

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

AMC TECHNOLOGY, LLC,)	Case No.: 11-cv-3403 PSG
)	
Plaintiff,)	ORDER GRANTING-IN-PART
v.)	CISCO’S MOTION FOR SUMMARY
)	JUDGMENT AND DENYING AMC’S
CISCO SYSTEMS, INC.,)	MOTION FOR SUMMARY
)	JUDGMENT
Defendant.)	
)	(Re: Docket Nos. 103, 110)

In this commercial dispute, Defendant Cisco Systems, Inc. (“Cisco”) moves for summary judgment.¹ Plaintiff AMC Technology, LLC (“AMC”) opposes, and has filed a summary judgment motion of its own, on both its affirmative claims and Cisco’s counterclaims.² Having considered the papers and oral arguments of counsel, the court GRANTS-IN-PART Cisco’s motion for summary judgment and DENIES AMC’s motion for summary judgment.

I. BACKGROUND

Cisco develops and sells software to customer contact centers so that they can receive, process, and route customer phone calls, texts, and other communications. These products include Unified Contact Center Express (“UCCX”), which is marketed to small businesses, and Unified

¹ See Docket No. 103.
² See Docket No. 110.

1 Contact Center Enterprise (“UCCE”), which is marketed to larger businesses. Businesses that
2 purchase these products often also use customer relationship management (“CRM”) database
3 software, typically developed by other companies such as Microsoft, Oracle, and Salesforce. To
4 integrate Cisco’s software with third-party CRM software, Cisco’s customers need additional
5 connector or adapter software. AMC develops and licenses these connectors and adapters.

6 **A. Cisco and AMC Agree to a Deal**

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8 In 2007, Cisco and AMC entered into a software development and licensing agreement
9 (“Agreement”) whereby AMC agreed to modify a number of its existing connector or adapter
10 software products according to Cisco’s specifications, and Cisco agreed to license both modified
11 software and standard software.³ The purpose was to resell the adapted products under the Cisco
12 brand.⁴

13 The Agreement refers to the AMC software products to be modified as “Deliverables,”⁵
14 that are described pursuant to a “Statement of Work.”⁶ The first Statement of Work is attached as
15 Exhibit A to the Agreement and lists specific products to be developed,⁷ resources to be provided
16 by Cisco,⁸ content requirements for the Deliverables,⁹ and a delivery schedule for the
17 Deliverables.¹⁰ The contract also contemplates future Statements of Work, which would add
18 Deliverables to the relationship:
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21 ³ See Docket No. 111, Ex. 14.

22 ⁴ See id.

23 ⁵ See id. § 1.6.

24 ⁶ See id. § 1.22.

25 ⁷ See id., Ex. A § 2.

26 ⁸ See id. § 3.

27 ⁹ See id. § 5.1.1.

28 ¹⁰ See id. § 5.1.2.

1 Additional Statements of Work. If Cisco desires to engage Licensor for additional services
2 which are not included in the Statement of Work and which do not constitute merely a
3 revision or modification of the Statement of Work, the parties shall in good faith negotiate
4 additional Statement of Work, each of which upon signing shall be deemed a part of this
5 Agreement. Additional Statements of Work shall be entered into by mutual agreement
6 between Cisco and Licensor and shall be substantially in the form of the Statement of Work
7 attached hereto. Each Statement of Work shall be signed by authorized representatives of
8 the parties. This Agreement may cover more than one Statement of Work at any given
9 time.¹¹

10 The Agreement also specifies the process for delivery and rejection or acceptance of any
11 Deliverable. The way it was supposed to work is this. AMC develops the Deliverable according to
12 a specification and delivers it according to the schedule provided in the Statement of Work.¹²
13 Cisco then reviews the Deliverable and within 15 days provides written notice of its acceptance or
14 rejection.¹³ If Cisco rejects the Deliverable, Cisco must provide written notice describing the
15 deficiencies not conforming to the Agreement specifications in “sufficient detail” for AMC to
16 correct them.¹⁴ AMC in turn corrects such deficiencies within 30 days, provided that AMC is not
17 delayed by “conditions outside its reasonable control.”¹⁵ This feedback loop is to continue at least
18 two more times, at which point Cisco is free to issue a final rejection.¹⁶ If Cisco issues a final
19 rejection of the Deliverable, AMC is to return any and all compensation already paid by Cisco for
20 that Deliverable and the Statement of Work terminates.¹⁷ Cisco then has the option to terminate
21 the Agreement with written notice.¹⁸

21 ¹¹ See id. § 3.11.

22 ¹² See id., Ex. B and Ex. A § 5.1.1.

23 ¹³ See id. § 3.2.

24 ¹⁴ Id.

25 ¹⁵ Id.

26 ¹⁶ See id.

27 ¹⁷ See id.

28 ¹⁸ See id.

1 As things turned out, AMC successfully developed a number of Deliverables under the
2 Agreement, which were accepted by Cisco and sold without issue. The parties have quarreled,
3 however, over two products – the “Siebel Adapter” and the “UCCX Connector” – giving rise to the
4 current suit.

5 **B. AMC Develops the Siebel Adapter**

6 The first Statement of Work called for AMC to develop the Siebel Adapter.¹⁹ Originally,
7 the Statement of Work called for the Siebel Adapter work to be completed in two phases, the first
8 ending on September 14, 2007 and the second on October 31, 2007.²⁰ The parties later agreed to
9 an amended development schedule, with delivery of the functional specification by October 29,
10 2007, delivery of test plan and results by October 31, 2007, delivery of software on a gold CD by
11 November 2, 2007, and final testing of the software at Cisco’s lab in Boxborough, Massachusetts
12 during the week of November 5, 2007.²¹

13 On October 26, 2007, AMC sent an email to Cisco purporting to delivery the functional
14 specification.²² On October 29, 2007, Cisco responded by inquiring whether AMC had sent the
15 wrong document because the purported functional specification appeared to it to be nothing more
16 than a feature summary.²³ AMC confirmed that it provided the correct document.²⁴ On October
17 30, 2007, AMC sent the test plans, supplementing them on November 2, 2007.²⁵ During the week
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21 ¹⁹ See id., Ex. A § 5.1.1.

