SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

----------X

W-SYSTEMS CORP.

Plaintiff,

- v -

MOUNTAIN AMERICA FEDERAL CREDIT UNION,

Defendant.

INDEX NO. 652848/2020

MOTION DATE 09/11/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30

were read on this motion to DISMISS.

This is a breach of contract case. Plaintiff W-Systems Corp. ("W-Systems") alleges that Defendant Mountain America Federal Credit Union ("MACU") improperly terminated the fixed-term software license agreements and also failed to pay all fees associated with the termination under a related services agreement. W-Systems asserts claims for breach of the licenses (Count I) and breach of the services agreement (Count II).

MACU moves to dismiss W-Systems' claims on the ground that MACU is not subject to personal jurisdiction in this Court and that W-Systems cannot rely upon a New York forum selection provision contained in an agreement to which W-Systems was not party to create such jurisdiction. For the reasons set forth below, MACU's motion is granted.

Factual Background

A. The Parties

W-Systems is a New Jersey-based company providing "transformational sales and marketing technology." (Complaint ("Compl.") ¶7 [NYSCEF 2]). W-Systems is a "certified elite partner" of SugarCRM, Inc. ("Sugar"), a company that produces customer relationship management ("CRM") software. (*Id.* ¶8). As an "elite partner" of Sugar, W-Systems frequently assists with facilitating the purchase and implementation of product licenses for Sugar's CRM software. (*Id.* ¶¶8-9).

MACU "is a federal credit union that does business localized in Utah," with its principal place of business in West Jordan, Utah. (*Id.* ¶5). In October 2015, MACU was searching for a CRM tool and was evaluating a number of products for that purpose. (*Id.* ¶9). MACU's Vice President of Sales contacted Sugar and W-Systems at that time to request information about Sugar's CRM software. (*Id.*). From October 2015 to April 2017, W-Systems worked with MACU representatives to demonstrate the software and to form a business relationship. (*Id.*).

B. The Agreements

On or about April 28, 2017, W-Systems and MACU executed a Software License Order Form ("2017 Order Form"). (*Id.* ¶10). Two days later, MACU and Sugar entered into a Master Subscription Agreement (the "MSA"), which provides that the CRM Software may be purchased from an Authorized Partner of Sugar via an Order Form. (*Id.*). Acting as Sugar's Authorized Partner in accordance with the MSA, W-Systems entered into the 2017 Order Form with MACU. (*Id.*). Under the 2017 Order Form, MACU purchased from W-Systems a five-year license to use Sugar's CRM software. (*Id.* ¶11). On January 31, 2019, W-Systems and MACU entered into a second Software License Order Form ("2019 Order Form"), which extended MACU's software

license to include additional Sugar enterprise subscription users as permitted by the 2017 Order Form. (*Id.* ¶14).

Both the 2017 Order Form and the 2019 Order Form (collectively, the "Licensing Order Forms") contain the following provision: "This licenses [sic] ordered are subject to the terms of the License Agreement or [the MSA]. . . ." (*See* Compl. Ex. A [NYSCEF 3]). Section 11.8 of the MSA provides that "Company and SugarCRM agree to submit to the personal and non-exclusive jurisdiction of the courts located in New York County, New York." (Compl. Ex. C, § 11.8 [NYSCEF 5]). The "Company" referred to in the MSA is MACU. (*See id.* at 1). W-Systems is not a party to the MSA. (Compl. ¶¶10-11). The Licensing Order Forms contain no similar provision.

