AMERICAN ARBITRATION ASSOCIATION

Case No. 54 180 Y 01325 06

BLUEBERRY SOFTWARE, INC.,

Claimant

and

PARAMETRIC TECHNOLOGY CORP,

Respondent.

_____/

OPINION REGARDING PARAMETRIC'S MOTION TO DISMISS BLUEBERRY'S CLAIMS AS UNTIMELY

Respondent has brought a motion to dismiss in its entirety the Arbitration Demand of Claimant, based upon a one-year limitations period set forth in the contract between the parties (the contract that also contains the agreement to arbitrate). The parties have fully briefed the issues (each party has filed 3 briefs in connection with this motion), and the Arbitrator conducted a nearly-three-hour hearing in which the representatives of the parties were fully heard.

Although there are several disputes of fact between Claimant and Respondent, and some disputes of law, many facts asserted in the pleadings, the briefs and the oral argument are not contradicted by either party. These undisputed facts require dismissal as a matter of law. A decision resolving the facts in dispute would not lead to a different legal conclusion.

Here are the undisputed facts that bear on this motion and the arbitrability of Claimant's Demand for Arbitration. Citations to sources appear in italics.

1. Blueberry and Arbortext entered into a software distribution and licensing contract, called the "Strategic Partnering Agreement," on July 12, 2000. The SPA permits Blueberry software to be incorporated into Arbortext products, in exchange for the payment, by Arbortext, of royalties to Blueberry. *Claimant's Demand for Arbitration ("Arb. Demand"), Section II; Respondent's Motion to Dismiss ("Motion"), at 1.*

2. In July 2005, Respondent Parametric bought the assets of Arbortext and, for purposes of the SPA with Blueberry, became Arbortext's successor. *Arb. Demand, Section I.B.; Motion at 1.*

3. In September 2000, an e-mail exchange occurred between a representative of Blueberry (Kevin Dwan) and a representative of Arbortext (Jim Sterken) concerning the terms of the SPA. The parties dispute whether that e-mail modified the terms of the SPA or merely clarified them; they agree that the e-mail occurred on September 25, 2000. *Claimant's Response to Motion ("Response") at 2-3; Motion at 4 and fn. 1.*

4. By May 2004, Blueberry was sufficiently concerned about the accounting of sales and royalties being provided and paid by Arbortext that Blueberry retained a third-party to conduct an audit. *Ex. J to Blueberry's Supplemental Brief on Delays.* The audit, by Plante & Moran, began in late 2004 and an audit report was issued on March 21, 2005. *Arb. Demand at 2; Motion at 2.*

5. On July 27, 2005, Blueberry's counsel sent a demand letter to Arbortext, seeking payment for what Blueberry considered to be underpayment and unreported royalties that Blueberry asserted were reflected in and confirmed by the P & M audit report. *Arb. Demand at 2; Exh. 3 to Motion.*

6. Among the claims asserted in the July 2005 letter are several categories of disputes, including those relating to the effect on Blueberry's royalties of the decision by Arbortext to "bundle" the Blueberry software, royalties due for maintenance revenue, unreported and underreported sales (relating to Intermarket, Valley Forge, DMSi, Teradyne, Planetgarden.com, Trellis Neutch and the US Coast Guard), and Vektas' use of software that may infringe upon Blueberry's copyright of the software. *Exh. 3 to Motion.*

7. Blueberry's Demand for Arbitration, filed September 25, 2006, includes claims relating to the effect on Blueberry's royalties of the decision by Arbortext to "bundle" the Blueberry software, royalties due for maintenance revenue, unreported and underreported sales (relating to Intermarket, Valley Forge, DMSi, Teradyne, Planetgarden.com, Trellis Neutch and the US Coast Guard), and Vektas' use of software that may infringe upon Blueberry's copyright of the software. The Demand also references underreported or unreported royalties from Arbortext discovered post-audit. *Arb. Demand at 2-4.*

8. During the hearing on this motion held by the Arbitrator on April 4, 2007, Blueberry's representative stated that the adjustments to royalties paid by Arbortext stopped in July 2005 when Parametric bought Arbortext. In the words of the Blueberry representative, Parametric has not recalculated pre-Parametric sales by Arbortext: "We are not looking for anything from Parametric that we did not look to Arbortext for."

