SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MARLA CRAWFORD,	:	
	:	
Plaintiff,	:	Index No. 159731/2020
	:	
v.	:	
	:	
THE GOLDMAN SACHS GROUP, INC., KAREN SEYMOUR, in her individual and professional capacities and DARRELL CAFASSO, in his individual and professional capacities,	:	
	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

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Plaintiff Marla Crawford, through her counsel Wigdor LLP, respectfully submits this Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration and Stay Proceedings ("Motion to Compel Arbitration").

PRELIMINARY STATEMENT

Defendants' Motion to Compel Arbitration[1] is grounded in the long-outdated, pre-#MeToo, pre-#Time'sUp proposition that it is acceptable for corporate defendants and the bad actors who work for them to silence female complainants by forcing them into secretive, confidential arbitration. Acknowledging the inherent unfairness of that scheme, the New York State Legislature passed legislation ending these attempts to muzzle those who have been wronged. Only one court has squarely addressed, in a litigated dispute, the issue before this Court – whether N.Y. Civil Practice Law & Rules ("CPLR") § 7515 ("Section 7515"), which prohibits mandatory arbitration of discrimination claims, is preempted by the Federal Arbitration Act, 9 U.S.C. § 2 ("FAA"). In Newton v. LVMH Moët Hennessy Louis Vuitton Inc. ("LVMH"), No. 154178/2019, 2020 WL 3961988 (N.Y. Sup. Ct., N.Y. Cty. July 10, 2020),[2] the court issued an extensively reasoned decision holding that the FAA did not preempt Section 7515 where the underlying contractual agreement and/or the underlying actionable conduct does not constitute interstate activity, holding that such conduct falls outside the regulatory purview of the Commerce Clause powers. Indeed, a finding that the FAA preempts Section 7515 would effectively gut the legislation of any effect and flout the will of the New York State Legislature,

[1] NYSCEF 9, https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=QQ_PLUS_nLHjlG9DgzP0Js/e0Hw==&system=prod; NYSCEF 10 https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=LzV/rhdpvC7up/vHe79m5A==&system=prod.

[2] NYSCEF 51, https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=D8uHdTJ71qY5Y62RDz07AA==&system=prod.

which was clearly not the legislative intent when the law was passed. As such, respectfully, Newton should be followed here.

BACKGROUND

I. Allegations of the Complaint

Plaintiff Marla Crawford was an Associate General Counsel for Defendant Goldman Sachs Group, Inc. ¶ 15.[3] Ms. Crawford joined Goldman in 2010 and enjoyed many years of successful employment. ¶¶ 21-27. In early 2018, Goldman hired Defendant Karen Seymour as its General Counsel, previously from Sullivan & Cromwell LLP ("Sullivan & Cromwell"). ¶ 28. In November 2018, Ms. Seymour hired Defendant Darrell Cafasso to be Goldman's Global Head of Litigation, also previously from Sullivan & Cromwell. ¶¶ 29-34.

Nearly immediately, Ms. Crawford observed inappropriate conduct by Mr. Cafasso, including excessive drinking and failure to take sexual harassment within the legal department seriously. ¶¶ 34-46. In 2019, while most of the department was on vacation, Mr. Cafasso began to sexually harass a much younger woman who reported to him, referred to in the Complaint as Jane Doe, conduct that he later reported himself as inappropriate. ¶ 54-58. Mr. Cafasso engaged in *quid pro quo* harassment of Jane Doe, trading attention and sexual favors for job benefits such as enhanced performance scores. ¶¶ 59-85. Ms. Crawford was disadvantaged by this *quid pro quo* exchange, including by having her performance scores decreased at the same time as Jane Doe's were raised. ¶¶ 82-86. Moreover, Mr. Cafasso's sexual misconduct with a subordinate was a violation of Goldman's company policies. ¶¶ 112-113.

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[3] All citations to the Complaint (Dkt. No. 1, NYSCEF 1, https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=6UN6Bq8/CfnwYAkLpdZWtQ==&system=prod) are set forth as "¶__."

