

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

NETEZZA CORPORATION,)
)
 Plaintiff,)
)
 v.)
)
 INTELLIGENT INTEGRATION SYSTEMS,)
 INC.,)
 Defendant.)

CIVIL ACTION NO. 09-4961 BLS

**AFFIDAVIT OF PAUL DAVIS
IN SUPPORT OF IISI'S MOTION FOR SUMMARY JUDGMENT**

I, Paul Davis, being duly sworn, do hereby depose and state as follows:

Introduction

1. I am the Chief Executive Officer ("CEO"), co-founder, and one-third owner of Intelligent Integration Systems ("IISI"), the defendant and counterplaintiff in the above-captioned action. Since IISI's founding, I have been personally involved in its business development planning, customer relationships, product marketing, and financial management. The statements made herein are based on my personal knowledge.

2. I hold a Bachelor's Degree from Tufts University and a *Juris Doctor* Degree from Suffolk University. Although I have not been in private practice for a number of years, I am also a member of the Massachusetts Bar. In addition to serving as the CEO of IISI, I am a General Partner at Seed Partners, LLC, an early-stage private investment company. Over the last several years, I have served as a member of the Boards of Directors of a variety of Seed portfolio companies, including Zipcar, GeneXP, Biosciences, where I served as the founding CEO, and

Predictive Networks, which I co-founded. From 1992 to 1996, I also held various positions, including Executive Vice-President and Chief Operating Officer, at Vanguard Automation, the leading provider of BGA interconnect systems for the semiconductor industry. In all of these positions, I had extensive involvement in negotiating the business and financial terms of commercial and intellectual property contracts.

IISI's Early Relationship and Contracts with Netezza

3. IISI was founded in 2005 to develop and market application software products to process and analyze the large quantities of data that were then being stored on a data warehouse computer called the 10,000 series Netezza Performance Server, or "NPS," which was then being marketed and sold by a privately owned company called Netezza Corporation ("Netezza").

4. In January of 2006, IISI entered into a contract with Netezza called the Solution Provider Agreement, which I signed on behalf of IISI, that authorized IISI to resell Netezza's NPS machines to IISI customers in conjunction with sales of certain IISI software which was designed to run on the NPS. In January of 2007, pursuant to an Addendum to the Solution Provider Agreement, which again I signed on behalf of IISI, Netezza delivered an NPS machine to IISI for IISI to use to develop other software products to run on the NPS.

5. Thereafter, IISI developed two software products to run on the NPS, one called "geospatial" that was designed to enable the NPS to organize and cross-reference large amounts of geographic location data being stored on it, and the other called the "extended SQL toolkit," which was designed to enable the NPS to better perform the task of accessing, retrieving, and processing inquiries about, the data stored on it.

6. In July of 2007, IISI entered into an Original Equipment Manufacturer, or OEM, agreement with Netezza, which again I signed on behalf of IISI, that licensed Netezza to use and

distribute IISI's geospatial product on the NPS for three years in return for Netezza making various royalty payments to IISI. The OEM agreement did not provide for any transfer of ownership of the geospatial or extended SQL toolkit products to Netezza, however.

The 2008 Purchase & Distribution Agreement

7. In early 2008, Netezza expressed interest to me in acquiring ownership of both the geospatial and extended SQL toolkit products. After substantial negotiations between Netezza and IISI --- in which IISI was represented by its in-house counsel Ron Turiello and its Chief Technology Officer Rich Zimmerman, and Netezza was represented by its in-house counsel Michael Crowley and its CEO Jim Baum --- IISI entered into a Purchase and Distribution Agreement with Netezza (the "Agreement"), which again I signed on behalf of IISI, on August 6, 2008.

8. When I signed the Purchase and Distribution Agreement, I understood that it provided that Netezza would have the right to distribute for three (3) years, and if it met all of its payment obligations under the Agreement would eventually acquire ownership of, what the Agreement referred to as the "IISI Products" --- which were specifically defined in the Agreement as the geospatial and extended SQL toolkit products described in the specifications set forth on Exhibit 1 of the Agreement (which were the specifications for IISI's then-existing geospatial and extended SQL toolkit products running on the NPS), and any later versions of those products that IISI chose to deliver to Netezza and add the specifications for into Exhibit 1 of the Agreement. I understood from this definition of IISI Products that IISI had the right to determine for itself, during the term of the Agreement, whether it would expand the definition of IISI Products to include and later versions of its existing products.

