

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: December 30, 2009

Date Decided: January 26, 2010

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RE: *CA, Inc. v. Ingres Corp.*
CA No. 4300-VCS

Dear Counsel:

This letter opinion addresses two issues raised by the parties' competing proposed orders implementing my December 9, 2009 memorandum opinion (the "Post-Trial Opinion"). In that opinion, the parties were ordered to present a conforming final order within fifteen days — *i.e.* by December 24, 2009.¹ In response to the parties' request, I briefly extended the deadline for them to present a final order. On December 30, 2009, the parties submitted not one stipulated proposed order, but two competing orders. Only at that time did the parties reveal, not by way of re-argument, but by way of argument over their competing proposed final orders, that the Post-Trial Opinion was based, in part,

¹ *CA, Inc. v. Ingres Corp.*, 2009 WL 4575009, at *49 (Del. Ch. Dec. 9, 2009).

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on an erroneous finding of fact. In addition, the parties disputed whether the Post-Trial Opinion should be read to allow Ingres to charge CA for access to OpenROAD 2006 only if Ingres charges all of its other customers for OpenROAD 2006. I now settle on a final order after explaining the basis for the prior findings regarding these two issues.

The first issue is whether my finding in the Post-Trial Opinion that EDS used Ingres' OpenROAD 2006 database software for only one month is incorrect, and what effect that erroneous finding of fact has on the implementing order. Concerning EDS' use of OpenROAD 2006, my decision found that (1) Ingres would have been required to provide CA the latest version of the OpenROAD software, which EDS ordered, free of charge as part of Ingres' maintenance and support obligations under the Legacy Support Agreement; (2) the 2007 Reseller Agreement superseded the Legacy Support Agreement as to CA's ability to obtain licenses of OpenROAD 2006 for its Legacy Customers; and (3) Ingres breached the Anti-Tampering Provision in the Contribution Agreement, and therefore any harm to it from EDS' brief use of OpenROAD 2006 was self-inflicted.² Of particular note here, the Post-Trial Opinion found that EDS' use of OpenROAD 2006 was limited to a brief, approximately one-month period in early 2009, and that finding in

² See *id.* at *21-*36.

part justified the conclusion that Ingres was not entitled to damages for EDS' use of the OpenROAD 2006 software.³

But, the letters accompanying both parties' proposed orders indicate that EDS is apparently still using OpenROAD 2006 to date.⁴ That is, both Ingres and CA agree that my finding as to EDS' use of OpenROAD 2006 was erroneous. They disagree, however, over the effect of this error on the final judgment. Ingres argues that this finding was crucial to my determination to deny Ingres any recovery for EDS' use of OpenROAD 2006.⁵ By contrast, CA argues that the erroneous finding does not affect the conclusion that Ingres is not entitled to damages for EDS' use of OpenROAD 2006.⁶

Before reaching a conclusion about the effect of this error, I first explain, for the purpose of clarifying the record, how I came to my prior conclusion. Because the witnesses at trial did not discuss the issue of whether or not EDS was still using OpenROAD 2006,⁷ my factual finding was based upon a number of documents in the

³ *Id.* at *36.

⁴ Letter from David J. Teklits to the Honorable Leo E. Strine, Jr. (Dec. 30, 2009) at 1-2 (“[A]s we understand, EDS continues to use OpenROAD 2006.”); Letter from Kurt M. Heyman to the Honorable Leo E. Strine, Jr. (Dec. 30, 2009) at 3 (“Ingres believes that, contrary to the Court’s Opinion, EDS continues to use OpenROAD 2006.”).

⁵ Letter from Kurt M. Heyman to the Honorable Leo E. Strine, Jr. (Dec. 30, 2009) at 3 (stating that “this factual finding was material to the Court’s decision regarding damages”).

⁶ Letter from David J. Teklits to the Honorable Leo E. Strine, Jr. (Dec. 30, 2009) at 2 (“CA believes that the term of EDS’ use of the product was not a pivotal fact in this Court’s finding that Ingres’ is not entitled to be paid by CA for EDS’ use of OpenROAD 2006.”).

⁷ *See, e.g., CA, Inc. v. Ingres Corp.*, CA No. 4300-VCS, at 1047:13-1052:14 (Del. Ch. Jul. 29, 2009) (TRANSCRIPT, testimony of John Swainson) (discussing CA’s agreement with EDS to

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record. An April 3, 2009 letter that CA sent EDS confirmed an agreement whereby CA agreed to provide support and cover up to \$1 million in costs if EDS rolled back to OpenROAD 4.1.⁸ And, in a contemporaneous email to CA, Sam Greenblatt of HP, Inc., EDS' parent company, indicated that EDS would take CA's offer and agree to roll back: "[w]e have represented to the court that we will be rolling back to open road 4.1."⁹

Based on these documents, my conclusion was that the April 3, 2009 agreement effectuated EDS' roll back. Because the OpenROAD 2006 drop down occurred in March 2009,¹⁰ I surmised that EDS used the software for approximately one month. This reading appeared consistent with the position Ingres took in its briefing, namely that CA, by agreeing to pay EDS to roll back to OpenROAD 4.1, had interfered with Ingres' contractual expectation that CA would provide OpenROAD 2006 to EDS under the terms of the 2007 Reseller Agreement.¹¹

roll back from OpenROAD 2006 to OpenROAD 4.1, but not indicating that EDS eventually refused to revert back to OpenROAD 4.1).

