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ACCESSDATA CORPORATION

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

ACCESSDATA CORPORATION, a Utah  
corporation,

Plaintiff,

v.

ALSTE TECHNOLOGIES GmbH, a  
German limited liability company,

Defendant.

AND RELATED COUNTERCLAIMS.

Case No. 2:08-cv-569-TC-PMW

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S RENEWED MOTION  
FOR SUMMARY JUDGMENT**

Chief District Judge Tena Campbell

Magistrate Judge Paul M. Warner

Plaintiff and counterdefendant AccessData Corporation (“AccessData”) respectfully submits the following memorandum in support of “Plaintiff’s Renewed Motion for Summary Judgment” (“Motion”).

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

For the past two decades, AccessData has been in the business of developing and distributing software used in digital investigations. (Decl. Timothy Leehealey Supp. Pl.’s Renewed Mot. Summ. J. [“Leehealey Decl.”], ¶ 2.) On May 7, 2005, AccessData entered into a Reseller Agreement with defendant and counterclaimant ALSTE Technologies GmbH (“ALSTE”), pursuant to which ALSTE was to resell certain AccessData products. (*Id.* at ¶ 3 & Ex. A.) At the end of 2007, ALSTE stopped paying AccessData for resold products. (Leehealey Decl. at ¶ 4.) AccessData commenced this action by filing a complaint on July 31, 2008 to recover for ALSTE’s breach of contract. (Dkt. 2.)

After AccessData perfected Hague Convention service on ALSTE (in Germany), ALSTE answered AccessData’s complaint with a motion for summary judgment (Dkt. 6); to which AccessData responded on January 5, 2009 with its own cross-motion for summary judgment (Dkt. 15). As it had in pre-litigation discussions, ALSTE argued that it should not have to pay AccessData *any* of the money it owed because *some* software it had resold was allegedly defective. (Dkt. 23 at 8-9.)

The Court denied AccessData’s motion on June 18, 2009, finding that ALSTE’s allegation raised a material issue as to whether AccessData had breached the implied covenant of good faith and fair dealing by delivering defective software. (Dkt. 49 at 5.) In its order denying AccessData’s motion for reconsideration, the Court further explained that AccessData’s claim for breach of contract was not ripe for summary judgment because “[t]he alleged defect might have deprived ALSTE of the benefits of the contract.” (Dkt. 54 at 3.)

AccessData pressed ALSTE for information relating to supposed defects before it sued, and AccessData resolved any and all issues it could discover to the full satisfaction of ALSTE's customers. (Leehealey Decl. at ¶¶ 6-8.) As a result ALSTE did not have, could not obtain, and did not submit any evidence to show that it had been deprived of the benefits of its contract with AccessData. That is why all the Court could or did conclude in denying AccessData's prior motions was that ALSTE's allegation of product defects "might" support a claim for breach of the implied covenant of good faith and fair dealing.

Taking its cue from the Court's prior rulings, AccessData propounded discovery to ascertain whether ALSTE had indeed been denied the benefits of its contract. (Decl. L. Rex Sears Supp. Pl.'s Renewed Mot. Summ. J. ["Sears Decl."], Exs. B, C.) ALSTE resisted that discovery, AccessData moved to compel, and the Court ordered ALSTE to respond. (Dkt. 75.) As more fully explained below, once ALSTE finally complied with the Court's order, it became apparent that it did not have and, by its own admission, *cannot obtain* any admissible evidence that it was deprived of the full benefits of its contract with AccessData.<sup>1</sup>

ALSTE's supplemental responses underscore the pretextual character of its product defect allegations in other ways, too. For example, ALSTE persuaded the Court to limit its obligation to supplement its responses by arguing that it should not have to produce information or documents relating to transactions or amounts owing that are not implicated by ALSTE's allegation that version 2.0 of AccessData's Forensic Toolkit® product was defective. (Dkt. 65 at 5-6; Dkt. 75 at 9, 11 ["ALSTE is ordered to provide the information sought in Interrogatory No.

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<sup>1</sup> ALSTE has counterclaimed for breach of two other contracts, a training agreement and a technical support agreement. The Court has dismissed the training agreement claim, leaving only ALSTE's technical support agreement counterclaim. (Dkt. 58 at 12.) By the present motion, AccessData is not seeking adjudication of that counterclaim.

