IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BLOCK FINANCIAL CORPORATION, Plaintiff/CounterclaimDefendant, v. INISOFT CORPORATION, Defendant/Counterclaim Plaintiff.	)))))))))	C. A. No.: 03C-04-010-CLS

ORDER

On this 2nd day of April, 2009, it appears to the Court that:

1. On October 31, 2008, this Court issued its Proposed Findings of Fact and Conclusions of Law Following a Non Jury Trial to the Parties under seal. In that Order, the Court determined that Block materially breached the November 2 Agreement ("Agreement") and requested the Parties to submit written argument regarding the calculation of contract damages. The Parties submitted their respective arguments to the Court. The following is the Court's decision on this matter.

2. Inisoft seeks $7,367,100 in contract damages and $1,503,040.80 in prejudgment interest accruing from December 31, 2002 to

December 31, 2008. It also seeks a declaratory judgment that Block did not develop its own online tax program independent of Inisoft's source code or, in the alternative, future damages in the form of three years of royalties in the amount of $3,970,800.

3. Block argues that Inisoft's damages should be limited to $1, 500,000 in contract damages and $483,750 in prejudgment interest. It claims that Inisoft is not entitled to damages after December 31, 2003 because Block had the right to terminate the Agreement after that time.

4. The standard remedy for breach of contract is based upon the reasonable expectations of the parties before the breach occurred.[1] This principle of expectation damages is measured by the amount of money that would put the non breaching party in the same position as if the breaching party had performed the contract.[2]

5. In this case, the Agreement provided a grant of a license by Inisoft to Block for the use of Inisoft software and its source code.[3] The Term of the Agreement was for the 2001 tax season (Year 1), the 2002 tax season (Year 2) and the 2003 tax season (Year 3). Block had the right to terminate the Agreement, at its sole discretion, after Year 3. Block paid

[1] *Leary v. Oswald*, 2006 WL 3587249 (Del. Super.) citing *Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001).
[2] *Id.*
[3] Software License Agreement, Joint Ex. 1.

Inisoft in full for Year 1 but terminated the Agreement before the end of Year 2. Block has not paid Inisoft for Year 2 or Year 3 of the Agreeement.

6. The Court found in its October 31, 2008 Order that Block's termination of the Agreement was unlawful and thus it is liable to Inisoft for damages resulting from its breach.

7. In the Agreement, the Parties prudently set forth the precise amount that Block was required to pay Inisoft for Year 2 and Year 3. Pursuant to Paragraph 6.3, Block was required to pay Inisoft $.40 per each tax return completed during Year 2 and $.45 per each tax return completed during Year 3. Block guaranteed a minimum of 1,500,000 completed tax returns for Year 2 and 2,000,000 for Year 3. The number of actual completed returns for these years was less than the guaranteed number. Consequently, Inisoft is entitled to $600,000 for Year 2 (1.5 million returns x $.40) and $900,000 for Year 3 (2 million returns x $.45). Because Block had the right to terminate the Agreement after Year 3, the Court finds that Inisoft is not entitled to contract damages after that time. Consequently, the Court awards Inisoft $1,500,000 on its breach of contract claim.

8. Inisoft is also entitled to prejudgment interest as a matter of right.[4] Prejudgment interest begins to accrue on the date on which payment

[4] *Underbrink v. Warrior Energy Services Corp.*, 2008 WL 2262316 (Del.Ch.).

[5] Under 6 *Del. C.* § 2301(a), the legal rate of interest is equal to 5% over the Federal Discount Rate in effect on the date that payment was due.

9. Although there appears to be some discrepancy between the Parties' representations regarding payment due dates, the Court finds that a reasonable interpretation of the November 2 Agreement required Block to make its Year 2 payment to Inisoft by December 31, 2001 and its Year 3 payment by December 31, 2002.[6]

10. In regards to Year 2, the legal rate of interest on December 31, 2001 was 6.25%. Application of that rate to the $600,000 payment owed to Inisoft amounts to an annual interest of $37,500 ($102.74 daily). Interest accrued from December 31, 2001 (the day the payment was due) through October 31, 2008 (the date judgment was entered) for a total interest amount of $256,439.04.[7]

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[5] *Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778 (Del. 1966).

[6] In making this determination, the Court considered the fact that under Paragraph 6.3 of the Agreement, Block was required to pay Inisoft each year during the Term of the Agreement by December 31st of that year. It also provides that Block had 30 days after the end of the Term to reconcile the Completed Tax Returns and pay Inisoft, within 14 days, for the Completed Tax Returns in excess of the 4,500,000 guaranteed by Block. The "Term" as defined in Paragraph 15.1 ended on September 30, 2003. These provisions discredit the notion that payment for Year 3 was due on December 31, 2003, because by that time, the Term of the Agreement would have already ended and payment for any overages would have already been paid by Block.

[7] The Court calculates that there are 2496 days from December 31, 2001 to October 31, 2008. This includes December 31, 2001 but not October 31, 2008.

11. In regards to Year 3, the legal rate of interest on December 31, 2002 was 5.75%. Application of that rate to the $900,000 payment owed to Inisoft amounts to an annual interest of $51,750 ($141.78 daily). Interest accrued from December 31, 2002 through October 31, 2008 for a total interest amount of $302,133.18.[8] The total amount of prejudgment interest for Year 2 and Year 3 combined is $558,572.22.

12. The Court finds an insufficient basis to adjust the accrual of prejudgment interest to compensate for the time the Parties spent litigating this case in the Court of Chancery.

13. Inisoft seeks for the first time a declaratory judgment that Block did not develop its own online tax program independent of Inisoft's source code. It also argues for the first time that Block's continued use of its source code constitutes a *de facto* extension of the Agreement. Because Inisoft did not raise these arguments at or prior to trial, they are dismissed as untimely.

14. On December 15, 2008, Inisoft submitted a letter to this Court requesting an additional $150,000 in compensatory damages and $69,386.66 in accrued interest totaling $219,386.66. Inisoft claims that these damages result from Block's failure to pay two Technology Fees pursuant to Paragraph 6.1 of the November 2 Agreement. Although Inisoft raised this

[8] The Court calculates that there are 2131 days from December 31, 2002 to October 31, 2008. This includes December 31, 2002 but not October 31, 2008.

claim in its original breach of contract claim, it dropped the claim by failing to assert it in its first set of interrogatory answers, its damages interrogatory answers, the Pretrial Stipulation, during trial or in its post-trial briefs.[9] Consequently, Inisoft's claim for Technology Fees is deemed waived.

15. Pursuant to this Order, Inisoft is entitled to $2,058,572.22 in damages resulting from Block's breach of the November 2 Agreement.

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.

[9] See *Rockwell Intern. Corp. v. U.S.*, 549 U.S. 457 (2007), citing *Wilson v. Muckala*, 303 F.3d 1207, 1215 (C.A.10 2002) ("[C]laims, issues, defenses, or theories of damages not included in the pretrial order are waived even if they appeared in the complaint and, conversely, the inclusion of a claim in the pretrial order is deemed to amend any previous pleadings which did not include that claim").