9. When I signed the Agreement, I was also aware that the definition of “Netezza Products” on page 1 of the Agreement said that the term “Netezza Products” would mean “the Netezza Performance Server, including any subsequent versions or releases of Netezza’s data warehouse appliance products made generally available to customers,” but the term “Netezza Products” was then used in only two parts of the Agreement:

(a) in Section 6.4 on page 6 of the Agreement, where IISI was warranting that the “IISI Products” -- as previously defined to include any later versions whose specifications IISI added into Exhibit 1 of the Agreement --contained no “open source” code that would affect Netezza Products; and

(b) on the bottom half of the “Schedule C - Training and Certification” section on page 18 of the Agreement, where the Agreement stated:

The parties agree to work in good faith to establish a certification process that may include, but not be limited to, the following:

- A process to certify that the installation/upgrade of the IISI Products does not adversely affect normal Netezza Products functionality;
- A process to certify that the invocation of IISI Product functionality, regardless of interaction with the Netezza Products, does not adversely affect performance of the Netezza Products;
- A process to certify that the IISI Products and the Netezza Products operate error free with a focus on timely and efficient certification;
- A process to ensure that issues/bugs/errors in the IISI Products or errors in the Netezza Products caused by installing/upgrading/running IISI Products functionality are addressed and corrected in a timely manner with a primary focus on ensuring on schedule delivery of product releases and functionality; and

- A process to certify that invocation of IISI Product functionality (e.g., interface, function calls, etc.) conforms to the established Netezza Products conventions.

Agreement at 18. When I signed the Agreement in 2008, I understood both of these portions of the Agreement to be allowing for the *possibility* that during the term of the Agreement, IISI *might* add later versions of the geospatial or extended SQL toolkit products into the definition of IISI Products by actually delivering them to Netezza and adding their specifications into Exhibit 1 of the Agreement, and that these later versions might be designed to run on later versions of Netezza data warehouse appliances, in which case IISI would work in good faith to certify that they were compatible with those appliances. I did not understand these provisions as in any way requiring IISI to develop such later versions, however, and they did not say that IISI would be required to do so. In fact, at the time the Agreement was signed, IISI did not know what new Netezza Products might be released in the future, or how difficult it would be to create new versions of the existing IISI Products to run on them, and it would not have made rational business sense for IISI have agreed to be required to create new versions of IISI Products every time a Netezza Product was released.

10. Also, at the time I signed the Agreement, I knew that my colleagues Mr. Zimmerman and Mr. Turiello had already communicated to Netezza that IISI would not agree to be required to develop new versions of software for Netezza under the Agreement except to correct customer problems with existing IISI Products, and that we had insisted on the deletion from the Agreement of provisions proposed by Netezza that would have called for IISI to develop new versions of the geospatial and extended SQL toolkit products with new functionality based upon requests made by Netezza in the ordinary course of its product development plans (so-called “Roadmap Functionality”). This fact also contributed to my

understanding, at the time I signed the Agreement on behalf of IISI, that the Agreement did not require IISI to develop later versions of its geospatial or extended SQL toolkit products to run on future Netezza Products.

11. I also understood, when I signed the Purchase and Distribution Agreement for IISI, that IISI was agreeing to provide maintenance and support for IISI Products, including bug fixes and product enhancements, in accordance with Schedule B of the Agreement, but nothing in those maintenance and support provisions caused me to think that IISI was agreeing, in the Purchase and Distribution Agreement, to be required to develop other versions of its geospatial or extended SQL toolkit products beyond what was necessary to correct technical problems that customers had with those existing products. To the contrary, after reading those provisions, I understood that they clearly required IISI only to provide maintenance and support for “IISI Products,” as previously defined in the Agreement.

12. In this regard, when I signed the Agreement, I saw that it stated, in Section 3.2 on page 4, that IISI was agreeing to the ‘IISI Commitments’ set forth on Schedule A on page 15 of the Agreement, which stated that:

1. IISI will provide timely *second level* support to Netezza regarding the maintenance and support of *IISI Products*. Maintenance and support will include bug fixes and product enhancements. IISI agrees to the maintenance and support terms set forth in *Schedule B*. (emphasis added)

I also saw that the “Support Terms and Conditions” on Schedule B of the Agreement to which IISI was agreeing, which appeared on pages 15-16 of the Agreement, simply required IISI to respond to requests for maintenance and support to address various categories of “technical problems” -- “Critical Problem[s],” “Minor Problem[s],” “Moderate Problem[s],” or “Serious Problems[s]” -- that were each defined in terms of how badly they “impaired” the operation of the relevant “IISI Product” or affected its availability to “users” of the IISI Product.

