

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:
INTERNATIONAL BUSINESS MACHINES :
CORPORATION, :
:
Plaintiff/Counterclaim Defendant, :
- against - :
BGC PARTNERS, INC., BGC BROKERS US, L.P., :
BGC FINANCIAL L.P., and BGC USA, L.P., :
Defendants/Counterclaim- :
Plaintiffs. :

Index No. 10-CV-128

**FIRST AMENDED ANSWER AND COUNTERCLAIMS**

**FIRST AMENDED ANSWER TO FIRST AMENDED COMPLAINT**

Defendants BGC Partners, Inc., BGC Brokers US, L.P., BGC Financial L.P., and BGC USA, L.P., (collectively, “BGC”),<sup>1</sup> by its undersigned attorneys, for its First Amended Answer to the First Amended Complaint in this action, states as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the First Amended Complaint.
2. Admits the allegations in paragraph 2 of the First Amended Complaint.
3. Admits the allegations in the first sentence in paragraph 3 of the First Amended Complaint; denies the allegations in the second sentence in paragraph 3 of the First

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<sup>1</sup> BGC does not concede that each or all of the entities named as defendants use or possess the Informix database software (“Informix” or the “Software”), which is the subject of IBM’s First Amended Complaint.

Amended Complaint, except admits that BGC Brokers US, L.P., is an indirect subsidiary of BGC Partners, Inc.

4. Admits the allegations in the first sentence in paragraph 4 of the First Amended Complaint; denies the allegations in the second sentence in paragraph 4 of the First Amended Complaint, and admits that BGC Financial, L.P. is a subsidiary of BGC Brokers US, L.P., and an indirect subsidiary of BGC Partners, Inc. and denies the last sentence in paragraph 4 of the First Amended Complaint.

5. Admits the allegations in the first sentence in paragraph 5 of the First Amended Complaint, and denies the allegations in the second sentence in paragraph 5 of the First Amended Complaint, except admits that BGC USA, L.P., is an indirect subsidiary of BGC Partners, Inc.

6. States that the allegations in paragraph 6 of the First Amended Complaint set forth conclusions of law to which no response is required.

7. States that the allegations in paragraph 7 of the First Amended Complaint set forth conclusions of law to which no response is required.

8. States that the allegations in paragraph 8 of the First Amended Complaint set forth conclusions of law to which no response is required.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the First Amended Complaint, except admits that in 2001 IBM acquired software assets and business relationships with more than 100,000 Informix customers for \$1 billion, and in both in its public statements and SEC filings, IBM announced that it would “maintain existing relationships with Informix customers and business partners,

including support for . . . current Informix products” so that “Informix customers can be confident that their investments in existing Informix products are secure.”

10. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the First Amended Complaint, except admits that Euro Brokers had entered into a license agreement with Informix Corporation prior to IBM’s acquisition of Informix’s database business in 2001, pursuant to which IBM acquired substantially all of the assets related to its database business (including the research, development, manufacture, distribution, marketing, sale and service of relational database management systems) and pursuant to which IBM assumed liabilities related to the database business, consisting primarily of current liabilities and future obligations under assigned contracts. Upon information and belief, IBM assumed liabilities and obligations with respect to Euro Brokers’ license of Informix software.

11. Denies the allegations in paragraph 11 of the First Amended Complaint, except admits that after acquiring Informix’s database business, IBM continued to maintain and support Euro Brokers’ Informix software (for which Euro Brokers paid agreed upon maintenance and support fees) and periodically sent Informix software upgrade packages to Euro Brokers and/or BGC, both before and after it sent any purported “migration package.”

12. Denies the allegations in paragraph 12 of the First Amended Complaint,

13. Denies the allegations in paragraph 13 of the First Amended Complaint, except admits that IBM periodically sent documentation regarding the Informix software, an example of which is attached to the First Amended Complaint as Exhibit C, to which the Court is respectfully referred for the complete and accurate presentation of its contents. BGC also

denies that anything contained in Exhibit C modified or altered the terms of the original license between Euro Brokers and Informix, which remains operative.

