and the specific terms of those benefit plan documents will govern in every respect and instance.

(amended complaint, exhibit A §§ 15 (a-b); NYSCEF Doc 36.) The Registered Rep Agreement provides the following:

> **5. Compensation**
>
> **5.1** As full compensation for services performed and sales made by Independent Contractor hereunder, the Firm, or its authorized designee or payor as permitted by Regulatory Requirements, will pay compensation to Independent Contractor, subject to the conditions contained in this Agreement and Regulatory Requirements, in accordance with applicable compensation plans and schedules (the "MetLife Compensation Plans" and such compensation payable to Independent Contractor pursuant to this section of the Agreement is "Compensation"), which are incorporated herein by reference. The MetLife Compensation Plans may be substituted or revised by the Firm in its sole discretion through authorized officers of the Firm, and not a supervisory principal, manager or other independent contractor of the Firm in any of the Firm's detached office, branch office or Office of Supervisory Jurisdiction, from time to time and upon

> notice to Independent Contractor, which such notice may be in the form of a general communication delivered electronically or other forms of notification. Independent Contractor agrees that no Compensation is due until such time as the Firm is in receipt of any commission, concession, 12b-1 fee, investment advisory fee, trails, service fee, or any other compensation payment from the issuer, sponsor or distributor and that such payment is clear from any liens or restrictions. The Firm's obligation to pay any Compensation to Independent Contractor is limited solely to the proceeds of commissions, concessions, 12b-1 fees, investment advisory fees and any other funds received by the Firm in compliance with Regulatory Requirements, including FINRA (formerly "NASD") Notice to Members 81-12 and as set forth in the MetLife Compensation Plans. . . .
>
> **5.8** Independent Contractor agrees that all Compensation will be paid to Independent Contractor in accordance with Regulatory Requirements and the MetLife Compensation Plans, and as required by Regulatory Requirements, the Firm shall have final approval authority over all Compensation that Independent Contractor is eligible to receive. Independent Contractor further agrees to release the Firm from any obligation to pay Compensation payable under this Agreement to the extent that paying such Compensation would cause the Firm to violate Regulatory Requirements or any other applicable laws, rules, regulations, or regulatory guidance or ruling. Upon demand by the Firm, Independent Contractor shall promptly return to the Firm all Compensation received in violation of or contrary to any provision under this Section 5 of the Agreement.
>
> **5.9** Independent Contractor acknowledges and agrees that Compensation paid under this Agreement shall constitute payment in full for all services rendered to the Firm under this Agreement.

(amended compl, exhibit B §§ 5.1, 5.8-5.9; NYSCEF Doc 37.)

Plaintiffs also attached a third document to the amended complaint titled Established Financial Services Representative Compensation Plan (the "2013 Compensation Plan") (*id.*, exhibit C, NYSCEF Doc 38). Defendants represent that the 2013 Compensation Plan comprises part or all of the "Company's Compensation Plans and Schedules" referenced in the FSR Agreement and the "MetLife Compensation Plans" referenced in the Registered Rep Agreement. The 2013 Compensation Plan also indicates it is effective as of December 30, 2013 (*id.*, exhibit C at 2). The 2013 Compensation Plan provides an explanation of a formula utilized by Defendants to calculate FSR commissions (*id.*, exhibit C at 2-10). In relevant part, the formula

provides for the application of certain positive and negative "Account Credits" in the calculation of the FSR's gross compensation (*id.* at 3). The 2013 Compensation Plan provides the following regarding when the commission shall be paid:

> No portion of First-Year or renewal/service (including asset trail) GDC, 12b-1 fees, GDC on assets and fees, Persistency Credits, Add-Ons or any other credit, account or amount (whether stated as fees, commissions, GDC, Total GDC, credits, expense allowance or otherwise) is earned, vested or available for payment as a wage, earnings or otherwise until such amount has been received by the Company from the product issuer, distributor or sponsor and all adjustments are made and the full compensation calculation formula set forth in the Plan, including but not limited to any provisions related to replacements, lapses, fees, expenses, lifts, reversals, chargebacks, leaves or termination, or any adjustments necessary to correct errors, including but not limited to calculation errors and overpayments is completed to produce an FSR's gross compensation. After all adjustments under the Plan are made and the compensation calculation formula is complete, the gross compensation number is transferred to payroll so that all applicable and permissible tax, benefit and other authorized withholdings and deductions can be made. Compensation payments are made weekly provided that here is a positive balance in the FSR's Accounts.

