UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of Arbitration between, **ALEXIS BERGER,** Petitioner, — and — **KARGO GLOBAL, INC.,** Respondent.	:	**CV-174288** **ECF CASE** **Petition for Confirmation of Arbitration Award Finding Gender Discrimination, Equal Pay Violation, Retaliation, Violation of Wage Law and Breach of Contract**

I. INTRODUCTION

Petitioner Alexis Berger seeks confirmation of the Arbitrator's award dated May 31, 2017 In The Matter of An Arbitration Between Alexis Berger (Claimant) and Kargo Global, Inc. (Respondent), American Arbitration Association Case No. 01-16-0002-1175) (the "Award"). A true and correct copy of the Award is attached as Exhibit A to the Declaration of Seth Rafkin, undersigned counsel for Ms. Berger, submitted herewith. The Award was rendered by the duly appointed Arbitrator, the Honorable Billie Colombaro (ret.) (the "Arbitrator"), with the consent of the parties. The Award represents a full determination of all claims and counterclaims submitted to arbitration by Petitioner and Respondent.

The Court has authority to confirm this arbitration award pursuant to the Federal Arbitration Act, 9 U.S.C. § 9. As set forth below, this Court has independent jurisdiction over the parties and this matter; the parties agreed to litigate their claims through arbitration; the parties did

in fact arbitrate; the arbitrator issued an award in Petitioner's favor; and the parties agreed that "judgment upon the award may be entered in any court having jurisdiction thereof." Rafkin Decl. Ex. B § 8.12.

Confirmation of the Award is proper in this case. "Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *E.g. Rai v. Barclays Capital Inc.*, 739 F.Supp.2d 364, 370 (S.D.N.Y. 2010), *citing Willemijn Houdstermaatschappij, BV v. Standard Microsystems*, 103 F.3d 9, 12 (2d Cir.1997); *see also, Local 1199, Drug, Hosp. & Health Care Employees Union v. Brooks Drug Co*., 956 F.2d 22, 24 (2d Cir.1992) ("*Local 1199*").

Indeed, so strong is the public policy interest in confirming arbitration awards, the Court of Appeals for the Second Circuit "adhere[s] firmly to the proposition ... that an arbitration award should be enforced, despite a court's disagreement with it on the merits, if there is a '*barely colorable justification for the outcome reached.*'" *Landy Michaels Realty Corp. v. Local 32B-32J*, 954 F.2d 794, 797 (2d Cir.1992); *see also, Local 1199*, 956 F.2d at 25 ("[T]he court is forbidden to substitute its own interpretation even if convinced that the arbitrator's interpretation was not only wrong, but plainly wrong.") (Internal quotations omitted).

There is no doubt that the Award here far exceeds this standard. As demonstrated herein, the Arbitrator was duly appointed by the American Arbitration Association ("AAA") with the parties' consent. The Arbitrator provided ample discovery, an extended evidentiary hearing, extensive post-hearing briefing followed by extensive oral argument. The Arbitrator applied the law to the facts and rendered her award against Kargo accordingly.

As the Award reflects, Petitioner was a highly compensated employee of Respondent Kargo Global, Inc. ("Kargo"), earning in excess of $1,000,000 per year in salary plus commissions

prior to her unlawful termination. She also held an equity interest worth nearly $9,000,000 in the company she helped build into a powerhouse with annual revenues in excess of $125,000,000.

The damages provided for in the Award are the consequence of a lengthy, manipulative, intentional and despicable course of conduct engaged in by Kargo and its highest-level officers, including, its President and Chief Operating Officer, Ryan McConville, its Chief Strategy Officer Doug Rohrer, its Vice President of Human Resources, Joy Sybesma, and its majority shareholder and Chief Executive Officer Harry Kargman.

Practically, it was a campaign designed to break a woman financially, emotionally and, in the process, try to claw back for itself (to the direct benefit of three highest-level officers) the substantial equity interest Petitioner had earned over the course of four years of hard work. Hard work that Kargo repeatedly acknowledged was responsible for building its sales force and bringing in $80 million dollars in annual revenue to Kargo's coffers.

Legally, it was a campaign of gender discrimination, retaliation, violation of equal pay and wage laws. The Arbitrator, an experienced jurist, summed up her findings as follows:

> "The evidence is overwhelming that Kargo violated Title VII, NYHRL, and NYCHRL. Additionally, Kargo breached its implied obligation to act in good faith and fair dealing in the Employment Agreement by manufacturing reasons to label her termination as a "for cause" termination. The evidence exposed that Kargo labored under a double standard, treating Ms. Berger differently from its male managers, who were never even written up, reprimanded, or disciplined in any way for similar or worse behaviors it used to discredit her. They criticized behavior from her that they would accept from a man to run her out of the company. It is clear from Kargo's actions and collective attitude that a woman is not permitted to act like a man."

Award, pp., 42-43

The Award also makes clear, Kargo's reprehensible conduct did not stop with the onset of litigation. Instead, Kargo doubled down. As the Arbitrator found:

- Kargo intentionally withheld documents responsive to the most basic discovery requests. Award, pp. 36-37.

- It refused to answer the most straightforward of interrogatories, despite two orders from the Arbitrator to do so. Award, pp. 34-35.

- Its in-house counsel misrepresented himself as having represented witnesses he finally admitted under oath that he never did as part of an attempt to prevent inquiry into his four-hour deposition "prep" sessions with key Kargo witnesses. Award, p. 34.

- Kargo even went so far as to seek to prevent a third-party witness from testifying by first telling her that she was not allowed to testify because of her separation agreement with Kargo and then within hours of the Arbitrator issuing a subpoena to appear at the hearing, warning the witness that service of a subpoena would be attempted. Award, pp. 37-39.

- Kargo and its counsel repeatedly represented to the Arbitrator that this witness "wanted nothing to do with the case." But when her appearance was finally secured by the subpoena, she testified that, in fact, she did want to testify but was led to believe by Kargo, including its head of Human Resources and its counsel, that she would be in breach of her separation agreement with Kargo if she did. Award, p. 39.

The damages awarded, $40,925,284.20, are the product of straightforward application of the law. As noted, Petitioner was a very high wage earner and held an equity stake valued at nearly $9,000,000. (A valuation made by Respondent's own retained consultant.) Under the applicable statutes, the Arbitrator was required to impose liquidated damages for equal pay violations (up to 300%). That statutory mandate combined with the value of the equity itself alone resulted in damages of more than $36,000,000. The remaining portion of the Award is composed primarily of $305,000 in earned but unpaid commissions and an equal amount under the liquidated damages provision of New York's Labor Law, an award of back pay and front pay under federal and state law, and awards for punitive damages ($300,000) and emotional distress ($60,000).

Kargo insisted on arbitration. It drafted the agreement containing the arbitration provision. That provision states: "The parties agree that any award rendered by the arbitrator *shall be final and binding*, and that judgment upon the award may be entered in any court having jurisdiction thereof." Rafkin Decl. Ex. B (emphasis added). Kargo has had the arbitration it insisted upon. It

was permitted extensive discovery, an extended arbitration hearing, extensive post-hearing briefing and oral argument. The Award was rendered by the Arbitrator duly appointed pursuant to the AAA procedure Kargo designated in its arbitration provision and in concert with the applicable law.

In short, the Federal Arbitration Act requires that the Award be confirmed.

II. THE COURT HAS JURISDICTION AND VENUE IS APPROPRIATE

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1367 (supplemental jurisdiction). Petitioner alleged, and at arbitration established, gender discrimination and retaliation claims in violation of, among other laws, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e) and equal pay violations pursuant to the Equal Pay Act of 1963 (29 U.S.C. § 206(d)) and Title VII. Award, pp. 13 – 14, 42 – 54, 59. Because the claims underlying the arbitration arise under federal law and could have been originally brought in a federal court (absent the arbitration clause), this Court has federal question jurisdiction over this petition. *See generally*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). The Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Petitioner's gender discrimination, retaliation and equal pay claims brought under New York law, as well as Petitioner's breach of contract and breach of the covenant of good faith and fair dealing claims, as all of these claims arise out of the same set of facts as the federal claims. In particular, the state law claims arise out of Respondent's campaign to push Petitioner out of her job and subsequent termination and treatment of her and her compensation. Award, pp. 13 – 14, 42 – 54, 59, 60 – 62.

Alternatively, diversity jurisdiction exists pursuant to 28 U.S.C. § 1331 because Petitioner and Respondent are citizens of different states and the amount in controversy exceeds $75,000. Petitioner was at the time the arbitration demand was filed, and at the time of the filing of this

Petition is, a citizen of the State of Illinois. Rafkin Decl. ¶ 1. Respondent is incorporated under the laws of Delaware and maintains its headquarters and principal place of business in New York City. Rafkin Decl. Ex. ¶ 11, Ex. G. Petitioner seeks to confirm an arbitration award well in excess of $75,000. Award, pp. 82-83. Accordingly, diversity jurisdiction exists.

Venue is proper and personal jurisdiction exists because Respondent agreed to arbitrate in New York City. Rafkin Decl. Ex. B § 8.12; *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 983 (2d Cir. 1996) ("A party who agrees to arbitrate in a particular jurisdiction consents not only to personal jurisdiction but also to venue of the courts within that jurisdiction."). Independently, venue is also proper because the Award was rendered in New York City, and pursuant to 28 U.S.C. § 1391(b) because Respondent, the sole defendant, is headquartered in New York City and a substantial part of the events giving rise to the Award occurred in New York City. Rafkin Decl. Ex. ¶ 11, Ex. G.; *see Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 197-204 (2000).

The Court is authorized to confirm this arbitration Award pursuant to the Federal Arbitration Act 9 U.S.C. § 9. Section 9 provides that a "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award." 9 U.S.C. § 9.

Here, Petitioner and Respondent are parties to an Employment Agreement containing an agreement to arbitrate. The Employment Agreement provides in pertinent part:

> 8.12 The parties agree that, except as discussed in this Agreement, any controversy, claim or dispute arising out of or relating to this agreement or the breach thereof, or arising out of or relating to the employment of the Employee, or the termination thereof, including any statutory or common law claims under federal, state or local law, including all laws prohibiting discrimination in the workplace, shall be resolved by arbitration before a single arbitrator in New York City, New York, in

> accordance with the Employment Dispute Resolution Rules of the American Arbitration Association. The parties agree that any award rendered by the arbitrator shall be final and binding and that judgment upon the award may be entered in any court having jurisdiction thereof.

Rafkin Decl. Ex. B.

The parties indeed arbitrated their claims in a seven-day hearing held in New York City. Rafkin Decl. ¶ 7. Thereafter, the Arbitrator issued the Award. Rafkin Decl. Ex. A. Further, the parties agreed that any award "shall be final and binding and that judgment upon the award may be entered in any court having jurisdiction thereof." *Id.* Ex. B. The parties also expressly incorporated the rules of the AAA into their arbitration agreement, which provide that judgment may be entered in any court having jurisdiction thereof. *See* American Arbitration Association, Employment Arbitration Rules and Mediation Procedures R-42(c) (July 1, 2016). As set forth above, this Court has jurisdiction over the parties and this controversy and may confirm the award and enter judgment. 9 U.S.C. § 9; *Dev. Specialists, Inc. v. Li (In re Coudert Bros.)*, 2017 BL 156345, 4- 5 (S.D.N.Y. May 09, 2017).

III. STANDARD OF REVIEW

The review of arbitration awards is governed by the Federal Arbitration Act. *See Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 201 (2d Cir.1998), *cert. denied*, 526 U.S. 1034 (1999). Pursuant to 9 U.S.C. § 9, any party to an arbitration may apply to a federal court for an order confirming the award resulting from the arbitration. The court "must grant ... an order [confirming the arbitration award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9; *see First Interregional Equity Corp. v. Haughton*, 842 F.Supp. 105, 108 (S.D.N.Y. 1994).

"Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive

litigation." *Rai*, 739 F.Supp.2d at 370, *citing Willemijn Houdstermaatschappij, BV*, 103 F.3d at 12; *see also, Local 1199*, 956 F.2d at 24.

Understandably, determinations of fact may not be revisited. *Wallace v. Buttar*, 378 F.3d 182, 193 (2d. Cir. 2004); *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 213 (2002); *accord ConnTech Dev. Co. v. University of Conn. Educ. Props., Inc.*, 102 F.3d 677, 687 (2d Cir.1996) ("holding that an erroneous factual determination is not a ground for vacating an arbitration award").

Indeed, so strong is the public policy interest in confirming arbitration awards, the Court of Appeals for the Second Circuit "adhere[s] firmly to the proposition ... that an arbitration award should be enforced, despite a court's disagreement with it on the merits, if there is a '*barely colorable justification for the outcome reached.*'" *Landy Michaels Realty Corp.*, 954 F.2d at 797 (citation omitted); *see also Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 516 (2d Cir.1991); *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir.1988).

There is no question that the Arbitrator's 83-page award detailing her determinations of fact, law and damages easily satisfies this standard.

IV. THE AWARD SHOULD BE CONFIRMED

A. The Arbitrator Was Duly Appointed

As prescribed by Kargo's arbitration provision, the Arbitrator was appointed pursuant to AAA's appointment process. The Arbitrator, Hon. Billie Colombaro (ret.), was among the list of potential arbitrators submitted to both parties. Each side had the opportunity to strike names from the list. Neither side struck Judge Colombaro and she was duly appointed by AAA. Rafkin Decl. ¶ 4, Ex. C.

B. The Arbitrator Permitted Full Discovery and Dispositve Motions

On August 1, 2016, the Arbitrator held an Arbitration Management Conference and by agreement of the parties and direction of the Arbitrator, a Scheduling Order of the same date issued. The Scheduling Order permitted each side to avail itself of document requests, interrogatories and depositions. The Scheduling Order also permitted each side to bring dispositive, in limine or other motions. Rafkin Decl. ¶ 5, Ex. D. The Scheduling Order also set an evidentiary hearing date of December 1, 2016. Kargo was also offered the opportunity to have a court reporter present for the arbitration hearing. It declined to do so. Rafkin Decl. ¶ 6.

Both Kargo and Ms. Berger availed themselves of all forms of permitted discovery. Kargo did not submit any dispositive or in limine motions. *Id.*

C. The Arbitrator Extended the Hearing to Allow for All Evidence to Be Presented and Allowed Kargo To Present Witnesses by Phone and Video

The Scheduling Order set a five-day evidentiary hearing to take place in New York City. After the hearing commenced, the Arbitrator extended the hearing for an additional two days to enable Kargo to put on all evidence it wished to offer. Rafkin Decl. ¶ 7. The Arbitrator also allowed Kargo to present witnesses via video and/or telephone. Scheduling Order ¶ 11; Award p. 68.

D. The Arbitrator Issued Subpoenas During the Hearing to Ensure Appearance of Witnesses for Both Sides

After the evidentiary hearing commenced, the Arbitrator issued two subpoenas. One was to assist Kargo in securing the appearance of a witness it wished to offer in support of its counter-claims. The other subpoena was issued to enable Ms. Berger to secure the appearance of a witness in support of her claims. Award, p. 38.

E. The Arbitrator Allowed for Extensive Post-Hearing Briefing

The Arbitrator directed the parties to provide post-hearing briefing, which Kargo had requested. The Arbitrator permitted the parties to agree upon a schedule and set no limits on the length or extent of such briefing. The evidentiary hearing concluded on December 13, 2016. The post-hearing briefing schedule allowed Kargo through and including February 13, 2017 to complete its post-trial briefing. Kargo's post-hearing briefing (excluding exhibits) totaled approximately 130 pages. Rafkin Decl. ¶ 9.

F. The Arbitrator Held Extensive Oral Argument Following the Post-Hearing Briefing

Following submission of the post-hearing brief, the Arbitrator then held a two-hour oral argument on March 29, 2017. Rafkin Decl. ¶ 10, Ex. F.

G. The Arbitrator's Award Is Thorough in Its Analysis of Both Law and Fact and Detailed in Its Findings

The 83-page Award rendered by Judge Colombaro, an experienced jurist, obviously exceeds by leaps and bounds the standard that "an arbitration award should be enforced … if there is a 'barely colorable justification for the outcome reached.'" *Landy Michaels Realty Corp.*, 954 F.2d at 797. The Award carefully analyzes the law and the evidence. Judge Colombaro provides equally detailed analysis and foundation for the damages awarded.

The Award is replete with evidentiary findings supporting Ms. Berger's claims, including gender discrimination and equal pay violations:

- "Obviously, being a 'pitbull' – having a 'personality trait of aggressiveness' – was, not only, considered to be a positive approach and an expectation, it was also part of Kargo's culture for men. Ms. Berger was the only one faulted for it." Award, p. 21.

- "The use of profanity and inappropriately suggestive language was no less part of the men's culture at Kargo than was politically incorrect and potentially offensive language. Their use of profane and inappropriately suggestive language was prolific – the lead coming from the top – starting with Kargo's founder and CEO,

Mr. Kargman, and continuing throughout the company. No one found it a problem, except when Ms. Berger used it – more evidence of a double standard." Award, p. 23-24.

- "Examples are too numerous. Just a few come from Mr. Kargman. In [an] advertisement, he had placed on the cover of a major advertising magazine – 'Advertising Age' a picture of a used condom wrapper having Kargo's name on it…. Another example involves a video he filmed for a national sales conference. Essentially, he promised employees that if they met their goals, he would 'shave his balls.' Ultimately, this comment was not used because *Ms. Berger* advised against it." … Mr. Kargman admitted that his language is so bad he is now paying a coach to help him 'kick the habit.'" … These are the three leaders of the company, using the same type of language and 'humor' for which they fault Ms. Berger." Award, p. 23-24.

- "Kargo witnesses … admitted that Mr. McConville [Kargo's President and Chief Operating Officer, Ryan McConville] is, essentially, 'hostile' in his communications: 'hot headed,' 'testy,' 'impatient,' has a 'temper' and 'shuts down' when angry or his ideas are challenged. Notwithstanding, these emotional erratic behaviors were acceptable. … even though it has a detrimental effect on the process, on the other employees and their ability to express opposing views. Yet, he is not considered to be 'too emotional.' He is not faulted or disciplined while Ms. Berger is." Award, p. 25.

- "These leaders were not the only ones with behavioral/managerial issues. Evidence was presented that there were numerous complaints from various women faulting [Ms. Berger's peer] Mr. Canty's behavior, his style of communication, and his management as being offensive and sexist, but he, too, was never reprimanded, disciplined or even written up. Rather, these complaints were ignored because, as Ms. Sybesma [Vice President of Human Resources] said, 'he was just being a boy.'" Award, p. 27.

- "At retreats, [Canty] would comment on [Berger's] sexuality and talk about 'flipping her back.' (She is gay.) He also asked her and her partner in Cannes to have 'a threesome with him.'" Award, p. 27.

- "[T]he evidence presented highlights the diverse way in which Kargo treated Ms. Berger versus her male counterparts regarding wages. It did not cut the base compensation or commissions of any other male executive at the company in 2016. These men behaved in the same or worse manner as that for which Kargo disciplined Ms. Berger. It did not even cut Mr. Canty's pay. He held the same position as Ms. Berger and numerous sexual harassment complaints had been lodged against him." Award, p. 54.

- "Regarding options, a difference in treatment is also blatantly apparent; namely, Kargo permitted its Vice President, Mr. McConville, to work for Emogi in an advisory position and to receive equity compensation without penalizing him by

taking away his Kargo options, *inter alia*. On the other hand, when Ms. Berger simply applied to Emogi for a job, she was terminated with Kargo avowing bogus reasons 'for cause,' depriving her of her vested options. Mr. McConville was bound by the same restrictive covenants Kargo relied on to terminate Ms. Berger and to 'strip' her of her options." Award, p. 55.

Further, the Award is detailed in its findings regarding Kargo's intent and credibility. For example:

- "More credibility problems for Kargo surfaced when Ms. Berger was about to call Ms. McCallum at the Hearing. … Ms. McCallum was no longer at Kargo. Kargo had terminated her. … Kargo prepared [Ms. McCallum's] separation agreement during this litigation. … While the agreement did not contain the usual exclusion of being able to testify in legal proceedings, it did include provisions that Ms. McCallum had an obligation to cooperate with Kargo and testify if necessary and could not disparage Kargo. … [Vice President of Human Resources] Ms. Sybesma testified that she had worked on many separation agreements and that they all included the familiar widespread clause that makes clear to an employee that nothing in a separation agreement can prevent him or from testifying in a legal process." Award, pp. 38-39.

- "To dissuade this Arbitrator from signing [the subpoena], Kargo's counsel repeatedly and adamantly represented to this Arbitrator that 'she [Ms. McCallum] does not want to testify/that she does not want to have anything to do with this.' This Arbitrator signed the subpoena. Knowing, now, the difficulty in securing Ms. McCallum's presence, shortly after the subpoena was issued, Kargo's counsel called [Ms. McCallum] and alerted her that Ms. Berger was attempting to serve a subpoena on her. … When [Ms. McCallum] testified she stated … that Kargo's counsel's representation to this Arbitrator was not the truth. It was not that she did not *want* to testify, rather, based on her conversations with Kargo personnel, she *understood she was prohibited* from testifying against Kargo and was required, instead, to *assist it.* Award, pp. 38-39.

- "At her deposition, [Kargo witness] Ms. Biegel testified that *none* of the lawyers [present for Kargo at the deposition] represented her. When Ms. Berger's counsel wanted to examine her about the contents of Kargo's counsel's four-hour preparation of her for the deposition, Kargo's counsel maintained that they *did* represent her. … [At the depositions] Mr. Greco [Kargo in-house counsel] stated that he represented Kargo *and* the witnesses when, in fact, he admitted at the Hearing that he never sought to represent these witnesses, never told them he represented them, and never believed he represented them." Award, pp. 33-34.

- "Other credibility issues regarding Kargo related to its refusal to answer one of Ms. Berger's Interrogatories which was pivotal to the issue of discrimination in the case. Ms. Berger's interrogatory was unambiguous – 'Identify all instances in which a complaint was made about a male executive or manager at Kargo.' Kargo

responded that 'no formal complaints had been filed.' Obviously, Ms. Berger had not limited her inquiry to "formal complaints." [T]his Arbitrator issued an Order, compelling Kargo to answer the question, providing information as to any complaint – formal or informal. Kargo refused to comply and repeated its previous answer along with 14 objections it had not previously asserted. Again, pursuant to Ms. Berger's Motion, this Arbitrator entered a second Order, compelling Kargo to answer the question asked. Again, Kargo refused to comply with the order and restated its previous answer in reverse order. Contrary to Kargo's representation regarding complaints, at the Hearing, Ms. Berger presented evidence of numerous complaints, suggesting sexual discrimination, against male managers." Award, pp. 34-35.

- "Next, we examine the reason Mr. Kargman ordered that Ms. Berger not be paid her earned Q1 commissions when he approved the payment of everyone else's commission. His testimony in his deposition and at the Hearing differ. At his deposition, he had no answer other than it is part of the dispute in the litigation. At the Hearing, he maintained that his decision was because her termination for cause contractually forfeited her commissions. This, like so many of Kargo's assertions, compounds the damage to his and to Kargo's witnesses' credibility because his account cannot be true physically. [E]veryone else was paid their Q1 commissions on May 30, 2016. The evidence reveals that **none** of the contractual bases Kargo cites to support its purported "for cause" termination existed *as of May 30, 2016* or even as of July 22, 2016 when Mr. Kargman terminated her… The fact is that Mr. Kargman decided not to pay her commissions before he decided to terminate her and did so without valid cause. Award, p. 52.

