

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

INTEGRATED STORAGE CONSULTING )  
SERVICES, INC., a Colorado corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
NETAPP, INC., a Delaware corporation, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No.: 5:12-CV-6209-EJD

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT’S  
MOTION TO DISMISS**

**[Re: Docket No. 51]**

Presently before the Court is NetApp, Inc.’s (“Defendant” or “NetApp”) Motion to Dismiss Integrated Storage Consulting Services, Inc.’s (“Plaintiff” or “ISCSI”) First Amended Complaint. The Court found this matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and previously vacated the hearing. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Having fully reviewed the parties’ briefings, and for the following reasons, the Court GRANTS IN PART AND DENIES IN PART Defendant’s Motion.

1           **I. BACKGROUND**

2           Plaintiff ISCSI is a Colorado corporation with its principal place of business in Colorado.  
3 Docket No. 44, First Amended Complaint (“FAC”) ¶ 2. Defendant NetApp is a Delaware  
4 corporation with its principal place of business in California. Id. ¶ 4.

5           Plaintiff markets data center and IT services on behalf of Defendant. Id. ¶ 3. Defendant  
6 does not typically sell directly to end users. Id. ¶ 11. Instead, in most cases, NetApp sells its  
7 products to NetApp distributors, who then sell NetApp products to resellers such as ISCSI, which  
8 then sell NetApp products to end user businesses. Id. However, NetApp works directly to promote  
9 sales to end users to ensure satisfactory sales of its products. Id. ISCSI invests hundreds of  
10 thousands of dollars in its sales representatives and systems engineers through payment of wages,  
11 funding training, and paying for certification tests, to be able to meet NetApp’s required guidelines.  
12 Id. ¶ 12.

13           ISCSI has been a NetApp reseller/partner since June 2, 2004. Id. ¶ 13. On or about April  
14 16, 2008, Plaintiff ISCSI and NetApp entered into a revised Reseller Authorization Agreement  
15 (“2008 Agreement”). Id. The most recent ISCSI-NetApp written Reseller Authorization  
16 Agreement became effective on January 19, 2011 (“2011 Agreement”). Id. In order to become a  
17 NetApp partner/reseller, a business must accept the terms and conditions of NetApp’s Reseller  
18 Authorization Agreement. Id. ¶ 14. The Reseller Authorization Agreement is a standardized  
19 agreement that has been prepared by NetApp. Id.

20           Sometime between December 2010 and January 2011, Plaintiff attempted to negotiate the  
21 terms of the 2011 Agreement. See id. ¶¶ 17-18. Bob Voydat of ISCSI reached out to Sam Sears of  
22 NetApp numerous times to attempt to edit the limitation of liability and other provisions of the  
23 reseller agreement because NetApp’s website would not accept contract edits. Id. ¶ 18. In mid-  
24 January, 2011, Sam Sears told Mr. Voydat that NetApp would not amend the contract and he said  
25 that ISCSI was free to accept the agreement and remain a NetApp partner or not accept the  
26 agreement and ISCSI would no longer be a NetApp partner. Id. ¶ 19.

1 A number of other documents are alleged to be incorporated by reference into the  
2 Agreements, including NetApp’s Partner Program Professional Services Certification Program  
3 Guide, 2013 North America Commercial USPS Reseller Guide, 2008 VIP Partner Guide, and 2010  
4 Reseller Guide. Id. ¶¶ 20, 24, 25, 26. These documents are alleged by Plaintiff to contain certain  
5 contractual terms, which the Court discusses in more detail below.

6 From time to time NetApp and a partner may decide to complete an Account Teaming  
7 Agreement, which further describes NetApp’s and ISCSI’s obligations for each registered  
8 opportunity. Id. ¶ 43. For example, in reliance on its right to payments on all revenues from the  
9 sale of NetApp products and services, on or about December 14, 2009, ISCSI and NetApp entered  
10 into a Teaming Agreement (“CaridianBCT Teaming Agreement”) for the provision of services to  
11 CaridianBCT, an ISCSI-procured customer. The CaridianBCT Teaming Agreement provides in  
12 relevant part that the parties, ISCSI and NetApp, will act in accordance with the terms and  
13 conditions set forth in the CaridianBCT Teaming Agreement. Id. NetApp and ISCSI entered into  
14 a similar Teaming Agreement for Xilinx. Id. ¶ 44.

15 On or about March 2007, Plaintiff and customer Tri-State entered into a Supplier Alliance  
16 Agreement, as amended May, 2009, in which Plaintiff ISCSI agreed to provide to Tri-State, and  
17 Tri-State agreed to pay Plaintiff for, NetApp products and services at a specified discount for a two  
18 year term per each Supplier Alliance Agreement, subject to renewal. Id. ¶ 49.

19 On or about September 27, 2010, Plaintiff and Xilinx entered into a Master Service  
20 Agreement, in which Plaintiff ISCSI agreed to provide to Xilinx, and Xilinx agreed to pay ISCSI,  
21 for ISCSI’s sale of NetApp services to Xilinx. Id. ¶ 50.

22 During the term of the Agreements, ISCSI was one of NetApp’s lead sales agents, receiving  
23 numerous awards and recognition from NetApp for the quality of its performance and volume of its  
24 sales. Id. ¶ 51.

25 On or about December 12, 2008, NetApp referred ST Micro to competing reseller Agilysys  
26 and possibly other resellers, and granted Agilysys a dual registration—the very same kind of  
27 registration which NetApp had already granted to ISCSI. Id. ¶ 52. NetApp failed to notify ISCSI  
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1 of this dual registration until after ST Micro placed approximately \$1 million worth of orders for  
2 NetApp products and services. Id. NetApp employees Rick Congdon, Keith Macove, Tyler  
3 Beecher, Tim Maggs, and Sam Sears encouraged ISCSI to continue to work to win the business for  
4 NetApp, but had no intention of supporting ISCSI's efforts, which resulted in harming ISCSI's  
5 future business relationship with ST Micro. Id. Through no fault of ISCSI, ISCSI has not taken  
6 another order from ST Micro since the dual registration in December 2008. Id.

