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AMERICAN ARBITRATION ASSOCIATION
WESTERN REGION
COMMERCIAL ARBITRATION TRIBUNAL

EXPRESS LOGIC, INC,

Claimant,

v.

GREEN HILLS SOFTWARE, INC.,

Respondent.

AND ALL RELATED CROSS-CLAIMS.

AAA No. 73 133 Y 00226 06 BRSH

FINAL AWARD

WE, THE UNDERSIGNED ARBITRATORS, Michael J. Weaver, Esq. (Chairman), Gregory A. Post, Esq. and Richard W. Page, Esq. (the "Tribunal") having been designated in accordance with the 1998 Reseller Agreement dated December 10, 1998 (the "Reseller Agreement") between Claimant Express Logic, Inc. ("Express Logic") and Respondent Green Hills Software, Inc. ("Green Hills") and by the consent of all parties participating in this arbitration, having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

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2 The claims of Express Logic for copyright infringement, breach of contract and unfair
3 competition, including its requests for injunctive relief and damages, are hereby denied. The claims
4 of cross-complainant Green Hills, including claims for libel and trade libel, interference with
5 prospective economic advantage and breach of the implied covenant of good faith and fair dealing,
6 are hereby denied. Each party shall bear its attorneys' fees and other expenses related to this
7 arbitration as incurred.

8 **I.**
9 **INTRODUCTION**

10 Express Logic is the developer and owner of several computer software programs for which
11 it asserts copyright protection. The principal software program marketed by Express Logic is a real
12 time operating system ("RTOS") named ThreadX. Express Logic asserts that it has duly registered
13 its copyrights with the United States Copyright Office as Registration Nos. TX-6-334-737 (ThreadX
14 Version 3.0); TX-6-334-738 (ThreadX Version 4.0); TX-6-334-736 (Programmers' Reference
15 Guide); and TX-6-341-013 (ThreadX User's Guide).

16 ThreadX was written in the C programming language and is a small footprint, low-end RTOS
17 which is embedded in a number of devices such as cell phones, thermostats, computer printers and
18 digital cameras.

19 Green Hills is the developer and owner of a number of RTOS computer programs and related
20 tool kits, including INTEGRITY, velOSity and the newly developed μ -velOSity (pronounced
21 "micro-velOSity"). INTEGRITY is a high-end RTOS which is used in many sophisticated
22 applications such as the avionics for the B-1 Bomber and for medical instruments which require a
23 very high level of quality processing. Green Hills' velOSity program is a mid-range RTOS which
24 occupies less space (has a smaller footprint) and fewer features than INTEGRITY, making it
25 partially competitive with ThreadX. With an even smaller footprint and fewer features, μ -velOSity
26 is a low-end RTOS which competes directly with ThreadX.
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2 For several years, Green Hills marketed ThreadX as its low-end RTOS product pursuant to
3 the Reseller Agreement, in which the parties agreed to mutual exclusivity. As part of mutual
4 exclusivity, Green Hills would only sell ThreadX as its low-end product and would cease marketing
5 velOSity. This relationship deteriorated to the point where the parties suspended mutual exclusivity.
6 Green Hills felt it needed to have its own low-end RTOS product. To accomplish this, Green Hills
7 reinstated its sales of velOSity and completed an in-house programming contest to write an
8 adaptation layer (or importation kit) allowing application programs written by ThreadX customers to
9 be imported to run on Green Hill's INTEGRITY (and the related RTOS velOSity). This gave Green
10 Hills the ability to sell directly to Express Logic's customer base. Next Green Hills had its computer
11 programmers write a new low-end RTOS, which it named μ -velOSity, that competed directly with
12 ThreadX.

13 The Reseller Agreement contains an arbitration clause at §18.1 which states in pertinent part:
14 "Any claim, dispute, action or proceeding related to or arising out of this Agreement shall be solely
15 and finally resolved by arbitration in the city of San Diego, California in accordance with the then
16 existing Commercial Arbitration Rules of the American Arbitration Association."

17 On June 12, 2006, Express Logic filed its Demand for Arbitration accusing Green Hills of
18 copyright infringement; breach of contract; breach of the implied covenant of good faith and fair
19 dealing and unfair competition. On July 13, 2006, Green Hills filed its cross-complaint alleging libel
20 and trade libel; tortious interference with prospective economic advantage; and breach of contract.

21 This proceeding was assigned to the Western Regional Office of the American Arbitration
22 Association ("AAA") for administration. Thereafter, the AAA duly appointed a panel of three
23 arbitrators, Michael J. Weaver, Esq. (Chairman), Gregory A. Post, Esq. and Richard W. Page, Esq.
24 (the "Tribunal").
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II.
CLAIMS AND CROSS-CLAIMS
AT ISSUE IN THIS ARBITRATION

First, Express Logic alleges copyright infringement of ThreadX because Green Hills (1) copied elements of ThreadX contained in the application programming interface (“API”) file in writing the adaptation layer for ThreadX-INTEGRITY and (2) later included ThreadX API elements used in the adaptation layer in the new RTOS μ -velOSity.

