

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

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

CASE NO. 09-4961-BLS

**DEFENDANT INTELLIGENT INTEGRATION SYSTEMS, INC.’S
MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant Intelligent Integration Systems, Inc. (“IISI”) has moved this Court for summary judgment (1) dismissing with prejudice plaintiff Netezza Corporation’s First Amended Complaint herein (the “Complaint”), and (2) granting IISI summary judgment on its claim that Netezza wrongfully terminated the Purchase and Distribution Agreement, dated August 6, 2008, which is referred to in the Complaint (the “Agreement”).

The grounds for this motion, as more fully set forth below, and in the other supporting papers filed herewith, are that the undisputed material facts, including the provisions of the Agreement and the circumstances surrounding its negotiation and performance by the parties, clearly demonstrate that as a matter of law, the Agreement did not require IISI to perform the work that Netezza claimed IISI was required to perform at the time Netezza relied on that nonperformance to terminate the Agreement. As a result, Netezza’s termination of the Agreement on November 20, 2009 was wrongful, and itself constituted a material breach of the Agreement by Netezza.

Under these circumstances, and based on the undisputed facts in the record, IISI is entitled to summary judgment in its favor both as to its claim for breach of the Agreement by Netezza, and as to Netezza's claims against it for alleged breach of the Agreement, breach of the implied covenant of good faith and fair dealing, intentional interference with contractual and advantageous relations, conversion, 93A, and declaratory judgment.

Statement of Facts

IISI respectfully refers the Court to the parties' annotated Rule 9A Statement of Undisputed Material Facts in Support of Defendant Intelligent Integration Systems, Inc.'s Motion for Summary Judgment ("Rule 9A Fact Statement") for a detailed recitation of the relevant facts, which include (i) the actual provisions of the Agreement; (ii) the content of the parties' negotiations concerning those provisions, and (iii) the events leading up to Netezza's November 20, 2009 termination of the Agreement, including what discovery has revealed Netezza actually did in this case. The key facts, however, can be briefly stated.

When the parties negotiated the Agreement, they specifically addressed the question of whether IISI would be obligated to further develop the geospatial and extended SQL toolkit products that it was selling to Netezza so as to add new functionality requested by Netezza in the ordinary course of business as part of its "roadmap," or development plan, for those products. After discussion, the parties specifically agreed that IISI would not be required to provide such "roadmap functionality," and that IISI would only be required to maintain and support the existing geospatial and extended SQL toolkit products by helping to correct technical problems that caused them not to function properly when used as intended. *See* Rule 9A Fact Statement at ¶¶ 10-15, 27-32.

The language in the Agreement was altered to reflect this understanding before it was executed. First, the definition of the "IISI Products" being sold was narrowed to cover only the products whose specifications appeared in Exhibit 1 to the Agreement -- which were the geospatial and extended SQL toolkit running on Netezza's NPS 10000 series machine -- and any new releases or versions delivered to Netezza by IISI whose specifications were added to Exhibit 1 of the Agreement *by IISI*, which gave IISI the option to provide roadmap functionality if it chose to do so, but did not require it to do so. Second, language proposed by Netezza's lawyer that would have required IISI to provide "functionality to be developed in the ordinary course as part of the product roadmap ('Roadmap Functionality')" was specifically deleted from the Agreement before it was signed. Third, language dealing with IISI providing "Customer Required Functionality" was narrowed to define such functionality only as "functionality requested by a customer to address a Moderate Problem, Serious Problem, or Critical Problem with the geospatial IISI Product (each as defined in Schedule B)," all of which were defined as "technical problems" with an existing IISI Product that already had "users." See Rule 9A Fact Statement at ¶¶ 8-16, 27-32.

Although the term "Netezza Products" was defined broadly in the Agreement, it was not part of the definition of IISI Products, and in fact was only used in two parts of the Agreement, both drafted by Netezza, neither of which contained any statement that IISI was required to further develop the IISI Products, and both of which appeared to have simply allowed for the possibility that IISI might choose to add later versions of its products, running on later versions of Netezza products, into the definition of "IISI Products," which is how IISI understood them when the parties signed the Agreement, which occurred in August of 2008. See Rule 9A Fact Statement at ¶¶ 19-23.

