

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

NAVCOM TECHNOLOGY, INC. and DEERE )	)
& COMPANY, )	
) Plaintiffs, )	
) v. )	
OKI ELECTRIC INDUSTRY CO., LTD. And )	
DOES ONE THROUGH TEN, inclusive, )	
) Defendants. )	
) )	
) )	
) )	
) )	

Case No.: 5:12-CV-04175-EJD

**ORDER DENYING PLAINTIFFS’  
MOTION FOR LEAVE TO AMEND;  
GRANTING IN PART AND DENYING  
IN PART THE MOTIONS FOR  
SUMMARY JUDGMENT**

**[Re: Docket Nos. 97, 100, 102, 131]**

Presently before the Court are four motions filed in the above-captioned case: a Motion for Leave to Amend filed by NavCom Technology, Inc. (“NavCom”) and Deere & Company (“Deere”) (collectively, “Plaintiffs”), a Motion for Summary Judgment filed by Plaintiffs, and two Motions for Summary Judgment filed by Oki Electric Industry Co., Ltd. (“Defendant”). The Court found these matters appropriate for decision without oral argument pursuant to Local Civil Rule 7-1(b), and previously vacated the corresponding hearing dates. Having fully reviewed the parties’

1 briefings, the Court DENIES Plaintiffs’ Motion for Leave to Amend. The three Motions for  
2 Summary Judgment, which seek to resolve a number of issues specific to this action, are  
3 GRANTED IN PART AND DENIED IN PART.

4 **I. BACKGROUND**

5 This action arises from the alleged breach of a contract between NavCom and Defendant  
6 (“the Agreement”) under which Defendant was obligated to develop or design a radio frequency  
7 application-specific integrated circuit (“RF ASIC”) to be included in NavCom’s products.  
8 Defendant was to sell the RF ASIC to NavCom following the successful completion of the  
9 Development Phase described in the Agreement.

10 The Agreement was executed in December 2005. The parties worked together to complete  
11 a technical specification for the RF ASIC chips. During the design process, the specification  
12 underwent several revisions. In April 2007, Defendant delivered a number of prototypes which  
13 failed under testing. A second set of prototype chips was delivered in early 2008, but those chips  
14 failed as well.

15 NavCom became concerned that the project would not succeed and proceeded to develop  
16 an alternate solution described as the “discrete solution.” By the summer of 2007, NavCom  
17 committed to developing the discrete solution parallel to the work with Defendant on the  
18 Agreement.

19 On July 8, 2008, Defendant gave written notice that it was terminating the Agreement.  
20 Plaintiffs went to market using the discrete solution in place of the RF ASICs Defendant was to  
21 provide under the Agreement, which resulted in higher costs to Plaintiffs. On June 22, 2012,  
22 Plaintiffs filed the instant action asserting a single claim for breach of contract.

23 **II. LEGAL STANDARD**

24 **a. Motion for Leave to Amend**

25 Federal Rule of Civil Procedure 16(b) provides that the district court must issue a  
26 scheduling order that limits the time to join other parties, amend the pleadings, complete discovery,  
27 and file motions. Fed. R. Civ. P. 16(b)(1)-(3). Once in place, “[a] schedule may be modified only  
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1 for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). The “good cause”  
2 requirement of Rule 16 primarily considers the diligence of the party seeking the amendment.  
3 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). “The district court may  
4 modify the pretrial schedule if it cannot reasonably be met despite the diligence of the party  
5 seeking the extension.” Id. (internal citation and quotation marks omitted).

6 Good cause may be found to exist where the moving party shows, for example, that it: (1)  
7 diligently assisted the court in recommending and creating a workable scheduling order, see In re  
8 San Juan Dupont Plaza Hotel Fire Litig., 111 F.3d 220, 228 (1st Cir. 1997), (2) is unable to comply  
9 with the deadlines contained in the scheduling order due to issues not reasonably foreseeable at the  
10 time of the scheduling order, see Johnson, 975 F.3d at 609, and (3) was diligent in seeking an  
11 amendment once the party reasonably knew that it could not comply with the scheduling order, see  
12 Eckert Cold Storage, Inc. v. Behl, 943 F. Supp. 1230, 1233 (E. D. Cal. 1996); see also Jackson v.  
13 Laureate, Inc., 186 F.R.D. 605, 608 (E. D. Cal. 1999). “If [the] party was not diligent, the inquiry  
14 should end.” Johnson, 975 F.2d at 609. If the court finds that there is good cause to modify the  
15 schedule, the court then turns to Rule 15(a) to determine whether the amendment sought should be  
16 granted. Jackson, 186 F.R.D. at 607 (“As the Ninth Circuit explained in [Johnson], once the  
17 district court has filed a pretrial scheduling order pursuant to Rule 16 which establishes a timetable  
18 for amending pleadings, a motion seeking to amend pleadings is governed first by Rule 16(b), and  
19 only secondarily by Rule 15(a).”)

20 **b. Motion for Summary Judgment**

21 A motion for summary judgment should be granted if “there is no genuine dispute as to any  
22 material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a);  
23 Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the  
24 initial burden of informing the court of the basis for the motion and identifying the portions of the  
25 pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the  
26 absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

1           If the moving party meets this initial burden, the burden then shifts to the non-moving party  
2 to go beyond the pleadings and designate specific materials in the record to show that there is a  
3 genuinely disputed fact. Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 324. The court must regard as  
4 true the opposing party’s evidence, if supported by affidavits or other evidentiary material.  
5 Celotex, 477 U.S. at 324. However, the mere suggestion that facts are in controversy, as well as  
6 conclusory or speculative testimony in affidavits and moving papers, is not sufficient to defeat  
7 summary judgment. See Thornhill Publ’g Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).  
8 Instead, the non-moving party must come forward with admissible evidence to satisfy the burden.  
9 Fed. R. Civ. P. 56(c); see also Hal Roach Studios, Inc. v. Feiner & Co., Inc., 896 F.2d 1542, 1550  
10 (9th Cir. 1990).

11           A genuine issue for trial exists if the non-moving party presents evidence from which a  
12 reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the  
13 material issue in his or her favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986);  
14 Barlow v. Ground, 943 F.2d 1132, 1134-36 (9th Cir. 1991). Conversely, summary judgment must  
15 be granted where a party “fails to make a showing sufficient to establish the existence of an  
16 element essential to that party’s case, on which that party will bear the burden of proof at trial.”  
17 Celotex, 477 U.S. at 322.