Because all elements asserted by Express Logic as being infringed are found within the ThreadX API header file entitled “tx_api.h” (containing several hundred lines of C programming language code), the Tribunal will use the term “ThreadX API” as a shorthand reference for the relevant asserted elements susceptible to copyright protection within each of the registered works. The Tribunal will refer to the entire ThreadX RTOS program (containing approximately 27,000 lines of C programming language code) as the “ThreadX RTOS.” The parties have engaged in spirited debate concerning the proper definition of the commonly used computer programming term “source code.” The Tribunal for purposes of this Final Award will use the term source code to refer to any code in the relevant programs written in the higher level C programming language.

Second, Express Logic alleges several breaches of contract based upon the Reseller Agreement, the 2001 Single Product License Agreement (the “2001 Single Product License”) and the 2004 Microprocessor Buyout Agreement dated June 30, 2004 (the “Buyout Agreement”). Express Logic has alleged five breaches of contract, including its claim for breach of the implied covenant of good faith and fair dealing. The five breaches of contract are as follows: (1) Misuse of ThreadX Source Code and Materials, (2) Breach of Confidentiality, (3) Use of Disparaging Advertising Material, (4) Removal of Copyright Notices and (5) Breach of the Implied Covenant of Good Faith and Fair Dealing.

Third, Express Logic has asserted claims for false advertising and unfair competition under the Lanham Act and California Business & Professions Code §17200.

1 Express Logic seeks injunctive relief, monetary damages and reimbursement of attorneys'
2 fees and expenses.

3 The cross-complaint filed by Green Hills contains a series of claims against Express Logic
4 including the following: (1) Libel and Trade Libel, (2) Tortious Interference with Prospective
5 Economic Advantage, and (3) Breach of the Implied Covenant of Good Faith and Fair Dealing.
6 Green Hills seeks monetary damages and reimbursement of attorneys' fees and expenses.

7 **III.**
8 **PRE-HEARING RULINGS**
9 **AND CONDUCT OF HEARINGS**

10 On September 22, 2006, a telephonic preliminary hearing was conducted with the Tribunal
11 and with counsel and company representatives for each of the parties. A briefing and hearing
12 schedule was established for consideration of an anti-SLAPP motion pursuant to California Code of
13 Civil Procedure ("CCP") §425.16 and in the alternative a motion for judgment on the pleadings
14 pursuant to CCP §438 filed by Express Logic. The purpose of each motion was to strike in its
15 entirety the cross-complaint filed by Green Hills. After consideration of the briefs and conducting a
16 hearing, the Tribunal denied the anti-SLAPP motion and granted the motion for judgment on the
17 pleadings only as to the breach of contract claims in the cross-complaint.

18 On September 22, 2006, the Tribunal additionally set a briefing and hearing schedule for a
19 motion for preliminary injunction filed by Express Logic. The basis for the motion for preliminary
20 injunction was that the Green Hills RTOS μ -velOSity was an infringing copy of the Express Logic
21 RTOS ThreadX. Express Logic asserted that Green Hills directly copied the source code of the
22 ThreadX API allowing the creation of μ -velOSity. Express Logic further asserted that all source
23 code is inherently expressive and entitled to copyright protection. Express Logic further asserted
24 that Green Hills was encouraging low-end RTOS users to migrate from ThreadX to μ -velOSity,
25 causing Express Logic irreparable injury and eroding Express Logic's customer base. Green Hills
26 argued that API's are functional and therefore cannot be protected as expression under copyright
27 law. After consideration of the briefs and conducting a hearing, the Tribunal was unwilling to rule
28 that source code is always expressive and entitled to copyright protection. *See Sega Enterprises Ltd.*

1 *v. Accolade, Inc.*, 977 F. 2d 1510 (9th Cir. 1992); *Sony Computer Entertainment, Inc. v. Connectix*
2 *Corporation*, 203 F.3d 596 (9th Cir. 2000). Conversely, the Tribunal was unwilling to rule that an
3 API was always functional and not entitled to copyright protection. *Bateman v. Mnemonics, Inc.*, 79
4 F.3d 1532 (11th Cir. 1996). The Tribunal denied the motion for preliminary injunction and invited
5 the parties through experts to perform an abstraction-filtration-comparison (“AFC”) analysis, the
6 purpose of which would be to identify the expressive content of the ThreadX API and compare this
7 protectable expressive content to μ -velOSity in order to determine whether copyright infringement
8 had occurred. Hearings were scheduled for February 2007 in San Diego, California.

