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**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-TC-PMW

Chief Judge Tena Campbell

Magistrate Judge Paul M. Warner

**DEFENDANT ALSTE TECHNOLOGIES'
MEMORANDUM IN OPPOSITION TO
PLAINTIFF ACCESSDATA'S RENEWED
MOTION FOR SUMMARY JUDGMENT**

ALSTE TECHNOLOGIES GmbH, a
German limited liability company,

Counterclaimant,

v.

ACCESSDATA CORPORATION, a Utah
corporation,

Counterdefendant.

Defendant ALSTE Technologies GmbH (“ALSTE”) respectfully submits the following memorandum in opposition to Plaintiff AccessData Corporation’s (“AccessData”) Renewed Motion For Summary Judgment (“Motion”).

I. INTRODUCTION

This is AccessData’s third attempt to avoid responsibility for selling defective products. AccessData is unwilling to stand by the Forensic Toolkit 2.0 (“FTK 2.0” or the “Software Product”); AccessData has gone to great lengths to find loopholes to avoid a trial on the merits. AccessData has argued: (1) the quality of its software products is irrelevant (Dkt. 51 at 3); (2) its disclaimer of warranties shields it from all liability (Dkt. 39 at 4); (3) whether the FTK 2.0 can function as a forensic tool is immaterial (Dkt. 39 at 5); and (4) it is not bound by the implied covenant of good faith and fair dealing. (Dkt. 51 at 2.) AccessData now attempts to argue that it did not breach the implied covenant of good faith and fair dealing as a matter of law. Again, AccessData misses the point and its Motion should be denied in its entirety.

As this Court has already explained on two prior occasions, whether there was a violation of the implied covenant of good faith and fair dealing is a question of fact and is inappropriate for decision as a matter of law. (Dkt. 49 at 5; Dkt. 54 at 4.) Specifically, this Court found that AccessData failed to meet its burden of establishing that the Forensic Toolkit 2.0 functioned as a forensic device and a material dispute existed as to whether the software was defective. (Id.) Nothing has changed; AccessData still cannot meet its burden.

ALSTE has provided evidence that FTK 2.0 was defective. Email communications show that AccessData knew FTK 2.0 was not ready for release, but sold it anyways. Complaints were widespread. In fact, AccessData’s own actions after the release of FTK 2.0 is very telling.

AccessData issues five fixes over the course of about a year, and shortly thereafter, simply scrapped FTK 2.0 and came out with a new product, FTK 3.0. Clearly, the outrage over FTK 2.0 was so colossal that AccessData worked furiously to replace the defective product shortly after its release. AccessData's contention that there is no evidence of defect is disingenuous.

II. STATEMENT OF UNDISPUTED FACTS

ALSTE is engaged in the business of computer forensics, systems analysis and software testing and training. ALSTE's clients primarily consist of German law enforcement agencies and other entities which perform criminal investigations. ALSTE worked extensively with AccessData during development of the Forensic Toolkit 2.0. During the development and testing of the Software Product, ALSTE discovered that the Software Product was defective; it had critical bugs and did not function properly. (Giacovelli Decl. at ¶5; Email attached as Exh. A to Giacovelli Decl.) It was virtually unusable as a forensic tool. (Giacovelli Decl. at ¶5.) ALSTE worked closely with management and the development team at AccessData to fix the defects. (Giacovelli Decl. at ¶8.) AccessData assured ALSTE that its concerns would be addressed prior to the release of the Software Product. (Giacovelli Decl. at ¶5.)

Based on AccessData's representations, ALSTE delivered the newly-released Software Product to some of its law enforcement clients. However, shortly thereafter, ALSTE discovered that the defects were never addressed. (Giacovelli Decl. at ¶5.) Many users of the Software Product called expressing difficulties with the software. (Giacovelli Decl. at ¶8.) ALSTE tested it and determined that FTK 2.0 did not function properly and discontinued selling it to its customers (Giacovelli Decl. at ¶5.) However, the damage had already been done; ALSTE was

now put in the position of having to spend an enormous amount of time trying to service the defective product (Giacovelli Decl. at ¶8.)

AccessData promised to fix FTK 2.0 (Giacovelli Decl. at ¶5.) However, despite several “fixes” AccessData never resolved the problems associated with the defective FTK 2.0 product. (Giacovelli Decl. at ¶6.) In fact, AccessData recognized the irreparable defects with FTK 2.0 and decided to simply scrap it. AccessData came out with Forensic Toolkit 3.0 only 18 months after FTK 2.0 was released (Giacovelli Decl. ¶9.) The life cycle of FTK 2.0 was substantially less than other similar software. (Giacovelli Decl. ¶9.) By way of example, approximately six years passed between the release of FTK version 1.0 and version 2.0. (Giacovelli Decl. ¶9.) Needless to say, the customers that purchased the FTK 2.0 product did not receive any value from it.