W-Systems alleges that MACU directed its actions to New York in the course of negotiating, drafting, and performing the Licensing Order Forms and the MSA by, among other things:

- Forming a business relationship with W-Systems to obtain a license for Sugar's CRM software. MACU's former Vice President of Sales and Operations, Preston Meline, met with Christian Wettre, President of W-Systems, at the 2015 CRM Evolution Tradeshow in New York City. (*See* Affidavit of Christian Wettre ("Wettre Aff.") ¶¶7-8 [NYSCEF 19]). At the CRM Evolution Tradeshow, Mr. Meline and Mr. Wettre discussed Sugar's CRM software, and a long-standing business relationship between the parties ensued. (*Id.* ¶¶7-8). MACU argues that that initial meeting is inconsequential and cannot serve as the basis for jurisdiction in this present dispute with W-Systems. (Defendant's Reply Memorandum ("Def. Rep. Memo"), at 11 [NYSCEF 27].

- Negotiating the MSA and the 2017 Order Form through regular communications directed to New York from October 2015 through April 2017, including on-going telephone, email, and text communications with Dennis Smith, who works in W-Systems' New York Office. (*See* Affidavit of Dennis Smith ("Smith Aff.") ¶¶7-8 [NYSCEF 21]). According to W-Systems, the MSA and 2017 Order Form were negotiated together as part of a single business transaction, with a single purpose. (*Id.* ¶9, Wettre Aff. ¶10).

- Communicating regularly with W-Systems' New York representatives about the installation and maintenance of the CRM Software on MACU's servers, including routine

correspondence with Mr. Smith and Kimberly Troy, managers of the MACU licensing project. (Wettre Aff. ¶¶15-16; Smith Aff. ¶¶13-14).

C. The Termination and Dispute

According to W-Systems, MACU breached the Licensing Order Forms by improperly terminating the licenses prior to the expiration of their fixed terms, and by failing to make payments due on the licenses. (*Id.* ¶¶38-39). W-Systems initiated this action on July 1, 2020. As noted above, W-Systems asserts two separate breach of contract claims based on the Licensing Order Forms and on a related services agreement.

MACU moves to dismiss W-Systems' claims for lack of personal jurisdiction, arguing (i) that it never entered into an agreement with W-Systems consenting to this Court's jurisdiction and (ii) that MACU's activities do not support the exercise of specific personal jurisdiction in New York.

Legal Analysis

A. The Forum Selection Provision

The threshold question on this motion is whether the forum selection provision in the MSA (to which W-Systems *is not* a party) requires MACU to litigate disputes with W-Systems under the License Order Forms, which contain no such provision. The Court finds that it does not.

First of all, the MSA's forum selection provision is not incorporated by reference into the License Order Forms. Under New York Law, "[i]ncorporation by reference . . . is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document 'beyond all reasonable doubt.'" (*Shark Info. Servs. Corp. v Crum and Forster Commercial Ins.*, 222 AD2d 251, 252 [1st Dept 1995]

[citations omitted]; *see also* 28 NY Prac., Contr. L. § 8:29). When incorporating individual provisions from another agreement, the language used must be clear enough to demonstrate that the parties intended for a specific section to be incorporated. (*See Miller v Mercuria Energy Trading, Inc.*, 291 F Supp 3d 509, 518 [SD NY 2018] ["[I]ncorporation by reference is limited to the section and purpose for which the incorporated document is identified."]; *see, e.g.*, *Castedo v Permanent Mission of Thailand to the United States*, 178 AD3d 531, 531 [1st Dept 2019]).

The fact that one agreement is "subject to" another, as is the case here, does not mean that all of its terms are incorporated (*Krasner v Transcontinental Equities, Inc.*, 70 AD2d 312, 316 [1st Dept 1979]; *Rice Mohawk U.S. Constr. Co. v Sturdy Concrete Co.*, 40 AD3d 1065, 1066 [2d Dept 2007]; *U.S. Steel Corp. v Turner Constr. Co.*, 560 F Supp 871, 873-874 [SD NY 1983]). The question in each case is whether the contract contains clear language incorporating the terms of one contract into the other. In *Krasner*, for example, the First Department found that "subject and subordinate to" language in a secondary lease was not specific enough to incorporate sublease consent provisions from the original lease. (70 AD2d at 316 ["That the sublease was subject and subordinate to the prior Liberty sublease did not create an obligation to obtain Krasner's consent to any assignment by Ben-Ness, not expressly reserved."]). Similarly, in *U.S. Steel*, the court held that a forum selection clause in a general construction contract was not incorporated by reference into a subcontract. (560 F Supp at 873-874, citing *City of New York v Pullman, Inc.*, 477 F Supp 438, 442 [SD NY 1979] ["If the purpose [were] to preclude [access] to a federal forum, explicit language [in the subcontract] to that effect would have foreclosed any issue on the matter."]).

