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Date Submitted: December 7, 2012

Date Decided: December 14, 2012

Re: Continuum Managed Services, LLC v. Datto, Inc.,
Civil Action No. 7749-VCG

Dear Counsel:

By Order of November 1, 2012, I directed the Defendant to provide a
“commercially effective” version of certain of its software to the Plaintiff. This

Letter Opinion addresses a limited issue: whether the software provided pursuant to that Order is “commercially effective” although it contains a command-line interface instead of a graphical-user interface. This Motion has come before me in the context of an expedited matter, in which Continuum Managed Services, LLC, (“Continuum”) has alleged, among other claims, that Datto, Inc. has breached the parties’ License Agreement by failing to provide a USB-conversion tool to Continuum for sale as part of Continuum’s bundled software and hardware package.¹ Continuum and Datto are both in the business of selling data backup and disaster recovery services, or “BDR.” Continuum sells such services in the context of a bundled package, which includes non-BDR computing services, whereas Datto solely sells BDR hardware and software solutions. Continuum moved for a preliminary injunction to order Datto to provide a tool, via USB thumb drive, that would reimage hardware devices currently in use in the marketplace. This tool renders hardware created by manufacturers other than Datto usable in conjunction with Datto’s software. It is Continuum’s position that the License Agreement obligates Datto to provide such a tool,² whereas Datto contends that the Agreement imposes no such obligation.³

¹ Compl. ¶¶ 108-10.

² See Pl.’s Op. Br. Supp. Mot. Prelim. Inj. 38-39.

³ Mot. Enforce Order Tr. 213:8-9, Dec. 5, 2012 (“Hr’g Tr.).

Oral argument was held on the Motion for a Preliminary Injunction on October 16, 2012. At that point, the parties had moved considerably closer together in their positions. I suggested that the parties meet and confer to see if they could work out an acceptable solution on their own. After multiple attempts to do so, at which point the parties were very close to agreement, the parties requested that I decide the remaining issues that the parties could not agree on, by entering an interim order that would govern the parties' arrangement until a trial on final relief could be held. After considering the parties' proposed language and the contract language, I entered such an interim order on November 1, 2012 (the "Interim Order").⁴

The Interim Order compelled Datto to deliver to Continuum "a version of its reimaging software, containing the technology used in its GenISIS product, and a commercially effective USB conversion tool capable of installing and deploying the reimaging software on the existing hardware devices" identified on a certain press release.⁵ Datto delivered such a tool, purporting to be in compliance with the Court Order, on November 13, 2012. On November 20, Continuum informed the Court that the tool delivered was unsatisfactory to them, and requested an

⁴ Continuum Managed Servs. LLC v. Datto, Inc., C.A. No. 7749-VCG (Del. Ch. Nov. 1, 2012) (ORDER) ("Interim Order").

⁵ Interim Order 1.

evidentiary hearing, at which Continuum planned to introduce evidence that Datto was not in compliance with the Court Order.⁶

The parties submitted pre-hearing statements, and an evidentiary hearing was held on December 5, 2012 to determine whether the tool provided to Continuum was commercially effective. The parties then submitted written closing arguments on December 7, 2012. After considering the language of the underlying agreement, the language of the Interim Order, and the testimony of witnesses, I have decided that the tool provided to Continuum by Datto is not commercially effective. My reasons for so finding follow.

In interpreting the Order, I have looked to the underlying contract and the course of dealing between the parties for guidance. The parties entered into the License Agreement somewhat hastily in December 2011. Continuum, a spun-off unit of a company already selling BDR solutions to the market, Zenith, had a unique relationship with Zenith's former customers.⁷ Continuum selected Datto as a partner because Datto's software is "turn-key" and user friendly.⁸ The goal of the relationship was for Continuum to sell Datto's BDR services in a bundled format with Continuum's other services.⁹ For each customer purchasing such a bundle, Continuum would pay royalties to Datto. Before contracting, Datto's CEO

⁶ Pl.'s Letter to Ct. 1, Nov. 4, 2012.

⁷ George Dep. 31:21-36:3, Sept. 14, 2012.

⁸ Hr'g Tr. 8:8-11.