ALSTE is not responsible for payment on the defective goods. AccessData’s failure to perform under the contract and its breach of the covenant of good faith and fair dealing, relieved ALSTE of its obligations to pay for the Software Product. The defective goods have caused great hardship on ALSTE and its clients, since ALSTE was required to service the defective product. (Giacovelli Decl. at ¶8.) ALSTE spent enormous amounts of time, money and resources to make up for AccessData’s wrongs. ALSTE was forced to try many different installations on numerous different hardware platforms trying to get FTK 2.0 to work as advertised. (Id.) ALSTE had direct contact with AccessData’s development team and conducted many tests at AccessData’s request to help localize the errors. Countless hours were spent trying to repair the damage caused by AccessData’s sale of the defective product. (Id.)

III. STATEMENT OF MATERIAL FACTS IN DISPUTE

Pursuant to DUCivR 56-1(c), ALSTE contends that the following material facts are in dispute:

1. AccessData's Statement of Material Facts ¶¶ 2 and 3. **Disputed.** ALSTE disputes that it owes AccessData money under the Reseller Agreement. AccessData breached the Reseller Agreement and the implied covenant of good faith and fair dealing when it delivered defective goods to ALSTE. AccessData was aware of such defects but sold them anyways. (Giacovelli Decl. at ¶5.)

2. AccessData's Statement of Material Facts ¶3. **Disputed.** ALSTE disputes that it owes AccessData \$83,304. AccessData breached the Reseller Agreement by selling defective goods. Also, pursuant to the technical support agreement reached between the parties, ALSTE is entitled to an offset against the damages alleged, and is thus not obligated to pay the amounts sought by AccessData in its Complaint. The specific amounts of credits and fees that ALSTE was/is currently entitled varied during the parties' relationship based upon the official AccessData Price List. Such credits and fees were negotiated with AccessData's Senior Vice President of Sales and Marketing, Mr. Omar Leeman. (Giacovelli Decl. at ¶7.) The terms of the technical services agreement were agreed upon orally and confirmed via several emails. (Giacovelli Decl. at ¶7.) AccessData has failed to properly credit ALSTE for its services. AccessData stopped applying ALSTE credits for its services beginning in 2008. (Giacovelli Decl. at ¶7.)

3. AccessData's Statement of Material Facts ¶4. **Disputed.** ALSTE disputes that only \$18,532 of the alleged amount owed relates to FTK 2.0. AccessData fails to provide proper support for its calculations. In addition, although not the entire amount in dispute is attributable to *direct* FTK 2.0 sales, many of ALSTE's customers purchased subscriptions which entitled them to upgrades for all of AccessData's products. (Giacovelli Decl. at ¶10.) ALSTE believes many of those customers may have downloaded FTK 2.0 as well. (Id.) Thus, ALSTE was required to service customers who had problems with FTK 2.0, whether or not ALSTE directly and specifically sold them the FTK 2.0 product. (Id.)

4. AccessData's Statement of Material Facts. ¶¶7, 8, 11. **Disputed.** ALSTE disputes that customers have not complained about the product and that it cannot obtain admissible evidence showing that customers experienced problems using the software. In fact, several complaints were made by telephone and ALSTE spent an enormous amount of time testing and troubleshooting. (Giacovelli Decl. at ¶8.) Despite ALSTE's efforts, the problems were never resolved. (Giacovelli Decl. at ¶6.) In addition, ALSTE owned over 26 copies of FTK 2.0, but could not get them to work. (Id.)

IV. ARGUMENT

A. **AccessData Has Failed To Meet Its Burden As Established By This Court's Previous Rulings**

1. **Whether AccessData Breached The Implied Covenant Of Good Faith And Fair Dealing Is A Factual Dispute To Be Decided By A Jury**

It is well established that all contracts are deemed to include an implied covenant of good faith and fair dealing, which prevents each party to the contract from intentionally or purposefully doing anything which will destroy or injure the other party's right to receive the fruits of the contract. (*St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 199 (Utah 1991). AccessData breached the implied covenant of good faith and fair dealing when it knowingly made false representations to ALSTE. It misrepresented to ALSTE that the critical bugs were fixed and that the product would function as a forensic tool. (Giacovelli Decl. at ¶5.)

As the court explained when it denied AccessData's first Motion for Summary Judgment, "The evidence before the court shows that there is a factual dispute as to whether the software was defective and nonconforming." (Dkt. 49 at 5.) This dispute still exists. Nevertheless, AccessData attempts to get around the Court's ruling by repackaging its previous argument that ALSTE got the benefit of its bargain. (Motion at 2.)