Here, as in *Krasner* and *U.S. Steel*, the language in the Licensing Order Forms is not specific enough to incorporate the forum selection provisions from the MSA. If the parties

intended for the MSA forum selection clause to apply to the Licensing Order Forms, they could have easily done so, but they did not. (*See Cornhusker Farms, Inc. v Hunts Point Co-op Mkt., Inc.*, 2 AD3d 201, 204 [1st Dept 2003] ["If these commercially sophisticated and counseled parties had intended to make the Plans part of their agreement, they could easily have accomplished that purpose by drafting the contractual writings so that one or more of them expressly incorporated the Plans by reference."]).

In the absence of incorporation by reference, generally there are three sets of circumstances under which a non-signatory may invoke a forum selection clause: "First, it is well settled that an entity or individual that is a third-party beneficiary of the agreement may enforce a forum selection clause found within the agreement. Second, parties to a 'global transaction' who are not signatories to a specific agreement within that transaction may nonetheless benefit from a forum selection clause contained in such agreement if the agreements are executed at the same time, by the same parties or for the same purpose. Third, a nonparty that is 'closely related' to one of the signatories can enforce a forum selection clause. The relationship between the nonparty and the signatory in such cases must be sufficiently close so that enforcement of the clause is foreseeable by virtue of the relationship between them" (*Freeford Ltd. v Pendleton*, 53 AD3d 32, 38-39 [1st Dept 2008] [citations omitted]).

None of those exceptions apply here. *First,* the MSA makes clear that "[t]here are no third-party beneficiaries to this agreement." (Compl. Ex. C, § 11.7]).

Second, the commercial relationship between W-Systems and Sugar is not "sufficiently close so that enforcement of the clause is foreseeable by virtue of the relationship between them" (*Freeford,* 53 AD3d at 39). That principle has been applied in limited circumstances where there

is a substantial connection between the parties, such as a parent-subsidiary or an employer-employee. (*See e.g.*, *Tate & Lyle Ingredients Ams., Inc. v Whitefox Tech. U.S.A., Inc.*, 98 AD3d 401, 401-402 [1st Dept 2012] [parent-subsidiary]; *Universal Inv. Advisory SA v Bakrie Telecom Pte., Ltd.*, 154 AD3d 171, 178-179 [1st Dept 2017] [employer-employee]; *Dogmoch Int'l. Corp. v Dresdner Bank AG*, 304 AD2d 396, 397 [1st Dept 2003] [parent-subsidiary]). Similarly, the First Department recently found this required relationship existed between the general partner of a fund and the fund itself. (*See Highland Crusader Offshore Partners, L.P. v Targeted Delivery Techs. Holdings, Ltd.*, 184 AD3d 116, 124-125 [1st Dept 2020]).

In *Tate & Lyle Ingredients*, a case cited by both parties, the First Department held that the relationship between the parent company and its subsidiary was so interconnected that the "nonparty's enforcement of the forum selection clause [was] foreseeable." (*Tate & Lyle Ingredients*, 98 AD3d at 402, quoting *Freeford*, 53 AD3d at 40). Specifically, the parent and the subsidiary "not only consulted with each other, but both were *intimately involved* in the decision-making process from the inception of the licensing agreement through [the] litigation." (*Id.* at 403 [emphasis added]; *see also Magi XXI, Inc. v Stato della Citta del Vaticano*, 714 F3d 714, 724 [2d Cir 2013] [holding that the parent and its subsidiary were "closely related" because the parent had "extensive and continuing involvement" in the execution of the sublicensing agreements]). Moreover, in *Tate & Lyle Ingredients*, the subsidiary could not sign licensing agreements "on its own authority" and needed express approval from the parent company to do so. (*Id.* at 403). The parent company also directed the subsidiary to initiate the action against the defendant. (*Id.*).

