UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND HER MOTION FOR A PRELIMINARY INJUNCTION

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POINT I

AILES WAIVED HIS OBJECTION TO VENUE IN NEW JERSEY NOTWITHSTANDING THAT HE ATTEMPTED TO "WITHDRAW" HIS MOTION TO COMPEL ARBITRATION IN THIS COURT

Ailes does not dispute that his July 8, 2016, motion to compel arbitration in this Court constituted a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Palcko v. Airborne Express, 372 F.3d 588, 597-98 (3d Cir. 2004). Instead, Ailes argues that his "withdrawal" of his 12(b)(6) motion after learning which judge was assigned to this action somehow revives the waivable venue defense that, for strategic reasons, Ailes chose not to assert in his initial 12(b)(6) motion. Ailes' argument is contrary to the plain language of Rules 12(g)(2) and 12(h)(1)(A), and the cases on which Ailes relies have been expressly rejected for this reason.

In Maxtena, Inc. v. Marks, No. CIV.A. DKC 11-0945, 2012 WL 113386, at *11 (D. Md. Jan. 12, 2012), the Court disagreed with Ailes' case from the Northern District of California, Remley v. Lockheed Martin Corp., and held:

> [I]n an attempt to avoid an outcome similar to *Rowley,* Marks cites an unpublished 2001 case from the United States District Court for the Northern District of California, in which the court permitted a defendant to include the defense of improper venue in a second motion to dismiss after the plaintiff chose to amend her original complaint. *See generally Remley v. Lockheed Martin Corp.*, No. C00–2495CRB, 2001 WL 681257 (N.D.Cal. June 4, 2001). *Remley*, even when coupled with the relatively few authorities that it references, is unconvincing in the face of the clear language set forth in Rule 12(g)(2). The limited cases that have permitted defendants to amend their motions to dismiss to include previously omitted, waivable defenses generally do so because the defense was added prior to the time that the district court evaluated the motion or was "inadvertently omitted." *Id.* at *3 (internal quotation marks omitted). The plain language of Rule 12(g)(2), however, would appear to preclude such considerations. *See, e.g.,* Fed. R.Civ.P. 12(g)(2) (*"Except as provided in Rule 12(h)(2) or (3),* a party that makes a motion under this rule *must not* make another motion ...." (emphasis added)). Permitting Marks to amend his first motion to dismiss to include the defense of improper venue would merely sanction an end run around both Rule 12(g)(2) and settled law within the Fourth Circuit. Therefore, his motions to dismiss for improper venue and for leave to amend the first motion to dismiss will be denied.

See also Rowley v. McMillan, 502 F.2d 1326, 1332-33 (4th Cir. 1974) (holding that defendant could not "revive" the defense of lack of personal jurisdiction by adding it to his motion to dismiss after the plaintiff amended the complaint).

In addition to the fact that Maxtena is consistent with the clear language of Rule 12, this Court should adhere to Maxtena because it promotes sound policy. The rule that Ailes' espouses would open the door for the judge-shopping in which Ailes has engaged here. It would allow a party such as Ailes to make a 12(b)(6) motion without including any objection to venue, wait to see which judge is assigned, and only thereafter "withdraw" the 12(b)(6) motion and raise for the first time an objection to venue. Ailes' judge-shopping should not be sanctioned.

Accordingly, pursuant to the plain language of Rules 12(g)(2) and 12(h)(1)(A), Ailes has waived his objection to venue in this Court.

POINT II

AILES' OWN CASES MAKE CLEAR THAT THIS COURT IS A PROPER VENUE TO DECIDE THE ISSUE OF THE ARBITRABILITY OF CARLSON'S CLAIM

Ailes argues that this Court should transfer venue to the SDNY or stay this action in favor of his petition to compel arbitration in the SDNY based on his argument that only the SDNY can compel arbitration in New York City pursuant to the arbitration clause in Carlson's Employment Contract with Fox News Network. Ailes' argument, however, puts the cart before the horse by assuming that Carlson's claim against Ailes, who is not a party to the Employment Contract and is expressly carved out from its provisions, is subject to arbitration. Thus, Ailes' objection to venue does not arise unless and until it were decided that Carlson's claim is subject to the arbitration clause. This Court can and should decide that issue.

The cases on which Ailes relies in fact support the granting of this application for a temporary restraining order and preliminary injunction because they confirm that a court outside

of the district set forth in the arbitration clause can, and often does, decide the threshold issue of whether the claim is subject to the arbitration clause.

