IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

NEON ENTERPRISE SOFTWARE, LLC
Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant.

CAUSE NO. A09CA896 JN

Jury Trial Requested

PLAINTIFF'S FIRST AMENDED COMPLAINT

Neon Enterprise Software, LLC ("Neon"), files this First Amended Complaint[1] against International Business Machines Corporation ("IBM"), and for cause of action shows the following:

I.
OVERVIEW OF CLAIMS

1. This case relates to monopolies that IBM has and is attempting unlawfully to maintain with respect to the computer processing of workloads generated by applications written originally to be processed on IBM mainframe computers, utilizing IBM's proprietary operating systems software (These applications will be called "Legacy Applications," and the workloads that they generate will be called "Legacy Workloads."). Critically, both the Legacy Workloads, and the Legacy Applications that generate them, belong not to IBM, but to its customers. By consequence of IBM's monopolies, the processing of its customers' Legacy Workloads generates billions of dollars in annual revenue for IBM in the form of operating systems software licensing fees. Neon's innovative zPrime products represent a substantial threat to IBM's monopoly

[1] This First Amended Complaint is being filed, as a matter of right, pursuant to Fed. R. Civ. P. 15 (IBM answered the original complaint on January 27, 2010).

control over Legacy Workloads, and, as a consequence, to a large portion of IBM's annual revenues. Faced with the threat now posed by Neon, IBM has used a variety of unlawful means, including misrepresentation, disparagement, threats of retaliation and baseless litigation, and other types of unfair and unlawful competition, in an attempt to crush Neon and thereby protect the revenue generated from IBM's monopoly in the processing of its customers' Legacy Workloads. Shortly after Neon announced the release of zPrime, an IBM salesperson explained to a representative of Honda, the global automobile manufacturer, that "IBM would look to make an example of the first companies that bought zPrime." In fact, IBM has sought to make "examples" of virtually every company that has seriously considered the purchase of zPrime.

2. The pretext for IBM's threats of retaliation and litigation (the central element of IBM's scorched-earth campaign) has been a false but persistent insistence that its contracts embody notions such as "authorized workloads" and "ineligible workloads" that prohibit its customers from using specialty processors that they own (and for which they have paid) to process Legacy Workloads. Neon has repeatedly requested that IBM provide a list or definition that will enable Neon and its customers to understand the basis (if any) of IBM's claims that only certain types of workloads are "eligible" and "authorized" for specialty processors; IBM has been unable and unwilling to respond to Neon's requests, and has, thus far, declined Neon's invitation that it amend its pleadings to supply for the edification of the Court and jury a list or definition of those workloads that are "authorized" and/or "eligible" for specialty processors.[2]

3. Having sold products to its customers without limitations on their use, IBM is attempting unlawfully and retroactively to impose such restrictions, all to the billion-dollar-plus detriment of consumers throughout the United States and the world. Indeed, IBM has even

[2] In the meantime, it has been providing its customers with a befuddling array of explanations for what is meant by the concepts of "authorized" and "eligible" workloads.

claimed, and asked its customers to agree, that the only workloads that are "authorized" to run on customer-owned specialty processors are those "for which the Specialty Engine was created and marketed by IBM." The fact that IBM points not to a contract, or language in one or more contracts, but instead to its unilateral intent in "creat[ing] and market[ing]," is telling. Imagine a company that sold both paperweights and staplers insisting that because it "created and marketed" the staplers for the purposes of attaching paper with staples, its customers could not use the stapler for a paperweight, and would instead have to buy the product—a paperweight—that the company had "created and marketed" for the purpose of keeping papers from blowing off of desks.

II.
PARTIES

4. Neon, the Plaintiff, is a Delaware Limited Liability Company. Its sole member is a California trust, the trustees and beneficiaries of which are citizens of Texas and California, respectively.

5. IBM, the Defendant, is a New York corporation doing business in Texas. It maintains its principal offices in the United States in the State of New York. IBM has answered and appeared.

III.
VENUE & JURISDICTION

6. This Court has jurisdiction over the Plaintiff's federal claims pursuant to the provisions of 28 U.S.C. § 1331, because these claims arise under the Constitution, laws, or treaties of the United States. Moreover, because there exists complete diversity of citizenship and because the amount in controversy exceeds $75,000, the Court has jurisdiction over all of the claims pursuant to the provisions of 28 U.S.C. § 1332(a).

7. Venue is proper in this Court under 28 U.S.C. § 1391(b), because IBM is a party that is found in the Western District of Texas (IBM has some 6,000 employees in the Austin area) and because a substantial part of the events giving rise to Neon's claims occurred in the Western District of Texas. Neon's principal office (where it has some twenty[3] employees) is in Travis County, Texas, at 11044 Research Boulevard, Austin, TX 78759-5342. Neon suffered the injuries caused directly and proximately by IBM's unlawful conduct in Travis County, Texas.

8. The Court has jurisdiction over the parties because the Defendant is a business registered and actually doing business in the State of Texas and the United States District Court's Western District of Texas.

IV.
ALLEGATIONS OF FACT

9. Neon is a small, privately owned software company that writes and sells products for businesses that use IBM mainframe computers and associated IBM operating systems and other software ("IBM Mainframe Customers"). Neon has been developing products for IBM Mainframe Customers for nearly 15 years. Until quite recently, most of Neon's products were what are known in the industry as "utilities" for mainframe databases, including IMS and DB2. Neon's utilities compete with products offered by IBM and others.

10. IBM Mainframe Customers include most of the largest corporations in the world, many of whom have used IBM mainframes, operating systems, and software for nearly 40 years. The operating environment associated with IBM mainframes is fundamentally different than most modern computing systems. As a consequence, customers that have long relied on IBM mainframes for mission-critical computing tasks have become "locked in"; *i.e.*, IBM Mainframe

[3] Quite recently, as a direct consequence of IBM's unlawful conduct as described in this amended complaint, Neon was forced to reduce the size of its staff, leaving dozens of talented citizens unemployed.

Customers have no realistic way of migrating away from their dependence on IBM hardware and software. The practical impossibility of migration enables IBM to extract from IBM Mainframe Customers a substantially higher price (in the form of software license fees) for the processing of Legacy Workloads (those workloads that can only be processed on IBM mainframes) than for the processing of workloads that can be performed on any number of other platforms ("Modern Workloads").

11. IBM boasts that some $5,000,000,000,000 (that's $5 trillion) in assets reside on mainframe computers, explaining that "[i]n banking, finance, health care, insurance, public utilities, government, and a multitude of other public and private enterprises, the mainframe computer continues to form the foundation of modern business." IBM notes that "[i]f you ever used an automated teller machine (ATM) to interact with your bank account, you used a mainframe." Millions of the ultimate users of IBM's mainframes are located in Texas, California and New York, as are many of the IBM Mainframe Customers that are affected adversely by the anticompetitive conduct described in this Amended Complaint. Each of the millions of ATM transactions that are initiated every hour of every day that are processed on an IBM mainframe computer generates Legacy Workloads; thus, each produces software licensing fees for IBM. Although IBM charges the fees to the companies that comprise the universe of IBM Mainframe Customers, it is consumers in the United States, and world-wide, who ultimately bear the costs imposed by IBM's monopoly on the processing of Legacy Workloads.

Workload Processing Realities

12. For about the past decade, IBM has used the letter "z," as in zSeries or System z, to refer to its mainframe offerings (collectively, "System z Offerings"). The "z" stands for zero downtime. Customers that obtained IBM's System z Offerings paid not only the up-front cost to

acquire the mainframe hardware, but also ongoing software licensing fees that were tied (in one form or fashion) to their use of the computer's central processor (the "CP"). As the number of transactions processed by the CP increased, so did the software licensing fees payable to IBM. Via this software licensing fee scheme, IBM effectively meters its customers' usage of the System z Offerings and thereby ties its revenues to the customers' demand. Although the customer in some technical sense "owns" the CP, the ongoing software licensing fees cause the arrangement more closely to resemble a situation in which IBM retains ownership of the CPs and charges the customers for their use.