9 Nineteen days of hearings were conducted during the months of February - May 2007. As
10 part of these hearings, the Tribunal was given an introductory tutorial in the C programming
11 language and was treated to a thorough AFC analysis of the ThreadX API as contained in the
12 tx_api.h file and to a rigorous comparison of the allegedly protected elements of the tx_api.h file to
13 the adaptation layer written by Green Hills and to the μ -velOSity RTOS as finally released to
14 customers. Post-hearing briefs were submitted. On June 27, 2007, the parties and their counsel
15 engaged in a full day of closing arguments. The parties requested that the Tribunal issue an Interim
16 Award resolving each of the claims in the demand and cross-complaint and that the Tribunal find
17 whether either party is entitled to reimbursement of its attorneys’ fees and expenses. The parties
18 requested that the hearing be left open to allow any party entitled to such reimbursement to submit
19 its declarations supporting attorneys’ fees and expenses. On July 19, 2007, each party submitted its
20 proposed form of Interim Award. On July 24, 2007, the Tribunal met to review the proposed forms
21 of Interim Award. On July 24, 2007, the Tribunal decided that all relevant evidence had been
22 presented and closed the hearings. Having decided all of the claims at issue in this proceeding, the
23 Tribunal hereby issues its Final Award.

24 III.

25 COPYRIGHT INFRINGEMENT CLAIMS

26 The evidence established that Express Logic owns valid copyrights in Registration Nos. TX-
27 6-334-737, TX-6-334-738, TX-6-334-736 and TX-6-341-013. The ThreadX API header file is
28 among the elements contained in Express Logic’s copyrights. Green Hills admits it copied the

1 ThreadX API header file. The pivotal issue in this dispute is whether what Green Hills copied is
2 protected by copyright law. Based on the evidence, the Tribunal finds that the ThreadX RTOS,
3 including the ThreadX API header file (consisting of tx_api.h) is an original work, showing a
4 sufficient modicum of creativity and independent creation by its author William Lamie. Express
5 Logic alleges copyright infringement of ThreadX because Green Hills (1) copied elements of the
6 ThreadX API in writing the adaptation layer for ThreadX-INTEGRITY and (2) later included
7 ThreadX API elements used in the adaptation layer in the new RTOS μ -veLOsity.

8 AFC Analysis. Pursuant to the pre-hearing orders of the Tribunal, the parties were to
9 perform an AFC analysis using experts in the field. The AFC analysis is designed through the
10 abstraction and the filtration phases to identify the code within ThreadX API which is protectable by
11 copyright law.

12 The first phase of the AFC analysis is abstraction. The purpose of this analysis is to identify
13 the portions of the computer program which are ideas and hence too abstract to be protectable under
14 copyright law. For purposes of an AFC analysis, the ThreadX API is visualized as a pyramid with
15 its object code at the bottom and several intermediate levels ultimately reaching the highest level of
16 abstraction (pure ideas) at the apex of the pyramid. The expressive code remaining after the
17 abstraction phase is then subjected to filtration.

18 The latter filtration phase of the AFC analysis is to apply existing legal theories which would
19 keep expressive code from being protectable under copyright law. Express Logic offered Dr.
20 Benjamin F. Goldberg who is a professor of computer science at New York University and has
21 previously been qualified to testify in court as an expert in AFC analyses. Dr. Goldberg's AFC
22 analysis was supported by Professor Douglas Gary Lichtman who is a professor of law at the
23 University of Chicago. The testimony of Dr. Goldberg as supported by Prof. Lichtman is the most
24 favorable for Express Logic. Dr. Goldberg identified several legal theories for filtration, including
25 originality, scenes-a-faire and merger. Dr. Goldberg's AFC analysis demonstrated protectable code
26 from the ThreadX API header file at several levels (Levels 0,1 & 2).

27 For purposes of its analysis, the Tribunal accepted that the abstraction and filtration
28 performed by Dr. Goldberg on ThreadX API resulted in protectable code. At level 0, the protectable

1 code identified by Dr. Goldberg included function prototypes, constant names, typedef names and
2 some comment fragments. At level 1, the protectable code identified by Dr. Goldberg included
3 English language translation of the prototypes. At level 2, the protectable code identified by Dr.
4 Goldberg comprised a list of ThreadX services, specifically the execution unit component.

5 Green Hills presented evidence from Professor Kevin Jeffay who is a professor of computer
6 science at the University of North Carolina at Chapel Hill and who has been previously qualified as
7 an expert in AFC analysis. His testimony was supported by Professor Peter S. Menell who is a
8 professor of law at the University of California, Boalt Hall. Based upon direction and instructions
9 provided by Prof. Menell, Prof. Jeffay then applied additional filtration factors for
10 interoperability/comparability, functionality and words and short phrases. The result of Dr. Jeffay's
11 analysis at level 0 is to filter all protoypes, constant names, typedef names and comment fragments.
12 The result of Dr. Jeffay's analysis at level 1 is to filter all English language translation of the
13 prototypes as compatibility restraints and as functional elements. The result of Dr. Jeffay's analysis
14 at level 2 is to filter the execution unit component as a compatibility restraint and under
15 functionality.

16 If the Tribunal decides that compatibility and functionality are legitimate filters under
17 applicable law, then no protectable code survives the abstraction and filtration phases to be
18 compared to the accused adaptation layer or to μ -velOSity. The Tribunal has considered all of the
19 legal authorities offered by the parties with particular emphasis on the law of the Ninth Circuit.