- "Notwithstanding this positive feedback … Mr. McConville decided not accept any of it. He went to Chicago -- Ms. Berger's base of operations – to interview four employees he knew to be averse to her, two of whom HR had already questioned – Ms. Biegel and Ms. Gossman. One of the other two he spoke with did not work for Ms. Berger and the fourth was new. [McConville] does not give these "interviewees" an opportunity to review his notes of their conversations to verify the correctness of his recordings. He does not speak with Ms. Berger to get her side of the story. He does not interview anyone who would be in Ms. Berger's favor, even though she supervised approximately 30 employees and there were employees with a dramatically different view of her and her management…. As with [Vice President of Human Resources] Ms. Sybesma's 'investigation,' his intention appears to be to build a case against Ms. Berger, not to seek the truth. Award, p. 9-11.

- "[McConville] testified at the Hearing that Ms. Abney identified some positive things about Ms. Berger, but he did not include those in his 'report.' Moreover, testimony at the Hearing revealed that some of the most pejorative and harmful information he used to get Ms. Berger out of Kargo is inaccurate. … Ms. Biegel testified that there are numerous other points in Mr. McConville's notes of her comments that are wrong or that she did not recall saying. ... Despite Mr. McConville's representations, Ms. Katz (Human Resources Director) testified that

> no new issues had come up. … Much of what [McConville] gathered is not only inaccurate but also unsubstantiated, third-hand 'information' – what he is told somebody told somebody. He also exaggerated. Nevertheless, her announced it as fact to the rest of management and HR and used it to have Ms. Berger removed." Award, p. 9-11.

The Award takes the same detailed approach with respect to damages. The Arbitrator considered and rejected Kargo's attempt to contradict its own retained valuation consultant, who *prior to the litigation* opined that the value of Kargo was in the $400 million range. Kargo then hired litigation experts to argue that somehow the value was really less than $100 million. Award, p. 66. The Arbitrator specifically found that Kargo's retained litigation expert failed even to make an effort to locate comparable market data that the expert admitted would be directly relevant to the question of valuation. That data was provided by Petitioner's expert and confirmed that the opinion of Kargo's own *pre-litigation* valuation expert was in line with market data, i.e. a fair valuation of Kargo would be $400 million. *Id.* pp. 67-69. When applied to the substantial equity that the Arbitrator held was unlawfully stripped from Petitioner, this resulted in a loss of $8,862,000. *Id.* p. 69.

The amount of the damages awarded is the outgrowth of unlawfully discriminating against, retaliating against, and breaching express and implied covenants with an employee whose hard work and determination over a span of four years resulted in earnings of more than $1,000,000 per year (including $300,000 in unpaid commission for 2016) and an equity stake totaling nearly $9,000,000 in the company she helped build. Once liability attaches and a willful violation found (as the Arbitrator did, *see* Award, p. 74), the damages awarded are driven from these established figures to determine back pay, front pay, and liquidated damages.

For example, once a willful violation of New York and federal equal pay act claims is established, the law mandates liquidated damages, of up to 300% of the underlying damages. Here, the equity stripped from Petitioner was valued at $8,862,000. Combined with the statutory tripling,

the result is $36,363,399. Similarly, the Arbitrator found liability for failing to pay earned commissions in the amount of $305,133.15. Under New York Labor Law 198 § (1-A), an equal amount in liquidated damages is imposed.

The Arbitrator took a similar approach in awarding back pay and front pay and offsetting for mitigation of Petitioner's new employment. Back pay through the date of Award is mandatory. With respect to front pay, Petitioner is a 32-year-old very successful executive who was employed at a company that, by its own admission, paid "above market." Award p. 72. The Arbitrator considered that it took her four years to reach her level of compensation at Kargo, and Kargo's experts were unable to identify any data showing comparable jobs with comparable compensation available to Petitioner. Award p. 72.

Petitioner requested and the Arbitrator awarded five years of front pay mitigated by her estimated compensation at her new employer and reduced to current value, finding the five-year time period "more than reasonable under these facts" and in comparison to far greater front pay awards approved by various courts. Award, p. 72. The total mitigated back pay and front pay damages results in a present value award of $3,571,622.54.

Additionally, the Arbitrator analyzed and found Petitioner had established the right to both punitive and emotional distress damages. Award, pp. 75-82. Mindful of the damages awarded in the categories above, the Arbitrator awarded the conservative sums of $300,000 for punitive damages and $60,000 for emotional distress.

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The excerpts above are but a sampling of the detailed findings made by the Arbitrator in the Award. In short, there can be no doubt that the Award meets the standard for confirmation.

V. CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this Court confirm that Award pursuant to the Federal Arbitration Act, 9 U.S.C. § 9.

June 7, 2017

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of Arbitration between, **ALEXIS BERGER,** Petitioner, — and — **KARGO GLOBAL, INC.,** Respondent.	**CV-17-4288** **ECF CASE** **Declaration of Seth A. Rafkin in Support of Petition for Confirmation of Arbitration Award and Exhibits Thereto**

I, Seth A. Rafkin, hereby declare that the following is true and correct, that I have personal knowledge of the same and could and would testify competently thereto.

1. I am counsel of record for Petitioner Alexis Berger in this matter and in the underlying Arbitration: In The Matter of An Arbitration Between Alexis Berger (Claimant) and Kargo Global, Inc. (Respondent), American Arbitration Association Case No. 01-16-0002-1175) (the "Arbitration"). On June 3, 2016, the date the demand for arbitration was filed, Ms. Berger was a resident of Chicago, Illinois. As of the date hereof, Ms. Berger resides in Chicago, Illinois and intends to remain living there. Respondent is incorporated under the laws of Delaware with its headquarters and principal place of business in New York City. *See* Exhibit G.

2. Attached hereto as Exhibit A is a true and correct copy of the Award rendered on May 31, 2017 by the duly appointed arbitrator in the Arbitration, the Honorable Billie Colombaro (the "Award").

3. Attached hereto as Exhibit B is a true and correct copy of Employment Agreement containing the applicable arbitration provision entered into between Petitioner Alexis Berger and Respondent Kargo Global, Inc. ("Kargo").

4. Attached hereto as Exhibit C is a true and correct copy of the correspondence from AAA confirming the appointment of the Honorable Billie Colombaro (ret.) as the arbitrator (the "Arbitrator"). Judge Colombaro was among the list of potential arbitrators submitted to both parties. Each side had the opportunity to strike names from the list. Neither side struck Judge Colombaro.

5. On August 1, 2016, the Arbitrator held an Arbitration Management Conference and by agreement of the parties and direction of the Arbitrator, a Scheduling Order of the same date issued. A true and correct copy of the Scheduling Order is attached hereto as Exhibit D.

6. Both Kargo and Ms. Berger availed themselves of all forms of permitted discovery. Kargo did not submit any dispositive or in limine motions. Kargo had the opportunity to have a court reporter present for the hearing. It declined to do so.

7. The Arbitration took place in New York City on December 5, 6, 7, 8, 9, 12 and 13, 2016. The Scheduling Order set a five-day evidentiary hearing to take place in New York City. After the hearing commenced, the Arbitrator extended the hearing for an additional two days to all enable Kargo the opportunity to offer all the evidence it wished to offer in its case-in-chief.

8. After the evidentiary hearing commenced, the Arbitrator issued two subpoenas. One was to assist Kargo in securing the appearance of Brandon Hillier, a witness it wished to offer in support of its counter-claims. The other subpoena was issued to enable Ms. Berger to secure the appearance of Ms. McCallum, a witness in support of her claims.

9. The Arbitrator directed the parties to provide post-hearing briefing. The Arbitrator permitted the parties to agree upon a schedule and set no limits on the length or extent of such briefing. Attached hereto as Exhibit E is a true and correct copy of the post-hearing briefing schedule agreed to by the parties and approved by the Arbitrator. The evidentiary hearing concluded on December 13, 2016. The post-hearing briefing schedule allowed Kargo through and including February 13, 2017 to complete its post-trial briefing. Kargo's post-hearing briefing (excluding exhibits) totaled approximately 130 pages.

10. Following submission of the post-hearing brief, the Arbitrator then held oral argument for approximately two hours on March 29, 2017. A true and correct copy of the oral argument scheduling notification is attached hereto as Exhibit F.

11. Attached as Exhibit G is a true and correct copy of publically available information on the New York secretary of state's website regarding the incorporation and headquarters of Kargo Global, Inc.

I declare under penalty of perjury under the laws of the United States that the foregoing is trued and correct.

Executed this 7th day of June, 2017 at Randolph, New Jersey.

Seth Rafkin

EXHIBIT A-1

AMERICAN ARBITRATION ASSOCIATION | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Northeast Case Management Center
Heather Santo
Assistant Vice President
950 Warren Avenue
East Providence, RI 02914
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May 31, 2017

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Case Number: 01-16-0002-1175

Alexis Berger
-vs-
Kargo Global, Inc.

Dear Parties:

By direction of the Arbitrator we herewith transmit to you the duly executed Partial Award in the above matter. This serves as a reminder that there is to be no direct communication with the Arbitrator. All communication shall be directed to the American Arbitration Association.

Thank you,

Michele Gomez
Manager of ADR Services
Direct Dial: (401) 431-4848
Email: MicheleGomez@adr.org

cc : Jennifer Bogue, Esq.
Hon. Billie Colombaro

AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT TRIBUNAL

IN THE MATTER OF AN ARBITRATION
(CASE NO: 01-16-0002-1175)

BETWEEN

ALEXIS BERGER
(Claimant)

-and-

KARGO GLOBAL, INC.
(Respondent)

PARTIAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement, dated August 21, 2012, entered into between the above-named parties and having been duly sworn; having duly heard the proofs and allegations of the parties; and having rendered a Final Award on May 31, 2017, do hereby, AWARD, as follows:

Introduction

On or about August 21, 2012, Kargo Global (Kargo) hired Alexis Berger as the Vice President of Sales, covering the Midwest Territory. This consisted of Illinois, Indiana, Michigan,

Texas, Minnesota, Wisconsin, Ohio, and Missouri. She was part of the "start-up" of the company.[1]

She enjoyed various benefits which included commissions, stock options, and a bonus. As Head of Sales, she recruited, hired, and managed a team. Both, the team and she derived a commission from their sales. The better she managed her team, the more money they and she made. She obtained excellent results, making her the highest paid employee at Kargo. She was so successful that the founder and CEO of the company, Harry Kargman, asked her to take over the failing West Coast territory. She did. Again, she was very successful, turning the territory's bottom line around. She managed both territories simultaneously, comprising of approximately 30 employees.

Ms. Berger reported directly to Mr. Kargman and was part of the upper management team. Mr. Kargman and Ms. Berger enjoyed a very close, synergistic relationship, personally and professionally, based on mutual respect, business values, and trust. He considered himself to be her "work husband."[2] The rapport the two shared was looked upon with much disfavor by Mr. Rohrer, Chief Strategy Officer, and Mr. McConville, President and Chief Operating Officer, resulting in considerable derision between them and Ms. Berger.

Mr. Kargman testified that "my peers said they wished I didn't always have Berger's back – that I'm was too close to her and that's why they kept things from me; I give her the benefit of the doubt more than I should. Ryan (Mr. McConville) said he was unhappy I was always taking sales' side (of which Ms. Berger was a part)."

In addition to being unhappy about Mr. Kargman's and Ms. Berger's relationship, Misters McConville and Rohrer were not happy about her salary. Mr. Rohrer called it "bullshit."[3] Mr. McConville called it "insane."[4] They thought she was overpaid. Both

[1] Mr. Kargman's testimony.
[2] JX 14.
[3] Ms. Berger's testimony.

complained that she had too much equity in the company. Mr. McConville was upset by Mr. Kargman giving her bonuses.[5] The two came aboard sometime after Ms. Berger.

Ms. Berger alleges as follows: in her four years, the company grew from approximately $5,000,000 in annual revenue to $135,000,000; at the outset of 2016, she was responsible for generating more than half of that revenue;[6] notwithstanding her extremely successful productivity, which generated this significant revenue for the company, she was terminated and denied her earned commissions, as well as her vested and unvested stock options unlike other male managers.

On the other hand, Kargo claims it terminated Ms. Berger for cause; thus, she was not entitled to the benefits it denied her.

Ms. Berger disputes this and asserts numerous claims including, *inter alia*, termination due to gender discrimination, retaliation, equal pay violation, and a breach of the implied covenant of good faith and fair dealing. Initially, Ms. Berger asserted Defamation but she did not pursue this claim.

Kargo counterclaims for a return of the $100,000 bonus it gave her pursuant to their Bonus Agreement, as well as damages it maintains it suffered because of her solicitation of Kargo employees after her termination, violating a non-compete obligation, divulging confidential information, tortious interference of contractual relations, and her breach of a duty of loyalty she owed to the company. It also submits that New York law does not control this case.

Ms. Berger disputes all.

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[4] *Id.*
[5] Mr. McConville's testimony.
[6] JX 29

Several contacts are involved in this dispute – an Employment Agreement, commencing August 21, 2012; an Inventions Agreement, which was never signed by Ms. Berger; a Bonus Agreement; and Stock Incentive Plan/Stock Option Agreements. Notwithstanding the Employment Agreement, Ms. Berger was an "at-will" employee.

There was no court reporter at the parties' seven days of evidentiary Hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Governing Law

The parties agreed in their Employment Contract that New York law **shall** govern this case and that the case is to be administered under the American Arbitration Association's Employment Rules.[7]

Termination – For Cause or Gender Discrimination

Ms. Berger must prove by a preponderance of evidence that:

- She suffered an adverse employment action;
- Her gender was a motivating factor in Kargo's termination decision, or
- If Kargo proves a legitimate reason for the termination, its stated reason for that decision is a pretext to hide gender discrimination; and
- Damages were caused by its adverse action.

The stage was set for Ms. Berger's termination on February 17, 2016. Misters Kargman, Rohrer, and McConville called her in to meet with them in New York. Mr. Rohrer presided. *Inter alia*, he told her there were serious concerns raised about her behavior; "someone" said

[7] § 8.13 Governing Law: Exclusive Jurisdiction, p. 7.

working for her was like being in an "abusive relationship," HR had conducted an investigation and was compiling the results.[8] She was stunned and visibly upset. Essentially, she was blindsided. She asked for examples, but they provided none nor an opportunity for her to defend herself.[9] She learned later that the "someone" was Ms. Geistman. Kargo had terminated her for under performance. She had never worked for Ms. Berger.

Notwithstanding this rebuking, oddly, on February 26, 2016 – nine days later – Kargo gives her a Retention Bonus of $100,000 with a letter, praising her "**current level** of service" and encouraging her to continue it:

> As you know, Kargo Global, Inc. (the "Company") greatly appreciates your efforts on the Company's behalf thus far. **To incentivize you to continue providing your current level of service** to the Company, the Company is offering you the opportunity to receive a retention bonus as set forth below." (Emphasis added.)[10]

On January 7, 2016, approximately one month before the New York meeting, Mr. Kargman told her [I am] "looking forward to many more years together as our partnership is strong and together we take the world by storm." Within the six months leading up to this February 16, 2016 meeting, he promoted her and praised her management of her teams. He shared much of this with the entire company, holding her out as an example for them to emulate:

For example, on August 19, 2015 – he promoted Ms. Berger to Senior Vice President, covering the Midwest/West Territory (Chicago and Los Angeles offices) because of her success as a manager. He describes her to the rest of the company as:[11] (Emphasis added.)

a. **"[g]reat team leader;"**

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[8] JX 38, Mr. Rohrer's and Ms. Berger's testimony.
[9] Ms. Berger's testimony.
[10] JX43.
[11] JX22.

b. someone who "give[s] a shit about this company and everyone here;"

c. someone who "really care[s];"

d. someone who "want[s] everyone around [her] to be successful," and tries "to help wherever [she] can."

e. "By herself with only moderate support from New York, Alexis (Berger) launched and recruited the entire Chicago and LA teams from scratch – **almost half the Company**."

f. "She was able to find our amazing people, drive a vision of differentiation, and lead **explosive growth and success**."

g. "Her curiosity and thoughtfulness around our future potential programmatic will drive our next set of successes."

h. "Tirelessly hard working and competitive."

i. She and Kevin have "driven revenues from $14M to almost $100M in two years."

j. She's "admired by agencies and clients; strong reputation in the industry."

On December 17, 2015 – Again, Mr. Kargman told her:[12] (Emphasis added.)

a. Even Doug Rohrer was remarking at how well the whole evening was put together – in classic "Alexis style."

b. "You are so **fucking** buttoned up and I am proud of you and the fact that you have chosen to work with me."

c. You are a force and glad that force is on my side . . . .

d. **"Looking forward to changing the industry with <u>you</u> in 2016!!!** . . . Ps – don't forget to charm the **shit** out of Kassan."

On January 7, 2016, he said:[13]

[12] CX 9

a. "I treasure our give and take and brutal honesty and **love working** and playing with you." (Emphasis added.)

b. "Looking forward to many more years **together** as our partnership is strong and together."

Despite all of this extraordinary praise and endorsement of her and her management performance and, even, imploring her to continue doing her job as she had been doing it, sweetened with a $100,000 reward, on March 9, 2016 – less than two weeks after giving her this bonus, she is placed on a termination track. Ms. Sybesma, the newly hired HR Vice President who reports to Mr. McConville and does his bidding, met with Ms. Berger to warn her, essentially, that she must change her personality and management or be terminated. Ms. Sybesma related, only, generalities about "complaints." She gave no specifics and no indication of who is doing the complaining. Accordingly, she afforded Ms. Berger no opportunity to defend herself or to explain.

Prior to this meeting, Mr. McConville urged that Ms. Berger be put on an involuntary leave.[14] Ms. Katz did not agree with it.[15] Ms. Sybesma advised against it.[16] She believed that the appropriate action to take is, **first**, to place Ms. Berger on a Performance Improvement Plan (PIP). Mr. McConville's "plan" is temporarily placed on hold. Ms. Sybesma follows through with putting Ms. Berger on a PIP during their March 9, 2016 meeting; namely:

> Alexis, over the past few weeks you have received feedback from your management team on some areas of performance concern including:
>
> - Unprofessional behavior
> - Inconsistent approach to management
> - Withholding information from your team or your superiors

[13] JX 27
[14] Ms. Sybesma's testimony.
[15] Ms. Katz' testimony.
[16] Ms. Sybesma's testimony.

> Alexis, it is imperative that you begin demonstrating improvements in these areas, and maintain consistent performance at such level. Failure to do so may result in further disciplinary action up to and including the **termination of employment.**[17] (Emphasis added.)

Again, Ms. Berger requested examples but Ms. Sybesma refused to give them. Thus, Ms. Berger declined to sign the PIP because it was vague, lacking specifics.[18] Notwithstanding, Ms. Sybesma acknowledges in a March 9, 2016 memo that Ms. Berger took immediate steps to comply with the plan. These steps include:

1. She arranged weekly life coach appointments;
2. She registered for Kellogg management school courses for executive coaching and management training at her expense;[19]
3. She will touch base weekly with HR;
4. She set up one-on-one discussions with her direct reports proactively to understand what she could do better for them.

Ms. Sybesma added to her memo, in part, "What I know so far:"

"It sounded to us like there may have been some mixed messages along the way . . . ."

Ms. Sybesma reported to leadership that she had placed Ms. Berger on a PIP, giving her a reasonable amount of time to fulfill it.[20]

After the February 17th New York meeting, scolding Ms. Berger and before Ms. Sybesma's March 9th meeting with her, Ms. Berger took proactive, remedial action. As a result, on March 6, 2016, Ms. Berger's fiercest complainant – Aly Gossman – wrote, in part:[21]

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[17] JX 52.
[18] Ms. Katz', Ms. Sybesma's, and Ms. Berger's testimony.
[19] JX 51; Ms. Berger's testimony.
[20] Ms. Sybesma's testimony.

> . . . there has definitely been a shift in Alexis's attitude and actions . . . over the past 2 weeks.
>
> I have seen an improvement in overall communication, skills, attitude, and the relationships she is trying to foster and build within the team.

Notwithstanding this positive feedback, HR having placed Ms. Berger on a PIP, and HR having given her time to change, Mr. McConville decided not to accept any of it. He went to Chicago – Ms. Berger's base of operations – to interview four employees he knew to be averse to her, two of whom HR had already questioned – Ms. Biegel and Ms. Gossman. One of the other two he spoke with did not work for Ms. Berger, and the fourth was new. He does not give these "interviewees" an opportunity to review his notes of their conversations to verify the correctness of his recordings. He does not speak with Ms. Berger to get her side of the story. He does not interview anyone who would be in Ms. Berger's favor, even though she supervised approximately 30 employees and there were employees with a dramatically different view of her and her management. For example, Mr. Hillier reported to Ms. Berger and respected and appreciated her and her management to such an extent that he left Kargo's employ in order to continue to work with her.

As with Ms. Sybesma's "investigation," his intention appears to be to build a case against Ms. Berger, not to seek the truth.

He testified at the Hearing that Ms. Abney identified some positive things about Ms. Berger, but he did not include those in his "report."

Moreover, testimony at the Hearing revealed that some of the most pejorative and harmful information he used to get Ms. Berger out of Kargo is inaccurate. For example, Ms. Biegel had submitted a letter of resignation. She stated reasons for leaving that had nothing to

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[21] JX 54.

do with Ms. Berger.[22] Yet, Mr. McConville reported that she, along with Ms. Gossman – two of Ms. Berger's reports and highest producers – were quitting because of her. This is the reason, which became characterized as "the fear of a large scale mutiny,"[23] he used to manipulate Mr. Kargman, to justify rescinding the PIP, and to order that Ms. Berger be placed on an involuntary leave of absence.

Ms. Gossman testified regarding Mr. McConville's incorrect reporting:

1. He reported that Ms. Gossman told him that Ms. Biegel's quitting was 80% due to Ms. Berger and 20% because of stress.[24]

Ms. Gossman said that she did not recall saying this to Mr. McConville and that she never said anything to him about quitting, herself.[25]

Contrary to Mr. McConville's testimony, Ms. Biegel testified that she never told Ms. Gossman that Ms. Berger was 80% the reason for her resignation; she simply wanted a job outside of sales. When Mr. McConville flew to talk with her in Chicago after her resignation, he wanted to know what would make her happy; she never brought up anything about Ms. Berger, and she never said anything to HR about Ms. Berger.[26]

Furthermore, Ms. Biegel testified that there are numerous other points in Mr. McConville's notes of her comments that are wrong or that she did not recall saying. Some of them include:

a. no accountability;
b. shaking talking to HK (Harry Kargman);
c. tried to shield;

[22] Ms. Biegel's testimony.
[23] Mr. Kargman's testimony.
[24] JX 53.
[25] Ms. Gossman's testimony.
[26] Ms. Biegel's testimony.

d. plays the role of friend in order to deal with her (Ms. Berger);

e. what does AB (Alexis Berger) do;

f. Only person in company with a personal assistant;

g. Emily – go get dogs, dry cleaner, book action flights with Catherine.

Despite Mr. McConville's representations, Ms. Katz testified that no new issues had come up between the time of placing Ms. Berger on the PIP and Mr. McConville's going to Chicago.

Much of what he gathered is not only inaccurate but also unsubstantiated, third-hand "information" – what he is told somebody told somebody. He also exaggerated.[27] Nevertheless, he announced it as fact to the rest of management and HR and used it to have Ms. Berger removed.

He ordered what he, and presumably Mr. Rohrer, wanted in the first place – an involuntary leave of absence. Namely, in his email of February 15, 2016, he advised Sybsema that "***we*** have a ***plan*** but would like to vet it with you."[28] (Emphasis added.) The "plan" was to put Ms. Berger on a leave of absence.[29] Sybesma testified that she advised against it; that the company should speak with Ms. Berger before forcing her out on a leave of absence.[30] She, also, recommended that the company provide Ms. Berger with "*clear examples* of when her behavior has not met expectations."[31] Mr. Rohrer and Mr. McConville did not follow that advice when they met with Ms. Berger in New York on February 17th. Ms. Sybesma did not follow her own advice when she met with Ms. Berger March 9th.