22 ²⁰ See id. § 5.1.2.

23 ²¹ See id., Ex. 7.

24 ²² See id., Ex. 8.

25 ²³ See Docket No. 104, Ex. 9.

26 ²⁴ See id.

27 ²⁵ See Docket No. 111, Ex. 17-19.

1 of November 5, 2007, AMC sent its engineers to test the software.²⁶ Cisco was dissatisfied with
2 the shipment and on November 12, 2007 sent AMC a report identifying a list of issues for AMC to
3 address.²⁷ Two days later, AMC responded, saying it had fixed 21 of the issues and was working
4 on the rest.²⁸ On November 19, 2007, Cisco informed AMC that Cisco was discussing the Siebel
5 Adapter internally and that it was “leaning” towards conducting an audit of AMC’s testing and lab
6 resources.²⁹ Cisco recommended that AMC “continue to solidify the Siebel [A]dapter with a goal
7 of being able to present a product that has extended testing and a high pass rate.”³⁰ On November
8 30, 2007, AMC informed Cisco that of the 55 issues identified by Cisco, all but six were either
9 duplicates, non-issues, “potential upgrades,” or were resolved.³¹ The remaining six included one
10 error yet to be fixed, one error that AMC needed to test on Cisco systems to fix, and four errors that
11 required Cisco input.³² Cisco did not respond to AMC’s email.

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13 Internally, on or around November 14, 2007, Cisco decided to “Re-Execute Commit” (“Re-
14 EC”) to the Siebel Adapter project and completely “revisit requirements, functional spec, gap
15 analysis” of the project.³³ Re-EC is an internal Cisco process that essentially halts all work on the
16 project and turns resources elsewhere.³⁴ Cisco then reevaluates the project, its requirements, and a
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20 ²⁶ See id., Ex. 20.

21 ²⁷ See id., Ex. 21.

22 ²⁸ See id., Ex. 22.

23 ²⁹ See Docket No. 104, Ex. 15.

24 ³⁰ See id.

25 ³¹ See Docket No. 111, Ex. 29.

26 ³² See id.

27 ³³ See id., Ex. 24.

28 ³⁴ See id., Ex. 1 at 183:17-184:11.

1 potential new schedule for completion of the project.³⁵ Cisco later communicated this intent to
2 AMC.³⁶

3 Cisco never completed the Re-EC process.³⁷ At a meeting in March 2008, Cisco
4 determined that no resources were available for the AMC Siebel Adapter project.³⁸ AMC asked
5 Cisco several times over the course of the next year or so whether the project would proceed, but
6 Cisco explained it did not have enough resources.³⁹ The project was never revived.

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8 **C. The UCCX Connector Languishes**

9 The UCCX Connector was not in the Summary of Development in the first Statement of
10 Work.⁴⁰ In original drafts, the UCCX Connector was included, but it was taken out by AMC's
11 lawyer during contract negotiations.⁴¹ Some references to "UCCX" and "CCE/CCX" remained,
12 however, in other parts of the Agreement and the Statement of Work, including the royalty
13 payments schedule, a list of both standard and developed software to be licensed, and criteria for
14 functional testing.⁴² Although AMC asked for updates on the UCCX Connector project, Cisco
15 stated it did not have the resources to pursue the project and it never went forward.⁴³
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20 ³⁵ Id., Ex. 5 at 79:23-80:7.

21 ³⁶ See id., Ex. 25.

22 ³⁷ See, e.g., id. at 81-82.

23 ³⁸ See id., Ex. 37.

24 ³⁹ See id., Ex. 5 at 279:24-280:21.

25 ⁴⁰ See id., Ex. 14, Ex. A § 1.1.

26 ⁴¹ See Docket No. 104, Ex. 31.

27 ⁴² See Docket No. 111, Ex. 14, Ex A § 1.1, 3.1, 5.1.12.

28 ⁴³ See id., Ex. 5 at 279:24-280:21; Ex. 38.

1 **D. Litigation Looms and Then Commences**

2 On August 2, 2011, AMC sent Cisco notice of AMC’s intent to terminate the Agreement
3 “due to Cisco’s material violations” of the contract.⁴⁴ Among other issues, the letter alleges that
4 Cisco breached the contract with respect to both the Siebel Adapter and UCCX Connector.⁴⁵ On
5 September 6, 2011, AMC sent a letter to Cisco terminating the Agreement.⁴⁶

6 On October 3, 2011, AMC filed a first amended complaint (“FAC”) alleging ten claims.⁴⁷
7 After the court granted-in-part Cisco’s motion to dismiss the FAC and the parties stipulated to
8 dismissal of certain claims, all that remains of the FAC are AMC’s claims for breach of contract
9 and breach of the covenant of good faith and fair dealing regarding the Siebel Adapter and the
10 UCCX Connector.⁴⁸ Cisco filed counterclaims for breach of contract and breach of the covenant of
11 good faith and fair dealing.⁴⁹

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13 **II. LEGAL STANDARDS**

14 Summary judgment is appropriate only if there is “no genuine dispute as to any material
15 fact and the movant is entitled to judgment as a matter of law.”⁵⁰ There are two distinct steps to a
16 motion for summary judgment. The moving party bears the initial burden of production by
17 identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence
18 of a triable issue of material fact.⁵¹ Where the moving party has the burden of proof at trial, he
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21 ⁴⁴ Id., Ex. 54.