20 The Ninth Circuit has approved the concept of abstraction used in *Computer Assocs. Int'l v.*
21 *Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992) aff'g 775 F.Supp. 544 (E.D.N.Y. 1991). See *Sega*
22 *Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1525 (9th Cir. 1992). The Ninth Circuit has
23 approved the concept of filtration prior to comparison to the allegedly infringing work. *Apple*
24 *Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1439-46 (9th Cir. 1994). Filtration on the basis of
25 compatibility has likewise been accepted. The Ninth Circuit has found that "functional requirements
26 for compatibility" in a computer program "are not protected by copyright." *Sega*, 977 F.2d at 1522;
27 *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Circuit 2000). The
28 Tribunal does not accept Express Logic's argument that *Sega* and *Sony* are limited to application of

1 the fair use doctrine. See *Atari Games Corp. v. Nintendo of Am., Inc.*, 1993 WL 214886 at *7n.14,
2 30 U.S.P.Q 2d 1401 (N.D. Cal. Apr. 15, 1993). Nor does the Tribunal accept that unprotected
3 compatibility constraints apply only if they restrain the copyright owner.

4 The Tribunal finds that under Ninth Circuit law it is appropriate to filter for compatibility
5 restraints and functionality as applied by Prof. Jeffay. Support for this legal conclusion can be found
6 in the Eleventh Circuit's decision in *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532 (11th Cir. 1996).
7 This decision was cited by both Express Logic and Green Hills in their various briefs and oral
8 arguments. *Bateman* relies heavily on *Sega* and *Sony* and reflects an understanding that filtration
9 can and should include compatibility and functionality issues.

10 In *Bateman*, the Court of Appeal reversed a jury verdict based on the trial court's failure to
11 instruct on functionality as part of the filtration analysis. *Bateman* lists numerous factors and
12 considerations relevant to this Tribunal's analysis of the issues before it, is supported by Ninth
13 Circuit authority, and is consistent with the logic reflected by the *Sony* and *Sega* line of cases.
14 Therefore, all ThreadX API elements in Dr. Goldberg's levels 0-2 are filtered for functionality and
15 compatibility, except for a small amount of code constituting parameter names and comments, which
16 are filtered for other reasons, such as the doctrine of words and short phrases.

17 Express Logic argues that the concept behind compatibility in *Sega* and *Sony* is to achieve
18 compatibility in the accused program μ -velOSity. Under the current set of circumstances, Green
19 Hills ultimately wrote μ -velOSity which is not compatible to ThreadX. Therefore, according to
20 Express Logic the application of the compatibility filter has been improperly applied by Prof. Jeffay
21 and does not eliminate the protectable code identified by Dr. Goldberg. Green Hills counters that at
22 this filtration stage in the AFC analysis, however, the focus is entirely on ThreadX as the asserted
23 product allegedly protected by copyright. The Tribunal finds that the method of application of the
24 compatibility factor by Prof. Jeffay was appropriate.

25 Prof. Jeffay testified that Dr. Goldberg made mistakes in his application of the filter for
26 originality and for other filtering factors. The Tribunal finds it unnecessary to make a finding based
27 upon originality or the other filtering factors applied by Dr. Goldberg, because the filters of
28 compatibility, functionality and words and short phrases were sufficient to filter all asserted elements

1 in the ThreadX API.

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3 Therefore, the Tribunal finds that none of the asserted elements of ThreadX API survives the
4 abstraction and filtration phases. Comparison to the accused adaptation layer and μ -velOSity is not
5 required. Therefore the Tribunal finds that pursuant to AFC analysis, neither the adaptation layer
6 nor μ -velOSity infringes ThreadX.

7 In addition to its AFC analysis, Express Logic advanced two further arguments to support
8 infringement of the ThreadX. The first is based upon a comparison of compilations of code from
9 ThreadX and μ -velOSity, which Dr. Goldberg concludes constitutes infringement by the accused
10 program μ -velOSity. The second is Express Logic's assertion that the direct copying by Andre Yew
11 of the ThreadX API header file, for creation of an adaptation layer, was infringement.

12 Compilation. Express Logic also claims infringement in a "compilation" of Level 0-2
13 elements. This claim is not supported legally or factually. First, Dr. Goldberg's "compilations"
14 were not the RTOSes "as a whole," or even of the API files, as they must be in order to be valid
15 compilations for these purposes. *Apple*, 35 F.3d at 1446. Dr. Goldberg created his own
16 compilations, which is error under Ninth Circuit law. Second, even if the actual compilations in just
17 the API files are compared, it is clear they are not "virtually identical," or "bodily appropriated," as
18 they must be to infringe. *Id.*; *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 205 (9th Cir.
19 1989).

20 Adaptation Layer. Express Logic also claims that, even if the μ -velOSity API header files do
21 not infringe the ThreadX API, the ThreadX-INTEGRITY adaptation layers developed by Mr.
22 Zavisca and Mr. Yew during the in-house Green Hills programming contest do infringe.

