WRITTEN DECISION – NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE INGENU, INC., Debtor. TRILLIANT NETWORKS (CANADA) INC., Plaintiff, Cross-Defendant and Counterclaimant in Reply, vs. INGENU, INC., Defendant, Cross-Complainant and Counterdefendant in Reply.	Case No. 20-03779-LT Chapter 11 Adv. Proc. No. 20-90108-LT **MEMORANDUM OF DECISION INCLUDING POST-TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW** Judge: Hon. Laura S. Taylor Dept.: Dept. 3, Rm. 129 Complaint Filed: September 18, 2020 Trial Date: October 16, 2023

The bench trial in connection with the adversary proceeding between Plaintiff, Cross-Defendant, Counterclaimant in Reply, and Creditor Trilliant Networks (Canada) Inc. ("Trilliant") and Defendant, Cross-Complainant, Counterdefendant in Reply, and Reorganized Debtor Ingenu Inc. ("Ingenu") took place on October 16, 2023, through October 26, 2023. After considering (1) the testimonial evidence presented at trial,[1] through declarations of experts,[2] and through deposition transcripts;[3] (2) the documentary evidence introduced during trial;[4] (3) the Joint Stipulated Facts;[5] and (4) the arguments made by the parties in briefing, during the trial and in written closing arguments,[6] the Court rules in Trilliant's favor as follows:

- First, the Court grants declaratory judgment in Trilliant's favor that Ingenu's attempt to terminate the parties' October 29, 2015, Value Added Reseller Agreement, as amended ("VAR"), was improper and invalid.

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[1] Trial transcripts are found at Dkt. No. 333 (Oct. 16, 2023 Tr. Test.); Dkt. No. 334 (Oct. 17, 2023 Tr. Test.); Dkt. No. 335 (Oct. 18, 2023 Tr. Test.); Dkt. No. 336 (Oct. 19, 2023 Tr. Test.); Dkt. No. 337 (Oct. 23, 2023 Tr. Test.); Dkt. No. 338 (Oct. 24, 2023 Tr. Test.); Dkt. No. 339 (Oct. 25, 2023 Tr. Test.); Dkt. No. 340 (Oct. 20, 2023 Tr. Test.); Dkt. No. 341 (Oct. 26, 2023 Tr. Test.).

[2] Expert declarations introduced into evidence are found at Dkt. No. 252 (Decl. of P. Zimmer ("Zimmer Decl.")); Dkt. No. 265 (Suppl. Decl. of P. Zimmer ("Supl. Zimmer Decl.")); Dkt. No. 253 (Decl. of S. Ch'ng ("Ch'ng Decl.")); Dkt. No. 254 (Decl. of B. Larkin-Connolly ("Larkin-Connolly Decl.")); Dkt. No. 247 (Decl. of E. Dean ("Dean Decl.")).

[3] The testimonial evidence introduced through deposition excerpts are found at Dkt. No. 294 (Trilliant's Am. Dep. Desig. of W. Schmidt ("Schmidt Am. Desig.")); Dkt. No. 342 (Submission of Tr. and Dep. Design. and Counter-Desig. of A. Gazzolo ("Gazzolo Desig. and Counter-Desig."). The excerpts of the video-taped deposition of William Schmidt were read into the record at trial. Dkt. No. 336, Test. W. Schmidt at 154:1-226:23. The Court's rulings on objections to deposition testimony were made on the record at trial. Dkt. No. 334 at 117:16-121:1; Dkt. No. 336 at 5:7-8:11. The excerpts of the deposition of Alvaro Gazzolo were not read into the record.

[4] Dkt. No. 359 provides a list of the documentary evidence received into evidence at trial.

[5] *See* Dkt. No. 287 (Oct. 18, 2023 Am. Pre-Trial Order ("Oct. 18, 2023 PTO")).

[6] *See* Dkt. No. 248 (Trilliant's Trial Br. ("Trilliant's Br.")); Dkt. No. 251 (Ingenu's Trial Br. ("Ingenu's Br.")) ; Dkt. No. 260 (Trilliant's Resp. Trial Br. ("Trilliant's Resp. Br.")); Dkt. No. 343 (Trilliant's Post-Trial Br. ("Trilliant's Closing Br.")); Dkt. No. 353 (Ingenu's Closing Trial Br. (Ingenu's Closing Br.")).

- Second, the Court grants judgment in Trilliant's favor on Ingenu's remaining crossclaims for:
    - Breach of contract regarding the VAR, the March 1, 2018, Letter Agreement (as amended on April 5, 2018) ("Letter Agreement"), and August 17, 2020, Standstill Agreement ("Standstill Agreement");
    - Breach of the implied covenant of good faith and fair dealing regarding the VAR and Letter Agreement;
    - Lanham Act; and
    - Unfair Competition Law ("UCL") – California Business and Professions Code section 17200.
- Third, because the Court finds that Ingenu has not prevailed on any of its claims, and Ingenu is not entitled to any damages, the Court declines to rule on Trilliant's Counterclaims in Reply for breach of contract regarding the VAR, Letter Agreement, Loan Documents,[7] and Standstill Agreement. At trial, Trilliant only maintained those claims defensively and for potential setoff or recoupment.
- Fourth, in light of the Court's ruling that Ingenu did not effectively terminate the VAR, Ingenu's Revised Chapter 11 Plan of Reorganization for the Debtor filed October 30, 2020 (Bk. Dkt. Nos. 138 & 140 at § 9.1)[8] ("Reorganization Plan"), and the Amended Order Confirming Debtor's Chapter 11 Plan of Reorganization filed December 23, 2020 (Bk. Dkt. No. 213 at ¶ 4 (a)) ("Confirmation Order"), the VAR is deemed rejected. Pursuant to Bankruptcy Code Section 365(n)(1)(B), Trilliant elected to retain its intellectual property

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[7] The "Loan Documents" consist of a Note and Warrant Purchase Agreement and a Security Agreement dated May 15, 2017, as well as three Promissory Notes dated March 1, April 5, and April 19, 2018. Ex. P-53 (Note and Warrant Purchase Agreement); Ex. P-266 (Note 1, Mar. 1, 2018); Ex. P-267 (Note 3, Apr. 5, 2018); Ex. P-84 (Note 4, Apr. 19, 2018).

[8] *In re Ingenu, Inc.*, No. 20-03779-LT11 (S.D. Cal. Bankr. Ct.) (the "Bankruptcy Case") is the docket of the bankruptcy proceeding underlying this adversary proceeding. References to documents filed in the Bankruptcy Case are cited as "Bk. Dkt. No. __," and documents filed in this adversary proceeding are cited as "Dkt. No. __."

rights (including applicable exclusivity provisions) under the VAR, and under any agreement supplementary to the VAR (including any embodiment of such intellectual property), for the duration of the VAR, and any period for which the VAR may be extended by Trilliant as of right (collectively, the "Retained IP Rights"), as reflected in its Notice filed on January 9, 2024 (Bk. Dkt. No. 336) (the "IP Rights Retention Notice"). Pursuant to the Reorganization Plan and Confirmation Order, Trilliant may file a proof of claim within forty (40) days of entry of this Judgment. [9]

- Fifth, pursuant to Bankruptcy Code Section 365(n)(3) and as requested in the Complaint, the Court enjoins Ingenu from interfering with Trilliant's exercise of its Retained IP Rights under the VAR, including concerning Ingenu's interactions with Trilliant's customers.

The Court initially announced its determinations, in brief, at a hearing and oral ruling held on December 15, 2023.[10] The Court then ordered Trilliant to prepare a proposed memorandum decision and findings ("Proposed Memorandum"); it did so. (Dkt No. 360). After review and amendment of the Proposed Memorandum, as appropriate, the Court finalized this memorandum [11]which contains more extensive findings of fact and conclusions of law. It supplements, rather than replaces, the previous oral ruling. But to the extent any inconsistency between the Court's oral ruling and this written memorandum exists, this memorandum controls.

I. INTRODUCTION

The dispute between Trilliant and Ingenu arises in large part from the VAR, which Trilliant and Ingenu entered into on October 29, 2015 (Ex. P-1) and amended on December 4, 2017 (Ex. P-69) and again on March 1, 2018 (Ex. P-78). The Court determined a number of issues

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[9] Trilliant's proposed findings that included a judicial determination of the impact of the IP Rights Retention Notice. The Court declines to make such findings. Either the issue is not subject to pending dispute and a determination is inappropriate, or, if a dispute exists, it was not cleanly before the Court at trial and a decision is premature. The Court also modifies the Fifth determination so that the injunction provided mirrors the complaint.

[10] *See* Dkt. No. 356 (Oral Ruling on Compl. for Decl. J. and Inj. Relief).

[11] The parties can see the changes made through generation of a red-line if they deem it appropriate. The Court acknowledges dating itself through use of the term "redline".

related to the VAR, including whether Ingenu's attempt to terminate the VAR before filing for bankruptcy was effective and whether either party breached the VAR. The Court also determined numerous issues arising from the parties' dealings pursuant to the VAR and related agreements, including that Trilliant did not cause Ingenu's financial collapse and that Trilliant did not cause Ingenu to lose the over a billion dollars of business.

Since the pre-trial motions phase of this adversary proceeding, including the initial motions to dismiss filed by Trilliant, Ingenu has consistently told the Court that Trilliant had committed a series of bad acts. The Court understood this "death by a thousand cuts" theory as alleging that a collection of seemingly minor transgressions amounted to something big and nefarious. As a result, the Court broadly allowed testimony at trial to which Trilliant objected, including from third-party witnesses ,Chris Pillow and Dave Mayer, and from all three of Ingenu's expert witnesses.

Despite this, a common theme emerged—Ingenu consistently lacked evidence to support the allegations it made in its July 2020 termination letter, wherein it first attempted to terminate the VAR, and the additional allegations it later raised throughout this case. This Order sets forth the Court's rulings, findings of fact, and conclusions of law in detail. In particular, the Order details the lack of evidence to support Ingenu's claims in contrast with the credible and substantial evidence that supports Trilliant's positions. The Court, therefore, concludes that Trilliant prevailed at trial and is entitled to judgment in its favor.

II. PROCEDURAL BACKGROUND

A. Ingenu's Chapter 11 Bankruptcy Proceedings

On July 27, 2020 ("Petition Date"), Ingenu commenced the Bankruptcy Case by filing a Voluntary Petition under Chapter 11. Bk. Dkt. No. 1.

1. Marketing Process and Auction

On August 11, 2020, Ingenu filed a motion to approve the process for marketing its assets for sale. Bk. Dkt. No. 38 (Mot. for Order Approving Marketing and Sale Procedures). The proposed sale included Ingenu's portfolio of 55 patents, pending patent applications, and related intellectual property, which Ingenu asserted comprised the vast majority of the value of its assets.

Id. at 7. This intellectual property included the intellectual property that Ingenu licensed to Trilliant under the VAR. Dkt. No. 287 at 3 (Oct. 18, 2023, PTO) ("Ingenu admits that it has stated its intent to sell substantially all of its assets, which include intellectual property.") Ingenu also sought approval to retain a team from Sherwood Partners, Inc. ("Sherwood"), led by Bernie Murphy, to run that sale process. Bk. Dkt. No. 38 (Mot. for Order Approving Marketing Process).

On August 27, 2020, Trilliant filed objections to the sale procedures motion, objecting, *inter alia*, to Ingenu's efforts to sell property in contravention of the VAR, including Trilliant's intellectual property rights under the VAR. Bk. Dkt. No. 77 (Trilliant's Obj. and Reservation of Rights) .

The Court granted Ingenu's motion on September 24, 2020. Bk. Dkt. No. 121 (Order Approving Marketing and Sale Procedures). Sherwood thereafter reached out to 147 prospective buyers. Bk. Dkt. No. 147 at ¶ 8 (Decl. of B. Murphy in Supp. of Debtor's Mot. to Determine Secured Status of Junior Claims). Of those, 101 parties responded. *Id.* Ninety passed on the opportunity. *Id.* Sixteen took the matter under review, with three parties signing a nondisclosure agreement and accessing the data room. *Id.* However, as of October 15, 2020, when the sale process concluded and the bid deadline expired, Ingenu had not received any bids. *Id.*

2. Trilliant Proofs of Claim

On October 1, 2020, Trilliant filed two proofs of claim against Ingenu in the Bankruptcy Case based on: (i) the VAR, designated as Claim No. 67 ("VAR Claim"), and (ii) the Loan Documents, designated as Claim No. 68 ("Loan Claim").

3. Chapter 11 Plan Confirmation

After the sale process failed to yield any bids for its assets, Ingenu sought to pursue a Chapter 11 plan of reorganization. On October 30, 2020, Ingenu filed its Revised Chapter 11 Plan of Reorganization. Bk. Dkt. No2. 138 & 140 (Reorganization Plan).

On December 1, 2020, Trilliant filed its Objection to Confirmation of Debtor's Proposed Chapter 11 Plan, which requested that the Court deny confirmation of the Reorganization Plan because, *inter alia*: (i) it improperly classified Trilliant's secured claim with general unsecured claims; (ii) it provided for estate property to vest in Reorganized Debtor Ingenu free and clear of

Trilliant's liens; and (iii) it violated the "best interest of creditors test," including because it deprived creditors of receiving any benefit from the estate's valuable causes of action. Bk. Dkt. No. 157 (Trilliant's Obj to Confirmation of Debtor's Proposed Ch. 11 Plan).

The Court held a hearing on December 15, 2020 on confirmation of the Reorganization Plan.

On December 23, 2020, the Court issued the Confirmation Order, confirming the Reorganization Plan. Bk. Dkt. No. 213. The Reorganization Plan and Confirmation Order each provide that "all remaining Executory Contracts and Unexpired Leases that exist between the Debtor and any Person shall be deemed rejected as of the Effective Date." Bk. Dkt. No. 213 at § III.B.4.a (Confirmation Order); Bk. Dkt. No. 140 at § 9.1 (Reorganization Plan). Regarding the VAR, they further provide that:

> For the avoidance of doubt, the foregoing shall apply to the [VAR] to the extent a determination is made that, contrary to the Debtor's position, the Debtor's termination of the [VAR] prior to the Petition Date was not effective, in which case the [VAR] shall either (1) be deemed rejected pursuant to the Plan, and Trilliant may assert continued rights in the Debtor's intellectual property under section 365(n) of the Bankruptcy Code, or (2) be the subject of continued litigation regarding whether the [VAR] is subject to termination as a result of pre-petition and continuing breaches, and the consequences of such termination.

Bk. Dkt. No. 213 at § III.B.4.a (Confirmation Order); Bk. Dkt. No. 138 at § 9.1 (Reorganization Plan).

The Confirmation Order also set a deadline for filing a proof of claim asserting any claims arising from the rejection of the VAR for on or before forty (40) days "after entry of a final order authorizing the rejection of the [VAR]." Bk. Dkt. No. 213 at § III.B.4.b (Ch. 11 Am. Order); *see also* Bk. Dkt. No. 140 at § 9.2 (Reorganization Plan).

Following the Confirmation Order, Reorganized Debtor Ingenu exists as a corporate entity in accordance with applicable law pursuant to its Amended Certificate of Incorporation and Bylaws. Bk. Dkt. No. 213 at § III.B.2 (Confirmation Order).

B. Trilliant Adversary Proceeding

On September 18, 2020, Trilliant initiated this adversary proceeding by filing its

Complaint for Declaratory Judgment and Injunctive Relief ("Complaint"). Dkt. No. 1 (Compl. For Decl. J. and Inj. Relief ("Compl.")). Trilliant's Complaint pleaded two causes of action: the first for declaratory judgment that Ingenu's purported attempt to terminate the VAR was ineffective, and the second for injunctive relief enjoining Ingenu from interfering with Trilliant's rights under the VAR.

On October 16, 2020, Ingenu filed its Answer (Dkt. No. 5) (Ans. To Compl. For Declaratory Judgment. ("Ingenu Ans.")) and Cross-Complaint Against Trilliant Networks (Canada) Inc. (Dkt. No. 6) (Cross-Compl.). Ingenu pleaded the following claims: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) Lanham Act (15 U.S.C. § 1125); (4) UCL under California Business and Professions Code section 17200; (5) intentional interference with prospective economic relations; (6) turnover of property of the estate (11 U.S.C. § 542); and (7) declaratory relief. Ingenu added an eighth claim for avoidance of fraudulent transfer (11 U.S.C. § 544(b) and Cal. Civ. Code § 3439.05) in its First Amended Cross-Complaint. Dkt. No. 14 (Ingenu's Am. Cross-Compl.). Ingenu's Cross-Complaint included a request for punitive damages based on its intentional interference with prospective economic relations claim, which as discussed below, the Court ultimately dismissed after three rounds of motions to dismiss.

On December 22, 2020, Trilliant filed its Counterclaims in Reply against Ingenu and Counterdefendant in Reply Alvaro Gazzolo. Dkt. No. 24 (Trilliant's Countercl. in Reply). Trilliant pleaded six causes of action: (1) breach of contract regarding the VAR; (2) breach of contract regarding the Standstill Agreement; (3) breach of contract regarding the Loan Documents; (4) breach of contract regarding the Letter Agreement; (5) intentional interference with contractual relations; and (6) intentional interference with prospective economic advantage. *Id.* On January 12, 2021, Ingenu filed its Answer. Dkt. No. 34 (Ingenu's Ans. to Countercl. in Reply). On January 22, 2021, Gazzolo filed his Answer.[12] Dkt. No. 35 (Gazzolo's Ans. to Countercl. in

[12] On April 10, 2023, Trilliant filed a stipulation voluntarily dismissing its claims against Mr. Gazzolo, with prejudice. Dkt. No. 183 (Stipulation of Dismissal).

Reply).

1. Dismissal of Ingenu's Intentional Interference and Punitive Damages Claims

Trilliant moved to dismiss Ingenu's intentional interference with prospective economic relations and punitive damages claims on November 6, 2020. Dkt. No. 11 (Trilliant's Mot. to Dismiss Cross-Compl). Rather than oppose Trilliant's motion to dismiss, Ingenu filed a First Amended Cross-Complaint on November 20, 2020. Dkt. No. 14 (Ingenu's Am. Cross-Compl.).

On December 4, 2020, Trilliant again moved to dismiss Ingenu's intentional interference with prospective economic relations and punitive damages claims. Dkt. No. 16 (Mot. to Dismiss First Am. Cross-Compl). On February 22, 2021, the Court issued an order granting Trilliant's motion to dismiss holding that Ingenu failed to state a claim for intentional interference with prospective economic relations and punitive damages. Dkt. No. 52 (Order on Mot. to Dismiss First Am. Cross-Compl.).

On February 25, 2021, Ingenu filed a Second Amended Cross-Complaint. Dkt. No. 53 (Ingenu's Second Am. Cross-Compl.). Trilliant again moved to dismiss Ingenu's intentional interference with prospective economic relations and punitive damages claims. Dkt. No. 55 (Trilliant's Mot. to Dismiss Second Am. Cross-Compl.). On May 17, 2021, the Court granted Trilliant's motion and gave Ingenu another opportunity to amend its claims. Dkt. No. 71 (Order on Mot. to Dismiss Second Am. Cross-Compl.).

On May 20, 2021, Ingenu filed a Third Amended Cross-Complaint. Dkt. No. 73 (Third Am. Cross-Compl.). On June 3, 2021, Trilliant again moved to dismiss Ingenu's fifth cause of action and claim for punitive damages for failure to state a claim upon which relief can be granted. Dkt. No. 78 (Trilliant's Mot. to Dismiss Third Am. Cross-Compl.).

On August 19, 2021, the Court granted Trilliant's motion to dismiss and dismissed Ingenu's claims for intentional interference with prospective economic relations and punitive damages with prejudice. Dkt. No. 102 (Mem. Decision on Mot. to Dismiss Third Am. Cross-Compl.).

On September 2, 2021, Trilliant filed an Answer to Ingenu's Third Amended Cross-

Complaint. Dkt. No. 109 (Trilliant's Ans. to Third Am. Cross-Compl.).

2. 2021 Trilliant Motion for Summary Judgment

On July 9, 2021, Trilliant filed a motion for summary judgment or, in the alternative, partial summary judgment on its claim for declaratory judgment, arguing that Ingenu's attempt to terminate the VAR was invalid because Ingenu failed to comply with the VAR's notice and cure provision. Dkt. No. 87 (Trilliant's 2021 Mot. Summ. J.). On September 3, 2021, the Court issued an order denying Trilliant's motion after finding that factual disputes existed. Dkt. No. 110 (Order Den. Trilliant's Mot. Summ. J.).

3. 2023 Trilliant Motion for Summary Judgment

On July 26, 2023, Trilliant moved for summary judgment or, in the alternative, partial summary judgment in its favor as to Ingenu's First, Second, and Third Causes of Action for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) violation of the Lanham Act. Dkt. No. 206 (Trilliant's 2023 Mot. Summ. J.). Trilliant sought summary judgment as to Ingenu's breach of contract and breach of the implied covenant of good faith and fair dealing claims for two reasons. First, the VAR's limitation of liability provision bars recovery for lost profits—the only damages sought by Ingenu. Second, there is no evidence of causation. Trilliant also argued that summary judgment should be granted on Ingenu's Lanham Act claim because it is barred under *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 43 (2003).

On September 20, 2023, the Court held a hearing on Trilliant's motion. Dkt. No. 226. At the hearing, the Court ordered the parties to file supplemental briefs on the issues of whether California Civil Code section 1668 renders the VAR's limitation of liability provision unenforceable and whether Ingenu has presented sufficient evidence to demonstrate a genuine issue of fact regarding whether any of Trilliant's alleged actions caused Ingenu's alleged damages. *See* Dkt. No. 228 (Ingenu's Suppl. Br. in Supp. of Opp'n. to Mot. Summ. J.); Dkt. No. 230 (Trilliant's Suppl. Reply in Supp. Mot. Summ. J.).

On September 29, 2023, the Court held a second hearing on Trilliant's motion, during which it heard oral argument before issuing an oral ruling granting in part and denying in part Trilliant's motion. Dkt. No. 234 (Oral Ruling on Mot. Summ. J.).

Following briefing on the proposed order and findings (Dkt. No. 236 (Joint Stip re Proposed Order re Trilliant's Mot. Summ. J.); Dkt. No. 259 (Trilliant's Statement re Scope of Order); and Dkt. No. 262 (Ingenu's Br. in Supp. of Prop. Order on Trilliant's Mot. Summ. J.)), the Court issued an order on October 23, 2023, granting in part and denying in part Trilliant's motion (Dkt. No. 302 (Order on Trilliant's Mot. Summ. J.)). The Court ordered as follows:

- The Court granted partial summary judgment in favor of Trilliant as to Ingenu's claims for consequential damages arising under the VAR in Ingenu's First and Second Causes of Action because Section 12.2 of the VAR precludes Ingenu from recovering lost profits resulting from alleged breaches of the VAR.
- In the alternative, the Court granted partial summary judgment in Trilliant's favor regarding Ingenu's claims for consequential damages arising under the VAR and under the Standstill Agreement in Ingenu's First and Second Causes of Action because Ingenu failed to present sufficient evidence of causation to create a genuine issue of fact regarding Ingenu's claimed lost profits from alleged business opportunities involving the following third parties:
    - Rain Cloud Water Management LLC / US AG Network LLC ("Rain Cloud"),[13] Aquacheck USA ("Aquacheck"), and Liquid Fibre SA ("Liquid Fibre"),[14]

[13] US AG Network LLC acquired Rain Cloud Water Management LLC. Dkt. No. 338, Test. C. Pillow at 8:15-23. This order refers to them collectively as "Rain Cloud."

