UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GRETCHEN CARLSON, Plaintiff, v. ROGER AILES, Defendant.	Civil Action No.: 2:16-cv-04138-JLL-JAD Motion Returnable Date: August 15, 2016

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON COUNT TWO OF THE AMENDED COMPLAINT

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Plaintiff Gretchen Carlson respectfully submits this brief in support of her motion pursuant to Federal Rule of Civil Procedure 56 for summary judgment on Count Two of the Amended Complaint for a declaratory judgment that Carlson has not waived her right to a jury trial and that none of her claims are subject to a valid or applicable arbitration agreement.

PRELIMINARY STATEMENT

Defendant Roger Ailes seeks to deprive Plaintiff of her statutory and Constitutional right to pursue this jury trial action for violation of the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 *et seq.* (Count One of the Amended Complaint), based on his assertion that the arbitration clause in Ms. Carlson's employment contract with Fox News Network LLC inures to his benefit. Ailes has made this assertion both by moving to compel arbitration in this action and by filing a duplicative petition to compel arbitration in the Southern District of New York, and therefore there is a justiciable controversy ripe for declaratory judgment.

Summary judgment should be granted declaring that Count One is not subject to arbitration because the contract itself, written by Fox lawyers, says the opposite. In the contract's first paragraph, Fox specifically identifies the only parties as "Gretchen Carlson ('Performer') and Fox News Network LLC ('Fox')." The contract does not define "Fox" to include any officers and executives such a Roger Ailes, although executive contracts typically have such inclusive language.

Moreover, the appended "Standard Terms and Conditions" exhibit which contains the arbitration agreement provides: "This Agreement shall inure to the benefit of Fox's successors, assignees, and Affiliates . . . ." That clause refers only to corporate entities and does not state that the contract or its arbitration clause shall inure to the benefit of Roger Ailes or any other individual. Employers who want to bind officers, executives, managers, and other employees to the employment contract or the arbitration clause do so by explicitly including them. Fox

specifically chose not to do so. Fox's intent to exclude claims against employees from the scope of the arbitration clause in the employment contract is made crystal clear by the fact that when Fox intended to make employees beneficiaries of its contracts, it did so explicitly. Unlike the employment contract, a proposed Severance Agreement that Fox provided to Carlson following her termination sought to prevent Carlson from suing "Fox and its divisions, subsidiaries, parents and all other affiliated corporations, *as well as their current and former employees, officers, directors, . . .*" and sought to prevent her from disparaging "Fox, *and/or any of its officers and/or any of its current and/or former employees*." (Emphasis added.) Thus, Fox knows how to bind its employees to contracts with officers and employees. It chose not to do so in its arbitration agreement with Carlson (deciding instead to make the arbitration agreement applicable only to "successors, assignees, and Affiliates"), and therefore it is clear as a matter of law that Ailes is not a beneficiary of that agreement.

Thus, the plain contract language allows Carlson to sue Ailes in a court rather than a secret arbitration and likewise gives Defendant Ailes the right to sue Fox employees in a public court proceeding. It would be grossly inequitable, asymmetrical and contrary to settled law discussed within to read the contract as requiring Carlson to secretly arbitrate against Ailes, a non-signatory, while permitting Ailes to publicly sue employees in open court.

Since the contract by its plain and unambiguous terms does not allow Ailes to deprive Ms. Carlson of her right to our civil justice system, the inquiry should end there and Carlson should be granted summary judgment declaring that Count One is not subject to arbitration. However, there are additional legal reasons why Ailes' argument that Count One is subject to arbitration fails as a matter of law.

It is significant that Ms. Carlson's claim of sexual harassment and retaliation is not based on her contract with Fox. Her claim under the New York City Human Rights Law is

independent of and not entwined with any claims of breach of contract, nor does she seek any contractual remedies. All of the cases on which Defendant Ailes relied in both his motion and his petition to compel Ms. Carlson into a secret arbitration proceeding are readily distinguishable because they concern plaintiffs whose claims relied on the existence and terms of the contract containing the arbitration clause and/or alleged that the actual signatory to the contract was somehow liable. Here, Ms. Carlson asserts no claims of contractual breach, nor does she seek any relief under the contract. Her New York City Human Rights Law claim against Ailes is based on an independent duty that he owed to her regardless of any employment contract. Moreover, Ms. Carlson's complaint expressly alleges that Ailes acted outside the scope of his agency, authority and employment and contrary to the interests of Fox News Network, and instead acted to satisfy his own prurient sexual interests. Under similar circumstances, courts have held that a non-signatory cannot rely on an agency or estoppel theory.

Additionally, even if the arbitration clause were applicable to Carlson's claim against Ailes, which it is not, there can be no genuine dispute that Ailes forfeited any right to enforce it because, in violation of the Draconian confidentiality clause embedded in Fox's arbitration clause, he has materially breached that clause by causing documents and other information about this matter to be publicly disseminated in an attempt to smear Ms. Carlson. No one in "default" of an arbitration clause is permitted to compel arbitration under 9 U.S.C. §3.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE CAN BE NO GENUINE DISPUTE

A. AILES ACTED IN HIS PERSONAL CAPACITY AND CONTRARY TO THE INTERESTS OF FOX NEWS NETWORK WHEN HE RETALIATED AGAINST PLAINTIFF BECAUSE SHE COMPLAINED OF DISCRIMINATION AND REBUFFED HIS SEXUAL ADVANCES

Ms. Carlson was employed by Fox News Network as an on-air personality from 2005

through her termination on June 23, 2016. Am. Comp. ¶¶ 8, 25.[1] During that time, Ailes was the Chairman and CEO of Fox News Network. *Id.* ¶ 3. After Ms. Carlson complained about sexual harassment and a hostile work environment Ailes, in his personal capacity, engaged in retaliation. At the same time, Ailes also retaliated against Carlson because she refused his sexual advances. *See generally* Complaint.

The Complaint states that, "[i]n doing these things, Ailes did not act in the interests of Fox News, but instead pursued a highly personal agenda." *Id.* ¶ 15. The Complaint also alleges:

> Ailes undertook these discriminatory and retaliatory actions in his individual capacity and for personal and unlawful purposes. His retaliation against Carlson was outside the scope of his authority, employment and agency at Fox News, which has adopted and professes to support anti-discrimination, anti-harassment and anti-retaliation policies. *Id.* ¶ 26.

By way of example, in September 2015, Carlson met with Ailes to seek to bring to an end his retaliatory and discriminatory treatment of her. *Id.* ¶ 21. As stated in the Complaint: "During that meeting in Ailes' office on September 16, 2015, Ailes stated to Carlson: 'I think you and I should have had a sexual relationship a long time ago and then you'd be good and better and I'd be good and better,' adding that 'sometimes problems are easier to solve' that way." *Id.* ¶ 22. The Complaint further states that, "Prior to and during that meeting, Ailes had made it clear to Carlson that he had the power to make anything happen for her if she listened to him and 'underst[ood] what he was saying." *Id.* ¶ 23. "Carlson refused to engage in a sexual relationship or participate in sexual banter with Ailes so Ailes retaliated." *Id.* ¶ 24.

Similarly, Ailes harassed and discriminated against Carlson in his personal capacity for his own illicit motives, and contrary to the interests of Fox News Network, by, among other things: asking her to turn around so that he could view her posterior; commenting repeatedly about Carlson's legs; making sexual advances by various means, including by stating that if he

[1] A copy of the Amended Complaint is submitted herewith as Exhibit 3 to the Certification of Nancy Erika Smith, Esq., dated July 18, 2016 ("Smith Cert.").

could choose one person to be stranded with on a desert island, she would be that person; asking Carlson how she felt about him, followed by: "Do you understand what I'm saying to you?"; boasting to other attendees (at an event where Carlson walked over to greet him) that he always stays seated when a woman walks over to him so she has to "bend over" to say hello; and embarrassing Ms. Carlson by stating to others in her presence that he had "slept" with three former Miss Americas but not with her. *Id.* ¶ 20.

The Complaint also states that Ailes, in furtherance of his personal attack on Carlson, acted contrary to the interests of Fox News Network by, among other things, removing Carlson from her position as co-host of the "Fox & Friends" morning show notwithstanding that she was highly popular and that the program had "achieved higher ratings than any other cable news morning show," *id.* ¶ 10; "assigning her fewer of the hard-hitting political interviews that are coveted by political correspondents (notwithstanding that she had received acclaim for her political interviews)," *id.* ¶ 14; and ultimately terminating Carlson on June 23, 2016, notwithstanding that "Carlson's show consistently ranked number one among cable news programs in her time slot and achieved its highest Nielson ratings ever in the final quarter of 2015 and in the first quarter of 2016, with ratings in her final month of June 2016 up 33% in total viewers year to date," *id.* ¶ 18.

B. CARLSON SUED AILES UNDER THE NEW YORK CITY HUMAN RIGHTS LAW

On July 6, 2016, Ms. Carlson commenced this action against Ailes in the Superior Court of New Jersey (where Ailes maintains a residence), asserting a single claim for violations by Ailes of the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 *et seq.* Smith Cert. Ex. 1. The New York City Human Rights Law makes it an unlawful discriminatory practice for an employee to discriminate against another employee in the workplace or to retaliate if another employee complains about unlawful discrimination. N.Y.C. Admin. Code §§

8-107(1)(a), 8-107(7) (emphasis added).

The New York City Human Rights Law provides that the offending employee alone may be liable under the statute. For example, the statute provides that where an employee engages in discriminatory conduct, the employer may be liable only in limited circumstances. *Id.* § 8-107(13)(b). Even if one of the conditions for employer liability is met, the plaintiff can still choose to sue only the perpetrator. Indeed, the statute builds in an additional defense for the employer. It allows the employer to establish that it had, among other things, policies and procedures for the prevention and detection of unlawful discrimination as well as meaningful and responsive procedures for investigating complaints of discrimination, *etc.* *Id.* § 8-107(13)(d). Accordingly, under the New York City Human Rights Law, there are additional hurdles, and ancillary issues that would need to be litigated, if Ms. Carlson chose to sue her former employer as opposed to suing the offending employee alone.

C. AILES, A NON-SIGNATORY, SEEKS TO FORCE THIS ACTION INTO A SECRET ARBITRATION PROCEEDING

On July 8, 2016, Ailes filed a Notice of Removal of the action to this Court and a motion to compel arbitration and stay judicial proceedings. *See* ECF Nos. 1 & 2. After this matter was given a judicial assignment on July 11, 2016, on July 15, 2016 Ailes purported to "withdraw" his motion in this Court and simultaneously filed a wholly-duplicative petition to compel arbitration in the Southern District of New York. *See* Smith Cert. Ex. 2. Given that Ailes already consented to venue in this Court with respect to the issue of whether Carlson's claim against him is subject to arbitration, on July 18, 2016, Carlson filed an Amended Complaint in this action, adding a second cause of action for declaratory judgment that her New York City Human Rights Law claim against Ailes is not subject to arbitration.

Ailes' efforts to compel this action into secret arbitration are meritless because he is not a party to any arbitration agreement with Carlson, nor did she ever agree to an arbitration provision

that applies to Ailes. Ailes relies on an arbitration clause that is found in section 7 of the purported "Standard Terms and Conditions" that were appended to Carlson's June 19, 2013 employment contract with Fox News Network (the "Employment Contract").

Nothing in the Employment Contract, the Standard Terms and Conditions, or the arbitration clause makes the arbitration clause applicable to a claim against Ailes or any other Fox News officer or employee. To the contrary, the Employment Contract states that the only "parties" thereto are Carlson and Fox News Network. Smith Cert. Ex. 4 at 1. The Employment Contract states that it, together with the Standard Terms and Conditions, "will constitute the understanding *between the parties* . . . ." *Id.* (emphasis added). Similarly, section 15.1 of the Employment Contract is an integration clause stating that "[t]his Agreement constitutes the entire agreement and understanding *between the parties* . . . ." *Id.* § 15.1.

The Employment Contract makes no mention whatsoever of Ailes. He is not even the corporate representative who signed the Employment Contract on behalf of Fox News Network. The Employment Contract also does not give any indication that other employees may be considered parties thereto or have been granted any right to enforce its provisions (or the provisions of the Standard Terms and Conditions). Rather, the Standard Terms and Conditions, which contain the arbitration clause, expressly *exclude* employees from those who may benefit from it. Section 15 of the Standard Terms and Conditions states: "This Agreement shall inure to the benefit of Fox's successors, assignees, and Affiliates. . . . As used in this Agreement, the term 'Affiliate' shall mean any company controlling, controlled by or under common control with Fox." Standard Terms and Conditions § 15.1. Officers or employees are not mentioned.

Indeed, when Fox intends to make employees the beneficiaries of its contracts, it does so explicitly. Upon Carlson's termination, Fox presented her with a proposed Severance Agreement and General Release ("Severance Agreement"). *See* Smith Cert. Ex. 10. Paragraph

4(a) of the proposed Severance Agreement sought to prevent Carlson from suing "Fox and its divisions, subsidiaries, parents and all other affiliated corporations, *as well as their current and former employees, officers, directors,* . . ." and paragraph 5(d) sought to prevent her from disparaging "Fox, *and/or any of its officers and/or any of its current and/or former employees*." (Emphasis added.) Unlike Fox's proposed Severance Agreement, the Employment Contract does not reference "officers" or "employees"; Fox instead chose to designate as the Employment Contract's beneficiaries only "successors, assignees, and Affiliates."

The Contract's plain language excludes officers and employees from the intended beneficiaries, and it would be contrary to the contracting parties' intent, and wholly unfair, to permit Ailes, a non-party to the Contract, to benefit from its arbitration clause, while he would be under no obligation to arbitrate any claim against Carlson or any other Fox employee.

D. AILES, BY HIS CONDUCT, HAS ACKNOWLEDGED THAT THE ARBITRATION CLAUSE DOES NOT APPLY TO HIM

The arbitration clause not only provides for arbitration, but it also includes exceptionally broad confidentiality restrictions. It provides that, "Such arbitration, all filings, evidence and testimony connected with the arbitration, *and all relevant allegations and events leading up to the arbitration*, shall be held in strict confidence. . . . Breach of confidentiality by any party shall be considered to be a material breach of this Agreement." Standard Terms and Conditions § 7 (emphasis added). Such a "gag order" would effectively prohibit Carlson from telling anyone (including the EEOC or the New York City Commission on Human Rights) about the circumstances of her ordeal, interviewing potential witnesses to support her claim, and restoring her credibility, in the wake of Ailes' smear campaign, by presenting irrefutable evidence of Ailes' wrongdoing in a public forum.

While Ailes seeks to use the arbitration clause as a shield in this action, there can be no genuine dispute that, by his conduct Ailes has acknowledged that the arbitration clause does not

apply to him: he has made or caused to be made repeated public disclosures concerning Carlson's claim, which, if the arbitration clause were enforceable and applicable to him, would violate its confidentiality provision. For example, within hours after Carlson filed the Complaint, Ailes issued a press statement disclosing "allegations and events" leading up to Carlson's claim by stating, among other things, that her termination purportedly "was due to the fact that her disappointingly low ratings were dragging down the afternoon lineup." Smith Cert. Ex. 5. That assertion is directly contradicted in the Complaint.[2] Ailes later publicly released four handwritten "thank you" notes that Carlson allegedly provided to him over the course of her eleven-year tenure at Fox News (which, of course, show nothing more than that Carlson was devoted to, and wanted to keep, her job). *Id.* Ex. 6. Ailes also released to the press an internal memorandum that, if authentic, would actually bolster Ms. Carlson's claim. *Id.*; *see also id.* Exs. 7 & 8. By leaking internal documents and making public disclosures concerning this matter -- even after demanding arbitration -- Ailes has acknowledged that the arbitration clause (with its confidentiality restrictions) does not apply to Carlson's claim against him. To the extent the arbitration clause does apply, which it does not, Ailes is in material breach of its provisions and should be estopped from invoking it.[3]

In addition, Defendant Ailes has threatened Carlson and his lawyers with legal action claiming that Ms. Carlson and her lawyers are somehow responsible for the statements of other women about their experiences with Defendant Ailes. The threat is clear in an email sent by Ailes' counsel on Saturday July 9, 2016 after Ailes filed his motion demanding arbitration: "Mr. Ailes has been and will continue to monitor your unlawful conduct in the media and take steps to

[2] Fox News issued a sharply different statement, announcing that it is taking the allegations seriously and has "commenced an internal review of the matter." Smith Cert. Ex. 5.

[3] Any other result would be fundamentally unfair because it would allow Ailes to call Carlson a liar in public (as he has done), and then recede into the shadows of confidential arbitration to prevent her from publicly demonstrating that she was telling the truth.

hold you responsible." Smith Cert. Ex. 9.

POINT I

CARLSON IS ENTITLED TO JUDGMENT AS A MATTER OF LAW THAT AILES CANNOT MEET THE STANDARD REQUIRED TO COMPEL ARBITRATION

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) ("[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."); *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994) ("The federal policy, however, does not extend to situations in which the identity of the parties who have agreed to arbitrate is unclear."); *Hirsch v. Amper Fin. Servs., LLC*, 215 NJ 174, 196, 71 A.3d 849, 861 (N.J. 2013) ("[A]lthough we are sensitive to the preference for resolving ambiguities in arbitration clauses in favor of compelling arbitration, that preference only applies when an agreement exists between the parties to arbitrate their disputes.").

Rather, only in rare circumstances will a non-signatory be permitted to enforce an

arbitration agreement. *Devon Robotics*, at *9; *see also Westmoreland v. Sadoux*, 299 F.3d at 465 ("we will allow a nonsignatory to invoke an arbitration agreement only in rare circumstances").

Under FRCP 56, summary judgment should be granted when, as here, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In *Republic of Iraq v. ABB AG*, the Court held: "a court's primary objective is to give effect to the intent of the parties as revealed by the language they chose to use and it should grant summary judgment when the words of the contract convey a definite and precise meaning." 769 F. Supp. 2d 605, 609 (S.D.N.Y. 2011) (internal quotes omitted).

There is no ambiguity here. The intent of the parties is clear and judgment should be granted as a matter of law declaring that Carlson's claim against Ailes is not subject to arbitration. The parties specifically declined to make Ailes a party to the arbitration agreement. Plaintiff Carlson has not waived her statutory and Constitutional right to sue Defendant Ailes and to avail herself of the public and fair process provided by our civil justice jury trial system.

POINT II

THE ARBITRATION CLAUSE DOES NOT APPLY TO CARLSON'S CLAIM AGAINST AILES

A. THE ABITRATION CLAUSE DRAFTED BY FOX LAWYERS SPECIFICALLY INCLUDES ONLY CORPORATE ENTITIES

The Second Circuit has held that "[a] decision to arbitrate must be consciously made" because "'by agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights, including that to subpoena witnesses, in favor of arbitration with all its well-known advantages and drawbacks.'" *Fuller v. Guthrie*, 565 F.2d 259, 261 (2d Cir. 1977) (quoting *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969 (2d Cir. 1974)); *see also Westmoreland*, 299 F.3d at 465 ("An agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our

state and federal judicial systems -- an openness this country has been committed to from its inception. It is then not surprising that to be enforceable, an arbitration clause must be in writing and signed by the party invoking it."). The contract must therefore evince a "conscious decision" for the subject claim to be covered by the arbitration clause. *Fuller*, 565 F.2d at 261. "[C]ourts should not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Norcast, S.AR.L. v. Castle Harlan, Inc.*, No. 12 Civ. 4973, 2014 WL 43492, at *4 (S.D.N.Y. Jan. 6, 2014) (internal quotes omitted). Moreover, as the Supreme Court of New Jersey has held, where the plaintiff's claims "implicate the right to a jury trial . . . [t]hat recognition informs our analysis given the importance of ensuring that a party has actually waived its right to initiate a claim in court in favor of submitting to binding arbitration." *Hirsch*, 215 *N.J.* 174, 194 (2013).

Here, Ailes seeks to restrict substantial rights of Carlson by imposing the arbitration clause and gag order on her claim against him under the New York City Human Rights Law. Such a restriction on Carlson's rights should never be imposed absent a "definite and precise" indication that it was her intent, when she entered into the Employment Contract with Fox News Network, that such a claim against Ailes would be subject to arbitration. *Republic of Iraq*, 769 F. Supp. 2d at 609. Allowing Ailes to force this case into a secret arbitration proceeding would prevent Carlson, a public figure, from presenting her claim in open court against Ailes, also a public figure, and from having that claim decided by a jury of her peers.[4] Indeed, the arbitration

[4] In arbitration, the rules of evidence do not apply, the ability to obtain discovery of evidence is curtailed, the rules of civil procedure do not apply, there is no meaningful appeal, the employee is required to pay fees of the arbitrators, and the arbitrators do not reflect the diversity of our nation which would be better represented by a jury of one's peers. Indeed, it is well-reported that an infirmity with arbitration is its dominance by Caucasian men. *See* F. Peter Phillips, *It Remains a White Male Game*, International Institute for Conflict Prevention & Resolution, Inc., Nov. 27, 2006 (available at http://www.cpradr.org/ About/NewsandArticles/ tabid/265/ID/90/It-Remains-A-White-Male-Game-NLJ.aspx); Caley E. Turner, *"Old, White, and Male": Increasing Gender Diversity in Arbitration Panels*, International Institute for Conflict Prevention

clause not only imposes confidentiality on the arbitration proceeding itself, but also broadly states that "all relevant allegations and events leading up to the arbitration, shall be held in strict confidence." Standard Terms and Conditions § 7. Enforcing that provision would prevent Carlson from speaking with enforcement agencies or even interviewing potential witnesses to support her claim and thus undermine the legal framework by which victims of sexual harassment, discrimination and retaliation can obtain redress from sexual predators and other wrongdoers.[5] It would essentially force her to relive and endure Ailes' discrimination and retaliation in secret and allow Ailes -- a national news executive and presumed proponent of a free press -- to engage in and conceal his deviant and illegal behavior with full immunity from public scrutiny.[6]

& Resolution, Inc., Summer 2014 (available at http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/884/Old-White-and-Male-Increasing-Gender-Diversity-in-Arbitration-Panels.aspx). Thus, "[t]o enforce a waiver-of-rights provision in this setting [a statutory discrimination claim], the Court requires some concrete manifestation of the employee's intent as reflected in the text of the agreement itself." *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 732 A.2d 665, 672 (N.J. 2001).