When Ms. Seymour learned about Mr. Cafasso's conduct, she told a senior member of the legal department: "Let's put this genie back in the bottle." ¶¶ 4, 103, 106. This was consistent with her approach to similar allegations of misconduct against another Managing Director in the legal department who was simply moved to another division in order to cover up his wrongdoing. ¶¶ 34-46. Goldman and Ms. Seymour proceeded to hire Weil Gotchal & Manges LLP ("Weil Gotschal") to conduct a sham investigation to protect Goldman and Cafasso; for example, no interviews were conducted of any of the employees who had first-hand knowledge of the circumstances leading to his disclosure of his misconduct. ¶¶ 99-111, 121. Mr. Cafasso was placed on a brief two week leave of absence, while Jane Doe was forced to leave Goldman and likely paid to keep the entire matter confidential. ¶¶ 95-98, 109.

Ms. Crawford was contemporaneously aware of Mr. Cafasso's harassment and objected to it, and he retaliated against her repeatedly. The retaliatory conduct took on numerous forms, including, *inter alia*, taking the unusual step of opening her closed performance review (the only attorney whose review he reopened of any of his attorney reports worldwide) and adding negative comments despite her direct manager's protestations and decreasing her bonus compensation. When Ms. Crawford complained to the human resources function that Mr. Cafasso's conduct was discriminatory and retaliatory, he retaliated further by decreasing her responsibilities and subjecting her to a hostile work environment. Eventually, after a serious of discriminatory and retaliatory acts, Goldman, Ms. Seymour and Mr. Cafasso terminated Ms. Crawford's employment. On the day that Ms. Crawford was terminated, she was the only attorney in the legal department whose job function was purportedly moved outside of New York. ¶¶ 70-74, 86, 88, 114-118, 124-172.

Throughout her employment Ms. Crawford, worked in Goldman's New York offices and resided within the State of New York. Throughout Ms. Crawford's employment, Goldman was a corporate resident of the State of New York. All of the factual allegations of the Complaint – including those summarized above – took place in New York.

II. Defendants' Articulated Defenses Are False

Contrary to Defendants' statements, there is nothing at all "second hand" or "derivative" about Ms. Crawford's claims. Ms. Crawford objected to sexual harassment towards another colleague and then objected to retaliation against her, and as a response she was subjected to harassment and ultimately termination. Defendants' claim that Plaintiff's knowledge was based on hearsay is emblematic of the fantastical lengths that these Defendants continue to go to in order to minimize their collective wrongdoing. As very clearly alleged in the Complaint, *it was Jane Doe herself, the victim of Mr. Cafasso's sexual improprieties*, who confided in Plaintiff. ¶¶ 54-79. Defendants' excuse that Ms. Crawford's job was moved during a time of reorganization of the company equally lacks credibility as she was the only attorney from the entire Legal Department whose job was "moved" to Dallas at the time she was forced out. ¶ 168.

III. Procedural History

Ms. Crawford commenced litigation on October 26, 2020 with a nearly identical pleading to the matter at bar. See Crawford v. Goldman Sachs Group, Inc. et al., 159055/2020 (N.Y. Sup. Ct., N.Y. Cty. October 26, 2020), Dkt. No. 1.[4] On November 4, 2020, Defendants improperly removed that action to the Southern District of New York on the basis that the Court *might* at *some point in the future* have subject matter jurisdiction over the claims if Ms. Crawford

[4] NYSCEF 1, https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=uW7w8VmozNhxRWW6kAFRvQ==&system=prod.

proceeded with claims under the title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* ("Title VII") and that the FAA conferred subject matter jurisdiction. Two days later, Defendants filed a motion to compel arbitration. See Crawford v. Goldman Sachs Group, et al., No. 20 Civ. 9197 (LJL), Dkt. Nos. 1-13. This was pure forum shopping. Presumably, Defendants believed that Federal District Court was a more advantageous venue in which to litigate a motion to compel arbitration.

Rather than wasting judicial resources litigating the appropriateness of Defendants' removal, Ms. Crawford voluntarily dismissed that action in order to re-file her case in this Court. Plaintiff's counsel explained to the Federal District Court that "Defendants have cited no authority for the proposition that subject matter jurisdiction is conferred based on the mere possibility of pursing a Title VII claim" and that "Defendants' argument that this Court has jurisdiction under the Federal Arbitration Act . . . is also contrary to established law." Id. at Dkt. No. 19. Defendants did not respond or otherwise contest Plaintiffs' arguments.