By contrast, in this case, W-Systems and Sugar simply have an arms' length business relationship. Sugar is not alleged to have been intimately and continuously involved in the

decision-making related to the licenses. W-Systems did not have to consult with or get approval from Sugar to enter into the separate licensing agreements with MACU; W-System had the authority to sign those agreements on its own. (Compl. ¶10). Furthermore, W-Systems worked with MACU to install and maintain the CRM Software as provided by the Licensing Order Forms, and related services agreement. (*Id.* ¶¶26-27; Smith Aff. ¶¶ 13-18). MACU paid all the fees due on the licenses directly to W-Systems—not Sugar. (Compl., ¶24; *see also* Compl. Ex. C § 5.2; Ex. D § 3 [NYSCEF 6]). When W-Systems believed MACU had breached the terms of the Licensing Order Forms and related agreements, it initiated the present action—not Sugar. (Compl. ¶3). As MACU points out, the arrangement between W-Systems and Sugar is "not unlike a consumer who buys Microsoft software from Best Buy and then asks Best Buy to install the software on the consumer's computer and provide technical support for an extra fee." (Def Rep. Memo, at 2). Importantly, W-Systems is merely one of 62 "certified elite partners" that sells licenses to Sugar's CRM software. (*Id.* at 10). In these circumstances, W-Systems cannot invoke the forum selection clause on the ground that it is "closely related" to Sugar.

Third, although the MSA and the License Order Forms have some factual connection, they are not an integrated "global transaction." The agreements involve different parties and serve separate and distinct purposes. The 2017 Order Form governs MACU's purchase of the CRM Software, and the terms of installation. (*See* Compl. Ex. A). The MSA governs the terms by which MACU can use the CRM Software, including copyright and trademark protections. (*See e.g.*, Compl. Ex. C, §§ 1.2, 3.1-3.3). Also, while the MSA contemplates subsequent Order Forms, it does not mention W-Systems or refer to the 2017 Order Form. (*See* Compl. Ex. C). Instead, Section 11.3 expressly provides: "This Agreement and any *Order Forms or exhibits attached hereto* . . . represent the entire agreement of the parties concerning its subject matter

and is intended to be the final expression of their Agreement. . . ." (*Id.* at § 11.13 [emphasis added]). No W-Systems Order Forms were attached to the MSA.

Accordingly, Plaintiff cannot use the forum selection provision of the MSA as a basis to assert personal jurisdiction against MACU.[1]

B. Personal Jurisdiction

With the forum selection provision out of the picture, W-Systems has failed to carry its burden of alleging facts sufficient to show that MACU is subject to personal jurisdiction in New York.

1. New York's Long-Arm Statute

New York's long-arm statute provides that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state." (CPLR 302 [a] [1]). CPLR 302 (a) (1) is a "single act statute," which means that "proof of one transaction in New York is sufficient to invoke jurisdiction . . . so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], quoting *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). Put another way, CPLR 302 (a) (1) supports exercising personal jurisdiction over a non-domiciliary who conducted purposeful activities in New York, *and* the claim against the non-domiciliary has a substantial relationship to those activities. (*See J.E.T. Adv. Assocs. v Lawn King*, 84 AD2d 744, 745 [2d Dept 1981]).

[1] Because W-Systems has not shown that it is entitled to the benefit of the forum selection clause contained in the MSA, W-Systems' reliance on New York General Obligations Law § 5-1402 to assert jurisdiction against MACU is unavailing.