The following year, in April of 2009, Netezza advised IISI that part of its “roadmap” for the geospatial IISI Product was to create versions of that software that would run on data warehouse appliances other than the NPS 10000 series on which geospatial was then designed to run, including a new data warehouse appliance, called “TwinFin,” that it was planning to announce and begin selling later that year. In particular, Netezza told IISI that part of the “roadmap functionality” for the geospatial IISI Product was to make it work on the TwinFin, and that it wanted IISI to do the development work for that. *See id.* at ¶ 34.

While IISI expressed a desire to accommodate Netezza in this regard, it said it had questions about the logistics of such a development effort, and it was not until August of 2009 that IISI was given any access to a TwinFin to examine it, and even at that time, the access was only by remote electronic connection. Almost immediately, IISI’s chief technology officer expressed concern about the lack of physical access to the TwinFin, which consisted of different hardware, working in a different way, than the NPS on which the existing geospatial IISI Product was designed to run, and reported that he had been unable to set up a proper development environment using only remote access to a TwinFin. *See id.* at ¶¶ 34-36, 38, 39.

Unbeknownst to IISI at the time, Netezza had already represented to the U.S. Government that geospatial was running and available on the TwinFin, when in fact it was not, and had been representing, at trade conferences, that it had a geospatial product that ran on its new TwinFin computer, when in fact it did not. On September 11, 2009, at a time when IISI was still reporting that it needed physical access to a TwinFin to set up a proper development environment, Netezza received a purchase order from a company acting for the U.S. Central Intelligence Agency (“CIA”) for a TwinFin priced at over \$1 million, and a software product

referred to as "Netezza GeoSpatial for Netezza TwinFin 12" which in fact did not exist. *See id.* at ¶¶ 40-42.

Thereafter, it was not until October 1, 2009 that Netezza gave IISI physical access to a TwinFin by delivering one to IISI's chief technology officer Rich Zimmerman, who promptly reported that he was not comfortable with the effort to develop geospatial on TwinFin, that the effort was "proving fraught with issues" that therefore would require "a thorough going over and a good QA cycle,"¹ and that he conservatively estimated at least two months for such a development effort -- until the "end of November, early December timeframe." Netezza's CEO James Baum, however, told the Netezza executives reporting to him that he wanted to book the \$1 Million revenue from the sale of the TwinFin to the CIA in the fiscal quarter ending October 31, 2009, and understood that he could not do so unless the "Geospatial for Netezza TwinFin" software that Netezza had sold to the CIA with the TwinFin worked, and was accepted by the customer. *See id.* at ¶¶ 43-45.

As a result, although IISI had received an email from Netezza on October 1, 2009 stating that the Government's need for geospatial on TwinFin was not "urgent," Netezza suddenly began pressuring IISI to develop a version of geospatial to run on the TwinFin on an accelerated, incremental basis, claiming that "national security" required it, and that the Government would "take whatever we give them." When IISI refused -- pointing out that (a) it did not want to deliver incremental portions of untested software for use by the Government in national security situations, (b) it was not required to add this kind of "Roadmap Functionality" to the geospatial IISI Product under the Agreement, and (c) it would need to have different terms and conditions

¹ Under Section 6.1 of the Agreement, if IISI added later versions of its products to the definition of "IISI Products" and released it to Netezza, IISI would also be broadly warranting that those later versions, like all "IISI Products," would be free from material defects, would contain no harmful code, and would, under normal use, conform to their specifications.

to govern such a development effort (such as different representations and warranties than those in Section 6.1 of the Agreement) -- Netezza "hacked" (Netezza's word) into IISI's geospatial sourcecode (in violation of the "no reverse engineering" provisions of the Agreement), and created a version of geospatial that ran on TwinFin, though very imperfectly, which it delivered to the CIA in October 2009, and which the CIA accepted. *See id.* at ¶¶ 47-48, 50-57.

Then, beginning at the end of October, 2009, Netezza commenced a full-scale project to develop a version of geospatial that would operate more correctly on TwinFin, using IISI trade secret test scripts and proprietary material that Netezza had obtained from IISI under the Agreement (which Netezza was not permitted to use for that purpose under the Agreement), and Netezza personnel and consultants who had previously been given access to trade secret information of IISI concerning its geospatial product. In late November, 2009, after Netezza's CEO reported to the Netezza Board of Directors that this project was well underway, Netezza publicly announced that it was terminating the Agreement -- under which it otherwise would have been required to pay millions of dollars of "guaranteed" and "progress" payments to IISI over the next several years-- for alleged failure by IISI to provide "maintenance and support" of IISI Products. *See id.* at ¶¶ 55, 57-59.

