Rel: December 2, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

SC-2022-0422

Ex parte Sunset Digital Communications, Inc.

PETITION FOR WRIT OF MANDAMUS

(In re: Point Broadband, LLC, and Point Broadband Fiber Holding, LLC

v.

Sunset Digital Communications, Inc.)

(Lee Circuit Court, CV-21-900189)

WISE, Justice.

Sunset Digital Communications, Inc. ("Sunset"), the defendant below, petitions this Court for a writ of mandamus directing the Lee Circuit Court to vacate its February 9, 2022, order denying its motion to

dismiss the complaint filed by the plaintiffs below, Point Broadband, LLC ("Point Broadband"), and Point Broadband Fiber Holding, LLC ("PBFH") (collectively referred to as "the plaintiffs"), and to enter an order dismissing the plaintiffs' complaint. We grant the petition and issue the writ.

Facts and Procedural History

On May 29, 2018, Sunset and Sunset Fiber, LLC, entered into a "First Amended and Restated Asset Purchase Agreement" ("the APA") with PBFH, which was then known as Sunset Digital Holding, LLC; PBFH is a wholly owned subsidiary of Point Broadband, which has its headquarters and principal place of business in Lee County. Section 10.11 of the APA provides:

> "This Agreement shall be governed by and construed in accordance with the internal laws of the Commonwealth of Virginia without giving effect to any choice or conflict of law provision or rule (whether of the Commonwealth of Virginia or any other jurisdiction).
>
> "ANY LEGAL SUIT, ACTION OR PROCEEDING ARISING OUT OF OR BASED UPON THIS AGREEMENT, THE OTHER TRANSACTION DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY MAY BE INSTITUTED IN THE FEDERAL COURTS OF THE UNITED STATES OF AMERICA OR THE COURTS OF THE COMMONWEALTH OF VIRGINIA IN EACH CASE LOCATED IN THE CITY OF BRISTOL,

> VIRGINIA, AND EACH PARTY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS IN ANY SUCH SUIT, ACTION OR PROCEEDING. SERVICE OF PROCESS, SUMMONS, NOTICE OR OTHER DOCUMENT BY MAIL TO SUCH PARTY'S ADDRESS SET FORTH HEREIN SHALL BE EFFECTIVE SERVICE OF PROCESS FOR ANY SUIT, ACTION OR OTHER PROCEEDING BROUGHT IN ANY SUCH COURT. THE PARTIES IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY OBJECTION TO THE LAYING OF VENUE OF ANY SUIT, ACTION OR ANY PROCEEDING IN SUCH COURTS AND IRREVOCABLY WAIVE AND AGREE NOT TO PLEAD OR CLAIM IN ANY SUCH COURT THAT ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM."

(Capitalization in original; bold typeface omitted; emphasis added.)

On June 11, 2021, the plaintiffs filed a complaint against Sunset in the Lee Circuit Court, seeking a judgment declaring that PBFH was not liable for certain unpaid taxes and penalties; that PBFH did not owe defense or indemnity obligations to Sunset relating to those unpaid taxes; that PBFH did not owe legal fees in connection with any audits or other investigations relating to Sunset's tax liability; and that Sunset owed PBFH defense and indemnity obligations in the event a third party sought to bring a claim or attempted to collect any unpaid taxes from PBFH. On July 19, 2021, Sunset filed a motion to dismiss the complaint pursuant to Rule 12(b), Ala. R. Civ. P., in which it alleged, among other

things, that the APA included a mandatory outbound-forum selection clause that "requires the parties to submit exclusively to the jurisdiction of the United States federal courts or the Virginia state courts located in Bristol, Virginia."

On November 19, 2021, the plaintiffs filed their response to the motion to dismiss. In their response, the plaintiffs argued, in pertinent part: "To the extent Section 10.11 can be characterized as a 'forum selection clause' (the APA does not characterize it as such), then its employment of the word 'MAY' makes it a permissive forum selection clause." (Emphasis omitted; capitalization in original.)

