UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GRETCHEN CARLSON, Plaintiff, v. ROGER AILES, Defendant.	**DOCUMENT FILED ELECTRONICALLY** Civil Action No.: 2:16-cv-04138-JLL-JAD

MEMORANDUM OF LAW OF DEFENDANT ROGER AILES IN SUPPORT OF HIS MOTION TO TRANSFER THIS CASE TO THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK OR, IN THE ALTERNATIVE, TO STAY THIS CASE PENDING THE OUTCOME OF HIS PETITION TO COMPEL ARBITRATION IN THE SOUTHERN DISTRICT OF NEW YORK

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PRELIMINARY STATEMENT

Although plaintiff Gretchen Carlson commenced this litigation against defendant Roger Ailes only nine days ago, the case already has a complicated procedural background because of the actions taken by Ms. Carlson and her counsel. First, Ms. Carlson filed a lawsuit in court, even though she had an arbitration provision in her Employment Agreement (the "Agreement") requiring her to bring all employment-related claims before an arbitration panel in New York City in accordance with the rules of the American Arbitration Association ("AAA"). Second, she elected to file that lawsuit in the Superior Court of New Jersey, Bergen County, even though all of the alleged events in the Complaint occurred in Manhattan. Third, Ms. Carlson pleaded only a violation of the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107 (the "NYCHRL"), not any New Jersey law, which reinforces that all of the alleged misconduct occurred in New York City because the NYCHRL only applies to conduct within the five boroughs of New York City. Fourth, Ms. Carlson, her counsel, and her retained public relations team orchestrated a media campaign to "tar and feather" Mr. Ailes's reputation, all in violation of Ms. Carlson's arbitration agreement.

Two days after the filing of the Complaint, Mr. Ailes properly removed the case to this Court, the only federal court where it could be removed, on the basis of diversity jurisdiction. (Dkt. No. 1). One the same day, Mr. Ailes filed a motion in this Court to compel arbitration pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4 (the "FAA"), in accordance with the arbitration provision in the Agreement. (Dkt. No. 2). It is now apparent, however, that this Court is not the correct venue under 28 U.S.C. § 1391(b) because (1) Mr. Ailes does not reside in this District, (2) none of the alleged acts giving rise to the claims occurred or had an impact in New Jersey, and (3) the case could be commenced in the U.S. District Court for the Southern District of New York (the "Southern District"). Indeed, the case belongs in the

Southern District as venue is proper there and only that Court has the power under the FAA to compel arbitration in New York City, which is what Ms. Carlson agreed to when she entered into the Agreement. As a result, Mr. Ailes has now filed a Petition to Compel Arbitration in the Southern District.

In view of these developments, Mr. Ailes notified this Court earlier today that he has withdrawn his Motion to Compel Arbitration pending here, and now moves for an Order transferring this case to the Southern District, or alternatively, for and Order staying this case pending the disposition of the Petition in the Southern District. Once the case is transferred to the Southern District, Mr. Ailes will request that it be consolidated with the Petition.

ARGUMENT

I. THE COURT SHOULD TRANSFER THIS CASE TO THE SOUTHERN DISTRICT BECAUSE THIS COURT IS NOT THE PROPER VENUE FOR THIS LITIGATION AND ONLY THE SOUTHERN DISTRICT CAN COMPEL ARBITRATION IN NEW YORK CITY.

a. Applicable Law.

A federal district court is authorized under 28 U.S.C. § 1406(a) to transfer or dismiss an action where venue in the filed district court is improper. *See* Fed. R. Civ. P. 12(b)(3); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 878 (3d Cir. 1995). In cases where the court's jurisdiction is based solely on diversity under 28 U.S.C. § 1391(b), venue is proper only in the following districts:

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or
>
> (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in

> which any defendant is subject to the court's personal jurisdiction with respect to such action.