### 18           **III. DISCUSSION**

19           In this Order, the Court will first address Plaintiffs’ Motion for Leave to Amend. It will  
20 then turn to the three Motions for Summary Judgment.

#### 21           **a. Plaintiffs’ Motion for Leave to Amend**

##### 22           **i. Rule 16(b)**

23           Since such an observation is critical to framing this analysis, the Court notes at the outset  
24 that a scheduling order setting a deadline for amendments to the pleadings was issued in  
25 November, 2012. Accordingly, the Court’s initial task is to determine whether Plaintiffs have  
26 shown good cause under Rule 16(b). Plaintiffs contend that they have shown good cause because  
27 their claim for fraud depends on facts they “could not have known until after the deadline for  
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1 amendments to the pleadings established in the Court’s scheduling order.” However, there are  
2 facts in the record that suggest that Plaintiffs knew at least some of the facts they are now using to  
3 support their fraud claim as early as 2006. Because Plaintiffs base their good cause argument on  
4 facts they allege they could not have known prior to 2013, and because an inability to comply with  
5 the scheduling order can support a finding of good cause, the Court finds it appropriate to compare  
6 the facts discovered in 2013 with the facts Plaintiffs possessed prior to 2013.

7 Plaintiffs make the following allegations to support their claim for fraud:

- 8 1) When Plaintiffs selected Defendant for the Agreement, Plaintiffs were given the  
9 impression that a design firm named Peregrine would take a substantial role in the  
10 project.
- 11 2) Defendant repeatedly told Plaintiffs that Peregrine would be doing the design work if  
12 Defendant were awarded the contract, and Defendant understood that Plaintiffs were  
13 relying on Defendant’s representations regarding Peregrine’s involvement in the  
14 project. Defendant made the representations regarding Peregrine intentionally to induce  
15 Plaintiffs into selecting Defendant for the contract.
- 16 3) Plaintiffs would not have selected Defendant for the project if Peregrine had not been  
17 doing the design work.
- 18 4) Defendant actually knew that Peregrine would take only a minor role in the project and  
19 that another firm named ACCO would be doing the design work. Peregrine’s role  
20 would be limited to oversight. Defendant did not disclose these details to Plaintiffs.

21 There is evidence in the record suggesting that Plaintiffs had many of these facts in their  
22 possession earlier than 2013. In the declaration of Jacob Makhinson, who was employed by  
23 Plaintiff NavCom as a Senior RF Engineer between 2005 and 2008, Makhinson testifies that he  
24 attended a design review meeting in France with ACCO, Peregrine, and Oki in July 2006. Docket  
25 No. 116 ¶ 7. At the meeting, Makhinson learned “that ACCO was doing all of the circuit-design  
26 work that we had been told that Peregrine would be doing prior to the execution of the Agreement.  
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1 It quickly became clear that Peregrine knew very little about the circuit design for the project, and  
2 that Peregrine’s role was limited to overseeing the project.” Id.

3 In 2013, NavCom, through discovery, obtained an email between Oki employees dated  
4 August 10, 2005 which contained the following statement: “I heard that we are using a French RF  
5 design team, along with Peregrine. Did this alarm NavCom in your last concall?” Docket No. 134,  
6 Ex. 11. According to NavCom, that was the point in time when Plaintiffs “knew that Oki’s  
7 representations regarding Peregrine’s role in the project were intentional and designed to induce  
8 NavCom into entering into the Agreement.” Docket No. 134, Pl.’s Brief ISO Mot. Leave to  
9 Amend at 7.

10 In addition, on August 8, 2013, NavCom took the deposition of Dr. Ron Reedy, Peregrine’s  
11 Chief Technology Officer. Id. Dr. Reedy testified that Peregrine’s only role in the project was to  
12 provide oversight and that he did not remember any request by Defendant that Peregrine conduct  
13 the design work. Id. According to NavCom, it was only after Dr. Reedy’s deposition that  
14 NavCom “now had information both that Oki’s representations regarding Peregrine’s role in the  
15 project were false, and that those representations were intentional, permitting them to plead a claim  
16 for fraud. Id.

17 The Court is not convinced that the facts contained in the August 10, 2005 email between  
18 Oki employees were so significant that it was only upon discovery of these facts that Plaintiffs  
19 became able to plead a fraud claim. First, Plaintiffs, through Mr. Makhinson, knew as early as  
20 2006 that Peregrine would have only a limited role in the project based on the meeting in France.<sup>1</sup>  
21 Dr. Reedy’s testimony serves only to reinforce that fact and contains no factual information that  
22 was not already revealed to Plaintiffs during the July 2006 meeting in France. Second, while the  
23 August 10, 2005 email might suggest that Defendant’s representations regarding Peregrine’s role  
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25 <sup>1</sup>As a general rule, an agent has a duty to disclose material matters to his or her principal, and the actual knowledge of  
26 the agent is imputed to the principal. In re Marriage of Cloney, 91 Cal. App. 4th 429, 439 (2001). Mr. Makhinson was  
27 employed as NavCom’s Senior RF Engineer and attended the July 2006 meeting in France to discuss the subject matter  
28 of the Agreement. Mr. Makhinson was acting as NavCom’s employee and performing duties related to his  
employment when he attended this meeting. Thus, any knowledge gained by Mr. Makhinson at this meeting was  
imputed to NavCom.

1 were intentional and designed to induce NavCom into entering the agreement, the Court is not  
2 convinced that this email was essential to NavCom’s ability to plead fraud.

3 In California, a claim of fraud has five elements: (1) the defendant made a false  
4 representation as to a past or existing material fact; (2) the defendant knew the representation was  
5 false at the time it was made; (3) in making the representation, the defendant intended to deceive  
6 the plaintiff; (4) the plaintiff justifiably and reasonably relied on the representation; and (5) the  
7 plaintiff suffered resulting damages. Lazar v. Super. Ct., 12 Cal. 4th 631, 638 (1996); Ali v.  
8 Humana, Inc., 2010 WL 2376972, at \*5 (E.D. Cal. June 22, 2012). Under Rule 9(b), a plaintiff  
9 who alleges fraud “must state with particularity the circumstances constituting the fraud,” but may  
10 “aver[ ] generally” the state of mind animating the fraud. Fed. R. Civ. P. 9(b). The pleading must  
11 “be specific enough to give defendants notice of the particular misconduct . . . so that they can  
12 defend against the charge and not just deny that they have done anything wrong.” Sanford v.  
13 Memberworks, Inc., 625 F.3d 550, 558 (9th Cir. 2010) (quoting Kearns v. Ford Motor Co., 567  
14 F.3d 1120, 1124 (9th Cir. 2009)); Neubronner v. Milken, 6 F.3d 666, 671–72 (9th Cir. 1993) (“A  
15 pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the  
16 defendant can prepare an adequate answer from the allegations.”) (internal quotations omitted);  
17 Odom v. Microsoft Corp., 486 F.3d 541, 553 (9th Cir. 2007) (recognizing that “plaintiffs may aver  
18 scienter generally, just as the rule states—that is, simply by saying that scienter existed”) (internal  
19 quotation omitted). To avoid dismissal, the complaint must describe the time, place, and specific  
20 content of the false representations and identify the parties to the misrepresentations. Kearns, 567  
21 F.3d at 1124.