On February 9, 2022, after conducting a hearing and giving the parties an opportunity to file additional briefs and/or caselaw regarding the applicability of § 10.11 of the APA, the trial court denied Sunset's motion to dismiss. In its order denying the motion to dismiss, the trial court stated, in pertinent part:

> "At issue is if the language ('may') creates a mandatory forum selection clause or clause that consents to jurisdiction. Language such as 'shall' or 'must' would be used in cases where the clause was to be considered mandatory. As this is a consent to jurisdiction clause and not a mandatory one, Alabama Courts have held that imperative language such as 'shall' or 'must' are required to find that the clause is a mandatory one. However, the word 'may' results in language

> that is much more permissive or rather a 'consent to jurisdiction' clause. Ex parte B2K Systems, LLC, 162 So. 3d 896, 902-903 (Ala. 2014)."

Subsequently, Sunset filed a petition asking this Court to issue a writ of mandamus directing the trial court to vacate the February 9, 2022, order denying its motion to dismiss, and to enter an order dismissing the plaintiffs' complaint on the basis that § 10.11 of the APA requires that the action be instituted in a state or federal court located in Bristol, Virginia.[1]

Standard of Review

> "This Court has held that an order denying enforcement of an outbound forum-selection clause is properly reviewable by a petition for a writ of mandamus:
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> > "'"'[A] petition for a writ of mandamus is the proper vehicle for obtaining review of an order denying enforcement of an "outbound" forum-selection clause when it is presented in a motion to dismiss.' Ex parte D.M. White Constr. Co., 806 So. 2d 370, 372 (Ala. 2001); see Ex parte CTB, Inc., 782 So. 2d 188, 190 (Ala. 2000). '[A] writ of mandamus is an extraordinary remedy, which requires the petitioner to demonstrate a clear, legal right to the relief sought, or an abuse of discretion.' Ex parte Palm Harbor Homes, Inc., 798 So. 2d 656, 660 (Ala. 2001). … "'

[1]Although Sunset raised additional grounds in support of its motion to dismiss, it does not raise any arguments in its mandamus petition regarding those additional grounds.

> "Ex parte Textron, Inc., 67 So. 3d 61, 65-66 (Ala. 2011) (quoting Ex parte Leasecomm Corp., 886 So. 2d 58, 62 (Ala. 2003))."

Ex parte B2K Sys., LLC, 162 So. 3d 896, 901 (Ala. 2014). "We review the trial court's holding regarding this issue to determine if it exceeded its discretion. Ex parte D.M. White Constr. Co., 806 So. 2d 370, 372 (Ala. 2001)." Castleberry v. Angie's List, Inc., 291 So. 3d 37, 42 (Ala. 2019).

Discussion

Sunset argues that the trial court erroneously found that § 10.11, the forum-selection clause in the APA, was permissive rather than mandatory. Specifically, it asserts that the trial court "wholly ignored the 'exclusive jurisdiction' language of the forum selection clause." Petition at 9. Therefore, it argues, the trial court erroneously denied its motion to dismiss on that ground.

> "At the outset, we note that '[a]n outbound forum-selection clause -- a clause by which parties specifically agree to trial outside the State of Alabama in the event of a dispute -- implicates the venue of a court rather than its jurisdiction. See Ex parte CTB, Inc., 782 So. 2d 188 (Ala. 2000); and O'Brien Eng'g Co. v. Continental Machs., Inc., 738 So. [2d] 844, 845 (Ala. 1999).' Ex parte Leasecomm Corp., 879 So. 2d 1156, 1158 (Ala. 2003). In F.L. Crane & Sons, Inc. v. Malouf Construction Corp., 953 So. 2d 366, 373 (Ala. 2006), this Court held that 'an outbound forum-selection clause raises

> procedural issues and is governed by the law of the forum jurisdiction -- in this case, the law of Alabama.'
>
> "In M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972), the United States Supreme Court held that, for purposes of federal law, outbound forum-selection clauses 'are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances.' This Court in Professional Insurance Corp. v. Sutherland, 700 So. 2d 347, 351 (Ala. 1997), adopted the Supreme Court's reasoning, stating that 'a forum selection clause should be enforced so long as enforcing it is neither unfair nor unreasonable under the circumstances.' This Court has stated that an outbound forum-selection clause is enforceable unless the party challenging the clause can clearly establish that enforcement of the clause (1) would be unfair on the basis that the contract was affected by fraud, undue influence, or overweening bargaining power or (2) would be seriously inconvenient for the trial of the action. Ex parte Leasecomm Corp., 879 So. 2d 1156 (Ala. 2003). A party seeking to dismiss an action filed in Alabama based on the existence of an outbound forum-selection clause must initially establish the existence of a contract containing an outbound forum-selection clause. The burden then shifts to the party challenging the enforcement of the clause to establish that enforcement of the clause would be unfair or unreasonable under the circumstances. Ex parte PT Solutions Holdings, LLC, 225 So. 3d 37 (Ala. 2016). This Court has noted that '[t]he burden on the challenging party is difficult to meet.' D.M. White Constr., 806 So. 2d at 372."

