

1 On August 4, 2015, Mr. Chao filed in this court a motion to quash the subpoena on grounds
2 that include (1) the subpoena was not served properly and also directs an appearance more than
3 100 miles away from Mr. Chao’s principal place of business, in violation of Fed. R. Civ. P.
4 45(c)(1)(A) and 45(d)(3)(A)(ii), and (2) the subpoena improperly calls for information that is
5 either attorney-client privileged or attorney work product. (Motion, ECF No. 1, at 3, 16-27.) After
6 the court ordered expedited briefing (*see* 8/4/15 Order, ECF No. 4), Tang Energy responded to the
7 motion, explaining that it is not seeking privileged information and instead is trying to prove that
8 AVIC International USA, Inc. (“AVIC USA”) is the alter ego of AVIC (represented by Mr. Chao).
9 (Joint Letter Brief, ECF No. 6 at 2.) It is seeking Mr. Chao’s testimony “to confirm that he was at
10 least the primary contributor to an appellate brief filed by . . . AVIC USA[], an entity represented
11 by Arent Fox and which Mr. Chao says that he does not represent.” (*Id.* at 4.) It also argues that
12 the Federal Rules of Civil Procedure do not apply; instead, the appropriate procedural rules are
13 those in the Federal Arbitration Act. (*Id.* at 3.)

14 The court finds that this matter is suitable for determination without oral argument under Civil
15 Local Rule 7-1(b). The court denies the motion to quash without prejudice because (1) this does
16 not appear to be the proper forum, (2) under the procedural rules in the Federal Arbitration Act,
17 Tang Energy must move to enforce its subpoena in the district where the arbitrators are sitting, and
18 (3) if Tang Energy moves to enforce its subpoena, then Mr. Chao can challenge it.

19 **ANALYSIS**

20 The parties agree that the underlying arbitration is subject to the Federal Arbitration Act, 9
21 U.S.C. §§ 1 et seq.² (*See* Motion, ECF No. 1 at 15; Joint Letter Brief, ECF No. 6 at 3.) “The
22 subpoena powers of an arbitrator are limited to those created by the express provisions of the
23 [Federal Arbitration Act].” *COMSAT Corp. v. Nat’l Science Found.*, 190 F.3d 269, 275 (4th Cir.
24 1999). The provision of the FAA providing those powers, 9 U.S.C. § 7, states in relevant part:

25 _____
26 ² Mr. Chao asserts that the court has subject-matter jurisdiction over this matter because the
27 underlying arbitration “falls under” the New York Convention on the Recognition and
28 Enforcement of Foreign Arbitral Awards, which is implemented through Chapter Two of the
FAA, 9 U.S.C. §§ 201-208. 9 U.S.C. § 203, in turn, provides that “[a]n action or proceeding
falling under the Convention shall be deemed to arise under the laws and treaties of the United
States,” thus providing this court with jurisdiction.

1 The arbitrators . . . may summon in writing any person to attend before them or any
2 of them as a witness and in a proper case to bring with him or them any book,
3 record, document, or paper which may be deemed material as evidence in the case. .
4 . . Said summons shall issue in the name of the arbitrator or arbitrators, or a
5 majority of them, and shall be signed by the arbitrators, or a majority of them, and
6 shall be directed to the said person and shall be served in the same manner as
7 subpoenas to appear and testify before the court; if any person or persons so
8 summoned to testify shall refuse or neglect to obey said summons, upon petition the
9 United States district court for the district in which such arbitrators, or a majority of
10 them, are sitting may compel the attendance of such person or persons before said
11 arbitrator or arbitrators, or punish said person or persons for contempt in the same
12 manner provided by law for securing the attendance of witnesses or their
13 punishment for neglect or refusal to attend in the courts of the United States.

8 (Emphasis added.)