22 The facts discovered in 2013 are new only so far as they speak to Defendant’s state of mind  
23 or Defendant’s alleged intent to fraudulently induce Plaintiffs into selecting Defendant for the  
24 contract. However, because scienter may be alleged “simply by saying that scienter existed,”  
25 Plaintiffs could have pleaded fraud whether or not they had the new facts in their possession.  
26 Thus, the Court finds that Plaintiffs could have pleaded fraud within the deadlines set by the  
27 scheduling order.

1           Accordingly, the Court finds that Plaintiffs have not shown good cause under Rule 16(b)  
2           and therefore shall not modify the scheduling order to permit Plaintiffs leave to amend their  
3           complaint.

4                           **ii. Rule 15**

5           Even if the Court had found that Plaintiffs have shown good cause, the Rule 15 factors  
6           weigh against granting Plaintiffs leave to amend.

7           As the Ninth Circuit and others have held, it is the consideration of prejudice to the  
8           opposing party that carries the greatest weight. See DCD Programs, Ltd. v. Leighton, 833 F.2d  
9           183, 185 (9th Cir. 1987). The party opposing amendment carries the burden of showing prejudice.  
10           Id. at 87.

11           Defendant argues that it will be prejudiced because it would have conducted additional  
12           discovery if it had known of Plaintiffs' fraud claim before discovery closed. Plaintiffs argue that  
13           Defendant did, in fact, already take some fraud-related discovery. Defendant sent three requests  
14           for admission asking Plaintiffs to admit that Defendant did not commit fraud and to admit that  
15           Plaintiffs had not asserted that Defendant committed fraud. Plaintiffs denied these requests for  
16           admission and blame Defendant for choosing not follow up with additional discovery such as  
17           asking Plaintiffs to state the basis for its denials.

18           Defendant also contends that it would have conducted additional discovery of former Oki  
19           employees had it known it was facing a claim for fraud. According to Defendant, the three  
20           employees are no longer directly within Defendant's possession, custody, or control. Defendant  
21           describes the three employees as "central figures involved in the NavCom RF ASIC development  
22           project on Oki Semiconductor's behalf and having direct knowledge of the issues in Plaintiffs'  
23           motion." The employees were involved in discovery either because Plaintiffs took depositions of  
24           them (with Defendant's counsel representing them) or because they helped prepare Defendant's  
25           witness for deposition. Defendant does not identify what information it hopes to retrieve from  
26           these employees through discovery.



1 A need to reopen discovery and therefore delay the proceedings supports a finding of  
2 prejudice from a delayed motion to amend the complaint. Lockheed Martin Corp. v. Network  
3 Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999) (citing Solomon v. North Am. Life & Cas. Ins.  
4 Co., 151 F.3d 1132, 1139 (9th Cir. 1998). Under these circumstances, the Court finds that the  
5 prejudice to Defendant would be significant. In granting Plaintiffs' request, the Court would be  
6 required to modify its scheduling order which would disrupt Defendant's trial preparations. The  
7 parties would likely need to engage in a new round of briefing to address Plaintiffs' new fraud  
8 claim. Additional discovery may need to be taken by both parties.

9 Thus, the Court finds that Defendant has carried its burden of showing prejudice under Rule  
10 15, which further supports denial of Plaintiffs' motion.

11 **b. The three Motions for Summary Judgment**

12 Having denied Plaintiffs' request to add a fraud claim, the Court next turns to Plaintiffs'  
13 remaining claim for breach of contract. Through their three motions for summary judgment, the  
14 parties have requested the Court to make a number of rulings relevant to the breach of contract  
15 claim. Specifically, the motions are:

- 16 1) Defendant's motion for summary judgment on the following issues: whether Plaintiffs  
17 failed to state a claim for breach of contract, and whether the contract that is the subject  
18 of this lawsuit was rescinded or abandoned by mutual consent (Docket No. 100).
- 19 2) Defendant's motion for summary judgment on the following issues: whether Plaintiffs'  
20 requested damages are precluded by the express terms of the contract, whether Plaintiff  
21 Deere failed to state a claim (Docket No. 102).
- 22 3) Plaintiffs' motion for summary judgment regarding Defendant's affirmative defenses  
23 (Docket No. 97).

24 The Court will begin by deciding the first motion, then proceed to deciding the second and  
25 third motions concurrently.

1 **i. The first Motion for Summary Judgment (Docket No. 100)**

2 Defendant's first Motion for Summary Judgment requests that the Court dismiss Plaintiffs'  
3 breach of contract claim because it fails to state a claim. This motion also requests that the Court  
4 find that the subject contract was rescinded or abandoned.

5 Between 2005 and 2008, Defendant was engaged in the development of radio frequency  
6 ("RF") application specific integrated circuits ("ASICs") for use in Plaintiffs' products.  
7 Development of the ASICs began when the parties entered into a Development and Purchase  
8 Agreement ("the original Agreement") on or about December 14, 2005. The original Agreement  
9 concerned the development of a three-chip integrated circuit ("IC") chipset referred to as "Version  
10 19."

11 Defendant's requests center around two separate points in time during this relationship,  
12 during which the parties performed acts which either amended, abandoned, or rescinded the  
13 Agreement. The first occurred in November 2006, when Defendant stopped development of  
14 Version 19 and began the development of a different three-chip IC chipset referred to as "Version  
15 25." Defendant contends that on this date, the parties rescinded or abandoned the original  
16 Agreement for the development of Version 19 and entered into a new Agreement for the  
17 development of Version 25. Plaintiffs contend that the original Agreement was amended rather  
18 than terminated.

19 The second relevant point in time is May 2008, when development for the three-chip  
20 chipset ceased and development for a redesigned RF ASIC including four chips commenced.  
21 Again, Defendant contends that when this event occurred, the Agreement for Version 25 was  
22 rescinded or abandoned and replaced with a new Agreement for the four-chip chipset, while  
23 Plaintiff contends that the Agreement was amended.