[14] In addition to Rain Cloud, Aquacheck, and Liquid Fibre, this includes the alleged potential partnerships between those three entities and the following third parties: MFA Oil, Tucor - Watts Water, Tucor - Golf Courses, BLG Farms, RG Farms, RDOF – Mississippi, Tucor – Disney, Tri County Conservation, Dunklin-Pemiscott County, MO Conservation District, E&J Gallo – Vanwall, Wade Equipment Group, Greenway Equipment, and Vanwall Equipment. Dkt. No. 206-13, Ex. A-3 (P. Zimmer Expert Report).

- Upland and Sky Puzzle,
- Ingenicas,
- Chilquinta and "Other" Projects,[15] and
- Tata.

- The Court denied partial summary judgment after finding a factual dispute as to whether the VAR's limitation of liability provision also applies to consequential damages arising under the Standstill Agreement.
- The Court denied summary judgment as to whether Trilliant's alleged breach of the Standstill Agreement caused Ingenu's claimed lost profits from alleged business opportunities involving the following third parties:
  - Radmond/Indonesia,
  - N.V. EnergieBedrijven Suriname ("EBS"), and
  - SAESA.
- The Court denied summary judgment regarding Ingenu's third cause of action under its Lanham Act claim.

4. The Parties' Pre-Trial Filings

On September 13, 2023, the parties filed a Joint Pre-Trial Order. Dkt. No. 217 (Sep. 13, 2023 Joint Pre-Trial Order). The parties amended the Joint Pre-Trial Order on October 13, 2023. Dkt. No. 274 (Oct. 13, 2023 Am. Joint Pre-Trial Order). The final and operative Amended Pre-Trial Order was approved by the Court on October 18, 2023. Dkt. No. 287 (Oct. 18, 2023 PTO).

On October 6, 2023, the parties filed their opening trial briefs and initial round of pre-trial filings.

Trilliant filed:

- Motion to Offer Declaration Testimony from Ingenu, Inc.'s Bankruptcy

[15] This also includes alleged potential partnerships with the following third parties: Agrisource Data, Ofserv oil companies, Inundata - City of Miami, US Sugar, Florida Crystals, Kubota, Hemp Global, Shell Oil, Total Oil, Investra, Compal, and Compal (Mal). Dkt. No. 206-13, Ex. A-3 (P. Zimmer Expert Report).

Proceeding at Trial (Dkt. No. 237) (Mot. to Offer Decl. Test. from Bk. Proceed.);

- Motions to Exclude Opinions and Testimony of Ingenu's three expert witnesses Brendan Larkin-Connolly (Dkt. No. 238) (Mot. to Exclude B. Larkin-Conolly), Paul Zimmer (Dkt. No. 239) (Mot. to Exclude P. Zimmer), and Shi Baw Ch'ng (Dkt. No. 240) (Mot. to Exclude S. Ch'ng);
- Designations from the deposition testimony of Mr. Gazzolo (Dkt. No. 242) (Dep. Desig. of A. Gazzolo) and William Schmidt, Ingenu's former Senior VP of Sales and Business Development (Dkt. No. 243) (Dep. Desig. of W. Schmidt);
- Written discovery designations (Dkt. No. 241) (Desig. of Disc. Resp.); and
- Declaration of Trilliant's expert rebuttal witness, Elizabeth Dean (Dkt. No. 247) (Dean Decl.); and
- Trilliant's Pre-Trial Brief (Dkt. No. 248) (Trilliant's Br.).

Ingenu filed:

- Motion to Permit Witnesses to Testify at Trial via Videoconference for third-party witnesses Chris Pillow and Dave Mayers (Dkt. No. 249) (Mot. to Permit Wit. to Testify Via Videoconf.);
- Designations from the deposition testimony of Mr. Gazzolo and Mr. Schmidt (Dkt. No. 250);
- Declarations of Ingenu's expert witnesses, Paul Zimmer (Dkt. No. 252) (Zimmer Decl.), Shi Baw Ch'ng (Dkt. No. 253) (Ch'ng Decl.), and Brendan Larkin-Connolly (Dkt. No. 254) (Larkin-Connolly Decl.); and
- Ingenu's Pre-Trial Brief (Dkt. No. 251) (Ingenu's Br.).

Trilliant filed its Responsive Pre-Trial Brief on October 11, 2023. (Dkt. No. 260) (Trilliant's Resp. Br.). Ingenu did not file a responsive brief.

5. The Court's Pre-Trial Rulings

a. The Court Broadly Allowed Ingenu's Arguments and Expert and Third-Party Witness Testimony at Trial.

The Court's October 12, 2023 Order on the parties' pre-trial motions broadly allowed Ingenu to present its desired arguments and witness testimony. Dkt. No. 268 (Ruling on Pre-Trial Mot.). First, The Court confirmed in its October 12, 2023, Order on the parties' pre-trial motions that the Court's partial summary judgment ruling did not impact Ingenu's right to argue any of the contractual breaches that it alleged occurred. *Id.* Instead, the Court's ruling only eliminated Ingenu's ability to make certain consequential damages claims. *Id.* Second, the Court allowed Ingenu to offer the remote testimony of third-party witnesses Chris Pillow and Dave Mayers. *Id.* Third, the Court denied all of Trilliant's motions to exclude Ingenu's expert testimony. *See id.*, *see also* Dkt. No. 270 (Order on Mot. to Exclude B. Larkin-Connolly), Dkt. No. 271 (Order on Mot. to Exclude P. Zimmer), Dkt. No. 272 (Order on Mot. to Exclude S. Ch'ng).

b. The Court Granted Trilliant's Motion to Admit Certain Declarations Filed by Ingenu in Its Bankruptcy Proceedings as Judicial Admissions.

The Court granted Trilliant's unopposed[16] Motion to Offer Declaration Testimony from Ingenu, Inc's Bankruptcy Proceeding at Trial, holding that Trilliant could offer certain declarations of Mr. Gazzolo from Ingenu's bankruptcy proceeding at trial as judicial admissions of Ingenu.[17] Dkt. No. 269 (Order on Trilliant's Mot. to Offer Decl. Test. from Bk. Proceeding).

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[16] Although Ingenu did not oppose Trilliant's motion, Ingenu objected to Mr. Gazzolo's declarations on relevance, hearsay, lack of foundation, and privilege grounds in the parties' Joint Pre-Trial Order. Such objections are baseless for the reasons discussed herein. Mr. Gazzolo's publicly-filed declarations as Ingenu's CEO form a contemporaneous record of Ingenu's financial state and business prospects throughout the bankruptcy proceedings—the same time period as many of the incidents and lost profits Ingenu alleged.

[17] The admitted declarations are:

- Omnibus Declaration of Alvaro Gazzolo in Support of Debtor's Voluntary Petition and First Day Motions (July 28, 2020), Bk. Dkt. No. 8 (Ex. P-157) (Omnibus Decl. of A. Gazzolo in Supp. of Debtor's Voluntary Pet.) ("Gazzolo Omnibus Decl.");
- Declaration of Alvaro Gazzolo in Support of Debtor's Motion to Determine Secured Status of Junior Claims (11 U.S.C. 506(a)) (Nov. 16, 2020), Bk. Dkt. No. 147-1 (Ex. P-192) (Decl. of A. Gazzolo in Supp. of Debtor's Mot. to Det. Secured Status of Jr. Cl.) ("Gazzolo

Mr. Gazzolo served as Ingenu's CEO in 2020 when Ingenu filed for bankruptcy, and he had worked for Ingenu since 2017 as the Chief Strategy Officer, Chief Operating Officer, President, and CEO. Ex. P-157 at ¶ 4 (Gazzolo Omnibus Decl.). Mr. Gazzolo submitted declarations throughout Ingenu's Bankruptcy Case, speaking for Ingenu under his authority as CEO. The Court repeatedly relied on Mr. Gazzolo's declarations, including when approving DIP financing and Ingenu's Reorganization Plan. *See* Bk. Dkt. 213 at 3 (Confirmation Order); Bk. Dkt. No. 64 (Final Order Authorizing Debtor to Obtain Post Pet. Financing, Authorizing the Use of Cash Collateral, Granting Adequate Protection, and Granting Liens and Superiority Cl.).

Mr. Gazzolo's declarations are admissions of a party opponent, and therefore admissible non-hearsay. *See* Fed. R. Evid. 801(d)(2)(A). Mr. Gazzolo made these statements as both "a person authorized to make a statement" (*i.e.*, Ingenu's CEO during bankruptcy proceeding) and an "agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(C and D). Mr. Gazzolo's statements are admissible whether or not he testifies at trial. *See Fischer v. Forestwood Co.*, 525 F.3d 972, 984 (10th Cir. 2008) ("[C]ourts have

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Decl. re Secured Status");

- Declaration of Alvaro Gazzolo in Support of Debtor's Response to Trilliant Networks (Canada) Inc,'s Opposition to Motion to Determine Secured Status of Junior Claims (11 U.S.C. 506(a)) (Dec. 9, 2020), Bk. Dkt. No. 190-2 (Ex. P-197) (Decl. of A. Gazzolo in Supp. of Debtor's Resp. to Opp. to Mot. to Det. Secured Status of Jr. Cl.) ("Gazzolo Decl. re Resp. to Opp. to Secured Status");
- Declaration of Alvaro Gazzolo in Support of Ingenu's Motion for Authority to Obtain Postpetition Financing; to Grant Priming Lien; to Use Cash Collateral; and for Related Relief (with Exhibits A-D) (July 28, 2020), Bk. Dkt. No. 7-1 (Ex. P-244) (Decl. of A. Gazzolo in Supp. of Mot. for Authority) ("Gazzolo Decl. re Mot. for Auth.");
- Declaration of Alvaro Gazzolo in Support of Motion for Order (I) Approving Marketing Process and Bid Procedures; (II) Authorizing Retention of Broker; and (III) Related Relief (Aug. 11, 2020), Bk. Dkt. No. 38-2 (Ex. P-245) (Decl. of A. Gazzolo in Supp. of Mot. of Order) ("Gazzolo Decl. re Mot. for Order");
- Declaration of Alvaro Gazzolo re Rule 1.8.8. in Support of Plan Confirmation (Dec. 7, 2020), Bk. Dkt. No. 177 (Ex. P-246) (Decl. of A. Gazzolo re Rule 1.8.8.) ("Gazzolo Decl. re Rule 1.8.8.");
- Declaration of Alvaro Gazzolo in Support of Memorandum of Points and Authorities in Support of Confirmation of Debtor's Chapter 11 Plan of Reorganization (Dec. 8, 2020), Bk. Dkt. No. 188-1 (Ex. P-247) (Decl. of A. Gazzolo in Supp. of Confirmation of Ch. 11) ("Gazzolo Decl. re Ch. 11"); and
- Declaration of Alvaro Gazzolo in Support of Debtor's Reply to Trilliant's Objection to Confirmation of Debtor's Proposed Chapter 11 Plan (Dec. 8, 2020), Bk. Dkt. No. 184-2 (Ex. P-248) (Decl. of A. Gazzolo in Supp. of Reply to Trilliant's Obj. to Confirmation of Ch. 11) ("Gazzolo Decl. re Reply to Obj to Ch. 11").

consistently rejected the argument that for an admission by a party opponent to be admissible, the declarant must be available for cross-examination.").

Further, the Ninth Circuit has held that "[f]actual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them." *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). Where those admissions are statements in a bankruptcy proceeding, the Court also has discretion to find that they constitute binding judicial admissions. *In re Ingrim Fam., LLC*, No. 3:15-BK-43036-MJH, 2019 WL 2524246, at *5 (9th Cir. June 18, 2019) (affirming summary judgment ruling in an adversary proceeding based on the bankruptcy court's finding that the debtor's statements in the bankruptcy schedule constituted a judicial admission). Indeed, the Ninth Circuit noted that "there exists a substantial body of case law holding that statements in [bankruptcy] schedules amount to binding judicial admissions." *Id.* (citations omitted); *In re Rolland*, 317 B.R. 402, 421 (C.D. Cal. 2004) ("Statements in bankruptcy schedules are executed under penalty of perjury and, when offered against a debtor, are eligible for treatment as judicial admissions") (collecting cases); *In re Bohrer*, 266 B.R. 200, 201 (N.D. Cal. 2001) (same). Declarations under penalty of perjury can also "constitute judicial admissions." *In re Paris*, 568 B.R. 810, 820 (C.D. Cal. 2017).

As noted above, the Court relied on Mr. Gazzolo's statements when approving Ingenu's Chapter 11 reorganization plan, as well as in other rulings. And Mr. Gazzolo executed his declarations "under penalty of perjury of the laws of the United States." *See* Ex. P-157; Ex. P-192; Ex. P-197; Ex. P-244; Ex. P-245; Ex. P-246; Ex. P-247; Ex. P-248. In view of Ingenu's intention that the Court should rely on Mr. Gazzolo's declarations in the bankruptcy proceeding, the Court gave them the same effect at the adversary trial and treated them as judicial admissions.

C. Operative Pleadings and Asserted Claims

When the parties reached trial, there were three operative pleadings:

- Trilliant's Complaint for Declaratory and Injunctive Relief (Dkt. No. 1),
- Ingenu's Third Amended Cross-Complaint (Dkt. No. 73), and
- Trilliant's Counterclaims in Reply (Dkt. No. 24).

As set forth in the Amended Joint Pre-Trial Order, each party abandoned certain claims

alleged in this proceeding. Dkt. No. 287 (Oct. 18, 2023, PTO). First, Ingenu declined to pursue its sixth cause of action for turnover of property of the estate and its eighth cause of action for avoidance of fraudulent transfer. Second, Trilliant declined to pursue its claims for intentional interference with contractual relations and intentional interference with prospective economic advantage – the Fifth and Sixth Causes of Action from its Counterclaims in Reply. *Id.* Third, Trilliant did not pursue monetary damages from Ingenu. *Id.* Trilliant only maintained its breach of contract claims as part of its defense that: (1) Trilliant is not liable on any of Ingenu's claims due to Ingenu's own failure to perform; and (2) the amounts that Ingenu owes under the Letter Agreement and Loan Documents act as an offset or recoupment should any damages be awarded to Ingenu against Trilliant. *Id.*

Further, as discussed above, the Court dismissed Ingenu's fifth cause of action for intentional interference with prospective economic relations with prejudice. Dkt. No. 102 (Mem. Decision on Mot. to Dismiss Third Am. Cross-Compl.).

Accordingly, the parties asserted the following claims at trial:

- Declaratory Judgment and Injunctive Relief (Trilliant Claims 1 and 2, and Ingenu Crossclaim 7)
- Breach of VAR Agreement (Ingenu Crossclaim 1)
- Breach of Standstill Agreement (Ingenu Crossclaim 1)
- Breach of Letter Agreement (Ingenu Crossclaim 1)
- Breach of the Implied Covenant of Good Faith and Fair Dealing (Ingenu Crossclaim 2)
- Lanham Act (15 U.S.C. § 1125) (Ingenu Crossclaim 3)
- UCL (Crossclaim 4)

Trilliant also maintained the following claims defensively and for setoff or recoupment purposes: breach of VAR (Trilliant Counterclaim in Reply 1); breach of Standstill Agreement (Trilliant Countercl. in Reply 2); breach of Loan Documents (Trilliant Countercl. in Reply 3); and breach of Letter Agreement (Trilliant Countercl. in Reply 4). Because the Court rules in Trilliant's favor on each of Ingenu's claims, it does not separately address these claims.

III. LEGAL STANDARDS

The legal standards for the claims presented at trial are as follows.

A. Declaratory Judgment

The Declaratory Judgment Act authorizes the Court to resolve an "actual controversy within its jurisdiction" by "declar[ing] the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Further, the United States Supreme Court has held that courts possess jurisdiction to issue declaratory relief where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citation and internal quotation marks omitted).

The parties agree that a substantial controversy exists between them regarding whether Ingenu's attempt to terminate the VAR was successful and the parties' respective rights and responsibilities under the VAR. *See* Dkt. 287 at ¶43 (Oct. 18, 2023 PTO (citing Dkt. No. 5 (Ingenu Ans.) for the admitted fact that "a substantial controversy between [Ingenu] and Trilliant")). As a result, the parties' declaratory judgment claims require the Court to determine whether Ingenu effectively terminated the VAR and in doing so to determine the merits of Ingenu's asserted support for its termination. Dkt. No. 287 (Oct. 18, 2023 PTO) ("Trilliant seeks a declaratory judgment confirming that Ingenu's purported termination of the VAR Agreement was invalid and that the VAR Agreement continues to be viable[,]" and "Ingenu seeks a declaration from the Court that Ingenu properly terminated the VAR Agreement on July 23, 2020").

B. Breach of Contract

California law establishes four elements for a breach of contract claim: (1) the existence of the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) damages to the plaintiff as a result of the breach. *See, e.g.*, *CDF Firefighters v. Maldonado*, 158 Cal.App.4th 1226, 1239 (2008); *Richman v. Hartley*, 224 Cal. App. 4th 1182, 1186 (2014), as modified on denial of reh'g (Feb. 5, 2008).

Regarding the second element, "[i]t is elementary a plaintiff suing for breach of contract

must prove it has performed all conditions on its part or that it was excused from performance." *Consol. World Invs., Inc. v. Lido Preferred Ltd.*, 9 Cal. App. 4th 373, 380 (1992) (citation omitted); *Richman*, 224 Cal. App. 4th at 1192 ("Generally, a party's failure to perform a condition precedent will preclude an action for breach of contract."). And "[s]imilarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." *Consol. World Invs.*, 9 Cal. App. 4th at 380 (citation omitted).

Lastly, as to damages, "[i]mplicit in the element of damage is that the defendant's breach caused the plaintiff's damage." *Troyk v. Farmers Grp., Inc.*, 171 Cal. App. 4th 1305, 1352 (2009). In particular, the defendant's breach must have "proximately caused" the plaintiff's damages. *St. Paul Fire & Marine Ins. Co. v. Am. Dynasty Surplus Lines Ins. Co.*, 101 Cal. App. 4th 1038, 1060 (2002); *see also* Cal. Civ. Code § 3300. California law also "require[s] that damages not be speculative or, conversely, that they be proved to a reasonable certainty." *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 962 (9th Cir. 2001); *see also* Cal. Civ. Code § 3301.

The test for determining proximate causation in a breach of contract claim "is whether the breach was a substantial factor in causing the damages." *US Ecology, Inc. v. State of Cal.*, 129 Cal. App. 4th 887, 909 (2005). "Substantial factor" must be "something which is more than a slight, trivial, negligible, or theoretical factor in producing a particular result.'" *Id.* (*quoting Espinosa v. Little Co. of Mary Hosp.*, 31 Cal. App. 4th 1304, 1314 (1995)). The causal occurrence needs to be "reasonably certain." *Id.* (quoting *Vu v. Cal. Com. Club, Inc.*, 58 Cal. App. 4th 229 (1997)).

C. Breach of the Implied Covenant of Good Faith and Fair Dealing

California law recognizes "an implied covenant of good faith and fair dealing" in every contract "that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107, 1120 (2008) (internal quotations and citations omitted). The covenant is read into a contract to protect contractual promises, not general public policy interests. *Id.* (internal citations omitted). Indeed, "the implied covenant will only be recognized to further the contract's purpose; it will not

be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." *Id.* (internal citations omitted).

The Court may disregard a claim for breach of the covenant of good faith and fair dealing "as superfluous" if it "relies upon essentially the same allegations" as a companion "breach of contract claim." *Yi v. Circle K Stores, Inc.*, 258 F. Supp. 3d 1075, 1086 (C.D. Cal. 2017), *aff'd*, 747 F. App'x 643 (9th Cir. 2019) (quoting *In re Facebook PPC Adver. Litig.*, 709 F. Supp. 2d 762, 770 (N.D. Cal. 2010) (internal quotation marks omitted)). Ingenu relies on the same breach allegations to support both its claims for breach of contract and breach of the implied covenant of good faith and fair dealing. *Compare* Dkt. No. 73 at ¶¶ 59, 28 (Third Am. Cross-Compl.) *with id.* ¶¶ 63-64. Further, at summary judgment and trial, the parties have argued the two claims together. In particular, neither Ingenu's pre-trial brief nor its post-trial brief separately addresses its breach of the covenant of good faith and fair dealing claim. Dkt. No. 251 (Ingenu's Br.); Dkt. No. 353 (Ingenu's Closing Br.).

Regardless, breach of contract and breach of the implied covenant of good faith and fair dealing claims have similar elements. The second through fifth elements are relevant here: "(2) the plaintiff fulfilled his obligations under the contract; (3) any conditions precedent to the defendant's performance occurred; (4) the defendant unfairly interfered with the plaintiff's rights to receive the benefits of the contract; and (5) the plaintiff was harmed by the defendant's conduct." *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010) (citing Judicial Council of California Civil Jury Instruction No. 325). The same causation standard also applies to both breach of contract and breach of the implied covenant of good faith and fair dealing claims. *See Britz Fertilizers, Inc. v. Bayer Corp.*, 665 F. Supp. 2d 1142, 1167 (E.D. Cal. 2009).

Accordingly, the Court's analysis below focuses on Ingenu's breach of contract claim, but the Court's analysis and ruling for Trilliant applies equally to Ingenu's breach of the implied covenant of good faith and fair dealing claim to the extent Ingenu has not abandoned the claim.

D. Lanham Act

In addition to addressing the registration, use, and infringement of trademarks, the Lanham

Act creates a cause of action for unfair competition arising from the "deceptive and misleading use of marks . . . of persons engaged in . . . commerce." *Dastar Corp.*, 539 U.S. at 29. Section 1125(a)(1) provides in pertinent part:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —
>
> > (A) is likely to cause confusion or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> >
> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities . . . .

15 U.S.C. § 1125(a); *see also Dastar Corp.*, 539 U.S. at 29. But this remedy "does not have boundless application as a remedy for unfair trade practices." *Dastar Corp.*, 539 U.S. at 29 (citation omitted). In particular, it "does not exist to reward manufacturers for their innovation in creating a particular device; that is the purpose of the patent law and its period of exclusivity." *Id.* at 34 (quoting *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 29 (2001)). It instead prevents "competitors from copying a source-identifying mark, . . . and helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product." *Id.* (internal quotations and citations omitted).

Section 43(a) "prohibits the use of false designations of origin, false descriptions, and false representations in the advertising and sale of goods and services." *Jack Russell Terrier Network of N. Ca. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1036 (9th Cir. 2005). Although, as discussed below, Ingenu failed to present any evidence to support its Lanham Act claim at trial, Ingenu's Pre-Trial Brief indicated that it intended to pursue a claim based on the assertion that Trilliant

claimed it could "offer Ingenu's IP/RPMA technology as its own."[18] Dkt. No. 251 at 23:16-24-6 (Ingenu's Br.) (citing Dkt. No. 73 at ¶¶ 71, 72 (Third Am. Cross-Compl.)).

A Lanham Act false designation of origin claim requires a plaintiff to prove the defendant "(1) used in commerce (2) any word, false designation of origin, false or misleading description, or representation of fact, which (3) is likely to cause confusion or mistake, or to deceive, as to sponsorship, affiliation, or the origin of the goods or services in question." *Luxul Tech. Inc. v. Nectarlux, LLC*, 78 F. Supp. 3d 1156, 1170 (N.D. Cal. 2015) (citing *Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 902–04 (9th Cir. 2007)).

