UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COGENT COMMUNICATIONS, INC., Plaintiff, v. DEUTSCHE TELEKOM AG, Defendant.	Case No. 1:15-cv-1632 LMB/IDD

MEMORANDUM IN SUPPORT OF DEUTSCHE TELEKOM AG'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FOR *FORUM NON CONVENIENS*

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Defendant Deutsche Telekom AG ("DT"), by counsel, files this Motion to Dismiss for *Forum Non Conveniens* as to the Amended Complaint filed by Cogent Communications, Inc. ("Cogent"),[1] and states as follows:

INTRODUCTION

Rather than amend its original Complaint, Cogent's latest Complaint contradicts its original Complaint, as Cogent tries to avoid dismissal for the reasons set forth in DT's previous motions to dismiss. In its original Complaint, Cogent alleged that DT breached both a 1999 written agreement ("1999 Agreement") that governed only the parties' New York, New York interconnection point, *see* Compl. ¶ 29, as well as an "implied-in-fact and/or oral agreement" that governed the parties' remaining seven interconnection points, including their interconnection point in Ashburn, Virginia. *See id.* ¶¶ 40, 42. Now, in its Amended Complaint, Cogent instead alleges that DT either breached an alleged oral agreement in 2004 ("2004 Oral Agreement") which "replaced" the 1999 Agreement or, in the alternative, the 1999 Agreement, which remains in effect and governs all of the parties' interconnection points. Am. Compl. ¶ 59, 65. Notwithstanding Cogent's crafty pleading, this case must be heard in Germany.

While Cogent's original Complaint failed to inform the Court of a written "Internet Peering Agreement" signed by the parties in 2003 (the "2003 Agreement"), Cogent now acknowledges the contract, which contains a mandatory forum selection provision requiring this case to be litigated in Bonn, Germany. Cogent's sole theory to avoid the mandatory forum selection clause is that the contract was originally executed between Cogent and DT's wholly owned subsidiary, T-Systems International GmbH ("T-Systems"). But, as Cogent is fully aware,

[1] DT is filing a motion to dismiss for failure to state a claim and lack of personal jurisdiction concurrently herewith. In filing this motion, DT in no way concedes that this Court is the proper forum to adjudicate Cogent's claims or that it possesses personal jurisdiction. *See, e.g.*, *Guthrie v. Flanagan*, No. CIV. A. 3:07CV479, 2007 WL 4224722, at *3 (E.D. Va. Nov. 27, 2007).

T-Systems and DT share a single interconnection port in Ashburn. Indeed, DT's "autonomous system number" ("AS Number") was used when Cogent interconnected with T-Systems under the express terms of the 2003 Agreement. And, as Cogent knows, following a publicly-disclosed demerger and takeover transaction in August 2005, the 2003 Agreement was transferred from T-Systems to DT. The fact that there is only one interconnection point in Virginia is fatal to Cogent's Complaint. Under the doctrine of *forum non conveniens*, this case should be dismissed to honor the forum specifically selected by these two sophisticated parties.

Cogent's decision to target the Eastern District of Virginia is nothing more than forum-shopping. In 2009, Cogent unsuccessfully sought the same relief—*i.e.*, that DT pay for all interconnection upgrades to help Cogent regardless of disparities in internet traffic—from German regulators. In essence, Cogent sells capacity it does not have and then wants DT to bail it out for free. Facing this negative precedent in Germany, Cogent has now twice attempted to plead around the 2003 Agreement and its mandatory forum selection provision.

As the Supreme Court recently explained in *Atlantic Marine Construction Co. v. U.S. District Court*, 134 S. Ct. 568 (2013), however, a valid and mandatory forum selection clause like the one the parties negotiated here should be enforced in all but the most exceptional circumstances. No such exceptional circumstances exist here. When a company formed in Delaware and headquartered in Washington, D.C. agrees with a German company headquartered in Germany to litigate disputes in Germany, that agreement should be enforced.

BACKGROUND

I. THE PARTIES' AGREEMENTS

Cogent and DT interconnect at eight locations: New York, Ashburn (Virginia), Los Angeles, London, Paris, Amsterdam, Frankfurt, and Vienna. *See* Am. Compl. ¶ 64. Cogent alleges that these interconnection points are governed by the alleged 2004 Oral Agreement or,

alternatively, the 1999 Agreement. *See id.* ¶¶ 64, 65. In fact, the parties' peering relationship—at least in New York and Ashburn—is governed by the 2003 Agreement.[2]

A. 1999 Peering Agreement

In 1999, DT entered into a written ISP Peering Agreement with a now-defunct internet service provider, PSINet. *See id.* ¶¶ 38-41. The parties entered into the agreement, *inter alia*, "to exchange data traffic between their respective networks in order to enable their respective customers to communicate more efficiently with each other." *See* Am. Compl. Ex. 1 at 1. According to Cogent, it acquired the 1999 Agreement from PSINet in bankruptcy in 2002, making it the "successor in interest to that contract." Am. Compl. ¶¶ 42-43.