23 Regarding Mr. Zavisca's adaptation layer (which was used as a starting point for the
24 development of μ -velOSity), the evidence as discussed above showed that (with the exception of
25 comments and parameter names) Mr. Zavisca copied only those elements required for compatibility,
26 which are not protected by copyright. The comments and parameter names are words and short
27 phrases.

28 Express Logic argues that Mr. Yew's adaptation layer infringed because it included an entire

1 copy of the ThreadX API. The evidence supports the conclusion Mr. Yew's adaptation layer was
2 never used beyond the in-house programming contest. Hence, even if Mr. Yew's adaptation layer
3 were infringement, Express Logic offered no proof of damage and the action was a transformative
4 fair use of a small amount of code constituting the ThreadX API.

5 The Tribunal concludes that, under the AFC analysis, the compilation analysis, and the
6 adaptation layer analysis, the copyright claims of Express Logic are denied.

7 IV.

8 CONTRACT CLAIMS

9 In addition to the allegations of copyright infringement, Express Logic has alleged five
10 breaches of contract, including breach of the implied covenant of good faith and fair dealing:

11 1. Misuse of ThreadX Source Code and Materials. Express Logic alleges that Green Hills
12 used ThreadX source code and materials for purposes beyond those allowed by Section 5.4 of the
13 Reseller Agreement, Paragraphs 2 and 3 of the 2001 Single Product License and paragraphs 2 and 3
14 of the Buyout Agreement. Green Hills argues that the alleged infringement is not of the terms of
15 these provisions, but rather that Green Hills exceeded the scope of the licenses granted by using
16 ThreadX for unlicensed purposes (to create and test an adaptation layer that became the starting
17 point for μ -velOSity). Hence, Express Logic seeks to protect its right to reproduce, distribute and
18 create derivative works from copyrighted works. Express Logic's reading of the relevant language
19 in the agreements is overbroad and not supported by the evidence offered during the hearing. There
20 is no proof that the contract was breached or that Green Hills used improperly the source code
21 provided under the terms of the relevant contract. In any case, there is ample proof that the ThreadX
22 API code was readily available from a host of public sources. Moreover, Express Logic has failed to
23 offer any evidence sufficient to demonstrate the existence of damage caused by the alleged breach of
24 the agreement. Even if liability existed based upon the evidence submitted, there would be no
25 remedy available for this alleged breach of the agreement.

26 2. Breach of Confidentiality. Express Logic also claims that Green Hills breached the
27 confidentiality provision (Section 11) of the Reseller Agreement by failing to take reasonable steps
28 to protect confidential ThreadX source code and my misusing confidential Express Logic pricing

1 and licensing information. Section 1.1 of the Reseller Agreement defines “Confidential
2 Information” and excludes certain types of information, including information that “is or becomes
3 generally know or available by publication, commercial use or otherwise through no fault of the
4 receiving party.” The evidence has not shown that Green Hills misused “Confidential Information”
5 as defined by the Reseller Agreement. First, Express Logic has not proven that any “Confidential”
6 ThreadX source code was used by Green Hills during the development of the adaptation layer.
7 Express Logic’s allegation of copying is limited to the publicly availability ThreadX API, and Green
8 Hills took more than reasonable steps to limit access to confidential ThreadX source code to only a
9 few Green Hills employees. Second, Express Logic has not demonstrated that any of the pricing and
10 licensing information allegedly misused was “Confidential Information.” To the contrary, Express
11 Logic’s witnesses acknowledged that Express Logic disclosed pricing and licensing information to
12 customers without confidentiality restrictions. Therefore, the breach of contract claim based upon
13 misuse of confidential information fails.

14 3. Use of Disparaging Advertising Material. Express Logic alleges that Green Hill breached
15 Section 13.2 of the Reseller Agreement by creating advertising material that harms Express Logic or
16 ThreadX. Section 13.2 provides:

17 At EL’s request, the Reseller shall provide EL with any and all
18 advertising copy to be used by the Reseller for the purpose of
19 promoting the sale of Products. The Reseller shall take care in
20 preparing advertising materials such that the advertising material will
not harm the reputation of the Products of EL.

21 Green Hills argues that “advertising materials” in the second sentence refers to “advertising
22 copy to be used by the Reseller for the purpose of promoting the Sale of [Express Logic] products.”
23 Express Logic, on the other hand, asserts that the obligation applied to Green Hills’ advertising for
24 any product. We find that the contract as a whole and the parties’ competitive relationship make it
25 clear that “advertising materials” refers to “advertising copy” used for the purpose of promoting
26 Express Logic products. Because there is no evidence that Green Hills created ThreadX advertising
27 material that disparages Express Logic or ThreadX, this claim fails.

28 4. Removal of Copyright Notices. Express Logic alleges that Green Hills removed Express

1 Logic copyright banners in violation of the second sentence of Section 14.1 of the Reseller
2 Agreement. Section 14.1 provides:

3 The trademarks and copyright notices of EL and its licensors, set forth
4 in Appendix "C," must be used by the Reseller in the prompting and
5 selling of the Products. *As a condition of entering this Agreement, the*
6 *Reseller agrees not to remove any trademarks or copyright notices or*
7 *proprietary legends contained within the Product.* In the event that the
8 Reseller develops packaging and labeling for the purpose of marketing
9 and selling the Products in the Geographic Territory, the Reseller shall
10 ensure that all trademark, copyright, and proprietary legends of EL and
11 its licensors are clearly indicated.

12 Express Logic claims that each sentence contains a distinct obligation. While Express Logic
13 acknowledges that the first and third obligations are tied to the promotion, marketing and sale of
14 Express Logic products, it argues that the obligation at issue here (*i.e.*, the second sentence) has no
15 such limitation. The Tribunal disagrees. The evidence has demonstrated that Section 14.1 as a
16 whole is limited to the trademark and copyright notices of Express Logic used in the promotion and
17 sale of Express Logic Products. Because Express Logic has neither alleged nor established that
18 Green Hills ever promoted or sold ThreadX without all copyright notices contained within ThreadX,
19 its claim for breach of Section 14 fails.

20 5. Breach of the Implied Covenant of Good Faith and Fair Dealing. Express Logic claims
21 that Green Hills breached the implied covenant of good faith and fair dealing by using its reseller
22 position "to isolate potential customers and push its products instead of Thread X." This claim
23 would improperly broaden the implied covenant to impose additional obligations, namely, mutual
24 exclusivity (which the parties expressly entered into after the execution of the Reseller Agreement
25 and subsequently terminated), that are not tied to the Reseller Agreement or the parties' legitimate
26 expectations. Thus, this claim fails.

27 V.

28 UNFAIR COMPETITION AND RELATED BUSINESS CLAIMS

Express Logic has asserted claims for false advertising and unfair competition under the
Lanham Act and California Business & Professions Code §17200.

1. False Advertising. Express Logic alleges that Green Hills falsely advertised μ -velOSity

1 by representing that it did not copy ThreadX and developed μ -velOSity entirely on its own, and by
2 claiming μ -velOSity is smaller and faster than ThreadX. Because Express Logic introduced no
3 consumer survey evidence to show consumer confusion, it was required to prove the statements were
4 literally false when analyzed in their full context. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d
5 1134, 1139-40 (9th Cir 1997). It has failed to do so. Green Hills' statement that it did not copy
6 ThreadX and developed μ -velOSity entirely on its own was in a press release responding to Express
7 Logic's statement that Green Hills copied ThreadX *as a whole*. Because Express Logic concedes
8 that Green Hills did not copy any ThreadX source code beyond the ThreadX API elements at issue,
9 Green Hills' statement cannot be found to be false. Express Logic also failed to prove that the
10 statement that μ -velOSity is smaller and faster than ThreadX is false. David Lamie testified that μ -
11 velOSity is smaller than ThreadX, and William Lamie admitted that his limited testing comparing
12 the speed of a few services was inconclusive. Therefore, the Tribunal denies the false advertising
13 claims.

14 2. Reverse Palming Off. Express Logic also claims that Green Hills' copying of the
15 ThreadX API and alleged palming it off as its own constituted unfair competition. However, we find
16 that Express Logic has no standing to bring this claim because it does not claim μ -velOSity is its
17 own physical product. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003).
18 Instead, Express Logic claims that portions of the ThreadX API were copied and sold as part of μ -
19 velOSity. This is a copyright claim that failed, and because Thread X API is not protected by
20 copyright law, it can be copied "at will and without attribution." *Id.* At 34. Therefore, the Tribunal
21 denies the reverse palming off claim.

22 3. Unfair Competition. Express Logic also alleges that Green Hills' abused its ThreadX
23 reseller position to further μ -velOSity goals and to gain an unfair competitive advantage which is
24 "unfair" and violated of Section 17200. To the extent Express Logic claims that Green Hills unfairly
25 copied ThreadX in the development of μ -velOSity, this claim is preempted by the Copyright Act and
26 fails for the reasons discussed above. 17 U.S.C. §301. Express Logic's "unfair" prong of its claim
27 also fails because Express Logic did not demonstrate that Green Hills' conduct met the standard of
28 harm to competition require by *Cel-Tech v. L.A. Cellular*, 20 Cal.4th 163, 186 (1999).

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VI.
INJUNCTION

Express Logic is seeking a permanent injunction against Green Hills and has asked to submit specific language if the Tribunal finds that Express Logic is entitled to this form of relief. The Tribunal has not found liability against Green Hills, nor does it find any basis for the issuance of an injunction.

VII.
DAMAGES

Express Logic's damage analysis is based entirely upon Dr. Ryan Sullivan's econometrics model. Dr. Sullivan provided expert testimony through Quant Economics, Inc. which is a business and economic consulting corporation. The Tribunal found that Dr. Sullivan was qualified to testify as an expert in damage analyses, including econometrics. The Tribunal recognizes that econometrics is an accepted method of damages analysis and notes the strength of the model is directly related to the assumptions upon which the econometric model is based. Econometrics uses a multiple regression analysis. Multiple regression analysis is an appropriate method of measuring the damages caused by the introduction and sale of μ -velOSity. Multiple regression analyses have been accepted by courts as a means to measure economic damages in litigation. *See, e.g., Federal Judicial Center's Reference Manual on Scientific Evidence* (2d ed. 2000); *Zentih Elecs. Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 418 (7th Cir. 2005).

