

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term 2010

5
6
7 (Argued: January 26, 2011 Decided: July 26, 2011)

8
9 Docket No. 10-911-cv

10
11 _____
12 TRADECOMET.COM LLC,

13
14 *Plaintiff-Appellant,*

15
16
17 -v.-

18
19 GOOGLE, INC.,

20
21 *Defendant-Appellee.*
22 _____

23
24 Before: WINTER, SACK, and LIVINGSTON, *Circuit Judges.*

25
26 Plaintiff-Appellant TradeComet.com LLC (“TradeComet”) appeals from a
27 judgment and order of the United States District Court for the Southern District
28 of New York (Sidney H. Stein, *District Judge*) granting Defendant-Appellee
29 Google, Inc.’s (“Google”) motion to dismiss TradeComet’s complaint pursuant to
30 Rules 12(b)(1) and 12(b)(3) of the Federal Rules of Civil Procedure. Google’s
31 motion was based on a forum selection clause in an agreement that Google
32 alleged bound TradeComet to bring its claims in either a federal or state forum

1 in Santa Clara County, California. TradeComet argues that when a forum
2 selection clause specifies that claims must be brought in a forum other than the
3 one in which they have been brought, yet permits those claims to be brought in
4 a different *federal* forum, a district court may only enforce the clause by
5 transferring the case pursuant to 28 U.S.C. § 1404. We reject TradeComet’s
6 argument and hold, consistent with our precedents, that a defendant may also
7 seek enforcement of a forum selection clause in these circumstances through a
8 Rule 12(b) motion to dismiss. In an accompanying summary order, we affirm the
9 district court’s dismissal of TradeComet’s complaint.

10 AFFIRMED.

11 CHARLES F. RULE (Jonathan Kanter, Joseph J.
12 Bial, and Daniel J. Howley, *on the brief*),
13 Cadwalader, Wickersham & Taft LLP,
14 Washington, D.C., *for Plaintiff-Appellant*.

15 JONATHAN M. JACOBSON (Sara Ciarelli Walsh, *on*
16 *the brief*), Wilson Sonsini Goodrich & Rosati,
17 P.C., New York, NY, *for Defendant-Appellee*.

18
19
20
21 DEBRA ANN LIVINGSTON, *Circuit Judge*:

22 Plaintiff-Appellant TradeComet.com LLC (“TradeComet”) appeals from a
23 judgment entered pursuant to an opinion and order of the United States District
24 Court for the Southern District of New York (Sidney H. Stein, *District Judge*)
25 dismissing its complaint. TradeComet brought this action against Defendant-

1 Appellee Google, Inc. (“Google”) for alleged violations of the Sherman Act, 15
2 U.S.C. §§ 1, 2, arising out of TradeComet’s use of Google’s “AdWords” search
3 engine advertising platform (“AdWords”). Google filed a motion to dismiss
4 pursuant to Rules 12(b)(1) and 12(b)(3) of the Federal Rules of Civil Procedure
5 for lack of subject matter jurisdiction and improper venue. Google argued that
6 TradeComet had accepted the terms and conditions associated with participation
7 in its AdWords program, which included a forum selection clause requiring
8 TradeComet to file its suit in state or federal court in Santa Clara County,
9 California, not in New York. TradeComet contended, *inter alia*, that a district
10 court may only enforce a forum selection clause permitting an alternative federal
11 venue pursuant to 28 U.S.C. § 1404, which authorizes transfer of the case to the
12 agreed-upon venue, rather than through Rule 12(b). In an opinion and order
13 dated March 5, 2010, the district court rejected this argument and concluded
14 that Google could seek enforcement of its forum selection clause by moving to
15 dismiss pursuant to Rule 12(b). The court then applied our four-part test for
16 determining whether to dismiss a claim based on a forum selection clause, *see*
17 *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383-84 (2d Cir. 2007), and granted
18 Google’s motion to dismiss.

19 Here, TradeComet renews its argument that a § 1404(a) motion to transfer
20 is the only appropriate vehicle for enforcing a forum selection clause when the

1 clause at issue permits an alternative federal forum. We reject TradeComet's
2 argument and hold, consistent with our precedents, that a defendant may seek
3 enforcement of a forum selection clause through a Rule 12(b) motion to dismiss,
4 even when the clause provides for suit in an alternative federal forum. In a
5 contemporaneous summary order filed with this opinion, we conclude that the
6 district court properly applied our test in *Phillips* to dismiss TradeComet's
7 complaint.

