COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

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 ISII 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 ISI 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