**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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

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**MEMORANDUM OF LAW IN SUPPORT OF THE APPLICATION OF PLAINTIFF FOR A TEMPORARY RESTRAINING ORDER AND HER MOTION FOR A PRELIMINARY INJUNCTION**

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**MARTIN S. HYMAN, ESQ.**
**MATTHEW C. DALY, ESQ.**

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## SUMMARY OF ARGUMENT

Plaintiff seeks a temporary restraining order, preliminary injunction and permanent injunction to prevent Defendant Roger Ailes or anyone on his behalf from perfecting, prosecuting or pursuing the FAA Petition he has filed in the United States District Court for the Southern District of New York, *Roger Ailes v. Gretchen Carlson*, Civil Action No. 16-cv-5671.

Preliminary injunctive relief is appropriate here. First, Plaintiff Gretchen Carlson will likely succeed on the merits of her claim that the venue must remain in this Court. Defendant Ailes has waived any defense with regard to venue by availing himself of the jurisdiction of this Court through his filing of a motion to compel arbitration, a 12(b)(6) motion under Third Circuit precedent. Ailes' failure to raise venue with or before that motion is a waiver under Fed. R. Civ. P. 12(g)(2) and 12(h)(1)(A).

Second, Plaintiff Carlson will suffer irreparable harm absent injunctive relief because her case will proceed simultaneously in two different jurisdictions, risking inconsistent rulings, creating chaos and jeopardizing her right to a jury trial.

Third, the balance of hardships tips decisively in Plaintiff Carlson's favor. Defendant Ailes does not even allege any hardship should he be forced to continue to litigate in his chosen forum, Federal Court in New Jersey. That is because there are no hardships associated with his litigating in his chosen forum.

Fourth, the public interest favors a preliminary injunction. The public interest is served by rejecting the judge-shopping and forum shopping maneuvers of the Defendant who first invoked the jurisdiction of this venue to rule on a motion to compel arbitration and then, after learning of the assignment of Judge Linares, purported to "withdraw" its motion and filed a Petition in New York that Ailes could have filed before said assignment. Maintaining one action in this Court promotes judicial economy and preserves the parties' legal resources.

## STATEMENT OF FACTS

On July 6, 2016, Plaintiff's original Complaint was properly filed in the Superior Court of New Jersey, Bergen County, where Defendant Ailes has maintained a residence for many years.

Two days later, on July 8, 2016, Defendant Ailes filed a Notice of Removal to this Court. See ECF Dkt. No. 1.

On the same day, Defendant simultaneously filed a Motion to Compel Arbitration and Stay All Further Judicial Proceedings (hereinafter simply, "Motion to Compel Arbitration/Stay"), returnable on August 1, 2016. See ECF Dkt. No. 2.

On July 12, 2016, the Court scheduled a Status Conference in this matter for July 20, 2016, at 11:30 a.m., before the Honorable Jose L. Linares. See ECF Dkt. No. 3.

On July 12, 2016, Ms. Carlson filed a Motion for Leave to Appear *Pro Hac Vice* for Martin S. Hyman, Esq., and Matthew C. Daly, Esq., with supporting papers. See ECF Dkt. No. 4.

On July 13, 2016, Defendant Ailes filed a letter with the Court consenting to the Plaintiff's Motion for *Pro Hac Vice* Admission. See ECF Dkt. No. 5.

By Order entered on July 13, 2016, the Court granted Plaintiff's *Pro Hac Vice* admission to Mr. Hyman and Mr. Daly. See ECF Dkt. No. 6.

Late in the afternoon of Friday, July 15, 2016, Mr. Ailes, without any prior notice to the Court and without consulting Plaintiff's counsel and after Plaintiff had already prepared opposition papers to the pending Motion to Compel Arbitration/Stay, Defendant wrote to the Court, requesting to withdraw the pending Motion to Compel/Stay. See ECF Dkt. No. 7.

Shortly thereafter, Defendant, apparently changing its litigation tactics and wanting yet another forum and judge, filed a "Motion to Transfer Case to the U.S. District 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," (hereinafter "Motion to Transfer to the S.D.N.Y"), returnable on August 15, 2106. See ECF Dkt. No. 9.