13. But not all of the workloads in modern businesses are Legacy Workloads; much of the processing (the Modern Workloads) involves applications and programs written for modern, "open" or "distributed" systems,[4] or in modern programming languages (like Java). As a matter of the design capabilities of the underlying hardware and software systems, IBM Mainframe Customers have the option of moving Modern Workloads (but not Legacy Workloads) to other computer platforms, or, alternatively, using the CPs on their mainframes to process the jobs. Because IBM tied its software licensing fees to CP usage, customers that elected to process Modern Workloads on their IBM CPs saw their costs increase dramatically. Consequently, many of the IBM Mainframe Customers began to process Modern Workloads on other, less expensive other platforms. As IBM Mainframe Customers began to invest in the technology that enabled them to process Modern Workloads on less expensive, non-IBM platforms, IBM saw a large potential loss in hardware workloads generally, and the possibility, specifically, that customers would seek ways in which they could move some or all of their Legacy Workloads away from IBM platforms.

[4] A distributed or open system includes multiple computers that communicate through a network. The computers interact in order to achieve a common goal.

IBM's Specialty Processors

14. Faced with the potential threat to the Legacy Workload monopoly arising from Modern Workloads being processed on open systems, IBM responded by offering "specialty processors" to its customers. In 2004, it began offering the zAAP specialty processor, and, in 2006, it released the zIIP specialty processor. IBM represented to IBM Mainframe Customers (including Neon) that for each central processor ("CP") they acquired, IBM Mainframe Customers buying a System z mainframe could also acquire one zIIP and one zAAP (collectively, the "SPs"), and that if they acquired zIIPs and zAAPs, they would have the right to them in perpetuity, even if they purchased a new mainframe. That is, an IBM Mainframe customer that paid for and acquired SPs along with a 2008 version of a mainframe would, upon acquisition of the next version of the IBM Mainframe, get an equivalent number of SPs.

15. IBM also claimed that certain work otherwise scheduled for the CP would routinely be diverted to one of the SPs and that, for workloads so diverted, there would be no associated software licensing fees. IBM thus represented that by adding one or more SPs, the customers could save by having workloads shifted from the CP to processors for which there would be no software licensing fees.[5] Here is what IBM said:

> As to the zAAP: "IBM does not impose software charges on zAAP capacity. Additional software charges will apply when additional general purpose CP capacity is used."
>
> As to the zIIP: "IBM does not impose software charges on zIIP capacity."

[5] The "savings" associated with the SPs turned out (for most customers) to be inconsequential due to the fact that not all Modern Workloads were shifted and not all of the workloads that were shifted got processed exclusively on the "free" SPs. Moreover, Neon discovered that the switching from CPs to SPs, using the IBM-supplied "switch-to" service, is inherently inefficient on modern processors, because the cache storage is lost when doing the switch. Additionally, the switch-to service invokes the dispatcher, which consumes additional instructions, and when switching to an SP, or back to a CP, a processor is not necessarily available, frequently causing the processing to be suspended. The end result is that there are cycles consumed on the SPs, but these are not directly offset by a reduction in processing on the CPs.

Finally, IBM represented that the SPs would always run at full speed, even if the customer had elected to obtain a CP that was, in the lexicon of the industry, "kneecapped."[6] Given that the SPs would be owned by the customers and bear no ongoing software licensing fees, they were—unlike CPs—in fact and reality the property of the IBM Mainframe Customers.

16. In the original implementations of the zIIPs and zAAPs, IBM configured its operating system so that of Modern Workloads would be diverted to either of the SPs; IBM configured its operating system to prevent Legacy Workloads from being diverted to SPs. IBM did not prohibit (by contract or otherwise) IBM Mainframe Customers, or third-party software vendors, from developing solutions that would enable Legacy Workloads to be processed on one or both of the SPs. In fact, IBM expressly informed users that there were different ways to enable workloads to be processed on the zIIP:

> Existing alternative approaches to zIIP enablement may include enabling each individual code path to exploit zIIP. The drawback to this approach is the time, skill, and resources required to do so.

See http://www.priorartdatabase.com/IPCOM/OOO183568/. And, upon release of the zIIP processor in early 2006, an IBM representative explained that:

> [t]he interfaces to the zIIPs are open, and other vendors are open to leverage it . . . . We want to make it accessible, since this can only help encourage more workloads to move to the mainframe.

See http://www.itjungle.com/big/big013106-story01.html. This statement, as it now turns out, was a lie: IBM never intended for IBM Mainframe Customers to move a substantial amount of processing off CPs and onto SPs. Having represented to IBM Mainframe Customers, software

[6] All three types of processors—zIIPs, zAAPs and CPs—are identical in capability, but customers in need of less performance than is available from a fully functioning CP can buy a mainframe in which the CP has, via IBM software, had its capacity limited. By purchasing a limited-capacity CP, the customer can save in up-front costs. Such CPs are described as having been "kneecapped."

vendors like Neon, and the world at large that the zIIPs would be "open" and "accessible," IBM cannot now be permitted retroactively to renege.

17. Moreover, one thing is clear: when IBM intends to restrict the workloads that can be processed on one of the processors that it sells, it knows how to inform its customers. Indeed, with respect to the specialty processor known as the "Integrated Facility for Linux" ("IFL"), IBM explains:

> The attractively priced IFL processor enables you to purchase additional processing capacity **exclusively for Linux workloads**, without affecting the MSU rating or the IBM System z model designation.

See http://74.125.95.132/search?q=cache:http://www-03.ibm.com/systems/z/os/linux/solutions/ifl.html (emphasis added). Neither IBM's customer contracts nor its website include any similar statements of exclusivity with respect to the workloads that a customer can process on the zIIPs and zAAPs that it buys from IBM.

18. To appreciate the nature of IBM's activities, it is important to understand that there is no physical difference—none—between CPs and SPs. Thus, in no sense will IBM be able honestly to claim that it made a substantial investment in its specialty processor offerings; it merely renamed some of the processors that were already packaged with its System z Offerings.

19. Moreover, as delivered, System Z mainframes include multiple arrays of identical processors, and, depending on what the customer ordered, some or all may be designated as CPs, and some (but not all) of the processors (no more than 2/3ds of them) may be designated as SPs. Finally, some of the processors (although resident on the machine as delivered) remain inactive until such time as the customer acquires (on a temporary or permanent basis) additional capacity

in the form of one or more CPs and/or one or more SPs.[7] Thus, a customer that buys a mainframe that is equipped with one CP and two SPs has acquired three identical processors. But, reflecting the fact that the workloads that IBM originally planned to shift to SPs consisted mostly of Modern Workloads for which it faced vigorous competition— *i.e.*, customers could process Modern Workloads on any number of newer, less expensive, non-IBM platforms—IBM had to charge a much lower price for the SPs than the CPs. Thus, IBM could not charge nearly so much for the processors intended (but not restricted) to compete in that market (SPs) as it could for the processors at the core of the mainframe (the CPs), notwithstanding the fact that the processors are identical in every way. Indeed, IBM charges no software licensing fees for work processed on SPs, while simultaneously charging billions of dollars for workloads processed on the CPs. The fact that IBM price discriminates in this way, for use of the same physicalproduct, by the same universe of customers, for different types of workloads, reflects that the market for processing Modern Workloads is a distinct and different (*i.e.*, competitive) market from the market for processing Legacy Workloads.

20. Because so much of IBM's revenue is derived from its exploitation of the monopoly power that it enjoys with respect to processing Legacy Workloads on CPs, any development that actually enabled IBM Mainframe Customers to move Legacy Workloads from a CP to one of the customer-owned, "free-for-usage" (but identical) SPs threatened IBM with the loss of billions of dollars in software licensing revenue. IBM Mainframe Customers, together with those (virtually everyone) that effectively consume the processing services, would benefit enormously from such a development. That is, transactions (like those generated by ATM

[7] In some of the allegations included in the counterclaims, IBM appears to suggest that Neon's zPrime product somehow causes Legacy Workloads to be shifted to one or more of these "dormant" processors for which IBM's customers have not paid. Any such suggestion is false: users of zPrime can only access those SPs that they own, and for which they have paid.

usage) that could now be processed on one of the SPs would be less costly to IBM's Mainframe Customers and, ultimately, to the consumers that use ATMs.