For example, in Ailes' case Optopics Laboratories, Corp. v. Nicholas, 947 F. Supp. 817, 819 (D.N.J. 1996), the designated forum in the arbitration clause was Philadelphia, Pennsylvania. The plaintiff commenced an action on the merits in the District of New Jersey. Id. at 818. The defendant moved to compel arbitration, and the plaintiff opposed, arguing that the claims fell outside the contractual arbitration provision. Id. The District of New Jersey decided the motion to compel arbitration, and held that the plaintiff's claims were subject to the arbitration clause. Id. at 822-24. Only after deciding that issue in the affirmative did the Court transfer the action to the Eastern District of Pennsylvania. Id. at 824. The Court expressly rejected the very argument that Ailes makes here that the District of New Jersey could not decide the issue of arbitrability. It held:

> Emphasizing this Court's inability to compel arbitration in Philadelphia, plaintiffs challenge this Court's authority to find their first three counts arbitrable. (Somewhat inconsistently, they do not contest this Court's authority to find their first three counts non-arbitrable.) Ignoring cases in which courts decide arbitrability despite lacking authority to compel arbitration, *see, e.g., Alpert,* 731 F.Supp. at 689, plaintiffs cite two recent cases for the proposition that courts without authority to compel arbitration cannot "direct its scope." *See Merrill Lynch, Pierce, Fenner & Smith v. Lauer,* 49 F.3d 323, 327, 329 (7th Cir.1995); *Bao,* 942 F.Supp. at 983 (citing *Lauer* with approval). Both cases deal with situations in which the contractual location of arbitration is in one circuit and a party starts an action in another. Both cases hold that if the law in the circuit chosen for arbitration differs from that in the circuit where suit is started, the court should not render a decision at odds with the binding law of the circuit in which the arbitration will occur, particularly when such decision would result in the dismissal of some of the claims. Plaintiffs interpret these cases to preclude courts from "adjudicating the arbitrability of claims to be arbitrated outside its jurisdiction." Plaintiffs' Supp.Br. at 6. This Court finds *Lauer* and *Bao* not on point and plaintiffs' argument for extending their holdings unpersuasive. In simple terms these cases simply hold that a choice of forum for arbitration carries with it a choice of the binding law of that jurisdiction. This choice cannot be frustrated by decisions made by a court in another circuit applying different rules of law. Here the transferor and transferee districts are both in the Third Circuit and the contract is, in any case, governed by Delaware law.

Id. at 824 n.14.

Similarly, here Ailes has never argued that there is any material difference between Third Circuit law or Second Circuit law on the issue of whether Ailes, as a non-signatory, is entitled to enforce the arbitration clause with respect to Carlson's statutory discrimination claim against him. To the contrary, his papers consistently rely on cases from both Circuits and he has taken the position that "[t]he Third Circuit shares the Second Circuit's view" on the arbitrability issue. Ailes' Opp. at 14.

In Ailes' case Alpert v. Alphagraphics Franchising, Inc., 731 F. Supp. 685, 687-89 (D.N.J. 1990), the District of New Jersey also first decided the threshold question of whether the claims were subject to the arbitration clause and, only after answering that question in the affirmative did the Court stay the action in favor of arbitration in Arizona pursuant to the arbitration clause.

This Court's decision in MidOil USA, LLC v. Astra Project Finance Pty Ltd., 2012 U.S. Dist. LEXIS 145070 (D.N.J. Oct. 9, 2012), also is fully consistent that the threshold issue of arbitrability can be decided by a court outside the venue set forth in the arbitration clause. In that case, a petition to compel arbitration was filed in the District of New Jersey, and the respondent cross-moved to stay arbitration and compel judicial review. Id. at *1. The arbitration clause provided for arbitration in New York City. Id. Nevertheless, this Court held that the Superior Court in New Jersey, where there was already pending an underlying action on the merits, would be an appropriate forum to decide the issue of arbitrability. It held:

> Astra has brought an action in New Jersey Superior Court, and therefore there is an available venue for MidOil to raise its arbitration arguments. . . . 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.

Id. at *5.

Here, the underlying action on the merits is already pending in this Court, and therefore this "is an available venue for [Ailes] to raise [his] arbitration arguments," id., which in fact he has already done.