Further invoking the jurisdiction of the District of New Jersey, also on the same afternoon of July 15, 2016, Defendant also filed his own Motion for *Pro Hac Vice* Admission of attorneys. See ECF Dkt. No. 8.

At the same time, invoking the jurisdiction of another court, Defendant filed a Petition to Compel Arbitration in the United States District Court for the Southern District of New York. Thus, Defendant has brought the identical issues before two, separate Unites States District Courts, having first filed in the District of New Jersey.

On that same day, July 15, 2016, Plaintiff opposed Defendant's Motion to Compel Arbitration/Stay, returnable on August 1, 2016, by filing a Brief in Opposition and Certification of Nancy Erika Smith, with exhibits. See ECF Dkt. No. 10.

Defendant has yet to serve Ms. Carlson with the Petition it references in its Motion to Transfer to the S.D.N.Y., nor did Defendant attach a copy of its Petition to its motion papers. See ECF Dkt. No. 9.

On July 18, 2016, Plaintiff filed this Order to Show Cause.

As set forth in the accompanying Brief, Defendant's maneuvering has placed the identical legal issues in two separate courts.

## ARGUMENT

### ALL FACTORS WEIGH IN FAVOR OF TEMPORARY RESTRAINTS AND A PRELIMINARY INJUNCTION

Federal Rule of Civil Procedure 65(b) gives federal courts the power to grant a temporary restraining order ("TRO") where necessary. A TRO "is an emergency remedy issued to maintain the status quo until a hearing can be held on an application for a preliminary injunction." Abbott Labs. v. Andrx Pharms., Inc., No. 05 C 1490, 2005 WL 1273105, at *1 (N.D. Ill. May 20, 2005); Ortho Pharma Corp. v. Amgen, Inc., 882 F.2d 806, 813 (3rd Cir. 1989) (noting that "the 'preservation of the *status quo*' represents the goal of preliminary injunctive relief in any litigation, including in an arbitrable dispute").

The standard for a temporary restraining order is the same as that for a preliminary injunction. See Bieros v. Nicola, 857 F.Supp. 445, 446 (E.D. Pa. 1994); Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc., 236 F.Supp. 2d 1152, 1154 (D. Haw. 2002); Bernina of America, Inc. v. Fashion Fabrics Int'l., No. 01 C 505, 2001 WL 128164, at *1 (N.D. Ill. Feb. 9, 2001); Lockheed Missile & Space Co. v. Hughes Aircraft Co., 887 F.Supp. 1320, 1323 (N.D. Cal. 1995). Thus, the Court may grant an application for a temporary restraining order and a preliminary injunction if Plaintiff shows (i) a reasonable likelihood of success on the merits; (ii) irreparable harm; (iii) that the balance of the hardships tips in its favor; and (iv) the injunction is in the public interest. See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co., 290 F.3d 578, 586 (3rd Cir. 2002); Ortho Pharma Corp., 882 F.2d at 812-13; Bradley v. Pittsburgh Bd. Of Educ., 910 F.2d 1172, 1175 (3rd Cir. 1990).

## POINT I

## PLAINTIFF CARLSON HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF HER CLAIM THAT VENUE SHOULD REMAIN IN THE DISTRICT OF NEW JERSEY RATHER THAN ANY FEDERAL COURT IN NEW YORK

### A. Defendant Ailes has Waived With Prejudice Any And All Objections to Venue in New Jersey

On July 6, 2016, Defendant Ailes removed Plaintiff Carlson's harassment and retaliation case from Superior Court of New Jersey, Bergen County (the location of Defendant's residence) to the United States District Court for the District of New Jersey. Further invoking the jurisdiction and venue of the Court, Defendant moved to compel arbitration.