Ex parte Terex USA, LLC, 260 So. 3d 813, 816 (Ala. 2018). [2]

[2]In this case, the plaintiffs do not challenge the enforceability of the forum-selection clause; they simply assert that it is permissive rather than mandatory.

The forum-selection clause at issue in this case provides:

> "Any legal suit, action or proceeding arising out of or based upon this agreement, the other transaction documents or the transactions contemplated hereby or thereby may be instituted in the federal courts of the United States of America or the courts of the Commonwealth of Virginia in each case located in the city of Bristol, Virginia, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action or proceeding."

(Capitalization and bold typeface omitted.)

In its order denying Sunset's motion to dismiss, the trial court determined that the use of the term "may" rendered the forum-selection clause permissive rather than mandatory.

> "'The intention of the parties controls in construing a written contract, and the intention of the parties is to be derived from the contract itself, where the language is plain and unambiguous. Food Service Distributors, Inc. v. Barber, 429 So. 2d 1025 (Ala. 1983). Likewise, in Flowers v. Flowers, 334 So. 2d 856, 857 (Ala. 1976), this Court held that, absent evidence to the contrary, "the words of an agreement will be given their ordinary meaning."'
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> "Loerch v. National Bank of Commerce of Birmingham, 624 So. 2d 552, 553 (Ala. 1993). Moreover, '[a]ll the provisions of a contract must be construed together so as to give harmonious operation to each of them, so far as their language will reasonably permit.' City of Fairhope v. Town of Daphne, 282 Ala. 51, 58, 208 So. 2d 917, 924 (1968). In a related vein, '[a] court seeks to accord the contracts "a reasonable construction under the terms used by the parties who made

> them, and when the contracts contain several provisions, all are construed together so that a harmonious operation can be given to each."' ANCO TV Cable Co. v. Vista Commc'ns Ltd. P'ship I, 631 So. 2d 860, 863 (Ala. 1993) (quoting United States Fid. & Guar. Co. v. Jacksonville State Univ., 357 So. 2d 952, 955 (Ala. 1978)).
>
> "The appellants are correct that our courts have stated that '[t]he word "shall" is clear and unambiguous and is imperative and mandatory,' Ex parte Prudential Ins. Co. of America, 721 So. 2d 1135, 1138 (Ala. 1998), but that, '[o]rdinarily, the use of the word "may" indicates a discretionary or permissive act, rather than a mandatory act.' Ex parte Mobile Cty. Bd. of Sch. Comm'rs, 61 So. 3d 292, 294 (Ala. Civ. App. 2010). See also Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc., 873 So. 2d 1091, 1098-99 (Ala. 2003) (stating that 'this Court has long recognized that words such as "may" ... denote permissive alternatives, not mandatory restrictions').
>
> "The word 'may' cannot, however, be viewed in isolation."

Hanover Ins. Co. v. Kiva Lodge Condo. Owners' Ass'n, 221 So. 3d 446, 451-52 (Ala. 2016) (emphasis added).

> "While the normal use of the word 'may' connotes a permissive character, the word can on occasion have a mandatory nature. Whether a permissive or mandatory construction is applicable depends on the apparent intention as gathered from the context, considering the whole instrument in which it is used. See 57 C.J.S. at p. 456."

Burgess Mining & Constr. Corp. v. City of Bessemer, 294 Ala. 74, 76, 312 So. 2d 24, 26 (1975).

In reaching its conclusion that the forum-selection clause was permissive, the trial court relied upon this Court's decision in B2K, supra. B2K involved four related agreements, each of which included a forum-selection clause. Two of the agreements provided that the "'[a]ny dispute shall be brought in the appropriate state or federal court in Kent County, Michigan,'" and that "'[t]his Agreement shall be enforced in the State of Michigan in either Kent County Circuit Court or the United States District Court for the Western District of Michigan.'" 162 So. 3d at 902. However, the forum-selection clause in the asset-purchase agreement in that case provided:

> "'The parties (a) irrevocably submit to the jurisdiction of any Michigan or federal court sitting in Grand Rapids, Michigan, in any action arising out of this agreement, (b) agree that all claims in any action may be decided in either court, and (c) waive, to the fullest extent that they may effectively do so, the defense of an inconvenient forum.'"