When conducting a personal jurisdiction analysis under CPLR 302 (a) (1), the primary consideration is the quality of the defendant's New York contacts, not simply their quantity. (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]; *L.F. Rothschild, Uterbeg, Townbin v McTamney*, 89 AD2d 540, 542 [1st Dept 1982], *aff'd* 59 NY2d 651 [1983] ["What is crucial is not how much business the defendant conducted with . . . the plaintiff, but rather, the extent of his related business activity in the State."]). Importantly, the plaintiff's own activities in New York, even on behalf of the defendant, cannot serve as a predicate to confer jurisdiction over an out-of-state defendant. (*J.E.T. Adv Assocs.*, 84 AD2d at 745).

Telephone calls and written correspondence by a non-domiciliary into New York, by themselves, "generally are held not to provide a sufficient basis for personal jurisdiction under the long-arm statute" (*Liberatore v Calvino*, 293 AD2d 217, 220 [1st Dept 2002]; *C. Mahendra (NY), LLC v Natl. Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015] ["[C]ourts of this state have generally held telephone communications to be insufficient for finding purposeful activity conferring personal jurisdiction."]). Such communications can suffice to attach jurisdiction in a particular case if they are used by the defendant to project itself into New York "to actively participate in business transactions." (*Liberatore*, 293 AD2d at 220; s*ee e.g.*, *Deutsche Bank*, 7 NY3d at 72 [finding jurisdiction under 302 (a) (1) because the defendant "knowingly entered" New York to pursue negotiations and conclude a substantial business transaction]; *Parke-Bernet Galleries, Inc. v Franklyn*, 26 NY2d 13, 17-18 [1970] [exercising jurisdiction under 302 (a) (1) because the defendant had direct and personal involvement in an on-going auction sale conducted in New York on an open phone line]. *Cf L.F. Rothschild*, 89 AD2d at 452 [finding that telephone conversations between the Pennsylvania-based defendant and a New York-based brokerage firm were not sufficient to confer personal jurisdiction]; *J.E.T.*

Adv. Assocs., 84 AD2d at 745 [no jurisdiction under 302 (a) (1) because the contract was negotiated over the phone, no meetings were held in New York, and all of the New York "activities related to the contract" were performed by the plaintiff]).

In this case, MACU is not alleged to have conducted the type of purposeful activity sufficient to confer personal jurisdiction under CPLR 302 (a) (1). *First*, MACU's communications to and from New York were not used as means "to actively participate in business transactions" in New York. (*Liberatore*, 293 AD2d at 220). Although MACU's former Vice President of Sales, Preston Meline, met with Christian Wettre, President of W-Systems at a 2015 trade show in New York to discuss the Sugar CRM software, MACU, W-Systems, and Sugar negotiated the terms of the MSA and the 2017 Order Form completely electronically. (Smith Aff. ¶¶7-8; Wettre Aff. ¶9). As the First Department has held, "negotiating a contract from outside New York is insufficient to constitute the transaction of business in New York." (*ABKCO Music, Inc. v McMahon,* 175 AD3d 1201, 1201 [1st Dept 2019] [citations omitted]). After the MSA and 2017 Order Forms were fully executed, W-System began working to install the CRM software on MACU's servers in Utah, where MACU is headquartered. (Smith Aff. ¶16, Compl. ¶¶5, 26-27). Although it is undisputed that MACU regularly communicated with W-Systems' representatives about the implementation of the software, the underlying transaction—installing the licensed CRM software—took place in Utah, not New York. (*See* Plaintiff's Opposition Memorandum ("Plaintiff's Opp. Memo"), at 14 [NYSCEF 24]; Smith Aff. ¶18).