22 ⁴⁵ See id.

23 ⁴⁶ See Docket No. 104, Ex. 40.

24 ⁴⁷ See Docket No. 34.

25 ⁴⁸ See Docket No. 64.

26 ⁴⁹ See Docket No. 77.

27 ⁵⁰ Fed. R. Civ. P. 56(a).

28 ⁵¹ See Fed. R. Civ. P. 56(c)(1); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

1 must “affirmatively demonstrate that no reasonable trier of fact could find other than for the
2 moving party.”⁵² If the moving party does not bear the burden of proof at trial, however, he may
3 satisfy his burden of proof either by proffering “affirmative evidence negating an element of the
4 non-moving party’s claim,” or by showing the non-moving party has insufficient evidence to
5 establish an “essential element of the non-moving party’s claim.”⁵³ If the moving party meets its
6 initial burden, the burden of production then shifts to the non-moving party, who must then provide
7 specific facts showing a genuine issue of material fact for trial.⁵⁴ A material fact is one that might
8 affect the outcome of the suit under the governing law.⁵⁵ A dispute is “genuine” if the evidence is
9 such that reasonable minds could differ and find for either party.⁵⁶

11 At this stage, the court does not weigh conflicting evidence or make credibility
12 determinations.⁵⁷ Thus, in reviewing the record, the court must construe the evidence and the
13 inferences to be drawn from the underlying evidence in the light most favorable to the non-moving
14 party.⁵⁸

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21 ⁵² *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

22 ⁵³ *Celotex*, 477 U.S. at 331.

23 ⁵⁴ See *id.* at 330; *T.W. Elec. Service, Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 630, 630 (9th
24 Cir. 1987).

25 ⁵⁵ See *Anderson*, 477 U.S. at 248.

26 ⁵⁶ See *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

27 ⁵⁷ *T.W. Elec. Serv., Inc.*, 809 F.2d at 630.

28 ⁵⁸ See *Anderson*, 477 U.S. at 248; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S.
574, 587 (1986).

III. DISCUSSION

A. AMC's Breach of Contract Claims

1. Siebel Adapter

As the party with the burden of proof at trial, to secure summary judgment on its breach of contract claims regarding the Siebel Adapter, AMC must prove “affirmatively demonstrate that no reasonable trier of fact could find other than” in its favor on every element of this claim.⁵⁹ Cisco not only opposes the motion, but further urges that summary judgment should be granted in its favor because AMC has insufficient evidence to establish at trial at least one essential element of its claim.⁶⁰ Given these dueling motions on the Siebel Adapter breach claim, the question before the court is simple – construing the evidence in favor of each party, could a reasonable jury find in favor of that party? Because court finds that the answer is yes, neither party is entitled to summary judgment.

Here’s why. At its heart, AMC’s breach of contract claim on the Siebel Adapter alleges that Cisco failed to properly engage in the accept-or-reject process for this Deliverable. To prove breach of contract, a plaintiff must demonstrate (1) the existence of a contract, (2) plaintiff’s performance, or excuse for nonperformance, and (3) the defendant’s breach.⁶¹

AMC and Cisco both agree that the Siebel Adapter was a Deliverable under the Agreement, meaning the terms of the Agreement governed each party’s duties regarding the Siebel Adapter. Where they disagree is whether AMC performed under the contract, or was excused from performing, and whether Cisco breached the contract by failing to perform.

⁵⁹ Soremekun, 509 F.3d at 984.

⁶⁰ Celotex, 477 U.S. at 331.

⁶¹ See Hamilton v. Greenwich Investors XXVI LLC, 195 Cal.App.4th 1602, 1614 (2011).

1 Before delving into the particular facts surrounding the Siebel Adapter delivery, a review of
2 the relevant terms of the Agreement is warranted. The Statement of Work attached to the
3 Agreement requires more than just software. Instead, each Deliverable be comprised of the
4 following:

- 5 (1) “Modifications to Licensor’s Multi-Channel Integration Suite to ensure such Software
6 complies with the Specifications” (i.e. the software itself),
- 7 (2) “Certifications of the Software from all CRM vendors that provide a formal certification
8 program. Copies of the certificates shall be delivered to Cisco” (“third-party
9 certification”),
- 10 (3) “Functional Specifications and other documentation as set out in the Agreement and
11 Exhibits thereto, including but not limited to: product description, design guide,
12 installation guide, configuration and administration guide, and trouble shooting guide”
13 (the “functional specifications”), and
- 14 (4) “[S]uch testing and quality assurance of the Software as agreed in writing with Cisco or
15 as reasonably requested by Cisco” (“testing results”).⁶²

16 **a. First Delivery**

17 AMC asserts it delivered the Siebel Adapter according to its obligations under the contract.
18 On November 5, 2007, AMC delivered the modified Siebel Adapter software to Cisco.⁶³ On
19 October 26, 2007, AMC delivered what it contends were the functional specifications.⁶⁴ On
20 October 30, 2007, AMC delivered test results.⁶⁵ On November 2, 2007, AMC delivered additional
21 user documentation.⁶⁶ Although AMC did not deliver the third-party certification, which in this
22 case would be provided by Oracle, AMC claims that Oracle could not issue the third-party
23 certification until Cisco had finally approved the software.⁶⁷

24 ⁶² See Docket No. 111, Ex. 14 § 5.1.1.

25 ⁶³ See id., Ex. 8 at 54:25-55:18.

