IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CA, INC., a Delaware corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 4300-VCS
	)	
INGRES CORPORATION, a Delaware corporation,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: September 9, 2009
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STRINE, Vice Chancellor.

I. Introduction

This case involves a dispute between a large software company, CA, Inc. ("CA"), and another software company, Ingres Corp. ("Ingres"), which CA spun off several years ago. Both companies operate in the enterprise information technology software industry. Because enterprise software is used to run complex organizations, it is costly for clients to change the software they use and thus clients tend to have long-term relationships with their enterprise software providers. These relations center in large measure on the ongoing support and product improvement the software developer can deliver to its clients, under contractual terms that are typically somewhat incomplete, with that incompleteness tempered by the mutual investment the providers and clients have in their ongoing relationship. In such an industry, a company's decision to divest a business unit or product line can cause thorny problems because the divesting entity will often have continuing contractual obligations to its customers that depend on the divesting entity's ability to continue to provide, support, and deliver updates of the divested products. In the case of CA and Ingres, CA negotiated at arms-length with the private equity investors who secured control of Ingres in the spin-off to specify, through detailed contractual arrangements, the obligations that the newly independent Ingres would have to continue to provide CA's customers with access, support, and improvements to the Ingres products they had been using when those products were owned by CA.

These contractual arrangements were important because some of CA's largest customers had long-term agreements with CA that entitled them to updates to a broad portfolio of CA products, including the database software and other products that were to be divested to Ingres (the "Legacy Products"). Without access to updates to the Legacy Products, CA would be unable to meet its contractual obligations to these customers (the "Legacy Customers"). Therefore, CA bargained for contract terms requiring Ingres to, among other things, provide technical support for and updates to the Legacy Products to CA's Legacy Customers *free of charge*. The requirement to provide updates was characterized as a maintenance and support obligation in the agreements effecting the Divestiture (the "Divestiture Agreements").

After the Divestiture was accomplished and CA's and Ingres' economic interests diverged, disputes between CA and Ingres soon arose. Of primary importance here, Ingres took the position that the maintenance and support obligations it owed to CA did not require it to provide CA's Legacy Customers with licenses to what Ingres called "new" or "post-divestiture" products (collectively "Post-Divestiture Products"). In Ingres's view, Post-Divestiture Products did not just include completely new products that had no origin in the Legacy Products that had been divested to Ingres. Rather, Ingres took the position that a sufficiently altered version of a "Legacy Product" was also a Post-Divestiture Product that it did not have to provide to CA's Legacy Customers unless they paid for a new license for that new iteration. Therefore, in Ingres'

view, if CA wished to provide these Post-Divestiture Products to its Legacy Customers, it would have to negotiate with Ingres and pay a price.

For example, Ingres argued that it did not have to provide licenses to the latest version of a Legacy Product called "OpenROAD"[1] because the latest version of the software was a Post-Divestiture Product and therefore Ingres had no duty to provide it for free to CA's Legacy Customers. As might be expected, CA disagreed with this position, and a dispute arose over what obligations Ingres had to provide CA's Legacy Customers with improved versions of the Legacy Products they were using. That disagreement was sharpened because CA had not negotiated with Ingres for the ability to provide its Legacy Customers with access to the core piece of software that was divested, Ingres' database product. The reason CA had not negotiated for access to the core Ingres database after the Divestiture was that the latest iteration of the Ingres database software, version "r3," had been open sourced and therefore made freely available to the user community before the Divestiture. After the spin-off, Ingres rapidly marketed a version of the database that was not open sourced and was available only to users who paid for a license. Ingres informed CA that it would not provide the new proprietary version of the database to CA's Legacy Customers unless they too took a license. This was an unwelcome surprise to CA because many of its key Legacy Customers relied upon the Ingres Database.

[1] OpenROAD, which stands for "Open Rapid Object Application Development," is a developer toolkit that programmers use to develop new software applications.

Ingres' refusal to provide updates began to hamstring CA's relationships with some of these key customers. As CA could not meet these customers' requests for the latest versions of Ingres products, CA began considering its options. Eventually, rather than suing Ingres to get Ingres to live up to its obligations under the Divestiture Agreements, CA took a less confrontational approach. After lengthy negotiations, CA and Ingres entered into a reseller agreement (the "2007 Reseller Agreement") by which CA could purchase licenses for the latest versions of Legacy Products that Ingres claimed were Post-Divestiture Products at a 28% discount and then pass those licenses on to CA's Legacy Customers. By covering all of Ingres' products, the 2007 Reseller Agreement plugged the gap in the Divestiture Agreements relating to version r3 of the Ingres Database because it expressly gave CA the means to obtain Ingres 2006, the successor software to version r3.

Nearly one year after the 2007 Reseller Agreement was executed, CA received an exceptionally large order from one of its long-standing Legacy Customers, Electronic Data Systems ("EDS"), for the latest version of Ingres' OpenROAD software, OpenROAD 2006. Before receiving this order, CA was unaware of how many OpenROAD users EDS had and was apparently unaware that Ingres licensed OpenROAD on a per processor basis. EDS had over 60,000 processors on which OpenROAD was installed. When calculated under the terms of the 2007 Reseller Agreement, EDS' order would amount to over $29 million worth of licenses, a figure far above any cost CA had thought it would bear when

it entered into that agreement and a figure that amounted to 39% of the valuation placed on the entire Ingres business when it was divested.[2]

When CA recognized the enormity of this cost, it demanded that Ingres provide the licenses for free under the maintenance and support terms of the original Divestiture Agreements. Ingres refused, arguing that the 2007 Reseller Agreement was now the sole mechanism by which CA could obtain these licenses for its customers. Litigation then broke out over this dispute, with CA arguing that Ingres had to provide OpenROAD 2006 to CA's Legacy Customers for free under the maintenance and support obligations of the Divestiture Agreements, and Ingres contending that it never had any obligation to provide OpenROAD 2006 to CA's Legacy Customers under the Divestiture Agreements and that, even if it had, any such obligation had been superseded by the 2007 Reseller Agreement.

These contentions were central to the case presented to me at trial and raised the related question of whether, if Ingres was correct, its secretive sales campaign to induce EDS to upgrade to OpenROAD 2006 breached an anti-tampering provision of the overarching agreement that effected the Divestiture, the Contribution and Stockholders Agreement, and constitutes a prior material breach that disentitles Ingres to payment for the brief period EDS used OpenROAD 2006.

Three core questions must be answered to resolve this dispute. The first is whether the original Divestiture Agreements required Ingres to provide the

[2] Ingres was valued at approximately $75 million when it was divested. CA's Op. Pre-Trial Br. at 17.

OpenROAD software ordered by EDS free of charge as part of the maintenance and support obligations Ingres undertook under those agreements. If the provision of future versions of OpenROAD was not part of Ingres's maintenance and support obligations, then Ingres does not have to provide OpenROAD 2006 for free, and I may conclude my inquiry. But, if Ingres did have to provide OpenROAD 2006 as part of its obligation of maintenance and support under the Divestiture Agreements, then the next question is whether the 2007 Reseller Agreement nevertheless superseded the relevant Divestiture Agreements as to this subject matter and, therefore, provides the only means for CA to obtain the OpenROAD 2006 licenses. If the 2007 Reseller Agreement is the only means, then CA must pay Ingres for the licenses per the terms of that agreement if CA chooses to provide the new version of OpenROAD to its Legacy Customers.

Finally, there is the third question. EDS' decision to order OpenROAD 2006 was not made in isolation. Rather, after the 2007 Reseller Agreement was executed, Ingres sales executives repeatedly and furtively contacted EDS in order to convince EDS to upgrade to OpenROAD 2006. Ingres' strategy was (1) to convince EDS to make the order for OpenROAD 2006 through its contract with CA and then (2) to charge CA for the licenses EDS ordered according to the terms of the 2007 Reseller Agreement. Ingres successfully concealed these sales activities from CA.

Because the Divestiture Agreements between CA and Ingres prohibited Ingres from contacting CA's customers in order to disrupt CA's contractual

relations with them, and because Ingres's contacts were intentionally designed to cause EDS to change its current business approach in a manner that would injure CA to Ingres's commercial benefit, the third question is whether Ingres can enforce the terms of the 2007 Reseller Agreement when Ingres itself breached an important anti-tampering provision in the Contribution and Stockholders Agreement — an agreement which was not superseded by the 2007 Reseller Agreement.

My conclusions on these three questions relating to the first dispute between CA and Ingres are as follows:

- Ingres would have had an obligation to provide CA's Legacy Customers with the latest version of the OpenROAD software for free as part of its maintenance and support obligations under the terms of the original Divestiture Agreements;

- But, the 2007 Reseller Agreement superseded the relevant Divestiture Agreements as to the terms under which Ingres must provide the latest version of OpenROAD, and therefore if CA chose (or was contractually obligated to) to provide OpenROAD 2006 to its Legacy Customers, it must order that product under the 2007 Reseller Agreement;

- Nevertheless, Ingres cannot now hold CA responsible in damages for the brief period EDS used the new version of OpenROAD because EDS' use of that new version directly resulted from breaches by Ingres of the anti-tampering provision of the Contribution and Stockholders Agreement. Once EDS was fully apprised of the situation, it reached an accord with CA to return to using the earlier version of the OpenROAD software to which CA held a license from before the Divestiture. Having itself provided EDS with the test license to the latest version of OpenROAD as part of its tampering scheme, Ingres is in no position to demand compensation from CA for the short period EDS used OpenROAD 2006. Ingres brought that harm on itself by its own breach of contract. Moreover, its contention that it was improper for CA to enter arrangements with EDS to mitigate the harm that Ingres sought to inflict upon CA is without legal or equitable force.

In other words, my conclusion is that, regarding the dispute over the EDS order, CA owes Ingres nothing in damages.

A second dispute between CA and Ingres was also tried. Around the same period when litigation over OpenROAD became likely, Ingres began to contend that CA was improperly using the Ingres Database software as a component in a software product CA made for Olympus America Inc.-Medical Systems Group ("Olympus"). Under the terms of the Divestiture Agreements, CA is allowed in perpetuity to "embed" the Legacy Products it had licensed from Ingres, including enhancements, updates, and improvements thereto, in CA's own software products. CA bargained for this right during the divestiture negotiations because it typically used the database software it divested to Ingres within its own products. Therefore, CA needed to secure the right to continuing support from Ingres for the Legacy Products that CA used within its own software solutions or it could not continue to sell those products at the same cost.

Well after the spin-off, Ingres took the position that CA's right to embed Ingres products did not extend to Ingres software used in an application called "EndoWorks" that CA developed for Olympus. Ingres argues that CA must compensate Ingres for its use of Ingres database software in EndoWorks because (1) the Ingres database is not so intertwined with EndoWorks as to be "embedded" within the meaning of the Divestiture Agreements; (2) EndoWorks is not one of CA's own products because CA made the software specifically for Olympus, and Olympus only, under a work-for-hire arrangement; and (3) Olympus is not a

qualified "distributor" of the Ingres software under the terms of the Divestiture Agreements.

Because, after considering parol evidence, I find that, as a contractual matter, the Ingres database is embedded within the EndoWorks, that EndoWorks is a CA product, and that Olympus is a proper distributor, I conclude that CA's arrangement with Olympus falls within the terms of the Divestiture Agreements. Therefore, CA is not required to compensate Ingres for the inclusion of Ingres' database software within the EndoWorks application.

Having resolved these two major issues, I finally turn to two related claims. First, because CA prevails on the Olympus-related claim, I find that CA is entitled to attorneys' fees related to that claim under the terms of the 2007 Reseller Agreement, which provides that a prevailing party to a dispute over the obligations set forth in the Agreement is entitled to reasonable fees. Because both parties prevailed on some of the substantive issues underlying the EDS-related claim and lost on others, I decline to award attorneys' fees for that claim to either party. And, second, because the claims pled by Ingres in a California action implicate a forum selection clause in the Legacy Support Agreement and CA Support Agreement, I grant CA's request that I enjoin that parallel California suit.

II. Factual Background

These are the facts as I find them after trial.

A. The Parties And The Enterprise Software Industry

CA develops and sells enterprise information technology software. In particular, CA produces a number of products for developing and managing databases. One of these products, the Ingres line of database software, is the focus of this litigation.

The Ingres software is a relational database management system intended to support "enterprise" (*i.e.*, large commercial and government) applications. The code behind the software was first developed as a research project at the University of California, Berkeley, starting in the early 1970s and ending in the early 1980s. Upon completion of the initial version, the database software was open sourced,[3] and a number of companies attempted to commercialize it (*i.e.*, develop non-open-sourced improvements). Currently, of the companies that built off of the original open source code developed at UC-Berkeley, Oracle has the largest share of the relational database market, with IBM's DB2 software second, and Microsoft's SQL Server third.[4]

In 1994, CA acquired ASK Corporation, a company that owned the "Ingres" brand name as well as rights to proprietary developments to the code originally developed at UC-Berkeley and related applications (the aforementioned

[3] "Open source software" refers to a broad software license that makes source code available to the general public for free with relaxed or non-existent copyright restrictions. *See* PAUL KAVANAGH, OPEN SOURCE SOFTWARE: IMPLEMENTATION AND MANAGEMENT 1-2 (2004).

[4] Press Release, Gartner, Inc., Gartner Says Worldwide Relational Database Market Increased 14 Percent in 2006 (June 18, 2007), *available at* http://www.gartner.com/it/page.jsp?id=507466. Combined, these companies control approximately 86% of the market. *Id.*

"Ingres Database"). ASK Corporation's Ingres Database software had a minor share of the market, and this market share did not increase appreciably after CA acquired the Database.[5] CA improved and supported the Ingres product and sold it to end-users, but, for the most part, CA used the Ingres Database as the embedded database within CA's own software products. CA released version 2.5 of the Ingres Database in 2001 and version 2.6 in 2002, neither of which were released as open source software. In August 2004, CA developed a new version of the Ingres Database called "version r3." By contrast with its handling of the prior versions of the Ingres Database, CA decided to open source version r3 in the hope that end users and programmers' interest in the software would increase if they could get it for free.

In 2005, CA decided to divest the Ingres business and that business' product line, which included versions 2.5, 2.6, and r3 of the Ingres Database. To this end, CA entered into negotiations with Garnett & Helfrich Capital ("G&H Capital"), a private equity firm that specializes in spinning out businesses for large technology companies. After extensive negotiations, CA and G&H Capital agreed upon a structure for the Divestiture and executed the Contribution and Stockholders Agreement and related Divestiture Agreements discussed below. The divested entity was to be named Ingres Corporation.

Following the Divestiture, the key personnel, for the purposes of this litigation, at Ingres were Roger Burkhardt, Chief Executive Officer and President;

[5] *See id.*

Mike Kostow, Vice President of Sales Operations; Steve Shine, Executive Vice President of Worldwide Operations; Neil Warnock, Solutions Director; Dev Mukherjee, Senior Vice President for Business Development and Product Management; Richard Mosher, Vice President and General Counsel; and Emma McGrattan, Senior Vice President for Engineering. Of these individuals, the following were involved with the EDS dispute: Burkhardt, Kostow, Mukherjee, Mosher, Shine, and Warnock. And, the following were involved in the Olympus dispute: Kostow, Shine, Mukherjee, Mosher, and McGrattan. Their counterparts at CA were John Swainson, Chief Executive Officer; Amy Olli, Executive Vice President and General Counsel; Laura McCluer, Vice President, Strategic Alliances; Ken Chin, Senior Vice President and Regional Chief Counsel for the Americas; George Cox, Vice President, Corporate Business Development; Darren Burrell, Account Manager; and Adam Bernstein, Vice President and Senior Counsel. Of these individuals, all were involved in the EDS dispute except Burrell and Bernstein. And, the following were involved in the Olympus dispute: Bernstein, Burrell, and McCluer.

B. The Ingres Divestiture And The Implementing Contracts

As first conceived, the deal to spin off Ingres would have required G&H Capital to contribute $45 million in cash to the newly independent Ingres and CA to contribute the Ingres Database plus certain liabilities. In return, G&H Capital was to receive 60% of the stock of Ingres, and Ingres would have the right to all contract renewals for the Database product divested to it once CA's pre-existing

contracts (the aforementioned "Legacy Contracts") with the current customers for those products reached the end of their terms. CA, in turn, would receive 20% of Ingres' equity, with the remaining 20% going to Ingres management.

Under the terms of the deal, CA would get no cash for its assets and only 20% of Ingres' equity because Ingres would be assuming the substantial maintenance and support obligations CA owed its then-existing customers (the so-called "Legacy Customers"). By assuming these obligations, Ingres would be required to provide maintenance and support free of charge for CA Legacy Customers who used the Ingres Database. This maintenance and support included the obligation to provide the Legacy Customers with updated versions of the Ingres Database. Later, when the set of Legacy Products was broadened during the course of the negotiations, this maintenance and support obligation was expanded to require Ingres to provide updates to those additional Legacy Products.

CA and Ingres also negotiated over the compensation Ingres would receive to provide on-going support for the Ingres Database when it was embedded in CA products. CA was entitled to continue to use the Ingres Database perpetually when embedded in CA products and Ingres had to provide support, for which it would only be able to charge cost plus 10%. The maintenance and support obligations were a critical part of the consideration flowing to CA for the Divestiture of the Ingres Database for two reasons.

First, Ingres' agreement to meet the support obligations under the Legacy Contracts filled a gap in those contracts caused by the Divestiture. By divesting

the Ingres Database, CA could no longer meet its support obligations under the Legacy Contracts relating to the Database products: for example, without ownership of the Database, CA could not provide updates of new developments to the Database — meeting that support obligation was only something Ingres, as the new owner of the Ingres Database, could do. Of course, a simple solution to this problem would have been to assign to Ingres the Legacy Contracts, including the support obligations found therein. But, CA could not have simply assigned the Legacy Contracts to Ingres because the Legacy Contracts typically gave the Legacy Customers the right to use a broad portfolio of CA products, most of which CA was not divesting to Ingres and wanted to continue to sell itself. Therefore, CA needed to make sure that it could obtain maintenance and support from Ingres for the Legacy Customers for any products divested to Ingres, so that it, CA, could continue to provide those Customers with the full range of product offerings they had previously used.

Second, as would be expected, before the Divestiture CA used its own database product — the Ingres Database — as the database component in many of its core products. Databases are often required as sub-components in enterprise software products for the purpose of keeping a record of the transactions accomplished and, more generally, of the information needed by the user in performing the software's functions. Because CA would no longer own the Ingres Database software after the Divestiture, this meant that CA would not be able to repair any problems in its own software that related to the functioning of the

embedded Ingres Database product. If something went wrong with the Ingres Database as embedded in these products, then both CA and its end user customer would need support from Ingres.

To solve these two support-related problems, CA and Ingres agreed that, after the Divestiture, CA would keep its relationships with the Legacy Customers until their Legacy Contracts expired and that Ingres would provide contractually-defined maintenance and support for the Legacy Products as required under the terms of those Legacy Contracts. The terms of this arrangement were set forth in a Legacy Support Agreement, which I discuss in more detail below. But, this arrangement was not reached easily, and the negotiations over the support obligations were contentious. G&H Capital argued that Ingres would be assuming a liability of unknown proportions because nobody could predict how much support end users or CA would seek during the term of a respective Legacy Contract. Ultimately, G&H Capital agreed for Ingres to assume the maintenance and support liabilities, but only after additional consideration was obtained. To wit, CA was required to divest to Ingres three additional product lines behind the Database product line: the Enterprise Access, EDBC, and OpenROAD lines of products. Of these, only OpenROAD is critical to this litigation.

These basic understandings were set forth in several detailed contracts, the relevant terms of which I describe next.

1. The Contribution And Stockholders Agreement

The Contribution and Stockholders Agreement (the "Contribution Agreement") is the base agreement containing the general business terms of the Divestiture. The Contribution Agreement sets forth the basic terms of the deal outlined above: (1) CA would transfer certain assets, including the Legacy Products, to Ingres; (2) G&H Capital would make a cash contribution of $45 million to Ingres; (3) in consideration of the cash contribution and asset transfer, Ingres would issue certain shares of its stock to CA and G&H Capital; and (4) Ingres would agree to assume the "Assumed Liabilities," a defined term in the Contribution Agreement that includes all "Assumed Support Liabilities" required to be performed under existing Legacy Contracts.[6] "Assumed Support Liabilities" is a specifically defined term in the Contribution Agreement that means "those Liabilities of [CA] and its Subsidiaries with respect to the provision of maintenance and support for customers and the Transferred Intellectual Property under the Legacy Contracts that [Ingres] agrees to assume pursuant to the Legacy Support Agreement."[7] Therefore, the Contribution Agreement links Ingres' maintenance and support obligations to Legacy Customers to the Legacy Support Agreement, which sets forth those maintenance and support obligations with greater particularity.

[6] JX-2 at § 2 (Contribution and Stockholders Agreement (July 1, 2005)) (the "Contribution Agreement").
[7] *Id.* at § 1.

The Contribution Agreement also contains a provision that regulates Ingres' contact with Legacy Customers (the "Anti-Tampering Provision"). The provision provides in relevant part:

> (d) *[Ingres] will not independently contact any [legacy customer] with regard to, or engage in discussions with any [legacy customer] for the purpose of, the renewal or making of a new Contract with [Ingres] and its Subsidiaries with respect to any Business Products or basic maintenance and support thereof prior to the end of the Current Term of the [legacy contract] to which it is party.* Notwithstanding the foregoing, for the avoidance of doubt, [Ingres] and its Subsidiaries may (i) respond to *customer inquiries* (so long as in a manner that would not reasonably be expected to disrupt or interfere with any [legacy contract]) or, (ii) engage in *technical discussions* regarding such Business Products or regarding Business Services at any time with an Person, including any [legacy customer].[8]

In other words, this provision in the Contribution Agreement circumscribed the contact Ingres could have with Legacy Customers during the terms of the Legacy Contracts to (1) customer inquiries and (2) technical discussions. Its plain purpose was to prevent Ingres from tampering with CA's relationships with its Legacy Customers during the term of the Legacy Contracts. This was important because CA was vulnerable to such tampering because it had divested ownership of products that it was required to deliver to its Legacy Customers. If Ingres could freely convince those Customers to enter into new arrangements with Ingres that would impose new costs on CA for use of Ingres products in order to increase profits to Ingres, CA stood to see the profit margins on some of its most important

[8] *Id*. at § 4.9 (emphasis added).

relationships shrink. CA bargained with Ingres to prevent it from engaging in such sales tactics.