7 On or about June 30, 2010, NetApp employees Rick Congdon, Keith Macove, Tyler  
8 Beecher, Todd Donaldson, Michelle Lanuza and Sam Sears referred CaridianBCT to Trace3 and  
9 possibly other resellers through Lanuza's verbal dual registration, stating to Jed Summerton,  
10 Director IT of CaridianBCT, that CaridianBCT would get the same registered pricing regardless of  
11 which partner CaridianBCT selected in response to Request for Proposals ("RFP") issued by  
12 CaridianBCT, and for which NetApp had already granted the exact same registration to ISCSI. Id.  
13 ¶ 53. NetApp failed to notify ISCSI of Lanuza's verbal dual registration of CaridianBCT until  
14 after CaridianBCT awarded the RFP to Trace3. NetApp employees Congdon, Macove, Beecher,  
15 Donaldson, Lanuza, and Sears encouraged ISCSI to continue to work to win the business for  
16 NetApp, but had no intention of supporting ISCSI's efforts, which resulted in harming ISCSI's  
17 future business relationship with CaridianBCT. Id.

18 On or about March 30, 2011, NetApp disrupted the Tri-State bidding process by requiring  
19 Tri-State to negotiate a volume purchase agreement ("VPA") directly with NetApp so that Tri-  
20 State was free to select any partner. NetApp also informed Tri-State of the criteria that they should  
21 use to select the NetApp partner and did nothing to support ISCSI's existing registrations with Tri-  
22 State for numerous opportunities, as well as the actual bid process for Tri-State. Id. ¶ 54. Prior to  
23 the VPA, Tri-State had been denied VPAs in 2007 and 2009 because its annual sales volume did  
24 not meet the minimum NetApp criteria of \$4 million. By requiring Tri-State to negotiate a VPA,  
25 NetApp refused to respect the price protection of registered opportunities described by the 2011  
26 Reseller Authorization Agreement. Id.

1 On or about September 25, 2012, NetApp referred Xilinx to World Wide Tech, Longview,  
2 e-Plus, and possibly other resellers and instructed Xilinx that ISCSI will no longer be the NetApp  
3 partner covering Xilinx. Id. ¶ 55. NetApp declined or refused to extend several existing ISCSI  
4 registrations and thus ISCSI is no longer able to provide Xilinx with VPA pricing per the  
5 established NetApp VPA with Xilinx. Id.

6 In the months preceding NetApp’s dual registration of the Customers and/or referral of the  
7 Customers to other resellers, authorized representatives of NetApp specifically encouraged ISCSI  
8 to continue to sign-up new customers. Id. ¶ 60. ISCSI continued its efforts to sell NetApp  
9 products and services to the Customers while NetApp decided which partner would actually get the  
10 deal from the Customers. Id. ¶ 62.

11 On or about June 2010, Ms. Lanuza told Jed Summerton, IT Director at CaridianBCT, that  
12 CaridianBCT would get the same registered pricing regardless of which partner CaridianBCT  
13 selected in response to a Request for Proposals (“RFP”) issued by CaridianBCT. Id. ¶ 65. On or  
14 about July 2010, CaridianBCT selected Trace3 as its NetApp partner, resulting in no pricing  
15 disadvantage to CaridianBCT. Id. ¶ 66.

16 On or about June 30, 2010, Robert Voydat, President of ISCSI, sent an e-mail request to  
17 Tyler Beecher stating his concerns regarding Ms. Lanuza’s conduct encompassing past and present  
18 engagements at CaridianBCT. Id. ¶ 68. Mr. Beecher never responded to Mr. Voydat’s repeated  
19 requests to meet and discuss the CaridianBCT situation and RFP. Mr. Beecher did not schedule a  
20 meeting until September 2010, after ISCSI’s competitor, Trace3, had been awarded the  
21 CaridianBCT RFP. Id.

22 On or about June 30, 2010, Robert Voydat of ISCSI repeatedly requested Messrs. Macove’s  
23 and Sears’ assistance to schedule a meeting with Mr. Beecher to discuss Michelle Lanuza’s  
24 conduct concerning the CaridianBCT RFP registrations and pricing concerns, but Mr. Macove and  
25 Mr. Sears said that Mr. Beecher would not meet with ISCSI to discuss the matter. Id. ¶ 69.

1 In response to Robert Voydat’s requests to Mr. Beecher for a meeting with Beecher, on or  
2 about June 30, 2010, Mr. Beecher left a voicemail for Bob Voydat stating that he [Mr. Beecher]  
3 would “support ISCSI 100%.” Id. ¶ 70.

4 Notwithstanding Mr. Beecher’s assurance to support ISCSI 100%, and on information and  
5 belief, NetApp employee Beecher intentionally allowed Ms. Lanuza to conduct a sales campaign at  
6 CaridianBCT. Id. ¶ 71.

7 By April 2011, ISCSI had been the established NetApp partner at Tri-State for the  
8 preceding seven years. Id. ¶ 73. Mr. Sears and Mr. Donaldson never met with ISCSI to discuss  
9 how they were going to support ISCSI at Tri-State when the Tri-State Bid selection process for the  
10 NetApp partner was issued in March of 2011. Id. Instead, on or about March 2011, Messrs.  
11 Donaldson and Sears met with Susan Bullwinkle at Trace3 to plan the “new policy that Tri-State  
12 has to sign a VPA (Volume Purchase Agreement) with NetApp.” Id. ISCSI had several accepted  
13 registrations with Tri-State during the bid selection process that were not honored after Tri-State  
14 selected Trace3 as its NetApp partner. Id. The VPA was granted even though NetApp had refused  
15 to complete VPAs in 2007 and 2009 for Tri-State because Tri-State’s annual sales volume was  
16 below the \$4 million revenue requirement to qualify for a VPA. Id.

17 On or about June 2010, NetApp employee Sam Sears failed to extend the registration  
18 request for ISCSI for the CaridianBCT RFP for an additional 180 days. Id. ¶ 74.

19 On or about April 2011, Sam Sears informed Mark Musilek of ISCSI-procured customer  
20 Tri-State, that NetApp had instituted a “new policy” that required customers to sign a VPA  
21 (Volume Purchase Agreement) with NetApp, after which Tri-State could select the NetApp Partner  
22 that it wanted to use. Id. ¶ 75. Previously, in 2007 and again in 2009, NetApp refused to negotiate  
23 a VPA with Tri-State as Tri-State’s annual NetApp Sales revenue did not meet the \$4+ Million  
24 Annual Sales requirement necessary to establish a NetApp VPA. Id.

25 On or about April, 2011, Mr. Sears informed Mark Musilek of Tri-State that Tri-State  
26 should base its partner selection on various criteria that Mr. Sears and NetApp provided to Tri-  
27 State, and thereby encouraged Tri-State to award bids to another reseller. Id. ¶ 76. The first bid  
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1 process was to find a single supplier that would provide NetApp hardware, software and  
2 maintenance. Id. The second bid process that NetApp suggested to Tri-State was to find a single  
3 supplier that would not only provide NetApp hardware, software and maintenance, but also would  
4 provide the integration support for NetApp’s Information Technology Department. Id.