26 ⁶⁴ See id., Ex. 15; Ex. 4 at 54:25-55:5.

27 ⁶⁵ See id., Ex. 17.

28 ⁶⁶ See id., Ex. 18, 19.

⁶⁷ See id. at 12.

1 The court must comment that Cisco appears to take conflicting positions as to whether
2 AMC indeed achieved delivery as required by the contract. While in its own motion for summary
3 judgment, Cisco does not dispute that AMC delivered at least the Siebel Adapter itself,⁶⁸ Cisco
4 argues in opposition to AMC's motion that AMC's delivery nevertheless was inadequate.⁶⁹ In any
5 event, what AMC ignores is that its delivery obligation was for a Deliverable, not just the software
6 piece of that Deliverable. As a result, the missing third-party Oracle certification alone is sufficient
7 issue to deny AMC's summary judgment motion on this claim. Substantial performance occurs
8 when there was "no willful departure from the terms of the contract, and no omission of any of its
9 essential parts."⁷⁰ While Cisco did not object to that omission at the time of receipt, a reasonable
10 jury could conclude that the Oracle certification was an essential part of the delivery obligation
11 such that without the certification, the delivery did not constitute substantial performance.⁷¹ Under
12 such circumstances, summary judgment to AMC on this issue is not justified.

14 **b. Rejection and Redelivery**

15 Cisco is not fortunate, however, as to the remaining aspects of AMC's performance, such
16 that it should prevail on its own motion. First, while it is undisputed that Cisco sent an error list of
17 55 issues with the Siebel Adapter software for AMC to resolve,⁷² it is very much disputed whether
18 Cisco provided "sufficient detail" in its list of the nonconformance to the specifications to allow
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23 ⁶⁸ See Docket No. 103 at 17. Cisco's 30(b)(6) witness also agreed as much. See Docket No. 111,
24 Ex. 8 at 53:25-54:18.

25 ⁶⁹ See Docket No. 128 at 10-11.

26 ⁷⁰ In re Kinney Aluminum Co. 78. F.Supp. 565, 567-68 (S.D. Cal. 1948).

27 ⁷¹ See id.

28 ⁷² See Docket No. 111, Ex. 21.

1 AMC to correct the problem.⁷³ The sufficiency of the detail of Cisco’s list to allow AMC to fix
2 problems is an open question that a reasonable jury could decide in AMC’s favor.

3 AMC might also persuade a reasonable jury as to whether AMC redelivered the Siebel
4 Adapter. AMC claims that although it did not physically redeliver the Siebel Adapter, the
5 doctrines of tender, prevention, and futility excused AMC’s nonperformance and triggered Cisco’s
6 duty to perform.

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8 First, AMC contends that its communications to Cisco on November 29 and 30, 2007
9 constituted a tender of redelivery to Cisco. Tender, or an offer for full performance, extinguishes
10 the tendering party’s obligation to perform and triggers the other party’s duty to perform.⁷⁴ It must
11 be made with the intent to extinguish the obligation.⁷⁵ To be operative, the offer must be made in
12 good faith, unconditional, and the party must be willing and able to perform.⁷⁶ On November 29,
13 2007, AMC’s representative Anthony Uliano (“Uliano”) called Cisco employees Richard Jefts
14 (“Jefts”) and Mike Bergelson (“Bergelson”) to inform Cisco of the status of the Siebel Adapter.⁷⁷
15 According to Uliano, he explained that of the six issues yet unresolved by AMC, four required
16 some kind of input from Cisco, and two others could be easily fixed.⁷⁸ On November 30, 2007,
17 Uliano emailed Jefts and Bergelson providing much of the same information – the email purported
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22 ⁷³ See *id.*, Ex. 14 § 3.2.

23 ⁷⁴ See Cal. Civ. Code §§ 1485, 1486.

24 ⁷⁵ See *id.*

25 ⁷⁶ See *Arnolds Mgmt. Corp. v. Eischen*, 158 Cal. App. 3d 575, 580 (1984); See also Cal. Civ. Code
26 §§ 1493-95.

27 ⁷⁷ See Docket No. 110-1 ¶¶ 4-5.

28 ⁷⁸ See *id.*

1 to deliver “the latest on the Siebel Adapter,” with a list of current issues showing six issues
2 remained to be fixed.⁷⁹

3 Accordingly, there is a question as to whether AMC’s offer constituted tender. While Cisco
4 is quite right that a jury might question AMC’s willingness and ability to fully perform if only
5 Cisco would consent, it should be left to the jury to weigh the evidence and determine what was
6 said in that phone conversation, and whether AMC’s message was sufficient to effect tender.

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8 Second, AMC argues that even if its performance was not enough to constitute tender,
9 AMC’s performance was excused because Cisco prevented it. “[W]here one contracting party
10 prevents the other’s performance of a condition precedent, the party burdened by the condition is
11 excused from performing it, and the benefited party’s duty of performance becomes
12 unconditional.”⁸⁰ AMC argues that Cisco prevented AMC’s performance by initiating the Re-EC
13 process on the Siebel Adapter project. The Re-EC decision sent the project “back to the drawing
14 board,” freezing the project and redistributing committed resources until Cisco re-evaluated the
15 project.⁸¹ After Cisco made the Re-EC decision, Cisco no longer had any engineers or resources
16 dedicated to working with AMC on the Siebel Adapter project. Cisco also never responded to
17 AMC’s November 14 status report, nor provided the information AMC claims was necessary to
18 complete the revisions. A reasonable factfinder might conclude that, all of this evidence
19 notwithstanding, in light of the Agreement’s purpose, which Cisco argues was to allow Cisco to
20 hire out development of adapters with minimal commitment of internal resources, Cisco did not
21 prevent AMC’s redelivery. But it might not. Once again, such disputes are best left to the jury to
22 resolve.
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25 ⁷⁹ Docket No. 112, Ex. 29.