14. Denies the allegations in paragraph 14 of the First Amended Complaint, except admits that IBM periodically sent documentation regarding the Informix software, an example of which is attached to the First Amended Complaint as Exhibit D, to which the Court is respectfully referred for the complete and accurate presentation of its contents. BGC also denies that anything contained in Exhibit D modified or altered the terms of the original license between Euro Brokers and Informix, which remains operative.

15. Denies the allegations in paragraph 15 of the First Amended Complaint, except admits that following BGC's 2005 acquisition of Euro Brokers, the legacy business of Euro Brokers continues to be conducted by various corporate entities, all indirect subsidiaries of BGC Partners, Inc.

16. Denies the allegations in paragraph 16 of the First Amended Complaint, except admits that IBM periodically sent documentation regarding the Informix software, examples of which are attached to the First Amended Complaint as Exhibits E-J, to which the Court is respectfully referred for the complete and accurate presentation of their contents. BGC further denies that anything contained in Exhibits E-J modified or altered the terms of the original license between Euro Brokers and Informix, which remains operative.

17. Denies the allegations in paragraph 17 of the First Amended Complaint, except admits that since entering into its original license agreement with Informix, Euro Brokers and/or BGC have continued to use the Informix software as permitted by the operative license agreement.

18. Admits that Plaintiff has elected to refer to the Informix software used by Euro Brokers and/or BGC after 2003 collectively as the “Informix Software” in the First Amended Complaint.

19. States that the allegations in paragraph 19 of the First Amended Complaint set forth conclusions of law to which no response is required.

20. Denies the allegations in paragraph 20 of the First Amended Complaint, except admits that KPMG purported to conduct an audit in the summer of 2008 regarding Euro Brokers and/or BGC’s use of Informix software, and admits that Plaintiff has elected to refer to certain licensed Informix software as “Extra Informix Copies” in the First Amended Complaint, but denies any suggestion that any Informix software running on BGC’s computers was insufficiently licensed.

21. Denies the allegations in paragraph 21 of the First Amended Complaint, except admits that IBM sent a written demand without justification for \$1,730,665.24 in September 2008.

22. Admits the allegations in paragraph 22 of the First Amended Complaint, except denies that BGC had any obligation to pay any additional monies demanded by IBM.

23. Denies the allegations in paragraph 23 of the First Amended Complaint, except admits that in December 2008, IBM demanded without justification that BGC enter into a purported new license for Informix software, and admits that BGC rejected IBM’s attempt to modify or supersede the original license, which remains operative.

24. Denies the allegations in paragraph 24 of the First Amended Complaint, except admits that IBM purported to terminate BGC's license for Informix software in December 2008.

25. Admits the allegation in paragraph 25 of the First Amended Complaint that BGC has not destroyed any copies of Informix software, but denies any suggestion that BGC was or is under any obligation to destroy such copies.

26. Admits the allegation in paragraph 26 of the First Amended Complaint that BGC has downloaded copies of Informix software after December 31, 2008, but denies any suggestion that such actions were improper or not permitted under the governing license agreement or applicable law.

27. Admits the allegation in paragraph 27 of the First Amended Complaint, but denies any suggestion that such possession or use is improper or not permitted under the governing license agreement or applicable law.

### **COUNT I**

28. Repeats and re-alleges its responses to paragraphs 1-27 of the First Amended Complaint as set forth above.

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 29 of the First Amended Complaint, and states that the allegations in the second and third sentences of paragraph 29 of the First Amended Complaint set forth conclusions of law to which no response is required.

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 30 of the First Amended Complaint,

and states that the allegations in the second and third sentences of paragraph 30 of the First Amended Complaint set forth conclusions of law to which no response is required.

31. States that the allegations in paragraph 31 of the First Amended Complaint set forth conclusions of law to which no response is required.

32. States that the allegations in paragraph 32 of the First Amended Complaint set forth conclusions of law to which no response is required.