Alternatively, a Lanham Act false representation or advertising claim requires Ingenu to prove:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997) (citations omitted). Regarding the first element, the Ninth Circuit defines commercial advertising or promotion as (1) commercial speech; (2) made "for the purpose of influencing consumers to buy defendant's goods or services;" and (3) "disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry." *Coastal Abstract Serv. Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999) (citation and internal quotation marks omitted).

E. UCL

California's UCL "prohibits unfair competition, including unlawful, unfair, and fraudulent

[18] These allegations would not support a false association claim under Section 1125(a)(1)(A), which requires a plaintiff to "allege [a] commercial injury based upon the deceptive use of a trademark or its equivalent to satisfy standing requirements." *Jack Russell Terrier Network*, 407 F.3d at 1036.

business acts." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1143 (2003). "Because the statute is written in the disjunctive, it is violated where a defendant's act or practice is (1) unlawful, (2) unfair, (3) fraudulent, or (4) in violation of section 17500 (false or misleading advertisements)," and "[e]ach prong of the UCL is a separate and distinct theory of liability." *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007).

Section 17200's unlawful prong "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (citation and internal quotation marks omitted). However, the scope of the unlawful prong is not limitless. Section 17200 claims cannot be predicated on breach of contract and must instead be predicated on a violation of statutory, regulatory, or other positive law. *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010) ("[A] common law violation such as breach of contract is insufficient.").

Regarding the unfair prong, the California Supreme Court has held that—in a case between competitors such as Trilliant and Ingenu—a business practice is "unfair" within the meaning of section 17200 only if the business practice amounts to an actual or imminent antitrust violation. *Cel-Tech.*, 20 Cal. 4th at 187.

IV. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND APPLICATION OF LAW TO FACTS

A. Jurisdiction

1. This adversary proceeding arises in and relates to Ingenu's Bankruptcy Case before this Court. The parties agree that this Court has jurisdiction to consider this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. Dkt. No. 287 (Oct. 18, 2023 PTO). This is a "core" proceeding under 28 U.S.C. § 157(b)(2)(A) and (O). *Id.*

2. Venue in this judicial district is proper pursuant to 28 U.S.C. §1409 as this adversary proceeding arises in and relates to a case under the Bankruptcy Code (the Bankruptcy Case) in this District. Dkt. No. 287 (Oct. 18, 2023 PTO); Dkt. No. 34 at ¶ 18 (Ans. to Countercl.).

B. Burden of Proof

3. Both Trilliant and Ingenu seek declaratory relief to determine their respective rights under the VAR, including whether or not Ingenu effectively terminated the agreement. In *Medtronic, Inc. v. Mirowski Fam. Ventures, LLC*, the United States Supreme Court held that the Declaratory Judgment Act is procedural and does not change the substantive aspects of the claim, including the burden of proof on the underlying, coercive claim.571 U.S. 191, 199 (2014) (citations omitted); *see also Nat'l Fire & Marine Ins. Co. v. Wells*, 301 F.Supp.3d 1082, 1096 (N.D. Ala. 2018) (applying *Medtronic* in a declaratory judgment action involving a breach of contract claim).

4. Here, Ingenu seeks a judicial determination that it terminated the VAR for cause based on a series of alleged material breaches by Trilliant. Under California law, the party asserting a breach of contract claim has the burden of proof on each element of the claim. *See Sonic Mfg. Techs., Inc. v. AAE Sys., Inc.*, 196 Cal. App. 4th 456, 464 (2011); *see also* Cal. Evid. Code § 500 ("Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."); *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 861 (2001), *as modified* (July 11, 2001) ("As a general rule, the 'party desiring relief' bears the burden of proof by a preponderance of the evidence.'") (citation omitted). Further, in analogous declaratory relief actions, California Courts have placed the burden of proof by a preponderance of the evidence on the party seeking to establish its rights under an agreement. *Aydin Corp. v. First State Ins. Co.*, 18 Cal. 4th 1183, 1188 (1998), *as modified on denial of reh'g* (Oct. 14, 1998) ("The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage.").

5. Accordingly, Ingenu bears the burden of proof by a preponderance of the evidence to establish its right to terminate the VAR based on alleged material breaches by Trilliant. Trilliant, likewise, bears the burden of proof by a preponderance of the evidence on its defensive breach of contract claim that Ingenu materially breached the VAR.

6. Ingenu bears the burden of proof by a preponderance of the evidence on its breach

of contract claims regarding the Standstill Agreement, the VAR, and the Letter Agreement. *See Sonic Mfg. Techs.*, 196 Cal. App. 4th at 464; *Buss v. Superior Court*, 65 Cal. Rptr. 2d 366, 378 (1997) (citations omitted).

7. Ingenu also bears the burden of proof by a preponderance of the evidence on its claim for breach of the implied covenant of good faith and fair dealing. *See Pugh v. See's Candies, Inc.*, 203 Cal. App. 3d 743, 763 (1988); *Buss*, 65 Cal. Rptr. 2d at 378 (citations omitted).

8. Further, Ingenu bears the burden of proof by a preponderance of the evidence on its Lanham Act and UCL claims. *See Binder v. Disability Grp., Inc.*, 772 F. Supp. 2d 1172, 1178 (C.D. Cal. 2011); *Ketab Corp. v. Mesriani L. Grp.*, No. CV1407241RSWLMRWX, 2016 WL 2902333, at *3 (C.D. Cal. May 18, 2016), *aff'd sub nom. Ketab Corp. v. Mesriani & Assocs., P.C.*, 734 F. App'x 401 (9th Cir. 2018).

C. Factual Background

1. Wireless Communication Networks and the Utility Industry

9. Utilities primarily utilize wireless communication technologies to enable them to deploy advanced metering infrastructure ("AMI")[19] or smart meters that wirelessly transmit usage data back to the utilities. Dkt. No. 333, Test. M. Mortimer at 51:22-52:1. AMI has replaced electromechanical meters and allows utilities to read meters without sending a person out to manually read them. Dkt. No. 333, Test. M. Mortimer at 52:14-20. But the use case for AMI extends beyond alleviating the need for in-person meter readers. The access to data provided by AMI allows utilities to manage outages, track and manage usage, manage distributed solar generation, and provide more efficient customer service. Dkt. No. 333, Test. M. Mortimer at 56:15-59:19.

10. But utilities and related entities have numerous uses for wireless communication technologies in addition to AMI. Dkt. No. 335, Test. J. Wilson at 118:18-119:15; 148:23-152:1.

[19] AMI refers to using some form of technology to communicate with utility meters or other devices to send data back to the utility. Dkt. No. 333, Test. M. Mortimer at 52:2-8.

2. Trilliant

11. Trilliant is a networking and communications company focused on providing AMI to utilities around the world. Dkt. No. 333, Test. M. Mortimer at 51:22-52:1. In the 1980s, Trilliant began providing AMI networks by utilizing a household's landline telephone but then later developed a cellular network. Dkt. No. 333, Test. M. Mortimer at 62:7-22. Trilliant developed its mesh networking technology called SecureMesh, which it still utilizes, to provide utility and other networks today. Dkt. No. 333, Test. M. Mortimer at 62:23-64:3. In a mesh network architecture, smart meters communicate with one another to form a web network that relays data back to a collector for the utility to gather and use. Dkt. No. 333, Test. M. Mortimer at 62:23-64:3; 67:3-23.

3. Ingenu

12. Ingenu was founded in 2008 as On-Ramp Wireless. Ex. P-157 at ¶ 6 (Gazzolo Omnibus Decl.). Ingenu developed a type of wireless communication technology called Random Phase Multiple Access ("RPMA"), which is at the heart of this case. RPMA is a Low Power Wide Area Network technology that supports a point-to-multipoint network. Dkt. No. 333, Test. M. Mortimer at 65:13-24. Like a cellular network, an RPMA network relies on a single base station, such as an access point, that connects to multiple devices. Dkt. No. 333, Test. M. Mortimer at 62:23-64:7. The devices, such as smart meters, connect directly to the base station and do not connect to each other. *Id.*

13. While a mesh network is well-suited and cost effective for cities, suburbs, and other more densely populated areas, RPMA networks work particularly well in rural and remote areas where a single base station can connect devices at longer ranges. Dkt. No. 333, Test. M. Mortimer at 67:3-68:16; 72:8-21; Dkt. No, 335, Test. J. Wilson at 117:18-118:15. Another significant benefits of RPMA is its ability to support numerous applications on a single network. Dkt. No. 335, Test. J. Wilson at 117:13-17.

14. At the height of its business, Ingenu operated 38 networks in the United States, employed about 150 individuals, and generated approximately $8,000,000 in annual revenue. Ex. P-157 at ¶ 6 (Gazzolo Omnibus Decl.).

15. But despite this revenue and the promise apparent in the RPMA technology, Ingenu never achieved consistent profitability and remained dependent on continued financing from its investors, even at some points, to make payroll. Ex. P-157 at ¶ 7 (Gazzolo Omnibus Decl.); Dkt. No. 337, Test. B. Rossing at 23:1-23. Ingenu's financial statements from 2011-2016 reflect that the company had continuing negative cash flow. Ex. P-264 (E. Dean Report), Attachment 5.

16. So, in 2015, Ingenu pivoted. It rebranded from On-Ramp Wireless to Ingenu and moved "out of the solution business" to public networks. Dkt. No. 335, Test. J. Wilson at 152:20-22, 121:10-122:19; Ex. P-251. Rather than continuing to develop applications itself for specific market segments, such as utilities, Ingenu sought to license RPMA technology to experts in those markets, like Trilliant in the utility market. Dkt. No. 335, Test. J. Wilson at 116:15-20. This allowed Ingenu to focus on its core communication system and public networks efforts. Dkt. No. 335, Test. J. Wilson at 116:15-20. This shift in business strategy is documented in Ingenu's contemporaneous press releases and other news coverage. *See* Ex. P-251.

17. Initially, Ingenu's pivot generated excitement, attracting additional outside investments and new board members, including the former chief technology officer of Verizon Wireless, the former CEO of Verizon Wireless, and a founder of Qualcomm. Dkt. No. 337, Test. B. Rossing at 27:21-28-15.

18. But Ingenu soon began to struggle financially. Developing and implementing public networks was a capital-intensive undertaking. Ingenu invested tens of millions of dollars in leasing space on towers and installing its network infrastructure on those towers. Dkt. No. 335, Test. J. Wilson at 121:19-122:19, 155:24-156:20.

19. To recoup these capital expenditures, Ingenu's public networks model intended to charge users a fee to connect devices to Ingenu's public network. Dkt. No. 335, Test. J. Wilson at 156:8-20, 139:11-22 ("[O]n the public network, it was all about connections and the service revenue associated with that."). As a result, Ingenu "wanted to enable any and all solutions onto that network" to increases the number the connections and Ingenu's resulting licensing income. Dkt. No. 335, Test. J. Wilson at 152:20-22, 153:4-6. While the technology is different, the business model resembles companies like Qualcomm, AT&T, and Verizon, which install network

infrastructures to deliver multiple applications (internet service, streaming, etc.) to consumers. Dkt. No. 335, Test. J. Wilson at 133:1-16 ("[T]he easiest way to think about" a public network "is like a cellular network that's dedicated for sensors"); Dkt. No. 333, Test. M. Mortimer at 86:9-15.

20. Ingenu could not find sufficient paying clients for its public networks, and its expenditures greatly outpaced its revenues. Ex. P-157 at ¶ 8 (Gazzolo Omnibus Decl.). In 2017 alone, Ingenu suffered more than $34 million in losses. Ex. P-264 (E. Dean Report), Attachment 5.

21. Early after Ingenu's 2020 Chapter 11 bankruptcy filing, Ingenu's then-CEO Alvaro Gazzolo explained how the public network strategy failed:

> The Debtor's [Ingenu's] financial difficulties were compounded in or around 2015, when the Debtor undertook misguided efforts to move beyond its core business and expand into "machine-to-machine" communication. The Debtor developed the network capacity to provide this type of communication, but was unable to attract customers for it. ***The Debtor ultimately ran out of funding in late 2017 and early 2018, and its business essentially collapsed.***

Ex. 157 at ¶ 8 (Gazzolo Omnibus Decl.) (emphasis added); *see also* Ex. P-192 at ¶ 7 (Gazzolo Decl. re Secured Status).

22. As Ingenu's finances deteriorated, Ingenu continued to seek financing and borrow money. By the time Ingenu filed for bankruptcy, equity holders had invested approximately $120 million in Ingenu, and secured lenders had invested another approximately $44 million. Ex. P-157 at ¶ 14 (Gazzolo Omnibus Decl.).

4. The VAR

23. After developing RPMA technology, Ingenu worked with General Electric ("GE") to sell private networks and utility systems pursuant to a reseller agreement. Dkt. No. 335, Test. J. Wilson at 115:5-12.

24. As part of its pivot to public networks, Ingenu approached Trilliant and offered Trilliant a reseller agreement and licenses to acquire the utility-facing (related) aspect of Ingenu's business. Dkt. No. 333, Test. M. Mortimer at 79:23-80:9; Dkt. No. 335, Test. J. Wilson at 115:9-116:20, 122:23-123:18, 127:11-128:3; Ex. P-261 (Ingenu blog post stating that "Trilliant will offer RPMA's endpoints, access points and other network infrastructure was part of their offerings.

Trilliant will be the point of contact for privately owned smart grid and smart metering applications").

25. The acquisition included "all of [Ingenu's] then-operating private utility networks." Ex. P-197 at ¶ 3 (Gazzolo Decl. re Resp. to Opp. to Secured Status); *see also* Ex. P-248 at ¶ 5 (Gazzolo Decl. re Reply to Obj to Ch. 11). Ingenu sought to transition its existing customers and support requirements to Trilliant to allow Trilliant to further expand the private network business and create a revenue stream for Ingenu. Dkt. No. 335, Test. J. Wilson at 115:22-25, 118:16-22, 125:2-18.

26. Trilliant offered technical expertise in communications, AMI business case development, and how to compete in the utility industry. Dkt. No. 333, Test. M. Mortimer at 84:17-23. Such expertise was important given that one of the challenges facing Ingenu was the "very complicated, very long sales process for these multimillion-dollar systems." Dkt. No. 333, Test. M. Mortimer at 82:13-15.

5. Ingenu Fails to Meet Its Contractual Obligations

27. Ingenu's financial struggles impacted its relationship with Trilliant and stressed Trilliant's relationship with its own customers. Dkt. No. 334, Test. N. Matchett at 187:9-18, 189:6-190:10.

28. By October 2017, Ingenu vendors were withholding products because their bills were unpaid. Dkt. No. 333, Test. M. Mortimer at 153:7-154:8. To provide liquidity to Ingenu, Trilliant agreed to enter into Purchase Order No. 4500009952 on October 31, 2017. Ex. P-67; Dkt. No. 333, Test. M. Mortimer at 150:5-7. The Purchase Order provided that Trilliant would pay Ingenu $854,084.12, which included $290,000 for a "capped software license and 2018 Support and Maintenance." Ex. P-67.

29. Shortly thereafter, Trilliant and Ingenu executed Amendment No. 1 to the VAR on December 4, 2017, which among other things, incorporated Purchase Order No. 4500009952 and added Piconodes to the definition of "Product" under the VAR. Ex. P-69; Dkt. No. 333, Test. M. Mortimer at 116:3-8, 146:15-22.

30. Despite the help from Trilliant, Ingenu continued to struggle financially. On

December 12, 2017, Trilliant sent a letter to Ingenu documenting its concerns and requesting written assurances that Ingenu could fulfill its obligations under the VAR, including the outstanding purchase orders. Ex. P-71; Ex. P-72. Trilliant closed the letter by emphasizing that Trilliant's "new customers point to the mutual benefit of this relationship" and expressing Trilliant's "sincere hope that we continue to have a productive business relationship." Ex. P-71.

31. Early in 2018, Ingenu and Trilliant began negotiating Amendment No. 2 to the VAR to allow Trilliant to manage Ingenu's product supply chain because Ingenu could no longer do so. Dkt. No. 334, Test. N. Matchett at 198:21-199:10.

32. The Parties executed Amendment No. 2 on March 1, 2018. Ex. P-78. Among other things, Amendment No. 2 (1) extended the term of the VAR to 2035; (2) granted Trilliant the rights and licenses necessary to manufacture the Products; (3) expanded the Ingenu source code escrow to include the source code and documentation needed to manufacture the Products; and (4) provided that Trilliant would loan Ingenu $3.95 million through three separate notes as well as pay Ingenu a defined Additional Royalty and a one-time $50,000 fee. *Id.*

33. Contemporaneously with Amendment No. 2, Trilliant and Ingenu entered into the Letter Agreement, which provided that Trilliant would loan Ingenu $3.95 million by purchasing three notes, Note 1, Note 2, and Note 3. Ex. P-79. Under the Letter Agreement, Trilliant's obligation to provide each loan was triggered only after Ingenu satisfied certain conditions precedent. *Id.* Apparently believing Ingenu had satisfied the conditions precedent to Note 1, Trilliant loaned Ingenu $950,000 on March 1, 2018. Ex. P-266.

34. In April 2018, Ingenu could not make payroll, so to help, Trilliant agreed to split Note 3 into two separate notes (Notes 3 and 4) each for $750,000. Ex. P-82; Dkt. No. 333, Test. M. Mortimer at 166:22-168:6. Trilliant loaned Ingenu $750,000 through Note 3 on April 5 (Ex. P-267) and $750,000 though Note 4 on April 19 (Ex. P-84).

35. Advancing the loan to be evidenced by Note 2, however, was conditioned on Ingenu delivering letters authorizing Ingenu's manufacturers to accept, manufacture, deliver, and fulfill Trilliant's orders for the Products ("Letter of Authorization"). Ex. P-79. As of July 28, 2018, Ingenu had not fulfilled that condition, and on that date, Trilliant's obligation to loan Ingenu

the additional $1.5 million expired. Ex. P-79 at § 5(e).

36. During the same months that Trilliant was trying to keep Ingenu afloat, Ingenu failed and refused to provide maintenance and support services that the VAR obligated it to provide. *See* Ex. P-86. Notwithstanding this breach, Trilliant paid Ingenu $43,077.84 on June 14, 2018. Ex. P-91; Ex. P-275.

37. Ingenu rewarded Trilliant's generosity by abandoning its maintenance and support obligations altogether in August 2018, when Trilliant escalated a technical support issue that affected all of Trilliant's customers. Dkt. No 334, Test. N. Matchett at 216:18-218:10; Dkt. No. 335, Test. N. Matchett at 11:24-15:2. Ingenu refused to act and instead demanded that Trilliant loan Ingenu an additional $1.5 million via Note 2 even though the conditions precedent had not been fulfilled and any obligation on Trilliant's part to make the loan had lapsed on July 28. Dkt. No 334, Test. N. Matchett at 216:18-218:10; Dkt. No. 335, Test. N. Matchett at 14:21-15:2.

38. When Ingenu refused to fix the issue for twelve days, Trilliant delivered a notice of breach to Ingenu on August 14, 2018, and notified the escrow agent of Ingenu's breach. Ex. P-112; Ex. P-117; Dkt. No. 333, Test. M. Mortimer at 182:2-7.

39. Ingenu did not deny its breaches of the VAR or object to the release of source code from escrow. Dkt. No. 335, Test. N. Matchett at 17:19-25; Dkt. No. 339, Test. B. Razi at 51:10-14. Indeed, Ingenu sent no substantive response whatsoever to Trilliant's breach letter and no response at all to the escrow agent. Instead, Ingenu's then-CEO Babak Razi emailed a threat to Trilliant, calling Trilliant "unethical" and prophesizing that "I will make it my personal mission henceforth to repay this kindness—either now or later." Ex. P-115.

6. Ingenu Files for Bankruptcy

40. On July 23, 2020, Ingenu's then-CEO, Babak Razi, sent a letter to Trilliant's Chairman and CEO, Andrew White, alleging that Trilliant had breached the VAR, that such breaches were material, and that a portion of the breaches were not curable ("Termination Letter"). Ex. P-143. As a result, Ingenu purported to terminate the VAR and reserved its intention to seek recovery of damages and other relief. *Id.* Ingenu provided no notice, formal or informal, to

Trilliant of these alleged breaches before the Termination Letter. Dkt. No. 287 at 3 (Oct. 18, 2023 PTO); Dkt. No. 241 at 4 (Disc. Desig.).

41. Trilliant received the Termination Letter on July 27, 2020. Dkt. No. 336, Test. D. Wolfe at 109:22-110:3. The same day, Ingenu filed for bankruptcy protection. Ex. P-154 (Voluntary Pet. For Non-Individuals Filing for Bk. ("Ingenu Bk. Pet.")). At that point, Ingenu remained in default on the three notes issued to Trilliant, totaling over $2.7 million in principal and interest. Ex. P-154.

42. In its bankruptcy, Ingenu sought to sell the intellectual property licensed to Trilliant under the purportedly terminated VAR. Dkt. No. 287 at 3 (Oct. 18, 2023 PTO).

7. The Standstill Agreement

43. In letters to Trilliant's customers and partners dated July 22, 2020—the day *before* the Termination Letter—Ingenu's outside counsel claimed that Trilliant's rights to utilize Ingenu's intellectual property were terminated and threatened legal action if they continued to utilize the intellectual property. Ex. P-142.

44. A few weeks later, Ingenu and Trilliant entered into the August 17, 2020 Standstill Agreement. Ex. P-163. The Standstill Agreement was a one-page agreement negotiated by Ingenu's and Trilliant's bankruptcy counsel, which—in the words of Ingenu's counsel—sought "to preserve the status quo for a few weeks to see if the parties could reach a new agreement. Ex. P-269. As he further explained: "We understand that you're going to keep doing what you've been doing previously, and we agree to not do anything to try to stop you while the standstill agreement is in force." *Id.* To effectuate this intent, the Standstill Agreement prohibited either party from "stating or suggesting that the VAR has been terminated." Ex. P-163.

45. The next month, Trilliant filed its Complaint in this adversary proceeding, seeking confirmation of its rights under the VAR and an injunction prohibiting Ingenu from interfering with those rights and with Trilliant's customer relationships. Ingenu then filed a Cross-Complaint, and Trilliant filed its Counterclaims in Reply.

D. Summary of the Court's Findings

46. The question at the heart of this case is the validity of Ingenu's theory that Trilliant

caused Ingenu's decline, ultimate bankruptcy, and unrealized business opportunities. At trial, no testimony supported that theory.

47. Ingenu was in decline long before this litigation and long before the accusations against Trilliant. In 2017 through 2018, high-profile board members and employees were leaving, and Ingenu was calling investors and asking for help to make payroll. No evidence at trial suggests that Trilliant caused any of that. Instead, the relationship with Trilliant soured because Ingenu was not maintaining its RPMA technology and refused to provide Trilliant the maintenance and support services Ingenu promised under the VAR.

48. Two years later, Ingenu's bankruptcy followed. Ingenu's new plan for profitability, formulated around the time of Ingenu's bankruptcy, was revenue sharing. However, the evidence at trial showed that the revenue sharing plan was not going to work either. Two of Ingenu's anticipated partners (Dave Mayers of Liquid Fibre and Brad Rathje of Aquacheck[20]) told Ingenu that they would not accept a revenue sharing deal. The Court received no evidence that Ingenu ever obtained a materially significant revenue sharing agreement.

49. Ultimately, Ingenu created useful and interesting technology, but it has been unable to make it commercially successful. That was not Trilliant's fault.