26 ⁸⁰ City of Hollister v. Monterey Ins. Co., 165 Cal. App. 4th 455, 490 (2008). See also Cal Civ.
27 Code § 1511.

28 ⁸¹ See Docket No. 111, Ex. 5 at 79:23-80:7; Ex. 24; Ex. 8 at 89:5-11.

1 Third, AMC argues that delivery would have been futile because Cisco had already decided
2 to Re-EC the Siebel Adapter project. Acts are futile where the defendant has expressly refused to
3 accept performance, the defendant indicates through conduct that it will not accept performance, or
4 performance would otherwise be pointless.⁸² A reasonable jury could find that in light of Cisco’s
5 decision to Re-EC the Siebel Adapter, Cisco would not have accepted redelivery of the product.

6 In sum, the issue of whether either party breached the Agreement with respect to the Siebel
7 Adapter must be presented to a jury.

8
9 **2. UCCX Connector**

10 The court next turns to AMC’s claim that Cisco breached the Agreement by refusing to
11 accept the UCCX Connector. This claim turns on whether the UCCX Connector was a Deliverable
12 under the Agreement.⁸³

13 Under California law, contract interpretation is a two-step process: first, the court looks to
14 see if there is any “ambiguity” in the contract, or whether the language is “reasonably susceptible
15 to the interpretation urged by a party.”⁸⁴ Only in the event that there is an ambiguity does the court
16 proceed to consider the extrinsic evidence in interpreting the contract.⁸⁵

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18 Although other products and standard software were licensed by the parties and included in
19 the royalty payments section, the contract clearly only subjects Deliverables to the development
20 and delivery schedule and the accept-or-reject process.⁸⁶ Under the plain terms of the Agreement,
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22 ⁸² See *Gross v. Raeburn*, 219 Cal. App. 2d 792, 807 (1963), *Sutherland v. Barclays*
23 *American/Mortgage Corp.*, 53 Cal. App. 4th 299, 312-13 (1997); *Garcia v. World Savings, FSB*,
183 Cal. App. 4th 1031, 1042-43 (2010).

24 ⁸³ See Docket No. 64 at 9.

25 ⁸⁴ *In re Facebook DPC Advertising Litigation*, 709 F.Supp.2d 762, 769 (N.D. Cal. 2010) (citing
26 *Wolf v. Superior Court*, 114 Cal. App. 4th 1343, 1351 (2004)).

27 ⁸⁵ See *id.*

28 ⁸⁶ See Docket No. 111, Ex. 14 § 3.2 (“Acceptance: Upon delivery of the Deliverables...”); Ex. A
 (“Deliverables; Delivery Dates”).

1 then, AMC’s duty to develop and deliver and Cisco’s corresponding duty to accept or reject arises
2 only where an item is designated a Deliverable. Thus, even if Cisco licensed the UCCX Connector
3 software,⁸⁷ an obligation to further accept an adapted version of that software does not exist unless
4 the UCCX Connector is properly characterized as a “Deliverable.”

5 As already discussed, Deliverables are by definition only those projects listed in any
6 Statements of Work expressly executed by the parties.⁸⁸ The Statement of Work contains the
7 following summary of products to be developed:

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9 **Summary of Development.**

10 Licensor agrees to modify Licensor’s Multi-Channel Integration Suite to interconnect Cisco
11 Unified Contact Center, Enterprise and Hosted as well as ICM Enterprise and Hosted with
12 the following CRM software:

- 13 • Siebel
- 14 • SAP CRM
- 15 • Microsoft Outlook
- 16 • Microsoft CRM
- 17 • PeopleSoft
- 18 • Salesforce.com⁸⁹

19 This summary of products to be modified plainly does not include “UCCX” or “Unified Contact
20 Center Express.”

21 AMC argues that the UCCX Connector was nevertheless a Deliverable under the
22 Agreement. AMC submits that there are other references to the UCCX Connector in the Statement
23 of Work, raising at least a triable inference that the UCCX Connector was intended to be a
24 Deliverable. However, the references identified by AMC are scattered and abstract at best. In
25 “Acceptance Testing and Acceptance Criteria,” the Agreement provides that “Software
26 interoperability testing will consist of testing the Software in an environment which consists of a

27 ⁸⁷ The UCCX Connector appears in the Agreement under a list of standard and developed software
28 to be licensed by Cisco. See Docket No. 111, Ex. 14, Ex. A. See also Docket No. 104, Ex. 3, 4.

⁸⁸ See Docket No. 111, Ex. 14 § 1.6.

⁸⁹ Id., Ex. A § 2.

1 live CCX and CCE system.”⁹⁰ AMC argues that this is another name for the Unified Contact
2 Center Express. Even if that were true, these statements reference operation testing conditions and
3 criteria rather than indicate any intent to treat the UCCX Connector as a product to be adapted by
4 AMC and licensed to Cisco.⁹¹ The legal maxim “expressio unius est exclusio alterius” applies
5 here – where a list of Deliverables is explicitly provided, it strains credibility to contend that
6 abstract references to a product elsewhere in the contract can create ambiguity as to whether it is
7 also a Deliverable.⁹²

8
9 The extrinsic evidence does not create any ambiguity in this plain interpretation, but
10 supports it. During negotiation, Cisco and AMC discussed including both UCCE and UCCX
11 Connectors in the contract.⁹³ An earlier draft included both UCCE and UCCX Connectors.⁹⁴
12 However, Cisco wanted to focus on the UCCE first because of greater demand on that side of the
13 business and asked AMC to remove the UCCX project.⁹⁵ The parties agreed to remove the UCCX
14 Connector from the first phase in order to focus on other projects. AMC’s President Uliano sent an
15 email to Cisco about the first draft, stating: “Also, I thought Express wasn’t going to happen in this
16 phase, so we should probably remove it.”⁹⁶ Accordingly, AMC’s lawyers made the revision

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19 ⁹⁰ Id. § 5.1.1.