33. Denies the allegations in paragraph 33 of the First Amended Complaint.

34. Denies the allegations in paragraph 34 of the First Amended Complaint.

35. Denies the allegations in paragraph 35 of the First Amended Complaint.

36. Denies the allegations in paragraph 36 of the First Amended Complaint.

## **COUNT II**

37. Repeats and re-alleges its responses to paragraphs 1-36 of the First Amended Complaint as set forth above.

38. Denies the allegations in paragraph 38 of the First Amended Complaint.

39. Denies the allegations in paragraph 39 of the First Amended Complaint, except admits that BGC was and is authorized to use Informix software pursuant to the original Euro Brokers/Informix license agreement, which IBM assumed responsibility for through its 2001 purchase of assets and liabilities from Informix and/or by virtue of its subsequent conduct.

40. Denies the allegations in paragraph 40 of the First Amended Complaint.

41. Denies the allegations in paragraph 41 of the First Amended Complaint.

42. Denies the allegations in paragraph 42 of the First Amended Complaint, except admits that BGC did not destroy all copies of Informix Software because it is under no obligation to do so.

43. Denies the allegations in paragraph 43 of the First Amended Complaint, except admits that BGC was and is authorized to use Informix software pursuant to the original Euro Brokers/Informix license agreement, which IBM assumed responsibility for through its 2001 purchase of assets and liabilities from Informix and/or by virtue of its subsequent conduct.

44. Denies the allegations in paragraph 44 of the First Amended Complaint.

45. Denies the allegations in paragraph 45 of the First Amended Complaint.

46. Denies the allegations in paragraph 46 of the First Amended Complaint.

### **COUNT III**

47. Repeats and re-alleges its responses to paragraphs 1-46 of the First Amended Complaint as set forth above.

48. Denies the allegations in paragraph 48 of the First Amended Complaint.

49. Denies the allegations in paragraph 49 of the First Amended Complaint.

50. Denies the allegations in paragraph 50 of the First Amended Complaint.

51. Denies the allegations in paragraph 51 of the First Amended Complaint.

52. Denies the allegations in paragraph 52 of the First Amended Complaint.

53. Admits that in the First Amended Complaint, IBM requests a trial by jury on all issues so triable.



**FIRST AFFIRMATIVE DEFENSE**

The First Amended Complaint fails to state a claim upon which relief may be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the doctrine of preemption under federal copyright law.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by the doctrines of waiver, laches, estoppel and unclean hands.

**FOURTH AFFIRMATIVE DEFENSE**

The First Amended Complaint is barred in whole or in part by the applicable statutes of limitation.

**FIFTH AFFIRMATIVE DEFENSE**

Through its 2001 purchase of assets and liabilities from Informix, including but not limited to obligations arising under licenses and business relationships between Informix and Euro Brokers, IBM assumed obligations to Euro Brokers which entitle Euro Brokers and BGC to the continued use of Informix software, subject to making annual payments for maintenance and support. Euro Brokers and its successors have made all required payments and are entitled to continue to use and employ the Informix Software.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred by its assumption of obligations from Informix to existing Informix licensees.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff has failed to mitigate its damages, if any.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff cannot recover statutory damages under federal copyright law for alleged copyright infringements that occurred before the effective date of the registration of the copyrights.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiff purported to terminate BGC's license to use the Informix software without justification and proper notice.

**TENTH AFFIRMATIVE DEFENSE**

BGC is not bound by the terms of the International Program License Agreement or the International Passport Advantage Agreement because IBM did not provide Euro Brokers/BGC sufficient notice of the terms of either agreement prior to Euro Brokers' downloading software components upon which IBM purports to condition their terms.

**ELEVENTH AFFIRMATIVE DEFENSE**

BGC is not bound by the terms of the International Program License Agreement or the International Passport Advantage Agreement because Euro Brokers/BGC did not assent to the terms of either agreement prior to downloading software components upon which IBM purports to condition its terms.

**TWELFTH AFFIRMATIVE DEFENSE**

BGC is not bound by the terms of the International Program License Agreement or the International Passport Advantage Agreement because the purported actions of a junior

technical staff person during the course of what appeared to be a routine software upgrade were insufficient to bind Euro Brokers/BGC.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Any purported amendment to Euro Brokers'/BGC's license to use the Informix software, which IBM contends occurred during the course of what appeared to be a routine software upgrade, fails for lack of consideration as Euro Brokers/BGC had a preexisting legal right to receive such upgrades.