5 On or about April 2011, Mr. Sears told Dick Shehan and Robert Voydat that it was Chris  
6 Thomas of NetApp, who instituted this new VPA policy. Id. ¶ 79. On or about April 2011, Chris  
7 Thomas refused to meet with Robert Voydat of ISCSI to discuss this “new VPA policy” nor would  
8 Mr. Thomas meet to discuss why NetApp would not authorize the return of \$14,000 worth of  
9 NetApp equipment that was unopened and in its original shipping boxes, costing ISCSI \$14,000  
10 worth of NetApp products. Id. ¶ 80.

11 Keith Macove encouraged ISCSI as the registered partner to continue to sell the NetApp  
12 products and services to these customers knowing that a dual registration existed at ST Micro. Id.  
13 ¶ 81. On or about December 2008, Tim Maggs encouraged ST Micro representative Lonnie  
14 Phillips to state that ST Micro did not want to do business with ISCSI, the first registered partner  
15 for ST Micro. Id. ¶ 82.

16 On information and belief, on or about September 2012 Tunc Kirli informed Robert Voydat  
17 of ISCSI that NetApp Management wanted to introduce ISCSI-procured customer Xilinx to a new  
18 NetApp partner to work with Xilinx in San Jose and Colorado, and that ISCSI would no longer be  
19 the NetApp partner working with Xilinx. Id. ¶ 83. On or about September 2012, Mr. Kirli stated  
20 to Robert Voydat of ISCSI and Kevin Block, Tim Lentz, Bill Wong, and Dave Sims, and several  
21 other employees of Xilinx that NetApp’s decision to change NetApp partners was made by NetApp  
22 management and Xilinx did not request it. Id. ¶ 84.

23 On or about October 2012, Bill Wong, Kevin Block, Tim Lentz, Dave Sims and Aaron  
24 Facey of Xilinx told Robert Voydat that Xilinx did not make any request to change NetApp  
25 partners, as it preferred to continue to work with ISCSI as Xilinx’s exclusive NetApp partner. Id. ¶  
26 85. This same request was originally made on August 26, 2009, in the presence of Rick Congdon,  
27 Sam Sears, and Tim Tutag from NetApp, as Kevin Block and Michael Allen requested that ISCSI  
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1 be the exclusive NetApp partner for all Xilinx domestic software and hardware engineering sites.

2 Id.

3 On or about September 2012, NetApp’s Tunc Kirli told Robert Voydat, that in discussions  
4 with NetApp management in California and with NetApp management in Denver, “it is clear that  
5 ISCSI is not being supported by NetApp Management in Denver and thus the request to introduce a  
6 new NetApp partner at Xilinx.” Id. ¶ 86.

7 Xilinx of San Jose gave ISCSI the highest partner rankings in the most recent NetApp  
8 partner survey, which took place in September 2012. Id. ¶ 87. Xilinx wanted ISCSI to be able to  
9 take several Xilinx orders with annual revenue opportunities for ISCSI in excess of \$2 million. Id.

10 NetApp refused to allow ISCSI to register and procure the NetApp support renewal for  
11 Xilinx that was placed with NetApp directly in October 2012, valued at approximately \$600,000,  
12 and worth approximately \$60,000 of annual profits for ISCSI. Id. ¶ 88.

13 ISCSI generated over \$3 million in annual NetApp revenue from Xilinx the past two fiscal  
14 years. Id. ¶ 90. With the loss of Xilinx as an ISCSI account, ISCSI will be forced to close its  
15 business operations, as sustainable revenue will not be sufficient to continue ISCSI’s operations.

16 By letter dated February 1, 2013, NetApp notified ISCSI that it did not plan to renew  
17 ISCSI’s Reseller Authorization Agreement. Id. ¶ 92.

18 **II. LEGAL STANDARD**

19 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim in the  
20 complaint with sufficient specificity to “give the defendant fair notice of what the . . . claim is and  
21 the grounds upon which it rests.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)  
22 (internal quotations omitted). A complaint which falls short of the Rule 8(a) standard may be  
23 dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).  
24 Dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is “proper only  
25 where there is no cognizable legal theory or an absence of sufficient facts alleged to support a  
26 cognizable legal theory.” Shroyer v. New Cingular Wireless Servs., Inc., 606 F.3d 658, 664 (9th  
27 Cir. 2010) (quoting Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)). In considering whether  
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1 the complaint is sufficient to state a claim, the court must accept as true all of the factual  
2 allegations contained in the complaint. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). While a  
3 complaint need not contain detailed factual allegations, it “must contain sufficient factual matter,  
4 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. (quoting Twombly,  
5 550 U.S. at 570).

### 6 **III. DISCUSSION**

7 Plaintiff’s FAC contains twenty-one claims. Defendant moves to dismiss all claims except  
8 Claims 14 and 16, which the Court previously ruled were sufficiently pleaded. Docket No. 51,  
9 Def.’s Mot. to Dismiss at 1, n.1; Docket No. 39, July 31, 2013 Order at 23.

#### 10 **a. Rule 15 violations**

11 As an initial matter, the Court notes that the FAC contains several claims that were not  
12 pleaded in Plaintiff’s original complaint. In its July 31, 2013 Order, the Court dismissed all but  
13 two of the claims in the original complaint. Although the Court granted Plaintiff leave to amend  
14 those claims which were dismissed, the Court did not grant Plaintiff leave to add new claims, and  
15 Federal Rule of Civil Procedure 15 prohibited it from doing so on its own volition. Under Rule  
16 15(a)(1), a party “may amend its pleading once as a matter of course” within 21 days after that  
17 pleading is served, or 21 days after service of a responsive pleading or motion under Rule 12. “In  
18 all other cases, a party may amend its pleading only with the opposing party’s written consent or  
19 the court’s leave.” Fed. R. Civ. P. 15(a)(2).

20 Here, Defendant filed its first motion to dismiss the original complaint on January 30, 2013  
21 and Plaintiff’s ability to amend as a matter of course expired 21 days later pursuant to Rule  
22 15(a)(1)(B). Amending the complaint to add new claims on August 15, 2013 without the  
23 stipulation of Defendant or leave of court was in contravention of Rule 15. The new claims must  
24 be dismissed on that ground alone.