50. The analysis in the subsections below sets forth the Court's rulings on each of the claims at trial and the evidence in support of those rulings. In further support of the Court's conclusions, the Court provides the following analysis of the credibility of the key witnesses at trial.

51. First, the Court finds highly credible the testimony of Jason Wilson, Ingenu's former Senior Vice President of Global Licensing and Business Development and Ingenu's chief negotiator of the VAR. Dkt. No. 335, Test. J. Wilson at 114:9-21, 124:16-22. Mr. Wilson managed the transition of Ingenu and GE customers to Trilliant and partnered closely with Trilliant employees Michael Mortimer, Nick Matchett, and Doug Wolfe to execute the VAR and

[20] Brad Rathje is the manager of Aquacheck—the company provides soil moisture sensors to Rain Cloud. Dkt. No. 338, Test. C. Pillow at 33:6-16.

pursue opportunities with Trilliant. Dkt. No. 335, Test. J. Wilson at 114:7-8, 123:22-124:10, 154:4-25. Mr. Wilson's testimony was crucial, and he supported Trilliant's version of the facts on many points. It was clear to the Court that Mr. Wilson believed in the revenue sharing solution and believed that the VAR was in Ingenu's best interest. It is also clear to the Court that Mr. Wilson was an independent thinker with no agenda beyond telling the truth.

52. Second, the Court found all of Trilliant's witnesses credible. The cohesive story that emerged from their testimony was particularly compelling to the Court.

- The Court found credible the testimony of Michael Mortimer, Trilliant's Chief Commercial Officer, lead negotiator of the VAR, and negotiator of VAR Amendment No. 1. Dkt. No. 333, Test. M Mortimer at 50:23-51:1, 78:13-15, 144:25-145:1. In particular, the Court found believable the testimony by Mr. Mortimer that Trilliant wanted Ingenu to survive and thrive. Further, the Court accepted Mr. Mortimer as an expert in the field of sales and marketing of wireless communications with an emphasis on the utility marketplace. Dkt. No. 333, Test. M Mortimer at 54:18-23, 61:1-21.
- The Court also found credible the testimony of Nick Matchett, Trilliant's Managing Director for Americas and negotiator of VAR Amendment No. 2. Dkt. No. 334, Test. N. Matchett at 184:7-11, 195:2-9. Mr. Machett was "the primary liaison between Trilliant and Ingenu" and kept a desk at Ingenu's office. Dkt. No. 334, Test. N. Matchett at 184:20-185:16. The Court also found his testimony that Trilliant wanted Ingenu to prosper believable.
- The Court found the testimony of Trilliant's Vice President of IT and Global Support and former Director of Customer Support, DeWayne Kuhn, very highly credible. Mr. Kuhn manages support services for Trilliant's RPMA and other customers. Dkt. No. 340, Test. D. Kuhn at 5:8-9, 6:7-13. The Court found very highly credible his testimony as to the process of onboarding the Ingenu relationship and technology, the problems arising from Ingenu's failure to provide maintenance support, and the difficulties faced by Trilliant even after the IP was released from escrow. The Court also accepted Mr. Kuhn as an expert in the architecture of computer networks, particularly wireless networks sold by Trilliant.

Dkt. No. 340, Test. D. Kuhn at 42:24-45:3.

- The Court also found credible the testimony of Trilliant's Vice President of Wireless Solutions, Doug Wolfe. Mr. Wolfe's work included pursuing opportunities in Indonesia with PLN and discussions with Rain Cloud and Liquid Fibre. Dkt. No. 335, Test. D. Wolfe at 211:8-213:14; Dkt. No. 336, Test. D. Wolfe at 10:18-12:9, 13:14-24. The Court found his explanations of his actions and communications with respect to those pursuits credible and consistent with the Court's conclusion that such actions did not breach the VAR.

53. Third, the Court finds Ingenu's witness and former CEO, Babak Razi, not credible.

- The evidence establishes, and Mr. Razi admitted, that he and his fund lost approximately $90 million as a result of Ingenu's collapse. Dkt. No. 339, Test. B. Razi at 64:12-23. Although this loss entitles him to be massively unhappy, he came across as grasping and vindictive in documents and oral testimony. For example, two years before sending the Termination Letter, when Trilliant gave notice of the escrow release, Mr. Razi threatened that "I will make it my personal mission henceforth to repay this kindness—either now or later." Ex. P-115.
- Mr. Razi also came across as weak on the facts and the equities. He seems to have, in the Court's opinion, blurred the distinction between the risk-reward dynamic intrinsic to an investor, where both risk and reward can be enormous, and the much more modest reward available to a licensee like Trilliant, which justifies less risk.
- Mr. Razi also had a weak understanding of the VAR, particularly the fact that Ingenu was obligated to provide the maintenance and support services that Trilliant requested even if Trilliant did not make the Note 2 loan to Ingenu under the Letter Agreement. Making that loan was not required for Trilliant to have the contractual right to those services under the VAR, and as previously noted, Trilliant was not obliged to make that loan because Ingenu failed to satisfy the conditions precedent for the loan by the Letter Agreement's deadline. Further, although Mr. Razi served as Ingenu's CEO from the middle of 2017 until "early 2020," Razi only "[v]aguely" recalled negotiating Amendment No. 2 to the VAR. Dkt.

No. 339, Test. B. Razi at 34:17-19, 71:7-9. He could not recall basic details about the VAR, including whether Ingenu was obligated to provide maintenance and support to Trilliant. Dkt. No. 339, Test. B. Razi at 72:3-12, 82:6-15.

- Mr. Razi's allegations that Trilliant manipulated the situation to gain access to Ingenu's technology are not credible. *See* Dkt. No. 339, Test. B. Razi at 53:8-54:2. The failure of Ingenu to provide maintenance and support services resulted in the escrow release of the IP. Trilliant could fix the problems where Ingenu refused to do so, but Trilliant does not own the IP and did not get the IP. Its rights remain limited by the VAR. Mr. Razi did not seem to understand the distinction.
- Mr. Razi also rather appallingly seemed to misapprehend his obligations once he began to run the company. His crocodile tears for line employees working without pay was, frankly, horrifying. If they could not be paid, he had an obligation to ask them not to work, the consequences being whatever they would be. Paying them was not an obligation of Trilliant, Mr. Rossing's fund, or anybody else.
- Finally, Mr. Razi did not appear to understand the technology. The notion that Piconodes do not work with a private network is ridiculous and contravenes common sense based on how the technology works. Numerous witnesses, including Mr. Wilson, debunked this claim. *See, e.g.*, Dkt. No. 335, Test. J. Wilson at 136:19-25; Dkt. No. 333, Test. M. Mortimer at 198:6-12.

54. Fourth, while the Court respects Ingenu's current President, CEO, and sole director, Brian Rossing, he is relatively new on the ground in this case and lacks personal knowledge of the key issues. Mr. Rossing did not become the President and sole director of Ingenu until January 2021. Dkt. No. 337, Test. B. Rossing at 69:21-70:14. Before then, Mr. Rossing described himself in an email to Trilliant as "only a creditor." Ex. D-9. Having no involvement in the negotiation of the VAR or its Amendments, he had no personal knowledge upon which to testify about Ingenu's intent when entering those agreements. Dkt. No. 337, Test. B. Rossing at 72:1-72:12. Further, Mr. Rossing does not have personal knowledge to support Ingenu's allegation that Trilliant was pursuing a "public network" deployment with Rain Cloud. Dkt. No. 337, Test. B. Rossing at

103:23-105:15. Nor does he have personal knowledge of the Standstill Agreement, which he learned about only after it had been terminated. Dkt. No. 337, Test. B. Rossing at 130:19-131:13. As a result, Mr. Rossing's testimony as to the belief that Trilliant was the cause of Ingenu's decline was not credible and was not supported beyond supposition.

55. Fifth, the Court gave no weight to Ingenu's damages expert, Paul Zimmer.

- Mr. Zimmer admits he made a $500 million mistake in his original report. Dkt. No. 338, Test. P. Zimmer at 67:18-20. Although Mr. Zimmer assumed that the revenue sharing would make his damages assessment possible, the only evidence at trial confirmed that model would not be successful. Dkt. No. 339, Test. D. Mayers at 27:2-13; Dkt. No. 336, Test. W. Schmidt at 167:22-169:7, 188:5-18. Further, Mr. Zimmer was unaware of the bankruptcy sale, which yielded no takers for purchase of Ingenu's IP. Dkt. No. 338, Test. P. Zimmer at 81:17-82:2. This should have been a consideration in some fashion, and Trilliant's rebuttal expert, Elizabeth Dean, laid out a mountain of other problems with Mr. Zimmer's opinion, which the Court found highly credible. *See* Dkt. No. 247 (Dean Decl.).
- This evidence undermined Mr. Zimmer's opinion, which relies entirely on an "Opportunities Pipeline" to identify business opportunities that Mr. Zimmer did not bother to evaluate as to their reality or as to Ingenu's realistic chance of winning them. Dkt. No. 338, Test. P. Zimmer at 60:16-62:7. Mr. Zimmer also assumed, in every instance, that Trilliant was the sole reason that Ingenu lost an opportunity. Dkt. No. 338, Test. P. Zimmer at 62:22-63:14. Mr. Zimmer simply assumed that Ingenu would adopt a "new business model" and because of its allegedly valuable IP, immediately turn a profit; such assumptions by an expert contravenes California law. Dkt. No. 338, Test. P. Zimmer at 72:16-73:8; *see also Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 774 (2012); *see, e.g.*, *Prostar Wireless Grp., LLC v. Domino's Pizza, Inc.*, 360 F. Supp. 3d 994, 1020 (N.D. Cal. 2018), *aff'd*, 815 F. App'x 117 (9th Cir. 2020).

In sum, the Court found Mr. Zimmer's opinions lacking in substance. And because the Court does not find Trilliant caused Ingenu to lose any business or suffer any damages, Mr. Zimmer's opinion is also irrelevant.

56. The Court finds Ingenu's utility regulatory expert, Brendan Larkin-Connolly, partially credible.

- Mr. Larkin-Connolly was more credible in discussing industry norms and agreeing that the sale of streetlight controllers to a utility as an end user was appropriate and within the Field of Use. Dkt. No. 341, Test. B. Larkin-Connolly at 26:8-16.
- But in other respects—in particular in interpreting the VAR—the testimony of Mr. Wilson, who actually negotiated the document for Ingenu, is vastly more compelling. Mr. Larkin-Connolly did not negotiate the VAR or its amendments, so his testimony cannot help the Court outside discussing what the industry might generally consider. Testimony regarding what the parties actually considered has to carry the day. For example, Mr. Larkin-Connolly takes a "strict view" that "in order for an RPMA network itself to remain within the field of use, all of the marketed or practiced end uses of the network must themselves be within the field of use." Dkt. No. 341, Test. B. Larkin-Connolly at 16:4-17. But his testimony contradicts—and ignores—testimony by both negotiators of the VAR (Mr. Wilson and Mr. Mortimer) that the Field of Use ***defined the type of network but not the type of applications*** on the network; it also contradicts their contemporaneous and subsequent actions in performing under the VAR *See* Dkt. No. 335, Test. J. Wilson at 146:2-16, 160:17-161:6, 166:5-16; Section IV(E)(1)(b), *infra*.
- Finally, Mr. Larkin-Connolly's opinion turns on the purported lack of "evidence" for various propositions, but he admitted that he did not review any evidence in the case. Dkt. No. 341, Test. B. Larkin-Connolly at 20:25-21:23 (reviewed no documents); 22:19-23:21 (declaring "no evidence" that irrigation customers used RPMA within the utility value chain); 28:14-29:20 (same re: streetlights).

57. The Court gives no weight to Ingenu's network expert, Shi Baw Ch'ng.

- Mr. Ch'ng relied on documents that, in fact, supported Trilliant. In particular, the trial evidence contradicts the only four bases of Mr. Ch'ng's opinion. Ex. D-340 at § 5.1 (S. Ch'ng Report); Dkt. No. 341, Test. S. Ch'ng at 60:20-61:7. His first two bases are a figure and a bullet point from Trilliant's Appliance Deployment Guide (Ex. D-340 at § 5.1 (S.

Ch'ng Report)), which is a re-branded version of the Ingenu Appliance Deployment Guide provided as part of Ingenu's training program (Dkt. No. 340, Test. D. Kuhn at 47:16-48:1; *compare* Ex. D-258 (Trilliant Appliance Deployment Guide) *with* Ex. P-10 (On-Ramp Wireless Appliance Deployment Guide) ("Ingenu Deployment Guide"). Mr. Ch'ng conceded that the figure and bullet point are identical in Trilliant's and Ingenu's guides. Dkt. No. 341, Test. S. Ch'ng at 62:13-63:12; 64:9-17. In other words, they were documents that were prepared by Ingenu and that Ingenu provided to Trilliant when the relationship was being onboarded. Ingenu was in effect saying to Trilliant "this is what you can do," but Mr. Ch'ng was using them to say, Trilliant, "this is what you cannot do." His third and fourth bases are emails referencing On-Ramp Total View ("OTV"). Ex. D-340 at § 5.1 (S. Ch'ng Report); Dkt. No. 341, Test. S. Ch'ng at 64:23-65:23. OTV is governed by a separate licensing agreement that has no private network restriction. Ex. P-271; Dkt. No. 341, Test. S. Ch'ng at 67:13-68:18.

- Further, Mr. Ch'ng's opinion contradicts a former Ingenu employee's testimony. Mr. Wilson testified that private networks may connect to the internet. Dkt. No. 335, Test. J. Wilson at 132:8-25. Mr. Ch'ng's opinion also contradicts Ingenu's trainings to Trilliant, which described private networks utilizing internet connections.[21] Dkt. No. 335, Test. J. Wilson at 131:25-132:25; Dkt. No. 340, Test. D. Kuhn at 8:3-9:19, 54:24-56:1, 64:16-65:14 (discussing Ex. P-10 and Ex. P-238).

E. The Parties' Declaratory Relief Claims

58. Both Trilliant and Ingenu bring claims for declaratory relief, requesting that the Court determine the status of the VAR following Ingenu's purported attempt to terminate it through the Termination Letter. Dkt. No. 1 at ¶ 44 (Compl.); Dkt. No. 73 at ¶ 112 (Third Am. Cross-Compl.).

59. California law governs the VAR. Ex. P-1 at ¶ 15.5. Accordingly, in interpreting the

[21] Mr. Kuhn explained that Trilliant's private networks rely on data encryption to prevent breaches and ensure security. Dkt. No. 340, Test. D. Kuhn at 53:8-54:18.

VAR, the Court must ascertain and give effect to the parties' "mutual intent[]" at the time the VAR was executed. Cal. Civ. Code § 1636. The Court determines the parties' intent from the written provisions "alone," provided "the language is clear and explicit, and does not involve an absurdity." Cal. Civ. Code §§ 1638 and 1639; *see also Marder v. Lopez*, 450 F.3d 445, 449 (9th Cir. 2006) ("The parties' intent should be inferred from the language of the [contract], so long as that language is not ambiguous or uncertain.").

60. However, where the language of a contract is "reasonably susceptible" to more than one interpretation, it is considered ambiguous. *Winet v. Price*, 4 Cal. App. 4th 1159, 1165 (1994). Even if a contract "is clear and unambiguous on its face, the trial judge must consider relevant extrinsic evidence that can prove a meaning to which the language of the contract is reasonably susceptible." *United States v. King Features Ent., Inc.*, 843 F.2d 394, 398 (9th Cir. 1988). Further, the Court may admit the extrinsic evidence "if the language of the contract is 'reasonably susceptible' of the meaning urged by the parties." *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1091 (9th Cir. 2005) (citing *Pacific Gas and Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33 (1968)).

61. California courts have long recognized that contemporaneous evidence of the contracting parties' intent and their actual performance under the contract is reliable, highly probative evidence of the contract's meaning. *E.g.*, *Alameda Cnty. Flood Control & Water Conservation Dist. v. Dep't of Water Res.*, 213 Cal. App. 4th 1163, 1200 (2013) ("It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be." (quoting *Mitau v. Roddan*, 149 Cal. 1, 14-15 (1906))); *see also Perez v. Discover Bank*, 74 F.4th 1003, 1010 (9th Cir. 2023) ("We look to the reasonable expectation[s] of the parties at the time of contract.") (citations and internal quotation marks omitted).

62. The VAR Section 4.2 governs a party's right to terminate the VAR. It provides:

> Termination for Cause. Each party may terminate this Agreement,

> upon written notice to the other party, in the event that the other party materially breaches its obligations hereunder, which breach remains uncured following sixty (60) Calendar Days from the date that the breaching party receives written notice from the non-breaching party.

Ex. P-78 at ¶ 13.

63. California law strictly enforces contract termination provisions and thus Ingenu may only terminate the VAR in compliance with Section 4.2. *See, e.g.*, *Mad River Lumber Sales, Inc. v. Willburn*, 205 Cal. App. 2d 321, 324 (1962) (holding the defendant "could only terminate the contract in accordance with" its terms, which "limited her power of termination"). This principle "is axiomatic." *Kuffel v. Seaside Oil Co.*, 11 Cal. App. 3d 354, 368 (1970) (holding that a party cannot shorten "the express term of a contract" unless it exercises the termination clause in "the manner prescribed by the contract").

64. As a result, to effectively terminate the VAR, Ingenu must comply with Section 4.2's terms, which include: (1) a "material[] breach" by Trilliant; (2) Ingenu providing "written notice" to Trilliant of the "material[] breach;" (3) Ingenu providing "sixty (60) Calendar Days" to Trilliant to cure any curable breaches, and (4) the alleged "breach remain[ed] uncured following sixty (60) Calendar Days. Ex. P-78 at ¶ 13. In particular, because the VAR expressly requires the terminating party to provide "written notice" of a material breach, Ingenu can only rely on "breaches" it provided Trilliant written notice of in its Termination Letter. Ex. P-78 at ¶ 13; Ex. P-143. Ninth Circuit precedent likewise requires pre-suit notice. *See Rano v. Sipa Press, Inc.*, 987 F.2d 580, 586 (9th Cir. 1993).

65. As set forth in detail below, the Court carefully considered all the evidence in connection with each specific breach alleged by Ingenu and determined that: (1) some alleged breaches did not occur, (2) the remaining alleged breaches were not material within any reasonable interpretation of the VAR and the facts of this case, and (3) all breaches that actually occurred were curable and cured within 60 days. Therefore, the Court concludes that Ingenu's attempt to terminate the VAR failed.

1. Ingenu Failed to Prove Any Uncured, Material Breach Identified in Its

Termination Letter.

66. The Court finds that none of the alleged breaches by Trilliant identified in the Termination Letter or later by Ingenu constitute an uncured material breach that supports Ingenu's attempt to terminate the VAR. The Court additionally finds that Ingenu's continuing material breach of the VAR precluded it from terminating the VAR for nonmaterial, curable breaches. Accordingly, declaratory judgment in Trilliant's favor that Ingenu did not effectively terminate the VAR is appropriate.

a. The Evidence at Trial Undermines the Credibility of Allegations Made by Mr. Razi in the Termination Letter.

67. As a threshold matter, the evidence at trial, including the timing of the Termination Letter and testimony of its author, Mr. Razi, and Ingenu's other employees at the time, undermine the credibility of the allegations in the letter. In particular, the Court finds that the Termination Letter appears to be an improper action borne out of desperation or, in an even less positive light, an attempt to achieve leverage and revenge. The evidence does not support the Termination Letter's allegations that non-curable defaults of the VAR by Trilliant existed.

68. The background facts of the case support the Court's conclusion. First, the evidence at trial did not support Mr. Razi's unreasonable assertion of generalized bad acts by Trilliant.

69. Second, Mr. Razi's warning to a board member that he would, in effect, seek revenge on Trilliant for requesting the release of the escrow also supports that the Termination Letter was an unwarranted attempt to terminate the VAR. *See* Ex. P-115 (Mr. Razi threatening that "I will make it my personal mission henceforth to repay this kindness—either now or later").

70. Third, the Termination Letter's timing also suggests bad faith. Seven months before sending the Termination Letter, Ingenu, through at least Mr. Gazzolo, was already in the marketplace telling a Trilliant supplier that Ingenu was going to terminate Trilliant's rights. Ex. P-130 (discussing Ingenu's plan to terminate the VAR in January 2020 with Renesas Electronics America Inc. ("Renesas")); Dkt. No. 339, Test. B. Razi at 68:20-69:11; *see* Dkt. No. 342 (Gazzolo

Desig. and Counter-Desig.), Ex. A at 33:13-17 (Mr. Gazzolo admitting he long hoped to terminate the VAR). Further, Ingenu took these steps without any demand on Trilliant and without any notice to Trilliant. Ingenu admits that it did not notify Trilliant of any alleged breaches of the VAR before sending the Termination Letter. Dkt. No. 241 at 4 (Disc. Desig.) (Ingenu concedes it provided no notice of breach prior to its Termination Letter); Dkt. No. 287 at 3 (Oct. 18, 2023, PTO) (Pre-Trial Order admitting the same).

71. Fourth, the Termination Letter is dated two business days before Ingenu's July 27, 2020, Chapter 11 filing. Ex. P-143. Trilliant, however, did not receive the Termination Letter until the same day Ingenu filed for bankruptcy.[22] Dkt. No. 336, Test. D. Wolfe at 109:22-110:3. Trilliant was owed far more by Ingenu under the notes that were in default than it owed to Ingenu directly under the VAR as monetary defaults. But because of the bankruptcy filing, Trilliant could not cure the alleged monetary defaults through setoff without violating the bankruptcy stay. While the Court declines to analyze whether non-stayed recoupment was available, the Termination Letter's timing appears calculated to limit Trilliant's options.

72. Fifth, as the conduct of the bankruptcy indicated, this was not a classic Chapter 11 "reorganization". Instead, from the very beginning of the case, Ingenu's intent was to sell all assets and, in particular, its intellectual property, with a backup plan of conversion of senior secured debt to equity. *See* Bk. Dkt. No. 7 (Mot. for Authority to Obtain Post Pet. Financing) (Ingenu confirming its intent the day after its bankruptcy filing to employ Sherwood Properties to market the company); Ex. P-157 (Gazzolo Omnibus Decl.); Ex. P-244 (Gazzolo Decl. re Mot. for Auth.); *see also* Dkt. No. 5 at ¶¶ 1, 32-33 (Ingenu Ans.). Ingenu's initial assumption must have been that recovery under this bankruptcy strategy would be improved if it could sell the assets free of Trilliant's license.

73. Relatedly, Ingenu was also in the marketplace making efforts to sell to utilities.

[22] At the December 15, 2023, hearing, the Court mistakenly stated that Trilliant did not receive the Termination Letter until after Ingenu filed for bankruptcy. The fact that Ingenu filed for bankruptcy the same day as Trilliant received the Termination Letter does not change the Court's finding that the timing of Ingenu's bankruptcy appears calculated to limit Trilliant's options.

This includes Ingenu's bid on the EBS tender in Suriname. Exhibit P-198 (Email re Waison-Suriname); Dkt. No. 335, Test. N. Matchett at 39:13-24. Such sales would have violated the exclusivity clause of the VAR.