For purposes of § 1391(b)(1), a person is "deemed to reside in the judicial district in which that person is domiciled." 28 U.S.C. § 1391(c)(1). "'[T]he domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning.'" *McCann v. Newman Irrevocable Trust,* 458 F.3d 281, 286 (3d Cir. 2006) (*quoting Vlandis v. Kline*, 412 U.S. 441, 454 (1973)).[1] Courts consider the following factors to assess a party's domicile: "declarations, exercise of political rights, payment of personal taxes, house of residence, and place of business." *Krasnov v. Dinan,* 465 F.2d 1298, 1300 (3d Cir. 1972). Other factors to be considered may include "location of brokerage and bank accounts, location of spouse and family, membership in unions and other organizations, and driver's license and vehicle registration." *McCann*, 458 F.3d at 286.

Under § 1391(b)(2), the test to determine venue involves the analysis of three factors: "(1) the place of injury; (2) the weight of contacts; and (3) whether a substantial part of the events or omissions giving rise to the claim occurred in the District." *Hoffer v. Infospace.com, Inc.*, 102 F. Supp. 2d 556, 568 (D.N.J. 2000) (quotations omitted). "To assess whether events or omissions giving rise to the claims are substantial, it is necessary to look at the nature of the dispute." *Ferratex, Inc. v. US Sewer & Drain, Inc.*, 121 F. Supp. 3d 432, 437 (D.N.J. 2015) (quotations omitted). Thus, in a discrimination case, a court considers where the alleged discrimination occurred and where the decision to terminate the plaintiff had an impact. *See Calkins v. Dollarland, Inc.*, 117 F. Supp. 2d 421, 427 (D.N.J. 2000) (holding that a plaintiff who

[1] A person's domicile for venue purposes is determined using the same test "as is applied in determining a party's citizenship for jurisdictional purposes." *Al Ghena Int'l Corp. v. Radwan*, 957 F. Supp. 2d 511, 521 n.7 (D.N.J. 2013) (quotations omitted).

alleged repeated harassment in New Jersey established that venue was proper in New Jersey because the discrimination occurred in New Jersey and she felt its impact in New Jersey).

b. Venue Is Not Proper Here Under 28 U.S.C. § 1391(b)(1).

Venue is not proper in this district under § 1391(b)(1) because Mr. Ailes is domiciled in New York – not in New Jersey. Although he has a residence in New Jersey, his primary residence is New York, where he has homes in Garrison, New York and New York City. (Dkt No. 1, Ailes Cert. ¶ 2).[2] He has resided in New York with his wife and son for more than five years and plans to continue to reside there indefinitely. (*Id.*). He has identified his Garrison, New York address as his home address on his recently filed federal and New York State income tax returns. (*Id.*, ¶ 3). He is registered to vote in the State of New York and regularly votes there. (*Id.*, ¶ 4). The State of New York is likewise his place of business. (*Id.*, ¶ 5). His automobile is registered in New York. (*Id.*, ¶ 6). His brokerage and bank accounts are in New York. (*Id.*, ¶ 7). Therefore, Mr. Ailes is domiciled in the State of New York – not in New Jersey – and application of § 1391(b) establishes that venue is proper in New York and not in New Jersey.

c. Venue Is Not Proper Here Under 28 U.S.C. § 1391(b)(2).

Nor is venue proper in this district under § 1391(b)(2), as none of the discriminatory and retaliatory acts alleged in the Complaint occurred or had an impact in New Jersey. Ms. Carlson worked in Manhattan, where Fox News is headquartered. (Dkt. No. 2-2, Asen Cert. Ex. A, p. 1

[2] References to the Certification of Roger Ailes in Support of Removal, which was attached as Exhibit B to the Notice of Removal (Dkt. No. 1), are designated as "(Ailes Cert. ¶ _)." Certifications may properly be considered in support of a motion for improper venue under Rule 12(b)(3). *See Bockman v. First Am. Marketing Corp.*, 459 Fed. App'x 157, 158 n.1 (3d Cir. 2012) (stating that a defendant is entitled to controvert allegations in the pleadings by means of an affidavit when filing a motion under Rule 12(b)(3)); *Calkins*, 117 F. Supp. 2d at 425-26 (considering the defendant's supporting certifications when evaluating plaintiff's improper venue motion under Rule 12(b)(3)).