Argument

I. SUMMARY JUDGMENT IN FAVOR OF IISI IS WARRANTED ON THE CONTRACT INTERPRETATION ISSUE, AND ON THE BREACH OF CONTRACT AND IMPLIED COVENANT CLAIMS IN THIS CASE

It is well-settled Massachusetts law that summary judgment should be granted as to those claims concerning which there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Cassesso v. Commissioner of Corrections*, 390 Mass. 419, 422 (1983); *Community National Bank v. Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ.

P. 56. In this case, Netezza's contract claims against IISI are based on a mistaken interpretation of the Agreement, and the interpretation of a written contract is a question of law, not of fact. *Allstate Ins. Co. v. Bearce*, 412 Mass. 442, 446-447 (1992); *Shea v. Bay State Gas Co.*, 383 Mass. 218, 223 (1981). Summary judgment dismissing those claims, and granting IISI summary judgment on its claim for wrongful termination of the Agreement, is therefore appropriate, for the reasons set forth below.

A. General Principles of Massachusetts Law Applicable to the Interpretation of the Purchase and Distribution Agreement

In construing any contract, the Court must give effect to the intentions of the parties, as expressed in the language employed, considered in light of the context of the transaction and the purposes to be accomplished. *See Starr v. Fordham*, 420 Mass. 178, 190 (1995); *Shea v. Bay State Gas Co.*, 383 Mass. 218, 224-25 (1981). "So far as reasonably practicable [a contract] should be given a construction which will make it a rational business instrument ..." *City of Haverhill v. George Brox, Inc.*, 47 Mass. App. Ct. 717, 720 (1999), quoting *Bray v. Hickman*, 263 Mass. 409, 412 (1928).

The principal guide to contract interpretation is, of course, the language of the contract itself. "Words that are plain and free from ambiguity must be construed in their usual and ordinary sense." *Citation Ins. Co.*, 426 Mass. at 381. However, the Court may also consider extrinsic evidence, not to vary or contradict the terms of an unambiguous contract, but to understand the context in which the parties executed it. *See, e.g. Robert Indus., Inc. v. Spence*, 362 Mass. 751, 753-754 (1973) ("When the written agreement, as applied to the subject matter, is in any respect uncertain or equivocal in meaning, all the circumstances of the parties leading to its execution may be shown for the purpose of elucidating, but not of contradicting or changing its terms"); *Keating v. Stadium Mgmt. Corp.*, 24 Mass. App. Ct. 246, 249 (1987). In doing so, a

court must interpret a contract in such a way as to give effect to each of its provisions. *See McMahon v. Monarch Life Ins. Co.*, 345 Mass. 261, 264 (1962). *Starr v. Fordham*, 420 Mass. 178 (1995) (the scope of a party's contractual obligations cannot be delineated by isolating words and interpreting them as though they stood alone, rather the contract must be read as whole).

In short, as the Massachusetts Supreme Judicial Court held in *Merrimack Valley Nat'l Bank v. G. Stewart Baird, Jr.*, 372 Mass. 721, 723-24 (1977):

When the words of a contract are clear they alone determine the meaning of the contract, but, when a contract term is ambiguous, its import is ascertained from the parties' intent *as manifested by the ... terms and the circumstances surrounding its creation*, such as [the] relationship of the parties, actions of the parties and established business usages.

(emphasis added). *See also Nile v. First NH Investment Serv. Corp.*, 96-2925, 1998 Mass. Super. Lexis 67, at * 15 ("In interpreting a contract, the court's first duty is to 'put ourselves in the place of the parties to the instrument, and then read it, giving to its words their plain and ordinary meaning in light of the circumstances, and in view of the subject matter, the acts of the parties, and their relations to each other.'")(citations omitted).