POINT III

THIS COURT IS THE MOST APPROPRIATE FORUM TO DECIDE THE ISSUE OF THE ARBITRABILITY OF CARLSON'S CLAIM AGAINST AILES PURSUANT TO THE FIRST-FILED RULE AND JUDICIAL ECONOMY

The first-filed rule and judicial economy dictate that this Court should decide the issue of the arbitrability of Carlson's claim against Ailes. Indeed, Rule 1 of the Federal Rules of Civil Procedure provides that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." There have been no less than four briefs already filed in this Court arguing the merits of the issue of whether Carlson's claim against Ailes is subject to the arbitration clause: (i) Ailes' July 8, 2016, motion to compel arbitration [ECF No. 2]; (ii) Carlson's July 15, 2016 opposition [ECF No. 10]; (iii) Carlson's July 18, 2016 motion for summary judgment for a declaratory judgment that her claim against Ailes is not subject to the arbitration clause [ECF No. 10]; and (iv) Ailes July 26, 2016 opposition to Carlson's application for a temporary restraining order and preliminary injunction [ECF No. 19]. Indeed, Ailes' opposition brief filed yesterday copies virtually word-for-word portions of Ailes' original motion to compel arbitration. See ECF No. 19 at 12-14. This Court also is already familiar with the issues, has already held a conference with the parties, and has scheduled another conference for August 4. Given the substantial progress that already has occurred in this Court, it would be a waste of the parties' and the Courts' resources, inefficient, and contrary to Rule 1, for the parties to restart before a new judge in the SDNY.

In these circumstances, the first-filed rule warrants enjoining Ailes from proceeding with the SDNY petition to compel arbitration pending this Court's determination of that very same issue. "The Third Circuit has adopted the 'first-filed' rule, which requires that '[i]n all cases of federal concurrent jurisdiction, the court which first has possession of the subject must decide it.'" Sinclair Cattle Co., Inc. v. Ward, 80 F. Supp. 3d 553, 558 (M.D. Pa. 2015) (quoting EEOC v. Univ. of Pa., 850 F.2d 969, 971 (3d Cir.1988)). The first-filed rule "seeks to promote comity among federal courts and encourage sound judicial administration." Id. Thus, "courts often look to the status of the second-filed action to determine whether" application of the first-filed rule is appropriate.

Here, Ailes raised the issue of the arbitrability of Carlson's claim first in this Court, there are four sets of briefs in this Court arguing the merits of that issue, and even Ailes' opposition to the order to show cause asks this Court to resolve that issue. The interest of "encourag[ing] sound judicial administration," id., supports this Court enjoining Ailes' prosecution of the duplicative SDNY petition to allow this Court to decide the issue of the arbitrability of Carlson's claim.

Ailes argues that this Court should find an exception to the first-filed rule on the basis that Carlson purportedly "engaged in egregious forum shopping." Ailes' Opp. at 10. That argument is frivolous. There is no basis whatsoever to conclude that Ms. Carlson engaged in forum shopping by filing her action against Ailes in Superior Court in New Jersey. The Superior Court in New Jersey was a logical forum because Ailes resides in New Jersey, which he has never disputed. Indeed, public records show that Ailes owns a mansion at 218 Truman Drive, Cresskill, New Jersey, which he has owned since the year 2000 and which was recently assessed at over $1.5 million. See http://njparcels.com/property/0208/301/22 and http://njparcels.com/sales/0208_301_22 (attached hereto as Attachment 1). It has been publicly reported that "Ailes

begins each workday buffered by the elaborate private security detail that News Corp. pays to usher him from his $1.6 million home in New Jersey to his office in Manhattan. See http://www.rollingstone.com/politics/news/how-roger-ailes-built-the-fox-news-fear-factory-20110525 (attached hereto as Attachment 2). That article describes Ailes' Garrison, New York home as only his "country home," but indicates that New Jersey is his main residence.[1] Moreover, Ailes is not a party to any arbitration agreement with Carlson. Therefore, bringing the action in New Jersey makes perfect sense. See Emergency Care Research Inst. v. Guidant Corp., 2006 WL 1879156, at *5 (E.D. Pa. July 5, 2006) (declining to find an exception to the first-filed rule because "[q]uite simply, there is nothing 'exceptional' at all about the present circumstances"). Simply because Ailes repeatedly proclaims "forum shopping" does not make it so.