On November 12, 2020, Ms. Crawford filed this action. Defendants have filed a Motion to Compel Arbitration on the basis of a purported arbitration agreement contained within a series of documents associated with a 2019 equity-based compensation award (the "Arbitration Agreement"). See Defs.' Br. at Exs. A[5] (electronic acknowledgement form as to the Award Agreement and the Goldman Sachs Amended and Restated Stock Incentive Plan, containing arbitration provision); B[6] (Award Agreement, containing arbitration provision at § 16); Ex. C[7]

[5] NYSCEF 13, https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=6k2tcV5rv5IY0t/FpWy/bw==&system=prod.

[6] NYSCEF 14, https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=Wvro1000hgJwpC6gNMFUUA==&system=prod.

(Amended and Restated Stock Incentive Plan, containing arbitration provision at § 3.17). In order for Ms. Crawford to receive the portion of her compensation paid in stock, she had no choice but to click an online box that contained the arbitration clause in question. For the reasons set forth herein, the Arbitration Agreement is unenforceable under New York State law as to Ms. Crawford's discrimination-based claims and such law is not preempted by federal law.

ARGUMENT

I. CPLR Section 7515 Prohibits Mandatory Arbitration Agreements

New York State has a "well defined and dominant public policy . . . against sexual harassment in the workplace. Phillips v. Manhattan & Bronx Surface Transit Operating Auth., 15 N.Y.S.3d 331, 335 (1st Dep't 2015). It is well known that mandatory arbitration has helped protect sexual harassers from liability and shield them from public disclosure. Confidential arbitration "isolate[s] employees and force[s] them to resolve their disputes individually in a secluded manner, weakening their cases and making it easier for employers to avoid liability." Meagan Glynn, #TimesUp For Confidential Employment Arbitration of Sexual Harassment Claims, 88 Geo. Wash. L. Rev. 1042, 1055 (July 2020). Further,

> [B]y forcing employees with harassment claims into a private forum governed by a confidentiality clause and procedures favoring the employer, victims are robbed of a fair proceeding and, ultimately, the justice they deserve. Besides the effect on the individual victim, this practice also frustrates the public goal of eliminating workplace sexual harassment. In fact, the problem of confidential arbitration is highlighted by the prevalence of workplace harassment in conjunction with the increasing use of mandatory arbitration agreements among employers.

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[7] NYSCEF 15, https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=1ECc8p6AehTdm4svuuNEiQ==&system=prod.

Id. For these reasons and others, during the early stages of the #MeToo era, New York State passed sweeping legislation intended to combat sexual harassment, including Section 7515. See N.Y. State Senate Stenographic Rec., 241st Leg. Reg. Sess. at 1853 ("So people like Harvey Weinstein come to mind, because he was able to be a serial sexual predator for decades because of such [arbitration] agreements").

Under Section 7515, New York State prohibits:

> [A]ny clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law.[8]

CPLR § 7515(a)(2). Furthermore, Section 7515 provides that "Except where inconsistent with federal law, the provisions of such prohibited clause as defined in paragraph two of subdivision (a) of this section shall be null and void." CPLR § 7515(b)(iii).

In interpreting a statute, a court's "primary consideration is to ascertain and give effect to the intention of the Legislature." Yatauro v. Mangano, 17 N.Y.3d 420, 426 (2011). "[T]he statutory text provides the clearest indication of legislative intent, and should be construed 'to give effect to its plain meaning.'" Civil Serv. Employees Ass'n, Inc. v. Westchester Cty. Health Care Corp., 138 A.D.3d 741, 742 (2d Dep't 2016). Furthermore, "a court in discerning the meaning of statutory language, must avoid objectionable, unreasonable or absurd consequences." Long v. State, 7 N.Y.3d 269, 273 (2006) (citing cases).

The stated intent of the New York State Legislature through Section 7515 – and other laws – was to help deal with the "scourge" of sexual harassment and discrimination by, *inter*

[8] Section 7515 was initially enacted in 2018 and only covered claims involving sexual harassment. In 2019, the law was amended to cover all claims of discrimination.

alia, doing away with mandatory arbitration. Indeed, the policy behind the law was to shine a public spotlight on these issues. See e.g. N.Y. State Senate Stenographic Rec., 241st Leg. Reg. Sess., at 1853 ("So that's what we're getting at in this legislation, is to end those types of arrangements where people committing bad acts can continue to get away with their bad behavior."), at 1855 ("So the bottom line is this is sweeping legislation that deals with the scourge of sexual harassment").[9] "To suggest that the [New York State] Legislature toiled to promulgate the general rule of CPLR 7515only to have it immediately swallowed up by a 'federal law' exception, would be to suggest an 'objectionable, unreasonable or absurd consequence.'" Newton, 2020 WL 3961988, at *5.[10]