20 ⁹¹ See *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 18 (1995) (“language in a contract must
21 be interpreted as a whole, and in the circumstances of the case, and cannot be found to be
ambiguous in the abstract. Courts will not strain to create an ambiguity where none exists.”).

22 ⁹² *Black v. Richfield Oil Corp.*, 41 F. Supp. 988, 995 (S.D. Cal. 1941) aff’d 146 F.2d 801 (9th Cir.
23 1944). See also Cal. Civ. Code § 3534 (“Particular expressions qualify those which are general”);
24 *Scudder v. Perce*, 159 Cal. 429, 433, 114 P. 571, 573 (1911) (“the familiar rule [is] that when
general and specific provisions of a contract deal with the same subject-matter, the specific
provisions, if inconsistent with the general provisions, are of controlling force”).

25 ⁹³ See Docket No. 104, Ex. 36 at 37:15-39:12.

26 ⁹⁴ See id., Ex. 30.

27 ⁹⁵ See Docket No. 104, Ex. 36 at 37:15-39:12.

28 ⁹⁶ Id., Ex. 30.

1 editing the term “Unified Contact Center Express, Enterprise” in the “Summary of Development”
2 to read only “Unified Contact Center, Enterprise.”⁹⁷ As AMC admits, they made this change
3 because although Cisco wanted the UCCX Connector, it “did not want it immediately.”⁹⁸ AMC
4 agrees that the UCCX Connector was “Phase 2” of the project,⁹⁹ which implies they knew that the
5 UCCX Connector was not part of any current Statement of Work.

6 AMC alternatively contends that post-contract communications “modified” the Statement
7 of Work to include the UCCX Connector as a Deliverable. Section 3.11 provides that “If Cisco
8 desires to engage Licensor for additional services which are not included in the Statement of Work
9 and which do not constitute merely a revision or modification of the Statement of Work, the parties
10 shall in good faith negotiation additional Statements of Work,” which must be in writing and
11 signed by party representatives by both sides.¹⁰⁰ AMC points to an email chain between the two
12 parties as such a revision. As with any contract, a modification requires mutual assent between the
13 parties, as evidenced by a “reasonable meaning of the words and acts of the parties, and not from
14 their unexpressed intentions or understanding.”¹⁰¹ The email chain shows that Cisco employee
15 Willem Nijenhuis (“Nijenhuis”) stated, “We are going to move ahead with the Connector project
16 for CCX now.”¹⁰² In response, AMC’s representative Uliano asked, “Will we start on that phase
17 after this one, or do you want us to try to get it done with this one?” apparently in reference to the
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23 ⁹⁷ See *id.*; See also *id.* Ex. 31, Ex. 27.

24 ⁹⁸ See Docket No. 134 at 22.

25 ⁹⁹ Docket No. 136, Ex. 3.

26 ¹⁰⁰ See *id.*, § 3.11.

27 ¹⁰¹ 1 Witkin, *Summary of Cal. Law* (10th Ed. 2005) Contracts, § 116; § 964. See also Cal. Civ.
Code §§ 1550, 1565.

28 ¹⁰² Docket No. 136, Ex. 2.

1 UCCE and UCCX Connectors.¹⁰³ Nijenhuis then responded, “That’s one of the many questions we
2 need to answer. It’s probably too[] late to really let in run parallel with the CEE one, but I’d like to
3 have it follow as close as possible.”¹⁰⁴ Lastly, Uliano responded “I think with all the work we’re
4 doing, we should be able to immediately move on to the IPCC-X phase. I’ll talk to the team and
5 get back to you.”¹⁰⁵ There is no evidence in this email exchange that can be construed as mutual
6 assent, either to create a modification in the current list of Deliverables or to add another Statement
7 of Work to include the UCCX Connector as a Deliverable. Uliano even explicitly says “I’ll... get
8 back to you,” rather than words of assent, even on AMC’s part. With no offer, acceptance, and
9 mutual assent that Cisco can point to, there can be no modification or Statement of Work
10 establishing the UCCX Connector as a Deliverable.¹⁰⁶

12 Even if the UCCX Connector were somehow construed to be an Agreement Deliverable,
13 AMC cannot prove that it delivered all of the components required to trigger Cisco’s corresponding
14 duties under the contract. AMC contends that it delivered a CD containing both the UCCE and
15 UCCX Connectors. But as noted previously, delivery requires not only delivery of the software,
16 but also specifications, test results, and third-party certification. AMC cannot establish that it
17 completed those steps, meaning it never completed delivery and Cisco had no obligation to accept
18 or reject. Under the facts presented, even viewing the evidence in the light most favorable to
19 AMC, no reasonable jury could conclude that Cisco breached an express term of the contract by
20 failing to accept the UCCX Connector. For these reasons, summary judgment in favor of Cisco
21 must be granted on AMC’s breach of contract claim with respect to the UCCX Connector.
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24 ¹⁰³ Id.

25 ¹⁰⁴ Id.

26 ¹⁰⁵ Id.

27 ¹⁰⁶ See *American Bldg. Maintenance Co. v. Indem. Ins. Co. of North America*, 214 Cal. 608, 615
28 (1932).