(amended compl, exhibit C at 2-3). The 2013 Compensation Plan also contains a diagram that illustrates how adjustments are made in the calculation of the employee's gross compensation (*id.* at 3). The negative "Account Credits" includes, among others, negative adjustments for "certain lapsed or replaced policies, and assessments for Non-Standard Value of Services ('NSVOS')" (*id.*). A document titled "Value of Services Standards," effective December 30, 2013, submitted by Defendants as documentary evidence in support to the motion, provides a detailed explanation of the NSVOS, as follows:

> The Company will provide a standard level of services to Financial Services Representatives ("FSRs") that will include a base level of office space (up to 80 square feet), administrative support for new business, administrative/compliance services, basic technology support, telephone, copier and fax machine availability and training on new products and systems. This Standard Value of Services is not included in the calculation of gross compensation and represents the standard level of services which are provided to FSRs as part of the value proposition and to allow them to conduct business. FSRs will also be allowed to elect certain services, such as additional office space in excess of the standard level provided by MetLife, such

> as additional office space, for which they will be assessed credits under their compensation plan for Non-Standard Value of Services ("NSVOS") . . . .

(Lynch aff, exhibit A at 3.) The document itemizes what services are "standard" (i.e., not included in the calculation of gross compensation) and which are "non-standard" elections (are included in the calculation of gross compensation). Standard elections include, *inter alia*, up to 80 square feet of office space, support from the firm's administrative staff for new business, access to a company laptop, telephone, copier and fax, business cards and other stationary, and basic training and oversight in various categories (*id.*). Non-standard elections include, *inter alia*, office space greater than 80 square feet, special marketing support, oversight of non-standard activities, specialized software and electronic devices, and specialized training (*id.*). The Value of Standard Services document also provides that "[p]ersonal assistants retained by the FSR are the responsibility of the FSR [and] are required to be paid directly by the FSR to the vendor (e.g. Oasis)" and "Errors & Omissions (E&O) [insurance] premiums are dependent upon coverage levels chosen by the FSR each year and are assessed through the NSVOS" (*id.*).

Plaintiffs allege that the FSR Agreement, Registered Rep Agreement, and the 2013 Compensation Plan are invalid, unconscionable, or are otherwise not enforceable agreements, and, because there were no valid compensation agreements between the parties, the negative adjustments made to Plaintiffs' compensation were illegal wage deductions under New York Labor Law § 193 (amended complaint ¶ 5 ["MetLife FSRs did not enter into any valid compensation contracts or agreements with MetLife. As a result, MetLife illegally deducted a variety of business expenses and chargebacks from the compensation of MetLife FSRs"], ¶ 31 ["Thus, for lack of true agreement, the [FSR Agreement] and/or the [Registered Rep Agreement], along with the Compensation Plan, do not constitute a valid contract which legally permits the deductions that MetLife has taken from the wages of Plaintiffs and the Class"], ¶ 45

[“Because no valid agreement existed between Plaintiffs and MetLife, the deductions that MetLife made from Plaintiffs’ compensation constitute illegal deductions from wages in violation of New York Labor Law”]).[3] On this basis, the amended complaint interposes causes of action for violation of Labor Law § 193 for unlawful wage deductions to purchase work facilities from employer, violation of Labor Law §193 and 12 NYCRR § 142-2.10 (a) for unlawful wage deductions to reimburse employer’s business losses, violation of Labor Law § 193 (3) (a) for unlawful requirement to pay support Defendants’ support staff, and for unjust enrichment.

