

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

NEON ENTERPRISE SOFTWARE, LLC

Plaintiff,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Defendant.

CAUSE NO. 1:09-cv-00896-JRN

Jury Trial Requested

NEON'S ANSWER TO IBM'S COUNTERCLAIMS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Neon Enterprise Software, LLC (“Neon”), the Plaintiff, now acting as Counter-Defendant, files this Answer¹ to IBM’s Counterclaims.

Introduction

1. During its campaign of disparagement, and while accusing Neon of being a thief, IBM warned would-be customers of Neon that IBM was, in effect, like an electric utility. In its answer and counterclaim, IBM has analogized itself to a cable television provider, yet another example of a company that has monopoly power. IBM’s self-assessments are spot-on.

2. A brief history of zPrime, Neon’s efforts to market it, and IBM’s efforts to thwart sales of it is in order:

- Before it even launched zPrime, Neon learned from a host of IBM Mainframe Customers that they were seeking solutions/products that would help them lower their cost of mainframe ownership and operation.

¹ The filing of this Answer is without prejudice to the right that Neon enjoys, under Fed. R. Civ. P. 15, to amend its complaint on or before February 17, 2010.

- Neon’s developers thus conceived of a manner in which IBM Mainframe Customers could process Legacy Workloads on zIIP and/or zAPP processors (“Specialty Processors”) and developed the product now known as zPrime.
- Neon reviewed the available information about the contracts pursuant to which Specialty Processors had been sold, and concluded that there existed no contractual restrictions or limitations—via designations of eligibility, IBM authorizations, or otherwise—on the sorts of workloads that a customer could direct to either of the Specialty Processors.
- Thus, Neon launched zPrime, and IBM Mainframe Customers began to test it. Those customers, like Neon, concluded that there were no contractual restrictions on the workloads that could be run on the Specialty Processors that they owned.
- Nonetheless, IBM initiated a campaign of disparagement and disinformation, asserting that one attribute of zPrime was that it would cause IBM Mainframe Customers to breach their agreements with IBM.
- Via multiple written inquiries, Neon and various IBM Mainframe Customers invited IBM to identify any contractual limitations on the rights of customers to process workloads on their Specialty Processors. IBM refused.
- Tellingly, however, IBM has now sought to have its customers execute new agreements that (unlike those in existence when zPrime was launched) have specific restrictions with respect to those workloads that are “eligible” for Specialty Processors.
- In the meantime, IBM has persisted in a campaign of disinformation in which it alludes to numerous alleged contracts, websites and product literature in an attempt to create the impression that there exist one or more contractual

limitations or restrictions, or lack of "IBM authorizations," that prevent IBM Mainframe Customers from saving hundreds of millions of dollars via the use of zPrime. Of course, customers need no authorizations in order to use the Specialty Processors that they own for processing any particular type of workload.

3. Finally, on December 14, 2009, Neon sued, thereby providing IBM with the opportunity to "put-up or shut-up;" IBM elected to do neither. Instead IBM filed a 37-page pleading that was larded with still more references to "IBM authorizations," alleged workload "restrictions" and "limitations," and "eligible" and "ineligible" workloads.

4. Conspicuous by their absence as exhibits to the pleading were any copies (even redacted ones) of any of the "contracts" from which IBM purports to quote (albeit selectively). And, of more importance, at no place in the pleading does IBM say, "Here is the list of authorized/eligible workloads that appear in the contracts pursuant to which our customers acquired their Specialty Processors." **In the hope (no doubt futile) that IBM will finally provide such information, Neon invites IBM to supplement its pleading to supply the Court and Jury—and all who would read its pleadings—with one or more contracts (even redacted ones) that include a list or definition of those workloads that are, as to Specialty Processors, "authorized" and "eligible". There is no such list and no such definition. There are no contractual limitations on the type of workloads that IBM's customers can run on the Specialty Processors for which they long ago paid in full. This no doubt explains IBM's recent efforts to secure amendments to its existing customer agreements.**

5. Moreover, it is telling that IBM has selected to represent it in this case one of the law firms that represented James Stracka in the “Fast400” litigation referenced in paragraph 21 of Neon’s complaint.² One of Stracka’s allegations in that litigation was:

IBM has for many years attempted to monopolize many relevant markets in the computer business in violation of 15 U.S.C. §§ 1 and 2, otherwise commonly known as the Sherman Antitrust Act. IBM’s conduct here seeks to perpetuate its habitual anticompetitive, monopolistic behavior, and thus it has been and is committing copyright misuse.