WHEREFORE, BGC requests judgment as follows:

- I. Dismissing the First Amended Complaint in its entirety;
- II. Awarding BGC the costs and disbursements of this action; and
- III. Awarding BGC such other and further relief as the Court may deem just and proper.

**FIRST AMENDED COUNTERCLAIMS**

Counterclaim Plaintiff BGC by its undersigned attorneys, for its counterclaims against International Business Machines Corporation ("IBM") alleges as follows:

**NATURE OF THE ACTION & BACKGROUND**

1. These counterclaims seek declaratory and injunctive relief designed to secure and protect BGC's continued right to the uninterrupted use of certain Informix database software (the "Software").
2. BGC is one of the world's leading inter-dealer brokers, providing integrated voice and electronic brokerage and trading services to wholesale market participants across the globe.

3. BGC is active in the global fixed income, rates, foreign exchange, equity derivatives, credit derivatives, futures and structured product markets, offering a full range of brokerage services including price discovery, trade execution, straight through processing and clearing, as well as settlement and access to electronic trading.

4. In the inter-dealer brokerage business, BGC functions primarily as an intermediary, matching up the trading needs of its institutional client base, which is primarily comprised of well-capitalized banks, dealers, investment banks and other financial institutions. BGC executes more than \$200 billion in trades through its New York office alone on a *daily* basis.

**The Underlying BGC/IBM License Dispute**

5. Approximately twenty years ago, Euro Brokers – an entity later acquired by BGC – entered into a perpetual license agreement with Informix Software, Inc. Pursuant to that license agreement, Euro Brokers became authorized to utilize the Software for a one-time license fee.

6. Along with a license to use the Software, Euro Brokers obtained the right to receive maintenance and technical support services from Informix, as well as periodic upgrades for the Software (including subsequently developed versions), in exchange for payment of annual maintenance and support fees, which Euro Brokers and its successors have consistently paid.

7. Upon information and belief, provision of such maintenance, technical support services and software upgrades was a standard feature of Informix’s arrangements with its licensees.

8. Also upon information and belief, IBM's standard form contracts also provide for software licensees to receive maintenance, technical support services and routine software upgrades in exchange for annual subscription and support fees.

9. Euro Brokers utilized the Software within the scope of its license with Informix.

10. Upon information and belief, in or about April 2001, IBM entered into an asset and liability purchase agreement with Informix pursuant to which it acquired substantially all of the assets related to Informix's database business for \$1 billion. Proxy materials filed with the Securities and Exchange Commission in connection with the transaction provide that "[p]ursuant to the terms of a master purchase agreement, dated as of April 24, 2001, between the company [Informix] and IBM and related agreements, the company will sell substantially all of the assets related to its database business (including the research, development, manufacture, distribution, marketing, sale and service of relational database management systems) to IBM, and IBM will assume certain liabilities related to the database business, consisting primarily of *current liabilities and future obligations under assigned contracts...*" IBM's "Assumed Liabilities" were defined to include "all obligations, liabilities and commitments under any contract that issued, held for use or intended to be used in the operation or conduct of the Database Business or to which the Acquired Assets are subject."

11. In a July 2, 2001 press release, IBM announced that, following the closing, it would "maintain existing relationships with Informix customers and business partners, including support for and updating of current Informix products."

12. Documents filed with the SEC and IBM's own public statements establish that, by virtue of the 2001 transaction with Informix, IBM acquired current liabilities and future obligations to Informix's existing licensees, which included Euro Brokers.

13. During the period following the 2001 acquisition – and prior to the time IBM contends Euro Brokers adopted the terms of a new IBM form of license, IBM continued to treat Euro Brokers as a valid licensee of the Software. During the post-acquisition period, as it had before, Euro Brokers paid amounts annually for maintenance and support of the Software, which IBM accepted. During this period, IBM provided maintenance and technical support services to Euro Brokers, as well as upgraded versions of the Software, just as Informix had done prior to the IBM acquisition.

