COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
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Wilmington, Delaware 19801-3734

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Date Decided: October 13, 2010

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Re: *Vianix Delaware LLC v. Nuance Communications, Inc.*, Civil Action No. 3801-VCP

Dear Counsel:

On September 13, 2010 Vianix filed its proposed form of order and final judgment which reflects its position that after applying the judicial findings of fact and conclusions of law encompassed in my Opinion of August 13, 2010 (the "Post-Trial Opinion" or "Opinion"),[1] Nuance is liable to it for damages in the amount of $6,868,125.00.[2] The next day, Nuance submitted a nine-page single-spaced letter in support of its contention

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1 *Vianix Del. LLC v. Nuance Commc'ns, Inc.*, 2010 WL 3221898 (Del. Ch. Aug. 13, 2010).

2 Docket Item ("D.I.") 192 ("Sept. 13 Letter").

that Vianix's proposed order fails to comply with the Opinion.[3] Based on my review of these letters,[4] their supporting documentation, and the Opinion, I find that, with certain modifications, Nuance's position is correct. Therefore, I decline to accept Vianix's proposed order and direct Nuance to modify its proposed order in accordance with this Letter Opinion and resubmit it.

I. Vianix Incorrectly Populated the Damages Spreadsheet

Nuance argued in its September 14 Letter that Vianix failed to comply with the Opinion in at least four respects. For the most part, Nuance's arguments have merit and I address each in turn below.

A. Does Vianix's estimate of 80,309 "Reported Users" for iChart comport with the Opinion?

In its proposed Post-Trial Damages Spreadsheet ("Damages Spreadsheet"), Vianix asserts that the total number of "Reported Users" of iChart is 80,309.[5] In arriving at this number, Vianix did not follow the instruction in the Opinion that, unless otherwise directed by the Court, "the Damages Spreadsheet will be populated with the Bourassa

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3 D.I. 193 ("Sept. 14 Letter"). According to Nuance, it would owe a total of $1,320,074 after correcting for Vianix's noncompliance with the Opinion. *Id*. at 9. Because it has already paid $1,210,641, Nuance contends that, after application of interest, the total outstanding amount owed to Vianix is $513,473. *Id*.

4 I also have reviewed the parties' supplementary letters. *See* D.I. 194-96.

5 Sept. 13 Letter Ex. 1, Damages Spreadsheet, at Attach. VI-H.

Data."[6] Because I did not direct the parties to use any other data to calculate the number of licenses or Reported Users for iChart, that information should have been derived from the Bourassa Data. In fact, the Bourassa Data shows that Nuance sold 27,752 iChart licenses.[7] Thus, I reject Vianix's proposed Damages Spreadsheet as inconsistent with the Opinion and accept, instead, Nuance's calculation on this point.

B. Should a multiplier be applied to the number of iChart licenses sold?

In the 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."[8] Thus, a multiplier should be applied to the number of product licenses only to the extent it was established at trial that the licenses for that product were concurrent licenses.[9] Vianix evidently believes that all

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6 Post-Trial Op., 2010 WL 3221898, at *6.

7 *See* JX 562 at NUAN-000153307-53310, NUAN-000153432-53433; Sept. 14 Letter at 2-3 & n.5, Ex. D at Attach. VI-H. Ellis testified at trial that the Bourassa Data indicates there were 30,991 iChart user licenses, but he evidently omits the negative entries in the Bourassa Data. *See* T. Tr. 1163-64; Sept. 14 Letter Ex. B. Bourassa adequately explained the occasional negative entries when he was cross-examined at trial. T. Tr. 1432-34. Therefore, I have included those entries in computing the total so that the number of iChart user licenses shown in the Bourassa Data is 27,752. *See* Sept. 14 Letter 3 n.5.

8 Post-Trial Op., 2010 WL 3221898, at *20.

9 I explained the rationale for using a multiplier to determine "End Users" from "Licenses" in that circumstance as follows:

iChart licenses sold by Nuance were concurrent licenses because it applied a 5x multiplier to each and every iChart license in its proposed Damages Spreadsheet.[10] Nuance, on the other hand, asserts that no iChart licenses were sold concurrently and, therefore, no multiplier at all should be applied to such licenses.[11]

> Because Nuance sold concurrent licenses, the number of End Users of its products will be greater than the number of licenses it sold, as more than one End User could use each concurrent license. Moreover, because Nuance sold many concurrent licenses and, from the evidence presented, a large number of individuals potentially could use these licenses, I find that the number of licenses Nuance sold reflects only a fraction of the true number of End Users of these products. Thus, I consider it appropriate to apply a multiplier to the data Nuance collected on the number of concurrent licenses sold to make a responsible estimate of the number of End Users covered by such licenses. *Id*. at *19.

In addition, I concluded that "a 5x multiplier must be applied to the number of concurrent user licenses Nuance sold to approximate the true number of End Users licensed." *Id*. at *29. This means that if Nuance did not sell concurrent licenses for a particular product, then there would be no need to use a multiplier to calculate the true number of End Users licensed because each license would represent one End User.

10 Sept. 13 Letter Ex. 1, at Attach. VI-H.

11 Sept. 14 Letter at 4-5. I note that Vianix applied a multiplier to 80,309, a number purporting to represent total Reported Users. Even if this number were correct, which it is not, applying a multiplier to a number of 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. Post-Trial Op., 2010 WL 3221898, at *19-20.

