UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-21261-Civ-KING/TORRES

KOSTI SHIRVANIAN AND MARIAN SHIRVANIAN, INDIVIDUALLY AND AS TRUSTEES OF THE KOSTI & MARIAN SHIRVANIAN LIVING TRUST,

Petitioners,

v.

BRUCE ROBERT BYERS,

Respondent.
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ORDER DENYING MOTION TO QUASH SUMMONS

This matter is before the Court on a Motion to Quash a summons compelling a non-party witness to testify in an arbitration proceeding. [D.E. 16]. After careful consideration of the motion, response, reply, and relevant authority, and for the reasons discussed below, the Respondent's Motion to Quash the summons is **DENIED**.

I. BACKGROUND

Bruce Robert Byers ("Respondent") is a former financial advisor at Salomon Smith Barney ("SSB") in Southern California. He is currently a Florida citizen residing in Broward County. Petitioners Kosti Shirvanian and Marian Shivanian, individually and as trustees of the Kosti & Marian Shirvanian Living Trust, (collectively, "Petitioners") seek the enforcement of a summons for the Respondent

to testify in an arbitration – currently being litigated in California – before the American Arbitration Association (the "AAA").[1] The underlying arbitration, *Shirvanian v. Citigroup Global Markets, Inc.*, AAA Case No. 72-168-Y-00005-04 alleges that SSB mishandled investment accounts maintained at the firm and made fraudulent representations resulting in approximately $42 million in losses to Petitioners. The Respondent was allegedly the primary broker in charge of the accounts at issue at SSB and at least partially responsible for many transactions and representations that are now at issue in the arbitration.

The Respondent's employment with SSB ended in 2007. The Respondent allegedly consented to being permanently barred from the securities industry upon claims that he solicited and failed to pay back loans from a number of clients to conceal misrepresentations he made to a client. As a result, the Respondent is not an employee at SSB, a non-party to the underlying arbitration, and lacks any desire to participate in the arbitration proceedings. Petitioners urge the Court that the Respondent's testimony is critical because the Respondent is in a special position to testify about relevant matters and his involvement in the proceedings would resolve various evidentiary questions that have arisen during the arbitration.

In March 2016, the arbitration panel issued a summons for the Respondent to appear and testify at an AAA office in Miami less than 50 miles from the

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[1] In Petitioners' Opposition to Respondent's motion to quash, Petitioners requested that the Court order the Respondent to appear before the AAA on either September 12 and 13, 2016, or October 24 and 25, 2016. Because the September dates have now passed, the Court will only consider the two October dates for the purpose of this motion.

Respondent's Florida home on June 2 and 3, 2016. After serving the Respondent with a summons, Petitioners filed their original petition with the Court seeking to enforce the June summons. But by the time the Respondent filed an answer to Petitioners' original petition, the June hearing dates were already near.

After the June hearing dates passed without a ruling from the Court, Petitioners obtained a new summons to direct the Respondent to appear in the three remaining hearing sessions scheduled for arbitration – in July, September, and October. On June 30, 2016, Petitioners filed their Amended Petition and attached the new summons. On July 18, 2016, Respondent filed his opposition to the Amended Petition and the instant Motion to Quash. Respondent's motion is premised on the basis that an arbitration panel sitting in California may not hail a Florida citizen to California consistent within the requirements of Section 7 of the Federal Arbitration Act ("FAA"). *See* 9 U.S. C. § 7. Because Petitioners have no basis to compel the Respondent to testify, Respondent contends that the summons should be quashed in its entirety.

II. ANALYSIS

In support of the Respondent's Motion to Quash the summons, Respondent makes three arguments. Respondent contends that Section 7 of the FAA is inapplicable because (1) the arbitration panel is not sitting in the Southern District of Florida, (2) the Court has no subject matter jurisdiction over the action, and (3) the summons imposes an undue hardship on Respondent. We will address each in turn.