8 BACKGROUND

9 Because we are reviewing the district court's dismissal of a complaint
10 pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, we view the facts
11 in the light most favorable to TradeComet. *See Phillips*, 494 F.3d at 384.
12 Google, a Delaware corporation, operates a well-known Internet search engine
13 website bearing the same name. It has its principal place of business in
14 Mountain View, California, and is authorized to do business in the State of New
15 York. In 2001, Google launched AdWords, an advertising platform that enables
16 advertisers to have their ads appear when Internet users perform searches
17 containing specified search terms on Google's website.¹ TradeComet, a Delaware

¹ In a prior decision, we described AdWords in the following manner:

AdWords is Google's program through which advertisers purchase terms (or keywords). When entered as a search term, the keyword triggers the appearance of the advertiser's ad and link. An

1 limited liability company with its principal place of business in New York,
2 operates its own search engine website, “SourceTool.com.” In contrast to
3 Google’s search engine, TradeComet’s search engine specifically targets
4 businesses seeking to buy or sell products and services to other businesses.²
5 Beginning in 2005, TradeComet used AdWords to generate online traffic for
6 SourceTool.com. In response to what it perceived to be anticompetitive conduct
7 on Google’s part, however, TradeComet filed suit in the United States District
8 Court for the Southern District of New York on February 17, 2009.
9 TradeComet’s complaint alleges violations of sections 1 and 2 of the Sherman
10 Act, 15 U.S.C. §§ 1, 2, in connection with the prices Google charged TradeComet
11 for its participation in the AdWords program.

12 Google requires AdWords users to accept certain terms and conditions to
13 activate an AdWords account. Google also requires AdWords users to agree to

advertiser’s purchase of a particular term causes the advertiser’s ad
and link to be displayed on the user’s screen whenever a searcher
launches a Google search based on the purchased search term.
Advertisers pay Google based on the number of times Internet users
“click” on the advertisement, so as to link to the advertiser’s
website.

Rescuecom Corp. v. Google, Inc., 562 F.3d 123, 125 (2d Cir. 2009) (internal
footnote omitted).

² According to TradeComet’s complaint, such websites are commonly
referred to as “business to business” (or “B2B”) search or exchange websites.

1 any subsequent modifications or additions to these terms and conditions in order
2 to continue advertising with AdWords. Over the course of TradeComet's
3 participation in the AdWords program, Google issued three agreements
4 delineating its terms and conditions. Two of them contained a forum selection
5 clause providing that "[t]he Agreement must be . . . adjudicated in Santa Clara
6 County, California." The third, effective August 2006, provided that all claims
7 "arising out of or relating to this Agreement or the Google Program(s) shall be
8 litigated exclusively in the federal or state courts of Santa Clara County,
9 California."

10 Subsequent to the filing of TradeComet's complaint, Google filed a motion
11 to dismiss for lack of subject matter jurisdiction and improper venue, pursuant
12 to Rules 12(b)(1) and 12(b)(3) of the Federal Rules of Civil Procedure. Google
13 argued that the forum selection clause contained in its August 2006 terms and
14 conditions applied to TradeComet's antitrust claims, and that the clause
15 required TradeComet to file its suit in a state or federal court located in Santa
16 Clara County, California. In opposing the motion, TradeComet contended, *inter*
17 *alia*, that the district court was required to convert Google's motion to dismiss
18 into a motion to transfer pursuant to 28 U.S.C. § 1404(a), since the forum
19 selection clause permitted venue in a different federal forum. The district court
20 concluded that a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(3) was

1 a proper vehicle for enforcing a forum selection clause, and found that the
2 August 2006 forum selection clause applied to TradeComet’s antitrust claims.
3 The district court granted Google’s motion to dismiss the complaint. This appeal
4 followed.

