

2012 WL 2087357 (S.D.N.Y.) (Trial Pleading)  
United States District Court, S.D. New York.

GOLDMAN, SACHS & CO., Plaintiff,

v.

GOLDEN EMPIRE SCHOOLS FINANCING AUTHORITY and Kern High School District, Defendants.

No. 12 CIV 4558.  
June 11, 2012.

### Complaint

Sullivan & Cromwell LLP, [David H. Braff](#), [Matthew A. Schwartz](#), 125 Broad Street, New York, NY 10004, Telephone: (212) 558-4000, Facsimile: (212) 558-3500, Email: [braffd@sullcrom.com](mailto:braffd@sullcrom.com), [schwartzmatthew@sullcrom.com](mailto:schwartzmatthew@sullcrom.com), Attorneys for Plaintiff, Goldman, Sachs & Co.

Judge [Sullivan](#).

Plaintiff Goldman. Sachs & Co. (“Goldman Sachs”), by and through its undersigned attorneys, hereby alleges as follows for its complaint against defendants Golden Empire Schools Financing Authority and Kern High School District (collectively “Golden Empire”):

#### ***NATURE OF THE ACTION***

1. This is an action to enjoin an arbitration that Golden Empire brought against Goldman Sachs before the Financial Industry Regulatory Authority (“FINRA”) on February 11, 2012, captioned *Golden Empire Schools Financing Authority and Kern High School District v. Goldman, Sachs & Co.*, FINRA No. 12-00476 (the “FINRA Arbitration”). The claims brought by Golden Empire against Goldman Sachs in the FINRA Arbitration are contained in its Statement of Claim filed with FINRA on February 11, 2012. The Statement of Claim is attached hereto at Exhibit I, Golden Empire's claims concern Goldman Sachs' role as the underwriter for three issuances of auction rate securities (“ARS”) by Golden Empire and role as a broker-dealer in ensuing auctions relating to the ARS. All of Golden Empire's claims are subject to exclusive forum selection clauses requiring them to bring any disputes with Goldman Sachs before this Court, not before FINRA.

2. The reason Golden Empire filed its claims before FINRA is simple: all of its claims are time-barred under the applicable statutes of limitation and fly in the face of its own disclosures, and would be subject to dismissal at the outset by this Court. Golden Empire is attempting to use the FINRA forum to circumvent, or at least forestall focus on, the applicable statutes of limitation and other facial deficiencies of its claims.

3. FINRA is an improper forum for Golden Empire to bring its claims against Goldman Sachs. The agreements governing the relationship between the parties giving rise to Golden Empire's claims contain exclusive forum selection clauses that provide that “*all actions and proceedings arising out of this Broker-Dealer Agreement or any of the transactions contemplated hereby shall be brought in the United States District Court in the County of New York.*” (Exs. 2, 3 and 4 (2004, 2006, and 2007 Broker-Dealer Agreements) at 13, 13, 11 (emphasis added)) Accordingly, the Court should declare that the parties' dispute is not arbitrable and enjoin the FINRA Arbitration.

#### ***THE PARTIES***

4. Plaintiff Goldman Sachs is a limited partnership organized under the laws of the State of New York, with its principal office located in New York, New York. Goldman Sachs has one general partner and one limited partner. Its general partner is The

Goldman, Sachs & Co. L.L.C, a limited liability company organized under the laws of the State of Delaware with its principal place of business in New York, and whose sole member is The Goldman Sachs Group, Inc. Goldman Sachs' limited partner is The Goldman Sachs Group, Inc., a corporation organized under the laws of the State of Delaware with its principal place of business in New York.

5. Defendant Golden Empire Schools Financing Authority is a public financing authority located in Bakersfield, California. Golden Empire has considerable experience and sophistication with financial products--particularly ARS -and contract negotiation.

6. Defendant Kern High School District (d/b/a Golden Empire Schools Financing Authority) is a school district located in Bakersfield, California. Upon information and belief, it is one of the school districts that has its projects funded by the Golden Empire Schools Financing Authority and. at all times relevant to this Complaint- Kern High School District acted through Golden Empire Schools Financing Authority.

7. In entering into the contracts governing the relationships between the parties, Golden Empire was advised by both an independent financial advisor. Dale Scott and Company, Inc. ("Dale Scott"), and independent legal counsel. Jones Hall.