A. Section 7 of the FAA

Respondent's first argument in support of his Motion to Quash is that section 7 of the FAA fails to empower the Court to grant the relief requested because it requires the California arbitration panel to be sitting in the Southern District of Florida.[2] "Under FAA section 7, a federal court's authority to enforce an arbitrator's subpoena is coextensive with the court's authority to enforce one of its own subpoenas." *Alliance Healthcare Servs., Inc. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011). Federal Rule of Civil Procedure 45 governs service and enforcement of a federal court's subpoena within 100 miles of the district. *See SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647, at *2 (D. Minn. Jan. 9, 2004); *see also* Fed. R. Civ. P. 45 ("The court for the district where compliance is required -- and also, after a motion is transferred, the issuing court -- may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.").

The parties do not dispute that the arbitration proceeding is based in California, and they also do not dispute that the arbitration panel is presently sitting in California. The question is whether a commitment from a majority of the *arbitrators* to convene in Florida in the near future warrants an Order compelling the Respondent to testify under the FAA.

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[2] The summons was issued in reliance upon section 7 of the FAA. [D.E. at 14-7].

In examining the scope of the statute, Section 7 provides the following:

> The arbitrators . . . or a majority of them, may summon in writing any person to attend before them or any of them as a witness . . . . Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, ***upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person*** or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7 (emphasis added).

Respondent argues that what determines where arbitrators are sitting is where they are physically present at the time of issuing the summons or during the pendency of a petition to enforce the summons. So, even though the arbitrators are prepared to take his testimony in Florida, they are not yet "sitting" in Florida during the pending enforcement proceeding. As such, this Florida District Court cannot enforce this summons.

The problem is that Respondent's argument is unsupported and appears to be flawed on its face. This interpretation suggests that the arbitration panel would need to travel to the witness's location to issue the summons and perhaps stay there until the local district court ruled on a petition to enforce the summons. If this were the correct interpretation, it suggests that Congress intended to saddle arbitration – a cost effective alternative to litigation – with time consuming burdens. The Court

rejects this unsupported interpretation because it suggests an arbitral panel could never issue, as a practical matter, an enforceable summons to a distant witness.

As Judge Gettleman of the Northern District of Illinois carefully explained, the intent of the FAA was to reach parties outside a district or state:

> The arbitration of any action affecting interstate commerce is likely to involve parties and witnesses located in more than one district or state. To find that the wording of the FAA precludes issuance and enforcement of an arbitrator's subpoena of a witness outside the district in which he or she sits, particularly where, as here, such discovery is agreed upon by the parties to the arbitration, would likely lead to rejection of arbitration clauses altogether. That would be contrary to the intent of Congress in enacting a national policy favoring arbitration.

Amgen Inc. v. Kidney Ctr. of Delaware Cty., Ltd., 879 F. Supp. 878, 882 (N.D. Ill. 1995).

Other courts have similarly concluded that, based on the plain language of the statute, Section 7 of the FAA references where the *arbitrators* are sitting, not where the *arbitration* is sitting. *See, e.g.*, *Hunter Eng'g Co. v. Hennessy Indus., Inc.*, 2009 WL 3806377, at *2 (E.D. Mo. Nov. 12, 2009) ("Under the plain language of the statute, Hunter must file its motion to enforce the arbitrator-issued subpoena in the district where the *arbitrator* is sitting.") (emphasis added); *Amgen*, 879 F. Supp. at 881 ("[A]ny petition to enforce the subpoena must be brought to this court, because the *arbitrator* is located in Chicago.") (emphasis added); *Amgen Inc. v. Kidney Ctr. of Delaware Cty., Ltd.*, 1994 WL 594372, at *1 (E.D. Pa. Oct. 20, 1994) ("Since the *arbitrator* in the underlying arbitration is sitting in Chicago, it was incumbent upon Amgen, pursuant to the plain language of Section 7 of the Federal Arbitration Act, to bring its petition to compel compliance in the United States

District Court for the Northern District of Illinois.") (emphasis added). Thus, for instance, an Illinois court found that "Section 7 unambiguously authorizes an arbitrator to summon any-party witnesses before an arbitration panel, *or before any member of the panel,* to give testimony and provide material evidence." *Alliance,* 804 F. Supp. 2d at 811 (emphasis in original).

