

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

10-2098

HOT SHOT SERVICES, INC.,

Plaintiff-Appellant,

vs.

CHRISTINE M. NANNEY,

Defendant-Appellee.

Appeal from the United States District Court for the District of New Mexico
D. Ct. No. CV-09-629 WJ/LAM
The Honorable William P. Johnson, United States District Judge

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

Notice of Attachments

This brief contains attachments which also have been filed in digital form

CORPORATE DISCLOSURE STATEMENT

Appellant, Hot Shot Services, Inc., pursuant to Fed. R. App. P. 26.1(a)-(b), states that it has no parent corporation and that no publicly held corporation owns any interest in it.

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STATEMENT OF RELATED CASES

There are no related cases.

JURISDICTIONAL STATEMENT

Hot Shot Services, Inc. appeals from the district court's April 23, 2010 Final Judgment. HSS timely filed its Notice of Appeal on April 26, 2010. The district court had jurisdiction pursuant to 18 U.S.C. §1332. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. THE DISTRICT COURT ERRED BY FAILING TO PLACE ON APPELLEE, THE MOVANT, THE BURDEN OF PROOF ON HER MOTION TO DISMISS FOR IMPROPER VENUE
- II. THE DISTRICT COURT ERRED BY MISAPPLYING NEW MEXICO LAW IN ITS INTERPRETATION OF THE CLAUSE
 - A. The District Court Correctly Chose State Law Instead of Federal Common Law To Interpret The Clause
 - B. The District Court Incorrectly Applied New Mexico Law
 1. Whether the Clause is “Mandatory” or “Permissive” is not a Relevant Consideration under New Mexico Law
 2. New Mexico Law Required the District Court to Consider Appellant’s Extrinsic Evidence Regarding the Meaning of the Clause

STATEMENT OF THE CASE

On June 26, 2009, Hot Shot Services, Inc. (“HSS” or “Plaintiff”) filed a civil suit in federal court against Christine M. Nanney (“Nanney” or “Defendant”) for claims related to her breach of an employment agreement (the “Agreement”). On August 31, 2009, Nanney filed a motion to dismiss

for improper venue pursuant to Fed. R. Civ. P. 12(b)(3), claiming that a choice of venue clause in the Agreement limited the venue for related legal proceedings to New Mexico state court. The venue clause states: “Any arbitration action, suit, or other legal [proceeding] arising out of this Agreement will be brought in Bernalillo County, New Mexico.” (hereinafter the “Clause”)

HSS argued that the Clause selects only the geographic location (Bernalillo County, New Mexico) in which any type of dispute should be initiated, not the particular forum within that geographic location, and allowed the parties to bring actions for their disputes regarding the Agreement in the United States District Court for the District of New Mexico. On April 23, 2010, the district court found that the Clause limited the venue for disputes between the parties to state court, granted Defendant’s motion to dismiss, and entered a Final Judgment. This appeal followed.

STATEMENT OF THE FACTS

I. The Lawsuit in the District Court.

HSS brought this action against Nanney under the district court’s diversity jurisdiction pursuant to 28 U.S.C. 1332. [Appendix p. 4] HSS alleged that Nanney, a former officer and director of HSS, ended her

personal relationship with HSS' founder, Kim Housholder, and convinced Ms. Housholder to execute the Agreement which purported to appoint Nanney as President of HSS for ten years at an annual salary of \$50,000, even though she would reside in a different state and not have defined duties. [Appendix pp. 4-5] HSS contended that Nanney breached the Agreement by violating its non-compete provision and misappropriating HSS' property and that the contract is void because its founder lacked authority to make the Agreement. [Appendix pp. 4-9]

Neither HSS nor Nanney was the drafter of the Agreement. HSS' founder, Ms. Housholder, and Defendant were represented by the same attorney who drafted the document for the parties. [Appendix p. 23] The Agreement states in ¶11 that it should be construed pursuant to New Mexico law and provides:

10. Jurisdiction and Venue. Any arbitration action, suit, or other legal [proceeding] arising out of this Agreement will be brought in Bernalillo County, New Mexico.¹

II. The Motions in the District Court.

Nanney moved to dismiss HSS' suit arguing that venue was incorrect under the Clause. [Appendix pp. 16-22] She did not discuss the interpretation of the Clause in her motion. [Appendix pp. 16-22] Her

¹ The word "proceeding" was unintentionally omitted from the Agreement. [Appendix pp. 38, 57]

affidavit in support of her motion fails to mention the meaning of the Clause.

[Appendix pp. 23-24]

Instead, Nanney focused on the validity of the Clause under federal law. She contended that most courts evaluate forum selection clauses by applying federal law, but that federal and state law standards were the same.

[Appendix p. 19] She contended that the Clause is valid and syllogized that the appearance of the word “will” in the Clause means that it is “mandatory” and compels venue in state court. [Appendix p. 20]

HSS in its Response contended that the true issue before the district court was not the validity but the interpretation of the Clause and that it should be interpreted using state law. [Appendix p. 27] HSS acknowledged that this Court has not yet explicitly decided that state law should be used to interpret contractual venue provisions, but traced the evolution of this Court’s relevant decisions and explained why this Court now would require the district court to use the law chosen by the parties in the Agreement to construe the Clause in that same contract. [Appendix pp. 28-29] HSS contended that under New Mexico law, the Clause is unambiguous and determines only the geographic location in which disputes regarding the Agreement should be initiated-not the particular forum within that confine. [Appendix p. 30]

HSS argued that the district court could not conclude that the parties intended to limit their disputes to state courts in Bernalillo County without improperly disregarding or rendering superfluous the language of the Clause about any arbitration action or other legal proceedings besides lawsuits because a party cannot bring any proceeding other than a lawsuit in a state court. [Appendix pp. 30-31] Similarly, HSS argued that the district court could not determine that the Clause means that if the parties choose to initiate an arbitration or other legal proceeding, they may do so anywhere in the county. [Appendix pp. 30-31] But, if they seek to initiate a suit, they are excluded from the federal court in the county. [Appendix pp. 30-31] HSS argued that no such language appears in the Clause and the Court is not free to rewrite the contract for the parties. [Appendix pp. 30-31]