The first cause of action for violation of Labor Law § 193 alleges, in relevant part, that “MetLife, pursuant to a unilaterally established and illegal policy, made deductions from the wages due to Plaintiffs and members of the Sub-Classes, or required them to pay additional sums by separate transaction, for the facilities and services used by a Sub-Class member in the performance of his or her duties, such as office space, telephone service, computer support, services of assistants, and liability insurance” (amended complaint ¶ 72). The second cause of action for violation of Labor Law § 193 and 12 NYCRR § 142-2.10 (a) similarly alleges that “pursuant to a unilaterally-established and illegal policy, MetLife deducted from wages (or required separate payments) in order to reverse and charge back compensation already paid to Plaintiffs and other members of the Sub-Classes in various circumstances that resulted in reduced revenue to MetLife from the business written by the FSR,” and “refused to pay the wages due to a member of the Common Law Employee and Statutory Employee Deduction Sub-Classes until after it first applied those wages to liquidate the Sub-Class member’s purported

[3] Plaintiffs also allege that they were misclassified as independent contractors throughout the course of their employment. For the purpose of this motion only, Defendants do not oppose this position and contend that Plaintiffs’ “claims are legally unsustainable even if the Court assumes that they were employees” (mem in support, n 4).

indebtedness to MetLife for reversals and charge backs of prior compensation imposed to offset the Company's business losses" (*id.* ¶¶ 89-90). The third cause of action alleges that Defendants made illegal deductions to Plaintiffs' wages by requiring them to pay, through non-party Oasis Outsourcing ("Oasis"), the salary and benefit expenses for support staff known as Professional Marketing Assistants ("PMAs") who assisted the FSRs in their work at MetLife (*id.* ¶¶ 96-104). Finally, Plaintiffs allege a fourth cause of action for unjust enrichment (*id.* ¶¶ 105-109).

Defendants vehemently deny Plaintiffs' allegation that they did not enter into any valid employment agreements with Defendants and contend that the FSR Agreement and the Registered Rep Agreement are valid and enforceable agreements of employment, which incorporate the 2013 Compensation Plan by reference. By this pre-answer motion to dismiss, Defendants move to dismiss the complaint on the grounds that the alleged deductions complained of are permissible adjustments that are part of a formula-based compensation system of the type addressed by the Court of Appeals in *Pachter v Bernard Hodes Group, Inc* (10 NY3d 609 [2008]), and again affirmed by the First Department in *Gold v New York Life Ins. Co.*, 153 AD3d 216 [1st Dept 2017], *revd on other grounds Gold v New York Life Ins. Co.*, 32 NY3d 1009 [2018]). Defendants argue that because the FSR Agreement, Registered Rep Agreement, and the 2013 Compensation Plan provide for the deductions as part of the calculation of commission, the adjustments are permissible under *Pachter* and *Gold*.

In opposition to the motion, Plaintiffs argue that *Pachter* is not controlling because the plaintiff in that action "had the option of receiving a fixed salary but instead ***chose*** to be compensated on a commission basis," but the Plaintiffs did not have an option regarding compensation structure or the option to negotiate the terms of the agreements (mem in opp at 2 [emphasis original], *quoting Pachter*, 10 NY3d at 618). Plaintiffs also argue that the FSR

Agreement, the Registered Rep Agreement, and the 2013 Compensation Plan are not valid employment agreements because, *inter alia*, FSRs did not negotiate with Defendants regarding the terms thereof, the 2013 Compensation Plan is unsigned, the FSR Agreement and the Registered Rep Agreement indicate that the referenced compensation plans may be modified at any time at the employer's sole discretion, and because the agreements state that Plaintiffs are not entitled to earn commissions after they leave the employ of MetLife, who may make adjustments to commissions "at any time" (*id.* at 5-6).

