AMERICAN ARBITRATION ASSOCIATION

BLUEBERRY SOFTWARE, INC. Claimant, v. PARAMETRIC TECHNOLOGY CORP. Respondent.	AAA No. 54 180 Y 01325 06 Case Manager: Hannah R. Cook Arbitrator: Kathryn J. Humphrey

PARAMETRIC TECHNOLOGY CORPORATION'S MOTION TO DISMISS BLUEBERRY'S CLAIMS AS UNTIMELY

Parametric Technology Corporation ("Parametric") moves for dismissal of Blueberry's claims because they were filed after the applicable period of limitations for these claims expired.

INTRODUCTION

Blueberry's claims arise from a July 12, 2000 software distribution and licensing agreement (the "Agreement") between it and Parametric's predecessor in interest, Arbortext. In that Agreement, the parties agreed to a one year period of limitations. Blueberry filed its demand for arbitration on September 25, 2006. Therefore, any claims that arose before September 25, 2005 are barred as untimely. In this case, all of Blueberry's claims arose before September 25, 2005, and are thus barred.

FACTUAL BACKGROUND

On July 12, 2000, Blueberry and Arbortext signed a software distribution and licensing Agreement under which Arbortext was to pay Blueberry royalties on sales of Arbortext products that incorporated Blueberry software. See Ex. 1. Most of Blueberry's claims date back almost to the signing of the Agreement, and relate to a September 25, 2000 email exchange in which Blueberry and Arbortext agreed to change the way Arbortext would calculate royalty payments

for Blueberry's product, Interchange. See Ex. 2. Blueberry denied that the email modified the contract.

Over the next several years, Blueberry repeatedly asserted that Arbortext breached the Agreement by not paying enough royalties. Even if Blueberry were correct, the time to bring any claims regarding that breach began to run back in 2000. But Blueberry did not file an action. Five years later, Blueberry was still arguing with Arbortext about these payments.

In 2005, with the dispute still unresolved, Blueberry invoked its audit right under the Agreement. Blueberry and Arbortext hired an independent auditor, Plante & Moran, to determine if any royalty payments were owed Blueberry. Plante & Moran issued its report on March 21, 2005. Plante & Moran found no exceptions in Arbortext's calculation of royalties, but noted some "potential" discrepancies relating to interpretation of the contract. For example, Plante & Moran did not opine on the legal issue of whether the September 25, 2000 email exchange modified the Agreement.

Seizing upon the "potential" discrepancies, Blueberry's legal counsel sent Arbortext a 17 page single-spaced demand letter with 26 exhibits. See Ex. 3. In that demand letter, Blueberry's counsel asserted the same claims Blueberry is asserting in this arbitration. In fact, Blueberry demanded substantially the same amount of damages. On September 25, 2006, fourteen months after Blueberry's demand letter, and six years after its dispute with Arbortext arose, Blueberry filed its Demand for Arbitration.

The claims it states are barred by the terms of the Parties' contract, in which Blueberry and Arbortext agreed that they would each have one year to bring any claims they may have against one another. Section 11 of the Agreement provides:

> No 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.

That is the statute of limitations that the parties bargained for, and that they expected to apply to their disputes. Contrary to that Agreement, Blueberry now asks this panel to determine "whether Arbortext has been paying the proper software royalties ... under the terms of the Parties' Strategic Partnering Agreement (SPA) *since that agreement was entered into on July 12, 2000.*" Arb. Demand p. 2. Certain of Blueberry's claims are over six years old. All arose more than one year before the claim was filed. In fact, all were expressly raised by Blueberry by July 27, 2005, over a year before the claim was filed. Blueberry's claims are untimely and are barred. Because Blueberry has failed to state any arbitrable claims, Parametric is entitled to dismissal, and to its costs and attorney's fees in defending these claims.