5 DISCUSSION

6 TradeComet primarily argues on appeal that the district court erred in
7 dismissing its case pursuant to Rule 12(b), rather than considering whether to
8 transfer it to an appropriate federal court pursuant to § 1404(a).³ TradeComet
9 contends that a district court must enforce a forum selection clause pursuant to
10 § 1404(a), and convert a Rule 12(b) motion into a motion to transfer, when the
11 clause at issue provides for suit in an alternative federal forum. TradeComet
12 thus argues that a Rule 12(b) motion to dismiss is available solely when a forum
13 selection clause specifies only foreign and/or state fora as acceptable venues for
14 adjudicating the parties’ disputes. We review *de novo* a district court’s dismissal
15 of a complaint pursuant to Rules 12(b)(1) and 12(b)(3), viewing all facts in the
16 light most favorable to the non-moving party. *See Phillips*, 494 F.3d at 384;
17 *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

³ Section 1404(a) provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a).

I.

The enforcement of a forum selection clause through a Rule 12(b) motion to dismiss is a well-established practice, both in this Circuit and others. *See, e.g., Phillips*, 494 F.3d at 383-84; *New Moon Shipping Co., Ltd. v. MAN B&W Diesel AG*, 121 F.3d 24, 28 (2d Cir. 1997) (citing cases). We have noted, however, that neither the Supreme Court, nor this Court, has “specifically designated a single clause of Rule 12(b)” – or an alternative vehicle – “as the proper procedural mechanism to request dismissal of a suit based upon a valid forum selection clause.” *Asoma Corp. v. SK Shipping Co., Ltd.*, 467 F.3d 817, 822 (2d Cir. 2006) (internal quotation marks omitted); *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 588-89 (1991) (enforcing a forum selection clause through a motion for summary judgment); *New Moon Shipping Co.*, 121 F.3d at 28 (noting that the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), failed to specify whether its analysis applied to the defendant’s motion to dismiss for lack of jurisdiction or for forum non conveniens). Consequently, we have “refused to pigeon-hole [forum selection clause enforcement] claims into a particular clause of Rule 12(b).” *Asoma*, 467 F.3d at 822. We have affirmed judgments that enforced forum selection clauses by dismissing cases for lack of subject matter jurisdiction under Rule 12(b)(1), *see AVC Nederland B.V. v. Atrium Inv. P’ship*, 740 F.2d 148, 152 (2d Cir. 1984), for

1 improper venue under Rule 12(b)(3), *see Phillips*, 494 F.3d at 382, and for failure
2 to state a claim under Rule 12(b)(6), *see Evolution Online Sys., Inc. v.*
3 *Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 508 n.6 (2d Cir. 1998).

4 In determining whether a Rule 12(b) motion to dismiss pursuant to a
5 forum selection clause was properly granted, we have analyzed the enforceability
6 of such clauses by applying the standards set forth by the Supreme Court in
7 *Bremen*.⁴ *See, e.g., Phillips*, 494 F.3d at 383-84; *Jones v. Weibrecht*, 901 F.2d 17,
8 18-19 (2d Cir. 1990) (per curiam); *Bense v. Interstate Battery Sys. of Am., Inc.*,
9 683 F.2d 718, 720-21 (2d Cir. 1982). The Court in *Bremen* held that forum
10 selection clauses “are prima facie valid and should be enforced unless enforce-
11 ment is shown by the resisting party to be ‘unreasonable’ under the circum-
12 stances.” 407 U.S. at 10.

13 To the extent TradeComet attempts to distinguish *Bremen* as announcing
14 a narrow rule to be applied solely in international cases, or those arising under
15 admiralty law, we are not persuaded. Although *Bremen* was an admiralty case
16 and involved international trade, we have recognized that its reasoning extends
17 beyond the admiralty and international contexts. *See Phillips*, 494 F.3d at 384.

⁴ Both parties agree, consistent with the choice of law provisions in Google’s terms and conditions for AdWords, that federal law governs the enforceability of the forum selection clause, while California state law controls the interpretation of that clause. *See Phillips*, 494 F.3d at 384-85.

1 The *Bremen* Court, moreover, relied on a non-admiralty, non-international case
2 for the “doctrine” that forum selection clauses “are prima facie valid,” and held
3 that it was “the correct doctrine to be *followed* by federal district courts sitting
4 in admiralty.” *Bremen*, 407 U.S. at 10 & n.11 (citing *Cent. Contracting Co. v.*
5 *Md. Cas. Co.*, 367 F.2d 341 (3d Cir. 1966)) (emphasis added). The Court also
6 noted that its holding was “merely the other side of the proposition recognized
7 by [the Supreme] Court in *National Equipment Rental, Ltd. v. Szukhent*, 375
8 U.S. 311 (1964),” which acknowledged as “settled . . . that parties to a contract
9 may agree in advance to submit to the jurisdiction of a given court.” *Id.* at 10-11
10 (quoting *Szukhent*, 375 U.S. at 315-16). Invoking *Bremen* in a non-admiralty
11 case, this Court has expressly recognized that *Szukhent* “involved no interna-
12 tional question.” *Bense*, 683 F.2d at 721.