1 Comparing the FAC to the original complaint, the new claims (the claims added in  
2 contravention of Rule 15) are Claims 1 through 5 and Claim 15.<sup>1</sup> Each of the new claims is  
3 dismissed without prejudice. However, Plaintiff is not granted leave to amend the new claims. If  
4 Plaintiff wishes to replead Claims 1 through 5 and Claim 15, it must seek leave to amend by  
5 motion or stipulation under Rule 15, as well as demonstrate good cause under Rule 16.<sup>2</sup>

6 **b. Breach of the Deal Registration Contracts (Claims 6 through 9)**

7 Plaintiff's sixth through ninth claims are for breaches of four "deal registration contracts."  
8 As described by the FAC, each deal registration contract is an agreement between Plaintiff and  
9 Defendant detailing the terms by which Plaintiff would resell Defendant's products to a named  
10 customer: CaridianBCT, ST Micro, Tri-State, and Xilinx. FAC ¶¶ 146-183. Plaintiff alleges that  
11 the four contracts were breached either because Defendant allowed the customers to be registered  
12 to resellers other than Plaintiff, or because Defendant encouraged the customers to work with  
13 resellers other than Plaintiff. Id. To put it another way, Plaintiff contends that the deal registration  
14 contracts provided it with exclusive rights to deal with those customers on behalf of Defendant.

15 Defendant denies that the four deal registration contracts are contracts at all, and argues that  
16 even if they are, the contracts do not contain the exclusivity terms alleged by Plaintiff. The Court  
17 agrees with Defendant and finds that Plaintiff's sixth through ninth claims do not state a claim for  
18 breach of contract because Plaintiff does not plausibly allege the existence of any contractual terms  
19 that would prevent Defendant from registering customers to other resellers or encouraging  
20 customers to work with other resellers.

21 The deal registration contracts are not alleged to be embodied in written and integrated  
22 instruments. Rather, Plaintiff essentially alleges that the deal registration contracts are created by  
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24  
25 <sup>1</sup> Defendant contends that Claims 6 through 9 are also new, but they are closely related to Plaintiff's claims for breach  
26 of the 2008 and 2011 Agreements. The Court did grant Plaintiff leave to amend its claims for breach of the 2008 and  
27 2011 Agreements, and finds it appropriate to render decision on Claims 6 through 9.

28 <sup>2</sup> On September 17, 2013, the Court issued a Case Management Order, which set the deadline for amendments to the  
pleadings to sixty days after the entry of the order. Docket No. 50. Allowing further amendments would require  
modifying the schedule, and Rule 16(b)(4) provides that "[a] schedule may be modified only for good cause and with  
the judge's consent."

1 operation of Defendant’s procedures for registering a new sales opportunity to a reseller,<sup>3</sup> and that  
2 the terms of such contracts may be derived or inferred from various documents related to the  
3 registrations.

4 Each deal registration contract is alleged to contain the following four terms pertaining to  
5 reseller exclusivity:

- 6 1) Exclusive Pricing granted only to the Registered Partner;
- 7 2) Exclusive NetApp Sales and Systems Engineering Resources provided only to the  
8 Registered Partner;
- 9 3) NetApp will maintain a good working relationship with the registered partner and not  
10 interfere with or damage the partner’s relationship with the partner’s customer; and
- 11 4) NetApp will maintain the partner’s opportunity sales campaign as confidential from all  
12 other potential non-registered partners on the deal.

13 Id. ¶ 36.

14 The terms are not expressly stated in any written document or oral statement. Instead,  
15 Plaintiff derives the terms from statements made in a number of documents drafted by Defendant.  
16 For example, on page 13 of NetApp’s 2010 Reseller Guide, attached as Exhibit A of the FAC, it is  
17 stated that “Opportunity Registration protects your sales opportunities.” According to the FAC,  
18 this language creates a contractual term under which Defendant promises that the deal registrations  
19 are exclusive to the reseller. See id. ¶ 38. The 2013 Reseller Guide, Exhibit E, contains identical  
20 language at page 12. Id. ¶ 29. The 2010 Reseller Guide also repeatedly refers to the reseller’s  
21 customers as “Your Customer.” Id. ¶ 39. The FAC appears to regard the references to “Your  
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23 <sup>3</sup> Plaintiff describes Defendant’s deal registration procedure as follows: NetApp permits business partners, such as  
24 ISCSI, to register new sales opportunities through NetApp deal registration programs. FAC ¶ 33. Registration is a  
25 rigorous and time consuming process, subject to many initial conditions including, but not limited to: (a) completion of  
26 a detailed registration form, specifying the nature of the opportunity including the potential customer, the type of  
27 opportunity presented, the anticipated scope of work, the anticipated gross order amount, and the anticipated timeline;  
28 (b) certification that the reseller has already met certain opportunity milestones including meeting with the prospect, an  
initial network/storage assessment; and (c) review and sign off on the registration request by various NetApp personnel  
including the channel manager, account manager, sales support, and the program manager. Id. To qualify for  
registration under a NetApp deal registration program, a reseller must demonstrate that it is leading with a NetApp  
product, meaning that a NetApp product will be central to the proposed deal. Id. ¶ 34. In this way, NetApp locks  
resellers like ISCSI into dealing primarily with NetApp on a particular opportunity. Id.

1 Customer” as evidence of Defendant’s awareness that deal registrations will be exclusive to the  
2 registering reseller. See id. Plaintiff identifies other, similar statements in footnote 20 of its  
3 response brief, including statements made in NetApp’s 2008 VIP Guide. Docket No. 55, Pl.’s  
4 Opp. to MTD at 12 n.20.

5 Plaintiff also contends that the exclusivity terms can be found in or inferred from a number  
6 of emails exchanged between Bob Voydat of ISCSI and various persons with @netapp.com or  
7 @salesforce.com email addresses. The emails are attached to the FAC as Exhibits F through I.  
8 The emails name the customer, list ISCSI as the “Partner/Reseller,” show a potential revenue for  
9 the opportunity, and provide other information. Pl.’s Opp. to MTD at 7. As proof that the  
10 registrations are exclusive, Plaintiff points to the following statement in Exhibit I (emphasis  
11 added): “Please be advised that the Deal Registration ‘XOR 3020 upgrade’ for customer ‘Xilinx  
12 Inc.’ has changed the status[sic] to ‘Accepted.’ The reason give[sic] for this change in status is:  
13 *Exclusive: Value Add.*”

14 Other than the reseller guides, the VIP guides, and the emails, the only source identified by  
15 Plaintiff for the existence of the exclusivity terms is “information and belief.” FAC ¶ 36.