ARGUMENT

I. ANY CLAIMS BLUEBERRY FILED MORE THAN ONE YEAR AFTER THEY ACCRUED ARE NOT ARBITRABLE

Just as Blueberry and Arbortext were free to agree to arbitrate any claims arising out of their contract, they were free to shorten the statute of limitations for filing those claims. See Rory & Woods v Continental Ins Co, 473 Mich 457, 470; 703 NW2d 23 (2005) (enforcing the parties' agreement to shorten the period of limitations for breach of contract claims to one year). The parties agreed 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." Ex. 1 § 11. Blueberry and Arbortext negotiated this term, and expected it to apply to their disputes.

This term limits not only the time Blueberry had to file its claims, but also the scope of authority that an arbitrator has to hear them. See Nielsen v Barnett, 440 Mich 1, 8; 485 NW2d 666 (1992). ("[B]ecause arbitration is a matter of contract, the arbitration agreement confers upon the arbitrators their authority to act and they are bound to act within the terms of the

agreement.") See also Port Huron Area School Dist v Port Huron Educ Ass'n, 426 Mich 143, 160-61; 393 NW2d 811 (1986) (vacating an arbitration award because the arbitrator exceeded the scope of authority granted to him by the parties' contract). Any claims Blueberry failed to file within one year after they accrued are inarbitrable, and must be dismissed. See Peterson v Art Van Furniture, No. 233745, 2003 WL 1985262 (Mich App April 29, 2003) (affirming arbitrator's dismissal of plaintiff's claim as "not arbitrable on procedural grounds" when claims were filed after the limitations period set forth in the parties' contract). See also Nielsen, 440 Mich at 10-11 (affirming arbitrator's dismissal of plaintiff's claim as untimely when plaintiff filed after the statute of limitations expired).

II. ALL OF BLUEBERRY'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AGREED UPON BY THE PARTIES, AND SHOULD BE DISMISSED

Blueberry has made three types of royalty claims, which it styles: (1) Pre-Audit Underpayment of Royalties, (2) Post-Audit Royalty Discrepancies, and (3) Potential Infringement of Blueberry Software (Pre-Audit & Post-Audit). All of these claims have expired.

A. Blueberry's Pre-Audit Underpayment of Royalties Claims are Barred

The statute of limitations has run on Blueberry's Pre-Audit Underpayment of Royalties claims. These claims are essentially that, since the fall of 2000, Arbortext incorrectly calculated royalties for new sales of its product, Interchange, and for maintenance/upgrade releases of Interchange. Blueberry claims these royalties should have been calculated as outlined in the July 12, 2000 Agreement, and not as proposed in the September 25, 2000 email exchange.[1]

[1] Originally, Arbortext's customers had to elect to purchase Interchange, which was sold as an add-on to other Arbortext products. If Arbortext's customers chose to buy Interchange, Blueberry received a percentage of the amount of the total sale. But when Arbortext proposed bundling Interchange with its other products, so that its customers would buy Interchange by default, Blueberry and Arbortext negotiated a new royalty payment structure. Unless Arbortext's customers specifically opted *out* of buying Interchange, Blueberry received a $10,000 credit for each sale of the bundled software. E3. Arbortext paid royalties on each $10,000 credit. Arbortext confirmed the new fee arrangement with Blueberry in the September 25, 2000 email. See Ex. 2.

Blueberry admits receiving this email, but denies that it modified the royalty fee Agreement. As such, Blueberry claims that Arbortext's subsequent royalty payments in accordance with that email breached the Agreement. Even if Blueberry were correct, its claims accrued, and the statute of limitations began to run, in 2000 when Blueberry received the email modification. At the latest, it accrued when Blueberry received the allegedly deficient payments in 2000. See Scherer v. Hellstrom, 270 Mich. App. 458, 463 n2; 716 N.W.2d 307 (2006) (stating that a breach of contract claim accrues when the alleged breach of contract occurred). The statute of limitations began to run in 2000 even if Blueberry was not aware of the claim at the time. See id.

Here, however, Blueberry was aware of the claim. Arbortext's September 2000 email specifically informed it that Arbortext was going to use the new method to calculate its payments. In addition, in March of 2005, Blueberry had the results of the Plante & Moran audit, which confirmed that this method had been used. Blueberry admits that its "demand for relief is based upon the Plante & Moran audited amount." Arb. Demand p. 4. Yet even after the audit results were issued, Blueberry still did not file. Instead, it waited another year and a half. There is no question that it was aware of its claims at this time.

