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OF THE  
STATE OF DELAWARE

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June 24, 2009

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***RE: Ivize of Milwaukee v. Compex Litigation Support  
C.A. No. 3158-VCL***

Dear Counsel:

I have received and reviewed the parties' letters regarding outstanding issues related to the order and final judgment in this case. For the reasons articulated below, the court finds Ivize's requested attorneys' fees to be reasonable, but certain expenses should not be included in the definition of "costs." Also, the court will require more information before a determination regarding the reasonableness of the expert fees can be made. As to the equipment not listed on Schedule 1.3 of the asset purchase agreement (the "APA"), Ivize will be liable to Compex in restitution for the fair value of the use of that equipment.

**I.**

At trial, Ivize showed that Compex breached the APA, and, thus, under the fee-shifting provision of that agreement, Ivize was entitled to its attorneys' fees and costs. Ivize seeks \$662,844.32 in attorneys' fees and costs and \$37,062.36 in expert witness fees. Compex argues that the court should award Ivize no more than half of the requested amount.

In determining the reasonableness of attorneys' fees, Delaware courts examine the factors set forth in Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Responsibility. These factors include, but are not limited to:

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the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal services properly, the fee customarily charged in the locality for similar legal services, the nature and length of the professional relationship with the client, and the experience, reputation, and ability of the lawyer or lawyers performing the services.<sup>1</sup>

Ivize's requested attorneys' fees are reasonable when the standards above are applied to the facts here. Ivize's attorneys spent over 1,350 hours on this matter, with substantial partner involvement, over the course of nearly two years of litigation.<sup>2</sup> Additionally, Compex made it necessary for Ivize's attorneys to, after failed attempts to negotiate, seek the intervention of this court to gain access to accounts receivable to which Ivize was clearly entitled. Furthermore, Ivize's attorneys engaged in negotiations regarding real estate and equipment leases related to the APA.<sup>3</sup> Ivize's attorneys are associated with two well respected law firms and the attorneys performed their duties skillfully. The hourly rates charged appear within the range of reasonableness when compared to the rates typically charged by Wilmington, Delaware and Boston, Massachusetts based law firms of comparable size and reputation.

In its June 11, 2009 letter, Compex correctly notes that the terms "costs" and "expenses" have distinct meanings under Delaware law. The definition of "costs" under Court of Chancery Rule 54 and under Delaware case law interpreting agreements between parties has been held to exclude items "such as photocopying, transcripts, travel expense, and computer research."<sup>4</sup> "Expenses," on the other hand, has a legally recognized broader definition.<sup>5</sup> Section 6.5 of the APA states that "[i]n the event of any litigation among the parties arising out of [the APA], each Prevailing Party (if any) shall be entitled to reasonable attorneys' fees and

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<sup>1</sup> *Tafeen v. Homestore, Inc.*, 2005 WL 789065, at \*2 (Del. Ch. Mar. 29, 2005).

<sup>2</sup> In this case, Ivize's attorneys filed a complaint, briefed and argued a motion for partial summary judgment, conducted discovery, took multiple depositions, and prepared for and participated in a two-day trial. Ivize's attorneys also assisted in Compex's separate lawsuit against its employees.

<sup>3</sup> Compex added to the difficulty of and time required for these negotiations by withholding information necessary for Ivize to determine with reliability its rights and liabilities with respect to the leases.

<sup>4</sup> *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at \*4 (Del. Ch. Apr. 27, 2004) (citations omitted).

<sup>5</sup> *Id.*

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*costs* associated with such litigation from its opposing party.”<sup>6</sup> Ivize argues that the parties intended for “expenses” to be covered by this section because the heading of the section is “litigation expenses.” Section 6.9 of the APA, however, does not allow the court to consider the headings in the construction or interpretation of the agreement. Therefore, the court will disallow any expenses related to photocopying, transcripts, travel expenses, and computer research.<sup>7</sup>

Also in its June 11, 2009 letter, Compex argues that the court should not approve Ivize’s request for reimbursement of expert fees because the court did not agree with the basic premise upon which the expert’s opinion was built. Compex’s breach of the APA caused the need for this litigation which reasonably required an expert to opine on the damages incurred as a result of that breach. While the court ultimately chose not to follow the analysis of the expert because it was based on a premise the court determined to be faulty, the court will not deprive Ivize of reimbursement for the expert’s fees simply because a legal argument failed.<sup>8</sup> Ivize, however, did not submit adequate information regarding how the expert’s time was spent and the rate(s) the expert charged for his time. Ivize is directed to provide such information to Compex. The parties should attempt to agree regarding reasonable expert fees. If agreement cannot be reached, the parties are directed to submit to the court affidavits containing the rate and use of time information.

## II.

In its June 8, 2009 letter to the court, Ivize essentially admitted that it used equipment for which leases were not listed on Schedule 1.3 of the APA as Assumed Liabilities. Compex argues that Ivize should be liable for the full lease

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<sup>6</sup> Emphasis added.

<sup>7</sup> Section 5.1 (indemnification by the Company and Parent), which includes “expenses” as recoverable in indemnification claims, likely does not deal with lawsuits between the parties to the APA. However, in a conflict between Section 5.1 and Section 6.5, the more directly applicable and narrower section, Section 6.5 controls. See *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 962 (Del. 2005). As discussed in the court’s post-trial opinion, Ivize is entitled to “expenses” it incurred pursuant to the separate Quantum Litigation, as Section 5.1 governs those expenditures. See *Ivize of Milwaukee, LLC v. Complex Litigation Support, LLC*, 2009 WL 1111179, at \*13-14 (Del Ch. Apr. 27, 2009).

<sup>8</sup> See *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 237-38 (awarding expert fees necessarily incurred by the plaintiffs, even though the defendants argued that the expert “did nothing to advance the fact-finding process.”).

payments associated with that equipment while the equipment was in Ivize's possession. Ivize, however, had no contractual obligation to assume the leases. Compex was aware that the equipment was in Ivize's possession and Ivize did not prevent Compex from retrieving the equipment. Therefore, Ivize shall pay Compex only the fair value of the use of the equipment, in restitution. The court has not been provided with sufficient information to determine the fair value of Ivize's use of the equipment, but expects that the parties can agree on a reasonable amount now that the correct theory has been identified. If the parties cannot agree on the amount owed, Ivize shall submit to the court an affidavit containing statements and documents sufficient to show how much the disputed equipment has been used and how that usage compares (as a percentage) to normal, full-time use.

### III.

The parties are directed to confer and submit a revised final order consistent with this opinion and affidavits, if required, on or before June 29, 2009.  
IT IS SO ORDERED.

/s/ Stephen P. Lamb  
Vice Chancellor