IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

SHERYN RICHARDSON	**Plaintiff**)	CASE NO. SX-08-CV-0000535
Vs.	)	ACTION FOR: DAMAGES - CIVIL
ESS SUPPORT SERVICES WORLDWIDE	)	
	Defendant)	

NOTICE OF ENTRY OF MEMORANDUM OPINION AND ORDER

TO: PAMELA LYNN COLON, ESQ.
BENNETT CHAN, ESQ.
JUDGES OF THE SUPERIOR COURT
LIBRARIAN
IT/ORDER BOOK

Please take notice that on July 31, 2009 a(n) MEMORANDUM OPINION AND ORDER dated July 30, 2009 was entered by the Clerk in the above-entitled matter.

Dated: July 31, 2009

Venetia H. Velazquez, Esq.
Clerk of the Court

Sharlene Turnbull

SHARLENE TURNBULL
COURT CLERK SUPERVISOR

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

SHERYN RICHARDSON, **PLAINTIFF,** **v.** **ESS SUPPORT SERVICES WORLDWIDE,** **DEFENDANT.**	**CIVIL NO: SX-08-CV-535** **ACTION FOR DAMAGES, BREACH OF CONTRACT, BAD FAITH AND UNFAIR DEALING, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND WRONGFUL DISCHARGE**

ORDER

In accordance with the Memorandum Opinion of even date, it is hereby

ORDERED that the provision of the DRA relating to the six month notice requirement is hereby stricken and the remaining provisions of the DRA are otherwise valid and enforceable; and further

ORDERED that the parties in this matter must submit to arbitration in accordance with the valid and enforceable portions of the DRA; and further

ORDERED that the Defendant's Motion to Dismiss is **DENIED**; and it is finally

ORDERED that the proceedings in the above-captioned matter are hereby stayed pending completion of arbitration.

DONE and so ORDERED this 30th **day of July, 2009.**

Edgar D. Ross
Senior Sitting Judge of the Superior Court

ATTEST:
VENETIA HARVEY-VELAZQUEZ
Clerk of the Court

By: _____
Court Clerk Supervisor

Dated: 7/30/09

CERTIFIED TO BE A TRUE COPY
This 31st day of July, 2009
VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT
By _____ Court Clerk

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

SHERYN RICHARDSON, **PLAINTIFF,** **v.** **ESS SUPPORT SERVICES WORLDWIDE,** **DEFENDANT.**	**CIVIL NO: SX-08-CV-535** **ACTION FOR DAMAGES, BREACH OF CONTRACT, BAD FAITH AND UNFAIR DEALING, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AND WRONGFUL DISCHARGE**

MEMORANDUM OPINION AND ORDER

July 30, 2009

THIS MATTER is before the Court on Defendant's Motion to Dismiss and Motion to Compel Arbitration. Plaintiff filed a response in opposition, and Defendant filed a reply thereto. For the reasons stated below, the defendant's motion to compel arbitration will be granted, and plaintiff's action will be stayed pending arbitration proceedings.

I. FACTS AND PROCEDURAL HISTORY

In December 2004, Sheryn Richardson ("Plaintiff") filed an application for employment which contained a Dispute Resolution Agreement ("DRA") with ESS Support Services Worldwide ("Defendant"). In January 2005, Plaintiff was hired as a Kitchen Helper. On April 24, 2008, Plaintiff was terminated from her position for gross neglect of her duties and refusal to perform her work assignment. On November 3, 2008, Plaintiff then brought the instant action against Defendant alleging, *inter alia,* wrongful discharge, intentional infliction of emotional distress, and breach of contract. In response, Defendant moved the Court to compel arbitration in this matter pursuant to the DRA. Defendant further moved to have the matter dismissed. Plaintiff opposes arbitration on the grounds that the DRA is unconscionable and therefore unenforceable as it is fundamentally unfair, and one-sided and contrary to public policy.

Plaintiff argues that Defendant's motion to compel should be denied, with the claim that the DRA contains several provisions that are unconscionable and therefore unenforceable. She further claims the DRA is unconscionable because it unreasonably favors ESS, and that it fails to inform Plaintiff of her rights.

II. Standard of Law

The Federal Arbitration Act establishes a strong federal policy in favor of enforcing arbitration agreements. *See, e.g.,* *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). The Supreme Court has also noted that generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements despite the Federal Arbitration Act's favorable approach toward arbitration agreements. *See, e.g.,* *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

In the Virgin Islands, section 208 of the Restatement (Second) of Contracts governs Plaintiff's claim of unconscionability claim. The Virgin Islands have adopted the Restatement (Second) of Contracts as the definitive source of decisional contract law, absent any local laws to the contrary. *See* 1 V.I.C. § 4. Section 208 provides:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Comment d of that section provides further guidance:

> A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, *together with terms unreasonably favorable to the stronger party,* may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real

> alternative, or did not in fact assent or appear to assent to the unfair terms.

RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (emphasis added).

III. DISCUSSION

The issue of the validity of arbitration agreements within the realm of employment is well-settled law in the Virgin Islands. While Plaintiff's Opposition to the Motion to Compel Arbitration was comprehensive, all of the issues it raises have been decided by this Court, the District Court, and the Third Circuit Court of Appeals, *ad nauseum*. In view of the foregoing, the Court will now address the Plaintiff's claims that the DRA is substantially and procedurally unconscionable.