2. The Legacy Support Agreement

The Legacy Support Agreement sets forth in greater detail the support obligations that Ingres owed to CA's Legacy Customers that held licenses to existing Ingres products. Most importantly for present purposes, the Legacy Support Agreement defined the "maintenance and support" that Ingres agreed to provide Legacy Customers as follows:

> Maintenance and support for Legacy Products: under any Legacy Contract that is set forth in Schedule 3.3(b)(i) to the Contribution Agreement (as such schedule is updated as of the Closing Date or otherwise amended pursuant to the terms of the Contribution Agreement), in the case of (x) any Stand-Alone Legacy Contract, as such Stand-Alone Legacy Contract is in effect as of the Closing Date and (y) any [Enterprise License Agreement], as such [Enterprise License Agreement] may be modified or amended from time to time subject to Section 2(e) hereof, including, in each case, *First Level Support, Second Level Support and any other obligations with respect to provision of maintenance and support as to any Legacy Contract to the extent (and only to the extent) that such First Level Support, Second Level Support or other obligation arises under such Legacy Contract*.[9]

This definition ties Ingres' support obligations, as set forth in the Contribution Agreement, to the particular maintenance and support obligations set forth in the relevant Legacy Contracts. That is, the Legacy Support Agreement is one link in the contractual chain running from the Contribution Agreement through the Legacy Support Agreement to the maintenance and support obligations in the

[9] JX-21 at § 2(a) (Legacy Support Agreement (November 4, 2005)) (the "Legacy Support Agreement") (emphasis added).

individual Legacy Contracts. But, the Legacy Support Agreement also gives its own three-tiered general definition of Ingres' maintenance and support obligations: *i.e.*, Ingres must provide First Level Support, which is defined as essentially fielding phone calls and troubleshooting,[10] provide Second Level Support, which involves detailed analysis of problems and the provision of maintenance releases and updates,[11] and then meet "any other" maintenance and support obligation found in a Legacy Contract. This final tier, which requires Ingres to meet "any other" maintenance and support obligation delineated in a Legacy Contract, makes clear that the Legacy Support Agreement does not limit the scope of the obligations found in the individual legacy support contracts.

In what would come to be a very important contractual omission, version r3 of the Ingres Database, the core Legacy Product divested to Ingres, was expressly excluded from the Legacy Support Agreement.[12] Version r3 was excluded from the maintenance and support obligations because it was an open source product, and therefore CA expected that Ingres would continue to provide maintenance releases and updates to the market generally free of charge. In other words, CA

[10] *Id*. at § 1 (defining "First Level Support" as "the receipt of a call from a Support Recipient and the attempt to diagnose the problem to determine if it relates to hardware, operating software or application software, whether provided by the Company, Seller or otherwise").

[11] *Id*. (defining "Second Level Support" as "any of the following to the extent they do not constitute First Level Support: (i) problem diagnosis; (ii) resolution through (a) error correction or (b) work arounds, (iii) provision of Maintenance Releases and Updates for all Legacy Products made available by the Company, and (iv) response to general advice and guidance questions concerning Legacy Products from any Support Recipients").

[12] *Id*. (defining "Updates" as "new releases of such Business Products that are intended to provide additional functionality, but not including Ingres r3 or any new release or Maintenance Release thereof").

believed that because version r3 was open sourced, there was no reason to bind Ingres to provide continued maintenance and support for it in the Legacy Support Agreement.

Finally, the Legacy Support Agreement also allowed Ingres to discontinue — or declare the "end of life" of — the Legacy Products. Under the terms of the Agreement, Ingres can discontinue a Legacy Product "in the ordinary course of business, consistent with past practice."[13] But, Ingres also has to comply with the terms of any specific Legacy Contract implicated "including without limitation (1) providing any required prior notice of such change in status required under such Legacy Contract and (2) continuing to provide the level of maintenance and support required under the terms of such Legacy Contract after such change in product status."[14]

3. The License Agreement And The CA Support Agreement

In addition to the Contribution Agreement and the Legacy Support Agreement, Ingres and CA also executed a license agreement (the "License Agreement") and a support agreement (the "CA Support Agreement"). The License Agreement provided CA with a right to use Legacy Products, including any improvements of those products, under two conditions: (1) that the Legacy Products be used for CA's own internal business purposes; or (2) that the products were reproduced and distributed to end users only when the Legacy Products were

[13] *Id*.
[14] *Id*. at § 3(b).

embedded in a CA product.[15] The parties entered into the License Agreement primarily in order to allow CA to continue selling its own products that embedded the Ingres Database.[16] Consistent with this understanding, the CA Support Agreement required Ingres to provide support to end users in cases where CA has the right to embed certain of the Legacy Products under the License Agreement.[17] Ingres was to receive the agreed upon cost plus 10% for this support.[18]

C. After The Divestiture, Disputes Arise Over Ingres' Obligation To Provide Products To EDS

Unsurprisingly, given the conflicting interests that resulted from the spin-off, disputes began to arise relatively soon after the Divestiture regarding Ingres' obligations under the Divestiture Agreements. In particular, it became clear after the spin-off that Ingres was bent on minimizing the extent to which it would provide maintenance and support to CA's Legacy Customers and maximizing its

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[15] In particular, the License Agreement provides that:

> [Ingres] hereby grants to the CA Entities a non-exclusive, perpetual, irrevocable, fully paid-up, royalty-free, worldwide license to the Ingres Owned Business Products solely for the following purposes: (i) to reproduce and use the Ingres Owned Business Products solely for the internal business purposes of the CA Entities (but in no event shall CA have the right to grant any Person other than a Person that, at the time of such proposed sublicensing, constitutes a Subsidiary of CA, a sublicense under the license granted in this Section 2(d)(i)), and (ii) to reproduce and distribute to end users (whether directly or indirectly through distributors and sub-distributors) the Ingres Owned Business Products (but excluding the OpenRoad, EA and EDBC products) solely in object code form and only when embedded in any products of the CA Entities.

JX-20 § 2(d) (License Agreement (November 4, 2005)) (the "License Agreement").

[16] Tr. at 36-37 (Cox).

[17] JX-19 at § 2 (CA Support Agreement (November 4, 2005)) (the "CA Support Agreement").

[18] *Id*. at § 5(a).

ability to charge anyone, including CA and its Legacy Customers, for Ingres products and services. Ingres therefore took at least two major steps in the direction of accomplishing this goal.

The first was that within three months of the Divestiture, Ingres announced that it was discontinuing version r3, the open source product that had been excluded from the Legacy Support Agreement. With its end of life announcement for version r3, Ingres also rolled out a new release of the Ingres Database called Ingres 2006. Unlike version r3, Ingres 2006 was not open source software. Therefore, by discontinuing version r3 and introducing Ingres 2006, Ingres was shifting its core database product from an open source to a proprietary platform. Because version r3 was not covered by the Legacy Support Agreement, CA therefore lacked any contractual club to get Ingres to provide Ingres 2006 as an update to any of the Legacy Customers who were using version r3. That was a problem for CA because some of its Legacy Contracts obligated it to provide the Customers with any new versions of the Ingres Database as part of maintenance and support, and Ingres 2006 was a new version of the Ingres Database.

The second tactic was similar in effect but had a less principled basis. Although Ingres's conversion of version r3 from an open source product to a proprietary product might not have been high-minded, it did not contravene any written obligation in any of the Divestiture Agreements. Rather, CA had left itself vulnerable to such a change, and Ingres struck where it hurt.

But the second tactic involved Ingres being begrudging in living up to the maintenance and support obligations set forth in the Legacy Support Agreement. Ingres came up with the notion that, if it made a change of some material magnitude in a Legacy Product (a change Ingres itself would determine) such that it could call the new version of the Legacy Product a "new" or "post-divestiture" product (collectively, the aforementioned "Post-Divestiture Products") and generally require clients to get a new license agreement to use it, then Ingres could refuse to provide that new version to CA's Legacy Customers. This second tactic appears to have been conjured up by some Ingres managers whose articulation of Ingres' obligations under the Legacy Support Agreement bespoke either an inability to read a contract after effort, a refusal to even read the contract at all, or a purposeful refusal to acknowledge Ingres's contractual duties to CA.[19] Notwithstanding the chutzpah involved in this effort, Ingres brazenly told CA that it would not honor orders for its self-identified Post-Divestiture Products as part of its maintenance and support obligations under the Legacy Support Agreement, but would instead require CA or the Legacy Customer to pay a new license fee to Ingres.

Most pertinently, Ingres eventually announced the end of life of its OpenROAD 4.1 product, which was a product covered by the Legacy Support

[19] *See, e.g.*, JX-265 (email from Shari Siegel to John Whittle and Ken Chin (June 13, 2006)) (claiming that CA's Legacy Customers did not have rights to obtain licenses to either "any product announced after [the Divestiture] date" or "[a]ny new licenses, or support, for any new distribution of software," including software to which the Legacy Customers held licenses before the Divestiture).

Agreement, and told CA that the new version of OpenROAD, deemed OpenROAD 2006, was a Post-Divestiture Product that Ingres did not have to provide as maintenance and support under the Legacy Support Agreement.

These two Ingres tactics, and their effect on CA's relationship with EDS, eventually generated this litigation.

1. The EDS Disputes

The first tactic — the conversion of version r3 from an open source product to the Ingres 2006 proprietary version — produced the initial flare up. This was followed by another argument over EDS' access to OpenROAD 2006. Those disputes cannot be understood without knowledge of CA's relationship with EDS.

a. The Relationship Between CA And EDS

EDS, a very large enterprise technology services provider that Hewlett-Packard Company recently acquired, is one of CA's largest customers. The terms under which EDS could order licenses to CA products are set forth in an agreement between CA and EDS called the Universal Enterprise Agreement, which is a Legacy Contract as defined in the Contribution Agreement and the Legacy Support Agreement. Under the terms of the Universal Enterprise Agreement, rather than pay a fee per license, EDS is allowed to order an unlimited amount of licenses for a broad range of CA products.[20] In return for this "all-you-can-eat" licensing arrangement, CA negotiated large upfront payments from EDS.

[20] JX-25 § 2.1 (Universal Enterprise Agreement (May 17, 1994)) (the "Universal Enterprise Agreement").

In 2000, EDS paid CA an upfront payment of $253.1 million in 2000, and then $92 million per year from 2006 to 2011 as a base fee. These fees just cover the all-you-can-eat license to all of CA's products — they do not include any maintenance and support from CA. Rather, under the terms of the Universal Enterprise Agreement, EDS is required to pay a separate annual fee of $23 million to purchase maintenance and support. Therefore, under the terms of the Universal Enterprise Agreement, EDS pays CA over $115 million a year, an amount which does not include the original base fee of more than a quarter of a billion dollars.

The scope of the Universal Enterprise Agreement is broad. Under the terms of the Agreement, EDS has a right not only to all of CA's products but also to all enhancements or improvements to those products. The Universal Enterprise Agreement entitles EDS to "Licensed Software," which includes (1) software that CA acquired or developed after the Universal Enterprise Agreement was executed, (2) software that CA licensed from a third party and, in turn, licensed to another third party, or (3) software that CA had licensed to EDS before the execution of the Universal Enterprise Agreement.[21] Furthermore, the definition of Licensed

[21] The full definition of Licensed Software is as follows:

> All software . . . and all Enhancements thereto that are (a) owned, acquired, designed or developed on or after the date hereof by [CA] from and after the time it becomes generally available for license to third parties, (b) licensed or held under license by [CA] from any third party licensor and licensed (or offered for license) by [CA] to any third party or (c) licensed prior to the date hereof to [EDS] by [CA] and used or held for use by [EDS] on the date hereof. The term "Licensed Software" includes, without limitation, (a) any software listed or referenced in CA's Product Pricing Handbook (as the same shall be in effect from time to time) and (b) subject to Section 2.1(d), all Included Business Application Software.

Software further includes "[a]ll software . . . and *all Enhancements* thereto."[22] The Agreement defines "Enhancements" as follows:

> Enhancements, Upgrades, Etc. [are] all improvements, developments, modifications, upgrades, updates, additions, extensions, expansions, new versions, new releases, flashes, program temporary fixes and other changes of or to the Licensed Software made generally available by Licensors to their licensees and customers (collectively, "Enhancements") . . . .[23]

Therefore, under the terms of the Universal Enterprise Agreement, CA was to continually provide EDS with not only licenses to all the software it held but also all the Enhancements to any of that Licensed Software. This obligation to provide Enhancements is even broader than the Legacy Support Agreement's requirement for Ingres to provide Legacy Customers with "Updates" to Legacy Products.

b. The First EDS Dispute: Access To Ingres 2006

i. EDS' Request For Ingres 2006 Reveals A Gap In The Divestiture Agreements

In 2006, EDS began requesting updates to Ingres products from CA under the terms of the Universal Enterprise Agreement. These requests revealed a gap in the language of the Legacy Support Agreement relating to the carve-out for version r3 of the Ingres Database. So long as the Ingres 2006 product that was the successor to version r3 was an Enhancement under the definition provided in the Universal Enterprise Agreement between CA and EDS — which it was — then CA was obligated to provide that product to EDS. But, although CA had this

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Id. at § 1.1.
[22] *Id*. (emphasis added).
[23] *Id*. at § 5.3 (emphasis in original).

obligation to provide such Enhancements to EDS, CA had no right under the Divestiture Agreements to obtain Ingres 2006 from Ingres because its predecessor, version r3, was expressly carved out of the Divestiture Agreements. In an effort to satisfy EDS, CA first tried asserting to Ingres that Ingres had assumed all of CA's licensing obligations to EDS in the Divestiture.[24]

Ingres, however, disagreed and began taking the position that it did not assume the obligation to provide new licenses for the products it developed after the Divestiture, which it referred to as Post-Divestiture Products.[25] Ingres made its position clear through repeated communications to CA. For example, Dev Mukherjee, who was Ingres' Senior Vice President for Business Development and Product Management at the time, testified that he repeatedly told CA that Ingres was not required under the Legacy Support Agreement to give CA licenses to Post-Divestiture Products.[26] In a slide deck sent to CA on the subject of EDS' right to updates of Legacy Products, Ingres summarized its position as follows:

- Ingres' obligations to EDS are the same as any other ELA per the Contribution and Stockholders Agreement
- Ingres product and support requests after November 4, 2005 [the date of the Divestiture] can only be fulfilled by Ingres Corporation
- Ingres 2006 is a new product and therefore not governed by the agreements between Ingres and CA at the time of the divestiture, or by the agreements between CA and EDS

[24] *See* JX-75 (email between Tom Berquist and Terry Garnett, Mark Barrenchea, and Roger Burkhardt (July 20, 2006)); Tr. at 1106-08 (Mukherjee).
[25] Tr. at 1088-92 (Mukherjee).
[26] *Id*. at 1083-92 (Mukherjee).

- Services beyond standard support (e.g. lifeline, migration, education) are not included and will be contracted and charged for independently

- Other Ingres products (e.g. OpenROAD) will be treated the same as the equivalent database products[27]

Also, Ingres' Chief Financial Officer, Tom Berquist, wrote a letter to CA's CEO, John Swainson, on July 7, 2006 making clear Ingres' position that "[n]ew products announced after the divestiture (e.g. Ingres 2006) are outside the scope of the [Legacy Support Agreement].").[28]

Contemporaneous communications from CA indicate that it appreciated Ingres' position. For example, CA's George Cox stated the following in an email to Ingres' Mukherjee:

> I had thought that you and I previously discussed that it seemed clear that Ingres had the responsibility to provide maintenance and support for licenses granted prior to the closing of the divestiture. That there was no contention on that point. The below orders are requests for upgrades, not new product orders – which is where the disconnect lies.[29]

In other words, CA believed that Ingres was flouting its obligations of maintenance and support. CA believed that the Legacy Support Agreement made Ingres responsible for providing Legacy Customers with new versions of Legacy Products if the obligation to provide such new versions was required as part of the maintenance and support provision of the underlying Legacy Contract and as part of the express duty of Ingres to provide updates of Legacy Products under the

[27] JX-109 (email between Dev Mukherjee and Marc Stoll (June 14, 2006)).
[28] JX-110 (email between Shari Siegel and Marc Stoll and George Cox (July 10, 2006)).
[29] JX-106 (email between Dev Mukherjee and George Cox (April 17, 2006)).

Legacy Support Agreement. But, CA understood that Ingres was refusing to acknowledge that the Legacy Support Agreement required that result.

This refusal of Ingres went beyond Ingres 2006, the successor to version r3 of the Ingres Database which was expressly carved out of the Legacy Support Agreement, and extended to Ingres' second tactic, which involved its contention that new versions of Legacy Products specifically covered by the Legacy Support Agreement did not have to be provided to Legacy Customers. Key negotiators for CA understood that this was Ingres's position during this time period, as the following testimony of CA's McCluer indicates:

> Q. Ingres' position in the fall of 2007 was quite consistent; right? It was — Ingres' position was, throughout the fall of 2007, we are not supplying post divestiture products to CA for free; correct?
>
> A. That was their statement.
>
> Q. That was not just their statement. That was their action; right?
>
> A. Yes.
>
> Q. And they took that position consistently through the fall of 2007; right?
>
> A. Yes.
>
> Q. Mr. Burkhardt and others at Ingres made that clear to you; right?
>
> A. Yes.[30]

Of course, just because CA understood Ingres's position did not mean that CA agreed with it. Rather, as would be expected, CA disagreed with Ingres'

[30] Tr. at 395-95 (McCluer).

position[31] and, in the early stages of this dispute, pushed back, telling Ingres that it had to fulfill its obligations under the Legacy Support Agreement. For example, in April 2006, CA's Cox told Ingres' Mukherjee in an email, "Ingres is required to provide support and maintenance (including upgrades) for [licenses that were granted before the Divestiture]."[32] By the summer of 2006, however, CA had conceded that Ingres was not required to provide updates to some products, in particular Ingres 2006, under the terms of the Legacy Support Agreement. CA executives knew that the carve-out of version r3 of the Ingres Database product gave Ingres the high hand on the issue of whether Legacy Customers could obtain Ingres 2006, and that CA was likely to have pay Ingres to get licenses to give to EDS and other legacy customers entitled to new versions of the Ingres Database from CA.[33] And CA also understood that Ingres was resisting the notion that it had a contractual duty to provide new versions of even Legacy Products, such as OpenROAD, that were clearly covered by the Legacy Support Agreement. CA's

[31] A number of internal CA documents indicate that CA believed the Legacy Support Agreement required Ingres to provide updates to Legacy Products, such as Ingres Database and OpenROAD. *See, e.g.*, JX-105 (email between Shari Siegel and Jay Diamond (April 17, 2006)) (stating that "[CA's] attorneys believe that since the CA license grant to EDS provides for unlimited usage and that Ingres has agreed to assume all liabilities under the EDS contract that Ingres then has honor [sic] that license grant and is then required to fulfill orders (and provide support and maintenance) for new licenses"); JX-707 (email between George Cox and Dave Hamacher (April 17, 2006)) (stating that "[Ingres is] taking way too much liberty in how they are defining an upgrade. It is extremely clear that they need to fulfill what we would call an upgrade in more than one of the agreements that was signed to consummate the divestiture").

[32] JX-106.

[33] *See* JX-107 (email between Robert Stafford and Dave Hamacher (April 24, 2006)) (conceding that, unlike with other Legacy Products, "[s]upport, maintenance, or services related to Ingres r3 requires [sic] EDS to contract directly with Ingres Corp.").

Laura McCluer testified that she understood that Ingres claimed that OpenROAD 2006 was a Post-Divestiture Product and therefore that Ingres did not have to provide it to CA or its customers free of charge:

> Q. So you were aware, in fact, that Ingres had refused to supply OpenROAD; correct?
>
> A. This [transcript of my deposition] states that I was.
>
> Q. Now, in fact, you're also aware that Ingres took the position that OpenROAD 2006 was a post-divestiture product. You're aware of that?
>
> A. They called it that, yes.
>
> Q. And you had heard, during this time period, that Ingres described OpenROAD 2006 as a post-divestiture product; right?
>
> A. Ingres was describing it as a new product. Sometimes used the term post divestiture.
>
> Q. They told you that — Ingres had told you, during this time period, that they were not going to provide post-divestiture products pursuant to any legacy contracts; right?
>
> A. They stated that.[34]

ii. To Plug The Gap Relating To Version r3 And Resolve Their Differences Regarding Post-Divestiture Products, The Parties Execute A Reseller Agreement In 2007

By the spring of 2007, this dispute between CA and Ingres, which prevented CA from obtaining new versions of Ingres' products for CA's Legacy

[34] Tr. at 362-63 (McCluer); *see also id*. at 376 (McCluer) ("Q. And Ingres had made unequivocal to you that it was not going to supply for free post-divestiture products; right? A. Yes. Q. And that included OpenROAD 2006; right? A. That was their position.").

Customers, was causing business problems for CA.[35] In particular, CA could not obtain licenses for orders from EDS requesting Ingres 2006, from Computer Sciences Corporation ("CSC") requesting an update to OpenROAD, from the UK's Office of National Statistics ("ONS") requesting Ingres 2006 and upgrades to OpenROAD, and from Siemens requesting Ingres 2006.[36] Ingres continued to refuse to provide the licenses necessary to fulfill these requests on the grounds that these products were Post-Divestiture Products and therefore were not updates under the terms of the Legacy Support Agreement. In an internally-circulated slide deck assessing CA's options for addressing these requests, CA's Laura McCluer identified two potential routes: i) CA could "move to enforce terms of divestiture agreement regarding performance of all obligations under legacy contracts"; or ii), CA could "[c]reate a global Reseller agreement w/ Ingres and negotiate discount beyond 40%."[37] In other words, CA saw its primary options as involving a choice between enforcing its right to maintenance and support under the Divestiture Agreements or bargaining for an acceptable commercial work-around that would allow them to meet their customers' needs at a reasonable cost.[38]

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[35] *See* Tr. at 268, 275, 322-23 (McCluer).
[36] JX-56 (email between Laura McCluer and Robert Stafford and Dave Hamacher attaching draft slide deck (August 28, 2007)).
[37] *Id*. (original emphasis).
[38] CA's McCluer described CA's strategy as follows:

> A. We know that most, if not all, of the customers that are using OpenROAD, are entitled to it for free, including ONS. The situation with ONS that was in our mind at this time was that, because Ingres was

(a) The Negotiations Of The 2007 Reseller Agreement

CA sought to achieve the second option by entering into a reseller agreement with Ingres (the aforementioned "2007 Reseller Agreement").[39] CA's McCluer explained CA's motivations for negotiating the agreement as follows:

> We will have very limited instances where we would have a requirement to provide Ingres licenses to a customer due to their contract terms. The two cases are:
>
> - Customers with unique upgrade or new product clauses: These customers may have broad clauses in their agreements that allow them access to upgrades and new versions of products without regard to potential divestitures
>
> - Specific requirements for EDS & CSC agreements
>
> We are in the process of negotiating an agreement with Ingres that will allow us to address these situations and I am drafting a process for how it will be implemented.[40]

> refusing to supply it, ONS was withholding a million dollar payment to CA.
>
> So in our mind – in my mind – we were putting this there. That if we had to, we could by a license of OpenROAD, supply it to ONS, make them feel comfortable so that we can get the monies owed to CA and move forward.
>
> Q. And was there a thinking that you would buy the products of OpenROAD that you thought you were entitled to for free, but you would buy them under the 2007 agreement to end the dispute, right?
>
> A. To end a concern with ONS. If we had to, we would do that. We had done a business analysis, and it made sense that we would have to do that.

Tr. at 384 (McCluer).

[39] This agreement was negotiated between CA's Laura McCluer, Ken Chin, and Amy Olli and Ingres' Roger Burkhardt, Mike Kostow, and Rich Mosher.

[40] JX-59 (email between Laura McCluer, Laura Drake, Allan Clayton, Marci Ginzburg, and Roy Gabarino (November 6, 2007)).