James Stracka’s Original Answer to International Business Machine Corporation’s Second Amended Counterclaims at 18 (copy attached as **Exhibit D**). Stracka—who, like Neon, had been subjected to counterclaims that he had violated IBM’s copyrights—noted that Professor Nimmer, the author of the world’s leading treatise on copyright law, had written a report that “shows that IBM’s claims are ill-founded,” and that, in addition, “undermine[d] IBM’s claim that Stracka and Svalgaard [a co-defendant] knowingly violated IBM’s rights.” The same pleading explained that “[t]he fact that a copyright expert of Professor Nimmer’s stature has concluded that there is nothing wrong with what Stracka and Svalgaard had done shows that a claim that they willfully violated IBM’s rights is and always has been insupportable.” A copy of this pleading is attached as **Exhibit C**.

Answers to Specific Allegations³

6. zPrime only enables use by IBM Mainframe Customers of specialty processor capacity (i) for which they have paid and (ii) as to which they are authorized. Although IBM is no less a monopolist than the average electric utility or cable television company, Neon must deny the allegations of paragraph 1. Moreover, the case is not about any “hijacking” of IBM’s intellectual property; it is instead about IBM’s attempts to prevent Neon and IBM Mainframe

² Copies of pleadings filed in Stracka’s case against IBM are attached as Exhibits A, B and C to this answer.

³ Attached as Exhibit E is a document that juxtaposes the allegations that IBM has made in its counterclaim with Neon’s responses to those allegations.

Customers from enjoying the benefits lawfully and ethically provided by Neon's innovative zPrime product.

7. Answering paragraph 2, Neon admits that zPrime, its product, lies at the crux of this dispute, but denies that zPrime is devised (or able) to "misappropriate IBM's intellectual property." Neon admits the allegations of the second through fifth sentences of paragraph 2, but it denies that IBM Mainframe Customers are, as compared to IBM, "sophisticated" with respect to IBM's tactics or that IBM provides any product or service at a cost that is reasonable. Moreover, even those customers who are ostensibly "sophisticated" have no ability effectively to negotiate with IBM, given IBM's well-documented monopoly power. Neon denies the allegations of the final sentence of paragraph 2.

8. Neon denies the allegations of paragraph 3. The misrepresentations set forth on paragraph 3 are precisely the sort that Neon has been forced to confront as it has endeavored to sell its zPrime product.

9. The allegations of paragraph 4 reveal that IBM's conceit, and its willingness to flex its monopolistic muscle, apparently know no bounds: prior to zPrime, the only way that IBM Mainframe Customers could process Legacy Workloads was to have them run on an "expensive-to-use" central processor. zPrime supplied a means by which IBM Mainframe Customers could use the Specialty Processors that they owned, and for which they had long ago paid, to process Legacy Workloads. For making possible this savings, Neon has sought to charge but a fraction of what the customer would otherwise be required to pay IBM. Neon is thus offering a product that competes with IBM. It is no surprise—in fact it is obvious—that successful competitors will cause a reduction in the revenues of the other competitors. Neon denies that any of IBM's revenues will have been reduced via anything resembling "misappropriat[ion]."

10. Neon denies the allegations of paragraph 5. Although IBM apparently believes it is “above the law,” there is no violation of any law or contract inherent in a decision by IBM’s Mainframe Customers to use zPrime to enable the Specialty Processors that they own to be used for the purpose of running Legacy Workloads.

11. Neon denies the allegations of paragraph 6, and has in no sense conceded that [t]his in not a case ... about a purported monopoly.” As revealed in Neon’s Complaint, IBM’s monopoly power explains much of IBM’s conduct in its desperate and unlawful attempt to stifle the competitive threat posed by zPrime. IBM’s System z offerings are in no sense “the most competitive [or] innovative in the marketplace;” indeed, the absence of competition makes clear that there is no real "marketplace."