A. Dispute Resolution Agreement is Procedurally Unconscionable

Plaintiff argues that she was forced to accept the terms of the DRA without any real opportunity to negotiate. She further argues that the employment contract is one of adhesion, and any term that unreasonably favors the Defendant is unconscionable. She concludes that because she had no real choice but to accept the terms, she has established the existence of procedural unconscionabilty. As stated above, a bargain is not unconscionable merely because the parties are in an unequal bargaining position, nor even because the inequality results in an allocation of the risks of the weaker party. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d.; See also Alejandro v. L.S. Holding, 130 Fed. Appx. 544. The *Alejandro* Court found that an arbitration clause is not unconscionable because it lacks mutuality. The Court also listed several factors, which must be considered in determining whether an agreement is procedurally unconscionable. Plaintiff's argument that she was forced to accept the document because she needed work does not rise to the level of the Alejandro factors. Further, this Court notes that the DRA does not limit the claims that Plaintiff can bring, or require her to bear an

unreasonable portion of the cost. Consequently, this Court holds that the DRA is not procedurally unconscionable.

B. Dispute Resolution is Substantively Unconscionable

1. Six Month Notice Requirement

Paragraph 3 of the DRA provides that any claim against Defendant "must be filed no more than six months after the date the employment action that is the subject of the claim." The DRA further provides that Plaintiff "waive[s] any statute of limitations to the contrary." The Third Circuit confronted the issue of unconscionable notice provisions in Alexander and held that such provisions are 'clearly unreasonable and unduly favorable to [the employer]." *Alexander v. Anthony International*, 341 F.3d 256 (3d Cir.2003). The *Alexander* court further stated that "[i]n addition to providing an apparently insufficient time to bring a well-supported claim, such an obligation prevents an employee from invoking the continuing violation and tolling doctrines."*Id.* at 267. Notwithstanding the language of the DRA that Plaintiff waives any statue of limitations to the contrary; the Court finds that the provision that reduces Plaintiff's statutory rights is unreasonable. The Court, therefore, holds that the instant six-month notice provision is unconscionable.

2. Prohibitive Arbitration Costs

As to the issue of Plaintiff's unfair burden of arbitration costs, Paragraph 2 of the DRA stipulates that if arbitration is initiated by Plaintiff "[she] will be responsible for a $50 filing fee payable to AAA. ESS (or the third party beneficiary, if applicable) will be responsible for filing the balance of the fee charged by AAA as well as AAA's daily administrative fees, the cost of the location, and the compensation and travel expenses of the Arbitrator."[o]ther than arbitrator's fees and expenses, each party shall bear its own costs and expenses, including attorney's fees."

Plaintiff asserts that under the agreement she "could be required to pay, at a minimum, a

$500.00, up to a $13,000.00, filing fee, and one half of the remaining costs of arbitrating [her] claims against the defendant, if [her] case is referred to a hearing". Plaintiff mistakenly maintains that she could be held responsible for exorbitant costs and that this clause is a violation of Virgin Islands public policy. The DRA clearly states that Plaintiff is only responsible for a $50.00 filing fee, which can be waived if the Plaintiff is financially unable to pay. All other costs are to be borne by the Defendant. The Court holds that the instant provision as to costs is not prohibitive and therefore not unconscionable.

3. Failure to Notify Plaintiff of the Finality of Arbitration

Plaintiff claims that the DRA is unconscionable because it did not adequately notify her that the determination of an arbitrator is a final non-appealable order. The DRA in the instant case provides: "Special Note: This agreement affects your legal rights. You should familiarize yourself with all rules and procedures before signing this Agreement. You may wish to seek legal advice before signing this agreement." This provision on the document is set apart from the other clauses of the DRA, and is written in a different type font and size. It is both in a larger and bolded font type. Plaintiff was put on notice that she was signing a document that affected her legal rights. This Court finds that from this statement in the DRA Plaintiff received sufficient notice.

C. Severability

Since the Court has concluded that the DRA's six-month notice provision is unconscionable it must next consider whether it is appropriate to sever the unenforceable provision from the remainder of the agreement. To this end, the court in *Spinetti v. Service Corp. Intern.*, 324 F.3d 212 (3rd Cir.2003) found that the task in this instance is to decide whether the unconscionable provisions constitute "an essential part of the agreed exchange" of promises. Restatement (Second) of Contracts § 184(1) (1981). Like the court in *Spinetti*, the Court here

concludes that the clear intent of the DRA to settle employment disputes through binding arbitration survives despite the unconscionable provision, and the provision regarding notice can be stricken without disturbing the primary intent of the parties' to arbitrate their disputes. Thus, the Court hereby deems unconscionable and severable the provisions of the DRA relating to the six-month notice requirement.

D. Stay of Proceedings

The Court is without discretion to dismiss a case where one of the parties applies for a stay pending arbitration. *See* Lloyd v. Hovensa, 369 F.3d 263 (3rd Cir.2004). However, in this instance Plaintiff did not apply for a stay pending arbitration. Nonetheless, the Court will err on the side of caution and find a request to compel arbitration as including an alternative request for a stay pending arbitration. Accordingly, the Court stays the proceedings in this matter pending arbitration.

III. CONCLUSION

The Court finds that the DRA is valid and enforceable under the Federal Arbitration Act. Based on this, the Court grants Defendant's Motion to Compel Arbitration. An appropriate order will follow.

Dated: July 30, 2009

Edgar D. Ross
Senior Sitting Judge of the Superior Court

CERTIFIED TO BE A TRUE COPY
This 31st day of July 20 09
VENETIA H. VELAZQUEZ, ESQ.
CLERK OF THE COURT
By _____ Court Clerk