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002][internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Dismissal under CPLR 3211 (a) (1) is warranted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "To be considered 'documentary' under CPLR 3211 (a) (1), evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1,* 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). In effect, "the paper's content must be 'essentially undeniable and . . . assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal citation omitted]). Affidavits and deposition testimony do not qualify as documentary evidence for the purposes of CPLR 3211 (a) (1) (*Lowenstern v Sherman Sq. Realty Corp*., 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc*., 84 AD3d 651, 651 [1st Dept 2011]), but judicial records, mortgages, deeds and contracts (*Fontanetta,* 73 AD3d at 84), and email and letter correspondence (*Kolchins v Evolution Mkts, Inc*., 31 NY3d 100, 106 [2008]) may be considered. "[W]here a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1)" (*Madison Equities, LLC v. Serbian Orthodox Cathedral of St. Sava*, 144 AD3d 431, 431 [1st Dept 2016], *citing 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

<u>Discussion</u>

A. Application of *Pachter* and Existence of Contracts

The payment of wages by employers is regulated by Article 6 of the New York Labor Law. Labor Law § 193 prohibits "any deduction from the wages of an employee" except under

certain circumstances enumerated in the statute (NYLL § 193 [a-b]). "Wages" are defined as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission, or other basis" (NYLL § 190 [1]). In *Pachter*, the Court of Appeals considered the certified question of when commissions are "earned" and therefore considered "wages" under Sections 191 and 193 of the Labor Law. The plaintiff in that action, Elaine Pachter, was employed as a vice-president for the defendant, Bernard Hodes Group, Inc. (10 NY3d at 613). Pachter's primary duties involved arranging for media advertisements for clients, and she was compensated on a commissioned basis whereby her commission earnings were calculated using a formula similar to the 2013 Compensation Plan at issue in this matter (*id.*). When a client was billed, Pachter's employer calculated her commission by deducting certain expenses from the amount billed to the client (*id.*). The deductions included finance charges assessed when Pachter did not receive payment from a client within 60 or 90 days, 50% of the cost of Pachter's assistant, 50-100% of losses caused when Pachter's clients refused or could not pay their bill, and Pachter's travel and entertainment expenses (*id.*, n 1).

The parties in *Pachter* did not have a written employment agreement, but the Court of Appeals held that "the evidence of the parties' extensive course of dealings for more than 11 years and the written monthly compensation statements issued by [the employer] and accepted by Pachter—provide[d] ample support for the conclusion that there was an implied contract under which the final computation of the commissions earned by Pachter depended on first making adjustments for nonpayments by customers and the cost of Pachter's assistant, as well as miscellaneous work-related expenses" (*id.* at 618). In considering whether the compensation scheme violated Labor Law § 193, the Court of Appeals adopted the reasoning of the federal

court in determining that the legality of this practice depended on "when Pachter's commission was 'earned' and became a 'wage' that was subject to the restrictions of section 193" (*id*.). "If the adjustments were made before the commissions were earned, section 193 did not prohibit them; but if the charges were subtracted after her commissions were earned, [the employer] engaged in impermissible practices under the statute" (*id.*). The Court of Appeals answered the certified question "by stating that, in the absence of a governing written instrument, when a commission is 'earned' and becomes a 'wage' for purposes of Labor Law article 6 is regulated by the parties' express or implied agreement; or, if no agreement exists, by the default common-law rule that ties the earning of a commission to the employee's production of a ready willing, and able purchaser of the services" (*id*.).

Relying on *Pachter*, Defendants move to dismiss the amended complaint on the grounds that the alleged deductions are permissible adjustments that are part of a formula-based compensation system that is outlined in the FSR Agreement, Registered Rep Agreement, and 2013 Compensation Plan, which govern the relationship between the parties. Plaintiffs oppose the motion and contend that the default common-law rule should apply because the purported agreements are not valid and enforceable (amended complaint ¶ 5; mem in opp at 3, NYSCEF Docs 35, 46). Under New York law, to establish the existence of an enforceable contract, a plaintiff must demonstrate the existence of an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (*Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). Here, the FSR Agreement and the Registered Rep Agreement set forth clear and definite terms of employment, and each agreement contains a provision that the Plaintiffs would be compensated in accordance with various compensation plans, which are incorporated into the FSR Agreement and the Registered Rep Agreement by reference (amended compl, exhibit A §§