14. Either by virtue of its 2001 acquisition of Informix's database business, or by virtue of its conduct after the transaction treating Euro Brokers as a valid licensee, IBM succeeded to Informix's rights and obligations in connection with the Euro Brokers/Informix license for the Software.

15. In 2005, BGC acquired Euro Brokers, and succeeded in interest to Euro Brokers' rights and obligations in connection with the Euro Brokers/Informix license.

16. BGC has utilized the Software in a manner consistent with the original Euro Brokers/Informix license for the Software.

17. BGC has consistently paid IBM an annual fee for maintenance and technical support of the Software, just as Euro Brokers had paid Informix and then IBM. Pursuant to this maintenance and support agreement, attendant to the underlying license

agreement, in the event of a failure or crash of the Informix servers, BGC could call IBM and receive technical support to assist its technological staff in bringing the servers back on-line.

18. The provision of such maintenance and support to BGC is critical. In the event of an Informix server crash or Software malfunction, IBM possesses the proprietary tools and software required to analyze and repair the Informix server configuration allowing the server to be brought back on-line.

19. In addition, in connection with its maintenance and support role, and in exchange for BGC's annual maintenance and support payments, IBM periodically provides Software upgrades to BGC to keep BGC's Informix database servers current, running smoothly and without interruption.

20. Neither BGC nor IBM disputes that a valid license agreement existed between Euro Brokers and Informix and that BGC became entitled to use the Software upon BGC's acquisition of Euro Brokers.

21. It was standard for Informix to provide maintenance, technical support and regular software upgrades to its licensees.

22. Neither BGC nor IBM disputes that Euro Brokers and BGC have paid annual maintenance and support fees for technical support for the Software.

23. In mid-2008, IBM asked to conduct an audit of BGC's use of the Software. At the conclusion of its review, for the first time, IBM claimed that BGC had exceeded the scope of its license to use the Software, and demanded approximately \$1.7 million in fees from BGC for new licenses and alleged back payments.

24. IBM predicated its request for additional fees on the theory that the original Euro Brokers/Informix license agreement had been amended or superseded following IBM's acquisition of Informix by virtue of purported actions taken by a junior technical staff person at BGC during the course of what appeared to be a routine software upgrade. BGC vigorously disputes IBM's assertion that the original license agreement has been amended by IBM's International Program License Agreement, the International Passport Advantage Agreement or otherwise.

25. BGC is not bound by the terms of the International Program License Agreement or the International Passport Advantage Agreement.

26. Euro Brokers and BGC were entitled to receive Software upgrades from IBM pursuant to their original license agreement and by virtue of their annual maintenance and support payments to IBM. IBM's withholding of such Software upgrades in the absence of a user clicking through various on-screen dialog boxes purporting to amend or supersede Euro Brokers'/BGC's license was a breach of IBM's existing obligations, fraudulent and deceptive.

27. IBM failed to provide sufficient notice to Euro Brokers/BGC of the terms of the International Program License Agreement and the International Passport Advantage Agreement prior to a Euro Brokers technical employee downloading various software components; IBM alleges that such downloading was conditioned upon acceptance of the terms of those agreements.

28. IBM failed to provide sufficient notice to Euro Brokers/BGC that, by a user clicking on various dialog boxes during the course of what appeared to be a routine software upgrade, IBM purported to modify the terms of Euro Brokers'/BGC's existing license



for the Software. Knowing that its software upgrades were likely to be downloaded by junior technical staff employees without authority to bind Euro Brokers/BGC, IBM concealed its effort to “migrate” Euro Brokers/BGC to a new license for the Software.

29. Although IBM purports to have conditioned the ability to download various Software components upon Euro Brokers’ acceptance of new license terms, IBM was legally obligated to deliver those Software products to Euro Brokers/BGC without preconditions pursuant to Euro Brokers’ original license agreement or the implied contract that was formed after IBM’s acquisition of Informix’s database business.

30. Neither Euro Brokers nor BGC knowingly intended to or performed any actions that manifested their assent to the terms of either the International Program License Agreement or the International Passport Advantage Agreement.

