

1 contract when Defendant provided notice of termination on July 8, 2008.¹ The Court found that
2 Defendant did have the right to terminate the Agreement but that Defendant did not appear to have
3 terminated according to the Agreement's terms. The Court previously found that Defendant may
4 be liable for damages for its failure to provide timely notice of termination but is in no position to
5 calculate what those damages might be.

6 In its Order, the Court analyzed the issues with the understanding that Plaintiffs' theory of
7 breach was that Defendant breached when it terminated the Agreement. The Court's Order does
8 not preclude Plaintiffs from presenting alternate theories of breach.

9 Plaintiffs' alternate theories of breach (breaches of Sections 2.2, 2.6, and 2.8) were not
10 discussed in Plaintiffs' moving papers and Plaintiffs may still present these theories. However,
11 Plaintiffs should be aware of certain issues that may arise should Plaintiffs attempt to bring these
12 theories of breach.

13 First, the Limitation of Liability Clause will continue to limit the damages Plaintiffs will be
14 able to claim. For every item of damages Plaintiffs might claim, Plaintiffs will need to show that
15 they are not precluded by the Limitation of Liability Clause. Second, Plaintiffs should be aware
16 that issues regarding the statute of limitations may arise should they attempt to recover for any
17 breaches that occurred more than four years prior to when the instant action commenced. Cal. Civ.
18 Proc. Code § 337. In their moving papers, Plaintiffs had argued that their claim for breach of
19 contract was outside the statute of limitations because Defendant breached when it provided notice
20 of termination on July 8, 2008, and Plaintiffs had filed the instant action June 22, 2012. Plaintiffs
21 may need to show why the statute of limitations does not apply to their alternate theories of breach.

22 Finally, the Court remains uncomfortable with Plaintiffs' third item of damages.
23 Specifically, Plaintiffs contend that Defendant's alleged breach (or breaches) of Sections 2.2, 2.6,
24 and/or 2.8 proximately caused Plaintiffs' third item of damages (the increased cost of using the
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26 ¹ Docket No. 114-4, Pl.'s Opp. to Def.'s Mot. for Sum. J. re Damages at 1 ("...Oki simply quit. It unilaterally
27 terminated the Agreement. A clearer case of breach of contract there could not be."); Docket No. 99-4, Pl.'s Memo
28 ISO Mot. Partial Sum. J. at 9 ("Here, there is no evidence that Plaintiffs' claim for breach of contract accrued prior to
July 8, 2008, when Oki delivered its notice of termination to NavCom").

1 replacement discrete solution). The Court disagrees and provides the following explanation to
2 clarify its thinking regarding the third item of damages.

3 Damages are awarded in an action for breach of contract to give the injured party the
4 benefit of his bargain and insofar as possible to place him in the same position he would have been
5 in had the promisor performed the contract. Coughlin v. Blair, 41 Cal. 2d 587, 602 (1953).

6 Plaintiff's third item of damages essentially seeks to place Plaintiffs in the position they
7 would have occupied if Defendant had never exercised its termination right and assumes that 1)
8 Defendant had been able to successfully create a prototype based on the specifications that both
9 parties had a role in developing, which further assumes that it was actually possible to produce a
10 working prototype based on the specifications provided, 2) Plaintiffs had ordered as much product
11 as they felt they needed over the period of X years (as described in the sealed Expert Report), 3)
12 Defendant actually accepted each one of those orders², 4) and this continued for the period of X
13 years. Given that contract damages attempt to place the promisee in the same position had the
14 promisor performed, this would be the maximum, or very close to the maximum, amount that
15 Plaintiffs could reasonably claim as a measure of contract damages that are not the consequential,
16 special, exemplary, etc. damages excluded by the Limitation of Liability clause.

17 Allowing Plaintiffs to recover this item of damages would render the termination right
18 meaningless. It would mean that Defendant would have negotiated for a right to terminate the
19 contract, exercised that right to terminate the contract (albeit without adhering to its notice
20 requirements), yet still remain liable for the full extent of the benefit Plaintiffs would have received
21 had the contract been performed indefinitely, successfully, and with no concern to whether
22 Defendant would actually have filled every one of Plaintiffs' orders (as described in the Expert
23 Report, eventually the cheaper ASICs would have been the same cost as the discrete solution, at
24 which point Plaintiffs' would have received the full benefit of the contract with Defendant vs.
25 going with the discrete solution).

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27 ² Agreement, Section 3.1 ("Seller *may* commence production of the units upon completion of the Development Phase
28 and upon receipt of acceptable purchase orders," compared with "Buyer *agrees* to enter purchase orders against this
Agreement during the term of the Agreement to achieve the annual commitment quantities set forth in Schedule D")

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did not reach this issue after identifying the more fundamental problem with awarding Plaintiffs these damages as discussed above.

Finally, with respect to the third-party beneficiary issue, the Court earlier declined to rule on the issue and both parties may still contest it.

IT IS SO ORDERED

Dated: March 20, 2014



EDWARD J. DAVILA
United States District Judge