### ***JURISDICTION AND VENUE***

8. This is an action for declaratory judgment pursuant to [28 U.S.C. § 2201 et seq.](#) and [Federal Rule of Civil Procedure 57](#), and for injunctive relief pursuant to [Federal Rule of Civil Procedure 65\(a\)](#).

9. This Court has subject matter jurisdiction pursuant to [28 U.S.C. § 1332](#) because the parties are of diverse citizenship and the amount in controversy, exclusive of interest and costs, exceeds \$75,000. Specifically, Golden Empire seeks through the FINRA Arbitration "many millions of dollars" of damages. (Ex. 1 at 14)

10. This Court also has subject matter jurisdiction pursuant to [28 U.S.C. § 1331](#). Goldman Sachs' request for an injunction and declaratory judgment necessarily presents questions of federal law because Golden Empire's claims in the FINRA Arbitration include claims under Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 promulgated thereunder.

11. This Court has personal jurisdiction over Golden Empire because Golden Empire contractually consented to the Court's jurisdiction in Golden Empire's broker-dealer agreements with Goldman Sachs. (Exs. 2, 3 and 4 (2004, 2006 and 2007 Broker-Dealer Agreements) at 13, 13, and 11) Additionally, this Court has personal jurisdiction over Golden Empire because this action arises out of activities undertaken by Golden Empire within this District in connection with its issuance of ARS, including but not limited to entering into underwriter and broker-dealer agreements with Goldman Sachs.

12. Venue is proper in this judicial district pursuant to [28 U.S.C. § 1391\(a\)\(2\)](#) because a substantial part of the events giving rise to this action occurred within this judicial district. In addition, venue is proper because Golden Empire contractually consented to the venue of this judicial district in its broker-dealer agreements with Goldman Sachs. (Exs. 2, 3 and 4 (2004, 2006 and 2007 Broker-Dealer Agreements) at 13, 13, and 11)

### ***FACTUAL BACKGROUND***

#### ***The 2004 Bond Issuance***

13. On July 15, 2004. Golden Empire elected to issue approximately \$95 million in ARS debt for purposes of funding various projects. Golden Empire chose Goldman Sachs to be the sole underwriter and broker-dealer for those ARS. The 2004 Bonds were issued pursuant to an underwriter agreement between Golden Empire and Goldman Sachs dated July 15, 2004 (the "2004 Underwriter Agreement"). Golden Empire was advised by its independent, experienced financial advisor, Dale Scott, and represented by its independent, experienced legal counsel, Jones Hall, throughout the negotiation and execution of this agreement. The 2004 Underwriter Agreement sets forth Goldman Sachs's limited duties in connection with the underwriting:

fundamentally, to purchase Golden Empire's ARS, distribute them to interested investors as *bona fide* securities, and perform other duties relating to the purchase and resale of the 2004 Bonds. (Ex. 5 (2004 Underwriter Agreement) at 2-3)

14. Simultaneously with entering into the 2004 Underwriter Agreement, Goldman Sachs and Golden Empire agreed that Goldman Sachs would also serve as broker-dealer for the 2004 Bonds, and those services were provided pursuant to a contract, dated July 21, 2004 (the "2004 Broker-Dealer Agreement"). Again, Golden Empire was advised by Dale Scott and represented by Jones Hall throughout the negotiation and execution of this agreement. As with the 2004 Underwriter Agreement, the 2004 Broker-Dealer Agreement sets forth Goldman Sachs' limited duties: fundamentally, to work with an auction agent to manage the auctions for the 2004 Bonds, to calculate the rate on the ARS, to communicate the auction results to the auction agent, and to perform other duties in connection with the management and conduct of the auctions. (Ex. 2 (2004 Broker-Dealer Agreement) at 3-7)

15. The 2004 Broker-Dealer Agreement contains a specific forum selection clause providing that the parties will bring any disputes arising out of the contract or any transactions contemplated by the contract in New York federal district court:

The parties agree that all actions and proceedings arising out of this Broker-Dealer Agreement *or any of the transactions contemplated hereby shall be brought in the United States District Court in the County of New York* and that, in connection with any such action or proceeding, submit to the jurisdiction of, and venue in, such court.