31. The purported actions of a junior technical staff person during the course of what appeared to be a routine software upgrade were insufficient to bind Euro Brokers/BGC to any amendment of the original Euro Brokers/Informix license terms, and did not bind Euro Brokers/BGC to the terms of any new license agreement for the Software. Conditioning access to such an upgrade on a user clicking through various on-screen dialog boxes purporting to amend or supersede Euro Brokers’/BGC’s license was a breach of IBM’s existing obligations, fraudulent and deceptive.

32. When BGC refused to acquiesce to IBM’s unjustified demand for additional fees, IBM purported to terminate BGC’s license to use the Software without proper notice.

33. Following the 2008 audit and IBM's demand for additional license fees, BGC and IBM actively negotiated IBM's claim for a \$1.7 million payment through business channels, and well as through both internal and outside counsel. IBM accepted BGC's 2008 maintenance payment and provided support during that period.

34. The last of those pre-suit conversations in connection with negotiations to resolve the parties' dispute occurred on June 3, 2009 between outside counsel for BGC and outside counsel for IBM. Neither BGC nor its counsel had any substantive communications with IBM after that call regarding resolution of the dispute before IBM filed this lawsuit on January 7, 2010.

**IBM Fails to Provide Software Maintenance Notwithstanding BGC's Annual Payment**

35. Notwithstanding the parties' license dispute, on June 25, 2009, BGC paid \$14,756.61 to IBM for its annual Informix software maintenance and support. This \$14,756.61 payment is consistent with the annual maintenance and support payments that BGC or its affiliates have made to IBM during the course of its use of the Software.

36. On June 25, 2009, a member of BGC's technical staff opened an online support case through IBM's software maintenance and support website with a service request related to an Informix server located in BGC's New York office.

37. BGC was informed that IBM had terminated Informix software maintenance and support to BGC as of June 16, 2009 (less than two weeks after counsel for IBM promised to respond to counsel for BGC regarding the underlying license dispute).

38. Eleven days after requesting that support, and after purportedly terminating BGC's maintenance and support for Informix, IBM cashed the \$14,756.61 maintenance check from BGC on July 6, 2009.

39. On July 13, 2009, BGC again required technical assistance from IBM regarding an Informix server, and a member of BGC's technical staff again opened an online support case with IBM's software maintenance and support website.

40. Rather than provide the requested (and paid-for) assistance, IBM's maintenance staff now told BGC that IBM had terminated Informix software maintenance and support to BGC as of March 31, 2009.

41. Following the July 13 support request, BGC technical personnel were able to access IBM's maintenance and support website – their user logins remained active – but were not able to receive technical support services from IBM personnel.

42. IBM has refused to provide maintenance and support to BGC for the Software, notwithstanding IBM's retention of the \$14,756.61 annual maintenance payment from BGC until its recent purported attempt to refund the check.

43. In addition to providing payment to IBM for the upcoming year of maintenance and technical support, BGC has otherwise complied with its obligations under the maintenance and support agreement.

44. On September 17, 2009, over two months after cashing the maintenance check, IBM left a voice mail for a BGC employee stating that IBM would now be attempting to “refund” the check “due to the dispute that we have.” IBM emphasized that BGC “will not be having any support” for the Software.

45. In late September 2009, IBM purported to issue a “refund” of BGC’s maintenance payment. BGC rejected the purported refund and, on October 13, 2009, sent the check for its ongoing maintenance and support for Informix back to IBM. IBM is still in possession of BGC’s most recent maintenance payment and has retained the benefit of such payment without providing the requisite maintenance and technical support services to BGC.

**Uninterrupted Functioning of the Software is Critical**

46. The Software is essential to BGC’s business operations. The Software is a database program, which has been adapted by BGC to its specific business applications. In addition to other uses, the Software is used to store, maintain and process data related to the core brokering activities of certain desks of BGC.

