UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAMELA K MARTENS, JUDITH P MIONE, ROBERTA O'BRIEN THOMANN, LORRAINE PARKER BETTE LASWELL, JENNIFER ALVAREZ, MARIANNE DALTON, PATRICIA CLEMENTE, SIMONE SCHWENDENER, CARA BETH WALKER, EDNA BROYLES ROBIN TOMPKINS, STEPHANIE RODRUCK, DANIELLE SACCONE BEVERLY TRICE, LORI HURWITZ, LYDIA KLEIN, EILEEN VALENTINO, PATRICIA HANLON, TERESA TEDESCO, MARY ANN CABELL, ARDIS VINNECOUR, and TRACY GIBBS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v

SMITH BARNEY INC
a/k/a SHEARSON/AMERICAN EXPRESS PROVISIONAL
a/k/a SHEARSON LEHAMN BROTHERS AND
a/k/a SHEARSON LEHMAN BROTHERS APPROVAL OF
HOLDINGS, INC , SHEARSON LEHMAN STIPULATION
BROTHERS, SMITH BARNEY/SHEARSON, INC , JAMES DIMON, NICHOLAS CUNEO, THE NEW YORK STOCK EXCHANGE and THE NATIONAL ASSOCIATION OF SECURITIES DEALERS,

Defendants

MOTION FOR LEAVE
TO FILE AMICUS CURIAE
BRIEF

Civil Action No 96- 3779 (CBM)

Presented By
Lois J Shapiro-Canter, Esq
President, National Organization
For Women-New York State, Inc

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INTEREST OF AMICUS

The National Organization For Women-New York State, Inc which is dedicated to the elimination of employment discrimination requests permission to file an amicus curiae brief

The National Organization For Women-New York State, Inc (NOW-NYS) is a leading state nonprofit women's civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights NOW-NYS was founded in 1967 by leaders of the National Organization For Women. A major goal of NOW-NYS, Inc is the elimination of barriers that deny women economic opportunities, including mandatory arbitration of employment discrimination claims under Title VII of the Civil Rights Act of 1964 as amended and the Pregnancy Discrimination Act NOW-NYS, Inc. has a deep and abiding interest in assuring the eradication of discrimination against women in the workplace

NOW-NYS, Inc is familiar with the questions involved in this case, and the scope of their presentation, and believes there is a necessity for additional argument on these points NOW-NYS, Inc feels these viewpoints would be helpful to the Court and important to the public

SUMMARY OF ARGUMENT

NOW-NYS is dedicated to ending discrimination of all kinds and has taken an active role to end mandatory arbitration in the workplace and advance the civil rights of workers NOW-NYS represents the interests of thousands of women who are employed A majority of the calls which come to our offices pertain to workplace discrimination NOW-NYS actively fights against discrimination which harms women and minorities to ensure all have the freedom to exercise their constitutional rights to a safe work environment NOW-NYS has worked hard to monitor the New York State Human Rights Commission progress in handling discrimination and work-related complaints. In addition, NOW-NYS has fought for measures which would ban mandatory arbitration agreements and prohibit retailiatory actions by the employer.

Employers are increasingly using tactics to limit their own liability under federal and state laws to limit access of their employees to civil rights laws The securities industry requirement that all employee disputes including allegations of sexual harassment and assault must go before employer-selected mandatory arbitration or mandatory alternative dispute resolution panels has created a hostile work environment for women in the securities industry

Closed door proceedings and arbiters of justice chosen in part by Defendant Employer confers the appearance of impropriety and does not reflect the open door access to the judiciary of Title VII and other civil rights laws If in fact Defendant Employer intends in good faith to proceed wholeheartedly with the diversity plans outlined in the agreement, why does it need a mandatory arbitration process a/k/a mandatory alternative dispute resolution system which denies women and minorities their constitutional right to access the courts to ensure freedom from discrimination and sexual harassment?

Defendant Employer could institute the diversity programs without continuing its mandatory arbitration mandatory/alternative dispute resolution program Diversity programs and training alone are integral to eradicate workplace discrimination in all circumstances

Denial of an employee's right to have access to a judicial system confers with it the intent to deny said employee the full panoply of constitutional rights available in a free society If this is not in fact the case, then why does Defendant Employer insist on abridging plaintiff's right to proceed in a civil court while at the same time enabling Defendant Employer the option of doing so? (See paragraph 7 5(1) Why has Defendant Employer proposed in this settlement such an onerous process for a claimant to exercise her rights, such procedure which requires unrealistic demands, deadlines, confusing requirements and a nearly impossible burden of proof to obtain punitive damages?