13. Specifically, I saw that after defining the types of problems that IISI was agreeing to help with, Section 2 of Schedule B on page 16 of the Agreement, entitled "IISI Maintenance and Support Responsibilities," required IISI, per Sections 2.2 and 2.3, to respond to the different defined categories of technical problems within specified timeframes, and per Section 2.1, to use "commercially reasonable efforts" to provide "maintenance and support" services "to support customers," including having sufficient technical knowledge available to handle "support escalations" from Netezza in a timely manner.

14. At the time I signed the Agreement, I understood the reference to "support escalations" to be a reference to the fact that the Agreement said, on page 15, that IISI would be providing "second level" support to Netezza "regarding the maintenance and support of IISI Products," and I understood the reference to "second level" support on page 15 to be a reference to the second level of three levels of "support" that Netezza had previously defined in its OEM agreement with IISI -- meaning that Netezza, not IISI, would be responding in the first instance to any technical problems that customers had with "IISI Products," and would "escalate" the problem to IISI, the "second level" supporter, only if their own personnel could not resolve it.

15. At the time I signed the Agreement, I also saw that Section 2.1 of Schedule B of the Agreement, on page 16, provided that "IISI will have telephone and email support available during Normal Business Hours and will provide support outside Normal Business Hours via pager," and that Sections 2.2 and 2.3 on that same page stated that IISI and the parties would work on any identified problems, in each case, "until the *IISI Product* is *restored* to service" or "the *IISI Product's* operation *is no longer impaired.*" This and all of the other "maintenance and support" language I have discussed above also contributed to my understanding that nothing in the maintenance and support provisions of the Agreement required IISI to develop other

versions of its geospatial or extended SQL toolkit products beyond what was necessary to correct technical problems that customers had with existing IISI Products.

16. On the other hand, I did understand, when I signed the Agreement, that apart from satisfying its maintenance and support obligations to help correct any technical problems that customers had with the existing IISI Products, IISI had some incentive, although it was not required to do so, to develop other versions of geospatial, and add their specifications into Exhibit 1 of the Agreement (such that they would become IISI Products under the Agreement), because in Schedule A of the Agreement, on pages 13-14, Netezza had agreed that in addition to making certain "Guaranteed Payments" to IISI, it would also make "Progress Payments" to IISI of up to \$1 million per year depending on how many licenses of the geospatial IISI Product Netezza sold each year over the next three (3) years.

17. I also understood, however, that under Section 6.1 of the Agreement, if IISI chose to deliver any such later versions of geospatial to Netezza and add their specifications into Exhibit 1 of the Agreement, it would be warranting that they were "free from material defects in workmanship" and would "under normal use, conform to the specifications set forth on Exhibit 1" of the Agreement. It was my opinion at the time, and remained so throughout 2009, that IISI would not want to deliver any such later versions of geospatial to Netezza pursuant to the Agreement, or add their specifications into Exhibit 1 of the Agreement, unless they were complete and had been fully tested in whatever their "normal use" environment was intended to be, including whatever machine they would operate on.

The Events of 2009

18. In the first year following execution of the Agreement, IISI met all of its maintenance and support obligations under the Agreement, and issued multiple additional

versions of the geospatial and extended SQL toolkit softwares to address customer problems and issues with how those products worked on the NPS. IISI never provided to Netezza any new releases or versions of geospatial or the extended SQL toolkit to run on any machines other than the NPS, however, and never added any specifications for such new releases or versions to Exhibit 1 of the Agreement.

19. In the late Spring of 2009, Netezza advised IISI that it was working on a new data warehouse product, and that part of its “roadmap” for geospatial was to make it run both on that new product (later called TwinFin) and on all of its systems, not just the NPS. At the time, Mr. Jon Shepherd of Netezza told me that Netezza wanted IISI to make geospatial work on the new Netezza systems, and that because of their design he thought it would be easy to do -- like “flicking-a-switch.”

