

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Fairview Health Services, Plaintiff, v. Quest Software, Inc. et al., Defendants.	Case No. 20-cv-01326 (SRN/LIB) ORDER
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John Rock and Kathryn A. Stephens, Rock Hutchinson, PLLP, 120 South Sixth Street, Suite 2050, Minneapolis, MN 55402, for Plaintiff.

Benjamin W. Hulse, Blackwell Burke PA, 431 South Seventh Street, Suite 2500, Minneapolis, MN 55415; and Bradford J. Axel and Theresa Wang, Stokes Lawrence, P.S., 1420 Fifth Avenue, Suite 3000, Seattle, WA 98101, for Defendants.

SUSAN RICHARD NELSON, United States District Judge

This matter is before the Court on the Motion to Transfer Venue [Doc. No. 27] filed by Defendants Quest Software, Inc. and One Identity, LLC, and the Motion to Dismiss [Doc. No. 21] filed by Plaintiff Fairview Health Services. Based on a review of the files, submissions, and proceedings herein, and for the reasons below, the Court **DENIES** both motions.

I. BACKGROUND

This dispute arises out of a software transaction between Fairview Health Services (hereafter, “Fairview”) and Quest Software, Inc. and One Identity, LLC (collectively, “Quest”). Beginning in 2004, Fairview purchased licenses for Quest’s Active Roles

software, a program which “facilitate[s] the administration and management of a company’s information technology accounts.” (Am. Compl. [Doc. No. 14], at ¶ 16.) The transaction between Fairview and Quest included two components: First, Fairview purchased perpetual licenses to use the Active Roles software; and second, Fairview signed annual “maintenance services” agreements, which entitled Fairview to various forms of technical support as well as software updates. (*See* Rock Decl. [Doc. No. 57], Ex. A, at §§ 2, 10 (2004 Software License Agreement between Fairview and Quest).) Fairview continued purchasing additional licenses periodically, and paying for maintenance services annually, through 2019. (*See* Am. Compl. ¶¶ 16-19, 29.)

In December 2019, Fairview notified Quest that it would not renew its maintenance services for the following year. (*Id.* ¶ 29.) Thereafter, Quest conducted an audit of Fairview’s use of the Active Roles software, and allegedly found that Fairview had deployed the Active Roles software well in excess of the licenses Fairview had purchased. (*Id.* ¶¶ 30-32.) According to Quest, its audit revealed that Fairview had deployed the software using 69,064 licenses more than Fairview had purchased over the years. (*Id.* ¶ 32.) Based on the results of its audit and its interpretation of the parties’ contracts, Quest concluded that Fairview owed a license fee of \$4,183,178.85. (*Id.* ¶¶ 35, 37.) Fairview disputed the extent of its alleged over-deployment, and when the parties could not reach an agreement, brought this declaratory judgment action. (*Id.* ¶¶ 32-38.)

Fairview seeks a declaratory judgment clarifying: 1) whether the parties’ 2004 Software License Agreement or their 2013 Software Transaction Agreement (“2004 SLA” and “2013 STA,” respectively) governs Fairview’s Active Roles licenses; 2) whether over-

deploying the Active Roles software beyond the allotted licenses constitutes a breach of the applicable agreement; 3) which accounts can be included in calculating whether an over-deployment has occurred; 4) how much Quest can charge for over-deployments; and 5) that Quest's exclusive remedy for an over-deployment is the right to invoice Fairview for the appropriate fees. (*Id.* ¶¶ 67-83.) Quest filed a counterclaim alleging that Fairview breached the 2013 STA and that Fairview's over-deployment renders it liable for copyright infringement, and seeking a declaratory judgment that the 2013 STA governs Fairview's deployment of the Active Roles software. (Answer & Countercl. [Doc. No. 16], at ¶¶ 42-52.)

After Fairview initiated this lawsuit, Quest filed a Motion to Transfer Venue, seeking to enforce a forum-selection clause in the 2013 STA. Fairview, in turn, filed a Motion to Dismiss Quest's breach of contract and copyright infringement counterclaims. Both motions require the Court to interpret the 2004 SLA and 2013 STA, as well as various purchase quotations signed by Fairview, which are either attached to or embraced by the pleadings. Accordingly, the Court next reviews the record pertinent to these agreements.