9. The July 2005 letter quantifies Blueberry's "Total Royalties due Blueberry" using, as its starting point, the P & M audit report's figure of $12,870,000.00, called "Total Revenue Related to Blueberry." It calculates a five percent royalty on that total revenue amount, subtracts certain royalties paid, adds $200,000 for Intermarket royalties, and projects an additional $30,000 of royalties "through 3Q 2005.". The final damages figure in Blueberry's July 2005 letter, labeled "Total Royalties due Blueberry," is shown as $750,000.00. *Exh. 3 to Motion, at 16.*

10. Blueberry's Demand for Arbitration, filed in September 2006, states that it "is based upon the Plante & Moran audited amount entitled, 'Total Revenue Related to Blueberry," which is $12,870,000.00 as of September, 2004." The Demand for Arbitration reaches a damages figure by calculating a five percent royalty on that total revenue amount, subtracting certain royalties paid, and adding $200,000 for Intermarket royalties. The final damages figure in Blueberry's Demand for Arbitration, labeled "Total Royalties due Blueberry as of 3d quarter 2004," is shown as $646,908.39. *Arb. Demand at 4.* The Demand also states that the calculation does not include royalties due for the 4th quarter of 2004 through the 3d quarter of 2006 (the time of filing the Arbitration Demand). *Arb. Demand at 4.*

11. The SPA between the parties provides, as a limitation of liability, that "[n]o action arising out of or in connection with this Agreement may be brought by Arbortext or Blueberry more than twelve (12) months after the occurrence of the event giving rise to the cause of action." *SPA, Section 11, found in Exh to Arb. Demand; Exh. 1 to Motion.* It also provides that, in the event of a dispute, "[t]he parties will first endeavor to informally resolve all disputes between them prior to resorting to arbitration as described in this Section. In the event that the parties are unable to informally resolve any material dispute or claim arising out of or in relation to this Agreement, or the interpretation, making, performance, breach or termination thereof, such dispute or claim shall be finally settled by binding arbitration . . . ." *Id., at Section 15.8.* The SPA contains a No Oral Modification Clause confirming that the written document sets forth the entire agreement between the parties: "No oral or written statement . . . shall add to or modify the terms of this Agreement unless agreed to in a writing signed by both parties." *Id. at Section 15.12.*

12. The audit and resulting report may have been delayed because of the involvement of a court-appointed Receiver on behalf of former partners of Blueberry Software. *Exhs. F – J, M to Blueberry's Supplemental Brief on Delays.*

13. No evidence has been presented of Receiver-related or court-related delay after March 21, 2005, when P & M issued its audit report. There is no showing that, after March 21, 2005, a court or court-appointed Receiver caused Blueberry in any way to delay raising any claim disclosed by the P & M audit report.

14. The Demand for Arbitration does not include a claim for damages caused by or an assertion of fraudulent concealment. *Arb. Demand.*

15. The Demand for Arbitration does not include a claim arising solely out of the workpapers of P & M; a claim allegedly concealed by Parametric and allegedly discovered in February 2007 in P & M's workpapers could not have been included in the 2006 Demand. *Arb. Demand.*

16. The Demand for Arbitration does not include a claim arising out of the January 2006 royalty statement for "Arbortext Architect," although the Demand was filed several months after that statement was received. *Arb. Demand.*