24 These two points in time are relevant for two reasons. First, Defendant contends that when  
25 Plaintiffs pleaded breach of contract Plaintiffs made reference only to the Agreement for the  
26 development of Version 19. Defendant reasons that because the Agreement for Version 19 ceased  
27 in November 2006 when development on Version 25 began, Plaintiffs' claim for breach of contract  
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1 fails to state a claim either because of the statute of limitations or because the alleged breach  
2 occurred in 2008 and that a contract cannot be breached after it ceases to exist. Second, Defendant  
3 makes essentially the same argument with respect to May 2008, when development for Version 25  
4 ceased and was replaced by development for a four-chip chipset.

5 Under Federal Rule of Civil Procedure 8(a), a “short and plain statement of the claim”  
6 suffices. The forms appended to the Federal Rules of Civil Procedure note that “plaintiff may set  
7 forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or plead it  
8 according to its legal effect.” Fed. R. Civ. P. Official Form 3, 12; see also 5 Charles Alan Wright  
9 & Arthur R. Miller, Federal Practice & Procedure § 1235 (2004). These forms are declared to be  
10 sufficient by Federal Rule of Civil Procedure 84.

11 Here, regardless of whether there were three separate contracts, or one contract modified  
12 twice, Plaintiffs have alleged sufficient facts to plead the contract according to its legal effect, and  
13 enough to enable Defendant to understand and respond to Plaintiffs’ claim. See Securimetrics, Inc.  
14 v. Hartford Cas. Ins. Co., 2005 WL 1712008, at \*2 (N.D. Cal. July 21, 2005). The Court has  
15 reviewed the several briefs and motions submitted by Defendant and has found nothing to indicate  
16 that Defendant was unable to understand or respond to Plaintiff’s claim. Furthermore, Defendant’s  
17 strongest defenses in this action are based upon specific provisions in the Agreement that limit  
18 liability and grant Defendant a right to terminate the contract. That Defendant was able to make  
19 these arguments demonstrates that Defendant had little difficulty understanding Plaintiffs’ claim,  
20 identifying the contract at issue, and preparing its defenses.

21 The Court at this time declines to rule on whether the legal effect of the changes to the  
22 Agreement in November 2006 and May 2008 was to amend, rescind, or abandon the Agreement.  
23 Notwithstanding Defendant’s potential rescission or abandonment defenses, Plaintiffs have pleaded  
24 sufficient facts to state a plausible cause of action for breach of contract and Defendant had notice  
25 of the claim as well as which contract was at issue.

26 Accordingly, Defendant’s first motion for summary judgment (Docket No. 100) is  
27 DENIED.

1                                   **ii. The second and third Motions for Summary Judgment**

2                   The second and third Motions for Summary Judgment raise a number of overlapping issues.  
3 For organizational purposes, the Court will begin this section of the opinion by resolving some of  
4 these issues before proceeding to a discussion of each individual motion.

5                                   **1. Whether Defendant had a right to terminate the Agreement**

6                   In July 2008, Defendant provided notice of termination of the Agreement to Plaintiffs.  
7 Defendant asserts that the Agreement provided it with the right to terminate the Agreement.  
8 Plaintiffs deny that Defendant had this right and argue that even if it did, Defendant breached  
9 because Defendant did not terminate the Agreement according to its terms.

10                   Defendant relies primarily on this language from the Agreement:

11                   **1.0 TERM.** The term of this Agreement for purposes of ASIC (Applications Specific  
12 Integrated Circuit) development and purchase order placement shall commence with the  
13 date first written above and continue until December 31, 2006. This Agreement shall  
14 automatically renew for successive one (1) year periods until Buyer or Seller terminates the  
15 Agreement with at least three (3) months written notice prior to the expiration of any then  
16 current term.

17                   Reading this language literally, Section 1.0 of the Agreement appears to expressly provide a  
18 right to terminate the Agreement for both Buyer and Seller (Plaintiff NavCom and Defendant,  
19 respectively). Plaintiffs set forth several arguments to contend that this language did not grant  
20 Defendant the right to terminate.

21                   Plaintiffs first direct the Court's attention to Section 2.7, which states:

22                   2.7 Termination During Development Phase. Buyer may terminate this Agreement for its  
23 convenience during the Development Phase upon written notice to Seller. Upon such  
24 termination, Buyer agrees to pay Seller all reasonable NRE charges which have become due  
25 and payable and all charges for work completed.

26                   Section 1.0 is a general provision that does not address termination during the Development  
27 Phase, while Section 2.7 specifically addresses termination during the Development Phase and  
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1 expressly grants the right to terminate only to Buyer. Reading the two sections together, Plaintiffs  
2 argue that because only Section 2.7 is specific to the Development Phase, it and only it governs the  
3 parties' rights to terminate during the Development Phase. Furthermore, Section 2.7 is the only  
4 provision that deals with termination prior to the end of a term (presumably, Plaintiffs refer to the  
5 "terms" defined by Section 1.0).

6 Plaintiffs also point to Schedule C of the Agreement, which indicates that the estimated  
7 time for development and turnaround of Engineering Prototypes was approximately ten months  
8 from the "sign-off of this Agreement." Plaintiffs further assert that "[t]he ten-month estimate is  
9 consistent with the one-year, initial term of the Agreement, and the expectation that Oki would  
10 create Engineering Prototypes within the first term. Once the development process was completed  
11 and once Plaintiffs were placing orders for the RF ASIC chipset, either party could choose not to  
12 renew the Agreement at the end of a one-year period, provided it gave three months notice to the  
13 other party. At that stage, and on three months' notice, the parties would be able to guarantee their  
14 supply or demand for the remainder of a term, and NavCom would have a sufficient time to secure  
15 an alternative source for RF ASICs in the event of an Oki-initiated termination." Docket No. 99,  
16 Pl.'s Memo ISO Mot. Partial Sum. J. at 12 (internal citations omitted).

17 The Court is therefore faced with an issue of contract interpretation and proceeds according  
18 to the following principles.

