

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

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THE CHARLES SCHWAB CORPORATION,	:	
CHARLES SCHWAB & CO., INC., TD	:	
AMERITRADE HOLDING CORPORATION, TD	:	
AMERITRADE ONLINE HOLDINGS	:	Index No. _____
CORPORATION, and TD AMERITRADE, INC.,	:	
	:	
	:	COMPLAINT
Plaintiffs,	:	
	:	
- against -	:	
	:	
THE GOLDMAN SACHS GROUP, INC. and	:	
GOLDMAN SACHS & CO. LLC,	:	
	:	
Defendants.	:	
-----X	:	

Plaintiffs The Charles Schwab Corporation and Charles Schwab & Co., Inc. (together, “Schwab”), and Plaintiffs TD Ameritrade Holding Corporation, TD Ameritrade Online Holdings Corporation, and TD Ameritrade, Inc. (“together, “TD Ameritrade,” and, together with Schwab, “Plaintiffs”), by and through their undersigned attorneys, as and for their Complaint against Defendants The Goldman Sachs Group, Inc. and Goldman Sachs & Co. LLC (together, “Goldman Sachs”), upon knowledge as to their own conduct and upon information and belief as to all other matters, hereby allege as follows:

PRELIMINARY STATEMENT

1. Plaintiffs bring this action for breach of contract and equitable relief to prevent Goldman Sachs from abandoning – without any legal justification – its contractual obligations to Plaintiffs under a governing agreement that expressly requires it to allocate to Schwab and TD Ameritrade shares in certain securities offerings, which Schwab and TD Ameritrade in turn make available to their retail customers for purchase.

2. That governing agreement, the Distribution Agreement, was entered into in 2001, and – unlike other contracts entered into between the same parties at roughly the same time – does not expire on a date certain and does not contain any provision for its termination at will, and the parties’ course of conduct over the past 17 years confirms that the parties have appropriately treated the agreement as continuing so long as there are shares for Goldman Sachs to allocate.

3. Goldman Sachs’s obligations arose in connection with its acquisition of Epoch Partners, Inc. from three broker-dealers, Schwab, TD Waterhouse, and Ameritrade, in 2001. Epoch was an online investment bank established by the broker-dealers to create a new distribution channel for their retail customers to receive shares in initial public offerings directly. In connection with Goldman Sachs’s 2001 acquisition, the parties entered into a Distribution Agreement requiring Epoch to continue to distribute the IPO and SPO¹ shares it received to the retail customers of Schwab and TD Ameritrade.

4. More than 17 years after the parties executed the Distribution Agreement, Goldman Sachs now threatens to terminate it unilaterally. Goldman Sachs does not – and cannot – claim any breach by Plaintiffs, nor any change in circumstances. Rather, it has determined that it wants 100% of the available allocation for its own high net worth customers. In service of this objective, Goldman Sachs has manufactured a shifting set of arguments in its attempt to escape the contract, none of which find any support in the plain language of the Distribution Agreement or under the law. For example, Goldman Sachs now contends that it has the right to terminate the agreement at a time of its own choosing and, indeed, that the agreement should have expired in 2007, when certain other obligations among the parties expressly expired.

¹ IPOs are initial public offerings and SPOs are secondary public offerings.

5. Yet the arrangement among the three broker-dealers that established Epoch, and the agreement with Goldman Sachs that incorporated those arrangements, contain no term and no termination provision with respect to Epoch's (Goldman Sachs's) obligations to allocate securities to Schwab and TD Ameritrade. The very purpose of Epoch was to create a new distribution channel for its original owners, and to provide the continuing opportunity for Plaintiffs' retail customers to participate in IPOs and SPOs. Epoch was not given the right, and did not have the right, to terminate its obligation to distribute the IPO and SPO shares it received to the broker-dealers (Epoch's original owners). Goldman Sachs knowingly and subsequently twice accepted and ratified this continuing obligation, which applies so long as Goldman Sachs has IPO and SPO shares to allocate. Indeed, after the parties had performed under the agreement for 12 years, they entered into a 2013 agreement (the "Assignment Agreement") in which they expressly reaffirmed that the Distribution Agreement "continue[d] to govern" and "remain[ed] in full force and effect." The parties have continued to abide by their obligations under the Distribution Agreement since they executed the Assignment Agreement.