4 . . . as to the Forensic Toolkit 2.0 only”], 12.) As confirmed by ALSTE’s supplemental response to AccessData’s Interrogatory No. 4, only five of the 41 invoices at issue, representing less than a fourth of the amount in dispute, are impacted by ALSTE’s allegation that Forensic Toolkit 2.0 is defective. (Sears Decl., Ex. E at 6; Leehealey Decl. at ¶¶ 4-6.) By its own argument and admission, ALSTE has no excuse whatsoever with respect to the other amounts due under the contract.

**II. STATEMENT OF MATERIAL FACTS**

Pursuant to DUCivR 56-1(b), AccessData states the following:

1. On or about May 7, 2005, AccessData and defendant ALSTE Technologies GmbH (“ALSTE”) entered into a “Reseller Agreement,” pursuant to which ALSTE was authorized to and has resold certain AccessData products. (Leehealey Decl. at ¶ 3 & Ex. A.)

2. Pursuant to the Reseller Agreement, ALSTE was and is obligated to pay AccessData for products shipped to ALSTE’s order within 60 days of being invoiced therefor. (Leehealey Decl., Ex. A at § 3.1.)

3. Since November 2007, pursuant to the Reseller Agreement, AccessData has shipped \$83,804 of product to ALSTE’s order, for which it has invoiced ALSTE; but ALSTE has failed to make payment, as required by the Reseller Agreement. The following table sets forth a running total of the amounts invoiced and due, as of the dates indicated, which remain unpaid:

<b>Invoice Date</b>	<b>Running Total</b>	<b>Due Date</b>
November 29, 2007	\$9,033.75	January 28, 2008
November 30, 2007	\$35,411.00	January 29, 2008
December 5, 2007	\$35,727.00	February 3, 2008

<b>Invoice Date</b>	<b>Running Total</b>	<b>Due Date</b>
December 11, 2007	\$41,039.00	February 9, 2008
December 14, 2007	\$47,245.00	February 12, 2008
December 27, 2007	\$53,332.00	February 25, 2008
December 28, 2007	\$57,332.00	February 26, 2008
December 31, 2007	\$70,541.50	February 29, 2008
January 10, 2008	\$70,591.50	March 10, 2008
January 15, 2008	\$70,957.50	March 15, 2008
January 17, 2008	\$73,054.00	March 17, 2008
January 24, 2008	\$73,370.00	March 24, 2008
January 28, 2008	\$78,074.50	March 28, 2008
January 29, 2008	\$79,880.50	March 29, 2008
February 5, 2008	\$81,977.00	April 5, 2008
February 11, 2008	\$82,077.00	April 11, 2008
February 20, 2008	\$82,404.00	April 20, 2008
March 27, 2008	\$82,504.00	May 26, 2008
March 31, 2008	\$83,154.00	May 30, 2008
April 8, 2008	\$83,404.00	June 7, 2008
May 9, 2008	\$83,654.00	July 8, 2008
May 16, 2008	\$83,804.00	July 15, 2008

(Leehealey Decl. at ¶ 5.)

4. Of the amounts still owing, no more than \$18,532 is attributable to Forensic Toolkit version 2.0; the rest is for other products. (Leehealey Decl. at ¶ 6.)

5. The customers who received Forensic Toolkit 2.0 also received and were licensed to use other versions of Forensic Toolkit with respect to which ALSTE alleges no defect. (*Id.*)

6. ALSTE has received payment for the licenses covering Forensic Toolkit 2.0 that it resold pursuant to the Reseller Agreement. (Sears Decl., Ex. E at 6.)

7. ALSTE cannot identify any customer of ALSTE that has complained about any product resold under the Reseller Agreement. (Sears Decl., Ex. E at 4-5.)

8. ALSTE does not have and cannot obtain any admissible evidence that any of the customers to which it resold AccessData's software experienced or continues to experience any problems using the software, whether as a forensic tool or otherwise. (*Id.*)

9. ALSTE cannot identify any instance in which it was unable to sell or resell any product ordered or delivered under the Reseller Agreement. (Sears Decl., Ex. G at ¶ 3.)

10. ALSTE cannot identify any instance in which it was not paid by any of its customers for any product ordered or delivered under the Reseller Agreement. (Sears Decl., Ex. A at 1, Ex. D at 3-8.)