13 *Bremen*, therefore, did not create a narrow rule holding forum selection
14 clauses to be *prima facie* valid solely in admiralty cases, or those involving
15 international agreements, but rather approved of a pre-existing favorable view
16 of such clauses. See *Evolution Online*, 145 F.3d at 509 n.10 (observing that the
17 Supreme Court in *Bremen* “noted the trend of judicial acceptance of forum-
18 limiting clauses by citing . . . at least one nonadmiralty case,” and that it “d[id]
19 not specifically limit the rule to admiralty cases”). We have cited *Bremen* in
20 concluding that the dismissal of a complaint was proper in a variety of different

1 contexts, including, as here, litigations involving federal antitrust claims. *See*
2 *Bense*, 683 F.2d at 719, 720-22 (antitrust claims under the Sherman Act); *see*
3 *also Phillips*, 494 F.3d at 381, 383-84 (claims under the Federal Copyright Act);
4 *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1356, 1362-63 (2d Cir. 1993) (claims
5 under the Securities Act and RICO); *AVC Nederland*, 740 F.2d at 149, 156
6 (claims under the Securities Exchange Act and SEC Rule 10b-5).

7 TradeComet argues that a district court nevertheless errs in enforcing a
8 forum selection clause pursuant to *Bremen* by granting a Rule 12(b) motion to
9 dismiss when the clause provides for an alternative *federal* forum to which the
10 matter could be *transferred* pursuant to § 1404(a). While admittedly most of our
11 precedents have involved forum selection clauses specifying a *foreign* forum,⁵
12 none of them reasoned that our application of *Bremen* and the propriety of
13 granting a motion to dismiss turned on the absence of a federal forum in which
14 suit could be brought. *Cf. Phillips*, 494 F.3d at 384 (“[I]t is well established in
15 this Circuit that the rule set out in *M/S Bremen* applies to the question of
16 enforceability of an apparently governing forum selection clause, irrespective of
17 whether a claim arises under federal or state law.”) (citing *Jones*, 901 F.2d at 18-
18 19; *AVC Nederland*, 740 F.2d at 156; *Bense*, 683 F.2d at 720-21); *see also S.K.I.*

⁵ *See, e.g., S.K.I. Beer Corp. v. Baltika Brewery*, 612 F.3d 705, 707 (2d Cir. 2010); *Phillips*, 494 F.3d at 382; *Evolution Online*, 145 F.3d at 507; *New Moon Shipping Co.*, 121 F.3d at 27; *AVC Nederland*, 740 F.2d at 151.

1 *Beer Corp.*, 612 F.3d at 708; *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 435
2 (S.D.N.Y. 2007) (Lynch, *J.*) (noting that “the [Second] Circuit has repeatedly
3 enforced forum selection clauses through motions to dismiss for improper
4 venue”). Moreover, in *Bense*, we applied *Bremen* and affirmed the grant of a
5 motion to dismiss in the context of a forum selection clause that provided for an
6 alternative federal forum. 683 F.2d at 719-20, 721. And among our sister
7 circuits, all who have considered forum selection clauses permitting an
8 alternative federal forum have affirmed dismissals pursuant to Rule 12(b) when
9 they found such clauses to be enforceable pursuant to *Bremen*.⁶

10 II.

11 TradeComet argues that even if such dismissals may have been
12 permissible prior to the Supreme Court’s decision in *Stewart Organization, Inc.*
13 *v. Ricoh Corp.*, 487 U.S. 22 (1988), *Stewart* requires a district court today to
14 apply § 1404(a) in enforcing a forum selection clause when the clause permits
15 suit in a federal forum other than the one in which suit has been brought. We
16 conclude that TradeComet misreads *Stewart*.