Ms. Crawford's claims fall clearly within Section 7515's scope. Ms. Crawford has set forth allegations of discrimination against Defendants and asserted causes of action under New York State and New York City's Human Rights Laws. Her claims are based solely on New York State law and arise out of facts and a purported arbitration agreement that occurred

[9] Defendants' citation to the N.Y. State Senate stenographic record (Defs.' Br. at p. 7-8) proves nothing more than that the legislators acknowledged that a court may need to determine whether, under the law, the FAA preempts CPLR Section 7515. For the reasons set forth in Newton and herein, we respectfully believe that the FAA does not control here.

[10] In Lamps Plus, Inc. v. Varela, 139 S.Ct. 1407, (2019) (Ginsbug, J., dissenting), Justice Ginsburg addressed the harm done by the Supreme Court's arbitration-related decisions. Justice Ginsburg opined that "[r]ecent developments outside the judicial arena ameliorate some of the harm this Court's decisions have occasioned," including that "some States have endeavored to safeguard employee' opportunities to bring sexual harassment suits in court. See, *e.g.*, N. Y. Civ. Prac. Law Ann. § 7515 (West 2019) (rendering unenforceable certain mandatory arbitration clauses covering sexual harassment claims)." 139 S.Ct. at 1422 (2019) (Ginsbug, J., dissenting) (parenthetical in original). If Section 7515 were ineffectual, it would seem unlikely that Justice Ginsburg – well aware of the FAA and its reaches – would state that Section 7515 ameliorated pro-arbitration case law.

completely within the State of New York. As such, Defendants' arbitration agreement must be deemed "null and void."[11]

II. The FAA Does Not Preempt CPLR Section 7515

Passed under Congressional Commerce Clause powers, the FAA provides for the validity and enforceability of arbitration agreements in certain contexts. Specifically, the FAA applies only to "contract[s] evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such conduct." 9 U.S.C. §2. Although the FAA uses the phrase "involving commerce," (and by reference, "such conduct") it is clear that this is prescribed to "interstate commerce" given the limitations on Congressional power. See e.g. Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 273 (1995) (interpreting "involving commerce" as "within the flow of interstate commerce").

As set forth above and at all times, Ms. Crawford lived in New York State and worked for Defendant Goldman Sachs in New York State where its corporate headquarters are based. Moreover, not only is the underlying contract mandating arbitration purely a function of intrastate activity, but all of the allegations of the Complaint occurred within New York State. All the discriminatory conduct at issue – both the sexual harassment towards a colleague that Ms. Crawford complained about and the discriminatory and retaliatory treatment towards Ms. Crawford directly – occurred in New York State. In short, the execution of the arbitration clause as well as all of the actionable conduct at issue is totally and completely *intra*state – not *inter*state – activity.

[11] Defendants' entire argument that "New York Has a Strong Policy In Favor of Arbitration" (see e.g. Defs.' Br. at 2, 11-13) requires one to completely ignore the recent passage of CPLR Section 7515. In fact, *all* the case law and authority cited in that section of Defendants' brief long pre-dates Section 7515.

The decision in Newton, 2020 WL 3961988 is directly on point here. In Newton, like the matter at bar, a New York-based employee asserted claims of discrimination and retaliation against her New York-based employer, LVMH. LVMH moved to compel arbitration on the basis of a pre-dispute arbitration agreement. The Newton court found that the arbitration agreement at issue was not "a contract evidencing a transaction involving commerce," specifically with respect to its application to discrimination and retaliation claims. Id. at *4. Separately, the Newton court *also* found that the alleged actionable conduct (i.e., the discrimination and retaliation) did not qualify as interstate commerce. Id. at 4 ("the acts of sexual harassment and related retaliation alleged in the complaint occurred intrastate – in defendant's New York City offices. Nothing relating to that conduct could possibly be cast as 'interstate' or 'economic in nature.'"). As such, the Newton court found that the FAA did not apply or preempt CPLR §7515.