74. Sixth, in nine letters dated the day ***before*** its Termination Letter, Ingenu wrote to Trilliant's partners and customers to "provide formal legal notice that Trilliant Network's license agreement has been terminated" and demanding that "any discussions" with Trilliant cease. Ex. P-142; Dkt. No. 287 at 3 (Oct. 18, 2023 PTO); Dkt. No. 334, Test. M. Mortimer at 176:11-177:12. Letters went to, among others, Liquid Fibre and Aquacheck. Ex. P-142. v Ingenu purported to terminate Trilliant's Letter of Authorization with Renesas the day after sending its Termination Letter, again claiming that "Ingenu has, contemporaneously with sending this letter, terminated its [VAR] with Trilliant." Ex. P-144. Ingenu also admits that it sent letters to two of Trilliant's prospective customers in Chile: SAESA and Chilquinta. Dkt. No. 287 at 3 (Oct. 18, 2023 PTO). By sending these letters the day before its Termination Letter, Ingenu denied Trilliant any opportunity to cure the alleged breaches with respect to those parties. Dkt. No. 334, Test. M. Mortimer at 176:11-177:12.

b. Trilliant Did Not Breach the Field of Use Provision.

75. Many of Ingenu's allegations attempted to paint Trilliant as veering "outside its lane" with respect to the scope of its license under the VAR. Ingenu is simply wrong.

76. VAR Sections 1.4 and 1.8 outline the scope of Trilliant's license. Section 1.4 provides Trilliant a license to "sell, offer for sale, have sold, market, publicly perform, display and distribute the Products . . . to Trilliant Partners and End Users in the Field of Use in the Territory . . . ." Ex. P-78 at ¶ 4. And Section 1.8 makes Trilliant's right to "resell Products for Private Networks within the Field of Use" globally "exclusive." Ex. P-1 at ¶ 1.8. In both instances, the VAR cites the Field of Use, which it defines as:

> Any application where the End User is a utility (Electric, Gas, Water or combination thereof or an entity engaged in the utility value chain, e.g., an energy retailer, energy generator, distributor, competitive power producer, grid operator, independent system operator, a demand aggregator, distributed energy resource provider, virtual peak power plan provider. For the avoidance of doubt the Field of Use does not include use of the RPMA Network to connect

> to assets and devices that are not owned, controlled, hosted, or made available by the End User for a use within the utility value chain.

Ex. P-78 at ¶ 19. The definition then includes a list of illustrative examples. *Id.*

77. The Court finds that the evidence at trial supports Trilliant's interpretation of the VAR and the Field Use restriction as defining the ***type of network*** (*i.e.*, private) and the ***type of entity*** using the network (*i.e.*, a utility or entity engaged in the utility value chain)—but it did ***not*** define the type of applications on that network. Dkt. No. 335, Test. J. Wilson at 146:2-16, 160:17-161:6, 166:5-16. As Ingenu's lead VAR negotiator, Jason Wilson, explained, the Field of Use permitted a utility or utility value chain purchaser to use the Private Network system as it wishes. Dkt. No. 335, Test. J. Wilson at 124:16-125:1, 145:22-146:22, 160:17-161:6, 166:5-16. As Mr. Wilson explained, a "private network can support any application," so the parties intended that if Trilliant had an application, and "the private network operator had a use case for that" application, they "could deploy it on that network"—"no problem." Dkt. No. 335, Test. J. Wilson at 165:18-166:4. As an example, for San Diego Gas & Electric, the Field of Use included streetlights, FAA lights atop transmission towers, distribution automation to monitor power lines, and monitoring weather stations. Dkt. No. 335, Test. J. Wilson at 117:18-118:22; 129:2-130:3. The Field of Use also included door security sensors that "[y]ou wouldn't think . . . would be part of the utility value chain but you can go into a transformer substation and alarm that." Dkt. No. 335, Test. J. Wilson at 166:5-12. Essentially, the parties intended the Field of Use provision's "[a]ny application" language to mean "[e]xactly what it says." Dkt. No. 335, Test. J. Wilson at 146:4-22.

78. The agreed-upon Field of Use was "***open season***" for any application that the customer sought to use for "operations and maintenance and things like that." Dkt. No. 335, Test. J. Wilson at 129:24-130:3 (emphasis added); *see also* Dkt. No. 335, Test. J. Wilson at 165:18-166:16. "[T]he core of [Trilliant's and Ingenu's] sales pitch" and "a key value proposition" of an RPMA private network "was its ability to support lots and lots of applications on a single network to capacity." Dkt. No. 335, Test. J. Wilson at 116:2-17:17, 129:2-130:3, 146:6-22, 160:17-161:6. That allowed customers to "monetiz[e]" their "capital investment across many, many

applications." Dkt. No. 335, Test. J. Wilson at 146:6-22; *see also* Dkt. No. 333, Test. M. Mortimer at 121:20-122:12. Ingenu "always intended to allow more and more applications on there because it was financially beneficial to Ingenu." Dkt. No. 335, Test. J. Wilson at 161:10-25. The only limitation was that it was for the ***customer's*** "use case," *i.e.*, they could not become Verizon Wireless. Dkt. No. 335, Test. J. Wilson at 146:6-22, 162:18-163:5.

79. As for the "utility value chain" portion of the Field of Use, that language was intended "to make sure . . . there was an opportunity for trying to sell private networks to" third-party companies that work with utilities or in the utility value chain and capture the "different nuances" that "you can imagine around the globe." Dkt. No. 335, Test. J. Wilson at 146:23-147:21.

80. Although Mr. Wilson did not negotiate VAR Amendment No. 2 and its definition of the Field of Use, Ingenu's sole remaining employee, Mr. Rossing, conceded that the scope of the Field of Use did not change in Amendment No. 2; it was amended simply to provide examples. Dkt. No. 337, Test. B. Rossing at 53:3-7 ("I don't think the intent was to make any changes to the field of use."); *see also* Dkt. No. 333, Test. M. Mortimer at 160:5-10; Dkt. No. 334, Test. N. Matchett at 204:16-19).

81. Additionally, Ingenu failed to support its allegations that Trilliant acted outside its license with evidence. Not a single witness before the Court testified that they or their company would have done business with Ingenu had Trilliant not interfered. Ingenu has no direct evidence of any interference by Trilliant. Instead, Ingenu asked the Court to rule based on assumptions. The Court declines to do so.

82. As discussed in detail below, the Court finds that Ingenu failed to support its case with anything even approaching concrete evidence of activities outside the Field of Use other than exploratory discussions to determine whether business within the Field of Use was possible.

(1) Private Networks for Streetlight Controllers for Utilities Are within the Field of Use.

83. The Court concludes that the efforts to sell a private network controlling streetlights in Chile via transaction through FAE Lumisistemas, Ltda ("FAE") was not a violation

of the VAR for the following reasons.

84. First, Trilliant never completed the sale to FAE. Dkt. No. 333, Test. M. Mortimer at 190:13-24.

85. Second, Ingenu previously acknowledged that the VAR authorized Trilliant to partner with FAE to provide a utility a private network involving the control of streetlights. Ex. P-107. In particular, while he was Ingenu's CEO, Mr. Razi wrote to FAE, authorizing and "fully endors[ing] Trilliant as your RPMA provider." Ex. P-107; Dkt. No. 333, Test. M. Mortimer at 191:10-17. At the time, Mr. Razi was aware the proposed transaction involved streetlights. Trilliant had discussed FAE's business with Mr. Razi, and the letter referenced it twice. Dkt. No. 334, Test. N. Matchett at 226:2-20; Dkt. No. 339, Test. B. Razi at 44:2-3 (Mr. Razi admitting FAE's business "was streetlights."); Ex. P-107.

86. Third, a 2017 email from an Ingenu employee shows that Ingenu shared an opportunity involving public lighting and other services for a Belgian utility with Trilliant. Ex. P-56 ; Dkt. No. 335, Test. N. Matchett at 18:3-19:9. This email was sent before Ingenu's operations significantly declined and provides further evidence that Ingenu intended the VAR to authorize Trilliant to pursue streetlight opportunities.

87. Fourth, Ingenu had transitioned or worked on streetlighting networks with Trilliant in Puerto Rico, Aruba, and San Diego—again confirming that Ingenu intended that the VAR authorize Trilliant to pursue and sell private networks for controlling streetlights to utilities. Specially, Mr. Wilson worked on a private network in Aruba where streetlights were "a big application." Dkt. No. 335, Test. J. Wilson at 149:23-150:24. He confirmed that those streetlight opportunities were within the Field of Use. Dkt. No. 335, Test. J. Wilson at 151:3-5. Ingenu later transitioned the Aruba network to Trilliant. Dkt. No. 335, Test. J. Wilson at 149:25-150:18; Dkt. No. 335, Test. N. Matchett at 20:12-22. Ingenu also actively assisted Trilliant's development of RPMA streetlights in Puerto Rico. Dkt. No. 334, Test. N. Matchett at 205:11-206:6. And Ingenu also transitioned a streetlighting network for San Diego Gas & Electric to Trilliant. Dkt. No. 335, Test. J. Wilson at 118:16-22, 129:2-20.

88. Fifth, the testimony in the case supports that the ability to conserve energy through

utility control of a lighting system has value to the utility independent of other considerations such as safety. Dkt. No. 333, Test. M. Mortimer at 125:24-126:5 & 160:11-19; *see also* Ex. P-78 at ¶ 19 (Field of Use includes "Use of the RPMA Network to ***monitor and/or control the power usage of other devices*** for demand reduction, load shedding, distribution system conditions, and similar programs." (emphasis added)).

89. Sixth, Ingenu's own expert agrees that a sale to a utility of a private network to control streetlights is allowed under the VAR. Ex. D-339 at ¶ 71 (B. Larkin-Connolly Report). As does Mr. Rossing. Dkt. No. 337, Test. B. Rossing at 84:2-13 (including "devices that monitor lights on top of poles" as an example of a device on a utility private network).

90. Finally, Ingenu did not argue that the FAE opportunity did not involve a private network. And while FAE, a non-utility, was involved as a conduit, the sale ultimately was to go to ENEL, a utility in Chile. Dkt. No. 334, Test. N. Matchett at 223:2-24; Ex. P-268.

91. The Court concludes that Trilliant had the right to sell private networks for streetlight controllers to utilities under the VAR. FAE's involvement does not change the fact that this was such a potential sale. There was no evidence that FAE was other than a mere partner or conduit in the enterprise. In such a case, the Court will not question that the application is within the utility value chain because the utility sees it as valuable, as evidenced by its potential acquisition.

92. In the alternative, to the extent the sale of a private network for streetlight controllers was inconsistent with the VAR—which the Court does not so conclude—Mr. Razi's letter on behalf of Ingenu precludes Ingenu's efforts to declare a material breach, particularly a non-curable one, based on such a sale. *See Rano*, 987 F.2d at 586 (defining material breach in an analogous context as a breach "of so material and substantial a nature that [it] affect[s] the very essence of the contract and serve[s] to defeat the object of the parties," constituting "a total failure in the performance of the contract") (citation and internal quotation marks omitted).

93. The Court does not reach the issue of whether Trilliant's bid on a private network streetlighting project for EBS constituted a material breach of the VAR because Ingenu did not introduce evidence at trial that it provided the written notice required under Section 4.2 of the

VAR of such a breach. *See Rano*, 987 F.2d at 586.

94. However, the Court notes that even if Ingenu had provided such notice, EBS is a utility and the private network streetlighting project would be authorized by the VAR. Dkt. No. 335, Test. N. Matchett at 21:14-17; Dkt. No. 337, Test. B. Rossing at 156:6-15 (Rossing admitted that he agreed at his deposition that the EBS project was within Trilliant's Field of Use.).

95. Additionally, as discussed in Section IV(F)(3)(b), *infra*, Ingenu was not harmed because its bid was futile. Further, Ingenu knew well before the Termination Letter that Trilliant was pursuing EBS and did not object.

(2) Trilliant's Discussions with Raincloud, Aquacheck, and Liquid Fibre Did Not Breach the VAR.

96. The Court finds that the evidence at trial fails to support that Trilliant committed a material, non-curable breach of the VAR by pursuing business from Rain Cloud, Aquacheck, and Liquid Fibre.

97. First, the undisputed evidence at trial establishes that Trilliant never sold a network of any type to Rain Cloud or Aquacheck. Dkt. No. 338, Test. C. Pillow at 43:17-18; Dkt. No. 336, Test. D. Wolfe at 34:6-10. The Court therefore disregards the Termination Letter's suggestion to the contrary. *See* Ex. P-143 at 1-2.

98. Second, Trilliant did not initially solicit business from Rain Cloud, Aquacheck, or Liquid Fibre. The evidence shows that Rain Cloud's sole owner, Chris Pillow, approached Trilliant in October 2019 about using RPMA but withdrew until March 2020 after having entered an agreement with Ingenu (per Mr. Wolfe's understanding). Dkt. No. 336, Test. D. Wolfe at 10:18-11:1, 14:4-9, 14:22-24; Dkt. No. 338, Test. C. Pillow at 23:15-22. Mr. Pillow reached out because of his problems working with Ingenu. Dkt. No. 338, Test. C. Pillow at 24:2-15, 25:3-8.

- Although Ingenu's technology had appeal as the solution for the public network that Mr. Pillow wanted to set up, he became frustrated with Ingenu's inability to properly support the program. Dkt. No. 338, Test. C. Pillow at 11:6-12:1, 24:2-15, 25:3-8. Mr. Pillow was already in a signed agreement with Ingenu when he reached out to Trilliant, so he was

cautious and approached Trilliant as an Ingenu licensee. Dkt. No. 338, Test. C. Pillow at 23:15-22, 36:22-37:17.

- Trilliant's response was also appropriately cautious. Mr. Wolfe, in a responsive email, made clear that Trilliant, consistent with the limitations of the VAR, could only work with a private network. In particular, Mr. Wolfe conveyed the VAR's Field of Use limitations under the NDA between Trilliant and Rain Cloud. Ex. D-42; Dkt. No. 336, Test. D. Wolfe at 13:25-14:3; *see also* Dkt. No. 338, Test. C. Pillow at 27:11-24, 29:5-23. Mr. Wolfe also conveyed Ingenu's request "that all communications with Rain Cloud cease immediately regarding deployments ***other than for private utility networks***." Dkt. No. 338, Test. C. Pillow at 31:13-32:5 (emphasis added).
- Ingenu argued that Mr. Pillow wanted a public network—not a private network. Although the Court agrees, the Court also finds that this argument misses the point. The evidence shows that Trilliant never represented that it could provide a public network. Instead, consistent with the VAR, Trilliant only offered to provide a private network. Dkt. No. 338, Test. C. Pillow at 26:3-10. For example, after seeking advice from Trilliant's counsel, Mr. Wolfe gave Rain Cloud his "bottom line": "Trilliant cannot [sic] supply, service or support any RPMA 'public' networks under our current licensing agreement without Ingenu's permission." Ex. D-99; Dkt. No. 336, Test. D. Wolfe at 15:8-21, 16:25-18:4. Further, Mr. Wolfe's proposals to Rain Cloud (and Aquacheck) presumed that Rain Cloud would "own the network" (*i.e.*, a private network) and estimated the cost for Rain Cloud's potential purchase of networking equipment. Ex. D-68.

Accordingly, based on the evidence and testimony at trial, the Court finds that Trilliant did not improperly attempt to sell Rain Cloud a public network.

99. Third, Trilliant's discussions with Rain Cloud were not successful. Mr. Pillow was interested, but ultimately, he went forward with Ingenu without Trilliant. Trilliant sold nothing to Rain Cloud, and even after the alleged breach, Ingenu and Rain Cloud carried on jointly forecasting profits. *See* Ex. P-166; Dkt. No. 336, Test. W. Schmidt at 188:19-23; Ex. P-165; Dkt.

No. 338, Test. C. Pillow at 40:6-11, 42:20-24.

100. Fourth, Mr. Mayers of Liquid Fibre was also involved with Ingenu and faced similar difficulties on the commercial side. He liked the RPMA technology and saw it as an appropriate pairing with his irrigation monitoring and optimization software, MyAgBuddy. But he expressed concerns about the commercial side of the transaction and about Ingenu's ability to support the product. Dkt. No. 339, Test. D. Mayers at 12:8-13:11; 25:10-19. He also directly and firmly rejected Ingenu's suggestion that he share fifty percent of any proceeds from the sale of Liquid Fibre's MyAgBuddy software with Ingenu. Dkt. No. 339, Test. D. Mayers at 27:2-18. In response to the proposal, Mr. Mayers stated: "I built the software, it doesn't belong to you, so forget it." *Id.*.

101. Fifth, as to the Termination Letter's allegations about representations Trilliant made to Aquacheck (Ex. P-143 at ¶ 1), the Court finds it notable that Ingenu did not support this assertion with non-hearsay testimony from Aquacheck. The Court does not accept the hearsay testimony, and the Court finds no support for the assertion in the letter, particularly given its low opinion of Mr. Razi's credibility.

102. Sixth, Ingenu actually had a deal with Rain Cloud, and Ingenu and Rain Cloud were forecasting profits as of late August 2020. Ex. P-165; Dkt. No. 338, Test. C. Pillow at 40:6-11; 42:20-24 (Rain Cloud and Ingenu shared the view they could win future business). The evidence suggests Ingenu simply could not live up to the deal. As to Aquacheck, Mr. Schmidt made it clear that Ingenu lost its opportunity because it was insisting on the revenue sharing that was also rejected by Liquid Fibre, and its principal, Brad Rathje, did not want to do business with Ingenu. Dkt. No. 336, Test. W. Schmidt at 167:22-169:7, 188:5-18.

103. In sum, there's no evidence that Trilliant attempted to sell a public network to Rain Cloud, Aquacheck, or Liquid Fibre, or that anything developed beyond general discussions about the benefits of an RPMA solution. Such generalized discussions do not constitute a material breach. *See Bos. LLC v. Juarez*, 245 Cal. App. 4th 75, 87 (2016) (holding that the defendant's breach of a lease agreement was immaterial "[i]n the absence of evidence of actual harm"). And, if they did, the default would be curable by cessation of the discussions given their undeveloped

nature and the lack of any agreement, sale, or diversion of opportunity for Ingenu.[23] Dkt. No. 334, Test. M. Mortimer at 165:13-25, 175:23-176:6. The Court, therefore, finds that Trilliant did not breach the VAR in connection with its discussions with any and all of Rain Cloud, Aquacheck, and Liquid Fibre.

104. Given the Court's ruling, it finds it unnecessary to reach the issue of whether a network for soil moisture controllers would consistently fall within the Field of Use. This is a nuanced question that must be determined on a case-by-case basis, looking at who was using the devices and the nature of the entity and its goal. *See* Dkt. No. 335, Test. J. Wilson at 174:25-176:22.

c. Trilliant's Sale of 768 Piconodes Did Not Breach the VAR.

105. The Court finds that Trilliant did not breach the VAR in connection with the sale of 768 piconodes to Liquid Fibre on May 8, 2020. *See* Ex. D-149; Dkt. No. 333, Test. M. Mortimer at 208:25-210:5; Dkt. No. 336, Test. D. Wolfe at 19:4-20:2. Ingenu's assertion that this sale breached Section 1.9 of the VAR because Piconodes only work with a public network is nonsensical. In particular, the Termination Letter erroneously asserts that Piconodes can only be used on a public network. Ex. P-143 at ¶ 2. All evidence at trial was to the contrary.

106. First, Mr. Wilson disproved this argument, testifying that Piconodes "[a]bsolutely" work on a private network because "a private network is just a configuration" and no "change in the comm system" is required. Dkt. No. 335, Test. J. Wilson at 136:19-25; *see also* Dkt. No. 335, Test. J. Wilson at 16:21-17:5 (describing the role of nodes in the network generally). Indeed, both Mr. Wilson and Mr. Mortimer confirmed piconodes work on private networks. Dkt. No. 335, Test. J. Wilson at 136:19-25; Dkt. No. 333, Test. M. Mortimer at 198:6-12. They also confirmed CCS3 works on private networks.[24] Dkt. No. 335, Test. J. Wilson at 145:7-12; Dkt. No. 333, Test.

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[23] The parties relied on this type of curing communication when Ingenu entered into an agreement with u-Blox that "provided them with a field of use that overlapped Trilliant's exclusive field of use." Dkt. No. 333, Test. M. Mortimer at 121:2-15; Ex. P-100. Ingenu also sent a letter to FAE to cure prior interference. Ex. P-107.

[24] Ingenu's Trial Brief does not mention CCS3, but the trial evidence showed Ingenu intended for Trilliant to upgrade to CCS3 to "streamline our support" and "add[] new features." *See* Dkt. No.

M. Mortimer at 198:6-199:5. A fact that Mr. Schmidt corroborated. Dkt. No. 336, Test. W. Schmidt at 211:17-19.

107. Second, the testimony at trial by Mr. Wilson and others established that Trilliant's right to sell Piconodes was not restrained by the VAR, or its amendments, as Ingenu did not manufacture them. As Mr. Wilson testified and Mr. Matchett corroborated, for the piconode, Ingenu sought to shift from a manufacturing model to a licensing-only model. Dkt. No. 335, Test. J. Wilson at 142:7-10; Dkt. No. 334, Test. N. Matchett at 195:15-197:21 ("Trilliant would order directly from Gemtek or Compal" and when a piconode "was connected to a system, [Ingenu] would be paid a licensing revenue."). Mr. Wilson explained Ingenu's intent to "remove [itself] from the direct margin stack." Ex. P-287. Ingenu planned to have "original equipment manufacturers . . . build the [pico]nodes and sell them directly to the market." Dkt. No. 335, Test. J. Wilson at 139:11-140:3 (discussing Ex. P-287). Ingenu's aim was to lower the cost of the piconode, driving more devices onto the network and increasing licensing fees. Dkt. No. 335, Test. J. Wilson at 139:11-142:6.

108. Third, Mr. Wilson further explained that Ingenu always intended that Trilliant would be authorized to sell the piconode because "***price was king***" for large deals, "so we're always looking for ways to . . . improve the price" and "mov[e] into more of these more advanced, smaller, lower cost node modules." Dkt. No. 335, Test. J. Wilson at 137:1-12 (emphasis added). Lower prices benefited Ingenu because the "more devices sold," the "more connections," and the "more licensing" for Ingenu. *Id.*

109. Fourth, Mr. Wilson confirmed that Trilliant has the authority to sell end points to a public network. Ex. D-195; Dkt. No. 335, Test. J. Wilson at 152:7-153:2; *see also* Dkt. No. 335, Test. N. Matchett at 56:7-13 ("Ingenu were looking for Trilliant to support them with public networks as an application partner."). Ingenu considered its public network similar to a cellular network where "there's no captive customer," and customers "don't have to buy the

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335, Test. J. Wilson at 145:1-6; Dkt. No. 333, Test. M. Mortimer at 109:22-110:16,198:6-199:5. Ingenu even urged Trilliant to transition to CCS3. Dkt. No. 334, Test. N. Matchett at 220:14-222:13 (discussing Ex. P-66).

infrastructure;" "they just deploy their applications or their solutions and utilize" the public network. Dkt. No. 335, Test. J. Wilson at 133:1-18. Customers pay per connected device, so Ingenu "wanted to enable ***any and all*** solutions" to drive devices onto the network and increase revenue. Dkt. No. 335, Test. J. Wilson at 133:19-134:3; 152:7-153:2 (emphasis added).

110. Fifth, the Termination Letter appears to assume that Trilliant was selling a public network. However, as discussed above in Section IV(E)(1)(b)(2), *supra*, no evidence at trial supported that allegation.