1 **B. AMC’s Breach of Implied Covenant of Good Faith and Fair Dealing Claims**

2 AMC brings four claims against Cisco for breach of the implied covenant of good faith and
3 fair dealing. Both AMC and Cisco seek summary judgment on these claims, again raising the
4 question of whether a reasonable jury could decide in either party’s favor. The implied covenant
5 “imposes upon each party a duty of good faith and fair dealing in its performance and its
6 enforcement.”¹⁰⁷ The implied covenant “is aimed at making effective the agreement's
7 promises.”¹⁰⁸ A plaintiff can show this by demonstrating “a failure or refusal to discharge
8 contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but
9 rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and
10 disappoints the reasonable expectations of the other party thereby depriving that party of the
11 benefits of the agreement.”¹⁰⁹

12
13 **1. Failing to provide customers with AMC’s maintenance releases and updates**

14 The court previously dismissed this claim with leave to amend, finding that Section 3.7 of
15 the Agreement does not provide for any obligation for Cisco to distribute AMC’s maintenance
16 releases and updates. The Agreement merely requires AMC to provide Cisco with maintenance
17 releases and updates, but does not say why.¹¹⁰ AMC argues that while there is no express
18 obligation for Cisco to distribute releases and updates to customers, Cisco had an implied
19 obligation to do so. But AMC does not provide any evidence supporting this skeletal theory.
20 AMC states only that Cisco’s failure to distribute AMC releases “caused customers to complain to
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25 ¹⁰⁷ Foley v. Interactive Data Corp., 47 Cal. 3d 654, 683 (1988).

26 ¹⁰⁸ Id.

27 ¹⁰⁹ Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 222 Cal. App. 3d 1371, 1395 (Ct. App. 1990).

28 ¹¹⁰ See Docket No. 111, Ex. 14 § 2.2.

1 AMC about software problems.”¹¹¹ While surely an inconvenient result for AMC, AMC has
2 provided no evidence as to why a failure to distribute updates to customers unfairly frustrates the
3 reasonable expectations under the agreement.¹¹² Summary judgment here in Cisco’s favor is
4 warranted.

5 **2. Failing to comply with the provision in the Agreement requiring Cisco to**
6 **accept or reject the AMC Siebel Adapter**

7 This claim overlaps with the breach of contract claim regarding the Siebel Adapter. “If the
8 allegations do not go beyond the statement of a mere contract breach and, relying on the same
9 alleged acts, simply seek the same damages or other relief already claimed in a companion contract
10 cause of action, they may be disregarded as superfluous as no additional claim is actually
11 stated.”¹¹³ As a result, to the extent that AMC contends here that Cisco failed to accept or reject
12 the Siebel Adapter in the same way that it asserts Cisco breached the contract by engaging in the
13 same, Cisco is entitled to summary judgment.

15 **3. Making false promises with respect to the development of the Siebel Adapter**

16 Cisco argues that statements made about Cisco’s intent to transfer customers from the Cisco
17 Siebel Adapter to the AMC Siebel Adapter made before the parties executed the Agreement are not
18 actionable. The court agrees. The implied covenant does not exist prior to the contract, so it does
19 not require the parties to “negotiate in good faith prior to any agreement.”¹¹⁴ Thus, statements
20 made only in negotiation, prior to any contract, occurred when no contractual duties existed and
21 therefore cannot form the basis for an implied covenant claim. Once again, summary judgment in
22 Cisco’s favor is warranted.

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25 ¹¹¹ Docket No. 134 at 20.

26 ¹¹² See Careau & Co., 222 Cal. App. 3d at 1395.

27 ¹¹³ Id.

28 ¹¹⁴ McClain v. Octagon Plaza, LLC, 159 Cal. App. 4th 784, 799 (2008).

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3 **4. Denying AMC the fundamental benefits of the Agreement with respect to the**
4 **UCCX Connector**

5 AMC's main implied covenant claims center on whether Cisco in bad faith denied AMC
6 the opportunity to reap royalty payments, as provided for in the contract, for both the Siebel
7 Adapter and the UCCX Connector. The Agreement provides that Cisco if developed software is
8 accepted, Cisco must pay AMC a set amount to compensate AMC for non-recurring engineering
9 costs, as well as a prepaid royalty amount.¹¹⁵ There is no express obligation for Cisco to market or
10 sell the products. However, in the event that Cisco did sell the products, Cisco agreed to pay AMC
11 additional royalty payments and maintenance fees.¹¹⁶

12
13 **a. Siebel Adapter**

14 AMC argues that Cisco frustrated this possibility of additional payments by completely
15 refusing to work with AMC on the Siebel Adapter project. While Cisco again argues that it is not
16 expressly required to provide any additional resources other than those specified in the Agreement,
17 if "cooperation of the other party is necessary for successful performance of an obligation, a
18 promise to give that cooperation... will often be implied."¹¹⁷ While the express terms do not
19 require additional resources from Cisco, they do not preclude additional resources. In fact, the
20 Agreement specifically contemplates the possibility that Cisco may provide additional resources:
21

22 **Cisco Property:**

23 4.8.1. During the term of this Agreement, Cisco may provide equipment, designs, materials,
24 software and other property of Cisco, including any and all pre-existing technology of
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26 ¹¹⁵ See Docket No. 111, Ex. 14 § 3.2, 3.3.

27 ¹¹⁶ See id. § 3.4.

28 ¹¹⁷ 1 Witkin, Summary of Cal. Law, Contracts § 798 (10th Ed. 2005).

