IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VIANIX DELAWARE LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 3801-VCP
	)	
NUANCE COMMUNICATIONS, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: October 27, 2010
Decided: February 9, 2011

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PARSONS, Vice Chancellor.

This is the next installment in a case arising from a dispute about the amount of royalties owed to the designer of audio compression software under a technology licensing agreement. On August 13, 2010, I issued a Post-Trial Opinion reflecting my findings of fact and conclusions of law concerning, among other things, the proper method by which the parties should calculate Plaintiff's damages. As a consequence of the parties' inability to agree about how to implement that method, I issued a Letter Opinion on October 13, 2010, regarding the proper amount of royalties to which Plaintiff was entitled. This matter is now before me on two post-trial motions: (1) a motion by Defendant to reopen the evidentiary record to consider newly discovered evidence; and (2) a motion by Plaintiff to reconsider certain of my conclusions in the Letter Opinion. For the reasons stated in this Memorandum Opinion, I deny the motion to reopen and the motion for reconsideration, as well, subject to one qualification.

I. BACKGROUND

A. Facts

Plaintiff, Vianix, is a Delaware limited liability company and a wholly-owned subsidiary of Vianix Virginia. Defendant, Nuance, is a Delaware corporation and a worldwide leader in providing speech and imaging solutions to businesses and consumers.[1]

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[1] On August 13, 2010, I issued the Post-Trial Opinion (the "Opinion") in this matter, *Vianix Del. LLC v. Nuance Commc'ns, Inc.*, 2010 WL 3221898 (Del. Ch. Aug. 13, 2010), which contains a full discussion of the facts. In addition, I issued a Letter Opinion on October 13, 2010 (the "Letter Opinion"), *Vianix Del. LLC v.*

The facts relevant to Nuance's motion are largely undisputed; what is disputed, as explained below, is their legal significance.[2] The parties currently are embroiled in multiple litigations, including an action between them in the Circuit Court of Virginia Beach (the "Virginia Action").[3] On July 31, 2009, in response to a Nuance production request in the Virginia Action, Vianix produced a number of documents, including a February 8, 2008 email between two Vianix employees, Veeru Ramaswamy, Vianix's Chief Technology Officer, and Reza Hashampour, Vianix's President and CEO (the "Email").[4] Vianix asserts that the Email is comprised of a series of notes by Ramaswamy about "various other people's conversations that occurred during a trade show in

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Nuance Commc'ns, Inc., 2010 WL 4054300 (Del. Ch. Oct. 13, 2010), pertaining to the damage calculation instructions in the Opinion. As in the Opinion and Letter Opinion, I use the term "Nuance" to refer to both Nuance and Dictaphone, a corporation that entered into the TLA with Vianix and later was acquired by Nuance. In addition, I note that terms in initial capitals, unless otherwise specified, have the same meaning as in the Opinion and the Letter Opinion.

2 For the sake of brevity, I briefly summarize the facts relevant to Nuance's motion to reopen the record. Because Vianix's motion for reconsideration is, by its nature, restricted to the record as it stands, I refer the reader to the Opinion and the Letter Opinion for additional details concerning it.

3 Nuance's Mot. to Reopen the Record on the Basis of Newly Discovered Evid. ("NMR OB") ¶ 13. The parties collectively have submitted seven different briefs on the two pending motions: Nuance's motion to reopen ("NMR") and Vianix's motion for reconsideration ("VMR"). The preceding citation was to the opening brief in connection with Nuance's motion. I also refer to Vianix's reply (*i.e.*, answering brief) on that motion and Nuance's reply as "NMR AB" and "NMR RB," respectively. Similarly, I refer to Vianix's brief in support of its motion for reconsideration as "VMR OB," Nuance's opposition (*i.e.*, answering brief) as "VMR AB," Vianix's reply brief as "VMR RB," and Nuance's sur-reply as "VMR SR."

4 NMR OB ¶¶ 6, 13; *id*. Ex. C, the "Email".

February 2008."[5] Nuance highlights a paragraph that appears to describe a discussion with a representative from Multimodal, a potential customer of Vianix's, wherein Ramaswamy stated that "[Hashampour] indicated that it [sic: is] per seat (server and client) and he indicated we understand that is not the pricing how MM [presumably, Multimodal] works on and so we already have given MM with one pricing per server without number of clients (or per seat)" (the "Statement").[6] Nuance asserts that this Statement is crucial to the Court's understanding of the parties' intent in entering into the TLA and is inconsistent with the facts as found in the Opinion.

Several months before the Email was produced to Nuance in the Virginia Action, Nuance issued to Vianix on November 3, 2008 a number of discovery requests in this litigation relating to the TLA and Vianix's performance under it. Nuance highlights two requests as relevant to its motion. In particular, request no. 1 sought "[a]ll documents and things concerning the TLA, including, but not limited to, all documents and things concerning Vianix's performance of its obligations under the TLA," and request no. 6 sought "[a]ll documents and things concerning any communication concerning the TLA between or among Vianix, Nuance, any representative of Vianix, or any representative of Nuance" (together, the "Production Requests").[7] The Email arguably should have been

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5 NMR AB ¶ 5.

6 The Email.

7 NMR OB Ex. A. The same trial counsel represented Nuance in the Virginia action as in this action. *See* NMR AB ¶¶ 11-12, Arg. ¶¶ 1-3.

produced pursuant to the Production Requests, but Vianix never did so. The parties proceeded to trial in this action in November 2009, approximately three months after Vianix produced the Email to Nuance in the Virginia Action.