Neither party's position is fully persuasive. At the outset, however, I remind both parties that the trial is over and the evidence is closed.[12] Moreover, Vianix had the burden to prove its damages, which included the burden to prove to what extent certain licenses were sold concurrently. But, Vianix offered no proof at trial that every iChart license was sold concurrently. Therefore, there is no basis in the record for applying a multiplier to each iChart license sold, as Vianix suggests.

On the other hand, the evidence did not conclusively show, as Nuance argues, that no iChart licenses were sold concurrently. Specifically, I find uninformative and unhelpful Nuance's argument that iChart licenses were freely given away because it only billed for lines transcribed,[13] especially because Nuance contended that it owed royalties for every *license* sold, rather than every End User.[14] In rejecting that position and holding that Nuance owed royalties for every End User, I found that Nuance sold both concurrent and nonconcurrent licenses.[15] I then instructed the parties to use the Bourassa Data to identify the number of concurrent licenses sold for purposes of populating the

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[12] On October 7, 2010, Nuance filed a motion to reopen the record with a supporting memorandum. Vianix has not yet responded to that motion. This Letter Opinion, therefore, does not address any of the issues raised by Nuance in that motion.

[13] *See* Sept. 14 Letter at 5.

[14] Post-Trial Op., 2010 WL 3221898, at *15.

[15] *Id*. at n.127.

Damages Spreadsheet.[16] I made clear, however, that if the Bourassa Data cannot be used for these purposes, the parties should deem 15% of licenses sold to be concurrent.[17]

Because Nuance failed to keep sufficient data to enable the Court to determine precisely the extent of its royalty obligations,[18] I order the parties to deem 15% of the 27,752 iChart licenses identified *supra* Part I.A as concurrent. As such, the parties should apply a 5x multiplier to that number when populating the Damages Spreadsheet. This approach adequately accounts for the limitations of the Bourassa Data and enables a reasonable and responsible estimate to be made in keeping with the evidence adduced at trial. Thus, the number of iChart End Users to be used in the Damages Spreadsheet is [27,752 x .85 =] 23,589 + [27,752 x .15 x 5 =] 20,815, for a total of 44,404.

C. Should a multiplier be applied to 100% of JobLister/TransNet licenses?

It is also evident from Vianix's Damages Spreadsheet that it applied a 5x multiplier to each and every JobLister and TransNet license.[19] This is plainly incorrect. As discussed *supra*, I instructed the parties to enter a multiplier into the Damages Spreadsheet only in "a manner appropriate to convert the actual number of licenses

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16 *Id*. at *20 & n.153. I arrived at the 15% number by reviewing the Bourassa Data for a couple of different products and determining for each product that approximately 15% percent of the reported licenses were concurrent.

17 *Id*.

18 *See* Post-Trial Op., 2010 WL 3221898, at *5-6.

19 Sept. 13 Letter Ex. 1, at Attach. VI-D.

Nuance sold into an estimate of total End Users."[20] As such, a multiplier should be applied to JobLister and TransNet licenses only to the extent they were shown to have been sold concurrently. The evidence showed that while some JobLister and TransNet licenses were sold concurrently, others were not.[21] Thus, application of a 5x multiplier to every JobLister and TransNet license is clearly erroneous.

For its part, Nuance calculated the damages using the actual number of concurrent JobLister and TransNet licenses specified in the Bourassa Data.[22] Because this comports with my instruction in footnote 153 of the Opinion and Vianix has not shown that the Bourassa Data cannot be used for that purpose, I adopt Nuance's calculations for this aspect of populating the Damages Spreadsheet.

D. Should a multiplier be applied to any Physician's Direct licenses?

Vianix evidently also applied a multiplier to certain of the Physician's Direct licenses indicated in the Bourassa Data for purposes of populating its Damages Spreadsheet.[23] This, too, is incorrect. Nuance provided credible evidence at trial that

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20 *See supra* note 9.

21 *See* JX 562 at NUAN-000153222, NUAN-000153343, NUAN-000153391; Post-Trial Op., 2010 WL 3221898, at *19.

22 *See* Sept. 14 Letter Ex. D, Nuance's Proposed Post-Trial Damages Spreadsheet, at Attach. VI-C, D.

23 Sept. 13 Letter Ex. 1, at Attach. WP4. Vianix apparently used a 5x multiplier for any entry containing the word "multi." *See id*.

Physician's Direct was identical to EWS,[24] which I determined Nuance did not license on a concurrent basis.[25] Therefore, the record indicates that Nuance did not sell concurrent licenses for Physician's Direct, and no multiplier should be applied to the number of licenses associated with this product.[26] Therefore, I reject Vianix's calculations regarding the Physician's Direct licenses as inconsistent with the Post-Trial Opinion.

II. Conclusion

For the reasons stated, I reject Vianix's proposed order and final judgment and direct Nuance to submit a proposed order and final judgment consistent with this Letter Opinion and the Post-Trial Opinion within five days. **IT IS SO ORDERED.**

Sincerely,

/s/Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

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[24] T. Tr. 1298 (Pearah).

[25] Post-Trial Op., 2010 WL 3221898, at *19.

[26] To the extent Vianix argues that the word "multi" in the description of some Physician's Direct clients within the Bourassa Data indicates the existence of concurrent licenses, that is not something Vianix litigated at trial. Hence, Vianix did not meet its burden to show by a preponderance of the evidence that Physician's Direct licenses were sold concurrently and may not raise new arguments now in an attempt to get a second bite at the apple. *Cf. Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991) (noting that issues not raised and fairly presented to the trial court should not be considered on appeal).