111. Sixth, the Court finds that the sale to Liquid Fibre was an accommodation made with Ingenu's approval to allow Liquid Fibre and Rain Cloud to do field tests involving RPMA technology. Dkt. No. 339, Test. D. Mayers at 24:10-25:6 (Liquid Fibre's piconode purchase was "with Ingenu's permission."). Mr. Schmidt admitted that at the time of the sale, "Ingenu was fine with Liquid Fibre buying a thousand PicoNodes from Trilliant." *See* Dkt. No. 336, Test. W. Schmidt at 193:11-24; *see also* 173:14-16, 173:20-23, 177:6-10, 180:25-181:9, 192:11-193:9 (Mr. Schmidt admitted Mr. Gazzolo also assented to the sale); *see also* Ex. P-136 (Mr. Schmidt's April 16, 2020 messages granting permission to Chris Pillow of Rain Cloud); Trilliant's Doug Wolfe, who handled the piconode sale to Liquid Fibre, also understood that Ingenu "approve[d] the sale." Dkt. No. 336, Test. D. Wolfe at 21:8-12. While that may have been desirable to Trilliant because they wanted to sell a private network using RPMA technology, it was actually beneficial to Ingenu, who was actively pursuing a deal for the public network that Rain Cloud and Liquid Fibre wanted and with whom Liquid Fibre has resumed discussions. Dkt. No. 339, Test. D. Mayers at 25:10-26:2 (Mr. Mayers had reached out to Mr. Rossing after not reaching a deal "with Bill Schmidt and Alvaro on the commercial side").

112. Seventh, the VAR Amendments confirmed Trilliant's rights to the piconode and ASIC incorporated into the piconode. The VAR Amendment No. 1 defined "Product" "to include all RPMA endpoint nodes including, without limitation, the 'Pico Node.'" *See* Ex. P-69; Dkt. No. 333, Test. M. Mortimer at 147:2-17. Amendment No. 2 revised the definition of "Hardware" to include the ASIC incorporated into the piconode, provided that the parties agreed on pricing. Dkt. No. 334, Test. M. Mortimer at 95:19-96:19; Ex. P-78 at 1-2. The parties agreed on a price in

August 2018 (price of $3.09 for the ASIC incorporated into the piconode). Ex. P-265; Dkt. No. 333, Test. M. Mortimer at 148:18-149:12; Dkt. No. 334, Test. N. Matchett at 218:19-220:21; Dkt. No. 339, Test. B. Razi at 74:15-76:6.

113. Trilliant's licensing rights to piconodes and CCS3 are consistent with VAR Sections 3.4 and 3.7. Both parties intended Section 3.4 as a framework for transitioning Trilliant to new nodes and new hardware made available by Ingenu. Dkt. No. 335, Test. J. Wilson at 134:9-136:8; Dkt. No. 333, Test. M. Mortimer at 101:15-102:6. Similarly, Section 3.7 was a framework for transitioning software, including Ingenu's CCS communication system. Dkt. No. 335, Test. J. Wilson at 135:5-136:4; Dkt. No. 333, Test. M. Mortimer at 105:13-106:4, 106:15-21, 109:10-110:16; Dkt. No. 334, Test. N. Matchett at 220-12-222:13.

114. Accordingly, Trilliant did not breach the VAR by selling 768 piconodes to Liquid Fibre in May 2020.

d. Failure to Pay Additional Royalties Was a Nonmaterial Breach that Trilliant Cured.

115. The Court finds that Trilliant did not materially breach the VAR by failing to pay Ingenu Additional Royalties and provide the corresponding sales reports under Section 2.4 as set forth in Amendment No. 2. *See* Ex. P-143 at ¶ 3. Although the Court finds Trilliant was technically in default of these obligations, the Court finds that the default related to the additional royalty and the failure to provide related reports were both nonmaterial and curable.

116. First, the defaults do not appear material given: (1) the small amount of the monetary default ($11,532.13 at the time of the Termination Letter);[25] (2) the failure by Ingenu to

[25] Although the parties negotiated the Additional Royalty so Ingenu could receive additional funds for any access points and micronode2 ASICs that Trilliant sourced directly from manufacturers after taking over the supply chain, in practice, Trilliant's pre-purchases from Ingenu stocked its warehouse with more product than it could sell. *See* Ex. P-78 at ¶ 8; Dkt. No. 334, Test. N. Matchett at 199:15-200:2. In particular, before Amendment No. 2, Trilliant pre-purchased over 108,000 micronodes and 60 access points for over $2.3 million. *See* Ex. P-19 (Purchase Order #5000003714), Ex. P-20 (Purchase Order #5000003712), Ex. P-21 (Purchase Order #5000003715), Ex. P-26 (Purchase Order #5000003760), Ex. P-37 (Purchase Order #5000003813), Ex. P-38 (Purchase Order #5000003814), Ex. P-43 (Purchase Order #5000000671), Ex. P-45 (Purchase Order #5100000683), Ex. P-58 (Purchase Order

make any previous demand; (3) the course of dealings between the parties; and (4) the fact that Ingenu's defaults under the notes exceeded $2.7 million. *See Rano*, 987 F.2d at 586. Regarding the second reason, Ingenu concedes it never notified Trilliant of these defaults before the Termination Letter. Dkt. No. 287 at 3 (Oct. 18, 2023 PTO); Dkt. No. 241 at 4 (Disc. Desig.). Ingenu never asked Trilliant for the Additional Royalty payments or notified Trilliant that the failure to pay these small-dollar claims was hampering its ability to do business. To the contrary, the Court concludes that what Ingenu was focused on at that time was obtaining the final $1.5 million loan from Trilliant.

117. Further, the Court finds that alleged defaults cannot support termination because they were curable and have been cured by Trilliant. Mr. Rossing admitted that Trilliant paid Ingenu $11,532.13 in outstanding Additional Royalties and provided a report for those royalties on September 22, 2020. Dkt. No. 73 at ¶ 36 (Third Am. Cross-Compl.); Dkt. No. 337, Test. B. Rossing at 114:14-115:5. Accordingly, no breach of the Additional Royalty remained uncured sixty days after Ingenu's Termination Letter.

118. While the Court acknowledges Trilliant's argument that it informally offset the Additional Royalties against the amounts owed by Ingenu to Trilliant, the Court finds that the record does not reflect that Trilliant perfected the offset. Further, while the failure to perfect the offset left Trilliant in default, the pre-petition availability of such offset rendered that default immaterial and curable because Trilliant could have resolved it through setoff at any pre-petition point in time. *See Bos. LLC*, 245 Cal. App. 4th at 87 (holding material breach requires actual harm). Mr. Mortimer testified that at the time, Ingenu had failed to make any payments on the over $2.45 million (plus interest) it owed to Trilliant in loans, and Trilliant had pre-paid $290,000 for 600,000 end point licenses, approximately half of which Trilliant still has not used as of the time of the trial. Dkt. No. 333, Test. M. Mortimer at 150:15-21, 199:6-18; Ex. P-154 at 35 (Ingenu's Voluntary Pet. for Ch. 11 Bk., listing $2,732,349.32 owed to Trilliant as of July 27, 2020).

e. Failure to Provide Projected Sales Forecasts Was a Nonmaterial

#5100000726), Ex. P-67 (Purchase Order #4500009952). Trilliant still has "some of this hardware six years later" as of trial. Dkt. No. 333, Test. M. Mortimer at 46:15-22.

Breach that Trilliant Cured.

119. The Court finds that Trilliant did not materially breach the VAR by failing to provide projected sales forecasts per Section 8.5 of the VAR. Ex. P-143 at ¶ 7. Although the Court finds that Trilliant did not consistently provide the semi-annual projected sales forecast in a formal fashion, the Court finds that this breach was immaterial, curable, and cured.

120. First, the Court finds that the failure to provide formal projected sales forecasts was not a material default given the lack of previous demand and the evidence that Ingenu had this information in an informal fashion or could get it promptly after requests. *See Bos. LLC*, 245 Cal. App. 4th at 87; *Rano*, 987 F.2d at 586.

121. The trial evidence established that the information in the reports was informally and otherwise provided. Mr. Wilson had his "finger on the pulse of every opportunity," and Mr. Matchett had an office at Ingenu, so the two had "frequent communication about the sales forecasts." Dkt. No. 335, Test. J. Wilson at 154:4-155-23,178:11-19. Mr. Matchett testified that he shared sales forecasts with Ingenu and discussed them with Mr. Wilson and others at Ingenu regularly. Dkt. No. 334, Test. N. Matchett at 185:10-22. Ingenu and Trilliant also regularly discussed price adjustments for specific bids. Dkt. No. 335, Test. J. Wilson at 137:1-138:21; *see also* Dkt. No. 333, Test. M. Mortimer at 201:17-202:7 (Trilliant "engaged with Ingenu on every large deal," so Ingenu "had a full understanding of Trilliant's pipeline."). Ingenu allowed this informality to be the rule of the day, and there was no evidence that Ingenu objected to this course of conduct.

122. Further, any default was immaterial because after Ingenu failed to deliver the 34,600 micronodes promised in VAR Amendment No. 1 and Trilliant took over the supply chain under VAR Amendment No. 2, it was pointless to send sales forecasts that Ingenu could not fill due to its financial collapse. *See Bos. LLC*, 245 Cal. App. 4th at 87; *Rano*, 987 F.2d at 586. Indeed,at some point, no one was left to receive the forecasts. Dkt. No. 333, Test. M. Mortimer at 201:7-203:1; *see also* Dkt. No. 337, Test. B. Rossing at 44:9-45:6 (after Ingenu office closed, NDJR Grid Partners II, LLC ("NDJR") didn't know where to send a default letter). Trilliant also "would have been happy to" send a sales forecast, but Ingenu never asked. Dkt. No. 333, Test. M.

Mortimer at 201:17-202:15.

123. Second, the failure to provide sales forecasts was curable, and Trilliant cured any default by sending a forecast in response to the Termination letter within the sixty-day cure period. Dkt. No. 73 at ¶ 44 (Third Am. Cross-Compl.).

124. Thus, the Courts finds that any lapses by Trilliant in providing formal projected sales forecasts was immaterial, curable, and cured within 60 days of receiving the Termination Letter.

f. Trilliant Never Misused Ingenu's Logos or Trademarks.

125. The Court finds that Trilliant did not breach Section 5.2 of the VAR by marketing and selling Products and Services under prohibited trademarks. Ex. P-143 at ¶ 4.

126. The evidence supports that Trilliant marketed and sold products and services under trademarks and trade names as required and allowed by the VAR Sections 5.1 and 5.2 and by controlling law. In particular, Section 5.1 "effectively provides Trilliant with a license to use the On-Ramp wireless name, logo, and marks." Dkt. No. 333, Test. M. Mortimer at 116:13-19. Under Section 5.2, Trilliant could use "[a]ny Ingenu/On-Ramp wireless marks or any other marks that Trilliant owned or controlled or licensed, provided that we didn't create a new mark that was intentionally confusing with an On-Ramp or Ingenu mark." Dkt. No. 333, Test. M. Mortimer at 116:20-117:10.

127. The Court finds Mr. Mortimer's testimony that Trilliant complied with these provisions and only used "the Ingenu names, the RPMA title, and . . . a term that Trilliant created called SecureReach" when marketing RPMA products was compelling. Dkt. No. 333, Test. M. Mortimer at 117:11-14, 118:9-14. There was no counter-testimony at trial to support a contrary conclusion.

128. The Court further notes that although the Termination Letter alleges certain improper comments to a third party, u-Blox, Ingenu failed to support its assertions with any testimony from u-Blox or any evidence of such comments.[26]

[26] Ingenu's failure to present evidence to support the allegations in the Termination Letter was a

129. A November 15, 2018 letter from Trilliant to SAESA was much discussed by Ingenu at trial as purporting to show a misrepresentation as to RPMA ownership. Ingenu examined Mr. Matchett about the letter but failed to present the Court with a translation signed by a certified translator in compliance with Federal Rule of Evidence 604. Dkt. No. 290 (Trilliant's Obj. to D-76 (Letter translated from Spanish to English)); Dkt. No. 335, Test. N. Matchett at 88:13-90:10; Dkt. No. 338, Test. P. Zimmer at 83:7-89:8; Dkt. No. 341; Dkt. No. 326 (Trilliant's Obj. to Ingenu's Changes to N. Matchett Test.).

130. Trilliant raised an objection to Ingenu's reliance on foreign-language documents and machine translations at the latest during summary judgment. *See* Dkt. No. 216-3 (Reply in Supp. of Mot. Summ. J.). Trilliant reiterated its objection at the pre-trial conference and in Trilliant's objections to Ingenu's trial exhibit list. Dkt. No. 274-2 (Ingenu's Ex. List). It was not until after the pre-trial conference that Ingenu finally started providing a human-translated version, yet Ingenu still failed to provide a legally adequate certification from the actual translator. It was not until after questioning Mr. Matchett about the letter at trial that Ingenu offered a new translation. And that new translation was materially different, including as to terms alleged to be misrepresentations. Dkt. No. 338, Test. P. Zimmer at 82:23-85:5.

131. Given the material differences in the new translation and Ingenu's repeated failure to produce a translation compliant with Rule of Evidence 604, the Court declines to admit the letter into evidence. *See United States v. Gasperini*, No. 16-CR-441 (NGG), 2017 WL 3140366, at *4 (E.D.N.Y. July 21, 2017), *aff'd,* 729 F. App'x 112 (2d Cir. 2018) (ordering the government to provide certified translations of foreign document before trial and holding that any foreign language documents for which certified translations were not provided by the deadline would be held inadmissible at trial); *The Sunrider Corp. v. Bountiful Biotech Corp.*, No. SACV 08-1339 DOC (AJWx), 2021 WL 4590766, at *15 (C.D. Cal. Oct. 8, 2010), *report and recommendation*

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consistent theme at trial. There were a lot of points in this case on which Ingenu could have called a witness to testify and did not. This failure indicates that such allegations by Ingenu were not substantiated.

adopted, No. SACV 08-1339, 2010 WL 4589156 (C.D. Cal. Nov. 3, 2010) (excluding foreign-language document under FRE 901 because English-language translation lacks foundation); *Kesel v. United Parcel Serv., Inc.*, No. C 00-3741 SI, 2002 WL 102606, at *3 (N.D. Cal. Jan. 17, 2002), *aff'd*, 339 F.3d 849 (9th Cir. 2003) (refusing to admit declaration when no explanation was provided as to how the document was translated, who the translator was, or the expertise of the translator); *Martini E Ricci Iamino S.P.A.—Consortile Societa Agricola v. Trinity Fruit Sales Co.*, 30 F. Supp. 3d 954, 964 (E.D. Cal. 2014) (disregarding Italian-language documents submitted in opposition to summary judgment and reasoning: "The documents are not translated into English by any person shown to be a competent translator. Thus, the documents are not admissible and cannot be considered.").

132. Regardless, the Court finds that the letter is insufficient to support Ingenu's claim that Trilliant marketed or sold Products and Services under prohibited trademarks or otherwise misrepresented its rights under the VAR.

133. Accordingly, Trilliant used only Ingenu and Trilliant marks, as was allowed. There's no evidence supporting that it did so improperly.

g. Trilliant Properly Requested the Escrow in August 2018.

134. The Court finds that Trilliant did not breach the VAR's "escrow" provision by notifying the agent to release the escrow materials. Ex. P-143 at ¶ 5 (Termination Letter).

135. The evidence at trial established that Trilliant acquired ASIC Escrow materials from the escrow agent Iron Mountain appropriately. As discussed in Section IV(E)(2), *infra,* there was adequate evidence supporting that Ingenu was not addressing problems with the technologies as required by the VAR. As a result, Trilliant properly notified the agent of an event triggering the release of the escrow materials. Amendment No. 2 defines the escrow release conditions, including in the event of a "Material Breach," which includes Ingenu failing to achieve restoration of a P-2 event "within 96 hours of submission." Ex. P-78 at ¶ 17 (Section 7.3(c)); Dkt. No. 335, Test. N. Matchett at 16:9-17:15.

136. Further, Ingenu received appropriate notice. On August 16, 2018, Iron Mountain notified Ingenu of Trilliant's escrow release trigger notification. Ex. P-117; Dkt. No. 333, Test. M.

Mortimer at 182:3-7, 184:8-14. Ingenu never responded, and Iron Mountain sent the escrow materials after the response period expired. Dkt. No. 335, Test. N. Matchett at 17:19-25; Dkt. No. 333, Test. M. Mortimer at 184:3-7; Dkt. No. 339, Test. B. Razi at 51:10-14.

137. The condition precedent to the release of the escrow materials was supported by the evidence. In particular, Ingenu's failure to respond to a P-2 situation in August 2018 justified Trilliant's escrow request. Ingenu did not provide any compelling evidence to the contrary.

138. Notably, the evidence supports that this was not entirely favorable to Trilliant given that Trilliant had to devote expensive engineering assets to make sense of the escrow materials before it could then solve its customers' problems on its own nickel. Dkt. No. 340, Test. D. Kuhn at 34:24-35:9, 35:10-36:3. As Mr. Kuhn testified, "it was a massive disruption [that took] a couple of months at least" to address. Dkt. No. 340, Test. D. Kuhn at 35:10-36:3. Ingenu "forced" Trilliant to assume Level 3/4 support functions on an ongoing basis. Dkt. No. 340, Test. D. Kuhn at 36:4-13. Trilliant has since incurred tremendous costs, hired additional support personnel, and incurred price increases from Ingenu's suppliers, who now demanded a premium. Dkt. No. 333, Test. M. Mortimer at 184:16-185:6; 186:9-23; 187:9-188:22. The evidence supports that Trilliant would have been far better off if Ingenu had lived up to its contractual obligations.

139. Further, Mr. Razi's assertion that Trilliant schemed to get the intellectual property is contradicted by the record. Trilliant did not "get" the IP—to the contrary, Ingenu continues to own the technology. All Trilliant got was the information it needed to service the IP since Ingenu was not living up to its obligations under its own contract.

140. Significantly, Ingenu's Trial Brief drops the allegation that Trilliant improperly acquired the escrow materials, and Ingenu has similarly abandoned its claim for Turnover of Property of the Estate regarding the escrow materials. Dkt. No. 251 at 11:1-19:10 (Ingenu's Br.); Dkt. No. 222 (Sep. 19, 2023 Pre-Trial Order); *see also BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 826 (9th Cir. 2000) ("A party abandons an issue when it has a full and fair opportunity to ventilate its views with respect to an issue and instead chooses a position that removes the issue from the case."); *Hobson v. Orthodontic Centers of Am. Inc.*, 220 F. App'x 490,

491 (9th Cir. 2007) ("OCA abandoned [its] claim when it consented to removing the promissory notes at trial.").

141. The Court thus concludes that Trilliant did not breach the VAR's "escrow" provision by notifying the agent to release the escrow materials.

h. Trilliant Did Not Breach Its Reasonable Cooperation and Professionalism Obligations under the VAR.

142. The Court finds no failure by Trilliant to cooperate in protecting Ingenu's IP rights under Section 8.3 of the VAR. Ex. P-143 at ¶ 6. Instead, the evidence showed that Trilliant provided a high level of cooperation, even as the ship was sinking. It was not required to bankroll Ingenu. Mr. Mortimer's testimony credibly rebuts this allegation. *See* Dkt. No. 333, Test. M. Mortimer at 201:10-16; *see also* Section IV(E)(1)(f) *supra* (citing Dkt. No. 333, Test. M. Mortimer at 116:13-117:14, 118:9-14, 200:13-20); Section IV(E)(3)(h), *infra*.

143. Again, Ingenu's Trial Brief drops the claim. *See BankAmerica Pension Plan*, 206 F.3d at 826; *Hobson*, 220 F. App'x at 491.

2. Ingenu's Material Breach of the VAR Precluded It from Terminating the VAR Based on Nonmaterial, Curable Breaches.

144. The Court finds Ingenu was in material default of its maintenance and support obligations under the VAR. Such obligations by Ingenu were material, and under Section 4.2 of the VAR, Ingenu's continuing default of those obligations since at least August 2018 precluded Ingenu from terminating the VAR for nonmaterial, small-dollar defaults by Trilliant. As discussed above, compliance with the Additional Royalty, sales report, and projected sales forecast requirements would not have resulted in payments or information that were particularly important to Ingenu. Ingenu's real goal was to raise millions of dollars to keep its ship afloat. And the chaotic state of Ingenu's business further limited the relevance of these relatively small-dollar payments and information. The same is true for other nonmaterial defaults for which Ingenu did not provide notice. On the other hand, Ingenu was in default in failing to properly support the software, which resulted in serious problems for Trilliant's customers that Trilliant could not address without Ingenu's help or exercise of its escrow rights and the incurrence of significant

expenses and disruption. Ingenu's failure to provide such contractually obligated help endangered Trilliant's business in a fundamental fashion. In this situation, the Court finds it would be improper for Ingenu to terminate the VAR.

145. The VAR's termination clause (Section 4.2) provides that a "non-breaching party" may terminate the Agreement. The Court interprets this as precluding a party who is in material breach of the VAR from terminating the VAR based on nonmaterial breaches by the other party.[27] *E.g.*, *Powertech Tech., Inc. v. Tessera, Inc.*, No. 11-cv-6121, 2014 WL 171830, at *5 (N.D. Cal. Jan. 15, 2014) (holding that a similar termination provision "requires the [terminating party] be substantially in compliance with its own obligations first."); *Stoddard v. Winnebago Indus., Inc.*, No. 11-cv-0370, 2012 WL 12846097, at *4 (S.D. Cal. Mar. 27, 2012) ("A breach does not terminate a contract as a matter of course, but is a ground for termination at the option of the injured party. . . . ***The non-breaching party*** has the right and option to determine what remedy he will pursue.") (internal citations omitted; emphasis added); *Brown v. Grimes*, 192 Cal. App. 4th 265, 277 (2011) ("[I]n contract law a material breach excused further performance by [an] innocent party" (internal citations omitted)).

146. The Court finds that Ingenu's maintenance and support obligations were materially important to Trilliant. *See* Ex. P-78 at § 17(c) ("The continuing Maintenance and Support of the Products sold and licensed by Trilliant is essential to Trilliant's ability to meet its contractual obligations to its End Users."). Ingenu materially and undisputedly breached those obligations. The Court finds the lack of any Ingenu evidence disputing that it failed in its critical obligations in this regard supportive of Trilliant's case.

147. In late 2017, Ingenu was declining as a business. Dkt. No. 334, Test. N. Matchett at 186:6-16; Dkt. No. 337, Test. B. Rossing at 24:5-24:19; 29:23-30:19; 34:2-15; 155:5-12. There were fewer people in the office, and it was difficult for Trilliant to get responses from Ingenu. Dkt.

[27] The Court stops short of finding the terminating party must be completely not in default to effectively terminate the VAR. The Court interprets the VAR as allowing for the terminating party to be in nonmaterial breach and terminate the VAR provided that the non-terminating party is in material breach of the VAR.

No. 334, Test. N. Matchett at 186:6-16. In December 2017, Trilliant flagged Ingenu's inability to support Trilliant's customers, which led to the negotiation of Amendment No. 2. *See* Exs. P-71 (VAR Ltr.) and P-72 ("Financial and Delivery Concerns"); Dkt. No. 334, Test. N. Matchett at 194:15-19 ("This letter and those discussions [] were the catalyst to the second amendment."). Trilliant sought to "work with Ingenu to . . . solve the problems in their business, address the financials and [] get the business back to an operational condition." Dkt. No. 334, Test. N. Matchett at 194:4-14.