Almost a year later, on October 4, 2010, counsel for Nuance "discovered" the Email among documents that had been produced to Nuance in connection with the Virginia Action. Nuance avers that its counsel did not notice the Email before the trial because "there were no common factual or legal issues between the two lawsuits" so it did not "review the Virginia Action production for documents that could be potentially relevant in this case."[8] On October 7, 2010, Nuance moved to reopen the record in this case to consider the Email. According to Nuance, that document should cause the Court to reconsider the resolution of a major issue in this case -- *i.e.*, the determination that Nuance had to pay Vianix a royalty for every End User of a MASC-bearing product.

B. Procedural History

Vianix commenced this action on June 2, 2008. After extensive pretrial proceedings, including motion practice and discovery, the Court conducted a six-day trial beginning on November 12, 2009. The parties then filed extensive post-trial briefs, and the Court heard post-trial argument on April 20, 2010.

The Court filed a seventy-five page Opinion on August 13, 2010, which directed counsel for Vianix, after conferring with counsel for Nuance, to submit a final damages calculation together with a proposed form of judgment. The parties, however, could not

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[8] NMR OB ¶ 13.

agree on such a calculation and submitted a series of letters supporting their respective positions.[9] In response, I issued the Letter Opinion on October 13, 2010, which, after finding Vianix's proposed final damage calculation to be defective on a number of grounds, ordered counsel for Nuance to submit a proposed final order and judgment consistent with the Letter Opinion. Nuance filed its proposed order on October 15.

Six days before I issued the Letter Opinion, however, Nuance moved to reopen the record based on the newly discovered Email. In addition, on October 20, 2010, Vianix filed a motion for reconsideration. The parties have briefed both of those motions. In the meantime, no final judgment has been entered yet. This Memorandum Opinion sets forth my ruling on those two motions.

II. ANALYSIS

A. Nuance's Motion to Reopen the Record

1. What standard governs Nuance's motion?

Nuance styled its motion as one "to reopen the record on the basis of newly discovered evidence," but acknowledges that "there are no Court of Chancery Rules that expressly set forth the standards or procedures for re-opening the record to admit newly discovered documents after the close of evidence but before judgment has been entered."[10] It describes its application as most analogous to a motion for a new trial under Rule 59(a) and a motion for relief from a judgment or order under Rule 60(b).

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9 *See* Docket Items (D.I.) 192-96. Indeed, the parties' proposed damages totals differed by more than six million dollars.

10 NMR OB ¶ 15.

Neither rule is directly on point, however, because the motion does not seek a new trial and I have not yet entered a final judgment or order. Nevertheless, Nuance contends that the cited rules, while not controlling, demonstrate that the decision to admit newly discovered documents after the close of evidence is within this Court's sound discretion.[11]

Vianix agrees that Rule 59(a) does not govern Nuance's motion because it does not seek a new trial, but rather only to reopen the record for the Court to consider one allegedly newly discovered document.[12] In its answering brief, however, Vianix invites the Court to treat Nuance's request as a motion to reopen a final judgment or order under Rule 60(b) in that it essentially asks this Court to reopen the evidentiary record to consider evidence potentially affecting some of the Court's rulings in the Opinion.[13] Nuance disagrees and contends that decisional precedent under that rule is "not helpful to the resolution of [its] motion" because its express requirements have not yet been met.[14]

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[11] Nuance clarified in its reply brief that it does not contend its motion is subject to either Rules 59(a) or 60(b), but, instead, that it is dependent "solely on the Court's discretion." NMR RB ¶ 14.

[12] NMR AB ¶ 4 n.1. Understandably, neither party urged the Court to treat Nuance's motion as a motion for reargument under Rule 59(f). Nuance seeks to reopen the record so the Court could consider new evidence not presented at trial. But, a motion for reargument "is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion." *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007); *Nevins v. Bryan*, 2006 WL 205064, at *3 (Del. Ch. Jan. 20, 2006).

[13] NMR AB ¶¶ 5-7.

[14] NMR RB ¶ 14.

I agree with Nuance. Rule 60(b) permits a Court to relieve a party only from a judgment or order that is final.[15] Thus, because no final judgment or order has been entered in this case, Rule 60(b) is not directly applicable.[16]

Yet, this Court may review Nuance's motion in its equitable discretion to determine whether reopening the trial record to consider allegedly newly discovered evidence would serve the interests of fairness and substantial justice.[17] A motion to reopen or supplement the record is addressed to the sound discretion of the Court.[18] In exercising my discretion in the circumstances of this case, I consider the Rule 60(b)(2)

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15 *See* Ct. Ch. R. 60(b).

16 *See, e.g.*, *Raphael v. Wilson*, 2008 WL 2838540, at *6 n.4 (Del. Ch. July 10, 2008) (noting that Rule 60(b) was inapplicable because the parties failed to have an arbitrator's order confirmed so there was no final judgment of record); *Upfront Enters., LLC v. Kent Cty. Levy Court*, 2007 WL 2584946, at *1 n.5 (Del. Ch. Aug. 29, 2007) (noting that Rule 60(b) was inapplicable because no final order had been entered); *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *2 (Del. Ch. May 11, 2001) (explaining that the defendants were not entitled to relief under Rule 60(b) because no final judgment had been entered so the requirements of that rule were not met); *In re Beatrice Cos.*, 1987 WL 758009, at *1 (Del. Ch. Dec. 18, 1987) ("A motion under Rule 60(b) assumes the existence of a final non-appealable order . . . ."). For the same reasons, Rule 59(e) is also inapplicable here. *See Cantor Fitzgerald, L.P.*, 2001 WL 536911, at *2.

