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Neon Pulls Disputed Software, Ends Suit Against IBM

By **Richard Vanderford**

Law360, New York (May 31, 2011) -- Neon Enterprise Software LLC, which claimed IBM Corp. tried to crush it by threatening its customers with contract suits, on Tuesday dropped a Texas unfair competition lawsuit against the giant and agreed to pull one of its mainframe software products from the market.

Neon will no longer sell its zPrime line of software, which allowed mainframe users to avoid paying tens of millions in licensing fees to IBM, and will terminate its outstanding licenses — effectively recalling the product. Once its users have stopped using zPrime, Neon must give the source code to IBM and destroy its own copies, according to an injunction approved in Texas federal court.

Removing a signature product from circulation was a monumental concession by Austin, Texas-based Neon, which had complained to U.S. courts and the European Union that IBM's mainframe licensing regime was anti-competitive and illegal. The case was nearing an end by trial — so close that Neon had proposed jury instructions — and Neon submitted a brief fighting IBM as late as Thursday.

In its public announcement of the deal, an action required under the injunction, Neon simply outlined the terms and offered customers some hope that the company would continue to exist, saying that “other Neon products are not affected by this settlement.”

IBM did not trumpet its win, and a representative did not immediately respond to a request for comment. The two companies did not say whether money changed hands as part of the deal.

The zPrime software works with IBM-made legacy mainframes called the zSeries, which are still used to handle substantial amounts financial and corporate data, according to Neon's complaint, filed in December 2009.

IBM charges legacy mainframe users licensing fees when the core processor is in use, a way of “metering” the mainframes' use that allows IBM to continue to squeeze money out of the decades-old systems, according to Neon.

Faced with the threat of losing market share to competitors, IBM released other mainframes that use the same internal architecture as its legacy mainframes but that lack the metered billing system, according to Neon. The zPrime products allowed users to push their legacy computing tasks onto the newer systems, cutting into IBM's licensing fee take but saving customers tens of millions of dollars, Neon said.

Neon's suit alleged that IBM's response to the threat — warning customers that it might sue them if they used zPrime — violated antitrust laws.

IBM had countered with claims that Neon's software violated the Digital Millennium Copyright Act and that the company was tortiously interfering with IBM's contracts with customers. Those claims have also been extinguished by the settlement.

Neon is represented by Alan D. Albright and Brian C. Nash of Bracewell & Giuliani LLP as well as

Nathan M. Smith, Chris Reynolds, Jean C. Frizzell and Jeremy L. Doyle of Reynolds Frizzell Black Doyle Allen & Oldham LLP.

IBM is represented by Shannon H. Ratliff, Ryan A. Botkin and Katherine P. Chiarello of Ratliff Law Firm PLLC, R. Paul Yetter and Collin J. Cox of Yetter Coleman LLP, and Evan R. Chesler, Richard J. Stark and Teena-Ann V. Sankoorikal of Cravath Swaine & Moore LLP.

The case is Neon Enterprise Software LLC v. IBM Corp., case number 1:09-cv-00896, in the U.S. District Court for the Western District of Texas.

--Editing by Eydie Cubarrubia.

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