In support of its position, HSS offered the Declaration of Ms. Housholder who explained that she and Nanney negotiated the Agreement which was drafted by their common attorney. [Appendix pp. 37-39] Ms. Housholder stated that they included the same venue provision that HSS (of which Nanney was President and a director) uses in other agreements to specify only the geographic location, Bernalillo County, where disputes must be resolved and not to specify any particular forum within Bernalillo County. [Appendix pp. 37-39] HSS includes this language for its

convenience because it is located in Bernalillo County. [Appendix pp. 37-39] Ms. Housholder also stated that the Clause does not mean that any forum in Bernalillo County, including the United States District Court for the District of New Mexico, should not be available to the parties to resolve a dispute arising from a contract which includes that language. [Appendix pp. 37-39] Ms. Housholder confirmed that HSS values its option to litigate in federal court because the procedures, resources, and expanded jury pool of federal court may offer it a strategic advantage in some cases. [Appendix pp. 37-39] HSS also believes that federal court generally is a better forum for corporations than state court, at least in Bernalillo County, New Mexico. [Appendix pp. 37-39]

Although HSS advocated for the interpretation of the Clause under state law, it contended that correct interpretation under federal common would produce the same result: that the Clause specified only location and forum within that location. [Appendix pp. 32-35] HSS argued that the district court must afford a strong presumption in favor of plaintiff's choice of forum and still should determine the intent of the parties. [Appendix pp. 32-35] But, the categorization of the Clause as "mandatory" or "permissive" does not advance that inquiry. [Appendix pp. 32-35] Even so, HSS contended that the Clause would be considered permissive rather than

mandatory and thus not enforceable. [Appendix pp. 32-35] In making this analysis, HSS advocated that Nanney, the movant, had the burden of proof to establish that venue in the district court was not proper. [Appendix pp. 32-35]

III. The Opinion of the District Court.

The district court granted Nanney's motion to dismiss. [Appendix pp. 66-67] The lower court distinguished the issues of the validity of the Clause from the issue of the interpretation of the Clause. [Appendix p. 58 n.3] The court determined that the law chosen by the parties in their contract also should govern the interpretation of a venue selection provision in the same contract-not federal common law. [Appendix p. 58] Next, the district court considered whether the Clause is "mandatory" or "permissive" and concluded that the clause is mandatory. [Appendix pp. 62-63] Finally, the district court endeavored to interpret the Clause under New Mexico law, concluding that the Clause was unambiguous and meant that the parties intended to restrict litigation to New Mexico state courts. [Appendix pp. 63-64] Otherwise, according to the district court, the parties would have specified that they could litigate in federal court. [Appendix pp. 63-64]

The district court rejected the declaration from Kim Housholder because it was only evidence of one side's understanding of the meaning of

the Clause – not the understanding of both parties. [Appendix p. 64 n.7] The court also rejected HSS’ arguments that the district court could not construe the Clause to require the parties to resort to state court without disregarding or rewriting the language of the Clause mandating that “arbitration actions or other legal proceedings” apart from lawsuits be brought there as well. [Appendix pp. 63-65] The court stated that it was at a loss to understand why in addition to suits, HSS could not bring “arbitration actions or other legal proceedings” in state court. [Appendix pp. 63-65] The district court concluded that HSS had not met its implicit burden by presenting any “convincing evidence” that the Clause permits the parties to sue in federal court. [Appendix p. 66] The court entered a Final Judgment dismissing HSS’ claims. [Appendix p. 67]

SUMMARY OF THE ARGUMENT

The district court correctly distinguished the issue of validity of the Clause from the issue of its interpretation and also properly determined that the Clause should be interpreted using New Mexico law which was chosen by the parties in the Agreement. However, the district court failed to properly interpret the Clause under New Mexico law. The lower court first inexplicably conducted a “mandatory/permissive” evaluation of the Clause which has no relevance under New Mexico law. Furthermore, the district court refused to consider the only extrinsic evidence offered by either of the parties, the declaration of Kim Housholder, on the incorrect ground that it was not evidence of *both* parties’ understanding of the meaning of the clause. Finally, the district court incorrectly determined that the Clause was unambiguous and meant that the parties could not bring in federal court a suit regarding the Agreement. In applying this analysis, the district court wrongly placed the burden of proof on HSS instead of Nanney, the movant, and additionally imposed a “clear and convincing” standard of proof rather than the correct “preponderance of the evidence” standard.

ARGUMENT

I. **THE DISTRICT COURT ERRED BY FAILING TO PLACE ON NANNEY, THE MOVANT, THE BURDEN OF PROOF ON HER MOTION TO DISMISS FOR IMPROPER VENUE.**

This Court's review of a district court's dismissal for improper venue based on a contract's choice of venue clause presents a question of law which the Court considers de novo. Jones v. KP&H LLC, 288 Fed. Appx. 464, 468 (10th Cir. July 22, 2008) (unpublished)(citing Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992); SBKC Serv. Corp. v. 1111 Prospect Partners, L.P., 105 F.3d 578, 581 (10th Cir. 1997)). The Court uses the same standard it applies to dismissals for failure to state a claim. Jones, 288 Fed. Appx. at 468 (citing Phillips v. Audio Active Ltd., 494 F.3d 378, 384 (2d Cir. 2007); Nazaruk v. eBay, Inc., 223 Fed. Appx. 815, 816 (10th Cir. May 15, 2007)(unpublished)). Specifically, the Court accepts "all well-pleaded allegations as true and view[] them in the light most favorable to the plaintiff." Jones, at 468 (quoting Lane v. Simon, 495 F.3d 1182, 1186 (10th Cir. 2007)).

In its Response to Defendant's Motion to Dismiss Under Fed. R. Civ. P. 12(b)(3), HSS asserted that the movant, Nanney, should bear the burden of proof. [Appendix pp. 27-28] Defendant failed to argue otherwise or confront the issue at all in her Reply. [Appendix p. 46] The district court did

not directly address HSS's argument that the movant should bear the burden of proof on a motion to dismiss for improper venue. However, it did state that "the Plaintiff has not presenting (sic) any convincing evidence" that venue was proper in federal court, [Appendix p. 66] indicating that the district court had placed the burden of proof on HSS.