20. Understanding that IISI was not required to develop new versions or releases of geospatial to run on TwinFin or other Netezza products, but that it could do so and add them into the definition of IISI Products under the Agreement if it so chose, or could negotiate new terms and conditions for developing them in a separate agreement, I wrote to Mr. Shepherd on May 26, 2009, stating among other things that

We’d like to be able to accommodate you on loading the product [geospatial] onto all the systems.

Our initial concern is logistical. We’d like to understand how the “flick a switch” method works. Would you take our spatial binary and somehow roll it into the system in a way that is reasonably protected from hacking or unauthorized turn-on. Would there be practical tracking and audit capability? I’ll ask Rich and Ron to take a look from our side ...

A copy of this email is attached hereto as Exhibit A. When Netezza did not respond to this email, I re-sent it again on June 23, 2009, and still received no response.

21. However, in August of 2009, Netezza personnel contacted my colleague Mr. Zimmerman directly and asked him to remotely access one of Netezza's new TwinFin machines to see if he could modify IISI's geospatial product to make it work on the TwinFin. Because we thought it might be in IISI's interest to do this work, even though it was not required to under the Agreement and there were, as yet, no known customers for geospatial operating on the TwinFin, IISI decided that Mr. Zimmerman would proceed to remotely access the TwinFin and evaluate what would be involved in an effort to develop a version of geospatial to operate on TwinFin. After several weeks of doing so, Mr. Zimmerman reported on September 4, 2009, both to me and to Netezza, that he needed physical access to an actual TwinFin machine in order to properly estimate the amount of time and effort that would be required for such a project. Netezza did not deliver such a machine to Mr. Zimmerman in August of 2009, however, nor did it deliver one in September of 2009.

22. Meanwhile, on August 6, 2009, Netezza failed to pay IISI the \$1,000,000 Guaranteed Payment that it had promised, in the Agreement, to pay IISI on that date. Because Schedule A of the Agreement provided that IISI would only receive interest on late payments if it gave Netezza written notice of and thirty (30) days to cure any nonpayments, I sent a letter to Netezza on August 7, 2009, a copy of which is attached as Exh. B to Netezza's complaint herein, noting the nonpayment -- which was a very significant problem for a small company such as IISI. I also wrote in the letter that IISI thought Netezza had violated the Agreement in other ways, and that IISI was requesting a response from Netezza on these issues as well in accordance with the "Dispute Resolution" provisions in Section 9.6 of the Agreement.

23. Netezza responded to my August 7, 2009 letter in a letter from its Vice-President Patrick Scannell dated August 24, 2009, a copy of which is attached as Exh. C to Netezza's

complaint herein, stating that Netezza was “processing” the \$1,000,000 payment, that it would be made to IISI by August 31, 2009, and that Netezza disagreed with IISI’s other claims of breach. It also asked that we contact Netezza’s in-house attorney to arrange further discussions relating to the dispute -- which we did with the result that a meeting between IISI and Netezza was set up for September 10, 2009. I attended that meeting with Marshall Peterson of IIS, and Rich Zimmerman called in by telephone. The attendees for Netezza were its CEO Jim Baum, its CFO Patrick Scannell, and its in-house lawyer Corey Dufresne.

24. At the September 10, 2009 meeting between IISI and Netezza, Mr. Baum and Mr. Scannell, after making a variety of comments about IISI and the dispute that had arisen, said they wanted to have IISI develop a version of geospatial to run on the new product that Netezza had just announced, the TwinFin. They did not claim that any customers had actually purchased the TwinFin, however, or that their relationships with any customers were being endangered as a result of not having a version of geospatial running on TwinFin.

25. In response, Rich Zimmerman and I both pointed out that Mr. Zimmerman had only been given remote access to a TwinFin the previous month, and had already told Netezza personnel that he needed physical access to TwinFin in order to estimate how long such a project would take. I also informed Netezza at the meeting, in items 5 and 6 on the 3rd page of a written letter that I personally delivered to the Netezza officials at the meeting, that the Agreement only covered “the specific software described in the specifications set forth on Exhibit 1 (Section 1, Definition of “IISI Products”)” and that, as I put it,

Netezza has no rights to any later version unless and until IISI decides to provide it to Netezza and add the specifications for such later versions to the schedule (Section 1, Definition of IISI Products)

A copy of my letter notifying Netezza of this point is attached as Exh. D to Netezza's complaint herein. Before the September 10, 2009 meeting ended, Netezza's CEO James Baum said that Netezza would find a TwinFin to deliver to Mr. Zimmerman, and my colleagues and I from IISI said that Mr. Zimmerman would examine it try to estimate what would be involved in creating a version of geospatial that would work on it. We did not agree to anything more than that, however, and we could not, as we still had never seen or examined a TwinFin machine.