⁶ See, e.g., *Slater v. Energy Servs. Grp. Int’l Inc.*, 634 F.3d 1326, 1333 (11th Cir. 2011); *Servewell Plumbing, LLC v. Fed. Ins. Co.*, 439 F.3d 786, 790-91 (8th Cir. 2006); *Muzumdar v. Wellness Int’l Network, Ltd.*, 438 F.3d 759, 761-62 (7th Cir. 2006); *Salovaara v. Jackson Nat’l Life Ins. Co.*, 246 F.3d 289, 299-301 (3d Cir. 2001) (per curiam); *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 386-89 (1st Cir. 2001); *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 374-76 (6th Cir. 1999).

1 *Stewart* did not consider the circumstances in which a defendant may seek
2 dismissal pursuant to Rule 12(b) in order to enforce a forum selection clause.
3 Instead, the Supreme Court addressed the question “whether a federal court
4 sitting in diversity should apply state or federal law in adjudicating *a motion to*
5 *transfer a case* to a venue provided in a contractual forum-selection clause.”⁷ 487
6 U.S. at 24 (emphasis added). The Supreme Court expressly stated that “the
7 immediate issue before the Court of Appeals was whether the District Court’s
8 denial of the § 1404(a) *motion* constituted an abuse of discretion.” *Id.* at 28
9 (emphasis added). *Bremen*, while “instructive,” was therefore inapplicable
10 because the respondent was not seeking dismissal of the claims pursuant to Rule
11 12(b), but rather transfer under § 1404(a). *Id.* at 28-29. As a result, the question
12 for consideration was whether § 1404(a) controlled “*respondent’s request* to give
13 effect to the parties’ contractual choice of venue and *transfer* this case.” *Id.* at
14 29 (emphasis added); *see also id.* at 32 (“We hold that . . . § 1404(a)[] governs the
15 District Court’s decision whether to give effect to the parties’ forum[]selection
16 clause and transfer this case”). The Court thus remanded to the district
17 court to determine “the appropriate effect under federal law of the parties’ forum

⁷ While the respondent in *Stewart* moved unsuccessfully to dismiss the case for improper venue under § 1406, the parties on appeal did not dispute that denial was proper, since respondent did business in the district he initially complained was improper. *See Stewart*, 487 U.S. at 28 n.8; *see also* 28 U.S.C. § 1391(c).

1 selection clause on *respondent's* § 1404(a) motion.” *Id.* (emphasis added).
2 *Stewart*, therefore, applied § 1404(a) because a § 1404(a) motion was before the
3 Court; the Court’s reasoning nowhere *requires* a court to consider a forum
4 selection clause pursuant to § 1404(a).

5 TradeComet’s reading of *Stewart* is further undermined by the Court’s
6 subsequent decision in *Shute*, where it applied the *Bremen* rule in an admiralty
7 case to uphold a forum selection clause permitting suit in a federal forum.
8 *Shute*, 499 U.S. at 587-88, 591-95. The Court concluded that the case had
9 properly been dismissed pursuant to a motion for summary judgment. *Id.* at
10 588-595. Under TradeComet’s reading of *Stewart*, however, the Court in *Shute*
11 should have examined the forum selection clause under § 1404(a), or should have
12 explained why the admiralty context required an exception to *Stewart*. Instead,
13 *Shute* barely mentions *Stewart*, and does so in support of *expanding* the reach
14 of *Bremen* to apply to form contracts, whose “terms . . . are not subject to
15 negotiation,” and where “an individual . . . will not have bargaining parity with
16 the [vendor].” *Id.* at 593; *see also id.* at 594 (reasoning that forum selection
17 clauses are beneficial because they “spar[e] litigants the time and expense of
18 pretrial motions to determine the correct forum and conserv[e] judicial resources
19 that otherwise would be devoted to deciding those motions” (citing *Stewart*, 487
20 U.S. at 33 (Kennedy, *J.*, concurring))).