17 *See, e.g.*, *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, 2010 WL 1818907, at *1 (Del. Ch. Apr. 23, 2010) ("The Court will allow the introduction of additional evidence when doing so will serve the interests of fairness and substantial justice."); *In re Transamerica Airlines, Inc.*, 2008 WL 509817, at *4 (Del. Ch. Feb. 25, 2008); *cf.* Fed. R. Civ. P. 16(e) ("The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.").

18 *See, e.g.*, *Lola Cars Int'l Ltd.*, 2010 WL 1818907, at *1; *Pope Invs. LLC v. Benda Pharm., Inc.*, 2010 WL 3075296, at *1 (Del. Ch. July 26, 2010); *Carlson v. Hallinan*, 925 A.2d 506, 519-20 (Del. Ch. 2006).

standard for evaluating whether to reopen a judgment to consider newly discovered evidence, though not controlling, to be both analogous and instructive. First, notwithstanding the absence of a final order, this Court has entered a comprehensive post-trial Opinion that describes in detail the matters to be encompassed by a final order. In addition, after the parties were unable to agree on the final damages total in accordance with the Opinion, the Court filed an eight-page Letter Opinion describing the proper implementation of the rulings in the Opinion and directed Nuance to file a proposed final order consistent with its instructions. Thus, the parties, in effect, have received the equivalent of this Court's final order on Vianix's trial claims in the form of these Opinions. Moreover, the action Nuance asks the Court to take would fall squarely within the ambit of Rule 60(b)(2) if a final order had been entered. Finally, the cases applying Rule 60(b)(2) have identified as relevant a number of equitable factors that are consistent with the factors Delaware courts typically consider in evaluating a motion to reopen or supplement the record with new evidence.[19] These factors are useful to the Court in determining whether consideration of the newly discovered evidence in question will serve the interests of fairness and substantial justice.

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[19] *See In re Transamerica Airlines, Inc.*, 2008 WL 509817, at *4 ("Relevant factors for admitting new evidence include: (1) whether it has come to the moving party's knowledge since the trial; (2) whether reasonable diligence would have caused its discovery for use at trial; (3) whether it will likely change the outcome; (4) whether the evidence is material *(i.e.*, not merely cumulative); (5) the timeliness of the motion; (6) undue prejudice to the nonmoving party; and (7) judicial economy."); *accord Carlson*, 925 A.2d at 519-20.

Therefore, I use Rule 60(b)(2) as a guidepost in the exercise of my general equitable discretion to analyze the merits of Nuance's motion to reopen the record to include the Email.

2. Standard for a motion to reopen judgment under Rule 60(b)(2)

Rule 60(b) allows a court to relieve a litigant of its burden under a final judgment if justice so requires. The Rule states, in pertinent part:

> On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence . . . or (6) any other reason justifying relief from the operation of the judgment.[20]

While litigants may resort to a Rule 60(b) motion to prevent an unfair result, they may do so only on a powerful showing that a substantial risk of injustice is present.[21]

In certain circumstances, a litigant may obtain judicial reconsideration of the merits of its claim under Rule 60(b) based on newly discovered evidence.[22] As discussed previously, whether to reopen a judgment on this basis is committed to the discretion of the Court.[23] To prevail on a newly discovered evidence claim, the movant has the burden

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[20] Ct. Ch. R. 60.

[21] *See Glinert v. Wickes Cos.*, 1992 WL 165153, at *3 (Del. Ch. July 14, 1992) ("A movant bears a heavy burden of proof in order 'to protect the finality of judgments against efforts to turn the vicissitudes of litigation into grounds for more litigation still.'").

[22] *See Norberg v. Sec. Storage Co. of Wa.*, 2002 WL 31821025, at *2 (Del. Ch. Dec. 9, 2002).

[23] *Id.*; *Pope Invs. LLC v. Benda Pharm., Inc.*, 2010 WL 3075296, at *1 (Del. Ch. July 26, 2010).

to show that: (1) newly discovered evidence has come to its knowledge since the trial; (2) it could not, in the exercise of reasonable diligence, have been discovered for use at the trial; (3) it is so material and relevant that it probably will change the result if a new trial is granted; (4) it is not merely cumulative or impeaching in character; and (5) it is reasonably possible that the evidence will be produced at the trial.[24] The court also may examine additional equitable factors, including: (6) whether the moving party has made a timely motion; (7) whether undue prejudice will inure to the nonmoving party; and (8) considerations of judicial economy.[25] Moreover, while Rule 60(b)(2) does not contain firm deadlines, a party seeking to reopen judgment based on newly discovered evidence must make its motion without unreasonable delay.[26] Finally, I note that "the admission of late submitted evidence is not favored."[27]

3. Application

Relevant to the first two factors, Nuance describes the Email as "newly discovered evidence" that came to its knowledge since the trial and could not, in the exercise of

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[24] *See, e.g.*, *Levine v. Smith*, 591 A.2d 194, 202 (Del. 1991), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Norberg*, 2002 WL 31821025, at *2.

[25] *See Pope Invs. LLC*, 2010 WL 3075296, at *1.

[26] *See In re U.S. Robotics Corp. S'holders Litig.*, 1999 WL 160154, at *8 (Del. Ch. Mar. 15, 1999).