26. Three (3) weeks later, on October 1, 2009, Netezza finally delivered a TwinFin to IISI for Mr. Zimmerman to examine. Prior to that time, no IISI personnel had ever seen or had physical access to a TwinFin machine. Although I suffered a heart attack on September 30, 2009 that required me to go into the hospital on an emergency basis for surgery, I became aware the following week that after working with the TwinFin for several days, Mr. Zimmerman had reported to Netezza, on October 7, 2009, that there were substantial technical problems and issues that had to be addressed and overcome as part of any effort to develop a version of geospatial that would run on TwinFin, and that he thought such a project would take "approximately two months" -- *i.e.* "until the end of November, early December timeframe."

27. Given what I understood were the significant hardware differences between the TwinFin and the NPS, and the fact that Mr. Zimmerman had only been working with the TwinFin machine for a few days, I thought that his two month estimate might well be overly optimistic, and that any such development project could take considerably longer, and involve substantial risk to IISI. As the principal business executive at IISI, I was responsible for assessing those risks, and had the authority to decide whether IISI would commit itself to this project, not Mr. Zimmerman, who did not have that responsibility or authority.

28. Among other things, I was very concerned, in early October of 2009, that if IISI attempted to provide a later version of geospatial running on TwinFin pursuant to the terms of the Agreement -- by delivering it to Netezza and adding its specifications into Exhibit 1 of the Agreement such that it became an "IISI Product" under the Agreement -- IISI would be warranting, under Section 6.1 of the Agreement (which applied to all "IISI Products"), that the new version of geospatial was "free from material defects in workmanship" and would "conform to the specifications" -- a warranty that I was not sure IISI would want to give as to a later version of geospatial operating on a different machine (the TwinFin) than the one it had been designed for (the NPS).

29. My concern in this regard was heightened on October 9, 2009, when Mr. Zimmerman advised me that Netezza's Jon Shepherd had called him that day claiming that Netezza had a U.S. Government customer that he had just been told wanted geospatial running on TwinFin as fast as possible so that they could target predator drones, and claiming that it was IISI's "patriotic duty" to help in this effort. No one at IISI had ever heard this before, and I was troubled that Netezza was suddenly asking us to become involved in an accelerated software development project to make geospatial run on TwinFin, a new product with which IISI had virtually no prior experience, for use by the U.S. Government in life-threatening military applications.

30. My concern was further heightened on October 10, 2009, when Mr Zimmerman called me again and said that Netezza had requested an emergency call that day about this situation, which occurred that afternoon. During that call, Netezza's CEO James Baum claimed that they had a "national security" situation, and that it was very important for "national security" purposes that IISI get geospatial up and running on TwinFin as fast as possible, and that rather

than developing a complete product, IISI should deliver to Netezza any portions of geospatial software that it could produce to run on TwinFin on an accelerated, incremental basis. In that same call, Netezza official Jon Shepherd claimed that this Government customer “will work with whatever we give them.”

31. During this October 10, 2009 call, my colleague Mr. Zimmerman explained in detail the technical issues and problems that he had encountered in examining the TwinFin over the previous week to ascertain what would be involved in trying to develop a version of geospatial to run on TwinFin, and my colleague Marshall Peterson responded to Mr. Shepherd’s statement that the Government would work with “whatever we give them” by stating that IISI did not want to provide a software product that was not fully developed and tested. Despite these responses, the Netezza officials simply repeated their claims that IISI needed to proceed to develop and deliver accelerated, incremental versions of a geospatial product to run on TwinFin in this way for “national security reasons.” They never suggested during this call, however, that IISI had any obligation under the Agreement to proceed with this incremental development and delivery of a version of geospatial to run on TwinFin, and I did not believe that we did.