In other words, CA was trying to reach a new contract that would allow it to get past the omission relating to version r3 in the Divestiture Agreements as well as what CA viewed as Ingres's refusal to live up it to its obligations under the Legacy Support Agreement. That is, CA was trying to find an acceptable method for muddling through this transition period until the term of the Universal Enterprise Agreement with EDS was through in 2011 and until its other key Legacy Contracts expired. Although not ideal from CA's perspective, CA preferred the certainty and speed of delivery of product that would result from a reseller agreement over full vindication of its rights under the Legacy Support Agreement in litigation, especially one assumes, because the latter route would be lengthy and could result in an inability on CA's part to meet its Legacy Customers' requirements.

Although the focus on the negotiations was primarily on EDS' request for Ingres 2006,[41] the evidence at trial demonstrated that CA repeatedly asked that Ingres include all of its self-identified Post-Divestiture Products, including OpenROAD 2006, in the 2007 Reseller Agreement.[42] For example, in its initial draft of a proposal for a reseller agreement that was circulated internally, CA included OpenROAD 2006 as one of the products to be included in the

[41] JX-1062 (email between Mike Kostow and Pam Fowler and Michael Lockhead (November 15, 2007)) ("We are in the process of completing a reseller arrangement with CA which is *primarily* focused around providing Ingres 2006 to EDS.") (emphasis added); Tr. at 282 (McCluer), 1474-75, 1485-86 (Kostow).
[42] Tr. at 309, 352, 362-63, 378, 382-83, 434 (McCluer), 1244, 1248, 1256-57 (Burkhardt), 1474-75 (Kostow), 1594 (Mosher).

agreement.[43] In its initial proposal communicated to Ingres, CA requested the ability to sell all of Ingres' products, including OpenROAD 2006.[44] In discussions of the terms of the proposed agreement, CA again insisted that the reseller agreement include all of Ingres products.[45] Finally, CA and Ingres also discussed how pricing would work for products other than the Ingres Database under the proposed reseller agreement, and CA requested that Ingres include its full price list with the executed agreement.[46]

Notably absent during these negotiations was any specific indication from CA that it still believed that Ingres would remain obligated to provide licenses for new versions of Legacy Products, such as OpenROAD 2006, for free under the terms of the Legacy Support Agreement after the execution of the 2007 Reseller Agreement. At most, CA has submitted evidence indicating that during

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[43] JX-29 (email between Laura McCluer and Ken Chin (September 17, 2007)).

[44] JX-7 (email between Laura McCluer and Roger Burkhardt (September 17, 2007)); JX-30 (email between Laura McCluer, Robert Stafford, and Dave Hamacher (September 17, 2007)); JX-284 (email between Laura McCluer, Robert Stafford, and Dave Hamacher (September 17, 2007)); JX-286 (email between Amy Olli, Laura McCluer and Ken Chin (September 25, 2007)); *see also* Tr. at 282-86 (McCluer), 1247-48 (Burkhardt), 1474-75, 1480-81 (Kostow). The name "OpenROAD 2006" does not appear as such in the 2007 Reseller Agreement. Rather, among others, the following products are listed: "OpenROAD Development," "OpenROAD for Windows Server," and "OpenROAD Application Specific Subscription." 2007 Reseller Agreement Ex. A. OpenROAD 2006 falls within these broader OpenROAD product categories. McCluer I Dep. at 169-72, 178-79.

[45] JX-288 (notes of Laura McCluer (August 29, 2007)).

[46] *See* JX-11 (email between Roger Burkhardt, Laura McCluer, Amy Olli, Ken Chin, and Mike Kostow (October 4, 2007)); JX-33 (email between Mike Kostow and Laura McCluer (October 8, 2007)); JX-34 (email between Mike Kostow and Laura McCluer (October 23, 2007)); JX-61 (email between Ken Chin, Richard Mosher, and Laura McCluer (November 12, 2007)), JX-62 (email between Mike Kostow, Laura McCluer, and Ken Chin (November 13, 2007)), JX-63 (email between Ken Chin and Mike Kostow (November 16, 2007)).

negotiations in August 2007,[47] CA's Amy Olli showed Ingres' CEO, Roger Burkhardt, a copy of a 2006 letter "reminding Ingres of their obligations under the EDS contract."[48] But CA's negotiators admit that they never pushed a more specific line than this, and that they knew that Ingres had refused to acknowledge that the Legacy Support Agreement required it to provide CA's Legacy Customers with new versions of OpenROAD or other Legacy Products. At trial, CA's McCluer admitted that she never told Ingres during the course of the negotiations that CA reserved the right to acquire Post-Divestiture Products under the Legacy Support Agreement after the entry of the 2007 Reseller Agreement.[49] She also testified that she did not recall CA's Amy Olli or Ken Chin, who were also part of the negotiating team, making such an assertion.

Put simply, CA never made clear at the bargaining table that it was CA's position that the 2007 Reseller Agreement was not a complete resolution of the parties' dispute over the so-called Post-Divestiture Products, but simply a contract that gave CA an additional contractual option for obtaining versions that Ingres deemed Post-Divestiture Products. That is, CA never told Ingres of its belief that it had two routes for obtaining licenses to Post-Divestiture Products: i) the Legacy Support Agreement; or ii) the 2007 Reseller Agreement. As CA now puts it, it

[47] *See* Tr. at 392 (McCluer) (recalling only one discrete instance during the negotiations of the 2007 Reseller Agreement when CA told Ingres that Ingres had to comply with the terms of the Divestiture Agreements).
[48] JX-282 (externally distributed conference call notes of Laura McCluer (August 29, 2007)).
[49] Tr. at 400 (McCluer).

simply added a 2007 Reseller Agreement belt to its Legacy Support Agreement suspenders as to the issue of obtaining Post-Divestiture Products. But CA never advanced that position specifically in the negotiations over the 2007 Reseller Agreement.[50]

Indeed, the trial record suggests that CA's negotiators did not themselves embrace the notion that the 2007 Reseller Agreement was intended to simply give CA another way of getting Post-Divestiture Products in addition to the Legacy Support Agreement, rather than in place of whatever rights were granted in the Legacy Support Agreement. Rather, CA's negotiators appear to have viewed the 2007 Reseller Agreement as the replacement bargain that resolved the dispute between CA and Ingres over that issue. For example, in an internal memorandum describing the process for ordering licenses under the 2007 Reseller Agreement, CA's McCluer wrote as follows:

> [T]here may be situations, where customers have required additional licenses of Ingres product from CA due to unique terms in their customer agreements (such [sic] EDS and CSC agreements) or where customers claim that as part of maintenance under the existing agreement they have with CA, they are entitled to a new version of an Ingres product released by Ingres during the maintenance term which Ingres claims is a "new" product and not covered by maintenance.
>
> *To address these unique situations*, we have established a reseller agreement with Ingres Corp. that allows CA to buy the relevant

[50] When asked why CA did not press this point with Ingres, McCluer said that they did not mention it because the point had already been raised earlier. *See id*. at 391 (McCluer). To the same question, Ken Chin admitted that the idea to mention CA's right to obtain licenses under the Legacy Support Agreement simply never occurred to him at the time. *See id*. at 580-81 (Chin).

> licenses from Ingres and furnish those licenses to customers to address contract terms or for customer satisfaction reasons. **Note that these licenses are furnished strictly at CA's expense and no additional fees are payable by the customer due to their agreement terms. Sales will not be compensated for the Ingres license.**[51]

McCluer's use of the word "unique" is telling for two reasons. Most obviously, it indicates that the 2007 Reseller Agreement dealt with "situations" where — as was the case with OpenROAD — "customers . . . as part of maintenance under the existing agreement they have with CA . . . are entitled to a new version of an Ingres product released by Ingres during the maintenance terms which Ingres claims is a 'new product' and not covered by maintenance." That is, the 2007 Reseller Agreement addressed the subject matter of the dispute CA was having with Ingres over so-called Post-Divestiture Products.

The word "unique" is also important for an economic reason. Internal CA documents indicate that the less contentious method of resolving this dispute by a new contract rather than immediate litigation was considered preferable because CA did not anticipate that its customers, such as EDS, would order many licenses for Ingres' Post-Divestiture Products. For example, CA estimated that "there is a potential for EDS to upgrade 50 licenses with a max of 100 during through [sic]

[51] JX-12 (memorandum attached to email between Laura McCluer and Mike Kostow (November 9, 2007)) (italicized emphasis added; otherwise original emphasis).

the balance of the EDS agreement term."[52] To the extent that things had panned out that way, CA's decision to compromise its dispute with Ingres by way of the 2007 Reseller Agreement would have likely made economic sense, as it would have cost less than a litigation battle that risked disrupting service to important Legacy Customers.

But, as we now know, CA drastically underestimated the new licenses it would be asked to provide under the 2007 Reseller Agreement. This failure in prediction not only fueled this litigation, it actually influenced the precise terms of the 2007 Reseller Agreement itself, which are discussed next.

(b) The Specific Terms Of The 2007 Reseller Agreement

By its terms, the executed 2007 Reseller Agreement allows CA to distribute licenses and support services for the products found on Ingres' standard price list[53] to certain approved end users, including EDS and CSC in particular.[54] Ingres' price list, which was attached as an exhibit to the 2007 Reseller Agreement, contained the Ingres Database, including Ingres 2006, and the OpenROAD software, including OpenROAD 2006.[55] In exchange for the ability to obtain these licenses, CA agreed to pay Ingres an up-front sum of $1,202,000 for up to sixty licenses of Ingres 2006 and to pay an additional $666.25 per month for any

[52] JX-286; *see also* JX-56 (estimating that EDS was using 100 Ingres licenses and budgeting approximately $1.4 million to cover Ingres licenses requested by all of CA's customers).
[53] JX-6 Ex. A (Ingres-CA Agreement (November 16, 2007)) ("2007 Reseller Agreement").
[54] *Id*. at § 2(A).
[55] *Id*. Ex. A.

additional license, subject to a 28% discount.[56] During the negotiations, CA had the opportunity to get a steeper discount in exchange for increasing the number of licenses it would pay for up front. But because CA did not believe that it would have to purchase many licenses under the 2007 Reseller Agreement, it refused that chance and accepted a lower discount.

The 2007 Reseller Agreement also contains two provisions addressing the Agreement's effect on prior agreements. In Section 15(M), the Agreement includes the following language:

> If CA (or any predecessor in interest to CA) has any prior reseller agreement ("Prior Agreement") with Ingres (or a Ingres predecessor or subsidiary) for any Products, this Agreement shall, subject to the below terms, supersede and replace the Prior Agreement, which shall be deemed terminated as of the effective date of this Agreement.[57]

Immediately thereafter, in Section 16, the 2007 Reseller Agreement states: "[t]his Agreement (including any attached Exhibits) is the complete and exclusive statement of the understanding between the parties and supersedes all prior agreements and representations between them relating to the subject matter of this Agreement."[58] Therefore, the 2007 Reseller Agreement superseded any prior reseller agreements and any other agreements relating to the same "subject matter" of the 2007 Reseller Agreement.

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[56] *Id*. Ex. D.
[57] *Id*. at § 15(M). In 2005, CA and Ingres executed a reseller agreement with a limited six-month term. *See* JX-5 (Ingres-CA Agreement (December 12, 2005)) ("2005 Reseller Agreement").
[58] *Id*. at § 16.

Exactly what the "subject matter" of the 2007 Reseller Agreement is a key issue in this case.

c. Ingres Embarks Upon A Clandestine Sales Campaign To EDS In The Wake Of The 2007 Reseller Agreement And Tries To Stick CA With The Resulting Bill

About one year after the 2007 Reseller Agreement was executed, EDS made an extremely large order —for over 60,000 licenses — for OpenROAD 2006 pursuant to its Universal Enterprise Agreement with CA. Although this massive order came out of nowhere from CA's perspective, the order was no surprise to Ingres. Rather, it was the outcome produced by a carefully targeted, secret marketing campaign Ingres directed at EDS to exploit CA's economic vulnerability in the wake of the 2007 Reseller Agreement.

Specifically, a high level Ingres executive, Steve Shine, conceived of a strategy to convince EDS to upgrade from OpenROAD 4.1 to OpenROAD 2006 using in large measure the notion that EDS could upgrade cost-free to OpenROAD 2006, because CA would be obliged to provide OpenROAD 2006 to EDS free of charge under the Universal Enterprise Agreement. Shine used as leverage Ingres' intention — which it had not shared with CA — to declare the end of life of OpenROAD 4.1. Shine therefore set out to convince EDS to move as rapidly as possible to OpenROAD 2006 and order that product through its Universal Enterprise Agreement with CA, arguing to EDS that it could therefore avoid paying for an OpenROAD 2006 license in 2011, when the Universal Enterprise Agreement with CA expired.

Shine is a bold and aggressive salesman; he is not a technical specialist. He moved swiftly to exploit what he saw as a chance to make big profits at CA's expense and develop a long-term relationship with EDS for Ingres. He began contacting EDS two weeks after the 2007 Reseller Agreement was signed.[59] Shine and those under his direction initiated this course of discussion, they were not responding to technical inquiries from EDS. Rather, Shine was acting like an aggressive salesman, pitching new business.

In March 2008, Shine and Ingres's Neil Warnock approached EDS to discuss the large installation of OpenROAD 4.1 at one of EDS' major customers, the Department of Work and Pensions of the British government (the "DWP").[60] At that time, Shine informed EDS that Ingres had decided to discontinue OpenROAD 4.1, meaning that Ingres would no longer support OpenROAD 4.1 free of charge after March 31, 2009.[61] In May 2008, Warnock recommended to EDS that it move its client DWP to OpenROAD 2006.[62] Shine told EDS that it would have to pay Ingres for extended support on OpenROAD 4.1 after March 2009, but that EDS would not have to pay Ingres to provide support on OpenROAD 2006 if EDS ordered it through its Universal Enterprise Agreement

[59] Tr. at 1533 (Kostow).
[60] JX-1269 (email between Irene Andrew, Neil Warnock, and Steve Shine (March 15, 2008)).
[61] Tr. at 1288-89 (Burkhardt).
[62] JX-1270 (email between Neil Warnock, Lukman Faily, and Richard Teale (May 20, 2008)); Tr. at 1174-75 (Warnock).

with CA.[63] In the summer and autumn of 2008, Shine continued to press EDS to convert to OpenROAD 2006.[64]

Upon EDS' request, Ingres gave EDS a temporary evaluation license for OpenROAD 2006 on September 16, 2008.[65] After receiving the evaluation license, EDS copied the license and installed OpenROAD 2006 on the DWP's system.[66] When providing the license, Shine requested confirmation that EDS would eventually order the OpenROAD 2006 licenses through its Universal Enterprise Agreement with CA.[67] EDS made that order for OpenROAD 2006 on September 18, 2008. But, because CA never actually executed the order for OpenROAD 2006 through the 2007 Reseller Agreement with Ingres, EDS only obtained access to OpenROAD 2006 because Ingres gave it the evaluation license.

Shine testified that his plan was to get EDS to ask CA for an update from OpenROAD 4.1 to OpenROAD 2006.[68] In March 2008, Shine described his plan to a colleague, Neil Warnock, as follows: "[w]e need to make sure they know that they have an impending commercial nightmare that if they take a pragmatic look

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[63] JX-1269; JX-1280 (email between Steve Shine and Neil Warnock (March 18, 2008)); Tr. at 807 (Shine).
[64] *Id*. at 776 (Shine); *see also* JX-1276 (email between Steve Shine, Deb Woods, and Michael Sale (September 2, 2008)); JX-1070 (email between Pam Fowler, Neil Warnock, Steve Shine, and Deb Woods (September 4, 2008)).
[65] Tr. at 785-86 (Shine) ("EDS requested a copy [of OpenROAD 2006] as soon as possible. We provided them with an evaluation copy."); *see also id*. at 1177 (Warnock); JX-275 (email between Tom Berquist, Terry Garnett, Mark Barrenechea, and Roger Burkhardt (July 20, 2006)).
[66] Tr. at 1208 (Warnock) ("Q. And in fact, EDS took the software that Ingres gave it and rolled it out to the DWP; isn't that right? A. They did.").
[67] *Id*.
[68] Tr. at 767 (Shine).

they could turn into a commercial win by leveraging their CA contract."[69] The "key messages" that Ingres sought to convey to EDS were as follows:

> You're in the crap if you don't agree something with us on the OpenROAD license by <date> because the CA bundled all-you-can-eat OpenROAD deal runs out and you have to come over to Ingres Corp. Further, unless you move from your current OpenROAD version you will also get caught up in more expensive legacy/lifeline support.
>
> We are in the unique — and time limited — position with CA whereby as part of an early OpenROAD 2006 upgrade deal, Ingres Corp. can offer substantial discounts and part funded service deals. CA will effectively be subsidizing this. The window on this is closing so a commitment needs to be made sooner rather than later.[70]

Therefore, Ingres' clear intent was to use the terms of EDS' deal with CA to Ingres' advantage.[71]

No one at Ingres, much less Shine, informed CA of the marketing campaign. Nor did Ingres inform CA of its intention to end of life Open Road 4.1 until nearly seven months after Ingres informed EDS.[72] This concealment was intentional, not inadvertent. Shine was trying to stick it to CA, and reap gains for Ingres in the process.

Shine's efforts at persuasion initially paid off. On September 18, 2008, EDS placed an order for OpenROAD 2006 through its Universal Enterprise

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[69] JX-1269.
[70] JX-1280; *see also* Tr. at 1188 (Warnock).
[71] *See* Tr. at 758 (Shine) (testifying that Ingres "wanted EDS to be our single largest channel partner").
[72] Ingres formally announced that OpenROAD 4.1 would be discontinued in the spring of 2009 on October 7, 2008. *See* JX-1124 (email between Neil Warnock, Roger Burkhardt, Mike Kostow, and Steve Shine (October 22, 2008)). In March 2008, Ingres told EDS of its intention to discontinue OpenROAD 4.1, but Ingres did not likewise inform CA. Tr. at 763 (Shine); *id*. at 1286 (Burkhardt); *id*. at 1499-1500 (Kostow).

Agreement with CA.[73] Upon receipt of the order, CA's McCluer forwarded the order to Ingres' Mike Kostow.[74] When forwarding, McCluer attached the spreadsheet that CA and Ingres typically used to track orders under the 2007 Reseller Agreement and asked Kostow, "[h]ow shall we record and handle this[?]" Therefore, it appears that McCluer was initially envisioning this order as falling under the 2007 Reseller Agreement. In his reply email, Kostow said, "We should plug this into the model I sent you for earlier transactions and derive the numbers for the 33 month period through June 2011. The numbers are going to be large and go above the pre-pay amounts."[75] In a later conversation, Kostow did the rough calculations and informed McCluer that the total amount that would be owed for EDS' order of over 63,000 licenses would be at least $25 million.[76] McCluer's initial response to the $25 million price tag was shock.[77] CA was not previously aware of the large OpenROAD installation at the DWP and thus never anticipated that EDS would place such a large order for OpenROAD 2006.[78]

Once McCluer realized the potential cost involved, she told Ingres "not to fulfill and hold until we can determine what we need to do."[79] McCluer then

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[73] *See* JX-1119 (email between Laura McCluer and Mike Kostow (September 22, 2008)).
[74] *Id*.
[75] JX-1121 (email between Mike Kostow and Laura McCluer (September 22, 2008)).
[76] JX-17 (email between Mike Kostow and Laura McCluer (September 22, 2008)); Tr. at 1496-98 (Kostow); McCluer Dep. I at 206.
[77] *Id*. at 326-27, 330, 448 (McCluer); *id*. at 1331-32 (Burkhardt); *id*. at 1553-54 (Kostow).
[78] *Id*. at 348-49, 406-07, 448-49 (McCluer). For example, an internal CA presentation analyzing the issues Ingres' position on "Post-Divestiture Products" was causing key Legacy Customers noted in regard to future EDS demand: "We have minimal knowledge of EDS' Ingres usage — verified 100 Ingres licenses in use." JX-114 (slide deck attached to email between Laura McCluer, Shari Siegel, George Cox, Ken Chin, Robert Stafford, and Dave Hamacher (August 21, 2007)).

forwarded the EDS order to a number of individuals within CA with a request to "strategize with Ken [Chin] on this because, ideally, it would be best if we did not have this obligation."[80] Shortly thereafter, CA's McCluer emailed Ingres' Pam Fowler, Vice President for Worldwide Support for Ingres, to get a sense of Ingres' current position on whether Legacy Customers had rights to updates.[81] McCluer asked, "[f]or those customers that have been using OpenRoad [sic] and were paying for maintenance, is this upgrade included for them, or is there a change to the license and maintenance fees. I am thinking about our legacy customers who have been using OR for awhile."[82] Fowler, who was not involved with the negotiations of any of the agreements between CA and Ingres, then replied, "[i]f a customer has a current valid license/support subscription they are entitled to move to OR 2006. So there isn't any issue for them."[83] At first glance, Fowler's response to McCluer's questions as to whether Legacy Customers had a right to updates to OpenROAD might suggest that Ingres viewed the Legacy Support Agreement to still be a viable mechanism for obtaining licenses to Post-Divestiture Products. But, Fowler's response is not, in my view, of any real interpretive weight. She is a technical support executive and was not involved in the negotiations of either the Divestiture Agreements or the 2007 Reseller

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[79] JX-728 (email between Robert Stafford, Dave Hamacher, and Ken Chin (September 29, 2008)).
[80] *Id*.
[81] JX-1054 (email between Laura McCluer and Pam Fowler (October 15, 2008)).
[82] *Id*.
[83] JX-1054.

Agreement.[84] Moreover, she appears to have simply said to McCluer that, if a customer had a license agreement with Ingres for OpenROAD, then it could pay fees. Her response does not at all seem to be an admission that CA's contractual rights amounted to a comparable license, especially when McCluer's question seems to suggest that EDS had been paying Ingres for maintenance and support.[85]

The strategy CA eventually chose was to take the position that the 2007 Reseller Agreement did not apply to EDS' order for OpenROAD 2006. On November 4, 2008, CA's Chin emailed Ingres' Kostow: "The fundamental business deal [in the Divestiture] was that Ingres would perform all of CA's obligations regarding Legacy Products under Legacy Contracts at no cost to CA or its customers."[86] Chin further noted that the only product excluded from the Legacy Support Agreement was version r3 of the Ingres Database and that "[t]here is no such exclusion for any other product."[87] Chin concluded, "Under the EDS Agreement, which is a Legacy Contract, EDS is entitled to new versions, new releases and upgrades of all Legacy Products and OpenRoad [sic] is a Legacy Product so EDS is entitled to OpenRoad [sic] 2006 at no cost under the Legacy Support Agreement."[88]

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[84] *See* Tr. at 1542 (Kostow) ("Q. [W]ho was Miss Fowler? . . . A. She interacted on how we were providing technical support. She wasn't involved in any of the contractual discussions.").
[85] *See* JX-1054 (limiting the question to "those customers . . . who were paying for maintenance").
[86] JX-1044 (email between Ken Chin, Richard Mosher, Laura McCluer, and Mike Kostow (November 4, 2008)).
[87] *Id*.
[88] *Id*.

In reply, Ingres repeated its earlier argument that OpenROAD 2006 was a Post-Divestiture Product that fell outside of the definition of Updates and Enhancements under the Legacy Support Agreement and the Universal Enterprise Agreement and therefore must be purchased by the terms of the 2007 Reseller Agreement. Ingres also took the position that, in any event, whatever obligations it owed to CA under the LSA had been superseded by the 2007 Reseller Agreement. Coincident with going to court over the OpenROAD issues, CA and Ingres also began to tangle about CA's use of the Ingres Database in a product it makes for Olympus. Because that is a discrete issue with its own complications, I address it later in this decision, after deciding the OpenROAD issues.