Second, W-Systems' reliance on its own activities in New York is unavailing. When "all of the New York activities relating to the contract [are] performed by [the] plaintiff," there is no basis for a court to exercise long-arm jurisdiction over a non-domiciliary defendant (*J.E.T. Adv*

Assocs., 84 AD2d at 745). In its reply brief, W-Systems alleges that its New York representatives worked over 1,000 hours on the MACU contracts, and remotely accessed MACU's systems from New York in order to install the CRM software. (Plaintiff's Opp. Memo, at 14). Absent from W-Systems' submissions are allegations of any specific activities that *MACU* undertook in New York, aside from communicating with W-Systems about the implementation of the CRM software in Utah. (*Id.*). W-Systems' activities in New York cannot be attributed to MACU, and thus, W-Systems fails to carry its burden of showing that MACU purposefully transacted business in New York.

2. *Due Process*

Even if MACU's conduct met the requirements of the long-arm statute, exercise of personal jurisdiction under CPLR 302 (a) (1) must also comport with federal due process requirements. (*See Al Rushaid v Pictet & Cie*, 28 NY3d 316, 330 [2016], citing *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000]). While the satisfaction of CPLR 302 (a) (1) criteria will generally satisfy due process requirements (*Sills v Ronald Reagan Presidential Found., Inc.*, 2009 WL 1490852, *10 [SD NY May 27, 2009]), New York courts have observed that a "separate constitutional analysis" is also required. (*Licci ex rel. Licci v Lebanese Canadian Bank, SAL*, 731 F3d 161, 170 [2d Cir 2013]).

To satisfy federal due process requirements, a nondomiciliary must have "certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." (*Daimler AG v Bauman*, 571 US 117, 127 [2014], quoting *Intl. Shoe Co. v Washington*, 326 US 310, 316 [1945]). The constitutional due process mandate "encompasses two requirements and jurisdiction may not be exercised unless both are present." (*Williams v Beemiller*, 33 NY3d 523, 528 [2019]).

A nondomiciliary has minimum contacts with the forum State if it "purposefully avails itself of the privilege of conducting activities within the forum State" (*Williams, 33 NY3d at 528 [citations omitted]*), "thus invoking the benefits and protections of [the forum State's] laws." (*Id.*, citing *Hanson v Denckla*, 357 US 235, 253 [1958]). As part of the minimum contacts analysis, New York courts evaluate "the quality and nature of the defendant's contacts [with New York] under a totality of the circumstances test." (*Licci*, 732 F3d at 170, citing *Best Van Lines, Inc. v Walker*, 490 F3d 239, 242 [2d Cir. 2007]). Once it is determined that the defendant has minimum contacts with the forum, the second step is to consider whether the exercise of personal jurisdiction would "comport with fair play and substantial justice." (*Id.*, quoting *Burger King Corp. v Rudzewicz*, 471 US 462, 476 [1985]). "Relevant factors at this second step of the analysis may include: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; [and] (3) the plaintiff's interest in obtaining convenient and effective relief. . . ." (*Id.* [citations omitted]).

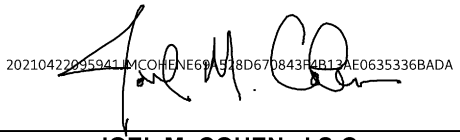
In this case, MACU does not have the requisite minimum contacts with New York to satisfy the federal due process requirements. MACU is headquartered in Utah and is not alleged to have conducted any business in New York. While MACU has frequently corresponded with W-Systems' New York representatives, these communications concerned the installation of Sugar's CRM software on MACU's servers *in Utah*, not New York. (*Id.* ¶¶26-27, Smith Aff. ¶16). As such, MACU did not purposefully avail itself to "the benefits and protections" of New York law. Because MACU does not have minimum contacts with New York, exercising personal jurisdiction would not comport with the constitutional due process mandate.

* * * *

In sum, MACU is not subject to personal jurisdiction in this Court and it has not consented to such jurisdiction by virtue of a forum selection provision contained in an agreement to which W-Systems is not a party. Therefore, it is

ORDERED that the Defendant's motion to dismiss is **GRANTED**. The Clerk is directed to enter judgment dismissing the Complaint.

This constitutes the Decision and Order of the Court.



4/22/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE