

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

_____)	
Abacus Corporation,)	Civil Action No. _____
a Maryland corporation,)	
)	
Plaintiff,)	
)	
v.)	<u>COMPLAINT</u>
)	
TempWorks Software, Inc.,)	(Jury Trial Demanded)
a Minnesota corporation,)	
)	
Defendant.)	
_____)	

Abacus Corporation (“Abacus”) for its Complaint against TempWorks Software, Inc. (“TempWorks”) states:

THE PARTIES

1. Abacus is a corporate service company offering staffing solutions for both employers and job seeks for nearly seventy (70) years. The Abacus client base spans a broad range of services and industries including Fortune 500 companies, federal, state, and local government entities, universities, hospitals, retailers, and more. The greatest part of the business of Abacus is staffing, with Abacus offering temporary placement, permanent placement, temp-to-hire, and direct hire opportunities. Janitorial and security services are also important parts of the Abacus business. Abacus has approximately 4,500 employees throughout the country.

2. TempWorks is a software company that markets its software products specifically for staffing agencies stating that the software provides a system to track talent from initial recruitment through job orders, payroll, and HR benefits. TempWorks software is touted as seamlessly integrating employee records with client functions, including invoicing and

collections, as well as providing paperless form management, payroll processing, and tax preparation and payment, among other functions.

NATURE OF THE ACTION, JURISDICTION, AND VENUE

3. This is an action for Abacus to recover damages for the repudiation and breach by TempWorks of the TempWorks Software Enterprise License Agreement (“Agreement”) entered into between them and effective 16 December 2010. A copy of the Agreement is attached as Exhibit A. The Contract Addendum is attached as Exhibit B, and the TempWorks Software Inc. Implementation & Consulting Services Proposal is attached as Exhibit C, both being related to the Agreement.

4. Abacus is a Maryland corporation with its principal place of business in Baltimore, Maryland. TempWorks is a Minnesota corporation with its principal place of business in Eagan, Minnesota.

5. The Court has original jurisdiction over the action pursuant to 28 U.S.C. § 1332 because the parties are citizens of different states and the amount in controversy, exclusive of interest and costs, exceeds \$75,000.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a). Furthermore, the parties agreed at Article 18 of the Agreement that any legal proceeding would be brought in an appropriate Minnesota court.

THE PARTIES’ AGREEMENT

7. Following negotiations the parties entered into the Agreement effective 16 December 2010 under which TempWorks was to provide consulting services and computer application software products for the purpose of updating the automated business operations of Abacus.

8. The TempWorks software was to support the staffing, security, and janitorial businesses of Abacus, including functions that are critical to the operation of the Abacus business. TempWorks assured Abacus that its software could support not only the staffing business but the security and janitorial businesses of Abacus equally well. Abacus operates from approximately twenty-three (23) offices across the country and issues paychecks to about 4,500 employees per week. Payroll processing and tax preparation and payment are among the functions critical to the business of Abacus that was to be supported by the TempWorks software.

9. One of the services provided by TempWorks under the Agreement was “TempWorks Scope Analysis” under which, among other things, TempWorks provided Abacus with its technical specifications and recommendations for the hardware, software, equipment, and systems necessary for the implementation and use of the TempWorks software at Abacus.

10. Pursuant to the Agreement, TempWorks required Abacus to install a SQL server, the Agreement stating at Section 4.02, “This server shall meet the minimum hardware, software and performance specifications as shall be established by Licensor [TempWorks].” Abacus installed an SQL server that met the specifications of TempWorks.

11. Section 4.02 of the Agreement further provided that “All client machines, which shall be licensed for the Software, shall have network access to this server.” All of the Abacus machines licensed for the Software had network access to the server specified by TempWorks.

12. Pursuant to Section 4.04 of the Agreement, TempWorks required Abacus to have “a functional LAN/WAN, fully tested and approved by Licensor [TempWorks].” The LAN/WAN of Abacus was approved by TempWorks.

13. Pursuant to Section 9.03 of the Agreement, TempWorks warranted to Abacus “that all consulting services performed by Licensor [TempWorks] for Licensee [Abacus] shall be performed in a professional and workmanlike manner consistent with the standards of the industry.”

14. Abacus fully satisfied all of the hardware, software, equipment, and system requirements that TempWorks identified as necessary following its scope analysis.

15. The parties also agreed, as detailed in Article 13 of the Agreement, that the TempWorks fees for certain of the specific services to be provided under the Agreement were capped in their amount; that is, TempWorks agreed to provide specific services for a not-to-exceed fee. For example, the fee for “TempWorks Scope Analysis” was capped at \$2,500. Other TempWorks services for which the fees were capped were “TempWorks Implementation,” “TempWorks AP/GL Implementation,” and “Additional Data Conversion.”

16. Before the parties agreed to the amount of the capped fees TempWorks had a full opportunity to understand the requirements of Abacus for the TempWorks software, including completion by the president of TempWorks of the scope analysis.

17. Abacus agreed and paid the \$2,500 cap for the scoping services fee based on the representation by TempWorks that the scoping analysis would be a full and complete analysis of Abacus’ needs, and that TempWorks would drill down into all of Abacus’ systems, processes, and architecture. TempWorks knew that Abacus relied upon it to determine the requirements for the operating environment necessary for the proper performance of the TempWorks software at Abacus.

18. The TempWorks scoping analysis was performed by its president, David Dourgarian. He spent less than eight (8) hours at Abacus to analyze the scope of Abacus’ needs

and requirements. Abacus was assured by Mr. Dourgarian that because he had analyzed the needs and requirements of hundreds of companies he had had sufficient time to fully scope the needs and requirements of Abacus.