Cogent contends that the 1999 Agreement covered the parties' New York interconnection at the time it was acquired by Cogent in 2002. *Id.* ¶ 44. The agreement is "governed by the substantive law of the State of New York, USA without reference to its principles of conflicts of law and may be modified only in writing signed by both Parties." Am. Compl. Ex. 1 § 6.7. Cogent further alleges that the parties began interconnecting at Ashburn under the 1999 Agreement in 2002 "consistent with Section 3.1," Am. Compl. ¶ 45,[3] but it has not alleged the existence of any written modification to include Ashburn under the agreement.

B. 2003 Peering Agreement

In 2003, Cogent entered into a written peering agreement with DT's wholly-owned subsidiary, T-Systems. *See* Am. Compl. Ex. 2. At the time, T-Systems operated DT's

[2] However, even if the 2003 Agreement merely governed the interconnection point in Ashburn, this Court sitting in Virginia has no basis upon which to hear this dispute.

[3] Section 3.1 of the purported 1999 Agreement provides that "[t]his Agreement contemplates the initial physical connection(s) will be at the following location(s), but the Parties may subsequently agree to connect at more locations than those specified below." Am. Compl. Ex. 1 § 3.1. It then lists "Telehouse or Herndon (still to decide) . . . New York/Virginia;" "PSI Network Europe, Germany (INX) . . . Berlin or Frankfurt;" and "Telehouse London/UK . . . UK." *See id.*

international wholesale division called International Carrier Sales & Solutions ("ICSS"), which managed DT's international interconnections, including the interconnections at Ashburn and New York. Decl. of Maureen Carroll ¶ 2 (attached hereto as Exhibit A). The 2003 Agreement was executed within the ICSS division. *Id.* "Maureen Wylie"—who now goes by the name Maureen Carroll—was employed by ICSS at the time and is listed as "[t]he contact person[] responsible for handling" the 2003 Agreement. Am. Compl. Ex. 2 at Annex 5.

The 2003 Agreement expressly states that it governs the parties' interconnection points in Ashburn and New York—importantly, the only two locations at which DT and Cogent shared interconnection points at the time of the 2003 Agreement's execution. *See* Am. Compl. ¶¶ 44-45. The agreement provides that "[f]or the mutual exchange of digital data traffic, the Parties hereby determine the peering point(s) pursuant to Annex 4 at which the traffic shall be transferred to the network of the other Party." Am. Compl. Ex. 2 § 2(2). Annex 4 lists "Equinix Ashburn" and "PAIX New York, NY." *See id.* at 11.

T-Systems and DT have always shared the same AS Number when interconnecting with Cogent in New York and Ashburn. The 2003 Agreement identifies "AS DTAG Macro" as the address to be used for the parties' network interconnections at those locations. Ex. A ¶ 3. Specifically, it states that "[t]he mutually accessible addresses have been listed in Annex 2 (for [T-Systems]) and Annex 3 (for Cogent Communications)," Am. Compl. Ex. 2 § 1(3), and Annex 2 lists "AS DTAG Macro" as an "Accessible Address[] of T-Systems International," *id.* at 9.[4] "DTAG" is an acronym for "Deutsche Telekom AG," and "AS DTAG Macro" contains DT's registered routes announced to peers and customers. Ex. A ¶ 4. "AS DTAG Macro" is also

[4] No number is listed for Cogent in Annex 3 of the 2003 Agreement, *see* Am. Compl. Ex. 2 at 10, but as Cogent alleges, Cogent has used AS 174 as "its primary address to interconnect with all ISPs" since it acquired PSINet's assets in bankruptcy in 2002. *See* Am. Compl. ¶ 20.

known as "AS DTAG" or "AS 3320." *See id.* As Cogent alleges, DT's AS Number for connecting with Cogent is AS 3320. Am. Compl. ¶ 21. Importantly, the AS DTAG/AS 3320 interconnection point is Cogent's only interconnection with DT in Ashburn. Ex. A ¶ 5.

By a publicly-disclosed demerger and takeover transaction in August 2005, DT acquired the ICSS division from T-Systems. *See id* ¶ 8. As a result of the transaction, the 2003 Agreement was transferred to DT. *Id.* At the time of the acquisition, DT informed all customers, including Cogent, that contracts with the ICSS divisions of T-Systems would be transferred to DT under German corporate law. *Id.* ¶ 9.

Cogent cannot now claim that there are two interconnection points in Ashburn or that it was unaware that DT had acquired the 2003 Agreement. At the time of the 2003 Agreement's execution, Cogent demonstrated an understanding that it was connecting to DT's network. *Id.* ¶ 6 (citing a July 28, 2003 email chain between Cogent employee Art Giannopoulos and T-Systems employee Ken Robinson discussing signing a peering agreement with the subject "Peering Agreement - DTAG & Cogent"). Indeed, the contact information listed in Annex 5 included "DTAG" email addresses. Am. Compl. Ex. 2 at 12. And over the years, Cogent has repeatedly acknowledged DT's ownership of the 2003 Agreement by continuing to contact Ms. Carroll—who now works in the ICSS division under DT—after the acquisition and demerger regarding the parties' interconnections pursuant to the 2003 Agreement. Ex. A ¶ 9.