1 The better reading of *Stewart*, one that gives effect to the Court’s three
2 decisions, is that *Stewart* deals with motions to transfer pursuant to § 1404(a),
3 while *Bremen* and *Shute* address the grant of dismissal or summary judgment
4 based on a forum selection clause. *Cf. Jones*, 901 F.2d at 19 (“In short, we find
5 nothing in *Stewart* or anywhere else that would compel us to reject the well
6 established rule of this Circuit that *Bremen* applies with equal force in diversity
7 cases.”).⁸ We therefore join the circuits that have considered this issue and
8 conclude that *Stewart* does not compel a district court to enforce a forum
9 selection clause under § 1404(a) where that clause permits suit in an alternative
10 federal forum. *See Slater*, 634 F.3d at 1333 (“[W]e conclude that § 1404(a) is the
11 proper avenue of relief where a party seeks the transfer of a case to enforce a
12 forum-selection clause, while Rule 12(b)(3) is the proper avenue for a party’s
13 request for dismissal based on a forum[]selection clause.”); *Salovaara*, 246 F.3d
14 at 299 (“[A]dding § 1404 to the mix does nothing to abrogate a district court’s
15 authority to dismiss under Rule 12.”); *see also Langley v. Prudential Mortg.*

⁸ TradeComet also relies on our decision in *Red Bull Associates v. Best Western International, Inc.*, 862 F.2d 963 (2d Cir. 1988), for the proposition that *Stewart* should control. However, as in *Stewart*, *Red Bull* only considered the denial of a § 1404(a) motion to transfer; while the defendant had also moved to dismiss pursuant to Rule 12(b)(3), neither party on appeal advanced any argument addressing the denial of this motion. *Red Bull*, 862 F.2d at 964 & n.1. The panel thus expressly declined to address the denial of the motion to dismiss. *Id.*

Capital Co., LLC, 546 F.3d 365, 371 (6th Cir. 2008) (Moore, *J.*, concurring) (reasoning that § 1404(a) controls where a party seeks to enforce a forum selection clause by moving to transfer venue, and that “when a party seeks to enforce a forum[]selection clause via a properly brought motion to dismiss, the district court may enforce the forum[]selection clause by dismissing the action”).

But cf. Kerobo v. Sw. Clean Fuels, Corp., 285 F.3d 531, 535 (6th Cir. 2002) (finding enforcement via a Rule 12(b)(3) motion to dismiss inappropriate in removal actions, where the forum selection clause permitted a federal forum, and the action was removed from state court to federal court).

For these reasons, we reaffirm our prior precedents and hold that a district court is not required to enforce a forum selection clause only by transferring a case pursuant to § 1404(a) when that clause specifies that suit may be brought in an alternative federal forum. Rather, in such circumstances, a defendant may seek to enforce a forum selection clause under Rule 12(b). The district court therefore properly considered Google's Rule 12(b) motion to dismiss the complaint.

CONCLUSION

We emphasize the limited nature of our decision. Our focus is solely on whether a district court called upon to enforce a forum selection clause is *required* to enforce it pursuant to § 1404(a) whenever the clause permits suit in

1 an alternative federal forum. Consequently, we do not address the related, but
2 separate, question whether a district court may, *sua sponte*, convert a Rule 12(b)
3 motion to dismiss into a § 1404(a) motion to transfer.⁹ We also do not address
4 circumstances in which a defendant moves in the alternative for both dismissal
5 under Rule 12(b) and transfer under §§ 1404 or 1406(a), *see, e.g., GMAC*
6 *Commercial Credit, LLC v. Dillard Dep’t Stores, Inc.*, 198 F.R.D. 402, 408-09
7 (S.D.N.Y. 2001), or circumstances in which a plaintiff responds to a Rule 12(b)
8 motion to dismiss by cross-moving to transfer, *see, e.g., Person v. Google, Inc.*,
9 456 F. Supp. 2d 488, 497-98 (S.D.N.Y. 2006). Further, we express no opinion as
10 to whether a defendant must invoke a particular subsection of Rule 12(b) to seek
11 enforcement of a forum selection clause, since TradeComet does not challenge
12 the decision below on this ground. For the foregoing reasons, and for the reasons
13 stated in the accompanying summary order filed today, the judgment of the
14 district court is AFFIRMED.

⁹ *Compare Composite Holdings, LLC v. Westinghouse Elec. Corp.*, 992 F. Supp. 367, 370 (S.D.N.Y. 1998) (reasoning that application of § 1404(a) “has no bearing on enforcement of forum selection clauses in other procedural contexts” and observing that defendant did not move to transfer under § 1404(a)), *with Lurie v. Norwegian Cruise Lines, Ltd.*, 305 F. Supp. 2d 352, 357 (S.D.N.Y. 2004) (concluding that a district court may *sua sponte* “transfer an action to a forum permitted by the applicable clause rather than dismiss the case”).