16 To be enforceable under California law, a contract must be sufficiently definite “for the  
17 court to ascertain the parties’ obligations and to determine whether those obligations have been  
18 performed or breached.” Bustamante v. Intuit, Inc., 141 Cal. App. 4th 199, 209 (2006) (quoting  
19 Ersa Grae Corp. v. Fluor Corp., 1 Cal. App. 4th 613, 623 (1991)) (internal quotation marks  
20 omitted). “The terms of a contract are reasonably certain if they provide a basis for determining  
21 the existence of a breach and for giving an appropriate remedy.” Id. (quoting Restatement  
22 (Second) of Contracts § 33(2) (1981)) (internal quotation marks omitted). The terms of a contract  
23 are determined by objective rather than by subjective criteria. Winograd v. Am. Broad. Co., 68  
24 Cal. App. 4th 624, 632 (1998) (internal citations omitted). The question is what the parties’  
25 objective manifestations of agreement or objective expressions of intent would lead a reasonable  
26 person to believe. Id. The interpretation of a written instrument is a question of law unless the  
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1 interpretation turns upon the credibility of extrinsic evidence. Meyer v. Benko, 55 Cal. App. 3d  
2 937, 943 (1976).

3 The reseller guides, VIP guides, and emails discussed above are the only “objective  
4 manifestations of agreement or objective expressions of intent” alleged by the FAC as a source of  
5 the exclusivity terms. Their only other source is “information and belief,” which is irrelevant  
6 because the law focuses on objective, not subjective, manifestations of agreement. Thus, any  
7 exclusivity terms must necessarily be derived or inferred from the language in the above-  
8 mentioned documents. Plaintiff does not allege that the interpretation of this language turns upon  
9 the credibility of extrinsic evidence. Interpretation of the language is therefore a legal question,  
10 and the Court must determine whether the language from NetApp’s reseller and VIP guides and the  
11 email exchanges would lead a reasonable person to believe that NetApp and ISCSI agreed that the  
12 reseller-customer relationships would be exclusive to ISCSI.

13 The Court concludes that it does not. Most telling is the fact that, other than a single  
14 context-less line in Exhibit I that states “Exclusive: Value Add,” the word “exclusive” does not  
15 appear in any of the language identified by Plaintiff. Also absent are any express statements that  
16 Defendant will refrain from registering customers to more than one reseller or that Defendant will  
17 not encourage customers to work with more than one reseller. Plaintiff points to the multiple  
18 references that “Opportunity Registration will protect your sales opportunities,” arguing that when  
19 Defendant allowed customers to be registered or referred to other resellers, Plaintiff was denied  
20 certain pricing protection that it had been promised. Pl.’s Opp. to MTD at 9. However, this  
21 statement is too vague to amount to an enforceable promise. It says nothing explicit regarding the  
22 rights and obligations of the parties. The references to “Your Customer” are even less indicative of  
23 a contractual promise of exclusivity. It would be expected that a right to deal exclusively with a  
24 customer would carry significance to the parties such that that right would be stated explicitly and  
25 clearly.

26 Furthermore, it is the general rule that “[s]everal contracts relating to the same matters,  
27 between the same parties, and made as parts of substantially one transaction, are to be taken

1 together. Cal. Civ. Code § 1642. Even assuming arguendo that the deal registration contracts are  
2 enforceable contracts, there are other contracts that govern the reseller relationship between  
3 Plaintiff and Defendant; namely, the 2008 and 2011 Agreements. The 2008 and 2011 Agreements  
4 expressly state that Plaintiff is a “non-exclusive” reseller. This express disavowal of exclusivity  
5 strengthens the conclusion that the vague language contained in the reseller and VIP guides and the  
6 email exchanges cannot reasonably be interpreted as granting Plaintiff exclusive rights to deal with  
7 CaridianBCT, ST Micro, Tri-State, and Xilinx.

8 For the reasons stated above, Claims 6 through 9 are DISMISSED with prejudice.  
9 Dismissal with prejudice is proper because under the Court’s interpretation of the written  
10 instruments discussed above, Plaintiff can prove no set of facts that would entitle it to relief under a  
11 claim for breach of contract on this particular theory. Therefore, it appears to a certainty that  
12 Plaintiff would be entitled to no relief under any state of facts that could be proved. Las Vegas v.  
13 Clark County, 755 F.2d 697, 701 (9th Cir. 1985).

14 **c. Breach of the 2008 and 2011 Agreements (Claims 10 through 13)**

15 Claims 10 through 13 are for breach of the 2008 and 2011 Agreements (collectively, “the  
16 Agreements”). Plaintiff alleges that the Agreements were breached when Defendant dual-  
17 registered customers to other resellers and/or when Defendant referred the customers to other  
18 partners. Plaintiff also alleges that the Agreements were constructively terminated without cause  
19 or notice and that Defendant deprived Plaintiff of the benefits of the contract. Finally, Plaintiff  
20 alleges that the 2011 Agreement was breached when Defendant failed to renew the Agreement for  
21 another term.

22 **i. Exclusivity and failure to renew**

23 A number of Plaintiff’s theories of breach of the Agreements are predicated on the  
24 contention that Defendant was restricted by contract from registering or referring customers to  
25 other resellers. The Agreements do not expressly bar Defendant from doing so; rather, Plaintiff  
26 alleges that NetApp’s VIP and reseller guides contain the exclusivity terms, and that the VIP and  
27 reseller guides are incorporated by reference into the Agreements. As discussed in the previous  
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1 section, the VIP and reseller guides cannot reasonably be read to impose the alleged exclusivity  
2 terms, and thus the Court rejects any theory of breach that is predicated on Defendant’s registration  
3 or referral of customers to other resellers.

4 Plaintiff also alleges that Defendant breached the Agreements by failing to renew them, but  
5 this allegation is conclusory because Plaintiff points to no contractual term or source of authority  
6 that would require Defendant to renew the Agreements.

7 **ii. Termination without cause**

8 Plaintiff also alleges that the Agreements were breached by Defendant’s failure to renew  
9 the Agreement for another term or by Defendant’s terminating the Agreement without cause. Both  
10 the 2008 and 2011 Agreements expressly allow either party to terminate without cause upon thirty  
11 days prior written notice (Section 3.0 of the 2008 Agreement and Section 4.0 of the 2011  
12 Agreement).