[27] *Pope Invs. LLC*, 2010 WL 3075296, at *1. This is because Rule 60(b) "implicates two important values: the integrity of the judicial process and the finality of judgments." *99-Year Lease Tenants of Lynn Lee Vill. v. Key Box 5 Operatives, Inc.*, 2005 WL 1924193, at *3 (Del. Ch. Aug. 4, 2005).

reasonable diligence, have been discovered for use at trial.[28] Specifically, it asserts that its counsel did not learn of the Email's existence until October 4, 2010, well after the trial. Despite having received the Email in connection with the Virginia Action three months before the November 2009 trial in this action, Nuance argues it had no reason or obligation to review the Virginia Action document production from Vianix with an eye toward this action because the two litigations have no factual or legal questions in common. Nuance further contends that the Email was responsive to its Production Requests and should have been produced by Vianix in this litigation. Thus, according to Nuance, it cannot be faulted for not discovering the Email for use at trial.

Vianix, for its part, disagrees and argues first that it was not required to produce the Email in this litigation because it was not responsive to the Production Requests. Vianix further contends that even if the Email was responsive, the Court should not consider it because the Email was in Nuance's possession for more than three months before the trial and more than a year before the Opinion issued. Therefore, according to Vianix, Nuance failed to act with reasonable diligence.

There is no dispute that Nuance received the Email in connection with a different lawsuit on July 31, 2010, and, therefore, had the Email in its possession before the trial. It also appears, however, that Nuance did not realize the contents of the Email or its claimed relevance to this action until October of 2010. Thus, for the purposes of this

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[28] NMR OB ¶¶ 1, 13-14.

Memorandum Opinion, I assume without deciding that the Email did not come to its attention until after the trial.

Even so, Vianix suggests that Nuance failed to exercise reasonable diligence by failing to discover for fourteen months that a document Vianix produced to it in connection with the Virginia Action arguably had relevance to this action. Both sides vigorously dispute this issue, especially with regard to whether the Email should have been produced by Vianix in response to the Production Requests. In fact, it is debatable whether the Email fell within the ambit of such Requests and, in any event, whether Vianix seriously can be faulted for failing to produce it. Similarly, I find no fault with Nuance in terms of the timing of its discovery of the Email and the filing of its motion to reopen. Both sides exhaustively litigated this case with numerous witnesses and hundreds of exhibits. Therefore, I assume for purposes of this Memorandum Opinion that Nuance could not have discovered the Email through the exercise of reasonable diligence before trial and I focus, instead, on the purported materiality of the Email.

Nuance contends that the Statement in the Email warrants a finding that the term "seats" as used in TLA Exhibit E refers to "licenses" and not "End Users," as the Court found in the Opinion. In that regard, Nuance denies that it is seeking reconsideration of the Court's interpretation of the TLA. Rather, Nuance claims to seek reconsideration, in light of the allegedly new evidence, of whether, notwithstanding the language of the TLA, the parties nonetheless agreed to compute royalties based solely on the number of

licenses sold by Nuance.[29] Specifically, Nuance points to the Court's finding that "there [was] no indication that Vianix ever understood the [last minute changes made to Exhibit E were supposed] to have the effect Nuance now claims it has [*i.e.*, that royalties were to be based on licenses and not End Users]."[30] Essentially, Nuance asserts that the Statement in the Email, which was made approximately five years after the parties entered into the TLA, is "evidence of precisely [such an] 'understanding' by Vianix."[31] That is, it claims that the Statement demonstrates that both parties, and not just Nuance, understood that the last minute changes to the TLA were material and reflected the parties' joint intent to charge Nuance "per seat," which Nuance asserts means per client or computer, and not per person.

Vianix urges the Court to exclude the Email as irrelevant extrinsic evidence that provides no basis for the Court to revisit its finding that the TLA unambiguously required Nuance to pay Vianix a royalty for every End User of a MASC-bearing product. In addition, Vianix contends that the Email is immaterial and does not evidence any agreement of Vianix with Nuance's interpretation, especially because Ramaswamy's notes in the Email do not provide a clear indication as to what the terms "number of clients," "per seat," or "(server and client)" meant in the context in which they were used

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29 NMR RB ¶ 11.

30 *Id*. ¶ 12.

31 *Id*.; NMR OB ¶ 11.

in the Email. Similarly, it is difficult to ascertain from the face of the Email what relation, if any, the Statement bears to the TLA's "per seat" tiered pricing formula.

At trial, the parties vigorously disputed how Nuance was to calculate royalties it owed for user fees under the TLA. In Part II.D.1 of the Opinion, I considered two separate questions regarding the proper interpretation of the TLA: (1) whether the parties intended to pay a royalty for every End User or, instead, for every license Nuance sold; and (2) even if the parties intended Nuance to pay per End User, whether they "nonetheless agree[d], due to the practical difficulties of counting End Users, for example, to compute the royalties based solely on the number of licenses Nuance sold."[32] Considering the language of Exhibit E of the TLA, I found that, with regard to the first issue, the TLA unambiguously required Nuance to pay Vianix a royalty for every End User of a MASC-bearing product.[33] As to the second issue, however, I found ambiguous the parties' use of "Nbr. of Seats" in the table in Exhibit E and the term "per seat licenses" in the definition of Cost/End User as they relate to the method of calculating the royalty due, and, as such, looked to extrinsic evidence for guidance.[34]

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32 Op. at 40.

33 *Id*. at 42.

34 *Id*. at 42-44. These terms were not defined in the TLA. *Id*. In particular, the Opinion states: "Nuance asserts that a per seat license can refer to both a unique user license and a concurrent license and, thus, encompasses all licenses that Nuance sold. This view arguably makes the 'per seat' part of per seat license meaningless. Yet, Nuance seems to suggest that a 'seat' corresponds to a single End User in the case of an individual license or, for a customer having a concurrent license, the maximum number of users who can use the Nuance

At trial, the parties did introduce some extrinsic evidence relating to the meaning of "Nbr. of Seats" and "per seat licenses." I considered, for example, three preliminary drafts of the TLA, each of which contained the term "Nbr. of Seats" and, unlike the final version, a provision stating that "[Nuance] will pay to Vianix a fee based on the number of End-Users . . . that is based on the cumulative number of End-Users covered by any Sublicense during the term of [the TLA]."[35] But, this provision did not make it into the final draft of the TLA; instead, it was replaced with an ambiguous reference to "the number of per seat licenses."[36] Vianix discounted this change as immaterial and argued it was not meant to vary the parties' intent to charge Nuance royalties per End User. In

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> product at one time. Vianix, on the other hand, effectively contends that there is no difference between the phrase 'per seat' and 'per End User.' Based on the inartful drafting of the TLA, I found that both these proposed constructions were reasonable, but mutually exclusive, thus rendering this language ambiguous.
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> One plausible interpretation of these terms is that 'Nbr. of Seats' is really just shorthand for per seat licenses as that term is used in the definition of Cost/End User and, as Nuance contends, simply means number of licenses. Defining the terms in this manner, however, is problematic, as the procedure by which user fee royalties are to be calculated breaks down if 'Nbr. of Seats' is read to mean number of licenses, without any regard to the number of End Users covered by each license. Because Nuance sold concurrent licenses, there is no clear correlation between the number of licenses it sold and the number of End Users authorized to use a Nuance Product with MASC Technology under those licenses. Thus, were Exhibit E construed in this fashion, Nuance unilaterally could control and keep down the royalties it owed without regard to the number of End Users involved. On the other hand, Vianix's position that the number of seats equates to the number of End Users raises the question why the parties used the word 'seats' instead of End Users." *Id*. at 42-44.

[35] *Id*. at 44. The quoted provisions supported an inference that the parties intended to use "Nbr. of Seats" to mean number of End-Users. *Id*. at 45.

[36] *Id*.

contrast, Nuance contended the change meant that it would owe a royalty only on the cumulative number of per seat licenses.

To sort out this discrepancy, I considered all the available evidence, including a 2003 Email from Nuance's Pearah. Based in part on that email, I determined that Nuance sought the last minute change intentionally to keep the TLA vague on the issue of royalties. I further found that this intent "undercut [Nuance's] position, as there [was] no indication that Vianix ever understood that the change . . . was to have the effect Nuance" claimed it had.[37] Specifically, I stated:

> In these circumstances, it was incumbent on Nuance to make sure Vianix shared its understanding of the reference to per seat licenses in the Cost/End User definition. Otherwise, it would risk having the term construed in accordance with Vianix's understanding of it. Nuance's failure to attempt to clarify this vague language provides a further reason to hold that both "Nbr. Of Seats" and per seat licenses mean End Users for purposes of interpreting Exhibit E.[38]

Thus, I held that the parties' use of "Nbr. of Seats" in the final draft of the TLA meant Nuance was required to pay a royalty for each End User, rather than for each license.

Having considered Nuance's motion regarding the Statement in the 2008 Email, I find that it is not so material and relevant that it is likely to change the result of my analysis concerning Vianix's understanding of the meaning of "Nbr. of Seats" or "per seat" or the import of the change in the final draft of the TLA discussed above.

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37 *Id*.

38 *Id*. at 46.

Specifically, Ramaswamy's reference to Vianix charging Dictaphone "per seat (server and client)" does not explain the meaning of "per seat." Nor is meaning of that term evident from the context in which it was used. That Vianix may have told a third party in 2008 that it billed Dictaphone for royalties on a per seat basis does not illuminate Vianix's understanding of how "per seat" billing under the TLA was supposed to operate.[39] As such, the Statement is not material and constitutes merely cumulative evidence of the fact that the parties intended for royalties to be calculated on a per seat basis. The Email and Statement, therefore, shed no additional light on the issue of what that term meant.

That Ramaswamy's summary of Hashampour's 2008 Statement arguably could be read as drawing a distinction between "seat" and "client" is similarly unilluminating. Nuance asserts that his use of "client" meant "computers, and not human beings [*i.e.*, End Users]."[40] In particular, it argues that Ramaswamy's Email shows Vianix charged Dictaphone per seat, which Vianix equated with the number of "clients," or, according to

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[39] Indeed, nothing in the Statement contradicts Vianix's argument that it, at all times, believed "seat" corresponded to "End User." Nuance argues that the Email shows that when Vianix communicated internally and to third parties about its billing practices regarding Nuance, it said nothing about charging the latter per End User. NMR OB ¶ 12. Yet, this argument misses the mark. Vianix credibly asserted that it believed per seat billing was synonymous with per End User billing. It is not clear from the face of the Email that the relevant Statement is inconsistent with Vianix's position.

[40] *Id*. ¶ 6.

Nuance, computer workstations.[41] But, this does not change my conclusion, after a lengthy trial, that Vianix understood "seat," as it was used in Exhibit E of the TLA, to mean "End User" for purposes of calculating royalties. The Email does not show that Vianix's understanding of the term "seat" in February 2008 was inconsistent with its position at trial. Instead, it amounts to one piece of evidence containing a term whose meaning the parties disputed at trial and, evidently, still dispute. Considered in the context of the testimony of numerous witnesses and a large number of exhibits, the Email does not materially strengthen Nuance's unsuccessful argument as to what Vianix understood "seat" to mean. Therefore, I find that the Email is merely cumulative and is not sufficiently material to warrant granting Nuance's motion to reopen the record in this action.