17. Blueberry has asserted, in connection with the briefing on Parametric's motion to dismiss, that Parametric or its predecessor Arbortext fraudulently concealed "facts and figures" and "the truth regarding its royalty payments." *Response to Motion at 11.* Blueberry states in its briefing on this motion that Parametric's actions made it impossible "for Blueberry to discovery the operative facts behind its claims," *id.,* but that the working papers and audit "substantiate some of Blueberry's suspicions." *Id.* at 12. Listing the discrepancies it discovered between Arbortext's royalties calculations and what those calculations should be, Blueberry says that "[t]hese discoveries were accomplished by the Plante & Moran audit completed in March of 2005 and further discovery was made from the Audit Working Papers which Blueberry received on February 26, 2007." *Id. at 15.*

18. Blueberry does not point to any alleged breach of contract that it asserts was unknown or unsuspected by Blueberry until revealed in 2007; each of the instances described in Blueberry's response papers is an issue that Blueberry identified for P & M, and asked P & M to investigate when the audit began in late 2004. *Compare Response to Motion at 12-15 to Exh. 3 to Motion.*

19. Neither party has asserted that there exists an express written agreement between Blueberry and Arbortext, or between Blueberry and Parametric, to modify the contractual limitations period, and no evidence of any modification has been provided.

Applicable principles of law and legal conclusions:

1. The contractual limitations period in the SPA shortens from the statutorily-provided six years to one year the time for a party to bring an action for alleged breach of the Strategic Partnering Agreement between Blueberry and Parametric's predecessor, Arbortext. *SPA, Section 11.0. Rory & Woods v. Continental Ins. Co.,* 473 Mich. 457 (2005).

2. The SPA's requirement that the parties attempt to resolve disputes before triggering arbitration and the agreement's stated one-year limitations period for bringing an action for breach must be interpreted and applied, if possible, so that they are consistent with one another, rendering neither extraneous or unenforceable. *See, e.g., Reardon v Kelly Servs.,* 210 Fed. Appx. 456, 459; 2006 U.S. App. LEXIS 30944 (6th Cir. 2006) (unpublished).

3. This motion (to determine whether the Demand for Arbitration is barred by the contractual limitations period) is properly before the Arbitrator. The Arbitrator has the power to determine whether a Demand for Arbitration is untimely and therefore unarbitrable by operation of statute or the terms of the parties' arbitration agreement.

Nielson v Barnett, 440 Mich. 1 (1992). On this, Claimant and Respondent agree. *Response to Motion at 10, fn. 1; Motion at 3-4.*

4. Arbitrators must follow the law in reaching an award. Awards that are inconsistent with applicable law can be vacated. *DAIIE v Gavin,* 416 Mich 407 (1982). Thus it is appropriate for an arbitrator to determine whether, under the undisputed facts, a claimant can prevail; if the undisputed facts render the claim improper or inconsistent with the law, it is appropriate for an arbitrator to dismiss the claim and award in favor of the respondent. If, on the other hand, there are genuine disputes about the facts that inform the legal basis for the claim, the arbitrator's award cannot be determined until, after having heard the merits of the disputed facts, the arbitrator engages in fact-finding and resolves the factual disagreements. Arbitrators often look to the parallel process used in the courts, of dismissal and summary judgment proceedings, in working through the issues. A standard akin to one for summary judgment is appropriate for this motion, because the parties have presented material that goes beyond the statements and evidence contained in the pleadings (the Demand, the Answer, and the exhibits thereto). The arbitrator must therefore determine whether, using only the facts not in dispute, the circumstances compel a ruling as a matter of law in favor of the moving party.

5. The highest court in Michigan has ruled recently, in the context of an insurance policy, that an unambiguous contractual limitations period should be enforced as written unless to do so violates public policy or law, and that only recognized traditional contractual defenses (e.g., duress, waiver, estoppel, fraud, unconscionability) may be used to avoid enforcement. *Rory & Woods v Continental Insur. Co.*, 473 Mich. 457, 470-71 and nns 23, 28 (2005). *See also Peterson v Art Van Furniture*, 2003 Mich. App. LEXIS 1060 (2003) (unpublished) (contractual limitations period is reasonable if gives opportunity to investigate and file action, not so short as to abrogate the right of action in practical terms, and does not bar action before loss or damage can be determined).