Neon's Solution

21. Neon is fortunate enough to employ several of the world's most highly skilled developers of products for the IBM mainframe environment, and those developers have a history of solving some of the most difficult problems encountered by IBM Mainframe Customers. The developers employed by Neon have written products for IBM mainframes that have generated sales of more than $1 billion. Cognizant of the savings that IBM Mainframe Customers would realize if Legacy Workloads could be shifted from CPs to one or both of the SPs, Neon's developers tackled and solved the problem. Their efforts enabled Neon, in June of 2009, to debut a revolutionary product called "zPrime." Via the use of zPrime, IBM Mainframe Customers could enable some or most of their Legacy Workloads to be processed on one of ***their*** SPs, thereby avoiding the punitive software licensing fees associated with use of the CP, the processor effectively owned and controlled by IBM. Moreover, to exploit fully the benefits of zPrime, many IBM mainframe customers would need to acquire additional SPs to process the work shifted to them from the CP. Thus, zPrime simultaneously enabled customers to save on software licensing fees and created new demand for IBM's SPs.

22. As previously noted, IBM had promised and assured every System z customer that it would be able to acquire one zIIP, and one zAAP, for each and every CP that the customer acquired and, importantly, that it would never charge software licensing fees for the capacity or usage of the SPs. Nonetheless, the SP business produced high margins for IBM, because, as indicated, selling SPs (for about $125,000 each, as compared to $1,000,000 or more for CPs) is a

simple matter of "activating," and designating as an "SP," a processor already resident on a customer's mainframe.

23. The reaction to zPrime from the mainframe community was, quite literally, unprecedented. Having long been held hostage to IBM's CP-Usage software-pricing model, IBM Mainframe Customers enthusiastically lined up to evaluate the touted benefits of zPrime. User after user discovered that the benefits were both real and substantial. Some of the IBM Mainframe Customers estimated that the use of zPrime would enable savings of tens, or even hundreds, of millions of dollars per year. But, because of Neon's status as IBM's competitor, all of those savings stood to reduce dramatically IBM's ongoing CP-usage-based software-licensing revenue.

24. The industry press realized the value inherent in Neon's zPrime. One typical description read as follows:

> The announcement of NEON Enterprise Software's new product, zPrime, didn't cause much stir in the IT media. It should have. Budget-strapped mainframe operations managers should be popping champagne corks, while mainframe vendors, hardware and software, are reaching for headache pills. With software accounting for as much as 60% of mainframe TCO, zPrime is poised to seriously disrupt current mainframe pricing practices. It can dramatically cut initial and on-going operating costs whether assessed on the basis of usage or central processor MIPS.

IBM's Unfair and Unlawful Competition

25. Starting in 1956, and continuing for the next 46 years, IBM operated under the terms of a "Consent Decree" that had been in place to limit continued use of its historically anti-competitive practices.[8] In 2002, by means of promises of future mainframe competition that proved to be false, IBM persuaded the government to lift the Consent Decree. Freed from the

[8] Ironically enough, one of the practices that predated the 1956 Consent Decree was IBM's practice of requiring customers to buy all of their punch cards from IBM, thereby enabling IBM to meter the customers' machine usage and to benefit in proportion to the needs of each of its customers. That practice has been supplanted—and improved—via the byzantine software licensing model now being employed by IBM.

limitations under which it had long operated, IBM began to entrench and expand its monopoly power in the markets for mainframe hardware and software. These efforts have included a variety of means, but the results have been predictable: IBM Mainframe Customers pay supra-competitive prices for IBM software, and both they, and any would-be competitor, feel the certain and scathing wrath and retaliation of IBM whenever they engage in an activity that threatens IBM's monopoly power and profits.

26. Even though some of the world's biggest companies, and many government agencies, are included among the universe of IBM Mainframe Customers, those otherwise powerful organizations have no choice but to depend, minute-by-minute, hour-by-hour, and day-by-day, on the hardware, maintenance, software, support and services provided by IBM. Slight disruptions in the availability of data, or a temporary inability to process transactions, could lead to catastrophic business consequences for many of IBM's Mainframe Customers, and associated personal consequences for individual information systems decision-makers. Thus, even these entities are vulnerable to IBM's threats to initiate baseless litigation, withhold services or support, or otherwise retaliate.

27. And, importantly, these are tactics with which IBM is well and truly familiar, because even it has claimed the mantle of victim when facing threats from an entity—Intel—regarded to possess monopoly power. In fact, the antitrust complaint filed against Intel by the State of New York included the following allegation:

> Moreover, Intel did not hesitate to threaten severe punishment for OEMs which marketed AMD [Advanced Micro Devices] in ways that Intel disapproved. **Even large and powerful firms, such as IBM, took those threats very seriously.** In 2003, for example, one IBM executive expressed doubts about the advisability of a proposed deal with AMD which would involve IBM marketing assistance, because Intel retaliation could severely damage IBM's multi-billion dollar business in low-end, industry standard servers, its "x-series" line: "It became clear to me that if we did all that on the marketing side [for AMD], Intel would kill our

> x-Series business." Later, in 2005, a senior IBM executive faced a similar issue: Key IBM customers wanted IBM to expand its line of AMD products, but a negative Intel reaction would put IBM in a "very difficult spot." The executive wrote: "I understand the point about the accounts wanting a full AMD portfolio. The question is, can we afford to accept the wrath of Intel…? It is a very hard question to deal with."

(emphasis added). A copy of the complaint is available at:

http://www.oag.state.ny.us/media_center/2009/nov/NYAG_v_Intel_COMPLAINT_FINAL.pdf.

As IBM's statements about Intel make clear, even a corporate giant can be intimidated and coerced by a monopolist that has expressed a willingness to retaliate.

28. In recognition of the fact that IBM has renewed its attempts to protect its monopoly power via unlawful and anticompetitive means, the United States Department of Justice has recently initiated an antitrust investigation of IBM's mainframe practices. *See* http://www.computerworld.com.au/article/321519/ibm_faces_doj_antitrust_inquiry_mainframes (Additional information about IBM's market dominance and its anticompetitive tactics is available at http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000187/UnderstandIBM.pdf.).

29. Since the expiration of the Consent Decree, IBM has made certain that customers and vendors understand the consequences of doing anything likely to threaten the IBM monopolies and associated profits. Customers that would like to use Neon's zPrime have access to information regarding IBM's anti-competitive practices, including IBM's well-publicized treatment of Jim Stracka when his company had the temerity to write innovative software that enabled two of IBM's products—the AS/400 and iSeries machines—to run faster than IBM originally intended them to run. IBM responded to Stracka's efforts to negotiate a sale of his company by having him arrested by the FBI for extortion. Within no time, those charges were

dropped. Stracka then sued IBM,[9] and in short order, IBM settled, extracting in return an agreement for his product to be removed from the market.

30. Typical of the reports available to IBM Mainframe Customers is one that includes this description of events:

> In November of 2002, Jim Stracka retained the services of the eminent firm of Fulbright & Jaworski to represent them in negotiations with IBM after IBM expressed an interest in purchasing the FAST400 technology. They agreed to meet with IBM's in-house counsel, Ron Lauderdale, in Houston, Texas, to discuss the terms of a possible sale.
>
> It turned out, however, that IBM's expressed interest in purchasing FAST400 was merely a pretext. When Lauderdale showed up for the meeting, he was accompanied by the FBI. Stracka was arrested at gun point, charged with attempting to extort $25 million from IBM, and jailed with a bond set at $500,000. The charges were dismissed after Stracka's attorney presented compelling evidence of his innocence.

See http://www.gmimotorsports.com/resources/motor-scooters/motor-scooters-news/-David-and-Goliath-Battle-Heats-Up-Between-IBM,-FAST400-motor-scooters-news-826.shtml. Thus, IBM Mainframe Customers became aware of some of the lengths to which IBM would go—like using its influence to initiate improper arrests—to deprive customers of innovative technologies (like zPrime).

31. In another example, Platform Solutions, Inc. ("PSI"), a company that threatened to compete with IBM, faced a lawsuit from IBM when it became apparent that PSI's products might erode IBM's monopoly profits. In recognition of the fact that the claims it had made against PSI were baseless and designed only to drench PSI in foul stench of litigation in which PSI stood accused of infringement of IBM's intellectual property (where have we heard this before?), IBM settled the case by buying PSI and eliminating the competitive threat (as it had done with Stracka).

[9] A host of well-known lawyers and law firms (including one retired federal judge and the Houston counsel representing IBM in this case) rushed to the aid of Stracka when they learned of his treatment.