When the parties could not reconcile their different views of their respective obligations under the various agreements, they filed suit. On November 21, 2008, Ingres filed an action against CA in the Superior Court of California of San Mateo County (the "California Action"). In the California Action, Ingres alleges claims for breach of contract (Count I), declaratory relief that the 2007 Reseller Agreement governs the provision of Ingres products to EDS and Olympus (Count II), and an accounting relating to the orders placed for Ingres products by EDS and Olympus (Count III).[89]

On January 20, 2009, CA filed this action against Ingres. CA's complaint requested a preliminary and permanent injunction enjoining Ingres from prosecuting the California Action (Count I); requested a preliminary and

[89] California Action Compl. ¶¶ 23-24.

permanent injunction requiring Ingres to perform its obligations under the Legacy Support Agreement, the CA Support Agreement, and the License Agreement (Count II); alleged that Ingres breached the Legacy Support Agreement, the License Agreement, and the CA Support Agreement (Count III); and requested a declaratory judgment that the Legacy Support Agreement governs the provision of OpenROAD 2006 to EDS and that CA's use of Ingres 2006 in the Olympus EndoWorks software is permissible "embedding" within the meaning of the CA Support Agreement (Count IV).[90] This opinion addresses Counts I through IV and the parties' requests for attorneys' fees.

Because EDS was moving forward with its plan to install OpenROAD 2006 on the DWP's system in March 2009, CA requested expedited proceedings two days after filing its complaint in this action on January 20, 2009.[91] In the stipulated scheduling order that resulted from that request, the parties agreed that (1) all discovery obtained in the California Action could be used in this case; (2) all discovery would be complete by June 8, 2009; (3) pre-trial briefing would be complete by June 15, 2009; and (4) an expedited trial would be held in this court.[92]

Early in this litigation, CA urged EDS to stop using OpenROAD 2006 and to "roll back" to OpenROAD 4.1. Eventually in April 2009, EDS and CA reached

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[90] Compl. ¶¶ 179-219.
[91] *See CA, Inc. v. Ingres Corp.*, C.A. No. 4300-VCS, at 9 (Del. Ch. Feb. 11, 2009) (TRANSCRIPT) (discussing need to expedite proceedings on account of EDS' plan to roll out OpenROAD 2006 in March 2009).
[92] *CA, Inc. v. Ingres Corp.*, CA No. 4300-VCS (Del. Ch. Feb. 23, 2009) (ORDER) (setting a schedule for discovery, briefing, and trial).

an agreement that EDS would change course and recommend to the DWP that it roll back to OpenROAD 4.1.[93] As compensation, CA agreed to pay EDS $1 million to cover the cost of the roll back and to provide support for OpenROAD 4.1 free of charge.[94] Therefore, EDS used OpenROAD 2006 for only a limited time and only pursuant to the evaluation license that Ingres provided EDS in autumn 2008. EDS is now using OpenROAD 4.1 in the DWP installation.

III. Legal Analysis

Resolving this dispute requires the interpretation of several interrelated contracts. Complicating the analysis, the contracts do not all choose the same jurisdiction's law to govern each agreement. Although most of the contracts between CA and Ingres have New York choice of law provisions,[95] the 2007 Reseller Agreement includes a California choice of law clause.[96]

A. The Dispute Over OpenROAD

The parties' dispute over the terms and conditions under which CA can get access to OpenROAD 2006, and the consequences of the brief period EDS used OpenROAD 2006 raises three major issues. The first is whether the maintenance and support terms of the Legacy Support Agreement required Ingres to provide

[93] JX-385 (email from EDS to CA (email between Sam Greenblatt and John Swainson (April 2, 2009)) (confirming that EDS would roll back to OpenROAD 4.1).
[94] JX-308 (letter from Amy Olli to EDS (April 3, 2009)) ("EDS may elect to migrate from OpenROAD 2006 to OpenROAD v. 4.1 . . . . CA agrees to reimburse EDS for up to US$1,000,000 incurred by EDS on a cost and materials basis in connection with such migration efforts . . . . Further, CA hereby agrees to provide support to EDS for Ingres OpenROAD v. 4.1 at no additional cost to EDS."); *see also* JX-384 (email between CA and EDS finalizing the terms of the agreement).
[95] *See, e.g.*, Contribution Agreement § 11.10; Legacy Support Agreement § 6(g).
[96] 2007 Reseller Agreement § 15(B).

CA with new versions of Legacy Products that Ingres believed were so different and improved as to constitute Post-Divestiture Products. But, if Ingres had to provide OpenROAD 2006 as part of its maintenance and support obligations under the Legacy Support Agreement, then the second question is whether the 2007 Reseller Agreement, which allows CA to obtain OpenROAD 2006 only for a price, supersedes the Legacy Support Agreement as to the subject of obtaining OpenROAD 2006. If the 2007 Reseller Agreement supersedes the Legacy Support Agreement in that respect, then Ingres would not have to provide OpenROAD 2006 to Legacy Customers free of charge even though, absent the 2007 Reseller Agreement, Ingres would have had to provide OpenROAD 2006 as part of its maintenance and support obligations under the Legacy Support Agreement. But, even if the 2007 Reseller Agreement exclusively governs EDS' order for OpenROAD 2006, there is a third question — whether Ingres' contact with EDS encouraging EDS to order OpenROAD 2006 breached the Anti-Tampering Provision in the Contribution Agreement. If Ingres breached this fundamental provision in the Contribution Agreement and thereby itself caused EDS to briefly use OpenROAD 2006 then Ingres' improper conduct disentitles it to any relief.

For the reasons discussed below, my conclusion is that (1) Ingres would have had to provide OpenROAD 2006 to CA as part of the maintenance and support obligations it owed under the Legacy Support Agreement; (2) the 2007 Reseller Agreement supersedes the Legacy Support Agreement as to the terms and

conditions on which CA could get certain new versions of products like OpenROAD; and (3) Ingres breached the Anti-Tampering Provision in the Contribution Agreement, and therefore must eat the costs caused by its own breaching conduct.

1. EDS Is Entitled To OpenROAD 2006 Under The Legacy Support Agreement

a. Contract Interpretation Under New York Law

Under New York law, the role of the court in interpreting contracts is to give effect to the intent of the parties.[97] "The best evidence of what parties to a written agreement intend is what they say in their writing."[98] Thus, a written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms.[99] A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion."[100] In examining a contract to find the parties' intent as to a particular section, the court should look to the entirety of the agreement in the context of the parties' relationship instead of isolating distinct provisions.[101]

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[97] *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 859 N.E.2d 498, 500 (N.Y. 2006); *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2002).
[98] *Slamow v. Del Col*, 594 N.E.2d 918, 919 (N.Y. 1992).
[99] *R/S Assoc. v. New York Job Dev. Auth.*, 771 N.E.2d 240, 242 (N.Y. 2002), *rearg. denied*, 775 N.E.2d 1291; *Giancontieri*, 566 N.E.2d at 642.
[100] *Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280, 1282-83 (N.Y. 1978), *rearg. denied* 46 N.Y.2d 940, 415 N.Y.S.2d 1027, 388 N.E.2d 372.
[101] *In re Roconda*, 688 N.E.2d 248, 252 (N.Y. 1997).

If the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity.[102] But, if the agreement is found to be ambiguous, the court then may consider extrinsic evidence, including trade usage and the parties' course of dealing or performance.[103] New York's version of the Uniform Commercial Code defines trade usage as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts."[104] The New York Uniform Commercial Code defines course of dealing as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."[105] And, finally, in regard to course of performance, the New York Uniform Commercial Code states that "[w]here the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to

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[102] *Teichman v. Cmty. Hosp. of W. Suffolk*, 663 N.E.2d 628, 630 (N.Y. 1996) ("[C]ourts give unambiguous terms their plain and ordinary meaning, and courts may not make or vary contract of insurance to accomplish their notions of abstract justice or moral obligation.")

[103] *See* N.Y.U.C.C. § 2-202(a) (McKinney 1964) (explaining that written contract terms "may be explained or supplemented . . . by course of dealing or usage of trade . . . or by course of performance") (internal citations omitted).

[104] N.Y.U.C.C. § 1-205(2).

[105] *Id*. at § 1-205(1).

determine the meaning of the agreement."[106] The New York Uniform Commercial Code also indicates how these three types of extrinsic evidence are to be weighed together:

> The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.[107]

Therefore, where the meaning of the written terms of the contract is ambiguous, New York law analyzes the parties' course of performance, their course of dealing, and finally the customs and usage of the relevant industry to ascertain the agreement's meaning.

b. Ingres' Obligations Under The Legacy Support Agreement

The Legacy Support Agreement requires Ingres to "perform and discharge, *at no cost, expense or charge* to [CA] or any Support Recipient, all Legacy Support Obligations that have not been performed or discharged as of the Closing Date, whenever arising or accruing . . . ."[108] The Legacy Support Agreement defines "Legacy Support Obligations" as:

> all obligations that [CA] is required to perform or discharge with respect to the provision of maintenance and support for Legacy Products under any Legacy Contract . . . including, in each case, *First Level Support, Second Level Support and any other obligations with respect to provision of maintenance and support as to any*

[106] *Id*. at § 2-208(1).
[107] *Id*. at § 2-208(2) (emphasis added).
[108] Legacy Support Agreement § 2(a) (emphasis added). "Support Recipient" is defined as "a customer of [CA] that is a party to a Legacy Contract." *Id*. at § 1.

> *Legacy Contract to the extent (and only to the extent) that such First Level Support, Second Level Support or other obligation arises under such Legacy Contract*.[109]

Therefore, this definition links Ingres' support obligations to the particular requirements of the Legacy Contracts. But, as the italicized language above indicates, the Legacy Support Agreement added its own gloss to the support obligations as found in the Legacy Contracts: rather than simply incorporating the Legacy Contracts' support requirements, the definition adds that Ingres' support obligations include "First Level Support, Second Level Support and any other obligations with respect to provision of maintenance and support."[110] Therefore, I will examine both whether the support obligations under the Universal Enterprise Agreement between CA and EDS require Ingres to provide OpenROAD 2006 to EDS free of charge and whether the Legacy Support Agreement's gloss on the Universal Enterprise Agreement's requirements alters Ingres' obligations in any relevant respect.

i. The Definitions Of "Update" Under The Legacy Support Agreement And "Enhancement" Under The Universal Enterprise Agreement

As discussed above, the Legacy Support Agreement provides three tiers of support services.[111] "First Level Support" includes providing a call center to receive customer calls and diagnosing problems.[112] Therefore, there is no question that provision of OpenROAD 2006 is not required under First Level Support,

[109] *Id*. at § 1 (emphasis added).
[110] *Id*.
[111] *Id*.
[112] *Id*.

which is essentially a commitment to provide a call center with the ability to identify problems and not a commitment to provide software.

"Second Level Support," however, includes not only problem diagnosis but also the resolution of problems and the "provision of Maintenance Releases and Updates for all Legacy Products."[113] It is this definition of Second Level Support that introduces the possibility that Ingres must provide EDS OpenROAD 2006 as an Update to a Legacy Product. The Legacy Support Agreement defines "Updates" as "new releases of [the Legacy Products] that are intended to provide additional functionality, but not including Ingres r3 or any new release or Maintenance Release thereof."[114] This definition raises the key question: is OpenROAD 2006 an Update of OpenROAD 4.1, a Legacy Product to which EDS already held a license?[115] If OpenROAD 2006 is an Update of OpenROAD 4.1, then, under § 2(a) of the Legacy Support Agreement, Ingres must provide OpenROAD 2006 to EDS at no charge.

But, the Legacy Support Agreement also provides a third tier of support by requiring Ingres to meet "any other obligations with respect to provision of maintenance and support." This language is important because, if OpenROAD 2006 does not fit the definition of Update under the Legacy Support Agreement, Ingres may still have to provide it if a Legacy Contract requires. Indeed, the Universal Enterprise Agreement between CA and EDS sets forth a number of

[113] *Id.* (emphasis added).
[114] *Id.*
[115] Tr. at 1322-24 (Burkhardt); Tr. at 759-60 (Shine).

"Basic Maintenance and Support" obligations that CA owes EDS. These maintenance and support terms, found in Section 5 of the Universal Enterprise Agreement, entitle EDS to maintenance and support — including updates — for "Licensed Software" at no additional charge.[116] In its definitional section, the Universal Enterprise Agreement defines "Licensed Software" as "all software . . . and all *Enhancements* thereto" that are owned, acquired, designed, developed, or licensed by CA.[117] Section 5.3 of the Universal Enterprise Agreement defines "Enhancements" as follows:

> Enhancements, Upgrades, Etc. Licensors shall, from time to time and in accordance with Licensors' then-existing delivery policies and procedures, provide Licensees with notice of and, upon the request of any Licensee, copies of all improvements, developments, modifications, *upgrades, updates*, additions, extensions, expansions, *new versions*, new releases, flashes, program temporary fixes and *other changes* of or to the Licensed Software made generally available by Licensors to their licensees and customers (collectively, "Enhancements") . . . .[118]

Because this language entitling EDS to Enhancements to Licensed Software is found in the Universal Enterprise Agreement's maintenance and support terms, it falls within the Legacy Support Agreement's third tier of support — "any other obligations with respect to provision of maintenance and support." Therefore, an additional question arises: whether OpenROAD 2006 is an Enhancement of Licensed Software as defined in the Universal Enterprise Agreement. The inquiry under this third-tier question and the inquiry under the definition of Second Level

[116] Universal Enterprise Agreement § 5.1.
[117] *Id*. at § 1 (emphasis added).
[118] *Id*. at § 5.3 (emphasis added).

Support in the Legacy Support Agreement are very similar: under Second Level Support, one asks whether OpenROAD 2006 is an "Update"; under the third tier of the Universal Enterprise Agreement, one asks whether OpenROAD 2006 is an "Enhancement."

Before analyzing these two inter-related questions, I must first address Ingres' arguments that interpreting these provisions is not as straightforward as it may appear. First, Ingres argues that these provisions must be interpreted in the "context" of maintenance and support. That is, Ingres believes that these obligations are only triggered when there is a problem in the software that requires maintenance, the implication being that, unless EDS identified a problem with OpenROAD 4.1, it was not entitled to an update to OpenROAD 2006. Ingres' basis for this argument is the sequential nature of the support obligations, which proceed from simple problem identification and troubleshooting in First Level Support to the provision of updates in Second Level Support. In other words, under this interpretation, EDS would not have access to updates under Second Level Support until First Level Support had been exhausted.

I find this argument unconvincing for several reasons. First, there is no language in the Legacy Support Agreement itself that expressly *conditions* Second Level Support on the exhaustion of First Level Support. Furthermore, Ingres has provided no evidence indicating that the parties understood the support obligations in this manner. The parties were addressing maintenance and support in the context of enterprise software. Customers of such software make a deep

investment and want all the support needed for that investment to pay off. Such support may require the provision of a new release or version; for example, a version of accounting software that addresses a new FASB rule. The Legacy Support Agreement itself defies Ingres' view by incorporating in the framework of maintenance and support a broad definition of Update. In this respect, Ingres is simply advancing a confined view of the commercial context that is unrooted in the parties' actual bargaining or the dynamics that existed between CA and its legacy customers.

Most important, the Legacy Support Agreement's inclusion of a third tier defies Ingres' blinkered understanding of maintenance and support. Likely for the precise reason that the maintenance and support needs of enterprise software customers are varied and memorialized in idiosyncratic contracts, the Legacy Support Agreement bound Ingres more broadly to provide maintenance and support as to the Legacy Products to whatever extent CA was required to do so in a Legacy Contract. Thus, the Universal Enterprise Agreement does not include the identical First Level/Second Level structure that is used in the Legacy Support Agreement and evidences the broader meaning that maintenance and support has in the enterprise software context.

Ingres' second argument is that EDS cannot get OpenROAD 2006 under the Universal Enterprise Agreement because EDS does not have a license to OpenROAD 2006 per Section 4.1 of the Universal Enterprise Agreement. Section 4.1 states in relevant part: "(a) [CA] shall deliver to [EDS], from time to time and

in accordance with [CA's] then-existing delivery policies and procedures, such number of copies of Licensed Software and related Documentation as shall be requested by [EDS]."[119] Ingres argues that OpenROAD 2006 is not "Licensed Software"[120] because it was not "owned, acquired, designed or developed" by CA, it was not licensed to CA by Ingres, and it was not licensed to EDS itself. Because the maintenance and support obligations under Section 5.3 of the Universal Enterprise Agreement only apply to products which have been licensed under Section 4.1, Ingres argues that EDS is not entitled to OpenROAD 2006 under Section 5.3.

But, Ingres' argument that EDS cannot receive OpenROAD 2006 as an update under Section 5.3 misreads the plain language of the Universal Enterprise Agreement. This is because, although EDS may not have a license to OpenROAD 2006, it does have a license to OpenROAD 4.1. That is, OpenROAD 4.1 falls within the definition of Licensed Software in the Universal Enterprise Agreement because EDS has a license to it already. Therefore, by falling within the definition of "Licensed Software," which includes not only licensed products but also "all Enhancements thereto," OpenROAD 4.1 provides a basis for access to its Enhancement, OpenROAD 2006.[121] To argue that EDS needs a new license under Section 4.1 for OpenROAD 2006 is to disregard the plain language of the

[119] Universal Enterprise Agreement § 4.1(a).
[120] *See supra* note 21 and accompanying text (discussing definition of Licensed Software in the Universal Enterprise Agreement).
[121] Universal Enterprise Agreement § 4.1(a).

definition of Licensed Software and to undermine the purpose of the maintenance and support obligations, which was to provide a means for EDS to receive improvements to Legacy Products for which it already had a license.

So, despite Ingres' attempt to complicate the issue, the analysis required under the Legacy Support Agreement is as simple as it first appears: the key issue is whether OpenROAD 2006 is an "Update" under the Legacy Support Agreement or an "Enhancement" under the Universal Enterprise Agreement.

ii. OpenROAD 2006 Is An "Update" Under The Legacy Support Agreement And An "Enhancement" Under The Universal Enterprise Agreement

Because the question under the Legacy Support Agreement — whether OpenROAD 2006 is an Update of OpenROAD 4.1 — is conceptually similar as whether OpenROAD 2006 is an Enhancement under the Universal Enterprise Agreement, I will analyze these issues together. My conclusion is that OpenROAD 2006 is both an Update for the purposes of the Legacy Support Agreement and an Enhancement under the Universal Enterprise Agreement, and therefore Ingres would have to provide OpenROAD 2006 to EDS free of charge.

As noted above, the key language in the Legacy Support Agreement defines "Updates" as "new releases of [the Legacy Products] that are intended to provide additional functionality."[122] CA argues that OpenROAD 2006 is an Update because it is a release related directly to OpenROAD 4.1.[123] Ingres argues that OpenROAD 2006 is not an Update but an entirely "new product," which is so

[122] *Id.*
[123] CA's Op. Post-Trial Br. at 14-18.

different from OpenROAD 4.1 that EDS is required to procure a new license before having access to it.[124]

OpenROAD 2006 is an Update under the Legacy Support Agreement because it falls within a plain reading of the language "new releases . . . that are intended to provide additional functionality." First, the evidence shows that internal communications within Ingres described OpenROAD 2006 as "the *latest release* of the [OpenROAD] software."[125] Furthermore, the evidence shows that OpenROAD 2006 introduces a range of new features that were not available in OpenROAD 4.1.[126] Therefore, OpenROAD 2006 falls within a straight-forward interpretation of the definition of Update in the Legacy Support Agreement: it is a new release with additional functionality.

Nevertheless, Ingres argues that this new functionality is so beyond what was available in OpenROAD 4.1 that OpenROAD 2006 must be considered an entirely separate product. First, Ingres points to a number of OpenROAD 2006's new features, namely a change to the software's "Workbench," the addition of new plug-in modules, JAVA connectivity, integration with Microsoft.NET applications, portlet support, the ability to deploy the application on a handheld PDA, http routing support, and the accommodation of different languages.[127] Ingres also argues that (1) OpenROAD 2006 uses a different business model than

[124] Ingres' Op. Post-Trial Br. at 38.
[125] JX-1070 (email between Pam Fowler, Neil Warnock, Steve Shine, and Deb Woods (September 4, 2008)) (emphasis added).
[126] *See, e.g.*, Tr. at 1154 (Warnock) (discussing new features).
[127] Ingres' Op. Br. at 41-42; *see also* Tr. at 1154-57, 1213, 1232-34.

OpenROAD 4.1 — namely, OpenROAD 2006 moved to a subscription model, which includes both the license and the right to support, from OpenROAD 4.1's model, which sold a license and a support contract separately — and (2) OpenROAD 2006 is open-source engineered, which means that OpenROAD 2006 customers can benefit from innovations created by developers working outside of Ingres, and therefore differs fundamentally from OpenROAD 4.1.

I reject Ingres' arguments for a number of reasons. First, Ingres provides no contractual grounds for its position. The term "new products" is not defined in the Legacy Support Agreement. Ingres argues that this means that OpenROAD 2006 does not fall within the language of the definition of Update in the Agreement. Because some of the Legacy Contracts include clauses that expressly entitle the Legacy Customer to access to "new products," Ingres argues that CA could have bargained for such a clause in the Legacy Support Agreement but did not. But, the definition of Update in the Legacy Support Agreement is broad — it is simply "new releases . . . that are intended to provide additional functionality." As Ingres must have been aware at the time of drafting, language this broad applies to not just routine fixes, such as bug patches, but also more extensive improvements to the software. But Ingres did not bargain for a definition of "new product" that would have clearly drawn the line between incremental improvements and entirely new pieces of software. Therefore, Ingres does not have the benefit of a contract term for which it could have bargained but did not obtain.

Second, if there were any ambiguity in whether OpenROAD 2006 is an Update under the Legacy Support Agreement (which there is not), the available extrinsic evidence contradicts Ingres' interpretation of the facts. Ingres documents describing OpenROAD 2006 indicate that Ingres viewed it internally as an update to OpenROAD 4.1. For example, the OpenROAD 2006 "Release Summary" describes "those changes made to existing features [of OpenROAD 4.1] and includes a list of any features removed from th[at] product for OpenROAD 2006."[128] That is, the Release Summary makes explicit that the link between OpenROAD 2006 and its predecessor, OpenROAD 4.1, is one of incremental improvement. This explicit discussion of how the next generation of the software improves upon the prior belies the argument that OpenROAD 2006 is an entirely new product because the discussion shows that OpenROAD 2006 directly builds upon OpenROAD 4.1. The language of the release summary is indicative: "Several *enhancements* were made to the OpenROAD Debugger. These enhancements *improve* the developer's ability to build, test, and deploy OpenROAD applications."[129] This language illustrates that OpenROAD 2006 adds additional functionality and therefore is an update to, and not a departure from, the OpenROAD 4.1 software.

[128] JX-1199 at eINGRES032161 (Ingres document (December 2006)). For example, the Release Summary discusses the changes between OpenROAD 4.1 and OpenROAD 2006's "workbench" interface. *Id*. at eINGRES032162.
[129] *Id*. (emphasis added).