(stating that Ms. Carlson "will be based in New York City")).[3] Likewise, Mr. Ailes has his office in Fox's Manhattan headquarters in New York City. (Ailes Cert. ¶ 5). Any asserted discrimination or retaliation that Ms. Carlson allegedly suffered during her employment had to occur in New York City. (*See* Complaint, ¶¶ 10-14, 16-17, 20, 24-25). Moreover, given that Ms. Carlson is a resident of Connecticut and has no apparent connection to New Jersey whatsoever, none of the alleged discrimination or retaliation had an impact in New Jersey, and venue is therefore improper in New Jersey under § 1391(b)(2).

Furthermore, Ms. Carlson's claims are brought pursuant to the NYCHRL, and she therefore implicitly alleges that all the acts of discrimination and retaliation occurred or had an impact in New York City. That is so because "[t]o state a claim under the NYCHRL, the [p]laintiff must allege that the [d]efendant discriminated against her within the boundaries of New York City." *Robles v Cox & Co., Inc.*, 841 F. Supp. 2d 615, 623 (E.D.N.Y. 2012); *EEOC v. Bloomberg LP*, 967 F. Supp. 2d 816, 865 (S.D.N.Y. 2013) (same). "A non-New York City resident cannot avail him[self] or herself of the protections of the [NYCHRL] unless he or she can demonstrate that the alleged discriminatory act had an impact within the City's boundaries" or that "the discriminatory acts alleged . . . occur[red] within the City." *Hardwick v. Auriemma*, 116 A.D.3d 465, 466-67 (1st Dep't 2014); *see Hoffman v. Parade Publ'n*, 15 N.Y.3d 285, 289 (2010). Thus, the alleged wrongs must have occurred or had an impact within New York City.

d. Venue Is Not Proper Here Under 28 U.S.C. § 1391(b)(3).

Finally, venue is not proper under § 1391(b)(3) because the action can be properly brought in the Southern District where Mr. Ailes resides – subject, of course, to an application

[3] References to exhibits attached to the Certification of Barry Asen in Support of Defendant Roger Ailes's Motion to Compel Arbitration and to Stay All Further Judicial Proceedings (Dkt. No. 2-2), are designated as "(Asen Cert. Ex. __)." References to paragraphs in the Asen Certification are designated as "(Asen Cert. ¶ __)."

being filed there to enforce the arbitration agreement. *See Calkins*, 117 F. Supp. 2d at 425-26 (where "venue would be appropriate elsewhere, the propriety of venue in New Jersey cannot be established under the statute's third, personal jurisdiction prong").

e. The Court Should Transfer The Case To The Southern District Because Venue Is Proper There And Only That District Can Compel Arbitration In This Case

Since venue is not proper in New Jersey under U.S.C. § 1391(b), the Court should transfer the case under 28 U.S.C. § 1406(a) to the Southern District of New York. Several reasons favor transfer:

First, venue is proper in the Southern District under § 1391(b)(1) as Mr. Ailes is domiciled in New York.

Second, venue is proper in the Southern District under § 1391(b)(2) as the events of which Ms. Carlson complains are alleged to have occurred in Manhattan.

Third, Your Honor's approval of Magistrate Judge Hammer's Report and Recommendation in *MidOil USA, LLC v. Astra Project Fin. Pty, Ltd.*, No. 12-5318, 2012 U.S. Dist. LEXIS 152905 (D.N.J. Oct. 24, 2012), recognized that this Court "may not compel arbitration outside the district in which it sits." *MidOil USA, LLC v. Astra Project Fin. Pty, Ltd.*, No. 12-5318, 2012 U.S. Dist. LEXIS 145070, at *4 (D.N.J., Oct. 5, 2012) (quotations omitted).[4] Since the arbitration clause sets New York City as the situs of the arbitration, the Southern District is therefore the only district court that can compel arbitration in New York City, and this Court should transfer the case to that court. *See Bao v. Gruntal & Co.*, 942 F. Supp. 978, 984 (D.N.J. 1998) (stating that under 9 U.S.C. § 4, where only a federal court sitting in New York had the power to decide whether a claim is arbitrable, the Court granted the defendant's cross-motion to transfer the case to the Southern District under § 1406(a)); *Optopics Laboratories*

[4] A copy of the *MidOil* opinion is attached hereto as Exhibit A.