Even if the Court deems certain provisions in a contract to contain a degree of ambiguity, the interpretation of its meaning is generally still a question of law for the Court. *See Greenleaf Glick v. Greenleaf*, 383 Mass. 290, 296 (1980) ("When an element of ambiguity appears in a written instrument, [courts] consider the general scheme it reveals to determine the significance and meaning of the ambiguous term"); *Frank Construction v. Republic Powered Metals, Inc.*, 11 Mass. App. Ct. 972 (1981) (finding that the preliminary issue of the existence of an ambiguity is itself a question of law for the court to determine);

Moreover, any ambiguity in particular language of a contract must be properly construed against the drafter of that language. *See Merrimack Valley Nat'l Bank v. Baird*, 372 Mass. at 724

(“As a general rule, a writing is construed against the author of doubtful language...if the circumstances surrounding its use and the ordinary meaning of the words do not indicated the intended meaning of the language.”) (citations omitted); *Republic Pipe & Supply Corp v. Marnell Construction Corp.*, 363 N.E. 2d 1361, 1362 (Mass. App. Ct. 1977) (noting that any ambiguity in a business instrument must be resolved against the drafter).

In particular, the drafter of an agreement has the burden of clear expression on an element of the contract important to him and burdensome to the other party. *See Recoll Mngmt Corp. v. Stone & Webster Engineering Corp.*, 1999 Mass. Super LEXIS 557, at * 34 (ruling in favor of the defendant contracting party after finding that the drafting party had the “clear burden of expression upon an element of the agreement important to it” and failed to meet it by specifically articulating the obligation it sought to enforce); *Wilcox, Inc. v. Shell Eastern Petroleum Products, Inc.*, 283 Mass. 383, 388 (1933) (“In order that the plaintiff may recover, the instrument relied on must be found to state the essential terms of a contract, by which the parties intended to be bound, with sufficient definiteness and clarity that a court, by interpretation with the aid of existing and contemplated circumstances, may enforce it.”); *Knowles v. Griswold*, 252 Mass. 172, 175 (1925) (ruling that to enforce a contract, it is “essential” that “its nature and the extent of its obligations be known”); *Merrimack Valley Nat’l Bank v. Baird*, 372 Mass. at 724.

If, for example, the drafting party fails to articulate an obligation that it seeks to impose on the other contracting party, or leaves a material term hidden in a general phrase, it has failed to carry its burden to specifically articulate that obligation or term, and the courts will resolve any dispute over it in favor of the other contracting party. In *Wilcox v. Shell Eastern Petroleum Products*, 283 Mass. 383, for example, the Supreme Judicial Court refused to enforce an exclusivity agreement between a business owner and a distributor, finding that although the

distributor agreed to a finite period of time in which it would supply products to the business owner, the contract was “silent on material matters important in its interpretation for the ascertainment of the obligations of the parties.” *Id.* (further concluding, “[m]any essential terms necessarily involved in the proposed undertaking [e.g., the price for the goods and the minimum quantity of goods to be sold during the contract] are not set forth and without them,” the plaintiff could not enforce the contract against the defendant). In this case, Netezza is seeking to enforce, as a purported requirement of the Agreement, an obligation that is not stated as a requirement *in* the Agreement -- which it drafted. This it cannot do.

Indeed, Massachusetts courts have consistently held that “[t]he author of the ambiguous term is held to any reasonable interpretation attributed to that term which is relied upon by the other party.” *See Merrimack Valley Nat’l Bank v. Baird*, 372 Mass. at 724; *Shea v. Baystate Gas Co.*, 383 Mass. at 225 (ruling that courts will grant summary judgment when the alternative interpretation placed on the contractual ambiguity is reasonable); *Republic Pipe & Supply Corp.* 362 N.E. 2d at 1362 (the author of the operating instrument must be held to the reasonable interpretation of the terms).

B. Under the Terms of the Agreement, Fairly Construed, IISI Was Not Required To Perform the Work that Netezza Claimed IISI Was Required to Perform

Put simply, there is no provision in the Agreement stating that IISI “shall” or was “required” to develop new software applications for later-developed Netezza products such as the TwinFin, and it would make no rational business sense for IISI to have agreed to do so when it had no way of knowing what risks or expense would be involved in such efforts. *See* Rule 9A Statement, at ¶¶ 12-15, 21. Moreover, by Netezza’s own admission, making geospatial work on the TwinFin was part of Netezza’s “roadmap functionality” for the product, and the evidence

concerning the parties' pre-contract negotiations makes it clear that they did not intend for IISI to have to provide "roadmap functionality" under the Agreement, and specifically removed such a requirement from the Agreement before they signed it. *See id.* at ¶¶ 9-15, 31-32, 34.