A split of authority exists on whether a plaintiff or defendant has the burden of proof on a motion to dismiss for improper venue. 14D Charles Alan Wright, et al., Federal Practice and Procedure § 3826, at pp. 555-62 (3d ed. 2007). Neither this Court nor the district court has ruled on the issue. See Burns v. Events & Transportation Assocs, Inc., No. 08-713 LH/RHS, at 3 (D.N.M. Dec. 15, 2008) (not resolving the issue but noting split of authority in circuits and lack of decision by Tenth Circuit). However, the better reasoned view is that the defendant has the burden of establishing that venue is improper. See In re Peachtree Lane Assocs., Ltd., 150 F.3d 788, 798 (7th Cir. 1998); Myers v. American Dental Ass'n, 695 F.2d 716, 724 (3rd Cir. 1982); Bartholomew v. Virginia Chiropractors Ass'n, 612 F.2d 812, 816 (4th Cir. 1979); Long John Silver's, Inc. v. Diwa III, Inc., 650 F.Supp.2d 612, 630 (E.D. Ky. 2009); Simon v. Ward, 80 F.Supp.2d 464, 466-468 (E.D. Pa. 2000); 17 James Wm. Moore et al., Moore's Federal Practice § 110.01[5][c] (3d ed. 2010).

It is a defendant's responsibility to timely object to plaintiff's choice of venue, otherwise, it waives that defense. Fed. R. Civ. P. 12(h)(1). Because a defendant must raise the issue of venue, a motion to dismiss for improper venue should be treated as an affirmative defense, and the defendant must bear the burden of proving that venue is improper. See Pacer Global Logistics v. National Passenger Railroad Corp., 272 F.Supp.2d 784 at 788 (E.D.Wis. 2003); Strickland v. Trion Group, Inc., 463 F.Supp.2d 921, 925 (E.D.Wis. 2006); Myers, at 724-725. When a defendant seeks the dismissal of a case based on the personal privilege of venue, it should be required to establish the privilege. Moore et al., § 110.01[5][c].

Nanney's motion to dismiss should be treated as an affirmative defense. Her objection was based on the personal privilege of venue, and she was responsible for raising the objection. Accordingly, defendant should bear the burden of proving her assertion that HSS's choice of venue is improper.

HSS recognizes that other courts have stated that a plaintiff has the burden of proving venue. See Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 355 (2nd Cir. 2005); Overland, Inc. v. Taylor, 79 F.Supp.2d 809, 811 (E.D. Mich. 2000); Nissan Motor Co., Ltd. V. Nissan Computer Corp., 89 F.Supp.2d 1154, 1161-1162 (C.D. Cal. 2000); Etienne v. Wolverine Tube,

Inc., 12 F.Supp.2d 1173, 1179-1180 (D. Kan. 1998); Johnson v. Washington Gas Light Co., 89 F.Supp.2d 45, 47 (D.D.C. 2000); Ryan v. Glenn, 52 F.R.D 185, 192 (N.D. Miss 1971). However, those cases holding that it is a plaintiff's burden to establish venue "reach this result without distinguishing between jurisdiction and venue." Myers v. American Dental Ass'n., 695 F.2d at 724. Jurisdiction concerns a court's authority to hear a case, while venue is a personal privilege and relates to the convenience of the litigants. Id. at 725. Unlike federal subject matter jurisdiction, which must be raised and established in the complaint, "venue is not a matter that must be raised by the proponent of the forum." See Strickland, 463 F.Supp.2d at 924; Moore, et al., § 110.01[5][c].

In addition to erroneously placing the burden of proof on HSS, the district court also employed the wrong standard of proof. In its analysis, the court relies upon HSS' failure to present "any *convincing* evidence" that venue was proper. [Appendix p. 66 (emphasis added)] HSS maintains that, because it should not bear the burden of proof, it need not present any evidence. Nonetheless, preponderance of the evidence, rather than clear and convincing evidence, is the correct standard of proof on a motion to dismiss for improper venue. "The party challenging venue bears the burden of establishing by a preponderance of the evidence that the case was incorrectly

venued.” In re Peachtree Lane Assocs. Ltd., 150 F.3d at 794; see Simon v. Ward, 80 F. Supp. 2d at 467 (a defendant should be required to make an evidentiary showing that venue is improper to reap the benefits of dismissal.) Accordingly, Defendant should have had to prove that venue was improper in the district court by a preponderance of the evidence.

II. THE DISTRICT COURT ERRED BY MISAPPLYING NEW MEXICO LAW IN ITS INTERPRETATION OF THE CLAUSE.

This Court’s review of a district court’s dismissal for improper venue based on a contract’s choice of venue clause presents a question of law which the Court considers de novo. Jones v. KP&H LLC, 288 Fed. Appx. 464, 468 (10th Cir. July 22, 2008) (unpublished)(citing Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992); SBKC Serv. Corp. v. 1111 Prospect Partners, L.P., 105 F.3d 578, 581 (10th Cir. 1997)). The Court uses the same standard it applies to dismissals for failure to state a claim. Jones, 288 Fed. Appx. at 468 (citing Phillips v. Audio Active Ltd., 494 F.3d 378, 384 (2d Cir. 2007); Nazaruk v. eBay, Inc., 223 Fed. Appx. 815, 816 (10th Cir. May 15, 2007)(unpublished)). Specifically, the Court accepts "all well-pleaded allegations as true and view[] them in the light most favorable to the plaintiff." Jones, at 468 (quoting Lane v. Simon, 495 F.3d 1182, 1186 (10th Cir. 2007)).

A. The District Court Correctly Chose State Law Instead of Federal Common Law To Interpret The Clause.

A venue or forum selection clause should be interpreted by state law. Northwest Nat. Ins. Co. v. Donovan, 916 F.2d 372, 374 (7th Cir. 1994) (“Validity and interpretation are separate issues, and it can be argued that as the rest of the contract in which a forum selection clause is found will be interpreted under the principles of interpretation followed by the state whose law governs the contract, so should that clause be.”); General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3rd Cir. 1986) (“The construction of contracts is typically a matter of state, not federal, common law, and forum selection clauses in diversity cases do not implicate a federal interest that justifies displacing state law.”); 14D Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3803.1, at pp. 131-32 (3d ed. 2007) (“despite the curious appeal by some lower courts to the federal common law of contract construction, it seems that the interpretation and character of the contract[’s forum selection clause] must be governed by state law.”)

