

Sean N. Egan, Esq. (# 7191)
Parkside Tower -- Suite 950
215 South State Street
Salt Lake City, Utah 84111-2374
Telephone: (801) 363-5181
Facsimile: (801) 363-5184
Attorneys for Defendant,
Alste Technologies, GmbH

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

ACCESSDATA CORPORATION, a Utah
corporation,

Plaintiff,

v.

ALSTE TECHNOLOGIES GmbH, a
German limited liability company,

Defendant.

Case No. 2:08-CV-00569

Judge Tena Campbell

**FIRST AMENDED ANSWER AND
COUNTERCLAIM FOR BREACH OF
CONTRACT**

ALSTE TECHNOLOGIES GmbH, a
German limited liability company,

Counterclaimant,

v.

ACCESSDATA CORPORATION, a Utah
corporation,

Counterdefendant.

Jury Trial Requested

FIRST AMENDED ANSWER AND COUNTERCLAIM

Through its undersigned counsel, Defendant and Counterclaimant ALSTE Technologies GmbH (“ALSTE”) responds to Plaintiff and Counterdefendant AccessData Corporation’s (“AccessData”) Amended Complaint for Breach of Contract (“Complaint”) as follows:

The Parties

1. ALSTE admits the allegations contained in paragraphs 1 and 2 of the Complaint.

Jurisdiction and Venue

2. ALSTE admits the allegations contained in paragraph 3 of the Complaint.
3. ALSTE denies that the amount in controversy raised by the Complaint, exclusive of interest, fees, and other costs, exceeds \$75,000.
4. ALSTE denies that this court has subject matter jurisdiction over this case.
5. ALSTE denies that this Court has jurisdiction over it pursuant to Utah Code Ann. §§78B-3-201(3) and/or 78B-3-205(1).
6. ALSTE denies that it has consented to this Court’s jurisdiction with respect to the goods referenced in the Complaint. Although ALSTE executed a contract on or about May 7, 2005, such contract was terminated on or about December 31, 2006 or shortly thereafter.
7. ALSTE denies that this action is properly venued in this District.
8. ALSTE denies that it has consented to have this action venued in this District. Although ALSTE executed a contract on or about May 7, 2005, such contract was terminated on or about December 31, 2006 or shortly thereafter.

Background

9. ALSTE admits the allegations contained in paragraphs 10 and 11 of the Complaint.

10. ALSTE admits that the Reseller Agreement was renewed for a one year term on December 31, 2005 as alleged in paragraph 12 of the Complaint, but denies it was renewed on December 31, 2006 and December 31, 2007.

11. ALSTE denies the allegations contained in paragraphs 13 and 14 of the Complaint.

Claim for Relief

12. ALSTE denies the allegations contained in paragraph 16 of the Complaint. AccessData failed to perform its obligations when it delivered defective goods.

13. ALSTE denies the allegations contained in paragraphs 17, 18 and 19 of the Complaint.

Prayer for Relief

14. ALSTE expressly denies that AccessData is entitled to any of the relief requested in the Prayer for Relief.

General Denial

15. ALSTE further denies each and every allegation set forth in the Complaint to which ALSTE has not specifically admitted, controverted, or denied.

AFFIRMATIVE DEFENSES

ALSTE asserts the following affirmative defenses and reserves the right to alleged additional defenses as they are discovered.

First Affirmative Defense

(Failure to State a Claim)

AccessData has failed to state a claim upon which relief can be granted.

Second Affirmative Defense

(Mitigation of Damages)

AccessData failed to mitigate damages by failing to take such actions as were or are reasonably necessary to minimize any loss which may have been, or in the future may be sustained.

Third Affirmative Defense

(Unclean Hands)

AccessData's claims are barred, in whole or in part, by the doctrine of unclean hands.

Fourth Affirmative Defense

(Estoppel)

AccessData's claims are barred, in whole or in part, by the doctrine of estoppel.

Fifth Affirmative Defense

(Waiver)

AccessData's claims are barred, in whole or in part, by the doctrine of waiver.

Sixth Affirmative Defense

(Failure of Consideration)

AccessData's claims are wholly or partially barred because of a failure of consideration.

Seventh Affirmative Defense

(Illegality)

AccessData's claims are wholly or partially barred because the contract is unenforceable on the grounds of illegality.

Eighth Affirmative Defense

(Vague, Ambiguous, and Otherwise Unintelligible Contract)

The alleged contract is uncertain and utilizes vague, ambiguous terms thereby preventing a meeting of the minds as to the scope, rights, and reservations of the alleged contract.

Ninth Affirmative Defense

(Unjust Enrichment)

AccessData's claims are barred, in whole or in part, because AccessData would be unjustly enriched if it were allowed to prevail on its claims.

Tenth Affirmative Defense

(Failure to Perform Conditions Precedent)

AccessData failed to perform under the contract, and thus, performance by ALSTE has been waived.

Eleventh Affirmative Defense

(Breach of the Implied Covenant of Good Faith and Fair Dealing)

AccessData's claims are barred, in whole or in part, because AccessData breached the implied covenant of good faith and fair dealing.

COUNTERCLAIM

Jurisdiction and Venue

1. The Court has jurisdiction over this counterclaim pursuant to 28 U.S.C. §1332. Both parties to this counterclaim are of diverse citizenship and the amount in controversy exceeds \$75,000 exclusive of interest, fees, and other costs.