32. At the time Mr. Baum made his claims, in the October 10, 2009 call with us, that a “national security situation” required that IISI develop and deliver a version of geospatial to run on the TwinFin, *I did not know*, nor did any of my colleagues at IISI know, that (a) a month earlier, in September of 2009, IISI had sold a product to the Government which it called “Spatial on TwinFin” that did not exist, as later admitted in a deposition by Mr. Baum that I attended and evidenced by Netezza’s own internal documents, in conjunction with Netezza’s sale to the Government at that time of a \$1 Million TwinFin machine; and that (b) in early October, 2009, prior to the October 10, 2009 conference call with us, Mr. Baum had informed other executives

at Netezza that he wanted to book the \$1 Million in revenue on the sale of that TwinFin computer to the Government in the Netezza fiscal quarter ending October 31, 2009, but that he understood that geospatial had to be working on TwinFin by October 31, 2009 in order for Netezza to do so.

33. Instead, on October 11, 2009, the day after the October 10, 2009 teleconference, I received a further email from Netezza's Jon Shepherd saying that he had not heard from my colleague Rich Zimmerman in the 24 hours since the October 10, 2009 telecon, and claiming that "[o]ur customer is anticipating a quick resolution and candid correspondence."

34. In response, although I was still recovering from the heart attack I had suffered 12 days earlier, I sent Mr. Shepherd an email on October 12, 2009, stating that although IISI was committed to acting in accordance with the Agreement, it did not want to proceed to try to deliver a new version of geospatial to run on TwinFin on an accelerated, incremental basis, and did not want to try to develop such a product without proper terms and conditions to govern that work, and a resolution of all the outstanding issues concerning it, which included what warranties, if any IISI would be asked to give concerning partial or incomplete deliveries of untested geospatial software for Twinfin.

We stand committed to acting in accordance with the 2008 contract [the Agreement]. The IISI Products, defined very specifically under the terms of that contract, are a source of great pride for us. . . . We certainly will support the current 10000 [NPS] spatial products as stipulated in the contract. ...

On the current matter, we allowed our holiday weekends to be disrupted, and we listened carefully. Marshall will provide a fuller response later on that topic. ... Given that Netezza ... only provided TwinFin about a week ago, our timeline estimates for development of the requested new product were very short and reasonable.

Jon's statement, apparently embraced by Jim, that the customer can "just work with whatever we give them" is not consistent with

how IISI works. And we really don't believe that it is how our national security agencies work. ... Frankly, we are concerned that, on these critical national security issues, Netezza appears to be trying to sell products that don't exist and to which it has no legal rights.

... given past Netezza conduct, you cannot expect IISi to do the kind of beyond the scope work that has been requested without governing terms and consideration for that work. Of course, any new deals for new IISi products like the requested Twinfin spatial product would require resolution of outstanding issues.

Finally, we do have an excellent solution to address this problem. The IISi ("Netezza") Spatial product on the 10000 [NPS] series. That's the product that Jim has stated runs 97,0000 times faster than any other. Netezza legally committed to IISi that it would sell that product. In this sensitive application area, our teams should focus on delivering a proven product that exists -- and to which Netezza has some non-exclusive rights.

A copy of this email is attached as Exhibit E to Netezza's complaint herein.

35. On October 13, 2009, Netezza's CEO Mr. Baum responded to my October 12, 2009 email with an email of his own, dated October 13, 2009, in which he did not address the concerns I had expressed, but instead asked when the geospatial on TwinFin software would be available for the Government customer he had referenced in the October 10, 2009 phone conference, and claimed that "it is the CUSTOMER who has indicated that he is willing to work with IISI and Netezza to accept [geospatial] code progressively." A copy of this email, IISI Dep. Exh. 62, is attached hereto as Exhibit B.

36. In his October 13, 2009 email to me, Mr. Baum admitted "[n]either of us is in a position to make assumptions about the nature of his application nor can we pass judgment as to the 'risk' created through this approach" -- which I understood to be a reference to the risks associated with progressively and incrementally delivering to the customer only certain geospatial functions to run on TwinFin, before the entire product was finished or tested. I considered these risks substantial, and likely to be imposed upon IISI, more than Netezza, if IISI

agreed to proceed with the development of a new version of geospatial to run on TwinFin on this progressive, incremental basis -- because IISI would be producing the code.