⁸ JX-388 (letter from Amy Olli to Dan Zadorzny (April 3, 2009)); *see also* JX-384 (email between John Swainson and Sam Greenblatt (April 1, 2009)) (discussing terms of the deal memorialized in the April 3, 2009 letter); JX-387 (email between Dennis Kozak and Sam Greenblatt (April 2, 2009)) (same).

⁹ JX-385 (email between Sam Greenblatt and John Swainson (April 2, 2009)).

¹⁰ *See* Tr. at 1177 (Warnock) (noting that EDS does "two code drops per year, one in March, one in October").

¹¹ *See, e.g.*, Ingres' Pre-Trial Op. Br. 30 (alleging that CA "entered into a secret agreement with EDS, pursuant to which CA agreed to pay EDS \$1 million and give it free, unlimited support if EDS would stop using OpenROAD 2006" and that "the evidence will show that CA has gone to extraordinary lengths to avoid its contractual obligations to provide OpenROAD 2006 to EDS in

At the post-trial oral argument, the status of EDS' use of OpenROAD 2006 was addressed briefly, and Ingres' counsel indicated that EDS' customer, the DWP, was still using OpenROAD 2006.¹² In crafting the Post-Trial Opinion, I forgot this oral statement and delved only into the voluminous record. As indicated above, this record was confusing and I came away from it with the wrong impression.

After receiving both parties' letters accompanying their competing proposed orders, I again reviewed the briefing and the record for evidence of what actually happened with EDS' roll back to OpenROAD 4.1. In its answering post-trial brief, CA noted that EDS had not yet reverted to OpenROAD 4.1, citing John Swainson's deposition testimony that EDS was still using OpenROAD 2006 by the time of that deposition on July 24, 2009.¹³ As with the discussion at the post-trial oral argument, I overlooked this deposition testimony and instead focused upon the written documents in

accord with the terms of the 2007 [Reseller] Agreement"); Ingres' Post-Trial Ans. Br. 22 ("CA entered into a secret agreement to pay EDS to roll back to OpenROAD 4.1 in order to avoid its obligations to Ingres (and Ingres's right to payment) under both the 2007 [Reseller] Agreement and [Contribution Agreement] for EDS's Order of OpenROAD 2006.").

¹² At post-trial oral argument, the following exchange occurred:

The Court: What's going on with OpenROAD 2006? Is someone using it? Is the English –

Mr. Berger: Yes.

The Court: – the English are using it?

Mr. Berger: Yes. The English government, the DWP is now using it.

CA, Inc. v. Ingres Corp., CA No. 4300-VCS, at 141:2-9 (Del. Ch. Sept. 3, 2009) (TRANSCRIPT).

the record when drafting the Post-Trial Opinion. In short, I blew it. EDS did not roll back to OpenROAD 4.1, and my original factual finding to the contrary was inaccurate.

The question then is what effect this error has on the Post-Trial Opinion and the proper form of final order. Ingres argues that this factual error requires a “wholesale reconsideration of the Court’s conclusion regarding damages.”¹⁴ I have duly reviewed my prior conclusion and assessed the effect this change has on that conclusion, and I have decided in the end that this clarification of the underlying facts does not materially affect the outcome of the case. Admittedly, one of the reasons supporting my prior conclusion that Ingres was not entitled to damages from CA for EDS’ use of OpenROAD 2006 was that Ingres was not materially harmed if EDS only used OpenROAD 2006 for approximately one month. Although EDS’ continuing use of OpenROAD 2006 means that Ingres has in fact suffered from the usage of that product without payment under the 2007 Reseller Agreement for some time, that fact does not color the other independent reasons supporting my conclusion that Ingres was not entitled to damages: namely that EDS installed OpenROAD 2006 only because of Ingres’ secret campaign, which breached the Anti-Tampering Provision in the Contribution Agreement; and Ingres alone brought this harm upon itself by giving EDS the evaluation license to OpenROAD 2006,

¹³ See CA’s Ans. Post-Trial Br. 26; see also Swainson Dep. II at 17:4-8 (“My understanding is that EDS never did revert back to the older version and they never took us up on the offer [to provide support and to cover up to \$1 million of the costs of the roll back].”).

which EDS used to roll out OpenROAD 2006 on the DWP's entire installation.

Therefore, this clarification of the facts does not materially affect my conclusion that CA does not owe Ingres damages for EDS' use of OpenROAD 2006. Because this clarification is immaterial, I do not include language in the final order, as Ingres has proposed, limiting damages to EDS' use of OpenROAD 2006 over a one-month period.

The second issue is whether Ingres must charge other customers for OpenROAD 2006 in order to charge CA for access to OpenROAD 2006 under the terms of the 2007 Reseller Agreement. In the context of discussing the 2007 Reseller Agreement's effect on the Legacy Support Agreement as to the provision of OpenROAD 2006, this court found as follows:

[T]he 2007 Reseller Agreement supersedes the Legacy Support Agreement in regard to Legacy Customers' ability to obtain licenses to OpenROAD 2006. But, this holding does not mean that Ingres can designate Legacy Products as Post Divestiture Products at its whim. That is, Ingres cannot pick and choose to whom a new version is an update, to be provided for free, or a Post-Divestiture Product, for which the customer must pay by procuring a new license or subscription agreement. Unless Ingres treats a new version of a Legacy Product as a Post-Divestiture Product for *all* its customers, and not simply for CA, Ingres remains obligated to provide maintenance and support for the Post-Divestiture Product as required by the Legacy Support Agreement.¹⁵

CA's proposed order makes the requirement that CA pay for OpenROAD 2006 under the 2007 Reseller Agreement conditional on Ingres charging all customers for OpenROAD

¹⁴ Letter from Kurt M. Heyman to the Honorable Leo E. Strine, Jr. (Dec. 30, 2009) at 3.

2006. That is, if Ingres provides OpenROAD 2006 for free to any customer, Ingres must provide it to CA for free as an update under the Legacy Support Agreement, rather than as a product covered by the 2007 Reseller Agreement. Ingres, on the other hand, argues that this condition of universal pricing under the 2007 Reseller Agreement only applies to future Post-Divestiture Products, and not to OpenROAD 2006.¹⁶ And, therefore, Ingres contends that the order should not make it a condition that Ingres treat all customers equally before it can charge CA for access to OpenROAD 2006.

I include language in the final order requiring Ingres to treat CA equally with other customers as to pricing for OpenROAD 2006, and not just for other products or future OpenROAD products. My reasoning for reaching this conclusion was clearly given in the Post-Trial Opinion:

[T]he 2007 Reseller Agreement is a “global” agreement meant to provide CA access to new products as they are presented generally to the market. That is, CA cut the deal it did in the 2007 Reseller Agreement because Ingres took the position that *all* customers — not just CA's Legacy Customers — had to pay for access to Post-Divestiture Products because those were new products that Ingres created after the Divestiture. As to improvements, updates, new versions, etc. of Legacy Products that are not

¹⁵ *CA, Inc. v. Ingres Corp.*, 2009 WL 4575009, at *33.

¹⁶ Letter from Kurt M. Heyman to the Honorable Leo E. Strine, Jr. (Dec. 30, 2009) at 2, n. 2 (“Ingres fully recognizes, as the Court held, that with respect to future versions of OpenROAD or other products, that ‘[u]nless Ingres treats a new version of a Legacy Product as a Post-Divestiture Product for all its customers, and not simply for CA, Ingres remains obligated to provide maintenance and support for the Post-Divestiture Product as required by the Legacy Support Agreement.’ However, specifically with respect to OpenROAD 2006 Ingres believes the Court already made its finding that this product is specifically covered by the 2007 Reseller Agreement.”) (internal citations omitted).

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treated by Ingres as entirely new products as to *all* customers, Ingres must honor all of its maintenance and support obligations under the Legacy Support Agreement.¹⁷

I do not understand how Ingres can interpret this language to mean that Ingres can discriminate against CA as to OpenROAD 2006 but not any other product covered by the 2007 Reseller Agreement. Consistent with the parties' expectations as to the scope of the 2007 Reseller Agreement, as explained in the language block-quoted immediately above, my conclusion is that Ingres must provide OpenROAD 2006 as an update to CA under the Legacy Support Agreement if it provides other customers (such as those who were licensed to use OpenROAD 4.1) with OpenROAD 2006 for free. That is, Ingres can only charge CA for OpenROAD 2006 under the 2007 Reseller Agreement if it treats CA equally with Ingres' other customers.

An implementing final judgment to this effect will be entered contemporaneously with this decision.

Very truly yours,

/s/ Leo E. Strine, Jr.

Vice Chancellor

¹⁷ *CA, Inc. v. Ingres Corp.*, 2009 WL 4575009, at *33.