148. The VAR (like other maintenance and support contracts) categorizes events on a scale ranging from Severity 1 or P-1 (most severe) to P-5 (least severe). Dkt. No. 340, Test. D. Kuhn at 28:10-30:20. "Severity 2 in general would be a critical issue [impeding] a major function of their business, such as they're receiving reads from the meters but there's no billing output or they can't do a reconnection of a client's meter." Dkt. No. 340, Test. D. Kuhn at 28:10-30:10. Crucially, Amendment No. 2 required resolution of P-2 events within 48 hours. *See* Ex. P-78 at Ex. D (Table A & § 3.4); Dkt. No. 335, Test. N. Matchett at 12:5-14. "Material Breach" is defined as a failure to restore "within 96 hours of submission of the Problem report." Ex. P-78 at ¶ 17 (§ 7.3(c)); Dkt. No. 335, Test. N. Matchett at 17:7-15.

149. The quality of Ingenu's maintenance and support changed in the spring of 2018. Dkt. No. 340, Test. D. Kuhn at 25:14-20; Dkt. No. 337, Test. B. Rossing at 34:2-15 ("[T]he departures really started in earnest in late 2017, and . . . cascaded throughout 2018."). Ingenu's response times to Zendesk support tickets "start[ed] to really stretch out." Dkt. No. 340, Test. D. Kuhn at 23:14-24:16, 27:4-28:9, 28:10-29:13. Ingenu was "missing payroll" and "selling anything they possibly could, computers, laptops, office furniture." Dkt. No. 337, Test. B. Rossing at 44:9-19. Then came a "bombshell" with "disastrous effect": Doug Avant, Ingenu's senior support engineer, informed Trilliant in June 2018 of his departure from Ingenu and that "no support or RMA services will be supplied to Trilliant at this time." Ex. P-285; Dkt. No. 340, Test. D. Kuhn at 25:21-27:6, 26:19-27:17, 31:21-32:19. Mr. Avant's departure was a "bombshell" because "the guy that knows all the secrets has left the company." Dkt. No. 340, Test. D. Kuhn at 26:23-27:3. On August 2, 2018, Trilliant reported a P-2 event affecting "all customers"—"the mapping

function ceased to function." Dkt. No. 340, Test. D. Kuhn at 33:3-22; Ex. P-104 (Email re No Resp.). Ingenu failed to respond for eleven days. Dkt. No. 340, Test. D. Kuhn at 33:23-25; Ex. P-114. This was a material breach. Dkt. No. 335, Test. N. Matchett at 17:7-15. Ingenu was "unwilling" to address the issue and ultimately "defiant" in not doing so. Dkt. No. 335, Test. N. Matchett at 14:14-24.[28]

150. When Mr. Matchett escalated the P-2 event, Ingenu CEO Babak Razi held maintenance and support "ransom," demanding that Trilliant loan money to Ingenu under Note 2 of the Letter Agreement. Dkt. No. 334, Test. N. Matchett at 208:1-210:10, 211:13-212:12; *see also* § III-D (re: Letter Agreement), *infra* at **Error! Bookmark not defined.**. Mr. Razi's response was stark: ***"Gentlemen, Our ability to support Trilliant will vastly improve with the note payment. Please help us so that we can help you."*** Ex. P-111 (emphasis added). Confronted with that email, Mr. Razi disputed that he had refused to provide maintenance and support. Dkt. No. 339, Test. B. Razi at 81:20-24. But that testimony is uncredible on its face, and all the more so because Mr. Razi could not recall that Ingenu even ***had an obligation*** to provide maintenance and support services under the VAR Agreement. Dkt. No. 339, Test. B. Razi at 82:6-15.

151. Trilliant sent a letter on August 14, 2018, detailing Ingenu's breach. Ex. P-112. Simultaneously, Trilliant requested the release of the materials held by escrow agent Iron Mountain under the VAR; Iron Mountain prompted Ingenu for a response. Ex. P-117; Dkt. No. 333, Test. M. Mortimer at 182:2-7. Ingenu never responded to Trilliant or Iron Mountain. Dkt. No. 335, Test. N. Matchett at 17:19-25; Dkt. No. 339, Test. B. Razi at 51:10-14. Trilliant was "forced to invoke the escrow and then reallocate our engineering staff [] to try to" fix the mapping function. Dkt. No. 340, Test. D. Kuhn at 34:24-35:9. "[I]t was a massive disruption [that took] a

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[28] Trilliant was "current in our payments for maintenance and support to Ingenu" at the time of the P-2 event. Dkt. No. 335, Test. N. Matchett at 15:3-12; Dkt. No. 334, Test. N. Matchett at 212:25-215:16. Mr. Matchett "had met with Ingenu several months before to go through and reconcile the amounts that were due under maintenance and support." Dkt. No. 335, Test. N. Matchett at 15:3-12. And on June 14, 2018, he sent a letter to Ingenu's CEO to reconcile "all the maintenance and support amounts, the number of devices, the customers so that everyone had a common understanding of – of the status for maintenance and support and the basis to our calculations." Dkt. No. 335, Test. N. Matchett at 104:1-10, 215:25-216:12; Ex. P-275.

couple of months at least" to address. Dkt. No. 340, Test. D. Kuhn at 35:10-36:3. Ingenu "forced" Trilliant to assume Level 3/4 support functions on an ongoing basis. Dkt. No. 340, Test. D. Kuhn at 36:4-13. Trilliant has since incurred tremendous costs, hired additional support personnel, and incurred price increases from Ingenu's suppliers, who now demanded a premium. Dkt. No. 333, Test. M. Mortimer at 184:16-185:6; 186:9-23; 187:9-188:22.

152. In sum, the Court finds that Ingenu's continuing material default of its maintenance and support obligations under the VAR precluded it from terminating the VAR for nonmaterial breaches by Trilliant. This finding separately supports the Court's ultimate conclusion that Ingenu did not effectively terminate the VAR, and the Court makes this finding in the alternative to its finding that the Termination Letter did not identify any material breaches by Trilliant that support Ingenu's attempted termination.

3. Ingenu Cannot Terminate the VAR Based on Alleged Breaches for Which It Did Not Provide Written Notice to Trilliant.

153. The Court finds that under Section 4.2, a party cannot terminate the VAR without appropriate written notice. Ingenu alleged additional breaches not mentioned in the Termination Letter, but the Court finds such breaches cannot support termination because the evidence at trial did not show: (1) Ingenu gave Trilliant written notice of such alleged breaches; or (2) any actual material breach.

154. Section 4.2 requires that "the non-breaching party" provide "written notice" of the "material[] breach" supporting termination. Ex. P-78 at ¶ 13. Ingenu concedes it provided no notice of breach prior to its Termination Letter. Dkt. No. 241 at 4 (Disc. Desig.). Ingenu cannot rely on alleged breaches ***not*** included in its Termination Letter to support its attempt to terminate the VAR. *See Rano*, 987 F.2d 580, 586.

155. Notice-and-cure is not a trivial technicality. Omitting the bargained-for notice deprives the breaching party of the opportunity "to cure the breach and thereby avoid the necessity of litigating the matter in court." *Alvarez v. Chevron Corp.*, 656 F.3d 925, 932 (9th Cir. 2011) (holding "post-suit notice" "completely undermine[s]" the "purpose" of a notice and cure provision); *Wilde v. Flagstar Bank FSB*, No. 18CV1370-LAB (BGS), 2019 WL 1099841, at *3

(S.D. Cal. Mar. 8, 2019) (dismissing claim where the plaintiff failed to comply with a notice and cure provision, because the plaintiff's time to comply with that provision "expired when [the plaintiff] filed suit").

156. Ingenu's failure to provide Trilliant written notice precludes Ingenu from relying on such alleged breaches as a basis for terminating the VAR Agreement. Ingenu alleged five such breaches in its Trial Brief: (i) Trilliant marketed "smart city" applications; (ii) Trilliant failed to pay Ingenu for piconode sales; (iii) Trilliant's private networks improperly utilize an internet connection; (iv) Trilliant violated the End User License Agreement ("EULA") provision of the VAR; and (v) Trilliant breached the confidentially provision of the VAR.[29] And although Ingenu appeared to argue the four following additional breaches at various times during this case, it never raised these in its Termination Letter or its Trial Brief: (i) Trilliant owed outstanding Gateway license payments; (ii) Trilliant failed to pay Ingenu for access points and micronodes; (iii) Trilliant failed to provide point of sale reports; and (iv) Trilliant failed to comply with the VAR's cooperation and professional provisions.

157. Moreover, even if Ingenu had provided written notice of these alleged breaches, the evidence did not support Ingenu on the merits of these alleged breaches, as explained below.

a. Trilliant Never Sold "Smart City" RPMA Applications.

158. The Court finds that there is no evidence supporting Ingenu's allegations regarding the sale of non-streetlighting Smart City applications or any evidence that Ingenu was in any way damaged by Trilliant's discussion of such applications.[30]

159. The Court declines to make a broad declaration as to whether all Smart City applications are within the Field of Use. And while Trilliant maintained at trial that Smart City

[29] Ingenu's Trial Brief alleges for the first time that Trilliant violated the VAR's confidentiality clause. *See* Dkt. No. 251 (Ingenu's Br.). This allegation is not in Ingenu's Termination Letter or Third Amended Cross-Complaint. Regardless, Ingenu did not offer any evidence to support its allegation that Trilliant breached the confidentiality provision.

[30] Ingenu alleges in its Trial Brief that Trilliant sought to deploy RPMA technology on streetlights for "smart city" applications, *e.g.*, "smart parking" and "smart tracking." Dkt. No. 251 at 13:20-26 (Ingenu's Br.).

applications deployed by a utility or entity in the utility value chain are within the Field of Use, there is no evidence that Trilliant acted on this belief in a fashion detrimental to Ingenu.

160. The Court finds that mere discussions with a party to determine whether activities consistent with the VAR are possible in a business transaction are neither a breach nor anything other than appropriate business discussions. Ingenu offered no evidence of "smart city" sales, nor that any third party received the "smart city" document Ingenu discussed at trial (Ex. D-303). No third-party witness testified that they received marketing related to smart city applications, let alone that they purchased a network from Trilliant to deploy smart city applications.

161. Accordingly, there is no evidence of any breach by Trilliant related to smart city applications or that Ingenu was damaged in any way.

b. The Prepaid Capped Software License Fee Paid Ingenu for Trilliant's Piconode Sales.

162. The Court finds that Trilliant appropriately paid for piconodes.[31] The evidence established that Ingenu intended an endpoint license fee to be its source of revenue for piconodes, and Trilliant prepaid the license fee.

163. First, with the piconode, Ingenu sought to shift from a manufacturing model to a licensing-only model. Dkt. No. 335, Test. J. Wilson at 142:7-10; Dkt. No. 334, Test. N. Matchett at 195:15-197:21 ("Trilliant would order directly from Gemtek or Compal" and when a piconode "was connected to a system, [Ingenu] would be paid a licensing revenue."). Mr. Wilson explained Ingenu's intent to "remove [itself] from the direct margin stack." Ex. P-287. Ingenu planned to have "original equipment manufacturers . . . build the [pico]nodes and sell them directly to the market." Dkt. No. 335, Test. J. Wilson at 139:11-142:6 (discussing Ex. P-287). Ingenu's aim was to lower the cost of the piconode, driving more devices onto the network and increasing licensing fees. Dkt. No. 335, Test. J. Wilson at 139:11-142:6.

[31] Ingenu alleges a breach of the VAR because Trilliant has not paid Ingenu for the sale of any piconodes. Dkt. No. 251 at 16:11-17:1 (Ingenu's Br.).

164. Ingenu's piconode model sought to "reduce the price to an acceptable level for the market." Dkt. No. 334, Test. N. Matchett at 195:22-196:23; Dkt. No. 333, Test. M. Mortimer at 141:22-142:10; Dkt. No. 334, Test. M. Mortimer at 182:8-15. Ingenu's prior manufacturing model was "very capital intensive," requiring it to buy "endpoints in large volume." Dkt. No. 333, Test. M. Mortimer at 141:5-21.

165. Second, under VAR Amendment No. 1, Trilliant pre-paid $290,000 for the Capped Software License Fee which "covered all Products ordered by Trilliant and licensed pursuant to the VAR" up to 600,000 end point nodes. Ex. P-69 at ¶¶ 1-2; Ex. P-67. The definition of "Products" in Amendment No. 1 added piconodes, bringing them within the prepaid license. Ex. P-69 at ¶ 1. As of trial, Trilliant had used only half the 600,000 licenses. Dkt. No. 333, Test. M. Mortimer at 150:8-21; 199:6-18.

166. The Court therefore finds that Trilliant did not breach the VAR by failing to pay for piconodes.

c. Trilliant's Private Networks May Connect to the Internet.

167. The Court finds that Trilliant's sale and deployment of private networks that utilize an internet connection does not violate the VAR's private network provision.[32] Dkt. No. 73 at ¶ 30 (Third Am. Cross-Compl.). As discussed above in Section IV(D), *supra*, the evidence at trial squarely contradicts Ingenu's only evidence—its expert Shi Baw Ch'ng.

168. First, Mr. Ch'ng's opinion contradicts a former Ingenu employee's testimony. Mr. Wilson testified that private networks may connect to the internet. Dkt. No. 335, Test. J. Wilson at 132:8-25; *see also* Dkt. No. 335, Test. J. Wilson at 128:16-129:1 (explaining the definition of a private network under the VAR).

[32] Ingenu's Third Amended Cross-Complaint alleges that Trilliant's networks connect to the internet, violating the VAR's private network provision. Dkt. No. 73 at ¶ 30 (Third Am. Cross-Compl.).

169. Second, Mr. Ch'ng's opinion contradicts Ingenu's trainings to Trilliant, which described private networks utilizing internet connections.[33] Dkt. No. 335, Test. J. Wilson at 131:25-132:25; Dkt. No. 340, Test. D. Kuhn at 8:3-9:19, 54:24-56:1, 64:16-65:14 (discussing Ex. P-10 (Ingenu Deployment Guide) and Ex. P-238). Ingenu also provided technology guides (Dkt. No. 340, Test. D. Kuhn at 12:20-13:4; Ex. P-233) and assisted in transferring Ingenu's private network customers to Trilliant (Dkt. No. 340, Test. D. Kuhn at 17:25-19:6; Ex. P-285).

170. Third, the trial evidence contradicts the only four bases of Mr. Ch'ng's opinion. Ex. D-340 at § 5.1 (S. Ch'ng Report); Dkt. No. 341, Test. S. Ch'ng at 60:20-61:7. His first two bases are a figure and a bullet point from Trilliant's Appliance Deployment Guide (Ex. D-340 at § 5.1 (S. Ch'ng Report)), which is a re-branded version of the Ingenu Appliance Deployment Guide provided as part of Ingenu's training program (Dkt. No. 340, Test. D. Kuhn at 47:16-48:1; *compare* Ex. D-258 (Trilliant Deployment Guide) *with* Ex. P-10 (Ingenu Deployment Guide)). Mr. Ch'ng conceded the figure and bullet point are identical in Trilliant's and Ingenu's guides. Dkt. No. 341, Test. S. Ch'ng at 62:13-63:12; 64:9-17. His third and fourth bases are emails referencing OTV, which is governed by a separate licensing agreement that has no private network restriction. Ex. D-340 at § 5.1 (S. Ch'ng Report); Dkt. No. 341, Test. S. Ch'ng at 64:23-65:23, 67:13-68:18; Ex. P-271.

171. Accordingly, Trilliant's private network design did not breach the VAR.

d. Trilliant Provided End User License Agreements to Its Customers and Partners.

172. The Court finds that Trilliant conveyed the End User License Agreement ("EULA") terms as required to its partners and customers.

173. Despite not raising any alleged breach related to EULAs or Section 1.9 in its Termination Letter, Ingenu's Trial Brief interpolates a requirement that Trilliant must send to its

[33] Mr. Kuhn explained that Trilliant's private networks rely on data encryption to prevent breaches and ensure security. Dkt. No. 340, Test. D. Kuhn at 53:8-54:18. The Court accepted Mr. Kuhn as an expert in the network architecture of computer networks. Dkt. No. 340, Test. D. Kuhn at 42:24-45:3.

customers the exact form of EULA found in Attachment 1 to Exhibit C to the VAR. Dkt. No. 251 at 17:10-11 (Ingenu's Br.). The VAR has no such requirement. Instead, Section 1.9 states that Trilliant only needs to transfer all "end-user license terms" to the end user. Ex. P-1 at § 1.9.

174. Trilliant conveyed all end-user license terms as required. Dkt. No. 333, Test. M. Mortimer at 133:25-134:21. Ingenu presented no evidence that Trilliant's Software License Agreement was inadequate in transferring end-user license terms. Nor did Ingenu present any evidence that Trilliant's Software License Agreement caused Ingenu any harm or that any Trilliant customer deployed RPMA contrary to the operative terms of the Ingenu EULA.

175. The Court thus finds no breach of the VAR related to EULAs.

e. Trilliant Cured Any Outstanding Gateway License Payments.

176. As to the Gateway license fees, the Court finds that Ingenu cannot terminate the VAR based on a breach that Ingenu has not raised in an appropriate termination letter and that Trilliant cured (to the extent there was, in fact, any default) before receiving notice from Ingenu.

177. First, neither Ingenu's Termination Letter nor its Trial Brief discuss gateway licenses, let alone alleges that Trilliant breached the VAR by failing to pay them. Ingenu presented no evidence that it notified Trilliant of any such failure, despite Mr. Rossing's testimony that he determined in January 2021, when he became President, that Trilliant had failed to pay such fees. Dkt. No. 337, Test. B. Rossing at 116:17-21.

178. Second, regardless, Trilliant made a $380,000 payment to Ingenu to settle any questions related to such fees or other potential royalties. Dkt. No. 337, Test. B. Rossing at 162:14-24. Trilliant obviously made this payment before Ingenu provided written notice of any issue regarding gateway license fees since Ingenu never provided such notice. Because Trilliant cured any breach before Ingenu provided written notice, Ingenu cannot terminate the VAR based on a failure to pay such fees.

179. Third, at trial, Ingenu offered no evidence that Trilliant owes a higher amount for gateway licenses and interest than the $380,000 Trilliant paid. Dkt. No. 334, Test. M. Mortimer at 152:14-153:8; Dkt. No. 336, Test. D. Wolfe at 105:10-21 (discussing Ex. D-157). In fact, Ingenu

did not present evidence of any specific amount of money or number of licenses for which payment is allegedly owed by Trilliant.

180. In light of the Court's ruling, it declines to address whether recoupment or setoff is available to Trilliant for any future Gateway license fees. The Court will not render a judgment for Ingenu on this record.

f. Trilliant Provided Purchase Orders; Ingenu Never Requested a Point-of-Sale Report.

181. The Court finds that the evidence does not support a breach related to a failure to provide point of sale reports. Neither Ingenu's Termination Letter nor its Trial Brief alleges Trilliant breached the VAR by failing to provide point of sale reports (VAR § 8.1), resulting in abandonment of that claim. Dkt. No. 73 at ¶ 41 (Third Am. Cross-Compl.); *see BankAmerica Pension Plan*, 206 F.3d at 826; *Hobson*, 220 F. App'x at 491.

182. Nonetheless, no such breach occurred. The VAR requires Trilliant to identify an End User either: "(i) in the applicable Product purchase order issued to [Ingenu]; or (ii) in writing within five (5) Business Days of receiving the applicable request from [Ingenu]." Ex. P-1 at § 8.1. Purchase orders introduced at trial identify the applicable End Users. Ex. P-26 (Purchase Order #5000003760); Ex. P-37 (Purchase Order #5000003813); Ex. P-38 (Purchase Order #5000003814); Ex. P-43 (Purchase Order #5000000671); Ex. P-67 (Purchase Order #4500009952). Trilliant also provided End User information in a June 14, 2018, letter to Mr. Razi listing all of Trilliant's customers and their number of network devices to confirm the maintenance and support fees. Dkt. No. 335, Test. N. Matchett at 105:15-21 (discussing Ex. P-275).

g. Trilliant Never Owed Access Point or Micronode Payments.

183. The Court finds that the evidence does not support a breach related to a failure to pay Ingenu for access points and micronodes. Neither Ingenu's Termination Letter nor its Trial Brief alleges Trilliant's nonpayment for access points and micronodes. As a result, Ingenu abandoned the allegation in its Third Amended Cross-Complaint that Trilliant has not paid Ingenu for those products for over two years. Dkt. No. 73 at ¶ 35 (Third Am. Cross-Compl.); *see BankAmerica Pension Plan*, 206 F.3d at 826; *Hobson*, 220 F. App'x at 491.

184. Nonetheless, the trial evidence proved that before Trilliant took over the manufacturing supply chain for access points and micronodes in 2018 under Amendment No. 2, it stockpiled over 108,000 micronodes and 60 access points, paying over $2.3 million to Ingenu. *See* Ex. P-19 (Purchase Order #5000003714), Ex. P-20 (Purchase Order #5000003712), Ex. P-21 (Purchase Order #5000003715), Ex. P-26 (Purchase Order #5000003760), Ex. P-37 (Purchase Order #5000003813), Ex. P-38 (Purchase Order #5000003814), Ex. P-43 (Purchase Order #5000000671), Ex. P-45 (Purchase Order #5100000683), Ex. P-58 (Purchase Order #5100000726), Ex. P-67 (Purchase Order #4500009952). Trilliant still has "some of this hardware six years later" as of trial. Dkt. No. 333, Test. M. Mortimer at 146:15-22.

h. Trilliant Acted in a Professional Manner.

185. The Court finds that Trilliant did not act unprofessionally or otherwise breach Section 9.3.1 of the VAR. First, Ingenu's Termination Letter and Trial Brief do not cite VAR Section 9.3.1, and Ingenu's Third Amended Cross-Complaint only alleges unspecified "deceptive, misleading, illegal or unethical business practice[s]." Dkt. No. 73 at ¶ 45 (Third Am. Cross-Compl.). Second, at trial, Ingenu failed to prove that Trilliant engaged in any such conduct. *See* Section IV(E)(1)(h), *supra*. Ingenu makes much of a September 20, 2020, internal email reflecting an executive team agenda that mentions "legally OK FUD" as an item for discussion. Ex. D-264. The internal discussion of this option is not proof that Trilliant took any such actions. Further, the email only mentions FUD or "fear, uncertainty, and doubt" as a possible agenda item and in the context of what was legally appropriate (*i.e.*, "legally OK"). The Court finds that email insufficient to prove a breach by Trilliant.

186. In contrast, the trial evidence showed that Ingenu consistently engaged in such deception, including telling FAE in 2018 that Trilliant lacked rights to work on a streetlighting project and interfering with SAESA, Chilquinta, and others. Ex. P-107; Dkt. No. 334, Test. N. Matchett at 224:4-21, 226:25-227:14. For years, Ingenu and Mr. Gazzolo "creat[ed] ill will" in the marketplace and with Trilliant's supply chain. Dkt. No. 335, Test. D. Wolfe at 217:20-218:9. This included "providing misinformation" to PLN in Indonesia. Dkt. No. 335, Test. D. Wolfe at 215:12-216:6; Dkt. No. 334, Test. M. Mortimer at 170:11-171:20. Given that context, Trilliant's

other communications regarding how to respond to this interference by Ingenu were reasonable and not a breach of the VAR. Ex. D. 264; Ex. D-89.

4. The Court Does Not Reach the Issue of Whether Ingenu's Failure to Provide Trilliant an Opportunity to Cure Precluded Termination of the VAR.