19 The goal of contract interpretation is to give effect to the parties' mutual intent. Cal. Civ.  
20 Code § 1636; Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1264 (1992); Southern Pac.  
21 Transp. v. Santa Fe Pac. Pipelines, Inc., 74 Cal. App. 4th 1232, 1240 (1999). "It is the outward  
22 expression of the agreement, rather than a party's unexpressed intention, which the court will  
23 enforce." Winet v. Price, 4 Cal. App. 4th 1159, 1166 (1992). When parties dispute the meaning of  
24 language in a contract, "the court must decide whether the language is 'reasonably susceptible' to  
25 the interpretations urged by the parties." Badie v. Bank of Am., 67 Cal. App. 4th 779, 798 (1998).  
26 Contract interpretation is a question of law unless the interpretation turns upon the credibility of  
27 extrinsic evidence. Id. at 799.

1 In determining whether the contract is reasonably susceptible to a party’s interpretation, the  
2 court looks at the language of the document itself. Id. Where contractual language is clear and  
3 explicit, it governs. Bank of the West, 2 Cal. 4th at 1264. In addition, the court may consider parol  
4 evidence, “not to vary or modify the terms of the agreement but to aid the court in ascertaining the  
5 true intent of the parties [citation], not to show that the parties meant something other than what  
6 they said but to show what they meant by what they said.” Denver D. Darling, Inc. v. Controlled  
7 Env’ts Constr., Inc., 89 Cal. App. 4th 1221, 1236 (2001) (internal quotations omitted).

8 A contract that is capable of more than one reasonable interpretation is ambiguous. Badie,  
9 67 Cal. App. 4th at 798. When a court is “[f]aced with contract language that is reasonably  
10 susceptible to more than one meaning, certain general rules of contract interpretation come into  
11 play to aid the court in resolving the ambiguity.” Southern Pac., 74 Cal. App. 4th at 1240. First,  
12 the words of a contract are understood in their ordinary and popular sense unless the parties ascribe  
13 a technical or special meaning. Id. The court must “determine the ultimate construction to be  
14 placed on the ambiguous language by applying the standard rules of interpretation” to give effect to  
15 the parties’ mutual intent. Badie, 67 Cal. App. 4th at 798. Further, the court can consider the  
16 circumstances under which a contract was negotiated, including its object, nature, and subject  
17 matter. Cal. Civ. Code § 1647. Courts must interpret contractual language in a manner which  
18 gives force and effect to every provision, and not in a way which renders some clauses nugatory,  
19 inoperative or meaningless. New York Life Ins. Co. v. Hollender, 38 Cal. 2d 73, 81–82 (1951).

20 Here, Defendant’s interpretation prevails. The Court begins by considering whether the  
21 contract is reasonably susceptible to the parties’ interpretations. Section 1.0 expressly grants  
22 Defendant the right to terminate the Agreement, subject to the term regarding three months’ notice.  
23 Plaintiffs point to Section 2.7 in an attempt to highlight an inconsistency in the contract. When a  
24 general and particular provision are inconsistent, the latter is paramount to the former. Cal. Civ.  
25 Proc. Code § 1859. However, these two sections are not inconsistent. Section 2.7 expressly grants  
26 only Buyer the right to terminate during the Development Phase. This is not inconsistent with  
27 Section 1.0’s grant of termination rights to both parties throughout each term of the contract.

1 Section 2.7 allows Buyer to terminate “for its convenience” during the Development Phase and  
2 does not require a three month notice period. Section 2.7 therefore grants Buyer a stronger  
3 termination right during the Development Phase than either party would otherwise have throughout  
4 the life of the Agreement. Nothing in Section 2.7’s language suggests that it was intended to  
5 nullify Defendant’s termination rights during the Development Phase.

6 As for Schedule C, it does nothing to help Plaintiffs. The Court finds no connection  
7 between the ten month estimate in Schedule C and the parties’ termination rights. Finally,  
8 Plaintiffs point to an email dated May 31, 2008, wherein one of Defendant’s employees stated that  
9 the Agreement has no option for Defendant to cancel. However, because this is parol evidence that  
10 would tend to show that the parties “meant something other than what they said,” the Court cannot  
11 consider it. Denver D. Darling, 89 Cal. App. 4th at 1236.

12 Accordingly, the Court finds that Defendant had the right to terminate the Agreement  
13 subject to the notice requirement described in Section 1.0.

## 14 **2. Whether Defendant breached the Agreement**

15 Plaintiffs’ next contention is that, even if Defendant did have the right to terminate,  
16 Defendant nevertheless breached the Agreement because Defendant failed to terminate according  
17 to the Agreement’s terms. According to Plaintiffs, Section 1.0 required Defendant to have  
18 provided three months’ advance notice prior to termination. Plaintiffs allege that Defendant simply  
19 terminated the Agreement immediately, violating the three months’ advance notice requirement.

20 Defendant does not deny that it terminated the Agreement without providing the required  
21 notice. The record shows that Defendant provided notice of termination through an email sent on  
22 July 8, 2008. Docket No. 99, Ex. 20. Nothing in the record indicates that Defendant continued  
23 working after the email was sent. On a motion for summary judgment, after the moving party  
24 meets its initial burden of demonstrating the absence of a triable issue of fact, the burden then shifts  
25 to the non-moving party. Celotex, 477 U.S. at 324. Having not denied that it failed to provide the  
26 required timely notice, Defendant has not met its burden.

1 Thus, the Court finds that Defendant breached the Agreement. This finding shall be limited  
2 to the purposes of this motion. Fed. R. Civ. P. 56(e)(2).

3 **3. Damages**

4 Through their motions, the parties disagree over whether Plaintiffs' estimated damages are  
5 recoverable. Plaintiffs seek damages consisting of the following three components:

- 6 1) The amounts NavCom paid to Oki pursuant to the terms of the Agreement (a first  
7 payment of \$300,000 and a second payment of \$120,000).
- 8 2) The internal expenses incurred by NavCom associated with the Agreement, which  
9 would include items such as the cost to attend meetings with Defendant, estimated at  
10 \$174,000 by Plaintiffs' damages expert.
- 11 3) The difference between NavCom's costs to go to market "with the discrete solution  
12 necessitated by Oki's breach, and a reasonable estimate of what their costs would have  
13 been had Oki not breached the Agreement and instead delivered the cheaper RF  
14 ASICs." Docket No. 99-4, Pl.'s Memo ISO Mot. Partial Sum. J. at 14.