Defendants mischaracterize the Newton decision, claiming that the "court's rationale turned entirely on the intraoffice nature of the alleged harassment and retaliation." See Defs.' Br. at p. 16. Defendants argue that Newton incorrectly premised its decision on whether the actionable claims involve interstate commerce rather than whether the agreement to arbitrate involves interstate commerce. Id. But Defendants are wrong. While the Newton court did find the underlying conduct "involved purely intrastate activity," it separately held that "[n]or can the Arbitration Agreement itself be reasonably characterized as a contract evidencing a transaction involving commerce, particularly insofar as it seeks application to sexual harassment or other discrimination-based claims." Id. at *4. That is, the Newton court specifically found that an intrastate agreement to arbitrate discrimination claims does not involve interstate commerce.

Plaintiff's counsel recognizes that federal courts have interpreted the phrase "involving [interstate] commerce" broadly to mean "affecting [interstate] commerce," Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003), but "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." United States v. Morrison, 529 U.S. 598, 608 (2000); see also United States v. Lopez, 514 U.S. 549, 556 (1995) ("[E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."). As cited by Newton, the Supreme Court in Morrison noted that, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." Newton, 2020 WL 3961988 at *4 (citing Morrison, 529 U.S. at 613). Put another way, the Commerce Clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

For these reasons, we respectfully submit that the Court had not fully considered all of the arguments set forth here in Fuller v. Uber Technologies, Inc. ("Uber"), No. 150289/2020 (PAG), 2020 WL 5801063 (N.Y. Sup. Ct., N.Y. Cty. Sept. 25, 2020). In Fuller, the primary issue was whether the arbitration agreement at issue contained a carve-out for sexual harassment claims. However, the Court briefly addressed the FAA's applicability, and found that it was applicable because an employee's arbitration agreement executed upon her hire constituted a transaction affecting interstate commerce. Id. at *1. Notably, in the motion papers, plaintiff's counsel did not even raise the issue of the Congress' ability to regulate a localized agreement to arbitrate discrimination claims or the applicability of Section 7515. See Fuller v. Uber

Technologies, Inc., No. 150289/2020 (PAG) at Dkt. No. 19.[12] Moreover, that case is distinguishable because the plaintiff resided and worked in New York while the two employer-defendants – Uber and Apex Systems LLC ("Apex") – resided in diverse states (California and Virginia, respectively). In finding the FAA applicable, the Court noted as much. See Fuller, 2020 WL 5801063, at *1 ("the FAA is applicable to the dispute resolution agreement as it was signed in connection with plaintiff's hire by Apex, a national staffing agency").

Similarly, distinguishable is Cusimano v. Schnurr, 26 N.Y.3d 391 (2015), where the Court of Appeals found that an agreement to arbitrate commercial disputes between New York-based family members with regard to a New York-based business fell within the scope of the FAA. The parties in Cusimano were engaged in a purely commercial business transaction and agreed to resolve such disputes through arbitration. The Court found that "matters concerning commercial real estate have been treated as implicating interstate commerce." Id. at 399 (citing Hall Street Associates, L. L. C. v Mattel, Inc., 552 US 576, 590 (2008) (observing that there was no dispute that the commercial lease involved interstate commerce); A-1 A-Lectrician, Inc. v Commonwealth Reit, 943 F Supp 2d 1073, 1078 (D. Haw. 2013)). In contrast, the matter at bar involves an agreement to arbitrate purely local discrimination and retaliation claims.[13]

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[12] NYSCEF 19, https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=b2_PLUS_xDtHYiMhu7P7GyreEuw==&system=prod.

[13] The same is true of Ayzenberg v. Bronx House Emanuel Campus, Inc., 93 A.D.3d 607 (1st Dep't 2012), cited by Defendants. Ayzenberg involved an arbitration agreement covering disputes between a consumer and a business and the First Department found a local law prohibiting arbitration agreements in such contexts to run afoul of the FAA – but again, like Cusimano this was clearly an agreement that arose in a commercial context to resolve commercial disputes. In Fuller, the Court also cited Zendon v. Grandison Mgmt., No. 18 Civ. 4545 (ARR), 2018 WL 6427636, at *3, n. 1 (E.D.N.Y. Dec. 7, 2018). In Zendon the parties did not litigate the issue of the FAA's applicability to agreements to arbitrate localized discrimination claims and the Court assumed its applicability in a brief footnote.