[27] Mr. McConville's testimony.
[28] JX 36.
[29] JX 37.
[30] *Id.*
[31] *Id.*

Ms. Sybesma complied with Mr. McConville's directive. She rescinded the PIP, cut off Ms. Berger's email, and gave Ms. Berger no information for a month about her position and her future with Kargo, despite Ms. Berger's inquiries.[32]

Foreshadowing what is about to happen to Ms. Berger, on April 5, 2016, (not copying Mr. Kargman) Mr. Rohrer wrote to Mr. McConville that it is "hard to hear" that she will be allowed to return, "even in a role that **stripped** title, pay, sales, etc."[33] (Emphasis added.)

A week later, on April 11, 2016, Ms. Berger is informed that:

1. she has been "reassigned;"
2. she will lose her title and her office;
3. she will be isolated from other sales employees;
4. she will have no employees to manage;
5. her salary will be cut from $375,000 to $250,000, (which will render a far less commission);
6. her position is no longer available to her; and
7. she must report to the new job on April 25, 2016 or be terminated.[34]

On April 22, 2016, her counsel informed Kargo that she will not accept this and that Kargo is discriminating against her by taking these actions, not having properly vetted the complaints against her and by not having investigated complaints she had previously made against Mr. McConville; therefore, she is filing an Equal Employment Opportunity Commission (EEOC) claim against Kargo.[35] Kargo did not terminate Ms. Berger despite her filing an EEOC

[32] Ms. Berger's testimony.
[33] JX 66.
[34] JX 69.
[35] CX 22.

complaint against it for discrimination and making it clear that she was not accepting the new job and returning to Kargo under those conditions.

Ms. Berger began to look for other employment. She did not return to Kargo on April 25, 2016.

On April 29, 2016, Ms. Sybesma advised her via email that on May 2, 2016 she would be placed on unpaid leave because of her "failure to return to work on April 25, as discussed."[36]

Kargo placed Ms. Berger on unpaid leave on May 2, 2016, and on May 30, 2016, when Ms. Berger's first Quarter (Q1) commissions were due, Kargo did not pay her. In Q1, she had earned $171,491.86 and an additional $133,639.47 through May 2. Ms. Katz testified that she was in a meeting when Mr. Kargman when he said that Ms. Berger was not going to be paid.[37] It is undisputed that Kargo paid everyone else theirs for both periods.[38]

On June 3, 2016, Ms. Berger filed her Demand for Arbitration, primarily, based on sexual discrimination via a double standard/stereotyping.

On July 22, 2016, Kargo's attorney sent Ms. Berger a letter, stating that Kargo is terminating her for cause, in pertinent part:

> . . . as a result of your client's continuous **abandonment of her position** for the past three months and, upon information and belief, her breach of the terms of her employment, including non-disclosure and non-compete obligations, effective immediately Alexis Berger's unpaid leave of absence shall end and she is terminated for cause. (Emphasis added.)

A termination for cause activates numerous negative consequences to Ms. Berger in various contracts; namely:

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[36] JX 80.
[37] Katz, former HR Director's Hearing testimony; deposition testimony, p. 31:24 – 33:13.
[38] *Id.*

1. Under the terms of Kargo's Stock Incentive Plan, the entire options, including vested options are terminated.

2. Under the Retention Bonus Agreement, Ms. Berger must repay the $100,000 retention bonus paid to her in 2016; and

3. Under the terms of her Employment Agreement, Ms. Berger must forfeit her already earned commissions.

In her Demand, Ms. Berger contended that: the evidence will show that she was not terminated for cause but, rather, because of Kargo's double standard and stereotyping regarding females and men, all of which would constitute sexual discrimination; Kargo's stated reasons for termination are pre-textual; and the so-called "investigations" Kargo used to support its reasons were, essentially, a sham and not done according to accepted procedures, further indicia of discrimination.

At the evidentiary Hearing, Kargo's witnesses denied all of the above and maintained that Kargo did not discriminate against Ms. Berger.

Ms. Berger makes her discrimination claims under Title VII of the Civil Rights Act of 1964, (42 U.S.C. § 2000e); the New York State Human Rights Law (NYHRL) (N.Y. Exec. § 296, *et. seq.*); and the New York City Human Rights Law ("NYCHRL") (Admin. Code of the City of New York § 8-107, *et seq.*).

To establish gender discrimination under Title VII and the NYHRL, Ms. Berger must prove, by a preponderance of the evidence, that:

1. she suffered an adverse employment action,
2. her gender was, at least in part, **a motivating factor** in Kargo's decision, or
3. Kargo's stated reason for its decision is a pretext to hide gender discrimination and

4. that she suffered damages caused by the adverse action.[39]

Further, under the NYCHRL, Kargo is liable if gender played *any* role in its employment decision.[40] (*Emphasis added.*) ". . . NYCHRL claims (must be analyzed) separately and independently from any federal and state law claims, **construing the NYCHRL's provisions broadly in favor of discrimination plaintiffs**, to the extent that such a construction is reasonably possible."[41] Even if the challenged conduct is not actionable under federal and state law, a trier of fact "must consider separately whether it is actionable under the broader New York City standards."[42] (Emphasis added.)

The law is well settled that an employer who permits, requires, or encourages certain behavior or traits in men (such as aggressive management and/or a sales' style), but holds it against women, discriminates on the basis of sex and gender. As the Supreme Court in *Price Waterhouse v. Hopkins*[43] discussed this as stereotyping and held:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" [citation]. An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

Likening her situation to that of the plaintiffs in these cases, Ms. Berger correctly points

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[39] *Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 121 (2d Cir. 1997); *see also* Manual of Model Civil Jury Instructions for The District Courts of The Eighth Circuit (applying same standard and precedent as Second Circuit courts).

[40] *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62, 76 (N.Y App. Div. 2009).

[41] *Laboy v. Office Equip. & Supply Corp.*, 2016 BL 322722, 11 (S.D.N.Y. Sept. 29, 2016) (citing and quoting *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 109 & 110 n.8 (2d Cir. 2013).

[42] *Id.*

[43] 490 U.S. 228, 251 (1989).

out that:

> *Price Waterhouse v. Hopkins* . . . is directly on point. Hopkins, like Berger, was one of very few women among a predominately male executive staff. (Like Ms. Berger) Hopkins suffered an adverse employment action in part because the male partners took issue with Hopkins' aggressiveness and her use of profanity, traits either required or condoned in men . . . .

And in she notes that,

> *Johnson v. J. Walter Thompson U.S.A., LLC*, a 2016 decision – the court recognized, language that does not explicitly reference a person's gender can nevertheless signify hostility towards a woman and, specifically, hostility towards *a woman exercising power* in the workplace. "Martinez's references to Johnson's being 'bossy' can be understood not as a sex-neutral insult but rather as invoking a double standard for men's and women's leadership in the workplace."[44]

> Evidence that female executives are described negatively in terms such as, "bossy," "emotional," and/or "aggressive" supports reliance on an impermissible double standard.[45]

As the *Johnson v. J. Walter Thompson U.S.A., LLC* court explained:

> [R]eferences to [a female executive] being "bossy" can be understood not as a sex- neutral insult but rather as invoking a double standard for men's and women's leadership in the workplace.[46] "[W]omen were twice as likely [than men] to be branded bossy in the workplace." The view of female bosses as "bossy" is a feature of the "glass ceiling problem[], namely, that given the close association of 'managers' and 'leaders' with masculinity, subjects tend to dislike women whom they rate highly as managers and leaders because of 'role incongruity'—the sense that it is incongruous for women to successfully perform masculine roles as opposed to feminine roles." [citation omitted].

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[44] 2016 BL 413160, 10 (S.D.N.Y. Dec. 13, 2016).
[45] *See Johnson v. J. Walter Thompson U.S.A., LLC*, 2016 BL 413160, 10 (S.D.N.Y. Dec. 13, 2016).
[46] See, e.g., Cathleen Clerkin et al., Bossy: What's Gender Got to Do with It? Ctr. for Creative Leadership 5 (2015).

This brand of stereotyping has been deemed impermissible under Title VII.[47]

Ms. Berger, also, reports that:

Lam is important for similar reasons. The *Lam* court held that describing a woman in inherently gendered language such as she is "too aggressive" and "too emotional" (just as Berger is "too emotional" while male employees are "passionate") can support an inference of discrimination.[48]

Ms. Berger addresses Kargo's attempt to distinguish these cases:

Kargo alleges that the facts of *Sassaman* "have no applicability here."

In *Sassaman*, Ms. Berger notes, we find that, as here, a complaint was made about the plaintiff's work place conduct. There, as here, the plaintiff argued that the employer did not conduct an adequate investigation and assumed the plaintiff's guilt without actually taking proper steps to come to that conclusion. Fearing retribution by the complaining employee (in *Sassaman,* a lawsuit, in this case, the alleged resignation of sales employees), the company forced the employee out of the company. *Sassaman* held, "where a plaintiff can point to evidence closely tied to the adverse employment action that could reasonably be interpreted as indicating that discrimination drove the decision, an arguably insufficient investigation may support an inference of discriminatory intent."[49] That is precisely the case here.

She continues,

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[47] *Id.*
[48] *Lam v. Univ. of Haw.*, 164 F.3d 1186, 1188 (9th Cir. 1998).
[49] *Sassaman v. Gamache*, 566 F.3d 307, 314-315 (2d Cir. 2009).

> Moreover, the factual parallels of *Mastro* are striking. In *Mastro*, the employer took adverse action against the plaintiff, Mastro, following a poorly executed investigation into whether Mastro had lied to his employer about another employee. **The company did not interview Mastro.** It "relied heavily" on the statements of Mastro's subordinate, Bryant, with whom he "had a strained working relationship and that, [] as a second-in-command to Mastro, stood to gain from disciplinary action against his boss." **The company did nothing to assess the credibility of Bryant. Nor did it assess the credibility of any other witnesses interviewed**, who were a "tight knit group" **and failed to consider that certain witnesses had a motive to lie**, while Mastro did not.[50] (Emphasis added.)

> There, as here, the employer argued that "the mere fact that they conducted an investigation and fired Mastro as a result should insulate their actions from further scrutiny." The *Mastro* court disagreed, holding that evidence that an employer's investigation "which was central to and culminated in [the plaintiff's] termination, was not just flawed but inexplicably unfair" is sufficient evidence for a finding of discriminatory intent.[51]

A failure to investigate or to properly investigate a claim of discrimination can be further indicia of discrimination.[52]

In response to a workplace complaint, in addition to interviewing the complainant, a thorough and proper workplace investigation by a company includes:

(1) interviewing the person accused of improper behavior **to obtain his or her version and identify witnesses or documents that support this version,**

(2) interviewing witnesses identified by the accusing and accused employees, **as well as other people likely to have observed relevant interactions or events**, and

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[50] *Mastro v. Potomac Electric Power Co.*, 447 F.3d 843, (D.C. Cir. 2006) at 855, 856.
[51] *Id.* at 856, 857.
[52] *Sassaman*, 566 F.3d at 315.

(3) summarizing interviews and asking those interviewed to review, correct, and return signed copies of the written summary.[53] (Emphasis added.)

Mastro held that failure to follow these procedures when investigating an employee and taking adverse action against him or her supports an inference that such adverse action was pre-textual and motivated by discrimination; such an "inexplicably unfair" investigation, leading to the plaintiff's termination that failed to interview the employee who was the target of the investigation, failed to consider motive of the witnesses' interviewed and "lacked the careful, systematic assessments of credibility one would expect in an inquiry on which an employee's reputation and livelihood depended."[54]

To properly apply the above law to this case and determine whether Ms. Berger was discriminated against or whether she was terminated for cause, in addition to examining Kargo's actions, we must inspect complaints regarding Ms. Berger's behavior in the context of Kargo's culture, expectations, and standard, as well as how men's behavior was perceived and how they were treated versus women, Ms. Berger in particular.

Kargo accused Ms. Berger of the following and used these representations to justify a "for cause" termination:

- Unprofessional behavior
- Inconsistent approach to management
- Withholding information from your team or your superiors
- Abandoning her position
- Violating the non-compete and non-solicitation provisions in the Inventions Agreement

When terminating Ms. Berger, Kargo provided no specifics for these portrayals. Notwithstanding, this Arbitration will consider the evidence presented as being intended for

[53] CX 49 (treatise citing EEOC investigation guidelines).
[54] *Mastro v. Potomac Electric Power Co.*, 447 F.3d 843 (D.C. Cir. 2006) at p. 855 -57.

the above. "Unprofessional behavior" can be considered as a conclusory umbrella under which all of the other categories fall.

Reviewing the evidence presented, specific complaints made about Ms. Berger included:

1. She was "too emotional;"[55]
2. She was "over sensitive" and "harsh;"[56]
3. She "shut people down;"[57]
4. She was "too edgy for Kargo's culture;"
5. She used profane, inappropriately suggestive, and politically incorrect, offensive language;[58]
6. Her management was like being in an "abusive relationship;"[59]
7. She was a "bully;"[60]

Ms. Biegel and Ms. Gossman are best friends and roommates, and Ms. Gossman was Ms. Biegel's direct report.[61] They are the only ones out of the four Mr. McConville interviewed to testify against Ms. Berger. They characterized her as a "bully" because of what they deemed to be her "aggressive" behavior.

Essentially, Mr. Rohrer testified in his deposition that "aggressive behavior" is a compliment – a positive trait:

> Q Did you ever describe Miss Berger as a pit bull?
>
> A If I did, it would have been in **complimentary** sense.
>
> Q Do you recall whether you described her as a pit bull? . . . .

[55] Mr. Kargman's and Ms. Gossman's testimony.
[56] JX 35; Mr. McConville's testimony.
[57] *Id.*
[58] Ms. Gossman's and Ms. Biegel's testimony.
[59] Mr. Rohrer February 17, 2016 New York meeting.
[60] *Id.*
[61] Ms. Biegel's testimony.

> **A** Not specifically. And like I said, it would have been complimentary, particularly to a partner.
>
> **Q** That's how you would have intended it?
>
> **A** Yes, that is. **There's something that is good about being a pit bull in the line of work that we are in.**
>
> **Q** What do you mean by that?
>
> **A** There is a **personality trait of aggressiveness <u>in what we do that can be helpful to what you do</u>**. . . . Some people are really aggressive, and it serves them well, so "pit bull" would have been used in that context. It's not meant to be a negative -- (Emphasis added.)[62]

He added that he, Mr. McConville, Mr. Kargman, and Mr. Canty were, also, "pit bulls."[63] At the Hearing, Mr. Rohrer changed his statement to: "it is more useful for a seller than a manager."

Mr. Rohrer is Kargo's Chief Strategy Officer. Obviously, being a "pit bull" – having a "personality trait of aggressiveness" – was, not only, considered to be a positive approach and an expectation, it was also part of Kargo's culture for men. Ms. Berger was the only one faulted for it.

Aside from this double standard, this put her in a Catch-22 situation, which the Supreme Court addressed in *Price Waterhouse*.[64]

It was Mr. Rohrer who told Ms. Berger at the New York meeting among himself, Mr. Kargman, and Mr. McConville that an unnamed employee had stated that working for her was like being in an "abusive relationship." Ms. Berger found out later that this employee was Ms.

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[62] Mr. Rohrer's deposition, 47:8 – 48.
[63] *Id.*, 47:8 – 49:5.
[64] 490 U.S. 228, 251 (1989).

Geistman, who had been terminated for her poor performance[65] and who had not worked for Ms. Berger. Interestingly, even though she was on Kargo's witness list, Kargo did not call her as a witness to authenticate such a damaging account which seemed to have "poisoned the well" at Kargo (being picked up and used by others).

Furthermore, Ms. Katz testified that, in 2014, Ms. Geistman had told her she had "concerns about Ms. Berger's management style." Notwithstanding, Ms. Katz had no apprehensions about it; thus, she did not investigate further.[66] The lack of concern was later buttressed by the fact that Ms. Berger was rewarded for her management by being promoted from Regional Vice President to Senior Vice President in 2015.[67]

Regarding the use of profane, inappropriately suggestive, and politically incorrect, offensive language, Ms. Berger admits and the evidence confirms that she spoke in these manners.

One example Kargo cites of the latter is her having called her reports, "my little monkeys." Ms. Berger testified that this had nothing to do with the color of their skin; she used it before black people were there and meant it as "my little kids," a term of affection; she borrowed it from her former boss who had called her and her co-workers that.[68]

Evidence shows that this type of speaking was not unique to Kargo's approved of culture for men and further evidences the double standard.

One example is from Mr. McConville, Kargo's President and Chief Operating Officer. He did a video for airing at a national sales conference. In the video, he talks about his fictional

[65] Ms. Katz testimony.
[66] *Id.*
[67] Mr. Kargman's testimony.
[68] Ms. Berger's testimony.

band, "guitarded" – a clear double entendre, making fun of the retarded.[69] Nevertheless, Mr. Rohrer testified this was not inappropriate and that he thought "in Kargo's culture, people would see it in a humorous way and not offend anyone."

The use of profanity and inappropriately suggestive language was no less part of the men's culture at Kargo than was politically incorrect and potentially offensive language. Their use of profane and inappropriately suggestive language was prolific – the lead coming from the top – starting with Kargo's founder and CEO, Mr. Kargman, and continuing throughout the company. No one found it to be a problem, except when Ms. Berger used it – more evidence of a double standard.

Examples are too numerous to include all of them. Just a few come from Mr. Kargman. In one, he promoted his company through a sexually provocative advertising campaign for **public consumption**. In this advertisement, he had placed on the cover of a major advertising magazine – "ADVERTISING AGE" – a picture of a used condom wrapper having Kargo's name stamped on it. The by-line was, **"DO YOU PRACTICE SAFE MOBILE?"**[70] Another example involves a video he filmed for a national sales conference. Essentially, he promised his employees that if they met their goals, he would "shave his balls."[71] Ultimately, this comment was not used because Ms. Berger advised against it, that it was inappropriate.[72] Mr. Kargman denies saying this.

Mr. Kargman typically used profanity. Below are examples of it in his praise of Ms. Berger, which he emailed to her and to the whole company: (Emphasis added.)

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[69] Mr. McConville's deposition and Hearing testimony.
[70] CX 53.
[71] Ms. Berger's testimony.
[72] *Id.*

"You are so fucking buttoned up and I am proud of you and the fact that you have chosen to work with me."[73]

I treasure our give and take and brutal honesty and love working and playing with you.[74]

Berger is someone who "give[s] a **shit** about this company and everyone here."[75]

Mr. Kargman admitted that his language is so bad he is now paying a coach to help him "kick the habit."[76]

Mr. Rohrer, Kargo's Chief Strategy Officer, also, generously used unbridled profanity. One example is his asking Kargo's consultants to "beat the **shit** out of us."[77] (Emphasis added.) At the Hearing, he admitted that he used profanity and he has heard other people at Kargo use profanity. He also acknowledged that he was featured in a video for the sales force, talking about smoking and drinking – "it was a humorous video." He felt "his behavior was **within the boundaries of reasonable** in this context, and there is a "sales culture" at Kargo, which involves partying, drinking, and **swearing**, etc. (Emphasis added).

These three are the leaders of the company, using the same type of language and "humor" for which they fault Ms. Berger.[78] They set the tone and the example for and, implicitly, give permission to other employees to emulate them.

Moving to the issue of behavior and management style, Mr. McConville called Ms. Berger "over sensitive" when she respectfully asked him not to criticize her in front of her reports. He also testified that she is "harsh." In addition to labeling Ms. Berger as "too emotional" and complaining that she "shut people down," Ms. Gossman testified, essentially,

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[73] CX 9.
[74] JX 27.
[75] JX 22.
[76] Mr. Kargman's testimony.
[77] CX 8.
[78] JX 22, CX 8, 9.

that she was moody. She said, "You never knew which Alexis would show up." This may refer to her complaining to Mr. Rohrer that Ms. Berger was "erratic" and was attributed to Ms. Berger's expression of frustration when things were not done correctly. Presumably, it is what Ms. Sybesma meant when she listed "inconsistent approach to management" in the PIP since she interviewed only Ms. Gossman. Since Ms. Sybesma gave no specifics to support her conclusions, it is not clear.

Kargo's witnesses were asked about men manager's behavior at Kargo. They admitted that Mr. McConville is, essentially, "hostile" in his communications: "hot headed," "testy," "impatient," has a "temper," and "**shuts down**" when angry or his ideas are challenged.[79] Notwithstanding, these emotional, erratic behaviors were acceptable. The witnesses attributed them to his being "passionate,"[80] a positive. And, his temper is "spun" into being a "strong personality."[81]

Mr. Kargman testified that when he disagrees with Mr. McConville, "he becomes sullen and **you know not to continue discussion because he's not listening**." (Emphasis added.) As is evident by this testimony, "shutting down" when other employees are trying to communicate with him has the effect of shutting them down because he is not available – "not listening."

Anger is a very strong emotion, which Mr. McConville expresses at work, but it, too, is acceptable at Kargo, even though it has a detrimental effect on the process, on other employees and on their ability to express opposing views. Yet, he is not considered to be "too emotional." He is not faulted or disciplined while Ms. Berger is.

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[79] JX 17; Mr. Kargman's, Mr. Rohrer's, and Ms. Berger's testimony.
[80] Ms. Sybesma's and Mr. Kargman's testimony.
[81] *Id.*

Ms. Berger had complained numerous times, not only to Mr. Rohrer[82] but also, directly to Mr. Kargman and to HR[83] about Mr. McConville's temper and his mistreatment of her on a call, as well as his unprofessional behavior, criticizing her in front of her colleagues.[84] He has also "screamed" at her.[85] Ms. Biegel had complained to Mr. Kargman about him, as well.[86] Nevertheless, both Ms. Berger's and Ms. Beigel's complaints fell on deaf ears.[87] No reprimand, no disciplinary action was taken.

On the other hand, when Ms. Gossman complained to Mr. Rohrer about Ms. Berger's "unprofessional behavior," he turned it over to HR. When Ms. Berger complained to him about Mr. McConville's temper and unprofessional behavior, he did not turn it over to HR.[88] Instead, he excused him.

He defended Mr. McConville's volatility, inconsistency, negative communications, explaining that his communication issues were limited and not impactful because Kargo's business has been successful and Mr. McConville is a big part of that success.

Ms. Berger, Kargo's senior-most female sales executive and highest earner,[89] was a vast part of Kargo's success. She helped build the company for what it is today. As noted above, at the outset of 2016, she was responsible for generating more than half of the company's revenue and was the highest paid employee because of her success in generating income for the company. "The reason Mr. McConville and Mr. Rohrer did not earn as much as Ms. Berger is because they did not meet their goals."[90] Yet, unlike Mr. McConville, she is criticized,

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[82] Mr. Rohrer's and Ms. Berger's testimony.
[83] *See* Mr. Rohrer's Deposition, 39-42; JX 17; Ms. Berger's testimony.
[84] Ms. Berger's testimony.
[85] *Id.*
[86] JX 17, p. 4.
[87] Mr. Rohrer's Deposition, 40:5-14; JX 35; Mr. McConville's testimony.
[88] Mr. Rohrer's deposition testimony, 39-42.
[89] Mr. Kargman's testimony.
[90] *Id.*

disciplined, and, ultimately, terminated, in part, for being "too emotional," for having an "inconsistent approach to management," for her communications, and for "unprofessional behavior" in general.

These leaders were not the only ones with behavioral/managerial issues. Evidence was presented that there were numerous complaints from various women, faulting Mr. Canty's behavior, his style of communication, and his management as being offensive and sexist, but he, too, was never reprimanded, disciplined, or even written up. Rather, these complaints were ignored because, as Ms. Sybesma said, "he was just being a boy."[91]

Mr. Canty was Ms. Berger's counterpart. They did not have a positive working relationship. At times, it was "hostile."[92] They had competing markets. At retreats, he would comment on her sexuality and talk about "flipping her back." (She is gay) He also asked her and her partner in Cannes to have "a threesome with him."[93]

The allegation that Ms. Berger "[withheld] information from [her] team or [her] superiors,"[94] apparently, came solely from Ms. Gossman. As a result, Mr. Rohrer testified that the biggest area of concern for the company was "secrecy and hiding of information that seems to be going on under [Ms. Berger's] guidance."[95]

Kargo entertained this complaint even though it was management's prerogative to determine what should be shared with their reports, and Kargo's practice had been to restrict information shared with non-managerial personnel.[96] Ms. Berger testified that, in her view as a manager, it makes sense to keep certain information (e.g., a deal not yet signed) from

[91] Ms. Sybesma's testimony.
[92] Ms. Berger's testimony.
[93] *Id.*
[94] JX 52.
[95] JX 37, JX 31.
[96] J31; Mr. McConville's testimony.