Moreover, reopening the record at this late stage of the proceedings would disserve the interests of judicial economy and cause undue prejudice to Vianix, as the nonmoving party. In the more than one year since the evidentiary record closed, the Court has issued two decisions totaling eighty-three pages addressing a myriad of detailed issues and establishing a complex methodology by which the parties are to calculate damages. Moreover, contrary to Nuance's assurances that the relief sought by its motion to reopen is extremely narrow in scope, its requested relief relates to a key issue of the case that was litigated exhaustively and undoubtedly would lead to still

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[41] *Id*. ¶ 12; NMR RB ¶ 7. Because computer workstations can be shared by multiple people, Nuance argues that Vianix understood that royalties would be calculated on a per license basis and not per End-User.

further proceedings.[42] Denying the normal degree of finality to the previous efforts of the parties and the Court here in favor of considering a document which, at best, is merely another indication of their dispute regarding the meaning of several key terms in the TLA, would not benefit the interests of justice. Therefore, having found that the factors to which courts traditionally look in determining whether to reopen a final judgment to consider newly discovered evidence under Rule 60(b)(2) do not support Nuance's position, and in the fully informed exercise of my equitable discretion, I deny Nuance's motion to reopen the record.[43]

B. Vianix's Motion for Reconsideration

1. Standard for a motion for reconsideration

The standard applicable to a motion for reargument is well settled. To obtain reargument, the moving party has the burden to demonstrate either that the court has overlooked a controlling decision or principle of law that would have controlling effect, or that it has misapprehended the facts or the law such that the outcome of the decision

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[42] In this regard, I echo the sentiments of the Delaware Supreme Court that our judicial system requires, and litigants are entitled to, fair trials, not perfect trials. *See Massey-Ferguson, Inc. v. Wells*, 421 A.2d 1320, 1321 (Del. 1980). Both parties to this action were afforded extensive opportunities to present their respective positions on the proper metric by which to count royalties. I am convinced, therefore, that Nuance received a fair trial.

[43] Accordingly, I also deny Nuance's request for reconsideration of my decisions pertaining to an award of attorneys' fees and the use of damage multipliers.

would be different.[44] A misapprehension of the facts or the law must be both material and outcome determinative of the earlier decision for the movant to prevail.[45] Moreover, reargument under Court of Chancery Rule 59(f) is only available to re-examine the existing record; therefore, new evidence generally will not be considered, and such motions must be denied when a party merely restates its prior arguments.[46]

2. Application

Vianix moves the Court to reconsider two rulings in its Letter Opinion. In particular, it seeks reconsideration of Part I.A where I held that Vianix incorrectly populated the Damages Spreadsheet with respect to the number of iChart licenses. In addition, Vianix argues that the Court erred by determining to apply a multiplier to too low a percentage of JobLister/TransNet licenses.

Before reaching the merits of these contentions, I address two preliminary issues raised by the parties. First, Vianix implies that the Court acted improperly when it considered a number of arguments Nuance made after the trial, the evidentiary record, and post-trial briefing were closed and then issued the Letter Opinion without having received Vianix's full input. Specifically, it takes issue with the Court's consideration of

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44 *See, e.g.*, *Medek v. Medek*, 2009 WL 2225994, at *1 (Del. Ch. July 27, 2009); *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007); *Nevins v. Bryan*, 2006 WL 205064, at *2 (Del. Ch. Jan. 20, 2006).

45 *See Aizupitis v. Atkins*, 2010 WL 318264, at *1 (Del. Ch. Jan. 27, 2010); *Medek*, 2009 WL 2225994, at *1.

46 *Reserves Dev. LLC*, 2007 WL 4644708, at *1; *Nevins*, 2006 WL 205064, at *3.

Nuance's nine-page, single-spaced September 14 Letter,[47] which Vianix characterizes as an uninvited supplemental post-trial brief on the issue of damages.[48] Vianix asserts that it sought the Court's guidance in a series of subsequent letters[49] and refrained from responding substantively to the arguments Nuance made in the September 14 Letter because it had not received a response from the Court. Vianix then complains that, without responding to its letters or affording it an opportunity to respond, the Court issued the Letter Opinion largely adopting Nuance's "erroneous straw-man arguments and mischaracterizations of both the evidence at trial and Vianix's proposed form of order and final judgment." As a result, Vianix claims it was forced to move for reconsideration as to the above-mentioned merits issues and "Nuance's uninvited and then-seemingly-impermissible post-trial brief on the issue of damages."[50]

There is no merit to Vianix's objections to the process that led to the Letter Opinion. In the post-trial Opinion, I ordered counsel for Vianix to confer with Nuance and submit a populated Damages Spreadsheet "implementing the rulings set forth [in the

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47 D.I. 193.

48 VMR OB 1-2; VMR RB 1.

49 *See* D.I. 194, 196. Vianix describes these letters as "short statement[s] indicating Vianix's disagreement with Nuance's various positions [in the September 14 Letter], offering its explanation of why the proposed form of order and final judgment submitted with its September 13 Letter fully complied with the Opinion, and seeking guidance on whether a further supplemental post-trial brief addressing Nuance's errors should be filed." VMR OB 1.

50 *Id*.

Opinion]."[51] Nuance submitted, and I considered, the September 14 Letter because Vianix failed to comply with that order. What was uninvited, therefore, was not the September 14 Letter; rather, it was Vianix's proposed form of order and final judgment which disregarded, in important respects, the Court's instructions in the Opinion as to how the Damages Spreadsheet was to be populated.

Based on Vianix's failure to follow the Opinion, the parties could not agree on a proposed form of judgment. In such circumstances, litigants usually submit their respective proposed forms of order together with a letter concisely identifying the points of disagreement and explaining their position on each point. Nuance's September 14 Letter did essentially that. The Letter was long, but still commensurate with the nature and extent of the parties' disputes regarding the import of the Opinion and the way in which Vianix purported to populate the Damages Spreadsheet. Indeed, I sustained nearly all of Nuance's objections in the Letter Opinion.

