Women Are Being Silenced at Goldman Sachs

November 12, 2020

Goldman Sachs should follow the lead of the #MeToo and #TimesUp movements and do away with forced arbitration and mandatory NDAs.

Dear Goldman Sachs's Board of Directors, Executive Officers and Management Committee:

I am writing this Open Letter because you have the ability to address systemic anti-woman anti-employee rights practice being employed at Goldman Sachs ("Goldman" or the "Bank"). As a former in-house attorney and someone fired for raising legal and ethical concerns, I am in a unique position to explain why Goldman's legal and business practices require change. I am asking that Goldman change its disposition towards employees who raise internal complaints — rather than treat us as "the enemy," we should be treated as courageous employees whose interests *align* not *conflict* with the Bank. I have asked repeatedly to be heard and was silenced and I am asking again for the Bank to listen. I have received many messages of support from current and former Goldman employees who applaud my efforts and are cheering my attempts at transparency. I am also asking that Goldman relieve me and all other employees from confidential arbitration and non-disclosure agreements ("NDAs""), which only protect wrongdoers and the Bank.

Background

Last week, I filed a lawsuit in New York State court alleging that the Bank's Global Head of Litigation, Darrell Cafasso, sexually harassed a Jane Doe subordinate and engaged in other misconduct. When Mr. Cafasso's misconduct was revealed, the Bank's General Counsel, Karen Seymour, said the Bank needed to " put this genie back in the bottle," and proceeded to ensure a sham investigation was done in which Mr. Cafasso was permitted to return while Jane Doe was forced to leave the Bank and is likely bound to complete confidentiality. I raised my concerns about this conduct, and in response I was told to keep my mouth shut. I was then retaliated against in numerous ways — negative comments in my review for the first time, a decrease in my compensation and then termination. After I retained counsel regarding my claims, my termination was accelerated without explanation. This retaliation was swift and harsh.

Immediately after filing my lawsuit, the Bank attempted to move my case from State to Federal court and repeatedly argued that I am "forum shopping." However, in virtually the same breath, the Bank filed a motion to compel arbitration of my claims. This is the most draconian form of forum shopping — one which thrusts otherwise public court proceedings behind closed doors before an inherently unfair forum highly likely to be biased in favor of Goldman. This is not the way a leading Bank — one which attempts to hold itself out as being supporters of women's rights — should operate. That is why I am asking you to release me from this unfair restriction and allow me to pursue my claims in open court. I also ask that you release harassment victims from any applicable NDAs, non-disparagement and cooperation agreements so they can speak freely to me and my counsel in the litigation. This should not be controversial.

Goldman Should Follow the Lead of its Own Counsel, Roberta Kaplan

Goldman has hired Roberta Kaplan of Kaplan Hecker & Fink LLP to defend the Bank and its executives in my case. Ms. Kaplan is the Co-Founder and Chair of the Time's Up Legal Defense Fund ("Time's Up"), and she and Time's Up have appropriately called for all companies — such as Goldman — to squarely address policies and practices that harm women in the workplace. It is without question that forced, mandatory and confidential arbitration is such a practice.

Goldman should not hide behind a purported women's rights activist to create an impression that it supports women. It is Goldman's *actions* that matter, not who the Bank is able to pay to push its agenda. In helping Goldman attempt to move my case into arbitration, Ms. Kaplan is advocating for a position that is the antithesis of her statement that "[t]he #MeToo and Time's Up movements constitute a revolution in women's rights that is too powerful to be turned back." Goldman's position that my claims must be arbitrated in secrecy sends a terrible, anti-#MeToo message to other women at Goldman that the Bank does not value

transparency and does not believe those who raise claims are entitled to a fair process of adjudication. This position will set Ms. Kaplan's work — and the good work of many others at Time's Up and otherwise — backward rather than forward.

Mandatory arbitration agreements for employees, in any form, are inherently wrong. Arbitration agreements unfairly prohibit employees from accessing the public court system, which was created and developed to uphold fairness and justice. These agreements attempt to thrust such claims into a quasi-judicial forum where an employee's rights are severely limited and diminished. Mandatory arbitration produces outcomes to the disadvantage of employees and the advantage of employers — which is surely why Goldman uses them. Among the problems, arbitrators, who are paid by the employer, are inherently biased and far less likely to side with the employee than an impartial jury.

Mandatory arbitration agreements such as the ones used by Goldman are also adhesive contracts, meaning employees are unable to negotiate the contract terms. Goldman has all the bargaining power in imposing mandatory arbitration on employees as the employee has no genuine choice. That is certainly the case for me, as Goldman conditioned the receipt of my compensation on my agreement to arbitrate any claims that might arise in the future. If I wanted to be paid for my hard work, I had no ability to opt-out of this provision or otherwise decide that it was fair. Being forced to accept arbitration harms women far more than men as women are far more likely to face harassment and discrimination.

But arbitration is even more dangerous — which is the form Goldman employs.

Goldman's arbitration agreement requires complete confidentiality of proceedings — meaning the Bank and individual wrongdoers will be permitted to have their misconduct completely hidden behind closed doors, never to be seen by the public, let alone shareholders. Confidential arbitration only further contributes to the proliferation of harassment in the workplace. In confidential arbitration, women do not know that others are being subjected to the same conduct and it stops the public from seeing patterns of misconduct by individuals or institutions.