Nevertheless, in the First Amended Complaint and in its various submissions in this case, Netezza has alleged that the definition of "Netezza Products" on page 1 of the Agreement, and Section 6.4 and the "Training and Certification" provisions in Schedule C that use the term "Netezza Products," and the "IISI Commitments" section in Schedule A, the "Maintenance and Support" provisions in Schedule B, and the "Customer Required Functionality" provisions in Section 2.4, taken together, obligated IISI to create a new version of its geospatial product to run on the Twinfin when Netezza asked it to do so in 2009. Careful examination of these provisions, however, in light of the principles of contract construction outlined above and the undisputed evidence concerning the parties' pre-contract negotiations, does not bear out this interpretation of them. They simply did not impose that requirement.

1. The Definition of "Netezza Products" and the Use of that Term in Section 6.4 and Schedule C of the Agreement, Did Not Require IISI to Develop a Version of Geospatial for TwinFin

The broad definition of "Netezza Products" on page 1 of the Agreement, for example, was used in only two parts of the Agreement: first, in Section 6.4 on page 6, where IISI was warranted that the "IISI Products" -- defined on page 1 of the Agreement as including later versions only if IISI added their specifications into Exhibit 1 of the Agreement -- contained no "open source" code that would affect "Netezza Products," and second, on the bottom half of the "Schedule C - Training and Certification" section on page 18 of the Agreement, where the Agreement stated that "[t]he parties agree to work in good faith to establish a certification process that may include, but not be limited to" (emphasis added), various processes to certify or

ensure that "IISI Products" -- again defined on page 1 as including later versions only if IISI added their specifications into Exhibit 1 -- do not "adversely affect," "operate error free with," "conform[] to," and do not cause "issues/bugs/errors" in, Netezza Products. See Rule 9A Statement at ¶¶ 19-22.

Neither of these usages of the term "Netezza Products" said that IISI was "required" to create later versions of IISI's geospatial or extended SQL toolkit products to run on all "Netezza Products," and to read them as doing so would render meaningless the provisions in the basic definition of "IISI Products" (a term which is used over 85 times throughout the Agreement) stating that IISI Products would include later versions or releases of IISI's geospatial or extended SQL toolkit products *only if* IISI delivered them to Netezza and added their specifications into Exhibit 1 of the Agreement. See *id.* at ¶¶ 8, 18-22. This would violate the maxim that a contract should be interpreted in such a way as to give effect to each of its provisions. See *McMahon v. Monarch Life Ins. Co.*, 345 Mass. 261, 264 (1962).

Also, it is undisputed that Netezza drafted the language in Schedule C, and that it was never the subject of any negotiation between the parties. See Rule 9A Statement at ¶¶ 19, 20. As such, any ambiguity in it must be construed against Netezza, and in favor of IISI, and any reasonable construction of it by IISI prevails. In this regard, when IISI signed the Agreement in 2008, it understood the language on the bottom half of Schedule C 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. *See id.* at ¶¶ 20-23.

IISI 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. *See id.* at ¶¶ 19-23. 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. *See id.* at ¶¶ 9-15.

Moreover, at the time it signed the Agreement, IISI 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 IISI 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"). *See id.* at ¶¶ 9-15.

Under all these circumstances, Netezza's claim that the definition of "Netezza Products" entitled it to require IISI to develop later versions of its geospatial and extended toolkit products to run on the TwinFin flies in the face of the parties pre-contract negotiations, is not supported by the plain language of the Agreement where the "Netezza Products" is used, and would nullify another term of the Agreement - the definition of IISI Products - that gave IISI control over what later versions of its products it might choose to develop and make subject to the Agreement. As

such, Netezza's interpretation of the Agreement in this regard cannot prevail. *See id.* at ¶¶ 8-15, 19-24.