13 As a threshold matter, Plaintiff contends that the termination provisions in the Agreements  
14 are unconscionable. Previously, the Court rejected this contention, finding that the provisions were  
15 not procedurally unconscionable because Plaintiff failed to produce evidence that the mutual  
16 termination provisions are the result of “oppression,” and Plaintiff did not allege that it objected or  
17 sought to negotiate the content of the mutual termination provisions at the time of the contract  
18 formation. Docket No. 39, 7/31/13 Order at 8. The Court also found that the termination  
19 provisions were not substantively unconscionable because Plaintiff and Defendant had the same  
20 power to sever the Agreements upon 30 days prior written notice. *Id.* at 9.

21 Plaintiff alleges new facts that it argues support findings that the terms are procedurally and  
22 substantively unconscionable. However, the Court notes that Plaintiff does not appear to allege  
23 that Defendant exercised its right to terminate according to the termination provisions of the  
24 Agreement. Rather, Plaintiff appears to regard Defendant’s registration and referral of customers  
25 to other resellers as the act of termination, labeling it a “constructive termination.” *See* Pl.’s Opp.  
26 to MTD at 14 (“. . . only to have NetApp terminate ISCSI’s reseller status and Customer  
27 relationships without cause or notice,” citing to paragraphs 12 and 57 of the FAC, which allege an  
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1 “effective” termination rather than an “express” termination.) However, nothing in the Agreements  
2 or the reseller/VIP guides prevented Defendant from registering or referring customers to other  
3 resellers and Plaintiff has cited no authority for why such acts are a “constructive termination.”<sup>4</sup>  
4 Thus, even if the Court were to find the termination provisions unconscionable, it does not appear  
5 that the FAC actually alleges that Defendant terminated the Agreement according to the  
6 termination provisions. Under the FAC’s allegations, the question is moot.

7 Accordingly, Claims 10 through 13 are DISMISSED with prejudice. Dismissal with  
8 prejudice is appropriate because Plaintiff’s amendments address only the alleged unconscionability  
9 of a contractual provision that was never exercised. Plaintiff pleads no new facts that suggest the  
10 existence of a viable theory for breach of the 2008 and 2011 Agreements. Therefore, it is clear that  
11 these claims could not be saved by amendment.

12 **d. Intentional Misrepresentation/Fraud (Claim 17)**

13 The elements of fraud are: (1) a misrepresentation (false representation, concealment, or  
14 nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance;  
15 (4) justifiable reliance; and (5) resulting damage. Robinson Helicopter Co., Inc. v. Dana Corp., 34  
16 Cal. 4th 979, 990 (2004). In alleging fraud or mistake, a party must state with particularity the  
17 circumstances constituting fraud or mistake. Fed. R. Civ. P. 9(b). Malice, intent, knowledge, and  
18 other conditions of a person’s mind may be alleged generally. Id.

19 Under Rule 9(b), averments of fraud must be accompanied by “the who, what, when,  
20 where, and how” of the misconduct charged, and the circumstances constituting the alleged fraud  
21 must be specific enough to give defendants notice of the particular misconduct so that they can  
22 defend against the charge and not just deny that they have done anything wrong. Vess v. Ciba-  
23 Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal citations and quotations omitted).

24 The FAC sets forth numerous statements and identifies the person or document making the  
25 statement and approximate or exact dates for when the statements were made, and attempts to  
26

27 <sup>4</sup> Furthermore, the only cases the Court can locate regarding “constructive termination” are in the context of  
28 employment contracts and do not appear to be applicable here.



1 explain why those statements are false. Plaintiff identifies the following alleged  
2 misrepresentations:

3 NetApp employee Tyler Beecher stated in a voicemail message to ISCSI's President Robert  
4 Voydat on or about July 1, 2010 that he [Mr. Beecher] will support ISCSI 100%. NetApp  
5 employees Mike McLean, Keith Macove, Todd Donaldson, Tim Maggs, and Sam Sears  
6 stated to Robert Voydat on or about March, 2009 that NetApp's channel policy is that  
7 NetApp and ISCSI win together and lose together and if NetApp has to lose business to  
8 support a registered partner NetApp will do it. NetApp employee Sam Sears told Robert  
9 Voydat regarding CaridianBCT on or about June 2, 2010 that by the spirit and letter of the  
10 law, the NetApp team's time and resources should go to ISCSI, not both partners . . . On or  
11 about March 2009, Messrs. Donaldson, Macove, and Sears told Robert Voydat that ISCSI  
12 is a Preferred NetApp Partner and that means ISCSI has NetApp's full support. On or  
13 about June 2, 2009, Messrs. Macove and Sears told Robert Voydat that ISCSI would get an  
14 8% commission on the ST Micro annual Support renewal because ISCSI sold all the  
15 systems to ST Micro, but ISCSI only received a 5% commission.

16 Pl.'s Opp. to MTD at 19. Plaintiff also points to the statement in the reseller guides that  
17 "Opportunity Registration protects your sales opportunities."

18 With respect to the majority of these statements, they cannot support a claim for fraud  
19 either because they are statements of opinion or because Plaintiff fails to sufficiently allege that  
20 they are false. A representation is one of opinion "if it expresses only (a) the belief of the maker,  
21 without certainty, as to the existence of a fact; or (b) his judgment as to quality, value, authenticity,  
22 or other matters of judgment." Restatement (Second) of Torts § 538A (1977). Expressions of  
23 opinion are not generally treated as representations of fact, and thus are not grounds for a  
24 misrepresentation cause of action. Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells, 86 Cal.  
25 App. 4th 303, 308 (2000); see also Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 835 (2002) (a  
26 statement that a positive eBay rating is "worth its weight in gold" is not an assertion of fact). For  
27 example, the statement by Mr. Beecher that he "will support ISCSI 100%" is not actionable  
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1 because it is merely Mr. Beecher’s judgment as to the quality of the relationship between NetApp  
2 and ISCSI.

3 The only statement identified by Plaintiff as a potentially actionable assertion of fact is the  
4 statement to Mr. Voydat that ISCSI would receive a 8% commission on the ST Micro renewal,  
5 because Plaintiff alleges that it received only a 5% commission. However, Plaintiff fails to plead  
6 reliance on this specific statement, or resulting damages from that reliance. Instead, Plaintiff  
7 pleads generally that it relied on all of the statements in its decision to conduct business with  
8 NetApp and as a result suffered damages in excess of ten million dollars. Because the statement  
9 regarding 8% commission pertains only to a transaction involving ST Micro, and because the  
10 alleged reliance and damages pertain to the entirety of the relationship between Plaintiff and  
11 Defendant, Plaintiff fails to plead reliance and damages with specificity.