162 So. 3d at 901-02. The forum-selection clause in the guaranty agreement in that case provided:

> "'Guarantor irrevocably agrees and consents that any action against Guarantor for collection or enforcement of this guaranty may be brought in any state or federal court that is located in, or whose district includes, Kent County, Michigan, and that any such court shall have personal jurisdiction over Guarantor for purposes of that action.'"

162 So. 3d at 902. This Court noted that, "when read individually, two of the provisions appear to be 'exclusive,' while the other two are 'permissive.'" Id. The two forum-selection clauses that were held to be permissive in B2K used the term "may." However, unlike in this case, neither of those two forum-selection clauses in B2K provided that the parties agreed to submit to the exclusive jurisdiction of the Michigan courts. Thus, B2K is factually distinguishable from the case at bar.

In Castleberry, supra, Jessie Castleberry and Rickey Castleberry joined a membership service provided by Angie's List, Inc., which "operate[d] a paid membership service that enables its members to search for local service providers and to submit and consider reviews and ratings relating to those service providers." 291 So. 3d at 39. The Castleberrys claimed that they had used their membership with Angie's List to locate a contractor, Dream Baths of Alabama, LLC, to renovate a bathroom and make it handicapped accessible. The Castleberrys subsequently sued Dream Baths and alleged various claims arising out of the renovation. They also named Angie's List as a defendant, "alleging that it had misrepresented Dream Baths' qualifications" and asserting claims of "breach of contract, breach of a duty of good faith and fair

dealing, fraud, unjust enrichment, and deceptive trade practices." Id. Angie's List filed a motion to dismiss the Castleberrys' claims against it based on the following provision set forth in the membership agreement between Angie's List and the Castleberrys:

> "'This Agreement and the relationship between You [the Castleberrys] and Angie's List will be governed by the laws of the State of Indiana, notwithstanding the choice of law provisions of the venue where any action is brought, where the violation occurred, where You may be located or any other Jurisdiction. You agree and consent to the exclusive Jurisdiction of the state or federal courts located in Marion County, Indiana and waive any defense of lack of personal jurisdiction or improper venue or forum non conveniens to a claim brought in such court, except that Angie's List may elect, in its sole discretion, to litigate the action in the county or state where any breach by You occurred or where You can be found. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out [sic] or related to Your use of the Service or this Agreement shall be filed within one (1) year after such claim or cause of action arose or will forever be barred.'"

Id. The trial court determined that the provision constituted a "'a valid and enforceable forum-selection clause that provides for the exclusive jurisdiction of the courts of Marion County, Indiana,'" and granted the motion to dismiss. 291 So. 3d at 40. After denying a motion to reconsider filed by the Castleberrys, the trial court certified the dismissal order as

final pursuant to Rule 54(d), Ala. R. Civ. P., and the Castleberrys appealed to this Court.

On appeal, the Castleberrys argued that the trial court had erred by determining that the contractual provision at issue was a forum-selection clause that allowed Angie's List to force its members to litigate their claims against it in the courts of Marion County, Indiana. In addressing this issue, this Court stated:

> "The Castleberrys point to Ex parte Dan Tucker Auto Sales, Inc., 718 So. 2d 33, 35-36 (Ala. 1998), for the propositions that '[g]eneral contract law requires a court to enforce an unambiguous, lawful contract, as it is written' and that, '[w]hen interpreting a contract, a court should give the terms of the agreement their clear and plain meaning and should presume that the parties intended what the terms of the agreement clearly state.' The Castleberrys assert that the language used in the forum-selection clause is unambiguous and that its clear and plain meaning is that Angie's List members agree to litigate in Indiana only those claims brought against them by Angie's List and not claims brought by them against Angie's List.
>
> "We disagree. The first sentence of the forum-selection clause provides for the application of Indiana law in 'any action.' The second sentence provides that Angie's List members 'agree and consent to the exclusive Jurisdiction of the state or federal courts located in Marion County, Indiana' and that, with respect to actions brought in those courts, members waive defenses such as lack of personal jurisdiction, improper venue, or forum non conveniens. We do not read the reference to the waiver of potential defenses by Angie's List members in actions brought against them in the courts of