⁹ George Dep. 102:10-15.

purportedly told Continuum that he would deliver to them a USB stick capable of reimaging existing devices.¹⁰ This device was important to Continuum because of its relationship with ex-Zenith customers, many of whom already had hardware devices and would prefer to use Datto's BDR software without buying new hardware devices.¹¹

After entering into the license agreement, Datto's executives regretted doing so, because they realized that Continuum's bundled package of products competed with Datto's own products in the marketplace.¹² At that point, the parties' relationship began to break down. Datto introduced a product into the marketplace in June 2012 that purported to do exactly what the tool promised to Continuum would do: reimage existing hardware devices.¹³ This tool, called GenISIS, did not exist in its current, branded form at the time of contracting. For that reason, when drafting the Interim Order, I preliminarily found that Continuum is not entitled to GenISIS, itself. However, Continuum is entitled to a commercially effective tool that has the same utility as GenISIS, which Datto conceded for the purposes of a

¹⁰ George Dep. 109:2-111:6; Neumann Dep. 82:14-17 (Sept. 13, 2012).

¹¹ See George Dep. 104:17-20; Neumann Dep. 79:1-10, Sept. 13, 2012. Datto's CEO understood that Continuum wanted Datto's software to be capable of working on non-Datto hardware. McChord Dep. 60:7-12, 121:13-122:1 (Sept. 12, 2012).

¹² See McChord Dep. 33:5-8 (Sept. 12, 2012).

¹³ McChord Dep. 229:14-16 (Sept. 12, 2012).

preliminary injunction when it agreed to an order which required it to turn over a “commercially effective” tool.¹⁴

The heart of Continuum’s argument is that the reimaging tool is not commercially effective because it contains a command-line interface instead of a graphical user interface (“GUI”).¹⁵ That is, to navigate the program, users have to type commands when prompted with specific questions.¹⁶ In contrast, GenISIS provides the user with a graphical user interface that allows the user to point-and-click certain responses instead of typing answers.¹⁷ GenISIS also allows the user to select responses from drop-down menus of choices, rather than requiring the user to guess, from an unknown set of possibilities, what answer the program wants the user to select.¹⁸ Finally, GenISIS prevents the user from moving forward when the user has made a mistake and helps the user to identify the source of the error.¹⁹ In contrast, when the user makes a mistake using the command-line interface, the tool will reject the user’s attempt to reimage the device and provide no feedback as to where the user made a mistake.²⁰ Jeff Neumann, a Continuum executive, testified that, in testing, he found the Datto tool to be error-prone,

¹⁴ See Datto’s Changes to Continuum’s Proposed Order ¶ 2, Oct. 25, 2012.

¹⁵ Hr’g Tr. 118:21-24.

¹⁶ Hr’g Tr. 64:17-21, 130:14-17.

¹⁷ Hr’g Tr. 20-21.

¹⁸ Hr’g Tr. 20:11-16, 41:13-14, 167:8-12

¹⁹ Hr’g Tr. 44-46.

²⁰ Hr’g Tr. 44:9-22.

difficult to use, and frustrating.²¹ Neumann further testified that the tool requires the user to engage in a cumbersome and complicated process without the guidance of adequate instructions.²² I found this testimony credible.

I also heard testimony from Datto's CEO, Austin McChord, who personally created the Datto tool to comply with the Court Order.²³ McChord could have easily used a GUI in creating the USB tool.²⁴ Indeed, he testified that he already had a GUI ready that would need only minor tweaking before it could be married with the reimaging software.²⁵ Instead, McChord went out of his way to write the code for a new, command-line interface.²⁶

Datto presented convincing evidence that the tool is effective: that is, it does work to configure existing storage devices to be compatible with Datto software.²⁷ But McChord also conceded that the command-line interface is less desirable than a GUI from a marketing perspective.²⁸ In denying that he selected the command-line interface for Datto's competitor for this very reason, McChord offered four

²¹ Hr'g Tr. 14:22-15:4.

²² Datto introduced evidence showing that, after multiple unsuccessful attempts at using the USB tool, Continuum was able to completely enter the required responses in under five minutes, once Continuum's IT professionals gained some working knowledge of the process. But it does not seem commercially reasonable to me that Datto can unilaterally impose the same learning curve on Continuum's customers, many of whom may not tolerate it, when there is a graphic-user interface available.