12 Accordingly, Plaintiff’s seventeenth claim is DISMISSED with leave to amend.

13 **e. Intentional Interference with Contractual Relations (Claims 18 and 19)**

14 To state a claim for intentional interference with contractual relations, Plaintiff must show:  
15 (1) a valid contract between plaintiff and a third party, (2) defendant’s knowledge of this contract,  
16 (3) defendant’s intentional acts designed to induce breach or disruption of the contractual  
17 relationship, (4) actual breach or disruption of the contractual relationship, and (5) resulting  
18 damage. CRST Van Expedited, Inc. v. Werner Enters., Inc., 479 F.3d 1099, 1105 (9th Cir. 2007);  
19 Reeves v. Hanlon, 33 Cal. 4th 1140, 1148 (2004).

20 To show a valid contract between Plaintiff and a third party, Plaintiff points to two  
21 contracts: the Supplier Alliance Agreement between Plaintiff and Tri-State (Exhibit M of the FAC,  
22 Claim 18) and the Master Services Agreement between Plaintiff and Xilinx (Exhibit N, Claim 19).  
23 Defendant does not dispute the validity of these contracts or its knowledge of their existence.

24 As a threshold matter, the parties dispute whether Defendant is a “stranger” to the two  
25 contracts. Under California law, as recognized by the Ninth Circuit, a claim for tortious  
26 interference of contract and prospective economic advantage may only lie against “strangers” or  
27 interlopers who do not have a direct and significant interest in the plaintiff’s contractual  
28

1 relationship with another individual or entity. Fresno Motors, LLC v. Mercedes-Benz USA, LLC,  
2 852 F. Supp. 2d 1280, 1293 (E.D. Cal. 2012). It is undisputed that Defendant is not a party to the  
3 contracts; what is disputed is whether Defendant’s interest in the contracts is direct and significant.  
4 Defendant, relying on Fresno Motors, argues that it had a direct interest in the contracts because  
5 “such agreements are for the sale of NetApp’s products; the sale of NetApp’s products requires  
6 cooperation from NetApp; and NetApp plainly stands to benefit from sales of its products.  
7 NetApp’s direct interest in the reseller-end-user agreements precludes ISCSI from bringing a claim  
8 against NetApp for tortiously interfering with a purported reseller-end-user agreements[sic].”  
9 Docket No. 58, Def.’s Reply at 14.

10 On a motion to dismiss, with few exceptions, the Court may consider only well-pleaded  
11 facts in the complaint. See Grand Opera Co. v. Twentieth Century-Fox Film Corp., 235 F.2d 303,  
12 307 (7th Cir. 1956). The FAC acknowledges that the contracts are “for the provision of NetApp  
13 products and services to” Xilinx and Tri-State. FAC ¶ 355. The FAC also alleges that “NetApp  
14 does not typically sell directly to end users. Instead, in most cases, NetApp sells its products to  
15 NetApp distributors, who then sell NetApp products to resellers such as ISCSI, which then sell  
16 NetApp products to end user businesses. However, NetApp works directly to promote sales to end  
17 users to ensure satisfactory sales of its products.” FAC ¶ 11.

18 Having reviewed the relevant case law, the Court shall not dismiss Plaintiff’s claims on the  
19 basis of the “not-a-stranger” doctrine. First, NetApp’s interest in the contracts, at least as alleged  
20 by the FAC, does not rise to the level of the defendant’s in Fresno Motors. In Fresno Motors,  
21 defendant Mercedes-Benz had a right to review and approve the transfer under the contract at issue  
22 in plaintiff Fresno Motors’ tortious interference claim. 852 F. Supp. 2d at 1299. Here, at least as  
23 far as the FAC alleges, NetApp did not have significant control or oversight over transactions made  
24 pursuant to the Supplier Alliance Agreement or the Master Services Agreement. Second, in  
25 Powerhouse Motorsports Grp., Inc. v. Yamaha Motor Corp., 221 Cal. App. 4th 867, 884 (2013), on  
26 similar facts,<sup>5</sup> the California appellate court found that Yamaha was a “stranger” to the contract

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28 <sup>5</sup> “The evidence shows that Yamaha was the distributor and that Yamaha would supply new motor vehicles to any  
successor dealer at prices and terms determined by Yamaha and the dealer. There is no evidence that Yamaha had any

1 despite a distributor-dealer relationship. And finally, many of the decisions applying the “not-a-  
2 stranger” doctrine, including Fresno Motors and Powerhouse, were decided after discovery rather  
3 than at the pleadings stage.

4 The Court turns next to the specific elements of Plaintiff’s claims.

5 **i. Claim 18: The contract between Plaintiff and Tri-State (Supplier**  
6 **Alliance Agreement)**

7 Plaintiff alleges that Defendant induced a breach or disruption of this contract by 1)  
8 referring Tri-State to ISCSI’s competitor(s), which resulted in the Supplier Alliance Agreement not  
9 being extended as it had been in 2009, and 2) ISCSI obtained registrations that Defendant failed to  
10 honor prior to the expiration of the Supplier Alliance Agreement.

11 Defendant contends that Plaintiff fails to allege that any customers breached a contract with  
12 ISCSI as a result of NetApp’s actions. Defendant also contends, and the Court agrees, that “ISCSI  
13 cannot allege that customers breached their contracts with it because there are no facts showing the  
14 contract terms prohibited customers from buying NetApp products from other sources.” Docket  
15 No. 51, Def.’s Mot. Dismiss at 21. Plaintiff also fails to identify anything in the contract that  
16 would obligate Tri-State to grant Plaintiff an extension.

17 However, a plaintiff need not allege an actual or inevitable breach of contract in order to  
18 state a claim for disruption of contractual relations. Pac. Gas & Elec. Co. v. Bear Stearns & Co.,  
19 50 Cal. 3d 1118, 1129 (1990). While the tort of inducing breach of contract requires proof of a  
20 breach, the cause of action for interference with contractual relations is distinct and requires only  
21 proof of interference. Id.