Importantly, when moving to compel arbitration, Ailes failed to join with that effort a motion challenging the venue of this Court. That omission is fatal to any claim now that Ailes makes regarding the propriety of venue in this Court. Put another way, by failing to timely object to venue, Ailes has waived all objections to venue. This waiver flows from the plain language of Fed. R. Civ. P. 12 as follows:

First, a motion to compel arbitration, such as the one filed by Ailes, is a 12(b)(6) motion, *i.e.*, a motion to dismiss for failure to state a claim, Palcko v. Airborne Express, 372 F.3d 588, 597-98 (3d Cir. 2004). As the Third Circuit held in Palcko, supra:

> Our prior decisions support the traditional practice of treating a motion to compel arbitration as a motion to dismiss for failure to state a claim upon which relief can be granted. See Nationwide Ins. Co. v. Patterson, 953 F.2d 44, 45 n. 1 (3d Cir. 1991) ("Dismissal of a declaratory judgment action because the dispute is covered by an arbitration provision is generally effected under Rule 12(b)(6) covering dismissals for failure to state a claim upon which relief can be granted, see, e.g., Aetna Casualty & Surety Co. v. Hameen, 758 F.Supp. 1049 (E.D. Pa. 1990), ...").

[Id., 372 F.2d at 597-98.]

Under Fed. R. Civ. P. 12(h), a party that makes a 12(b)(6) motion waives a venue defense if he does not include it in his initial motion.

Rule 12(h)(1) provides, in pertinent part:

> (h) Waiving and Preserving Certain Defenses.
> (1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)-(5) by:
> (A) omitting it from a motion in the circumstances described in Rule 12(g)(2).

Venue is included in this waiver rule because it is listed as Rule 12(b)(3) in the "list" of waivable defenses referred to above in Rule 12(h)(1).

Thus, venue is waived if it is "omitted . . from a motion in the circumstances described in Rule 12(g)(2)."

Rule 12(g)(2) provides, in pertinent part:

> (g)Joining Motions
>
> (2)Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this Rule must not make another motion under this Rule raising a defense or objection that was available to the party but omitted from its earlier motion.

Under this Rule, because Ailes made a "motion under this rule," i.e., he made a Rule 12(b)(6) motion to compel arbitration, he is not entitled "to make another motion under this rule" – i.e., his recently filed 12(b)(3) venue motion – if the later filed motion "rais[es] a defense or objection that was available to the party but omitted from its earlier motion." Mr. Ailes' venue objection was obviously available to him at the time he filed his 12(b)(6) motion to compel arbitration, thus he had no choice but to join that venue motion with his 12(b)(6) motion or suffer waiver with prejudice of venue objections. Therefore, Ailes is absolutely barred from challenging venue in this Court. It is noteworthy that the foregoing Rules impose a waiver based solely on the "making" of the 12(b)(6) motion. It therefore does not help Ailes that after he

learned of the judge assignment in this case, he purported to "withdraw" his motion – the motion was made and that fact cannot be erased.

Furthermore, it is of no avail to Ailes that he has premised his (waived) venue objections on language in 9 U.S.C. § 4 regarding the filing of a Petition to compel arbitration in the venue of the State identified in the arbitration agreement.

First, to render that statutory language even a colorable venue defense, Ailes would have to first prove that he is a party to that arbitration agreement. He has not, to date, offered any such proof and Plaintiff has, in fact, moved for summary judgment that he is not covered.

Second, even if he were a party to the arbitration agreement, nevertheless, Ailes waived all venue objections as detailed above. It is beyond dispute that the 9 U.S.C. § 4 language concerns a waivable matter of venue, not an unwaivable jurisdictional rule – thus, Ailes has waived whatever right he imagines the arbitration clause gave him to a New York venue. Thus, even if it were the law that a District Court in New Jersey cannot compel arbitration in New York, the so-called Ansari Rule[1], it is clear that such a rule is one of venue, not jurisdiction, and may be waived. See, Let's Go Aero, Inc. v. Cequent Performance Products, Inc., 2016 WL 827985 *2 (Fed. Cir. March 3, 2016); Sanchez v. Nitro-Lift Techs LLC, 762 F.3d 1139, 1151-52 (10th Cir. 2014); Image Software, Inc. v. Reynolds & Reynolds Co., 459 F.3d 1044, 1052 (10th Cir. 2006).