In its Motion to Reconsider Order Deny Summary Judgment, AccessData already argued that ALSTE had not submitted any admissible evidence that showed that the defects interfered with ALSTE's consummation of the resale transactions, and thus, was entitled to damages as a matter of law. The Court disagreed. Specifically, the Court ruled that "Because the parties do not contend that ALSTE bargained to resell software that was allegedly useless, the evidence when

viewed in the light most favorable to ALSTE suggests that AccessData might have breached the contract by supplying allegedly defective good.” (Dkt. 54 at 4.) The fundamental question in this case still has not been addressed by AccessData: Was FTK 2.0 defective?

The Court provided additional guidance in its ruling: “The extent to which a party may invoke the obligation of good faith under Utah law “turns on the extent to which the contracting parties have defined their expectations and imposed limitation on contract terms. “ *Eggett v. Wasatch Energy Corp.*, 94 P.3d 193, 197 (Utah 2004). Needless to say, ALSTE’s expectation was that it would receive conforming products, not defective products. ALSTE was deprived of the full benefits of the parties’ contract when AccessData knowingly delivered defective goods. When ALSTE resold the defective products, it got much more than it had bargained for. Rather than “pushing the box” as the parties intended, ALSTE was hit was a deluge of upset customers who demanded that ALSTE test and troubleshoot their problems. Surely, if ALSTE would have known FTK 2.0 was defective, it would never have resold it. No one in their right mind would resell a knowingly defective product for a small margin and assume the headaches and liability associated therewith. ALSTE should not be left holding the bag for AccessData’s wrongs.

The bottom line is, if ALSTE received what it had bargained for and got the benefits of the contract, ALSTE would not have had to spend countless hours trying to service AccessData’s defective product. To take this example to an extreme, let us say that ALSTE was provided stolen goods by AccessData. Does that mean ALSTE got the benefits of its bargain? Of course not. ALSTE may still be able to resell the stolen software to its customers, but it would come

with a hefty price that ALSTE did not bargain for, such as the headaches, reimbursements and legal troubles.

2. ALSTE Suffered Damages As A Result Of AccessData's Breach Of The Implied Covenant Of Good Faith And Fair Dealing

ALSTE spent enormous amounts of time, money and resources making up for AccessData's wrongs. ALSTE was forced to try many different installations on numerous different hardware platforms trying to get the FTK 2.0 product to work as advertised. (Giacovelli Decl. at ¶8.) ALSTE had direct contact with AccessData's development team and conducted many tests at AccessData's request to help localize the errors. Countless hours were spent trying to repair the damage caused by AccessData's sale of the defective product. (Id.)

B. There Is Substantial Evidence That FTK 2.0 Did Not Function Properly

1. ALSTE Has Provided Evidence Of Defect

It is common knowledge amongst the computer forensics industry that FTK 2.0 did not function properly. (Giacovelli at ¶9.) There were widespread complaints from end users. Trainers were told to stop teaching FTK 2.0. (Id.) AccessData openly acknowledged issues with FTK 2.0. Testing conducted by ALSTE showed it could not function as a forensic tool. (Id.) Five fixes were issued in a short span of about 13 months. (Giacovelli Decl. at ¶6.) ALSTE owned at least 26 copies of FTK 2.0 and could not get them to work. (Id.)

2. AccessData Was Aware Of The Customer Complaints and Issued A New Version Of The Software

As discussed above, AccessData recognized the irreparable defects with FTK 2.0 and decided to scrap it. *AccessData came out with Forensic Toolkit 3.0 only 18 months after FTK 2.0 was released* (Giacovelli Decl. ¶9.) The life cycle of FTK 2.0 was substantially less than

other similar software. (Id.) By way of example, over six years passed between the release of FTK version 1.0 and version 2.0. (Id.) Needless to say, those customers that purchased the FTK 2.0 product did not receive any value from it.

V. CONCLUSION

For all the foregoing reasons, ALSTE requests that AccessData's renewed motion for summary judgment be denied in its entirety.

RESPECTFULLY SUBMITTED this 30th day of April, 2010.

By /s/ Samuel A. Wong
Samuel A. Wong
Attorneys for Defendant Alste
Technologies GmbH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of April, 2010, a true and correct copy of the foregoing **DEFENDANT ALSTE TECHNOLOGIES' MEMORANDUM IN OPPOSITION TO PLAINTIFF ACCESSDATA'S RENEWED MOTION FOR SUMMARY JUDGMENT** 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.

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By /s/ Samuel A. Wong