37. For these reasons, I concluded, in or about mid-October of 2009, that it would not be prudent for IISI to expand the definition of "IISI Products" under the Agreement by delivering to Netezza, and preparing and adding the specifications for into Exhibit 1 of the Agreement, a new version of geospatial to run on the TwinFin -- in part because under Section 6.1 of the Agreement, IISI would then be warranting that whatever it delivered to run on the TwinFin, a machine with which it had virtually *no prior experience*, was "free from material defects in workmanship" and "will, under normal use, conform to the specifications...." I was also certain at that time that IISI was not required to undertake such a project under the Agreement, because this was precisely the kind of "Roadmap Functionality" that Netezza had specifically asked IISI to agree to produce under the Agreement when it was being negotiated, and that IISI had specifically said it would not agree to do.

38. On October 14, 2009, however, I received by email a letter to me from Netezza's Vice-President and General Counsel, Corey Dufresne, a copy of which is attached as Exhibit F to Netezza's complaint herein, in which Netezza claimed, for the first time, that the development of a geospatial product to run on TwinFin -- a machine that had only been delivered to IISI two weeks earlier -- was a "Customer Required Functionality" within the meaning of Section 2.4 of the Agreement, and that IISI was required to develop this new product under the Agreement.

39. Netezza further demanded, in the last sentence of the third paragraph of Mr. Dufresne's aforesaid October 14, 2009 letter, that IISI complete the development of a version of geospatial to run on TwinFin, which he referred to as a "port" of geospatial to Twinfin, "no later than Friday, October 23, 2009" -- even though IISI had only been given a TwinFin to examine

two weeks earlier, on October 1, 2009, and even though Mr. Zimmerman had already told Netezza, in an October 7, 2009 email, a copy of which is attached to his affidavit herein, that in his estimation it would take approximately *two months* to complete such a project. Netezza also argued, in the fourth paragraph of the letter, that it had reason to believe that IISI had not deposited the geospatial product source code into escrow under Section 2.4 of the Agreement -- but Netezza, up to that time, had not yet identified an escrow agent with whom IISI should deposit that source code, as required by Section 2.4 of the Agreement.

40. In response to the aforesaid October 14, 2009 letter from Mr. Dufresne, IISI's in-house lawyer Ron Turiello informed Mr. Dufresne, on October 19, 2009, that IISI was not required, under the Agreement, to perform the type of software development work that would be required to create a version of geospatial to run on TwinFin, and that the issue of such development work had been specifically negotiated by him with Netezza's prior General Counsel Michael Crowley the previous year. At that time, he also sent Mr. Dufresne copies of two emails from the previous year in which the concept of IISI agreeing to do this type of development work under the Agreement had been first raised by Netezza, and then rejected by IISI, in July of 2008 - - before the Agreement was signed. Copies of these emails are attached to Mr. Turiello's affidavit herein.

41. IISI also retained counsel, the law firm of Quinn Emanuel, to address the issue with Netezza, and Quinn Emanuel partner Kevin Reed wrote a letter to Netezza on October 28, 2009 explaining why the Agreement did not require IISI to develop and provide Netezza with a version of Geospatial to run on the new TwinFin machine. A copy of that letter is attached as Exhibit G to Netezza's complaint herein.

42. During this same October 2009 time period, I was contacted by telephone by an individual who identified himself as Skip McCormick, claimed to be associated with the U.S. Central Intelligence Agency (“CIA”), and expressed an interest in acquiring a version of geospatial that would operate on the TwinFin. At the time I was on my way to the hospital having suffered a slight relapse following my September 30, 2009 heart attack, and was in no position to speak with him at any length. I also could not verify that he truly was a representative of the CIA, and told him that I was concerned at being unable to do so.

43. A few minutes later, I received an email dated October 14, 2009, indicating it was from Skip McCormick at an email address designated “skip@ucia.gov,” stating that “*We depend on the geospatial tool here every day,*” and “*we just upgraded to a P12*” -- which I knew was Netezza’s numerical designation for a particular size TwinFin -- “*but it doesn’t yet have the geospatial tools.*” The email went on to say “*I’m trying to figure out what options are available for getting them asap.*” A copy of this email (the “McCormick email”) appears as the first email, chronologically, in the email chain attached hereto as Exhibit C. Since I knew there were no geospatial tools in existence to run on the TwinFin at the time I received this email, I assumed, when the email referred to wanting “to figure out what options were available for getting them,” that it was referring to options for a development effort to create a version of geospatial to run on TwinFin.