Green Hills asserts that Dr. Sullivan's model is speculative and unreliable for multiple reasons, including that it fails to prove the fact of any damage with reasonable certainty; Dr. Sullivan's claim of price erosion is factually unsupported; Dr. Sullivan applied an arbitrary and unsupported "rule of thumb" to construct a period of alleged impact; Dr. Sullivan applied an incremental profit rate that is unsupported and unreliable; and Dr. Sullivan's regression analyses are an unreliable and speculative predictor of alleged damages.

1 The Tribunal believes that many of Green Hills' arguments are well founded. Dr. Sullivan's
2 testimony lacks sufficient foundation and is largely speculative. Express Logic has failed to offer
3 competent evidence of the amount of harm, if any, suffered as a result of Green Hills' conduct, or the
4 duration for such harm. Even if liability for copyright infringement had been established, the
5 evidence submitted on damages would be insufficient to support any award of damages.

6 Green Hills asserts that Express Logic made no attempt to prove an essential element of its
7 non-copyright claims – the fact of damages flowing from these claims. Express Logic attempted to
8 prove damages exclusively through the testimony of Dr. Sullivan, whose conclusions were based
9 entirely on alleged harm flowing from the introduction and sale of μ -velOSity. “But for” causation
10 may exist between the introduction and sale of μ -velOSity and the alleged copyright infringement.
11 However, the Tribunal has not found liability for copyright infringement.

12 Neither Dr. Sullivan nor Express Logic successfully established a proximate relationship
13 between the non-copyright claims and the harm that Dr. Sullivan purported to identify from the
14 introduction and sale of μ -velOSity. For that reason alone, Express Logic has failed to prove its
15 non-copyright claims. Therefore, regardless of any criticism of Dr. Sullivan's econometric model,
16 no damages are causally connected to any of these non-copyright bases of liability.

17 VIII.

18 CROSS-COMPLAINT

19 The cross-complaint of Green Hills includes claims for libel and trade libel, interference with
20 prospective economic advantage and breach of the implied covenant of good faith and fair dealing.

21 1. Libel and Trade Libel. On June 12, 2006, Express Logic posted a press release on its
22 website announcing this arbitration and declaring, *inter alia*, that μ -velOSity is an “illegal copy” of
23 ThreadX and that Green Hills “violated ThreadX copyright” and “engaged in deceptive business
24 practices designed to mislead customers.” Express Logic argues that its statements are not libelous
25 because they are non-actionable opinions, true and protected under the litigation privilege.

26 Regarding the libel and trade libel claims, Green Hills had to establish a false and
27 unprivileged statement in writing concerning Green Hills which exposed Green Hills to hatred,
28 contempt, ridicule, or disgrace, or which cause it to be shunned or avoided, or which had the

1 tendency to injure Green Hills in its occupation, thereby causing damage . California Civil Code
2 §45. Given Green Hills admission of copying, however, Green Hills did not prove the challenged
3 statements false. Moreover, the alleged-offending statements are inactionable opinions. Therefore,
4 the Tribunal finds that Green Hills’ libel and trade libel claims fail.

5 2. Tortious Interference. Green Hills alleges that the actions of Express Logic constitute
6 tortious interference with prospective economic advantage. Express Logic contends that Green Hills
7 failed to prove that Express Logic’s actions were independently wrongful and that Express Logic
8 had knowledge of or intent to interfere with Green Hills’ economic relationships.

9 To establish tortious interference, Green Hills must establish (1) an existing business
10 relationship or “prospective business relationship” with an identifiable third party, with the
11 probability of future economic benefit to Green Hills; (2) Express Logic’s knowledge of the specific
12 relationship and intent to interfere with it; (3) Express Logic engaged in wrongful conduct outside
13 the boundaries of fair competition, separated from the interference; (4) disruption of the relationship;
14 and (5) economic harm to Green Hills. *Westside Ctr. Assocs. v. Safeway Stores*, 42 Cal.App. 4th 507,
15 542 (1996). Green Hills’ argument that Express Logic’s actions were wrongful independent of the
16 interference itself was that Express Logic made libelous statements. Because Green Hills has failed
17 to establish libel, Green Hills’ tortious interference claim also necessarily fails. Green Hills also
18 failed to show that Express Logic knew of and intended to interfere with particular Green Hills’
19 relationships. With respect to AEI in particular, Express Logic made the press statement months
20 before Green Hills engaged AEI in any dialogue concerning μ -velOSity. The Tribunal finds that
21 Green Hills failed to prove the requisite elements of tortious interference.