DT continues to use AS 3320/AS DTAG Macro to interconnect with Cogent in Ashburn and New York, Ex. A ¶¶ 5, 10, and the 2003 Agreement still governs those internet peering locations, Am. Compl. Ex. 2 at Annex 4. Most importantly for purposes of this motion, the 2003 Agreement contains a clear and unequivocal mandatory forum selection provision requiring that this case be brought in Germany under German law. The forum selection provision states:

> This Agreement shall be subject to the law of the Federal Republic of Germany. Bonn shall be the place of jurisdiction.

Id. § 14 (3). The 2003 Agreement also provides for the amendment of the agreement, but only in writing. *See id.* § 14(1) ("Any amendments to this Agreement must be made in writing.").

C. Alleged 2004 Oral Agreement

Contrary to its original Complaint and the express terms of the 2003 Agreement, Cogent now alleges for the first time that all of the parties' interconnection points—including the interconnection points in Ashburn and New York—are governed by the 2004 Oral Agreement. Compl. ¶¶ 60-61. Cogent claims that the 2004 Oral Agreement supersedes the 1999 Agreement, even though (1) the 2004 Oral Agreement covers the same subject matter as the 1999 Agreement (*i.e.*, the New York and Ashburn interconnections), (2) modifications to the 1999 Agreement must be in writing, and (3) the 1999 Agreement was never terminated. *See id.* ¶ 59. Similarly, although the 2003 Agreement expressly covers the New York and Ashburn interconnections using AS 3320 and also can only be modified in writing, Cogent alleges—notwithstanding the inherent contradiction—both that the 2004 Oral Agreement operates independently of the 2003 Agreement, *see* Am. Compl. ¶¶ 74-75, and that the parties "cease[d] utilizing the 2003 Agreement" in 2004, *see id.* ¶¶ 77-78. Cogent's arguments are neither logical, nor accurate.

II. PROCEDURAL HISTORY

Cogent filed its original Complaint on December 8, 2015. *See* Dkt. No. 1. It alleged that the 1999 Agreement governed only the New York interconnection point, *see* Compl. ¶ 29, and that the remaining interconnection points were governed by an "implied-in-fact and/or oral agreement," *id.* ¶¶ 39-40. With respect to the Ashburn interconnection, Cogent alleged that the parties had "exchanged data in Ashburn, Virginia since February 2005." *See id.* ¶¶ 40, 42. Cogent's original Complaint did not mention the parties' 2003 Agreement.

On March 14, 2016, DT filed two motions to dismiss. The first sought dismissal under the doctrine of *forum non conveniens* and for lack of personal jurisdiction based on the forum selection provision found in the parties' 2003 Agreement. *See* Dkt. Nos. 10-12. The second motion sought dismissal of Cogent's oral contract and implied duty claims under Fed. R. Civ. P. 12(b)(6) because Cogent failed to allege sufficient terms to establish the existence of an enforceable agreement and because the claims were untimely, violated the statute of frauds, and were expressly prohibited by the 1999 Agreement. *See* Dkt. Nos. 13-15. Rather than respond to DT's motions, Cogent opted to prepare an amended complaint. *See* Dkt. No. 16. Cogent filed its Amended Complaint on April 4, 2016 and now alleges an entirely new contractual relationship between the parties. *See* Dkt. No. 20.

III. PRIOR PROCEEDINGS

This action is not the first time Cogent has attempted to compel DT to assume the costs of upgrading interconnection capacity for Cogent's benefit regardless of the amounts of internet traffic initiated by the parties. In August 2009, Cogent's German subsidiary, Cogent Communications Deutschland GmbH, filed a complaint with Germany's Federal Network Agency for Electricity, Gas, Telecommunications, Post, and Railway ("FNA")—Germany's equivalent of the Federal Communications Commission—seeking an order requiring DT to establish free and unconditional interconnection for internet transit services. *See* Ex. B.[5] Cogent alleged that DT was refusing to expand the parties' globally existing interconnection capacities—which Cogent claimed were insufficient—without monetary compensation.

[5] This Court may take judicial notice of a certified translation of the decision of a foreign administrative agency. *See* Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."); *United States v. Garland*, 991 F.2d 328, 332 (6th Cir. 1993) (taking judicial notice of judgment of Ghanian court); *cf. Lyons v. Coxcom, Inc.*, 718 F. Supp. 2d 1232, 1237 (S.D. Cal. 2009) (taking judicial notice of FCC opinion and order).