Furthermore, Vianix had ample time to respond to Nuance's Letter before I issued the Letter Opinion. Vianix sent letters to the Court on September 20 and 21, several weeks before I issued the Letter Opinion, but made no attempt to respond substantively to the September 14 Letter. Vianix offers the excuse that it was waiting for the Court's permission to respond. Yet, in both of its letters, Vianix proclaimed that its proposed

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[51] Op. at 75. Ironically, the Court had to order that action because Vianix based its damages case on the unpopulated Damages Spreadsheet, a model which could not be populated conclusively with data until after the Court rendered its Opinion on a large number of discrete disputes.

form of order and final judgment accurately reflected the Court's resolution of the factual disputes in this case.[52] Thus, Vianix plainly signaled its disagreement with the substance of the September 14 Letter. As explained in the Letter Opinion, Vianix's position was manifestly incorrect in a number of material instances. Having chosen to submit a proposed form of judgment inconsistent with the Court's Opinion, it was incumbent upon Vianix to respond substantively to the September 14 Letter, even absent a formal invitation to do so. To accept Vianix's position would mean that a court not only would have to endure the burden of a party's unreasonably strained reading of its opinion, but also would have to invite another full round of briefing on that reading. Neither the rules nor common sense require such deference.

As a direct consequence of the parties' inability to agree as to the method called for in the Opinion for populating the Damages Spreadsheet, largely due to Vianix's erroneous positions, I issued the Letter Opinion on October 13, 2010 and ordered Nuance to prepare a proposed form of order and final judgment consistent with the Letter Opinion. As Vianix has not identified any facts or principles of law that I misapprehended with respect to these issues, I reject Vianix's objections to the process pursuant to which the Court considered Nuance's September 14 Letter and issued the Letter Opinion.

Turning to the other preliminary issue, Nuance argues that Rule 59 does not permit a movant to file a reply brief and, as such, Vianix's reply brief in support of its motion for

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[52] *See* D.I. 194, 196.

reargument should be stricken. Generally, Rule 59(f) does not contemplate a reply in support of a motion for reargument absent leave of court.[53] Ordinarily, I would strike Vianix's reply brief on that basis. To avoid any possible doubt as to whether Vianix had an adequate opportunity to be heard on the issue of the proper method by which to populate the Damages Spreadsheet, however, I have considered the reply brief here.[54]

As its first substantive ground for reargument, Vianix contends that the Court erred in rejecting its proposed number of iChart configured users. In the Letter Opinion, I found that Vianix failed to comply with my instruction to use the Bourassa Data to populate the Damages Spreadsheet with the correct number of iChart licenses or Reported Users.[55] I found that the Bourassa Data showed that Nuance sold 27,752 iChart licenses, far less than Vianix's 80,309 proposed configured-user number.[56] Vianix strenuously argues that the Court's method for estimating the number of End Users using the number of licenses "does not make any logical or rational sense at all."[57] Vianix also objects to any reliance on Nuance's supposedly new, unfounded argument in its

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53 *Pharmerica Long Term Care Inc. v. New Castle RX, LLC*, 2010 WL 5130746, at *5 n.17 (Del. Ch. Dec. 8, 2010) (citing *Deloitte & Touche USA LLP v. Lamela*, 2006 WL 345007, at *1 n.5 (Del. Ch. Feb. 7, 2006)). The Rule only allows for the moving party to file "[a] motion . . . setting forth briefly and distinctly the grounds therefore," as to which any party opposing the motion may serve "a short answer to each ground asserted." Ct. Ch. R. 59(f).

54 In the interests of fairness, I also have considered Nuance's sur-reply.

55 Letter Op. at 3.

56 *Id*.

57 VMR OB 4.

September 14 Letter that the method of royalty calculation was to pay for End Users rather than licenses sold.[58] But, I find that these positions have no merit. The Court carefully considered Vianix's arguments in the context of both the Opinion and the Letter Opinion. In addition, Nuance never made the argument Vianix attributes to it. In its September 14 Letter, Nuance explicitly stated that Vianix's iChart configured user calculation "violates . . . [the Opinion's] instruction that iChart *licenses*, not *users*, should be used to populate the Damages Spreadsheet."[59] I also found that Nuance's position in its September 14 Letter was consistent with my instruction in the Opinion to use the Bourassa Data to calculate the number of licenses for iChart.[60] As with its proposed Damages Spreadsheet, Vianix's motion indicates that it still is calculating its iChart figure using "configured users" and not licenses, as it was supposed to do.[61] As I found in the Letter Opinion, Vianix did not use the Bourassa Data in arriving at its 80,309 total.[62] Because merely restating a failed argument provides no basis for reargument, I deny this aspect of Vianix's motion.

Vianix's subsidiary grounds for reargument as to iChart are equally unavailing. It first objects to the Court's decision to adjust the total iChart license figure by adding back

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58 VMR RB 3; VMR OB 4.

59 Sept. 14 Letter at 2.

60 *See* Letter Op. at 3.

61 Sept. 13 Letter Ex. 1, Damages Spreadsheet, at Attach. VI-H; VMR OB 6.

62 Letter Op. at 2.

negative entries in the Bourassa Data. As stated in the Letter Opinion, however, this issue was addressed at trial and I determined that Bourassa adequately explained the occasional negative entries when he was cross-examined by Vianix.[63] Because Vianix did not identify any material fact or principle of law that I misapprehended on this issue, it provides no basis for reargument.