22 Plaintiff alleges that, but for Defendant’s referral of Tri-State to other resellers, which was  
23 deliberately intended to disrupt the agreements between ISCSI and Tri-State, the Supplier Alliance  
24 Agreement would have been extended another term. Although Tri-State was not obligated to  
25 extend the contract, and Defendant was not barred from referring Tri-State to other resellers, such

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26 right to determine the vehicles sent to the dealer, approve or disapprove any business practice of the dealer, assume any  
27 financial obligations to the dealer, or otherwise review any part of the dealer’s operations. Nor did Yamaha have any  
28 rights to determine the terms or conditions of the Powerhouse/MDK contract apart from approval of the sale and  
review of MDK’s financial stability as a Yamaha dealer.” Id.

1 allegations are sufficient to state a claim because Plaintiff alleges that the referrals were intended to  
2 interfere with the contractual relationship. See Quelimane Co. v. Stewart Title Guar. Co., 19 Cal.  
3 4th 26, 56 (1998) (“The tort of intentional interference with performance of a contract does not  
4 require that the actor’s primary purpose be disruption of the contract. . . The rule applies. . . to an  
5 interference that is incidental to the actor’s independent purpose and desire but known to him to be  
6 a necessary consequence of his action.”)

7 For example, in Tuchscher Dev. Enterprises, Inc. v. San Diego Unified Port Dist., 106 Cal.  
8 App. 4th 1219 (2003), the court found that allegations that the defendant’s interference caused a  
9 refusal to extend a negotiating agreement’s deadline could state a prima facie case for tortious  
10 interference. Id. at 1240. Although the court ultimately found that the plaintiff’s evidence showed  
11 that the third party merely permitted the negotiating agreement to expire, as was its right, id. at  
12 1241, the court’s reasoning implies that the plaintiff could have prevailed had the evidence shown  
13 that the defendant’s interference actually caused the third party’s refusal to extend the deadline.  
14 Furthermore, in Tuechscher, as in the instant case, there were indications that the third party had  
15 extended the agreement once before, an important distinction to avoid turning every contract  
16 expiration into a “failure to extend.”

17 For the reasons discussed above, the Court finds that the FAC states a claim for intentional  
18 interference with contractual relations as to the contract between Plaintiff and Tri-State.  
19 Accordingly, Defendant’s motion is DENIED to the extent it seeks to dismiss Claim 18.

20 **ii. Claim 19: The contract between Plaintiff and Xilinx (Master Services**  
21 **Agreement)**

22 Plaintiff alleges that Defendant induced a breach or disruption of this contract by 1)  
23 referring Xilinx to ISCSI’s competitor(s), 2) instructions to Xilinx that ISCSI would no longer be  
24 the NetApp partner covering Xilinx, and 3) NetApp’s declining several ISCSI registrations causing  
25 ISCSI to no longer be able to provide Xilinx with VPA pricing per the established NetApp VPA  
26 with Xilinx. As a result of Defendant’s actions, Plaintiff alleges that it became unable to fulfill the  
27 terms of the Master Services Agreement (“MSA”).

1 The Court finds that claim 19 is insufficiently pleaded. Although Plaintiff alleges that the  
2 contractual relationship was disrupted because it became unable to fulfill the terms of the MSA,  
3 Plaintiff does not identify any specific contractual term or obligation. As a result, the allegation is  
4 conclusory and not entitled to the assumption of truth.

5 Furthermore, having reviewed the MSA, the Court is unable to identify what, if any,  
6 obligations Plaintiff had under this contract. The MSA, according to its terms, obligates ISCSI to  
7 “perform the duties specified in one or more Statements of Work signed by each party and  
8 incorporated into this Agreement by reference.” However, the only Statement of Work attached to  
9 the MSA is blank and includes only ISCSI’s signature, and as far as the Court can tell the MSA did  
10 not actually obligate Plaintiff to do anything.

11 Accordingly, Claim 19 is DISMISSED with leave to amend.

12 **f. Intentional Interference with Prospective Economic Relations (Claims 20 and**  
13 **21)**

14 The elements of intentional interference with prospective economic advantage have been  
15 stated as follows: (1) an economic relationship between the plaintiff and some third party, with the  
16 probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the  
17 relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship;  
18 (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused  
19 by the acts of the defendant. LiMandri v. Judkins, 52 Cal. App. 4th 326, 339 (1997) (internal  
20 citations and quotations omitted).

21 Unlike a claim for intentional interference with contractual relations, a claim for  
22 interference with prospective economic relations requires proof that the defendant’s conduct is  
23 wrongful apart from the interference itself. Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11  
24 Cal. 4th 376, 392 (1995).

25 As to independent wrongful conduct, Plaintiff alleges that Defendant’s conduct was  
26 wrongful because of the CEDA violations alleged in Claims 1 through 5, Defendant’s breach of its  
27 commitments under the VIP and reseller guides, Defendant’s intentional misrepresentation, and  
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1 Defendant's breach of the Xilinx Teaming Agreement and CaridianBCT Teaming Agreement.  
2 Pl.'s Opp. to MTD at 24. However, as stated above, Plaintiff fails to state a claim for violation of  
3 CEDA, fails to state a claim for breach of commitments under the VIP and reseller guides, and fails  
4 to state a claim for intentional misrepresentation.

5 Defendant's alleged breach of the Caridian BCT Teaming Agreement could potentially  
6 support a claim for interference with prospective economic relations, but Plaintiff fails to non-  
7 conclusorily allege how the breaches of the Teaming Agreements interfered with a prospective  
8 economic relationship between Plaintiff and CaridianBCT. Instead, the FAC simply alleges  
9 generally that the relationships with all customers were disrupted by a number of wrongful acts  
10 without adding any facts that explain how the relationships were disrupted by a particular wrongful  
11 act.

12 Accordingly, Claims 20 and 21 are DISMISSED with leave to amend.

#### 13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART  
15 Defendants' Motion to Dismiss. Claims 1 through 5 and Claim 15 are dismissed without prejudice  
16 and without leave to amend. Claims 6 through 13 are dismissed with prejudice. Claim 17 and  
17 Claims 19 through 21 are dismissed without prejudice and with leave to amend. Claims 14, 16,  
18 and 18 are adequately pleaded and survive Defendants' Motion.

19 Plaintiff is advised that it may not add new claims or parties without first obtaining  
20 Defendants' consent or leave of court pursuant to Federal Rule of Civil Procedure 15, and  
21 demonstrating good cause under Rule 16. Plaintiff is further advised that failure to amend the  
22 complaint in a manner consistent with this order may result in the dismissal of this action.

23 **IT IS SO ORDERED**

24 Dated: July 9, 2014

25   
26 \_\_\_\_\_  
27 EDWARD J. DAVILA  
28 United States District Judge