12. Neon denies the allegations of paragraph 7.

13. Paragraph 8 consists solely of prefatory matter and requires no response.

14. Neon admits the allegations of paragraph 9 of the counterclaim.

15. Neon admits the allegations of paragraph 10 of the counterclaim.

16. Neon admits the allegations of paragraph 11 of the counterclaim.

17. Neon admits the allegations of paragraph 12 of the counterclaim.

18. Neon admits the allegations of paragraph 13 of the counterclaim.

19. Neon denies the allegations set forth in the first sentence of paragraph 14 of the Counterclaim. Neon admits the allegations of the second and third sentences of paragraph 14. Neon denies all of the other allegations of paragraph 14. The Machine Code License includes no such restrictions on usage, and IBM cites no such restrictions in its pleading.

20. Neon admits the allegations of the first sentence of paragraph 15 of the Counterclaim. Neon denies all of the other allegations set forth in paragraph 15. zPrime does not enable IBM Mainframe Customers to “help themselves” to processing capacity for which they

have not paid, or for which they lack authorization. zPrime instead enables IBM Mainframe Customers to make use of Specialty Processors, and capacity, for which they have paid.

21. Neon admits the allegations of paragraph 16.

22. Neon admits the allegations of paragraph 17.

23. Although Neon believes the allegations of paragraph 18 to be true, it will not be able to say so with certainty until it has an opportunity to review the contracts to which this paragraph is referring.

24. Neon admits the allegations of paragraph 19.

25. Neon admits the allegations of paragraph 20.

26. Neon admits the allegations of paragraph 21.

27. Neon admits the allegations of paragraph 22 (except that it is without sufficient information to admit or deny whether “capacity on demand” “reflects substantial investment by IBM”). Importantly, however, the allegations of paragraph 22 are orthogonal to the issues in dispute. zPrime in no sense permits IBM Mainframe Customers to access or use processing capability for which they have not paid, or to process workloads that are not “authorized.”

28. Neon admits the allegations of paragraph 23 (except that it denies that zIIPs and zAAPs are “limited purpose” processors in any relevant sense), but, like the allegations of paragraph 22, they are orthogonal to the issues in dispute. zPrime only enables users to access Specialty Processor capacity for which the IBM Mainframe Customer has paid, and for which the IBM Mainframe Customer has been authorized. IBM’s efforts to suggest otherwise are knowingly disingenuous.

29. Neon denies the allegations of paragraph 24. The Machine Code License in no sense distinguishes between general and Specialty Processors; and, z/OS does not direct

workloads to specialty processors based on what customers are “contractually permitted to process on Specialty Processors.” (And, in all fairness, IBM knows better.)

30. Answering paragraph 25, Neon is without sufficient information to admit or deny why IBM priced its Specialty Processors as it did, but is satisfied that IBM secretly intended that its customers would get little or no use from them. Neon denies the other allegations set forth in paragraph 25.

31. Neon denies the allegations of paragraph 26, but again requests that IBM supply a list of the authorizations to which it is referring. zPrime only enables IBM Mainframe Customers to use computing capacity for which they have, in fact, paid.

32. Neon admits the allegations of paragraph 27.

33. Neon admits the allegations of paragraph 28.

34. Neon admits the allegations of paragraph 29.

35. Neon admits the allegations of the first sentence of paragraph 30, and denies the allegations of the second sentence. zPrime does not provide any “improper shifting” of workloads. Indeed, IBM tends to use the word “improper” when referring to any action—regardless of its legality—that results in customers saving money.

36. Answering paragraph 31, Neon admits that IBM has introduced a variety of Specialty Processors, but denies that the introduction of them has anything to do with efforts to reduce the total costs of mainframe ownership; the introduction of Specialty Processors instead reflects an effort by IBM further to entrench and protect its “electric-utility”-like monopoly.

37. Neon admits the allegations of the first sentence of paragraph 32, except that it denies any suggestion that zAAPs were limited to Java workloads.⁴ Neon denies the allegations of the second sentence of paragraph 32.

38. Neon admits the allegations of the first sentence of paragraph 33, except that it denies any suggestion that zIIPs were limited to workloads that use enclave SRBs. Neon denies the allegations of the second sentence of paragraph 33.