Corp. v. Nicholas, 947 F. Supp. 817, 824-25 (D.N.J. 1996) (deciding *sua sponte* to transfer the case to the Eastern District of Pennsylvania under 28 U.S.C. § 1404(a) for the convenience of parties and witnesses and in the interest of justice because, under 9 U.S.C. § 4, the court lacked authority to compel arbitration to the contractually-chosen forum of Philadelphia).[5]

Mr. Ailes has today filed in the Southern District a Petition to compel arbitration of Ms. Carlson's claims in New York City. The Petition seeks to compel arbitration in accordance with the Agreement that Ms. Carlson signed with Fox News, which requires her to arbitrate any controversy, claim or dispute arising out of or relating to her employment, in New York City in accordance with the rules of the AAA. (Asen Cert. Ex. A, p. 4). Since the arbitration clause sets New York City as the situs of the arbitration, the Southern District may properly compel arbitration in New York City. Accordingly, the Court should transfer the case to the Southern District.

II. IN THE ALTERNATIVE, THE COURT SHOULD STAY THIS CASE PENDING THE OUTCOME OF THE PETITION TO COMPEL ARBITRATION IN THE SOUTHERN DISTRICT.

If the Court decides against a transfer to the Southern District, then Mr. Ailes respectfully requests that the Court use its discretionary authority to stay this action pending the outcome of the Petition to compel arbitration filed in the Southern District. Courts have recognized that a stay is appropriate in this district where another district has the sole authority to resolve the arbitrability of a claim. *See Alpert v. Alphagraphics Franchising, Inc.*, 731 F. Supp. 685, 689 (D.N.J. 1990) (staying a pending litigation in New Jersey where the Court was unable to compel arbitration in Arizona to "allow [the] defendant to proceed with arbitration [in Arizona] in

[5] Section 1404(a) permits transfer "for the convenience of the parties" in cases (unlike under § 1406(a)) that "ha[ve] been brought in the correct forum." *Lafferty v. St. Riel*, 495 F.3d 72, 76 (3d Cir. 2007). Transfer is appropriate if "on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." *Jumara*, 55 F.3d at 879.

accordance with [a franchise] agreement, and if necessary petition the court in Arizona" to compel arbitration); *see also Gilmore v. Berg*, 761 F. Supp. 358, 363 (D.N.J. 1991) (*citing Bechtel Corp. v. Local 215, Laborers' Int'l Union*, 544 F.2d 1207, 1215 (3d Cir. 1976) (the power to stay is discretionary). The Court should therefore permit the Southern District to determine whether the dispute between the parties is arbitrable and stay this action pending the outcome of Mr. Ailes's petition to compel arbitration.

CONCLUSION

Defendant Ailes respectfully requests that this Court grant his motion to transfer this action to the Southern District because this Court is not the proper venue for this case while the Southern District is the correct forum. Alternatively, if the Court does not transfer this action, then it should stay the case until the Court in the Southern District rules on defendant Ailes's Petition to Compel Arbitration.

Dated: July 15, 2016

Respectfully submitted,

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EXHIBIT A

FOCUS - 10 of 34 DOCUMENTS

MIDOIL USA, LLC, Petitioner, v. ASTRA PROJECT FINANCE PTY LTD., Respondent.

Civil Action No.: 12-5318 (JLL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2012 U.S. Dist. LEXIS 152905

October 24, 2012, Decided
October 24, 2012, Filed

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: *MidOil USA, LLC v. Astra Project Fin. Pty, Ltd., 2012 U.S. Dist. LEXIS 145070 (D.N.J., Oct. 5, 2012)*

COUNSEL: [*1] For MIDOIL USA, LLC, Petitioner: THOMAS W. WILLIAMS, LEAD ATTORNEY, MAHWAH, NJ.

For ASTRA PROJECT FINANCE PTY LTD., Respondent: MEIR MOZA, LEAD ATTORNEY, LAW OFFICES OF MEIR MOZA, ESQ., MINEOLA, NY.

JUDGES: Jose L. Linares, United States District Judge.