The proposed stipulation is burdensome, unfair and denies workers their civil rights The National Organization For Women-New York State, Inc respectfully requests the Court to reject the proposed stipulation and lead the nation and disapprove mandatory arbitration/mandatory alternative dispute resolution systems in the workplace

ARGUMENT

I THE PROPOSED STIPULATION IS AGAINST PUBLIC POLICY

Title VII of the Civil Rights Act of 1964 was enacted to establish an administrative forum and a court of law for employees to litigate claims of unlawful employment practice Title VII gives individuals the right to a trial by jury and the right to receive damages in employment discrimination cases It is in the interest of the public good that all individuals have free unhampered access to the laws of the land, including our structure of constitutional legal protections. Institution of a quasi court system within the confines of an employer's business setting which attempts to mirror our revered judiciary but instead distorts it by placing tedious limitations on victim's rights in often secretive proceedings runs afoul of this country's treasured open access to our judicial system The right to earn a livelihood free from discrimination and harassment is an issue of liberty The right to have unhampered access to our judicial system is a constitutional right and should not be abridged by individual employers each carving out different internal systems of justice to prevent employees use of our civil rights laws The proposed stipulation is against public policy and does not exemplify the freedom to our court system for redress of discrimination and employment related claims envisioned by the Congressional creators of Title VII

Class Counsel's assertion in paragraph 1 14 that the proposed settlement promotes the goals of equal employment opportunity and gender equality at the heart of "Title VII and similar civil rights laws" is without merit The heart of Title VII relies upon access to an independent judiciary which provides each woman and man in this country the constitutional right to be free

from discrimination and sexual harassment in the workplace The proposed settlement in fact fosters a closed door judiciary controlled by mediators, establishing a mandatory arbitration system cloaked as mandatory alternative dispute resolution and denial of complete access to the very civil rights laws Defendant Employer and Class Counsel claim to espouse

The proposed stipulation refers to the substantial benefits to the proposed class (para I 13) However, the proposed settlement materially benefits the Defendant Employer while at the same time allowing for the institution of a mandatory arbitration procedure a/k/a mandatory alternative dispute resolution system in direct contravention to the intent of historic Title VII of the Civil Rights Act of 1964 and to the long term detriment of the class and all women similarly situated now and in the future.

II THE PROPOSED STIPULATION DENIES WOMEN AND MINORITIES ACCESS TO THE JUDICIAL SYSTEM TO EXERCISE THEIR CONSTITUTIONAL RIGHTS

In 1991, Congress passed the Civil Rights Act of 1991, which for the first time gave women and people of color a right to a trial by jury and damages in employment discrimination cases under Title VII of the 1964 Civil Rights Act Consistent with the thrust of the earlier law, the 1991 Act provided not only compensatory damages as a remedy for the employee, but also punitive damages as a strong deterrent for employers

Mandatory arbitration and mandatory alternative dispute resolution strips women and men of their constitutional right to utilize Title VII and the court system to promote freedom for a safe work environment

A mandatory arbitration system is cumbersome, as expensive as court litigation absent the constitutional protections of our nation's civil rights laws. Mandatory arbitration/mandatory alternative dispute resolution often establishes onerous rules on the claimants which are more stringent than civil court practice. These more onerous rules are designed to advantage the Defendant Employer and serve to the detriment of the claimant.

Mandatory arbitration and mandatory alternative dispute resolution processes effectively gut the civil rights laws and allows the securities industry to lag behind other professional fields in hiring, working conditions and promotion of women and people of color.

When employees sign mandatory arbitration or mandatory alternative dispute resolution agreements as a condition of employment, the employer, is able to bypass the very system established to protect the most basic of rights: the civil courts. Without the deterrent effect of the courts, discrimination has been allowed to grow--on Wall Street and throughout the industry--denying women and people of color access to the most lucrative positions in the field.

III. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND THE NATIONAL ASSOCIATION OF SECURITY DEALERS DISAPPROVES MANDATORY ARBITRATION A/K/A ALTERNATIVE DISPUTE RESOLUTION

The Equal Employment Opportunity Commission (EEOC) has declared that " arbitration systems are not suitable for resolving class or pattern or practice claims of discrimination (Policy statement dated July 10, 1997) The EEOC has stated that arbitration systems " ... protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader--and more accurate--view of an employer's conduct "(Policy statement dated July 10, 1997)

The proposed stipulation establishes such limits on an employee's claim. Paragraph 7.4(1) of the proposed stipulation limits the joinder of claims to those claimants located in the same branch office of the defendant. This restriction will deny claimants the opportunity to show company wide patterns of discrimination and bears upon the credibility of Defendant Employer's alleged good will to institute anti-discrimination programs. If indeed Defendant Employer intends in good faith to implement the diversity programs outlined there would be no reason to deny multi-district office plaintiffs' joinder of claims. In fact, it would expedite review of such cases. Clearly, defendant employer is concerned about future class action suits being initiated and has proposed this language to deny individuals the ability to demonstrate a pattern of systemic workplace discrimination.