39. Neon denies the allegations of paragraph 34.

40. Neon denies the allegations of paragraph 35, but notes the irony of an IBM-sized company, with its fleet of thousands of lawyers, pointing to extrinsic evidence in an attempt to limit the rights of customers who have already been forced to sign contracts of adhesion written and drafted by IBM.

41. Neon denies the allegations of paragraph 36, and would note that the ideas embodied and suggested in it reflect a profound misunderstanding of the technical operation of zPrime.

42. Neon admits the allegations of the first sentence of paragraph 37, but denies each and every of the other allegations set forth therein. Neon does not subvert or otherwise affect the “z/OS switch-to service and dispatcher....”

43. Answering paragraph 38, Neon admits that these statements appear on its website, but denies any suggestion or implication that zPrime functions in such a way as to cause IBM’s customers to breach or otherwise violate the letter or spirit of their agreements.

44. Neon admits the tautological allegations of paragraph 39: savings made available by one merchant necessarily come at the expense of one or more of its competitors.

⁴ IBM claims that it “subsequently expanded the scope of allowable zAAP workloads.” This allegation begs myriad questions, such as, “How was such an expansion effected?”, and, “In which documents/contracts does it appear?”

45. Neon denies the allegations of paragraph 40. zPrime does not enable customers to “appropriate general-purpose computing capacity that they did not purchase....” zPrime instead assists customers in finally being able to utilize the Specialty Processor capacity that IBM induced them to purchase on the basis of false and misleading assurances regarding the benefits to be provided by such Specialty Processors; *i.e.*, zPrime makes a reality of the IBM promises.

46. Answering paragraph 41, Neon admits that it has knowledge of some of the contracts that IBM uses with its customers, but has yet to see or otherwise become aware of any contract that includes restrictions or limitations of the sort that IBM has suggested and alleged in its pleadings and claimed and asserted in its world-wide campaign of disinformation and disparagement. Neon admits that in attempting to respond to IBM’s unlawful disparagement, it has discussed with some of its actual and potential customers the rights that those customers enjoy under their agreements with IBM.

47. Neon denies the allegations of the first two sentences of paragraph 42. Neon admits that upon realization that IBM had never, in fact, intended that customers would get substantial benefits and cost savings from their acquisition of Specialty Processors, it became apparent that zPrime went “against what IBM intended their systems to do,” and they have so informed their actual and potential customers.

48. Neon denies the allegations of paragraph 43. The use of zPrime does not result in the misappropriation of fees from IBM, and Neon has never sought to have IBM’s customers breach one or more of their agreements with IBM.

49. Neon denies that it has made any statements suggesting sponsorship or approval of zPrime by IBM; indeed, Neon has made abundantly clear (and all customers experienced in dealing with IBM plainly understand) that IBM does not sponsor, has not authorized, and would not support the use of any product (including zPrime) contemplated to save the customer money

at the expense of IBM. Neon admits that it has made the other statements attributed to it in paragraph 44, but denies that any one or more of them was either false or misleading.

50. Neon denies the allegations of the first two sentences of paragraph 45 of the counterclaim. Although Neon lacks sufficient information to admit or deny the balance of the allegations of paragraph 45, it has no reason to doubt the truth of them.

51. Because IBM elected not to attach a copy of the document from which it purports to quote in this paragraph, Neon can neither admit nor deny the truth of the allegations of paragraph 46. That said, if there existed a list of IBM authorizations that make clear that Highmark had no right to run certain workloads on its Specialty Processors, it would have been very easy for IBM to quote such a list here or elsewhere in its pleading.

52. Because IBM elected not to attach a copy of the document from which it purports to quote in this paragraph, Neon can neither admit nor deny the truth of the allegations of paragraph 47. That said, these allegations, if true, are irrelevant to this dispute: zPrime does not enable IBM Mainframe Customers to access or use “built-in capacity” that was to remain inactive, or that was otherwise restricted. IBM Mainframe Customers that elect to use zPrime only make use of such processing capacity as they have already acquired and as to which no additional “authorizations” are required.

53. Because IBM elected not to attach a copy of the document from which it purports to quote in this paragraph, Neon can neither admit nor deny the truth of the allegations of paragraph 48. That said, these allegations, if true, are irrelevant to this dispute: zPrime in no sense enabled Highmark to access or use Machine Code except as it was authorized to do by having paid for the Specialty Processors.

