UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RACHEL WITLIEB BERNSTEIN, ANDREA MACKRIS, and REBECCA GOMEZ DIAMOND, Plaintiffs, v. BILL O'REILLY and FOX NEWS NETWORK LLC, Defendants.	Index No.: 17-cv-9483(DAB)

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT BILL O'REILLY'S MOTION TO DISMISS OR COMPEL ARBITRATION

SMITH MULLIN, P.C.
420 Lexington Avenue, Suite 300
New York, New York 10170
(212) 297-6134; fax: (917) 677-3697
(nmullin@smithmullin.com)

240 Claremont Avenue
Montclair, New Jersey 07042
(973) 783-7607; fax: (973) 783-9894

Of Counsel and on the Brief:
NEIL MULLIN, ESQ.
NANCY ERIKA SMITH, ESQ.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

In blatant and material breach of the very arbitration clauses defendant O'Reilly now seeks to impose on the plaintiffs, on October 18, 2017, defendant O'Reilly and his lawyers convened an on-the-record conference with The New York Times where he defamed the plaintiffs. Violating strict confidentiality provisions embedded in the arbitration clauses, he told reporters Emily Steel and Michael Schmidt of The New York Times that he had actual "physical proof" that plaintiffs' abuse claims (and those of two or three others) were "bullshit" and "all crap." He ranted that the claims of the women in the April 1, 2017 New York Times article were "politically and financially motivated" and that he could "prove it with shocking information." He contended that the women, including the plaintiffs, had "destroy[ed] [his] children." This defamatory press conference was the culmination of a stream of public defamation by O'Reilly that began six months earlier with the publication of the April The New York Times article.

O'Reilly publicly and falsely blamed the women with whom he settled with having broken their Agreements by going to The New York Times. Indeed, as early as September 2016, O'Reilly, through his lawyers, threatened to take legal action against plaintiff Mackris because, according to him, she had spoken to Emily Steel of The New York Times. But, during the period from September 2016 through December 4, 2017, O'Reilly never filed an arbitration claim despite his claim now that plaintiffs violated their Agreements, which they did not[1]. Rather, in blatant violation of the confidentiality provisions embedded in the arbitration clauses of the

[1] The New York Times' reporters have publicly suggested that federal authorities investigating sexual harassment at Fox leaked information about O'Reilly's settlements with victims. (Mullin Dec., **Ex. H**, Tr. 18:1-17).

Settlement Agreements, O'Reilly repeatedly and publicly defamed the plaintiffs. That was his chosen remedy for a perceived breach.

It is elementary that an arbitration clause is simply a contract subject to principles of state contract law. It is a basic principle of New York contract law that a party who materially breaches a contract cannot demand performance by the non-breaching party. O'Reilly's repeated breaches of the arbitration clauses through public defamation of the plaintiffs require that - even if those clauses covered plaintiffs' defamation claims - and they do not - plaintiffs do not have to arbitrate. Having been publicly defamed in breach of the arbitration clauses, plaintiffs may now publicly clear their names.

STATEMENT OF FACTS

A. Plaintiffs Entered Agreements with Defendant O'Reilly Settling Provable Claims of Harassment

More than 15 years ago, on September 9, 2002, plaintiff Rachel Witlieb Bernstein entered into an Agreement with Fox News in which defendant Bill O'Reilly is a named third-party beneficiary. (Severance Agreement and General Release attached to the Declaration of Neil Mullin, Esq. as **Ex. A**, hereinafter "Mullin Dec., ___").

More than 13 years ago, on October 28, 2004, plaintiff Andrea Mackris entered into a Settlement Agreement, along with her then lawyer and his firm, with defendant Bill O'Reilly and Fox News Network. (Mullin Dec., **Exs. B**). This Settlement Agreement was amended more than 10 years ago on November 7, 2007. (Mullin Dec., **Ex. C**).

Almost seven (7) years ago, on August 10, 2011, plaintiff Rebecca Gomez Diamond entered into a Settlement Agreement and Release with defendants Bill O'Reilly and Fox News Network. (Mullin Dec., **Ex. D**).

Embedded in the Mackris and Diamond arbitration clauses (Ms. Bernstein does not have an arbitration clause) is a requirement that all disputes covered by the clauses be arbitrated in total confidentiality. (Mullin Dec., **Ex. B**, ¶ 9; **Ex. D**, ¶ 7).

In all the years since these Settlement Agreements have been entered, up until the present, none of the plaintiffs breached any of the provisions of the Agreements. (Mullin Dec., proposed Second Amended Complaint, **Ex. E**, ¶¶ 21, 23 and 25.

On September 12, 2016, defendant O'Reilly's lawyer, Fredric S. Newman, wrote a letter to plaintiff Andrea Mackris stating, "We understand that you have been interviewed by Emily Steel, and perhaps others, concerning Fox News" and threatening Mackris with "immediate legal proceedings" in the event she breached the Settlement Agreement[2]. (Mullin Dec., **Ex. F**).

On April 1, 2017, The New York Times reported that "Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up." The article was written by Emily Steel and Michael S. Schmidt and revealed that O'Reilly and/or defendant Fox News had paid five (5) women about $13 million to forego litigation and never speak about what O'Reilly did to them. The article specifically named each of the three plaintiffs, noting that a settlement was reached

---

[2] It is unclear how Mr. Newman became aware of this fact. In the past, defendant O'Reilly and Fox News engaged in surveillance and intimidation of Ms. Mackris (as reflected in her Settlement Agreement (Ex. B, ¶ 4(c)). Perhaps that surveillance was reactivated once defendants became aware that The New York Times was writing a story, or defendants were surveilling Ms. Steel. Notably, neither defendant O'Reilly nor defendant Fox instituted an arbitration action or sought injunctive relief in September of 2016 as required by the Settlement Agreements' arbitration clauses.

with Ms. Bernstein in 2002, with Ms. Mackris in 2004, and with Ms. Diamond in 2011. In addition to plaintiffs, the article named Laurie Dhue (currently suing Mr. O'Reilly for defamation) and one other woman as people who settled with O'Reilly.