The FNA refused to initiate a proceeding against DT, explaining that it "can in legitimate cases obligate operators of public telecommunications networks who control access to end users and have no considerable market power to interconnect their networks upon request with those of operators of other public telecommunications networks, provided this is required to ensure the communication of users and the provision of services and their interoperability." *Id.* at 4. But it ruled with respect to Cogent's complaint:

> [N]o obligation to interconnect is required in order to ensure the communication of users and the provision of services as well as their interoperability. [DT] is willing, also without such an interconnection obligation, to expand the capacities in accordance with [Cogent's] wishes and against payment. In view of regulatory objectives, especially those with regard to ensuring cross-network availability of services, there are no objections to this offer. According to the Ruling Chamber's preliminary investigations there is no cause for accepting [Cogent's] claim that [DT] must interconnect with it with no capacity limitation or with a capacity of at least 175 Gbit/s free of charge.

Id. While Cogent alleges that in a February 2010 letter to the FNA during those proceedings, it "informed DT of its belief that the 2003 Agreement was 'no longer binding'" and that "[i]n its responsive filing, DT did not respond to this assertion" (Am. Compl. ¶ 79), Cogent's contention is not accurate. In fact, DT's submission to the FNA expressly states that the 2003 Agreement had "not yet been terminated." *See* Ex. C at 14.

STANDARD OF REVIEW

"If [a] forum selection clause points to a state or foreign forum, the defendant can enforce it through the doctrine of *forum non conveniens*." *Harmon v. Dyncorp Int'l, Inc.*, No. 1:13cv1597(LMB/TRJ), 2015 WL 518594, at *8 (E.D. Va. Feb. 6, 2015) (Brinkema, J.). "In *Atlantic Marine*, the Supreme Court explained that 'a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases' and that the analysis is the same regardless of whether the forum selection clause points to a federal or nonfederal forum." *Id.* (quoting *Atl. Marine*, 134 S. Ct. at 579-80) (emphasis added). "In determining whether to

enforce a valid forum selection clause, 'the plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed.'" *Id.* (quoting *Atl. Marine*, 134 S. Ct. at 581-82). Where the parties have a valid forum-selection clause, "a district court should ordinarily transfer the case to the forum specified in that clause." *Atl. Marine*, 134 S. Ct. at 581.

In *Atlantic Marine*, the Supreme Court expressly declined to address whether *forum non conveniens* can result in dismissal under Fed. R. Civ. P. 12(b)(6), but it made clear that a party can seek dismissal by filing a "*forum non conveniens* motion." *Id.*; *see also id.* at 580 n.4 (finding that even if a defendant could seek dismissal under Rule 12(b)(6) the defendant "would have sensible reasons to invoke § 1404(a) or the *forum non conveniens* doctrine in addition to Rule 12(b)(6)" (emphasis added)). Courts routinely consider evidence outside of the complaint when analyzing *forum non conveniens*. *See, e.g.*, *Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 248 (4th Cir. 2011) (considering affidavits submitted with the motion to dismiss); *Galustian v. Peter*, 750 F. Supp. 2d 670, 679 (E.D. Va. 2010) (same).

ARGUMENT

Two large, sophisticated companies sharing internet interconnections in countries across the United States and Europe, negotiated the 2003 Agreement to govern those interconnections, and agreed to litigate any claims arising therefrom in Germany. In its initial Complaint, Cogent ignored the contract's very existence, presumably to avoid the parties' forum selection clause. Confronted with the 2003 Agreement in DT's initial Motion to Dismiss, Cogent now tries in its Amended Complaint to escape the forum selection provision by arguing that the 2003 Agreement applied only to T-Systems and is somehow irrelevant. This is nothing more than forum-shopping, because Cogent is well-aware that German regulators previously rejected

Cogent's claim. The parties' forum selection clause should be enforced, and the case should be dismissed for *forum non conveniens*.

I. THE 2003 AGREEMENT GOVERNS THE PARTIES' NEW YORK AND ASHBURN INTERCONNECTION POINTS.

As stated above, Cogent's Amended Complaint alleges an entirely different contractual arrangement between the parties than what was alleged in the original Complaint. In light of this about-face, Cogent's allegations lack any credibility. *See SunTrust Mortgage, Inc. v. Nationwide Equities Corp.*, No. 3:12CV330-JRS, 2012 WL 4953120, at *4 (E.D. Va. Oct. 16, 2012) ("[A] party . . . cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version.")); *Heritage Oldsmobile-Imports v. Volkswagen of Am., Inc.*, 264 F. Supp. 2d 282, 290 (D. Md. 2003) ("It is unseemly that plaintiffs have changed their position about the substance of their oral agreements with VW in order to bolster their legal position. Their original allegations draw into question the veracity of their present allegations and can be used to impeach whatever sworn testimony they give in the future."). However, even if the newly-minted allegations in the Amended Complaint were true, the 2003 Agreement governs at least the parties' interconnection points in New York and Ashburn, and Cogent's arguments cannot succeed.