This Court has not explicitly decided this issue, but recently has come to construe forum and venue selection provisions using state law. This evolution in the Court’s thinking may be traced from earlier cases like SBKC Service Corp. v. 111 Prospect Partners, L.P., 105 F.3d 578, 581 (10th

Cir. 1997), in which the Court focused on the “language and intent” of the parties to interpret a choice of venue provision. Id. Ultimately, however, the court determined that such an approach “makes unnecessary exploration of whether federal common law or Kansas law should apply because the result would be the same in either case.” Id. Similarly, in Excell, Inc. v. Sterling Boiler & Mechanical, Inc., 106 F.3d 318 (10th Cir. 1997), the court stated, “The parties have not discussed whether Colorado state law or federal common law controls the validity and interpretation of the forum selection clause. Because we believe there are no material discrepancies between Colorado law and federal common law on these matters, we find it unnecessary to decide the issue. Id. at 320.

More recently, the Court has recognized that a federal district court’s interpretation of forum and venue selection clauses is a matter of contract interpretation and looked to the relevant law chosen by the parties to guide that effort. In Yavuz v. 61 MM, Ltd., 465 F.3d 418 (10th Cir. 2006), the Court stated that it saw no reason why a forum selection clause in an international agreement, “among the multitude of provisions in a contract, should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties.” Id. at 427-28. In Jones v. KP&H LLC, 288 Fed. Appx. 464, 468 (10th Cir. July 22, 2008) (unpublished), the

court looked directly to Kansas law rather than federal common law to construe a choice of venue provision because the contract provided that Kansas law governed construction of its terms.

B. The District Court Incorrectly Applied New Mexico Law.

Although the district court correctly determined that it should construe the Clause using New Mexico law, it misapplied that law. The court conducted a needless analysis of whether the Clause is mandatory or permissive. More importantly, the court also refused to consider the only extrinsic in making its interpretation of the clause.

1. Whether the Clause is “Mandatory” or “Permissive” is not a Relevant Consideration under New Mexico Law.

Nothing in New Mexico law directs a court to consider whether the language of a contract is mandatory or permissive when interpreting that language. The district court made the conclusory observation that “[a]pplying New Mexico law, the Court must first determine whether the provision at issue is mandatory or permissive.” [Appendix p. 62] But, the district provided no rationale for that conclusion. The district court cites only to federal cases to justify its analysis and conclusion that the Clause is “mandatory.” It is unclear what import the district court’s “mandatory/permissive” inquiry had on its decision because the court never mentions this factor in its decision.

2. New Mexico Law Required the District Court to Consider Appellant's Extrinsic Evidence Regarding the Meaning of the Clause.

Under New Mexico law, a court interpreting a contract provision must determine the intent of the parties and do so by first considering whether the provision is ambiguous. Mark V, Inc. v. Melkas, 114 N.M. 778, 781-82, 845 P.2d 1232, 1235-36 (1993). "New Mexico law . . . allows the court to consider extrinsic evidence to make a preliminary finding on the question of ambiguity." Id. at 781, 1235. Indeed, New Mexico has "followed the modern trend and adopted the contextual approach to contract interpretation, in recognition of 'the difficulty of ascribing meaning and content to terms and expressions in the absence of contextual understanding.'" Id. (quoting C.R. Anthony Co. v. Loretto Mall Partners, 112 N.M. 504, 508817 P.2d 238, 242 (1991)).

"Without a full examination of the circumstances surrounding the making of the agreement, ambiguity or lack thereof often cannot properly be discerned." Mark V, Inc., at 781, 1235. "[I]n determining whether a term or expression to which the parties agreed is unclear, a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and of course performance." C.R. Anthony Co., 112 N.M. at 508-09, 817 P.2d at 242-43. "It is important to

bear in mind that the meaning the court seeks to determine is the meaning one party (or both parties, as the circumstances may require) attached to a particular term or expression at the time the parties agreed to those provisions.” Id.

Contrary to these clear rules of interpretation, the district court simply determined that the Clause was unambiguous from only the language of the Agreement and refused to consider HSS’ evidence of the contrary meaning of the Clause. [Appendix pp. 63-66 & n.7] HSS presented the Declaration of Kim Housholder who made clear that HSS uses the Clause in other agreements to specify only the geographic location, Bernalillo County, where disputes must be resolved and not to specify any particular forum within Bernalillo County. [Appendix p. 23-24] HSS includes this language for its convenience because it is located in Bernalillo County. [Appendix p. 23-24] Ms. Housholder stated that the Clause does not mean that any forum in Bernalillo County, including the United States District Court for the District of New Mexico, should not be available to the parties to resolve a dispute arising from a contract which includes that language. [Appendix p. 23-24] Ms. Housholder confirmed that HSS values its option to litigate in federal court because the procedures, resources, and expanded jury pool of federal court may offer it a strategic advantage in some cases. [Appendix p.

23-24] HSS also believes that federal court generally is a better forum for corporations than state court, at least in Bernalillo County, New Mexico.

[Appendix p. 23-24]

The district court rejected the Declaration of Ms. Housholder on the ground that it was merely evidence of Plaintiff's understanding of the Clause and not reflective of the understanding of *both* parties. [Appendix p. 64 n.7 (emphasis in original)] The district court was wrong. A court ought not reject a party's extrinsic evidence of the meaning of a contract term because it does not speak to the opposing party's understanding. Such a requirement is not found in New Mexico law. The district court cites no authority for its conclusion. Both HSS and Nanney were free to submit whatever extrinsic evidence they deemed appropriate and the district court should have weighed that evidence as it would with any contested issue. The New Mexico Supreme Court has stated the procedure:

The present law in this state concerning the interpretation of ambiguous or unclear language in written agreements may be summarized as follows: An ambiguity exists in an agreement when the parties' expressions of mutual assent lack clarity. The question whether an agreement contains an ambiguity is a matter of law to be decided by the trial court. The court may consider collateral evidence of the circumstances surrounding the execution of the agreement in determining whether the language of the agreement is unclear. If the evidence presented is so plain that no reasonable person could hold any way but one, then the court may interpret the meaning as a matter of law. If the court determines that the contract is reasonably and

fairly susceptible of different constructions, an ambiguity exists. At that point, if the proffered evidence of surrounding facts and circumstances is in dispute, turns on witness credibility, or is susceptible of conflicting inferences, the meaning must be resolved by the appropriate fact finder.

Mark V, Inc., at 781, 1235.

Nanney chose not to submit any evidence. Accordingly, in the face of the only extrinsic evidence about the meaning of the Clause, the district court should not have determined that the Clause meant just the opposite. The evidence presented was “so plain that no reasonable person could hold any way but one.” See id. The district court, pursuant to New Mexico law, should have determined as a matter of law that the Clause allowed HSS to bring its suit against Nanney anywhere in Bernalillo County, including federal court.

Moreover, the district court was incorrect in its characterization of Ms. Housholder’s statement as evidence of only HSS’ understanding of the Clause. Ms. Housholder made clear that HSS, of which Nanney was an officer and director, uses the Clause in other contracts and does so only to specify that relevant disputes be resolved in an appropriate forum in Bernalillo County, specifically including federal court. Thus, HSS has offered evidence of Nanney’s understanding and use of the Clause.

Putting aside the extrinsic evidence, the district court's interpretation of the clause is not cogent. The Clause cannot be read to restrict the parties to a New Mexico state court in Bernalillo County, New Mexico. The clause says nothing about courts. The provision is clear that whatever method a party may choose to resolve a dispute arising from the Agreement, it must be brought in Bernalillo County. To conclude that the parties intended to limit their disputes to state courts in Bernalillo County, the Court would have to disregard the contract language about any arbitration action or other legal proceedings besides lawsuits - a party cannot bring those actions in a state court in Bernalillo County. The Court cannot construe the Agreement in such a way as to render language of the contract superfluous. See City of Albuquerque v. BPLW Architects & Eng'rs, Inc., 2009-NMCA-81, ¶18, 213 P.3d 1146, citing Pub. Serv. Co. of N.M. v. Diamond D Constr. Co., 2001-NMCA-82, PP19, 31, 131 N.M. 100, 33 P.3d 651 (noting that the court "will not read a particular provision of a contract such that another provision is rendered meaningless"); see also Jones v. KP&H LLC, 288 Fed. Appx. at 468 (the court rejected parties' interpretations of contract that did not construe all provisions in harmony and avoid reducing particular terms to absurdity).

Likewise, the parties did not intend the Clause to mean that if they choose to initiate an arbitration or other legal proceeding, they may do so anywhere in the county. But, if they seek to initiate a suit, they are excluded from the federal court in the county. No such language appears in the Agreement and the Court is not free to rewrite the contract for the parties. See *Brown v. American Bank of Commerce*, 79 N.M. 222, 226, 441 P.2d 751, 755 (1968). Indeed, under the Clause, “arbitration actions”, “suits”, and “other legal proceedings” all are treated exactly the same. The only restriction on their availability is that they be brought in Bernalillo County, New Mexico.

The district court rejects these arguments and in doing so abandons any attempt to determine what the parties intended the Clause to mean. Instead, the court substituted its notion of what the clause means. For example, the court noted that venue in federal courts is properly stated in terms of judicial districts rather than counties and that the judicial district of the District of New Mexico includes every county in the State of New Mexico. [Appendix p. 64] The court adds that a party who files suit in federal court is not guaranteed have its case will be assigned to a judge in Albuquerque. [Appendix p. 64] The district court concludes from those observations that the parties intended to limit themselves to New Mexico

state court. [Appendix p. 64] Otherwise, they would have specified that they could bring suits in the “District Court for the District of New Mexico.” [Appendix p. 64]

Of course, no evidence exists that the parties intended any such thing. The record is devoid of any mention that the parties knew about judicial districts or intended to exclude federal court as an option to resolve their disputes regarding the Agreement because they did not specify venue in those terms. To the contrary, the evidence is just the opposite.

Similarly, the district court dismisses HSS’ argument that the Clause could not mean the parties were restricted to state court because it provides for arbitration actions and other legal proceedings and those could not be brought in a state court. [Appendix pp. 65-66] The court writes: “Obviously, the process of arbitration occurs before an arbitrator and not a state court judge. But the language of the contract refers to arbitration *actions*-not merely the process of arbitration.” [Appendix p. 66 (emphasis in original)] The district court fails to explain what it means by arbitration actions or why it believes they may be brought in state court. It does not discuss at all what it believes the reference in the Clause to other legal proceedings means or why such proceedings could be brought in state court. But of course, under New Mexico law, the goal of a court interpreting a contract is to discern the

intent of the parties. Mark V, Inc., at 781-82, 1235-36. A court should not substitute its meaning for the meaning of the parties as the district court did in this case.

CONCLUSION

Nanney, the movant, had the burden to prove by a preponderance of the evidence that venue was not proper in the district court. She did not meet her burden. The only evidence about the parties' meaning of the Clause is that it allows the parties to resolve their disputes regarding the Agreement in any forum in Bernalillo County, specifically including federal court. This Court should determine as a matter of law that the Clause means just that and reverse the district court's dismissal of Plaintiff's claims.

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument to address: 1) that a movant should have the burden of proof on a motion to dismiss for improper venue pursuant to Fed. R. Civ. P. 12(b)(3), an issue of first impression in this Circuit, 2) that a court should construe a contractual venue provision pursuant to the state law chosen by the parties, an issue that this Circuit has not directly decided, 3) that the district court improperly construed the venue provision under New Mexico law, and 4) any other concerns of the panel not adequately addressed in the briefs.

Respectfully submitted,

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/s/

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CERTIFICATE OF DIGITAL SUBMISSIONS

I HEREBY CERTIFY that all required privacy redactions have been made and with the exception of those redactions, every document submitted in digital form is an exact copy of the written document filed with the Clerk, and the digital submissions have been scanned for viruses with the most recent version of Symantec Endpoint Protection, Program Version 11.0.4202.75, a commercial virus scanning program and, according to the program, are free of viruses.

DATED October 20, 2010.

/s/
David A. Streubel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Appellant's Opening Brief was served via the ECF/NDA system on Karen Aubrey, counsel of record for Defendant-Appellee, this 20th day of October, 2010.

/s/

Signature

October 20, 2010

Date signed

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Attachment A

MEMORANDUM ORDER AND OPINION
GRANTING DEFENDANT'S MOTION TO DISMISS UNDER
FEDERAL RULE OF CIVIL PROCEDURE 12(B)(3)
(April 23, 2010)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

HOT SHOT SERVICES, INC.,

Plaintiff,

v.

No. 9-CV-629 WJ/LAM

CHRISTINE M. NANNEY,

Defendant.

**MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT’S MOTION TO
DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(3)**

THIS MATTER comes before this Court on Defendant’s Motion to Dismiss Plaintiff’s Complaint for improper venue under Rule 12(b)(3) of the Federal Rules of Civil Procedure (Doc. 4). The parties to this dispute signed a contract stipulating that any legal proceedings must be brought in Bernalillo County, New Mexico. Plaintiff sued Defendant in the United States District Court for the District of New Mexico for a variety of claims arising from an alleged breach of her employment contract. Defendant now moves to dismiss Plaintiff’s complaint, asserting that under the terms of the contract venue is only proper in New Mexico state court. Because the contract clearly restricts the parties to New Mexico state court, the Court GRANTS Defendant’s motion and dismisses Plaintiff’s Complaint.

BACKGROUND

The Plaintiff, Hot Shot Services, Inc. (“Hot Shot”), is a courier service based in Albuquerque, New Mexico. The Defendant, Christine Nanney, is a former officer and director of Hot Shot who resides in Colorado. In 2009, Defendant and Plaintiff’s founder signed an

Employment Agreement which, among other things, appointed Defendant as President of Hot Shot for ten years. The Agreement contains a venue provision which states: “Any arbitration action, suit or other legal [proceeding]¹ arising out of this Agreement will be brought in Bernalillo County, New Mexico.” The Agreement also states that it is governed by the laws of New Mexico.

Plaintiff now contends that Defendant breached the Agreement by violating its non-compete provision and misappropriating Plaintiff’s property. Based on these allegations, Plaintiff sued Defendant for a variety of state law claims in the U.S. District Court for the District of New Mexico asserting diversity jurisdiction. Defendant then filed the instant Motion to Dismiss, claiming that the Agreement’s venue provision limits any dispute to New Mexico state court only.

ANALYSIS

Both parties agree that the provision at issue is a valid forum selection clause or venue provision.² They disagree, however, over its interpretation. Plaintiff asserts that the provision only restricts the geographic location in which disputes must be initiated to Bernalillo County,

¹ The parties agree that the word “proceeding” was unintentionally omitted from the Agreement.

² The parties quibble over whether the provision is properly termed a “forum selection clause” or a “venue provision.” The proper term for the provision depends, of course, on its ultimate interpretation. Forum selection clauses “clearly confine litigation to specific tribunals to the exclusion of all others.” *Jones v. KP&H, LLC*, 288 Fed. Appx. 464, 468 n.3 (10th Cir. 2008) (quoting *SBKC Service Corp. v. 1111 Prospect Partners, L.P.*, 105 F.3d 578, 582 (10th Cir. 1997)). Venue provisions, on the other hand, merely limit litigation to specific geographic venues which may contain multiple acceptable tribunals. *Id.* While the provision at issue here is titled “Jurisdiction and Venue,” the title of the provision is not dispositive of its meaning. Given my ruling that the provision at issue constitutes a forum selection clause, rather than merely a venue provision, I will refer to it as such throughout this opinion.

New Mexico. According to Plaintiff, the clause does not limit Plaintiff to a particular forum within Bernalillo County—it can sue in either state or federal court, so long as the court is located within Bernalillo County, New Mexico. Defendant, on the other hand, argues that the provision restricts Plaintiff to New Mexico state court only.

1. Whose Law Applies?

Before turning to the merits of this dispute, this Court must first determine whether New Mexico law or federal common law should govern the interpretation of this contractual provision. Courts have split over the question of whether the interpretation of forum-selection provisions is a procedural question governed by federal law or a substantive question governed by state law.³ *See, e.g., Preferred Capital, Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303, 308 (6th Cir. 2007) (concluding that state law should apply to the interpretation of forum selection clauses); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988) (applying federal law to determine the scope of the forum selection provision at issue); *General*

³ Courts are also divided over the question of whether federal or state law governs the *enforcement* of forum-selection clauses. Validity and interpretation are separate issues. *See Northwestern Nat. Ins. Co. v. Donovan*, 916 F.2d 372, 374 (7th Cir. 1990) (noting that while federal law most likely applies to the former, state law may apply to the latter). That question is not before this Court, however, because both parties agree that the clause here is enforceable. They disagree only over the proper interpretation of the clause.

The Court notes briefly that the question at issue here is not controlled by the Supreme Court's opinion in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). In *Stewart*, the Supreme Court held that, when a party moves for a change of venue under 28 U.S.C. §1404(a), federal law controls the validity of any forum selection provision. This case is distinguishable on two grounds. First, the question here is one of contract interpretation rather than validity. Second, this suit is not subject to a §1404(a) motion to transfer because neither party contends that there is any other federal court which can hear this dispute. "It is important to note that the approach outlined in *Stewart* is limited in application: it can and must be followed only when a transfer under § 1404(a) is possible." 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3803.1, at p. 120 (3d ed. 2007).

Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 356-57 (3rd Cir. 1986) (noting that contract construction is a matter of state law and that federal law only applies in areas such as admiralty where the courts have authority to develop substantive law or where strong federal interests are involved); *Nutter v. New Rents, Inc.*, 1991 WL 193490, at *6 (4th Cir. 1991) (holding that the interpretation of a forum selection clause is a substantive question governed by state law). The Tenth Circuit has not directly addressed this issue but has avoided the question in several cases by asserting that state law and federal common law are identical in the case at hand. *See, e.g., Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 320-21 (10th Cir. 1997) (finding no material discrepancies between Colorado law and federal common law and therefore declining to decide which law applies); *SBKC Service Corp. v. 1111 Prospect Partners, L.P.*, 105 F.3d 578, 582 (10th Cir. 1997) (“This decision also makes unnecessary exploration of whether federal common law or Kansas law should apply because the result would be the same in either case.”).