[1] Ansari v. Quest Communications Corp., 414 F.3d 1214, 1219-20 (10th Cir. 2005).

**B. Even if He Had Not Waived His Venue Objections, Ailes is Barred From Transferring this Case To New York Under the "First-Filed" Rule**

On July 7, 2016, Plaintiff filed her discrimination suit in Superior Court, Law Division, Bergen County, a county in which the sole Defendant has a residence. At that point, Defendant could have filed a Petition under 9 U.S.C. § 4 in the United States District Court for the Southern District of New York.[2] Instead, on July 8, 2016, Ailes opted to remove the matter to this Court and to file here a motion to compel arbitration in this venue.

On July 11, 2016, Your Honor was assigned to this case and thereafter the Court set a status conference for July 20, 2016. Relying on the fact that Defendant filed a motion to compel, Plaintiff began preparing a responsive brief. Then, on the eve of Plaintiff's responsive brief being due, without any notice or warning to Plaintiff or the Court, Defendant purported to "withdraw" his motion to compel and filed a Petition to Compel Arbitration in the New York Southern District. Thereafter, Defendant filed a motion here objecting to venue.

This disturbing course of conduct, which appears motivated by Your Honor's assignment as judge, is prohibited under the "first-filed" rule, a rule that strongly favors keeping an action venued in the District Court where it was first filed. That rule mandates that this case be kept in New Jersey, the venue where the case was first filed and where defendant chose to first file his motion to compel arbitration.

The first-filed rule is "grounded in equitable principles" and "encourages sound judicial administration and promotes comity among federal courts of equal rank." Equal Employment Opportunity Commission v. University of Pennsylvania, 850 F.2d 969, 971 (3d Cir. 1988) ("E.E.O.C."). Only under "rare or extraordinary circumstances" should a district court deviate

[2] We believe such a Petition should fail because Ailes is a stranger to the arbitration agreement.

from the application of the first-filed rule. Such circumstances include "inequitable conduct, bad faith, or forum shopping," among others. E.E.O.C., 850 F.2d at 972. The party opposing the application of the first-filed rule, in this case Roger Ailes, bears the burden of showing such extraordinary circumstances exist. Maximum Human Performance, Inc. v. Dymatize Enterprises Inc., 2009 WL 2778104 (D.N.J. 2009) at *4. Although the parties in the action must share an identity, "[t]he substantive touchstone of the first-to-file inquiry is subject matter." QVC, Inc. v. Patiomats.com, LLC, 2012 WL 3155471 at *3 (E.D. Pa. August 3, 2012) (Schiller, S.J.) (internal quotes and citation omitted). D & L Distribution, LLC v. Agxplore Int'l, LLC, 959 F.Supp.2d 757, 765-66 (E.D. Pa. 2013).

Here, there is no doubt that the first-filed motion to compel arbitration was filed in this Court on July 8, 2016. The New York action was filed on July 15, 2016. That filing has not been perfected yet by service. There is no doubt that the substance of the motion to compel filed in New Jersey on July 8, 2016 was identical in substance to the Petition filed in New York on July 15, 2016.

Thus, the burden of proof is now on Ailes to prove that a "rare or exceptional" circumstance exists justifying a rejection of venue under the first-filed rule. No such circumstance exists. To the contrary, game-playing and judge-shopping by Defendant weigh hugely against Ailes in his efforts to overcome the "first-filed presumption." Can Ailes be heard to say that his "withdrawal" of the motion to compel, somehow eliminates that motion's status as the first-filed? Allowing that would be to reward behavior that is disruptive of the orderly administration of justice. If Ailes had chosen to do so, he could have filed an FAA Petition in New York right after plaintiff filed in Bergen County. Instead, he chose to test the waters in the New Jersey Federal Court to see which judge might be assigned to his case. It was only after that judicial assignment, that Ailes went into the New York Court with a Petition. Thus, even if

Ailes had not waived all of his venue objections – and he has – under the "first-filed" rule, still he must fail in his efforts to deny New Jersey venue.