[5] The United States Equal Employment Opportunity Commission issued a policy statement on July 7, 2016, explaining that mandatory arbitration clauses in employment agreements are a barrier to achieving equality in the workplace. The EEOC stated:

> Mandatory arbitration policies shield many industries and their employment practices from public scrutiny by requiring individuals to submit their claims to private arbiters rather than public courts. By taking discrimination claims out of the public view, forced arbitration can prevent employees from learning about similar concerns shared by others in their workplace and can impede the development of the law. It can also weaken an employer's incentive to proactively comply with the law, when organizations are not held publically accountable for violations of ant-discrimination laws.

Equal Employment Opportunity Commission, *Advancing Opportunity: A Review of the Systematic Program of the U.S. Equal Employment Opportunity Commission*, July 7, 2016 (available at https://www.eeoc.gov/eeoc/systemic/review/).

[6] Such a provision is particularly unfair because Ailes chose to humiliate Carlson publicly, *see, e.g.*, Am. Comp. ¶ 20, and has publicly disparaged and threatened her and her counsel following the commencement of this action, *see* Smith Cert. Exs. 5-9, yet the arbitration clause would

Application of the arbitration provision also would deprive Carlson of the statutory rights afforded to her under the New York City Human Rights Law to have the choice to bring the claim in court. N.Y.C. Admin. Code § 8-502. Indeed, imposing the restrictive and secretive arbitration procedures on Carlson's claim against Ailes would be in direct conflict with New York's policy against discrimination. As the New York Court of Appeals has held: "The governmental policy against discrimination enjoys the highest statutory priority, based upon legislative findings that discrimination "threaten[s] the rights and proper privileges of [the City's] inhabitants and menace[s] the institutions and foundation of a free democratic state." *Beame v. DeLeon*, 662 N.E.2d 752, 756 (N.Y. 1995) (quoting N.Y.C. Admin. Code § 8-101).[7]

Fox lawyers drafted an arbitration clause appended to Ms. Carlson's latest contract (it was not included as part of her three prior contracts) which specifically identified the parties who were bound by its terms. Clearly, Ms. Carlson never waived her substantial rights under the New York City Human Rights Law based on the language in that clause. The Employment Contract indicates no "conscious decision" that the arbitration clause covers this claim. *Fuller*, 565 F.2d at 261. To the contrary, the Employment Contract repeatedly states that the only "parties" thereto are Carlson and Fox News Network. Employment Contract at 1 & § 15.1. In

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effectively prevent Carlson from publicly defending herself and resurrecting her image and career, which Ailes sought to sabotage.

[7] In a string of recent decisions, the Supreme Court of New Jersey has held that an arbitration clause or other contractual provision that restricts an individual's ability to pursue a discrimination claim must be construed strictly and/or is unenforceable. *See Garfinkel*, 773 A.2d at 672 ("The Court will not assume that employees intend to waive [rights under anti-discrimination law] unless their agreements so provide in unambiguous terms."); *Atalese v. U.S. Legal Servs. Group, L.P.*, 99 A.3d 306, 316 (N.J. 2014) ("the wording of the service agreement did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory [anti-discrimination] claims in court"); *Rodriguez v. Raymours Furniture Co.*, --- A.3d. ---, 2016 WL 3263896, at *11 (N.J. June 15, 2016) (holding that contractual shortening of anti-discrimination law's statute of limitation was unenforceable as "contrary to the public policy expressed in" the statute). These decisions are even more compelling when the party seeking to enforce the arbitration clause is not a signatory to the agreement or even mentioned therein.

McCarthy, 22 F.3d at 358-59, the Court held that an integration clause such as the one found in section 15.1 of the Employment Contract indicates an intent to limit arbitral rights to signatories.

The Employment Contract makes no mention whatsoever of Ailes -- he is not even the corporate representative who signed the Employment Contract on behalf of Fox News Network. The Employment Contract also does not give any indication that other employees may be considered parties thereto or may otherwise enforce its provisions (or the provisions of the Standard Terms and Conditions). Rather, the actual language in the Standard Terms and Conditions *excludes* employees from provisions of the clause by specifically identifying only the corporate entities that benefit from the clause. Standard Terms and Conditions § 15.1. This is in direct contrast to the proposed Severance Agreement, which did include officers and employees in its provisions. Smith Cert. Ex. 10.

If Fox News Network had intended for officers or employees to benefit from the arbitration clause, it could have included such a provision in the Employment Contract, just as it did in the proposed Severance Agreement, but it chose not to do so. *See Republic of Iraq*, 769 F. Supp. 2d at 614 ("had the parties intended to extend the right of arbitration, they would not have drafted an arbitration provision that singled out the 'Parties' and omitted any mention whatsoever of the Republic, as they did"); *see also Constantino v. Frechette*, 897 N.E.2d 1262, 1266 (Mass. App. Ct. 2008) ("If the nursing home harbored the intention to bring its employees within the purview of the arbitration provision, it had the duty to clearly inform its patients that the arbitration provision was intended to inure to the benefit of individual nurses as well. . . . This was not done in the contract before us, and important rights should not be waived by implication."); *McCarthy*, 22 F.3d at 360 ("A corporation that wishes to bring its agents and employees into the arbitral tent can do so by writing contracts in general, and arbitration clauses in particular, in ways that will specify the desired result.").

The Fifth Circuit's reasoning in *Westmoreland*, 299 F.3d at 467, is instructive:

> [Defendants] did not negotiate an arbitration agreement regarding their personal claims and liabilities. This was no small matter. It gave them access to the courts for any claim they may have had against Westmoreland, subject to the limitation that they would have had to confront the arbitration agreement if they attempted to enforce the terms of that agreement.
>
> . . . Directly put, the courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable backdrop of legal rules -- the cardinal prerequisite to all dispute resolution.

Carlson has not sued *any* party to or beneficiary of the Employment Contract; she has not sued Fox News Network or any of its successors, assignees or affiliates. Carlson has sued only the perpetrator of the discriminatory and retaliatory conduct -- the man who demanded sexual favors from her and marginalized and humiliated her -- Ailes. The New York City Human Rights Law gives Carlson the right to sue personally and individually the employee who engaged in the discriminatory and retaliatory conduct and imposes no requirement that Carlson also sue the employer. Given the language of the Employment Contract, there would have been no basis for Carlson to have understood that a direct statutory claim against an individual personally for compensatory and punitive damages would be subject to an arbitration clause in an agreement that expressly applies only to Fox News Network and its "successors, assignees, and Affiliates." Standard Terms and Conditions § 15.1. *See Miness v. Ahuja*, 713 F. Supp. 2d 161, 164 (E.D.N.Y. 2010) ("[T]here is nothing in the Miness Employment Agreement that suggests that the defendants have a right to enforce the contract as third parties."); *see also Di Martino*, 2009 WL 27438, at *7 ("The language used -- and, just as important, not used -- in the Arbitration Clause makes clear that it is meant only to apply to a dispute between [the parties thereto]").

Thus, the language of the Employment Contract shows as a matter of law that Carlson did not intend or agree to waive her statutory and Constitutional rights with regard to this claim, nor was she even put on notice that she would be doing so, by entering into the Contract.

B. AILES DOES NOT FIT WITHIN ANY EXCEPTION THAT WOULD ALLOW HIM TO ENFORCE THE ARBITRATION CLAUSE AS A NON-SIGNATORY

In addition to the fact that by its clear terms the Employment Contract itself shows that neither Carlson nor Fox News Network intended for her New York City Human Rights Law claim against Ailes to be subject to the arbitration clause, it is also clear as a matter of law that Ailes also does not fit within any exceptions that would allow him to enforce the arbitration clause as a non-signatory to the Employment Contract.

1. Carlson's Claim Does Not Fall Within the Agency Exception Because She Sued Ailes In His Individual Capacity For a Statutory Tort Claim that Does Not Derive From or Depend on the Employment Contract

Ailes relies on an "agency" theory to seek to compel arbitration. *See* ECF No. 2 & Smith Cert. Ex. 2. Ailes' pleadings to compel arbitration, however, contain virtually no analysis of the allegations in this action. Indeed, he does not even assert that the alleged conduct, if true, was within the scope of his agency at Fox News Network. Instead, by ignoring Carlson's allegations, Ailes attempts to advance the sweeping proposition that an executive may *always* obtain the benefit of an arbitration provision in a contract between his or her employer and the plaintiff based on an agency theory. As noted above, that is not the law.

The cases cited by Ailes are distinguishable. Each of them involved claims against the non-signatory which were premised on contractual rights in the same contract that contained the arbitration clause and/or the non-signatory's liability was premised on the misconduct of the signatory. Those facts are not present here. Where, as here, a plaintiff sues a non-signatory in his or her individual capacity based on tortious conduct that is entirely independent of the contract containing the arbitration clause, courts have held that the non-signatory is not entitled to invoke the arbitration clause. And this should be especially true when, as here, the tortious conduct violates an important human rights statute designed to protect individuals from discrimination. *See* footnote 7 *supra*.

a. Neither the Contract nor Fox News Network's Conduct is at Issue in Ms. Carlson's Claim and Therefore Ailes' Cases are Plainly Distinguishable

In the Third Circuit decision cited by Ailes, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1112 (3d Cir. 1993), the plaintiffs were Trustees of a pension plan that opened cash management accounts with the brokerage firm Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPF&S"). The Trustees and MLPF&S were parties to a Cash Management Agreement that contained an arbitration clause. *Id.* The Trustees' financial consultant was Stewart, an employee of MLP&S. *Id.* MLP&S's affiliate, Merrill Lynch Asset Management, Inc. ("MLAM"), also provided advisory services to the Trustees. *Id.* The Court stated that "the dispute in this case flows directly from Stewart's unauthorized purchase of several units of a limited partnership interest" that the Trustees alleged "were inappropriate for the Accounts" and "Stewart's purchases were contrary to the pension plan's stated investment objectives." *Id.* The Trustees sued MLP&S, Stewart, and MLAM under ERISA. *Id.* at 1113. The Court held that Stewart and MLAM, although non-signatories, were entitled to rely on the arbitration clause in the Cash Management Agreement between the Trustees and MLP&S. *Id.* at 1121-1122.

In so holding, the Court reasoned that the Trustees' claims were, in effect, for breach of the Cash Management Agreement. It stated that: "[I]ndeed, one is left to ponder what purpose an arbitration clause would serve if it did not encompass claims that the terms of the parties' agreement had been breached." *Id.* at 1115. The Court also reasoned that "MLAM's interests are directly related to, if not predicated upon, MLPF&S's conduct." *Id.* at 1122.[8] Here,

[8] The two cases that *Pritzker* relied on also involved claims that were dependent on the contract containing the arbitration clause. *See Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990) (holding that officers and directors could rely on arbitration clause in stock purchase agreement between company and plaintiff in action against the company and the individual defendants for federal securities laws violations for fraudulently inducing plaintiff to enter into the agreement); *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1188 (9th Cir. 1986) (where plaintiff sued broker, account executive and supervisor for federal securities violations, holding that non-

Plaintiff's claim against Ailes is completely separate from her Employment Contract and based entirely on her statutory rights.

In the next cases cited by Ailes, *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), the non-signatories were not simply employees seeking to rely on the arbitration clause agreed to by their employer; they were alleged to be "control persons" of certain entities that allegedly engaged in federal securities violations. There, certain investors (referred to as "Names") in Lloyd's syndicates (the entities that nominally underwrite insurance risk) sued the syndicates, the Managing Agents that managed the syndicates, the Member Agents who represented the investors in their dealings with the syndicates, and individual Chairs of the Members and Managing Agents. The Names asserted causes of action for violations of the federal securities laws and RICO in connection with their investments in the syndicates. The Names' claims against the individual Chairs were based on "controlling person" liability under section 15 of the Securities Act and section 20 of the Securities Exchange Act. *Id.* at 1358. The defendants moved to compel arbitration.

The Court found that all of the defendants were parties to or third-party beneficiaries of a contract containing an arbitration clause except for the individual Chairs.[9] *Id.* at 1359-60. The Court held, however, that the individual Chairs also were entitled to rely on the arbitration clauses in the agreements of the Members and Managing Agents. *Id.* at 1360. In a misleading portion of his brief (*see* ECF No. 2 & Smith Cert. Ex. 2), Ailes selectively quotes from *Roby* for

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signatory account executive and supervisor could rely on arbitration clause in Customer Agreement between plaintiff and broker because "[a]ll of the individual defendants' allegedly wrongful acts related to their handling of [plaintiff's] securities account," which was governed by the Customer Agreement). Indeed, following *Letizia*, the Ninth Circuit confirmed in *Britton v. Co-op Banking Group*, 4 F.3d 742 (9th Cir. 1993), that for an employee to be able to rely on an arbitration clause agreed to between its employer and the plaintiff, the plaintiff's claims must be based on the contract. (*See* discussion of *Britton* at page 22 below.)

[9] Ailes does not argue that he is a third-party beneficiary of the Employment Contract, nor could he since the Contract expressly states that it inures only to the benefit of "Fox's successors, assignees, and Affiliates" (Standard Terms and Conditions § 15.1), but not officers/employees.

the purported proposition that: "'Courts in this and other circuits have consistently held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement. . . If it were otherwise, it would be too easy to circumvent the agreements by naming individuals as defendants instead of the entity Agents themselves.'" *See* ECF No. 2 & Smith Cert. Ex. 2 (Ailes' Mem. at 4) (quoting *Roby*, 996 F.2d at 1360). The quote is distorted by the ellipses, which is used to omit key language from the Court's holding. This was not an oversight. The language Ailes' lawyers took out shows that the holding is narrow and inapplicable to this case. The Court held that the individual Chairs were entitled to rely on the arbitration clause because:

> The complaints against the individual Chairs are completely dependent on the complaints against the Agents. Whether the individual Chairs are disclosed agents or controlling persons, their liability arises out of the same misconduct charged against the Agents. If the scope of the Agents' agreements includes the Agents' misconduct, it necessarily includes the Chairs' derivative misconduct. Moreover, we believe that the parties fully intended to protect the individual Chairs **to the extent they are charged with misconduct within the scope of the agreements.** *Roby*, 996 F.2d at 1360 (emphasis added).

Roby, therefore, does not support Ailes here because the individual non-signatories in that case were sued together with the signatories on a theory of derivative liability based on alleged misconduct of the signatories within the scope of the contracts. Here, sexually harassing and retaliating against Ms. Carlson clearly was not within the scope of Ailes' official duties.

The Second Circuit's more recent decision in *Ross*, 547 F.3d 137, indicates that *Roby* should be limited to its facts. In *Ross*, the Second Circuit noted that where, as here, a "non-signatory moves to compel arbitration with a signatory, it remains an open question in this Circuit whether the non-signatory may proceed upon any theory other than estoppel." *Id.* at 143 n.3. *Ross* therefore confirms that the non-signatory Chairs in *Roby* were permitted to enforce the arbitration agreements not based on their status as agents of the signatories, but because the claims against them were premised on the misconduct of the signatories. That is clearly not the

case here. Ms. Carlson has made no claims against the signatory, Fox News Network.

b. Under Facts Similar to this Case Courts Have Not Permitted Non-Signatories to Compel Arbitration

Cases in the Third Circuit and elsewhere have held that where, as here, the non-signatory is sued in his individual capacity and the claims are not based on the contract containing the arbitration clause or on liability of the signatory, the claims are not subject to arbitration.

For example, in *Devon Robotics*, 2012 WL 3627419 (E.D. Pa. 2012), a company sued an officer of the counterparty to certain distribution agreements for breach of fiduciary duty and tortious interference with contract. The Court held that the officer could not compel arbitration based on an arbitration agreement between the companies. The Court distinguished *Pritzker* because the claims against the officer (DeViedma), "ar[o]se from his independent tortious conduct for which he [was] personally liable." *Id.* at *9 n.7. The Court further held that:

> [A]ny fiduciary duty DeViedma owed to Devon is by virtue of his position as COO and independent of any obligations he may have had under the agreements. At the heart of Devon's claim is the contention that DeViedma entered in a fiduciary relationship with Devon, one that may have been initially prompted by the contracts with HRSRL but was not intimately founded in or intertwined with any contractual obligation. *Id.* at *10 (internal quotes and citation omitted).

The Court also distinguished *Pritzker* on the additional ground that the plaintiff had asserted ERISA claims against both the signatory and the non-signatory, and "[g]iven that the court was compelled to submit the matter to arbitration in regards to the signatory-principal, the court applied the agency exception to compel arbitration of the same matter in regards to the non-signatory agent of that principal." *Id.* at *9 n.7.

The distinctions relied on in *Devon Robotics* also apply here. Carlson has sued Ailes for "independent tortious conduct for which he is personally liable," which claim does not depend on the terms or existence of her Employment Contract. Ailes had a statutory and moral duty not to retaliate against and sexually harass Carlson. That duty was independent of any employment

contract. Moreover, Carlson has elected to sue Ailes only and not the signatory to her Employment Contract, Fox News Network, as was her prerogative under the law.

Similarly, in *Britton v. Co-Op Banking Group*, 4 F.3d 742 (9th Cir. 1993), plaintiffs were investors in an allegedly fraudulent tax shelter and brought an action under the federal securities laws against the company that sold the investments and its owner. In connection with their investments, the plaintiffs had signed a contract with the company defendant that contained an arbitration clause. *Id.* at 743. The individual defendant moved to compel arbitration of the claims against him on the ground, among others, that "he [was] an agent, officer, and employee" of the company." *Id.* at 744.

The Ninth Circuit affirmed the denial of his motion to compel arbitration. It stated that "[t]he sum and substance" of the allegations against the individual defendant were that he "attempted to defraud the investors into not pursuing their law suits against the persons who originally sold the securities under the contract." *Id.* at 748. The Court held:

> These acts are subsequent, independent acts of fraud, unrelated to any provision or interpretation of the contract. They simply do not impose any contractual liability, vicariously or otherwise, upon Liebling. As such, we find that Liebling has no standing to compel arbitration, even though he was an agent, officer and employee of GDL during its later months of existence. *Id.*

Other courts also have declined to permit a non-signatory to enforce an arbitration clause where the plaintiff's claim did not depend on the contract containing the arbitration clause. *See Westmoreland*, 299 F.3d at 465 ("We have sustained orders compelling persons who have agreed to arbitrate disputes when the party invoking the clause is a nonsignatory, but only when the party ordered to arbitrate has agreed to arbitrate disputes arising out of a contract and is suing in reliance upon that contract."); *Constantino*, 897 N.E.2d at 1267 ("Merely asserting that all agents, when acting within the scope of their agency, are entitled to benefit from the arbitration clauses -- and only the arbitration clauses -- negotiated by their principals requires an extension

of the law of contracts and agency relationships, which we decline to do."); *see also Di Martino*, 2009 WL 27438, at *7 (holding that beneficiary of employee benefits plan could not compel the plan's advisory board members to arbitrate her claims for breach of fiduciary duty, even assuming that the board members were also parties to the plan containing the arbitration clause, because the plaintiff was "not asserting claims against petitioners in their representative capacity to obtain her benefits under the Plan" but rather she was "seeking damages from petitioners personally and individually, including punitive damages").

The First Circuit's decision in *McCarthy* is particularly instructive. In *McCarthy*, the plaintiff agreed to sell certain stock to the defendant, Azure, and plaintiff entered into a Purchase Agreement and a Confidentiality Agreement with a company (Theta II) that Azure had formed to serve as the vehicle for the planned purchase. 22 F.3d at 353. Azure signed the agreements on behalf of Theta II. *Id.* Both agreements contained an arbitration clause. *Id.* Pursuant to the transaction, McCarthy was to be employed by Theta II and given stock options. *Id.* at 354. Soon after the closing, however, Azure terminated McCarthy's employment and he was never given any ownership interest in Theta II, and Azure merged Theta II into a new company and began selling shares to the public. *Id.* The plaintiff sued Azure, Theta II, and the newly-created company for breach of an employment contract, wrongful discharge, fraud, misrepresentation, emotional distress, unfair trade practice and racketeering. *Id.* at 361. Azure and the companies moved to compel arbitration, but the motion was granted only as to Theta II, the party to the arbitration agreements. On Azure's appeal, the First Circuit affirmed that Azure did not have a right to enforce the arbitration agreements.

The First Circuit addressed many of the same cases cited by Ailes and recognized the important distinction of suing the non-signatory in an individual capacity versus an official capacity:

> For present purposes, we regard the distinction between Azure, in his personal capacity, and Azure, in his representative capacity, as possessing decretory significance. Not coincidentally, in each of the four cases relied on by appellant the court confronted a situation in which the claim asserted related to actions undertaken by a corporate representative in his or her official, rather than personal, capacity; and each of the courts based its holding on this circumstance. *See Roby,* 996 F.2d at 1360 (concluding that the "complaints against the individual Chairs are completely dependent on the complaints against the [principals] . . . [and] arise[ ] out of the same misconduct charged against the [principals]"); *Arnold,* 920 F.2d at 1282 (similar); *see also Pritzker,* 7 F.3d at 1114 (reciting facts demonstrating that the nonsignatory was being sued for acts within the scope of her role as an agent of the signatory corporation); *Letizia,* 802 F.2d at 1188 (finding that all the individual defendants' allegedly wrongful acts related to their employment responsibilities).
>
> Here, in contradistinction, plaintiff asserts claims against Azure in his personal, rather than his corporate, capacity. This is no mere semantic quibble. An official capacity suit is, in essence, another way of pleading an action against an entity of which an officer is an agent. Consequently, such a suit is, in all respects other than name, to be treated as a suit against the entity. By contrast, personal capacity suits proceed against the individual, not against the entity with which the individual is affiliated.
>
> In the corporate context, personal capacity actions can take several forms, including by way of illustration claims alleging *ultra vires* conduct; tort suits in which a corporate officer or agent, though operating within the scope of corporate authorization, through his or her own fault injures another to whom he or she owes a personal duty; and, of more immediate applicability, suits alleging that a person affiliated with a corporation created or manipulated it as part of a larger (fraudulent) scheme.
>
> It is, therefore, apparent that drawing a distinction between individual capacity and representative capacity claims is to draw a distinction that portends a meaningful legal difference. Indeed, the distinction between claims aimed at a defendant in his individual as opposed to representative capacity can be found across the law. . . . The ubiquity of the distinction is a reflection of the reality that individuals in our complex society frequently act on behalf of other parties -- a reality that often makes it unfair to credit or blame the actor, individually, for such acts. At the same time, the law strikes a wise balance by refusing automatically to saddle a principal with total responsibility for a representative's conduct, come what may, and by declining mechanically to limit an injured party's recourse to the principal alone, regardless of the circumstances. *Id.* at 359-60 (footnotes and citations omitted).