2. Venue is proper in this District pursuant to 28 U.S.C. §1391. AccessData is a Utah corporation with its principle place of business in Lindon, Utah.

3. This counterclaim is a compulsory counterclaim brought in accordance with Federal Rules of Civil Procedure 13(a)(1) in that the aforementioned causes of action arises out of the transaction or occurrence that is the subject matter of AccessData's claim and does not require adding another party over which the Court cannot acquire jurisdiction.

General Allegations

4. On or about May 7, 2005, ALSTE and AccessData entered into a written agreement for the resale of AccessData products (the "Reseller Agreement"). Under section 4.5 of the Reseller Agreement, ALSTE was asked to provide technical support to its customers "when possible." ALSTE was under no obligation to provide technical support whatsoever to non-customers.

5. In March of 2006, AccessData published a newsletter announcing that Tanja Giacobelli and Steven Wood, both employees of ALSTE, were the first two people to earn the AccessData Certified Examiner status. ALSTE began receiving an enormous amount of calls for technical support from individuals that did not have a business relationship with ALSTE. This included customers of other resellers and German speaking users of the product who called AccessData directly for technical support, but were referred by AccessData to ALSTE.

6. By the middle of 2006, the sheer volume of calls to ALSTE for technical support from non-customers was causing severe business disruption to ALSTE. ALSTE brought this to AccessData's attention. AccessData recognized that it was patently unfair for ALSTE to provide

technical support when it had no obligation to do so, but wanted ALSTE to continue to provide such technical support to non-customers for AccessData's own benefit. For several months, AccessData and ALSTE negotiated the terms of an agreement whereby ALSTE would receive compensation for providing technical support to users of AccessData products (the "Technical Support Agreement"). John Hansen and Omar Leeman agreed that AccessData would provide four free training seats per month (or the monetary equivalent if ALSTE did not use the training seats) to ALSTE in exchange for technical support. The training seats could be converted to a cash value and credited to ALSTE's balance relating to software sales. Such credits were applied to ALSTE's invoices until December of 2007. The Technical Support Agreement is also supported by several emails in 2006 and 2007, including those written by Omar Leeman, who states on March 2, 2007, that he "agreed to the training seats as compensation as John discussed with [ALSTE]" There are also several emails that confirm verbal understandings with respect to the terms of the Technical Support Agreement.

7. To this day, ALSTE continues to provide technical support for AccessData products, but has not received any compensation for its services since December of 2007. AccessData has breached its contract with ALSTE by failing to credit ALSTE's account in the amount equal to four training seats per month. The value of the training seats has changed over time, but ALSTE believes it is currently \$1000 per seat.

8. In addition, under the written Training Partner Agreement entered into on or about May 7, 2005, ALSTE was entitled to fees and credits for its services. Under the Training Partner Agreement, ALSTE was entitled to make from \$1,995 to \$2,495 per training course.

AccessData breached the Training Partner Agreement beginning in January of 2008 by failing to allow ALSTE to conduct training classes under false pretenses.

Claims for Relief

(Breach of Contract)

9. ALSTE hereby incorporates by reference paragraphs 1 through 8 of this counterclaim as if fully set forth herein.

10. ALSTE has performed its obligations under the Reseller Agreement, the Technical Support Agreement and the Training Partner Agreement.

11. AccessData has failed to perform its obligations under the Reseller Agreement, the Technical Support Agreement and the Training Partner Agreement, as discussed herein above.

12. As of January 31, 2009, ALSTE has suffered at least \$103,740 in damages as a result of AccessData's breach of the Technical Support Agreement and the Training Partner Agreement.

13. The Technical Support Agreement and the Training Partner Agreement have never been terminated.

14. The Technical Support Agreement and the Training Partner Agreement remain in full force.

15. By reason of the foregoing, ALSTE is entitled to damages in an amount to proven at trial, but in no event less than \$103,740, together with prejudgment interest thereon, attorney's fees, and other costs of suit.

Prayer for Relief

WHEREFORE, ALSTE prays for relief as follows:

1. Enter judgment for ALSTE against AccessData in an amount to be proven at trial, but in no event less than the principal sum of \$103,740;
2. Award ALSTE compensatory damages;
3. Award ALSTE prejudgment interest;
4. Award ALSTE attorney's fees and costs;
5. Award ALSTE further relief as this court may deem just and proper.

RESPECTFULLY SUBMITTED this 27th day of March, 2009.

By: /s/ Sean N. Egan
Sean N. Egan
Attorneys for Defendant and Counterclaimant
ALSTE Technologies GmbH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of March, 2009, a true and correct copy of the foregoing **FIRST AMENDED ANSWER AND COUNTERCLAIM FOR BREACH OF CONTRACT** was served upon the persons named below, at the address set out below their name, either by mailing postage prepaid, by hand-delivery, by Federal Express, by telecopying to them or by the CM/ECF electronic filing system, a true and correct copy of said document.

Sterling A. Brennan, Esq.
L. Rex Sears, Esq.
WORKMAN NYDEGGER
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

- U.S. Mail
- Federal Express
- Hand-Delivery
- Telefacsimile
- Other: CM/ECF

By _____