

CONTRACTS**Breach of Contract**

Hewlett-Packard failed to pay software royalties, plaintiff said**Decision (P)** \$6,208,440**Case** Richard A. Ross v. Hewlett Packard, No. 104 CV 015323**Court** Superior Court of Santa Clara County, San Jose**Judge** John J. Garabaldi**Date** 11/6/2007**Plaintiff****Attorney(s)**

Kirk B. Freeman (lead), Law Offices of Kirk B. Freeman, San Francisco, CA
Mathew A. Mallet, Law Offices of Kirk B. Freeman, San Francisco, CA

Defense**Attorney(s)**

Franklin Brockway Gowdy (lead), Morgan, Lewis & Bockius, LLP, San Francisco, CA
Benjamin B. Smith, Morgan, Lewis & Bockius, LLP, San Francisco, CA
Sharon R. Smith, Morgan, Lewis & Bockius, LLP, San Francisco, CA

Facts & Allegations

In 1999 plaintiff Richard Ross, 50, a computer software inventor, and Hewlett-Packard entered into a written contract wherein Hewlett-Packard purchased Ross's company, Telemedia Devices, Inc., for the purpose of acquiring Ross' technology, FreezeDry, for use by its embedded software organization. FreezeDry is software code that reduces the memory and increases the speed of Java language virtual machines. The contract provided for payment of royalties of up to \$4.75 million over a five-year period if Hewlett-Packard's sales of Chai Virtual Machine, which used the FreezeDry code, exceeded \$50 million in net revenues. The virtual machine allowed the Java computer language to operate on different operating systems of different computer models. Hewlett-Packard did not pay the royalties when they allegedly came due in December 2003.

Ross sued Hewlett-Packard for breach of contract. He claimed that royalties were to be calculated only on the defendant's sales of its products containing the Chai Virtual Machine to external third party customers. Such customers often did not qualify for the company's higher discount rates because they bought in low bulk (four units or less) and so paid a higher per unit price.

Hewlett-Packard countered that royalties should be calculated on internal transactions between the embedded software organization and other divisions of Hewlett-Packard. These were often high-volume transactions which increased the discount rate and therefore reduced the per unit price assigned to the Chai Virtual Machine software for purposes of the royalty calculations.

The parties disputed whether sales of the Chai Virtual Machine exceeded \$50 million in net revenues.

Injuries/Damages

Ross sought recovery of lost revenue from unpaid royalties.

Result

A jury found in favor of plaintiff and awarded him \$4.75 million in unpaid royalties and \$1,458,440 in pre-judgment interest for a total award of \$6,208,440.

Plaintiff(s)**Richard A. Ross**

\$4,750,000 Unpaid royalties

\$1,458,440 Pre-judgment interest

\$6,208,440 plaintiff's total award**Demand** \$4.5 million**Offer** \$1 million**Insurer(s)**

None reported

Plaintiff**Expert(s)**

Richard Ross, damage models, Berkeley, CA (Kirk B. Freeman, Mathew A. Mallet)

Defense**Expert(s)**

Michael C. Keeley, economics, Menlo Park, CA (Franklin Brockway Gowdy, Benjamin B. Smith, Sharon R. Smith)

Post-Trial

A decision is pending on defendant's affirmative defense argument that plaintiff Ross acted with unclean hands by fraudulently inducing the agreement with Hewlett-Packard. Defendant claimed that plaintiff had misrepresented the technical capacity of the FreezDry software.

Editor's Note

None reported

Written By –Eddie Vega