Carlson's claim against Ailes falls within the line of cases of *McCarthy*, 22 F.3d 351, *Devon Robotics*, 2012 WL 3627419, *Britton*, 4 F.3d 742; *Westmoreland*, 299 F.3d 462, and *Constantino*, 897 N.E.2d 1262, and is far afield from the cases cited by Ailes in his motion to

compel arbitration. Ailes "is comparing apples to oranges." *McCarthy*, 22 F.3d at 357. Carlson sued Ailes in his individual capacity, not in his official capacity, for discrimination and retaliation that, as alleged in the Amended Complaint, he committed alone, outside the scope of his agency, to further his own personal illicit agenda, and contrary to the professed policies of Fox News Network. Am. Comp. ¶¶ 15, 26. Indeed, Ailes have never alleged that the conduct of which Carlson complains would fall within the scope of his agency as Chairman and CEO of Fox News Network. The New York City Human Rights Law expressly provides for a claim against an employee without the need to name the employer. Moreover, Carlson's claim does not rely in any way on any terms of the Employment Contract or even the existence of the Employment Contract. She would have a claim against Ailes under the New York City Human Rights Law even if the employment relationship had been at-will. The Employment Contract's language itself also indicates an intent to exclude employees from coverage under the arbitration clause.

Under these circumstances, Carlson is entitled to a declaratory judgment that Ailes is not entitled to enforce the arbitration clause as a non-signatory.[10]

[10] The other cases cited by Ailes are distinguishable for the same reasons recognized in *McCarthy* and *Devon Robotics* -- namely, the plaintiffs sued the non-signatories for claims that were premised on the existence of the contract containing the arbitration clause and/or based on their involvement in alleged wrongdoing by the corporate signatory. *See Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 222 (3d Cir. 2007) (plaintiff did not dispute that the executives were acting as agents for the corporation); *Marcus v. Frome*, 275 F. Supp. 2d 496, 505 (S.D.N.Y. 2003) (holding that "[t]he claims against [the CEO], in this case, are based on the conduct of [the corporation], and because [the corporation] would be entitled to seek arbitration under the Purchase Agreement, [the CEO], as an employee of [the corporation], is also entitled to seek arbitration under the Agreement"); *Bleumer v. Parkway Ins. Co.*, 649 A.2d 913, 931 (N.J. Super. Ct. Law Div. 1994) (decided under the FAA) (holding that non-signatory parent company and officer were entitled to enforce arbitration provision because CEPA only imposes liability on those who "act[] directly or indirectly on behalf of or in the interest of an employer with the employer's consent" and therefore plaintiff "must demonstrate [that non-signatories] acted in a representative capacity for" his employer); *Hirschfeld Prods, Inc. v. Mirvish*, 630 N.Y.S.2d 726, 727-28 (N.Y. App. Div. 1995), *aff'd*, 88 N.Y.2d 1054 (N.Y. 1996) (decided under the FAA) (holding that the plaintiff's claims, although labeled as "torts," were in fact contract claims because "[t]he acts alleged in the complaint to compromise willful, malicious and wanton conduct do not represent the breach of a legal duty independent of the contract itself, arising

c. There Is No Policy Reason to Permit Ailes to Enforce the Arbitration Clause

Ailes also makes a policy argument based on his claim that Carlson employed a "tactical strategy" to sue Ailes and not Fox News Network to avoid arbitration. *See* ECF No. 2 & Smith Cert. Ex. 2 (Ailes' Mem. at 3). Ailes' policy argument does not hold water.

As a preliminary matter, Carlson had a statutory right and legitimate reasons to sue Ailes alone, thereby invoking a remedy expressly contemplated under the New York City Human Rights Law. As the Complaint alleges, Ailes alone made sexual advances to Carlson and retaliated against her for refusing them. Moreover, the Human Rights Law imposes additional limitations and hurdles to suing an employer based on conduct of an employee that are not implicated in an action against the employee alone. *See* N.Y.C. Admin. Code § 8-107(13). Indeed, Carlson alleges that Fox News "has adopted and professes to support anti-discrimination, anti-harassment and anti-retaliation policies." Am. Comp. ¶ 26. Additionally, the Employment Contract by its express terms does not apply to officers or employees, and therefore the Contract contemplated court actions against individuals such as Ailes.

The Court in *McCarthy* addressed and rejected the same policy argument made by Ailes. *McCarthy*, 22 F.3d at 360. The Court held "that policy considerations, placed in proper perspective, tilt in the opposite direction." *Id.* First, the Court held that "the best preventative is to act *before*, rather than *after*, the fact"; in other words, to draft the arbitration clause to include employees. *Id.* (emphasis in original). Second, the Court held that "whether a claim properly lies against a party in his individual capacity or in his official capacity is ultimately a function of the facts, not of pleading techniques alone." *Id.* Here, there is no question that Carlson's claim against Ailes for sexual harassment and retaliation is properly asserted against him in his

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from circumstances extraneous to, and not constituting elements of, the contract" (internal quotes omitted)).

individual capacity. Third, the Court held that "we are doubtful that the incentive to plead deceitfully exists at all" because "an agent is not ordinarily liable for his principal's breach of contract" and thus "manipulating the reality of events in order to bring suit against the agent holds only marginal promise of financial reward." *Id.* at 360-61.

Finally, the Court held that "most important from a policy standpoint," permitting a non-signatory sued in his or her individual capacity to enforce an arbitration clause "would introduce a troubling asymmetry into the law" because "the agent, though he could not be compelled to arbitrate, nonetheless could compel the claimant to submit to arbitration." *Id.* at *361 ("In other words, an agent for a disclosed principal would enjoy the benefits of the principal's arbitral agreement, but would shoulder none of the corresponding burdens."). Indeed, imposing such a "troubling asymmetry" is precisely what Ailes seeks to do here. He seeks to force Ms. Carlson to pursue her statutory discrimination claim against him in a secret arbitral chamber solely because a contract to which he is not a party contains an arbitration clause, yet if he brought a similar tort action against Ms. Carlson, he would not be constrained by any arbitration clause.

The public policy considerations are even more compelling given that constitutional and statutory rights are involved. *See Beame*, 662 N.E.2d at 756; footnote 5 *supra*. Public policy strongly cuts against imposing the arbitration clause on Carlson's claim against Ailes.

2. Carlson's Claim Against Ailes Also Does Not Fall Within the Estoppel Exception Because It Does Not Rely On the Existence of the Employment Contract

Although Ailes does not expressly rely on an estoppel theory in his pleadings to compel arbitration, for the avoidance of doubt we briefly address it here.

The law is clear that Carlson's claim against Ailes does not fall within the estoppel exception. For estoppel to apply, "the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the

arbitration provision in pursuing its claim." *Norcast S.AR.L.*, 2014 WL 43492, at *6 (internal quotes omitted); *Ross*, 547 F.3d at 143 (holding that the "'issues the non-signatory is seeking to resolve in arbitration'" must be "'intertwined with the agreement that the estopped party has signed'" (quoting *JLM Indus.*, 387 F.3d at 177)). Thus, "[t]he essential question [for estoppel] is whether Plaintiffs would have an independent right to recover against the non-signatory Defendants even if the contract containing the arbitration clause were void." *Miron*, 342 F. Supp. 2d at 333-34 (estoppel did not apply because, "[w]ere this Court to find the BDO Agreement void, invalid, or unenforceable, Plaintiffs would still have valid causes of action against the Deutsche Bank Defendants grounded in both common law and statutory remedies").

Here, Carlson's New York City Human Rights Law claim does not rely on, and is not intertwined with, any terms of her Employment Contract. Carlson is not suing for breach of any provision of her Employment Contract, nor is she seeking any relief under her Employment Contract. Carlson's Complaint does not even mention any terms of her Employment Contract. Moreover, her claim under the New York City Human Rights Law does not depend on the existence of her Employment Contract. Indeed, Carlson could assert her claim under the New York City Human Rights Law whether or not she had a written employment contract.

Thus, Carlson's "claims do not 'rel[y] on the terms' of the [Employment Contract], such that [she] is estopped from denying the applicability of the Agreement's arbitration clause." *Norcast S.AR.L.*, 2014 WL 43492, at *6 (quoting *Oxbow Calcining USA Inc. v. Am. Indus. Partners*, 948 N.Y.S.2d 24, 29 (1st Dep't 2012)).

POINT III

EVEN IF THE ARBITRATION CLAUSE APPLIED TO CARLSON'S CLAIM AGAINST AILES, WHICH IT DOES NOT, AILES SHOULD BE ESTOPPED FROM INVOKING BECAUSE THERE CAN BE NO GENUINE DISPUTE THAT HE IS IN MATERIAL BREACH OF ITS PROVISIONS

Under section 3 of the FAA, on which Ailes relies to seek to compel arbitration, a party is

entitled to a stay of a court action in favor of arbitration only "providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3; *see also Council of W. Elec. Tech. Employees v. W. Elec. Co.*, 238 F.2d 892, 895-96 (2d Cir. 1956) (holding that defendant forfeited its right to arbitration under section 3 of the FAA).[11] Here, if the arbitration clause applied to Carlson's claim against Ailes, which it does not, Ailes is in material breach of the clause because he has publicly disclosed documents and information about this matter and launched his army of friends and business associates to make statements and appearances in the press designed to smear Ms. Carlson and disparage her claims in violation of the arbitration clause's confidentiality restrictions. At the same time, Ailes has threatened Plaintiff's counsel with legal action. (Smith Cert. Ex. 9). The law does not allow Ailes to attempt to use the arbitration clause as a shield while publicly attacking Ms. Carlson in breach of its provisions.

Intertwined within the arbitration clause in section 7 of the Standard Terms and Conditions are confidentiality restrictions, including that "all relevant allegations and events leading up to the arbitration, shall be held in strict confidence." The arbitration clause further states that: "Breach of confidentiality by any party shall be considered to be a material breach of this Agreement." Standard Terms and Conditions § 7. If the arbitration clause applies to Carlson's claim, Ailes has willfully breached this confidentiality provision, constituting a "material breach" of the arbitration clause by its very terms. On a continuous basis from the moment Ms. Carlson commenced this action and even after Ailes filed this motion to compel arbitration, Ailes has been disseminating to the press documents and misinformation that clearly involve "allegations and events" concerning this matter. He has disclosed, among other things: information concerning alleged audience ratings relating to Ms. Carlson (Smith Cert. Exs. 5 & 8); copies of handwritten thank you notes that Ms. Carlson allegedly provided to him during the

[11] Whether there is a default or waiver of the right to arbitrate is an issue for the court. *Karnette v. Wolpoff & Abramson, LLP*, 444 F. Supp. 2d 640, 644 (E.D. Va. 2006).

course of her eleven-year career at Fox News (*id.* Ex. 6); and an internal memo that he supposedly wrote to a colleague in September 2015 concerning Ms. Carlson (*id.* Ex. 6). Forcing Ms. Carlson into arbitration now would certainly prejudice her, because it would effectively prevent her from publicly defending herself and responding to Ailes' public smear campaign -- a tactic he is reputed to have mastered over the years. Thus, even if the arbitration clause applied to Carlson's claim against Ailes, which it does not, he has forfeited any right to enforce it by reason of having materially breached its provisions.[12]

CONCLUSION

For the reasons set forth herein, summary judgment should be granted declaring that Carlson did not waive her right to a jury trial on Count One of the Amended Complaint and Count One is not subject to arbitration.[13]

Respectfully submitted,

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Attorneys for Plaintiff Gretchen Carlson

Dated: July 18, 2016

By: /s/ *Nancy Erika Smith*
NANCY ERIKA SMITH

[12] Ailes' claim that Carlson breached the arbitration agreement by filing this action would not give him a basis to breach its provisions in response. "Under settled election-of-remedies principles, when one party to a contract feels that the other contracting party has materially breached its agreement, the non-breaching party may either stop performance and assume the contract is voided, or it may continue its performance and sue for damages," but "*under no circumstances may the non-breaching party stop its own performance while continuing to take advantage of the contract's benefits*." *Lafarge Bldg. Materials, Inc. v. Pozament Corp.*, 28 Misc. 3d 1228(A), 2010 WL 3398537, at *8 (N.Y. Sup. Ct. Aug. 24, 2010) (emphasis added). Since Ailes has "stop[ped] [his] own performance" under the arbitration clause, he is not entitled "to take advantage of the [arbitration clause's] benefits." *Id.*

[13] If the Court believes there are issues of material fact that need to be resolved with regard to this motion, then Plaintiff asserts her right to a jury trial under 9 U.S.C. § 4.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

GRETCHEN CARLSON,	:	Document Electronically Filed
Plaintiff,	:	**Civil Action No. 2:16-cv-04138-JLL-JAD**
v.	:	
ROGER AILES,	:	**CERTIFICATION OF NANCY ERIKA SMITH, ESQ.**
Defendant.	:	

Pursuant to 28 U.S.C.A. § 1746, I, Nancy Erika Smith, Certify:

1. I am a partner with the law firm Smith Mullin, P.C.co-counsel for plaintiff, Gretchen Carlson ("Ms. Carlson"), in the above-captioned matter. As such I am fully familiar with the facts set forth herein. I submit this Certification in support of Plaintiff's motion, pursuant to Federal Rule of Civil Procedure 56, for summary judgment on Count Two of the Amended Complaint for a declaratory judgment that Carlson has not waived her right to a jury trial and that Plaintiff Carlson's claims are not subject to a valid or applicable arbitration agreement.

2. Attached hereto as **Exhibit 1** is a true and correct copy of Ms. Carlson's original Complaint, which was filed on July 6, 2016 in the Superior Court of New Jersey, Bergen County where Defendant Roger Ailes has maintained a residence for many years.

3. Two days later, on July 8, 2016, Ailes filed a Notice of Removal to this Court.

4. Further invoking the juridiction of this Court, Defendant Ailes also filed a motion to compel arbitration. *See* ECF No. 2.

5. Four days after this matter was given a judicial assignment, on July 15, 2016, just as Carlson's opposition to the motion to compel arbitration were coming due, Ailes purported to "withdraw" his motion in this Court and simultaneously filed a wholly-duplicative petition to compel arbitration in the Southern District of New York. Attached hereto as **Exhibit 2** are true and correct copies of Ailes' Petition to Compel Arbitration and Memorandum of Law in Support of His Petition to Compel Arbitration in the Southern District of New York.

6. The same day, Carlson filed in this Court her opposition to Ailes' motion to compel arbitration. *See* ECF No. 10.

7. Given that Ailes already invoked the jurisdiction of this Court and consented to venue in this District for the dispute over whether Carlson's New York City Human Rights Law claim against Ailes is subject to arbitration, and given that his attempt to judge-shop by filing a duplicative petition in the Southern District of New York was wholly improper, on July 18, 2016, Carlson filed an Amended Complaint, adding a second cause of action for a declaratory judgment that she did not waive her right to a jury trial on her New York City Human Rights Law claim against Ailes (Count One) and that the claim is not subject to arbitration. Attached hereto as **Exhibit 3** is a true and correct copy of the Amended Complaint.

8. A copy of an excerpt of Ms. Carlson's Employment Contract with Fox News Network, together with an excerpt of the "Standard Terms and Conditions" contained in Exhibit A to the Employment Contract, was submitted as an exhibit to the Certification of Ailes' counsel in support of Ailes' motion to compel arbitration (ECF No. 2-2). A true and correct copy of relevant excerpts from the Employment Contract and Standard Terms and Conditions is also annexed hereto as **Exhibit 4**.

9. The arbitration clause at issue is contained in section 7 of the Standard Terms and Conditions and includes confidentiality restrictions providing that: "Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading to the arbitration, shall be held in strict confidence. . . . Breach of confidentiality by any party shall be considered to be a material breach of this Agreement."

10. Attached hereto as **Exhibit 5** is a true and correct copy of an article, dated July 6, 2016, from the publication Deadline | Hollywood, titled *Roger Ailes: Gretchen Carlson Lawsuit "Retaliation" for "Network's Decision Not To Renew Her Contract*," which shows that, on the

same day Ms. Carlson filed this action, Ailes issued a press statement disseminating negative and derogatory information about Ms. Carlson, which information is directly contradicted by the factual allegations in the Complaint.

11. The article shows that Mr. Ailes' press statement was in sharp contrast to the press statement from 21st Century Fox (the parent of Fox News), stating that it "take[s] these matters seriously" and has "commenced an internal review of the matter." *See* Ex. 5.

12. Attached hereto as **Exhibit 6** is a true and correct copy of an article, dated July 9, 2016, from the publication Daily Mail, titled *Former Model alleges Roger Ailes took out his genitals and told her to perform oral sex as SIX women come forward with harassment claims in wake of Gretchen Carlson suit*. The article shows that Ailes disseminated to the press, or caused to be disseminated, copies of four handwritten notes that Ms. Carlson wrote to Ailes during the course of her eleven-year tenure at Fox News. Ex. 6 at ¶¶ 6-8. Ailes apparently believes these letters somehow undercut Ms. Carlson's claims, when really they show nothing more than that Ms. Carlson was devoted to, and wanted to keep, her job.

13. The article also indicates that Ailes disseminated to the press, or caused to be disseminated, a copy of a Memorandum, dated September 23, 2015, that Ailes supposedly wrote to one of his colleagues regarding Ms. Carlson. Ex. 6 at ¶ 6. This memorandum, if authentic, actually bolsters Ms. Carlson's claim, but, in all events, Ailes' disclosure of it to the press following Ms. Carlson's commencement of this action clearly would constitute a violation of the arbitration clause (to the extent that clause applied to Ms. Carlson's claim, which it does not).

14. Attached hereto as **Exhibit 7** is another article from Deadline | Hollywood, titled *Fox News Chief Roger Ailes Polishing Spin Amid Dizzying Harassment Allegations*, dated July

13, 2016, which comments on the "spin mastery" of Mr. Ailes and the manner in which he is "connecting female network talent anxious to tell their pro-Ailes testimonials with scoop-hungry media outlets." The article astutely notes that his media campaign "supplements his attempt to keep former FNC host Carlson's lawsuit out of the public glare of a courtroom and instead in the private chambers of an arbitrator, claiming the lawsuit filed last week is a breach of her contract." Ex. 7 at ¶ 1.

15. Attached hereto as **Exhibit 8** is an article from the publication RawStory, titled *'Are you wearing any panties? I wish you weren't': Allegations pile up against Fox Boss Roger Ailes*, dated July 13, 2016, showing that Ailes caused another statement to be issued to the press again disparaging Ms. Carlson and commenting on internal matters relating to her claim.

16. Attached hereto as **Exhibit 9** is a true and accurate copy of an email from defendant Ailes' lawyers threatening plaintiff Carlson and her counsel sent on Saturday, July 9, 2016, at the same time Ailes was releasing to the press documents and statements about the evidence and unleashing his army of employees to disparage plaintiff and praise him. Also attached is our reply.

17. Attached hereto as **Exhibit 10** is a true and correct copy of relevant excerpts of a proposed Severance Agreement and General Release that Fox presented to Carlson upon her termination.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Executed on July 18, 2016, in Montclair, New Jersey.

/s/ *Nancy Erika Smith*
NANCY ERIKA SMITH

EXHIBIT 1

SMITH MULLIN, P.C.
Nancy Erika Smith, Esq. (Atty. ID #027231980)
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(973) 783-7607
Attorneys for Plaintiffs

GRETCHEN CARLSON,

Plaintiff,

v.

ROGER AILES,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO.:

Civil Action

COMPLAINT AND JURY DEMAND

Plaintiff Gretchen Carlson ("Carlson" or "plaintiff"), by her undersigned attorneys, says:

PARTIES

1. Carlson is a resident of Connecticut who was employed by Fox News in New York City as the host of the afternoon program "The Real Story with Gretchen Carlson."

2. Carlson is a graduate of Stanford University, a former Miss America (1989), an accomplished concert violinist, a best-selling author, an award-winning journalist and a Trustee of the March of Dimes. Carlson has had a successful career in television as a reporter, commentator and program host.

3. Defendant Roger Ailes ("Ailes") is a resident of Cresskill, New Jersey. Ailes is the Chairman and CEO of Fox News.

NATURE OF THE CASE

4. This case arises from violations by Ailes of the New York City Human Rights Law, New York City Administrative Code § 8-107. Ailes has unlawfully retaliated against

Carlson and sabotaged her career because she refused his sexual advances and complained about severe and pervasive sexual harassment.

5. Ailes retaliated against Carlson in various ways, as described below, including by terminating her employment on June 23, 2016, and, prior thereto, by, among other things, ostracizing, marginalizing and shunning her after making clear to her that these "problems" would not have existed, and could be solved, if she had a sexual relationship with him.

6. When Carlson met with Ailes to discuss the discriminatory treatment to which she was being subjected, Ailes stated: "I think you and I should have had a sexual relationship a long time ago and then you'd be good and better and I'd be good and better," adding that "sometimes problems are easier to solve" that way. Carlson rebuffed Ailes' sexual demands at that meeting, and nine months later, Ailes ended her career at Fox News.