First, under Cogent's own allegations, the 1999 Agreement never governed the Ashburn interconnection. Cogent alleges that "Cogent and DT added an interconnection location in Ashburn, Virginia consistent with Section 3.1 of the 1999 Agreement." Am. Compl. ¶ 45. That section provides that "the Parties may subsequently agree to connect at more locations than those specified below." Am. Compl. Ex. 1 § 3.1. However, the 1999 Agreement also expressly states that it "may be modified only in writing signed by both Parties," *id.* § 6.7, and Cogent does not allege the existence of any written modification to the 1999 Agreement. *See First Data Merch.*

Servs. Corp. v. Oxford Mgmt. Servs., Inc., No. 07-CV-2083-RRM-ETB, 2011 WL 1260223, at *4 (E.D.N.Y. Mar. 30, 2011) ("Where . . . a contract requires modifications to be effectuated in a signed writing, oral modifications are prohibited.").

Second, the 2003 Agreement expressly supersedes the 1999 Agreement with respect to the New York interconnection point. Again, the 1999 Agreement only permits amendments in writing. *See* Am. Compl. Ex. 1 § 6.7. And the 2003 Agreement addresses the same subject matter—internet peering—and same physical router with the same AS Number at the same location. *See* Am. Compl. Ex. 2 § 2(2) & Annex 4 (identifying New York as a "peering point(s) . . . at which the traffic shall be transferred to the network of the other Party" (emphasis added)). Thus, the later-executed 2003 Agreement must supersede the 1999 Agreement as a matter of New York, Virginia, and German law. *See, e.g.*, *Kennedy v. Kennedy*, 83 Va. Cir. 439, 439 (2011) ("Where the parties to an existing contract enter into a new agreement, completely covering the same subject-matter, but containing terms which are inconsistent with those of the earlier contract, so that the two cannot stand together, the effect is to supersede and rescind the earlier contract, leaving the later agreement as the only agreement of the parties on the subject." (quoting Henry Campbell Black & Jay McIlvaine Lee, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* § 530 (2d ed. 1929))); *Indep. Energy Corp. v. Trigen Energy Corp.*, 944 F. Supp. 1184, 1195 (S.D.N.Y. 1996) ("Under New York law, a subsequent contract regarding the same subject matter supersedes the prior contract. Prior agreements and negotiations are deemed to merge and be subsumed in a later written agreement." (internal citation omitted)); *cf.* Judgment of the Higher Labor Court of Berlin, dated August 31, 2000, beck-online AP BGB § 611 Berufssport no. 22. Any claim Cogent has regarding internet peering with DT in New York must therefore be brought under the 2003 Agreement and its

German forum selection clause.[6]

Third, the alleged 2004 Oral Agreement is unenforceable under the 2003 Agreement, at least with respect to Ashburn and New York. The 2003 Agreement expressly identifies Ashburn and New York as "peering point(s) . . . at which the traffic shall be transferred to the network of the other Party." *See* Am. Compl. Ex. 2 § 2(2) & Annex 4. Thus, the 2004 Oral Agreement cannot constitute an independent agreement with respect to those interconnections. *See, e.g.*, *Casciano v. JASEN Rides, LLC*, 109 F. Supp. 3d 134, 141 n.2 (D.D.C. 2015) (finding that an express contract could preclude a similar implied-in-fact contract (citing *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (foreclosing the possibility that there could be an entirely new implied-in-fact contract covering the same subject matter as an express contract, because "[i]t is well settled that the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter, unless the implied contract is entirely unrelated to the express contract"))); *Layton v. MMM Design Grp.*, 32 F. App'x 677, 682 (4th Cir. 2002) ("[T]he law will not imply a contract when the suit is upon a contract in writing." (citing *Royer v. Bd. of County Supervisors*, 10 S.E.2d 876, 881 (Va. 1940)). Nor could the alleged 2004 Oral Agreement constitute an amendment to the 2003 Agreement with respect to the New York and Ashburn interconnections, which expressly requires all amendments to be "in writing." Am. Compl. Ex. 2 § 14(1); *see also* Judgment of the German Federal Supreme Court dated September 17, 2009, MMR beck-online, 2010, 336 (337) (where contract requires amendments to be in writing an implied-in-fact amendment is not enforceable). Any claim Cogent has with respect to internet peering in Ashburn or New York is governed by the 2003 Agreement and subject to its German forum selection clause.

[6] Even if the 1999 Agreement was somehow modified to include the Ashburn interconnection, it would be superseded for the same reason.

Finally, the 2003 Agreement cannot be disregarded simply because it was executed by T-Systems. *See* Am. Compl. ¶¶ 74-77. That is, the 2003 Agreement expressly requires the parties to interconnect their "networks" at New York and Ashburn using the AS DTAG Macro address. *See* Am. Compl. Ex. 2 § 1(1) & at 9, 12. T-Systems and DT have always shared the AS DTAG Macro address—which is also known as AS 3320 or AS DTAG—when interconnecting with Cogent. *See* Ex. A ¶ 4. And most importantly, the AS DTAG/AS 3320 interconnection point is Cogent's only interconnection point with DT in Ashburn. *Id.* ¶ 5. In other words, even though the 2003 Agreement was executed by T-Systems, it expressly requires interconnection to the DT network using the DT AS number.