IBM's Tactics

32. Among the tactics unlawfully employed by IBM in its attempts to promote the sales of its Legacy Workload processing, protect its software licensing fees, and deprive IBM Mainframe Customers and consumers of the substantial cost savings made available via the use of zPrime are the following:

- Representing falsely that one of the characteristics of Neon's zPrime is that it causes IBM Mainframe Customers to violate one or more of the agreements pursuant to which those customers obtained their IBM Mainframe Offerings. None of IBM's customer agreements limit the ability of the customer to use zPrime or move their Legacy Workloads to one or more of the SPs that they own.

- Claiming falsely, in a letter to a host of IBM Mainframe Customers, that the use of zPrime will cause Neon's customers to become obligated—contrary to IBM's original promises to customers that purchased SPs—to pay software license fees for workloads shifted to SPs.[10] IBM's contracts include no provision that would entitle IBM to charge for processing done on SPs, and IBM has long promised its customers that processing done on SPs will never bear software licensing fees.

- Conditioning the sale of new SPs on the IBM Mainframe Customers' agreement not to use zPrime, thereby foreclosing a substantial amount of competition in the market for the processing of Legacy Workloads. Via the use of zPrime, Legacy workloads can be processed on customer-owned SPs, as opposed to the CPs, each of which, via the software licensing scheme, are effectively owned and forever controlled by IBM.

- Representing to IBM's customers that zPrime is an unlawful "circumvention" technology.

- Threatening that IBM Mainframe Customers that use zPrime will be sued by IBM, while knowing that, in fact, there exists no basis for any such litigation.

- Misrepresenting that Neon's zPrime Product enables IBM Mainframe Customers to steal from IBM, as one might steal from an electric utility company by wiring around a meter box.

[10] IBM has even told at least one customer that the use of zPrime will cause work done on processors not affected by zPrime (IFLs) to bear software licensing fees.

IBM has employed these tactics to promote the sales of its Legacy Workload processing, and System z Offerings generally, throughout the United States, Canada and Europe, and in interstate commerce. The unlawful tactics have had a very substantial effect on interstate commerce.

33. As noted earlier, IBM Mainframe Customers are, as to their Legacy Workloads, "locked in." Moreover, most of them must obtain additional licenses, hardware, and/or capacity from IBM annually (or even more frequently), and all are in ongoing need of support services from IBM. Thus, like IBM in the Intel case, they are uniquely vulnerable to discipline and reprisal from IBM.

34. Because its customers have no alternatives, IBM enjoys the ability unlawfully to extract from future negotiations any revenue lost via a customer's use of zPrime, and, not surprisingly, IBM has used threats of price increases, and reduced and/or eliminated discounts, unlawfully to discourage IBM Mainframe Customers from contracting to acquire zPrime. In case after case, as IBM became aware that a given customer had tested and was prepared to acquire zPrime, IBM made clear that such a decision by the customer would result in prospective and severe discipline from IBM. Importantly, more than 50 potential customers had expressed strong interest in testing and purchasing zPrime. But, given IBM's treatment of Stracka and PSI and IBM Mainframe Customers' dependence on IBM's products, it is easy to understand why IBM Mainframe Customers would be reluctant to "rock the boat" in the face of IBM's unfair competition and disparagement as described herein.

The Relevant Markets

35. IBM has monopoly power in the relevant geographic market and in the relevant product markets and submarkets.

36. Neon contends that the relevant geographic market is world-wide.

37. The relevant product markets include the processing of Legacy Workloads on IBM mainframe computers and the means of enabling Legacy Workloads to be processed on Specialty Processors. The only products available for the processing of Legacy Workloads are the CPs that come with IBM's System z Offerings, and the SPs that IBM Mainframe Customers have acquired for their own use and benefit. But, prior to the release of zPrime, the IBM-Mainframe-Customer-owned SPs did not compete with the CPs, because IBM Mainframe Customers lacked a means of enabling their Legacy Workloads to be processed on either or both of their SPs. Neon's zPrime product provided IBM Mainframe Customers with an alternative, and far less expensive means of processing Legacy Workloads. In other words, Neon, through zPrime, facilitates competition between the IBM-controlled CPs, and the customer-owned SPs. IBM has attempted to exclude this better and less costly product from the market, thereby injuring competition and artificially increasing the amounts that IBM Mainframe Customers must pay for the processing of Legacy Workloads.

38. That the processing of Legacy Workloads is a distinct and relevant market is made plain by the fact that IBM imposes no software license fees for the processing of Modern Workloads on SPs, yet charges billions of dollars annually for processing Legacy Workloads on CPs, which, as noted elsewhere, are identical to the SPs. Moreover, IBM sells SPs for a small fraction (about $1/8^{th}$) of the price for which it sells CPs, further underscoring the fact that the processing of Legacy Workloads is a relevant and distinct market.[11]

[11] Intuition suggests that the Legacy Workloads and applications associated with them could simply be moved or ported to mainframes made by one or more of the companies that make competitive, mainframe hardware. Unfortunately, the companies that once competed with IBM have all left the market. And, even though some of their hardware is still in use and theoretically available for purchase or lease, that equipment is not an option for processing of Legacy Workloads, because the processing of Legacy Workloads relies, in part, on IBM software, and IBM refuses to license its software for use on hardware made by any other supplier. Thus, there are no non-IBM mainframe platforms that compete for the processing of Legacy Workloads.

39. One service that comes with IBM mainframes, including those with SPs, is what IBM calls "Switch-To" service; this service is the means by which IBM moves workloads to SPs. Prior to the release of Neon's zPrime product, customers seeking to move workloads to the SPs that they owned had to rely exclusively on IBM's Switch-To service. Neon has—despite IBM's unlawful and malicious acts of interference—managed to penetrate and capture a very tiny share of this relevant market.

IBM's Monopoly Power over Legacy Workloads

40. As previously indicated, IBM Mainframe Customers are "locked in." IBM Mainframe Customers that consider migrating their Legacy Applications (many of which are, by any measure used in the computer industry, ancient) and data to an open/distributed systems environment (*e.g.*, Unix), face a number of formidable problems, each of which helps to ensure that IBM, year-in and year-out, maintains its monopoly power in the market for processing Legacy Workloads. In order to "migrate" to a non-IBM environment, an IBM Mainframe Customer must "port" code and data from an IBM environment, including especially its operating system, to an environment that is fundamentally different and incompatible. Among the major problems that are encountered (and that thereby present insuperable barriers to entry) when attempting to "port" code and data are the following:

- Most IBM Mainframe Customers have long-running, custom-coded applications that comprise tens, and often hundreds, of millions of lines of code that must be ported. For many of the IBM Mainframe Customers, this code is the product of thirty-plus years of development and tweaking. Porting this code to a new platform must be done module-by-module. The process is slow and risky because of the technical differences between how an IBM mainframe interprets data and how open and distributed platforms interpret data. [12] And, while application programmers are working on this "port," they are not available for developing

[12] Mainframes use Extended Binary Coded Decimal Interchange Code ("EBCDIC") and the distributed platforms interpret data using the American Standard Code for Information Interchange ("ASCII").

new enhancements that allow the business to meet regulatory requirements or provide additional business value to remain competitive.

- Not all source code is available to the customer. Over the decades, IBM Mainframe Customers have lost the source code for various routines and functions, and many of the individuals that were involved in writing the code are no longer available. These executable modules are alive and well and, despite the loss of the source code, continue to execute on an IBM mainframe without requiring a re-compile. If the customer decides to migrate, these modules must be coded anew. This task is nearly impossible, because the programmers must find all instances in which each module is used and ensure that the new code, written for the new platform/environment, accommodates all known inputs and produces all expected outputs.
- Over 70% of the world's data is on the mainframe. IBM Mainframe Customers that seek to migrate must convert their mainframe data to an equivalent distributed platform source. The mainframe data is stored in EBCDIC format while distributed platforms store data in ASCII format. This introduces special problems for data stored in specific sequences; *e.g.*, EBCDIC numbers sort to the bottom of the list while ASCII numbers sort to the top.
- File structure differences create additional issues for IBM Mainframe Customers seeking to migrate away from dependence on IBM. For example, there is no equivalent IMS database structure[13] that runs on a distributed platform. As a consequence, migration is in no sense a simple "port" of the business application. Rather, it becomes a complete rewrite and re-architecting of the business application.
- COBOL programs[14] cannot be moved in isolation. They are but one part of a complete system that is typically composed of many interrelated databases, sequential files and hundreds of interrelated job streams.
- Finally, many of the Legacy Applications of IBM Mainframe Customers are written in Assembler or PL/I, languages for which there exist no available products for conversion of those applications to run on open/distributed systems. Without a production-ready PL/I compiler, customers would have to take their legacy programs and try to find a test compiler that was a "best-fit" for their environment. Any such compiler must understand the program instructions (as coded by the programmer) and translate them to machine code (code that the operating system understood). Finding a PL/I compiler that understood the IBM PL/I program instructions and properly generated the machine code for their target operating system is practically impossible. Applications and programs written in Assembler language would require a complete re-write because zSystem Operating System instruction set would not assemble on an open/distributed system platform.