6. Because Goldman Sachs's position has no merit, and because Goldman Sachs's improper termination of its obligations to Schwab and TD Ameritrade will cause them irreparable and unquantifiable harm, Plaintiffs seek not only damages for Goldman Sachs's breach of its contract, but also specific performance and a declaration that the Distribution Agreement remains in full force and effect – as Goldman Sachs itself acknowledged in 2013 – and that Goldman Sachs is obligated to perform under its terms. Plaintiffs also seek an injunction against Goldman Sachs preventing it from (a) terminating the Distribution Agreement, and (b) improperly withholding any securities that must be made available to Plaintiffs pursuant to and in accordance with the terms of the Distribution Agreement.

PARTIES

7. Plaintiff The Charles Schwab Corporation (“CSC”) is a corporation organized under the laws of the state of Delaware, with its principal place of business located at 211 Main Street, San Francisco, CA 94105. CSC is a savings and loan holding company that engages, through its subsidiaries, in wealth management, securities brokerage, banking, asset management, custody, and financial advisory services.

8. Plaintiff Charles Schwab & Co., Inc. (“CS & Co.”) is an indirect, wholly owned subsidiary of CSC, incorporated under the laws of the state of California, with its principal place of business located at 211 Main Street, San Francisco, CA 94105. CS & Co. is a securities broker-dealer registered with the United States Securities & Exchange Commission, the fifty states, the District of Columbia, and Puerto Rico.

9. Plaintiff TD Ameritrade Holding Corporation is a corporation organized under the laws of the state of Delaware, with its principal place of business located at 200 South 108th Avenue, Omaha, NE 68154. TD Ameritrade Holding Corporation, through its subsidiaries, is a leading provider of securities brokerage services and technology-based financial services to retail investors, traders, and independent registered investment advisers. Plaintiff TD Ameritrade Online Holdings Corporation is a direct subsidiary of TD Ameritrade Holding Corporation.

10. Plaintiff TD Ameritrade, Inc. is an indirect, wholly owned subsidiary of TD Ameritrade Holding Corporation organized under the laws of the state of New York, with its principal place of business located at 200 South 108th Avenue, Omaha, NE 68154. TD Ameritrade, Inc. is a securities broker-dealer registered with the Securities & Exchange Commission, the fifty states, and the District of Columbia.

11. Defendant The Goldman Sachs Group, Inc. (“GS Group, Inc.”) is a corporation organized under the laws of the state of Delaware, with its principal place of

business located at 200 West Street, New York, NY 10282. GS Group, Inc. is a bank holding company and a financial holding company that engages, through its subsidiaries, in investment banking, securities underwriting, securities brokerage, investment management, and other financial services.

12. Defendant Goldman Sachs & Co. LLC (“Goldman Sachs & Co.”), a wholly owned subsidiary of GS Group, Inc., is a limited liability company organized under the laws of the state of New York, with its principal place of business located at 200 West Street, New York, NY 10282. Goldman Sachs & Co. is a securities broker-dealer registered with the United States Securities & Exchange Commission, the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands.

JURISDICTION AND VENUE

13. This Court has personal jurisdiction over Goldman Sachs pursuant to CPLR § 301 because Goldman Sachs has its principal place of business in New York, and Goldman Sachs agreed to be subject to personal jurisdiction in New York state court with regard to the parties’ dispute.

14. Venue is proper pursuant to CPLR § 503 because, *inter alia*, Goldman Sachs’s principal office is located in New York County, and Goldman Sachs has agreed to waive any objection to the laying of venue in New York County.

FACTS

Plaintiffs Establish a Successful Retail Channel for the Sale of New-Issue Securities

15. Beginning in 1999, Schwab, together with fellow broker-dealers TD Waterhouse and Ameritrade, established Epoch Partners, Inc. (“Epoch”), an online investment

bank, to facilitate the sale of new-issue securities directly to individual retail customers who held accounts at Schwab, TD Waterhouse, and Ameritrade.²

16. The “direct to retail” model was a then-new concept that was beneficial to both issuers and investors: issuers had access to a stable pipeline of individual investor capital as an alternative to raising institutional capital through traditional investment banks (such as Goldman Sachs), and individual investors benefitted from having the opportunity to purchase shares at public offering prices.

17. Epoch established the viability of the retail channel and built up a considerable share of the market. In 2001, Epoch was acquired by Goldman Sachs, which was eager to access the individual investor market for securities offerings that it was underwriting.