²³ Hr'g Tr. 110:13-16.

²⁴ Hr'g Tr. 117:6-118:20.

²⁵ Hr'g Tr. 118:4-7.

²⁶ Hr'g Tr. 118:13-24.

²⁷ Hr'g Tr. 88:17-22.

²⁸ Hr'g Tr. 207:6-10.

alternative reasons why he chose to include a command-line interface instead of a GUI.²⁹ I will address each of these reasons in turn.

First, McChord testified that a command-line interface is more compatible with Continuum's needs than a GUI.³⁰ McChord believes that Continuum wishes to use the conversion tool to reimage all types of hardware, many of which McChord testified result in glitches or are unworkable with a GUI.³¹ If that is true, Continuum is making a mistake by requesting a graphic interface and is choosing an inferior product. But I do not find Datto's argument—that it has provided a superior product out of concern for Continuum—credible, since Datto is competing with Continuum. In presenting this justification, McChord has ignored that the tool must not be just effective, it must be *commercially* effective. Thus, the desirability of the conversion tool from a marketing perspective is relevant to whether the tool complies with the Interim Order. I reject Datto's argument that the (supposedly) superior utility of the tool offsets the tool's lack of user-friendliness.

Second, McChord testified that a command-line interface allows the seller to provide better support to its customers.³² Once again, if Continuum wants to make the mistake of choosing an inferior product, that is Continuum's choice. Datto has

²⁹ Hr'g Tr. 123:21-24.

³⁰ Hr'g Tr. 124:5-18.

³¹ Hr'g Tr. 127:17-20.

³² Hr'g Tr. 124:23-126:3.

no tech-support obligation to Continuum’s customers.³³ The best argument that Datto has in terms of its support obligations is that Datto might come under greater stress from *Continuum*, to which it does owe support obligations.³⁴ I find that possibility—that support claims might trickle down from Continuum’s customers, through Continuum, and on to Datto—too attenuated to be persuasive.

If true, these first two arguments, that a command-line interface is more compatible and results in lower support obligations, seem to suggest that Datto knows Continuum’s business better than Continuum does.³⁵ Indeed, the subtext of McChord’s testimony is that he has created an interface for Continuum that is superior to the product that he sells for his own company. That position is untenable. If Continuum is making a mistake in abandoning the (supposedly superior) command-line interface, why is Datto so jealously guarding its GUI? Datto’s own advertising on its webpage stresses how easy-to-use and user-friendly its GenISIS software is.³⁶ Furthermore, McChord testified that he had an “enormous objection” to turning over the GUI to Continuum.³⁷ That position

³³ Hr’g Tr. 244:21-245:6.

³⁴ See Hr’g Tr. 129:3-8 (“Things like the remote imaging capability that is available in the Continuum tool and not in GenISIS is a great example of ways where we have actually improved the tool that we’ve delivered to Continuum so that it’s easier for them to support and will reduce the support burden upon Datto.”).

³⁵ See, e.g., Def.’s Letter to Ct. 4, Dec. 7, 2012 (“[A] command-line conversion tool is far more appropriate for Continuum’s intended use . . .”).

³⁶ Hr’g Tr. 199:3-10,

³⁷ Hr’g Tr. 200:6-10.

suggests to me that there is a significant commercial advantage in using a GUI over a command-line interface.

Third, McChord testified that the command-line interface will allow for differentiation in the marketplace.³⁸ Datto does not want the market to be confused about which tool would be right for them if both were to contain graphic-user interfaces. This argument is belied by McChord's testimony that he was seriously considering switching to a command-line interface for GenISIS.³⁹ If Datto did decide to make such a switch, which seems highly unlikely, that would destroy the very market differentiation that Datto is attempting to create. Furthermore, this market-differentiation argument has nothing to do with whether the tool is commercially-effective; it is not Datto's prerogative to decide, unilaterally, how the Continuum tool and GenISIS should be differentiated, if that decision results in a conversion tool for Continuum that is not commercially effective.

Fourth, McChord testified that he believed a command-line interface was all that was required by the Court Order.⁴⁰ That simply begs the question of what the Court Order means, and provides no basis for me to find a command-line interface to be commercially effective.