For these reasons and others, through a series of laws attempting to address systemic sexual harassment and discrimination, the State of New York recently *banned* the use of forced arbitration for discrimination claims, though Goldman argues that this law should not be followed. However, your lawyer, Ms. Kaplan, has said of these sweeping laws that, "[t]hese regulations will soon set the new baseline minimum required to do business in the Empire State." Ms. Kaplan cited a *New York Times* article titled "#MeToo Called for an Overhaul. Are Workplaces Really Changing?" that looked at whether the #MeToo movement had made any lasting impact and applauded companies that have eliminated mandatory arbitration.

But Ms. Kaplan has urged companies to go further than New York law's minimums:

> Rather than skating by on compliance minimums, New York companies should embrace these new state and city laws as motivation to set cutting-edge precedents. Not only is it the right thing to do, but it is also a smart, growth-oriented decision that projects confidence in a corporation's future, prioritizes the broader company culture and ultimately will save the company money and increase profits. It is a signal to employees and clients that the company is actively engaging in today's conversation about what makes a modern, equitable workplace. After all, #TimesUp.

Rather than be stuck in the past, Goldman should follow Ms. Kaplan and Time's Up's lead. Goldman should follow New York law — notwithstanding any arguable federal law to the contrary — and do away with mandatory arbitration.

New York is not alone. Many other states and Congress have sought to ban mandatory forced arbitration in the employment context. In 2019, the House passed the Forced Arbitration Injustice Repeal (FAIR) Act, which would prohibit companies from requiring workers to resolve legal disputes in private arbitration. Representative Pramila Jayapal (D-Wash.) explained that "[f]orced arbitration doesn't give . . . workers the full protection of the law. It is a perpetually rigged deck against the most vulnerable party in the dispute."

While the Senate has yet to vote on the FAIR Act, many companies are doing the right thing without waiting for the federal government to require it — Wells Fargo, Uber, Google, Facebook, Lyft, Slack, Airbnb, Skadden Arps Slate Meagher & Flom LLP, Sidley Austin, Kirkland & Ellis LLP and Orrick, Herrington & Sutcliffe LLP have all banned the use of forced arbitration. Moreover, the campaign has attempted to further educate the public by compiling a list of companies that force their employees to arbitrate claims. Goldman is on the wrong side of that list.

Many people have called on Time's Up to directly take on forced arbitration, which has been called a "Harasser's Best Friend." A group of courageous students from Ms. Kaplan's alma mater, Harvard Law School, started the People's Parity Project, an organization devoted to eliminating mandatory arbitration clauses from employee contracts. Sejal Singh, one of the organization's founders, said "Forced arbitration . . . is a legal tool that employers use to sweep misconduct under the rug."[5] That is precisely what Goldman is doing here.

While Goldman has not ended forced arbitration on its own, Goldman now has an opportunity to do the right thing. Goldman can follow the guidance from the #MeToo and Time's Up movements. Goldman can follow the requirements of New York law intended to combat workplace misconduct. Goldman can decide to follow the direction of Congress. If nothing else, Goldman should follow the guidance of its own counsel — and put an end to forced arbitration.

Goldman Should Relieve Jane Doe From Non-Disclosure and Cooperation Agreements

The Jane Doe victim who I felt was mistreated — and whose mistreatment the Bank sought to cover up — should be permitted to speak freely about her experiences. It would be manifestly unfair to her, and to me in my litigation, for her to be muzzled with an NDA and an agreement to "cooperate" with Goldman. I therefore ask Goldman to relieve her of any such restrictions.

Ms. Kaplan herself has called for an end to NDAs, stating that they "isolate and deter complainants." Mr. Kaplan's Time's Up organization has been steadfast in its position against non-disclosure agreements for victims. The Time's Up website has a landing page dedicated to "How NDAs Harm Working Women." According to Time's Up: "**The bottom line: mandatory NDAs are categorically wrong because they silence women from reporting harassment, abuse, or discrimination."**

Time's Up has specifically called on companies to release women from NDAs. In fact, Tina Tchen, Time's Up's President and CEO, specifically called on NBC Universal to release employees from NDAs:

> If NBC is truly committed to letting survivors and employees speak out about sexual harassment at the network, it should simply release them from their non-disclosure agreements . . . @TIMESUPNOW calls on @NBCUniversal to announce unequivocally that they are free to speak without any fear of retaliation.

In response to Time's Up and public pressure, NBC agreed, publicly stating that employees would not be held to NDAs in their separation agreements. Goldman should do the same.

One can hardly forget the public rebuke of former presidential candidate Michael Bloomberg, when it was revealed during debates that women who had worked for his company were bound by NDAs. Following the debates, Bloomberg announced that it would stop using NDAs and release certain former employees. Time's Up stated in response:

> For far too long, mandatory NDAs have meant that workplace harassment remains hidden — silencing those who experience sexual harassment and enabling abusers to evade discovery and avoid consequences. Sexual harassment takes away the voice and agency of an individual employee — and mandatory NDAs have perpetuated this stark power imbalance.

Goldman should heed the sentiments of the Time's Up organization founded by its own lawyer, Ms. Kaplan. Goldman should release Jane Doe of her post-employment confidentiality and cooperation restrictions.

In closing, I hope this letter is received in the spirit in which it was intended; namely, to better the rights of women at Goldman and to chart a path forward for Goldman to be a leader in these important issues of our day. While we have differences that will be worked out in litigation, hopefully we can agree that is a worthwhile goal.

Sincerely,

Marla Crawford

Attorney with over 30 years of experience representing and advising companies in all phases of commercial litigation and regulatory proceedings.