15 The parties dispute whether these damages items are precluded by the Agreement.  
16 Specifically, the Agreement contains a Limitation of Liability Clause ("the Limitation Clause")  
17 which reads:

18 **16.0 LIMITATION OF LIABILITY.** Notwithstanding any other provisions in this  
19 Agreement, neither party shall be liable with respect to its obligations under this  
20 Agreement for consequential, exemplary, special, or incidental damages, including, without  
21 limitation, lost profits, even if it has been advised of the possibility of such damages, except  
22 in the case of fraud; malicious, willful, or intentional tortious acts; breaches of  
23 confidentiality; obligations to indemnify under these Terms and Conditions; violation of  
24 either party's intellectual property rights; or claims arising out of or relating to personal  
25 injury and/or death.  
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1 **a. Whether the alleged fraud renders the Limitation Clause**  
2 **unenforceable**

3 As a threshold matter, Plaintiffs assert that Defendant's alleged fraudulent conduct places  
4 each of Plaintiffs' claimed damages items outside the scope of the Limitation Clause, both by the  
5 Limitation Clause's express language and by the public policy against allowing parties to contract  
6 out of liability for fraud. Plaintiffs refer to Defendant's alleged misrepresentations regarding  
7 Peregrine's and ACCO's roles in the project, as discussed elsewhere in this Order.

8 Plaintiffs did not plead a fraud claim in their Complaint, and as discussed above, the Court  
9 shall not grant Plaintiffs leave to add a fraud claim. However, Plaintiffs argue that even when a  
10 plaintiff pleads only breach of contract and does not assert a tort cause of action, a court may refuse  
11 to enforce a limitation of liability provision if it will serve to insulate a party from damages  
12 resulting from its own fraudulent acts. See Civic Ctr. Drive Apartments Ltd. P'ship v. Sw. Bell  
13 Video Servs., 295 F. Supp. 2d 1091, 1106 (N.D. Cal. 2003) (citing Cal. Civ. Code § 1668, which  
14 provides that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone  
15 from responsibility for his own fraud, or willful injury to the person or property of another, or  
16 violation of law, whether willful or negligent, are against the policy of the law.")

17 Thus, under both California law and the language of the Limitation Clause itself, the  
18 Limitation Clause is unenforceable if enforcement of the Limitation Clause would exempt  
19 Defendant from responsibility for its own fraud. Here, however, the Limitation Clause will not  
20 exempt Defendant from liability for fraud because Plaintiffs waived the alleged fraud by  
21 continuing to perform the contract even after Plaintiffs discovered that alleged misrepresentations  
22 had been made by Defendant. Plaintiffs learned of Defendant's alleged misrepresentations  
23 regarding Peregrine's and ACCO's involvement in the project as early as July 2006. Plaintiffs  
24 continued to perform until Defendant allegedly breached the contract when it gave Plaintiffs notice  
25 of termination in July 2008. Even in cases where a party has been fraudulently induced to make  
26 either a contract of sale or purchase, it follows that if, after full knowledge of the fraud or deceit, he  
27 goes forward and executes it notwithstanding such fraud, the damage which he thereby sustains is  
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1 voluntarily incurred. Commodity Credit Corp. v. Rosenberg Bros. & Co., 243 F.2d 504, 512 (9th  
2 Cir. 1957).

3 The Court’s next task is to apply the Limitation Clause to each of Plaintiffs’ claimed item  
4 of damages.

5 **b. The first and second claimed items of damages**

6 Plaintiffs’ first item of claimed damages is for the amounts NavCom paid to Oki pursuant  
7 to the terms of the Agreement (a first payment of \$300,000 and a second payment of \$120,000,  
8 labeled as “Development Charges” under Schedule C of the Agreement). Plaintiffs’ second item of  
9 claimed damages is for \$174,000, representing the internal expenses incurred by NavCom  
10 throughout the period the Agreement was active. Defendant contends that these damages are  
11 expressly precluded by the Limitation Clause because they are either consequential, exemplary,  
12 special, or incidental damages. Plaintiffs, to the contrary, assert that these damages are general (or  
13 direct) damages, which are not expressly precluded by the Limitation Clause.

14 These damages cannot properly be characterized as general or direct damages. Damages  
15 awarded to an injured party for breach of contract seek to approximate the agreed-upon  
16 performance. Lewis Jorge Const. Mgmt., Inc. v. Pomona Unified Sch. Dist., 34 Cal. 4th 960, 967  
17 (2004) (internal citations and quotations omitted). The goal is to put the plaintiff “in as good a  
18 position as he or she would have occupied” if the defendant had not breached the contract. Id.

19 Contractual damages are of two types—general damages (sometimes called direct damages)  
20 and special damages (sometimes called consequential damages). Id. at 968. General damages are  
21 often characterized as those that flow directly and necessarily from a breach of contract, or that are  
22 a natural result of a breach. Cal. Civ. Code § 3300 (damages “which, in the ordinary course of  
23 things, would be likely to result” from breach).

24 These first and second items of damages are unrecoverable as general damages because  
25 they do not flow directly and necessarily from a breach of contract, and are not a natural result of a  
26 breach. Lewis Jorge, 34 Cal. 4th at 968. Unlike in a typical contract for the sale of goods where  
27 the plaintiff provides payment in advance and the buyer breaches by failing to deliver the goods as  
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1 promised, this is a contract for the development and production of a new product where the parties,  
2 in the express terms of the contract, contemplate a multi-step Development Phase under which a  
3 product design would (and did) undergo a series of revisions. The Development Charges and the  
4 internal expenses incurred by NavCom were incurred during the Development Phase, and the  
5 Development Charges are described in Schedule C as “includ[ing] one occurrence of each of the  
6 actions itemized above. Repetition of any of these steps will result in additional development  
7 charges.” In other words, the Development Charges were paid in exchange for the performance of  
8 the actions referenced in Schedule C of the Agreement. Plaintiffs incurred internal expenses in  
9 order to allow Defendant to perform the actions referenced in the Agreement. Plaintiffs do not  
10 argue that the Defendant failed to perform those actions. Both sides acknowledge that they worked  
11 with each other for a period of several years and that Defendant did in fact produce a number of  
12 prototypes that were ultimately rejected by Plaintiffs.

13 Here, Defendant breached the contract when it failed to provide timely notice of  
14 termination. However, Plaintiffs’ first and second claimed items of damages are expenditures  
15 incurred in exchange for Defendant’s performance of the actions described in the Agreement, and  
16 Defendant did perform those actions. Allowing Plaintiffs to recover the first and second claimed  
17 items of damages would place Plaintiffs in a better position than they would otherwise have  
18 occupied because they would have received Defendant’s performance in exchange for no cost to  
19 Plaintiffs.

20 Accordingly, the Court finds that Plaintiffs are barred by law from recovering the first and  
21 second claimed items of damages.