54. Because IBM elected not to attach a copy of the document from which it purports to quote in this paragraph, Neon can neither admit nor deny the truth of the allegations of

paragraph 49. That said, no charges are “applicable” when an IBM Mainframe Customer uses the Specialty Processors that it owns and for which it has paid, because IBM promised, when they were sold, that it would never charge for the use of them.

55. Because IBM elected not to attach a copy of the document from which it purports to quote in this paragraph, Neon can neither admit nor deny the truth of the allegations of paragraph 50. But, as noted, it is odd that IBM has not purported to list or define, with respect to Highmark or any of its other customers, the “authorizations” that were obtained in connection with Specialty Processors.

56. Because IBM elected not to attach a copy of the documents from which it purports to quote in this paragraph, Neon can neither admit nor deny the truth of the allegations of paragraph 51. Neon again invites IBM to supplement its pleading in order to supply the documents that allegedly list or define the workloads to which Highmark or any other IBM Mainframe Customer was limited in using Specialty Processors.

57. Neon denies the allegations of paragraph 52, and repeats its plea that IBM supplement its pleading in order to supply the documents that allegedly list or define the workloads to which Highmark or any other IBM Mainframe Customer was limited in using Specialty Processors.

58. Neon denies the allegations of paragraph 53. Moreover, Neon notes that where Specialty Processors owned by an IBM Mainframe Customer are concerned, there are no “applicable charges” for the use of them. Finally, Neon repeats its plea that IBM supplement its pleading in order to supply the documents that allegedly list or define the workloads to which Highmark or any other IBM Mainframe Customer was limited in using Specialty Processors.

59. Although Neon was and is aware that Highmark has multiple contracts with IBM, it denies the allegations of paragraph 54. First, it is not aware of any contractual obligations of

Highmark, or any other IBM Mainframe Customer, that limit or restrict the workloads that can be run, free of software licensing fees, on Specialty Processors. Second, it has never induced or attempted to induce any one or more of IBM's Mainframe Customers to breach any contract with IBM.

60. Neon denies the allegations of paragraph 55. What IBM characterizes as goodwill is, in most cases, fear. Moreover, there is nothing "fair" about IBM's pricing programs, and their only predictable aspects are their high levels and substantial opacity.

61. Answering paragraph 56, Neon admits that it has used, and is continuing to use, zPrime on its own System z mainframe computer. Neon denies that its use of zPrime results in a breach of any of its agreements with IBM.

62. Neon is without sufficient information either to admit or deny the allegations of paragraph 57. Indeed, given the copyright misuse of which IBM's current counsel complained in the Stracka litigation, and the misuse in which IBM has elected to engage in its efforts to protect its monopoly from Neon's zPrime, Neon doubts the validity of the listed copyrights. Importantly, as paragraph 57 makes clear, IBM is fully capable (when it so desires) of including in its pleading a list; thus, Neon reiterates its request that IBM provide a list or definition of those workloads that are "authorized" or otherwise eligible for customer-owned Specialty Processors.

63. Neon is without sufficient information to either admit or deny the allegations of paragraph 58; that said, it has reason to doubt (as noted elsewhere in this answer) that "IBM has duly and legally complied in all respects with the provisions of the copyright laws of the United States...."

64. Neon is without sufficient information to either admit or deny the allegations of paragraph 59.

65. Neon admits the allegations of paragraph 60 (none of which, by the way, are relevant to this dispute).

66. Neon admits the allegations of the first, second and fourth sentences of paragraph 61; Neon denies the balance of the allegations included in paragraph 61.

67. Neon denies all of the allegations of paragraph 62. As to Specialty Processors that have been acquired by IBM Mainframe Customers, there are no unauthorized workloads and there is no such thing as “ineligible software.”

68. Neon denies all of the allegations of paragraph 63. As to Specialty Processors that have been acquired by IBM Mainframe Customers, there are no unauthorized workloads.

69. Neon is without sufficient information to either admit or deny the allegations of the first two sentences of paragraph 64, except to deny that there is (in the context of Specialty Processors) anything fairly described as “ineligible program code.” Neon denies that “zPrime is primarily designed and produced for the purpose of circumventing the protection afforded by IBM’s technological measures;” zPrime instead enables IBM’s customers lawfully to benefit from their ownership of Specialty Processors.