15 (a-b) ["The Company agrees to compensate Representative and Representative shall accept such payment in accordance with the provisions of the Company's Compensation Plans and Schedules . . . ."]; exhibit B §§ 5.1, 5.8-5.9 ["As full compensation for services performed and sales made by Independent Contractor hereunder, the Firm . . . will pay compensation to Independent Contractor . . . in accordance with applicable compensation plans and schedules (the 'MetLife Compensation Plans' and such compensation payable to Independent Contractor pursuant to this section of the Agreement is 'Compensation'), which are incorporated herein by reference"], NYSCEF Docs 36-37). Plaintiffs concede they signed the FSR Agreement and the Registered Rep Agreement (amended complaint ¶ 28) and accepted compensation for the duration of their lengthy employment with Defendants.[4] These circumstances demonstrate the elements of a contract and, therefore, this court concludes that the FSR Agreement and the Registered Rep Agreement are valid, enforceable employment agreements.

The court is not persuaded by Plaintiffs' assertion that the lack of a "choice" to receive compensation on a non-commission basis distinguishes this case from *Pachter* or somehow renders the contracts "invalid." The Court of Appeals' holding in *Pachter* was not contingent on the existence of such a choice and Plaintiffs cite no case law that supports a finding that the lack thereof would render an employment contract invalid and unenforceable. The provisions of the agreements that reserve Plaintiffs' right to change the commission structure at any time similarly do not invalidate the agreements (*Cuervo v Opera Solutions LLC*, 87 AD3d 426, 426-427 [1st Dept 2011], *citing Pachter* and affirming a trial court determination that the reduction of plaintiff's commissions did not violate the contract or Labor Law §§ 191 and 193 because the employment agreement expressly reserved the employer's right to modify the commission

[4] Of the named Plaintiffs, Slavin was employed by Defendants for twenty-two years, Horsford was employed for eight years, and Esposito was employed for ten years.

structure at any time]). Under New York law, "[w]hen there is an at-will employment relationship, the employer may unilaterally alter the terms of employment, and the employee may end the employment if the new terms are unacceptable" (*Jennings v Huntington Crescent Club*, 120 AD3d 1394, 1394 [2d Dept 2014]).

Plaintiffs' assertions that the agreements are unenforceable because they "allow for deductions . . . to be made *after* wages are otherwise due" is unpersuasive because the Court of Appeals and the First Department upheld similar schemes that provided for deductions of certain amounts in subsequent pay periods in *Pachter* and *Gold* (*see Pachter*, 10 NY n 4 [Deductions to plaintiffs wages included finance charges assessed when Pachter did not receive payment from a client within 60 or 90 days and 50-100% of losses caused when Pachter's clients refused or could not pay their bill]; *Gold*, 153 AD3d at 226 [Deductions included annualized commission reversals and refunds of premium reversals]). Similarly, the agreements are not "illusory" because they do not provide for the payment of commissions after termination. Absent a contractual provision that provides for the payment of post-commissions, an at-will employee is not entitled to payment of commissions after his or her employment has ended (*Arbeeny v Kennedy Executive Search, Inc.*, 71 AD3d 177, 18 [1st Dept 2010]).

Finally, Plaintiffs have not pled sufficient facts to support a finding that either the FSR Agreement or the Registered Rep is unconscionable. To establish unconscionability, a party must show that "the contract was both procedurally and substantively unconscionable when made—*i.e.*, some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Ortegas v G4S Secure Solutions [USA] Inc.*, 156 AD3d 580, 580 [1st Dept. 2017] [internal quotation marks and citation omitted]). There is no evidence that Plaintiffs lacked any meaningful choice when

they signed the FSR Agreement and the Registered Rep Agreement. Plaintiffs were free to either accept the position and compensation terms or seek employment that utilized a different pay structure. Thus, it is the determination of this court that the FSR Agreement and the Registered Rep Agreement are valid and enforceable according to their terms.[5]

The Court of Appeals held in *Pachter* that where the parties agreed that "computation of commissions will include certain downward adjustments . . . the commission will not be deemed 'earned' or vested until computation of the agreed-upon formula" (10 NY3d at 617). The 2013 Compensation Plan specifically outlines, in detail, such a formula and provides that positive credits, "whether stated as fees, commissions, GDC, Total GDC, credits, expense allowance or otherwise . . . is earned, vested or available for payment as a wage, earnings or otherwise until such amount has been received by the Company from the product issuer, distributor or sponsor and all adjustments are made and the full compensation calculation formula set forth in the Plan" (*id.*). However, on this motion it is unclear whether the 2013 Compensation Plan represents the totality of the "Company's Compensation Plans and Schedules" referenced in the FSR Agreement or the "MetLife Compensation Plans" referenced in the Registered Rep Agreement, or whether Defendants are in possession of additional documents that comprise these plans and schedules. Plaintiffs' submission of a purported 2010 Compensation Plan and 2012 Compensation Plan in support of their motion suggests that additional documents may exist (NYSCEF Docs 44-45).