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[13] IMS databases—unlike most modern databases—are hierarchical, not relational. *See* http://publib.boulder.ibm.com/infocenter/zos/basics/index.jsp?topic=/com.ibm.zos.zmiddle/zmiddle_76.htm.

[14] COBOL—standing for Common Business-Oriented Language—is one of the languages used by mainframe programmers. It is one of the world's oldest programming languages.

These are among the many reasons that IBM Mainframe Customers remain "locked-in" to IBM, and thereby bound, year-in and year-out, to pay billions of dollars in software licensing fees to have Legacy Workloads processed on CPs.

41. The strength of the lock-in of IBM Mainframe Customers is reinforced by the lack of competition on the IBM-dominated, hardware side of the market. Because only IBM's mainframe operating systems can process Legacy Workloads, any mainframe hardware must be capable of running those operating systems in order to compete for customers with Legacy Workload. Prior to 2001, IBM licensed its operating system to alternative vendors of mainframe hardware, known as "plug-compatible manufacturers" or "PCMs". The last of these PCMs, however, exited the market in 2000. Since that time, IBM has refused to license its operating system to new hardware competitors, thereby foreclosing any attempt to introduce mainframe hardware that is compatible with IBM's mainframe operating systems. IBM has also blocked entry of non-IBM emulation technology that has emerged to enable non-mainframe servers to run IBM's mainframe operating systems. As a result, IBM is today the only player in the market for mainframe hardware capable of processing Legacy Workloads.

zPrime was a Threat to IBM's Monopolies

42. Aggravating the lock-in inherent in the applications that IBM Mainframe Customers run on their CPs was IBM's decision to sell SPs to those customers on the basis of representations and agreements that did not purport to restrict the types of workloads that could be run on them. In fact, until Neon released its zPrime product, IBM never sold an SP pursuant to a contract that included a workload-type restriction on the uses that could be made of the SP. Subsequent to the release of zPrime, IBM first engaged in a campaign of misrepresentation regarding the qualities, uses and benefits of the zPrime Product. When it became apparent that

not all of its customers would be deterred, IBM decided to commit further violations of the antitrust laws. For several weeks now, it has been scrambling to secure new agreements that would, for the first time, put IBM in control of those workloads that could be processed on the SPs. These new agreements have taken at least two forms: (i) IBM has sought to have customers buying new SPs agree not to purchase or use Neon's zPrime product; and (ii) IBM sought to have existing customers agree to new terms that would, at least prospectively, limit the ability of those customers to use Neon's zPrime product. Via these actions, IBM has conceded that the contract rights, as originally asserted and claimed, did not exist and that its only hope of stopping sales of the competitive zPrime product was via what are, in practical effect, exclusive dealing arrangements that foreclose a substantial amount of competition—indeed, all competition—in the market for the processing of Legacy Workloads.

43. IBM provides IBM Mainframe Customers that own[15] Specialty Processors a means—called "Switch-to Service"—to move workloads to one or more of the Specialty Processors. See IBM's Answer and Counterclaim at ¶¶ 36, 37 and 64. Neon's zPrime product is an alternative, cheaper, and far more robust, means for moving workloads to one or more of the Specialty Processors.

44. Moreover, IBM Mainframe Customers commonly run out of capacity on one or more of their central processors. Before Neon introduced its zPrime product, the solution for capacity-limited, IBM Mainframe Customers was to acquire additional CP capacity from IBM. The acquisition of additional CP capacity from IBM has a two-fold, and negative, impact on IBM Mainframe Customers: (i) CPs are very expensive; and (ii) because software license fees

[15] Some IBM Mainframe Customers actually use equipment lease financing to acquire their IBM computers, via transactions in which IBM sells the computers to the leasing company, and the leasing company becomes the actual lessor. When this Amended Complaint refers to equipment and processors that are owned by IBM Mainframe Customers, it includes those subject to lease financing.

are based on CP capacity or usage, the acquisition from IBM of additional CP capacity caused an increase in the amount of software license fees that would be due to IBM. Indeed, many of the IBM Mainframe Customers that have sought to investigate Neon's zPrime product have done so because they were, or were about to become, capacity-limited. These customers explained that they had two choices: (i) move some of the workloads then being processed on their CPs onto the SPs that they then owned or could acquire; or (ii) purchase additional CP capacity from IBM, and face the prospect, going forward, of paying increased software licensing fees to IBM. Thus, the market recognized the economic and real interchangeability as between what IBM was offering—additional CP capacity—and Neon's zPrime product.

45. Neon's zPrime product provides and facilitates a competitive alternative to IBM's offerings, because, via the acquisition of zPrime, IBM Mainframe Customers can utilize their SP capacity (capacity that they own, and for which they have paid), thereby eliminating the necessity of (i) using IBM's "switch-to" service; or (ii) acquiring additional CP capacity from IBM.

46. Finally, Neon has for many years offered and sold a line of utilities for mainframes that compete directly with the mainframe utilities sold by IBM and others.

47. Accordingly, Neon and IBM are direct competitors both within and without the market for the processing of Legacy Workloads, and the market for assigning workloads to SPs.

Antitrust Standing

48. Antitrust standing embraces two concepts: (i) the plaintiff must have an "antitrust injury," *i.e.,* an injury that flows from an anticompetitive aspect of the practice under scrutiny; and (ii) the plaintiff must be an "efficient enforcer" of the antitrust laws. Antitrust law favors granting standing to the most direct victims of defendants' anticompetitive conduct; accordingly,

Neon the target of IBM's exclusionary activities and anticompetitive practices, has antitrust standing.

49. IBM has engaged in an effort to eliminate competition from Neon's zPrime product by requiring IBM Mainframe Customers to enter into agreements pursuant to which they agree not to buy Neon's zPrime product. IBM has now refused to sell additional Specialty Processors absent an agreement from the customer that IBM will get to decide which workloads will be eligible to run on such Specialty Processors. The practical effect of this agreement is that those customers will have, in return for being able to buy one or more Specialty Processors, agreed that they will not buy or use Neon's zPrime product. IBM's practices, as alleged in this Complaint, exclude Neon from the market, increase prices to consumers, and limit the ability of consumers to have access to Neon's less expensive and better product.

Retaliation Against Neon

50. Intending to force Neon to drop zPrime, IBM has:

- cut off discounts on which Neon depends for its mainframe business;
- conditioned Neon's continued participation in IBM's early release program on Neon abandoning zPrime;
- rejected Neon's participation in critical IBM mainframe conferences on which Neon depends to generate business; and
- caused Neon to be pre-emptively excluded from various user-group meetings.

51. IBM's dominance in the markets for mainframe operating systems and hardware means that companies in the mainframe industry (often referred to as the mainframe ecosystem) have no option but to depend on IBM for a wide variety of mainframe-related products, services and support. Among the incentives provided by IBM are special discounts that IBM provides to business partners or other vendors developing mainframe-related software. These discounts are

critical for companies to operate effectively, and their award provides IBM with enormous influence over all companies in this ecosystem. Moreover, the use of the special discounts is profitable to IBM, because it encourages the development of new products that help serve to keep IBM Mainframe Customers wedded to System z Offerings.

52. For 15 years, Neon has worked alongside IBM in developing and supplying a variety of mainframe-related software utilities for IBM's IMS and DB2 mainframe databases, including: management tools for assessment and performance improvement of IMS databases; reorganization utilities for IMS full-function and fast-path databases; backup and recovery tools for standard and point-in-time recoveries; DB2 database management and health-check tools; DB2 capacity management tools; SQL analysis and performance tools; and bind and rebind analysis and performance tools.