Third, the conceptual line separating "update" from "new product" is not nearly as sharply defined as Ingres suggests. The difference between an update and a new software product is not arithmetical — there is no magical threshold past which adding bells and whistles to a pre-existing piece of software will suddenly transform those additions from a mere update to a full-blown new product. Rather, as one would expect in an industry characterized by long-term relational contracting, the decision to designate an improvement to a piece of software an update to be given free to clients as part of their existing license and support arrangements — Version 4.2 of a product with a series beginning with 4.0 — or an entirely new product for which clients must pay by bargaining for a new license — Version 5.0! — is a business judgment about what the market will bear.[130] That is, if the developer has sufficient market power, it may choose to deem a new development a so-called "new product" and attempt to require a new round of higher licensing fees, rather than an update to an existing product, regardless of the actual technical differences between the new and the existing software. Here, Ingres had a greater than ordinary incentive to take the position that OpenROAD 2006 was an entirely new product because it was insulated, through the unique way the Divestiture was structured, from any relational fallout from the decision to announce the end of life of OpenROAD 4.1 because many of

[130] *See, e.g.*, JX-69 (email between John Swainson and John Livingston (December 29, 2005)) (noting that "CA will make its designation of an Update, Upgrade, or New Version based on applicable *business, technological, or other relevant criteria*") (emphasis added).

the users were Legacy Customers of CA, not customers of Ingres. In other words, perhaps because it did not stand to lose as many of its own long-term customers as would have been typical, Ingres took the position that OpenROAD 2006 was an entirely new product in order to take advantage of the terms of the Divestiture Agreements, which placed the burden of maintaining relationships with Legacy Customers on CA.

Under the Universal Enterprise Agreement, Ingres' obligation to provide OpenROAD 2006 as an Enhancement is even clearer. The Universal Enterprise Agreement defines "Enhancements" capaciously to include "all improvements, developments, modifications, *upgrades*, *updates*, additions, extensions, expansions, *new versions*, new releases, flashes, program temporary fixes and *other changes* of or to the Licensed Software."[131] Per the analysis discussed immediately above in the context of the Legacy Support Agreement's definition of Update, OpenROAD 2006 falls within this definition: *i.e.*, the new functionality of OpenROAD 2006 not only makes it an Update under the Legacy Support Agreement but also an "improvement," "development," "modification," "upgrade," "new version," "update," etc. under the definition of Enhancements in the Universal Enterprise Agreement.

Again, if there were any ambiguity in the meaning of Enhancement, the extrinsic evidence shows that OpenROAD 2006 falls within the definition provided in the Universal Enterprise Agreement. Documents relating to the

[131] Universal Enterprise Agreement § 5.3.

release of OpenROAD 2006 refer to OpenROAD 2006 using some of the designations listed in the Universal Enterprise Agreement's definition of Enhancement. For instance, with the release of OpenROAD 2006, Ingres published a document entitled "Ingres Best Practices: *Upgrading* from OpenROAD 4.1 to OpenROAD 2006."[132] This manual, which uses language such as "[u]pgrading OpenROAD 4.1 to OpenROAD 2006 is straightforward and inexpensive,"[133] makes it clear that OpenROAD 2006 is an "upgrade" within the definition of Enhancements in the Universal Enterprise Agreement. Furthermore, internal Ingres emails discuss "upgrading" OpenROAD 4.1 to OpenROAD 2006: for example, in reference to EDS' decision to move to OpenROAD 2006, Ingres' Neil Warnock wrote, "If [EDS] remain[s] on [OpenROAD] 4.1 beyond Mar 31, 2009 our recommended fix for new reported problems is to *upgrade* to OR2006 — EDS/DWP cannot risk *upgrading* OpenROAD via an overnight emergency patch."[134] Also, the press release announcing the end of life of OpenROAD 4.1 referred to OpenROAD 2006 as "our most current *version* of OpenROAD,"[135] suggesting that OpenROAD 2006 is a "new version" under the meaning of Enhancements in the Universal Enterprise Agreement. In summary, a number of internal Ingres documents refer to OpenROAD 2006 in terms identical to those that define an Enhancement under the Universal Enterprise Agreement.

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[132] JX-1200 (Ingres document (2006)) (emphasis added).
[133] *Id*. at eINGRES049348.
[134] JX-1125 (email between Roger Burkhardt, Mike Kostow, and Steve Shine (October 22, 2008)) at eINGRES118096.
[135] *Id*. at eINGRES11098 (emphasis added).

In conclusion, Ingres' argument that OpenROAD 2006 is not an Update under the Legacy Support Agreement fails. Ingres is obligated to provide OpenROAD 2006 to EDS free of charge on two grounds: first, its obligations to provide Updates under the Legacy Support Agreement; and second, the requirement for it to fulfill the maintenance and support obligations in the Universal Enterprise Agreement between EDS and CA.

2. The 2007 Reseller Agreement Supersedes The Legacy Support Agreement As To The Subject Matter Of CA's Access To Post-Divestiture Versions Of Legacy Products

But, although Ingres is required to provide OpenROAD 2006 to EDS under the terms of the Legacy Support Agreement and the Universal Enterprise Agreement, Ingres may not have to give OpenROAD 2006 free of charge if the 2007 Reseller Agreement supersedes the portions of the Legacy Support Agreement that deal with the same subject matter. The 2007 Reseller Agreement allows CA to obtain an enumerated list of Ingres products for a price — so, if the 2007 Reseller Agreement controls, then EDS can only receive licenses to OpenROAD 2006 after CA has purchased those licenses from Ingres. Therefore, the next question is whether the 2007 Reseller Agreement was the exclusive means for CA to obtain the OpenROAD 2006 licenses needed to fulfill EDS' order.

a. Contract Interpretation Under California Law

By its terms, the 2007 Reseller Agreement is governed by California Law.[136] Like New York law, California law requires the court interpreting a contract to focus upon the parties' intentions.[137] The starting place for this analysis, under both states' laws, is the parties' agreement.[138] Where the meaning of the agreement's terms is clear, both California and New York law require the court to honor that meaning.[139]

But there is a difference between California and New York law in how extrinsic evidence is used to resolve any ambiguities in a contract's written language. New York law, which follows the traditional rule, allows the court to examine extrinsic evidence only when the contract's written terms appear ambiguous.[140] Under New York law, extrinsic evidence is not admissible to create an ambiguity in a contract whose meaning is otherwise clear.[141] But, where the written language is facially ambiguous, extrinsic evidence, such as the parties' course of dealing or performance, can be referenced in order to resolve the

[136] 2007 Reseller Agreement § 15(B).
[137] *Compare* Cal. Civ. Code § 1636 (requiring that contracts be interpreted "to give effect to the mutual intention of the parties as it existed at the time of contracting") *with Wallace v. 600 Partners Co*., 86 N.Y.2d 543, 548 (N.Y. 1995).
[138] *City of Manhattan Beach v. Superior Court*, 13 Cal. 4th 232, 238 (Cal. 1996); *Hensler v. City of Los Angeles*, 124 Cal. App. 2d 71, 77-78 (Cal. 1954). *Greenfield v. Philles Records, Inc*., 98 N.Y.2d 562, 569 (N.Y. 2002); *Brainard v. N.Y. Cent. R. Co*., 242 N.Y. 125, 133 (N.Y. 1926).
[139] *County of San Diego v. Ace Prop. & Cas. Ins. Co*., 37 Cal. 4th 406, 415 (Cal. 2005). *Greenfield*, 98 N.Y.2d at 569.
[140] *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (N.Y. 1990).
[141] *Id*. at 163.

ambiguity.[142] Under California law, however, extrinsic evidence may be used to explain the meaning of a contract even if the contract appears unambiguous on its face.[143] The logic behind the California approach is that the meaning of a contract "can only be found by interpretation in light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended."[144] In summary, the difference between the treatment of extrinsic evidence under California and New York law is one of sequence: New York law considers extrinsic evidence only after an ambiguity is found, while California law uses extrinsic evidence during the initial determination of whether an ambiguity exists.

In the end, these differences are not consequential because the precise scope of the subject matter of the 2007 Reseller Agreement and its superseding effect on the Legacy Support Agreement cannot be determined from the face of the 2007 Reseller Agreement. As Ingres itself admits, the Legacy Support Agreement remains in effect and is superseded only in part by the CA Support

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[142] *State v. Home Indem. Co*., 66 N.Y.2d 669, 671 (N.Y. 1985).
[143] *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37 (Cal. 1968) ("The test of extrinsic evidence to explain the meaning of a written instrument is not whether [the contract] appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.").
[144] *Id*. at 38; *accord Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (Cal. 2006) (quoting *Pacific Gas*, 69 Cal. 2d at 37); *Garcia v. Truck Ins. Exchange*, 36 Cal. 3d 426, 435 (Cal. 1984) (same).

Agreement.[145] Determining the precise scope of supersession requires consideration of the parol evidence. I undertake to determine that scope now, considering the relevant parol evidence to help interpret the contractual text.

b. The Effect Of The 2007 Reseller Agreement On Ingres' Obligations Under The Legacy Support Agreement

i. The 2007 Reseller Agreement Governs The EDS Order For OpenROAD 2006 Exclusively

My interpretation of the 2007 Reseller Agreement, the negotiations that led to the Agreement, and the parties' performance under the Agreement leads me to conclude that the Agreement addresses the subject matter of the terms on which CA could procure new versions of Legacy Products, such as OpenROAD 2006, that Ingres claimed were Post-Divestiture Products, so long as Ingres treated the new version as a new product as to all customers, not just CA.

The first question in analyzing the subject matter supersession issue is whether the 2007 Reseller Agreement applies to EDS' order for OpenROAD 2006 at all. CA argues that the 2007 Reseller Agreement's purpose was only to address the gap in the Divestiture Agreements relating to the Ingres Database. That is, because the open source version r3 database was carved out of the Divestiture Agreements, CA had no contractual basis to obtain Ingres 2006, the successor to version r3, when Ingres made access to Ingres 2006 available only through paid

[145] *See, e.g.*, Tr. at 1580 (Mosher) ("The legacy support agreement has ongoing obligations of the parties to provide the first- and second-level support as described in there for legacy contracts. The 2007 agreement from the very beginning was, as I understand, to allow CA to purchase products that were described in the exhibit for their customers, in particular EDS and CSC.").

subscription. Therefore, CA argues that the 2007 Reseller Agreement was only meant to plug this gap and not to address licenses for other Ingres products, such as OpenROAD.

Although access to Ingres 2006 was the main concern driving the negotiation of the 2007 Reseller Agreement,[146] that contract's scope is not limited to that single product line. Under the 2007 Reseller Agreement, CA obtained the right to distribute and provide support for specifically identified Ingres products to specifically identified End Users.[147] The terms "Products" and "Support Services" in the 2007 Reseller Agreement include OpenROAD 2006. "Products" is defined to mean "all or any portion of the commercially available object code software products specified in Exhibit A" to the Agreement.[148] OpenROAD 2006 is one of the Products listed in Exhibit A.[149] Also, the "Support Services" apply to OpenROAD 2006 because they are defined to include "support and maintenance services provided by Ingres related to the use of the Products."[150] EDS is also an "End User" under the 2007 Reseller Agreement, which defines "End User" as "EDS and CSC and their respective customer(s) whereby such party is licensed to use the Products pursuant to a Legacy Contract as defined in the Contribution and

[146] *See, e.g.*, JX-1062 (email between Pam Fowler, Mike Kostow, and Michael Lockhead (November 16, 2007)) (mentioning that the "reseller arrangement with CA . . . is *primarily* focused around providing Ingres 2006 to EDS") (emphasis added).
[147] 2007 Reseller Agreement § 2(A).
[148] *Id*. at § 1.
[149] *See supra* note 44 (discussing how OpenROAD 2006 falls within the broader categories listed in Exhibit A of the 2007 Reseller Agreement).
[150] 2007 Reseller Agreement § 1.

Stockholders Agreement."[151] Therefore, the EDS order of OpenROAD 2006 falls within the terms and conditions of the 2007 Reseller Agreement.

Furthermore, the negotiations leading up to the 2007 Reseller Agreement indicate that the parties intended the Agreement to apply to OpenROAD, not just the Ingres Database. The evidence at trial showed that the 2007 Reseller Agreement was intended to be a global agreement that would allow CA to purchase Ingres' products and then provide those products to its Legacy Customers, such as EDS.[152] CA requested that the 2007 Reseller Agreement be a global agreement covering all Ingres products because it was facing customer requests for products other than the Ingres Database, including OpenROAD.[153]

For example, during the negotiations, the CA team sent an email to Ingres' CEO proposing that the 2007 Reseller Agreement would cover "[p]otential volumes of 300 licenses of Ingres 2006 (*plus potential for other Ingres Corp. products such as OpenRoad* [sic])."[154] In response, Ingres' CEO agreed that "[o]ther products, including OpenRoad [sic], can be included as part of this reseller agreement."[155] In a later email, CA repeated its proposal that the 2007 Reseller Agreement "would include Ingres 2006 and any other divested

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[151] *Id.*
[152] JX-114 (discussing key legacy customers request for upgrades, including OpenROAD, and the need for a "global corporate Reseller agreement with Ingres" to address the problem); *see also* Tr. at 295, 307-309, 387-88, 441-42 (McCluer); *id*. at 552-53 (Chin); *id*. at 1235-42, 1253-54, 1264 (Burkhardt); *id*. at 1472-73, 1492-93 (Kostow).
[153] *See supra* notes 35 through 38 and accompanying text. *See also* JX-114 (discussing requests from various customers for Ingres 2006 and OpenROAD 2006).
[154] JX-284 (emphasis added).
[155] JX-289 (email between Laura McCluer, Amy Olli, and Ken Chin (October 4, 2007)) .

product."[156] During the negotiations, CA also "required that the new product licenses include *all Ingres products that were divested and not just the Ingres DB* [database]."[157] Later, CA clarified that pricing for OpenROAD licenses would be handled in the same fashion as pricing for Ingres 2006.[158] Furthermore, the Ingres price list which provided the basis for pricing licenses under the 2007 Reseller Agreement listed the OpenROAD product line.[159] In her testimony, CA's McCluer said that these requests to include all of Ingres' products in the 2007 Reseller Agreement were made because CA was concerned about meeting the requests from customers such as CSC and ONS, and not only EDS.[160] Notes from the negotiations also confirm that CA specifically requested coverage for "CSC license requests for additional, legacy product (non Ingres 2006)."[161] Therefore,

[156] JX-31 (email between Amy Olli, Laura McCluer, and Ken Chin (September 25, 2007)) (emphasis in original).
[157] JX-32 (emphasis added).
[158] *See* JX-34 ("If we agree to the 100 processors pre-pay in the model below, then we can put a volume discount in place for any future ordering of Ingres product — [the Ingres Database], OpenRoad [sic], etc. Go-forward pricing would include the volume discount and the prepay discount for multi-year subscriptions.").
[159] *See* JX-1020 (email between Mike Kostow, Laura McCluer, Ken Chin, and Richard Mosher (November 13, 2007)). In August 2008, Ingres sent CA an updated price list, which again listed OpenROAD. JX-1043 (email between Richard Mosher, Ken Chin, Laura McCluer, Mike Kostow, and Sharon Stetson (August 28, 2008)).
[160] *See* Tr. at 383 (McCluer) ("Q. And [the discount under the 2007 Reseller Agreement is] for all the customers, including the other legacy customers that we were talking about a moment ago, whether it's ONS; right? A. It was specifically, we thought, for ONS or . . . CSC.").
[161] JX-282; *see also* JX-288 (notes of negotiations indicating that "CA stressed that the reseller agreement was not only to address EDS requests but would be needed to support customers with [Legacy Contracts] who have new product clauses in their contracts as well as CSC").

CA itself bargained for OpenROAD products to be included in the 2007 Reseller Agreement.

CA's second argument is that, even though the 2007 Reseller Agreement covers the EDS order, it still had a right to obtain the OpenROAD 2006 licenses for free under the Legacy Support Agreement. That is, CA argues that the 2007 Reseller Agreement was simply an *additional* mechanism — secondary to the Legacy Support Agreement — by which it could obtain licenses for Ingres products. Therefore, CA argues that its right to free updates under the Legacy Support Agreement was never extinguished or waived. Ingres, on the other hand, argues that the 2007 Reseller Agreement supersedes the Legacy Support Agreement and, therefore, serves as the exclusive means for CA to obtain OpenROAD 2006 licenses.

Although some in CA may have internally viewed the 2007 Reseller Agreement as an insurance policy that would give it a second mechanism for acquiring licenses other than the Legacy Support Agreement,[162] that is not the bargain CA struck with Ingres. First, the integration clause that was included in the 2007 Reseller Agreement expressly indicates that the Agreement supersedes prior agreements covering the same subject matter. Specifically, Section 16 of the 2007 Reseller Agreement states: "[t]his Agreement (including any attached

[162] *See, e.g.*, JX-724 (email between Robert Stafford and Laura McCluer (October 11, 2007)) (indicating that "the purpose of [a reseller] agreement we put into place is not to endorse Ingres but to protect us in our EDS obligations and to do the best we can to minimize the cost and risk of addressing these obligations").

Exhibits) is the complete and exclusive statement of the understanding between the parties and supersedes all prior agreements and representations between them relating to the subject matter of this Agreement." The term "subject matter" is not defined anywhere in the 2007 Reseller Agreement.

But, for well over a year before the 2007 Reseller Agreement was negotiated, Ingres had been refusing to provide upgrades to what it deemed Post-Divestiture Products to CA and its Legacy Customers.[163] At that time, Ingres also began suggesting that a reseller agreement would be a solution.[164] Therefore, it was clear to CA that Ingres (1) refused to provide licenses to Post-Divestiture Products under the terms of the Legacy Support Agreement and (2) meant for a reseller agreement to be the sole mechanism by which such licenses could be obtained. In other words, it was clear that, from Ingres' position, the "subject matter" of the Legacy Support Agreement relating to the contested new versions of Legacy Products and the proposed reseller agreement would be the same.

[163] *See, e.g.*, JX-101 (email between George Cox and Dave Hamacher (March 2, 2006)) (showing a dispute between CA and Ingres over support for existing licenses); JX-106 (email between George Cox and Dev Mukherjee (April 17, 2006)) (disputing whether Ingres had to provide upgrades for free); JX-109 (stating that "Ingres 2006 is a new product and therefore not part of our agreements with CA, or CA with EDS" and that "[o]ther Ingres products (e.g. Open ROAD [sic]) will be treated the same as the equivalent database products"); JX-110 (stating that "[n]ew products announced after the divestiture (e.g. Ingres 2006) are outside the scope of the agreement"); *see also* JX-707; JX-265.

[164] *See* JX-106 (suggesting that "[Ingres] could put in place a standard reseller agreement" to handle requests for upgrades to Post-Divestiture Products).

CA's own internal communications reveal that it understood that the subject matter of the agreements overlapped.[165] Furthermore, at trial, CA's employees testified that they understood at the time that Ingres was refusing to provide licenses to its self-defined set of Post-Divestiture Products unless the licenses were provided under the terms of a new reseller agreement.[166] Critically, CA understood that Ingres took the position that new versions of OpenROAD were Post-Divestiture Products and that Ingres refused to acknowledge any obligation to provide new versions of OpenROAD under the Legacy Support Agreement.[167]

But, despite understanding Ingres' negotiating position, CA never pushed its claim that it still had a right to licenses to Post-Divestiture Products under the Legacy Support Agreement during the negotiations of the 2007 Reseller Agreement. The only evidence that CA ever asserted its right to licenses for Post-Divestiture Products, such as OpenROAD 2006, during the negotiations of the 2007 Reseller Agreement is found in notes of a discussion between CA and Ingres in August 2007.[168] When asked why CA did not press this point with Ingres,

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[165] *See, e.g.*, JX-714 (email between Dave Hamacher, Robert Stafford, and Laura McCluer (May 29, 2007)); JX-724; JX-59.
[166] Tr. at 395-96 (McCluer); Tr. at 579 (Chin).
[167] CA's McCluer testified that she understood that Ingres claimed that OpenROAD 2006 was a Post-Divestiture Product and therefore that Ingres did not have to provide it to CA or its customers free of charge. Tr. at 362-63 (McCluer); *see also id*. at 376 (McCluer) ("Q. And Ingres had made unequivocal to you that it was not going to supply for free post-divestiture products; right? A. Yes. Q. And that included OpenROAD 2006; right? A. That was their position. Q. And they were taking that position . . . through to this 2007 agreement; right? A. Yes.").
[168] *See supra* notes 47 through 50 and accompanying text; *see also* Tr. at 392 (McCluer) (recalling only one discrete instance during the negotiations of the 2007 Reseller

McCluer said that they did not mention it because the point had already been raised earlier.[169] To the same question, Ken Chin admitted that the idea to mention CA's right to obtain updates for EDS under the Legacy Support Agreement simply never occurred to him at the time.[170]

Indeed, internal CA communications suggest that CA itself understood that the 2007 Reseller Agreement would be the exclusive mechanism for legacy customers' orders for Post-Divestiture Products. Most specifically, CA's McCluer drafted an internal CA memorandum describing the purpose of the 2007 Reseller Agreement as follows:

> [T]here may be situations, where customers have required additional licenses of Ingres product from CA due to unique terms in their customer agreements (such [sic] EDS and CSC agreements) or where customers claim that as part of maintenance under the existing agreement they have with CA, they are entitled to a new version of an Ingres product released by Ingres during the maintenance term which Ingres claims is a "new" product and not covered by maintenance.
>
> *To address these unique situations, we have established a reseller agreement with Ingres Corp*. that allows CA to buy the relevant licenses from Ingres and furnish those licenses to customers to address contract terms or for customer satisfaction reasons. **Note that these licenses are furnished strictly at CA's expense and no additional fees are payable by the customer due to their agreement terms. Sales will not be compensated for the Ingres license.**[171]

Agreement when CA told Ingres that Ingres had to comply with the terms of the Divestiture Agreements).

[169] *See id*. at 391 (McCluer).

[170] *See id*. at 580-81 (Chin).

[171] JX-12 (emphasis added); *see also* JX-59.

This internal CA document demonstrates that CA understood the 2007 Reseller Agreement, not the Legacy Support Agreement, to be the mechanism for fulfilling orders for Post-Divestiture Products, such as OpenROAD 2006. Indeed, in her deposition testimony, CA's McCluer described the 2007 Reseller Agreement as the only way CA could peaceably obtain licenses to Post-Divestiture Products for its customers.[172]

As discussed previously, the record suggests that CA relented in the face of Ingres' obstinacy because it believed that resolving the dispute about access to Ingres 2006, the successor to version r3 of the Ingres Database, and new versions of other Legacy Products was preferable to litigation. Because CA had no route to getting Ingres 2006, it was in a difficult spot on that point. And as to the dispute over other Post-Divestiture Products, CA had customers who wanted updates in real time, not after years of litigation. Having made the calculus that the amount of orders it would have to place for Post-Divestiture Products would not be material enough to outweigh the benefits of resolving the dispute then and there

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[172] McCluer testimony was as follows:

> Q. So the 2007 agreement gave you a way to provide Open Road [sic] 2006 to CSC, correct?
>
> A. Correct.
>
> Q. And you had no other way of supplying that Open Road 2006 [sic] to CSC, correct?
>
> A. We had no other way to supply it because Ingres refused to adhere to their contract obligations. So because Ingres refused to address their contract obligations we had — we had no way to supply the product anyway.