The cases cited by Ailes are also plainly distinguishable or support this Court's resolution of the arbitration issue. In WeWork Companies v. Zoumer, 2016 U.S. Dist. LEXIS 46033 (S.D.N.Y. Apr. 5, 2016), the plaintiff sued her former employer in California state court, and the parties were both signatories to an arbitration agreement providing for arbitration in New York. The employer filed a petition to compel arbitration in New York. In opposition to the petition in New York, the employee raised the first-filed rule. The SDNY held that the first-filed rule did not apply because: "While the parties in the two cases are the same, the issues, although related, are distinct. The California Action involves substantive claims for which respondent is seeking relief under California labor laws whereas the petitioner before this court seeks to compel arbitration of those claims." Id. at *3. WeWork is therefore clearly distinguishable because here, before filing his petition to compel arbitration in New York, Ailes filed a motion to compel

[1] See also http://gawker.com/fox-news-boss-roger-ailes-treats-cops-as-his-personal-m-1629613609 (attached hereto as Attachment 3) ("According to police reports obtained by Gawker, the Cresskill Police Department supplies 24/7 security to Ailes' residence there . . . .").

arbitration in this Court, and three subsequent briefs have been filed in this Court addressing the merits of that issue, so the arbitrability issue is in two courts at the same time.

Ailes' case Matter of the Petition of the Home Insurance Co., 908 F. Supp. 180 (S.D.N.Y. 1995), actually supports this Court's determination of the arbitrability issue. There, the plaintiff brought an action on the merits in Wisconsin state court, and the defendant removed to the Eastern District of Wisconsin and moved to stay the action in favor of arbitration pursuant to an arbitration clause calling for arbitration in New York. The Wisconsin federal court decided the issue of whether the claim was arbitrable and only after deciding that question in the affirmative did it grant the stay of that action. See id. at 182 n.1.

Finally, Ailes' case Matter of the Complaint of Weeks Marine, Inc., 2016 U.S. Dist. LEXIS 77808 (D.N.J. June 14, 2016), an admiralty action for claims arising from a maritime collision, is completely inapposite because that case was transferred to New York under 28 U.S.C. 1404(a) based on considerations of convenience, including that three related actions already had been filed in the Southern District of New York and those plaintiffs consented to the transfer of the action. Id. at *6. Ailes has not moved under section 1404(a), nor has he ever argued that New Jersey would be an inconvenient forum. Ailes himself owns a mansion in New Jersey. See Attachments 1-3 hereto. His attorneys have a Newark office. See http://www.ebglaw.com/office-locations/newark/. Ailes' "country home" in Garrison is closer to Newark than it is to Manhattan (46 miles to Newark vs. 47 miles to Manhattan). Moreover, several key witnesses are found in New Jersey, including Ailes and Steve Doocy (who is specifically referenced in the Complaint), and it is believed that additional potential witnesses Neil Cavuto, Suzanne Scott, and Michael Clemente are also located in New Jersey.

Accordingly, there is no basis to deviate from the first-filed rule in this case, and its underlying considerations of judicial economy clearly dictate that the issue of arbitrability should

be decided by this Court.

POINT IV

THE RISK OF DUPLICATIVE LITIGATION AND INCONSISTENT ADJUDICATION CONSTITUTES IRREPARABLE HARM WARRANTING AN INJUNCTION OF AILES' PROSECUTION OF THE SDNY PETITION

Ailes' argument that simultaneously litigating the arbitrability issue in this Court and in the SDNY does not constitute irreparable harm is absurd and contrary to law. In In re CD Liquidation Co., LLC, 462 B.R. 124, 134-35 (Bankr. D. Del. 2011), the Court held that the prospect of duplicative litigation satisfied the irreparable harm element supporting an injunction because the duplicative litigation "may give rise to inconsistent verdicts" and "[a]bsent an injunction, [the defendant] is harmed by having to defend against two lawsuits asserting the same claims." See also Am. Employers' Ins. Co. v. Elf Atochem N. Am., Inc., 656 A.2d 58, 63 (N.J. App. Div. 1995) ("[T]he prejudice of litigating in two forums is obvious. As plaintiffs assert, litigating the same issues in two jurisdictions involves a duplication of effort and excessive expense, and there is a chance of inconsistent rulings."); Microsoft Corp. v. Motorola, Inc., 871 F. Supp. 2d 1089, 1100 (W.D. Wash. 2012) (holding that "[c]ourts have found that court policies against avoiding inconsistent judgments, forum shopping and engaging in duplicative and vexatious litigation" support issuance of anti-suit injunction).

CONCLUSION

For all of the reasons set forth herein and in Ms. Carlson's opening brief, Plaintiff's Application for Order to Show Cause with Temporary Restraints and for a Preliminary Injunction should be granted.

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Dated: July 28, 2016