53. In September 2009, Neon sent a routine request to IBM that CICS/TS for z/OS v4.1 be added to Neon's authorized developer discount software list. IBM had previously granted many similar requests. The request—submitted after the release of zPrime—was promptly rejected by IBM. The succinct response, dated September 23, 2009, stated only that "*IBM has considered Neon's request and has declined it.*"

54. IBM's decision has placed Neon's ability to compete across its full product range in jeopardy. The discounts Neon received from IBM in developing its mainframe products are critical for Neon to compete for mainframe business. IBM's refusal to apply these discounts to Neon place Neon at a disadvantage compared to its competitors who continue to receive such discounts from IBM, and serve to preclude Neon from effectively supporting its existing customer base.

55. IBM's overall strategy also includes a decision to condition Neon's participation in IBM's "Early Release Program" for mainframe software on Neon abandoning zPrime. Having advance releases of IBM's software allows developers to spend time creating competitive utilities and tools for such IBM software before it is released to the general public. This allows customers to purchase the core software and its related utilities contemporaneously. As in the case of its discount programs, IBM's Early Release Program enables IBM to exert enormous power over dependent companies in the mainframe ecosystem.

56. After the release of zPrime, IBM conditioned Neon's continued participation in the Early Release Program (for z/OS 1.11) relating to *all Neon products* on Neon abandoning zPrime. IBM sent Neon additional, revised terms and conditions to Neon's 2008 Vendor Access Agreement with IBM, which included the following provision:

> You are not eligible to use the Code provided by this Exhibit on an IBM system if you execute anything other than Java-language based workloads on any zSeries Application Assist Processor (zAAP) installed on the IBM system.

57. When Neon acquired its zAAP processor for its own IBM mainframe, the agreements by which it became bound included no such restriction on workloads. In recognition of this fact, IBM conditioned Neon's further participation in the "Early Release Program" on a promise by Neon that it would, prospectively, agree to new limitations on its use of its zAAP.

58. IBM's alteration of its Vendor Access Agreement with Neon harms Neon's ability to compete in an environment where delays in product releases relative to competitors can be fatal to their success. Moreover, it prevents Neon from mimicking the environments in which its existing customers are operating.

59. IBM often hosts or moderates conferences and user-group meetings of mainframe professionals. These meetings provide an essential forum for discussion of mainframe technical

issues as well as business generation opportunities, as IT professionals from potential customers are often in attendance. Neon has regularly attended such meetings, and has made valuable contributions facilitating effective use of IBM Mainframe Offerings by other IBM Mainframe Customers.

60. In keeping with historical practices, Neon submitted an application for a booth at IBM's zEXPO conference scheduled for late 2009. On August 24, 2009, the "IBM System z Brand" declined Neon's application to exhibit at the conference. Similarly, Neon prepared to attend an IBM user group meeting in September. However, on September 4, 2009, Dean Compher, an IBM employee, contacted Neon by email stating:

> I'm not exactly sure what is going on, but I must ask you not to attend this user group meeting. I got that word from my management. I feel badly that things had to end this way, but there is nothing that I can do. Thank you for arranging the speaker. I hope that we can work together sometime in the future under better circumstances.

61. IBM's termination of Neon's participation in its conferences and user-group meetings adversely affects Neon's ability to compete with IBM and others. Because Neon's competitors remain able to seek business contacts at IBM-sponsored or -hosted events, Neon's inability to generate business through this important channel will result in Neon being at a competitive disadvantage. Also, the exclusion of Neon—and related inability of Neon to share its products and knowledge with other attendees—harms IBM's own products by depriving IBM Mainframe Customers of means to more effectively use those products. The willingness of IBM to sacrifice the effectiveness of its own user meetings and product conferences in order to suppress ZPrime is indicative of IBM's monopolistic behavior.

IBM's Specific Customer Threats, Misrepresentations

and Other Exclusionary Activities

62. IBM's willingness to threaten retaliation against any IBM Mainframe Customer that uses zPrime makes clear that its customers are "locked-in," and, in addition, that IBM is quite willing to use as a massive hammer its customers' dependence on IBM's System z Offerings; Customers that had an alternative would tell IBM to "pound sand."

63. IBM has informed many of Neon's prospective customers that zPrime is "illegal" and should not be used. For example:

- In July 2009, IBM informed HuK Coburg, a German health insurance company, that "zPrime is illegal and [the customer] should never use it."
- In August 2009, a technical consultant (Martin Boakes, of Thesaurus), reported to Neon that at a meeting with UK retailer Sainsbury's, Mark Anzani of IBM told Sainsbury's representatives that IBM viewed any attempt by Sainsbury's to use zPrime as grounds for IBM to review its pricing structures offered to Sainsbury's.
- In September 2009, IBM made the same assertion that zPrime is illegal to the U.S. subsidiary of Daimler-Benz.
- IBM made similar statements in conversations with Swisscom, which informed Neon in September that:

> We had quite an animated conversation with IBM. Nothing new. They keep banging on their license model. We have pointed out that we have bought a product not their business model. They claim that they have the right to determine (authorize) what can be executed on a processor. Their basis is the LIC. We have recorded that we do disagree. . . . I have mentioned, that verbal threats (full capacity charging) amongst partner [sic] is inappropriate as long as the legal basis is unclear.

- A German business partner reported to Neon that IBM "threatened them to cancel the business partner contract immediately, if they include zPrime in any way."
- In September 2009, a representative from Federal Express told Neon that the company was rethinking its decision to go ahead with zPrime because had IBM

informed it that such action would result in a change to FedEx's licensing charges.

- Also in September 2009, U.S. home-goods retailer Home Depot reported to Neon that "IBM is putting a full court scare tactics on us right now [sic]."

- Following a visit from an IBM executive in September 2009, U.S. credit reporting bureau Experian wrote to Neon, stating:

> Just so you know, Experian will not be pursuing a formal contract with Neon because of potential IBM billing issues which could arise from utilizing Neon's zPrime software. At this time, Experian does not wish to risk this type of distraction from IBM. Due to your efforts, we have proven Neon's technology is sound and functions as designed. Plus, we have demonstrated Neon is a great company and maybe someday in the future we will consider zPrime or other Neon DB2 utilities.

- IBM's ability and willingness to dissuade even its largest customers from using non-IBM software can be seen in its actions directed against a major US bank. Given the size of its mainframe operations and its focus on cost savings to address the financial downturn, the bank expressed a great deal of interest in zPrime, indicating this to IBM. In October 2009, an executive with the bank reported to Neon that she had held a conversation with IBM about the bank's interest in zPrime. During that conversation, Dot Alexander, IBM's Vice President of Software Sales, compared zPrime users to cable TV customers who purchased illegal set-top boxes to avoid cable fees. When the executive questioned this comparison, Ms. Alexander said that IBM bases its services on a "revenue model" containing certain assumptions, and that using zPrime could affect the bank's level of service. The bank continued to express interest in zPrime. However, in December 2009, the bank backed away from its interest. A bank employee reported to Neon that IBM indicated that if the bank went ahead with zPrime, IBM "would have to change their pricing structure and charge for software across the board and charge them for IFL's [IBM's Integrated Facility for Linux specialty engine processor, which is not affected by zPrime] as well." The employee told Neon reported that the bank was concerned about being named in a lawsuit, and that IBM "is aware of all the parties using zPrime and they will potentially be named in a lawsuit from IBM."

Injuries and Damages to Neon

64. IBM's unlawful conduct as alleged in this Complaint has injured Neon in its property and business. The damages flowing from IBM's unlawful conduct have, to date, manifested themselves in at least two ways: (i) Neon has lost sales that, absent IBM's conduct, would have been made; and (ii) for such sales that Neon has been able to make, it has been forced to accept a price that is well below what it would have received in the absence of IBM's unlawful and anti-competitive interference. Neon anticipates that it will continue to lose sales and margin to IBM's unlawful tactics. Moreover, IBM's violations of the Lanham, Sherman and Clayton Acts have enabled it to earn profits that, in the absence of such violations, it would not have earned. By deterring and preventing customers from using zPrime, IBM has enabled itself to earn hundreds of millions of dollars in additional licensing fees and hardware upgrades. By the time this case reaches trial, this figure is likely to exceed a billion dollars.

CAUSES OF ACTION

Lanham Act

65. Neon incorporates all of the allegations of paragraphs 1-64, including, but not limited to, all allegations regarding false claims made by IBM.