[5] Assuming *arguendo*, that the FSR Agreement, Registered Rep Agreement, and 2013 Compensation Plan were "invalid," as Plaintiffs assert, the Court of Appeals held in *Pachter* that "[t]he lack of a specific written contract is not determinative" where the record showed that Pachter was employed by the plaintiff for over eleven years, accepted commission payments according to the commission formula, and "understood the adjustments and acquiesced in them," thereby consenting to the compensation plan (10 NY3d at 618). If the contracts were unenforceable, there would be a question of fact whether there was an implied contract between the parties.

Additionally, on this pre-answer motion to dismiss, there is currently no evidence before the court regarding what negative adjustments or deductions MetLife *actually made* when calculating Plaintiffs compensation, *i.e.*, whether or not it faithfully applied the formula as set forth in the 2013 Compensation Plan. In particular, the nature of the Value of Services Standards scheme of deductions is not well suited to dismissal prior to discovery because questions of fact exist whether deductions for “office space, telephone service, computer support, services of assistants, and liability insurance” (amended complaint ¶ 72) were properly deductions for “non-standard” services or were improper deductions made for “standard” services. It is also unclear whether all reversals and charge-backs complained of in the second cause of action were encompassed in the FSR Agreement, Registered Rep Agreement, and 2013 Compensation Plan. With respect to PMAs, questions of fact exist regarding to what extent MetLife exercised control or authority over the PMAs and the terms of their employment and whether and to what extent Defendants benefitted from their work, which was paid for by the FSRs.

Finally, and perhaps most significantly, the FSR Agreement, Registered Rep Agreement, and 2013 Compensation Plan each indicate an effective date of December 30, 2013, but the putative class includes individuals employed by MetLife from August 22, 2010, until the present, or at least until 2016 MetLife purportedly ceased employing FSRs. Therefore, a question of fact also exists regarding what contracts, if any, were in effect prior to 2013 and whether the 2013 documents were later replaced by more recent agreements. Therefore, dismissal of the amended complaint is not appropriate because the documentary evidence before the court does not utterly refute all of Plaintiffs’ factual allegations and conclusively establish a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). For these reasons, the motion to dismiss is denied.

B. Unjust Enrichment

It is well established that a Plaintiff may not recover in unjust enrichment where a contract governs the subject matter (*Centennial El. Indus., Inc. v New York City Hous. Auth.*, 129 AD3d 449, 450 [1st Dept 2015] ["Plaintiff may not recover in *quantum merit* or unjust enrichment given that the contract governs the subject matter."]). Nevertheless, a cause of action for unjust enrichment may be maintained where a bona fide question exists regarding whether there was an agreement between the parties (*see Loheac v Children's Corner Learning Center*, 51 AD3d 476, 476 [1st Dept 2008]). Because there is no evidence currently before the court regarding whether there was a contractual agreement between the parties from August 22, 2010, through December 20, 2013, and regarding how long the FSR Agreement, Registered Rep Agreement, and 2013 Compensation Plan remained in effect, dismissal of the cause of action for unjust enrichment is not appropriate at this time.

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that Defendants shall file an answer to the amended complaint within 20 days of filing of this order; and it is further

ORDERED that within 30 days of Defendants' answer the parties shall submit a proposed preliminary conference order, in a form that substantially conforms with the court's form order located at https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-CD.pdf, to the court by email to the Clerk of this Part (Part 38) (rwoody@nycourts.gov).

This shall constitute the decision and order of the court.

ENTER:

4/6/2021
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**