McCluer Dep. II at 36.

without litigation, CA made a deal that compromised the Post-Divestiture Product issue in a manner favorable to Ingres.[173] The economic calculus behind CA's decision is illustrated by the fact that it declined the chance to pre-pay for a higher amount of licenses under the 2007 Reseller Agreement in exchange for a higher discount, a decision that suggests that CA did not think it would have to purchase many licenses under the 2007 Reseller Agreement. CA's initial response to EDS's order of OpenROAD 2006 was to consider what filling that order under the 2007 Reseller Agreement would cost. Only when CA learned to its horror that OpenROAD was licensed on a per processor basis and that EDS's installation at the DWP had over 60,000 processors, did CA scramble back to arguing for Ingres to live up to its maintenance and support obligations under the Legacy Support Agreement. But Ingres had already taken the position that it did not have to provide new versions of OpenROAD and other Legacy Products under the Legacy Support Agreement because those versions were Post-Divestiture Products. It was that bargaining position that led to the 2007 Reseller Agreement, an agreement that deals with the subject matter of how CA can get access to versions of Legacy Products that Ingres has deemed to be Post-Divestiture Products.

[173] *See* Tr. at 384 (McCluer) ("Q. And there was a thinking that you would buy the products of OpenROAD that you thought you were entitled to for free, but you would buy them under the 2007 agreement to end the dispute; right? A. To end a concern with ONS. If we had to, we would do that. We had done a business analysis, and it made sense that we would have to do that."); *see also id*. at 387 (McCluer) ("Q. So you're negotiating this reseller agreement so that you can procure this product to make it easy for your customers; right? A. Yes. Q. That's the purpose of this reseller agreement, so that you can provide — meet your customers' needs; right? A. So we can meet our contract obligations, yes.").

Therefore, I conclude that the 2007 Reseller Agreement supersedes the Legacy Support Agreement in regard to Legacy Customers' ability to obtain licenses to OpenROAD 2006. But, this holding does not mean that Ingres can designate Legacy Products as Post Divestiture Products at its whim. That is, Ingres cannot pick and choose to whom a new version is an update, to be provided for free, or a Post-Divestiture Product, for which the customer must pay by procuring a new license or subscription agreement. Unless Ingres treats a new version of a Legacy Product as a Post-Divestiture Product for *all* its customers, and not simply for CA, Ingres remains obligated to provide maintenance and support for the Post-Divestiture Product as required by the Legacy Support Agreement. This is because the 2007 Reseller Agreement is a "global" agreement meant to provide CA access to new products as they are presented generally to the market. That is, CA cut the deal it did in the 2007 Reseller Agreement because Ingres took the position that *all* customers — not just CA's Legacy Customers — had to pay for access to Post-Divestiture Products because those were new products that Ingres created after the Divestiture. As to improvements, updates, new versions, etc. of Legacy Products that are not treated by Ingres as entirely new products as to *all* customers, Ingres must honor all of its maintenance and support obligations under the Legacy Support Agreement.

ii. Because Its Breach Of The Anti-Tampering Provision In The Contribution Agreement Inspired EDS' Short-Term Use Of OpenROAD 2006, Ingres Is Not Entitled To Compensation For EDS' Brief Use Of That Product

Because the 2007 Reseller Agreement governed the EDS order placed for OpenROAD 2006 in October 2008, Ingres argues that it is entitled to payment under the price terms of the Agreement for those OpenROAD licenses requested by EDS. Under the terms of the 2007 Reseller Agreement, CA would have to pay Ingres $29,020,502 for the OpenROAD 2006 licenses ordered by EDS. This figure is based upon an order of 63,110 licenses[174] at $19.16 per processor per month,[175] taken over the 33 month period called for by the 2007 Reseller Agreement.[176] This total, $39,903,191, is subject to $10,882,689 worth of discounts,[177] which brings the alleged total amount owed to $29,020,502.

But, although the 2007 Reseller Agreement governed the EDS order for OpenROAD 2006, Ingres cannot recover damages for EDS' temporary use of

[174] EDS placed an order for 63,100 licenses for OpenROAD 2006 on September 18, 2008. JX-16.

[175] Under the 2007 Reseller Agreement, the cost of OpenROAD 2006 is $230 per year per processor. 2007 Reseller Agreement Ex. A. Therefore, the monthly cost of OpenROAD 2006 is $19.16.

[176] The parties agreed that orders placed for EDS under the 2007 Reseller Agreement would be multi-year subscriptions running from the date of the order through the end of the Universal Enterprise Agreement's term. Tr. at 1483-84 (Kostow). The Universal Enterprise Agreement between EDS and CA has a termination date of June 30, 2011. Universal Enterprise Agreement § 5. Therefore, the relevant time period is from September 18, 2008 to June 30, 2011, or 33 months.

[177] The 2007 Reseller Agreement identifies two discounts applicable to the amount owed to Ingres for EDS' order of OpenROAD 2006: first, a 20% volume discount; and second a discount that in the event that "CA commits to subscriptions in excess of twelve (12) months, Ingres shall apply an additional eight percent (8%) discount against the base price for each subsequent twelve (12) month period or portion thereof." 2007 Reseller Agreement Ex. D.

OpenROAD 2006 because the EDS order resulted from Ingres' repeated breaches of the Anti-Tampering Provision in the Contribution Agreement.

Specifically, Ingres breached the Contribution Agreement by surreptitiously encouraging EDS to upgrade to OpenROAD 2006. The Contribution Agreement's Anti-Tampering Provision prohibited Ingres from discussing the making of a new contract between Ingres and Legacy Customers until the terms of those Customers' Legacy Contracts expired.[178] Ingres was only allowed to respond to customer inquiries and to discuss technical issues.[179]

Despite this Anti-Tampering Provision, Ingres secretly approached EDS for the purpose of convincing EDS to recommend to its client, the DWP, to upgrade to OpenROAD 2006 and to request the licenses for that upgrade through EDS' Universal Enterprise Agreement with CA. In March 2008, Ingres' Steve Shine, Executive Vice President of Worldwide Operations, informed EDS — but not any other Legacy Customer and, importantly, not CA — that Ingres was going to discontinue support for OpenROAD 4.1.[180] During the summer of 2008, Shine had meetings with EDS to convince them to use OpenROAD 2006 instead of OpenROAD 4.1.[181] On September 3, 2008, an internal Ingres email suggested that

[178] Contribution Agreement § 4.9; *see supra* note 8 and accompanying text.
[179] *Id.*
[180] *E.g.*, Tr. at 761-63 (Shine); Tr. at 1285-86 (Burkhardt); JX-1279 (email between Neil Warnock, Steve Shine, Simon Cattlin, and Deb Woods (September 11, 2008)); JX-1124 (email between Neil Warnock, Roger Burkhardt, Mike Kostow, and Steve Shine (October 22, 2008)); JX-1276. Ingres did not tell any other customer that it intended to declare end of life for OpenROAD 4.1 until October 7, 2008. JX-1122 (email between Mike Kostow and Laura McCluer (October 10, 2008)).
[181] Tr. at 776 (Shine).

Ingres should relax its deadline for discontinuing OpenROAD 4.1, but not tell EDS in order to keep the pressure on EDS to upgrade to OpenROAD 2006.[182] Shine responded to the email, "No announcement to go out to customers for 48 hours while I see if I can solve this [directly] with EDS."[183] Thereafter, Shine contacted Paul Jennings at EDS and told him it would be risky for the DWP to remain on OpenROAD 4.1.[184]

These discussions were in clear breach of the Anti-Tampering Provision in the Contribution Agreement. Ingres cannot credibly argue that these were "technical" discussions within the meaning of Section 4.9(d) of the Contribution Agreement. Indeed, Shine described the purpose of his communications with EDS in unmistakable terms. On March 14, 2008, Shine sent an email to Ingres' Neil Warnock and others in which he stated, "We need to make sure they [EDS] know they have an impending commercial nightmare that if they take a pragmatic look they could turn into a commercial win by leveraging their CA contract."[185] A few days later, on March 17, 2008, Warnock sent an email to Shine summarizing Ingres' message to EDS as follows:

> You're in the crap if you don't agree something with us on the OpenROAD license by <date> because the CA bundled all-you-can-eat OpenROAD deal runs out and you have to come over to Ingres Corp. Further, unless you move from your current OpenROAD

[182] JX-1067 (email between Steve Shine, Bill Maimone, Joseph Kronk, and Deb Woods (September 3, 2008)).
[183] *Id.*
[184] JX-1070; *see also* Tr. at 766 (Shine).
[185] JX-1269.

> version you will also get caught up in more expensive legacy/lifeline support.
>
> We are in the unique—and time limited—position with CA whereby as part of an early OpenROAD 2006 upgrade deal, Ingres Corp. can offer substantial discounts and part funded service deals. CA will effectively be subsidizing this. The window on this is closing so a commitment needs to be made sooner rather than later.[186]

Furthermore, in an internal email chain beginning May 16, 2008, Shine asked Ingres' Mike Kostow what EDS had ordered under the 2007 Reseller Agreement because Shine wanted to know if there was "precedent" for an order from EDS for OpenROAD.[187] When Kostow sent a list of orders under the 2007 Reseller Agreement showing that EDS had not ordered any OpenROAD licenses, Shine replied, "So there has not been any Openroad [sic] draw down against the EDS/CSC contract? Shame as it would be good to get some 'precedent' in [p]lace before the storm hits!"[188] As these internal documents indicate, Ingres was not contacting EDS to discuss technical issues but was orchestrating a secret campaign to stick CA with the bill for EDS' upgrade to the latest version of OpenROAD. Indeed, Shine, a slick sales executive, lacked the necessary technical expertise that would allow him to address such issues with EDS.[189]

Therefore, EDS' decision to order OpenROAD 2006 through its Universal Enterprise Agreement came about only because of Ingres' repeated breach of the

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[186] JX-1280; *see also* Tr. at 1188 (Warnock).
[187] JX-1113 (email between Steve Shine, Mike Kostow, and Roger Burkhardt (May 19, 2008)).
[188] *Id.*
[189] *E.g.*, Tr. at 816-17 (Shine) (admitting that he was "[a]bsolutely not" the lead technical person over the Ingres Database).

Anti-Tampering Provision in the Contribution Agreement. It is doubtful that EDS, a long-time customer of CA, would have unilaterally stuck CA with such a disproportionately large charge to get a product for which it did not have an urgent need because OpenROAD 4.1 was working just fine at the time.[190] The Anti-Tampering Provision was designed in large measure to prevent Ingres from exploiting the vulnerability CA faced as a result of the Divestiture. Ingres flouted both the letter and spirit of that provision with its secretive campaign to convince EDS to deviate from the existing products it was using from CA and use a new product. The intent of Ingres' campaign was for Ingres to obtain new contractual rights[191] at CA's expense and secure a long-term relationship with EDS around

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[190] Ingres' Neil Warnock testified that EDS did not need to upgrade to OpenROAD 2006 at the time:

> Q. [W]e were covering the fact that OpenROAD 2006 is not an essential component of the services that [Ingres] offers. Do you remember that?
>
> A. That is correct.
>
> Q. And isn't it correct that nothing was stopping EDS, either from a technical or practical matter, from staying at [OpenROAD] 4.1?
>
> A. That is correct.
>
> Q. And there was no urgency for EDS to move to OpenROAD 2006?
>
> A. That's correct.

Tr. at 1182 (Warnock).

[191] Under the terms of the 2007 Reseller Agreement, CA was required to notify Ingres whenever a potential customer indicated interest in an Ingres product. 2007 Reseller Agreement § 3.A. The customer would then license the software directly from Ingres, through a new Enterprise License Agreement. *Id*. at § 3.A.1. But, if the customer was either "unable or unwilling" to license directly from Ingres, then it could sub-license the software from CA on "substantially the same terms" as those found in Ingres' standard Enterprise License Agreement. *Id*. at §§ 2.A, 3.A.1. Therefore, under either approach, new contract rights would be forged that would be advantageous to Ingres. Ingres'

OpenROAD 2006, a relationship secured by sticking the initial costs to CA. Moreover, even if it could somehow be seen as not a technical violation of the letter of the Anti-Tampering Provision, this clandestine, tricky sales campaign was so clearly contrary to the relationships forged by the Divestiture Agreements as to constitute contractual bad faith and therefore a rare instance of a breach of the implied covenant of good faith and fair dealing.[192] It is against such contact with customers that the Anti-Tampering Provision was created as a safeguard to protect CA against precisely the sales tactics employed, and Ingres cannot now reap a windfall — the $29 million Ingres is demanding for the OpenROAD 2006 licenses is 39% of the $75 million value placed on all of the Ingres assets divested in 2005[193] — by brazenly breaching a provision in an important overarching agreement governing the Divestiture. Indeed, Ingres had a perfectly appropriate option available to it for approaching EDS: in September 2007, CA offered to "facilitate a meeting between EDS and Ingres in order for Ingres to discuss its plans and offerings with EDS and provide an opportunity for Ingres to establish a

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argument that CA is culpable for negotiating with EDS to get EDS to roll back to OpenROAD 4.1, demonstrates that Ingres viewed itself as forming a new contractual relationship with EDS around OpenROAD 2006.

[192] *See Dalton v. Educational Testing Service*, 87 N.Y.2d 384, 389 (N.Y. 1995) (stating that the implied covenant of good faith and fair dealing requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract") (internal citations omitted); *see also* GLEN BANKS, NEW YORK CONTRACT LAW § 11:23, at 440 (2006) ("The covenant of good faith and fair dealing binds each party to refrain from taking action that would deprive the other party of the fruits of the contract.").

[193] CA's Op. Pre-Trial Br. at 17.

direct relationship and agreement with EDS for its offerings."[194] But, rather than take CA up on its offer for a three-way meeting between CA, Ingres, and EDS, Ingres instead chose to work with EDS behind CA's back. Why? Because it wanted to gain a huge windfall at CA's expense.

Ingres nevertheless argues that CA's behavior in working with EDS and agreeing that EDS would roll back to OpenROAD 4.1 was equally improper. To wit, after the CA-Ingres dispute boiled over into expedited litigation as EDS was beginning to implement OpenROAD 2006 at the DWP, CA and EDS reached an accord on terms by which EDS would change course and recommend to the DWP that it roll back to OpenROAD 4.1.[195] As compensation, CA agreed to pay EDS $1 million to cover the cost of the roll back and to provide support for OpenROAD 4.1 free of charge.[196] Ingres argues that CA entered into this agreement to avoid its contractual commitments to Ingres under the 2007 Reseller Agreement.[197]

But, Ingres' argument overlooks the important fact that Ingres' contractually-prohibited tampering alone was responsible for EDS' temporary use of OpenROAD 2006. Upon EDS' request, it was Ingres, not CA, that gave EDS a

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[194] JX-284.
[195] JX-385 (confirming that EDS would roll back to OpenROAD 4.1).
[196] JX-308 ("EDS may elect to migrate from OpenROAD 2006 to OpenROAD v. 4.1 . . . . CA agrees to reimburse EDS for up to US$1,000,000 incurred by EDS on a cost and materials basis in connection with such migration efforts . . . . Further, CA hereby agrees to provide support to EDS for Ingres OpenROAD v. 4.1 at no additional cost to EDS."); *see also* JX-384 (email between John Swainson, Sam Greenblatt, and Amy Olli (April 1, 2009)) (finalizing the terms of the agreement).
[197] Ingres' Op. Pre-Trial Br. at 29-30.

temporary evaluation license for OpenROAD 2006 on September 16, 2008.[198] When providing the license, Shine requested a confirmation that EDS would eventually order the OpenROAD 2006 licenses through its Universal Enterprise Agreement with CA.[199] EDS made that order for OpenROAD 2006 on September 18, 2008. It is notable, however, that CA never completed the order for the OpenROAD 2006 licenses through the 2007 Reseller Agreement, although it initially passed EDS' request on to Ingres. Therefore, Ingres only has itself to blame for any harm it has experienced from EDS' brief use of OpenROAD 2006.

In that respect, EDS only used OpenROAD 2006 in its installation at the DWP for about one month,[200] and therefore any harm Ingres suffered was immaterial. Indeed, Ingres does not really seek damages; rather, it seeks a gotcha award of an exorbitant amount of money for an "order" that CA never actually placed. There was nothing inappropriate in CA trying to protect its key relationship with EDS after Ingres' tampering scheme came to light. Ingres has suffered no compensable damages, and it cannot demand a court of equity to reward it for its bad faith scheming at the expense of its contractual partner.[201]

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[198] Tr. at 785-86 (Shine); *see also id*. at 1177 (Warnock); JX-275.
[199] *Id*.
[200] EDS began its upgrade to OpenROAD 2006 at its installation at the DWP in March 2009. Tr. at 1177 (Warnock) (noting that the DWP does "two code drops per year, one in March, one in October"). Therefore, because EDS had agreed to roll back to OpenROAD 4.1 by April 2, 2009, EDS used OpenROAD 2006 for only approximately one month.
[201] Under both New York and California law, "[a] party in breach of its contractual obligations may not thereafter seek to enforce the contract for its own advantage." BANKS, NEW YORK CONTRACT LAW § 20:24, at 755 (2006); *Castle Creek Tech. Partners, LLC v. CellPoint Inc*., 2002 WL 31958696, at *7 (S.D.N.Y. Dec. 9, 2002) ("When a

B. The Olympus Dispute

The dispute about EDS' access to OpenROAD 2006 is not the only contested matter in this case, however. Ingres also claims that CA owes Ingres a large amount of money for the licenses to Ingres 2006 it has sold to Olympus America Inc.-Medical Systems Group ("Olympus").

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party to a contract has breached the agreement . . . either by acting in bad faith or by violating an express covenant within the agreement, it may not later rely on that breach to its advantage."); *Kirke La Shelle Co. v. The Paul Armstrong Co.*, 188 N.E. 163, 167-68 (N.Y. 1933) (holding that party that had breached one provision within a contract could not rely on that breach to avoid its obligations under a different provision); *Int'l Marble and Granite of Colo., Inc v. Cong. Fin. Corp.*, 465 F. Supp. 2d 993, 1003-04 (C.D. Cal. 2006) (appling California law and stating that "[i]t is elementary that one party cannot compel another to perform while he himself is in default under the contract"); *Brown v. Dillard's, Inc*., 430 F.3d 1004, 1010 (9th Cir. 2005) ("A bedrock principle of California contract law is that '[h]e who seeks to enforce a contract must show that he has complied with the conditions and agreements of the contract on his part to be performed.'") (citations omitted); *Potero Homes v. W. Orbis Co*., 28 Cal. App. 3d 450, 458 (Cal. Ct. App. 1972) (following "the fundamental tenet that a 'person cannot take advantage of his own act or omission to escape contract liability'") (citations omitted); *Andrews v. Horton*, 8 Cal. App. 2d 40, 44 (Cal. App. Ct. 1935) (following the "elementary [principle] that one party cannot compel another party to perform while he is himself in default under the contract"). Furthermore, under New York and California law, "a material breach excuses the nonbreaching party from any further obligation of performance under the contract." BANKS, NEW YORK CONTRACT LAW § 20:24, at 755 (2006); *Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc.*, 361 F. Supp. 2d 283, 291 (S.D.N.Y. 2005) (stating that under New York law "[a] fundamental principle of contract law provides that the material breach of a contract by one party discharges the contractual obligations of the non-breaching party"); *cf. Nijjar v. Mittal*, 2006 WL 3307457, at *6 (Cal. App. Ct. Nov. 15, 2006) ("[A] nonperforming party is liable for any breach of contract, but the other party is discharged from further performance, and is entitled to substantial damages only when there is a material breach.") (citing 23 WILLISTON ON CONTRACTS § 63:3, 438); *Filet Menu, Inc. v. C.C.L. & G., Inc.*, 79 Cal. App. 4th 852, 861 (Cal. Ct. App. 2000) ("If either [party to a contract] has committed a material breach of contract, or has by repudiation manifested an intention to commit such a breach, the other party should be excused from the obligation to perform further.") (quoting 6 WILLISTON ON CONTRACTS § 864, 289-90); *Vineland Homes v. Barish*, 138 Cal. App. 2d 747, 759 (Cal. Ct. App. 1956) ("Performance by the party not in fault is always excused by the wrongful refusal to perform by the other party."); RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981) ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.").

1. Factual Background Relating To Olympus

The following are the facts relevant to the Olympus dispute between CA and Ingres.

a. The Relationship Between CA And Olympus

Before the Divestiture, CA had been using the Ingres Database — primarily versions 2.5 and 2.6 but also version r3 — as a component in a number of other products which CA sold. CA planned to continue this practice in the future, and thus CA needed to retain the contractual right to do so after the Divestiture was consummated. Therefore, as part of the Divestiture, Ingres licensed to CA the right to embed Ingres software within CA's products on a perpetual basis.[202] Because CA would have the right to continue embedding the Ingres Database into CA's products, CA also needed to secure support from Ingres for the Database when embedded. Therefore, in the CA Support Agreement, CA bound Ingres to provide support for the Ingres Database when used in this fashion.[203]

One of the customers for whom CA embedded the Ingres Database is Olympus, a medical equipment producer, supplier, and servicer that is a subsidiary of the large Japan-based optics manufacturer. In November and December 1999, Olympus and CA entered into several agreements to complete a joint venture,[204]

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[202] *See* License Agreement § 2(d).
[203] *See* CA Support Agreement §§ 1-2.
[204] *See* JX-201 (CA Global Professional Services Statement of Work for Olympus America, Inc. (November 30, 1999)) ("Statement of Work"); JX-202 (EndoWorks Development Services Agreement (December 2, 1999)); JX-203 (Independent Software Vendor Agreement (November 30, 1999)) ("ISV Agreement").

the purpose of which was for CA to "provide services for the development of an imaging software application entitled EndoWorks."[205] EndoWorks is a medical imaging system, used for endoscopy procedures. Under the agreements, CA does not own any "right, title, or interest" to the EndoWorks product, and CA's efforts were "work made for hire."[206] CA's obligations under the agreements comprised three main components: (1) CA was to develop the application software for EndoWorks, which involved providing technical software development, business and medical subject matter expertise, and manufacturing and delivering a finished product; (2) CA was also to give ongoing support for EndoWorks; and (3) CA was to supply a medical lexicon with sentence construction capabilities to be used for procedure reporting.[207]

CA and Olympus also have a contractual arrangement that allows Olympus to resell licenses for the Ingres Database product along with its EndoWorks system.[208] This contract is referred to as the Independent Software Vendor Agreement (the "ISV Agreement"). Under the terms of the ISV Agreement, Olympus agreed to provide first level support to end users of the EndoWorks

[205] JX-202.
[206] *Id*. at §2(a).
[207] Statement of Work at CA0720182.
[208] ISV Agreement; *see also* JX-204 (Amendment No. 3 to Independent Software Vendor Agreement (December 31, 2003)); JX-206 (Amendment No. 4 to Independent Software Vendor Agreement (January 31, 2008)); JX-215 (Amendment No. 5 to Independent Software Vendor Agreement (March 31, 2009)); Tr. at 677-78 (Burrell).

product, and CA agreed to provide second level support.[209] That agreement was most recently amended in March 2009.[210]

The EndoWorks software required a relational database to record information collected during endoscopy procedures, and the database that CA used when building the EndoWorks product was the Ingres Database.[211] Therefore, the Divestiture of the Database to Ingres caused a similar problem to that discussed above in the context of the EDS dispute: namely, CA had to contractually bind Ingres to meet the support commitments CA owed to Olympus in regard to the Database. To do so, CA and Ingres entered into the CA Support Agreement, which required Ingres to provide second level support in situations where CA had the right to embed Ingres products.[212] In other words, if Olympus encountered a problem with the EndoWorks software, it would contact CA, who would then bring in Ingres if second level support for the embedded Ingres Database were necessary.[213]

b. After The Divestiture, Ingres Provides Second Level Support To Olympus Under The Terms Of The CA Support Agreement

Shortly after CA spun off the Ingres business in 2005, Olympus contacted CA's Darren Burrell, the manager of the Olympus account, to request assurance that the Divestiture would not affect the support services for EndoWorks to which

[209] ISV Agreement § 4.2.
[210] JX-204; JX-206; JX-215.
[211] *Id.*; *see* JX-1264 (e-mail between Steve Shine and Christopher Arisian (October 13, 2008)) (explaining that "Ingres technology is embedded in the EndoWorks product").
[212] CA Support Agreement § 2(b).
[213] Tr. at 647:11–24 (Burrell).