70. Neon denies all of the allegations of paragraph 65.

71. Neon admits the allegations of paragraph 66, except that it objects to the use of the pejorative “traffics,” and notes that there is another little verse under it: IBM interferes in Neon’s efforts to do so by misrepresenting the rights of its customers and misrepresenting the functioning of Neon’s zPrime.

72. Answering paragraph 67, Neon incorporates its answer to the referenced paragraphs.

73. Answering paragraph 68, Neon admits that IBM has entered into contracts bearing those titles with System z customers, including Highmark, but, despite reasonable

inquiry, is without sufficient information to admit or deny the validity of any one or more of them.

74. Neon denies the allegations of paragraph 69.

75. Answering paragraph 70, Neon admits that it was aware that Highmark was a party to multiple contracts with IBM, but denies that it had or has knowledge of any contracts between Highmark and IBM that limit or otherwise restrict the workloads that Highmark was entitled to run on its Specialty Processors, and notes that IBM has cited none in its counterclaim.

76. Neon denies the allegations of paragraph 71.

77. Neon denies the allegations of paragraph 72.

78. Answering paragraph 73, Neon incorporates its answer to the referenced paragraphs.

79. Neon denies the allegations of paragraph 74.

80. Neon denies the allegations of paragraph 75. Neon never agreed to any list or definition of “authorized” workloads for its Specialty Processors, and IBM never provided any such list to Neon (nor has it done so in its lengthy answer and counterclaim). It has only used its mainframe for processing that is fully authorized by its agreements with IBM.

81. Neon denies the first sentence of paragraph 76, and states that the terms of any of its agreements with IBM speak for themselves. Neon denies the other allegations of paragraph 76.

82. Neon denies the allegations of paragraph 77.

83. Answering paragraph 78, Neon incorporates its answer to the referenced paragraphs.

84. Neon admits the allegations of paragraph 79, except that it objects to the use of the pejorative “traffics,” and notes that there is another little verse under it: IBM interferes in

Neon's efforts to do so by misrepresenting the rights of its customers and misrepresenting the functioning of Neon's zPrime.

85. Neon denies all of the allegations of paragraph 80. zPrime is not designed and produced for the purpose of circumventing the protection afforded by IBM's technological measures; zPrime instead enables IBM Mainframe Customers lawfully (and, in most cases, finally) to benefit from their ownership of Specialty Processors.

86. Neon denies the allegations of paragraph 81. The "commercially significant purpose[s]" of zPrime are described in Neon's complaint and include assisting IBM Mainframe Customers in better utilizing, and thereby benefiting from, the Specialty Processors that they own.

87. Neon denies the allegations of paragraph 82.

88. Neon denies the fatuous allegations of paragraph 83.

89. Neon denies the allegations of paragraph 84.

90. Answering paragraph 85, Neon incorporates its answer to the referenced paragraphs.

91. Answering paragraph 86, Neon states that it is without sufficient information, despite reasonable inquiry, either to admit or deny the allegations. That said, Neon currently has no reason to doubt the truth of them.

92. Neon denies the allegations of paragraph 87. It has never made, nor has it assisted in the making of, any unlawful copies of copyrighted code.

93. Neon denies the allegations of paragraph 88.

94. Neon denies the allegations of paragraph 89; there has been no infringement via the use of zPrime.

95. Neon denies the allegations of paragraph 90.

96. Neon denies all of the allegations of paragraph 91, and, in particular, doubts the validity of IBM's copyrights, given the misuse of them in this case, and the misuse reflected in pleadings filed on behalf of James Stracka by the law firms that represented him in that litigation, one of which now represents IBM in this case.

97. Neon denies the allegations of paragraph 92, and notes that instead of losing substantial revenues as a result of Neon's marketing of zPrime (as should have been the case), IBM has via the use of misrepresentations about its products and zPrime, generated hundreds of millions of dollars in additional revenue that Neon seeks in this litigation to have IBM disgorge.

98. Neon has not infringed IBM's copyrights, and has no intention ever to do so. Thus, it denies the allegations of paragraph 93.