9 The plain language of 9 U.S.C. § 7 requires that a person who wants a subpoena issued by
10 arbitrators to be enforced do so by filing a petition the district court in which the arbitrators are
11 sitting. Numerous courts have recognized this requirement. *See, e.g., Dynegy Midstream Servs. v.*
12 *Trammochem*, 451 F.3d 89, 95 (2d Cir. 2006) (“FAA Section 7 provides that subpoenas issued
13 under that section may be enforced by petition to ‘the United States district court for the district in
14 which such arbitrators, or a majority of them, are sitting.’ 9 U.S.C. § 7. Here, the arbitrators were
15 sitting in the Southern District of New York, so FAA Section 7 required that any enforcement
16 action be brought there.”); *Alliance Healthcare Servs., Inc. v. Argonaut Private Equity, LLC*, 804
17 F. Supp. 2d 808, 811-12 (N.D. Ill. 2011) (“Because the arbitration proceeding is being conducted
18 in Chicago, only a court in this district [the United States District Court for the Northern District
19 of Illinois] may enforce a subpoena issued by the arbitrators.”); *Amgen Inc. v. Kidney Ctr. of*
20 *Delaware County, Ltd.*, 879 F. Supp. 878, 881 (N.D. Ill. 1995) (9 U.S.C. § 7 made clear “that any
21 petition to enforce the subpoena must be brought to this court, because the arbitrator is located in
22 Chicago”); *Amgen Inc. v. Kidney Ctr. of Delaware County, Ltd.*, Civ. A. No. 94-MC-0202, 1994
23 WL 594372, at *1-2 (E.D. Pa. Oct. 20, 1994) (“Since the arbitrator in the underlying arbitration is
24 sitting in Chicago, it was incumbent upon Amgen, pursuant to the plain language of Section 7 of
25 the Federal Arbitration Act, to bring its petition to compel compliance in the United States District
26 Court for the Northern District of Illinois,” not in the United States District Court for the Eastern
27 District of Pennsylvania, as it did.); *see also* Martin Domke, Gabriel Wilner & Larry E.
28 Edmonson, 2 Domke on Commercial Arbitration § 29.12 (3d ed. 2015) (“A petition to enforce

1 subpoenas issued by arbitrators must be brought in the district in which such arbitrators are
2 sitting.”)

3 9 U.S.C. § 7 says nothing about a person to whom a subpoena is directed being required to file
4 a motion to quash. Indeed, as the Fourth Circuit has explained:

5 . . . [O]nce subpoenaed by an arbitrator the recipient is under no obligation to move
6 to quash the subpoena. By failing to do so, the recipient does not waive the right to
7 challenge the subpoena on the merits if faced with a petition to compel. The FAA
8 imposes no requirement that a subpoenaed party file a petition to quash or otherwise
9 challenge the subpoena; the Act’s only mechanism for obtaining federal court
10 review is the petition to compel. *See* 9 U.S.C.A. § 7 (“[U]pon petition the . . .
11 district court . . . may compel the attendance of such person.”).

12 *COMSAT*, 190 F.3d at 276 (footnote omitted); *see also* Thomas H. Oehmke & Joan M. Brovins, 3
13 Commercial Arbitration § 90.3 (2015) (citing *COMSAT* for this point). At least one district court
14 has come to the same conclusion. *See Odfjell Asa v. Celanese AG*, 348 F. Supp. 2d 283, 288
15 (S.D.N.Y. 2004) (Rakoff, J.) (“While Stolt-Nielsen undoubtedly has standing to object in a proper
16 forum to O’Brien’s giving of testimony or providing of documents as to which Stolt-Nielsen
17 claims privilege, there is considerable doubt in this Court’s mind that this is the proper forum, at
18 least at this juncture, since the FAA nowhere explicitly gives a person subpoenaed to an
19 arbitration the right to move in a federal district court to quash the subpoena.”) (footnote omitted).
20 It is perhaps not surprising, then, that the court has found no instances where, upon the petition of
21 a subpoena recipient, a district court has quashed a subpoena issued by arbitrators, let alone one
22 issued by arbitrators sitting in a different district.

23 In light of these authorities, the court cannot conclude that the Northern District of California
24 is the proper forum to address Mr. Chao’s challenge to the subpoena. *See id.* The court thus denies
25 the motion to quash without prejudice. If Tang Energy Group files a petition to enforce the
26 arbitrators’ subpoena, Mr. Chao may challenge the enforcement of the subpoena at that time and
27 raise the issues he raises here.

28 CONCLUSION

The court denies the motion to quash without prejudice. The court previously granted Mr.
Chao’s motion to hear his motion to quash on shortened time by ordering an expedited briefing
process. (8/4/15 Order, ECF No. 48 at 2.)

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This disposes of ECF Nos. 1 and 2. The Clerk of the Court shall close the file.

IT IS SO ORDERED.

Dated: August 6, 2015



LAUREL BEELER
United States Magistrate Judge