B. Defendant O'Reilly Defamed Plaintiffs Relentlessly on National TV, on National Radio, on Webcasts, on Blogs, in the Print Media and Social Media Published Throughout the World

Enraged that The New York Times had exposed his harassment of the small specifically-defined group of five women, O'Reilly began a public relations campaign of defamation against his victims. As specifically detailed in the proposed Second Amended Complaint (Mullin Dec., **Ex. E**), O'Reilly viciously defamed the plaintiffs throughout the world for nine months - until plaintiffs sued to stop it. Millions of people around the world heard the defamation. It resulted in many derogatory comments holding plaintiffs up to derogation and ridicule in newspapers, on TV, on radio, on webcasts, on websites, on blogs, and on social media. O'Reilly's defamatory statements were published in print and online in the largest media in the world, including, but not limited to, Newsweek, the Washington Post, NBCnews.com, New York Magazine, Money Magazine, CNN.com, CNBC.com, Vanity Fair, the LA Times, the Washington Examiner, Huffington Post, the Chicago Tribune, the Hollywood Reporter, the Daily Mail, and The New York Times.

Defendant O'Reilly's defamatory statements are too numerous to list, but, as detailed in the proposed Second Amended Complaint, they include:

- "we have physical proof that this is bullshit. Bullshit. Okay? So, it's on you, if you want to destroy my children further. All right? Because it's all crap." (Mullin Dec., **Ex. E**, ¶ 68).

- "So why don't you be human beings for once? This is horrible. It's horrible what I went through, horrible what my family went through. This is crap, and you know it. It's politically and financially motivated, and we can prove it, with shocking information." (Id. at ¶ 68)

- calling "these harassment deals" a "bunch of garbage." (Id. at ¶ 72).

- "In 20 years and 6 months at the Fox News Channel, I resolved three situations. Three I resolved. And I did that to protect my children from harm. And I would do anything, anything to protect my children from harm. So it was three in 20 years and 6 months that I resolved. Part of the resolution is nobody talks about it. Now, obviously that's been broken on the other side. But I can't break it, because if I do, that opens everything all up again and it's insane." (Id. at ¶ 71).

- "The bottom line is that my enemies who want to silence me have made my life extremely difficult and have hurt me in the marketplace. Anybody who doesn't like me will believe all this stuff, the smear merchants put out, but I'm interested in you. I'm I'm interested in the people who are fair-minded." (Id. at ¶ 74).

- "Never give up telling the truth. Never give up protecting your family. I'm going to go down fighting and I'm going to go down telling the truth." (Id. at ¶ 77).

- "It is tremendously disheartening that we part ways due to completely unfounded claims." (Id. at ¶ 27).

- "No one was mistreated on my watch." (Id. at ¶ 47).

- "I never mistreated anyone." (Id. at ¶ 57).

- "Once you get a famous name, you're in the political arena, the combination is devastating. If they can get you, they're going to get you." (Id. at ¶ 48).

- O'Reilly repeatedly referred to himself as a "victim." (Id. at ¶¶ 27, 50).

- Claiming to be conducting an "investigation" "clearing his name" "to expose the whole thing" "the smears." (Id. at ¶¶ 50, 75).

- "What we are going to uncover is shocking . . . that this could happen in our Republic - this kind of defamation . . . and it's bought and paid for . . . millions of dollars in play . . . is shocking." (Id. at ¶ 50).

- Claiming after his "investigation" he would give the public "facts," "no he said she said. Facts. Cold stone facts. Shocking the defamation that can occur." (Id. at ¶ 50).

- "They don't care if it's true or not. Allegations become facts." (Id. at ¶ 50).

- "Well, it's been a horrendous experience. I've been in the broadcast business, journalism business 43 years. I've never had one complaint filed against me by a coworker, in any human resources department in 43 years. And that encompasses 12 different companies." (Id. at ¶ 67).

- "So, all of a sudden, all this stuff happens, and the pain it brings to my children is indescribable. Indescribable. And I would give up my life to protect my children, but I find myself not able to protect them because of things that are being said about me, their father." (Id. at ¶ 67).

- "Every allegation is a conviction . . . every allegation in this area is a conviction. They don't look for the truth." (Id. at ¶ 52).

- "Eric Bolling's son is dead. He's dead. Because of allegations made, in my opinion, and I know this to be true, against Mr. Bolling. No game.[3]" (Id. at ¶ 67).

- Repeatedly calling the plaintiffs' harassment claims a "political and financial hit job," and "politically and financially motivated." (Id. at ¶¶ 59, 63).

- "I'm vulnerable to lawsuits from individuals who want me to pay them to avoid negative publicity." (Id. at ¶ 26).

- Repeatedly, over and over, falsely stating "I have been in the broadcast business for 43 years, 12 different companies. Never one time was there any complaint filed against me with Human Resources or anybody's legal team, nothing, zero." (Id. at ¶ 69).

- "The worst part of my job is being a target for those who would harm me and my employer, the Fox News Channel. Those of us in the arena are constantly at risk, as are our families and children. My primary efforts will continue to be to put forth an honest TV program and to protect those close to me." (Id. at ¶ 26).