2. **The Maintenance and Support Provisions in the "IISI Commitments" Section of Schedule A, and the "Support Terms and Conditions" in Schedule B to Which they Refer, Did Not Require IISI to Develop a Version of Geospatial for TwinFin**

Netezza also argues, however, that IISI was required to develop another version of its geospatial IISI Product to run on the TwinFin under the "IISI Commitments" language in Schedule A on page 15 of the Agreement, which read:

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), but the specific referenced maintenance and support "Terms and Conditions" that follow on Schedule B of the Agreement, which appears on pages 16-17 of the Agreement, made clear that the "maintenance and support" being referred to here, including bug fixes and product enhancements, was limited to that which was necessary to address the specific categories of "technical problems" with the IISI Product identified in the referenced Schedule B -- such as a "Critical Problem," "Minor Problem," "Moderate Problem," or "Serious Problem." *See id.* at ¶¶ 27-32; *see also Dickson v. Riverside Iron Workers, Inc.*, 372 N.E. 2d 1302, 1304 (Mass. App. Ct. 1978) (citations omitted); *Recoll Mngmt Corp.*, 1999 Mass. Super LEXIS 557 at * 28-29 ("Under the canon of *eiusdem generis* applicable generally to the language of legal instruments from constitutions to contracts, the interpreter of a generic or open-ended term accompanied by an enumeration of specific examples is entitled to conclude that the open term carries a meaning of the same kind or quality as the specific examples.").

In this regard, each of the defined categories of "technical problems" was defined on Schedule B in terms of how badly it "impaired" the operation of the "IISI Product" or affected its

availability to “users” of the IISI Product. Section 2 on Schedule B, entitled “IISI Maintenance and Support Responsibilities,” then required IISI, per Sections 2.2 and 2.3, to respond to the different defined categories of 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, and by providing that “IISI will have telephone and email support available during Normal Business Hours and will provide support outside Normal Business Hours via pager.” *See* Rule 9A Statement at ¶¶ 27-31. **These clearly were not software development project provisions; they were maintenance provisions.**

Similarly, the reference to “support escalations” was 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 “second level” support was 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. *See id.* Again, these clearly were not software development project provisions; they were maintenance provisions

Finally, Section 2.1 of Schedule B of the Agreement, on page 16, and 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.*” *See id.* at ¶ 30. These too clearly were not software development project provisions; they were maintenance provisions. Taken together, all of this language leads to the

conclusion that all IISI was agreeing to do in this section was to bug fix and product enhance its existing geospatial or extended SQL toolkit products as necessary to correct address “technical problems” that customers had with them that impaired their operation --- not to develop new versions of them that would run on entirely new hardware platforms such as TwinFin.

Any doubt on this question is resolved by the fact that the “maintenance and support” language in Schedule A of the Agreement, on page 15, under the heading “IISI Commitments,” was drafted by the Netezza lawyer Michael Crowley, appeared in Mr. Crowley’s first draft of the Agreement and all his subsequent drafts, and was never the subject of any negotiation between the parties. See Rule 9A Statement at ¶ 27; see also Turiello Aff. at ¶ 17. In this regard, the Massachusetts courts have consistently held that “[t]he author of the ambiguous term is held to any reasonable interpretation attributed to that term which is relied upon by the other party.” See *Merrimack Valley Nat’l Bank v. Baird*, 372 Mass. at 724; *Shea v. Baystate Gas Co.*, 383 Mass. at 225; *Republic Pipe & Supply Corp.* 362 N.E. 2d at 1362 (the author of the operating instrument must be held to the reasonable interpretation of the terms).

In this case, IISI clearly did not understand this language to be requiring IISI to do any software development or enhancement of the IISI Products except as necessary to address the type of technical problems with existing IISI Products defined in Schedule B of the Agreement, as IISI’s lawyer had specifically discussed with Netezza’s attorney, and he had agreed to. See Rule 9A Statement at ¶¶ 12, 14, 29; Turiello Aff. at ¶ 17. This was a reasonable interpretation of these provisions by the non-drafting party that must properly prevail as a matter of law -- particularly where, as here, the parties other pre-contract negotiations, including the deletion of the “roadmap functionality” language from the Agreement, and the IISI attorney’s discussions with the Netezza attorney about how IISI would not agree to be required to perform new

software development work, but would only provide maintenance and support to its existing products, support IISI's interpretation. See Rule 9A Statement at ¶ 8-15, 14, 29.