66. Section 43(a) of the Lanham Act (15 U.S.C. §1125) makes it unlawful for a party to "misrepresent the nature, characteristics, qualities, or geographic origin of . . . another person's goods, services, or commercial activities . . . in commercial advertising or promotion." In promoting its System z Product Offerings, in emails, telephone conversations, correspondence, and face-to-face meetings, IBM has intentionally and willfully misrepresented the nature, characteristics, and qualities of Neon's product, zPrime, and Neon's commercial activities. Every time that IBM can use misrepresentations to persuade a customer not to buy zPrime, it

ensures additional sales of its System z Offerings. zPrime saves money for IBM Mainframe Customers in at least two ways: customers with CPs that are operating near capacity can avoid obtaining additional capacity by using zPrime to shift Legacy Workloads to SPs, and customers that currently process Legacy Workloads on CPs can save software licensing fees by moving workload to the SPs via the use of zPrime. Thus, while commercially promoting sales of its System z Offerings (hardware and software), IBM has represented that zPrime causes IBM Mainframe Customers to violate one or more provisions of their agreements with IBM. Although false, this claim has had a chilling effect on sales of zPrime and has promoted additional sales of IBM Mainframe Offerings. Neon seeks to recover, *inter alia*, the profits earned by IBM via its Lanham Act violations.

67. Neon desired not to litigate with a company that had the enormous resources of IBM. Thus, when Neon learned that IBM was making these representations about zPrime, Neon repeatedly asked IBM to point to one or more provisions of any customer agreement that would be violated via the use of zPrime. To date, IBM has pointed to none, underscoring the fact that it has actual knowledge that its statements about zPrime are false. Moreover, in recognition of the fact that it has no basis for the unlawful and unfair competition and disparagement in which it has thus far engaged, IBM is actively involved in requesting provisions in customer agreements that would prospectively give IBM the right to limit the types of workloads that can be processed on zIIPs and zAAPs.

68. This is an "exceptional case" in which the Court should award Neon reasonable and necessary attorneys' fees, along with enhanced damages, as permitted under the Lanham Act.

California Unfair Competition[16]

69. Neon incorporates the allegations of paragraphs 1-68 of this complaint.

70. Some of the customers to whom Neon has attempted to sell zPrime are (unsurprisingly) based in California. California has a sweeping, statutory unfair competition law designed to deal harshly with exactly the sort of tactics now being employed by IBM in an effort to deter IBM Mainframe Customers from using zPrime. CAL. BPC. CODE § 17200 provides:

> As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

The business acts and practices that IBM has used in an effort to persuade IBM Mainframe Customers to have Legacy Workloads processed on the IBM-controlled CPs and not to become users of Neon's revolutionary zPrime are, within the meaning of § 17200, unlawful and unfair, and, were deceptive and had the likelihood of deceiving recipients of the information. Moreover, IBM's tactics are prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.[17] Neon has been injured in its business by IBM's violations of 17200.

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[16] Neon reserves the right to add unfair competition claims under the common or statutory law of any one or more of the states in which, based upon discovery, it appears that IBM has engaged in such conduct.

[17] Section 17500 provides:

> It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such

New York Deceptive Acts and Practices

71. Neon incorporates the allegations of paragraphs 1-70 of this complaint.

72. Some of the customers to whom Neon has attempted to sell zPrime, particularly in the financial services industry, are based in New York. New York General Business Law § 349 provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful," and that "any person who has been injured by reason of any violation of this section" may bring suit for damages and/or to enjoin such conduct.

73. IBM has made false and deceptive statements and representations, and otherwise utilized deceptive acts and practices, in order to persuade IBM Mainframe Customers in the United States and throughout the world, including New York, not to purchase or use zPrime. IBM's deceptive acts and practices, directed in part to customers in New York, have included making and reneging on promises and representations related to the use of SPs, misrepresenting the content and import of IBM Mainframe Customers' existing contracts with IBM (many of which were wholly or in large part form-contracts and/or contracts of adhesion), misrepresenting facts concerning zPrime, threatening baseless litigation on the basis of its misrepresentations, and exploiting imbalances of bargaining power to enter contracts with IBM Mainframe Customers and later unilaterally impose contractual changes rather than abide by the terms of its contracts. These acts and practices have materially affected the decision-making of IBM Mainframe Customers in New York considering the purchase of zPrime.

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statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

74. IBM's deceptive acts and practices have a broad impact on New York consumers and/or significant ramifications for the public in New York, because of their harm to New York-based IBM Mainframe Customers and because of the pervasive influence that the processing of Legacy Workloads has on everyday modern life. IBM's statement that "[i]f you ever used an automated teller machine (ATM) to interact with your bank account, you used a mainframe" applies to millions of consumers in New York. Entities such as banks, healthcare providers, government entities, and public utilities, including prospective zPrime customers that have declined or delayed purchase in response to IBM's deceptive acts and practices, pass on monopoly-inflated mainframe computing prices to New York consumers. ZPrime holds the potential to substantially mitigate these costs, and could have done so already in the absence of IBM's deceptive acts and practices.

75. Neon has suffered injury as a result of IBM's deceptive acts and practices, particularly in the form of lost business with potential customers in New York that have declined to purchase zPrime or have delayed purchase of zPrime in response to them. Neon also has suffered loss of reputation and goodwill throughout the United States and the world, including New York, as a result of IBM's deceptive acts and practices. Neon accordingly seeks an award of its actual damages, plus reasonable attorney's fees and a permanent injunction against IBM's deceptive acts and practices.

Business Disparagement

76. Neon incorporates the allegations of paragraphs 1-75 of this complaint.

77. Without privilege, justification or excuse, IBM has maliciously published false and disparaging words regarding Neon and zPrime, and this business disparagement has caused

special damages to Neon in the form of lost sales. Some of IBM's statements—including that Neon is like a person who assists in the theft of electricity from the electric utility, or cable television programs from a cable television company—are defamatory *per se*. The customers to whom sales have been lost as a consequence of IBM's business disparagement include (at least) the following: HEB Grocery Stores and Highmark. IBM published false and misleading statements about Neon's zPrime with knowledge of their falsity, with reckless disregard as to the statements' truth, or with ill will or intent to interfere with the Neon's economic interest. Because it knows that IBM has no basis for its false claims that zPrime will cause IBM Mainframe Customers to violate their agreements with IBM, Neon has repeatedly asked IBM to point to one or more provisions of any customer agreement that would be violated via the use of zPrime. To date, IBM has pointed to none, implicitly conceding the fact that it has actual knowledge that its statements about zPrime are false. IBM has instead attempted to claim that the rights of the owners of SPs are limited by what IBM intended when it "created and marketed" SPs.

Tortious Interference with Prospective Contracts

78. Neon incorporates the allegations of paragraphs 1-77 of this complaint.

79. As noted, via the licensing and subsequent use of zPrime, IBM Mainframe Customers can reduce dramatically (for some, by as much as 90%) their need to purchase additional hardware and/or software capacity from IBM. And, for the biggest users of IBM mainframes, these savings are astronomical: one potential customer calculated savings of $100,000,000 over a two-year period. Also, with very few (and unique case) exceptions, the potential customers have found no technical bugs in zPrime; once installed, its presence becomes transparent to the IBM Mainframe Customers. Further, its price is but a fraction of the dollars that the customer will save. As a consequence, zPrime pays for itself in a matter of months or, in

some cases, mere weeks. One of the many prospective customers that loved zPrime—and concluded that it would realize large software licensing fees savings via the use of it—was Highmark. Thus, there was a reasonable probability that potential customers (such as Highmark and HEB) would have licensed software from Neon. When IBM became aware that Highmark and others were close to agreeing to terms for the license of zPrime, IBM elected to interfere through the use of specific and unlawful disparagement of zPrime and threats of retaliation and baseless litigation. IBM's unlawful threats, disparagement and unfair competition have caused these and other potential customers to decline closing transactions that would save them hundreds of millions of dollars in the next few years alone.

80. IBM's acts of interference are "unlawful" in at least the following ways:

- Under the Texas Deceptive Trade Practices Act (DTPA), which provides that "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce **are hereby declared unlawful** and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code." Among the acts and practices declared "unlawful" by the DTPA[18] (and in which IBM has engaged) are the following:

  - representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not: IBM originally represented to its customers that processing on SPs would not cause the customer to incur software licensing fees and that there were no limits on the workloads that were eligible for processing on SPs. IBM now claims that there will be fees and that there are such limits.