7. As a direct and proximate result of Carlson's refusing Ailes' sexual advances, and in retaliation for Carlson's complaints about discrimination and harassment, Ailes terminated her employment, causing her significant economic, emotional and professional harm.

COUNT ONE

8. After working for five years as a news correspondent and co-host of "The Saturday Early Show" on CBS News, Carlson joined Fox News in 2005.

9. Carlson was a conscientious, hard-working, and successful journalist/reporter/host at Fox News for eleven years during which she interviewed numerous political leaders and celebrities, including Barack Obama, Hillary Clinton, Henry Kissinger, Donald Trump, George W. Bush, Laura Bush, Condoleezza Rice, Tony Blair, Colin Powell and Madeline Albright. Notwithstanding her strong performance and tireless work ethic, however, Ailes denied Carlson fair compensation, desirable assignments and other career-enhancing opportunities in retaliation

for her complaints of harassment and discrimination and because she rejected his sexual advances.

10. For seven and one-half years, Carlson was a popular co-host of the "Fox & Friends" morning show, which achieved higher ratings than any other cable news morning show.

11. On or about September 3, 2009, Carlson complained to her supervisor that one of her co-hosts on Fox & Friends, Steve Doocy, had created a hostile work environment by regularly treating her in a sexist and condescending way, including by putting his hand on her and pulling down her arm to shush her during a live telecast.

12. Doocy engaged in a pattern and practice of severe and pervasive sexual harassment of Carlson, including, but not limited to, mocking her during commercial breaks, shunning her off air, refusing to engage with her on air, belittling her contributions to the show, and generally attempting to put her in her place by refusing to accept and treat her as an intelligent and insightful female journalist rather than a blond female prop.

13. After learning of Carlson's complaints, Ailes responded by calling Carlson a "man hater" and "killer" and telling her that she needed to learn to "get along with the boys."

14. Ailes retaliated against Carlson and damaged her career by, among other things, assigning her fewer of the hard-hitting political interviews that are coveted by political correspondents (notwithstanding that she had received acclaim for her political interviews), removing her from her regular once-a-week appearances on the highly-rated "Culture Warrior" segment of "The O'Reilly Factor," reducing her appearances during the 6:00 a.m. hour (where she had generated increased ratings), and directing that she not be showcased at all.

15. In doing these things, Ailes did not act in the interests of Fox News, but instead pursued a highly personal agenda.

16. In 2013, in further retaliation for her refusal to accede to sexual harassment and retaliation, Ailes fired Carlson from "Fox & Friends."

17. Ailes reassigned Carlson to the 2 p.m. to 3 p.m. EST time slot, substantially reduced her compensation (even though, as a solo program host, her workload increased), and refused to provide her with anywhere near the level of network media support and promotion provided to other Fox News hosts who did not complain about harassment and rebuff his sexual advances.

18. Despite the lack of promotional or other network support, Carlson continued to work diligently and her show achieved success by delivering solid and consistent ratings increases up until the day she was terminated. In fact, Carlson's show consistently ranked number one among cable news programs in her time slot and achieved its highest Nielson ratings ever in the final quarter of 2015 and the first quarter of 2016, with ratings in her final month of June 2016 up 33% in total viewers year to date. This success shows that there was no legitimate business reason for terminating Ms. Carlson.

19. Unable to deny Carlson's on-air skills, Ailes admitted that she is smart, well-prepared and one of the best interviewers at Fox News.

20. On those occasions when he spoke directly with Carlson, Ailes injected sexual and/or sexist comments and innuendo into their conversations by, among other things:

a. Claiming that Carlson saw everything as if it "only rains on women" and admonishing her to stop worrying about being treated equally and getting "offended so God damn easy about everything."

b. Describing Carlson as a "man hater" and a "killer" who tried to "show up the boys" on Fox & Friends.

c. Ogling Carlson in his office and asking her to turn around so he could view her posterior.

d. Commenting that certain outfits enhanced Carlson's figure and urging her to wear them every day.

e. Commenting repeatedly about Carlson's legs.

f. Lamenting that marriage was "boring," "hard" and "not much fun."

g. Wondering aloud how anyone could be married to Carlson, while making sexual advances by various means, including by stating that if he could choose one person to be stranded with on a desert island, she would be that person.

h. Stating "I'm sure you [Carlson] can do sweet nothings when you want to."

i. Asking Carlson how she felt about him, followed by: "Do you understand what I'm saying to you?"

j. Boasting to other attendees (at an event where Carlson walked over to greet him) that he always stays seated when a woman walks over to him so she has to "bend over" to say hello.

k. Embarrassing Ms. Carlson by stating to others in her presence that he had "slept" with three former Miss Americas but not with her.

l. Telling Carlson that she was "sexy," but "too much hard work."

21. In September 2015, Carlson again sought to bring to an end the retaliatory and discriminatory treatment she had endured by asking to meet with Ailes.

22. During that meeting in Ailes' office on September 16, 2015, Ailes stated to Carlson: "I think you and I should have had a sexual relationship a long time ago and then you'd

be good and better and I'd be good and better," adding that "sometimes problems are easier to solve" that way.

23. Prior to and during that meeting, Ailes had made it clear to Carlson that he had the power to make anything happen for her if she listened to him and "underst[ood]" what he was saying.

24. Carlson refused to engage in a sexual relationship or participate in sexual banter with Ailes so Ailes retaliated.

25. In further retaliation for her opposition to sexual harassment and her unwillingness to have a sexual relationship with him, Ailes consistently denied plaintiff various opportunities that were afforded to other Fox News hosts, by, among other things:

a. Reducing her compensation to a level that was greatly disproportionate to that of similarly-situated male employees and others who had not complained about discrimination and harassment;

b. severely curtailing her appearances as a guest commentator on prime time shows, as she had regularly done in the past;

c. blocking her from appearing as a substitute host on prime time or daytime panel shows;

d. refusing to assign her to cover high-visibility events or conduct important interviews;

e. refusing to give her social media, public relations and advertising support anywhere close to the support given other hosts who did not complain about discrimination and harassment;

f. shunning, ostracizing and humiliating her, both publicly and privately; and

g. decreeing that her contract not be renewed on June 23, 2016.

26. Ailes undertook these discriminatory and retaliatory actions in his individual capacity and for personal and unlawful purposes. His retaliation against Carlson was outside the scope of his authority, employment and agency at Fox News, which has adopted and professes to support anti-discrimination, anti-harassment and anti-retaliation policies.

27. By and through his creation of a discriminatory, hostile and harassing work environment, his demands for sexual favors, and his retaliation against Carlson for her objections to discrimination and retaliation, Ailes has violated the New York City Human Rights Law.

28. As a direct and proximate result of Ailes' harassing, discriminatory and retaliatory treatment of her, plaintiff has suffered, and continues to suffer, adverse job consequences, including economic damages, pain, mental anguish, loss of enjoyment of life and damage to her reputation and career.

WHEREFORE, plaintiff demands judgment against Ailes as follows:

A. Compensatory damages, including lost compensation, damage to career path, damage to reputation and pain and suffering damages;

B. Damages for mental anguish;

C. Reimbursement for negative tax consequences resulting from a jury verdict;

D. Punitive damages;

E. Attorneys' fees and costs of suit; and

F. Such other relief as the court may deem equitable and just.

SMITH MULLIN, P.C.
Attorneys for Plaintiff

BY: _____
NANCY ERIKA SMITH

Dated: July 6, 2016

JURY DEMAND

Plaintiff Gretchen Carlson demands trial by jury with respect to all issues that are so triable.

SMITH MULLIN, P.C.
Attorneys for Plaintiff

BY: _____
NANCY ERIKA SMITH

Dated: July 6, 2016

CERTIFICATION

Pursuant to New Jersey Court *Rule* 4:5-1, counsel for Plaintiff hereby certifies that to her knowledge, no matter related to this one is currently pending in either arbitration or litigation.

SMITH MULLIN, P.C.
Attorneys for Plaintiff

BY: _____
NANCY ERIKA SMITH

Dated: July 6, 2016

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROGER AILES,

Petitioner,

v.

GRETCHEN CARLSON,

Respondent.

No. _____

ECF Case

PETITION TO COMPEL ARBITRATION PURSUANT TO SECTION 4 OF THE FEDERAL ARBITRATION ACT

Petitioner Roger Ailes ("Petitioner" or "Mr. Ailes"), by and through his attorneys, Epstein Becker & Green, P.C., brings this Petition pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4 (the "Petition"), to compel the arbitration of the employment-related claims of Respondent Gretchen Carlson ("Respondent" or "Ms. Carlson") in accordance with the arbitration provision in her multi-million dollar Employment Agreement (the "Agreement') with Fox News Network, LLC ("Fox News"). For his Petition, Mr. Ailes alleges as follows:

INTRODUCTION

1. Although Ms. Carlson's litigation against Mr. Ailes, Fox News' Chairman and Chief Executive Officer, began just nine days ago when she filed a Complaint against him in the Superior Court of New Jersey (the "Complaint"), this case already has a complicated procedural background because: (a) Ms. Carlson's lead counsel, a New Jersey attorney, filed the Complaint in New Jersey even though Ms. Carlson is a Greenwich, Connecticut resident, all of the alleged events in her pleading occurred at her place of employment in New York City, Mr. Ailes's primary residence is in New York, and she claimed no violation of New Jersey law; (b) Ms. Carlson sought to avoid arbitration of her claims by not making any claims against Fox News

and suing only Mr. Ailes, but in the process disregarded the well-established law in the Second and Third Circuits holding that her claims against Mr. Ailes must be arbitrated as well; and (c) Ms. Carlson and her counsel – without any pre-suit communication with Mr. Ailes – simultaneously commenced a carefully orchestrated, negative publicity attack against Mr. Ailes in the media, which blatantly violated Ms. Carlson's Agreement.

2. Since July 6, 2016, the efforts of Ms. Carlson, her counsel, and her public relations team have spawned a myriad of stories about this case in the media, on-line and on television, including articles in *The New York Times, The Wall Street Journal, The Washington Post,* and *The New York Daily News,* among many others. In so doing, Ms. Carlson's lead counsel has made statements going well beyond the ambit of what might be protected by the litigation privilege. Ms. Carlson and her attorneys even posed for pictures in a front-page story in *The New York Times* where they again blasted Mr. Ailes. There is no legitimate reason for Ms. Carlson's strategy, particularly in light of the confidentiality provision in her Agreement. Rather, the goal of Ms. Carlson's entire campaign is obvious: besmirch Mr. Ailes's reputation so that he will pay her an exorbitant settlement.

THE ARBITRATION AGREEMENT AND PROCEDURAL HISTORY

3. The arbitration provision in Ms. Carlson's Agreement states as follows:

> Any controversy, claim or dispute arising out of or relating to this Agreement or Performer's [Ms. Carlson's] employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association ["AAA"] then in effect. ... Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence. [*See* excerpts of Agreement attached as Exhibit A]

4. Completely disregarding this arbitration provision in her Agreement, Ms. Carlson filed her Complaint, a copy of which is attached as Exhibit B, in the Superior Court of New

Jersey, Bergen County, not claiming that Mr. Ailes violated any New Jersey law, but alleging that he violated the New York City Human Rights Law, N.Y.C. Adm. Code § 8-107 (the "NYCHRL"), which applies only to alleged discriminatory actions occurring in the five boroughs of New York City.

5. Ms. Carlson did not name Fox News as a defendant in her Complaint, but named only Mr. Ailes, who her Complaint acknowledges is Fox News' "Chairman and CEO." (*See* Exhibit B at ¶ 3). By naming only Mr. Ailes, Ms. Carlson obviously hoped to circumvent the arbitration provision in her Agreement – which requires the proceedings, filings, evidence and "all relevant allegations and events leading up to the arbitration" to be held in strict confidence – so that she could carry out her public attack on Mr. Ailes. Under Second Circuit and Third Circuit law, however, and as addressed in the accompanying Memorandum of Law, courts have uniformly held that an employee such as Ms. Carlson cannot evade an agreed-to arbitration clause in a contract with her employer by suing only an individual corporate officer in court.

6. Since there was no legitimate reason for Ms. Carlson to have brought her case in the Superior Court of New Jersey, on July 8, 2016, Mr. Ailes removed the case to the United States District Court for the District of New Jersey (the "New Jersey Federal Action"), based on diversity of citizenship, as Ms. Carlson resides in Connecticut while Mr. Ailes's primary residence is in New York. Also, on July 8, 2016, Mr. Ailes filed a motion in the District of New Jersey to compel the arbitration of Ms. Carlson's claims before a three-member panel of the AAA in New York City, as required by her Agreement.

7. Because this Court has the authority to compel arbitration in New York City under the Federal Arbitration Act (whereas the District Court of New Jersey might only possess the authority to compel arbitration in New Jersey), Mr. Ailes is today withdrawing the motion to

compel arbitration filed last Friday in the New Jersey Federal Action, and files his Petition with this Court pursuant to § 4 of the Federal Arbitration Act. The Petition requests this Court to order that Ms. Carlson's Complaint be arbitrated in New York City in accordance with the rules of the AAA. At the same time, Mr. Ailes is filing in the District Court in New Jersey, a motion to transfer the New Jersey Federal Action to this Court where it may be consolidated with this Petition or, in the alternative, staying the New Jersey Federal Action pending the disposition of this Petition.

THE PARTIES

8. Petitioner Ailes is an individual with his principal residence in the State of New York, where he has residences in Garrison, New York and Manhattan, and therefore is a citizen of New York. He is the Chairman and Chief Executive Officer of Fox News.

9. Respondent Carlson is a Connecticut citizen who was employed by Fox News in Manhattan.

10. At all relevant times, Fox News employed Ms. Carlson at its headquarters in Manhattan. Moreover, the decision not to renew Ms. Carlson's Agreement and to end her employment relationship with Fox News was made in Manhattan.

JURISDICTION AND VENUE

11. This Court has jurisdiction over the Petition pursuant to 28 U.S.C. § 1332(a)(1) because complete diversity of citizenship exists among the parties, and the amount in controversy exceeds $75,000.00, exclusive of interest and costs, as Ms. Carlson is seeking compensatory damages, including damages for lost compensation, damages to career path, damage to reputation, pain and suffering damages, and damages for mental anguish. At the time

that her Agreement expired last month, Ms. Carlson's salary was in excess of $1 million annually.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(1) as Mr. Ailes is domiciled in New York. Venue is also proper in the Southern District under 28 U.S.C. § 1391(b)(2) as the events of which Ms. Carlson complains are alleged to have occurred in Manhattan. Finally, venue is proper in the Southern District because the written arbitration agreement provides for binding arbitration in New York, New York.

FACTUAL ALLEGATIONS

13. In June 2013, Ms. Carlson entered into her Agreement with Fox News. It contains an arbitration provision which required her to arbitrate in New York City all claims arising out of or relating to her employment with Fox News.

14. The Agreement expired on June 23, 2016, and Ms. Carlson's employment ended at that time.

15. On July 6, 2016, Ms. Carlson filed a Complaint against Mr. Ailes in the Superior Court of New Jersey.

16. On July 8, 2016, Mr. Ailes's counsel accepted service of the Summons and Complaint. On the same day, Mr. Ailes removed the Complaint to the United States District Court for the District of New Jersey, pursuant to 28 U.S.C. § 1446, based on the existence of diversity jurisdiction.

17. The Complaint alleges that Mr. Ailes's conduct toward Ms. Carlson in the Fox News workplace during her employment violated the NYCHRL. The single-count Complaint sets forth retaliation, discrimination and hostile environment employment claims under the NYCHRL.

18. The claims pleaded in the Complaint arise out of or are related to Ms. Carlson's employment with Fox News.

19. By the plain terms of the arbitration provision in the Agreement and applicable law, the claims in the Complaint must be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the AAA.

20. Because Ms. Carlson's claims should have been brought in arbitration, and venue in the District of New Jersey is not proper pursuant to 28 U.S.C. § 1391, Mr. Ailes is contemporaneously withdrawing his motion to compel arbitration pending in the United States District Court for the District of New Jersey and filing a motion to transfer the case pending there to this Court pursuant to 28 U.S.C. § 1406(a), to be consolidated with this Petition.

FIRST CLAIM
(Order Compelling Arbitration Pursuant to 9 U.S.C. § 4)

21. Petitioner Ailes repeats and realleges the allegations set forth in Paragraphs 1 through 20 above as if fully set forth herein.

22. The Agreement is a valid and enforceable contract.

23. Ms. Carlson voluntarily agreed to the terms of the Agreement, including the arbitration provision.

24. All of the claims brought by Ms. Carlson in the Complaint fall within the scope of the arbitration provision, which requires that any and all claims arising out of or relating to Ms. Carlson's employment at Fox News be decided by mandatory arbitration at the AAA in New York City.

25. Although Mr. Ailes is not a signatory of the Agreement, Ms. Carlson's claims in the Complaint must be arbitrated, as the Second Circuit Court of Appeals has held that an

employee cannot avoid an arbitration agreement with her employer with a tactical strategy of suing only an executive of that employer in court. The law in the Third Circuit is the same.

26. Ms. Carlson brought the Complaint in contravention of the arbitration provision of the Agreement.

27. Pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, this Court has authority to compel Respondent to arbitrate all claims brought in the Complaint.

PRAYER FOR RELIEF

WHEREFORE, Petitioner Ailes demands judgment as follows:

1. That the Court issue an Order, pursuant to Section 4 of the Federal Arbitration Act, compelling the arbitration of all claims in the Complaint before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association, as well as any and all other claims that could be brought against Mr. Ailes that arise out of or relate to Respondent's employment at Fox News.

2. That the Court grant any other relief in favor of Mr. Ailes that it deems just and proper.

Dated: July 15, 2016

Respectfully submitted,

EPSTEIN BECKER & GREEN, P.C.

/s/ David W. Garland
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David W. Garland
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QUINN EMANUEL URQUHART & SULLIVAN, LLP

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Attorneys for Petitioner Roger Ailes

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROGER AILES,

Petitioner,

v.

GRETCHEN CARLSON,

Respondent.

No. _____

ECF Case

PETITIONER ROGER AILES'S MEMORANDUM OF LAW IN SUPPORT OF HIS PETITION TO COMPEL ARBITRATION

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QUINN EMANUEL URQUHART & SULLIVAN, LLP

John B. Quinn (*pro hac vice* motion forthcoming)
Susan R. Estrich (*pro hac vice* motion forthcoming)
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Attorneys for Petitioner Roger Ailes

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

In June 2013, Respondent Gretchen Carlson, a well-known cable television news anchor employed by the Fox News Network, LLC ("Fox News") in Manhattan, entered into a multi-million dollar, three-year employment agreement (the "Agreement") with Fox News that contained an arbitration provision. In pertinent part, the arbitration provision provides:

> Any controversy, claim or dispute arising out of or relating to this Agreement or Performer's [Ms. Carlson's] employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association ["AAA"] then in effect. ... Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence.

(*See* Exhibit A, page 12, attached to the accompanying Petition).

Ignoring the Agreement's binding arbitration provision, Ms. Carlson last week filed a Complaint in New Jersey Superior Court, Bergen County, asserting claims arising out of and relating to her employment at Fox News. The Complaint alleges that during her employment, Petitioner Roger Ailes, Fox News' Chairman and Chief Executive Officer, sexually harassed her, discriminated against her, and retaliated against her by not renewing her Agreement, purportedly because she had rebuffed his alleged advances and complained. The Complaint pleads only an alleged violation of the New York City Human Rights Law, N.Y.C. Adm. Code § 8-107 (not New Jersey law). (The Complaint is attached as Exhibit B to the Petition).[1]

Ms. Carlson not only improperly filed her public Complaint in the New Jersey Superior Court, as opposed to filing it with the AAA, she has repeatedly violated her confidentiality obligation so that she, her counsel, and their public relations firm (aptly-named Ripp Media) could vilify Mr. Ailes publicly, try this case in the newspapers, on-line and on television, and coerce him

[1] The Complaint was removed from New Jersey Superior Court to the District Court for the District of New Jersey based on diversity of citizenship. (*See* Petition ¶ 12)

to settle. Ms. Carlson's counsel has been on a non-stop tour of major media outlets ever since, making one non-privileged statement after another: articles quoting the Complaint and/or Ms. Carlson or her counsel's outrageous comments have appeared in *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *The New York Daily News*, *People Magazine*, *Politico*, *Daily Beast*, *The Hollywood Reporter*, *New York Magazine*, among others. Moreover, as further evidence of Ms. Carlson's and her counsel's intentional violation of the Agreement's confidentiality provision, they did not reach out to Mr. Ailes before filing the Complaint in the Superior Court. Instead, they struck without warning and blasted their salacious allegations to the media immediately upon filing.

In a transparent attempt to evade the Agreement and her contractual commitment to arbitrate, Ms. Carlson named only Mr. Ailes as a defendant in her Superior Court action, rather than naming Fox News as well. At the same time, however, she could not avoid identifying Mr. Ailes in her Complaint by his corporate title, "the Chairman and CEO of Fox News." (*See* Petition Ex. B at ¶ 3). Such gamesmanship did not permit Ms. Carlson to ignore her contractual obligations, file in Superior Court, and publicly engage in a smear campaign against Mr. Ailes. Her lead counsel, an experienced New Jersey plaintiff-side employment lawyer, knows better. As addressed below, both Second Circuit and Third Circuit law squarely hold that an employee cannot avoid a binding arbitration agreement with her employer by merely naming her employer's corporate officer (such as Chairman and CEO Ailes) as the defendant.

For these reasons and those that follow, Petitioner Ailes respectfully requests that this Court compel the arbitration of Ms. Carlson's claims at the AAA in Manhattan pursuant to the explicit terms of the Agreement and stay all further proceedings in this Court.[2]

[2] Mr. Ailes's motion to compel arbitration filed in the U.S. District Court for the District of New Jersey has been withdrawn. Ms. Carlson had not responded to the motion at the time that it was withdrawn.

ARGUMENT

THIS COURT SHOULD COMPEL ARBITRATION IN ACCORDANCE WITH MS. CARLSON'S EMPLOYMENT AGREEMENT AND SHOULD STAY ALL FURTHER JUDICIAL PROCEEDINGS.