The weight of this persuasive case law demonstrates that arbitrators – not arbitration proceedings – control the applicability of the FAA. And because arbitrators control the applicability of the FAA, the threshold question becomes whether arbitrators may be deemed "sitting" in Florida for the purpose of receiving the Respondent's testimony. Indeed, "the language of Section 7 is broad, limited only by the requirement that the witness be summoned to appear 'before the arbitrators or any of them' and that any evidence requested be material to the case." *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 578–79 (2d Cir. 2005) (citing 9 U.S.C. § 7). Accordingly, there is little to no restriction in the statutory language that suggests that an arbitrator may not be deemed "sitting" in another locality apart from the arbitration proceedings.

Alliance is persuasive as well in explaining this principle. In that case, the respondents moved to enforce a subpoena for oral testimony before a single member of an arbitration panel in San Francisco, California even though the arbitration proceedings were conducted in Chicago, Illinois. Because the respondents sought relief in the Northern District of Illinois, the court found that "FAA section 7 permits only a court in the district where the arbitration is being conducted to

enforce an arbitration subpoena" and denied the motion to enforce the subpoena. *Id.* at 813. The court reasoned that "[t]he express terms of FAA section 7 limit this Court's arbitration subpoena enforcement authority to the authority it has under existing law" and that Federal Rule of Civil Procedure 45 precludes issuance of a subpoena from Illinois to compel a hearing in California. *Id.* But unlike the circumstances in *Alliance,* the Petitioners here seek to enforce a summons from a Florida court to compel the Respondent to testify in Florida – not California.[3] Because the arbitrators will travel to Florida, this Court has the authority under the FAA to compel the Respondent to testify under existing law. *See* 9 U.S.C. § 7.

Respondent also claims that there is a large degree of confusion as to where the Respondent may be expected to testify. The summons directs the Respondent to testify in Miami but directs the Respondent's questions regarding the summons to a case manager in Fresno, California. [D.E. 14-17]. To clarify the location of the possible testimony, Respondent contends that his counsel communicated with the arbitration panel's case manager. The case manager allegedly informed Respondent's counsel that the panel might not be present in Florida at the time of the Respondent's testimony. The Respondent further argues that the petition reflects that the arbitration panel has been at all times sitting in California and it

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[3] The Second Circuit confronted a similar situation in *Dynegy*, where the court found that a district court in New York could not enforce an arbitration subpoena to a non-party in Texas nor require the witness to produce documents in the District Court in Texas. *See Dynegy Midstream Servs. v. Trammochem*, 451 F.3d 89, 96 (2d Cir. 2006). This case is distinguishable, for the reasons discussed above, because the Petitioners here are seeking to enforce a summons against the Respondent within the Court's jurisdiction.

remains uncertain if the panel will travel to Florida. Because of the confusion between the pleadings and the information provided to Respondent's counsel, Respondent argues that this provides no basis for the FAA to control.

Yet Petitioners reiterated that at least a majority of the arbitrators will travel to Florida to receive the Respondent's testimony.[4] The summons to the Amended Petition also states explicitly that the Respondent is summoned as a witness in Miami, Florida [D.E. 15-1] and the arbitration panel affirmed on the record that the next hearing sessions would be in Los Angeles only if the Court did not grant Petitioners' Amended Petition. [D.E. 19-1]. Because Petitioners have reassured the Court that Miami, Florida is where the arbitration panel will receive the Respondent's testimony, this should alleviate any outstanding concerns that Respondent has about travelling to California. Accordingly, the FAA empowers the Court to compel the Respondent to testify in Florida.

B. Subject Matter Jurisdiction

The Respondent's second argument in support of his Motion to Quash is that there is no subject matter jurisdiction. In an action brought under the FAA, a petitioner must show that a court is empowered to grant the relief requested and that there is sufficient jurisdiction. *See Amgen, Inc. v. Kidney Ctr. of Delaware Cty., Ltd.*, 95 F.3d 562, 567 (7th Cir. 1996) ("When a party to an arbitration initiates an

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[4] This representation is pivotal. If Petitioners do not travel to Florida to receive the Respondent's testimony, the Court may no longer have the authority under the FAA to compel the Respondent to testify and the aforementioned legal analysis may be inapplicable. We are thus relying on this accommodation for purposes of this motion.

independent proceeding, it must establish that the dispute that underlies the arbitration would come within the jurisdiction of the district court."). The Eleventh Circuit has pointed out that the FAA is non-jurisdictional and does not supply a basis for federal jurisdiction:

> It is a long-accepted principle that the FAA is non-jurisdictional: The statute does not itself supply a basis for federal jurisdiction over FAA petitions. The Supreme Court described the non-jurisdictional cast of the statute in *Vaden* this way: As for jurisdiction over controversies touching arbitration, however, the FAA is something of an anomaly in the realm of federal legislation: It bestows no federal jurisdiction but rather requires for access to a federal forum an independent jurisdictional basis' over the parties' dispute. Thus, although the FAA enlarges the range of remedies available in the federal courts, it does not supply an independent basis for federal jurisdiction. Therefore, the parties must identify an independent basis for federal jurisdiction over a petition to compel arbitration brought pursuant to the FAA.

Cmty. State Bank v. Strong, 651 F.3d 1241, 1252 (11th Cir. 2011) (internal citations and quotation marks omitted). Because the FAA does not confer subject matter jurisdiction, there must still be diversity or federal question jurisdiction to confer a district court with authority to grant any relief.

Petitioners argue that there is diversity jurisdiction because the parties to the California arbitration reside in California and New York. Respondent concedes that there is diversity jurisdiction but only over the California arbitration. Because Respondent is a non-party to the underlying action, Respondent argues that there must be diversity jurisdiction between the Petitioners and Respondent.[5] The Court

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[5] Respondent fails to cite any case law in support of his position that diversity jurisdiction must exist between the Petitioners and the Respondent – rather than the underlying action – nor does he explain how this comports with the overall intent of the FAA.

assumes that the Respondent's argument hinges on the jurisdictional amount in controversy requirement since Petitioners and Respondent obviously reside in different states. Taken to its logical conclusion, Respondent's position assumes that there must be diversity jurisdiction between a petitioner and a non-party witness, rather than the underlying dispute. But, if this was the rule, it is not evident how a federal court would ever acquire subject matter jurisdiction over a Section 7 petition for an out of state nonparty witness.

A case that illustrates the opposite point is *Amgen, Inc. v. Kidney Ctr. of Delaware Cty., Ltd.*, 95 F.3d 562 (7th Cir. 1996). That case also involved a question on whether a third party could be compelled to comply with a subpoena under the FAA. In the Seventh Circuit's analysis on subject matter jurisdiction, the Court explained that "[w]hen a party to an arbitration initiates an independent proceeding, it must establish that *the dispute* that underlies the arbitration would come within the jurisdiction of the district court." *Id.* at 567. Hence the court only considered whether there was diversity or federal question jurisdiction between the parties in the underlying dispute – and *not* an analysis of the third party witness. *Id.* at 568. And because the record in that case was unclear on the status of diversity of the underlying litigants in the arbitration, the Court remanded the case for fact-finding by the district court. Notably, no mention was made that the district court take into account the citizenship of the third party witness in its analysis. *Id.* at 568-59.

Applying that rationale here, diversity is undeniably present in the arbitration proceeding. Accordingly, there is diversity jurisdiction to empower the Court to enforce the summons *viz-a-viz* this third party under the FAA.[6]

C. Undue Hardship

Respondent's final argument is that the summons imposes an undue hardship on Respondent because the summons – as drafted – requires six days of testimony over four months.[7] But, four of these dates have now passed. The only remaining dates available for Respondent to testify are in October and Petitioners only seek those two remaining days for Respondent to testify. The reduction of six days of testimony to two, and a commitment to take the Respondent's testimony in Florida and not California, fully mitigate the hardship claimed by the Respondent. Accordingly, the summons shall be enforced to the extent that Respondent is only obligated to provide testimony on October 24 and 25, 2016.

III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Respondent's Motion to Quash [D.E. 16] is **DENIED**. The summons is deemed amended to remove the July and September dates and to clarify that Respondent is only ordered to provide testimony in Florida on October 24 and 25, 2016.

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[6] Because the Court finds that there is diversity jurisdiction in the underlying arbitration, the Court need not explore the merits of Petitioners' claim that federal question jurisdiction is also present.

[7] The six dates requested in the summons included July 26 and 27, 2016, September 12 and 13, 2016, and October 24 and 25, 2016.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of September, 2016.

/s/ *Edwin G. Torres*
EDWIN G. TORRES
United States Magistrate Judge