Two recent Tenth Circuit cases, however, suggest that when a contract includes a choice-of-law provision courts should apply that law to questions of interpretation of forum-selection provisions. First, the Tenth Circuit has explicitly held that courts should construe forum-selection provisions in international contracts under the law specified in the contract’s choice-of-law provision. *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 422 (10th Cir. 2006) (“We hold that when an international commercial agreement has both choice-of-law and forum-selection provisions, the forum-selection provision must ordinarily be interpreted under the law chosen by the parties.”). While the Tenth Circuit’s holding applies only to international disputes, its reasoning applies with equal force to domestic disputes as well. “A forum-selection clause is part of the contract. We see no particular reason . . . why a forum-selection clause, among the multitude of

provisions in a contract, should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties.” *Id.* at 428. Second, in an unpublished decision, the Tenth Circuit interpreted a venue provision in a domestic contract according to Kansas law because the contract included a choice-of-law provision stipulating that Kansas law controlled. *Jones v. KP&H LLC*, 288 Fed.Appx. 464 (10th Cir. 2008) (unpublished). “Because [the contract] provides that Kansas law governs the construction of its terms, we apply Kansas substantive law to this case.” *Id.* at 468 (citing *Yavuz*). These two cases, taken together, suggest that courts should honor a choice-of-law provision in a domestic contract and should use *that* law to interpret a forum-selection clause in the same contract. Here, the contract at issue clearly stipulates that New Mexico law governs the contract. Therefore, this Court will interpret the contract’s forum selection clause under New Mexico law.⁴

Furthermore, under a straightforward *Erie* analysis, I conclude that New Mexico law should apply. Under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), in a case before a federal court under diversity jurisdiction, substantive issues are governed by state law while procedural issues are governed by federal law. As noted above, the Courts of Appeals are divided on the question of whether forum selection clauses are a matter of state substantive law or federal procedural law and the Tenth Circuit has not decided the issue. To make matters worse, in situations such as this where there is no federal statute or rule on point,⁵ courts are forced to

⁴ The Court notes that if federal common law, rather than New Mexico law, governs, the result would be the same. As discussed below, the Tenth Circuit has held, under federal common law, that forum-selection provisions which restrict venue to a specific county are referring only to state courts within that county. *See Excell*, 106 F.3d at 321.

⁵ Arguably, there is a federal rule in play here. Defendant brings this motion under Rule 12(b)(3) of the Federal Rules of Civil Procedure which permits a defendant to assert a defense of improper venue by motion or responsive pleading. However, the available case law suggests

make a “relatively unguided *Erie* choice.” *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

Acknowledging these difficulties, I hold that while the *validity* of forum-selection clauses may arguably be a procedural matter,⁶ the *interpretation* of these same clauses is a substantive matter.

In so holding, I find the reasoning of the Third Circuit particularly persuasive: “The construction of contracts is usually a matter of state, not federal, common law. Federal courts are able to create federal common law only in those areas where Congress or the Constitution has given the courts the authority to develop substantive law, as in labor and admiralty, or where strong federal interests are involved, as in cases concerning the rights and obligations of the United States.”

General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 356 (3d Cir. 1986).

The interpretation of contracts is traditionally an area governed by state law and forum selection clauses are merely another negotiated component of a contract. New Mexico has a significant interest in ensuring that contracts governed by its laws are interpreted and enforced correctly. In contrast, the federal government’s interest only extends as far as its rules and statutes apply. *See* FED. R. CIV. P. 12(b)(3); 28 U.S.C. §§ 1391-1412. While those federal rules and statutes govern where venue may exist generally and how a party raises a motion to dismiss for improper venue, they do not address the correct interpretation of a venue provision in a contract. In addition, applying state law to the interpretation of forum-selection clauses advances the twin aims of

that this federal rule is not significant enough to be considered directly on point. *See Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512 n.2 (9th Cir. 1988) (noting that no federal rule is directly on point in a motion to dismiss).

⁶ *See Milk ‘N’ More, Inc. v. Beavert*, 963 F.2d 1342, 1346 (10th Cir. 1992) (citing federal common law to support the enforcement of a forum selection clause even though the parties stipulated that Kansas law controlled the interpretation of the contract); *ADT Security Services, Inc. v. Apex Alarm, LLC.*, 430 F. Supp. 2d 1199, 1204 (D. Colo. 2006) (deciding that federal law controls the question of whether forum selection clauses are enforceable).

Erie: discouragement of forum-shopping and avoidance of inequitable administration of the laws. *Hanna*, 380 U.S. at 468. If federal law applied, then forum-selection clauses in New Mexico contracts could be interpreted one way in New Mexico state court but another way in federal court. Such an approach makes little sense. While I realize that the majority of circuits have reached the opposite conclusion, *see, e.g., Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1068 (11th Cir. 1987); *Manetti-Farrow*, 858 F.2d at 513; *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 827-28 (6th Cir. 2009), I hold that the interpretation of forum-selection clauses in contracts is a substantive matter governed by state law.

Because the contract at issue stipulates that New Mexico law governs and because, under an *Erie* analysis, the interpretation of a forum selection clause is a substantive issue, I conclude that New Mexico law applies. Accordingly, I will interpret the provision according to New Mexico law.

2. Mandatory or Permissive?

Applying New Mexico law, the Court must first determine whether the provision at issue is mandatory or permissive. Mandatory forum selection clauses “contain clear language showing that jurisdiction is appropriate only in the designated forum.” *Excell*, 106 F.3d at 321. Permissive clauses, on the other hand, “authorize jurisdiction in a designated forum, but do not prohibit litigation elsewhere.” *Id.* (quotation omitted). Clauses stating that venue *shall* lie in a specific forum are considered mandatory clauses. *See id.*; *Milk ‘N’ More, Inc. v. Beavert*, 963 F.2d 1342, 1346 (10th Cir. 1992) (“The use of the word ‘shall’ generally indicates a mandatory intent unless a convincing argument to the contrary is made.”); *Mueller v. Sample*, 93 P.3d 769, 773 (N.M. Ct. App. 2004). Here, the clause states that all legal proceedings “will” be brought in Bernalillo County, New Mexico. The word “will”, like the word “shall”, indicates a mandatory

action. See, e.g., *J.P. Morgan Chase Bank, N.A. v. Coverall N. Amer., Inc.*, 2009 WL 1531779, at *3 (N.D. Ohio 2009); *Florida State Bd. of Admin. v. Law Eng'g & Envtl. Serv., Inc.*, 262 F.Supp.2d 1004, 1010 (D. Minn. 2003). Therefore, the Court holds that the provision at issue here is a mandatory one.