EXHIBIT A-2

widespread dissemination to limit distractions and potential disappointment for employees. Moreover, non-managerial employees were kept informed with appropriate company information via Kargo's publication of its executive meetings' minutes to everyone in the company.

When Ms. Berger's suggested that they create separate distribution lists (aliases) for communications – one for the management team and one for the executive team – Mr. McConville used it as evidence of her "general tendency to want to suppress and control information."[97] In fact, Kargo had already set up other similar email "aliases,"[98] and Amanda Katz, Director of HR at the time, did not share Mr. McConville's view. Instead, she enthusiastically supported Ms. Berger. She wrote: "Good idea!"[99]

Kargo failed to identify any specific evidence to support its contention that Ms. Berger was inappropriately withholding or controlling information other than in her business judgment as a manager and within Kargo's established practices.

Mr. Rohrer testified that Ms. Gossman also complained to him that Ms. Berger had plagiarized, but Kargo did not present any evidence of this either.

Ms. Gossman was also unhappy that Ms. Berger, her superior, required accountability from her regarding how she spent her time. Essentially, she did not like Ms. Berger's protocols and procedures.[100] It was apparent from Ms. Gossman's testimony that she wanted to do what she wanted when she wanted without her manager's control or oversight and that there should be no problem with her going over her manager's head when she was annoyed or displeased.

Ms. Gossman's credibility is lacking and her motive for complaining about Ms. Berger is

[97] JX 31.
[98] *Id.*
[99] *Id.*
[100] Ms. Gossman's testimony.

suspect. She resented the fact that Ms. Berger was a layer of management between her and upper management. She wanted direct access to Mr. Rohrer and Mr. McConville.[101] Recently, Kargo promoted her to peer management.

Behind her manager's back, Ms. Gossman contacted Mr. Rohrer and arranged a clandestine meeting with him, in part, to complain about Ms. Berger, and it can be inferred – to gain favor. As a participant in getting Ms. Berger's terminated, Ms. Gossman no longer had to deal with Ms. Berger coming between her and higher management and her complaints furthered Mr. Rohrer's agenda.

Secretly, Ms. Gossman met with Mr. Rohrer at the company's retreat in Costa Rica in late January 2016, where, as Ms. Gossman testified, they concocted a "fake" cover story to tell Ms. Berger and to devise a plan of action. She testified that she had "texted Doug in advance that I wanted to spend time with him. I sat next to him at dinner. We left, went into a private area, and talked. We talked about my concerns about the commission change, why I didn't take the promotion in L.A., opportunities in New York, and problems working with Alexis."

It is noteworthy that there is no mention of her "quitting" if Ms. Berger were permitted to stay – the reason Mr. McConville gave to support the need to rescind the PIP and place Ms. Berger on an involuntary leave which culminated in her constructive discharge.

Ms. Gossman continued: "He followed up later and called my cell phone from an airport when I was at home."

The "information" she provided to Mr. Rohrer was used to discredit and oust Ms. Berger. It was Ms. Gossman who started the whole "investigation" against Ms. Berger.[102] According to Mr. Rohrer, she told him she "felt cutoff from him, Ryan (Mr. McConville), and the New York office; Ms. Berger's behavior was erratic – abusive at times – she was fearful; Ms.

[101] *Id.*; JX 37.
[102] Ms. Katz' testimony.

Berger's language made her uncomfortable."

At the Hearing, when she was asked what she was "fearful" of, she had no answer. Behaviors she described as "erratic" were no different in nature or severity from complaints that had been made against male managers against whom no action had been taken. "Feeling uncomfortable with Ms. Berger's language" is, likewise, curious since she made no complaints about the men's language that she admitted at the Hearing was "offensive." It is unclear what she meant by "abusive," if, indeed, she said that to Mr. Rohrer, as that characterization seemed to originate with the terminated employee who did not even work for Ms. Berger.

Furthermore, nothing Ms. Gossman said rises to the level of "abusive." It is also noteworthy that Ms. Berger's management style, about which Ms. Gossman complained, remained the same throughout Ms. Berger's tenure,[103] Mr. Kargman constantly praised her for it, and in the four years she was at Kargo, not one person on either of her teams quit, which is unheard of in the industry.[104]

Ms. Gossman, even, blamed Ms. Biegel's shingles on Ms. Berger. No evidence was presented that Ms. Berger was anything but kind and extremely generous to and supportive of Ms. Biegel.

Ms. Gossman testified that she was "sad they were going to keep Ms. Berger on and work through the issues with her," and she appeared to be proud of having had this underhanded meeting and concocting a dishonest story. She saw no problem with it nor did upper management (Mr. Rohrer, Mr. McConville, Mr. Kargman) or HR, despite the fact that Mr. Kargman believed this type of behavior was improper and acknowledged that it was not the right way to treat your superior. In fact, it was not his practice as CEO of the company. He gave an example at the Hearing.

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[103] Ms. Berger's testimony.
[104] Ms. Berger's testimony.

When he was asked what was the appropriate "chain of command" for employees at Kargo, he answered by describing a similar situation to Ms. Gossman's which had occurred concerning one of his other managers – Kartel Goksel, the Chief Technology Officer – who reported directly to him. He explained that Mr. Goksel's report, Bernard, had gone around him to complain that Mr. Goksel was, essentially, "keeping too tight a leash on him." Mr. Goksel was very upset that Bernard had gone over his head. Mr. Kargman intervened and spoke to Mr. Goksel to help him better manage his reports and he made it clear to Bernard that he "should not go around his boss;" instead, he should first raise his issues with his manager and if that was unsuccessful, HR could work with the two of them.

Mr. Goksel, a male manager, was not disciplined for the way he managed his complaining report and the report was not permitted to go above him.

When Ms. Gossman did precisely the same thing as Bernard, i.e., went around her boss to one of the two senior most sales executives in the company, Mr. Kargman did not intervene in the reasonable, common sense way that he had approached the Kartal/Bernard issues. Instead, Ms. Gossman was commended, while Ms. Berger was faulted for doing the job of a manager.

Ms. Biegel also testified against Ms. Berger. Her testimony equally revealed the inappropriate treatment of Ms. Berger and betrayal of her for personal gain.

On about August 2016, Kargo gave Ms. Biegel her "dream" job – Senior Director of Learning and Development. She reports to Ms. Sybesma in HR.

Ms. Berger had recruited and hired Ms. Gossman and Ms. Biegel. Ms. Biegel began working with her around October 2012. Ms. Biegel testified that they were friends outside of work and that they maintained a close relationship until Ms. Berger's departure.

Documentary evidence presented at the Hearing showed that Ms. Berger had been a fierce supporter of her reports, always looking out for their best interest. This is demonstrated in part by her having always done her best to get them better compensation packages and, especially, by her having stepped in to defend and protect Ms. Biegel when Mr. McConville mistreated her on a call.[105] Ms. Biegel acknowledged that Ms. Berger had also tried to get her promoted and that when she "would share with Alexis (Ms. Berger) when she was too stressed, Alexis would say, 'what we can do to reduce your stress.'"[106] Another example – Ms. Berger had convinced Kargo to give Ms. Biegel a BMW to incentivize her to meet her goal.[107]

In addition to "having Ms. Biegel's back" professionally, Ms. Berger had supported her personally. One touching example was that Ms. Berger treated Ms. Biegel and twenty other women important to Ms. Biegel, to a celebratory, 30th birthday dinner party for Ms. Biegel, sparing Ms. Biegel that expense. At the Hearing, Ms. Biegel characterized Ms. Berger's "insistence" with the manager that she pay for the entire dinner as "bullying," instead of expressing gratitude for the gift and her generosity.

This is dramatically different from her testimony at her deposition and, *inter alia*, damages her credibility.

At her deposition, she was questioned about the email she had sent Ms. Berger and her partner after the dinner expressing appreciation.[108] After the party, she sent Ms. Berger and her partner, Catherine, this email:[109]

> Subject: Thank you so much!
>
> Friends, I just wanted to say thank you again for being there on Friday. And for the extremely unnecessary but amazingly thoughtful gifts and actions taken at Bar Siena ;)

[105] Ms. Berger's testimony.
[106] Ms. Biegel's testimony.
[107] Ms. Berger's testimony.
[108] Ms. Biegel Deposition, 31:6 – 32:14.
[109] JX 21.

So lucky to have you in my life and am very grateful to call you my friends. Thank you thank you thank you! Biegs

At her deposition, she was asked:

Q. Do you recall sending that e-mail?

A. Absolutely.

Q. And is what you're saying in this e-mail, is it truthful?

A. Totally....

Q. Do you recall what the event was?

A. Absolutely. It was my birthday....it was my 30th birthday. It was a big birthday, and I had a dinner with about 20 girls....

Q. Yep. And your thank you e-mail went to just Catherine and Alexis. Did they put on the dinner for you or why was it just to them I guess is what I'm asking.

A. So I planned the dinner, and Lex unbeknownst to me **worked with the manager to pay for the dinner**. So she -- I had paid for it upfront but she actually went ahead and **talked to the manager** and ended up taking care of the dinner for all of my friends that were there. (Emphasis added.)

Q. Got you. You appreciated that?

A. I did appreciate that.

Other credibility questions, regarding Ms. Biegel's truthfulness, are raised by her contrary representations regarding the question of whether Kargo's attorneys represented her. Kargo's litigation counsel consists of Mr. Turcotte, Ms. High, and Ms. Anderson. Its in-house counsel is Mr. Greco. Mr. Greco had been present at the witnesses' preparation sessions and for much of the Hearing.

At her deposition, Ms. Biegel testified that none of the lawyers represented her.[110] When Ms. Berger's counsel wanted to examine her about the contents of Kargo's counsel's

[110] Ms. Biegel's Deposition, 9:1-16.

four-hour preparation of her for the deposition, Kargo's counsel maintained that they **did** represent her. After the deposition, this Arbitrator ordered Ms. Biegel to provide an affidavit on the issue. This time, contrary to her deposition testimony, she asserted also under oath that Mr. Turcotte and Ms. High offered to represent her, personally, and that she accepted. She also provided in the affidavit that Mr. Greco was, simply, **present** at the deposition preparation session and that: (Emphasis added.)

> At the beginning of our meeting (to prepare for the deposition) Ms. High and Mr. Turcotte informed me that, based on their representation of me, my discussion with them was protected from disclosure under the attorney-client privilege and therefore Ms. Berger's counsel was precluded from any inquiry into to [sic] the substance of my communications with counsel.

Additionally, at Ms. Biegel's and Ms. Gossman's depositions, Mr. Greco stated that he represented Kargo **and the witness**[111] when, in fact, he admitted at the Hearing that he never sought to represent these witnesses, never told them he represented them, and never believed he represented them.

Other credibility issues regarding Kargo relates to its refusal to answer one of Ms. Berger's interrogatories which was pivotal to the issue of discrimination in this case. Ms. Berger's interrogatory was unambiguous – "Identify all instances in which a complaint was made about a male executive or manager at Kargo." Kargo responded that "no **formal** complaints had been filed;" that the only one it was aware of was the one which Claimant had asserted against Mr. McConville. (Emphasis added.)

Obviously, Ms. Berger had not limited her inquiry to "formal" complaints.

Pursuant to Ms. Berger's Motion to Compel, this Arbitrator issued an Order, compelling Kargo to answer the question, providing information as to **any** complaints – formal or informal.

[111] Ms. Biegel's Deposition, 5:18-19; Ms. Gossman's Deposition, 5:18-19.

Kargo refused to comply and repeated its previous answer along with 14 objections it had not previously asserted. Again, pursuant to Ms. Berger' Motion, this Arbitrator entered a second Order, compelling Kargo to answer the question asked. Again, Kargo refused to comply with the order and restated its previous answer in reverse order.

Contrary to Kargo's representation regarding complaints, at the Hearing, Ms. Berger presented evidence of numerous complaints, suggesting sexual discrimination, against male managers:

1. Ms. McCallum complained on **multiple occasions** to **HR** that her male managers were being disrespectful to her; they told her she was the problem if she spoke up about issues needing correction, and they treated her like a housekeeper.[112]

   For example, her manager, Evan Schwartz, would not respect her as a manager – he called her "too sensitive; he made her cry a few times."[113] He would tell her she was "being emotional all the time."[114] One example was when there was a break-in. On the entire side of the office, computers were missing. "He indicated it was no big deal. [She] asked that no one be allowed to come into that space until police had done their processing; he said [she][115] had to stop acting with her emotions and be level headed like him."

   "He went on a screaming rampage, saying she wasn't doing her job."[116]

   Ms. Katz, the Director of HR at the time, was part of the conversation when Ms. McCallum was making these complaints.[117]

   Mr. Modi, Head of Finance and Business Operations, was Mr. Schwartz' boss. Ms. McCallum went to him and to Mr. McConville, but she received "no help from either so she went to HR."

   She continuously told Ms. Sybesma [Head of HR] about her issues with Mr. Canty, and it "resulted in a write up about [her] short comings."

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[112] Ms. McCallum's testimony.
[113] *Id.*
[114] *Id.*
[115] Ms. Berger's testimony.
[116] *Id.*
[117] *Id.*

Neither Mr. Schwartz nor Mr. Canty was ever disciplined, while Ms. McCallum was written up and later terminated. She believed it was because she was "too vocal;"[118]

"In [her] performance warning, [her] manager had used examples but they were false and [she] advised Joy [Sybesma] and asked to have an opportunity to refute them but that never happened."

2. After having taken maternity leave, Ms. Dalton, an employee in sales reporting to Mr. Canty, asked him to take her "work from home" day, which was granted to all other employees. He refused the request. She complained to Ms. Sybesma about him and his management:[119]

> I asked Kevin if I could WFH (work from home) this Thursday . . . . He said that ***because I've been out for 12 weeks, he feels it is more appropriate that I am in the office and did not approve***. (Emphasis is hers)
>
> I feel that denying me of a privilege granted to the entire company strictly because I was on medical leave is discriminatory and inappropriate. I also worry that Kevin will hold my medical leave against me for future PTO.
>
> I believe there needs to be a level set that ***my medical leave should have no bearing on my privileges as an employee nor should impact anything moving forward***. I do not want to be punished for my time away or have it held over my head.

3. Ally Cuervo, also, complained to HR about Mr. Canty, but Ms. Sybesma dismissed it as Mr. Canty was just "being a boy." Ms. Cuervo quit in a few months just prior to the Hearing.[120]

Kargo ignored more of Ms. Berger's discovery requests. It did not produce extremely pertinent responsive documents. To that reciprocal request, Ms. Berger had provided all correspondence, whether it had been created on her workplace account or personal one. She even produced emails in her partner's possession. It was not learned until the Hearing that

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[118] *Id.*; *see* RX 88, 89.

[119] CX 41.

[120] Mr. Kargman's testimony.

Kargo had provided only those communications created on workplace accounts even though it was aware that employees also used their personal accounts for work related matters. At the Hearing, Kargo maintained that it had made no attempt to obtain information from these sources. Notwithstanding, it had in its possession and had prepared its witnesses from the extremely relevant email between Mr. Rohrer and Ms. Gossman regarding Ms. Berger and her case. Mr. Rohrer and Ms. Gossman had created it on their personal accounts.

More credibility problems for Kargo surfaced when Ms. Berger was about to call Ms. McCallum at the Hearing. She had included her on her witness list. At that time, Ms. McCallum was no longer at Kargo.[121] Kargo had terminated her.

Initially, she had contacted Ms. Berger because she admired her.[122] Ms. Berger had been Ms. McCallum's only "ally" at Kargo.[123] Ms. Berger had helped her with Mr. Kargman.[124] She told Ms. Berger that she would welcome the opportunity to talk with Ms. Berger's counsel, both, about her own potential claims, as well as whether she might have information germane to Ms. Berger's case; she would also testify for Ms. Berger.[125] She advised that she was considering her own legal action against Kargo because she felt she was being pushed out for being "too vocal."[126]

After the Hearing had begun, Ms. Berger's counsel received a text from Ms. McCallum:

> "Hey Seth meant to let you know, I signed a separation agreement yesterday and cannot discuss Kargo in that capacity."[127]

Kargo prepared her Separation Agreement during this litigation. Ms. Berger's Demand for Arbitration was received on June 3, 2016. Kargo had Ms. McCallum sign a Separation

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[121] Ms. McCallum's testimony.
[122] *Id.*
[123] Id.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] CX 55.

Agreement on November 16, 2016, effective November 18, 2016.

While the agreement did not contain the usual exclusion of being able to testify in legal proceedings, it did include provisions that Ms. McCallum had an obligation to cooperate with Kargo and to testify if necessary[128] and could not disparage Kargo:[129]

> You shall not make, publish or issue any **detrimental, derogatory or other critical comments or statements**, whether written or oral, **concerning the Company, or any of its officers, directors or employees** . . . to any third party including, without limitation, public or trade media. (Emphasis added.)

Ms. Sybesma testified that she had worked on many separation agreements and that they all included the familiar widespread clause that makes clear to an employee that nothing in a separation agreement can prevent him or her from testifying in a legal process.

The agreement also provided Ms. McCallum with a $4000 "**bonus**" along with six weeks severance pay.[130]

After receiving Ms. McCallum's text, Ms. Berger's counsel requested a subpoena for her appearance. To dissuade this Arbitrator from signing it, Kargo's counsel repeatedly and adamantly represented to this Arbitrator that "she does not **want** to testify/she does not **want** to have anything to do with this."

This Arbitrator signed Ms. Berger's subpoena.

Knowing the, now, difficulty in securing Ms. McCallum's presence, shortly after the subpoena was issued, Kargo's counsel called her and alerted her that Ms. Berger was

[128] CX 54, provision nos. 11 and 18.
[129] *Id.*, provision no. 11.
[130] *Id.*; provision no. 3.

attempting to serve a subpoena on her.[131] As a result, it took around the clock efforts and several days to accomplish service on Ms. McCallum.

When she testified, essentially, she stated that "Joy [Ms. Sybesma] advised [her] that it was in [her] Separation Agreement that [she] had to assist Kargo if asked, and Joy told her that her assistance was needed;"[132] that Kargo's counsel's representation to this Arbitrator was not the truth. It was not that she did not **want** to testify, rather, based on her conversations with Kargo personnel, she understood that she was **prohibited** from testifying against Kargo and was required, instead, to assist it.

Further damage to Kargo's credibility is done when its witnesses tried to explain what warranted a change from the PIP to an involuntary leave of absence in just a few days. The main reason the witnesses gave is that they learned that Ms. Gossman and Ms. Biegel, their two top producers, threatened to quit if Ms. Berger were not removed, and they did not want to lose the income these them. However, this is not the truth according to Ms. Gossman and to Ms. Biegel. They testified that they did not tell Mr. McConville this. There is no credible evidence that Ms. Gossman told Mr. Rohrer this during their surreptitious meeting. In fact, when Mr. Kargman received Ms. Biegel's resignation notice around March 1, 2016, he went to talk with her to ask the reason.[133] During their conversation, Ms. Biegel never brought up Ms. Berger.[134] Furthermore, Ms. Biegel's email resignation and actions support that the reason she wanted to leave her job in sales was not because of Ms. Berger. She no longer wanted the stress of sales. Ms. Biegel was going to leave sales whether Ms. Berger stayed or left, and she did just that.

Furthermore, Kargo's explanation is not credible or logical. Ms. Gossman and Ms. Biegel were Kargo's top money producers **because of Ms. Berger's management**, whose management

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[131] Ms. McCallum's testimony.
[132] *Id.*
[133] Mr. Kargman's testimony.
[134] *Id.*

Kargo was about to lose as well as the income from its highest producer – Ms. Berger – through its own actions. After Kargo removed her, it offered a job to Ms. Beigel that she wanted in HR, out of sales. It is obvious that doing this meant that they would lose the income they now urge they were trying to preserve.

Mr. Kargman's credibility was severely damaged when he testified, *inter alia*, about the "cause" for Ms. Berger's ultimate "official" termination of July 22, 2016. Kargo has maintained that it was, in part, because she violated the non-disclosure provision of the Inventions Agreement by sharing confidential information, but Mr. Kargman had no credible information to support that allegation, revealed by the following testimony at his deposition:

> Q: I'm asking you if you have any knowledge of a specific piece of confidential information disclosed by Alexis Berger other than compensation information that you've described already.
>
> A: My understanding, it's that there was an **allusion** to other information being disclosed, **which I don't have exact, personal, detailed knowledge of**, but I'm sure it's something that we can get at in the litigation. (Emphasis added.)

This litigation has uncovered that the "confidential information" which was the foundation, in part, for Kargo's termination "for cause" was her sharing her compensation at Kargo when she was interviewing with Emogi for a job. This is not prohibited even if she had been bound by the Inventions Agreement, which she is not. Under federal law, employees are not prohibited from discussing their compensation.[135]

That aside, Mr. Kargman testified that he was not told until ***August 2016*** that Ms. Berger had shared her compensation at Kargo. Yet, Kargo terminated her in ***July*** for **this** "cause" and stated such in its counsel's July 22, 2016; namely, she had violated the Inventions Agreement by

[135] *See, e.g., Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014).

divulging her compensation information to her prospective employer, Emogi.[136]

Furthermore, another part of Kargo's "for cause" basis was an alleged violation of the non-compete clause in the Inventions Agreement. Again, this termination letter "for cause" was not sent until July 22. Ms. Berger had not begun working for Emogi until August so she could not have violated the provision and, simply, looking for a job is not a violation of a non-compete obligation. Certainly, it is not a "good faith" basis and reasonable belief (as the Equity Plan requires) to evoke "cause."[137] Mr. Kargman testified that "**They came up with the idea** of cause when **they** found out the job she was going to go to." (Emphasis added.) This suggests an attempt at an after the fact fabrication of a reason to support cause from which bad faith and a lack of credibility can be inferred.

In summary, when Ms. Berger sought a job at Emogi after learning of Kargo's intent to demote her, Kargo considered this job **search** to be a violation of the non-compete provision of the Inventions Agreement which Ms. Berger had not signed. It used her search as a violation of the non-compete restriction to strengthen its "termination for cause" claim and maintained that this forfeited her options, *inter alia*. However, Kargo permitted Mr. McConville, to provide actual services to Emogi while at Kargo in exchange for Emogi giving options to him, and Kargo permitted him to retain all of his stock options even though Mr. McConville has the same non-compete covenant Kargo claims Ms. Berger violated.[138] Additionally, presumably, Kargo would have allowed Mr. McConville to continue this service as it was Emogi that terminated the contract between it and Mr. McConville. Furthermore, when Mr. Hiller, Ms. Berger's direct report, left Kargo to work with her at Emogi, Kargo did not tell him that he could not exercise his options or that he was terminated for cause.[139]

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[136] Mr. Kargman's Deposition, 8-9.
[137] JX 1, pg. 28.
[138] JX 6.
[139] Mr. Hillier's testimony.

These are just two other clear inappropriate acts of discrimination against Ms. Berger and applications of the double standard. Kargo's failure to properly investigate claims against her, as well as failure to investigate claims of discrimination she made are other indicia of discrimination.[140]

Even though Ms. Berger was an "at-will" employee, she had a right not to be terminated because of her sex/stereotyping or to be subjected to a different standard than her male counterparts.