3. The "Customer Required Functionality" Provisions in Section 2.4 of the Agreement Did Not Require IISI to Develop a Version of Geospatial for TwinFin

Finally, Netezza also argues that IISI was required to develop a version of geospatial to run on the new TwinFin because it was supposedly a "Customer Required Functionality" under Section 2.4 of the Agreement, but as the Geospatial Product Manager for Netezza, Jon Shepherd, admitted in his deposition, making geospatial work on TwinFin was part of Netezza's "roadmap functionality" for the product beginning in the Spring of 2009:

Q. (By Mr. Kaler) Okay. I'll repeat it. The question I'm asking you was, I mean, the term "roadmap" refers to, loosely speaking, your plans for future development of the product, right?

A. *Yes.*

Q. Okay. *And part of Netezza's roadmap for the spatial product as of April 2009 was to make it work on the TwinFin, correct?*

A. Correct...

Q. . . . you understood that part of the roadmap functionality for the geospatial product at this time was to make it work on TwinFin, right?

A. Yes.

Rule 9A Fact Statement at ¶ 34 (emphasis added).² As such, it clearly was not something that resulted from a customer "technical problem" with the existing IISI Product.

In this regard, "Customer Required Functionality" under the Agreement was specifically defined in Section 2.4 -- in response to pre-contract negotiations in which IISI's lawyer Mr. Turiello edited it to narrow its scope, see Turiello Aff. at ¶ 12 -- as being limited to functionality requested by a customer "to address a Moderate Problem, Serious Problem, or Critical Problem

² Appendix Tab 64 (Shepherd Dep Transcript) 130-19 to 131-3, 131-16 to 131-19.

with the geospatial IISI Product (each as defined in Schedule B).” Agreement at p. 3; *see also* Rule 9A Statement at ¶ 15.

Schedule B of the Agreement, in turn, defined a “Critical Problem” on page 16 as “a technical problem” that renders the IISI Product unavailable to “users” or unable to perform a critical user function.” *See* Rule 9A Statement at ¶ 30. It then defined a “Minor Problem” as “a technical problem that does not impair the operation of the IISI Product.” It then defined a “Moderate Problem” as:

a technical problem that impairs operation of the IISI Product to a lesser degree than a Serious Problem, but does not render the IISI Product unavailable to users or unable to perform a critical user function;

and a “Serious Problem” as:

a technical problem that substantially impairs operation of the IISI Product, but does not render the IISI Product completely unavailable to users or unable to perform a critical user function.

(emphasis added). *Id.* Clearly, Netezza’s request, and its customer’s request, that IISI develop a version of geospatial to run on Netezza’s new TwinFin product, was not a request for functionality “to address” any of these types of technical problems. In fact it was not a request to address a “technical problem” at all. *See id.* at ¶¶ 29-32, 34. It was a request for software development, pure and simple, and IISI (as it pointed out to Netezza in the Fall of 2009) was not required to agree to it. *See id.* at ¶¶ 34, 36.

The record of the parties’ pre-contract negotiations, in which Netezza specifically proposed that IISI agree to perform additional software development in the ordinary course of business and IISI refused, saying it would only address technical problems with its existing products, clearly supports this conclusion, *see* Rule 9A Fact Statement” at ¶¶ 8-15, 27-32, and Netezza has no legitimate argument to the contrary. Under these circumstances, Netezza simply

had no right to terminate the Agreement, as it did on November 20, 2009, for alleged failure by IISI to provide "Customer Required Functionality" pursuant to Section 2.4 of the Agreement.

4. **Netezza's Wrongful Termination of the Agreement on November 20, 2009 Was Itself a Material Breach of the Agreement, Precluding It From Recovering as to Any Other Claimed Breach By IISI, and Allowing IISI to Terminate the Agreement and Recover Damages**

It is well-settled law in Massachusetts that "an unjustified termination is treated as a material breach thereby excusing the other party from further performance under the contract." *Foster v. Mayo*, No. 04-0934-C, 2006 Mass. Super. LEXIS 658, at *14-15 (Mass. Super. Ct. December 19, 2006) (holding that termination of agreement due to delay in obtaining clear title improper and constituted material breach where delay contemplated and understood prior to execution of agreement). As the *Foster* court noted, the plaintiff there, as the "initial breaching party" by way of its unjustified repudiation, was "precluded as a matter of law from asserting breach of contract." *Id.* at *17. The same is true here as to Netezza, which had no grounds to terminate the Agreement because, as set forth above, IISI had not breached it in declining to develop a version of geospatial to run on TwinFin.

