

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)