(*Id.* at 13 (emphasis added))

16. The 2004 Underwriter Agreement, which was negotiated simultaneously with the 2004 Broker-Dealer Agreement as part of the same transaction, contains no agreement to arbitrate, and provides that California law governs its validity, interpretation and performance. (*See* Ex. 5 (2004 Underwriter Agreement) at 13, 3)

17. The 2004 Underwriter Agreement and the 2004 Broker-Dealer Agreement were negotiated simultaneously and executed contemporaneously as part of the set of contracts that governed Golden Empire's 2004 ARS issuance. Both agreements were the result of arm's-length negotiations between Goldman Sachs and Golden Empire, as well as Golden Empire's counsel.

18. The 2004 Broker-Dealer Agreement also contains a merger clause providing that the "[the 2004] Broker-Dealer Agreement, *and the other agreements and instruments executed and delivered in connection with the issuance of the [ARS, contain the entire agreement between the parties relating to the subject matter hereof,* and there are *no other* representations, endorsements, promises, agreements or understandings ... between the parties relating to the subject matter hereof." (Ex. 2 (2004 Broker-Dealer Agreement) at 13 (emphasis added))

### ***The 2006 ARS Issuance***

19. In 2006, Golden Empire decided that it wanted to finance another project using long term debt, and it again chose to issue ARS. On June 20, 2006, Golden Empire issued \$20 million of ARS (the "2006 Bonds"), for which Goldman Sachs again served as sole underwriter and broker-dealer.

20. Like the 2004 Bonds, the 2006 Bonds were issued pursuant to an underwriter agreement, dated July 6, 2006 (the "2006 Underwriter Agreement"), which sets forth Goldman Sachs' limited duties as underwriter. (Ex. 6 (2006 Underwriter Agreement) at 2-4) Once again, Golden Empire had its own financial advisor and legal counsel advising it regarding this agreement.

21. In the Broker-Dealer agreement for the 2006 Bonds, dated July 13, 2006 (the "2006 Broker-Dealer Agreement"), the parties again explicitly agreed that any dispute would be brought in New York federal district court:

The parties agree that all actions and proceedings arising out of this Broker-Dealer Agreement or any of the transactions contemplated *hereby shall be brought in the United States District Court in the County of New York* and that, in connection with any such action or proceeding, submit to the jurisdiction of, and venue in, such court.

(Ex. 3 (2006 Broker-Dealer Agreement) at 13 (emphasis added))

22. The 2006 Underwriter Agreement, which was negotiated simultaneously with the 2006 Broker-Dealer Agreement as part of the same transaction, contains no agreement to arbitrate, and provides that California law governs its validity, interpretation and performance. (Ex. 6 (2006 Underwriter Agreement) at 13, 3)

23. The 2006 Underwriter Agreement and the 2006 Broker-Dealer Agreement were negotiated simultaneously and executed contemporaneously as part of the set of contracts that governed Golden Empire's 2006 ARS issuance. Both agreements were the result of arm's-length negotiations between Goldman Sachs and Golden Empire, as well as Golden Empire's independent counsel.

24. The 2006 Broker-Dealer Agreement also contains a merger clause providing that the “[2006] Broker-Dealer Agreement, *and the other agreements and instruments executed and delivered in connection with the issuance of the [ARS, contain the entire agreement between the parties relating to the subject matter hereof,* and there are *no other* representations, endorsements, promises, agreements or understandings, oral, written or inferred, between the parties relating to the subject matter hereof.” (Ex. 3 (2006 Broker-Dealer Agreement) at 13)

### ***The 2007 ARS Issuance***

25. In 2007, Golden Empire again chose to issue ARS, and on July 3, 2007 it issued \$10 million of auction rate bonds (the “2007 Bonds”). Once again, Goldman Sachs served as sole underwriter and broker-dealer.

26. Like the 2004 and 2006 Bonds, the 2007 Bonds were issued pursuant to an underwriter agreement, dated July 11, 2007 (the “2007 Underwriter Agreement”), and a broker-dealer agreement, dated July 18, 2007 (the “2007 Broker-Dealer Agreement”). Once again, Golden Empire had its own independent financial advisor and legal counsel advising it regarding these agreements.