The National Association of Securities Dealers (NASD), one of the bodies that regulates the securities industry, recently voted to remove the requirement that industry employees submit employment discrimination complaints to arbitration. The policy change will take effect one year after the Securities and Exchange Commission (SEC) approves the new policy. The proposed stipulation is out of step with NASD policy and EEOC statements on the issue of mandatory arbitration.

IV. THE U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS RULED CONGRESS NEVER INTENDED TITLE VII CLAIMS TO BE SUBJECTED TO MANDATORY ARBITRATION AGREEMENTS

Federal Judge Nancy Gertner ruled on January 26, 1998 that due to the unfairness of the industry sponsored system of mandatory arbitration, a former Merrill Lynch financial consultant

can bring her sexual harassment claim to court instead of a New York Stock Exchange arbitration panel

Judge Gertner ruled that Congress did not intend to subject Title VII claims to mandatory arbitration agreements, stating that she was disturbed by the

> "structural bias in the system--the extent to which the New York Stock Exchange arbitration system is dominated by the securities industry, that is, by the employer's side of this dispute. From the rules that govern arbitral procedure, through the selection of the arbitrators to the details of discovery practice, the system is dominated by the NYSE itself Merrill Lynch, in turn, helps govern the NYSE."

V THE PROPOSED STIPULATION ESTABLISHES GROSS PROCEDURAL ADVANTAGES FOR DEFENDANT EMPLOYER TO CLAIMANT'S DETRIMENT

The proposed settlement mandates onerous deadlines and limitations on employees' prosecution of their case and establishes unfair and inequitable rights for defendant employer

First, the proposal gives unfair advantage to the Defendant Employer who is allowed to bring an unlimited number of firm representatives into a meeting convened to hear an employee claim Paragraph 7 13(4) entitled "Conduct of Meetings" gives to Defendant Employer an unfair advantage over the claimant in that the defendant is permitted to admit counsel and "representatives of the Firm" to mediation sessions but claimants are limited to counsel and one family member "Representatives of the firm" could theoretically constitute any number Defendant Employer chooses and these individuals could be assigned to assist in preparation of

the case against claimant These individuals should be disallowed in the mediation setting

Second, paragraph 7 13 entitled 'Mediation' requires the Claimant to serve on the Dispute Resolution Process Administrator (DRP) a written demand for mediation of an eligible claim and requires the DRP Administrator (who is paid by Defendant Employer) to serve said document on Defendant Employer's office of general counsel within three days of receipt Failure to submit this claim in said manner and in accordance with said time restrictions would cause the claim to be irrevocably waived, discharged and released in any forum whatsoever. In fact, in the event the DRP Administrator were to fail to serve the complaint to defendant's counsel within the time allotted claimant's right to proceed with an eligible claim would be defeated through no failure to act of her own. This procedure is onerous, unfair and harsh and alone invites denial of the proposed stipulation.

Third, under New York State civil procedure, failure to serve an answer results in a default, yet in this proposed stipulation the Defendant Employer is rewarded for failure to comply In the proposed settlement Defendant Employer's failure to provide an answer is to be treated as a denial of the complainant's allegations Nowhere in this proposed stipulation is the claimant rewarded for failure to perform, but in fact faces irrevocable waiver of her claim for failure to comply with tedious and numerous procedural requirements

Throughout the proposed settlement the complainant is repeatedly threatened with irrevocable waiver of her claim for failure to comply with a complexity of deadlines and requirements, yet, in this provision, Defendant Employer is allowed to ignore a significant deadline and have it work to it's advantage at the same time This provision is one sided to wholly advantange the Defendant Employer to the detriment of the claimant. Certainly, if the court is to take seriously

Defendant-Employer's representation to advance the goal of a workplace free from discrimination. Defendant Employer can respect the significance and seriousness of meeting a deadline and file a timely answer

Fourth, the proposed stipulation establishes a narrow statute of limitations Interim Claimants have only 90 days after an interim claim arises to bring a complaint through the mandatory alternative dispute resolution process/ mandatory arbitration system pursuant to section seven entitled "Dispute Resolution Process" If the claim is not brought within this time frame it shall be deemed waived irrevocably In addition, the stipulation proposed creates an unrealistic time frame for the filing of a claim.