Plaintiffs and Goldman Sachs Enter into the Distribution Agreement

18. Epoch and Goldman Sachs contemplated a merger that would preserve the arrangements that already had been agreed to between Epoch and the broker-dealers. To that end, on June 12, 2001, Goldman Sachs, Epoch, Schwab, and TD Waterhouse (now TD Ameritrade) entered into an Amended and Restated Distribution Agreement (the “Distribution Agreement,” attached as Exhibit A), which largely replicated the mechanics of the original distribution agreement that had been executed between Epoch and the broker-dealers.

19. The Distribution Agreement obligates Goldman Sachs (through Epoch) to allocate to Schwab and TD Waterhouse (now TD Ameritrade) shares in certain public offerings by U.S. issuers in which Goldman Sachs serves as lead managing underwriter and lead bookrunner. (Ex. A, Distribution Agreement § 1.1(a).) Goldman Sachs also is obligated to use

² In 2006, Ameritrade acquired TD Waterhouse, and the business was renamed TD Ameritrade.

its “reasonable best efforts” to allocate shares to the two dealers in public offerings in which Goldman Sachs serves as a non-bookrunning lead managing underwriter or a co-managing underwriter, and in any non-U.S. issuer offering in which Goldman Sachs serves as lead managing underwriter and lead bookrunner. (*Id.*)

20. In return for guaranteed allocations, Schwab and TD Ameritrade agreed to give to Goldman Sachs the dealer concessions they typically would receive from the sale of the securities. Neither Schwab nor TD Ameritrade receives any portion of the underwriting spread earned by Goldman Sachs on their sales to retail customers of Schwab and TD Ameritrade.

21. The number of shares allotted to each of Schwab and TD Ameritrade is determined according to a particular allocation formula set forth in Section 1 of the Distribution Agreement. For any given offering, Goldman Sachs is allocated a certain number of securities on a “free retention” basis (*i.e.*, any securities that remain after accounting for the portion of the new issue retained for institutional sales and for any underwriters that are not part of the syndicate). Goldman Sachs must allocate to the dealers, in the aggregate, not less than the greater of 15% of Goldman Sachs’s free retention, or, for any offering of up to \$1 billion, 1.5% of the securities offered for sale in the United States. (*Id.* § 1.2(b).) No dealer is entitled to receive more than the aggregate number of securities for which it has received indications of interest or conditional offers to purchase. (*Id.* § 1.2(d).)

22. The Distribution Agreement contemplates termination only upon defined events related to a change in control. (*Id.* §§ 5.2, 7.) It does not provide for its termination at will, and it does not terminate on any date certain.

23. In conjunction with, and as contemplated by, the Distribution Agreement, Schwab and Goldman Sachs also entered into two additional agreements, an Agreement for

Distribution of Research (the “Research Agreement”) dated September 28, 2001, attached as Exhibit B, and a Data License and Security Agreement dated December 7, 2000 (the “Data License Agreement”), attached as Exhibit C.³ The Research Agreement provided for the exclusive distribution of Goldman Sachs’s investment research to Schwab’s customers. The Data License and Security Agreement provided for the exclusive distribution to Goldman Sachs of certain de-identified and aggregated information relating to Schwab’s customers. Per their express terms, the Research Agreement and the Data License and Security Agreement expired on December 15, 2007.

The Parties Perform Under the Agreement for More than a Decade, then Reaffirm Their Obligations Under the Distribution Agreement in 2013 and Continue to Perform Under the Distribution Agreement, as Reaffirmed

24. Following the parties’ execution of the Distribution Agreement, Goldman Sachs has for 17 years complied, to Plaintiffs’ knowledge, with its obligations thereunder, and Plaintiffs have complied with their obligations as well.

25. For the first six years of the Distribution Agreement, Goldman Sachs complied without any protest. However, in the years following the expiration of the Research Agreement and the Data License Agreement – both of which contain express provisions for their expiration on December 15, 2007 – Goldman Sachs occasionally would assert that the Distribution Agreement should have terminated at the same time as the other two agreements, even though it contains **no** similar provision for its termination.

³ Pursuant to the terms of the Distribution Agreement, Goldman Sachs and Schwab kept in place the original Data License and Security Agreement as executed between Epoch and Schwab; Goldman Sachs thus does not appear as a signatory to the contract but was nonetheless bound by its terms through its expiration.

26. In spite of these occasional protestations, Goldman Sachs continued to perform under the Distribution Agreement long after 2007 (as did Schwab and TD Ameritrade).

27. Indeed, since 2007, Goldman Sachs has allocated to Schwab and TD Ameritrade shares in more than 300 public offerings under the Distribution Agreement. In other words, the Distribution Agreement has remained fully in effect, with all parties performing with that understanding.