E.E.O.C. v. Waffle House, Inc., 534 U.S. 279 (2002), cited by Defendants, is also not controlling. Waffle House has been cited for the proposition that "[e]mployment contracts . . . are covered by the FAA." However, just like Newton "the critical distinction between that case and the one presently before this court is that the gravamen of the dispute is that case [Waffle House] revolved exclusively around a quintessential incident of employment [the loss of an employee's job]" whereas the matter at bar revolves around "alleged activity more akin to tortious conduct unrelated to the employer/employee contractual relationship, and alleged complicity therein, *i.e.* allegations of [discriminatory] and retaliatory acts reactionary to [Plaintiff's] internal complaint about such harassment." Thus, for the same reasons as Newton, Waffle House is inapplicable here. While Defendants argue that Newton's rationale is distinguishable to the matter at bar because Ms. Crawford was ultimately terminated, that does not change the nature of the underlying conduct that was a series of discriminatory and retaliatory acts over an extended period of time.[14]

Finally, for many of the same reasons, Defendants' other cited cases – Ricketts v. Nat'l Debt Relief LLC, No. 21056/2019E (N.Y. Sup. Ct. Bronx. Cty. Oct. 8, 2019), Latif v. Morgan Stanley & Co. LLC, No. 18 Civ. 11528, 2019 WL 2610985, at *2-4 (S.D.N.Y. June 26, 2019) and Whyte v. WeWork Cos., No. 20 Civ. 1800, 2020 WL 3099969 (S.D.N.Y. June 11, 2020) – are distinguishable. Ricketts was a 1.5-page short-form order which compelled arbitration of sexual harassment claims after the plaintiff appears to have not even presented an argument that the FAA was inapplicable. See Ricketts, at p. 2. In Latif, the plaintiff did not argue the absence of a "transaction[s] involving commerce," so the matter was not properly litigated before the

[14] To the extent the Court finds that Ms. Crawford's isolated termination claim is subject to arbitration, Ms. Crawford's other claims for disparate treatment preceding her termination should remain before this Court.

court. The Latif court did not even address the issue, and because of that the Newton court noted, "no treatment is accorded in Latif to the observation . . . that the FAA explicitly limits its scope to a 'transaction involving commerce.'" Newton, 2020 WL 3961988, at *6. Similarly, the Whyte court took for granted the FAA's application and followed Latif, without conducting a reasoned analysis as was done in Newton.[15]

Conspicuously, for all the case law cited, Defendants fail to mention Tantaros v. Fox News Network, LLC ("Fox News"), No. 19 Civ. 7131 (ALC), 2020 WL 3050576 (S.D.N.Y. July 31, 2020). In Tantaros, the plaintiff filed a state court action for declaratory judgment that her arbitration agreement with her employer-defendant was null and void under Section 7515. Fox News removed the matter to federal court, and the plaintiff moved for remand, which was denied. Plaintiff then sought an interlocutory appeal. In granting plaintiff's request, the court noted that the "[plaintiff's] arguments are not only plausible interpretations of the statute, but the operative question presents knotty legal problems that are subject to legitimate, substantial dispute." 2020 WL 3050576, at * 4.

In sum, Newton is the only court to issue a reasoned decision in a fully litigated dispute as to whether the FAA preempts Section 7515 when the underlying contract and/or the underlying actionable conduct is purely intrastate activity. It found that it does not. We respectfully ask the Court to hold similarly here.

[15] We further submit that Latif and Whyte should be afforded even less consideration as the interpretation of state law should remain in "the exclusive province of the State courts . . ." People ex rel. Weber & Heilbroner v. Graves, 249 A.D. 49, 54, (3d Dep't 1936).

III. To the Extent the Court is Inclined, Plaintiff Is Amenable to Holding A Decision on this Matter in Abeyance Pending the Outcome of the *Newton* Appeal

As acknowledged by Defendants, the Newton decision is currently on appeal for the First Department's February Term. We respectfully recognize that the First Department's decision will likely be controlling in this matter and binding on this Court. In the interest of conserving judicial resources, Plaintiff is amenable to holding this motion in abeyance pending the outcome of that appeal.

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests an order denying Defendants' Motion to Compel Arbitration and for such other and further relief deemed just and/or proper.

Dated: December 14, 2020
New York, New York

Respectfully submitted,

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