[18] Although it is likely that most of the persons to whom IBM directed its deceptive acts and practices would not qualify as "consumers" for purposes of being able to maintain a private action against IBM, the deceptive acts and practices are nonetheless unlawful and could be pursued by governmental authorities. *See* TEX. BUS. & COM. CODE ANN. § 17.46 (2009) (preamble) ("False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code.").

- disparaging the goods, services, or business of another by false or misleading representation of facts: IBM has claimed falsely that zPrime is an unlawful circumvention technology that will cause users of it to violate their agreements with IBM. These claims are both false and misleading.

- advertising goods or services with intent not to sell them as advertised: after advertising zIIPs and zAAPs as being free of software licensing charges and representing that they were open to exploitation by their customers, IBM has now refused to sell them unless the customers agree to pay software licensing charges for processing Legacy Workloads, or, alternatively, agree not to use zPrime.

- representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law: IBM has represented to *all* of its IBM Mainframe Customers that its customer agreements prohibit the customers from causing Legacy Workloads to be processed on the SPs. This representation is false.

- failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed: IBM was careful to disclose the "exclusive" limitations on the Workloads that could be processed on its IFL specialty processors. It now appears that it secretly intended workload limitations to apply in addition to the zIIPs and zAAPs, but it never disclosed any such limitations when selling those processors.

- IBM has engaged in business disparagement of Neon in dealing with Neon's prospective customers.

- IBM has violated §43(A) of the Lanham Act in its communications with Neon's prospective customers.

- IBM's conduct is also rendered "unlawful" by 15 U.S.C. §45 (the FTC Act).

81. IBM's tortious interference with Neon's prospective contracts as alleged above has been the producing and proximate cause of tens of millions of dollars in damages to Neon in that, but for IBM's unlawful and tortious interference, there is a reasonable probability that Neon would have entered into lucrative contracts with at least Highmark.

Clayton Act Section 3

82. Neon incorporates the allegations of paragraphs 1-81 of this complaint .

83. Section 3 of the Clayton Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia… , or fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. §14.

84. IBM is engaged in commerce, and, while engaged in commerce, and with the specific intent of excluding Neon and its zPrime product from the IBM-dominated markets and submarkets, has adopted new contracting practices that violate the prohibitions of Section 3 of the Clayton Act.

85. If an IBM Mainframe Customer that owns one or more SPs "uses" Neon's zPrime product, some of the customer's Legacy Workloads will be processed on either or both of the customer-owned SPs. Thus, by securing new promises from its customers that those customers will not permit Legacy Workloads to be processed on the SPs that they own, or are in the process of acquiring, IBM is extracting from those customers an agreement not to use or otherwise deal in a product—Neon's zPrime—that is being sold and marketed by Neon, one of IBM's competitors. In addition, IBM has conditioned the availability of product discounts on agreements by the customers receiving those discounts not to use or deal in Neon's zPrime product. This, likewise, is a violation of Section 3.

86. IBM, through its new contracting practices, has in effect precluded customers buying products and merchandise from IBM from buying or using Neon's competitive zPrime product, thereby substantially lessening competition in the market for the processing of Legacy Workloads and in the market for Switch-To services. The amount of foreclosed competition is substantial, because absent such restrictions, billions of dollars in software licensing fees could be saved by IBM Mainframe Customers, and Neon would, in turn, earn hundreds of millions in revenue.

87. Section 4 of the Clayton Act provides for private enforcement of the antitrust laws, including Section 3 of the Clayton Act and Sections 1 and 2 of the Sherman Act. It provides, in relevant part, as follows:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and **shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee**.

15 U.S.C. §15 (emphasis added).

88. IBM's violations of Section 3 of the Clayton Act have injured Neon in its business and property and Neon therefore seeks awards of actual and treble damages, costs, and reasonable attorneys' fees.

Section Two of the Sherman Act

89. Neon incorporates the allegations set forth in paragraphs 1-88 of this complaint .

90. Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony….

15 U.S.C. §2.

91. The offense of monopoly under Section 2 consists of two elements: (1) possession of monopoly power in the relevant market, and (2) willful acquisition or maintenance of that power as opposed to acquiring market dominance through competitively desirable means or through events beyond its control. Both elements are easily satisfied by the conduct of IBM as alleged in this amended complaint.

92. IBM, in the processing of Legacy Workloads, has monopoly power, in that it has the power to control prices and exclude competition. Indeed, manifest in its response to Neon's zPrime product are multiple examples of IBM raising prices, revoking product discounts, and taking other actions contemplated to exclude Neon from the market. Absent monopoly power, IBM would not have the ability, with impunity, to promise to raise prices to those customers that elect to use Neon's zPrime product, nor would it be able to make its customers agree, as a condition to purchasing SPs, that they will not use Neon's zPrime product. Finally, most (if not all) of the contracts between IBM and IBM Mainframe Customers are adhesion contracts, drafted by IBM, that include (quite incredibly) a provision that grants IBM the unilateral right to change the terms of the contract on three months' notice[19] to the client. Only an entity with monopoly power could secure such terms in its contracts with customers.

93. IBM is attempting now to preserve and maintain its monopoly power via the use of agreements that will, prospectively, prohibit IBM Mainframe Customers from using Neon's zPrime Product. As noted elsewhere (and conceded by IBM), Neon, via sales of its zPrime product, has the ability to take significant business away from IBM; and, by reducing the software licensing fees that it charges for the processing of Legacy Workloads, IBM could, in one fell swoop, eliminate any demand for Neon's zPrime product.

[19] The form ICA provides: "In order to maintain flexibility in our business relationship, IBM may change the terms of this Agreement by providing Customer at least three months' written notice." See https://www-304.ibm.com/businesscenter/cpe/download0/185939/ica_us.pdf, at section 1.7.

94. IBM's violations of Section Two of the Sherman Act have injured Neon in its business and property and Neon therefore seeks awards of actual and treble damages, costs, and reasonable attorneys' fees.

Declaratory Judgment

95. Neon incorporates the allegations set forth in paragraphs 1-94 of this complaint .

96. 28 U.S.C.A. § 2201 empowers the Court to "declare the rights and other legal relations of any interested party seeking such declaration . . . ." Neon seeks the following declarations from the Court:

- None of the IBM contracts or software licenses that relate to the use of SPs by the customer impose any limitations on the type of workloads that can be processed on the SPs.
- The use of zPrime, including all of its versions, will not cause IBM Mainframe Customers to breach or otherwise violate any agreements with IBM.

As reflected in the correspondence sent by IBM, there exists an actual controversy between Neon and IBM regarding these issues.

Punitive Damages

97. IBM's conduct as alleged herein has been accompanied by a malicious desire to crush Neon and deny IBM Mainframe Customers the hundreds of millions of dollars in savings that could be realized by the use of zPrime to enable Legacy Workloads to be processed on customer-owned SPs for which IBM promised there would be no software licensing fees. IBM engaged in the conduct with the actual subjective awareness that such conduct would cause real and substantial economic harm to Neon, IBM's Mainframe customers, and the millions of individuals who stand to benefit from anything that lowers the cost of processing Legacy Workloads. Because IBM has now embarked on a campaign to put new agreements in place with its customers, it has acknowledged the falsity of its prior representations.

Jury Trial

98. Neon hereby demands a trial by jury on all of its claims and causes of action.

PRAYER

Wherefore, Neon prays that IBM be cited to appear and answer and that upon trial Neon have judgment as follows:

1. for its actual damages;
2. for treble damages under section 4 of the Clayton Act;
3. for reasonable and necessary attorneys fees and costs;
4. for a permanent injunction against IBM's unlawful and deceptive trade practices;
5. for disgorgement of the portion of IBM's profits on software licensing fees earned as a consequence of its violations of the Lanham Act, enhanced as allowed by law;
6. for punitive damages in an amount to be determined by the jury;
7. for a declaratory judgment as requested above;
8. for pre- and post-judgment interest at the maximum lawful rate;
9. for reasonable and necessary attorneys' fees; and
10. for such other and further relief to which Neon shows itself entitled.

Dated: February 17, 2010

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct of the above document will be served upon all known record of counsel through the Court's electronic filing system this 17th day of February 2010.

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