3. Interpreting the Contract Provision

Turning, at last, to the meaning of contract provision, the Court must determine whether the provision requires Plaintiff to file in New Mexico state court or whether the language permits Plaintiff to file in federal court. The relevant language states: “Any arbitration action, suit, or other legal [proceeding] arising out of this Agreement will be brought in Bernalillo County, New Mexico.” The provision does not expressly restrict suit to state court or forbid suit in federal court. Defendants argue, however, that the reference to Bernalillo County indicates that suits should be brought exclusively in state court. I agree.

In order to determine the meaning of a contractual provision, New Mexico courts will look first to the language of the contract as well as any extrinsic evidence offered the parties to determine whether the contract language is ambiguous. *Mark V., Inc. v. Melkas*, 845 P.2d 1232, 1235 (N.M. 1993). “If the evidence presented is so plain that no reasonable person could hold any way but one, then the court may interpret the meaning as a matter of law.” *Id.* On the other hand, if an ambiguity exists, the court may resolve the ambiguity “by interpreting the contract using accepted canons of contract construction and traditional rules of grammar and punctuation.” *Id.* at 1236. Here, I hold that the reference to Bernalillo County renders the clause unambiguous; by limiting venue to Bernalillo County, New Mexico, the parties clearly

expressed their intent to restrict litigation to New Mexico state courts.⁷

The Second Judicial District Court of the State of New Mexico plainly sits in Bernalillo County, while the federal court properly sits in the District of New Mexico rather than in any particular county. As the Tenth Circuit has noted, federal court venue is stated in terms of judicial districts rather than counties. *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 321 (10th Cir. 1997) (“For federal court purposes, venue is not stated in terms of ‘counties.’ Rather, it is stated in terms of ‘judicial districts.’”). While the District of New Mexico includes Bernalillo County within its borders, it also includes every other county in the state because the District of New Mexico is a statewide district. It is also true that there is a federal district courthouse in Bernalillo County, New Mexico—specifically, in Albuquerque. But a party who files suit in the Albuquerque federal courthouse is not guaranteed that his case will be assigned to a judge in Albuquerque; the case may be assigned to a judge in Las Cruces or Santa Fe—neither of which is located in Bernalillo County. By agreeing that any suit must be brought only in Bernalillo County, the parties were effectively limiting themselves to New Mexico state court. If the parties had intended to permit suit in federal court, they easily could have specified that actions may be brought in the District Court for the District of New Mexico

⁷ Kim Householder, the founder and sole shareholder of Hot Shot, states in an affidavit that she believed the venue provision in the Agreement merely limited the geographic location of any legal proceeding to Bernalillo County, but did not restrict proceedings to state court. She further stated that she “would not have agreed to eliminate federal court as an option to resolve disputes arising from the Agreement.” Under New Mexico law, courts may consider extrinsic evidence to determine whether the contract language is ambiguous. Despite this, the Court does not believe that Ms. Householder’s affidavit renders the contract language ambiguous. Her affidavit merely reiterates what is already obvious from Plaintiff’s Complaint—Plaintiff believes that it can file suit in federal court. Plaintiff does not present any extrinsic evidence suggesting that *both* parties, during the negotiations over the contract, understood the forum selection clause to limit only the geographic locale and not the particular forum where disputes could be brought.

or the state courts of Bernalillo County.

While there is no New Mexico case law addressing the proper construction of a forum selection clause which limits disputes to a particular county, I find persuasive the reasoning of the Tenth Circuit and other courts which have reached similar conclusions. *See Knight Oil Tools, Inc. v. Unit Petroleum Co.*, 2005 WL 2313715, at *9 (D.N.M. 2005) (“Although New Mexico has not addressed forum-selection clauses in particular, its decisions relating to choice-of-law provisions indicate that New Mexico would apply the same rule as the Tenth Circuit as well.”). In *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, the Tenth Circuit interpreted a forum-selection provision under federal common law which stated: “[V]enue shall lie in the County of El Paso, Colorado.” Reasoning that federal courts are not classified by county, the Court concluded: “Because the language of the clause refers only to a specific county and not to a specific judicial district, we conclude venue is intended to lie only in state district court.” *Id.* at 321 (citations omitted). A district court in Colorado reached the same conclusion when interpreting a similar provision under Colorado law. *See Intermountain Systems, Inc. v. Edsall Construction Co., Inc.*, 575 F.Supp. 1195, 1198 (D. Colo. 1983) (“Indeed, to include the federal district court for the district of Colorado within the ambit of Adams County, Colorado would be a severe catachresis.”).


Plaintiff argues that the Court cannot construe the provision to restrict the parties to state court without rendering part of the contract language superfluous. The contract limits arbitration actions, suits and other legal proceedings to Bernalillo County, New Mexico. According to the Plaintiff, “[t]o conclude that the parties intended to limit their disputes to state courts in Bernalillo County, the Court would have to disregard the contract language about any arbitration action or other legal proceedings besides lawsuits—a party cannot bring those actions in a state

court in Bernalillo County.” The Court is at a loss to understand why Plaintiff could not bring arbitration actions or other legal proceedings in state court. Obviously, the process of arbitration occurs before an arbitrator and not a state court judge. But the language of the contract refers to arbitration *actions*—not merely the process of arbitration. Furthermore, even if the clause referred to the process of arbitration, the Tenth Circuit has held that reference to arbitration in a forum-selection clause does not broaden the available forums for the parties. “We are not persuaded . . . that the inclusion of ‘Arbitrator’ in the forum selection clause renders the clause ambiguous. We agree with the district court that the clause at issue reflects an exclusive forum selection of Colorado state court unless arbitration is selected.” *American Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F.3d 921, 927 n.5 (10th Cir. 2005). Accordingly, the Plaintiff has not presenting any convincing evidence that the contract provision permits the parties to sue in federal court.

CONCLUSION

For the reasons described above, the Court GRANTS Defendant’s Motion to Dismiss for improper venue. This case is hereby dismissed.

SO ORDERED.


UNITED STATES DISTRICT JUDGE

Attachment B

FINAL JUDGMENT (April 23, 2010)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

HOT SHOT SERVICES, INC.,

Plaintiff,

v.

No. 9-CV-629 WJ/LAM


CHRISTINE M. NANNEY,

Defendant.

FINAL JUDGMENT

THE COURT having granted Defendant's Motion to Dismiss by a Memorandum Order and Opinion entered April 23, 2010 [Doc. 9],

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's claims are dismissed, thereby disposing of this case in its entirety.



UNITED STATES DISTRICT JUDGE