Moreover, Blueberry's counsel's July 27, 2005 demand letter specifically raises these issues. In fact, the damages chart in that letter is nearly identical to the chart Blueberry included in the Relief Requested portion of its Demand for Arbitration. See Ex. 3 p. 16; Arb. Demand p. 4. Even if Blueberry were given a year from when it formally asserted these claims through counsel, as opposed to a year from when the claims accrued, these claims would still be over a year old, and barred.

B. Blueberry's Post-Audit Royalty Discrepancy Claims are Barred

The statute of limitations has also run on what Blueberry styles as its "Post-Audit Royalty Discrepancy" claims. Though Blueberry refers to them as "post-audit" claims, the title is not representative. Again, Blueberry is seeking pre-audit royalties. Blueberry contends:

> Post-Audit royalty reports reveal additional royalty discrepancies. Since [Parametric] purchased Arbortext in July 2005, Blueberry has received four royalty reports. These reports raise new questions about Arbortext's previous royalty report statements because they contain line items indicating that there were previous sales to certain customers that were never reported to Blueberry in the past.

Arb. Demand p. 3 (emphasis added). Blueberry is not claiming that any recent royalty payments are incorrect. Instead, Blueberry posits without support that since Parametric now reports more sales than Arbortext used to, Arbortext's pre-2005 payments must have been deficient. Again, even if Blueberry were correct, these claims accrued when the alleged breach – Arbortext's supposed failure to report all of its pre-July 2005 sales – occurred. See Scherer, 270 Mich. App. at 463 n2. At best, these claims expired in July 2006, months before Blueberry filed its arbitration demand.

C. Blueberry's Potential Infringement Claim is Barred

Finally, the limitations period has run on Blueberry's Potential Infringement claim. This claim is based on Blueberry's belief that, contrary to section 6.1 and Exhibit C of the Agreement, Arbortext permitted a company named Vektas to sell Arbortext software incorporating Blueberry's technology without paying Blueberry royalties. Even if Blueberry were correct, its claims accrued when the breach of the royalty Agreement occurred. See Scherer, 270 Mich. App. at 463 n2. The Agreement states that "Arbortext shall not provide Blueberry Software to others without payment of royalty, except upon the advance written approval of Blueberry." Ex. 1 at Ex. C. So the breach would have occurred if and when Arbortext provided Blueberry's

software to Vektus without having first obtained written approval from Blueberry. Blueberry alleges that this happened before Vektas was acquired by Inmedius on June 2, 2005. See Ex. 3 at 14. At the very latest, Blueberry's claim accrued on June 2, 2005 and expired on June 2, 2006.

Again, the statute of limitations would have begun to run by June of 2005 whether or not Blueberry was aware of the claim at the time. See Scherer, 270 Mich. App. at 463 n2. But as of at least March of 2005, Blueberry was aware of this claim. Blueberry specifically asked Plante & Moran to investigate Arbortext's relationship with Vektas as part of the audit. And after the audit, this claim became the subject of the third section of Blueberry's counsel's July 27, 2005 demand letter. . See Ex. 3 at 14-16. Under the Agreement, this claim is barred, and inarbitrable.

RELIEF REQUESTED

Blueberry and Arbortext specifically agreed to arbitrate claims within one year of their accrual, or not at all. The statute of limitation for these claims has passed, and they are no longer arbitrable. Parametric requests dismissal of Blueberry's claims with prejudice, and requests the costs and fees it incurred responding to these long-expired claims.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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Dated: February 23, 2007

PROOF OF SERVICE

Denise M. Huffman, being first duly sworn, deposes and says that she served a copy of all documents upon counsel of record on 2-23-07 by placing said documents in a properly addressed envelope, addressed via

X First Class
X Facsimile and email
☐ Fed Ex/UPS
☐ Hand Delivery

Denise M. Huffman

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