The nature of sexual harassment is a complex one Victims do not report incidents immediately, fearing retailiatory action by the employer, such as loss of status and intimidation. In recognition of this phenomenon, section 297 of the New York State Human Rights Law gives a complainant one year to file a complaint Paragraph 7 2(2) entitled "Interim Claims" of the proposed settlement, requires claimants to file a claim within 90 days. A claimant who files a claim under this proposed settlement in any forum other than through mandatory dispute resolution/mandatory arbitration finds her claim irrevocably and permanently barred from said internal employer arbitration system The claimant is also denied access to the federal court system and any state and other forums since the proposed stipulation mandates the internal mandatory alternative dispute resolution/mandatory arbitration sytem as the sole arbiter of claimant's rights

Fifth, paragraph 7 14(6) proceeds to establish a different standard of proof for award of punitive damages in non-federal gender-based claims Claimant has the " burden of proving by

clear and convincing evidence that the defendant acted or failed to act with malice or willfulness or reckless indifference to claimant s rights" Because the proposed stipulation disallows joinder of claims among different office branches to prove a company wide pattern of conduct, it will be difficult to prove this harsh standard Evidence of malice, willfulness or reckless indifference are acts which are not always apparent and are easily cloaked behind a facade of professional decorum Because this standard of proof is harsh it will be difficult for a claimant to obtain punitive damages in non-federal gender-based claims

Sixth, paragraph 7 14(8)(b) allows the Firm to obtain medical and mental health evidence of the claimant if the claimant has raised an issue of physical, psychological or emotional injury or distress of any kind. The proposed stipulation does not require limitations on the access to such records to only those that have accrued as a result or subsequent to the physical, psychological or emotional injury and without requiring defendant to show relevance and need to access said records It also does not allow claimant opportunity to show the records are not relevant to the claim This provision allows defendant to require the claimant to sign releases to any records the defendant requests even those which may have existed prior to the incident of alleged discrimination or employment period This broad reach to access employees' medical and psychological records could be used to harass the employee

Seventh, paragraph 7 5(1) allows retaliatory actions on behalf of Defendant Employer against a claimant since it preserves Defendant Employer's claims and counterclaims and allows the defendant to raise same " against any person or entity in any forum of whatsoever kind or nature with jurisdiction to resolve such claims or counterclaims." So in fact Defendant-Employer is permitted to exercise its constitutional right to utilize any judicial forum of its

choosing a right to which it emphatically denies to employee claimants (See paragraph 8.2(1)(q), last sentence "The Dispute Resolution Process provided for under this Settlement Stipulation shall be the sole and exclusive means for Eligible Claimants to seek monetary or other relief against Smith Barney with respect to any Eligible Claim") This inequitable dealing out of access to the civil courts is an abuse and is indicative of not only Defendant Employer's recognition of the superior value of access to the judiciary but is also evident of the inherent unfair nature of this proposed stipulation

VI. UNCLEAR AND VAGUE LANGUAGE RENDER THIS PROPOSED STIPULATION UNENFORCEABLE

Several paragraphs of the proposed stipulation are vague, unclear or contradictory.

First, the proposed stipulation requires Defendant Employer to spend $15 million on Diversity Programs and Initiatives (DPI) which is to be satisfied within four years Although section eight requires Defendant Employer to establish diversity programs and initiatives they are only required to maintain said programs for three years In fact, paragraph 8.4 states that

> " no obligation set forth in Section Eight of this Settlement Stipulation shall continue, or shall be deemed to continue, beyond three years after the Effective Date, except for the DPI Obligation which must be satisfied within four years of the Effective Date "

It would appear that Class Counsel and Defendant Employers' representation of the proposed stipulation's emulation of Title VII is short-sighted and short lived

Second, the definition of "Interim Claim" in the definition section is unclear since it states that these are gender based or retailiatory claims which arise "on or after the Effective Date but

no later than the date two years after the Effective Date It is unclear what the deadline for filing gender-based claims is for claims which occur two years and one day and more beyond the effective date

Third, the proposed stipulation's paragraph 7 14(4) is confusing First, it states that no burden of proof shall be imposed on an eligible claimant in regard to a gender-based claim It then states that the mandatory alternative dispute resolution a/k/a mandatory arbitration panel " shall decide such Gender-Based Claim(s) without regard to burden of proof, based on a preponderance of the credible evidence admitted at the ADR hearings " These phrases are clearly contradictory In addition, the paragraph proceeds to hold that the Claimant is not relieved from the "... burden of proving in any ADR proceeding that said Claimant suffered individual injury and actual damages...".

Fourth, it is unclear as to what is meant in paragraph 7 17 entitled "Termination of Dispute Resolution Process" "In no event may any otherwise Eligible Claim be commenced or brought in the Dispute Resolution Process susequent to the date two years and 90 days after the Effective Date "

Fifth, the second to the last line of paragraph 7 14(8) (entitled "Discovery") fails to identify what paragraph it is referring to

CONCLUSION

For the foregoing reasons, the National Organization For Women New York State Inc respectfully requests the Court to reject the proposed stipulation

DATED Latham, New York
March 16, 1998

Respectfully submitted,

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