11. ALSTE cannot identify any instance in which any of its customers returned, or requested or obtained a refund for, any product ordered or delivered under the Reseller Agreement. (*Id.*)

### **III. ARGUMENT**

#### **A. AccessData's Prima Facie Case Is Undisputed.**

The Reseller Agreement required AccessData to “ship all ordered Products as directed by Reseller.” (Leehealey Decl., Ex. A at § 3.3.) AccessData did so. (Leehealey Decl. at ¶ 4.) The Reseller Agreement required ALSTE to make payment within 60 days of being invoiced for the products shipped to its order. (Leehealey Decl., Ex. A at § 3.1.) ALSTE has not paid for \$83,804 of product was shipped and invoiced under the Reseller Agreement. (Leehealey Decl. at ¶ 4.) No dispute exists concerning AccessData's prima facie case of its claims for breach of



contract and damages of \$79,804.<sup>2</sup> See *Bair v. Axiom Design, LLC*, 20 P. 3d 388, 392 (Utah 2001) (“The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages.”).

**B. ALSTE Does Not Have and Cannot Obtain Evidence to Support its Affirmative Defense that AccessData Breached the Implied Covenant of Good Faith and Fair Dealing.**

Rather than disputing AccessData’s prima facie case, ALSTE asserts as an affirmative defense that AccessData breached the implied covenant of good faith and fair dealing and deprived ALSTE of the benefit of its contract. Specifically, according to ALSTE, the implied covenant of good faith and fair dealing was breached because the Forensic Toolkit 2.0 product was so defective as to be useless. As noted above, this contention reaches less than a fourth of the amount at issue. ALSTE has articulated no excuse for its failure to pay the rest.

The only “evidence” ALSTE ever offered to support its defense is a self-serving declaration that *ALSTE* considered AccessData’s software “useless,” or at least unsuitable for use as a forensic tool. But what ALSTE contracted for is the resale of AccessData software to others, not the purchase of software for its own use. (Leehealey Decl., Ex. A.) Thus what matters is not what ALSTE thought of the software but what the customers to whom the software was resold thought. See *Smith v. Grand Canyon Expeditions Co.*, 84 P.3d 1154, 1160 (Utah 2003) (“The reach of the implied covenant of good faith and fair dealing extends no further than the purposes and express terms of the contract.”). To sustain its defense, ALSTE must produce evidence that defects in the software rendered it useless to the customers to whom it was resold;

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<sup>2</sup> Against the \$83,804 ALSTE owes, AccessData is applying four unused \$1,000 training credits.

and as a result, ALSTE was deprived of the benefits of the contract, i.e., resale of the software it ordered. *See State Farm Mut. Auto Ins. Co. v. Green*, 2003 UT 48, 89 P.3d 97, ¶¶ 2 (“State Farm may not deny . . . coverage to Green on the basis of her breach unless State Farm was actually prejudiced”), 31 (“the breach [of a consent to settle exclusion] is material only if it results in actual, rather than theoretical, impairment”). As explained below, ALSTE has not and admittedly cannot produce evidence of either.

**1. ALSTE Has No Evidence that its Customers Found the Software Useless.**

After being compelled to supplement its responses to AccessData’s discovery requests, ALSTE provided the following information:

- “All complaints to ALSTE about the Forensic Toolkit 2.0 product were made in the form of telephone calls. . . . ALSTE did not record the name, identities or other private information of the callers.” (Sears Decl., Ex. E at 5.)
- “ALSTE has conducted a diligent search for emails, faxes, and telephone records relating to technical support provided on the Forensic Toolkit 2.0 product, but was unable to find any responsive information.” (*Id.* at 4.)
- “Pursuant to the court’s order, [ALSTE] conducted diligent searches for records and information relating to customer complaints, unsuccessful sales and technical support regarding the Forensic Toolkit 2.0 product. . . . [ALSTE] was unable to recover any such information.” (Sears Decl., Ex. G at ¶ 3.)