---

[3] Eric Bolling responded to defendant O'Reilly using Bolling's son's death as an example of the consequences of women complaining about harassment by stating in part: "I believe it is beyond inappropriate for anyone to bring in the tragic death of my son Eric Chase Bolling . . .I hope he will honor my request and avoid any future mentions of my son. My parting from Fox News was in no way connected to the tragic news of my son's passing . . ."

- Using his children as human shields, O'Reilly repeated endlessly: "But most importantly, I'm a father who cares deeply for my children and who would do anything to avoid hurting them in any way. And so I have put to rest any controversies to spare my children." (Id. at ¶ 27).

- "But accusations are not facts. Accusers are not automatically victims." (Id. at ¶ 78).

- "My biggest mistake was settling." (Id. at ¶ 69).

- "In my case, all the confidentiality stuff was - violated - every bit of it." (Id. at ¶ 69).

- "We thought people would uphold their oath and what they agreed to do. They haven't." (Id. at ¶ 70).

- "There are two things here when it comes to women being, um, mistreated, that's the best word, every American should want one thing - justice . . . The other thing is verifiable. I've been in the business 43 years. Never once was there a complaint filed against me with any HR in 12 different companies. Verifiable." (Id. at ¶ 73).

- "My conscience is clear. What I have done is organized a legal team to get the truth to the American people." (Id. at ¶ 52).

- "I can go to sleep at night knowing very well that I never mistreated anyone on my watch in 42 years." (Id. at ¶ 52).

- "All right, so there's a lot of talk about here in America and I'm going to be very precise in my analysis tonight because it's a fact that we have now entered a very dangerous period in our republic. Today, Matt Lauer left NBC News because he was accused of something. So I was thinking maybe we move the media from New York City to Salem, Massachusetts." (Id. at ¶ 78).

- "I've been upfront on this from the very beginning. In my situation, I took the slings and arrows and I told my attorneys we'll abide by what we promised to do. But we are now going to confront everybody in court. That's where we're going to adjudicate, in my situation. We've already filed one lawsuit and we've got others ready to go." (Id. at ¶ 78).

- "You know, am I mad at God? Yeah, I'm mad at him. I wish I had more protection." (Id. at ¶ 77).

- calling himself a "victim" of a "smear campaign," "a brutal campaign of character assassination this is unprecedented in post-McCarthyist America." (Id. at ¶ 27).

LEGAL ARGUMENT

POINT I

DEFENDANT O'REILLY MATERIALLY BREACHED THE VERY ARBITRATION CLAUSES HE NOW SEEKS TO ENFORCE AND, THEREFORE, PLAINTIFFS DIAMOND AND MACKRIS ARE FREE TO LITIGATE THIS MATTER IN OPEN COURT RATHER THAN SECRET ARBITRATION PROCEEDINGS

Even assuming, *arguendo* only, that the arbitration clauses in question cover the claims here of Ms. Mackris and Ms. Diamond[4], those arbitration clauses are unenforceable against them, because defendant O'Reilly has materially breached the arbitration clauses he now seeks to enforce by engaging in a public smear campaign against the plaintiffs rather than abiding by the strict confidentiality requirements of the arbitration clauses. Defendant O'Reilly did not file any claim for arbitration in the last 18 months, since he became aware that The New York Times was pursuing a story about his repeated abuse of women. Instead, in violation of the confidentiality provisions embedded in the very arbitration clauses he seeks to enforce, he has engaged in a very public, well-publicized campaign of smears and defamation against the small, identifiable group of women named in The New York Times article. Having materially breached the arbitration clauses, he cannot now hold plaintiffs to them.

Judge Briccetti of this Court has recently held that when one party materially breaches an arbitration agreement, the non-breaching party is relieved of his/her obligation to arbitrate:

> The FAA provides that otherwise-valid arbitration agreements can be rendered unenforceable based "upon such grounds as exist at law or in equity for the

[4] Ms. Bernstein is not a signatory to any arbitration agreement. Defendants' argument that she has lost her right to sue is patently frivolous.

> revocation of any contract." 9 U.S.C. § 2. "Thus, a party seeking to avoid enforcement of an arbitration agreement can . . . invoke a defense that would be available to a party seeking to avoid the enforcement of any contract." Brown v. Dillard's, Inc., 430 F.3d 1004, 1010 (9th Cir. 2005) (explaining that state laws related specifically to arbitration agreements are not a valid basis on which to render an arbitration agreement unenforceable). Under New York law, when a party to a contract materially breaches that contract, it cannot then enforce that contract against a non-breaching party. See, e.g., in re Lavigne, 114 F.3d 379, 387 (2d Cir. 1997). A breach is material when it "substantially defeats the purpose of that contract." Id. (Emphasis supplied) (citation omitted).
>
> * * *
>
> Thus, "when an employer enters into an arbitration agreement with its employees, it must itself participate in properly initiated arbitration proceedings or forego its right to compel arbitration. [Defendant] cannot compel [plaintiff] to honor an arbitration agreement of which it is itself in material breach." Id., 430 F.3d at 1006.

(Nadeau v. Equity Residential Properties Management Corporation, 251 F.Supp.3d 637, 641-42 (S.D.N.Y. 2017).)

The Mackris arbitration clause states, in pertinent part:

> All parties agree that any such arbitration proceedings will be held in **strict confidence** and that any filing, materials, evidence or testimony in or concerning such arbitration and any opinion in such proceedings **shall be and shall remain confidential and that breach of such confidentiality shall be a breach under Paragraph 7(f) hereto**.