Having listened to the witnesses and considered documentary evidence, this Arbitrator finds Ms. Berger and her witnesses to be more credible. Having reviewed all the law presented by both sides, especially the shifting burdens of proof expressed in *Price Waterhouse* and having considered each argument both parties' counsel submitted, as well as their evidence, this Arbitrator finds that:

1. Ms. Berger has met her, preponderance of the evidence, burden of proof that she was **not** terminated for cause;

2. The "causes" Kargo provided are pre-textual;

3. Sexual discrimination was, **at the very least**, a motivating factor in her termination, and this was a collaborative orchestration carried out in a malicious, insidious, and humiliating manner, having the effect of depriving her of her earned commissions, her retention bonus, her stock options, her position, her livelihood, and her dignity.

The evidence is overwhelming that Kargo violated Title VII, NYHRL, and NYCHRL. Additionally, Kargo breached its implied obligation to act in good faith and fair dealing in the Employment Agreement by manufacturing reasons to label her termination as a "for cause" termination. The evidence exposed that Kargo labored under a double standard, treating Ms. Berger differently from its male managers, who were never even written up, reprimanded, or disciplined in any way for similar or worse behaviors it used to discredit her. They criticized

[140] *Sassaman*, 566 F.3d at 315.

behavior from her that they would accept from a man to run her out of the company.

It is clear from Kargo's actions and collective attitude that a woman is not permitted to act like a man.

Its "reassignment" of Ms. Berger to "a role that **stripped** title, pay, sales, etc.;"[141] specifically, taking away her "Senior Vice President" title,[142] cutting her salary from $375,000 to $250,000 and her commission potential in 2016 from $562,000 to $12,000[143] - were part of its acts of discrimination and constituted a constructive discharge as of April 11, 2016.[144] Kargo's refutation, that it did not intend it to be a termination; that it thought Ms. Berger – an industry wide extolled and accomplished professional who had won an award in a business publication for her management and for being a "woman to watch" in mobile marketing[145] – would accept such an obvious degradation, is not credible, nor is Mr. Kargman's testimony that he thought she would try to negotiate. With probing, he backed off of this statement and conceded that he really did not think she would try to negotiate since Kargo had taken a more formal approach upon Ms. Sybesma's advent. Furthermore, if indeed he thought she would negotiate, he knew this position was not worthy of her and he did not expect her to accept it. Moreover, Ms. Sybesma's talking points[146] for the conversation with Ms. Berger about this "reassignment" make Kargo's real intention of an ultimatum clear:

> If you decide not to take the role at any point during the 4 weeks (of involuntary leave of absence) then **we will terminate you** from your current role.
>
> If you don't take this leave of absence, **you will be terminated.** (Emphasis added.)

There is no room in the above for negotiation, and it amounts to a constructive discharge. A "constructive discharge" occurs when an employer creates an "intolerable work

[141] JX 66 - Mr. Rohrer's email to Mr. McConville.
[142] Ms. Sybesma's testimony; JX 62; JX 66.
[143] JX 29; Mr. Kargman's testimony.
[144] *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 161-62 (2d Cir.1998).

[145] R9.
[146] JX 62.

atmosphere that forces an employee to quit involuntarily."[147] Ms. Berger did not accept this "reassignment" but did offer to return to her position of SVP over sales.[148]

The *Ingrassia v. Shell Oil Co.* court held:

> New York courts have uniformly held that any reduction in rank or material change in the duties of an employee will form the basis of an action by an employee for breach of his employment contract and that a wrongfully discharged employee may refuse an offer of "other" employment without affecting the liability of the employer for wrongful discharge if the "other" employment amounts to a reduction in rank.[149]

Kargo argues that the parties' Employment Agreement gave it the right to reassign her with impunity; thus, her refusal to report to work on April 25th for the new job constituted "abandonment of her position" and, thus, "cause" for termination.

The pertinent part of the Agreement provides:

> Company, in its sole discretion, may change, amend or alter Employee's **position, duties and/or work location** from time-to-time as it deems appropriate; however, Company shall not relocate Employee outside of Illinois without Employee's consent . . . .[150] (Emphasis added.)

This provision does not include authority to decrease her salary. However, section 4 of the Agreement, entitled **COMPENSATION AND BENEFITS**, does address it and mandates a compensation certain except for an increase. It provides that:

> Company **shall** compensate Employee **pursuant to the terms stated in this Section 4.1**, to be paid **in accordance with Company's then-current payroll practices** commencing on the Commencement Date and continuing **for the duration of the Employment Period**, prorated for any partial compensation period. Employee shall be eligible for compensation **increases** at the discretion of Company. (Emphasis added.)

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[147] *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir.1996).
[148] JX 76; Ms. Berger's testimony.
[149] 394 F. Supp. 875, 886 (S.D.N.Y. 1975).
[150] Employment Agreement, Section 3.

In other words, this provision gives Kargo the right to increase her salary but not to decrease it, providing that her salary will remain constant throughout her employment except for increases at the Company's discretion.

Indeed, it is extremely difficult to imagine and unreasonable to think that Ms. Berger would have consented to giving Kargo such an indiscriminate power to decrease her salary and resulting benefits. Kargo's logic means that it could have, legally, reassigned her to even a janitorial position and salary or the like. It is absurd to suggest that this would have been contemplated or accepted Ms. Berger. Moreover, this ambiguity must be construed against Kargo, the drafter.

Nevertheless, even if there were such a mutual intent, Kargo cannot use a contract as a shield against its unlawful discrimination. Findings of constructive discharge and sexual discrimination render its "abandonment of her position" claim moot.

Kargo's other "termination for cause" arguments are that Ms. Berger violated the non-disclosure, non-solicitation, and non-compete provisions of the Inventions Agreement. Kargo failed to present a copy of the agreement with Ms. Berger's signature. Ms. Katz testified that Ms. Berger never signed it. Kargo argues that this is of no moment because the Employment Agreement, expressly, incorporates the Inventions Agreement into the Employment Agreement, which she did sign; thus, she is bound by the Inventions Agreement.

Kargo is correct that the language in the Employment Agreement does, expressly, incorporate the Inventions Agreement, but it is incorrect that this means the Inventions Agreement binds Ms. Berger, for the following reasons.

1. No evidence was presented that it was attached to the Employment Agreement which Ms. Berger did sign – there could have been more than one version; there is no evidence that she read the Inventions Agreement alluded to; thus, there is no way she could know the **specifics** in it, as is required by the Agreement's "acknowledgement" requirement entitled "ENFORCEMENT OF COVENANTS:"

> Individual acknowledges that Individual has carefully read **and considered all the terms and conditions** of this Agreement, including the restraints imposed upon him pursuant to Section 4 hereof. (Emphasis added.)

2. No evidence was presented as to whether the Inventions Agreement had never been modified.

3. All the Employment Agreement did was reference the name of the agreement. This does not satisfy the requirements to bind Ms. Berger.

Kargo's argument that she knew what was in it and that she was supposed to sign it or that she agreed she was bound by it is of no legal moment. *Nobel Ins. Co. v. Hudson Iron Works, Inc.*[151] rejected parole evidence where defendants "seek to rely on, at best, inconclusive, **unexecuted**, one-sided documents to markedly alter the terms and plain meaning of the [original agreements]." (Emphasis added.)

Moreover, Kargo's counsel misstates Ms. Berger's testimony concerning Ms. Berger's understanding of whether she was bound by the Inventions Agreement. She questioned Ms. Berger about this at her deposition:

> Q [Ms. High]: Did you understand that you're bound by the inventions agreement?
>
> Mr. RAFKIN: Objection, calls for a legal conclusion.
>
> A [Ms. Berger]: I never signed the inventions agreement because **it was never presented to me.**
>
> Q: Do you have an understanding one way or the other whether you're bound by the inventions agreement by its incorporation into this document?
>
> MR. RAFKIN: Objection, calls for a legal conclusion.
>
> A: It's my opinion I would be bound to it **if I had executed that document**, and for

[151] 51 F. Supp. 2d 408 (S.D.N.Y. 1999).

whatever reason they never presented me with that document **when joining the company.**[152] (Emphasis added.)

Finally, even if a signed Agreement did exist, New York Courts generally do not enforce these restrictive covenants when an employee is terminated without cause,[153] which is the finding in the instant case; the alleged violations did not theoretically transpire until after Kargo terminated her; and this allegation evidences a further act of unlawful discrimination.

For all of the above reasons, an Inventions Agreement cannot be enforced against Ms. Berger; thus, the "non-disclosure," "non-compete," and "non-solicitation" provisions do not bind her. As such, they cannot form part of "cause" for her termination.

Additionally, Kargo's failure to pay Ms. Berger her Q1 earned commissions constitutes a "first breach" of the agreement upon which it predicates these counterclaims. "When a party benefiting from a restrictive covenant in a contract breaches that contract, the covenant is not valid and enforceable against the other party because the benefiting party was responsible for the breach."[154]

Accordingly, Kargo is barred as a matter of law from asserting a breach by Ms. Berger.[155]

As to its remaining counterclaims of Breach of Duty of Loyalty and Fair Dealing and Tortious Interference, the "unclean hands" doctrine precludes Kargo from obtaining relief.

The elements of the "unclean hands" defense are:

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[152] Ms. Berger's Deposition, 37:25 – 38:16.

[153] *Arakelian v. Omnicare, Inc.*, 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010).

[154] Cornell v. T.V. Development Corp., cited in *Decapua v. Dine-A-mate, Inc*, 292 A.D.2d 489, 491 (N.Y. App. Div. 2002).

[155] *DeCapua v. Dine-A-Mate, Inc.*, 292 A.D.2d 489, 491 (N.Y. App. Div. 2002); *In re UFG Int'l, Inc.*, 225 B.R. 51, 56 (Bankr. S.D.N.Y. 1998); *Cornell v. T.V. Dev. Corp.*, 268 N.Y.S.2d 29, 34 (N.Y. 1966); *J.K. Dental Lab Servs., Inc.*, 2013 BL 54293 at p. 6; *In re UFG Int'l, Inc.*, 225 B.R. 51, 56 (Bankr. S.D.N.Y. 1998).

1. the plaintiff is guilty of immoral, unconscionable conduct;
2. the conduct was relied upon by the defendant; and
3. the defendant was injured thereby."[156]

This Arbitrator finds that these elements are supported by the evidence adduced outlined above.

Furthermore, regarding an employee's Duty of Loyalty, as Ms. Berger reports, this notion is "rooted in the law of agency.[157] That is obviously inconsistent with a blanket duty to be forever loyal to a **former** employer of whom an employee is no longer an agent, outside an employee's common law continuing duty not to misappropriate a company's proprietary information." (Emphasis added.) There is no evidence that Ms. Berger misappropriated Kargo's proprietary information. Thus, she did not breach a duty of loyalty.

In summary, Ms. Berger has satisfied her burden of proof that none of the reasons Kargo provided support its "for cause" termination and they are nothing more than a demonstration of impermissible stereotyping and a double standard, amounting to a pre-text.

In short, Kargo cannot identify a nondiscriminatory reason, standing alone, to support a legitimate "for cause" termination.

RETALIATION

Ms. Berger asserts that Kargo retaliated against her for complaining about discrimination; this was a violation of violation of Title VII, the NYHRL, the NYCHRL, and New York Labor Law section 215.

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[156] *Doe ex rel. Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324, 350, 2010 BL 145991, 14 (S.D.N.Y. 2010).
[157] *Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 200 (2d Cir. 2003).

Under NYCHRL, as with discrimination, if retaliatory intent played any role in Kargo's decision not to pay Ms. Berger her commissions, to label her termination as "for cause," and/or to forfeit her options, Kargo is liable for retaliation.[158]

To establish a *prima facie* case, she must show that:

> (1) she was engaged in [a protected] activity;
>
> (2) the employer was aware of [her] participation in the protected activity;
>
> (3) the employer took adverse action against her; and
>
> (4) a causal connection existed between the protected activity and the adverse action taken by the employer.[159]

Retaliation claims are subject to the McDonnell Douglas burden-shifting standard.[160]

The evidence shows that, when Kargo sought to "reassign" her, Ms. Berger complained to Kargo about unfair treatment, and her counsel sent a letter to Ms. Sybesma, asserting that Kargo's actions discriminated against her on the basis of gender. He also followed up with a draft EEOC charge, alleging gender discrimination.[161]

Ms. Berger need not prove that she was discriminated against to establish that she was engaged in a protected activity.[162]

The *Adams v. Canon USA, Inc.* court found that "The letter from Adam's attorney, as well as Adams' complaint to the EEOC, constitute protected activity."[163] The *Lamberson v. Six West Retail Acquisition Inc.* court held that, "Protected oppositional activities include informal as well

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[158] *Williams v. New York City Hous. Auth.*, 61 A.D.3d at 76; *Laboy*, 2016 BL 322722 at 11.
[159] *Raniola v. Bratton*, 243 F.3d 610, 624 (2d Cir. 2001); *see also Antolino v. Distribution Mgmt. Consolidators Worldwide, LLC*, 2013 BL 208006, 5 (N.Y. Sup. Ct. Aug. 02, 2013) (applying NYLL § 215).
[160] *Kirkland v. Cablevision Systems*, 760 F.3d 223, 225 (2d Cir. 2014).
[161] CX 22; *see Raniola*, 243 F.3d at 624-25.
[162] *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996).
[163] 2009 BL 204652, 19 (E.D.N.Y. Sept. 22, 2009).

as formal complaints and complaints to management."[164]

Notwithstanding, Kargo argues that Ms. Berger did not engage in a protected activity in good faith because she had been advised of alleged performance issues and the "reassignment" had a self-evident business rationale.

Ms. Berger counters that:

> a plaintiff need only "have had a good faith, reasonable belief that [s]he was opposing an employment practice made unlawful by Title VII."[165] The question is whether the plaintiff has "challenged employment practices that, if proven, were unlawful under Title VII."[166] Gender discrimination, if proven, violates Title VII and New York law.

Kargo further maintains that none of the actions Ms. Berger has identified had anything to do with her protected activity.

Ms. Berger replies that:

> The first adverse action is the leave of absence. Placing an employee on an involuntary, unpaid leave of absence constitutes adverse employment action.[167] The only question is whether Kargo did so *at least in part* because Berger asserted her right not to be discriminated against. **Berger was put on an unpaid leave just <u>days</u> after complaining about discrimination.** (Emphasis added.)

In *Ibraheem v. Wackenhut Servs.*, Inc., the plaintiff was terminated after he filed an EEOC charge and a lawsuit. The court said that this permitted "an inference that he was retaliated against."[168]

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[164] 122 F. Supp. 2d 502, 511 (S.D.N.Y. 2000).
[165] *Kessler v. Westchester Cnty. Dept. of Soc. Servs.*, 461 F.3d 199, 210 (2d Cir. 2006).
[166] *Id.*
[167] *Taedger v. New York*, 2013 BL 284262, 6 (N.D.N.Y. Oct. 15, 2013); *Lara v. City of New York*, 1999 BL 545, 5 (S.D.N.Y. June 29, 1999).
[168] *Ibraheem v. Wackenhut Servs.*, Inc., 29 F. Supp. 3d 196, 213 (E.D.N.Y. 2014).

Kaytor v. Elec. Boat Corp. held that a "close temporal proximity between the plaintiff's protected action and the employer's adverse employment action may itself be sufficient to establish the requisite connection between a protected activity and retaliatory action."[169]

Additionally, there is no evidence that Kargo investigated Ms. Berger's claim of discrimination against her. Failure to fulfill a duty is no less an adverse employment action than an affirmative action.[170] Kargo claims that it had no duty to investigate and that a failure to investigate cannot constitute an adverse employment action.[171]

Kargo is partially correct. The *Fincher* court Kargo relies on held that a failure to investigate a complaint of discrimination, **standing alone**, is not an adverse employment action. However, that is not the situation in the instant case.

Ms. Berger clearly demonstrated that a "failure to investigate" was not the only discriminatory act against her. In addition to failing to investigate or to remedy her complaint of discrimination, Kargo:

1. put her on an unprecedented leave of absence as a disciplinary action which it had not done with male employees for the same or worse behaviors;
2. put her on an unpaid leave without benefits;
3. refused to pay her earned commissions for 2016 when it paid everyone else theirs; and
4. terminated her employment for pre-textual "causes" to deny her the right to exercise her vested stock options and to trigger the repayment of her retention bonus.

Finally, *Fincher* does not stand for the proposition that an employer is relieved of its duty to investigate claims of discrimination or that the failure to do so is not evidence of an

[169] 609 F.3d 537, 552 (2d Cir. 2010).
[170] *Fincher v. Depository Trust and Clearing Corp.*, 604 F.3d at 712.
[171] *Id.*

unlawful motive.[172]

Next, we examine the reason Mr. Kargman ordered that Ms. Berger not be paid her earned Q1 commissions when he approved the payment of everyone else's commissions. His testimony in his deposition and at the Hearing differ. At his deposition, he had no answer other than it is part of the dispute in the litigation. At the Hearing, he maintained that his decision was because her termination for cause contractually forfeited her commissions.

This, like so many of Kargo's assertions, compounds the damage to his and to Kargo's witnesses' credibility because this account cannot be true physically. His former HR Director, Ms. Katz, testified at the Hearing that everyone else, except Ms. Berger, was paid their Q1 commissions on May 30, 2016. The evidence reveals that **none** of the contractual bases Kargo cites to support its purported "for cause" termination existed as of May 30, 2016 or even as of July 22, 2016 when Mr. Kargman terminated her; namely, Kargo had asserted that Ms. Berger had violated the non-compete, non-solicitation, and non-disclosure provisions in her Inventions Agreement. This is impossible because Ms. Berger did not begin working for Emogi (which Kargo deemed to be a competitor) until August and disclosure of her compensation before then was not a violation of the non-disclosure provision, but more importantly, she was not bound by this unsigned agreement. The fact is that Mr. Kargman decided not to pay her commissions before he decided to terminate her and he did so without valid cause.

Kargo argues that Ms. Berger has not proved a causal connection between her protected activity and the adverse action taken by the employer – the final element of proof required for proving retaliation; namely, she has not proved a causal connection between her complaining that the demotion, pay cut, etc. were discriminatory and Kargo's subsequent placing her on unpaid leave, days later, and having taken no action in the interim to respond to, investigate, or address her alleged discrimination.

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[172] *Sassoman*, 566 F.3d at 315.

Aside from the inference of retaliation, which can be drawn from the proximity between Ms. Berger's complaint and Kargo's adverse actions, the causal connection and Kargo's intent to punish Ms. Berger are reflected in Mr. Kargman's state of mind. In response to "why did you have Ms. Sybesma send Ms. Berger the April 29, 2016 letter,[173] telling her she was being placed on **unpaid** leave and Kargo will be **terminating her benefits**," he said,

> "I did it because I was disappointed that she hired an attorney and threatened to sue me without discussing this with me."

This begs the more probable than not inference that Mr. Kargman's actions were not taken because Ms. Berger legally deserved them but rather as acts of retaliation to punish her for making an official complaint against Kargo for its discrimination.

This Arbitrator finds that she has proven by a preponderance of the evidence every element she is required to prove for a retaliation claim against Kargo.

EQUAL PAY ACT CLAIM

Ms. Berger claims that Kargo violated state and federal equal pay laws, in particular, Title VII, the Equal Pay Act, the Lilly Ledbetter Fair Pay Act, and New York Labor Law (NYLL) section 194, when it cut her base salary by 45% and, thus, her commissions, which are wages;[174] failed to pay her earned Q1 commissions; and in its diverse treatment of her options.

The "Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work . . . . All forms of pay are covered by this law, including salary, overtime pay, bonuses, **stock options**, profit sharing and bonus plans, life insurance, vacation

[173] JX 80.
[174] NYLL § 193.

and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel, expenses, and benefits."[175] (Emphasis added.)

To prevail on an equal pay claim, Ms. Berger must prove:

1. Kargo treated her wages or benefits (including stock options) differently than it treated the wages or benefits of men;

2. Berger performed equal work on a job requiring equal skill, effort, and responsibility; and

3. the jobs are performed under similar working conditions.[176]

"An equal pay claim under New York Labor Law § 194 is analyzed under the same standards applicable to the federal Equal Pay Act."[177]

"An equal pay claim under Title VII is analyzed under the same standards as an Equal Pay Act claim, except that, in addition to establishing the elements of an Equal Pay Act claim, a plaintiff must produce evidence of discriminatory animus.[178]

Regarding element number 1 above, the evidence presented highlights the diverse way in which Kargo treated Ms. Berger versus her male counterparts regarding wages. It did not cut the base compensation or commissions of any other male executive at the company in 2016. These men behaved in the same or worse manner as that for which Kargo disciplined Ms. Berger. It did not, even, cut Mr. Canty's pay. He held the same position as Ms. Berger and numerous sexual discrimination complaints had been lodged against him.

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[175] https://www.eeoc.gov/laws/types/equalcompensation.cfm; *See Perdue v. City University of New York*, 13 F. Supp. 2d 326, 333 (E.D.N.Y. 1998).
[176] *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 524 (2d Cir. 1992), *also* 29 U.S.C. § 206(d); *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1973), *Talwar v. Staten Island Univ. Hosp.*, No. 14-1520-cv (2d Cir. 2015).
[177] *Talwar v. Staten Island Univ. Hosp.*, No. 14-1520-cv (2d Cir. 2015).
[178] *Id.* (citing *Belfi v. Prendergast*, 191 F.3d 129, 139 (2d Cir. 1999)).

Regarding options, a difference in treatment is also blatantly apparent; namely, Kargo permitted its Vice President, Mr. McConville, to work for Emogi in an advisory capacity and to receive equity as compensation without penalizing him by taking away his Kargo options, *inter alia*. On the other hand, when Ms. Berger simply applied to Emogi for a job, she was terminated with Kargo avowing bogus reasons "for cause," depriving her of her vested options. Mr. McConville was bound by the same restrictive covenants Kargo relied on to terminate Ms. Berger and to "strip" her of her options.

Regarding the second and third elements of proof required of Ms. Berger, there is no dispute that she performed the same "work on a job requiring equal skill, effort, and responsibility" and that the job was performed under similar working conditions as Mr. Canty, who was Senior Vice President for the East Coast. The only difference is that, given that she was the highest earner, she performed her job better.

Ms. Berger has satisfied the requirements for establishing a *prima facie* case.

"Once the plaintiff establishes a *prima facie* case, the employer must justify the disparity by showing it results from:

1. a seniority system;
2. a merit system;
3. a system which measures earnings by quantity or quality of production; or
4. a differential based on any other factor other than sex."[179]

Given the evidence outlined above, Kargo has failed to show any factors other than sex being responsible for the disparity it showed.

To prove a violation under Title VII, one factor remains – discriminatory animus. Animus means hostility or ill feeling.

[179] *Aldrich*, 963 F.2d at 524 (citing 29 U.S.C. § 206(d)(1), *Corning*, 417 U.S. at 196).

EXHIBIT A-3

The record is replete with evidence – expressed and implied – of hostility towards Ms. Berger, which is reflected in many of Kargo's actions, in particular, in Mr. McConville's and Mr. Rohrer's aggressive efforts to force her out.

To that end, they drove a sham, biased "investigation" against Ms. Berger, faulting her for behaviors they and other male managers were engaging in; Mr. Rohrer arranged a "clandestine" meeting with Ms. Berger's direct report, Ms. Gossman, to collect nefarious information against Ms. Berger and conspired with Ms. Gossman to concoct a "fake" cover story; and in accordance with Mr. Rohrer's and Mr. McConville's agenda, Mr. McConville pushed to have Ms. Berger placed on an unprecedented leave without giving her an opportunity to defend or explain herself in the face of the accusations being stacked against her or to give her an opportunity to "change."