These responses concede that ALSTE has no admissible evidence, and will not be able to obtain any admissible evidence, that its customers complained of the Forensic Toolkit 2.0 product, were unsatisfied with that product in any way, or found the product useless or otherwise defective. ALSTE simply cannot carry its burden to raise a triable issue of fact as to whether its customers found the Forensic Toolkit 2.0 software that was resold to them “useless.”<sup>3</sup>

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<sup>3</sup> Even if ALSTE presented evidence of customer dissatisfaction with version 2.0, in particular,

## **2. ALSTE Has No Evidence that it Was Deprived of the Benefit of the Contract**

To prevail on its affirmative defense, ALSTE must also show that AccessData's alleged breach was prejudicial to ALSTE's enjoyment of the benefit of its contract. *See State Farm*, 2003 UT 48 at ¶¶ 2, 31. Here, the benefit for which ALSTE contracted was the resale of software to its customers. (*See Leehealey Decl.*, Ex. A at § 1.1.) In discovery, ALSTE was asked to identify any instance in which it was deprived of that benefit as a result of any defect in AccessData's software, whether by way of lost sales, payments withheld by customers, or refunds it was required to make. (*Sears Decl.*, Ex. A at 1, Ex. B at 1-2.) Although ALSTE went to great lengths to bury the fact, ALSTE identified no such injury in its responses. (*Sears Decl.*, Ex. D at 3-8, Ex. E at 5-6.) What is more, ALSTE's supplemental response to Interrogatory No. 5 confirms that ALSTE was paid by its customers for each of the five resales covering Forensic Toolkit 2.0. (*Sears Decl.*, Ex. E at 6.) Thus ALSTE's discovery responses confirm that ALSTE was not deprived of the benefits of its contract by any alleged defect in the software. Because the benefit for which ALSTE contracted was the resale of software, and ALSTE's discovery responses confirm that ALSTE received that benefit, ALSTE's affirmative defense fails.

### **C. AccessData Is Entitled to Prejudgment Interest.**

In addition to unpaid principal, AccessData also is entitled to prejudgment interest at the statutory rate of 10% per annum, running from the date on which the various amounts ALSTE owes came due. Utah Code Ann. § 15-1-1(2); *Baker v. Dataphase, Inc.*, 781 F. Supp. 724, 731

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still it would not thereby raise a triable issue of material fact because the customers who received that version of Forensic Toolkit also received and were licensed to use other versions of the software that ALSTE does not allege were defective in any respect, let alone useless. (*See Leehealey Decl.* at ¶ 6.)

(D. Utah 1992). The following table provides a calculation of prejudgment interest through July 15, 2008, the date on which the last of the unpaid amounts came due:

<b>Invoice Date</b>	<b>Running Total</b>	<b>Due Date</b>	<b>Interest</b>
November 29, 2007	\$9,033.75	January 28, 2008	\$418.28
November 30, 2007	\$35,411.00	January 29, 2008	\$29.09
December 5, 2007	\$35,727.00	February 3, 2008	\$14.11
December 11, 2007	\$41,039.00	February 9, 2008	\$13.59
December 14, 2007	\$47,245.00	February 12, 2008	\$228.60
December 27, 2007	\$53,332.00	February 25, 2008	\$12.21
December 28, 2007	\$57,332.00	February 26, 2008	\$95.89
December 31, 2007	\$70,541.50	February 29, 2008	\$1.88
January 10, 2008	\$70,591.50	March 10, 2008	\$1.74
January 15, 2008	\$70,957.50	March 15, 2008	\$10.56
January 17, 2008	\$73,054.00	March 17, 2008	\$15.07
January 24, 2008	\$73,370.00	March 24, 2008	\$9.78
January 28, 2008	\$78,074.50	March 28, 2008	\$66.06
January 29, 2008	\$79,880.50	March 29, 2008	\$53.44
February 5, 2008	\$81,977.00	April 5, 2008	\$45.33
February 11, 2008	\$82,077.00	April 11, 2008	\$2.60
February 20, 2008	\$82,404.00	April 20, 2008	\$7.70
March 27, 2008	\$82,504.00	May 26, 2008	\$0.68
March 31, 2008	\$83,154.00	May 30, 2008	\$2.52
April 8, 2008	\$83,404.00	June 7, 2008	\$2.60
May 9, 2008	\$83,654.00	July 8, 2008	\$0.19
May 16, 2008	\$83,804.00	July 15, 2008	\$0.00

As reflected in the foregoing, through July 15, 2008, \$3,388.74 in prejudgment interest had accrued. If the \$4,000 offset for unused training credits is applied to the earliest transaction, interest accumulated through July 15, 2008 falls by \$185.21, to \$3,203.54. To that amount

should be added interest accruing at an annualized rate of 10%, on the entire \$79,804 balance (\$21.86 per day), from July 15, 2008 to the date of judgment.

#### **IV. CONCLUSION**

The Court should enter summary judgment in AccessData's favor, in the principal amount of \$79,804, plus prejudgment interest.

Dated: March 30, 2010

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