22 **c. The third claimed item of damages**

23 Defendant categorizes this item of damages as “lost profits” within the meaning of the  
24 Clause, which would render them unrecoverable. Plaintiffs advance three arguments in rebuttal: 1)  
25 Plaintiffs’ claimed damages are not “lost profits,” rather, Plaintiffs are claiming “cover” damages  
26 pursuant to the Uniform Commercial Code (“UCC”), 2) even if Plaintiffs’ claimed damages are  
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1 “lost profits” rather than “cover,” they are a species of lost profits different from the lost profits  
2 precluded by the Clause, and 3) the damages are “increased costs” rather than “lost profits.”

3 **i. Whether the damages are recoverable as cover**

4 Cover is defined under the UCC as making in good faith, and without unreasonable delay,  
5 any reasonable purchase goods in substitution for those due from the seller. See Cal. Com. Code §  
6 2712; KGM Harvesting Co. v. Fresh Network, 36 Cal. App. 4th 376, 380 (1995). According to  
7 Plaintiffs, in this case, Plaintiffs’ implementation of the more expensive discrete solution is “cover”  
8 for Defendant’s failure to provide what was promised under the Agreement.

9 The parties disagree whether the Agreement is a contract for services or a contract for a sale  
10 of goods, which would determine whether or not the UCC applies. The Court finds that the  
11 Agreement, at least at the point in time when it was terminated, is a contract for services.

12 The UCC applies to “transactions in goods.” Cal. Com. Code § 2102. “Goods” are defined  
13 in the Code as “all things (including specially manufactured goods) which are movable at the time  
14 of identification to the contract for sale . . .” Cal. Com. Code § 2105. The UCC does not apply to  
15 transactions involving service. Complications arise when the transaction involves both goods and  
16 services. The courts have held application of the UCC in these instances turns on the “essence” of  
17 the agreement. Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc., 208 Cal. App.  
18 3d 1297, 1305 (1989); RRX Industries, Inc. v. Lab-Con, Inc., 772 F.2d 543, 546 (9th Cir. 1985).  
19 The court discerns what is the predominant factor-whether the thrust is the rendition of service with  
20 goods incidentally involved or whether the transaction is a sale of goods with labor incidentally  
21 involved. United States ex rel. Bartec Industries, Inc. v. United Pacific Co., 976 F.2d 1274, 1277  
22 (9th Cir. 1992).

23 In TK Power, Inc. v. Textron, Inc., 433 F. Supp. 2d 1058, 1061 (N.D. Cal. 2006), the court  
24 analyzed a contract for the development and production of high frequency on-board battery  
25 chargers for electric golf carts. TK was approached by Textron as one of several potential vendors  
26 to develop the product. Id. at 1060. TK was charged with developing a product that “represented  
27 new technology that had not been previously incorporated into this context.” Id. TK was to

1 provide prototypes for laboratory testing, and once those prototypes tested successfully, TK would  
2 then undertake the mass production of approximately 75,000 units per year. Id.

3 The court found that the essence of the contract was for service, not goods, because most of  
4 the price Textron had paid up to the point of the lawsuit was for development of the prototypes. Id.  
5 at 1062. The court found that Textron was bargaining more for TK’s “knowledge, skill, and  
6 ability” than it was for the actual material goods. Id.

7 The court, and the parties, agreed that the UCC would have applied to the production and  
8 sale of the mass produced chargers. Id. at 1063. Where the parties differed was whether the UCC  
9 should apply to the entirety of the contract, or whether the court should segregate the contract such  
10 that the common law would apply to the development portion of the contract and the UCC to the  
11 production portion of the contract. Id.

12 The TK Power court concluded that the latter position was correct, considering three  
13 factors: 1) whether the non-goods aspect of the transaction is clearly distinct and easily separable  
14 from the goods aspect, 2) whether the alleged performance or non-performance pertains solely to  
15 the non-goods aspect of the transaction, and 3) whether it makes sense to apply the UCC to the  
16 non-goods aspect of the transaction and whether applying non-UCC law accords with the parties’  
17 intent.

18 This Court finds the TK Power court’s analysis instructive to the instant case and  
19 accordingly finds that the Agreement is segregable, that the Agreement never proceeded past the  
20 development phase, and that the development phase portion of the Agreement is governed by the  
21 common law. The Agreement is clearly divided into a Development Phase and a Production  
22 Phase, and the Production Phase was not to commence until the Development Phase was  
23 completed. During the Development Phase, Plaintiffs bargained for Defendant’s knowledge, skill,  
24 and ability more than they bargained for the actual material goods. Plaintiffs have thus far made to  
25 Defendant a first payment of \$300,000 and a second payment of \$120,000, in accordance with  
26 Schedule C of the Agreement. Both payments are labeled “Development Charges.” The parties  
27 agree that the Production Phase never commenced. Under these circumstances, the Court finds that  
28

1 the contractual relationship, at least up to the point where it ended and this lawsuit began, is more  
2 appropriately viewed as a services contract than a goods contract.

3 Having determined that the relationship between the parties is a services contract and that  
4 the UCC does not apply, the Court finds that this item of damages is not recoverable as cover under  
5 the UCC.

6 **ii. Whether the damages are otherwise recoverable**

7 Plaintiffs next contention is that, even if its third item of damages is more appropriately  
8 characterized as “lost profits” rather than “cover,” it is still not barred by the Limitation Clause  
9 because the Limitation Clause does not expressly preclude recovery of general damages and that, at  
10 least here, the lost profits Plaintiffs seek are lost profits as a measure of general damages rather  
11 than lost profits as a measure of consequential damages. Plaintiffs also argue that this item of  
12 damages should not be characterized as “lost profits” because they are actually “increased costs.”

13 However, regardless of how these damages are characterized, Plaintiffs may not recover  
14 them because they were not proximately caused by the breach. Under contract principles, the non-  
15 breaching party is entitled to recover only those damages, including lost future profits, which are  
16 proximately caused by the specific breach. See, e.g., Metzenbaum v. R.O.S. Associates, 188 Cal.  
17 App. 3d 202, 211 (1986); Brandon & Tibbs v. George Kevorkian Accountancy Corp., 226 Cal.  
18 App. 3d 442, 457 (1990). Or, to put it another way, the breaching party is only liable to place the  
19 non-breaching party in the same position as if the specific breach had not occurred. St. Paul Fire &  
20 Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co., 101 Cal. App. 4th 1038, 1061 (2002).

21 Plaintiffs’ damages expert calculated Plaintiffs’ damages as the increased costs that  
22 Plaintiffs would have endured over a multiple year period, estimated at several million dollars.<sup>2</sup>  
23 Docket No. 104, Ex. 4, Expert Report. However, Defendant’s breach was that it failed to provide  
24 the required three months’ notice prior to termination. The Court has little difficulty concluding  
25 that the breach in this case is not the proximate cause of several years’ worth of increased costs.