A. Federal Law Requires That Arbitration Provisions Be Enforced.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (the "FAA"), states that a contract provision "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-25 (1991); *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

The FAA, § 4, provides that a "party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition **any** United States district court, which save for such agreement, would have jurisdiction . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." (emphasis added) *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 619 n.3 (1985).

The FAA further provides that when a party files a judicial complaint in violation of an agreement to arbitrate, a federal district court shall stay all judicial proceedings and direct the parties to proceed to arbitration. *Gilmer*, 500 U.S. at 25, citing 9 U.S.C. §§ 3 and 4; *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

The Supreme Court has long instructed that arbitration is strongly favored as a matter of policy and that any ambiguities in the scope of an arbitration clause should be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Thus, a court must compel arbitration "unless it may be said with positive assurance that the

arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers of Amer.*, 475 U.S. 643, 650 (1986).

B. Ms. Carlson's Arbitration Agreement Is Both Applicable and Enforceable.

The arbitration provision in the Agreement here expressly provides that "[a]ny controversy, claim or dispute arising out of or relating to this Agreement or Performer's [Ms. Carlson's] employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the American Arbitration Association then in effect." The language of the Agreement could not be clearer: the Complaint, which on its face involves claims arising out of and relating to Ms. Carlson's employment at Fox News, belongs at the AAA.

Courts uniformly reject Ms. Carlson's transparent tactical strategy of attempting to evade her arbitration agreement by arguing that only the employer, and not the employer's executive, signed the Agreement, and therefore the provision purported does not apply. For example, in *Roby v. Corp. of Lloyd's*, where the plaintiffs argued that the arbitration agreement was not enforceable because defendants' chairpersons were not parties to it, the Second Circuit rejected the argument and instructed:

> Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement. ... **We believe that this [naming of the Chairs] is a distinction without a legal difference. ... If it were otherwise, it would be too easy to circumvent the agreements by naming individuals as defendants instead of the entity Agents themselves.**

Roby, 996 F.2d 1353, 1360 (2d Cir. 1993) (emphasis added); *see also Campaniello Imports Ltd. v. Saporiti Italia S.p.A.*, 117 F. 3d 655, 668-69 (2d Cir. 1997); *Marcus v. Frome*, 275 F. Supp. 2d 496,

504-05 (S.D.N.Y. 2003).[3] Naming Chairman and CEO Ailes as a defendant, and not Fox News, is precisely such a "distinction without a difference."

The Third Circuit shares the Second Circuit's view. It has directed that "[b]ecause a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements." *Pritzker v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 7 F.3d 1110, 1121-22 (3d Cir. 1993) (affirming the District Court's decision to compel arbitration). More recently, the Third Circuit reaffirmed its holding in *Pritzker*, stating: "The *Pritzker* rule – that nonsignatory agents may invoke a valid arbitration agreement entered into by their principal – is well-settled and supported by other decisions of this Court." *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 224 (3d Cir. 2007).

Likewise, the New York and New Jersey state courts reject the tactic of attempting to avoid arbitration by suing a corporate officer, instead of the corporation itself. In New York, as the Appellate Division, First Department explained and the New York Court of Appeals affirmed, the "attempt to distinguish officer and directors from the corporation they represent for the purposes of evading an arbitration provision is contrary to the established policy of this State." *Hirschfield Productions, Inc. v. Mirvish*, 218 A.D.2d 567, 568 (1st Dep't 1995), *aff'd*, 88 N.Y.2d 1054, 1056 (1996). And in *Bleumer v. Parkway Ins.* Co., 277 N.J. Super. 378, 408-13 (Law Div. 1994), the plaintiff argued that he should be permitted to sue his employer's chief financial officer in court because the chief financial officer was not a signatory to his arbitration agreement with his employer. Relying on *Pritzker* and *Roby*, the New Jersey court granted the defendants' motion to compel arbitration and stayed any further proceedings in court. *Id.* at 413.

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[3] Complaints asserting violations of the New York City Human Rights Law, which are subject to arbitration agreements, but are filed in court, are uniformly compelled to arbitration. *See, e.g., Thomas v. Public Storage, Inc.*, 957 F. Supp. 2d 496, 497 (S.D.N.Y. 2013).

In sum, Ms. Carlson's ploy of filing against Mr. Ailes alone in the Superior Court of New Jersey to justify her shameless publicity campaign should not be countenanced. All applicable law requires that the Complaint be compelled to arbitration.

CONCLUSION

Ms. Carlson's attempt to game the system so as to avoid the arbitration provision for her completely baseless allegations is contrary to law and unsupported by the facts. The arbitration provision in the Agreement required Ms. Carlson to file her Complaint, which squarely relates to her employment at Fox News, with the AAA in New York City. There is no legal basis upon which she can rightfully assert that she was entitled to sue Petitioner Ailes in court and sully his reputation in public. Mr. Ailes's Petition to compel arbitration and stay all judicial proceedings should be granted in all respects.

Dated: July 15, 2016

Respectfully submitted,

EPSTEIN BECKER & GREEN, P.C.

/s/ David W. Garland
Ronald M. Green
David W. Garland
Barry Asen
250 Park Avenue
New York, New York 10177
Telephone: (212) 351-4500

QUINN EMANUEL URQUHART & SULLIVAN, LLP

John B. Quinn (*pro hac vice* motion forthcoming)
Susan R. Estrich (*pro hac vice* motion forthcoming)
James R. Asperger
865 S. Figueroa St., 10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000

Attorneys for Petitioner Roger Ailes

EXHIBIT 3

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Martin S. Hyman, Esq.
Matthew C. Daly, Esq.
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New York, New York 10017
(212) 907-7300
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

GRETCHEN CARLSON,	:	Civil Action No.: 2:16-cv-04138-JLL-JAD
Plaintiff,	:	
v.	:	Civil Action
ROGER AILES,	:	
Defendant.	:	**AMENDED COMPLAINT, REQUEST FOR DECLARATORY JUDGMENT AND DEMAND FOR JURY TRIAL**

Plaintiff Gretchen Carlson ("Carlson" or "plaintiff"), by her undersigned attorneys, says:

PARTIES

1. Carlson is a resident of Connecticut who was employed by Fox News in New York City as the host of the afternoon program "The Real Story with Gretchen Carlson."

2. Carlson is a graduate of Stanford University, a former Miss America (1989), an accomplished concert violinist, a best-selling author, an award-winning journalist and a Trustee of

the March of Dimes. Carlson has had a successful career in television as a reporter, commentator and program host.

3. Defendant Roger Ailes ("Ailes") is a resident of Cresskill, New Jersey. Ailes is the Chairman and CEO of Fox News.

NATURE OF THE CASE

4. This case arises from violations by Ailes of the New York City Human Rights Law, New York City Administrative Code § 8-107. Ailes has unlawfully retaliated against Carlson and sabotaged her career because she refused his sexual advances and complained about severe and pervasive sexual harassment.

5. Ailes retaliated against Carlson in various ways, as described below, including by terminating her employment on June 23, 2016, and, prior thereto, by, among other things, ostracizing, marginalizing and shunning her after making clear to her that these "problems" would not have existed, and could be solved, if she had a sexual relationship with him.

6. When Carlson met with Ailes to discuss the discriminatory treatment to which she was being subjected, Ailes stated: "I think you and I should have had a sexual relationship a long time ago and then you'd be good and better and I'd be good and better," adding that "sometimes problems are easier to solve" that way. Carlson rebuffed Ailes' sexual demands at that meeting, and nine months later, Ailes ended her career at Fox News.

7. As a direct and proximate result of Carlson's refusing Ailes' sexual advances, and in retaliation for Carlson's complaints about discrimination and harassment, Ailes terminated her employment, causing her significant economic, emotional and professional harm.

COUNT ONE

8. After working for five years as a news correspondent and co-host of "The Saturday Early Show" on CBS News, Carlson joined Fox News in 2005.

9. Carlson was a conscientious, hard-working, and successful journalist/reporter/host at Fox News for eleven years during which she interviewed numerous political leaders and celebrities, including Barack Obama, Hillary Clinton, Henry Kissinger, Donald Trump, George W. Bush, Laura Bush, Condoleezza Rice, Tony Blair, Colin Powell and Madeline Albright. Notwithstanding her strong performance and tireless work ethic, however, Ailes denied Carlson fair compensation, desirable assignments and other career-enhancing opportunities in retaliation for her complaints of harassment and discrimination and because she rejected his sexual advances.

10. For seven and one-half years, Carlson was a popular co-host of the "Fox & Friends" morning show, which achieved higher ratings than any other cable news morning show.

11. On or about September 3, 2009, Carlson complained to her supervisor that one of her co-hosts on Fox & Friends, Steve Doocy, had created a hostile work environment by regularly treating her in a sexist and condescending way, including by putting his hand on her and pulling down her arm to shush her during a live telecast.

12. Doocy engaged in a pattern and practice of severe and pervasive sexual harassment of Carlson, including, but not limited to, mocking her during commercial breaks, shunning her off air, refusing to engage with her on air, belittling her contributions to the show, and generally attempting to put her in her place by refusing to accept and treat her as an intelligent and insightful female journalist rather than a blond female prop.

13. After learning of Carlson's complaints, Ailes responded by calling Carlson a "man hater" and "killer" and telling her that she needed to learn to "get along with the boys."

14. Ailes retaliated against Carlson and damaged her career by, among other things, assigning her fewer of the hard-hitting political interviews that are coveted by political correspondents (notwithstanding that she had received acclaim for her political interviews), removing her from her regular once-a-week appearances on the highly-rated "Culture Warrior" segment of "The O'Reilly Factor," reducing her appearances during the 6:00 a.m. hour (where she had generated increased ratings), and directing that she not be showcased at all.

15. In doing these things, Ailes did not act in the interests of Fox News, but instead pursued a highly personal agenda.

16. In 2013, in further retaliation for her refusal to accede to sexual harassment and retaliation, Ailes fired Carlson from "Fox & Friends."

17. Ailes reassigned Carlson to the 2 p.m. to 3 p.m. EST time slot, substantially reduced her compensation (even though, as a solo program host, her workload increased), and refused to provide her with anywhere near the level of network media support and promotion provided to other Fox News hosts who did not complain about harassment and rebuff his sexual advances.

18. Despite the lack of promotional or other network support, Carlson continued to work diligently and her show achieved success by delivering solid and consistent ratings increases up until the day she was terminated. In fact, Carlson's show consistently ranked number one among cable news programs in her time slot and achieved its highest Nielson ratings ever in the final quarter of 2015 and the first quarter of 2016, with ratings in her final month of June 2016 up 33% in total viewers year to date. This success shows that there was no legitimate business reason for terminating Ms. Carlson.

19. Unable to deny Carlson's on-air skills, Ailes admitted that she is smart, well-prepared and one of the best interviewers at Fox News.

20. On those occasions when he spoke directly with Carlson, Ailes injected sexual and/or sexist comments and innuendo into their conversations by, among other things:

a. Claiming that Carlson saw everything as if it "only rains on women" and admonishing her to stop worrying about being treated equally and getting "offended so God damn easy about everything."

b. Describing Carlson as a "man hater" and a "killer" who tried to "show up the boys" on Fox & Friends.

c. Ogling Carlson in his office and asking her to turn around so he could view her posterior.

d. Commenting that certain outfits enhanced Carlson's figure and urging her to wear them every day.

e. Commenting repeatedly about Carlson's legs.

f. Lamenting that marriage was "boring," "hard" and "not much fun."

g. Wondering aloud how anyone could be married to Carlson, while making sexual advances by various means, including by stating that if he could choose one person to be stranded with on a desert island, she would be that person.

h. Stating "I'm sure you [Carlson] can do sweet nothings when you want to."

i. Asking Carlson how she felt about him, followed by: "Do you understand what I'm saying to you?"

j. Boasting to other attendees (at an event where Carlson walked over to greet him) that he always stays seated when a woman walks over to him so she has to "bend over" to say hello.

k. Embarrassing Ms. Carlson by stating to others in her presence that he had "slept" with three former Miss Americas but not with her.

l. Telling Carlson that she was "sexy," but "too much hard work."

21. In September 2015, Carlson again sought to bring to an end the retaliatory and discriminatory treatment she had endured by asking to meet with Ailes.

22. During that meeting in Ailes' office on September 16, 2015, Ailes stated to Carlson: "I think you and I should have had a sexual relationship a long time ago and then you'd be good and better and I'd be good and better," adding that "sometimes problems are easier to solve" that way.

23. Prior to and during that meeting, Ailes had made it clear to Carlson that he had the power to make anything happen for her if she listened to him and "underst[ood]" what he was saying.

24. Carlson refused to engage in a sexual relationship or participate in sexual banter with Ailes so Ailes retaliated.

25. In further retaliation for her opposition to sexual harassment and her unwillingness to have a sexual relationship with him, Ailes consistently denied plaintiff various opportunities that were afforded to other Fox News hosts, by, among other things:

a. Reducing her compensation to a level that was greatly disproportionate to that of similarly-situated male employees and others who had not complained about discrimination and harassment;

b. severely curtailing her appearances as a guest commentator on prime time shows, as she had regularly done in the past;

c. blocking her from appearing as a substitute host on prime time or daytime panel shows;

d. refusing to assign her to cover high-visibility events or conduct important interviews;

e. refusing to give her social media, public relations and advertising support anywhere close to the support given other hosts who did not complain about discrimination and harassment;

f. shunning, ostracizing and humiliating her, both publicly and privately; and

g. decreeing that her contract not be renewed on June 23, 2016.

26. Ailes undertook these discriminatory and retaliatory actions in his individual capacity and for personal and unlawful purposes. His retaliation against Carlson was outside the scope of his authority, employment and agency at Fox News, which has adopted and professes to support anti-discrimination, anti-harassment and anti-retaliation policies.

27. By and through his creation of a discriminatory, hostile and harassing work environment, his demands for sexual favors, and his retaliation against Carlson for her objections to discrimination and retaliation, Ailes has violated the New York City Human Rights Law.

28. As a direct and proximate result of Ailes' harassing, discriminatory and retaliatory treatment of her, plaintiff has suffered, and continues to suffer, adverse job consequences, including economic damages, pain, mental anguish, loss of enjoyment of life and damage to her reputation and career.

COUNT TWO

29. Plaintiff repeats and realleges the previous allegations as if set forth at length herein.

30. On July 8, 2016, Defendant Ailes invoked the jurisdiction of the United States District Court for the District of New Jersey by filing a removal petition and a motion to compel plaintiff to arbitrate her harassment and retaliation claims against Defendant Ailes. Since then, Defendant Ailes has continued to invoke the jurisdiction of this Court by filing additional motions.

31. Plaintiff never agreed to arbitrate any claims with Defendant Ailes.

32. Defendant Ailes is not a party to any arbitration agreement with Plaintiff.

33. The arbitration agreement to which Defendant Ailes claims to be a party specifically omits him as a party or a beneficiary thereof.

34. By and through his actions, Defendant Ailes seeks to deprive Plaintiff Carlson of her statutory and Constitutional rights to a jury trial.

WHEREFORE:

A. Plaintiff Carlson seeks a Declaratory Judgment that she has not waived her right to a jury trial and that none of Plaintiff's claims are subject to a valid or applicable arbitration agreement.

Additionally, Plaintiff demands judgment against Ailes as follows:

B. Compensatory damages, including lost compensation, damage to career path, damage to reputation and pain and suffering damages;

C. Damages for mental anguish;

D. Reimbursement for negative tax consequences resulting from a jury verdict;

E. Punitive damages;

F. Attorneys' fees and costs of suit; and

G. Such other relief as the court may deem equitable and just.

SMITH MULLIN, P.C.
Attorneys for Plaintiff

BY: _____
NANCY ERIKA SMITH

Dated: July 18, 2016

JURY DEMAND

Plaintiff Gretchen Carlson demands trial by jury on all issues, including whether any of her harassment and retaliation claims are subject to a valid and applicable arbitration agreement.

SMITH MULLIN, P.C.
Attorneys for Plaintiff

BY: _____
NANCY ERIKA SMITH

Dated: July 18, 2016

CERTIFICATION

Pursuant to F.R.C.P. 11.2, counsel for Plaintiff hereby certifies that to her knowledge, this matter is the subject of another action pending in the United States District Court for the Southern District of New York, *Roger Ailes v. Gretchen Carlson*, Civil Action No. 16-cv-5671.

SMITH MULLIN, P.C.
Attorneys for Plaintiff

BY: _____
NANCY ERIKA SMITH

Dated: July 18, 2016

EXHIBIT 4

1211 Avenue of the Americas, 2nd Floor
New York, New York 10036

June 19, 2013

Ms. Gretchen Carlson
c/o IMG Talent Agency LLC
50 Main Street, Suite 1625
White Plains, New York 10606
Attention: Ms. Sharon Chang

Dear Ms. Carlson:

The following, when signed by Gretchen Carlson ("Performer") and Fox News Network L.L.C. ("Fox"), together with the Standard Terms and Conditions and The Fox News Employee Handbook, attached hereto as Exhibits A and B respectively, and made a part hereof by this reference (collectively hereafter the "Agreement"), will constitute the understanding between the parties relative to Performer's employment as an anchor/co-anchor, host/co-host (including occasional substitute-anchor/host on Programs, at Fox's request, from time to time during the Term), occasional general assignment news reporter, news correspondent, and in any other related on-air capacity as Fox may require in connection with the Fox News Channel, the Fox Business Network, news programs, news services, internet services, news feeds, news magazine programs, election specials, public affairs programs, documentaries, radio programs, special programs, program series, or other programming produced, in whole or in part, by Fox or by any of its affiliated companies. All of the programming described in the preceding sentence is hereinafter collectively referred to as the "Programs."

1. SERVICES: Performer will be based in New York City and will render her services hereunder to the best of Performer's abilities, and in accordance with Fox's scheduling and production requirements, as subject at all times to Fox's direction and control. Beginning on or about September 16, 2013 (or the date Performer begins anchoring the daytime Program referenced in this paragraph 1), Performer's primary services will be as a solo anchor of a regularly scheduled Program[1] which will air live Mondays through Fridays between noon and 4pm Eastern Time. Between June 23, 2013 (i.e. the start of the Term hereof) and September 16, 2013 (or the date Performer begins anchoring the daytime Program referenced in this paragraph 1), Performer shall continue to co-host "Fox and Friends" unless Fox and Performer agree otherwise.

2. TERM: The term ("Term") of this Agreement shall commence on June 23, 2013 and shall continue for three consecutive years through and including June 23, 2016, unless sooner terminated as herein provided. Each one-year period of the Term is sometimes also referred to as a Contract Year.

[1] Fox and Performer shall mutually agree on the title of said Program which will contain Performer's name.

15. GENERAL:

15.1 This Agreement constitutes the entire agreement and understanding between the parties, and it supersedes and replaces all prior communications, negotiations and agreements, whether written or oral. This Agreement cannot be changed, modified, amended or supplemented, except in a subsequent writing that contains the handwritten signatures of the parties. Subsequent e-mails with typed names and/or signature blocks are not sufficient for purposes of changing, modifying, amending or supplementing this Agreement.

15.2. Each party has cooperated in the drafting and preparation of this Agreement. Hence, in any construction or interpretation of this Agreement, the same shall not be construed against any party on the basis that the party was the drafter.

15.3. This Agreement shall be governed according to the laws of the State of New York without regard to conflict of laws principles.

If the foregoing is in accordance with Performer's understanding, kindly so indicate by signing below.

Very truly yours,

FOX NEWS NETWORK L.L.C.

By: Mark Kramer

Title: CFO

Date: 7/2/13

ACCEPTED AND AGREED TO:

By: Gretchen Carlson
GRETCHEN CARLSON

Date Executed: 4/20/13

Exhibit A

STANDARD TERMS AND CONDITIONS

1. **MAIL**

1.1. Unless marked personal and confidential, Fox may open and answer mail addressed to Performer relating to the Programs, provided that all such mail relating to Performer or intended for Performer, or copies thereof, shall be turned over to Performer within a reasonable length of time. Performer shall turn over to Fox forthwith any mail addressed to Performer relative to the Programs or the operation of the applicable Fox facility.

2. **EXCLUSIVITY**

2.1. Performer's services shall be completely exclusive to Fox, unless otherwise specifically set forth. Accordingly, during the Term, Performer shall not:

2.1.1. Render other television services of any type whatsoever, whether free, over-the-air, basic cable or pay cable; or

2.1.2. Engage in any activity that would conflict or interfere with the performance of Performer's services hereunder, or would otherwise be prejudicial to Fox's business interests; or

2.1.3. Permit or authorize the use of Performer's real or stage name, voice, portrait, picture or likeness, or the use of any endorsement or testimonial in advertising or publicizing any institution, product or service; or

2.1.4. Engage in any activity whatsoever relating to the sale, advertising or promotion of any articles or materials used on the Program.

2.2. Without limiting the generality of any of the foregoing, during the Term, Performer will not, directly or indirectly:

2.2.1. have an interest of 1% or more in a corporation, firm, trust or association which is in competition with Fox;

2.2.2. own or have any beneficial interest in any company, business or interest where to do so will conflict with the full and faithful performance of Performer's duties for Fox, specifically including, without being limited to, any companies which produce and/or distribute feature or syndicated films, records, cartoons, radio or television programs, or manage or represent talent (other than companies whose stock is listed on a national stock exchange); or

all claims, damages, liabilities, costs and expenses (including reasonable attorneys' fees) arising out of, and finally determined to have resulted from the sole, but willful or grossly negligent acts of Performer in connection with (a) the use of any Materials not required of Performer, but furnished by Performer hereunder, and/or the use of any Materials not approved in advance by Fox, (b) any breach or alleged breach by Performer of any warranty or agreement made by Performer hereunder, or (c) any act done or words spoken by Performer in connection with the production, broadcast or dissemination of any Programs, provided same was not approved by Fox in advance.