Vianix also challenges the accuracy of Nuance's calculation of the iChart total because "none of the math used to arrive at Nuance's conclusion is shown, documented, or explained."[64] This argument, too, is unpersuasive. Nuance determined the proposed iChart license total by taking the net sum of iChart licenses in the Bourassa Data, including adjustments for negative entries, which showed that Nuance sold 27,752 iChart licenses.[65] As such, Vianix has failed to establish that I misapprehended or misapplied any facts or principles of law in accepting this number.

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63 Letter Op. at 3 n.7.

64 VMR OB 6.

65 I also reject Vianix's motion for reargument to the extent it claims that the Court should have applied a 5x multiplier to the total number of iChart licenses. *See* VMR RB 4; VMR OB 8. Vianix concededly reached its proposed sum by adding configured users. VMR OB 6. As I stated in the Letter Opinion, applying a multiplier to a figure representing users, and not licenses, would "be wholly inconsistent with my instruction to apply a 5x multiplier to the number of concurrent licenses sold by Nuance." Letter Op. at 4 n.11. I instructed the parties to apply a 5x multiplier in a manner appropriate to convert the actual number of concurrent licenses Nuance sold into an estimate of the total End-Users covered by those licenses. Op. at 53. In the Letter Opinion, I also held that "[b]ecause Nuance failed to keep sufficient data to enable the Court to determine precisely the extent of its royalty obligations," the parties should deem 15% of all iChart licenses sold to be concurrent, consistent with my instructions in footnote 153 of

Turning next to the second substantive ground for reargument, Vianix contends that the Court erred in finding that while some JobLister and TransNet licenses were sold concurrently, others were not, and, therefore, refusing to apply a 5x multiplier to every JobLister and TransNet license. It asserts that there was sufficient evidence adduced at trial to show that all of Nuance's licenses for JobLister and TransNet were concurrent, which means that a 5x multiplier should have been applied to the entire JobLister and TransNet totals, as Vianix did in its proposed form of order and final judgment.[66] Vianix further argues that Nuance's recent argument otherwise represents a sea change from its position at trial that all transcriptionist licenses were concurrent.

Not surprisingly, Vianix views the evidence solely from its own perspective. Based on my review of the evidence, however, I found, and still find, that it shows some, but not all, of the JobLister and TransNet licenses Nuance sold were concurrent. It also is not clear that Nuance changed its position on this issue. The parties presented conflicting evidence as to whether all JobLister and TransNet licenses were sold on a concurrent basis. But, there is sufficient evidence to support Nuance's position that JobLister and TransNet licenses were sold both on concurrent and nonconcurrent bases.[67] Indeed, the Bourassa Data reflects this in that it provides separate tallies for concurrent and user

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the Opinion. Letter Op. at 6. Vianix has failed to show any reason to revisit these determinations.

66 *See* VMR OB 8; VMR RB 4.

67 Letter Op. at 7; *see generally* JX 562; JX 199.

JobLister and TransNet licenses.[68] On the other hand, Vianix relies on certain statements from Nuance witnesses Heffernan and Shroff that suggest all of the licenses for those products (or at least the vast majority) were sold concurrently.[69] Complicating this situation further is the fact that, for the most part, Vianix elected not to cross examine Bourassa about his Data. This tactic resulted in certain detailed questions regarding the Data remaining unanswered.

Based on a careful consideration of the evidence and the parties' submissions on this issue, I remain convinced that the Bourassa Data is the most accurate source of information to calculate the royalties due, including for JobLister and TransNet. In so holding, I find that Vianix has not met its burden to show that I misapprehended material facts or principles of law in declining to apply a 5x multiplier to all JobLister and TransNet licenses, as Vianix proposes.[70] Thus, I deny Vianix's motion for reargument with respect to its claims regarding JobLister and TransNet subject to the following exception: if the total number of concurrent licenses for JobLister and TransNet reported in the Bourassa Data as a percentage of the total number of all licenses for those products is less than 15 %, the 5x multiplier shall be applied to 15% of that total number of

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68 *See* JX 562 at NUAN-000153222-25, NUAN-000153341-45, NUAN-000153391.

69 *See*, *e.g.*, PX 186, Dep. of Donna M. Heffernan, 182-83; T. Tr. 1511-14 (Shroff).

70 In the Letter Opinion, I instructed the parties to enter a multiplier into the Damages Spreadsheet only in "a manner appropriate to convert the actual number of licenses Nuance sold into an estimate of total End Users." Letter Op. at 6-7. That is, a 5x multiplier should have been applied to JobLister and TransNet licenses only to the extent such licenses were shown to have been concurrent.

licenses. This exception is consistent with the Opinion and the Letter Opinion[71] and provides a reasonable check on the Bourassa Data.

I conclude by reiterating a point made in the Letter Opinion. The trial is over and the evidence is closed. Both parties chose to proceed with their respective litigation strategies. In some situations the strategies paid off, and, in others, they did not. Both parties now must live with their strategic decisions. This is especially true for Vianix because, as Plaintiff, it had the burden to prove its damages by a preponderance of the evidence. Its motion for reargument, in many ways, is more accurately described as an attempt to relitigate issues on which it lost at trial. The time for that has passed.

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, Nuance's motion to reopen the record is denied and Vianix's motion for reargument is denied, subject only to the limited condition imposed as to JobLister and TransNet licenses. Accordingly, I direct Nuance promptly to submit for the Court's approval an appropriately updated form of the proposed final order and judgment it filed on October 15, 2010.

IT IS SO ORDERED.

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[71] *See* Op. at 20 & n.153; Letter Op. at 6.