6. Even if Parametric continued to make regular payment of royalties after September 25, 2005 (one year before the Arbitration Demand was filed), that business relationship did not constitute waiver by Parametric, does not give rise to estoppel, and does not toll the limitations period. *See Gjertson v Pioneer State Mut'l Ins. Co.*, 2006 Mich. App. LEXIS 2401 (2006) (unpublished); *Dahrooge v. Rochester-German Ins. Co.,* 177 Mich. 442 (1913).

7. The allegation of fraudulent concealment does not toll the limitations period here. In the case of a *statutory* period, the Michigan Supreme Court holds that the fraudulent concealment "must be the concealment of the fact that plaintiff has a cause of action. If there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute 'It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows that a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim.'" *Janiszewski v Behrmann*, 345 Mich. 8 (1956)

(*quoting Weast v Duffie*, 272 Mich. 534, 539 (1935)). That standard is codified in MCLA 600.5855, sometimes referred to as "the discovery rule." That law extends the statutory limitations period where "a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim . . . ." It too is predicated upon a fraudulent concealment of the *existence* of a claim, not upon concealment of the evidence that supports an already-known claim. There should be no lesser standard for a limitations period to which the parties have contracted.

8. There is no evidence that Parametric (or Arbortext before it) concealed (whether fraudulently or not) from Blueberry the fact that there was a potential arbitration claim under the SPA. In fact, Parametric had stated each of its claims in a lengthy letter to Parametric in July 2005, but did not file its Demand for Arbitration until 14 months after that letter was written.

9. If no equitable principles suspend the running of the contractual limitations period, any claims arising from events occurring *before* September 25, 2005 (one year before the filing of the Demand for Arbitration) are barred, as untimely, by operation of Section 11 of the SPA.

10. Blueberry was in a position to file its Demand for Arbitration by March of 2006. Blueberry was aware, by March 21, 2005, when the audit report was issued, of each of the issues it describes in its briefs as having been concealed by Arbortext or Parametric. By March 21, 2005, Blueberry had the facts sufficient to allow it to conclude whether it had a dispute upon which it could have brought a claim for arbitration. The facts cited in the July 2005 demand letter, and upon which that demand letter is based, are the same facts that are asserted as the basis for the Demand for Arbitration.

12. Any claim arising solely out of the workpapers of P & M; a claim allegedly concealed by Parametric and then discovered by Blueberry in February 2007 when it received P & M's workpapers, is beyond the scope of the Arbitration Demand.

13. Any claim arising out of the January 2006 royalty statement for "Arbortext Architect," allegedly concealed by Parametric and then discovered in January 2006, is not within the scope of the Demand for Arbitration.

14. Although the SPA requires the parties to discuss claims and disputes before "resorting to arbitration," its limitations period applies not to the raising of claims or giving notice of disputes, but to the bringing of an *action* based upon a dispute or claim. The limitations period sets out a clear time by which an "action . . . may be brought" and that bright-line limit is not inconsistent with the requirement that the parties make a preliminary attempt to discuss and resolve the disputes between them. The provision requiring an attempted informal resolution should not be interpreted as extending that contractual limitations period when the aggrieved party provided notice of a dispute within one year but did not file its arbitration demand within that time. Even though the dispute may have been raised, any "action" is nevertheless required to be brought

within a year, absent an express written agreement to modify the contractual limitations period.

15. Using only the facts not in dispute, and the applicable law, the circumstances compel a ruling as a matter of law in favor of Parametric.

Therefore, the claim is dismissed. The administrative fees of the American Arbitration Association and the Arbitrator's compensation shall be borne as incurred.

Kathryn J. Humphrey

Dated: July 7, 2007