He emailed Ms. Sybesma on February 15, 2016, "**we** have a **plan** but would like to vet it with you."[180] (Emphasis added.) The "plan" was to put Ms. Berger on a leave of absence.[181] Despite Ms. Sybesma advising against it; that they should first speak with Ms. Berger and give her "*clear examples* of when her behavior has not met expectations,"[182] he and Mr. Rohrer did not do so. Despite Ms. Sybesma's disapproval of their "plan," Mr. McConville uprooted the PIP Ms. Sybesma had put in place and had Ms. Berger placed on the involuntary leave he had wanted Ms. Sybesma to condone.

Mr. McConville described the process as one to "put Alexis to the side."[183]

Ms. Sybesma admitted that neither she nor Ms. Katz followed Bloomberg law[184] regarding proper investigation procedures for complaints.

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[180] JX 36.
[181] JX 37.
[182] *Id.*
[183] Mr. McConville's testimony.
[184] CX 49.

Kargo's "investigation" led to adverse action against Ms. Berger and was not just unsound but "inexplicably unfair."[185] That renders the "investigation," itself, evidence of discriminatory animus against Ms. Berger.[186]

Additionally, Kargo did not investigate Ms. Berger's unequivocal complaint of gender discrimination raised in her letter of April 15, 2016.[187] Kargo's failure to do so is more evidence of its discriminatory intent[188] and animus towards Ms. Berger.

It was no secret at Kargo that Mr. McConville and Mr. Rohrer resented the close relationship Mr. Kargman and Ms. Berger had fostered with each other. At the Hearing, Mr. McConville testified that their relationship was "unhealthy" and "rogue." An example he gave was that "on a daily basis, they would talk to each other, not involving others." This upset him despite the fact that Ms. Berger was Mr. Kargman's direct report. Mr. McConville stated that Ms. Berger is "so used to getting her way because of her relationship with HK (Harry Kargman)."[189] Thus, Mr. McConville and Mr. Rohrer purposefully excluded Mr. Kargman from their communications regarding Ms. Berger because, as Mr. McConville wrote to Mr. Rohrer, "that just plays into the whole triangle."[190] Mr. Kargman was excluded from almost all of the communications from February and March of 2016 regarding their collection of "information" to support their "plan."[191] They were vigilant about maintaining control of their stratagem.[192]

Examples include that they did not tell Mr. Kargman that Ms. Gossman had reported on March 6th a substantial improvement; that Ms. Biegel and Ms. Gossman had not in truth threatened to quit because of Ms. Berger; that the PIP HR had decided on was upended because

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[185] *Mastro v. Potomac Electric Power Co.*, 447 F.3d 843, 855 (D.C. Cir. 2006).
[186] *Id.*
[187] Ms. Sybesma's testimony.
[188] *Sassaman*, 566 F.3d at 314-315; *Torres v. Pisano*, 116 F.3d 625, 638 (2d Cir. 1997).
[189] JX 53.
[190] RX 22.
[191] JX 31, 32, 33, 36, 37, 38, 46, 55, 58, 64, or 66.
[192] JX 38.

of Mr. McConville's baseless unilateral decision, or that Ms. Berger had already begun to significantly implement the plan when Mr. McConville ordered it to be rescinded.[193]

Mr. Kargman was not aware of the complaints against Ms. Berger and "unhappy people" until Mr. Rohrer and Mr. McConville set up the New York meeting to censure Ms. Berger.[194] To ensure his support, Mr. Rohrer and Mr. McConville lead him to believe they needed to take immediate action against Ms. Berger to avoid "a widespread exodus out of -- out of the Chicago office."[195]

Mr. Kargman testified:

> I wasn't as in the loop as I would have liked to have been, and I certainly am now, but basically he (Mr. Rohrer) said that there were serious and grave morale issues, which I didn't know the details around at the time, and that we needed to do something about it swiftly or we would have an even bigger problem on our hands.[196]

After they had accomplished getting Ms. Berger demoted and reassigned, Mr. Rohrer was still not happy because she was not, yet, completely out of the company. On April 5, 2016, he wrote to Mr. McConville (not copying Kargman):

> . . . . What was hard to hear was the hit to our culture in condoning her behavior by **allowing her to return even in a role that stripped title, pay, sales, etc.**[197]

Along with the sentiment, his choice of the word, "stripped," was telling of his attitude and animus intention.

Once Kargo placed Ms. Berger on an unpaid leave based on its fabricated "cause," it, not only denied her $300,000 in earned commissions, when it paid everyone else, but even

[193] Mr. Kargman's Deposition, 130:12 – 131:19.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] JX 66.

refused to reimburse her $400 in costs that it had promised.

This Arbitrator finds that Ms. Berger has satisfied the "discriminatory animus" requirement for the Title VII violation.

BREACH OF CONTRACT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Ms. Berger claims that:

> "Kargo breached Berger's Employment Agreement and modifications thereto[198] and her Options Agreements[199] as well as the implied covenant of good faith and fair dealing by: (1) refusing to pay her earned commissions; and (2) asserting a "for cause" termination and on that basis terminating Berger's vested options and seeking repayment of the retention bonus.

Regarding the breach of contracts, Ms. Berger must prove, by a preponderance of the evidence, the:

1. formation of a contract,
2. performance by [Ms. Berger],
3. breach by Kargo and
4. resulting damage.[200]

To establish a breach of the implied covenant of good faith and fair dealing, Ms. Berger must establish that:

1. Kargo owed her a duty to act in good faith and conduct fair dealing,
2. Kargo breached that duty; and
3. the breach of duty proximately caused her damages."[201]

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[198] JX 2, 29.
[199] JX 3, 8, 13.
[200] *Genger v. Genger*, 2016 BL 321652, 2 (2d Cir. Sept. 29, 2016) (citing *McCormick v. Favreau*, 82 A.D.3d 1537, 1541 (N.Y. App. Div. 2011).

Gaia House Mezz LLC held that the implied covenant of good faith and fair dealing prevents "any party from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[202]

There is no credible evidence that Ms. Berger did anything but satisfy all of her obligations to Kargo. On the other hand, as is chronicled above and for those reasons, the evidence confirms that Kargo committed the first material breach of the parties' Employment Agreement and that Kargo acted in bad faith regarding all contracts with Ms. Berger; namely, by labeling her termination as "for cause" when there were no bases, cutting her salary and benefits, denying her the commissions she had earned, and forfeiting her options.

Accordingly, she is entitled to damages for Kargo's breach of contract and the implied covenant of good faith and fair dealing.[203]

DID KARGO'S FAILURE TO PAY EARNED COMMISSION VIOLATE NEW YORK LABOR LAW

To establish a violation of NYLL section 193, Berger must establish that:

1. Kargo was Ms. Berger's employer, and
2. Kargo unlawfully made deductions from her earned compensation.[204]

Under NYLL, earned commissions are "wages," and the failure to pay wages, including earned commissions, is an improper deduction under the statute.[205]

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[201] *Harte v. Ocwen Fin. Corp.*, 2014 BL 260903, 9 (E.D.N.Y. Sept. 19, 2014) (citing *Champagne v. United States*, 2014 WL 1404566, at *9 (N.D.N.Y. Apr. 10, 2014); *In re Tremont Sec. Law, State Law, & Ins. Litig.*, 2013 WL 5393885, 8 (S.D.N.Y. Sept. 26, 2013)(stating elements); *Washington v. Kellwood Co.*, No. 2009 BL 347072, 6 (S.D.N.Y. Mar. 24, 2009) (same).
[202] *Gaia House Mezz LLC v. State St. Bank & Trust Co.*, 720 F.3d 84, 93 (2d Cir. 2013).
[203] See *Genger v. Genger*, 2016 BL 321652, 2 (2d Cir. Sept. 29, 2016) (citing *McCormick v. Favreau*, 82 A.D.3d 1537, 1541 (N.Y. App. Div. 2011).
[204] NYLL § 193, *Ryan v Kellogg Partners Inst. Servs.*, 968 N.E.2d 947, 945 (N.Y. 2012).
[205] *Scarpinato v. East Hampton Point Mgmt. Corp.*, 2015 BL 288786,*4 (Sup. Ct. Aug. 14, 2015), *Ryan*, 968 N.E.2d at 945.

In the instant case, Kargo failed to pay Ms. Berger $305,121.33 in earned commissions for Quarters 1 and 2 of 2016 – January 1, 2016 through and including May 2, 2016. This amount is undisputed.[206] These commissions were due and owing to her as had been and was at the time Kargo's practice with all of its employees to pay them when their work had been booked and run.[207] Ms. Katz verified this, testifying in her deposition that "Typically they're paid 60 days after the close of a quarter."[208]

Moreover, contrary to Kargo's assertions, those commissions are not subject to forfeiture.[209]

New York law is settled that once a commission is earned, it may not be forfeited.[210] "New York has a longstanding policy against the forfeiture of earned wages."[211] This policy "applies to earned, **uncollected** commissions as well."[212] (Emphasis added.)

Kargo argues that due to Ms. Berger's "for cause" termination, the provision in the parties' Employment Agreement requires her to forfeit her accrued but unpaid commissions. Having determined that her termination was not for cause but rather due to unlawful discrimination, this provision is moot.

Finally, in a 2007 opinion letter addressing commission wages, the New York Department of Labor provided that "failure to pay wages **by reason of termination of employment, whether by resignation** or otherwise, is a violation of [New York Labor Law] § 191(3)."[213] (Emphasis added.)

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[206] CX 42; Testimony of Ms. Sybesma, Ms. Katz, Mr. Kargman, Ms. Berger.
[207] Ms. Berger's testimony.
[208] Ms. Katz deposition, p. 35.
[209] V.A.3.
[210] *Arbeeny v. Kennedy Exec. Search, Inc.*, 71 A.D.3d 177, 182 (N.Y. App Div, 2010).
[211] *Esmilla v. The Cosmopolitan Club*, 936 F. Supp. 2d 229, 252 (S.D.N.Y. 2013) (citing and quoting *Weiner v. Diebold Group, Inc.*, 568 N.Y.S.2d 959, 961 (N.Y. App. Div. 1991).
[212] *Arbeeny*, 71 A.D.3d at 182.
[213] NYDOL Opinion Letter, April 10, 2007 (available at https://labor.ny.gov/legal/counsel-opinion-letters.shtm).

Kargo further attempts to justify its failure to pay Ms. Berger her earned commissions by arguing that it has a practice of being able to "claw back" or refuse to pay commissions based on it having not yet received the fees from clients on which the commissions are based.

Ms. Berger testified that in her four years of managing sales teams at Kargo she was not aware of a single time in which a commission was withheld or clawed back on the basis of revenue not being received from a client. Nothing in the commission plan allows Kargo to do so and Kargo failed to produce any documentary evidence demonstrating even one instance in which it withheld or clawed back commission compensation.

In fact, the commission plan contradicts Kargo's assertions. The plan states specific dates on which the commissions will be paid. It provides no exceptions:

> Commission amounts paid on same date schedule as 2015 – 60 days after quarter end.
>
> - Q1 2016 paid May 31st, 2016
> - Q2 2016 paid August 31st, 2016
> - Q3 2016 paid November 30th, 2016
> - Q4 2016 paid Feb 28th, 2017

It is undisputed that every employee, other than Ms. Berger, earning commissions for Q1 and Q2 2016 under the plan received them on time in keeping with this payment schedule on a book and run basis.

According to all of the evidence and the law, Kargo's failure to pay Ms. Berger these wages violated NYLL section 193, and Ms. Berger is entitled to damages.

KARGO'S COUNTERCLAIMS

The lack of validity of all of Kargo's counterclaims has been handled herein above. Thus, they will not be discussed further.

DAMAGES

Having found that Ms. Berger is entitled to relief on all of her claims, a determination of the amount of her damages is, now, necessary.

Ms. Berger's original estimate in her Demand for Arbitration was $3,000,000. Due to information garnered during discovery, this estimate was revised to approximately $25,000,000 before the Hearing. Based on evidence adduced at the Hearing, it was updated to the present amount of approximately $47,000,000, admittedly, a vast difference.

Kargo argues that Ms. Berger should be limited to her original amount because "defending a $3,000,000 claim is much different from defending a $47,000,000 claim." What was litigated were **claims.** These never changed. Kargo had the same ability as Ms. Berger to estimate damages based on evidence adduced. There was no need for Kargo to rely on Ms. Berger's estimates. Thus, Ms. Berger's recovery will not be limited.

Commissions and Related Liquidated Damages

Commissions

Under the commission plan applicable to Ms. Berger, which Kargo issued for 2016,[214] her commissions totaled $305,131.33 for the period of January 1, 2016 through and including May 2, 2016, the day she was put on unpaid leave.[215] She is awarded that amount.

Liquidated Damages, Fees and Costs

[214] CX 10.
[215] Ms. Sybesma, Ms. Katz, Mr. Kargman, and Ms. Berger's testimony.

A failure to pay earned commissions renders the employer liable for mandatory liquidated damages in an amount equal to the amount of commissions it failed to pay.[216] Thus, Ms. Berger is entitled to an additional $305,133.15 in statutory liquidated damages. She is also entitled to attorneys' fees and costs which will be addressed upon her post-Award motion.

Options

As Ms. Berger urges, she is entitled to recover the value of her stock options on two bases:

1. contractual; and/or
2. statutory because of discrimination, retaliation, and/or an equal pay violation.

Kargo breached its contractual obligations to Ms. Berger when it unlawfully invoked "cause" for terminating her employment, having the effect of precluding her from exercising her stock options.

Stock options were a component of her compensation package. Their value is recoverable as damages under the discrimination, retaliation, and equal pay statutes.[217]

Ms. Berger had, both, vested and unvested stock options. What must be decided is whether she is entitled to recover her unvested options, avoiding undue speculation.

She helped build Kargo from infancy to adulthood. Kargo was her life and her identity. She had enormous success there, enjoying a close working relationship with its CEO. She was paid extremely well – much more there than she could garner anywhere else in the industry doing the same work. Having to go to another employer would mean she would have to start

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[216] NYLL § 198(1-a); *Walpert v. Jaffrey*, 2016 BL 270608, 8 (S.D.N.Y. Aug. 17, 2016).
[217] *See Greene v. Safeway Stores, Inc.*, 210 F.3d 1237, 1243 – 44 (10th Cir. 2000).

all over and recreate at least the same successful environment. She had no intentions of doing this. She had invested her money, her time, her reputation, and her expertise in Kargo.

Given the evidence and finding Ms. Berger to be completely credible, this Arbitrator is convinced that but for Kargo's illicit actions, she would have remained at Kargo until the Company is sold. She had full intention to do so, no reason to leave, and every reason to stay until she was able to have the fruits of her labor along with the rest of Kargo's employees. In fact, exiting was "the carrot" she and the other Kargo employee stockholders were working towards, looking forward to, and constantly talking about – "exiting."[218] To that end, approximately six months before the Hearing, Kargo engaged an expert, Mr. Hadl, to provide his opinion, *inter alia*, on the value of the company for the purpose of its "exit."

Given all of the above facts, this Arbitrator finds that Ms. Berger is damaged for the loss of the value of her unvested options, as well as her vested options.

Kargo's actions breached her options contract.

"The proper measure of damages for breach of contract is determined by the loss sustained or gain prevented at the time and place of the breach." [219] "The rule is precisely the same when the breach of contract is nondelivery of shares of stock."[220]

Accordingly, the value of her options must be determined as of the date of constructive discharge – April 11, 2016. Ms. Berger and Kargo are at odds as to what methodology to use to arrive at the value – whether to use the exercise value or the value for which they would likely trade.

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[218] Ms. Berger's testimony.

[219] *Simon v. Electrospace Corp.*, 28 N.Y.2d 136, 145 (1971), citing *Parker v. Hoppe*, 257 N.Y. 333, 341; *Hoppe v. Russo-Asiatic Bank*, 235 N.Y. 37, 39; 11 Williston, Contracts [3d ed.], § 1339; 25 C. J. S., Damages, § 74, at pp. 850-851; 13 N. Y. Jur., Damages, § 43; Restatement, Contracts, § 329, esp. Comment b; cf. § 338, incl. Comments

[220] *Simon v. Electrospace Corp.*, 28 N.Y.2d 136, 145 (1971).

Kargo contends that the appropriate measure is arrived at by using the 409A methodology which its expert, Carlyn Taylor, used, and Kargo's other expert, Dr. David Lewin, supported. Professor Lewin, acknowledged that he is not a valuation expert and to the extent his report utilized valuation data, it was prepared by people at Ms. Taylor's firm.

Notwithstanding, Kargo's two experts, Ms. Berger's expert, and Misters Modi, Rohrer, and McConville agreed that potential investors and acquirers look at valuing a company based on factors, such as a multiple of its annual revenues, multiple of its EBITDA, multiple of cash flow, etc. Mr. McConville, Kargo's President, was unable to identify any purpose Kargo's 409A valuations serve other than setting the exercise price for stock options granted to employees.[221]

Indeed, Mr. Hellgren, Ms. Berger's expert, testified that in his experience with 409A valuations, he has only seen them used for setting the exercise price of options and that they are skewed towards lower valuations to make the options more attractive to employees.

This makes sense because, since the exercise price is lower than the price expected, if the stock were traded, and it is a popular method for companies to use to attract, motivate, and retain employees who hope to make a significant profit at the time of the stock's sale.

Nevertheless, both of Kargo's experts calculated the options based on 409A values and using data, only, applicable to **publicly** held companies, not to privately held companies, which is Kargo's status. Ms. Taylor was unable to identify an ad tech sector investment, acquisition, or similar transaction in which the stock price in the acquisition was a 409A valuation. **She agreed that private company data would be relevant** but testified that none was available. However, when pressed, she admitted that she had not made any effort to determine whether any private company data was available.

[221] Mr. McConville's Deposition, 23:13 – 24:12.

Kargo's two experts, Ms. Berger's expert, and Misters Medi, Rohrer, and McConville agreed that data for *privately* held companies is different from that pertaining to publicly held companies. Obviously, data regarding private companies like Kargo's would be more germane and accurate than that of publically held companies.

Ms. Taylor's opinion is rejected as it is not based on a proper foundation.

Mr. Hellgren has been an executive in the ad tech industry for nearly a decade. For the past two years, he has been the Chief Executive Officer of a technology company. He worked at JumpTap – a mobile advertising company for eight years until end of 2013 as head of operations – part of the leadership team – and ran the ad operations, publishing side, etc. JumpTap was a trail blazer in building an ad platform to show on a mobile.[222] He moved on after it was acquired by Millenial Media, a competitor.

He is the only witness who testified to having personal experience concerning an acquisition in the ad tech industry – the acquisition of JumpTap. He submitted that the valuation used for that acquisition was a multiple of the annual revenues projected for JumpTap at the time of the acquisition, not its most recent 409A valuation.

He is the only expert to have provided recent market data published by Business Insider regarding the valuations of **privately** held ad tech companies in recent market transactions.[223] That data shows the valuation trend in the privately held ad tech industry for the last 12 months to be 6 times annual revenues; i.e., a multiple of 6X.[224] This evidence is unrebutted.

For the reasons above, this Arbitrator accepts Mr. Hellgren's opinion and valuation methodology.

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[222] Mr. Hellgren's testimony.
[223] CX 50.
[224] CX 50, p 15.

To calculate the amount of damages necessary to compensate Ms. Berger for her lost options, four factors must be applied:

1. the fair market value of Kargo stock;
2. the exercise price of Berger's options;
3. an appropriate discount rate for lack of marketability; and
4. the number of options subject to the calculation, e.g., all unvested options, all options whether vested or unvested.

Kargo retained consultant, John Hadl, a widely sought-after consultant with a profound expertise in ad tech valuation and related transactions such as acquisitions and mergers.[225] Evidence adduced reveals that he had been involved in some of the largest acquisitions in the industry; Kargo had asked him to provide his opinion on Kargo's valuation, *inter alia*, to aid Kargo in its "exit" strategy; any it paid him $10,000 per month for his expertise and opinion. Notwithstanding, Kargo does not use his opinion in the instant matter, but rather, it presents Ms. Taylor's who did not use private company data and who presents a much lower value and a very different methodology for valuation from Mr. Hadl's. Kargo could have had Mr. Hadl testify by video if necessary to modify his opinion, if he could, but it chose not to call him and did not offer any reasons that prevented him from testifying. This gives rise to an adverse inference.[226] Furthermore, Ms. Taylor ignores Mr. Hadl's opinion but does not offer an explanation why Mr. Hadl's opinion on valuation should be marginalized.

Misters Rohrer, McConville, Kargman, and Modi testified that Mr. Hadl's opinion, six months earlier, was that Kargo's market value is in the range of $150M to $450M.

Mr. Hellgren testified that Mr. Hadl is "highly respected," and everyone knows him in the industry because he is the "Godfather."

[225] Mr. Rohrer's testimony.
[226] *People v. Kitching*, 78 N.Y.2d 532, 536 (1991).

Ms. Berger offers that $400 million is a fair valuation given: the credible evidence adduced; that it is at the mid-point of the latest market data;[227] and it is within the valuation Mr. Hadl provided, albeit near the top of his range.

To arrive at a price per share, the $400M is divided by the number of outstanding shares in the company which is 6,000,100. Mr. McConville testified that this is the correct number of outstanding shares, and both the 2015 409A valuation and Ms. Taylor's valuation rely on this number.[228] This yields a per price share of $66.66.

The next step is to discount that price per share by an appropriate discount percentage to reflect lack of marketability. All of Kargo's 409A valuations and Ms. Taylor's valuation utilized a 30% discount rate. Utilizing that rate, the discounted price per share is $46.66. This figure is multiplied by the number of shares. Ms. Berger's vested and unvested shares at the time of her termination were 200,000. The resulting figure is $9,332,000 which is the "Discounted Option Value."

Next, subtract the exercise price Ms. Berger would have had to pay to exercise the option. This is determined by multiplying the number of shares granted in each option grant by the exercise price of the applicable option grant. The result is $470,000.

The final step is to subtract the exercise price from the Discounted Option Value equaling $8,862,000.

Back Pay and Front Pay

Given the findings of discrimination and retaliation, Ms. Berger is entitled to recover

[227] Mr. Hellgren's testimony.
[228] RX 97.

back pay and front pay.[229]

Back pay is the value of wages and benefits she would have earned between the time she was placed on unpaid leave and the date of an Award. Front pay is the difference in salary benefits she would have earned at Kargo versus what she is receiving in her current employment.[230]

An award of front pay is within the factfinder's discretion.[231] The *Reed v. A.W. Lawrence & Co.* court found that front pay is proper "where reinstatement is inappropriate and the plaintiff has been unable to find another job, in order to make victims of discrimination whole in cases where the factfinder can reasonably predict that the plaintiff has no **reasonable** prospect of obtaining **comparable** alternative employment'" and that a factfinder has wide latitude in determining the appropriate amount.[232] (Emphasis added.) Front pay is "the difference in the benefits and salary Plaintiff would have received at Defendant and what [he/she] is earning and receiving in [his/her] current employment."[233]

Factors that are considered in determining the amount of back pay and front pay due Ms. Berger, are:

1. the value of the wages and benefits Ms. Berger would have received at Kargo had she not been placed on unpaid leave and her employment terminated;

2. the date through which it is reasonably certain to take her to attain employment at a compensation comparable to that which she earned at Kargo;

3. the mitigation offset, i.e., the amount she will earn from new employment over that same period; and

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[229] *United States v. Burke*, 504 U.S. 229 at 238, 58 FEP 1323 (1992); *Sharkey v. Lasmo (AUL Ltd.)*, 214 F.3d 371 at 374 – 75; *Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1182 (2d Cir. 1996).
[230] *Burke*, 504 U.S. at 238; *Reed*, 95 F.3d at 1182 (2d Cir. 1996).
[231] *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993), cert. denied, 510 U.S. 1164(1994)," quoted in *Reed v. A. W. Lawrence Co*, 95 F.3d 1170, 1177 n.7 (2d Cir. 1996).
[232] 95 F.3d 1170, 1182 (2d Cir. 1996).
[233] James Publishing, Inc., Federal Employment Jury Instructions, §1:1290.