Marion County, Indiana, as limiting the earlier provision stating that Angie's List members agree to the exclusive jurisdiction of those courts. Finally, the last sentence of the clause references 'any claim or cause of action arising out [of] or related to [Angie's List members'] use of [Angie's List] Service or [the membership] Agreement' and purports to impose a one-year limitations period on such claims. Based on the entirety of the clause, we simply cannot agree with the Castleberrys that the clause unambiguously means that Angie's List can force its members to litigate in the courts of Marion County, Indiana, only those claims brought against members by Angie's List in those courts. To the contrary, we agree with Angie's List that the plain meaning of the language used makes the clause applicable to actions filed against Angie's List by Angie's List members.[1]

"Ex parte CTB, Inc., 782 So. 2d 188 (Ala. 2000), upon which the Castleberrys rely, is distinguishable. In that case, this Court determined that a contractual provision with language that was similar, but not identical, to the language at issue in the present case was not an outbound forum-selection clause. The provision in CTB stated:

> "'"Governing Law. This Contract will be construed and enforced under the laws of the State of Indiana (but not giving effect to any conflict of laws provisions), and [the plaintiff] consents to jurisdiction and venue in the Federal and State Courts located in Indiana."'

"782 So. 2d at 190. The Court in CTB determined that, although the clause demonstrated consent by the plaintiff to personal jurisdiction in the courts of Indiana, 'nothing in the clause require[d] that any action involving these parties be filed in Indiana.' Id. at 191. The forum-selection clause in the present case, however, does more than simply demonstrate a consent by the Castleberrys to personal jurisdiction of courts in Indiana. It provides that the Castleberrys agree to the

'exclusive' jurisdiction of those courts. Thus, we disagree with the Castleberrys that the reasoning employed in CTB applies equally to the forum-selection clause in this case.

"_____

"[1]In their opening brief to this Court, the Castleberrys suggest that the use of the term 'exclusive jurisdiction' in the forum-selection clause is intended to establish only that Angie's List members cannot object to a lack of personal jurisdiction over them with respect to claims brought against them in the courts of Marion County, Indiana. They do not, however, provide a persuasive explanation for why the clause uses the term 'exclusive' and not 'personal' to qualify 'jurisdiction,' if the intent was to waive objections to personal jurisdiction. In addition, it is noteworthy that the clause later expressly provides that Angie's List members will not contest personal jurisdiction in Marion County, Indiana. The Castleberrys make no further arguments in their opening brief regarding the use of the term 'jurisdiction.' See generally Ex parte International Paper Co., 285 So. 3d 753, 757-58 (Ala. 2019) (enforcing a forum-selection clause providing that '"[t]he Courts of Tennessee shall have ... exclusive jurisdiction over any disputes arising out of or relating to this agreement"' (quoting waste-services agreement)); Ex parte Textron, Inc., 67 So. 3d 61, 63 (Ala. 2011) (enforcing a forum-selection clause providing that a party 'consent[ed] to the exclusive jurisdiction of the Courts [in Rhode Island]'). We also note that, although the Castleberrys point out that the forum-selection clause is titled 'governing law' and not 'forum/venue selection,' counsel for the Castleberrys conceded during the hearing on Angie's List's motion to dismiss that 'the title of [the clause] isn't determinative' of its meaning."

Castleberry, 291 So. 3d at 40-41 (final emphasis added).

In Fear and Fear, Inc. v. N.I.I. Brokerage, L.L.C., 50 A.D.3d 185, 851 N.Y.S.2d 311 (2008), the Appellate Division for the Fourth Department of the New York Supreme Court ("the New York court") was presented with a forum-selection clause that is similar to the one at issue in this case. Fear and Fear involved an asset-purchase agreement

> "that provided that '[t]he parties ... agree that any and all actions arising under or in respect of this Agreement may be litigated in any federal or state court of competent jurisdiction located in the Borough of Manhattan, State of New York.' The agreement also provided that 'each party to this Agreement irrevocably submits to the personal and exclusive jurisdiction of such courts for itself ... and in respect of its ... property with respect to such action ... and hereby waives any objection that any such court is an improper or inconvenient forum.'"