27. In the 2007 Broker-Dealer Agreement for the 2007 Bonds, the parties again explicitly agreed that any dispute would be brought in New York federal district court:

The parties agree that all actions and proceedings arising out of this Broker-Dealer Agreement or any of the transactions contemplated *hereby shall be brought in the United States District Court in the County of New York* and that, in connection with any such action or proceeding, the parties shall submit to the jurisdiction of, and venue in, such court.

(Ex. 4 (2007 Broker-Dealer Agreement) at 11 (emphasis added))

28. The 2007 Underwriter Agreement, which was negotiated simultaneously with the 2007 Broker-Dealer Agreement as part of the same transaction, contains no agreement to arbitrate, and provides that California law governs its validity, interpretation and performance. (Ex. 7 (2007 Underwriter Agreement) at 13, 3)

29. Just as with the 2004 and 2006 ARS transactions, the 2007 Underwriter Agreement and the 2007 Broker-Dealer Agreement were negotiated simultaneously and executed contemporaneously as part of the set of contracts that governed Golden Empire's 2007 ARS issuance. Both agreements were the result of arm's-length negotiations between Goldman Sachs and Golden Empire, as well as Golden Empire's independent counsel.

30. As with the 2004 and 2006 transactions, the 2007 Broker-Dealer Agreement also contains a merger clause providing that the “[2007] Broker-Dealer Agreement, *and the other agreements and instruments executed and delivered in connection with the issuance of the [ARS, contain the entire agreement between the parties relating to the subject matter hereof,* and there are *no other* representations, endorsements, promises, agreements or understandings, oral, written or inferred, between the parties relating to the subject matter hereof.” (Ex. 4 (2007 Broker-Dealer Agreement) at 11)

### ***The FINRA Arbitration***

31. On February 11, 2012--more than four years after the first ARS auctions began to fail, and long past the expiration of the two, three and four-year statutes of limitation governing its claims--Golden Empire filed a Statement of Claim with FINRA, thereby instituting arbitration proceedings against Goldman Sachs. FINRA gave notice to Goldman Sachs of the Statement of Claim on April 26, 2012.

32. In its Statement of Claim, Golden Empire alleges that, in connection with its role as underwriter and broker-dealer for the Golden Empire ARS, "Goldman [Sachs had] ... superior knowledge of market risks and opportunities ... [and] failed to disclose to [Golden Empire] material facts...."<sup>1</sup> (Ex. 1 at 16) It also alleges that Goldman Sachs routinely placed "support bids" in order to "prop[] up the [ARS] market," and that in February 2008, when Goldman "decided without warning to stop supporting the ARS market[,] [t]he ARS market promptly collapsed, and the rates on [Golden Empire's] ARS skyrocketed." (Ex. 1 at 1-2) Golden Empire claims that, as a result of the failure of its auctions it "paid much higher interest payments and sustained other damages, such as the costs of refinancing." (Ex. 1 at 2)

33. The relief Golden Empire seeks in the FINRA Arbitration consists of actual, compensatory, punitive, and consequential damages; restitution and disgorgement of all fees and costs associated with the ARS, including broker-dealer fees; and its fees and costs associated with the FINRA Arbitration. (Ex. 1 at 21-22)

34. Golden Empire's claims and theories are specious, particularly in light of its own disclosures and information at its disposal concerning "support bids" and the potential for failed auctions. However, Goldman Sachs and Golden Empire never agreed to arbitrate disputes arising out of Golden Empire's ARS. To the contrary, the Broker-Dealer Agreements--which, along with "the other agreements and instruments executed and delivered in connection with the issuance of the ARS, contain the *entire agreement* between the parties" related to Golden Empire's ARS (Exs. 2, 3 and 4 (2004, 2006 and 2007 Broker-Dealer Agreements) at 13, 13, and 11 (emphasis added))--specifically provide that any disputes arising out of Golden Empire's ARS shall be brought, if at all, in the United States District Court in the County of New York, thereby plainly precluding arbitration.

35. Goldman Sachs' answer to Golden Empire's Statement of Claim is due on June 12, 2012, which it intends to file with FINRA solely in order to avoid the possibility of defaulting in the FINRA Arbitration. Goldman Sachs' answer will expressly reserve Goldman Sachs' right to object to the arbitrability of Golden Empire's claims before FINRA.