22 3. Breach of Implied Covenant. Green Hills also alleges that Express Logic breached the
23 implied covenant of good faith and fair dealing by depriving Green Hills of the right to a private
24 arbitration. The Reseller Agreement at section 18.1 provides for the arbitration of any claim “related
25 to or arising out of [the] Agreement,” and the parties agreed that any arbitration would be governed
26 by the Commercial Arbitration Rules of the AAA, which provide, *inter alia*, that “[t]he arbitrator
27 and AAA shall maintain the privacy of the hearings unless the law provides contrary. Rule 23. The
28 confidentiality obligations imposed under Rule 23 are directed at the AAA and the members of the

1 Tribunal. Absent an express provision of confidentiality in the operative agreement between the
2 parties, there is no predicate for this claim. The Tribunal finds that the issuance of press releases
3 related to an arbitration, while inconsistent with the privacy of an arbitration, does not support a
4 cause of action for breach of the implied covenant.

5 4. Damages. The parties stipulated that, “if the Tribunal finds that Green Hills is entitled to
6 recover damages on its counterclaims, the total amount of special damages shall be \$91,600.”
7 Because the Tribunal has denied all claims in the cross-complaint, no damages are assessed against
8 Express Logic.

9 IX.

10 PREVAILING PARTY – ATTORNEYS’ FEES

11 Express Logic argues that it be awarded attorneys’ fees under the exceptional case doctrine
12 based upon a finding that Green Hills acted “maliciously, fraudulently, deliberately or willfully.”
13 Section 1117(a) of the Copyright Act. *Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210,
14 1216 (9th Cir. 2003). Express Logic asserts that the exceptional case doctrine applies to false
15 advertising and improper litigation tactics. Express Logic further asserts that Green Hills has
16 engaged in both forms of activity.

17 Green Hills asks that it be granted attorneys’ fees under the Copyright Act which provides
18 the Tribunal with discretion to determine whether a prevailing party is entitled to recover its fees.
19 *See Fogerty v. Fantasy*, 510 U.S. 517, 534 (1994) (attorney’s fees are to be awarded to prevailing
20 parties under the Copyright Act “only as a matter of the court’s discretion”). The discretionary
21 factors to be considered in awarding attorneys’ fees are “frivolousness, motivation, objective
22 unreasonableness (both in the factual and in the legal components of the case) and the need in
23 particular circumstances to advance considerations of compensation and deterrence.” *Id.* At 535 n.
24 19. Weighing these factors, the Tribunal concludes in its discretion, that neither Express Logic nor
25 Green Hills is the prevailing party. Therefore, Express Logic and Green Hills shall each bear its
26 own attorneys’ fees, administrative fees, arbitrators’ fees and other expenses incurred in relation to
27 this proceeding.
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X.
CONCLUSION


WE, THE UNDERSIGNED ARBITRATORS, Michael J. Weaver, Esq. (Chairman), Gregory A. Post, Esq. and Richard W. Page, Esq. (the “Tribunal”) having been designated in accordance with the 1998 Reseller Agreement dated December 10, 1998 (the “Reseller Agreement”) between Claimant Express Logic, Inc. (“Express Logic”) and Respondent Green Hills Software, Inc. (“Green Hills”) and by the consent of all parties participating in this arbitration, having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

1. The copyright infringement claims of Express Logic are hereby denied;
2. The breach of contract claims of Express Logic are hereby denied;
3. The breach of the implied covenant of good faith and fair dealing claims made by Express Logic is hereby denied;
4. The unfair competition claims of Express Logic are hereby denied;
5. The injunctive relief claim made by Express Logic is hereby denied;
6. The libel cross-claim of Green Hills is hereby denied;
7. The trade libel cross-claim of Green Hills is hereby denied;
8. The tortious interference with prospective economic advantage claim of Green Hills is denied;
9. The administrative filing and case service fee of the AAA, totaling \$12,500.00, shall be borne as incurred. The fees and expenses of the arbitrators, totaling \$363,569.14, shall be borne as incurred.
10. This Final Award is in full settlement of all claims and counterclaims submitted in this Arbitration.

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11. All claims, including any claims under the cross-complaint, not expressly granted herein are hereby denied.

Dated: August 17, 2007

By: 
Michael J. Weaver,
Chairman

Dated: August ____, 2007

By: _____
Gregory A. Post,
Arbitrator

Dated: August ____, 2007

By: _____
Richard W. Page,
Arbitrator


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11. All claims, including any claims under the cross-complaint, not expressly granted herein are hereby denied.

Dated: August __, 2007

By: _____
Michael J. Weaver,
Chairman

Dated: August 17, 2007

By: 

Gregory A. Post,
Arbitrator

Dated: August __, 2007

By: _____
Richard W. Page,
Arbitrator

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11. All claims, including any claims under the cross-complaint, not expressly granted herein are hereby denied.

Dated: August __, 2007

By: _____
Michael J. Weaver,
Chairman

Dated: August __, 2007

By: _____
Gregory A. Post,
Arbitrator

Dated: August 19, 2007

By: _____
Richard W. Page,
Arbitrator