IN THE UNITED STATES DISTRCIT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FEDSERV, LLC	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 1:12-cv-00127-LO-JFA**
	)	
HEWLETT-PACKARD COMPANY,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

Plaintiff FedServ, LLC ("FedServ") respectfully opposes the Motion to Dismiss filed by Defendant Hewlett-Packard Company ("HP"). Defendant HP raises two alleged grounds to dismiss the Complaint: (1) that FedServ lacks standing to bring this suit; and (2) that venue is inappropriate in Virginia, as the result of the operation of the Governing Law provision of the contract between the parties. Both arguments are without merit and will be addressed in turn.

Factual Background

FedServ is a two-member limited liability company organized under the laws of the Commonwealth of Virginia. (Compl. ¶ 1). From 1995 until 2010, FedServ provided sales and service of HP products (and its predecessor, Compaq[1]) under a series of online, click-through Partner Agreements. (*Id*. ¶¶ 1, 5 & 6). Those adhesive agreements were drafted exclusively by HP, with voluminous and non-negotiable terms. (*Id.* ¶¶ 5, 6). For years, FedServ was a successful sales partner, generating millions of dollars of sales for HP annually. (*Id.* ¶¶ 9-13).

[1] For ease of reference, both HP and Compaq Computer Corporation will be referred to herein as "HP."

FedServ achieved that success through significant investments of time, money and relationships to build several large government clients. (*Id.* ¶ 14).

Beginning in 2007, HP engaged in a series of actions, described fully in the Complaint, including interfering with large-scale sales which ultimately denied FedServ significant earned commissions. In 2010, after a 15-year business relationship and recognition as one of HP's "most outstanding partners supporting the Public Sector Market" only 8 months earlier, HP unilaterally terminated the Partner Agreement with FedServ. (*Id.* ¶¶ 29, 36). HP's actions were unconscionable, denying FedServ rightfully earned commissions for tens of millions of sales of HP products to government customers. (*Id.* ¶¶ 37-43). Essentially HP allowed FedServ to do all of the work to develop clients, promote HP solutions, and develop specific sales opportunities, and then took those actual sales away from FedServ.

FedServ's LLC status was administratively terminated on December 31, 2007. FedServ was reinstated, however, and its LLC status fully restored, on March 7, 2012. (*See* Order of Reinstatement, attached as Exhibit 1).

Argument

I. FedServ Has Standing to Assert the Claims in the Complaint.

HP's first argument is based on a limited and incomplete reading of Virginia law related to the registration of limited liability companies. Citing Va. Code § 13.1-1050.2.A, HP argues that a failure to pay an annual registration fee means that the registration of an LLC "shall be automatically canceled...." (*See* Deft.'s Mem. Supp. Mot. Dismiss at 4). While this is true, HP ignores the fact that an LLC can be reinstated quite easily, the result of which is to treat the LLC as if it had never been canceled. FedServ was reinstated on March 7, 2012, so HP's argument that FedServ lacks standing is moot.

Section 13.1-1050.4 of the Virginia Code is titled "Reinstatement of a limited liability company that has ceased to exist." It provides for a five-year window for an LLC to rectify a cancellation. The statute also makes explicit the legal effect of a reinstatement under its terms:

> If the limited liability company complies with the provisions of this section, the Commission shall enter an order of reinstatement of existence. Upon entry of the order, the ***existence of the limited liability company shall be deemed to have continued from the date of the cancellation as if cancellation had never occurred***, and any liability incurred by the limited liability company or a member, manager, or other agent after the cancellation and before the reinstatement is determined as if cancellation of the limited liability company's existence had never occurred.

Va. Code § 13.1-1050.4(C) (emphasis added). On March 7, 2012, FedServ received an Order of Reinstatement from the Virginia State Corporation Commission consistent with Va. Code § 13.1-1050.4. (Exhibit 1). The legal effect of that Order is to treat FedServ "as if the cancellation had never occurred." Therefore, HP's argument is moot and the Court should deny its Motion to Dismiss.

II. The Eastern District of Virginia is a Proper Venue for This Action.

HP's second argument is that the consent-to-jurisdiction clause contained in the Governing Law section of the Partner Agreement requires exclusive jurisdiction in the courts of California. This argument also fails because the language on which HP relies ("the courts of California will have jurisdiction...") does not require exclusive venue in California but is merely a permissive, non-exclusive consent-to-jurisdiction clause. By virtue of that clause, FedServ has waived objections to personal jurisdiction in California, but has not agreed to select California as the exclusive forum for any and all disputes with HP.

The key issue is whether the alleged forum selection clause is permissive or mandatory; *i.e.*, whether it lists one acceptable forum among many, or whether it defines the one and only place where a lawsuit may be brought. *See Unistaff, Inc. v. Koosharem Corp.*, 667 F. Supp. 2d

616, 618 (E.D. Va. 2009); *Xerox Corp. v. Premiere Colors, LLC*, 3:10-CV-412, 2010 WL 3928515 (E.D. Va. Oct. 4, 2010) (holding that a permissive forum-selection clause authorizes, but does not require, that the suit be brought in the designated forum). If a forum selection clause is mandatory, it contains some language requiring that "the designated courts are the only ones which have jurisdiction." *Kachal, Inc. v. Menzie*, 738 F. Supp. 371, 374 (D. Nev. 1990). Words such as "shall," "only" or "exclusive" are often indicators that a clause is mandatory rather than permissive. *Unistaff*, 667 F. Supp. 2d at 619. While "shall" is often used in the context of mandatory clauses, some further language indicating intent to make jurisdiction exclusive is required to make a forum selection clause mandatory. *Id.* at 619-20 (quotation omitted).