Olympus was entitled.[214] According to the testimony of CA's McCluer, this concern arose in the autumn of 2006 because an Ingres sales executive had told Olympus that CA could no longer support the embedded product and that, therefore, Olympus would have to contract directly with Ingres for support services.[215] On October 4, 2006, Burrell emailed Ingres' Mukherjee to set up a call to discuss Ingres' support for the EndoWorks product.[216] On that conference call, which also included McCluer, Burrell outlined the EndoWorks product and described the role the Ingres Database played in the product.[217] Burrell and McCluer made clear that Olympus would still be contacting CA for support but that Ingres was obligated to step in and provide second level support if necessary.[218] Mukherjee agreed that the Ingres Database was an embedded product within the meaning of the CA Support Agreement and, therefore, that Ingres would provide support to Olympus.[219] At the end of the call, Mukherjee also agreed to contact Olympus to explain Ingres' commitment to provide support for EndoWorks.[220]

A call between CA, Ingres, and Olympus was held shortly thereafter, and included CA's Burrell, Ingres' Mukherjee, and a number of Olympus

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[214] Tr. at 658 (Burrell); 337-38 (McCluer).
[215] *Id*.
[216] *See* JX-207 (email between Dev Mukherjee and Darren Burrell (October 4, 2006)).
[217] Tr. at 662-66 (Burrell); 338-39 (McCluer).
[218] *Id*. at 340.
[219] *Id*. at 339.
[220] *Id*.

representatives.[221] During that call, CA and Ingres reassured Olympus that Ingres would handle requests for second level support for the EndoWorks product.[222] From the testimony of Ingres employees and from internal Ingres documents, it is evident that Ingres did in fact provide this support to Olympus, including sending Ingres support personnel to Olympus to work on EndoWorks.[223]

In April and May 2007, CA and Ingres had general discussions over Ingres' support obligations for embedded products. Part of the discussions involved which products were embedded and, thus, required Ingres support. On May 3, 2007, CA's McCluer sent Ingres a list of CA products that embedded Ingres products.[224] Absent from this list was EndoWorks.

For a brief period of time, CA and Ingres diverted from the CA Support Agreement's architecture for support — whereby CA provided first level support, and Ingres second level — and set up a system whereby Olympus would contact Ingres directly for all support requests.[225] Apparently, this system was established at Olympus' request.[226] But, by December 2007, this system caused problems

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[221] *Id*.
[222] *Id*. at 666-67 (Burrell).
[223] Tr. at 849 (Shine) ("Q. It's true, is it not, Mr. Shine, that Ingres provides second-level support to Olympus? A. That's correct."); *see also* JX-1266 (email between Christopher Arisian, Steve Shine, Mike Kostow, and Roger Burkhardt (October 30, 2008)) (indicating that Ingres personnel were onsite at Olympus installing Ingres 2006).
[224] *See* JX-734 (email between Laura McCluer, Roger Burkhardt, Emma McGrattan, Amy Olli, Mike Lockhead, and Marc Stoll (May 3, 2007)).
[225] *See* JX-1445 (email between Darren Burrell and Laura McCluer (December 17, 2007)); JX-1031 (email between Richard Mosher, Adam Bernstein, Mike Kostow, and Michael Lockhead (December 12, 2007)); Tr. at 670-71 (Burrell).
[226] *Id.* at 668 (Burrell) ("The customer [Olympus] had actually made a request, inquiring to see if they were able to, you know, reach out to Ingres Corp. with any questions.").

because CA believed that Ingres personnel were attempting to sell new products to Olympus in violation of the Anti-Tampering Provision of the Contribution Agreement under the guise of having support discussions.[227] The resulting debate between CA and Ingres about how support should be provided to Olympus is illuminating for two reasons.

First, Ingres initially took the position that it was directly discussing support with Olympus because CA had represented to Ingres that the Ingres Database was not an embedded product within EndoWorks. In an email from Ingres to CA, Ingres' Richard Mosher described Ingres' position as follows:

> CA came to Ingres (via Darren Burrell) and Darren (one of the account managers for CA at Olympus) wanted to make sure that Ingres was taking direct responsibility for the support relationship at Ingres. CA (through Darren) were very clear that this was not an 'embedded' product, but rather a customer application project that was done under [a contract] with Olympus.[228]

In response, CA disagreed. Taking issue with Ingres' rendition of the facts, CA's Adam Bernstein, Vice President and Senior Counsel, stated:

> I did want to respond to one point in your e-mail. In it you say "CA (through Darren) were very clear that this was not an 'embedded' product . . . ." In point of fact, this is not the case. Darren has confirmed that he has <u>never</u> indicated that this was not an "embedded" product. Moreover, as the result of a number of previous discussions with Ingres (specifically Dev Mukherjee,

[227] *See* JX-1445 (demonstrating that CA requested from Ingres "confirmation in writing that: Ingres understands the obligations of Section 4.9(d) of the [Contribution Agreement], that it intends to honor those obligations, and that doing so means not soliciting current CA [Legacy Customers]. I thought we had worked this out prior to Ingres' meeting with Olympus, only to find that the situation we had hoped to avoid was exactly what ended up transpiring").
[228] JX-1445.

> Ingres' SVP Business Development and Product Management), the parties (both CA and Ingres) have been treating this as an embedded product.[229]

Therefore, in December 2007, the parties debated the very point of disagreement in the current litigation, and CA indicated its position that the Ingres Database was an embedded product.

Secondly, shortly after this exchange between the parties over whether the Ingres Database was an embedded product, Ingres backed down from its position. In fact, Ingres suggested that the direct communication between Olympus and Ingres be stopped and that the parties return to the system established in the CA Support Agreement, agreeing that the Ingres database was an embedded product under the terms of the CA Support Agreement as a reason for eliminating the direct connection between Ingres and Olympus.[230] Also, in January 2008, CA's Ken Chin emailed Ingres to reiterate CA's view that Ingres was obligated to provide second-level support to Olympus for the Ingres Database embedded in

[229] *Id*. (original emphasis).

[230] *See* JX-1445 ("[Ingres'] Michael [Lockhead] just called me and told me that they are going to remove that direct contact [between Ingres and Olympus] because [the Ingres Database] is an embedded solution and support CA as 2nd level support as they should."); Tr. at 669-71 (Burrell) (describing conversation with Ingres support executives, Pam Fowler and Michael Lockhead, where Lockhead stated that the Ingres Database was a product embedded within EndoWorks for which Ingres would provide second level support"); JX-1032 (email between Richard Mosher, Adam Bernstein, Mike Kostow, Michael Lockhead, and Sharon Stetson (December 20, 2007)) (confirming telephone discussion that "CA views Ingres as being 'embedded' with respect to the products provided by CA to Olympus" and that "CA will support Olympus [at level-one] directly, and will obtain L2 support from Ingres Corp.").

EndoWorks.[231] Ingres' Richard Mosher replied, "I'll remind our team that we have a Services Agreement in place and that we need to abide by its terms."[232] Therefore, the December 2007 discussions between CA and Ingres are important because (1) the parties debated the basic disagreement over EndoWorks being litigated presently and (2) Ingres acquiesced to CA's position and continued to treat EndoWorks as an embedded product.

c. Ingres Claims That The Ingres Database Is Not Embedded In EndoWorks And Demands Compensation

Despite Ingres' familiarity with the EndoWorks product, as chronicled above and as reflected in Ingres' dealings with Olympus and its provision of second level support for EndoWorks, Ingres now claims that it was misled by CA to believe that the Ingres Database was embedded in EndoWorks. According to Ingres, when it responded to a request by Olympus in June 2008 to perform a "health check" on the way the Ingres Database was being used in the EndoWorks product, Ingres suddenly learned for the first time that EndoWorks was not in fact a CA product in which the Ingres Database was embedded but was rather a custom-built product that CA made only for Olympus.[233] At the same time Ingres

[231] JX-1034 (email between Richard Mosher and Ken Chin (January 24, 2008)) ("I have been told that someone from Ingres – maybe Emma, told our customer at Olympus that Ingres will not be providing r3 fixes anymore for the embedded products. I will reiterate to you that if we need fixes for embedded products, Ingres is contractually obligated to provide them and I will enforce that Support Agreement if we have to.").
[232] *Id.*
[233] *See* JX-1260 (email between Chip Nickolett and Christopher Arisian (September 18, 2008)) (discussing health check Ingres performed on EndoWorks).

received this purported revelation, it began discussing with Olympus a potential upgrade of the EndoWorks system to Ingres 2006.[234]

In particular, Ingres' sales personnel, led by Steve Shine, met with Olympus to discuss an upgrade to Ingres 2006 and provided Olympus with an evaluation license.[235] Internal Ingres emails from July 2008 indicate that the Ingres sales team was well familiar with the EndoWorks software and Olympus' installation of the Ingres Database.[236] In September 2008, just as he was finalizing the order for OpenROAD 2006 with EDS, Steve Shine drafted an internal email outlining the ways Olympus could overcome any resistance CA might put up over Olympus upgrading to Ingres 2006.[237] Notably, in that same email, Shine wrote that they at Olympus "**NEED TO CHECK THE SITUATION WHEREBY WE PROVIDE CA WITH PERPETUAL (AS OPPOSED TO SUBSCRIPTION LICENSES) VIA THE RESELLER AGREEMENT. IE** [sic] **CA will try to only pay for partial year subscription until their contract expires**."[238]

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[234] JX-1254 (email between Alex Xenos, Tyler McGraw, and Chip Nickolett (July 17, 2008)); Tr. at 1276-80 (Burkhardt).

[235] JX-1252 (email between Christopher Arisian, Chip Nickolett, Alex Xenos, and Steve Shine (June 9, 2008)) (internal Ingres email re: Olympus update – not what was expected).

[236] *See* JX-1255 (email between Christopher Arisian and Chip Nickolett (July 17, 2008)) (Olympus email to Ingres re: Olympus: Ingres 2006 license cost) (recounting Olympus and Ingres' discussions about "licensing the newest Ingres database (2006) for resale to our EndoWorks customers); JX-1254 (discussing Olympus' installation of 3,500 licenses of versions 2.6 and r3 of the Ingres Database).

[237] *See* JX-1259 (email between Steve Shine and Christopher Arisian (September 17, 2008)) (discussing Olympus' options, including "OLYMPUS GOES LEGAL WITH CA" in the event that CA refuses to pay for the upgrade to Ingres 2006 under the terms of its Legacy Contract with Olympus).

[238] *Id*. (original emphasis).

Therefore, as he had done with EDS, Shine was looking to leverage the 2007 Reseller Agreement with CA to Ingres' advantage.

As Ingres was negotiating with Olympus, CA interceded and told Olympus that it could get Ingres 2006 at a reduced price through the terms of Olympus' Legacy Contract with CA because the Ingres Database was embedded in EndoWorks.[239] Olympus terminated the negotiations with Ingres and told Ingres that it would obtain Ingres 2006 from CA. CA then provided Olympus with Ingres 2006 on October 10, 2008.[240] On October 15, 2008, Ingres' Mike Kostow forwarded internally to a number of Ingres executives the email chain between Ingres' Mosher and CA's Bernstein from December 2007 discussing whether the Ingres Database was an embedded product and requested an update of where that discussion had gone.[241] Therefore, it appears that Ingres only began to reassess its position on whether the Ingres Database was an embedded product after it lost its bid to sell Ingres 2006 to Olympus and after the dispute over EDS' OpenROAD order erupted. In any event, on March 30, 2009, CA and Olympus executed an amendment to the ISV Agreement in which CA agreed to provide Olympus with

[239] JX-1209 (email between Christopher Arisian, Dinendra Ramachandran, Scott Bamford, Monica Levitt, Steve Shine, and Chip Nickolett (Sept 18, 2008)); JX-1254; JX-1256 (email between Steve Shine and Christopher Arisian (August 5, 2008)); Tr. at 792-93 (Shine).
[240] Tr. at 750 (Shine).
[241] JX-1265 (email between Richard Mosher, Christopher Arisian, and Mike Kostow (October 15, 2008)) (showing Ingres' Kostow asking "[w]hat's the latest correspondence on [the 2007 discussion about whether Ingres is to provide support to Olympus directly] from Olympus?").

(1) support for 1200 perpetual licenses of Ingres 2006 and (2) any additional licenses of the Ingres Database.[242]

Ingres argues that CA is not entitled under the License Agreement to provide the Ingres Database products and support to Olympus because the Ingres Database is not embedded in EndoWorks. Therefore, Ingres argues that it must be compensated for the provision of Ingres 2006 to Olympus. Under the terms of the 2007 Reseller Agreement, Ingres argues that it is owed $31 million for support of the 1200 database licenses provided by CA to Olympus under the ISV Agreement amended in March 2009.

2. A Plain Reading Of The Relevant Agreements Does Not Completely Resolve The Question Of Whether CA's Use, Sale, And Distribution Of The Ingres Database In EndoWorks Violates Any CA-Ingres Agreement

As discussed above, the License Agreement provides CA with a "perpetual irrevocable, fully paid-up, royalty-free, worldwide license to the Ingres Owned Business Products" for two main uses.[243] CA is therefore allowed to use the Ingres Products for "internal business purposes of the CA entities."[244] Moreover, CA can "reproduce, and *distribute to end users* (*whether directly or indirectly through distributors and sub-distributors*) the Ingres Owned Business Products . . . solely in object code form and only when *embedded* in *any products of the CA*

[242] JX-215.
[243] License Agreement § 2(d).
[244] *Id.* at § 2(d)(i).

Entities."[245] Thus, except for internal uses, the only way CA can use the Ingres products without an additional fee is by embedding the Ingres object code in a CA product distributed to end users.

Ingres' first argument is that EndoWorks is not a "CA Product" as defined in the agreements, in part because EndoWorks was specifically "made for hire" by CA for Olympus.[246] Moreover, all of the intellectual property created by CA and Olympus for EndoWorks is retained by Olympus, not CA.[247] And, second, Ingres argues that the relationship between CA and Olympus is governed by an Independent Software Vendor Agreement — not, for example, a distribution-type agreement — and, therefore, CA does not "distribute" through Olympus. Ingres contends that the nature of the relationship between CA and Olympus, as evidenced by the controlling ISV Agreement, is not a distributorship-type relationship.[248]

That is, Ingres contends that the CA Support Agreement embraces a narrow conception of the terms "product" and "distribute." To Ingres, a "product" of CA only includes products based on intellectual property owned by CA, not simply products made by CA. Likewise, Ingres contends that the term "distribute" must be read as encompassing only the selling of products through an official entity,

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[245] *Id.* at § 2(d)(ii) (emphasis added); *see also* CA Support Agreement ("[T]he Parties desire to enter into this Agreement to enable [CA] and certain of its customers to continue to benefit from Support in respect of Company Products and Embedded [CA] Products . . . .").
[246] *See* Ingres' Ans. Post-Trial Br. at 41-42; Tr. at 434 (McCluer).
[247] *Id.*
[248] *See* Ingres' Ans. Post-Trial Br. at 42-43.

such as an authorized dealer, which operates under parameters set by CA, and not selling products through a company like Olympus, which controls the marketing and sales price for EndoWorks and has the direct relationship with the end users.

Ingres' third argument is that, even if EndoWorks is a "CA Product" and Olympus a "distributor" within the meaning of the License Agreement, Ingres' product was not "embedded" in EndoWorks because it was installed separately, configured separately, maintained separately, and upgraded separately.[249] That is, Ingres argues that the Ingres Database was not embedded in EndoWorks because the Database is not so closely integrated with the EndoWorks software that its installation, configuration, and maintenance occur automatically.[250]

It is, of course, possible that the parties to the CA Support Agreement embraced a narrow conception of these terms. When considered on their face, the contractual meanings of the relevant terms of the CA Support Agreement — "embedded," "product," and "distribute" — are not readily apparent. Each of these may, but need not, have the narrow sense that Ingres advances. For example, the term "distributor" can mean, as Ingres argues, an authorized dealer officially retained to sell a manufacturer's products; but "distributor" can also have the broader connotation of any entity that stands between a manufacturer and

[249] *See* Ingres' Ans. Post-Trial Br. at 44; Tr. at 1370 (McGrattan) ("Q. Okay. So you – you've identified three characteristics: silent installation, silent configuration, and management of the database by the application. Were all of these required characteristics for embedding? A. For embedding Ingres within CA products they were, yes.").
[250] *See* Ingres' Ans. Post-Trial Br. at 44.

the final customer in a sale of a product.[251] Likewise, the term "product of the CA entities" can refer to a product that CA owns in the sense that it owns the intellectual property the product embodies. But a "product of the CA entities" may also refer more broadly to something that CA *makes*, whether it retains the intellectual property to the item or not.[252] And, the term "embedded" can have the narrow, specialized meaning that Ingres advances — i.e., that the Ingres Database must be so integrated into EndoWorks so that no end-user interaction with the Database is necessary — or the broader meaning of an embedded object being one that is simply an integral part of another object.[253] Therefore, these terms are ambiguous, and I must look to extrinsic evidence, including CA and Ingres' course of dealing and performance and their industry's trade usage, to ascertain the meaning of the terms. In light of this extrinsic evidence, I find that (1) EndoWorks is a CA Product; (2) the Ingres Database is embedded in EndoWorks; and (3) Olympus is a distributor under the terms of the License Agreement between CA and Ingres.

a. CA Support And License Agreements Are Interpreted Under New York Law

The CA Support Agreement and the License Agreement are governed by New York law.[254] Therefore, the New York interpretation principles previously discussed direct my analysis.[255]

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[251] *See infra* note 261 and accompanying text (discussing common dictionary definitions).
[252] *See infra* note 257 and accompanying text (discussing common dictionary definitions).
[253] *See infra* note 263 and accompanying text (discussing common dictionary definitions).
[254] CA Support Agreement § 9(g); License Agreement § 6.14.

b. It Is Not Immediately Clear From The Language Of The Relevant Contract Whether CA Distributes The Ingres Database As An Embedded Component In A CA Product

Although I find the contractual terms to be less than perfectly clear, my initial reading of the contract leads me to believe that Ingres' definitions of "product," "embedded," and "distribute" are too limited.

Because the term "product" alone is undefined by any of the agreements between CA and Ingres, I follow New York law and look first to the plain meaning of the word "product" as used in ordinary language to interpret the phrase "product of the CA Entities."[256] In both Black's Law Dictionary and non-legal English dictionaries, the noun "product" is defined to mean something made by one's effort.[257] From this general understanding, the phrase "any product of the CA Entities" would reasonably include whatever CA makes, develops, and designs, and not just that software which CA expressly brands and sells as its own.

From this general definition, Ingres' argument that EndoWorks is not a CA Product because it was "made for hire" has little force and actually supports the notion that EndoWorks is a product covered by the phrase "any product of the CA Entities" in the License Agreement. CA wrote the code for the EndoWorks product — thereby "producing" EndoWorks under any general conception of the

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[255] *See supra* notes 97 through 107 and accompanying text.
[256] *See Laba v. Carey*, 277 N.E.2d 641, 644 (N.Y. 1971).
[257] *See* BLACK'S LAW DICTIONARY 1209 (6th ed. 1990) (defining "product" as "[s]omething produced by physical labor or intellectual effort . . . "); WEBSTER'S NEW COLLEGIATE DICTIONARY 911 (1979) (defining "product" as "something produced"); AMERICAN HERITAGE COLLEGE DICTIONARY 299 (3d ed. 1993) (defining "product" as "[s]omething produced by human or mechanical effort or by a natural process. . . . A direct result[,] a consequence").

word "produce" — and it does not matter whether CA retained any intellectual property rights in EndoWorks after completion of the project. It is enough that CA made, and continues to make by manufacturing, EndoWorks; that it made and makes EndoWorks *for hire* is beside the point.

Ingres' additional argument, that CA is not "distributing" EndoWorks through Olympus to end users also depends upon what appears to be a very narrow conception of the term "distribute." Under the License Agreement, CA is only permitted to "distribute to end users."[258] Once again, to "distribute" is not defined in the CA-Ingres agreements.[259] But, the distribution language in the License Agreement is followed by a parenthetical that reads "whether directly or indirectly through distributors and sub-distributors."[260] Therefore, although the License Agreement does not specifically define "distributing," the parenthetical language makes clear that distributing the product to end users can occur through an intermediary. Furthermore, in both Black's Law Dictionary and non-legal English dictionaries, "to distribute" is defined generally as supplying goods to retailers or consumers and "distributor" is defined as anyone that sells a commodity.[261] Although Olympus might not ordinarily be thought of as a "distributor" in the

[258] License Agreement § 2(d).
[259] *See* CA Support Agreement; CA License Agreement; Legacy Support Agreement.
[260] License Agreement § 2(d).
[261] BLACK'S LAW DICTIONARY 427 (5th ed. 1979) (defining "distributor" as "any "relationship which stands between the manufacturer and the retail seller in purchases, consignments, or contracts for sale"); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 368 (1988) (defining "to distribute" as "to give out or deliver" and "distributor" as "one that markets a commodity"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 524 (4th ed. 2000) (defining "to distribute" as "[t]o supply (goods) to retailers" and "distributor" as [o]ne that markets or sells merchandise").

traditional sense of being something like an authorized dealer, it acts in that functional capacity here. That is, CA produced and sold EndoWorks to end users through Olympus, which functions as an intermediate distributor under the terms of the EndoWorks Development Services Agreement and the ISV Agreement.[262] Therefore, the fact that the Ingres Database is distributed indirectly by CA through Olympus does not change the result here.

Finally, Ingres' interpretation of "embedded" as a piece of software that is so closely integrated with the final product that it is not installed, configured, maintained, or updated separately also appears excessively narrow. The CA Support Agreement defines "Embedded [CA] Products" as "all software programs, applications, source code and object code, databases and other compilations of information of [CA] . . . in which [an Ingres database] is either (x) currently embedded or (y) hereafter embedded . . . that are owned developed, licensed to, licensed by or otherwise offered to customers by [CA]." The term "embedded" is not specifically used in any of the CA-Olympus agreements regarding the EndoWorks project.