Nor can Cogent claim to be unaware that the 2003 Agreement was transferred from T-Systems to DT in 2005 and remains in effect today. Not only did DT inform Cogent of the transfer after DT acquired ICSS from T-Systems, *id.* ¶ 9, but the same point of contact listed in the 2003 Agreement—Maureen (Wylie) Carroll, *see* Am. Compl. Ex. 2 at 12—continued to represent DT after the acquisition, Ex. A ¶ 9. Cogent's suggestion that DT conceded that the 2003 Agreement is no longer binding is both misleading and inapposite. DT made no such concession—in DT's filing with the German regulators, it expressly stated that the 2003 Agreement had not been terminated. *See* Ex. C at 14. And in any event, Cogent still cannot explain how the 2004 Oral Agreement was enforceable, at least with respect to New York and Ashburn, when the 2003 Agreement was still in effect at the time. Nothing in Cogent's Amended Complaint undermines the applicability of the 2003 Agreement at least to those locations, and thus Cogent's claims are governed by its forum selection provision.

II. THE 2003 AGREEMENT'S FORUM SELECTION CLAUSE IS VALID AND MANDATORY.

Because the 2003 Agreement applies to all of Cogent's claims, those claims are subject to the agreement's forum selection clause. Again, that clause provides:

> This Agreement shall be subject to the law of the Federal Republic of Germany. Bonn shall be the place of jurisdiction.

Id. § 14 (3). The provision is both valid and mandatory.

A. The 2003 Agreement's Forum Selection Clause Is Valid.

Forum selection clauses are routinely enforced. *See Vulcan Chem. Techs., Inc. v. Barker*, 297 F.3d 332, 339 (4th Cir. 2002). The Supreme Court has found that forum selection clauses in international contracts—like the 2003 Agreement—are *prima facie* valid. *Id.* (citing *Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 10 (1972)). "A forum selection clause is valid 'absent a showing that the chosen forum is unreasonable or was imposed by fraud or unequal bargaining power.'" *Harmon*, 2015 WL 518594, at *9 (quoting *Vulcan*, 297 F.3d at 339).

The 2003 Agreement's forum selection clause is plainly reasonable. It involves two sophisticated entities, and there are no indicia of fraud. DT is a German company; the parties' interconnection points are located in the United States and Europe, including Germany, *see* Compl. ¶ 60; and key witnesses with respect to the 2003 Agreement are located in Germany, including DT's signatory on the 2003 Agreement. Indeed, Cogent already sought the relief requested here in Germany from German regulators. *See* Ex. B. As such, the forum selection clause should be upheld. *Cf. Harmon*, 2015 WL 518594, at *8 (finding forum selection clause unreasonable where there was "no connection between any underlying event" and the forum).

B. The 2003 Agreement's Forum Selection Clause Is Mandatory.

The 2003 Agreement's forum selection clause is also mandatory under Fourth Circuit precedent. "[A] federal court interpreting a forum selection clause must apply federal law in doing so." *Albemarle Corp. v. Astrazeneca UK Ltd*, 628 F.3d 643, 650 (4th Cir. 2010). "When construing forum selection clauses, federal courts have found dispositive the particular language of the clause and whether it authorizes another forum as an alternative to the forum of the

litigation or whether it makes the designated forum exclusive." *Id.* (emphases in original). "A general maxim in interpreting forum-selection clauses is that an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion." *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 290 (4th Cir. 2007) (internal quotation omitted).

In *Sterling Forest Associates, Ltd. v. Barnett-Range Corp.*, 840 F.2d 249, 250 (4th Cir. 1988), *abrogated on other grounds by Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989), the Fourth Circuit held that a forum selection clause nearly identical to the 2003 Agreement's provision was mandatory. There, the plaintiff, a Georgia limited partnership, brought suit under a purchase agreement in North Carolina, and the defendant, a California corporation, brought suit against the plaintiff under the agreement in California. *Id.* at 250. The purchase agreement contained the following forum selection provision: "This Agreement shall be construed and enforced in accordance with the laws of the State of California and the parties agree that in any dispute jurisdiction and venue shall be in California." *Id.*

The Fourth Circuit held that this language is mandatory. It first explained that if the language were deemed to be permissive, the clause would be "meaningless and redundant." That is, because the defendant was a California corporation, "federal jurisdiction and venue statutes provide as a matter of law that California is a proper state for suit." *Id.* at 251. It then found that the clause's plain language demonstrated the parties intended it to be mandatory:

> We would demean the intelligence and legal ability of the drafters of the Purchase Agreement were we to hold that, when, after negotiating the issue, they wrote that the Agreement shall be "construed and enforced" in accordance with California laws and that "venue shall be in California", what they really meant was that the place in which suit may be brought "shall exist" in California and "elsewhere as well".