4. a method to discount the front pay portion to present value.

Value of Wages & Benefits

The value of her lost options is discussed above. In addition to that loss, she no longer has the benefit of the 401k employer match Kargo provided; namely, an annual match of $10,600.

Regarding the value of her cash compensation loss, the evidence establishes that: Ms. Berger's earnings grew substantially for each year she worked at Kargo; she had always achieved, if not exceeded her quotas; and she was on track in meeting her quotas for 2016 – her commission earnings through the end of April were already $305,133. Continuing at this level of production, at 100% of her assigned quota for 2016, she would have received $562,000. In other words only one month into the second quarter, she had already achieved more than 50% of her *annual* quota. Thus, it is reasonable to assume and more probable than not that her earnings would have continued to grow each year she remained at Kargo. Notwithstanding, Ms. Berger limits her damage demand by assuming that her earnings for 2016 and beyond would have remained at the same level as her 2015 earnings. They were $1,084,037.30.

Adding this value to her 401k match yields $1,094,637.30 per year or $91,219.77 per month – the "Unmitigated Monthly Wage/Benefit Amount."

The Time It Will Take Ms. Berger To Attain Comparable Employment – Front Pay

Mr. Kargman testified that he believes that "Kargo pays people better than any other company in the industry." This was also Ms. Berger's experience when she searched for jobs.

Turning to case law for guidance to determine a reasonable time period for front pay in Ms. Berger's case, *Padilla v. Metro-North Commuter R.R.*[234] affirmed a front pay Award for 20+ years; *Buckley v. Reynolds Metals Co.*[235] allowed nine years; *Meacham v. Knolls Atomic Power Lab*[236] approved Awards for 9, 10, 12, and 12.5 years for four employees.

Notwithstanding, these protracted front pay periods affirmed by courts, Ms. Berger suggests that she be compensated for only five years beyond the date of this Award.

In considering Ms. Berger's suggestion, this Arbitrator took into account the following evidence:

1. The testimony of Misters Kargman, Rohrer, and McConville that Kargo's sales force was paid **above market**;

2. Professor Lewin, the expert retained by Kargo, was unable to provide any data showing that there are comparable jobs with comparable compensation available for Ms. Berger;

3. After realizing that she would not be able to return to her position at Kargo, Ms. Berger explored alternative, "comparable" employment possibilities with a number of employers in the industry to no avail. It was after this search that she accepted the opportunity at Emogi where she earns much less than she did at Kargo; and

4. It took Ms. Berger four years to accomplish the income level she had at Kargo when she was terminated and it paid its sales force above the market,

Accordingly, this Arbitrator finds that Ms. Berger has met her burden of proof for entitlement to front pay and that a five years period is more than reasonable under these facts.

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[234] 92 F.3d 117, 126 (2d Cir. 1996).
[235] 690 F. Supp. 211, 216 (S.D.N.Y. 1988).
[236] 381 F.3d 56, 78 (2d Cir. 2004).

These damages are calculated by Multiplying the Unmitigated Monthly Wage/Benefit Amount of $91,219.77 by the 71 months between May of 2016, when Kargo stopped paying her, and May 31, 2022, the end of the front pay period. This yields the total unmitigated wage/benefit damages of $6,476,603.60.

This amount must be offset by an amount Ms. Berger will reasonably earn during the same period. She had no income from May 2, 2016 through late August 2016, when she started working for Emogi. Her salary at Emogi is $300,000 with an opportunity to earn up to an additional $200,100 in commission compensation.[237] Ms. Berger testified that Emogi is not presently generating revenue, and because a contract did not come to fruition, revenue originally projected to commence in early 2017 is now delayed. Ms. Berger did not earn any commission compensation from Emogi for 2016.[238] Accordingly, her projected Emogi salary and commission earnings for 2017 more probably than not will not exceed $400,000. Giving Kargo the benefit of the doubt, assuming Emogi and Ms. Berger excel in 2018 and beyond, her annual earnings would be $500,100, as well as a guaranteed $50,000 bonus. Thus, that amount is added to the offset amount. In addition, Ms. Berger suggests factoring in an increase in her Emogi earnings of $25,000 for each of the years from 2019 to 2022. This suggestion is accepted.

Accordingly, the Unmitigated Monthly Wage/Benefit Amount of $91,219.77 should be offset by Ms. Berger's Emogi earnings. This yields $3,623,706.20.

Discounting Front Pay Portion to Present Value – 2% Year-By-Year

As of May 31, 2017, $898,357.03 would be the back pay which is not subject to discounting to present value. The remaining $2,725,349.17 is subject to a 2% discount on a year-by-year basis[239] which comes to $2,673,265.51. This front pay is added to the back pay of

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[237] JX 98.
[238] Ms. Berger's testimony.
[239] *Oliveri v. Delta S.S. Lines, Inc.*, 849 F.2d 742, 746-748 (2d Cir. 1988).

$898,357.03 for a total mitigated, discounted back pay and front pay award of $3,571,622.54.

In anticipation of an Award as of May 31, 2017, Ms. Berger submitted charts in her "Exhibit B Updated Damages For May 31, 2017" document. This provides the step by step calculations for all of the totals above. This Arbitrator accepts those calculations and the methodology behind them, incorporates them into this Award by reference, and attaches the charts to the Award as "AWARD EXHIBIT A."

Equal Pay Liquidated Damages

"Liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article."[240]

Having found that Ms. Berger satisfied her burden of proof for an equal pay violation and that Kargo's violation was willful, this Arbitrator finds that she is entitled to liquidated damages in an amount equal to 300% of the total amount of damages found to be due under New York law.

Her unpaid commissions were $305,133.15; her options are valued at $8,862,000. Adding these two figures and multiplying by 300% equals $27,501,399.

Liquidated Damages for Retaliation

Having also prevailed on her retaliation claim, Ms. Berger is entitled to $20,000 as liquidated damages.[241]

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[240] NYLL § 198(1-a).

[241] New York Labor Law § 215; *Antolino v. Distribution Mgmt. Consolidators Worldwide, LLC*, 2013 BL 208006, 5 (N.Y. Sup. Ct. Aug.02, 2013).

Emotional Distress

Ms. Berger is entitled to receive damages for emotional distress.[242] In addition to the facts above which reveal how she was treated by Kargo, she testified that, essentially, she was devastated by its treatment, as well as by losing her position, her livelihood, and by having to relocate from her home place in Chicago where her family lives to New York. She suffered from sustained insomnia, nausea, stress, and severe depression. Her depression was so severe, she rarely left her house the month she was on leave.

Evidence also shows that she felt betrayed and humiliated by Kargo's placing her on involuntary leave to the point that she asked Ms. Sybesma to tell her teams that she was on a vacation.

It bears repeating that, beginning on February 17, 2016 at the New York meeting and throughout the entire process, Kargo's handling of her and her termination were a collaborative orchestration carried out in the most malicious, insidious, humiliating manner. Furthermore, during her tenure, Kargo constantly sent her mixed messages – praising her one minute, holding her up to the company as a model to emulate and giving her a $100,000 bonus to "incentivize" her to continue doing what she had been doing and the next minute, blindsiding her – telling her that some unidentified person had said working with her was like being in an abusive relationship.

Before her official termination, they moved her things out of her office which was obviously visible to all at Kargo. Mr. Rohrer confirmed that she did not have to vacate her office in Chicago to do the new job.[243] Given his hostile attitude towards Ms. Berger, it can be inferred that having her vacate was done purely to further denigrate her. Remembering his remark: it is "hard to hear that she will be allowed to return, even in a role that stripped title,

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[242] *Dotson v. City of Syracuse*, 2011 BL 53682, 15 (N.D.N.Y. Mar. 02, 2011).
[243] Mr. Rohrer's testimony; see also his deposition, p.128. l. 4.

pay, sales, etc."

Being labeled "abusive" was, especially, hurtful to Ms. Berger. It was later discovered that the person who supposedly initially made this remark did not even work with her and had been terminated by Kargo about which she was upset.[244]

Never being given specifics of who was complaining and exactly what the complaints were, she was not able to defend herself against the allegations above. Instead of providing this information, again, Kargo, gave her mixed messages. First, it placed her on a PIP giving her a chance to "remedy" the situation, on which she immediately began working. Then, just days later, it rescinded that and put her on involuntary leave for a month, keeping her "in the dark" for the month; and it cut-off her email access. After a month, it gave her an ultimatum – take a shameful demotion or you are terminated. When she refused, it refused to pay her over $300,000 in earned commissions. She was counting on this amount as she was building a new house in Chicago, which Kargo knew about. With no justifiable legal reason, it portrayed her termination as one "for cause" about which company employees became aware. When Kargo discovered she was seeking a new job at Emogi, it advised her that her right to her options was forfeited – no job, no salary, no commissions, no options. She had to start all over to build a successful environment for herself.

At every turn, Kargo did its best to "choke off" her attempts to move on and to support herself. She was scared of losing her savings and her home.[245]

Throughout this drawn-out trauma, she had to deal with knowing that she had been branded as a malevolent force inside the company she helped build and that people she had defended, advocated for, and thought were her friends, betrayed her in favor of the company they still work for and labeling her a "bully" for doing an act of kindness for them.

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[244] Ms. Katz's testimony.
[245] Ms. Berger's testimony.

Her "insomnia, depression, sustained physical nausea, stress," are understandable under these circumstances and completely credible.

The challenge is how to quantify the damage Kargo's unlawful actions caused.

As guidance, Ms. Berger offers, *inter alia*, *Thorsen v. County of Nassau*[246] which revised a $1,500,000 award to $500,000, and *Phillips v. Bowen*[247] which upheld a judgement of $400,000. Accordingly, Ms. Berger submits that, in her case, $650,000 would be a reasonable award.

Thorsen provides a framework for categorizing and measuring emotional distress damages. It specifies, in pertinent part, that:

> Emotional distress awards within the Second Circuit can generally be grouped into three categories of claims: garden-variety, significant and egregious. In garden variety emotional distress claims, the evidence of mental suffering is generally limited to the testimony of the plaintiff, who describes his or her injury in vague or conclusory terms, without relating either the severity or consequences of the injury. Such claims typically lack extraordinary circumstances and are not supported by any medical corroboration. Garden variety emotional distress claims generally merit $30,000 to $125,000 awards.
>
> Significant emotional distress claims differ from the garden-variety claims in that they are based on more substantial harm or more offensive conduct, are sometimes supported by medical testimony and evidence, evidence of treatment by a healthcare professional and/or medication, and testimony from other, corroborating witnesses. Finally, egregious emotional distress claims generally involve either outrageous or shocking discriminatory conduct or a significant impact on the physical health of the plaintiff. In significant or egregious cases, where there is typically evidence of debilitating and permanent alterations in lifestyle, larger damage awards may be warranted.
>
> In *Rainone,* the court found $175,000 in compensatory damages was excessive even though the plaintiff's emotional distress was "more than mere `garden variety.'"[248] The court was persuaded by the fact that "there was **no evidence of physical manifestations**

[246] 722 F. Supp. 2d 277, 294, 2010 BL 149202, 14 (E.D.N.Y. 2010).
[247] 278 F.3d 103, 111-12 (2d Cir. 2002).
[248] *Rainone v. Potter,* 388 F. Supp.2d 120 (E.D.N.Y. 2005) (Cited in *Thorsen, supra*).

> **of emotional** distress or debilitating alterations in lifestyle, **and no evidence of permanency,**" and thus found that an award of $50,000 was appropriate.[249] (Emphasis added.)

Thorsen was seen by a psychologist for his depression and anxiety for six months, twice a week and continued to have therapy for about a year and a half. He was prescribed Celexa and Wellbutrin. "The psychologist testified in detail about his emotional state . . . ."[250]

The evidence also showed that "Thorsen became detached from his family and co-workers."[251] Most significantly, Dr. Bayer testified that Thorsen suffered "from what he termed a 'major stress attack' in February 2001 that required hospitalization."[252]

This court found that Thorsen's emotional distress damages are properly categorized as significant rather than merely garden-variety."[253]

Phillips v. Bowen[254] upheld a $400,000 judgment. In that case,

> Plaintiff submitted evidence of ongoing harassment by each defendant over a five-year period. Phillips and her boyfriend testified in detail about her emotional distress, physical illness, and the effects of defendants' conduct on her lifestyle and relationships. Phillips' co-workers testified about the deterioration they observed in Phillips. Other less direct indicia of plaintiff's damages came from the defendants themselves, who unapologetically described their treatment of plaintiff. (Citations omitted).

In the instant case, given the case law above, the suggested award of $650,000 would most appropriately be awarded if the emotional distress were categorized as "egregious." While completely credible, *inter alia*, the only evidence Ms. Berger presented was her own;

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[249] *Id. at 126.*
[250] *Thorsen v. County of Nassau, supra.*
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] 278 F.3d 103.

there was no testimony from friends, co-workers, or health care professionals, no hospitalization, no medication, and no evidence of debilitating and permanent alterations in lifestyle. Accordingly, the evidence she presented does not rise to legal standard of significant or egregious.

Given these guidelines, this Arbitrator finds that the evidence of her emotional distress falls within the "garden variety" and awards $60,000.

Punitive Damages

Ms. Berger offers *Luciano v. Olsten Corp.* for guidance.

That court provided that punitive damages are applicable when a plaintiff proves that a defendant discriminates "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[255] The *Zakre v. Norddeutsche Landesbank Girozentrale*[256] court is in agreement with *Luciano* and awarded punitive damages under the NYCHRL.

"In *Kolstad v. Am. Dental Ass'n*,[257] the Supreme Court explained that the terms 'malice' and 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law. The Court stated that to be liable for punitive damages under Section 1981a, 'an employer must at least discriminate in the face of a perceived **risk** that its actions will violate federal law to be liable in punitive damages.'" (Citations omitted. Emphasis added).

In the instant case, there is significant evidence of unlawful complicity motivated by malice, stemming from the very top – Mr. Kargman, the Chief Executive Officer, Mr. McConville, the President and Chief Operating Officer, Mr. Rohrer, the Chief Strategy Officer, and Ms. Sybesma, the Vice President of Human Resources. Even though it is widely known by the lay

[255] *Luciano v. Olsten Corp.*, 110 F.3d 210, at 220 (2d Cir. 1997).
[256] 541 F. Supp. 2d 555, 102 FEP Cases 1320 (S.D.N.Y. 2008).
[257] 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) (Cited in *Zakre v. Norddeutsche Landesbank Girozentrale, supra*).

people that it is unlawful to discriminate based on sex and double standards, giving Kargo every benefit of the doubt, it had counsel to advise it and, certainly, should have known the risk when it took the unlawful actions it took.

The evidence supports Ms. Berger's experience that "the executive team is a boy's club."[258] Although the initial discriminatory efforts were driven and motivated by Mr. McConville's and Mr. Rohrer's resentment and jealousy of her, about which Mr. Kargman knew, Mr. Kargman participated and permitted the unlawful behavior. When a CEO's top producer is being targeted in this manner, common and business sense dictate that he should thoroughly investigate what is really going on before taking such drastic actions. Instead, Mr. Kargman:

1. accepted Misters McConville's and Rohrer's speculation that there would be "large scale mutiny" without checking it out;

2. did not question his managers for full disclosure of details despite his strong praise of Ms. Berger just three weeks earlier, which he obviously thought was warranted, when their mission was to assemble "evidence" against her rather than do an unbiased investigation in search of the truth;

3. did not require a fair and proper investigation for complaints against her or for her complaint of sexual discrimination;

4. did not vet the so-called witnesses Mr. McConville and Mr. Rohrer had collected nor even inquire as to why more people were not questioned before taking such a drastic action against his top producer;

5. did not provide Ms. Berger with an opportunity to defend herself, even, in the New York meeting in which he was present. Instead, he permitted Mr. Rohrer to insult her;

6. did not question the "findings" and actions of his managers, whom he knew to have animosity towards her;

7. retaliated against her and ordered that she not be paid her earned commissions;

[258] Ms. Berger's testimony.

8. labeled her termination as "for cause" intending its detrimental consequences to her, knowing that his "reasons" were false and not physically possible under the timeline of events.

For these reasons and for all the clear and convincing evidence detailed herein above, the elements for punitive damages have been satisfied. The purpose of punitive damages is to deter the employer from engaging in the wrongful conduct again.[259]

In this regard, Ms. Berger suggests that "a punitive award should be equal to no less than 5% of Kargo's 2016 annual revenues ($6,750,00). It is an amount likely to get the attention of Kargo's executives, i.e., send the message that conduct such as that engaged in here will lead to material financial impact."

In *Luciano*, the court reduced the jury's punitive damages award from $5,000,002 to $300,000, pursuant to the statutory cap under 42 U.S.C. § 1981a(b)(3)(D). While it is true that there is no cap for compensatory and punitive damages under NYCHL, in determining the appropriate amount of punitive damages, this Arbitrator is guided by the wisdom of the principle expressed in *Luciano*; namely, the purpose of punitive damages is to deter the employer from engaging in the same wrongful conduct in the future but **not to cause it financial ruin**.

Ms. Berger's equal pay liquidated damages award of 300% of her total damages – $27,501,399 – along with anticipated attorney fees and costs, should send the "message that conduct such as that engaged in here will lead to material financial impact" but will not lead to financial ruin.

However, since punitive damages are warranted, Ms. Berger is awarded an additional $300,000.

Attorneys' Fees and Cost

[259] *Luciano*, 110 F.3d at 221.

Ms. Berger has noted correctly that her "causes of action also entitle her to an award of her reasonable attorneys' fees and costs.[260] An award of reasonable fees to a prevailing plaintiff for an Equal Pay Act claim is mandatory.[261]

AWARD

In arriving at this AWARD, this Arbitrator has considered all of Kargo's arguments on all issues in the context of pertinent legal authorities in the instant matter and found them to be without merit.

I, the **UNDERSIGNED ARBITRATOR**, having been duly designated and sworn, and having duly heard the proofs and allegations of the parties, do hereby, Award, as follows:

1. Claimant is awarded $305,131.33 for her commissions from January 1, 2016 through and including May 2, 2016;

2. Claimant is awarded Liquidated damages pursuant to NYLL § 198(1-A) in the amount of $305,133.15;

3. Claimant is awarded $8,862,000 for the value of lost vested and unvested options;

4. Claimant is awarded $3,571,622.54 for back pay and front pay;

5. Claimant is awarded $27,501,399 for Equal Pay Liquidated Damages;

6. Claimant is awarded $20,000 for NYLL § 215 as liquidated damages for retaliation;

7. Claimant is awarded $60,000 for emotional distress damages;

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[260] 42 U.S.C. § 2000e-5(k); N.Y. Exec. Law § 297.10.

[261] 29 U.S.C. § 216(b); *Eddleman v. Switchcraft*, Inc., 927 F.2d 316, 317, 55 FEP 483 (7th Cir. 1991); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86, 33 FEP 977 (2d Cir. 1983); *Herndon v. William A. Stroub, Inc.*, 17 F. Supp. 2d 1056, 1065 (E.D. Mo. 1998).

2. Claimant is awarded Liquidated damages pursuant to NYLL § 198(1-A) in the amount of $205,133.15;

3. Claimant is awarded $8,862,000 for the value of lost vested and unvested options;

4. Claimant is awarded $3,571,622.54 for back pay and front pay;

5. Claimant is awarded $27,501,399 for Equal Pay Liquidated Damages;

6. Claimant is awarded $20,000 for NYLL § 215 as liquidated damages for retaliation;

7. Claimant is awarded $60,000 for emotional distress damages;

8. Claimant is awarded $300,000 for punitive damages.

9. Claimant may retain her $100,000 bonus.

10. All of Respondent's claims are expressly denied.

11. Claimant is given two weeks from the date she receives this Award to move for attorney fees and costs. Kargo is given two weeks from receipt of Claimant's Motion to provide a response, if any.

This Award is in full settlement of all claims/counterclaims submitted to this arbitration, except for attorney fees and costs. All claims/counterclaims not expressly granted herein are hereby denied with prejudice.

May 31, 2017
DATE

Billie Colombaro
Hon. Billie Colombaro (ret.), Arbitrator

EXHIBIT B

EMPLOYMENT AGREEMENT

Employer: Kargo Global, Inc., a Delaware corporation (the "***Company***") with its principal place of business at 36 East 12th Street, Sixth Floor, New York, NY 10003.

Employee: Alexis Erin Berger ("***Employee*** *or* ***"You"***), residing at: 21 East Huron, Apt. 2101, Chicago, I.L. 60611

Position: Vice Presidents Sales, Midwest Territory

Commencement Date: August 21, 2012

Compensation: $235,000 base salary per annum plus Qualified Commissions (as described below);

TERMS AND CONDITIONS

This Employment Agreement ("***Agreement***"), made as of the Commencement Date set forth above (the "***Commencement Date***") is entered into by Company and Employee.

WHEREAS, Company wants to employ Employee, and Employee desires to be employed by Company.

WHEREAS, this Agreement supersedes and terminates any and all prior or contemporaneous written and oral agreements between Company and Employee, except for the Nondisclosure/Noncompete/Inventions Agreement dated August 21, 2012 between Company and Employee (the ***"Inventions Agreement"***) , which agreement is hereby confirmed as continuing in full force and effect.

In consideration of the mutual covenants and promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Employment** Company agrees to employ Employee and Employee hereby accepts employment at least through December 31, 2012, subject to the terms and conditions set forth herein and at the Company's absolute discretion.

2. **Term of Employment** The term of Employee's employment hereunder shall commence on the Commencement Date and continue on an "at will" basis until terminated by Employer or Employee at any time (such term being referred to herein as the "***Employment Period***").

3. **Position and Capacity** Employee shall serve in the capacity of Vice President Sales, Midwest Territory. The "Midwest Territory" shall consist of the following states: Illinois, Indiana, Michigan, Texas, Minnesota, Wisconsin, Ohio, and Missouri. The Company may reasona-

bly amend the Midwest Territory upon notice to Employee. Company, in its sole discretion, may change, amend or alter Employee's position, duties and/or work location from time-to-time as it deems appropriate; however, Company shall not relocate Employee outside of Illinois without Employee's consent. Employee accepts such employment and agrees to undertake the duties and responsibilities inherent in such position and such other duties and responsibilities as the Chief Executive Officer or other officer of the Company, or his or her designee, shall from time-to-time assign to Employee. Employees responsibilities may include but are not limited to building a sales and account management team and directly bring in sales from new relationships as well as existing Kargo relationships in the Midwest Territory and achieving the sales goals for the Midwest Territory determined by the Company in its reasonable discretion. Employee shall devote his/her entire business time, attention and energies to the business and interests of Company during the Employment Period. At no time during the Employment Period will Employee render commercial or professional services of any nature to any person or organization, whether or not for compensation, without the prior written consent of such Chief Executive Officer. Employee shall abide by the rules, regulations, instructions, personnel practices and policies of Company, including Company's Employee Handbook, as may be adopted by Company, and any changes thereto which may be adopted from time-to-time by Company.

4. Compensation and Benefits

4.1 Compensation Company shall compensate Employee pursuant to the terms stated in this Section 4.1, to be paid in accordance with Company's then-current payroll practices commencing on the Commencement Date and continuing for the duration of the Employment Period, prorated for any partial compensation period. Employee shall be eligible for compensation increases at the discretion of Company.

You will receive an annual base salary of $235,000, plus Qualified Commissions (as defined below). Your first opportunity for a review of your annual base salary will be October 1, 2013. In addition to your annual salary, You will be entitled to receive Qualified Commissions on business sold by You and your sales team in the Midwest that directly report to You and closed by the Company, provided that no commission or other compensation shall be payable (i) unless such commission or compensation is expressly approved in advance in writing by one of the following individuals: Harry Kargman or Kevin Canty, (ii) for additional revenue based on revised terms and conditions that are subsequently negotiated or renegotiated, as evidenced by a written document, an amendment, or supplement to an existing agreement and in which You did not participate in such revision or renegotiation thereby earning Qualified Commissions.

"Qualified Commissions" shall mean commissions based upon Company sales as approved by the Company based upon the following commission structure: (a) eight percent (8%) of Net Revenue received by the Company during the applicable Royalty Period for business that You source yourself or is sourced by your sales team in the Midwest Territory who directly report to You as is determined by the Company in its reasonable discretion. In addition, You shall receive an additional two percent (2%) of Net Revenue for any calendar quarter (comprising of three consecutive Royalty Periods) in which You or your sales team in the Midwest Territory who directly report to You generate the greater of: 1) $1,500,000 in gross commissionable sales for such calendar quarterly period that are collected by the Company subject to the terms of Section 5 below or 2) 150% of the sales goal as set by the Company in its reasonable discretion for

such period that are collected by the Company subject to the terms of Section 5 below, all as is determined by the Company in its discretion. For purposes of this Agreement, "Net Revenues" shall mean all revenue actually received by the Company under the applicable business agreements less (i) all taxes, duties and any other amounts required to be paid to any taxing or other governmental authority other than the Company's income taxes; or (ii) third party or customer costs, including revenues shares, royalties, commissions, fees, refunds, rebates or credits that are required to be paid by the Company with respect to such revenues. For purposes of this Agreement, "Royalty Period" shall mean any calendar month in which Kargo receives a payment in connection with a commissionable business transaction referenced above provided that the Employee is still employed by the Company. Except as expressly set forth in Section 5 below with respect to voluntary termination of employment with at least one month's prior notice to the Company, in no event will Employee receive any Qualified Commissions based on revenues received after Employee is no longer retained by the Company.

Employee will receive all Qualified Commissions to which Employee is entitled within thirty (30) days after receipt of the applicable revenues by the Company and paid according to the regular payroll practices of the Company.

4.2 **Retention Bonus** Employee shall be eligible an annual retention bonus based upon personal and company wide performance. This bonus is guaranteed so long as You are an employee of the Company at the end of a fiscal year, December 31st, and will be pro-rated based upon the amount of time you were employed at the Company. The annual bonus, based upon a full year of employment, will be between 10%-20% of your base salary, but no less than twenty thousand dollars ($20,000) pro-rated on an annualized basis, with the exact percentage based upon both individual and company-wide goals at the sole discretion of the Company. Individual goals will include such tangible and intangible factors such as close rate on RFP's, innovation, professionalism, attitude, contribution to the team, adherence to deadlines, punctuality, leadership, commitment, ideation, going the extra miles, interactions with other Kargo employees and assisting them in their jobs, dedication, flexibility in work schedule to meet the Company needs, training others, and integrity. With regard to company-wide goals, the Company will set monthly, quarterly and annual goals and You will participate in any company-wide bonuses that are generally provided upon reaching certain goals.

4.3 **Benefits** Employee shall be eligible to participate in all benefit programs, including standard medical and dental insurance that Company makes available to its employees to the extent that Employee's position, tenure, salary, age, health and other qualifications make him/her eligible to participate. Company may discontinue, amend or alter such employee benefit programs at any time and from time to time as Company, in its sole discretion, may deem appropriate. The Company's benefits, payroll, and other human resource management services are provided through TriNet HR Corporation, a professional employer organization. As a result of Company's arrangement with TriNet, TriNet will be responsible for administrative tasks associated with Employee's employment and benefits.

4.4 **Paid Time Off and Leave** Employee shall be eligible to receive vacation time, sick leave, medical leave (paid and unpaid), holiday time and personal time off in each calendar year in accordance with Company's then-current practices, as may be reflected in an employee handbook or policy manual. This position is exempt under one or more of the "white collar" ex-

emptions provided in federal or state law, and therefore Employee will not be eligible to receive overtime pay.

4.5. Expenses Subject to advance written authorization by an officer of Company, Company shall reimburse Employee for all reasonable and necessary expenses incurred in carrying out his/her duties under the Agreement, except that normal travel and living expenses incurred within Employee's city of residence shall be borne by Employee. Employee shall present to Company from time-to-time an itemized statement of account of such expenses, with appropriate receipts, in such form as may be required by Company. You may be issued a corporate credit card and shall sign a separate corporate credit card agreement with the Company which shall set forth the policies and rules of the cards use as well as requirements for managing and tracking the expenses incurred using the corporate credit card as well as an obligations for submitting receipts and documenting expenses for record keeping purposes.

5. Employment Termination

Either party may terminate this Agreement at any time, with or without cause or advance notice, for any reason, and no reason need be given for termination, provided that Employee shall give Company at least two (2) weeks prior written notice before resigning such employment. If terminated involuntarily without cause, Employee shall be entitled to all compensation accrued under this Agreement up to the effective date of termination. If employee is terminated for cause, employee will forfeit any accrued but unpaid Qualified Commissions. If employee voluntarily terminates his or her employment with at least one month of prior notice, signs a Company release agreement and Company receives the revenue associated with accrued Qualified Commissions within ninety (90) days after the date upon which Employee gave notice to the Company, employee will receive such accrued Qualified Commissions received during such ninety-day period; otherwise employee forfeits all accrued but unpaid Qualified Commissions. Employee will forfeit any unpaid Qualified Commissions if employee joins a direct or indirect competitor of Company as is determined by Company in its reasonable discretion.

6. Non-Disclosure, Noncompetition and Inventions

Reference is made to the Inventions Agreement (as defined in the recitals above). The Inventions Agreement is hereby confirmed as continuing in full force and effect, and the terms and conditions thereof are hereby expressly incorporated by reference herein in their entirety. Employee's employment is contingent on the acknowledgment and acceptance of the Inventions Agreement.

7. Company Records and Property; Other Agreements

7.1 Company Record and Property Employee agrees that all files, letters, memoranda, reports, records, data, schematics, sketches, drawings, notebooks, program listings, computer programs, databases, products, test equipment, prototypes, computers, mobile devices or other written, photographic, magnetic or other tangible material, whether or not containing Confidential Information or Intellectual Property (as such terms are defined in the Inventions Agreement), and whether created by Employee or others, which shall come into his/her custody or possession (hereinafter collectively referred to as "***Company Records***") shall be, shall continue to be and are

the exclusive property of Company to be used by Employee only in the performance of his/her duties for Company. Employee shall use diligent efforts to track and record all sales relationships and meetings via Sales Force, or alternative Company CRM, and Employee's employment shall be contingent on the diligent use of the Company's CRM. All such Company Records or copies thereof and all other tangible property of Company in the custody or possession of Employee shall be delivered to Company, upon the earlier of: (i) a request by Company; or (ii) termination of this Agreement. After such request, termination or delivery, Employee agrees not to and shall not retain any such Company Records or copies thereof or abstracts or notes containing any such Proprietary Information, or other tangible property of Company.

7.2 **Other Agreements** Employee represents that she is not bound by the terms of any agreement with any previous employer or other parties to refrain from using or disclosing any trade secret or confidential or proprietary information in the course of his/her employment with Company or to refrain from competing, directly or indirectly, with the business of such previous employer or any other party that would inhibit her ability to perform his obligations hereunder. Employee further represents that her performance of all the terms of this Agreement and as an employee of Company does not and will not breach any agreement to keep in confidence proprietary information, knowledge or data acquired by him in confidence or in trust prior to her employment with Company.

7.3 **Reasonable Assistance.** In addition to Employee's obligation to assist the Company to perfect its rights in Intellectual Property, as set forth in Section 3 of the Inventions Agreement, if Employee voluntarily terminates his or her employment, Employee will, at the Company's request, provide reasonable assistance to Company to transfer any unique skills or knowledge in training a replacement, and assist in ongoing litigation matters. Employee and Company will cooperate to find a mutually agreeable time to render such assistance. Employee will not charge the Company for time spent in fulfilling these obligations, but Company will pay or reimburse any reasonable out-of-pocket expenses incurred by Employee while fulfilling these obligations. The provisions of this Section 7.3 will survive the expiration or earlier termination of this Agreement.

7.4 **Company and Affiliates** The term "Company" used in Section 6 and this Section 7 will be deemed to include any Affiliate of Company, as such term is defined in the Inventions Agreement or any licensor of Intellectual Property to the Company.

8. Miscellaneous

8.1 **Notices** Any written notice required or permitted to be delivered pursuant to this Agreement will be in writing and will be deemed delivered: (a) upon delivery if delivered in person; (b) three (3) business days after deposit in the United States mail, registered or certified mail, return receipt requested, postage prepaid; (c) upon transmission if sent via telecopier or e-mail, with a written confirmation copy sent via overnight mail; and (d) one (1) business day after deposit with a national overnight courier, in each case to the Company's principal place of business and the address listed above for Employee, as applicable, or to such other address as may be specified upon notice.

8.2 **Pronouns** Whenever the context may require, any pronouns used in this Agreement shall include the corresponding masculine, feminine or neuter forms, and the singular forms of nouns and pronouns shall include the plural, and vice versa.

8.3 **Waiver** No delay or omission by the Company in exercising any right under this Agreement shall operate as a waiver of that or any other right. A waiver or consent given by the Company on any one occasion shall be effective only in that instance and shall not be construed as a bar or waiver of any right on any other occasion.

8.4 **Captions** The captions of the sections of this Agreement are for convenience of reference only and in no way define, limit or affect the scope or substance of any section of this Agreement.

8.5 **Severability** In case any provision of this Agreement shall be invalid, illegal or otherwise unenforceable, the validity, legality and enforceability of the remaining provisions shall in no way be affected or impaired thereby.

8.6 **Employee Certification** Employee certifies and acknowledges that she has carefully read all of the provisions of this Agreement and that he understands and will fully and faithfully comply with its provisions. Employee represents that she has the legal capacity to execute and perform her obligations under this Agreement and the Inventions Agreement.

8.7 **Acknowledgement of Company Handbook** Employee acknowledge that Employee's employment is contingent upon reading and accepting the terms and policies in the Kargo employee handbook, incorporated herein by reference. Kargo reserves the right to change or revise it policies, procedures, and benefits at any time.

8.8. **Non-Disparagement** You shall not make, publish or issue any detrimental, derogatory or other critical comments or statements, whether written or oral, concerning the Company, or any of its officers, directors or employees, or their products or services, to any third party including, without limitation, advertisers, their agencies, publishers, Company partners or any trade media whether anonymously, confidentially or otherwise for a period commencing on the Commencement Date and for a period of 24 months following the Termination Date of this Agreement.

8.9 **Required Documentation** Employee must provide to Company the documents necessary for Company to comply with any government-mandated requirements to verify employment eligibility as determined by the United States Department of Justice for establishing identity and employment eligibility. Company will not be able to compensate Employee until all necessary documents have been received by Company and verified by Trinet.

8.10 **Amendment** This Agreement may be amended or modified only by a written instrument duly executed by both the Company and Employee.

8.11 **Successors and Assigns** This Agreement shall be binding upon and inure to the benefit of both parties and their respective successors and assigns, including any corporation

with which or into which the Company may be merged or which may succeed to its assets or business, provided, however, that the obligations of Employee are personal and shall not be assigned by him/her.

8.12 **Arbitration** The parties agree that, except as discussed in this Agreement, any controversy, claim or dispute arising out of or relating to this agreement or the breach thereof, or arising out of or relating to the employment of the Employee, or the termination thereof, including any statutory or common law claims under federal, state or local law, including all laws prohibiting discrimination in the workplace, shall be resolved by arbitration before a single arbitrator in New York City, New York, in accordance with the Employment Dispute Resolution Rules of the American Arbitration Association. The parties agree that any award rendered by the arbitrator shall be final and binding, and that judgment upon the award may be entered in any court having jurisdiction thereof. The parties further acknowledge and agree that, due to the nature of the Confidential Information, trade secrets and Intellectual Property belonging to Company to which Employee has or will be given access, and the likelihood of significant harm that Company would suffer in the event that such information was disclosed to third parties, nothing in this paragraph shall preclude Company from seeking injunctive relief to prevent Employee from violating the obligations established in this Agreement or in the Inventions Agreement.

8.13 **Governing Law; Exclusive Jurisdiction** This Agreement shall be construed, interpreted and enforced in accordance with the laws of the State of New York, without regard to its conflict of laws principles. Any suit brought relating to this Agreement shall only be brought in the Federal or state courts located in New York County, New York, and the parties agree to exclusive personal jurisdiction in such courts.

8.14 **Entire Agreement** This Agreement, the Inventions Agreement and the exhibits hereto and thereto constitute the entire agreement between the parties and supersede all prior agreements and understandings, whether written or oral, relating to the subject matter of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Employment Agreement as of the day and year first set forth above.

COMPANY
Kargo Global, Inc.

By: _____

Title: PRESIDENT & CEO

EMPLOYEE
Alexis Erin Berger

_____

EXHIBIT C

AMERICAN ARBITRATION ASSOCIATION | INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Northeast Case Management Center
Heather Santo
Assistant Vice President
950 Warren Avenue
East Providence, RI 02914
Telephone: (866) 293-4053
Fax: (866) 644-0234

July 19, 2016

Seth Rafkin, Esq.
Cooley, LLP
1114 Avenue of the Americas
New York, NY 10036
Via Email to: srafkin@cooley.com

Christopher Turcotte
The Law Office of Christopher B. Turcotte, P.C.
575 Madison Avenue, Suite 1006
New York, NY 10022
Via Email to: cturcotte@cbtlaw.com

Case Number: 01-16-0002-1175

Alexis Berger
-vs-
Kargo Global, Inc.

Dear Parties:

Arbitrator Colombaro's appointment is hereby confirmed.

The Arbitrator is available to conduct the Arbitration Management Conference on the following dates:

July 22, 2016: From 10:00 AM-3:00 PM (must be finished by 4:00 PM)
July 25, 2016: From 10:00 AM-6:00 PM
July 26, 2016: From 1:00 PM-2:00 PM (must be finished by 2:00 PM)
From 3:30 PM-6:00 PM
July 27, 2016: From 1:00 PM-3:00 PM
August 1, 2016: From 10:00 AM-6:00 PM
August 2, 2016: From 2:00 PM-4:00 PM (must be finished by 4:00 PM)

The parties are requested to advise the undersigned of their availability on or before July 20, 2016.

I look forward to working with you and should there be any questions, please do not hesitate to call.

Thank you,

Elisheva Berlin on behalf of
Michele Gomez
Manager of ADR Services
Direct Dial: (401) 431-4848
Email: MicheleGomez@adr.org

EXHIBIT D

AMERICAN ARBITRATION ASSOCIATION

Employment Tribunal

In the Matter of Arbitration Between:

Alexis Berger
(Claimant)

-vs-

Kargo Global, Inc. **(Respondent)**

Case Number: 01-16-0002-1175

Management Conference Report and Scheduling Order

Pursuant to the Employment Arbitration Rules of the American Arbitration Association's (AAA) National Rules for the Resolution of Employment Disputes as amended and in effect November 1, 2009, an Arbitration Management Conference was held on August 1, 2016. Present were Seth Rafkin, Esq. (Cooley, LLP), representing Claimant; Alexis Berger, Claimant; Christopher Turcotte, Esq. (Christopher B. Turcotte, P.C.) and Tracy High, Esq. (S&C's Litigation Group) appearing for Respondent; and Elisheva Berlin on behalf of Michele Gomez, Case Manager, appearing for the AAA.

By Agreement of the parties and direction of the Arbitrator, the following actions were taken and are Ordered:

1. Discovery will be conducted on a tiered basis:
   a. Ten Interrogatories per side are permitted;

b. Thirty document requests per side are permitted;

c. The parties' first requests for Document Production and Interrogatories will be exchanged by **August 12, 2016**;

d. Responses are due by 30 days thereafter for this request and for all requests thereafter, which are not to exceed the permitted limits above and not to exceed completion by **October 28, 2016**.

e. In the event that parties claim a privilege as to any document, counsel shall produce and serve, as part of the document exchange, privilege logs listing the date of the document(s), its author(s), its addressee(s) and copy recipient(s), a description of the contents, and the type of privilege claimed;

f. Eight depositions per side are permitted which must be completed by **October 28, 2016**;

g. The parties will make every attempt to resolve disputed issues before making application to the Arbitrator. If they cannot resolve any discovery dispute, Motion(s) to Compel are to be filed by **November 18, 2016**.

2. Dispositive Motion(s) are to be filed by **November 3, 2016**. The opposing party must respond by **November 17, 2016**.

3. A status conference call will be held on **November 14, 2016**.

4. *In Limine* Motions, if any, shall be made by **November 16, 2016**. Responses are due by **November 23, 2016**. The Arbitrator will rule, with or without oral argument, as she may direct.

5. The parties reserved **November 18, 2016** as the date to attempt to mediate their dispute, should they decide to do so. They are to advise the Case Manager 7-10 days before this date as to whether they, indeed, do wish to attempt Mediation.

6. On **November 17, 2016**, the parties are to simultaneously exchange their lists of witnesses they intend to call and the exhibits they intend to enter at the Evidentiary Hearing.

    a. Witness lists are to include a brief summary of expected testimony for each witness. The summaries shall, specifically, reference any asserted conduct of the parties relevant to the claims or defenses;

    b. Each proposed exhibit shall be pre-marked for identification and sufficient copies brought to the Hearing in a binder for the Arbitrator.

7. The parties shall prepare a Joint Exhibit binder or binders for the Arbitrator, chronologically arranged (unless grouping of documents make it more logical for them to be otherwise arranged), and tabbed for easy reference.

    a. Joint exhibits shall be pre-marked J-1, *et seq.*, with party exhibits marked C-1, *et seq.* and R-1, *et seq.*, respectively. Rebuttal exhibits, not included in the binder, should be held to a minimum.

    b. The binder(s) shall be brought to the Hearing for the Arbitrator.

8. The parties are to submit briefs by **November 22, 2016**.

9. Five days are reserved for the Evidentiary Hearing, which is scheduled for **December 1, 2, 5, 6, 7,** beginning each day at 10:00 a.m. and ending at 5:00 p.m.

    a. The Hearing will be held at the American Arbitration Association's offices located at 120 Broadway, New York, NY 10271.

10. There will be no Court Reporter for the Hearing.

11. Testimony shall be given, under oath, in person, by videoconference, or by other means as directed by the Arbitrator.

12. All substantive issues shall be governed by New York law to be determined by the Arbitrator.

13. Rules of Evidence may be relaxed in this Arbitration in the interest of justice.

14. The Arbitrator will provide a Reasoned Award as required by the AAA Employment Rules.

15. All deadlines, stated herein, will be strictly enforced unless a party has made a good cause request for an extension in which case extensions will be freely given as long as the Hearing dates are not affected.

16. Additional Management Conference calls may be requested by the parties or directed by the Arbitrator as the need may arise.

17. This Order shall continue in effect unless and until it is amended by subsequent order of the Arbitrator.

Dated: August 1, 2016

Hon. Billie Colombaro
(Ret.), Arbitrator

EXHIBIT E

Seth Rafkin

From: AAA Michele Gomez <MicheleGomez@adr.org>
Sent: Monday, December 19, 2016 3:50 PM
To: Seth Rafkin
Cc: Chris Turcotte; High, Tracy Richelle; Andersen, Christina; Jennifer Bogue
Subject: RE: Berger v. Kargo Global Inc. Stipulated Briefing Schedule

Good Afternoon:

This will confirm Judge Colombaro has approved the briefing schedule stipulated by the parties.

Regards,

Kristy Allison on behalf of

AAA Michele Gomez
Manager of ADR Services

American Arbitration Association
Labor, Employment & Elections
T: 401 431 4848 F: 401 435 6529 E: MicheleGomez@adr.org
950 Warren Ave., East Providence, RI 02914-1414
www.adr.org

From: Seth Rafkin [mailto:srafkin@rafkinesq.com]
Sent: Friday, December 16, 2016 10:18 AM
To: AAA Michele Gomez
Cc: Chris Turcotte; High, Tracy Richelle; Andersen, Christina; Jennifer Bogue
Subject: Berger v. Kargo Global Inc. Stipulated Briefing Schedule

Good morning Michele,

The parties have conferred on the briefing schedule and have stipulated to the following schedule:

- On or before January 9, 2017:
  - Claimant to submit her brief in support of her claims.
  - Respondent to submit its brief in support of its counter-claims
- On or before January 30, 2017:
  - Respondent to submit its brief in opposition to Claimant's brief in support of her claims
  - Claimant to submit her brief in opposition to Respondent's brief in support of its counter-claims
- On or before February 13, 2017:
  - Claimant to submit her reply re Respondent's opposition brief re Claimant's claims.
  - Respondent to submit its reply re Claimant's opposition brief re Respondent's counter-claims.

The parties have also agreed that there is not a need for page-limits on the briefs above.

The parties understand that the Arbitrator may wish to schedule time for oral argument after the briefing is submitted.

Please confirm that you will forward the proposed schedule to the Arbitrator and thank you for your assistance.

Thank you

SETH RAFKIN
RAFKIN ESQ. PLLC
1201 Sussex Turnpike, Suite 102
Randolph, New Jersey 07869
973.891.3370
Email: srafkin@rafkinesq.com

EXHIBIT F

Seth Rafkin

From: AAA Michele Gomez <MicheleGomez@adr.org>
Sent: Wednesday, March 15, 2017 11:27 AM
To: 'Chris Turcotte'; Seth Rafkin; Jennifer Bogue; 'Andersen, Christina'; 'High, Tracy Richelle'
Subject: Oral Argument: Alexis Berger v. Kargo Global, Inc., Case No. 01-16-0002-1175

Good Morning:

This will confirm that oral argument has been scheduled for March 29, 2017 at 10:00 a.m. Please connect to the call using the following telephone number and pass code:

Telephone: 888.537.7715
Pass Code: 79587959#

Regards,

Kristy Allison on behalf of

AAA Michele Gomez
Manager of ADR Services

American Arbitration Association
Labor, Employment & Elections
T: 401 431 4848 F: 401 435 6529 E: MicheleGomez@adr.org
950 Warren Ave., East Providence, RI 02914-1414
www.adr.org

EXHIBIT G

NYS Department of State

Division of Corporations

Entity Information

The information contained in this database is current through June 6, 2017.

Selected Entity Name: KARGO GLOBAL, INC.
Selected Entity Status Information

Current Entity Name: KARGO GLOBAL, INC.
DOS ID #: 2862499
Initial DOS Filing Date: JANUARY 28, 2003
County: NEW YORK
Jurisdiction: DELAWARE
Entity Type: FOREIGN BUSINESS CORPORATION
Current Entity Status: ACTIVE

Selected Entity Address Information

DOS Process (Address to which DOS will mail process if accepted on behalf of the entity)
C/O CORPORATION SERVICE COMPANY
80 STATE STREET
ALBANY, NEW YORK, 12207-2543

Chief Executive Officer
HARRY KARGMAN
826 BROADWAY
5TH FLR
NEW YORK, NEW YORK, 10003

Principal Executive Office
KARGO GLOBAL, INC.
826 BROADWAY
5TH FLR
NEW YORK, NEW YORK, 10003

Registered Agent
CORPORATION SERVICE COMPANY
80 STATE STREET
ALBANY, NEW YORK, 12207-2543

This office does not record information regarding the names and addresses of officers, shareholders or directors of nonprofessional corporations except the chief executive officer, if provided, which would be listed above. Professional corporations must include the name(s) and address(es) of the initial officers, directors, and shareholders in the initial certificate of incorporation, however this information is not recorded and only available by viewing the certificate.

***Stock Information**

# of Shares	Type of Stock	$ Value per Share
No Information Available		

*Stock information is applicable to domestic business corporations.

Name History

Filing Date	Name Type	Entity Name
JAN 28, 2003	Actual	KARGO GLOBAL, INC.

A **Fictitious** name must be used when the **Actual** name of a foreign entity is unavailable for use in New York State. The entity must use the fictitious name when conducting its activities or business in New York State.

NOTE: New York State does not issue organizational identification numbers.

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