In sum, Plaintiff is likely to succeed in her claim that no legitimate, viable venue objections exist that should deprive her of New Jersey, her chosen venue.

## POINT II

## PLAINTIFF WILL SUFFER IRREPARABLE INJURY IF AILES IS NOT REQUIRED TO CLOSE THE NEW YORK LITIGATION

If Ailes is not immediately stopped from pursuing the New York action simultaneously with the New Jersey action, Plaintiff will suffer irreparable injury. First, there is the risk that the Courts will issue inconsistent rulings. Such inconsistent rulings will create litigation chaos and undermine public confidence in the court system. It will also waste judicial resources. For example, if the New York Court were to enforce the arbitration agreement including its draconian confidentiality provision but this Court denies enforcement, then utterances of the Plaintiff and/or her lawyers in this proceeding, while entirely appropriate, will expose Plaintiff and her lawyers to legal jeopardy under the New York ruling. Indeed, Ailes has already threatened Plaintiff and her lawyers with a lawsuit for appropriate public comments about the New Jersey litigation. (See Certification of Nancy Erika Smith, Esq. filed in support of Plaintiff's motion for summary judgment on Count Two, ¶ 12).

In addition to the risk of conflicting legal rulings and the jeopardy they create, litigating in two forums is overwhelming for Plaintiff, an individual who, according to her allegations, is still coping with the consequences of crass sexual harassment and retaliation, including termination of her eleven year employment. Ailes should not be allowed to re-traumatize Plaintiff with the prospect of dual depositions, dual court appearances, and dual submissions simultaneous actions in two jurisdictions. Plaintiff was recently the victim of sexual harassment by Ailes. When she rebuffed his advances, she was terminated. Sexual harassment is severe or

pervasive conduct so severe as to create an abusive environment. Ailes should not be able to continue his pattern of abusive behavior through scorched earth litigation. To prevent irreparable harm, he should be required to litigate this matter in an orderly and efficient way rather than through the creation of legal chaos.

## POINT III

## THE BALANCE OF HARDSHIPS FAVORS THE PLAINTIFF

If this Court grants the requested TRO and temporarily restrains Ailes from serving his New York Petition on Plaintiff and otherwise perfecting or prosecuting his Petition, he will suffer no harm or prejudice. Thereafter, the Court will be able to permanently dispose in an orderly way of his alleged venue objections as well as his claim that somehow he gets the benefit of an arbitration agreement to which he is not a party or signatory.

If, on the other hand, this Court denied temporary relief, the chaos Ailes has created with his second filing shall continue. He will send process servers to the plaintiff and seek rulings from the New York court while plaintiff litigates here. Thus, the balance of hardships strongly favors the plaintiff and plaintiff has satisfied this element of proof.

## POINT IV

## THE INJUNCTIVE RELIEF SOUGHT IS IN THE PUBLIC INTEREST

Defendant Ailes has created litigation chaos. First he filed a motion to compel in this Court and induced Plaintiff to prepare a response. Then, without warning, he "withdrew" that motion, after learning of the judge assignment in this Court, and ran into the New York federal Court with a Petition seeking the very same relief as he had sought in his original motion. Recently, he added to this chaos by filing a venue motion that, under the court rules, should have been filed with his original motion to compel arbitration.

Obviously, this chaos and confusion, wastes judicial resources and creates the public impression that a powerful defendant is above the rules of the courts. It would greatly serve the public interest and maintain the dignity of this Court to restrain Ailes until a hearing on this application.

## CONCLUSION

For all of the foregoing reasons, Plaintiff's Application for Order to Show Cause with Temporary Restraints should be granted.