Id. at 252. The court proceeded to list multiple examples of similar forum selection clauses

deemed by federal courts to be mandatory. *Id.* (citing decisions from other jurisdictions finding forum selection clauses with similar language to be mandatory).[7]

The *Gordonsville Industries v. American Artos Corp.*, 549 F. Supp. 200 (W.D. Va. 1982), case out of the Western District of Virginia cited by the Fourth Circuit is particularly instructive. There, like here, a German defendant challenged the American plaintiff's contract claims based on the parties' forum selection provision. *Id.* at 202. That provision stated that "the place for litigation shall be the [Civil Court] in Bochum, Germany." *Id.* at 204. The Western District of Virginia enforced the forum selection provision stating:

> GEA, a German corporation, entered into a contract with an American corporation. An unequivocal statement as to the choice of forum in the event of suit was included in the written contract executed by GEA and Artos. By including this provision in the contract, the two parties eliminated the uncertainties and great inconveniences that both parties could confront by being forced to adjudicate the contract in a forum familiar to both parties.

Id. at 205. Cogent presumably also knew that the forum selection clause in the 2003 Agreement was mandatory, attempting to avoid the clause by failing to tell the Court about its existence.

By contrast, the *IntraComm* case provides an example of a permissive forum selection clause. There, the forum selection provision stated: "In the event that such good faith

[7] There are also many recent examples of courts enforcing forum selection provisions with similar language. *See, e.g.*, *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 763-67 (5th Cir. 2016) (applying German law to find the provision "jurisdiction, venue, courts, and place of performance shall be at the corporate seat of PACT AG" mandatory); *Brooks-Williams v. Keybank, Nat'l Ass'n*, No. WDQ-15-559, 2015 WL 9255327, at *4 (D. Md. Dec. 17, 2015) (enforcing a forum selection provision reading "'any suit ... must be brought in a court ... in the county in which you [KeyBank] maintain your ... principal place of business.' The term 'must' is synonymous with 'shall,' which courts routinely find is indicative of mandatory forum selection clauses."); *Turfworthy, LLC v. Dr. Karl Wetekam & Co. KG*, 26 F. Supp. 3d 496, 505-06 (M.D.N.C. 2014) (finding the following provision mandatory: "If the purchaser is a trader, our registered place of business shall be the place of jurisdiction; however, we shall also be entitled to institute legal proceedings against the purchaser at its domicile. For the rest, the statutory place of jurisdiction shall apply."); *Davis Media Grp., Inc. v. Best W. Int'l, Inc.*, 302 F. Supp. 2d 464, 467 (D. Md. 2004) (enforcing a clause that reads "all suits and special proceedings brought hereunder . . . shall be subject to the jurisdiction of the Courts of the State of Arizona").

negotiations do not result in a resolution of a dispute, either party shall be free to pursue its rights at law or equity in a court of competent jurisdiction in Fairfax County, Virginia." *IntraComm*, 492 F.3d at 290 (emphasis omitted). The court found that the "shall be free to" language was "scarcely, if any, more restrictive than the word 'may.'" *Id.* And in so holding, it compared the clause at issue to a clause analyzed by the Tenth Circuit in *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318 (10th Cir. 1997), which provided, "Jurisdiction shall be in the state of Colorado." *IntraComm*, 492 F.3d at 290 (citing *Excell*, 106 F.3d at 321). The Fourth Circuit found that the clause at issue in *Excell* was an example of a mandatory provision. *See id.*

The 2003 Agreement's forum selection provision is nearly identical to the forum selection clauses upheld by the Fourth Circuit in *Sterling Forest* and the Western District of Virginia in *Gordonsville*. That is, it uses the unequivocal and mandatory term "shall" to identify the only location with jurisdiction over matters arising under the contract: "Bonn shall be the place of jurisdiction." Am. Compl. Ex. 2 § 14(3) (emphasis added); *cf. Sterling Forest*, 840 F.2d at 250 ("[T]he parties agree that in any dispute jurisdiction and venue shall be in California."); *Gordonsville*, 549 F. Supp. at 204 ("[T]he place for litigation shall be the [Civil Court] in Bochum, Germany."); *see also IntraComm*, 492 F.3d at 290 (finding that the clause "[j]urisdiction shall be in the state of Colorado" would be mandatory). Indeed, as in *Sterling Forest*, the provision would be redundant if the clause was only permissive, because a suit in Bonn would be proper regardless of the clause. *Cf. Sterling Forest*, 840 F.2d at 251; Ex. D (Declaration of Dr. Benedikt Burger) ¶ 26.