My initial impression is that the Ingres Database is embedded in EndoWorks. As defined by modern dictionaries, the definition of "embedded" is "to enclose closely" or "to make something an integral part of."[263] The Ingres

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[262] *See* EndoWorks Development Services Agreement; ISV Agreement.

[263] *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 911 (1979); *see also* AMERICAN HERITAGE COLLEGE DICTIONARY 448 (3d ed. 1993) ("To fix firmly in a surrounding mass . . . . To cause to be an integral part of a surrounding whole.").

Database readily fits this general definition because it is a component — or "an integral part of" — the EndoWorks system.

3. The Relevant Extrinsic Evidence Indicates That CA Distributed The Ingres Database As An Embedded Component Within EndoWorks, A CA Product

Because a plain reading of the agreements does not completely resolve the meaning of these terms, I turn to extrinsic evidence. Under New York law, I consider CA and Ingres' course of dealing and course of performance and the relevant trade usage to discern their intentions, giving particular weight to their course of performance.[264] All three types of extrinsic evidence lead to the conclusion that CA appropriately distributed the Ingres Database as an embedded piece of software within EndoWorks, which was a CA Product within the meaning of the License Agreement and CA Support Agreement. Therefore, the extrinsic evidence confirms my initial interpretations of the agreements' plain meaning.

a. Trade Usage, The Broader Commercial Context Of CA And Olympus' Relationship, And Ingres' Own Documents Indicate That CA Distributed The Ingres Database As An Embedded Component In EndoWorks, A CA Product

I begin my consideration of the extrinsic evidence with the question of whether the Ingres Database is embedded within EndoWorks. My conclusion is that the Ingres Database is "embedded" in the EndoWorks product for three reasons. First, the industry-specific meaning of embedded indicates that the Ingres Database is embedded within EndoWorks. "Embedded" is a term used frequently in the enterprise software industry, as CA's expert persuasively testified in

[264] N.Y.U.C.C. § 2-208(2); *see also supra* note 106 and accompanying text.

court.[265] Essentially, within the industry, "embedded" means the database was included with the application and the end-user does not directly interact with the database.[266] The evidence at trial showed that end users of EndoWorks could not work directly with the Ingres Database.[267] Furthermore, the EndoWorks software does not work with any other database other than the Ingres Database, and the EndoWorks software cannot be installed without the Ingres Database.[268] Therefore, based on the evidence presented at trial, looking at the term "embedded" from a technological point of view — either using the plain, dictionary definition or the industry term — the Ingres Database is embedded in EndoWorks.

Second, several times Ingres itself labeled the use of Ingres 2006 in EndoWorks as "embedded." For example, in a proposal to Olympus submitted by Ingres in late 2008, Ingres wrote, "Ingres is pleased to provide Olympus with a fee schedule for Ingres technology *embedded* in the EndoWorks product."[269] Also, in an email from Ingres' Emma McGrattan to Ingres' CEO, Roger Burkhardt, McGrattan refers to the Ingres Database as used by Olympus as an example of an

[265] Tr. at 909–10 (Greenspun).
[266] *Id.* at 909–11 ("[I]t's no longer embedded if they have to descend into the world of the programmer and look at [computer] code."). In an internal email, Ingres' Mukherjee indicated that Ingres did not have a standard definition of "embedded" but rather considered a product embedded if it was "fully incorporated in a CA application with no direct access to the database." JX-1146.
[267] Tr. at 631 (Burrell); *see also* Tr. at 724-26 (Cohen) (noting that the Ingres Database resides beneath several layers of other applications and that there is no direct access to the Ingres Database by end users); Tr. at 926 (Greenspun) (testifying that the Ingres Database cannot be accessed by end users).
[268] Tr. at 729-733 (Cohen).
[269] JX-1264 (email between Steve Shine and Chris Arisian (October 13, 2008)).

embedded product.[270] Furthermore, Ingres' claim that, to be embedded, a database cannot be installed separately, configured separately, maintained separately, accessed separately, or upgraded separately is contradicted by Ingres' own documents, in particular its "Guide to Embedding Ingres," which indicates (1) that the Ingres Database can be installed separately and still be considered embedded;[271] and (2) that the Ingres Database can be maintained separately and still be considered embedded.[272]

The third reason applies not only to the definition of "embedded" but also relates to the other disputed definitions of "product" and "distribute." Ingres' argument overlooks the broader commercial context of CA's relationship with Olympus, which illustrates that Ingres takes too narrow a view of the terms "product," "distribute," and "embedded." The parties' course of dealing during the negotiations of the Divestiture Agreements indicates that the parties intended the License Agreement and CA Support Agreement to permit CA to continue to make money after the Divestiture by selling products into which it embedded the Ingres Database.[273] One of the products in which CA had embedded the Ingres Database and from which CA made money from sales was EndoWorks. The key contractual protections for Ingres surrounding embedded products were that (1)

[270] JX-1262 (email between Roger Burkhardt, Emma McGrattan, and Bill Maimone (October 7, 2008)).
[271] JX-306 at eINGRES082688 (Ingres document (March 2007)) (discussing the "silent installation of Ingres with, or without, other applications").
[272] *Id*. at eINGRES082693-99 (discussing maintenance of the database).
[273] *See* Tr. at 36-41 (Cox) (discussing the License Agreement and CA Support Agreement's intended role as fulfilling CA's need to continue using and selling embedded Legacy Products after the Divestiture); *see also* License Agreement § 2(d).

Ingres would be paid for maintenance and support for the embedded product and (2) more importantly, that CA could not use the embedded product provision as a ruse to sell end users the Ingres Database itself. That is, for a product to qualify as an embedded one, end users had to be able to use the Ingres Database product only in conjunction with the CA product and not for separate purposes. The end user provision guaranteed that the Ingres Database had to go to the end user itself and could not be split off by a middleman into a stand-alone product. This ensured that only Ingres would control future sales of the Ingres Database as a separate product.

When viewed in the broader commercial context of what the License Agreement and CA Support Agreement were designed to accomplish, the EndoWorks product easily fits within the meaning of the agreements. Olympus distributed the EndoWorks product to end users who could only use the Ingres Database in conjunction with use of EndoWorks itself. For example, the ISV Agreement between CA and Olympus makes clear that EndoWorks cannot be distributed as a "stand-alone" product or with other software.[274] The later amendments to this agreement maintain the same structure of restrictions on using EndoWorks — *i.e.*, the Ingres Database can only be used as a component of the EndoWorks program.[275] In other words, whatever the technical meaning of "product," distribute," and "embedded" may be, Olympus and CA *contractually*

[274] *See* ISV Agreement §§ 2.2., 2.5.
[275] *See* JX-204; JX-206; JX-215.

treated the Ingres Database as inseparable from the EndoWorks product. By doing so, CA and Olympus were giving Ingres the benefit of the bargain it had struck with CA under the Licensing Agreement because, in its arrangement with Olympus, CA took measures to ensure that Olympus could not make a profit by simply selling licenses to stand-alone Ingres products. Indeed, all Ingres is required to do as to EndoWorks is to provide the same support it does for other CA embedded products, and Ingres receives compensation for doing so. For these reasons, I believe that Ingres takes too narrow a view of the terms "product," "distribute," and "embedded" and that these terms' broader meanings were the contractually-intended ones.

Additionally, as discussed next, the parties' course of performance evidences their mutual belief that EndoWorks was a CA product that embedded the Ingres Database and was permissibly distributed to end users by Olympus.

b. The Parties' Course Of Performance Also Indicates That CA Distributed The Ingres Database As Software Embedded In EndoWorks, Which Was A CA Product

Most conclusive is Ingres and CA's course of performance, which removes any residual doubt about the parties' intentions and understanding of their agreements. Ingres provided second level support for the EndoWorks project for years. Ingres incurred costs to provide such support, so it certainly knew that its product was embedded (technically or otherwise) in a product that CA did not sell to customers other than through Olympus. Because Ingres knew how CA was using the Ingres Database in its joint venture with Olympus, and because Ingres

never disagreed with this use of the Database, I conclude that Ingres understood EndoWorks as falling within the scope of the License Agreement and CA Support Agreement.

First of all, Ingres was aware that CA and Olympus were engaged in the EndoWorks joint venture and that CA and Olympus used the Ingres Database in EndoWorks, since at least September 2006.[276] At that time, CA's Burrell contacted Ingres' Mukherjee to discuss the details of support for the EndoWorks product.[277] During those conversations, Mukherjee agreed that the Ingres Database was a product embedded in EndoWorks and that Ingres was required to provide second level support.[278] Indeed, Mukherjee discussed the details of the support arrangement in a joint conference call with Olympus representatives.[279] Following this discussion, Ingres provided support to Olympus, consistently for at least two years.[280] During this time, Ingres had whatever access to the EndoWorks product it needed to realize that the product was custom-made for Olympus.[281]

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[276] JX-205 (email between Tim Prosser and Darren Burrell (September 14, 2006)) (discussing Olympus-CA projects, including EndoWorks).
[277] *See* JX-207 (email between Dev Mukherjee and Darren Burrell (October 4, 2006)).
[278] Tr. at 662-66 (Burrell); 338-39 (McCluer).
[279] *Id*.
[280] *See* Tr. at 849 (Shine); *see also* JX-1266.
[281] Ingres' Mukherjee admitted as much in his testimony:

> Q. Mr. Mukherjee, you knew Olympus was using the Ingres database, didn't you?
>
> A. Yes.
>
> Q. And CA was providing the Ingres database to Olympus?
>
> A. Yes.

Also, the fact that the EndoWorks product was not included in the list of embedded products circulated in May 2007[282] means that it should have been immediately apparent to Ingres that EndoWorks was a tad different than a typical CA product in which the Ingres Database was embedded. That is, Ingres had notice that EndoWorks was not a typical embedded product, but it did not take the opportunity to protest the access that CA was giving Olympus to the Ingres Database.

Furthermore, Ingres cannot credibly argue that it was unaware of how CA was using the Ingres Database in EndoWorks because, when Ingres tried to make the argument that the Database was not embedded in EndoWorks in December 2007, CA explicitly objected and told Ingres that CA expected Ingres to provide support to Olympus for the product.[283] Therefore, the very issue at the heart of the present dispute was before the parties nearly two years ago. At that time, rather than standing its ground, Ingres acquiesced to CA's position and agreed to continue providing support for the Ingres Database as an embedded product in EndoWorks.[284] By its own behavior under the terms of the relevant agreements, Ingres confirmed its acceptance that EndoWorks was a CA product that embedded

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> Q. You never insisted that CA pay for, in essence, databases embedded in EndoWorks, did you?
>
> A. I don't recall doing so, no.

Tr. at 1133 (Mukherjee).

[282] *See* JX-734.

[283] *See* JX-1445.

[284] *See id*.; Tr. at 669-71; JX-1032; JX-1034.

the Ingres Database. Having reached this accord, the parties then continued to perform under the contract with the understanding that the Ingres Database was embedded, that EndoWorks was a CA product, and that Olympus properly distributed the software.[285]

Finally, the sales efforts of the Ingres management, which attempted to poach Olympus as a client for Ingres, belie any argument that Ingres was not well familiar with how its Database was used in the EndoWorks product.[286] Emails between Ingres sales executives indicate a close familiarity with Olympus' installation of the Ingres Database,[287] which makes it impossible to believe that Ingres only learned the details of EndoWorks in the summer of 2008.

The far more plausible explanation of Ingres' behavior is that it was inspired to invent a new and narrower view of the embedded product provisions in the License Agreement and the CA Support Agreement when it needed to swing a counterpunch in its fight against CA over the EDS order in late 2008. Before that time, Ingres had adhered to a course of performance consistent with CA's treatment of EndoWorks as an embedded product. The evidence shows that Ingres began second-thinking its course of conduct in October 2008, shortly after the

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[285] *See, e.g.*, JX-1266 (indicating that, in 2008, Ingres personnel were onsite at Olympus installing Ingres 2006). Of course, Ingres' response to Olympus' request for a "health check" further indicates that Ingres continued to provide support after the December 2007 discussion over whether the Ingres Database was embedded in EndoWorks. *See supra* note 233 and accompanying text.

[286] *See* JX-1256; JX-1264.

[287] *See supra* notes 235 through 238 and accompanying text.

EDS order for OpenROAD 2006 was submitted.[288] In other words, Ingres' EndoWorks-based claim has all the signs of being the creative invention of a litigant looking for an additional club to wield against its opponent.

In sum, I am convinced that the parties' course of performance likewise establishes that CA distributed the Ingres Database as embedded software within EndoWorks, which was a CA Product. Therefore, I conclude that CA does not owe Ingres any damages related to the Olympus dispute.

C. Whether The California Action Should Be Enjoined

CA argues that Ingres should be enjoined from prosecuting the California Action, in which Ingres has asserted claims related to this action, because the Legacy Support Agreement contains a forum selection clause governing all claims relating to the agreement. The relevant text from the Legacy Support Agreement is as follows:

> Each party hereto agrees that it shall bring any action or proceeding in respect of any claim directly arising out of or related to this Agreement, whether in tort or contract or at law or in equity in any state or US. federal court sitting in The City of New York or in any state or U.S. federal court sitting in the State of Delaware (collectively, the "Chosen Courts") . . . .[289]

This is a broad forum selection clause sweeping in all claims that "arise out of" or "relate to" the Legacy Support Agreement.[290] But, although it chooses California

[288] *See* JX-1265.
[289] Legacy Support Agreement § 6(g).
[290] Language such a "relate to" or "arise out of" is to be read broadly. *See Elf Atochem N.A. v. Jaffari*, 727 A.2d 286, 294-95 (Del. 1999) (holding that claims under a separate contract were all subsumed under the forum selection clause in the LLC Agreement,

law to govern the contract, the 2007 Reseller Agreement does not expressly choose the forum where any related disputes are to be adjudicated.[291] Therefore, the question of whether the forum selection clause in the Legacy Support Agreement presents the very same issue as discussed above — namely, whether the 2007 Reseller Agreement, which contains no such forum selection clause, supersedes the relevant language in the Legacy Support Agreement. Because the forum selection issue implicated one of the primary substantive issues in this case — namely, the scope of the integration clause in the 2007 Reseller Agreement — I earlier refused both CA's request for a preliminary injunction enjoining the California Action[292] and Ingres' motion to stay this proceeding in deference to the California Action.[293]

At trial, Ingres presented no evidence that the forum selection clause in the Legacy Support Agreement was superseded by the 2007 Reseller Agreement, and none of the negotiations around the 2007 Reseller Agreement suggest any explicit

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which broadly covered any claim "related to" the LLC Agreement); *see also Triple Z Postal Servs., Inc. v. United Parcel Serv., Inc.*, 2006 WL 3393259, at *7 (N.Y. Sup. Ct. Nov. 24, 2006) (explaining that New York public policy "favors enforcement of forum selection clauses and supports a broad reading of these clauses"); *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 98 N.Y.2d 238, 247 (N.Y. 2002) (incorporating the forum selection clause found in six agreements into eight additional agreements where all of the contracts fell under one global agreement); BANKS, NEW YORK CONTRACT LAW § 27:17, at 1228 (2006) ("Where numerous agreements are part of 'one global agreement,' a forum selection clause in one agreement will be deemed applicable to other agreements that do not contain such a clause.").

[291] *See* 2007 Reseller Agreement § 15(B).

[292] *CA, Inc. v. Ingres Corp.*, C.A. No. 4300-VCS, at 2 (Del. Ch. Feb. 11, 2009) (TRANSCRIPT) (declining to enjoin California action).

[293] *CA, Inc. v. Ingres Corp.*, C.A. No. 4300-VCS, at 45 (Del. Ch. May 29, 2009) (denying Ingres' motion to stay).

or implicit intent by either party to displace the forum selection clause in any respect. The 2007 Reseller Agreement remains part and parcel of a larger contractual relationship between CA and Ingres created by the Divestiture Agreements, and therefore must be understood within the context of that larger framework. Indeed, as this case shows, the 2007 Reseller Agreement's plain terms do not reveal where it begins and the Legacy Support Agreement ends. That intersection requires an understanding of the Legacy Support Agreement and the confined way in which the 2007 Reseller Agreement modified the parties' obligations under the Legacy Support Agreement. Indeed, Ingres' own witnesses described the 2007 Reseller Agreement as a gap-filler that picked up where the Legacy Support Agreement left off and admitted that the Legacy Support Agreement still has operative force.[294] Also, in California, Ingres recognized the relation of the 2007 Reseller Agreement to the Legacy Support Agreement by seeking a declaration that the 2007 Reseller Agreement, and not the Legacy Support Agreement, applied to EDS's access to OpenROAD 2006 through CA.[295] Therefore, I conclude that the 2007 Reseller Agreement does not supersede the Legacy Support Agreement's forum selection clause.

[294] *See, e.g.*, Tr. at 1580 (Mosher) ("The legacy support agreement has ongoing obligations of the parties to provide the first- and second-level support as described in there for legacy contracts. The 2007 agreement from the very beginning was, as I understand, to allow CA to purchase the products that were described in the exhibit for their customers, in particular EDS and CSC.").
[295] California Action Compl. ¶¶ 21-25.

The claims that Ingres prosecuted here, which were fully tried, are similar, and in many ways identical, to the claims it has pled in the California Action. All the claims in the California Action implicate, in the sense of directly requiring consideration of the terms of and certainly in the sense of relating to, not only the Legacy Support Agreement but also the CA Support Agreement, which has a choice of forum provision that is identically broad.[296] As this decision indicates, Ingres' claims under the 2007 Reseller Agreement at the very least "relate to" the Legacy Support Agreement in two respects. First, this ruling defined the respective spheres of the 2007 Reseller Agreement and the Legacy Support Agreement. Second, this decision has also required consideration of the broader network of contracts, including not only the Legacy Support Agreement and the CA Support Agreement but also the Contribution Agreement and the License Agreement, in which the 2007 Reseller Agreement is situated. The 2007 Reseller Agreement is a contract with dignity, but it remains just one of several contracts that govern the ongoing relationship between CA and Ingres. Traditionally, courts try to give a consistent reading to interrelated agreements.[297] Such consistency is

[296] *See* CA Support Agreement § 9(g).

[297] *See Simon v. Navellier Series Fund*, 2000 WL 1597890, at *7 (Del. Ch. Oct. 19, 2000) (finding that multiple agreements "must be viewed together and in their entirety when determining the scope and nature of" the parties' obligations); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981) ("A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together."); 11 WILLISTON ON CONTRACTS § 30:26 (4th ed. 1999) at 239 ("Apart from the explicit incorporation by reference of one document into another, the principle that all writings which are part of the same transaction are interpreted together also finds application in the situation where incorporation by reference of another document may be inferred from the context in which the documents in question were executed."); *see also* BANKS, NEW YORK

especially warranted here because of the complex relationship between CA and Ingres. Indeed, it is because of this complexity that the parties inserted broad choice of forum provisions in the Legacy Support Agreement and the CA Support Agreement in an effort to prevent the kind of claim splitting and piecemeal litigation that Ingres' California Action threatens.

Ingres agreed in the fundamental Legacy Support Agreement that it would adjudicate all claims in tort or contract that relate to these agreements in a specific forum. By enjoining Ingres from proceeding in a different forum, I simply hold it to the promises it made — promises that remain binding upon it. Obviously, this order intends no disrespect to my distinguished judicial colleagues in California; rather, it is compelled by the parties' contracts. Therefore, I hereby enjoin the California Action in order to enforce the parties' clear choice to adjudicate disputes relating to the Legacy Support Agreement and the CA Support Agreement either in Delaware or New York.[298]

CONTRACT LAW § 8:14, at 311-12 (2006) (noting that, under New York law, the "general rule is that instruments executed in connection with a single transaction may be read and construed together" and that "[i]n reading the documents together, a court should harmonize their terms and reconcile any differences"); *Versaci v. Superior Court*, 127 Cal. App. 4th 805, 814 (Cal. Ct. App. 2005) ("It is a familiar rule . . . that where several papers covering the same subject matter are executed by . . . the same parties . . ., all are to be considered together, and with the same effect as if all had been incorporated in one document.") (citations omitted); Cal. Civ. Code § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.").

[298] *See Outukumpu Eng'g Enter., Inc. v. Kvaerner EnviroPower, AB*, 685 A.2d 724, 733 n.5 (Del. Super. 1996) ("forum selection clauses are 'presumptively valid' and should be 'specifically' enforced.'") (citing *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)); DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 5.04[a], at 5-57

D. Whether CA Or Ingres Is Entitled To Attorneys' Fees

The final issue I must determine is whether either party is entitled to attorneys' fees. The 2007 Reseller Agreement provides in relevant part: "[i]f either party is compelled to seek judicial enforcement of its rights under this Agreement, the prevailing party in any such action shall be entitled to recover its costs incurred in such action, including reasonable attorneys' fees . . . ."[299] Because Ingres sought a "judicial determination of its rights" under the 2007 Reseller Agreement, this fee shifting provision applies. As to the dispute over EDS' order for OpenROAD 2006, neither CA nor Ingres can be deemed the prevailing party, as both sides won on material issues and lost on others. Therefore, I decline to shift fees between the parties as to the EDS dispute. But, as the prevailing party on the Olympus-related claims, CA is entitled to costs and reasonable attorneys' fees under the terms of the 2007 Reseller Agreement. CA shall submit an affidavit as to its fees and costs solely relating to the Olympus issue, and Ingres must respond to CA's submission. Any dispute by Ingres shall only be raised after Ingres shares comparable information with CA about its own fees and costs for the Olympus-related portion of this litigation.

(2009) ("Under modern jurisprudence a forum selection clause is presumptively valid and subject to specific enforcement."); RESTATEMENT (SECOND) OF CONTRACTS § 357 (1981) ("[S]pecific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty.").

[299] 2007 Reseller Agreement § 15(B).

V. Conclusion

For the foregoing reasons, I find, first, that (1) the latest version of the OpenROAD software, which EDS ordered, would have been owed by Ingres to CA as part of Ingres' maintenance and support obligations under the Legacy Support Agreement; (2) the 2007 Reseller Agreement supersedes the Legacy Support Agreement as to CA's ability to obtain licenses of OpenROAD 2006 for its Legacy Customers; and (3) Ingres breached the Anti-Tampering Provision in the Contribution Agreement, and therefore any harm to it from EDS' brief use of the OpenROAD 2006 is self-inflicted. Thus, my conclusion regarding the EDS order for OpenROAD 2006 is that CA is not required to pay Ingres approximately $29 million for the licenses to the latest version of the OpenROAD software.

Secondly, because I find that the Ingres Database is embedded within the meaning of that term in the License Agreement, that EndoWorks is a CA product, and that EndoWorks is permissibly distributed to end users through Olympus, I conclude that CA is not required to compensate Ingres for the inclusion of the Ingres Database software within the EndoWorks application. Furthermore, I find that CA has the right to continue to provide these licenses to Olympus under the March 2009 amendment to their ISV Agreement, and that Ingres is required to continue to provide support for these licenses under the CA Support Agreement.

Finally, I find that Ingres must pay CA's reasonable attorneys' fees and costs for prevailing on the Olympus dispute. And, I hereby enforce the broad forum selection clause in the Legacy Support Agreement by enjoining the

California Action. The parties shall collaborate on a form of implementing final judgment and submit it within fifteen days. IT IS SO ORDERED.