99. Answering paragraph 94, Neon incorporates its answer to the referenced paragraphs.

100. Because Neon has not made, and is not making, false and misleading statements regarding zPrime, it denies all of the allegations of paragraph 95. Neon admits that it has attempted to inform all of IBM's Mainframe Customers of the benefits of zPrime and how the use of zPrime in no way violates any of IBM's rights under any of the agreements with which Neon is familiar.

101. Neon denies the allegations of paragraph 96, because each assumes that Neon has made false and misleading statements. Moreover, Neon has never attempted to claim or suggest that it developed zPrime with the consent or approval of IBM (nor would such consent or approval be necessary). The balance of the statements set forth in paragraph 96 ((a)-(f)) are all true.

102. Because Neon has made no "false statements" regarding the "fundamental characteristics of zPrime" or "Neon's commercial activities," it denies the allegations of

paragraph 97. Moreover, but for IBM's false statements regarding its rights and the operation of zPrime, Neon would have many more customers than it does now.

103. Neon admits the allegations of paragraph 98.

104. Paragraph 99 gets it exactly backwards: It is Neon that has suffered and will continue to suffer injury as a consequence of IBM's unlawful actions. Thus, Neon denies the allegations of paragraph 99.

105. Although Neon agrees with IBM that there has been a violation of the Lanham Act, the violator is IBM, not Neon; thus, it denies the allegations of paragraph 100.

106. Neon agrees that this case is an exceptional one, but Neon is the party entitled to an award of fees under 15 U.S.C. 1117(a). Thus, it denies the allegations of paragraph 101.

107. Answering paragraph 102, Neon incorporates its answer to the referenced paragraphs.

108. Neon denies the allegations of paragraph 103.

109. Answering paragraph 104, Neon denies that IBM is entitled to any award of attorneys' fees.

110. Neon denies each allegation of the counterclaim not otherwise addressed in this Answer.

Affirmative Defenses

111. As set forth elsewhere, Neon denies that zPrime results in the infringement of one or more of IBM's alleged copyrights. But, to the extent that the use of zPrime results in the unauthorized use of all or any portion of one or more programs as to which IBM now claims a copyright, such use is "fair use," because labeling the use as unlawful would stifle the very creativity that the copyright laws are designed to foster, and would otherwise assist IBM in maintaining monopoly power.

112. IBM has repeatedly represented that there would never be any software licensing charges for workloads processed on Specialty Processors. It has also asserted that the purpose of Specialty Processors was to save its customers from the high costs of having workloads processed on the central processors. Having made these and other representations in its marketing of Specialty Processors, it would be unjust and unfair now to renege on its promises. Thus, IBM's claims are barred by quasi estoppel.

113. IBM has misused the copyrights as to which it has, via its counterclaim, alleged infringement by Neon. IBM's copyright misuse includes efforts to use the copyrights to obtain rights that it surrendered via contract, and that it disavowed in the marketing of Specialty Processors.

114. IBM's non-contract claims are barred by the economic loss rule, in that the duties allegedly breached by Neon were created by contract, or not at all.

115. IBM's claims are barred by the doctrine of "unclean hands," as alleged in detail in Neon's Complaint (as same may, from time to time, be amended).

116. Neon's actions are, based on the facts as pleaded in detail in Neon's Complaint (as same may, from time to time, be amended), privileged. Moreover, all of the statements that Neon has made and published regarding zPrime, and the entitlement of IBM Mainframe Customers to use zPrime, are true.

117. To the extent that IBM's contracts with its customers prohibit those Customers from using zPrime in connection with the Specialty Processors that they own, those contracts violate the federal and state antitrust laws, including Section 3 of the Clayton Act (and comparable state statutes).

Jury Demand

118. Neon demands a trial by jury on all of IBM's counterclaims, and all of its defenses to those counterclaims.

Prayer

Wherefore, premises considered, Neon prays that IBM take nothing by way of this action and that it go hence, without day. Neon prays for judgment in accordance with the prayer in its Complaint, as same may be amended, from time to time, and seeks such other and further relief to which it may show itself entitled.

Dated: February 1, 2010

**REYNOLDS, FRIZZELL, BLACK,
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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 1st day of February 2010.

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