50 A.D.3d at 186, 851 N.Y.S.2d at 312. The plaintiff in that case commenced an action in Onondaga County, New York. The defendants subsequently filed a motion for a change of venue to New York County, which the trial court granted. The issue on appeal in that case was "whether the use of the permissive term 'may' in a forum selection clause negated its mandatory nature." Id. In addressing that issue, the New York court stated:

> "We reject plaintiff's contention that the language of the forum selection clause was not mandatory. 'The general rule in cases containing forum selection clauses is that "[w]hen only jurisdiction is specified the clause will generally not be

enforced without some further language indicating the parties' intent to make jurisdiction exclusive"' (John Boutari & Son, Wines & Spirits, S.A. v Attiki Importers & Distribs., 22 F.3d 51, 52 [(1994)]). Here, the parties' intent to make the jurisdiction exclusive is demonstrated by the language 'each party ... irrevocably submits to the personal and exclusive jurisdiction of such [Manhattan] courts.' The agreement further provided, however, that any actions with respect to the agreement 'may be litigated' in Manhattan. It appears that the issue concerning the effect of the permissive term 'may' in a forum selection clause is one of first impression in New York State courts. The issue was presented in AGR Financial, L.L.C. v Ready Staffing, Inc. (99 F. Supp. 2d 399, 400 [(2000)]), where the agreement specified that 'ANY LEGAL ACTION ... WITH RESPECT TO THIS AGREEMENT ... MAY BE BROUGHT IN THE COURTS OF THE STATE OF NEW YORK IN THE CITY OF NEW YORK OR OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF NEW YORK ....' The District Court for the Southern District of New York concluded that '[t]he use of the word "may" does not negate the mandatory nature of the forum selection clause. All it does is make clear that it is up to [the plaintiff] whether it will enforce the clause by bringing suit in either the New York state or federal forum. [The plaintiff] is not compelled to bring suit in either forum but once it chooses to do so, its decision is binding. Furthermore, the use of the word "courts" does not negate the exclusivity of jurisdiction in the chosen forum once [the plaintiff] makes its election. It simply indicates that jurisdiction will lie only in the court that [the plaintiff] selects' (id. at 402).

"The forum selection clause before the District Court in AGR Financial, L.L.C. is similar to the one at issue here, and we also conclude that the use of the phrase 'may be litigated in any federal or state court of competent jurisdiction located in the Borough of Manhattan' (emphasis added) does not negate the mandatory nature of the forum selection clause.

> Indeed, that phrase merely makes clear that the party commencing an action may choose whether to litigate the action in either federal or state court in Manhattan. That is the extent of the party's choice. The phrase in the agreement otherwise requires the parties thereto to submit to the personal and exclusive jurisdiction of one or the other of the Manhattan courts identified."

50 A.D.3d at 187-88, 851 N.Y.S.2d at 313.

The forum-selection clause in this case provides that actions arising out of or based upon the APA "may be instituted in the federal courts of the United States of America or the courts of the Commonwealth of Virginia in each case located in the city of Bristol, Virginia." (Emphasis added.) The plaintiffs contend that, because that portion of the forum-selection clause used the term "may," the clause was merely permissive rather than mandatory. However, immediately after that portion of the forum-selection clause, in the very same sentence, the clause continues by providing that "each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding." (Emphasis added.) When reading the forum-selection clause as a whole, it is clear that the parties agreed to "irrevocably submit[] to the exclusive jurisdiction" of either the "the federal courts of the United States of America or the courts of the Commonwealth of Virginia in each case

located in the City of Bristol, Virginia." See, e.g., Castleberry, 291 So. 3d at 41. Additionally, the phrase "may be instituted in the federal courts of the United States of America or the courts of the Commonwealth of Virginia in each case located in the City of Bristol, Virginia," "merely makes clear that the party commencing an action may choose whether to litigate the action in either federal or state court" in Bristol, Virginia. Fear and Fear, 50 A.D.3d at 188, 851 N.Y.S.2d at 313.

Based on the foregoing, § 10.11 of the APA constitutes a mandatory outbound forum-selection clause. See Castleberry, supra; Fear and Fear, supra. Accordingly, the trial court exceeded its discretion when it rejected Sunset's argument that the plaintiffs' complaint was due to be dismissed based on the forum-selection clause and, thus, denied Sunset's motion to dismiss.

Conclusion

For the above-stated reasons, we grant the petition for a writ of mandamus and direct the trial court to vacate its February 9, 2022, order denying Sunset's motion to dismiss and to enter an order dismissing the plaintiffs' the complaint.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Bryan, Sellers, Mendheim, and Stewart, JJ., concur.

Mitchell, J., recuses himself.