In addition, Netezza's wrongful termination of the agreement accorded IISI the right to assert its own termination of the Agreement because Netezza, as the "initial breaching party," has committed a material breach. As a leading treatise on contracts has stated, any party

... that chooses to exercise the right of self-help either by suspending or *electing to terminate* takes the risk that a court may later regard the exercise as precipitous. ... [T]hat party's decision 'is fraught with peril, for should such determination, as viewed by a later court in the calm of its contemplation, be unwarranted, *the repudiator himself will have been guilty of material breach* and himself become the aggressor, not an innocent victim.'

Farnsworth on Contracts, § 8.15, quoting *Walker & Co. v. Harrison*, 81 N.W.2d. 352, 355 (Mich. 1957) (holding no valid ground existed for repudiation which itself constituted material breach)(emphasis added).

The actions by Netezza in terminating the Agreement prematurely when no valid ground existed exemplifies this standard of contract law. The Massachusetts Supreme Judicial Court (“SJC”) has recognized this basic premise since the early 20th century. In *F.E. Atteaux and Co., Inc. v. Mechling Brothers Manufacturing Co.*, 245 Mass. 483 (1923) the parties entered into a contract for the exclusive sale of certain chemicals. *Id.* at 488. After contract modification negotiations broke down, one party refused to proceed on the stated terms of the contract unless certain concessions were made. *Id.* at 493. The SJC held that by repudiating the contract, without justification, the repudiator had committed a material breach that relieved the other party relieved of further performance obligations. *Id.* at 498.

A case in 2008 from the United States Court of Federal Claims illustrates the same with similar facts to this case. In *Sterling, Winchester & Long, LLC v. U.S.*, 82 Fed. Cl. 560 (Fed. Cl. 2008), *affirmed by* 2009 U.S. App. LEXIS 12263 (Fed. Cir., June 5, 2009), the parties entered into a trademark license agreement whereby the United States Postal Service agreed to license some of its trademarked property to Sterling for production of commemorative calendars. *Id.* at 561. The agreement specified three (3) royalty payments over the course of the deal. *Id.* at 562.

After the first royalty payment was made, Sterling demanded that the Postal Service purchase its calendars and sell them through their catalog and philatelic centers. *Id.* The Post Office rejected Sterling’s request as the parties’ agreement did not impose such an obligation, and as a result, Sterling filed suit claiming breach of contract. *Id.* After holding that contract, by its terms, did not require the Postal Service to open up its distribution channels, the Court held

that Sterling committed the “first material breach” by giving notice of its termination of the contract. *Id.* at 565. As a result, the Postal Service’s counterclaim for breach of contract was granted. *Id.* at 565-566.

The same result is warranted here -- IISI should be awarded summary judgment on its breach of contract claim against Netezza on account of Netezza’s wrongful termination of the Agreement.

C. The Implied Covenant of Good Faith and Fair Dealing Did Not Require IISI To Perform the Work that Netezza Claimed IISI Was Required to Perform

Netezza further argues that IISI violated the implied covenant of good faith and fair dealing because it failed to develop a new geospatial product for TwinFin, after Netezza admittedly failed to provide IISI with access to a TwinFin on which to try to do so until October 1, 2009, and IISI reminded Netezza that it was not required to develop new products pursuant to the Agreement, and could not do so on the incremental, accelerated basis demanded by Netezza. *See* Rule 9A Fact Statement at ¶¶ 34-40, 51. Careful review of the undisputed facts reveals, however, it was *Netezza’s* conduct and its attempts to coerce Intelligent to perform work it had no obligation to do and did not contract for -- that violated the implied covenant of good faith and fair dealing. *See id.* at ¶¶ 38-55.

In this regard, “every contract implies good faith and fair dealing between the parties to do it.” *T.W. Nickerson v. Fleet Nat’l Bank*, SJC-10487, 2010 Mass. LEXIS 197, at * 15 (Mass. Apr. 16, 2010), quoting *Anthony’s Pier Four, Inc v. HBC Assocs.*, 411 Mass. 451, 471 (1991). “The purpose of the implied covenant is to ensure that neither party interferes with the ability of the other to enjoy the fruits of the contract...and that, when performing the obligations of the contract, the parties ‘remain faithful to the *intended and agreed expectations*’ of the contract.”