**SMITH MULLIN, P.C.**
Attorneys for Plaintiff

BY: /s/ Neil Mullin

Dated: July 18, 2016

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Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT**
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| GRETCHEN CARLSON, | : | Document Electronically Filed |
| Plaintiff, | : | **Civil Action No. 2:16-cv-04138-JLL-JAD** |
| v. | : | |
| ROGER AILES, | : | **ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS** |
| Defendant. | : | |

**THIS MATTER** having been opened to the Court upon the application for emergent relief made by Plaintiff, Gretchen Carlson, pursuant to Fed. R. Civ. R. 65 and Local Rule 65.1, seeking entry of an Order to Show Cause with Temporary Restraints against Defendant Roger

Ailes, temporarily restraining and enjoining Ailes and anyone on his behalf from perfecting, prosecuting, or pursuing a Petition under the Federal Arbitration Act he has filed in the United States District Court for the Southern District of New York captioned *Roger Ailes v. Gretchen Carlson*, Civil Action No. 16-cv-5671 (" the New York Action") and it appearing to the Court from specific facts shown by the Certification of Nancy Erika Smith, Esq. that immediate and irreparable harm will result to Gretchen Carlson if said New York Action is not immediately stayed until such time as the Court may conduct a hearing as to why a preliminary and permanent injunction should not issue against Defendant; and notice of this application having been provided to Defendant; and the Court having considered the submissions of the parties and the arguments of counsel; and for good cause shown, it is hereby

**ORDERED AS FOLLOWS:**

1. Defendant Ailes shall show cause at the time, date, and place stated below why his currently pending motion to transfer venue of this matter from the United States District Court of New Jersey to the Southern District of New York should not be stricken with prejudice because, a) pursuant to Fed. R. Civ. P. 12(g)(2) and 12(h)(1)(A), Ailes waived all venue issues when, on July 8, 2016, he filed a Fed. R. Civ. P. 12(b)(6) motion to compel arbitration and omitted from said motion any claim that venue was properly in New York rather than New Jersey; b) the New Jersey action, including Ailes' motion to compel arbitration, takes venue-precedence over the New York action under the first-to-file rule; c) Ailes' filing in New York amounts to prohibited judge-shopping and forum shopping.

2. Defendant Ailes shall show cause at the time, date, and place stated below, why he should not be preliminarily and permanently enjoined from perfecting, prosecuting or pursuing a Petition under the Federal Arbitration Act he has filed in the United States District Court for the Southern District of New York captioned *Roger Ailes v. Gretchen Carlson*, Civil Action No. 16-cv-5671; and

3. Defendant Ailes shall show cause at the time, date, and place below why a declaratory judgment should not be entered in favor of Gretchen Carlson declaring that Defendant Ailes is neither a party to nor beneficiary of any arbitration agreement with Plaintiff Carlson, nor does any such agreement to which Ms. Carlson is a party inure in any manner whatsoever to the benefit of Ailes.

4. This Court shall conduct a hearing on this Order to Show Cause on the _____ day of _____, 2016, commencing at _____ at the Martin Luther King, Jr. Federal Building and U.S. Courthouse, 50 Walnut Street, Newark, New Jersey, 07101 before the Honorable Jose L. Linares, U.S.D.J., in the courtroom regularly assigned to said judge.

5. Plaintiff Gretchen Carlson shall serve a copy of this Order upon Defendant Roger Ailes by email and Federal Express to his counsel Barry Asen and David Garland, Esqs. of Epstein, Becker & Green.

6. Defendant Ailes shall file and serve by email and Federal Express to Plaintiff's counsel Smith Mullin, P.C. and Golenbock Eiseman Assor Bell & Peskoe LLP any papers in opposition to the application for preliminary and permanent injunction and

declaratory judgment no later than the _____day of _____, 2016 and Plaintiff shall serve any reply papers by email and Federal Express no later than the _____day of _____, 2016.

_____
Honorable Jose L. Linares U.S.D.J.

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Attorneys for Plaintiff

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

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

1. I am a partner with the law firm Smith Mullin, P.C., co- counsel for plaintiff, Gretchen Carlson ("Ms. Carlson"), in the above-captioned matter. As such I am fully familiar with the facts set forth herein. I submit this Certification in support of Ms. Carlson's Order to Show Cause, filed herewith.

2. On July 6, 2016, Plaintiff's original Complaint was properly filed in the Superior Court of New Jersey, Bergen County, where Defendant Ailes has maintained a residence for many years.