## CAUSES OF ACTION

### COUNT I

#### (For a declaratory judgment)

36. Goldman Sachs repeats and realleges paragraphs 1 through 35 as though fully set forth herein.

37. The parties contractually agreed to bring any dispute related to Golden Empire's 2004, 2006 and 2007 Bonds exclusively in this Court. Goldman Sachs' valid and binding agreements with Golden Empire supersede any right that Golden Empire may have had to arbitrate under the FINRA Code of Arbitration Procedure.

38. Goldman Sachs is compelled to seek relief in this Court because arbitration is a creature of contract, and a FINRA arbitration panel has no authority to decide whether the parties have submitted to it under the terms of their contract. It is well-settled law that only a court can determine whether parties agreed to arbitrate and, under the terms of the Goldman Sachs' contracts with Golden Empire, this Court is the parties' exclusive chosen forum.

39. As a matter of law, unless Golden Empire is enjoined from pursuing its claims in the FINRA Arbitration, Goldman Sachs will suffer irreparable harm because it will (i) be deprived of its right to select the forum in which it expressly agreed to resolve disputes, (ii) be forced to arbitrate a dispute it has not agreed to arbitrate, and (iii) be forced to incur the substantial time and expense of defending itself in the arbitration proceeding, or risk an adverse outcome in those proceedings, even though Goldman Sachs is not legally compelled to arbitrate Golden Empire's stale claims. Being compelled to arbitrate a dispute where the parties have not agreed to arbitrate constitutes irreparable harm as a matter of law.

40. Declaratory relief from this Court will resolve this controversy.

41. As alleged herein, a real, substantial and immediate controversy is presented regarding the rights, duties and liabilities of the parties. Goldman Sachs therefore requests a declaratory judgment from this Court pursuant to 28 U.S.C. § 2201 *et seq.* and Rule 57 of the Federal Rules of Civil Procedure that Golden Empire's claims are not arbitrable and that Golden Empire must bring its claims, if at all, in this Court.

## ***COUNT II***

### **(For injunctive relief)**

42. Goldman Sachs repeats and re-alleges paragraphs 1 through 41 as though fully set forth herein.

43. Golden Empire has asserted claims for compensatory, consequential, and punitive damages against Goldman Sachs in the FINRA Arbitration and, on information and belief, unless enjoined, will continue to pursue such claims.

44. As a matter of law, unless Golden Empire is enjoined from pursuing its claims in the FINRA Arbitration, Goldman Sachs will suffer irreparable harm because it will (i) be deprived of its right to select the forum in which it expressly agreed to resolve disputes, (ii) be forced to arbitrate a dispute it has not agreed to arbitrate, and (iii) be forced to incur the substantial time and expense of defending itself in the arbitration proceeding, or risk an adverse outcome in those proceedings, even though Goldman Sachs is not legally compelled to arbitrate Golden Empire's stale claims. Being compelled to arbitrate a dispute where the parties have not agreed to arbitrate constitutes irreparable harm as a matter of law.

45. The balance of equities weighs heavily in favor of an injunction.

46. The public interest would be served by enjoining Golden Empire from pursuing its time-barred and meritless claims against Goldman Sachs in the FINRA Arbitration because the parties' agreements preclude arbitration of this dispute.

### ***PRAYER FOR RELIEF***

WHEREFORE, Goldman Sachs respectfully requests that this Court enter an order:

1. Declaring that (a) FINRA is not an appropriate forum to resolve a dispute between Goldman Sachs and Golden Empire pursuant to their contracts related to ARS; and (b) FINRA has no jurisdiction to adjudicate the FINRA Arbitration;
2. Preliminarily and permanently enjoining Golden Empire from pursuing any claims against Goldman Sachs in the FINRA Arbitration;
3. Awarding Goldman Sachs' costs of suit; and
4. Granting such other relief as may be just and proper.

Dated: June 11, 2012

New York, New York

By: <<signature>>

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Footnotes

- 1 Golden Empire brings claims for (i) breach of fiduciary duty, (ii) fraud, (iii) negligent misrepresentation, (iv) violation of the Section 10(b) of the Exchange Act, and (v) violations of the California Securities Act, and (vi) breach of MSRB/NASD duties. (Ex. 1 at 16-20)

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