³⁸ Hr'g Tr. 127:6-129:8.

³⁹ Hr'g Tr. 197:15-19.

⁴⁰ Hr'g Tr. 129:13-16.

I am tasked with interpreting what is required by the License Agreement, based on the parties' expressed intent at the time of contracting. Looking at the License Agreement, and the course of dealing between the parties, it is clear to me that Datto would not have supplied this version of the tool had it not decided to compete with Continuum subsequent to contracting. At the time of contracting, Datto was interested in maximizing Continuum's efforts to attract new customers, since Datto received royalties for each new instance of the licensed software.⁴¹ I find that the tool the parties contemplated, and which is required by the contract and the parties' course of dealing, is a commercially effective tool that is relatively user-friendly. A command-line interface does not fulfill that obligation.

As a result, I find that the tool Datto delivered to Continuum did not comport with my Order that the tool be "commercially effective." I order Datto to provide Continuum with a version of its reimaging software, containing the technology used in its GenISIS product, and a commercially effective USB conversion tool capable of installing and deploying the reimaging software on the enumerated existing hardware devices, *that also utilizes a graphical user interface comparable to that used in GenISIS*. This new tool should be delivered to Continuum no later

⁴¹ See Yoch Aff. Exs. 11-12, Technology License Agreement, Dec. 8, 2011.

than December 17, 2012. McChord testified that he could create such a tool in one day, so the week I have allowed him should be sufficient.⁴²

To clarify what I expect from Datto, the new tool can be different from GenISIS, but it cannot be inferior. That is, this Order does not require Datto to deliver its GenISIS product to Continuum: the License Agreement does not mention GenISIS, only the utility underlying GenISIS. Continuum is not entitled to a product with the GenISIS brand or the GenISIS-specific GUI. However, Continuum is entitled to a tool with a GUI that is comparable to the other products that Datto has placed in the marketplace.⁴³

Two minor issues remain. At the hearing, much was made about the adequacy or inadequacy of the software instructions that Datto provided to Continuum.⁴⁴ It seems reasonable that Datto and Continuum work together to provide a set of written instructions to be given to Continuum's customers. Finally, the parties dispute whether a "click-through" End User License Agreement between Continuum's customers and Datto is an appropriate component of the tool.⁴⁵ Continuum has not offered sufficient evidence of why such an agreement is

⁴² Hr'g Tr. 119:11-16. I informed the parties of my decision during a teleconference held on December 10, 2012, so Datto will have a full week to prepare and turn over the new tool to Continuum.

⁴³ *E.g.*, GenISIS and the tool provided to Tech Data.

⁴⁴ *See, e.g.*, Hr'g Tr. 14:16-21.

⁴⁵ *See, e.g.*, Hr'g Tr. 15:19-16:1.

unreasonable, other than the bare fact that Continuum does not favor such a term.⁴⁶

It seems appropriate to me that Datto receive adequate protection against warranty claims, particularly because my Order expressly declared that Datto has limited warranty obligations with respect to the conversion tool.⁴⁷ As a result, I also direct Continuum and Datto to work together to develop terms of an End User License Agreement that will adequately protect Datto, consistent with my previous Order.

Finally, I address the parties' cross-requests that I shift fees for this Motion.⁴⁸ I am unwilling to shift fees here. I am not convinced that Datto's technical failure to comply with my Order was a result of bad faith. A future failure to comply with the Order may well command a different result, however.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

⁴⁶ See, e.g., Pl.'s Letter to Ct. n.3, Dec. 7, 2012 (“[T]he EULA impermissibly creates a direct relationship between Datto and Continuum’s customers that does not reflect and interferes with the relationship between Continuum and its customers. Further, as written, the EULA is confusing, in as much as it imposes misleading and incomplete obligations on customers.”)(citations omitted). Continuum made these assertions, but set forth little to no information explaining the assertions. A plain-language reading of the Datto EULA does not seem to impose any new or different obligations on Continuum; it merely clarifies that Datto has no warranty obligations.

⁴⁷ See Interim Order ¶ 5.

⁴⁸ See Pl.'s Letter to Ct. 9, Dec. 4, 2012; Def.'s Letter to Ct. 9, Dec. 4, 2012.