26  
27  
28 <sup>2</sup> The Court describes the Expert Report vaguely because its contents are sealed.

1 Plaintiffs' damages calculation might be appropriate if Defendant's breach was a breach of  
2 a legally binding commitment to provide several years' worth of product to Plaintiffs. In this  
3 hypothetical scenario, Defendant would have guaranteed both that it would succeed in developing  
4 an acceptable prototype, and that it would continue providing the product for a multiple year  
5 period. Nothing in the Agreement, or elsewhere in the record, indicates that Defendant made such  
6 a promise, and the Agreement's grant of termination rights to both sides certainly weighs heavily  
7 against such a finding.

8 It is certainly plausible that Plaintiffs suffered some amount of damages as a proximate  
9 result of Defendant's breach (losing the benefit of three months to prepare for Defendant's  
10 termination, for example), but not nearly to the extent described in Plaintiffs' Expert Report. Thus,  
11 the Court finds that Plaintiffs' third item of claimed damages is not recoverable as a matter of law.

#### 12 **4. Application to second and third Motion for Summary Judgment**

13 Having made the conclusions of law described above, the Court shall now apply them to  
14 each individual Motion for Summary Judgment and shall also discuss the remainder of the issues  
15 presented by each motion.

##### 16 **a. Defendant's Motion for Summary Judgment (Docket No.** 17 **102)**

18 This Motion for Summary Judgment requests that the Court make the following rulings: 1)  
19 that NavCom is precluded from claiming the three items of damages discussed in the parties'  
20 briefs, and 2) that Deere is dismissed with prejudice from the action for failing to state a claim  
21 upon which relief can be granted.

22 In the discussion above, the Court found that Plaintiffs are indeed precluded by law from  
23 recovery of the three items of damages at issue. Accordingly, the Court GRANTS Defendant's  
24 Motion for Summary Judgment to the extent it seeks to preclude the three items of damages.

25 Next, Defendant argues that Deere should be dismissed with prejudice because its damages  
26 are precluded under the Agreement. Although the Court agrees with Defendant that the damages  
27

1 thus far requested by Plaintiffs are unrecoverable, this does not mean that any other potential item  
2 of damages is also unrecoverable.

3 According to the parties, Deere's participation in the action is based upon a third-party  
4 beneficiary theory. A contract, made expressly for the benefit of a third person, may be enforced  
5 by him at any time before the parties thereto rescind it. Cal. Civ. Code § 1559. The parties' briefs  
6 discuss a number of cases in which plaintiffs were or were not found to be third-party beneficiaries  
7 who could sue to enforce a contract.

8 The parties' cases, however, all seem to contemplate a scenario under which the third-party  
9 beneficiary was suing under a contract to which it was not directly a party, but also where the  
10 direct party was absent from the suit and the third-party beneficiary was suing alone. Here, all of  
11 the direct parties to the Agreement (NavCom and Oki) are present. There do not appear to be any  
12 rights that Deere may enforce that NavCom may not, or vice versa, so it would appear that Deere's  
13 claims rise and fall with NavCom's.

14 At this time, the issue of whether Deere is or is not a party to the action appears to be  
15 irrelevant. The Court therefore DENIES Defendant's Motion for Summary Judgment to the extent  
16 that it seeks to dismiss Deere from this action.

17 **b. Plaintiffs' Motion for Summary Judgment (Docket No.**  
18 **97)**

19 Plaintiffs' Motion for Summary Judgment requests that the Court dismiss a number of  
20 Defendant's affirmative defenses.

21 **i. Defendant's Ninth Affirmative Defense (Statute of**  
22 **Limitations**

23 This affirmative defense asserts that Plaintiffs filed their breach of contract claim after the  
24 expiration of the statute of limitations for a breach of contract. In California, a breach of contract  
25 claim must be brought within four years of the date of breach. Cal. Civ. Proc. Code § 337. As  
26 discussed above, Defendant breached when it terminated the Agreement on July 8, 2008 without  
27



1 providing three months' notice. Plaintiffs filed their complaint on June 22, 2012, which is within  
2 the four-year statute of limitations.

3 Accordingly, Plaintiffs' request to dismiss Defendant's Ninth Affirmative Defense is  
4 GRANTED.

5 **ii. Defendant's Sixth Affirmative Defense (Right to**  
6 **Terminate)**

7 As discussed above, Defendant had a right to terminate the contract. Plaintiffs' request to  
8 dismiss this defense is DENIED.

9 **iii. Defendant's Fifth Affirmative Defense (Failure to**  
10 **Mitigate)**

11 Mitigation of damages is a question of fact. Royal Thrift & Loan Co. v. Cnty. Escrow, Inc.,  
12 123 Cal. App. 4th 24, 37, 20 Cal. Rptr. 3d 37, 47 (2004). Plaintiffs' request to dismiss this defense  
13 is DENIED.

14 **iv. Defendant's Seventh Affirmative Defense**  
15 **(Limitation of Liability Clause)**

16 As discussed above, the Limitation of Liability Clause is enforceable. Plaintiffs' request to  
17 dismiss this defense is DENIED.

18 **v. Defendant's Second, Third, and Fourth**  
19 **Affirmative Defenses (Waiver, Estoppel, and**  
20 **Unclean Hands)**

21 At this time it appears unnecessary to address these defenses and the parties' briefs spend  
22 little time discussing them. Plaintiffs' request to dismiss these defenses is DENIED.

23 **vi. Defendant's Eighth Affirmative Defense (Lack of**  
24 **Standing)**

25 Defendant's lack of standing defense is based upon Deere's alleged third-party status. For  
26 the reasons discussed above, this issue does not need to be resolved at this time. Plaintiffs' request  
27 to dismiss this defense is DENIED.

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**IV. CONCLUSION**

For the foregoing reasons, Plaintiffs’ Motion for Leave to Amend (Docket No. 131) is DENIED. Defendant’s Motion for Summary Judgment (Docket No. 100) is DENIED. Defendant’s Motion for Summary Judgment (Docket No. 102) is GRANTED IN PART and DENIED IN PART. Plaintiffs’ Motion for Summary Judgment (Docket No. 97) is GRANTED IN PART and DENIED IN PART.

**IT IS SO ORDERED**

Dated: March 11, 2014

  
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EDWARD J. DAVILA  
United States District Judge