

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA**

<b>SUMAN DEWAN GUPTA et al.,</b>	*	
	*	
<b>Plaintiffs,</b>	*	<b>CV No. 12-1787</b>
	*	
<b>v.</b>	*	<b>JUDGE JANE TRICHE MILAZZO</b>
	*	
<b>MERRILL LYNCH &amp; CO., INC. et al.,</b>	*	<b>HON. ALMA L. CHASEZ</b>
	*	<b>MAGISTRATE JUDGE</b>
<b>Defendants.</b>	*	

**DEFENDANTS MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.’S  
AND MERRILL LYNCH & CO., INC.’S MOTION TO COMPEL ARBITRATION  
AND TO DISMISS FOR IMPROPER VENUE**

Defendants Merrill Lynch, Pierce, Fenner and Smith, Inc. (“MLPFS”) and Merrill Lynch & Co., Inc. (“ML & Co.”) hereby move to compel arbitration and, further, to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(3).<sup>1</sup> For reasons more fully stated in the accompanying Memorandum in Support, Plaintiffs Narinder Gupta and Suman Gupta both signed arbitration

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<sup>1</sup> In the Fifth Circuit, a motion to compel arbitration may be brought as a motion to dismiss for improper venue. *See Sinners & Saints, L.L.C. v. Noire Blanc Films, L.L.C.*, 2013 WL 1335732 at \*4 (E.D. La. Mar. 29, 2013):

Circuits are split on the issue of whether Rule 12(b)(1) or 12(b)(3) is the proper motion for seeking dismissal based on a forum-selection or arbitration clause. *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5<sup>th</sup> Cir. 2005). The Fifth Circuit has not definitively decided whether Rule 12(b)(1) or Rule 12(b)(3) is the proper vehicle for a motion to dismiss based on an arbitration clause. *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 472, n. 3 (5<sup>th</sup> Cir. 2010) (“Our Court has not previously definitively decided whether Rule 12(b)(1) or Rule 12(b)(3) is the proper rule for motions to dismiss based on an arbitration or forum-selection clause”) (citations omitted). Nevertheless, the Fifth Circuit has noted that arbitration clauses are indistinguishable from forum-selection clauses for enforceability purposes and has analyzed motions to dismiss based on arbitration clauses under Rule 12(b)(3). *Id.*; *Lim*, 404 F.3d at 902 (analyzing motion to dismiss based on an arbitration clause under Rule 12(b)(3) and observing that “other circuits agree that a motion to dismiss based on an arbitration or forum selection clause is proper under Rule 12(b)(3)”); *see Haynsworth v. The Corporation*, 121 F.3d 956, 961 (5<sup>th</sup> Cir.1997). Because the Fifth Circuit has endorsed Rule 12(b)(3) as the proper vehicle to seek dismissal based on either an arbitration or forum-selection clause, the Court will treat Defendants' motion as a 12(b)(3) motion to dismiss for improper venue.

agreements that bind them to arbitrate the claims brought herein, and Plaintiffs Neel Gupta and Jagan Gupta are similarly bound by those agreements as purported non-signatory beneficiaries thereof.

WHEREFORE, Defendants Merrill Lynch, Pierce, Fenner and Smith, Inc. (“MLPFS”) and Merrill Lynch & Co., Inc. respectfully move this Court to enter an order compelling arbitration and dismissing this action pursuant to Federal Rule of Civil Procedure Rule 12(b)(3).

Respectfully submitted this 30th day of August, 2013.

**By: /s/ Cullen J. Brown**  
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**Attorneys For Merrill Lynch & Co. Inc. and  
Merrill Lynch, Pierce, Fenner & Smith, Inc.**

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of court by using the CM/ECF system which will send a notice of this electronic filing to all known counsel of record. Service to all known counsel of record who have not consented to email notification and electronic service has been made via U.S. Mail, postage prepaid.

/s/ Cullen J. Brown