28. Not only did Goldman Sachs (and Schwab and TD Ameritrade) continue to perform under the Distribution Agreement, it expressly and unambiguously **reaffirmed** the continuing validity of the Distribution Agreement.

29. In particular, in February 2013 – more than 12 years after the Distribution Agreement had taken effect – Epoch, Goldman Sachs, Schwab, and TD Ameritrade executed an Assignment, Assumption and Release Agreement (the “Assignment Agreement”), attached as Exhibit D, pursuant to which Epoch, after being repurposed by Goldman Sachs, assigned to Goldman Sachs all of its rights and obligations under the Distribution Agreement.

30. The Assignment Agreement contains multiple provisions that unmistakably provide that the Distribution Agreement shall continue to govern and remain in full effect.

31. Specifically, in the third “WHEREAS” clause of the Assignment Agreement, the parties expressed their desire and intent for the Distribution Agreement to “continue to govern”:

WHEREAS, it is the desire and intent of Assignee [Goldman Sachs] and Schwab, CSC, TDAOHC and TD Ameritrade that the terms and conditions of the Distribution Agreement and the Master Dealer Agreement continue to govern with respect to the subject matter thereof as if Assignee were a party to the Selling Agreements [i.e., the Distribution Agreement and the Master Dealer Agreement] in the place of Assignor;

32. The parties further memorialized this intent in Section 1.5 of the Assignment Agreement, which expressly provides:

Section 1.5 Effect on the Selling Agreements. Except as set forth in this Agreement, the Selling Agreements remain in full force and effect, without modification or amendment.

33. In more recent years, Goldman Sachs has developed its private-banking arm, which serves individual clients who, like Schwab and TD Ameritrade's customers, want the opportunity to participate in public offerings of new-issue securities that Goldman Sachs lead underwrites. Every retail share that Goldman Sachs is contractually obligated to give to Schwab and TD Ameritrade is one fewer share than it can make available to its own customers.

34. Perhaps for this reason (in whole or in part), Goldman Sachs now seeks to escape its obligations under the Distribution Agreement and the 2013 Assignment Agreement that re-affirms its continuing effect.

35. On April 4, 2018 Goldman Sachs, through its counsel, purported to provide Schwab and TD Ameritrade written notice of its termination of the Distribution Agreement, effective on the 90th day thereafter, attached as Exhibits E and F. (Goldman Sachs subsequently agreed to extend the notice period such that it would expire on September 20, 2018).

36. In its April 4 notices to Plaintiffs, Goldman Sachs sought to justify its purported termination of the Distribution Agreement on two alternative yet equally invalid grounds.

37. Its first argument claimed that the parties intended the agreement to be terminable at will by either party on or after December 15, 2007, which appears to be a variant of Goldman Sachs's argument, discussed in paragraph 25 above, that the Distribution Agreement

expired on that date, simultaneously with the Research Agreement and Data License Agreement (even though those two agreements contained express expiration provisions and the Distribution Agreement had none).

38. Its second argument claimed that the Distribution Agreement is terminable at will, even in the absence of such a provision to that effect.

39. Neither argument has merit.

40. The first argument fails for multiple reasons, including that (a) the parties' 2013 Assignment Agreement – executed *six years* after the termination of the other agreements – expressly affirms that the Distribution Agreement shall “continue to govern” and “remain in full force and effect;” (b) unlike the Research Agreement and Data License Agreement, the Distribution Agreement had no fixed durational term or expiration date, which these sophisticated parties demonstrated that they knew how to include, yet did not include in the Distribution Agreement; (c) what the parties did include, however, was an exclusivity period in Section 5.1 of the Distribution Agreement (whereby Schwab and TD Ameritrade agreed they would not act as an underwriter or dealer for certain other offerings) that *ran until December 15, 2007*, which date would have been completely unnecessary if the entire agreement should have terminated or was terminable on that date; and (d) the continuous course of conduct of the parties, and particularly of Goldman Sachs, following December 15, 2007 – a period of more than 10 years – in performing under the agreement evidences an understanding that the Distribution Agreement did not expire in December 2007, and that Goldman Sachs's obligations to perform thereunder were and are continuing.