OPINION BY: Jose L. Linares

OPINION

ORDER

THIS MATTER comes before the Court by way of the filing of a Petition to Compel Arbitration, pursuant to the Federal Arbitration Act, *9 U.S.C. § 4*. This Court had referred Petitioner's motion to compel arbitration (and Respondent's cross-motion to stay arbitration) to the Honorable Michael A. Hammer, United States Magistrate Judge, pursuant to *28 U.S.C. § 636 (b)(1)(B)*. Magistrate Judge Hammer filed a Report and Recommendation in connection with the parties' applications on October 5, 2012. In particular, Magistrate Judge Hammer recommended that the undersigned deny Petitioner's motion to compel arbitration and dismiss the action. Having reviewed the Report and Recommendation, and having received no objection thereto, and for good cause shown,

IT IS on this **24th day of October, 2012**,

ORDERED that the Report and Recommendation of Magistrate Judge Hammer, filed on October 5, 2012 [CM/ECF Docket Entry No. 6], is hereby **ADOPTED** as [*2] the findings of fact and conclusions of law of this Court; and it is further

ORDERED that Petitioner's motion to compel arbitration is denied without prejudice and the matter is hereby dismissed; and it is further

ORDERED that Respondent's motion to stay arbitration [Docket Entry No. 4] is denied as moot.

IT IS SO ORDERED.

/s/ Jose L. Linares

Jose L. Linares

United States District Judge

MIDOIL USA, LLC, Petitioner, v. ASTRA PROJECT FINANCE PTY LTD., Respondent.

Civil Action No. 12-5318 (JLL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2012 U.S. Dist. LEXIS 145070

October 5, 2012, Decided
October 9, 2012, Filed

SUBSEQUENT HISTORY: Adopted by, Dismissed by, Motion denied by, Without prejudice, Motion denied by, As moot *MidOil USA, LLC v. Astra Project Fin. Pty, LTD., 2012 U.S. Dist. LEXIS 152905 (D.N.J., Oct. 24, 2012)*

CORE TERMS: compel arbitration, arbitration, arbitration clause, arbitration agreement, proper district, concurrent jurisdiction, arbitrate, Federal Arbitration Act FAA, transferring, refile, venue, sits

COUNSEL: [*1] For MIDOIL USA, LLC, Petitioner: THOMAS W. WILLIAMS, LEAD ATTORNEY, MAHWAH, NJ.

For ASTRA PROJECT FINANCE PTY LTD., Respondent: MEIR MOZA, LEAD ATTORNEY, LAW OFFICES OF MEIR MOZA, ESQ., MINEOLA, NY.

JUDGES: Michael A. Hammer, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: Michael A. Hammer

OPINION

REPORT & RECOMMENDATION

I. Introduction

Before the Court is a petition by MidOil LLC ("MidOil" or "Petitioner") to compel arbitration. Respondent Astra ("Astra" or "Respondent") cross-moves for an order to stay arbitration and compel judicial review. The Honorable Jose L. Linares, United States District Judge, referred the motion to this Court for Report and Recommendation. Pursuant to *Federal Rule of Civil Procedure 78*, the Undersigned did not hear oral argument. For the reasons set forth herein, the Undersigned respectfully recommends that Petitioner's motion to compel arbitration be denied, and that the case be dismissed.

II. Analysis

On or about January 11, 2012, the parties entered into a contract. Petition To Compel Arbitration, Aug. 23, 2012, ECF No. 1-3, Exh. A (corporate finance agreement). The arbitration clause provides in pertinent part:

> In the event of dispute [*sic*] concerning any aspect of this Agreement (including [*2] breach or alleged breach thereof) the PARTIES agree to have the dispute arbitrated and settled by binding arbitration in New York City under the most recent version of the Rules of the American Arbitration Association.

Id. at 8 (Item 23.01). The parties agree that this is the relevant clause at issue.

The plain language of the arbitration agreement makes clear that if the arbitration clause applies, the arbitration would proceed in New York, not in New Jersey. Because the parties' contract calls for arbitration to occur in New York City, it is beyond this Court's power to compel arbitration. Although the Federal Arbitration Act ("FAA") requires broad construction of arbitration clauses ', but there is a threshold question of what power the court has to compel this arbitration.