1 Cisco (collectively “Cisco Property”) to Licensor for its use in fulfilling its obligations
2 hereunder.¹¹⁸

3 More fundamentally, though, both parties have presented evidence as to whether Cisco denied
4 basic information necessary to complete the project. For example, AMC submits evidence that it
5 needed Cisco’s existing Siebel Driver to make certain technical changes,¹¹⁹ as well as evidence of
6 internal decisions by Cisco to discontinue the project and Cisco’s failure to respond to AMC
7 requests for information. Cisco in turn offers evidence that it sent AMC all necessary information,
8 including a copy of its existing Siebel Driver.¹²⁰ A reasonable jury could go either way on this
9 question of whether Cisco frustrated the purpose of the Agreement, which requires that jury and
10 not the undersigned to resolve this issue.

11 **b. UCCX Connector**

12 AMC also asserts that Cisco violated the implied covenant by not pursuing the UCCX
13 Connector project. As established previously, under the Agreement Cisco appears to have had a
14 non-exclusive license to the UCCX Connector, but the parties did not set the project in motion.
15 Unlike the Siebel Adapter, the UCCX was not a Deliverable. Cisco did not contract AMC to
16 develop the UCCX Connector, and so does not have any implied obligations to cooperate with
17 AMC regarding development of the UCCX Connector. AMC suggests that licensing the product,
18 standing alone, creates an obligation to sell the product. But this theory of the implied covenant
19 must be rejected because the implied covenant must rest upon “the existence of some specific
20 contractual obligation.”¹²¹ This is because the implied covenant is limited to ensuring that the
21 parties receive the benefits of their agreement.¹²² Merely accepting a non-exclusive license to a
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25 ¹¹⁸ See id. § 4.8.

26 ¹¹⁹ See Docket 134, Ex. 6 at 232:13-16; Ex. 1 at 273:13-275:5; Ex. 14 at 73:10-75:21.

27 ¹²⁰ See Docket No. 129, Ex. 7 at 161:5-17; Ex. 14 at 266:13-269:18, 273:13-274:2; Ex. 15; Ex. 16.

28 ¹²¹ *Racine & Laramie, Ltd. v. Dep't of Parks & Recreation*, 11 Cal. App. 4th 1026, 1031 (1992).

1 product does not give rise to a “specific contractual obligation” to hire AMC to develop a modified
2 version of that product, and then go on to sell that product to others.¹²³ AMC also was free to sell
3 the product to others, differentiating this case from others where a covenant to sell was implied.¹²⁴
4 Summary judgment in favor of Cisco on this issue is warranted.

5 C. **Cisco’s Counterclaims**

6 AMC alone moves for summary judgment on Cisco’s counterclaims. Cisco’s first
7 counterclaim is that AMC breached the contract by (1) failing to deliver the Siebel Adapter and (2)
8 prematurely terminating the Agreement. As to the first ground for breach, as discussed above there
9 is a disputed issue of material fact of whether AMC delivered the Siebel Adapter. As to the second
10 ground for breach, AMC contends that because Cisco was in breach of the contract, it cannot argue
11 that AMC’s termination was premature. However, as also noted in the above discussion, it is
12 disputed whether Cisco breached the contract. If a jury were to find that Cisco did not breach, it
13 could also find that AMC’s termination was unjustified. Summary judgment is thus improper.
14

15 As its second counterclaim, Cisco also asserts AMC breached the implied covenant of good
16 faith by “failing to dedicate sufficient infrastructure and manpower resources to fulfill its
17 development and testing obligations for the AMC Siebel Adapter pursuant to the terms of the OEM
18 Agreement.”¹²⁵ Cisco has presented evidence raising at least a disputed issue of fact as to whether
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21 ¹²² See *Careau & Co.*, 222 Cal. App. 3d at 1395.

22 ¹²³ Cf. *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 358 (1997) (holding that where Warner
23 Bros. paid Locke for a first look deal whereby Locke was required to submit any movie project to
24 Warner Bros. first before submitting to other studios, and Warner Bros. had accepted Clint
25 Eastwood’s offer to reimburse Warner Bros. so long as it categorically refused all of Locke’s
26 submissions, Warner Bros. breached the implied covenant because it had a express contractual duty
27 to consider Locke’s proposals in good faith).

28 ¹²⁴ Cf. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917) (holding that plaintiff’s “sole
compensation for the grant of an exclusive agency is to be one-half of all the profits” resulting
from the defendant’s sales, so the defendant had an implied duty to use “best efforts” to create
sales).

¹²⁵ Docket No. 128 at 23.

1 AMC did so. For example, AMC's own employees admitted to sometimes overcommitting and
2 missing deadlines.¹²⁶ Additional evidence discussed above supports Cisco's contention that
3 AMC's delivery was far from perfect. It would be reasonable, therefore, for a jury to conclude that
4 AMC did not follow the contract in good faith.

5 **IV. CONCLUSION**

6 AMC's motion for summary judgment is DENIED. Cisco's motion for summary judgment
7 is GRANTED as to AMC's breach of contract claim regarding the UCCX Connector, but DENIED
8 as to the Siebel Adapter. Cisco's motion for summary judgment as to AMC's claims for breach of
9 the implied covenant is GRANTED as to claims based on Cisco's failure to provide upgrades and
10 release updates to customers, GRANTED as to claims based solely on Cisco's failure to adhere to
11 the accept-or-reject provision for the Siebel Adapter, GRANTED as to the UCCX Connector, but
12 DENIED as to Cisco's failure to cooperate on the Siebel Adapter.

13 **IT IS SO ORDERED.**

14 Dated: July 11, 2013

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18 PAUL S. GREWAL
19 United States Magistrate Judge

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¹²⁶ See Docket No. 129, Ex. 6 at 198:9-20, 227:5-13; Ex. 3 at 223:3-224:5; Ex. 5; Ex. 3 at 220:23-221:18.