(Mullin Dec., **Ex. B**, ¶ 9(a)) (Emphasis supplied).

Likewise, plaintiff Diamond's arbitration clause makes secrecy and confidentiality a material condition. It provides that, "Both the mediation and arbitration shall be **strictly confidential. The parties agree that any breach of confidentiality shall be considered a breach of Paragraph 4 herein**." (Paragraph 4 is the entire confidentiality clause of Ms. Diamond's Settlement Agreement.) (Mullin Dec., **Ex. E**, ¶ 7) (Emphasis supplied).

Instead of maintaining secrecy and confidentiality required by the arbitration and confidentiality clauses incorporated therein, defendant O'Reilly went public and did not file any arbitration claims. One of the most shocking examples of a material breach of the arbitration clause occurred on October 18, 2017, when, in blatant violation of the confidentiality provisions embedded in the arbitration clauses, O'Reilly and two of his lawyers invited reporters Emily Steel and Michael Schmidt of The New York Times to a tape-recorded, on-the-record interview. During that interview, O'Reilly stated:

> We have physical proof that this is bullshit. Bullshit. Okay? So it's on you if you want to destroy my children further. Alright, cuz (sic) it's all crap. Why don't you be human beings for once. This is horrible. It's horrible what I went through. Horrible what my family went through. This is crap. And you know it. It's politically and financially motivated. And we can prove it with shocking information.
>
> (Mullin Dec., **Ex. H**; Tr. 20:18-19).

It is difficult to imagine a more material breach of an arbitration agreement. As the Complaint makes clear, this public outburst was simply one incident among many in which O'Reilly smeared the plaintiffs. For seven months, O'Reilly maligned plaintiffs as liars, extortionists and political hit-women, calling their harassment claims "meritless," "unfounded," "politically and financially motivated," "garbage," "bullshit," and "crap," while maintaining that he and his "legal team" had "shocking evidence" of the "truth."

The breach of the arbitration agreements' confidentiality provisions was especially corrupt and material because O'Reilly claimed or implied publicly that plaintiffs had no evidence of his wrong-doing while actually knowing that he had insisted in the Settlement Agreements that all three plaintiffs provide to him or destroy all of the physical evidence of his harassment of

them. (Mullin Dec., **Exs. A, B and D**). Because O'Reilly materially breached the arbitration agreements, plaintiffs Mackris and Diamond cannot be compelled to arbitrate. Nadeau, supra. Plaintiff Bernstein never signed any arbitration agreement.

POINT II

O'REILLY WAIVED ANY RIGHT TO COMPEL ARBITRATION

It is well-settled that if a party acts inconsistently with an arbitration agreement, and thereby prejudices a second party, then that non-compliant party has waived his right to demand arbitration. Here, O'Reilly has for over a year acted as if no arbitration agreement exists, or if it exists, has no applicability to plaintiffs' claims. He has, as detailed above, blatantly violated the confidentiality requirements embedded in the arbitration clause through his months-long campaign of defamation. He has waived also by failing for more than a year to file an arbitration against plaintiffs though he claims to have had claims against them as of the April 1, 2017 New York Times article and claimed even before that date to have a claim against Mackris for allegedly speaking to a New York Times reporter. Finally, he has waived the arbitration clause by filing, for public consumption, his merits argument for dismissal of the Complaint instead of waiting for the Court to first rule on the arbitration issue. Thus, he has engaged in public, merits-based litigation in violation of the very arbitration clause he seeks to enforce.

While most claims of arbitration waiver arise where a party engages in extended litigation before seeking arbitration[5], courts have found waiver where a party, to the detriment of another, engages in other actions inconsistent with an arbitration clause, such as delaying or refusing to

[5] See, e.g., Sherrill v. Grayco Builders, Inc., 64 NY2d 261, 475 N.E.2d 332, 486 N.Y.S.2d 159 (1985).

cooperate in an arbitration proceeding. See, Brown v. Dillards, 430 F.3d 1004 (9th Cir. 2005), cited with approval in Nadeau, supra:

> A party seeking to prove waiver of a right to arbitrate must demonstrate (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing the arbitration resulting from such inconsistent acts.

[Dillards, supra, 430 F.3d at 1012, quoting, Britton v. Co-Op Banking Group, 916 F.2d 1405, 1412 (9th Cir. 1990)].

Obviously, O'Reilly (1) knew he had an arbitration clause in the Agreements he signed; and (2) acted inconsistently with those clauses by never filing an arbitration and instead repeatedly breaching the arbitration clauses' confidentiality provisions. Most importantly, O'Reilly's breaches profoundly prejudiced the plaintiffs - instead of being drawn into a confidential arbitration proceeding, they have been subjected to months of defamation. All three pre-requisites of waiver have been met. Even now, defendant O'Reilly has invoked the jurisdiction of this Court in making a motion to dismiss on the merits - on the gamble if he wins in Court he won't have to arbitrate. Therefore, O'Reilly is no longer entitled to demand arbitration because he waived as well as breached the arbitration clauses.

POINT III

PLAINTIFFS' CLAIMS OF RECENT DEFAMATION ARE NOT ARBITRABLE UNDER THE AGREEMENTS EXECUTED THIRTEEN YEARS AGO BY MACKRIS AND SEVEN YEARS AGO BY DIAMOND TO SETTLE CLAIMS OF SEXUAL HARASSMENT

Even if this Court were to find that O'Reilly neither breached nor waived the arbitration clauses in question, nevertheless, this matter should not be dismissed because the claims of recent defamation in the Complaint are simply not covered by arbitration clauses in agreements

settling sexual harassment claims made many years ago. The defamation claims in the plaintiffs' Complaint are not arbitrable.

A. The Issue of Arbitrability is for this Court, not an Arbitrator.

It is troubling indeed that defendants omit from their brief the landmark Supreme Court case governing whether a court or an arbitrator shall decide arbitrability. In First Options of Chicago, Inc. v. Kaplan and MK Investments, Inc., the Supreme Court held:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. AT&T Technologies, supra, at 649, 106 S.Ct., at 1418-1419; see Warrior & Gulf, supra, at 583, n. 7, 80 S.Ct., at 1353, n. 7. In this manner the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about he question "whether a particular merits-related dispute is arbitrable ...
>
> [Id. 514 U.S. 938 at 944, 115 S.Ct. 1920 at 1924 (1995)].

Thus, in determining whether arbitrability itself is arbitrable, absent a "clear and unambiguous" provision in an arbitration agreement delegating arbitrability to an arbitrator, that issue is reserved for the court. "Silence or ambiguity" on this issue must be resolved in favor of the Court deciding arbitrability. See also, Shaw Group, Inc. v. Triplefine International Corp., 322 F.3d 115, 120 (2d Cir. 2003) ("An important exception applies, however, when the document concerns who should decide arbitrability. The law then reverses the presumption to favor judicial rather than arbitrable resolution.")

Here, there is no "clear and unmistakable" delegation of arbitrability to an arbitrator. Indeed, the word "arbitrability" appears nowhere in the arbitration clauses of Mackris or Diamond. In an attempt to overcome this problem, defendants point to a reference in Mackris' arbitration clause that refers generally to "the rules of the American Arbitration Association."

In a sleight of hand, defendant O'Reilly cites AAA Commercial Arbitration Rule 7 to argue that the parties agreed to have an arbitrator determine arbitrability:

> R-7(a). Jurisdiction. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.

In fact, any arbitration in this matter would be under the AAA Employment Rules. The reason defendant O'Reilly did not quote the applicable employment rule is that it does not provide that arbitrators decide arbitrability in employment cases. It reads in full:

> 6(a) Jurisdiction. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

Obviously, any claim arising under the Settlement Agreements at issue here would have been an employment law matter and, therefore, the AAA Employment Rules would have been applied. Under those rules, arbitrability is left to the Court[6].

B. Plaintiffs' Defamation Claims Are Not Arbitrable

As to arbitrability, Mackris' Agreement, executed more than 13 years ago, actually has a very narrow scope. It purports to require arbitration only for "any action arising out of or relating to this Agreement." (Mullin Dec., **Ex. B**, ¶ 9(a)). The current "action" for recent defamation, based on comments O'Reilly uttered 13 years after the Agreement, does not "arise from" and is "not related to" a Settlement Agreement resolving sexual harassment claims. It is an action that in fact "arises from" New York's common law governing defamation. Even if the Agreement

---

[6] Although plaintiffs have argued that the Employment Law Rules clearly apply, if there is any ambiguity about arbitrability, that ambiguity must be resolved against committing the issue of arbitrability to the arbitrator. First Options, supra. Accordingly, this Court should decide the arbitrability of plaintiffs' claims.

had never existed, Mackris would have been entitled to bring this action. The defamation does not "relate to" the Settlement Agreement, a document settling sexual harassment claims that were brought in 2004. It relates to ugly words defendant spoke in retaliation for a New York Times article published on April 1, 2017, over 13 years after the Agreement.

Diamond's arbitration clause covers "any dispute concerning this Agreement or anything else related to the Claims." The term "Claims" is actually defined in one of the Settlement Agreement's "Whereas" clause to be claims of "unlawful termination, pregnancy discrimination, hostile environment, sexual harassment, *quid pro quo* sexual harassment, sex discrimination and retaliation." (Mullin Dec., **Ex. D**). The list of "Claims" does not include "defamation" and certainly does not include defamation that occurred many years after the termination of plaintiff's employment at Fox and the execution of the Settlement Agreement in 2011.

O'Reilly committed the tort of defamation against Mackris and Diamond in response to and in retaliation for a New York Times article published on April 1, 2017, years after employment-related issues had been settled by the Agreements. This defamation claim was not the subject of arbitration agreements executed years before and, therefore, plaintiffs' current claims are not arbitrable.

The arbitration clauses here are not, as defendants maintain, "exceedingly broad" (Db at 7). Nor are they the "paradigm" of a broad arbitration clause like the one cited by defendants in Collins & Aikman Prods. Co. v. Bldg. Sys. Inc., 58 F.3d 16, 20 (2d Cir. 1995). The arbitration clause in that case covers "any claim or controversy arising out of or relating to this Agreement." By contrast, Mackris' arbitration clause is limited to "actions" arising out of the Agreement, *i.e.*, breach of contract actions, not independent torts occurring years later. Likewise, Diamond's

arbitration clause does not refer to any and all disputes between the parties no matter how far in the future they arise, but rather, Diamond's arbitration clause refers only to disputes arising from the Agreement, *i.e.*, breach of contract claim - not raised here - or disputes arising as to a limited list of "claims" that does not include defamation.

The Second Circuit has held that a defamation claim that extended to matters beyond the underlying contract was not covered by an arbitration clause even broader than the ones at issue herein. Leadertex, Inc. v. Morganton Dyeing and Finishing Corp., 67 F.3d 20 (2d Cir. 1995). In refusing the compel arbitration, the Second Circuit ruled that courts should focus on the "core issues" in a pending case and compare them to the core issues in the settled arbitrable matter. If there was a significant gap between the two, the new matter should not be deemed arbitrable. Id.

The core issues in plaintiffs' defamation action are whether plaintiffs are part of a vast "left-wing conspiracy," "politically motivated" to "smear" defendant O'Reilly and hurt his children. Also at the core of defendant O'Reilly's defamation is the false statement that plaintiffs "never complained" about defendant O'Reilly's behavior to their employer, defendant Fox News. Although defendant O'Reilly's defamatory statements that plaintiffs' harassment claims were "unfounded" and that he "never mistreated anyone on his watch" are "closely related" to the underlying harassment claims and "resolution of [the defamation claims] will necessitate examining the same evidence." . . . "the defamatory statements [contain] a number of charges extending beyond" the original harassment claims. Leadertex, supra, at 28.

POINT IV

PLAINTIFFS HAVE CLEARLY PLED DEFAMATION UNDER NEW YORK LAW

At the pleading stage, courts must accept the allegations of the complaint as true and, reading the complaint in conjunction with supplementing affidavits, a motion to dismiss must be denied "[i]f , upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation." Davis v. Boeheim, 24 N.Y.3d 262, 268, 998 N.Y.S.2d 131, 22 N.E.3d 999 (2014). Plaintiffs have clearly pled the elements of defamation. Defendant O'Reilly made false statements intending "to expose plaintiffs to public contempt, hatred, ridicule, aversion, or disgrace[7]." Id.

A. The Statements Are Defamatory and Were Published

First, plaintiffs clearly allege that O'Reilly's statements about them are false. There can be no dispute that O'Reilly made the statements attributed to him in the Second Amended Complaint - many of them are recorded. Similarly, there can be no dispute that the relevant statements were published.

B. O'Reilly's Defamation Exposed Plaintiffs to Public Contempt and Ridicule

The Complaint clearly alleges that O'Reilly's defamation damaged plaintiffs' reputations and character, held them up in a false light, and portrayed them as liars and extortionists. There will be ample evidence in print media, social media, blog posts, website comments and statements on TV and radio shows which shows the public contempt and ridicule to which plaintiffs were exposed as a result of O'Reilly's defamation.

---

[7] Clearly the defamatory statements made by defendant O'Reilly are also "disparaging" in violation of plaintiff Bernstein's Settlement Agreement. (Mullin Dec., **Ex. A**, ¶ 5(f)).

In a strikingly similar case in which many of the same arguments made by defendant O'Reilly here were made by defendant Donald Trump, and applying the same law, the Court found that the defamation action should proceed.

Just like defendant O'Reilly, defendant Trump alleged that the women accusing him of sexual harassment were "smearing" him for "financial" and "political" reasons. (Zervos v. Trump, Slip Op., p. 5, Mullin Dec., **Ex. G**).

Judge Schecter cited New York law, applicable here, holding at page 15:

> In Davis v. Boeheim, the Court of Appeals determined that a defamation action could be maintained against a defendant who called individuals claiming to have been victims of sexual abuse liars and stated that he believed that they were motivated by money to go public (Davis, 24 NY3d 262 [reinstating defamation action against someone who may have known undisclosed facts about alleged sexual abuse]). The Court concluded that the statements were susceptible to a defamatory connotation because they communicated that defendant had information unknown to others that justified his statements that the individuals were neither credible nor victims of abuse. (id. at 272). Defendant in Davis 'appeared well placed to have information about the charges' and the context of the statements suggested that he 'spoke with authority and that his statements were based on facts' (id. at 273).

In Davis, supra, a college coach called sex abuse allegations against another coach "unfounded" claiming the accusers were "financially motivated." The Davis court held:

> In determining the sufficiency of a defamation pleading, we consider "whether the contested statements are reasonably susceptible of a defamatory connotation." As we have previously stated, "[i]f, upon any reasonable view of the stated facts, plaintiff would be entitled to recovery for defamation, the complaint must be deemed to sufficiently state a cause of action." (Citations omitted).

Defendant O'Reilly claims that his statements are opinion. (Db at 17). A review of his statements show that characterization to be absurd. Defendant O'Reilly repeatedly speaks of "facts," "truth," "evidence," and "proof." Assuming, *arguendo*, that some statements, out of

context, could be characterized as "an opinion, those statements clearly 'impl[y] that [they are] based upon facts which justify the opinion but are unknown to those reading or hearing it" . . . are thus "mixed opinion" and are "actionable." Id. at 269 (citations omitted).

Here, O'Reilly speaks as THE person who presents himself repeatedly as knowing "certain facts, unknown to [the] audience, which support [the speaker's] opinion and are detrimental" to the plaintiffs. Id. "The dispositive inquiry . . . is 'whether a reasonable [reader, listener or viewer] could have concluded that [the statements] were conveying facts about the plaintiff.'" Id. 269-270 (citations omitted).

O'Reilly similarly, and for a much longer period of time, repeatedly claimed that plaintiffs were liars who were financially and politically motivated, that he was victimized by them, that they hurt his children, that they smeared him, that they never complained of harassment or abuse during their employment, that the only reason he paid plaintiffs' settlements was to "spare [his] children," that he is a "target," that he did not "mistreat" plaintiffs, that their claims were "unfounded," "all crap" and "bullshit," and that plaintiffs wanted him to pay them to "avoid negative publicity." All the numerous well-publicized statements in which defendant O'Reilly portrays himself as a victim and truth teller and plaintiffs as liars and extortionists clearly add up to a claim for defamation.

Applying the relevant law, the same conclusion reached in Zervos v. Trump should be reached here: "A reader or listener, cognizant that defendant knows exactly what transpired, could reasonably believe what defendant's statements convey: that plaintiff[s] [are] contemptible because [they] 'fabricated' events for personal gain." (Zervos, Slip Op., p. 17, Mullin Dec., **Ex. G**).

The court in Zervos noted that publishing the claim that someone is a liar is libelous on its face. Divet v. Reinisch, 169 AD2d 416 (1st Dept. 1991). Here too, defendant O'Reilly used "specific, easily understood language to communicate" that plaintiffs lied to further their interests. Davis, supra, at 271.

C. A Jury Can Reasonably Determine That Defendant O'Reilly's Statements Are "Of and Concerning" Plaintiffs

The question of whether a statement is "of and concerning" plaintiffs is a jury question. Harwood Pharmacal Co. v. National Broadcasting Co., 9 N.Y.2d 460, 462, 214 N.Y.S.2d 725, 174 N.E.2d 602 (1961). In this case, the statement made by O'Reilly in the April 1, 2017 New York Times article which named plaintiffs by name was clearly "of and concerning" them.

Thereafter, the defamatory statements were made in reference to The New York Times article which named only five women, three of whom are plaintiffs herein. Clearly, the five[8] women named are part of "'a particular, specifically-defined group of individuals' that a jury could find included plaintiff[s].'" (Zervos, Slip. Op. footnote 3, citing Three Amigos SJL Rest., Inc. v. CBS News, Inc., 28 N.Y.3d 82, 86-87 (2016), Mullin Dec., **Ex. G**).

D. Defendant O'Reilly Cannot Rely on the Settlement Agreements As a Defense to Defamation

O'Reilly claims that his statements regarding Andrea Mackris are "true" because Ms. Mackris "conceded in a 'public statement' that 'no wrongdoing' had occurred." (Db at 21-22). To support this argument, defendant O'Reilly cites this Court to the April 1, 2017 New York Times article which states "the parties agreed to issue a public statement that 'no wrongdoing

---

[8] After October 23, 2017, the women identified by name as victims of O'Reilly's harassment rose to six - still a "particularly, specifically-defined group of individuals." Three Amigos, supra.

whatsoever' had occurred." (Bourne Dec., Ex. 5). Calling this joint statement in 2004 a "concession" that Ms. Mackris is a liar, extortionate, financially and politically motivated, etc. is beyond ridiculous. What defendant hides from the Court is the fact that the statement issued in 2004 was part of an overreaching, unethical Settlement Agreement.

The statement on which defendant O'Reilly now relies in support of his motion to dismiss was actually a joint statement written by O'Reilly's lawyers and is included as an Exhibit to the Mackris Agreement. (Mullin Dec., **Ex. B**, ¶ 7(e) and Exhibit A).

In evaluating why Ms. Mackris would agree to the public statement demanded by O'Reilly, the entire Settlement Agreement - and Ms. Mackris' legal position at the time - should be addressed. Further, all the plaintiffs' Settlement Agreements are pertinent in evaluating O'Reilly's statements in context, particularly his statements about having "evidence" and "proof." All plaintiffs were forced to relinquish audio and video tapes recording O'Reilly's harassment and abuse.

First, and most- shocking, Ms. Mackris' lawyer changed sides - agreeing to become O'Reilly's lawyer - while negotiating the Agreement. (Mullin Dec., **Ex. B**, ¶7(h))[9]. This profoundly unethical conflict left Ms. Mackris virtually without legal counsel.

Notably, the Agreement requires Ms. Mackris to lie - even in legal proceedings or under oath - if any evidence becomes public, by calling valid evidence "counterfeit" or "forgeries":

---

[9] The same paragraph in the Mackris Agreement also unethically prohibits Ms. Mackris' lawyers from representing any other clients with claims against O'Reilly or Fox. This provision was enforced in an "Amendment" to the Settlement Agreement in which Ms. Mackris' former lawyer, Benedict Morelli, and his firm agreed not to represent Rudi Bakhtiar in her harassment claims. (Mullin Dec., **Ex. C**).

> 4(b) Mackris, Morelli and the Morelli Firm expressly represent that the originals and all copies of any and all Materials, specifically including audiotapes, videotapes, and digital recordings, have been turned over to O'Reilly prior to the execution of this Agreement . . . **It is expressly agreed that, should any Materials become public by any means including through third parties after the date of this Agreement, all parties will disclaim them as counterfeit or forgeries . . . Mackris shall return all sums paid under this Agreement, forfeit any future payments due under this Agreement, disgorge to O'Reilly the value of any benefit earned or received as a result of such disclosure, and pay to O'Reilly all reasonable attorney's fees and costs incurred by O'Reilly in attempting to enforce this Agreement**.
>
> (Mullin Dec., **Ex. B**).

The Mackris Agreement acknowledges that Bo Dietl (and others) surveilled, investigated and amassed information about Ms. Mackris, including tapes, photographs, emails, letters, calendars and diaries. (Mullin Dec., **Ex. B**, ¶ 4(c)).

O'Reilly has stated publicly that he has "shocking information," "physical proof that this is bullshit," and a "bunch of garbage." O'Reilly knew when he made these statements that all three plaintiffs had been forced to give him or his lawyer Fredric Newman[10] all of their extensive, irrefutable evidence as part of settlement. The plaintiffs' lawyers did not even retain copies of the evidence under these Agreements. Ms. Mackris and Ms. Diamond were required to relinquish tape recordings and Ms. Bernstein was required to relinquish videotapes. (Mullin Dec., **Ex. B**, ¶4(a); **Ex. D**, ¶ 4.2; **Ex. A**, ¶ 4(d)).

The Mackris and Diamond Agreements prohibit plaintiffs from assisting or cooperating with other victims of O'Reilly's harassment. (Mullin Dec., **Ex. B**, ¶ 7(g) and **Ex. D**, ¶ 4.4).

In the context of the three Settlement Agreements - all requiring that the physical

---

[10] In the event that Mr. Newman, defendant O'Reilly's current counsel, refuses to produce or has destroyed evidence, a motion to disqualify him will be filed because he is a witness and may be a defendant.

evidence of harassment be delivered to O'Reilly or his lawyers - defendant O'Reilly's reliance on a false statement issued in the context of those settlements should be rejected as a reason to dismiss this action. If relevant or admissible at all, the jury should be allowed to examine the worth of the statement in context. The jury should also view the evidence plaintiffs were required to relinquish to O'Reilly and his counsel.

POINT V

DEFENDANT O'REILLY IS A THIRD PARTY BENEFICIARY TO MS. BERNSTEIN'S AGREEMENT

O'Reilly's claim that he is "not a party" to the Bernstein Agreement and, therefore, is not bound by it is ludicrous. (Db at 10). He is clearly a third-party beneficiary. In reality, Count One of the Complaint alleges that plaintiff Bernstein "entered into a Settlement Agreement and Release releasing Fox News and Bill O'Reilly of all claims, including claims of discrimination." The Agreement provides as follows:

> Non-disparagement: Wittlieb (sic) and Fox agree not to disparage, trade libel, or otherwise defame each other, and in the case of Fox, Wittlieb (sic) agrees not to disparage, trade libel, or otherwise defame its officers or employees, including, without limitation, Bill O'Reilly. In the case of Wittlieb, (sic) for purposes of this paragraph 5e (sic), the term "Fox" shall mean the Released Parties referenced in paragraph 4a above, including Bill O'Reilly and said Released Parties agree not to disparage, trade libel, or otherwise defame Wittlieb (sic). (Emphasis supplied).

(Mullin Dec., **Ex. A**, ¶ 5(f)).

Defendant O'Reilly does not quote this language in the Complaint for obvious reasons. Clearly, the Agreement, signed by current Fox News Co-President Jack Abernathy binds and inures to the benefit of Mr. O'Reilly. He is a third-party beneficiary of the contract who benefits

from the general release Ms. Bernstein gives him in the Agreement. Under settled New York law, a third-party beneficiary to a contract who receives a direct benefit under the contract (like a general release) is estopped to deny any obligations, like non-disparagement, imposed by the contract. See, LaRoss Partners, LLC v. Contact 911 Inc., 874 F.Supp.2d 147, 155-156 (E.D.N.Y. 2012) and Aguas Lenders Recovery Group LLC v. Suez, S.A., 585 F.3d 696, 700-01 (2d Cir. 2009).

Thus, O'Reilly, having directly benefitted from the Settlement Agreement's general release, is estopped to deny his obligation to refrain from disparaging Ms. Bernstein.

POINT VI

MS. BERNSTEIN'S RIGHT TO BRING THIS ACTION IS NOT LIMITED BY OTHER PARTIES' AGREEMENTS

Defendants make the extraordinary claim - unsupported by any law at all - that a plaintiff who has never agreed to arbitrate any claims and is not a signatory to any arbitration agreement can be denied her access to court because other parties may be signatories to such agreements. (Db at 8-10). There is no cite in defendant's brief in support of this absurd proposition because no court has denied a party access to court because another party agreed to arbitrate.

In fact, courts have refused to enforce arbitration against non-signatories, even among related parties, because the FAA only speaks to actual "agreements" to arbitrate. As the Second Circuit has held, it is a "bedrock principle" of arbitration law that:

> [A]rbitration is a matter of consent, not coercion. Specifically, arbitration is a matter of contract, and therefore a party cannot be required to submit to arbitration any dispute which it has not agreed so to submit. Thus, while the FAA expresses a strong federal policy in favor of arbitration, the purpose of Congress in enacting the FAA was to make arbitration agreements as enforceable as other contracts, *but not more so*.

(Ross v. Am. Express Co., 547 F.3d 137, 142-43 (2d Cir. 2008) (internal quotes and alterations omitted, emphasis in original) (quoting JLM Indus., Inc. v. Stolt-Nielsen S.A., 387 F.3d 163, 171 (2d Cir. 2004)).

Thus, "[t]he presumption of arbitrability has never been extended to claims by or against non-signatories." Devon Robotics v. DeViedma, No. 09-cv-3552, 2012 WL 3627419, at *9 (E.D. Pa. Aug. 23, 2012) (citing Miron v. BDO Siedman, LLP, 342 F.Supp.2d 324, 332 (E.D. Pa. 2004)); see also, Westmoreland v. Sadoux, 299 F.3d 462, 465 (5th Cir. 2002), rehearing denied, 2002 WL 31049584 (5th Cir. Aug. 26, 2002), cert. denied, Sadoux v. Westmoreland, 537 U.S. 1232 (2003) ("[The FAA] signifies that we will read the reach of an arbitration agreement between parties broadly, but that is a different matter from the question of who may invoke its protections.")

CONCLUSION

For all the foregoing reasons, defendant O'Reilly's motion to dismiss, or in the alternative, to compel arbitration, must be denied.

SMITH MULLIN, P.C.
Attorneys for Plaintiffs

BY: /s/ Neil Mullin
NEIL MULLIN

Dated: April 3, 2018