A. 2004 Software License Agreement

In 2004 and 2005, Fairview purchased 18,101 licenses for the Active Roles software from Quest. (Am. Compl. ¶ 17.) These purchases were governed by a standard-form 2004 Software License Agreement, which provided:

Subject to the terms and conditions of this Agreement, . . . Quest hereby grants to Licensee, and Licensee accepts from Quest, a perpetual, non-exclusive, non-transferrable and non-sublicensable right to use the Software described on the applicable Quotation Form. . . .

(Rock Decl., Ex. A (“2004 SLA”), at § 2.) In addition, the 2004 SLA defined “Software” to include “corrections, enhancements, and upgrades to the Software that Quest may make available pursuant to Section 10 below.” (*Id.* § 1(e).)

Section 10 of the 2004 SLA addressed “maintenance services,” which included various forms of technical support. (*Id.* § 10.) The maintenance services provision contemplated that Fairview would pay an annual fee in exchange for twelve months of the described technical support, and then the agreement would automatically renew to provide another twelve months of support until canceled by the parties. (*See id.*) One of the “maintenance services” was:

Quest shall make available to Licensee new versions and releases of the Software, including Software corrections, enhancements and upgrades, if and when Quest makes them generally available without charge as part of Maintenance Services for the Software.

(*Id.*) The parties appear to agree that this maintenance services feature entitled Fairview to upgraded versions of the software. (Am. Compl. ¶ 43 (“Fairview was entitled to receive updated versions of the Active Roles software by virtue of the licenses it purchased in 2004.” (citing sections 1(e), (2), and (10) of the 2004 SLA)); Answer & Countercl. ¶ 19 (“[D]uring the maintenance period, maintained licensees are entitled to upgrade their licensed software to the most recent version that has been released at no additional cost.”).)

The 2004 SLA also included a “Usage Verification” provision, which the parties have referred to as a “true-up provision.” The true-up provision entitled Quest to audit Fairview’s deployment of the Active Roles software, and provided that:

If Licensee’s use of the Software is found to be greater than contracted for, Licensee will be invoiced for the additional licenses or license upgrades

(based on the applicable units of measure, e.g., servers, server tiers or users) and the unpaid license fees shall be payable in accordance with this Agreement. Additionally, if the unpaid fees exceed five percent (5%) of the license fees paid for the subject Software, then Licensee shall also pay Quest's reasonable costs of conducting the audit.

(2004 SLA § 16.) The 2004 SLA also stated that “[n]either this Agreement nor any Quotation Form may be modified or amended except by a writing executed by a duly authorized representative of each party.” (*Id.* § 17(j).)

Fairview regularly purchased additional licenses in the following years until it acquired a total of 38,081 licenses by January 2016. (Am. Compl. ¶ 17.) It is alleged that Fairview signed a Support Renewal Quotation every year in order to extend the annual maintenance services it received. (*Id.* ¶ 18.)

B. 2013 Software Transaction Agreement

In 2013, Active Roles version 6.9 was released and Quest, then operating as Dell Software, began using the standard-form 2013 Software Transaction Agreement. (Answer & Countercl. ¶ 21; *id.*, Ex. 2 (“2013 STA”).) The 2013 STA granted a “non-exclusive, nontransferable . . . and non-sublicensable license to access and use the quantities of each item of Software identified in the applicable Order.” (2013 STA § 2(a).) Where the software was installed on the customer's own equipment, the license was perpetual. (*Id.* § 2(b).) As with the 2004 SLA, the 2013 STA provided for annual maintenance services which entitled the customer to new versions of the Active Roles software. (*Id.* § 10.) And like the 2004 SLA, the 2013 STA included a true-up provision:

If Customer's deployment of the Software . . . is found to be greater than its purchased entitlement to such Software, Customer will be invoiced for the over-deployed quantities at Dell's then current list price plus the applicable

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