19. In the course of the parties' performance under the Agreement various deficiencies in the TempWorks software came to light. Among them was the ability of the TempWorks software to support the janitorial business of Abacus. Although Abacus noted before the parties entered into the Agreement that the janitorial business had different requirements from the staffing business, and although TempWorks assured Abacus that its software was sufficient to support those different needs, in fact the janitorial business presented a number of issues that had to be resolved during the implementation phase before the TempWorks software could support that business.

20. Another deficiency was the fact the TempWorks software did not properly calculate local taxes due in Pennsylvania. In each of the various instances in which the TempWorks software was deficient for the Abacus business, Abacus and TempWorks spent the time and resources necessary to correct the deficiencies in the software. Yet, each of these instances revealed that the TempWorks software, without correction, was not sufficient to support the usual business requirements of Abacus.

21. It was also revealed during the implementation phase that TempWorks had wrongly assumed its software could correctly calculate unemployment based on year-to-date payroll data. In fact, the software required the detail of data by pay period before unemployment could be properly calculated. Substantially more hours than TempWorks had assumed were required to input data by pay period so that unemployment could be correctly calculated by the TempWorks software.

22. System crashes were also experienced during various tests of the TempWorks software. TempWorks advised Abacus that the crashes were due to TempWorks' understatement in its scope analysis of the server requirements necessary for the use of the TempWorks software at Abacus. Upon the recommendation of TempWorks, Abacus purchased additional hardware and software to balance the load across the servers. Unfortunately, that proposed solution did not solve the problem of system crashes.

23. Because the system continued to crash, and if not crash, because the TempWorks software operated so slowly it was not practical to test its functions in actual use in the Abacus business, Abacus undertook a stress test of the TempWorks software with 44 of its 75 licensed users logged into the system. Abacus shared the results of its stress test with TempWorks.

24. At 10:22AM on June 23, 2011, Abacus made the following inquiry of TempWorks: "What is the TW protocol for necessary bandwidth? We only have 40+/- users on and I am knocked off yet again. This can't move forward until resolved." At 11:13AM of the same day TempWorks responded: "to support all 44 users their main office pipe they [sic] would need around a 900% increase in bandwidth."

25. The Abacus network infrastructure was wholly deficient to support the intended use of the TempWorks software, a fact that TempWorks failed to identify in its scope analysis. As TempWorks later admitted, "The scoping process did leave some stones unturned, in which we have taken responsibility for on many instances."

26. Correction of the deficiencies in the TempWorks software, the time actually required to input data to enable a conversion to the TempWorks system, and correction of performance deficiencies caused by the inadequate initial scoping of the project by TempWorks, resulted in TempWorks incurring fees that exceeded the capped or not-to-exceed amounts of the

Agreement. In those instances in which the not-to-exceed cap was not (yet) exceeded, the time incurred by TempWorks because of these deficiencies created more risk that the capped amounts understated the time necessary for TempWorks to perform.

27. The TempWorks software has never been fully functional at Abacus and has never been used by Abacus to support its business operations. Because the TempWorks software has never been fully utilized, it is unknown whether all of the product and systems deficiencies have been corrected.

TEMPWORKS REPUDIATION AND BREACH

28. The June 2011 invoice of TempWorks sought to bill for services in amounts that exceeded the capped or not-to-exceed amounts of the Agreement for those services. As a consequence, Abacus disputed the correctness of the invoice.

29. Abacus met in person with TempWorks at the TempWorks offices to address TempWorks' continued commitment to the project in light of the capped fee structure of the Agreement as well as to discuss the proper application of the Agreement to the services provided and billed on the June 2011 invoice.

30. Agreement on the June invoice was not reached at the in-person meeting, and TempWorks president, David Dourgarian, authorized two of his vice-presidents to continue those discussions to work with Abacus. Later, the parties agreed to the amount due TempWorks on the June 2011 invoice under the Agreement, and Abacus paid the corrected amount.

31. Thereafter, TempWorks, through its president David Dourgarian, repudiated the agreement reached on the June 2011 invoice and repudiated the Agreement. TempWorks' president demanded payment of the full amount of the June 2011 invoice, regardless of the not-to-exceed capped amounts of the Agreement, and refused to continue work under the Agreement

unless the June 2011 invoice was paid in full. TempWorks declared itself in total breach of the Agreement.

32. TempWorks' refusal to be bound by the Agreement and to perform in accordance with its terms ended the Agreement.

33. TempWorks' subsequence statements of a willingness to provide its services under a different agreement to be negotiated by the parties are meaningless. The TempWorks software was to support functions that are core to the business of Abacus. A trustworthy software vendor is critically important. Abacus informed TempWorks it has no interest in negotiating a different agreement with TempWorks.

34. As a result of the repudiation and total breach of the Agreement by TempWorks, Abacus has incurred pre-paid license fees and the expense of hardware, software, and related systems requirements, it has incurred and will continue to incur the expense of network infrastructure that has no value, it has incurred training costs that have no value, and it has incurred the lost wages of its employees' time all in an amount to be proven at trial of at least \$344,000.

WHEREFORE, Abacus Corporation requests Judgment against TempWorks Software, Inc. as follows:

1. The award of money damages in that amount proven at trial;
2. The award of pre-judgment and post-judgment interest;
3. The award of costs and expenses; and
4. The award of such other and further relief as is just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury of all issues so triable.

Respectfully submitted,

Dated: December 7, 2011

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