41. Goldman Sachs's second, alternative argument – that the Distribution Agreement is terminable at will – is equally unavailing. As with the first argument, the

sophisticated parties clearly could have included – but did not include – a provision that the Distribution Agreement was terminable at will, and the Court should not read such a provision into the agreement. The parties also could have included an at-will termination provision in the 2013 Assignment Agreement when they reaffirmed that the Distribution Agreement would “continue to govern” and “remain in full force and effect,” yet none exists. As with the first argument, Goldman Sachs’s alternative argument also is at odds with the continuous course of Goldman Sachs’s conduct for 17 years since the inception of the agreement in 2001. And Goldman Sachs’s second argument fails because, among other reasons, Section 1.6 of the Distribution Agreement provides “most favored nation” protections for Plaintiffs that would be completely meaningless if Goldman Sachs could simply terminate the agreement at will to avoid those provisions.

42. For these and other reasons, the arguments that Goldman Sachs has concocted to cast off its obligation to continue to perform under the Distribution Agreement and the 2013 Assignment Agreement are untenable.

43. Goldman Sachs’s purported termination of the Distribution Agreement threatens irreparable and unquantifiable harm to Plaintiffs. As set forth above, Schwab’s and TD Ameritrade’s customers want the opportunity to participate in public offerings of new-issue securities; if Goldman Sachs no longer allocates shares to Schwab and TD Ameritrade, some number of customers will no doubt take their business to other firms that can provide that opportunity, including Goldman Sachs itself. And some prospective customers of Schwab and TD Ameritrade will never become customers if they do not have the opportunity to invest in new-issue securities in public offerings. The full financial impact of this misconduct cannot be quantified and should be prevented by this Court. Simply put, Goldman Sachs should not be

permitted to improperly terminate its agreement with Schwab and TD Ameritrade and allocate to its own customers (or anyone else) the shares that rightfully belong to Plaintiffs, at great harm to Plaintiffs.

FIRST CAUSE OF ACTION
(Breach of Contract)

44. Plaintiffs incorporate by reference each of the prior paragraphs of the Complaint as if fully set forth herein.

45. By purporting unilaterally to terminate the Distribution Agreement, which is not terminable at will by any party, Goldman Sachs is in breach of the agreement.

46. Goldman Sachs's purported termination also constitutes a breach of the Assignment Agreement, in which the parties expressly agreed that the Distribution Agreement continues to govern and remains in full force and effect, without modification or amendment.

47. Plaintiffs have fulfilled all of their obligations under both the Distribution Agreement and the Assignment Agreement.

48. Plaintiffs will be damaged by Goldman Sachs's breach of the Distribution Agreement and the Assignment Agreement, in an amount to be determined at trial.

SECOND CAUSE OF ACTION
(Declaratory Judgment and for Specific Performance)

49. Plaintiffs incorporate by reference each of the prior paragraphs of the Complaint as if fully set forth herein.

50. Goldman Sachs's wrongful purported termination of the Distribution Agreement – as well as its intended unlawful withholding of shares that should be allocated to Plaintiffs for sale to their customers – will cause irreparable and unquantifiable harm to Plaintiffs, including but not limited to the loss of customers who value that service which Plaintiffs have long provided pursuant to the Distribution Agreement.

51. Equity therefore demands that Goldman Sachs not be permitted to terminate the Distribution Agreement, nor to allocate to its own current or prospective customers, or to anyone else, the shares that should be allocated to Plaintiffs but for Goldman Sachs's unlawful conduct.

52. Accordingly, this Court should issue a declaration that the Distribution Agreement is not terminable at will and remains in full force and effect, that Goldman Sachs shall not improperly withhold any securities that must be made available to Plaintiffs pursuant to and in accordance with the terms of the Distribution Agreement, and that Goldman Sachs must perform under the Distribution Agreement according to its terms.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor against Defendants and award to Plaintiffs the following relief:

- (a) Damages from Goldman Sachs in an amount to be proven at trial;
- (b) A declaration that the Distribution Agreement is not terminable at will and remains in full force and effect, and that Goldman Sachs shall not improperly withhold any securities that must be made available to Plaintiffs pursuant to and in accordance with the terms of the Distribution Agreement;
- (c) A preliminary and permanent injunction barring Defendants from (i) terminating the Distribution Agreement at will, and (ii) otherwise improperly withholding any securities that must be made available to Plaintiffs pursuant to and in accordance with the terms of the Distribution Agreement;

- (d) An order requiring Goldman Sachs to perform the Distribution Agreement according to its terms;
- (e) An order awarding Plaintiffs their costs and attorneys' fees; and
- (f) Such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 20, 2018

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