The forum-selection clause in the contract between FedServ and HP provides that "the courts of California will have jurisdiction" over disputes arising in connection with the agreement. A review of similar forum-selection and consent-to-jurisdiction clauses discussed in other decisions from this Court and others indicates that this language is clearly permissive, rather than mandatory. *See, e.g., Xerox Corp. v. Premiere Colors, LLC*, 3:10-CV-412 (JRS), 2010 WL 3928515 (E.D. Va. Oct. 4, 2010) ("You agree to the jurisdiction and venue of the federal and state courts in Monroe County, New York" found to be merely permissive in light of absence of limiting or mandatory language); *Bank v. Advanced Sys. Servs. Corp.*, 1:09-CV-23 (GBL), 2009 WL 855730 (E.D. Va. Mar. 30, 2009) (finding the language "irrevocably submits to the Jurisdiction of any state or federal court sitting in the State of Maryland" to be permissive, reasoning that "[s]ince the clause does not have any specific language excluding jurisdiction outside of Maryland, it merely confers jurisdictions in Maryland without making it exclusive"); *King v. PA Consulting Group, Inc.*, 78 Fed. Appx. 645, 647-49 (10th Cir. 2003) (finding

permissive a clause which stated "This agreement and all matters arising in connection with it shall be governed by the law of the State of New Jersey and shall be subject to the jurisdiction of the New Jersey Courts"); *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 957 (5th Cir. 1974) (finding permissive clause which stated "the parties submit to the jurisdiction of the courts of New York"); *AmerMedCorp. v. Disetronic Holding AG*, 6 F. Supp. 2d 1371, 1374-75 (N.D. Ga. 1998) (finding permissive clause which stated that "the courts of the canton of Berne, Switzerland, shall have jurisdiction for all disputes arising out between the parties and waive any claim to the contrary"). *Cf. Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984) (*overruled on other grounds, Powerex Corp. v. Reliant Energy Svcs.*, 127 S.Ct. 2411 (2007)) (mandatory forum selection clause stated "this Agreement shall be litigated only in the Superior Court for Los Angeles").

Where, as here, the clause merely confers jurisdiction in a particular forum, the Fourth Circuit has clarified that it should not be treated as a mandatory forum-selection clause. *See IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 290 (4th Cir. 2007) ("[A]n agreement ***conferring*** jurisdiction in one forum will not be interpreted as ***excluding*** jurisdiction elsewhere unless it contains specific language of exclusion.") (emphasis in original) (quotation omitted). In the case at bar, agreeing that "the courts of California will have jurisdiction" confers jurisdiction only; it does not exclude jurisdiction in other locales, such as Virginia. The clause does not say, for example, that "only the courts of California will have jurisdiction" or that "jurisdiction shall be exclusively in the courts of California." It is merely an acknowledgement by FedServ, a Virginia LLC, that the courts of California would have jurisdiction over it should HP decide to bring a lawsuit against FedServ in California. That has not occurred, so the clause does not apply.

To the extent there is any ambiguity in the language of this clause, it should be construed against HP, the drafter, especially where, as here, the contract at issue is a contract of adhesion. *See Karnette v. Wolpoff & Abramson, L.L.P.*, 444 F. Supp. 2d 640, 646 (E.D.Va. 2006) ("It is axiomatic that ambiguity in a contract is construed against the drafter") (applying Delaware law); *Martin & Martin, Inc. v. Bradley Enterprises, Inc.*, 256 Va. 288, 291 (1998); *Badie v. Bank of America*, 67 Cal. App. 4th 779, 798 (1998).

The issue is not, as HP suggests, whether the clause is enforceable. FedServ does not dispute that consent-to-jurisdiction clauses are, as a general proposition, enforceable. Enforcing the clause as written, however, does not require dismissal or transfer to California. HP is subject to personal jurisdiction here in Virginia, and the statutory venue requirements of 28 U.S.C. § 1391(a) are otherwise met. *See Convergence Technologies (USA), LLC v. Microloops Corp.*, 711 F. Supp. 2d 626, 640 (E.D. Va. 2010) (noting that venue is proper under 28 U.S.C. § 1391 in any district in which a defendant corporation is subject to personal jurisdiction). Nothing in the Partner Agreement requires that this case be heard only in HP's home forum of California, so HP's Motion to Dismiss should be denied.

Conclusion

FedServ has standing to enforce its contract with HP, and the contract does not contain a mandatory forum-selection clause setting California as the sole appropriate venue. For these reasons, the Court should deny Defendant's Motion to Dismiss the Complaint.

Dated: March 8, 2012

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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