187. Trilliant also argues that Ingenu's Termination Letter—which provided no meaningful prelitigation opportunity to cure—was ineffective to terminate the VAR because of Section 4.2's notice-and-cure provision. The Court does not reach this issue because the Court finds that Ingenu failed to prove any uncurable, material breaches to support its attempt to terminate the VAR.

F. Breach of Contract – Standstill Agreement

188. The Court finds that Ingenu did not offer sufficient evidence at trial to prove that Trilliant breached the Standstill Agreement.[34] First, Ingenu's continued communications with third parties claiming that the VAR had been terminated breached the Standstill Agreement. Second, Ingenu failed to introduce evidence to establish improper communications with Radmond, EBS, and SAESA. The exhibits Ingenu introduced at trial show nothing more than business conversations permitted by the Standstill Agreement. Third, Ingenu's Standstill Agreement damages fail because Ingenu did not present any evidence demonstrating that Trilliant was a substantial factor in causing Ingenu to lose any of these alleged opportunities. *See Troyk*, 171 Cal. App. 4th at 1352 ("An essential element of a claim for breach of contract are damages resulting from the breach."); *Ruiz v. Gap, Inc.*, 380 F. App'x 689, 692 (9th Cir. 2010) ("[U]nder California law, a breach of contract claim requires a showing of appreciable and actual damage." (internal quotation marks omitted)).

189. The Court makes findings on each of these three issues in the alternative, and each finding would independently support judgment in Trilliant's favor on Ingenu's breach of contract claim regarding the Standstill Agreement.

[34] The Court previously granted partial summary judgment in favor of Trilliant as to Ingenu's claims for consequential damages arising under the Standstill Agreement except for Ingenu's allegations of lost profits related to: Radmond/Indonesia, EBS, and SAESA. Dkt. No. 302 (Order re Mot. Summ. J.).

1. Ingenu Breached the Standstill Agreement.

190. The Court finds that Ingenu breached the Standstill Agreement in connection with its communications with LED Source Experts N.V. ("LED Source") and CIMCON Lighting, Inc. ("CIMCON").

191. The Standstill Agreement prohibits interference with the other party's VAR-related third-party relationships, and it defines interference in part to mean that "no party shall send any communication to any third party stating or suggesting that the VAR has been terminated." Ex. P-163. Ingenu breached that promise:

- On September 29, 2020, Ingenu delivered LED Source a letter stating, "LED Source Experts N.V. . . . is an operational partner of Ingenu and has been granted the authority and license to utilize Ingenu's RPMA® wireless communications technology and deploy RPMA® enabled networks and loT services within the country of Suriname." Ex. P-175; Dkt. No. 336, Test. W. Schmidt at 199:20-200:17.
- On November 12, 2020, Mr. Schmidt wrote to third parties CIMCON and LED Source to discuss why EBS extended the tender deadline: "In my opinion, Trilliant is pushing the extension to figure out ***how to regain their RPMA license, which they do not have***." Ex. P-190 (emphasis added); Dkt. No. 336, Test. W. Schmidt at 206:2-25.

192. These actions constitute unrebutted breaches of the Standstill Agreement. In fact, Mr. Schmidt was never even told about the Standstill Agreement, indicating that Ingenu took few if any steps to follow it. Dkt. No. 336, Test. W. Schmidt at 207:22-208:3.

2. Ingenu Failed to Prove That Trilliant Breached the Standstill Agreement.

193. The Court finds that Trilliant did not violate the Standstill Agreement. The documentary evidence introduced at trial supports this point sufficiently, and Ingenu introduced no testimony from third parties to evidence a breach.

194. As Ingenu's counsel explained when the parties executed the Standstill Agreement, "[w]e understand that you're going to keep doing what you've been doing previously, and we agree not to do anything to try to stop you while the standstill agreement is in force." Ex. P-269.

Ingenu failed to offer any evidence that Trilliant did anything other than continue its prior business operations.

195. Ingenu offered no documentary evidence or testimony at trial that showed Trilliant sent a communication to Radmond, EBS, or SAESA that interfered with Ingenu's relationship with them while the Standstill Agreement was in effect.

196. Ingenu instead attempted to point to an unrelated discussion of a possible settlement. That discussion did not involve any individuals from Radmond, EBS, or SAESA and was evidenced in two emails between Mr. Wolfe, Mr. Pillow, and Brad Rathje of Aquacheck about a potential settlement with Ingenu, in which the parties would agree that Ingenu could exclusively pursue opportunities in Indonesia. Ex. D-63; Ex. D-64. Rather than harm Ingenu's efforts, the proposed deal discussed by Mr. Wolfe would have allowed Ingenu to pursue "monetize[ing] the Indonesian market." Ex. D-63; Ex. D-64. Trilliant's efforts to identify a commercial resolution for the parties' dispute do not constitute a violation of the Standstill Agreement.

3. Ingenu Failed to Prove Damages.

197. The Court further finds that Ingenu failed to prove causation of any damages by Trilliant. Ingenu's business failures were not caused by Trilliant. There is overwhelming evidence that Ingenu's business model failed for reasons unrelated to Trilliant. Ingenu had good technology, maybe even great technology, but it could not develop a model that made a profit while utilizing it. Mr. Gazzolo, who again was no friend to Trilliant, laid the company's demise squarely at the feet of Ingenu management. The story that Trilliant caused the company to lose opportunities and fail is just that, a mere story. Ingenu may point to a few random statements that are naughty and ask the Court to engage in conjecture. But after years of discovery and a two-week trial, no hard evidence supports that the story is based on the truth. The Court declines to so determine.

198. By August 17, 2020, when the parties entered into the Standstill Agreement, and through its termination of the Standstill Agreement on January 28, 2021, Ingenu was ill-positioned to win any business. It had long ceased operations, filed for bankruptcy protection, laid off its employees, and was trying to sell off its remaining assets, including its intellectual property. At

the trial, Ingenu offered no evidence that anything Trilliant did was a substantial factor in Ingenu failing to realize any alleged business opportunities with Radmond, EBS, or SAESA.

a. Radmond

199. The Court finds that Ingenu did not prove Trilliant caused Ingenu to lose any economic opportunities in Indonesia. Ingenu supplies no direct evidence supporting that Trilliant caused it to lose this opportunity. No one directly involved in Indonesia so testified. Although Mr. Rossing asserted that Ingenu had entered into at least ten letters of intent or memorandums of understanding in Indonesia (Dkt. No. 337, Test. B. Rossing at 128:25-129:16), Mr. Rossing's belief that Ingenu would have gotten the opportunity but for Trilliant is not evidence. It is conjecture. None of those documents Mr. Rossing referenced were introduced, and nothing corroborates his testimony.

200. Ingenu cites testimony regarding an internal Trilliant email regarding how to respond to false statements by Mr. Gazzolo and Mr. Schmidt that Trilliant had no rights and no ability to deploy RPMA technology in the Indonesian marketplace. Ex. D-89. The Court finds Mr. Wolfe's testimony credible that this email and the reference to cutting "the head off the snake" was not a statement about bringing Ingenu down inappropriately but a statement about the desire to stop inappropriate disparagement by Mr. Gazzolo and Mr. Schmidt. Dkt. No. 335, Test. D. Wolfe at 217:17-219-10; Dkt. No. 336, Test. D. Wolfe at 111:3-112:18. The evidence utterly fails to support that Ingenu lost more than half a billion dollars because of Trilliant's efforts during the short standstill period or at any point in time.

b. N.V. EnergieBedrijven Suriname

201. The Court finds that Ingenu did not prove Trilliant caused Ingenu to lose any economic opportunities with EBS.

202. First, Ingenu asked the Court to assume that EBS canceled the bidding process solely because of the actions of Trilliant, but no one actually involved in the decision at EBS or those working with it so testified. Nor are there any documents evidencing that Trilliant was involved beyond submitting a competing bid, and there is no evidence of communications during

the relevant period. If the Court is to assume a cause of the canceled bidding process as Ingenu requests, the existence of the global pandemic seems a far more likely reason to cancel the project.

203. Second, the evidence also supports that Ingenu submitted the highest bid for the project. Dkt. No. 335, Test. N. Matchett at 36:7-37:15. Ingenu also did not facially meet several of the requirements for the project. EBS had vendor qualifications that Ingenu and LED Source could not meet, *e.g.*: (i) five years' financial records and that the business was in good standing; (ii) selling the same products and services for five plus years; (iii) three contracts above $3 million for the same products and services; and (iv) a solution with bidirectional communication. *See* Ex. P-171 at 44-45 (§ 3.1); Dkt. No. 335, Test. N. Matchett at 38:7-39:9; Dkt. No. 336, Test. W. Schmidt at 203:8-20 (Mr. Schmidt admitting that bidirectional communication was "still a challenge for Ingenu").

204. Third, Ingenu knew and, thus, implicitly consented to Trilliant's pursuit of this project. Trilliant did an RPMA pilot project with EBS in 2017, notifying Ingenu of the opportunity along with a purchase order for EBS. Ex. P-242; Dkt. No. 335, Test. N. Matchett at 22:23-24:13. EBS was a utility. Dkt. No. 335, Test. N. Matchett at 21:14-17. The sale was within the Field of Use in that regard. Again, Ingenu's expert agreed. *See* Ex. D-339 at ¶ 71 (B. Larkin-Connolly Report) . As did Mr. Rossing. Dkt. No. 337, Test. B. Rossing at 156:6-15 (admitting that he agreed at his deposition that the EBS project was within Trilliant's Field of Use).

205. Finally, Trilliant did not get the bid either because EBS ended the bid process before selecting a winner. Dkt. No. 336, Test. W. Schmidt at 209:3-7.

c. SAESA

206. The Court finds that Ingenu did not prove Trilliant caused Ingenu to lose any economic opportunities with SAESA. Ingenu offered no evidence at trial reflecting any communications between Trilliant and SAESA during the term of the Standstill Agreement. The only SAESA-related evidence offered by Ingenu was the 2018 letter for which Ingenu failed to provide a timely certified translation. The Court has declined to admit this exhibit (*see* Section IV(E)(1)(f), *supra*), but regardless, a letter from 2018 is insufficient to show a violation of an agreement that came into existence years later, after Ingenu's business had collapsed.

207. Further, Ingenu knew of and, thus, implicitly consented to Trilliant's pursuit of work with SAESA. Indeed, SAESA was one of the utility customers that Mr. Wilson helped Ingenu transition to Trilliant. Dkt. No. 335, Test. J. Wilson at 147:22-148:22.

208. Lastly, as discussed above in Section IV(D), *supra*, the Court finds that the opinions of Ingenu's damages expert, Paul Zimmer, are unreliable and uncredible.

G. Breach of Contract – VAR

209. As discussed above, the Court previously granted partial summary judgment in favor of Trilliant as to Ingenu's claims for consequential damages arising under the VAR in Ingenu's First and Second Crossclaims. Dkt. No. 302 (Order on Mot. Summ. J.). At trial, Ingenu did not present any fact evidence of harm or non-consequential damages, and Ingenu does not seek any non-consequential damages. Dkt. No. 251 at 20:18-21:19 (Ingenu's Br.). Because damages are a necessary element of a breach of contract claim under California law, Ingenu's failure to prove any harm or damages warrants a ruling in favor of Trilliant on this claim. *See Troyk*, 171 Cal. App. 4th at 1352; *Ruiz*, 380 F. App'x at 692.

210. In the alternative and as set forth above in Section IV(E), *supra*, the Court finds that Trilliant did not materially breach the VAR, and separately, that Ingenu itself materially breached the VAR by failing to provide maintenance and support services. Both findings independently support a judgment in favor of Trilliant on Ingenu's first claim for breach of the VAR.

H. Breach of Contract – Letter Agreement

211. Trilliant and Ingenu entered into the Letter Agreement on March 1, 2018, at the same time as VAR Amendment No. 2. Ex. P-79 (Ltr. Agreement); Ex. P-78 (VAR Amend. 2); Dkt. No. 333, Test. M. Mortimer at 162:24-163:2. The Letter Agreement contemplated Trilliant loaning Ingenu $3,950,000, divided among Notes 1, 2, and 3, each premised on conditions precedent. Ex. P-79; Ex. P-78 at 1. Trilliant's obligation to make the loans was set to terminate on July 28, 2018, meaning that the conditions precedent had to be satisfied by that date in order for Trilliant to be obligated to purchase the Notes. Ex. P-79 at 5(e).

212. Trilliant made the "Note 1" loan of $950,000 on March 1, 2018. Ex. P-266; Dkt. No. 333, Test. M. Mortimer at 163:24-165:3. Because Ingenu was desperate for cash to make payroll but unable to fulfill the conditions precedent for the Note 3 loan, Trilliant agreed to an amendment splitting the $1,500,000 Note 3 loan into two separate notes for $750,000 each (Notes 3 and 4). Ex. P-82, Dkt. No. 333, Test. M. Mortimer at 167:6-168:6. Trilliant made the Note 3 loan on April 5, 2018, and the "Note 4" loan on April 19, 2018. Ex. P-267 (Note 3, Apr. 5, 2018); Ex. P-84 (Note 4, Apr. 19, 2018); Dkt. No. 333, Test. M. Mortimer at 169:7-8.

213. The Court, as discussed above, determines that the evidence does not support Ingenu's narrative that Trilliant acted in bad faith to hurt Ingenu and obtain its technology. The evidence—Mr. Matchett and Mr. Wilson's testimony, in particular—supports that Trilliant and Ingenu had a good working relationship. Dkt. No. 335, Test. J. Wilson at 123:22-124:10, 154:4-155:21, 177:23-178:7; Dkt. No. 335, Test. N. Matchett at 185:10-21, 205:24-206:6. That relationship unraveled not because of bad acts by Trilliant but because Ingenu was incapable of providing the technical support required by the VAR and incapable of earning a profit in the new iteration of its business. The evidence also does not support Ingenu's narrative that Trilliant's goal was to acquire Ingenu's source code. What Trilliant wanted was a business relationship with a partner who would hold up its part of the bargain. What it got was a company that could not make payroll, much less appropriately service and support the licensed software.

214. The Court finds that Ingenu failed to prove its breach of contract claim regarding the Letter Agreement based on Trilliant declining to loan Ingenu an additional $1,500,000 (Note 2) over and above the $2,450,000 it had already lent.

215. First, Ingenu cannot deny that it breached the Letter Agreement by failing to repay Notes 1, 3, and 4. *See* Ex. P-154 at 35 (Ingenu's Bankruptcy Petition reflecting the unpaid Notes plus interest in the amount of $2,732,349.32); Dkt. No. 333, Test. M. Mortimer at 176:8-11.

216. Second, Trilliant was not required to make the Note 2 loan because Ingenu failed to meet a condition precedent. The Letter Agreement required "Ingenu's delivery . . . of a signed acknowledgment from [Renesas] to manufacture, sell and deliver Ingenu's ASIC Products directly

to Trilliant on the same or substantially similar terms [as to Ingenu]."[35] Ex. P-79 at 1(b)(iv). Ingenu did not timely do so. Dkt. No. 333, Test. M. Mortimer at 169:12-15; Dkt. No. 334, Test. M. Mortimer at 180:14-181:4.

217. Ingenu's failure to satisfy the conditions precedent and its own breaches excused Trilliant's performance. *See Ninety-Nine Invs. v. Overseas Courier Serv. (Singapore) Priv.*, 113 Cal. App. 4th 1118, 1131 (2003) (finding that buyer was excused from performing its obligations because seller failed to satisfy condition precedent); *Rubin v. Fuchs*, 1 Cal. 3d 50, 54-55 (1969) (California Supreme Court holding that buyer was not obligated to perform on his contractual obligations because seller failed to satisfy condition precedent); *see also Brown*, 192 Cal. App. 4th at 277 ("[I]n contract law a material breach excused further performance by [an] innocent party" (internal citations omitted)).

I. Breach of the Implied Covenant of Good Faith and Fair Dealing.

218. Ingenu relies on the same allegations set forth in its breach of contract claim for the VAR and Letter Agreement to support its breach of the implied covenant good faith and fair dealing claim. Dkt. No. 73 at ¶¶ 59, 63-64 (Third Am. Cross-Compl.). Under California law, a breach of the implied covenant of good faith and fair dealing claim requires Ingenu to prove that it; (1) fulfilled its obligations under the VAR and Letter Agreement; (2) any conditions precedent to Trilliant's performance occurred; (3) Trilliant unfairly interfered with Ingenu's rights to receive the benefits of the VAR and Letter Agreement; and (4) Ingenu was harmed by the Trilliant's conduct. *Rosenfeld*, 732 F. Supp. 2d at 968 (citing Judicial Council of California Civil Jury Instruction No. 325). As set forth above in Sections IV(G) and IV(H), *supra*, Ingenu failed to prove these elements. Accordingly, the Court finds that judgment should be entered in Trilliant's

[35] Prior to Amendment No. 2, Trilliant could not "get product out of Ingenu," and Ingenu could not "get product out of their manufacturers" because it "owed money to the manufacturers." Dkt. No. 334, Test. N. Matchett at 198:21-199:10. The parties intended Amendment No. 2 to give Trilliant "the rights to work directly with Ingenu's manufacturers." Dkt. No. 334, Test. N. Matchett at 198:21-199:10; Dkt. No. 337, Test. B. Rossing at 55:13-15 (Amendment No. 2 and the Letter Agreement were "part and parcel with each other").

favor as to Ingenu's second cause of action for breach of the implied covenant of good faith and fair dealing.

J. Lanham Act

219. The Court finds that the evidence does not support Ingenu's Lanham Act claim, and judgment in favor of Trilliant is appropriate.

220. Ingenu's claim fails for lack of evidence. Ingenu asserts its Lanham Act claim "seeks to protect its unique and traceable source code for the RPMA technology[.]" Dkt. No. 251 at 24:4-6 (Ingenu's Br.). But Ingenu identified no evidence at trial of Trilliant falsely designating Ingenu source code as its own, nor that Ingenu suffered any damages. Nor did Ingenu present any evidence at trial to satisfy any of the several elements of a Lanham Act false designation of origin claim or a Lanham Act false representation or advertising claim. *See Luxul Tech*, 78 F. Supp. 3d at 1170 (setting forth the elements of a false designation of origin claim); *Southland Sod*, 108 F.3d at 1139 (setting forth the elements of a false representation or advertising claim). Ingenu similarly failed to present any evidence to support brand marketing breach allegations. *See* Sections IV(E)(1)(f), *supra.*

221. Accordingly, judgment in favor of Trilliant is appropriate on Ingenu's Lanham Act claim.

K. UCL

222. The Court finds that the evidence does not support Ingenu's UCL claim, and judgment in favor of Trilliant is appropriate.

223. First, Ingenu bases its UCL claim on Trilliant's alleged "deceptive and unfair business practices in its efforts to sell the Products and in undermining the RPMA and Ingenu's association with and control of that brand." Dkt. No. 251 at 28:13-16 (Ingenu's Br.). Ingenu's unlawful business practices claim fails because, as discussed above, Ingenu did not present evidence to support brand marketing breach allegations and Lanham Act assertions. *See* Sections IV(E)(1)(f) and IV(J), *supra.* And Ingenu's argument that Trilliant engaged in an "unlawful" business practice because it breached the VAR fails as a matter of law. Section 17200 claims cannot be predicated on breach of contract and must instead be predicated on a violation of

statutory, regulatory, or other positive law. *Shroyer*, 622 F.3d at 1044 ("These practices alone do not amount to a violation of the 'unlawful' prong of § 17200 . . . . [A] common law violation such as breach of contract is insufficient.")

224. Second, Ingenu's unfair business practices claim fails because Ingenu did not prove that Trilliant's conduct threatened an incipient antitrust violation. *Cel-Tech.*, 20 Cal. 4th at 187.

225. Accordingly, judgment should be entered in favor of Trilliant on Ingenu's UCL claim.

L. The Court Does Not Address Trilliant's Right to Net Amounts Owed to Ingenu.

226. Trilliant argues that it has a right to net any amounts owed to Ingenu against credit and debt owed to Trilliant, including unpaid loans to Ingenu and prepayment for end-point licenses. As there are no damages awarded to Ingenu, the Court does not address Trilliant's netting argument.

M. Ingenu's Rejection of the VAR under the Confirmation Order and Trilliant's Retention of IP Rights

227. Based on the Court's ruling that Ingenu did not effectively terminate the VAR, and Ingenu's rejection of all Executory Contracts and Unexpired Leases under the terms of its Reorganization Plan and the Confirmation Order, the VAR is deemed rejected. Bk. Dkt. No. 213 at § III.B.4.a (Confirmation Order); Bk. Dkt. No. 138 at § 9.1 (Reorganization Plan).

228. As reflected in its IP Rights Retention Notice, pursuant to Bankruptcy Code Section 365(n)(1)(B), Trilliant has elected to retain its Retained IP Rights under the VAR, including: all rights to enforce any exclusivity provisions of the VAR, and under any agreement supplementary to the VAR; all rights to the intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the Petition Date for the duration of the VAR, and for any period for which the VAR may be extended by Trilliant as of right under applicable nonbankruptcy law. Bk. Dkt. No. 336.

229. As noted in Trilliant's IP Rights Retention Notice, pursuant to Bankruptcy Code Section 365(n)(2), Ingenu is required to allow Trilliant to exercise such Retained IP Rights (subject to Section 365(n)(2)'s requirements) for the duration of the VAR (and any period for which the VAR may be extended by Trilliant). Bk. Dkt. No. 336.

230. Thus, consistent with Trilliant's IP Rights Retention Notice and as requested in the Complaint, pursuant to Bankruptcy Code Section 365(n)(3), the Court enjoins Ingenu from interfering with Trilliant's exercise of its Retained IP Rights. Bk. Dkt. No. 336.

V. CONCLUSION

The Court thus rules in Trilliant's favor as follows:

- First, the Court grants declaratory judgment in Trilliant's favor that Ingenu's attempt to terminate the VAR was improper and invalid.
- Second, the Court grants judgment in Trilliant's favor on Ingenu's remaining crossclaims for:
    - Breach of contract regarding the Standstill Agreement, VAR, and Letter Agreement;
    - Breach of the implied covenant of good faith and fair dealing regarding the VAR and Letter Agreement;
    - Lanham Act; and
    - UCL.
- Third, because the Court finds that Ingenu has not prevailed on any of its claims, and Ingenu is not entitled to any damages, the Court declines to rule on Trilliant's Counterclaims in Reply for breach of contract regarding the VAR, Letter Agreement, Loan Documents, and Standstill Agreement. At trial, Trilliant only maintained those claims defensively and for the purpose of a potential setoff or recoupment.
- Fourth, in light of the Court's ruling that Ingenu did not effectively terminate the VAR, Ingenu's Reorganization Plan, and the Confirmation Order, the VAR shall be deemed rejected. Pursuant to Bankruptcy Code Section 365(n)(1)(B), Trilliant has elected to retain its Retained IP Rights under the VAR pursuant to its IP Rights Retention Notice. Trilliant

may file a proof of claim based on damages resulting from Ingenu's rejection of the VAR within forty (40) days of entry of Judgment.

Fifth, pursuant to Bankruptcy Code Section 365(n)(3) and as requested in the Complaint, the Court enjoins Ingenu from interfering with Trilliant's exercise of its Retained IP Rights under the VAR, including concerning Ingenu's interactions with Trilliant's customers.

IT IS SO ORDERED.

Dated: February 13, 2024

The Honorable Laura S. Taylor
United States Bankruptcy Judge