3. Two days later, on July 8, 2016, Defendant Ailes filed a Notice of Removal to this Court. See ECF Dkt. No. 1.

4. On the same day, Defendant simultaneously filed a Motion to Compel Arbitration and Stay All Further Judicial Proceedings (hereinafter simply, "Motion to Compel Arbitration/Stay"), returnable on August 1, 2016. See ECF Dkt. No. 2.

5. On July 12, 2016, the Court scheduled a Status Conference in this matter for July 20, 2016, at 11:30 a.m., before the Honorable Jose L. Linares. See ECF Dkt. No. 3.

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8. By Order entered on July 13, 2016, the Court granted Plaintiff's *Pro Hac Vice* admission to Mr. Hyman and Mr. Daly. See ECF Dkt. No. 6.

9. Late in the afternoon of Friday, July 15, 2016, Mr. Ailes, without any prior notice to the Court and without consulting Plaintiff's counsel and after Plaintiff had already prepared

opposition papers to the pending Motion to Compel Arbitration/Stay, Defendant wrote to the Court, requesting to withdraw the pending Motion to Compel/Stay. See ECF Dkt. No. 7.

10. Shortly thereafter, Defendant, apparently changing its litigation tactics and wanting yet another forum and judge, filed a "Motion to Transfer Case to the U.S. District 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," (hereinafter "Motion to Transfer to the S.D.N.Y"), returnable on August 15, 2106. See ECF Dkt. No. 9.

11. Further invoking the jurisdiction of the District of New Jersey, also on the same afternoon of July 15, 2016, Defendant also filed his own Motion for *Pro Hac Vice* Admission of attorneys. See ECF Dkt. No. 8.

12. At the same time, invoking the jurisdiction of another court, Defendant filed a Petition to Compel Arbitration in the United States District Court for the Southern District of New York. Thus, Defendant has brought the identical issues before two, separate Unites States District Courts, having first filed in the District of New Jersey.

13. On that same day, July 15, 2016, Plaintiff opposed Defendant's Motion to Compel Arbitration/Stay, returnable on August 1, 2016, by filing a Brief in Opposition and Certification of Nancy Erika Smith, with exhibits. See ECF Dkt. No. 10.

14. Defendant has yet to serve Ms. Carlson with the Petition it references in its Motion to Transfer to the S.D.N.Y., nor did Defendant attach a copy of its Petition to its motion papers. See ECF Dkt. No. 9.

15. On July 18, 2016, Plaintiff filed this Order to Show Cause.

16. As set forth in the accompanying Brief, Defendant's maneuvering has placed the identical legal issues in two separate courts.

17. Plaintiff will suffer irreparable injury if the New York matter is permitted to continue since there is the risk that the Courts will issue inconsistent rulings.

18. It is a waste of judicial resources to have two separate proceedings with identical issues, leading to the potential for inconsistent rulings.

19. Plaintiff will also be harmed, for example, if the New York Court were to enforce the arbitration agreement including its draconian confidentiality provision but this Court denies enforcement, then utterances of the Plaintiff and/or her lawyers in this proceeding, while entirely appropriate, will expose Plaintiff and her lawyers to legal jeopardy under the New York ruling.

20. Indeed, Ailes has already threatened Plaintiff and her lawyers with a lawsuit for appropriate public comments about the New Jersey litigation. (See Certification of Nancy Erika Smith, Esq. filed in support of Plaintiff's motion for summary judgment on Count Two, ¶ 12).

21. Plaintiff will be further harmed by being forced to litigate in two forums which is overwhelming for Plaintiff, an individual who is still coping with the consequences of crass sexual harassment and retaliation, including termination of her eleven year employment. See Amended Complaint, at ECF Dkt. No. 10.

22. Defendant Ailes should not be allowed to re-traumatize Plaintiff with the prospect of dual depositions, dual court appearances, and dual submissions simultaneous actions in two jurisdictions.

23. Defendant Ailes should not be able to continue his pattern of abusive behavior through scorched earth litigation. To prevent irreparable harm, he should be required to litigate this matter in an orderly and efficient way rather than through the creation of legal chaos.

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

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

/s/ Nancy Erika Smith
NANCY ERIKA SMITH