Moreover, the clause contains no permissive language like the clause at issue in *IntraComm*. To the contrary, like the clause in *Sterling Forest*, it also uses the term "shall" to mandate that the contract must be covered by German law: "This Agreement shall be subject to

the law of the Federal Republic of Germany." Am Compl. Ex. 2 § 14(3) (emphasis added). This provision further makes clear that the parties intended disputes under the contract to be heard in Germany. Indeed, under the Fourth Circuit's decision in *Albemarle*, even a forum selection clause that is permissive under federal law will be deemed mandatory if there is a foreign choice of law provision and the clause is mandatory under the identified choice of law. 628 F.3d at 651. Here, under German law, the language of § 14(3) is mandatory. *See* Ex. D ¶ 25. Therefore, the 2003 Agreement's forum selection provision is plainly mandatory for this additional reason.

III. THE 2003 AGREEMENT'S FORUM SELECTION CLAUSE SHOULD BE ENFORCED AND ALL OF COGENT'S CLAIMS SHOULD BE DISMISSED.

Under the Supreme Court's recent decision in *Atlantic Marine*, the forum selection clause in the 2003 Agreement must be enforced. In *Atlantic Marine*, the Supreme Court provided the framework for analyzing a *forum non conveniens* motion where the parties have agreed to a valid and mandatory forum selection provision. First, "the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." *Atl. Marine*, 134 S. Ct. at 581 (emphasis added). "[T]he plaintiff's choice of forum merits no weight." *Id.* Second, the Court is not to "consider arguments about the parties' private interests" and "must deem the private-interest factors to weigh entirely in favor of the preselected forum." *Id.* at 582. "Because [public-interest] factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases." *Id.* (emphasis added). And third, "when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a . . . transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations." *Id.* Ultimately, it is "[o]nly under extraordinary circumstances unrelated to the convenience of the

parties" that a *forum non conveniens* motion should be denied. *Id.* at 581 (emphasis added).[8]

No such "extraordinary circumstances" exist here. As the Fourth Circuit has articulated, the public interest factors bearing on *forum non conveniens* include:

> "the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty."

Tang, 656 F.3d at 249 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)). None of these factors should disturb enforcement of the 2003 Agreement's forum selection provision negotiated by these sophisticated parties. To the contrary, these factors favor dismissal from this Court in favor of a German court.

First, this Court and the court in Bonn have similar caseloads. In the 12-month period ending on June 30, 2015, this Court had 4,915 filings, with an average of 318 civil filings per judge. *See* Federal Court Management Statistics, June 2015, *available at* http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-june-2015. The relevant Bonn court heard 6,713 civil matters in 2015 divided between 36 judges.

Moreover, this is not a local controversy. DT is a German corporation, and Cogent is a Delaware corporation with its principal place of business in Washington, D.C. *See* Am. Compl. ¶¶ 1, 5. Thus Germany—not Virginia—has an interest in this dispute. Indeed, it would be unfair to burden the citizens of Virginia with jury duty in this case. The only tie this proceeding has to Virginia is the Ashburn interconnection point, and to the extent that creates any local interest in this matter, there is also a German interconnection point that would counterbalance that interest.

The remaining factors also strongly favor dismissal. The 2003 Agreement requires that it

[8] The Supreme Court found that this analysis applies equally to motions to transfer under § 1404 and motions to dismiss for *forum non conveniens*. *Atl. Marine*, 134 S. Ct. at 580.

be considered under German laws. Am. Compl. Ex. 2 § 14(3) ("This Agreement shall be subject to the law of the Federal Republic of Germany."). As such, it would both be more efficient and more appropriate for the matter to be decided by a German court, as the parties agreed. Dismissal in favor of a German court would also reduce the risk of "unnecessary problems . . . in the application of foreign law." *See Tang*, 656 F.3d at 249.

Finally, it is worth noting that there are no barriers to Cogent bringing its claims in Germany. *See* Ex. D ¶¶ 12, 17-20, 36. Cogent's breach of contract and implied duty claims are cognizable in Germany such that it will neither be deprived of all remedies nor treated unfairly in Germany. *See id.* ¶¶ 17-20. And to the extent Cogent's claims may be time-barred in Germany, the timeliness issues there are no more acute than the timeliness issues here—the statute of limitations is the same both in this jurisdiction and in Germany. *See* Def. Mem. in Supp. of Mot. to Dismiss for Failure to State a Claim at 8-9; Ex. D ¶ 20.

There is no reason to disturb the parties' negotiated choice of forum. DT and Cogent, two large, sophisticated entities, entered into an agreement governing their peering relationship and requiring any disputes arising therefrom to be heard in a German court. Cogent should not be allowed to escape that agreement simply because it obtained a negative ruling from German regulators on the same issues raised here. DT merely asks—as the Supreme Court requires—that the parties' agreement to litigate this dispute in Germany be enforced.

CONCLUSION

For all to foregoing reasons, Defendant DT respectfully requests that this Court grant Defendant's Motion to Dismiss for *Forum Non Conveniens*, dismiss the Complaint in its entirety, award DT its attorneys' fees and costs incurred with respect to this Motion, and grant such further relief as this Court deems proper.

Dated: April 25, 2016

DEUTSCHE TELEKOM, AG
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