5.2. Fox shall similarly indemnify and hold Performer harmless from and against any and all claims, damages, liabilities, costs and expenses, including reasonable attorneys' fees, arising out of the use of any materials furnished or approved by Fox in connection with the broadcast of any Programs.

5.3. Each party will give the other prompt written notice of any such claims and/or legal proceedings and shall cooperate with each other on all matters covered by this paragraph, which shall survive the expiration or termination of this Agreement.

6. INTERNET RESTRICTIONS:

Performer shall not participate in or publish a web log (i.e. a "blog"), post on internet message boards or chat rooms, maintain a website or publish any other similar content on the internet or through any other form of communication or new media (including iPods), whether now known or hereafter devised, via personal computer, personal email, instant messenger, Blackberry, PDA, cellular telephone or other wireless or online method, or any other method whether now known or hereafter devised, without Fox's prior permission in each instance. Notwithstanding the foregoing, Performer shall be permitted to participate in any website which is owned by The Miss America organizations, provided she gives Fox prior notice of her participation in each instance. This paragraph 6 does not apply to any and all social media which Performer uses in connection with her services for Fox, including Facebook, Twitter, Instagram, etc., and any other social media approved by Fox, whether now known or hereafter devised.

7. ARBITRATION

Any controversy, claim or dispute arising out of or relating to this Agreement or Performer's employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association then in effect. The arbitrators shall issue a full written opinion setting forth the reasons for their decisions. Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence. Judgment may be entered on the arbitrators' award in any court having jurisdiction; however, all papers filed with the court either in support of or in opposition to the arbitrators' decision shall be filed under seal. Breach of confidentiality by any party shall be considered to be a material breach of this Agreement.

stage name, recorded voice, biographical data, portrait, likeness and/or picture for advertising purposes and/or purposes of trade in connection with the Programs and in connection with Fox's institutions, products and services and the institutions, products and services of any sponsor of the Programs, provided that no such use shall constitute an endorsement or testimonial by Performer for any institution, product or service.

13. FORCE MAJEURE

If Fox's normal business operations or the production or dissemination of Programs is materially hampered or otherwise interfered with by reason of an event of Force Majeure or other disruptive event which is beyond Fox's control, then Fox shall have the right upon notice to Performer to suspend the rendition of services by Performer and Fox shall have no obligation to pay Performer during such Force Majeure. As used herein "Force Majeure" shall include but not be limited to events beyond the control of Fox, such as a labor dispute, strike, acts of God (including weather, governmental action, regulations or decrees). In the event of a Force Majeure which continues for 30 consecutive days, Fox and Performer shall each have the right to terminate this Agreement upon 30 days prior written notice thereof provided the Force Majeure is still in effect upon the effective date of termination. If upon receipt of Performer's notice of termination Fox resumes payment of compensation to Performer, Performer's notice of termination shall be deemed null and void, and this Agreement shall continue in full force and effect as though no notice of termination had been given. A "Force Majeure" event does not mean solely an economic or financial downturn in the business of Fox.

14. PERFORMER INCAPACITY

Subject to standard Fox employment policies, including without limitation policies regarding short term and long term disability (if Performer opts for long term disability), if Performer is prevented from or materially interfered in the rendition of services for two consecutive weeks or four weeks in the aggregate in any Contract Year, by reason of illness, physical or mental disability or alteration in Performer's appearance or impairment of voice or other cause which would make Performer's failure to render services excusable at law, Fox shall have no obligation of payment hereunder except that Fox shall pay Performer for up to two weeks during each Contract Year.

15. GENERAL

15.1. This Agreement is non-assignable by Performer and any purported assignment by Performer shall be void. This Agreement shall inure to the benefit of Fox's successors, assignees, and Affiliates, and Fox and any subsequent assignee may freely assign this Agreement, in whole or in part, to any party, provided that such party assumes and agrees in writing to keep and perform all of the executory obligations of Fox hereunder. As used in this Agreement, the term "Affiliate" shall mean any company controlling, controlled by or under common control with Fox.

EXHIBIT 5

DEADLINE | HOLLYWOOD

Roger Ailes: Gretchen Carlson Lawsuit "Retaliation" For "Network's Decision Not To Renew Her Contract"

By Lisa de Moraes *on* Jul 6, 2016 4:08 pm

Associated Press

Fox News boss Roger Ailes has issued a statement saying claims against him made by former Fox News Channel host Grethen Carlson are untrue. This morning, his former on-air host filed a lawsuit against him claiming he gave her the hook after she refused his sexual advances. His statement:
"Gretchen Carlson's allegations are false. This is a retaliatory suit for the network's decision not to renew her contract, which was due to the fact that her disappointingly low ratings were dragging down the afternoon lineup. When Fox News did not commence any negotiations to renew her contract, Ms. Carlson became aware that her career with the network was likely over and conveniently began to pursue a lawsuit. Ironically, FOX News provided her with more on-air opportunities over her 11 year tenure than any other employer in the industry, for which she thanked me in her recent book. This defamatory lawsuit is not only offensive, it is wholly without merit and will be defended vigorously."

Ailes statement came around the same time Fox News parent 21st Century Fox issued a statement saying it has launched an internal review of Carlson's allegations. Both statements came about six hours after word broke Carlson had filed a lawsuit against Ailes, in which she also made allegations about her former *Fox & Friends* co-host Steve Doocy. "The Company has seen the allegations against Mr. Ailes and Mr. Doocy," 21st Century Fox said in the statement. "We take these matters seriously. While we have full confidence in Mr. Ailes and Mr. Doocy, who have served the company brilliantly for over two decades, we have commenced an internal review of the matter."

In June, Carlson's *Real Story* clocked 186K news demo viewers, to CNN's 190K in the same timeslot with *Newsroom*. Among overall viewers Carlson's 1.22M whomped CNN's 789K.

EXHIBIT 6

Daily Mail .com

Wednesday, Jul 13th 2016 2PM 86°F 5PM 84°F 5-Day Forecast

Former model alleges Roger Ailes took out his genitals and told her to perform oral sex as SIX women come forward with harassment claims in wake of Gretchen Carlson suit

- **Six women have come forward claiming they were sexually harassed by Roger Ailes including two who were teenagers at the time**
- **Only two of the women revealed their names with the other four choosing to keep their identity a secret**
- **These six incidents all happened before Ailes took over as CEO of Fox News in 1996**
- **Ailes and his legal team filed papers in federal court Friday arguing that Gretchen Carlson was in breach of contract when she filed her lawsuit**
- **They are asking that the case be moved to arbitration, citing an 'arbitration provision' in Carlson's 'multi-million dollar employment agreement'**
- **The former Miss America, 50, alleges that she was fired after 11 years with the network when she refused to sleep with Ailes**
- **The network's parent company, 21st Century Fox, said that it has 'full confidence' in Ailes, but has 'commenced an internal review'**

By Chris Spargo For Dailymail.com

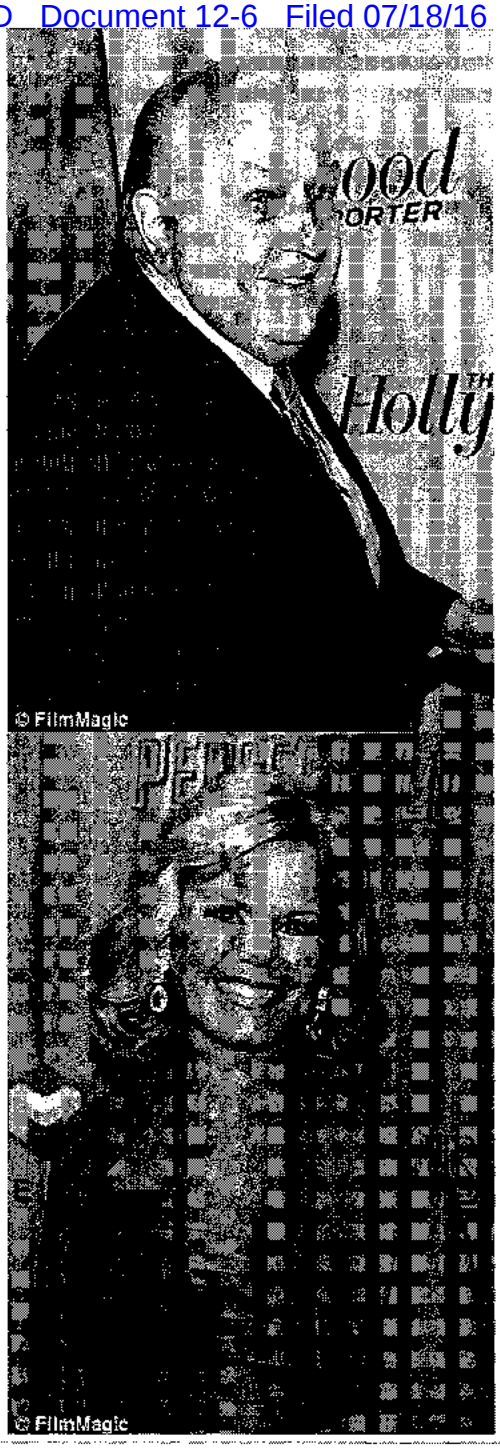
Published: 10:08 EST, 9 July 2016 | Updated: 15:19 EST, 9 July 2016

Gretchen Carlson is not alone in her allegations of sexual harassment against Roger Ailes as six women have now come forward claiming the Fox News CEO made unwanted sexual advances towards them, including some who were only teenagers at the time.

Daily Intelligencer spoke with the women about their alleged encounters with Ailes, four of whom decided to withhold their names citing shame and fear of retribution as their reasons for not revealing their identity.

Three of the women were models at the time of alleged incident, one was a TV producer, one was a media consultant and one was a Republican National Committee field adviser.

Scroll down for video



Firing back: Roger Ailes (left) and his legal team filed papers in federal court Friday arguing that Gretchen Carlson (right) was in breach of contract when she filed her lawsuit

Claim: The popular host of The Real Story with Gretchen Carlson (above with Miss America 2015 Kira Kazantsev in 2014) filed a complaint on Wednesday alleging that she was let go after 11 years with the network for refusing to sleep with Ailes

One of the models, whose name has been withheld, claims that she met Ailes on the set of The Mike Douglas Show in 1967 when she went to try and get a walk-on part. Ailes was the executive producer of the program at the time.

She alleges that she arrived late in the evening as they were closing up and Ailes took her to his office and locked the door.

'He reclined on a couch in a seating area under a map that had flags of all the cities they were syndicated in,' said the woman, identified as Susan.

'He proceeded to pull down his pants and very gingerly pull out his genitals and said, "Kiss them." And they were red like raw hamburger.'

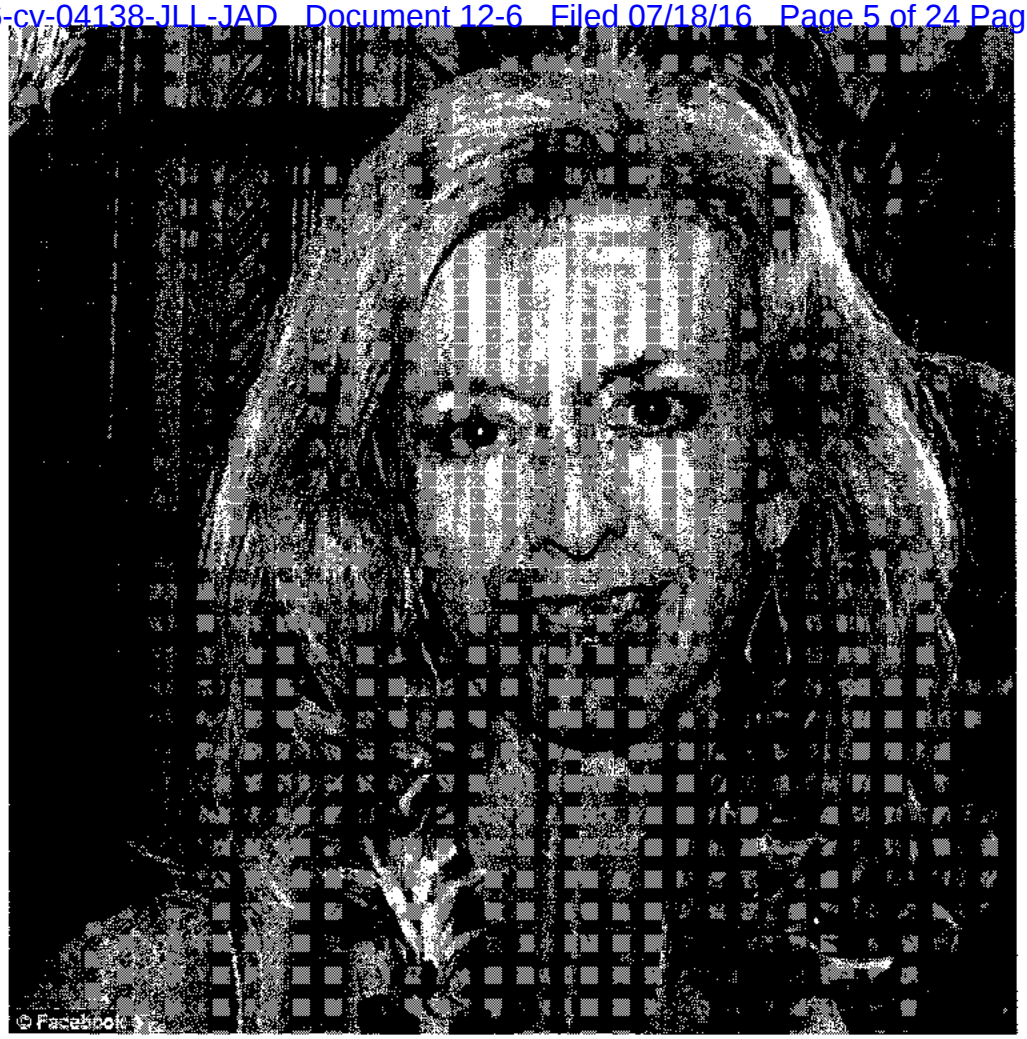
Susan, now 66, claims she refused his offer and ran around the office until Ailes 'finally pulled up his trousers.' He then allegedly pulled out a tape recorder and said: 'Don't tell anybody about this. I've got it all on tape.'

'I think he knew I was sixteen,' said Susan.

Barry Asen of Epstein, Becker and Green, who is representing Ailes, said in a statement: 'It has become obvious that Ms. Carlson and her lawyer are desperately attempting to litigate this in the press because they have no legal case to argue.

'The latest allegations, all 30 to 50 years old, are false.'

The accusations made by these women also all occurred well before Ailes was at Fox News.



Sharing her story: Kelly Boyle (above) alleges that Roger Ailes made unwanted sexual advances towards her in 1989 when she was 29

Kellie Boyle claims that Ailes propositioned her back in 1989 when she was 29 after her husband, who worked at CNBC, introduced the pair.

After that first meeting Boyle, now 54, claims that Ailes invited her to his office in New York City and then out to dinner in Washington DC when the two realized they would be in the capitol at the same time.

It was after that dinner that Boyle claims Ailes propositioned her, allegedly implying that if she went along it would be a benefit to her career.

Boyle claims she was with Ailes' in his car when he said to her: 'You know if you want to play with the big boys, you have to lay with the big boys.'

He then allegedly began listing women he had been with, referring to the women who are with men in the media and politics worlds as their 'friend'.

Boyle claims she then asked: 'Would I have to be friends with anybody else?'

Ailes allegedly responded by saying: 'Well you might have to give a blowjob every once in a while.'

When she told him she would have to think about, Ailes allegedly said: 'No, if you don't do it now, you know that means you won't.'

Boyle said that Ailes called her a few days later and asked: 'Have you changed your mind yet?'

That is when she claims she told Ailes how much she loved her husband and was committed to their relationship.

She did not hear from him again but claims that later on a high-ranking friend in the Republican National Committee said: 'Word went out you weren't to be hired.'

Marsha Callahan was another model who claims she met Ailes around 1967 while doing an episode of The Mike Douglas.

'I recall very clearly, he said he'd put me on the show but I needed to go to bed with him,' said Callahan.

'I was a really shy girl, but I was a little cheeky so I said, "Oh yeah, you and who else?" And he said, "Only me and a few of my select friends."'

Callahan, now 73, claims she eventually turned him down, and that he later ignored her when they saw one another in passing on set.

Jane was an actress hoping to break into broadcasting when she met Ailes in 1982 at the age of 30 she claims, going to his office to tape an audition segment with him.

He then allegedly locked the door and made Jane, now 62, change her clothes.

'He pulled out a garter belt and stockings and told me to put them on. I was very nervous; I didn't know what to do,' claims Jane.

'He was standing there and I put them on. He wanted me to model them for him.

'After that, something sexual took place, but I blocked it out of my mind. I don't know if I engaged with him orally or he engaged with himself.

'I felt I was being used for his sexual satisfaction. I felt very threatened.'

Diane, a 69-year-old media consultant who is withholding her name, also claims that she met Ailes when she and some friends from her modelling agency were sent down to audition for a spot on The Mike Douglas Show in 1965 or 66 when she was still a teenager.

The girls were taken in one at a time to speak with Ailes claims Diane.

'When my turn came I went in and he didn't waste any time. He grabbed me and had his hands on me and he forced me to kiss him,' claims Diane.

'When I recoiled he said, "Well, you know no girls get a job here unless they're cooperative." I just pushed him away and ran out of there.'

Pat, a 65-year-old former TV producer, said she met Ailes in 1975 during an interview at his Central Park South apartment.

'I don't remember his exact words, but his message was: If you want to make it in New York City in the TV business, you're going to have to fuck me, and you're going to do that with anyone I tell you to,' claims Pat of her interview with Ailes.

'I was afraid he was going to pin me down. He was a big guy and I'm not big at all. He could have overpowered me. I remember running out of that apartment like my hair was on fire and standing on the sidewalk crying, thinking, "What's that guy think I was, a prostitute?"'

Carlson filed a complaint in the Superior Court of New Jersey on Wednesday alleging that she was let go on June 23 after 11 years with the network for refusing to sleep with Ailes.

Carlson wrote in her court filing about a conversation she had with Ailes last September in which he allegedly said to her: 'I think you and I should have had a sexual relationship a long time ago and then you'd be good and better and I'd be good and better.'

Ailes has denied her claims.

Carlson's lawyers said in a statement on Saturday shortly after the article about these women was published: 'Yesterday in a statement to the press ("litigating in the press"), an Ailes spokesperson challenged Gretchen's lawyers to come forward with other victims of Ailes' sexual harassment to speak on the record.

'Today, six brave women voluntarily spoke out to New York Magazine detailing their traumatic sexual harassment by Ailes. We are hearing from others.

'Then, Barry Asen, Ailes' lawyer, accused Gretchen of "litigating in the press" and, without any investigation, within 3 hours, claimed that the allegations are false. How does he know that?

'Women have the right to speak out -- whether Ailes likes it or not -- even about trauma they endured years ago and that haunts them to this day. Calling these women liars because they chose to speak out is despicable. Bullying and threats will not silence these brave women.'

The room where it allegedly happened: Three of the six women who came forward claim they received Ailes' unwanted sexual advances while at The Mike Douglas Show

Ailes and his lawyers claim that Carlson was in breach of her contract when she made the decision to publicly file a sexual harassment suit against her former Fox News boss, and are hoping to have the case moved to arbitration.

In court documents filed late Friday in the United States District Court for the District of New Jersey, Ailes' legal team points to a clause in the 'multi-million dollar employment agreement' that Carlson signed in 2013 which contained an 'arbitration provision.'

That actual clause is included in the filing and states: 'Any controversy, claim or dispute arising out of or relating to this Agreement or Performer's [Plaintiff's] employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association ["AAA"] then in effect.'

It then further stipulates: 'Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence.'

The filing also takes direct aim at Carlson and her legal team, accusing Carlson of attempting to try the case in the press,

'Plaintiff improperly filed her public Complaint with the Superior Court, as opposed to filing it with the AAA and adhering to her contractually-required confidentiality obligation, so that her counsel could tar Mr. Ailes's reputation publicly, try this case in the media press, and coerce him to settle,' reads the filing submitted by Ailes' attorney.

The filing goes on to say about Carlson's legal team: 'Plaintiff's counsel has been on a non-stop tour of major media outlets ever since, making one false and defamatory statement after another.'

MEMORANDUM

TO: Bill Shine
FROM: Roger Ailes RA
DATE: September 23, 2015
RE: Gretchen Carlson

I met with Gretchen and I think we'll give it another chance. Let me know how the promo schedule has changed. Gretchen wants her slot back on Culture Warrior with Bill O'Reilly. Take his temperature on it and also check her ratings on it. She claims her ratings went up whenever she was on. We might as well put her on Fox & Friends for a promo segment on her show to see if it works. Ask Petterson to keep a close eye on it. See if there's a way to use her on radio also.

Memo: Days after their meeting Ailes sent a memo to head of programming Bill Shine about giving Carlson 'another chance'

Asen, who filed the documents on Friday, said in a statement: 'Gretchen Carlson had an arbitration clause in her contract, stating that any employment dispute regarding her employment at Fox News must be done via confidential arbitration.

'Because Ms. Carlson's lawsuit violated the arbitration clause, a motion was filed in federal court to have the case arbitrated. The federal court is the proper court to decide the motion because Ms. Carlson's primary residence is in Connecticut and Mr. Ailes' primary residence is in New York.'

Nancy Erika Smith and Martin Hyman, who are representing Carlson in the case, also released a statement on Friday after this most recent filing in the case.

'Roger Ailes is trying to force this case into a secret arbitration proceeding. Gretchen never agreed to arbitrate anything with Mr. Ailes and the contract on which he relies does not mention him and is not signed by him,' they said in a statement.

'Gretchen intends to fight for her right to a public jury trial, a right protected by the discrimination laws and our Constitution. It is disturbing that the head of a large media company would try to silence the press and hide from the public a matter of such importance.'

The filing came one day after Fox News released four personal notes that Carlson wrote to Ailes in the months after she alleges he asked her to sleep with him, including one just days after that meeting.

In the notes Carlson pleads with Ailes to be given more air time and for the chance to fill in for hosts Megyn Kelly and Greta Van Susteren on their programs.

'I'd love to stay at Fox & show you everything that I can do,' wrote Carlson in a letter sent on September 21, just after she alleges Ailes propositioned her.

She then suggested that she and Fox News correspondent Bill Hemmer do a 7pm show for the network.

On November 11, she sent Ailes a note after Fox Business Network hosted the Republican debate, writing: 'Maybe for the next debate you could incorporate my experience, smarts & wit - on stage - or doing the FoxNews.com analysis after.'

She closed the note by writing: 'I know I wouldn't let you down.'

In her October 9 letter to Ailes, Carlson broached the subject of filling in for other hosts on the network, writing: 'I hope you'll reconsider me filling in for Greta or Megyn. Last [night] Sandra Smith filled in for MK. Why not me?'

She signed the note with a smiley face.

A few weeks later, on October 27, she sent Ailes to let him know she would be appearing in front of Congress, closing pout the letter by writing: 'I have a waiting list for high level staff to come see me which is unprecedented. Thanks as always for your support.'

Days after their meeting Ailes also sent a memo to head of programming Bill Shine about giving Carlson 'another chance,' and to look into having her back on The O'Reilly Factor, the network's highest rated show.

10/9/15

Hi Roger —

I'm including a few prime time special ideas as you requested. Let me know what you think.

Also – I hope you'll reconsider me filling in for Greta or Megyn. Last wk Sandra Smith filled in for MK. Why not me?

:)

Thanks,

Gretchen

FOX NEWS

10/2[illegible]/15

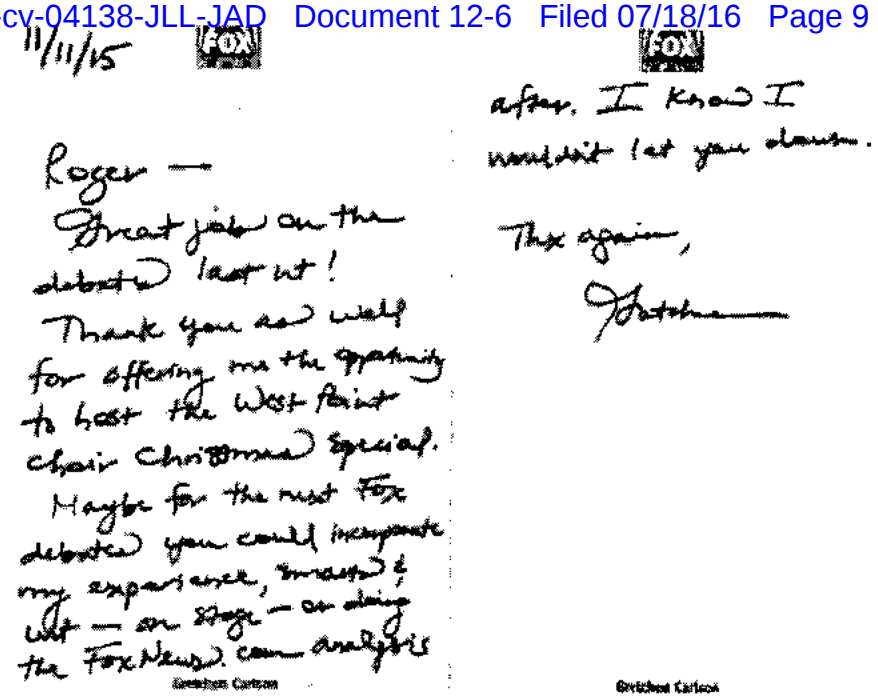
Hi Roger — Hope you are great!

Wanted to let you know I was invited to speak to members of Congress by Rep. Cathy McMorris Rodgers for the 1st ever leadership conference of inspirational women. It's bi-partisan — I am doing it tomorrow — & I have a waiting list for high level staff to come. So the cause is [illegible].

Thanks as always for your support

Gretchen

On the air: Carlson asks Ailes for more airtime and if she might be able to fill in for hosts Megyn Kelly and Greta Von Susteren (left)


11/11/15

Roger —
Great job on the debate last night!
Thank you and Wally for offering me the opportunity to host the West Point Chair Christmas special.
Maybe for the next Fox debate you could incorporate my experience, smarts & wit — on stage — or doing the FoxNews.com analysis

Gretchen Carlson

after. I know I wouldn't let you down.

Thx again,

Gretchen

Gretchen Carlson

Put me in: On November 11, she sent Ailes a note (above) after Fox Business Network hosted the Republican debate, writing: 'Maybe for the next debate you could incorporate my experience, smarts & wit'

'He's the Bill Cosby of media,' Smith told **Daily Intelligencer**.

'My office is being deluged with calls and website contacts from women. I don't even have a count anymore ... Women as young as 16 who said he demanded oral sex.

'Another said during an interview that he said, "Take off her bra." She was devastated.'

A FOX News spokesperson responded to this by saying: 'This is a new low even for Gretchen and her opportunistic publicity hound lawyer - there's absolutely no truth to this latest anonymous accusation.'

Van Susteren also came to Ailes' defense in an interview with **People**, saying: 'Of course, the first thing that occurred to me is that, unfortunately, we have a disgruntled employee, a colleague.

She went on to say: 'I read that her show wasn't being renewed and , being a lawyer, I thought she got angry. I deal with Roger Ailes often. I've often been alone with Roger Ailes in his office over the course of 15 years and I've never seen anything like what I'm reading about in the papers and the magazine.'

Van Susteren also said 'most people, man or woman, would give anything to have had the air time [Carlson] had on Fox & Friends,' adding that her move to the network's afternoon lineup to host her show was a 'huge promotion.'

Kiran Chetry, a former Fox news anchor, also commented on her relationship with Ailes in a Facebook post, saying: 'Over the years at Fox, I met with Roger Ailes one-on-one many times and never once did Roger ever make me feel uncomfortable or put forth any sexual advances.

'I can't speak for Gretchen since I wasn't in the room obviously but I will tell you that I never felt uncomfortable around Roger Ailes.

'And that's the reason I'm speaking out. Because I think this Situation points to a larger issue --which is that there are very real instances where people are or feel sexually propositioned or intimidated by those in positions of power and are too afraid to speak out.

'That is a fact. The flip-side is whenever someone is accused of sexually harassing or intimidating someone who works under them, they are as good as dead reputation- wise.'

She closed by writing: 'Even though our parting was ugly and public, largely because of miscommunications and middle-men, I would never use this situation to settle a score.'

Former Westchester County district attorney and Fox News contributor Jeanine Pirro also spoke highly of Ailes in an interview with **People**, saying he was a 'delight to be around.

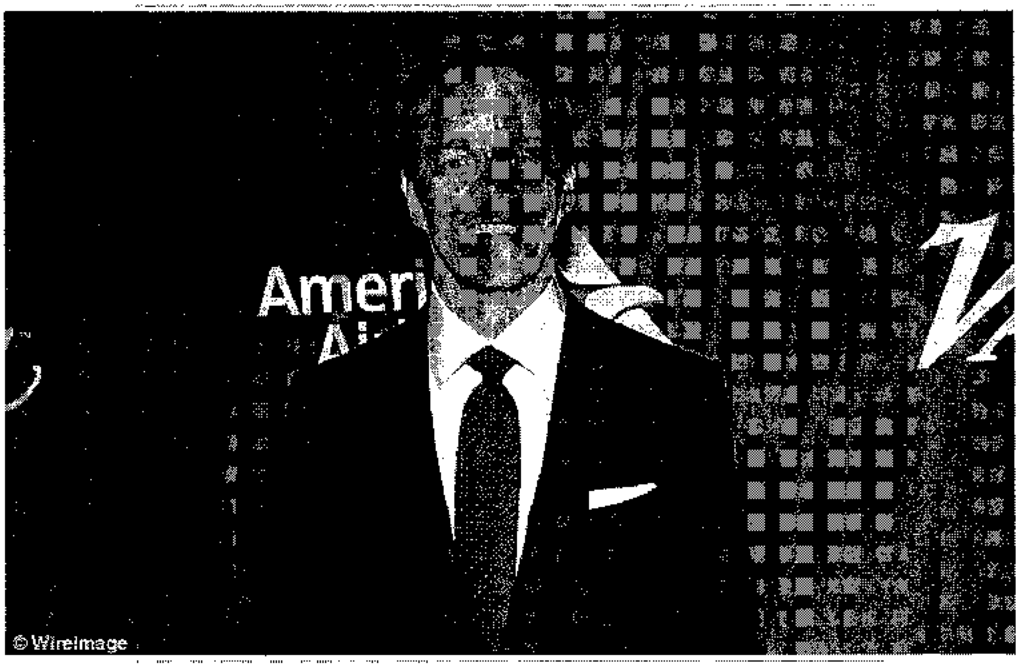
'When I started working for him, it was a little different. It was a little more distant because he was running Fox,' said Pirro, who knew Ailes for over a decade prior to working for the network.

'He always had a smile on his face and always was a delight. I'm a huge fan of Roger Ailes, not just in terms of his personality and the man I never thought I would work for, but more than that. I think he's a giant.

'I think he's does stuff in media that people said he couldn't. I have tremendous admiration for him.'

Question: Carlson wanted to know why Sandra Smith (left in 2007) filled in for Kelly (right in May) during her absence over her

Good fit: Carlson also asked for the chance to fill in for Van Susteren (above in 2006) in one letter



Team: Carlson suggested in one note that she and Fox News correspondent Bill Hemmer (above in April) do a 7pm show for the network

Carlson's lawyers revealed on Thursday they planned to subpoena Judith Regan to testify in their lawsuit. The former Harper Collins executive sued News Corp. in 2007 for $100million after claiming a senior executive at the company asked her to lie to federal investigators.

Regan did not respond to a request for comment from DailyMail.com about this news.

Meanwhile, 21st Century Fox, the network's parent company, responded to Carlson's complaint on Wednesday saying in a statement: 'While we have full confidence in Mr. Ailes and Mr. Doocy, who have served the company brilliantly for over two decades, we have commenced an internal review of the matter.'

The **Huffington Post** spoke with Fox News insiders who made damaging claims about Ailes, with one employee alleging: 'He always brags to people about how he doesn't do polling or testing when he chooses his on-air talent. He told me that if he was thinking of hiring a woman, he'd ask himself if he would f*** her, and if he would, then he'd hire her to be on-camera.'

A contributor at the network meanwhile alleged that Ailes once asked her to 'turn around so he can see my a**.'

And a third individual said they were not surprised when they learned that Carlson had filed her suit.

'We thought it would happen after she was taken off of Fox & Friends,' said the Fox News source.

'She kept quiet because Roger gave her the afternoon show, but everyone at Fox knew it was eventually coming. He hated her and would tell people that she was "a crazy, vindictive b***."'

Ailes has himself admitted to hiring at least one women based on her looks, saying in a 2011 interview of his decision to bring Sarah Palin on as a Fox News commentator: 'I hired Sarah Palin because she was hot and got ratings.'

He also said in a 1994 interview with Don Imus that Mary Matalin and Jane Wallace, who were the co-hosts of Equal Time on CNBC at the time, were 'girls who if you went into a bar around seven, you wouldn't pay a lot of attention, but get to be tens around closing time.'

Ailes was president of CNBC at the time, and would one year later be at Fox News.

Ailes responded to Carlson's claims with a statement released on Wednesday that said: 'Gretchen Carlson's allegations are false. This is a retaliatory suit for the network's decision not to renew her contract, which was due to the fact that her disappointingly low ratings were dragging down the afternoon lineup.

'When Fox News did not commence any negotiations to renew her contract, Ms. Carlson became aware that her career with the network was likely over and conveniently began to pursue a lawsuit. Ironically, FOX News provided her with more on-air opportunities over her 11 year tenure than any other employer in the industry, for which she thanked me in her recent book.

'This defamatory lawsuit is not only offensive, it is wholly without merit and will be defended vigorously.'

Carlson's lawyers issued a response to this on Thursday morning, saying in a statement: 'Ailes' claim that Gretchen Carlson was terminated because of bad ratings is demonstrably false.

'The publicly available ratings confirm the allegation in the Complaint that at the time of her termination Gretchen's total viewership was up 33% year to date and up 23% in the key demographic.

'After her firing from Fox and Friends for complaining about discrimination, Gretchen was moved to a challenging time slot and denied support and promotion. Despite this, she succeeded and was the number one cable news show in her time slot in total viewers.

'Regarding Ailes' claims that Gretchen's allegations are false, we challenge him to deny, under oath, that he made the statements attributed to him in the Complaint.

'Finally, Ailes does not allow his employees to speak to the press or publish anything without prior approval. Gretchen was chastised for answering a question from a hometown newspaper about her favorite Minnesota State Fair food. In her book Gretchen told her story while trying to keep her job - knowing that Ailes had to approve what she said.'

Fox News responded to this by pointing out that The Real Story was beat by CNN in the month of June in the all-important 25-54 demographic, and that the show has actually gone up in viewers since Carlson's departure last month.

The network also said that the increase in viewers from last year was the result of the current election cycle, and that all programs are up from 12 months ago.

Furthermore, the network stated that Nielsen Ratings show that Carlson had less viewers than Kelly after taking over her time slot in 2013 while Fox & Friends increased its viewership when Elizabeth Hasselbeck took over for Carlson.

Shooting star: Carlson was crowned Miss America in 1989 (above) during the annual event in Atlantic City, New Jersey

Memories: Carlson posted a photo on Instagram of her trip to Disney (above) after winning the Miss America crown

Carlson posted on Facebook Wednesday morning: 'As you may have heard, I am no longer with Fox News. I value your support and friendship, especially now, so please stay in touch with me.'

Carlson claims in her complaint that Ailes called her a 'man hater' and accused her of wanting to 'show up the boys' when she complained about what she alleges was diminishing treatment and 'pervasive sexual harassment' by her Fox & Friends co-host Steve Doocy.

Doocy also 'created a hostile work environment by regularly treating her in a sexist and condescending way, including by putting his hand on her and pulling down her arm to shush her during a live telecast,' claims the complaint.

These complaints about Doocy are why she was fired from the marquee show in 2013 and placed as the host of her own afternoon show, claims Carlson in her complaint.

Carlson, 50, alleges that her compensation was decreased at this time as well by the network.

The spot was open at the time because Ailes had made the decision to move Megyn Kelly from that afternoon slot to the 9pm hour, following the network's highest rated program, The O'Reilly Factor.

Elisabeth Hasselbeck was then brought on to join Doocy and Brian Kilmeade on Fox & Friends.

'We believe that the evidence will confirm that Gretchen was fired from Fox & Friends for speaking up about demeaning and discriminatory behavior on and off the set,' said Nancy Erika Smith of Smith Mullin PC, who is representing Carlson.

ROGER AILES' STATEMENT

'Gretchen Carlson's allegations are false. This is a retaliatory suit for the network's decision not to renew her contract, which was due to the fact that her disappointingly low ratings were dragging down the afternoon lineup. When Fox News did not commence any negotiations to renew her contract, Ms. Carlson became aware that her career with the network was likely over and conveniently began to pursue a lawsuit. Ironically, FOX News provided her with more on-air opportunities over her 11 year tenure than any other employer in the industry, for which she thanked me in her recent book. This defamatory lawsuit is not only offensive, it is wholly without merit and will be defended vigorously.'

GRETCHEN CARLSON'S RESPONSE

'Ailes' claim that Gretchen Carlson was terminated because of bad ratings is demonstrably false. The publicly available ratings confirm the allegation in the Complaint that at the time of her termination Gretchen's total viewership was up 33% year to date and up 23% in the key demographic. After her firing from Fox and Friends for complaining about discrimination, Gretchen was moved to a challenging time slot and denied support and promotion. Despite this, she succeeded and was the number one cable news show in her time slot in total viewers. Regarding Ailes' claims that Gretchen's allegations are false, we challenge him to deny, under oath, that he made the statements attributed to him in the Complaint.'

Carlson also included a list of comments she claims Ailes made to her at the workplace in her complaint.

'Ogling Carlson in his office and asking her to turn around so he could view her posterior,' reads one grievance in the complaint.

In another instance Carlson alleges in her complaint that Ailes asked her how she felt about him before stating: 'Do you understand what I'm saying to you?'

Carlson also claims in her complaint that Ailes once told people at an event that he likes to stay seated when women greet him so they have to 'bend over' to say hello.

The Fox News CEO also called Carlson 'sexy' but 'too much hard work' and said he had 'slept' with three former Miss Americas but never her according to the complaint.

Carlson was crowned Miss America in 1989.

Gabriel Sherman wrote in his unauthorized biography of Ailes that he once said of Carlson's win: 'It must not have been a good year.'

Carlson states in her complaint that Ailes also denied her 'various opportunities that were afforded to other Fox News hosts.'

These include: 'reducing her compensation'; 'severely curtailing her appearances as a guest commentator'; blocking her from appearing as a substitute host'; 'refusing to assign her to cover high-visibility events'; 'refusing to give her social media, public relations, and advertising support'; 'shunning, ostracizing and humiliating her, both publicly and privately" and then ultimately 'decreeing that her contract not be renewed,' claims the complaint.

Carlson is requesting compensation for her mental anguish and punitive damages in her suit, and asking for a jury trial.

'By and through his creation of a discriminator, hostile and harassing work environment, his demands for sexual favors, and his retaliation against Carlson for her objections to discrimination and retaliation, Ailes has violated the New York City Human Rights Law,' reads the complaint, which was filed in the Superior Court of New Jersey.

Carlson lives in Connecticut and Fox News headquarters are in Manhattan, but Ailes lives in Cresskill, New Jersey.

Carlson said in a statement on Wednesday: 'I have strived to empower women and girls throughout my entire career.

'Although this was a difficult step to take, I had to stand up for myself and speak out for all women and the next generation of women in the workplace.

'I am extremely proud of my accomplishments at Fox News and for keeping our loyal viewers engaged and informed on events and news topics of the day.'

Relationship: Ailes has been married to Elizabeth Tilson (above in January 2015) since 1998 and the couple has one child

Love of her life: Carlson is married to baseball agent Casey Close (above in 2010) and the couple have two children

Ailes, 76, was named CEO of Fox News in 1996, and in 2005 Rupert Murdoch named him Chairman of the Fox Television Stations Group. He has been married to Elizabeth Tilson since 1998 and the couple has one child.

He allegedly stated that marriage was 'boring,' 'hard,' and 'not much fun' according to claims made by Carlson in her complaint.

Carlson meanwhile is married to baseball agent Casey Close and the couple have two children.

Close has represented some of the biggest stars in baseball, most notably Derek Jeter, who he worked with during his entire professional career.

Carlson joined Fox News in 2006 after six years working for CBS, and spent seven years on Fox & Friends.

She began hosting her own afternoon program in September of 2013, where she remained until being fired last month.

In 2015 she released a memoir, Getting Real, detailing her early struggles and career as a journalist.

In that book she wrote about first meeting Ailes, and the excitement she felt at the time joining the network.

'He saw something in me that he liked – what he called my "killer instinct." He once noted that I would stop at nothing to do the job. He got me,' wrote Carlson.

'Over the years I've come to value our time together. He encourages me to be myself, to relax and to not try so hard to look smart. "People know you're smart," he says.

'He was also the first person to urge me to talk about being Miss America. CBS had taken the reference off my resume and I had come to see it – unfortunately – as not especially good for my credibility.

'Roger insisted people wanted to hear about Miss America from time to time, and that was certainly a pleasant shock.'

That book was released three months before the alleged conversation between Ailes and Carlson that she details in her complaint.

Carlson also revealed in an interview on her former Fox & Friends co-host Brian Kilmeade's radio show in 2013 that she was not allowed to wear pants while hosting the popular morning program.

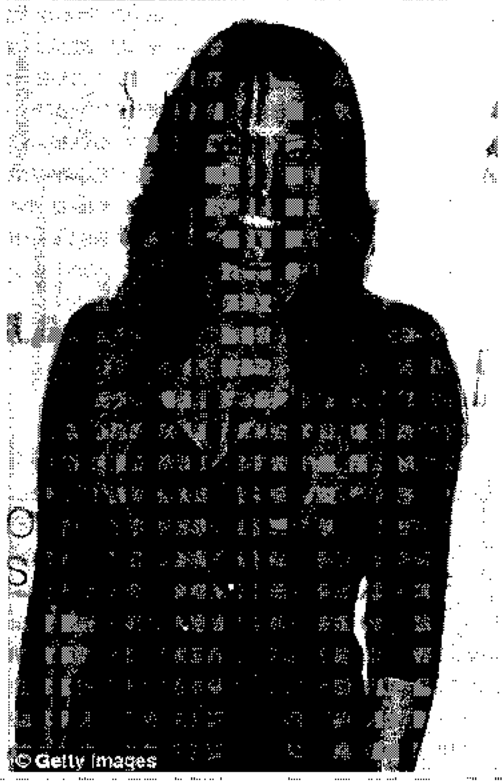
After walking into the room to sit down for the interview the first thing Carlson said was: 'Nobody's going to recognize me because not only am I dressed casually, I have on pants! Now, pants were not allowed on Fox & Friends, remember?'

Her comment came one year after Kilmeade joked about the Fox News hiring process on his show by saying: 'It was actually - we go to the Victoria's Secret catalog and we said, 'Can any of these people talk?' And they all could and they all went to college.'

Kilmeade also once caused Carlson to storm off the set of Fox & Friends when he said: 'Women are everywhere. We're letting them play golf and tennis now.'

He later claimed he was only joking, and Carlson, who was met with boos as she walked away, was laughing as she told him while she left: 'You know what? You read the headlines, since men are so great. Go ahead.'

Kilmeade later said on the program after Carlson returned that he is 'pretty much not sexist.'



Replacements: Elizabeth Hasselbeck (left in June 2015) took over for Carlson on Fox & Friends and Kimberly Guilfoyle (right in April) has been doing The Real Story

Allegation: Carlson also accuses her former Fox & Friends co-host Steve Doocy (above in 2013 with Brian Kilmeade on right) of 'pervasive sexual harassment' in her complaint

Carlson wrote about her past experiences with sexual harassment in a piece for **Huffington Post** last June, just three months before her alleged conversation with Ailes.

'Most professional women I know have experienced sexual harassment. So have I - a few times - and I never talked about it until now. If that seems surprising, it shouldn't be, writes Carlson at the beginning of her essay.

'I've always considered myself a strong woman, not afraid to stand up for myself, but in the face of sexual harassment I was silent. As the issue takes a prominent place in the headlines today, I sometimes feel guilty about my trepidation.

'Perhaps I could have moved the conversation forward if I had come forth.'

She then went on to detail three instances in which she was allegedly harassed by a male early in her career.

Carlson then wrote: 'To be honest, if a young professional woman were to ask my advice about what to do if she were sexually harassed, I might hesitate. It's well and good to say, 'Expose the harassers,' but even with laws and HR departments, we're unfortunately not at a place where we can say absolutely that a woman who is harassed will be protected from repercussions if she tells.

'Those repercussions aren't just the obvious trauma of being publicly involved in a scandal. They can be more insidious — an aura of doubt about her reliability, her stability and her toughness that could have an impact on her career growth.

'No wonder most women just prefer to move on and not tell.'

Kimberly Guilfoyle hosted Carlson's show, The Real Story, on Tuesday on Fox News.

Comments (155)

Share what you think

Oldest
Best rated
Worst rated
View all

ine, Baltimore MD USA, 3 days ago

there's smoke there's fire.

Click to rate 21 7

3irl904, Jacksonville, United States, 3 days ago

were red like raw hamburger" GAG!!! I just puked in my mouth.... Go get him girls!! He's a pig.

Click to rate 29 8

EXHIBIT 7

DEADLINE | HOLLYWOOD

Fox News Chief Roger Ailes Polishing Spin Amid Dizzying Harassment Allegations

By Lisa de Moraes 3 hours ago

REX/Shutterstock/Fox News

After a bombshell lawsuit filed last week by Gretchen Carlson was closely followed by a *New York Magazine* expose in which more women detailed their own lurid allegations against Fox News chief Roger Ailes spanning decades, the master of message manipulation is now fighting to retain control over his Fox News empire. But with Carlson's lawyer happily announcing, "Someone suggested he's the Bill Cosby of media" and media coverage now racing in that direction, can Ailes survive?

It won't be for lack of trying. The spin mastery of the man who famously media-consulted Republican presidents Richard Nixon, Ronald Reagan and George H.W. Bush could well determine whether the Murdochs keep him on at a time when CNN is enjoying a Jeff Zucker-led, political-election-cycle-fueled ratings resurgence. It's playing out dramatically as both the Republican and Democratic National Conventions are fast approaching. Fox News reps are spinning up a storm, connecting female network talent anxious to tell their pro-Ailes testimonials with scoop-hungry media outlets. This supplements his attempt to keep former FNC host Carlson's lawsuit out of the public glare of a courtroom and instead in the private chambers of an arbitrator, claiming the lawsuit filed last week is a breach of her contract.

THE COLUMN

LISA DE MORAES on Television

Since former Fox News Channel host Carlson filed that lawsuit in New Jersey Superior Court alleging Ailes sacked her after she rebuffed his sexual advances, Greta Van Susteren, Maria Bartiromo and the others have said in these interviews that Ailes never sexually harassed them, and described him variously as a great boss, a champion of women, and a "father figure." Jeanine Pirro, Kimberly Guilfoyle, Martha MacCallum, Harris Faulkner, Sandra Smith, Mercedes Colwin, and Ainsley Earhardt, as well as former FNC talent Elisabeth Hasselbeck and Kiran Chetry, have contributed glowing stories to the We Stand With Roger pile-on.

Carlson responded today with an interview on the front page of the New York Times business section, in which she showed off her three silver bracelets engraved with the words "Carpe diem," "Brave," and "Fearless." In the long article's other bit of breaking news, Carlson claimed Ailes never brought up ratings weakness in any discussions, and that she was not told about it when she was let go. "It was cold and calculating," she told NYT of the meeting in June when she was informed her contract would not be renewed. "It took 30 seconds, there was no, 'Thank you for your service of 11 years,' and there was absolutely no discussion of ratings."

Ailes has dismissed Carlson's lawsuit, calling it "a retaliatory suit for the network's decision not to renew her contract which was due to the fact that her disappointingly low ratings were dragging down the afternoon lineup." (Nielsen ratings out yesterday for the week Carlson's suit was filed, show her 2 PM program clocking its best weekly ratings ever.) Ailes took Carlson off *Fox & Friends* in 2013, giving her her own program in the 2 PM time slot that Megyn Kelly had used as a springboard to primetime fame. Carlson's contract was not renewed when it expired last month.

Ailes' feisty litigate-in-the-press campaign has, to date, notably lacked a character reference from Kelly, the reigning queen of Fox News. But the sheer volume is impressive and the on-air wagon-circling could give pause to Rupert Murdoch's sons, James and Lachlan, who run Fox News parent 21st Century Fox, what with Fox News being 21st Century Fox's biggest profit driver. The message to the Murdochs is clear: Roger Ailes *is* Fox News.

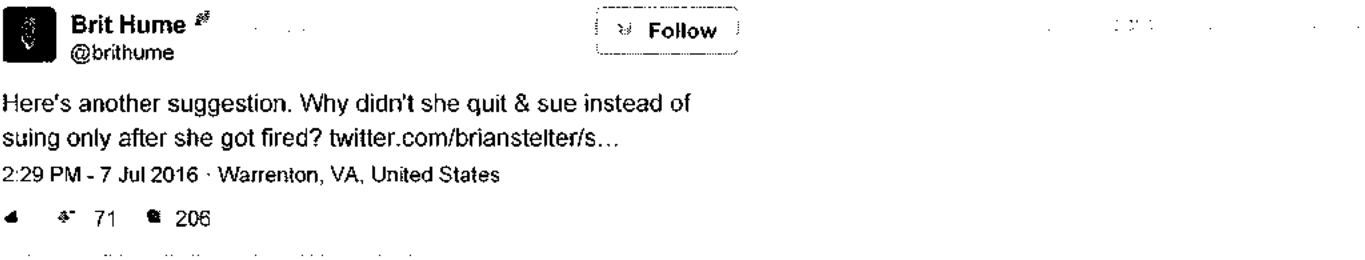
The corporation so far has only issued a statement, late last Wednesday, saying it would conduct an internal investigation of the situation. Both Murdoch sons, reported to be non-fans of Ailes, have asked an outside attorney to investigate the claims.

Until the August 1 ruling on Ailes' arbitration argument, the wagon-circling will continue and more talent interviews (read: click bait) served up to traffic-obsessed media; in some cases Ailes has even co-opted outlets not typically kind to him.

With the audience delivery of such outlets as *People*, *New York Times*, Huffington Post, The Daily Beast, and the trades, Ailes's female-fan chorus has been heard loud and clear, without his once having to use his own network's airwaves, which might be frowned upon by whoever is conducting that 21st Century Fox investigation. In fact, since Carlson's attorneys filed her lawsuit there has been virtually no mention of it on Fox News Channel, except for a brief report by Shep Smith the day after the filing, and another brief mention by Fox News' media expert Howard Kurtz on his show that Sunday.

Bret Baier last night joined those publicly expressing support for Ailes, telling CBS' *Late Show* host Stephen Colbert, "These headlines are foreign to me," and "the Roger I know is somebody who has been amazing to me," while noting he's worked at FNC for nearly two decades.

And similarly, FNC's biggest star Bill O'Reilly, who is booked for NBC's *Late Night* this evening, is expected to take and answer questions on Ailes. O'Reilly has not weighed in on Carlson's claims to date. But FNC's Sean Hannity and Brit Hume worked overtime when news of the lawsuit broke, tweeting about Carlson's "BS:"



Meanwhile, Carlson's camp is giving Ailes quite a run. Over the weekend, Ailes attorneys found themselves having to deny new allegations made against their client – this time by women who had contacted Carlson's attorneys when the suit was filed, and subsequently were interviewed by NYMag's Gabriel Sherman. Six women, two of whom spoke on the record, detailed concupiscent claims of alleged sexual harassment in the late '80s and late 60's, before Ailes launched Fox News Channel. Entirely not coincidentally, Sherman is author of *The Loudest Voice In The Room: How The Brilliant, Bombastic Roger Ailes Built Fox News – And Divided A Country*, the unauthorized and highly controversial 2014 book blasted by Fox News. It includes more sexual harassment allegations, including TV producer Randi Harrison's claim Ailes offered to hike her paycheck by $100 in the '80s, in exchange for on-demand sex with him.

In a statement, Ailes' attorney scolded Carlson and her lawyers for "desperately attempting to litigate this in the press because they have no legal case to argue." But Carlson's attorneys, who had previously said they studied Sherman's book before filing the lawsuit, outmaneuvered the exec, deftly shooting back: "Yesterday in a statement to the press ("litigating in the press"), an Ailes spokesperson challenged Gretchen's lawyers to come forward with other victims of Ailes' sexual harassment to speak on the record. Today, six brave women voluntarily spoke out to New York Magazine detailing their traumatic sexual harassment by Ailes. We are hearing from others…Women have the right to speak out — whether Ailes likes it or not — even about trauma they endured years ago and that haunts them to this day. Calling these women liars because they chose to speak out is despicable. Bullying and threats will not silence these brave women."

It's that kind of carefully crafted post-Cosby era rhetoric that had many media pundits giving Carlson's camp the early advantage in this slug-fest with Ailes. Carlson, said one media observer, "struck hard and fast" and caught Ailes "flat-footed." Another put their money on Carlson, "by virtue of her suit bringing out other allegations," noting, "Everyone loves a party."

"Her team has played a very smart hand for keeping this in the press," said yet another TV news pundit, noting Carlson attorney's follow to various Ailes moves. "Each day, Carlson's camp has a new angle."

"You have to wonder how long they've been planning this," mulled that pundit. That one's easy: "Months ago," Carlson's attorney, Nancy Erika Smith recently told *Marie Claire*, adding, "It was long before we knew that she was going to be terminated."

It's hard to tell at this point which side is winning in the court of public opinion, and the story still is young. But one industry sage advised Ailes he's still catching up. Carlson "had the advantage of surprise and a head start."

EXHIBIT 8

'Are you wearing any panties? I wish you weren't': Allegations pile up against Fox boss Roger Ailes

BRAD REED
13 JUL 2016 AT 16:25 ET

Roger Ailes (Wikipedia Commons)

Fox News boss Roger Ailes isn't going down without a fight -- but it does appear that he has a massive fight on his hands.

***New York Magazine's* Gabriel Sherman is out with a new report** claiming that "at least three" former Fox News anchors are claiming they've been harassed by Ailes.

"One former rising star at the network has said that Ailes approached her during a barbecue at Fox & Friends host Steve Doocy's house in New Jersey while she was bouncing on a trampoline with children and said, 'Are you wearing any panties? I wish you weren't,'" Sherman writes. "Another recently departed Fox host has claimed Ailes made her turn around in his office to show him her figure."

And that's not all: More women who worked with Ailes during his career as a daytime TV exec have come forward to corroborate other women's stories of sexual harassment. A 67-year-old former model who worked on *The Dennis Wholey Show* in the '60s, for instance, claims that when she was just 19, "Ailes asked her to lift up her skirt and lie facedown on a bed at the Sheraton Gibson Hotel in Cincinnati."

ELECTIONS 2016

Pro-LGBT group hilariously trolls GOP -- billboard of Trump and Cruz kissing erected outside RNC

Feds fear domestic terror at conventions: 'We have to be concerned about things getting out of hand'

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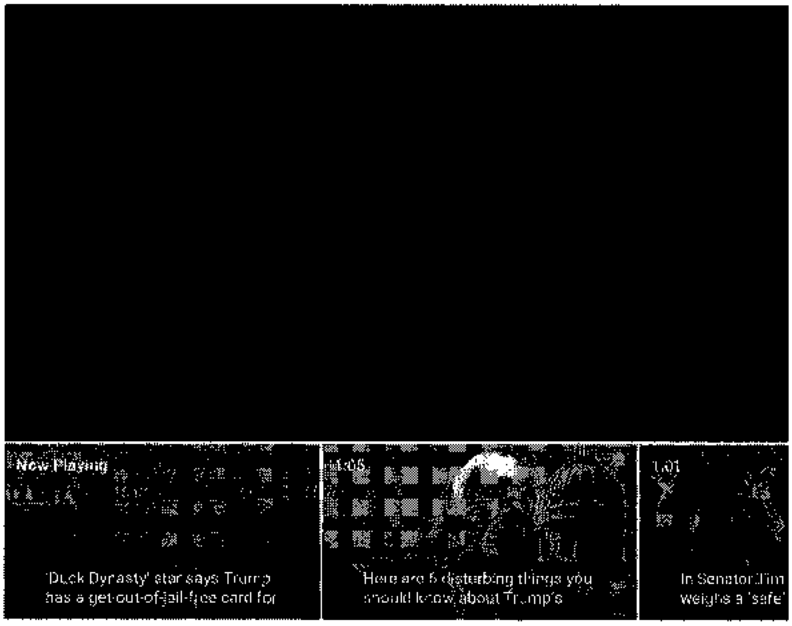
Update, 7:28 p.m. EST: Fox News responded to the report in a statement emailed to *The Raw Story*.

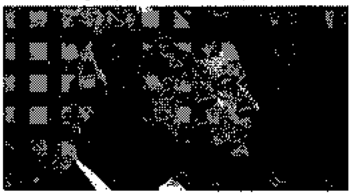
"Gabe Sherman continues to conduct a baseless smear campaign in concert with Gretchen Carlson's lawyer," the statement read. "Carlson's contract was not renewed because she was a failure with the audience. Once again, Sherman's twisted allegations from anonymous sources are completely false."

NEXT ON RAW STORY >

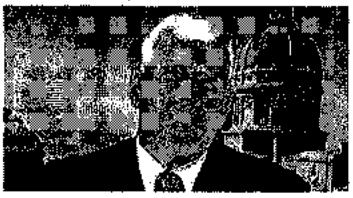
Pro-LGBT group hilariously trolls GOP — billboard of Trump and Cruz kissing erected outside RNC



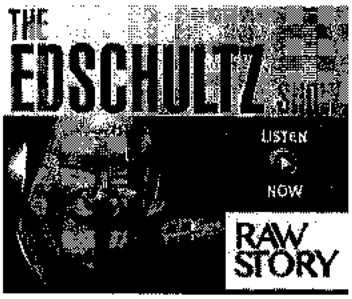
WATCH: Black man flips Fox News the bird during report from Trump Tower

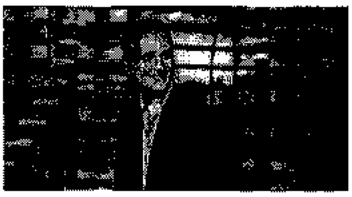


FBI, Homeland Security chiefs preparing for violence at political conventions



Here are 5 disturbing things you should know about Trump's likely VP pick Mike Pence





This Stock Could Be Like Buying Amazon in 1997

Women uses Pokemon GO to catch her boyfriend cheating

EXHIBIT 9

Nancy Erika Smith

From: David W. Garland <dgarland@ebglaw.com>
Sent: Saturday, July 09, 2016 3:20 PM
To: Amy Evans; Nancy Erika Smith
Cc: Neil Mullin; Nancy Erika Smith; Barry Asen
Subject: Gretchen Carlson v. Roger Ailes

Dear Ms. Smith:

We strongly request that you cease and desist from your virtually non-stop media campaign to smear Roger Ailes with numerous untrue allegations, some dating back more than 50 years, long before Fox News came into existence in 1996 and long before your client, Gretchen Carlson, joined Fox News in 2007.

Many of your extra-judicial statements have nothing to do with Ms. Carlson's case pending in federal court, and therefore fall far outside the ambit of the litigation privilege. Moreover, given the strict confidentiality requirement set forth in Ms. Carlson's employment agreement, you have been tortiously interfering with her contractual obligations.

Mr. Ailes has been and will continue to closely monitor your unlawful conduct in the media and take steps to hold you responsible.

Very truly yours,

David Garland

From: Amy Evans <aevans@smithmullin.com>
Date: 7/8/16, 2:32:28 PM EDT
To: David W. Garland <DGarland@ebglaw.com> Barry Asen <BAsen@ebglaw.com>
Cc: Neil Mullin <nmullin@smithmullin.com> Nancy Erika Smith <nsmith@smithmullin.com>
Subject: Gretchen Carlson v. Roger Ailes

Dear Counsel:

Attached please find correspondence from Neil Mullin, Esq. to the Clerk, with enclosure, regarding the above-captioned matter.

Very truly yours,

Amy L. Evans
Legal Assistant
Smith Mullin, P.C.
240 Claremont Avenue
Montclair, NJ 07042
(973) 783-7607
(973) 783-9894 - Fax

SMITH MULLIN, P.C.
COUNSELLORS AT LAW

Nancy Erika Smith

From: Neil Mullin
Sent: Saturday, July 09, 2016 3:54 PM
To: dgarland@ebglaw.com
Subject: Your emailed threat

Dear Mr. Garland:

I write in response to your email of July 9, 2016, 3:20 p.m. to me and my partner.

As your firm did in the Makris matter, you have now personally threatened my partner Nancy Erika Smith and our legal team with litigation against us.

First, we will not be intimidated by your thuggish conduct or that of Mr. Ailes.

Second, you seem to blame us for what six brave women are saying to the media about Mr. Ailes. Their exercise of First Amendment rights is not unlawful and you may not sue my firm because victims of sexual harassment chose to speak out.

Third, our few comments to the press have been well within the litigation privilege and have been based on sound evidence. Mr. Ailes on the other hand has recently defamed us as a bunch of "ambulance chasers." Thus, we are the ones being defamed, not your client. Indeed the entire Ailes media attack machine is in motion against us, our client, and the other brave women who have come forward. Your partner, Mr. Asen recently defamed all of those women, effectively calling them liars. Perhaps they will sue him and your firm.

Don't bully us. Don't sink to the level of your client.

Neil Mullin

EXHIBIT 10

SEVERANCE AGREEMENT AND GENERAL RELEASE

1. **SEVERANCE AGREEMENT:** This writing represents the Severance Agreement and General Release ("Agreement") between Fox News Network L.L.C. ("Fox") and Gretchen Carlson ("Carlson"), and the promises following represent full consideration for the Agreement.

2. **RECITALS:**

   a. Carlson's Employment Agreement with Fox dated June 19, 2013 (the "Employment Agreement") and her services thereunder are hereby terminated effective June 23, 2016; and

   b. Carlson and Fox desire to settle fully and finally any differences between them, including, but in no way limited to, any differences in any way related to the fact of Carlson's employment, the Employment Agreement, and the termination thereof.

3. **PROMISES OF FOX:**

   a. [redacted]

   b. [redacted]

   c. [redacted]

PROMISES OF CARLSON:

a. Released Actions/General Release: Carlson (on behalf of herself and all her heirs, assigns, legal representatives, successors in interest, or any person claiming through her) releases Fox and its divisions, subsidiaries, parents and all other affiliated corporations, as well as all their current and former employees, officers, directors, agents, shareholders, attorneys, accountants, partners, insurers, advisors, partnerships, assigns, successors, heirs, predecessors in interest, joint venturers, and affiliated persons (collectively "Released Parties") from all liabilities, causes of actions, charges, complaints, suits, claims, obligations, costs, losses, damages, injuries, rights, judgments,

attorney's fees, expenses, bonds, bills, penalties, fines, liens, and all other legal responsibilities of any form or nature whatsoever, whether known or unknown, suspected or unsuspected, fixed or contingent, which she has or had or may claim to have by reason of any and all matters from the beginning of time through the date of her execution of this Agreement (hereinafter 'Released Actions'), including but not limited to those arising from the termination of Carlson's employment. Finally, Carlson acknowledges and warrants that she does not currently suffer from any work-related injuries, and that she is fully recovered from any previous work-related injuries she may have sustained during the performance of her services for Fox. In short, Carlson (on behalf of herself and the others described above) hereby knowingly and voluntarily releases any and all claims she has or may have against Fox and the other Released Parties arising from the beginning of time through the date of her execution of this Agreement.

b. Knowing and Voluntary Discrimination Release: **Carlson is hereby advised to consult with her attorney carefully prior to signing this Agreement because she is permanently giving up significant legal rights.** Carlson specifically intends to include, as a Released Action, any claims related to race, color, ancestry, national origin, sex, pregnancy, disability, medical condition, religion, age, sexual orientation, or marital status, discrimination in employment under Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, as amended by the Older Workers' Benefit Protection Act of 1990 (the 'ADEA'), the New York State Human Rights Law, the New York City Human Rights Law, the New York Labor Code, the Equal Pay Act, the Americans with Disabilities Act, the Fair Labor Standards Act or any other law, regulation, ordinance, or common law breach of contract, or tort claim that may have arisen before the effective date of this Agreement, including but not limited to those arising from or related to Carlson's services to Fox or the termination of Carlson's employment. Carlson makes this inclusion knowingly and voluntarily.

c. [redacted]

d. [redacted]

[redacted]

5. **PROMISES OF CARLSON AND FOX:**

[redacted]

d. Non-disparagement: Carlson and Fox each agree not to disparage, trade libel, or otherwise defame the other, and in the case of Fox, Carlson agrees not to disparage, trade libel, or otherwise defame Fox, and/or any of its officers and/or any of its current and/or former employees.

CONSTRUCTION OF THIS AGREEMENT:

a. Choice of Law: This Agreement is to be construed pursuant to the substantive laws

of the State of New York without regard to conflict of law principles.

b.

c.

d.

e.

f.

7. **EFFECTIVE DATE OF THIS AGREEMENT:** This Agreement shall be effective on the date signed by Carlson and Fox and if those signatures are on different dates, the effective date of this Agreement shall be the latter of those dates.

Dated: _____:

_____
Gretchen Carlson

Dated: _____:

Fox News Network L.L.C.

By:_____

Title:_____