44. Late the next day, while I was still in the hospital, and had consulted with other IISI officials, I replied to the McCormick email in an email of my own that I sent on October 15, 2009, stating in part that “[t]his is a follow-up to your inquiry about IISI geospatial development work,” and offering to meet with them if Netezza wanted to consent to such a meeting. A copy of this reply email that I sent appears within the email chain attached hereto as Exhibit C. IISI’s

in-house counsel Ron Turiello then forwarded my email exchange with Mr. McCormick to Netezza, along with his own covering email informing Netezza that IISI had been approached by the CIA to do this development work, and asking if Netezza would be available to discuss this possibility. A copy of this email from Mr. Turiello to Netezza also appears in the Exhibit C attached hereto.

45. Thereafter, our in-house lawyer Ron Turiello had a series of telephone discussions with Netezza's attorney Corey Dufresne which he has described in his affidavit, but when he was unable to get Netezza to consent in writing to IISI meeting with what we understood was Netezza's CIA customer, we ceased communicating with McCormick and never had a meeting with him or the CIA. Approximately a month later, without responding to IISI's request to engage in further discussions pursuant to the dispute resolution provisions of the Agreement, Netezza delivered notices to IISI on November 20, 2009 purporting to terminate the Agreement, and commenced this action against IISI.

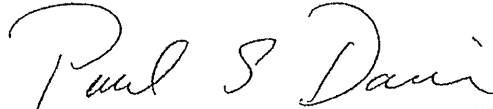
46. At the time Netezza served IISI with a copy of the initial complaint it filed in this matter, Netezza requested that IISI return the NPS and TwinFin machines previously provided to Intelligent. When IISI received Netezza's request, I spoke with Richard Zimmerman, the CTO of IISI, about what information was stored on those machines. Among other things, Mr. Zimmerman informed me that his proprietary testing data, and the source code for IISI's geospatial product, had been loaded onto both machines -- in the case of TwinFin as part of the evaluation that Mr. Zimmerman had conducted the previous month to estimate how long it might take to develop a version of geospatial to run on TwinFin.

47. The test data and source code for geospatial that are loaded on the NPS and TwinFin machines currently in IISI's possession are proprietary trade secrets of IISI that it has

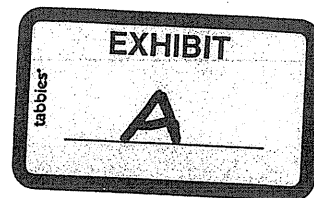
held confidential and not disclosed to third parties, and that IISI believes it has a legitimate right not to disclose to Netezza, but because it appears that these machines may be evidence in this case, IISI did not and does not want to alter their records by removing or deleting this trade secret material without agreement of the parties and/or court approval.

48. Accordingly, IISI's counsel communicated with Netezza's counsel on this subject in December of 2009, and wrote to Netezza's counsel about it on January 20, 2010 in a letter of which I received a copy which is attached hereto as Exhibit D, advising that both machines had been disconnected and were being preserved until the parties could reach agreement and obtain court approval on how to address the trade secret and evidence preservation issues involving them, and requesting that the parties discuss the issue further. No such discussion or agreement has yet been reached, however.

Sworn to under the pains and penalties of perjury this 30th day of April, 2010.



Paul Davis



From: Paul Davis
Sent: Tuesday, May 26, 2009 8:42 PM
To: 'Jon Shepherd'
Subject: Software Request

Hi Jon,

We'd like to be able to accommodate you on loading the product onto all the systems.

Our initial concern is logistical. We'd like to understand how the "flick-a-switch" method works. Would you take our spatial binary and somehow roll it into the system in a way that is reasonably protected from hacking or unauthorized turn-ons? Would there be a practical tracking and audit capability? I'll ask Rich and Ron to try to take a look from our side to make this work.

We think this attempt to more fully integrate raises another seemingly contradictory - but really complementary - issue. Many customers - particularly some with the most compelling application needs - require special development and integration help at the front-end of the process. IISi obviously has prime mastery of the product path and code via Rich, but we also have two senior developers/integrators in Joseph Pacatte and Tim Callaghan who can create special solutions. Fully exploiting the spatial potential will require special work.

In a sense, the phrase "seemingly contradictory, but really complementary" describes the whole history of IISi with Netezza. Netezza ownership and control was always stated as a goal. The unorthodox SQL marketing agreement deferred much risk for Netezza, but also provided a mechanism for Netezza if it wants to become more involved with the product. At this point, we think we either have to work closer together or Netezza needs to consider exercising its option to participate fully in the development of the technology. psd