1 The line of Supreme Court cases elucidating how courts should broadly interpret arbitration provisions is a long one. See, e.g., *AT & T Mobility LLC v. Concepcion, US , 131 S. Ct. 1740, 1749, 179 L. Ed. 2d 742 (2011)* ("[C]ourts must place arbitration agreements on equal footing with other contracts and enforce them according to their terms."); *Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)* (stating that [*3] the FAA reflects "the national policy favoring arbitration agreements"); *AT & T Tech., Inc. v. Comm's Workers of Am., 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)*.

Pursuant to *9 U.S.C. § 4*, a New Jersey court may not compel arbitration outside of New Jersey. *9 U.S.C. § 4* (stating that a court is authorized to compel arbitration "within the district in which the petition for an order direction such arbitration is filed"); *Econo-Car International v. Antilles Car Rentals, 499 F.2d 1391, 1394, 11 V.I. 258 (3d Cir. 1974)*. *Section 4* also provides that if an arbitration clause applies, then "the court shall make an order directing the parties to proceed to arbitration in ***accordance with terms of the agreement.***" *9 U.S.C. § 4* (emphasis added). The parties' choice of New York as the forum to arbitrate, coupled with MidOil's choice of New Jersey to bring its petition to compel arbitration, creates a procedural quandary that the Court can resolve only by either: (1) dismissing the matter so that MidOil may refile in the proper district, or (2) transferring this matter to the proper district. In *Shaffer v. Graybill, 68 Fed. Appx. 374 (3d Cir. 2003)*, the Third Circuit considered an arbitration clause that provided for arbitration [*4] in the State of New York and directed the lower court to dismiss the action or transfer it to the proper district in accordance with the arbitration clause. *Id. at 377* ("[A] district court may not compel arbitration outside the district in which it sits . . . ."). In *Bosworth v. Ehrenreich, 823 F. Supp. 1175 (D.N.J. 1993)*, the Court considered whether it could compel arbitration in New Jersey when a contract required the arbitration to take place in the Southern District of New York. The Court concluded that it could not compel the arbitration. *Id. at 1180* ("This Court sits in New Jersey and cannot compel arbitration in New York. . . Therefore, the Court may not compel arbitration in New York and will not, even if it could, compel arbitration in New Jersey."); see also *Villano v. TD Bank, 2012 U.S. Dist. LEXIS 123013 (D.N.J. Aug. 29, 2012)* (not compelling arbitration because it was outside District of New Jersey). Therefore, the Court has no power to grant the petition.

The next question is whether the Court should dismiss or transfer the petition. [2] The former option appears to be the better choice. Astra has brought an action in New Jersey Superior Court, and therefore there is an [*5] available venue for MidOil to raise its arbitration arguments. State courts have concurrent jurisdiction over the Federal Arbitration Act with federal courts. *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc., 571 F.3d 299, 308 (3d Cir. 2009)* ("[T]he FAA grants concurrent jurisdiction to federal and state courts and thus expressly contemplates the state court as an adequate forum for adjudication."); see also *Vaden v. Discover Bank, 556 U.S. 49, 71, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009)* ("State courts have concurrent jurisdiction under the FAA, state courts as well as federal courts are obliged to honor and enforce agreements to arbitrate."). Presumably if the superior court finds the matter is subject to the parties' arbitration clause, then it would stay the action until the parties arbitrate their disputes. Alternatively, MidOil has the option of refiling its petition to compel arbitration in the appropriate district in New York. [3] Each of those potential avenues counsels in favor of dismissing this case rather than transferring it.

2 There is no reason to stay this action because MidOil's petition to compel arbitration constitutes the entire action.

3 Another reason not to transfer is it is not immediately [*6] clear what district would be proper. The agreement specifies "New York City" as the proper venue for arbitration. This could potentially mean any of the five boroughs, some of which are in the Southern District of New York and some of which are in the Eastern District of New York. The more prudent course, therefore, is to allow the petitioner to refile in the district it believes proper.

III. Conclusion

Because the Court has no authority to grant MidOil's petition to compel arbitration, it is respectively recommended that Petitioner's motion to compel arbitration be denied and this case be dismissed.

The parties have fourteen days to file and serve objections to this Report and Recommendation pursuant to *28 U.S.C. § 636* and Local Rule 7.1(c)(2).

Date: October 5, 2012

/s/ Michael A. Hammer

UNITED STATES MAGISTRATE JUDGE