47. In BGC’s New York offices alone, Informix is essential to the operations of thirty of BGC’s fifty desks.

48. Without the Software, BGC could not effectively process and settle trade data related to its brokering of the following financial products:

- Emerging Market Brady Bonds and Sovereign Debt;
- Emerging Market Euro Bonds;
- Emerging Market Credit Derivatives;
- U.S. Corporate Credit Derivatives;
- Credit Default Asset Backed Index;
- Convertible Bonds;
- Mexican Interest Rate Swaps, Swaptions and Forwards;
- Latin American Interest Rate Swaps and Swaptions;

- Latin American Non-deliverable Forwards;
- Overnight Federal Funds and Short Dated Euro Dollar Deposits;
- Fixed Date Euro Dollar Deposits;
- Interest Rate Swaps, Forward Rate Agreements and Overnight Index Swaps;
- Interest Rate Options;
- Mortgage-Backed Securities;
- High Grade Corporate Bonds;
- High Yield Corporate Bonds;
- Government Agencies;
- U.S. Treasuries;
- Asian and Emerging Market Non-Deliverable Forwards;
- Institutional Money Markets;
- Repurchase Agreements; and
- Structured Credit Products.

49. The Software is integral to BGC's trading, settlement and brokerage operations – without it, BGC would be forced to attempt to revert to manually inputting massive volumes of trade data for settlement and record keeping purposes. Given the tremendous volume of trading activity reliant on the Software, it is nearly certain that failure of the Software will cause significant disruption to the business of BGC and its customers.

50. In light of the enormous volume of trading activity on those desks relying on the Software, and BGC's position as a leader in the interdealer brokerage industry, there is a

substantial likelihood that a failure of the Software would cause significant disruption in the public financial markets generally.

51. BGC's ability to conduct its business efficiently and service its customers' needs is dependent on its continued and uninterrupted access to Informix, and IBM's provision of maintenance and support services for the Software.

**BGC's Plan to Migrate Off of Informix**

52. Because the Software is no longer an optimal fit for BGC's business needs, BGC has decided to migrate off of the Software to another database software platform.

53. The process of migrating users off of the Software and transitioning them to another database platform is exceptionally complicated and time consuming. In particular, BGC's migration off of Informix is difficult because BGC does not use the Software simply as a storehouse of information, like a simple database application. Rather, in most instances, the business rules that enable BGC's core brokering activities are tightly woven into the Software.

54. Each desk that relies upon the Software specializes in brokering a particular type of financial product, and the use of the Software has been customized desk-by-desk to support each group's particular brokering activities and back-end processing of the resulting trade data. The "business logic" or rules of each desk's trading operations is embedded into the versions of the Software currently in use at BGC.

55. Therefore, it is not possible for BGC to discontinue using the Software immediately and to replace Informix with a new product within a short period of time. Significant time and effort must be spent to understand the business logic of each desk that must be decoupled from the Software and replaced with similar functionality in a new application.

56. BGC is committed to the process of migrating off of the Software and the transition process is well underway. By the Spring of 2010, it is estimated that 30% of BGC's current Informix usage will have been transitioned off of the Software, and the full migration is projected to be completed by the end of 2010.

57. During the migration process it is critical that IBM continue to provide maintenance and technical support services for the Software in order to ensure that the migration goes as smoothly as possible and without unnecessary delay.

**FIRST CAUSE OF ACTION**

**BREACH OF AGREEMENT FOR MAINTENANCE  
AND TECHNICAL SUPPORT SERVICES**

58. BGC repeats and re-alleges the allegations in paragraphs 1 through 57 as if fully set forth herein.

59. BGC and IBM are parties or successors in interest to a valid and binding agreement whereby IBM is obligated to provide maintenance and technical support services to BGC for the Software as well as periodic Software upgrades in exchange for the payment of an annual fee.

60. On June 25, 2009, BGC tendered a check in the amount of \$14,756.61 for annual maintenance and support services to IBM, which IBM cashed on July 6, 2009. IBM's acceptance of BGC's payment created a binding agreement – a renewal of the parties' prior agreement for IBM to provide maintenance and technical support services to BGC for the Software as well as periodic Software upgrades.

61. In addition to providing payment to IBM for the upcoming year of maintenance and technical support, BGC has otherwise complied with its obligations under the maintenance and support agreement.

62. By accepting payment from BGC but refusing to perform technical support services as requested by BGC, IBM has breached its contractual obligations.

63. IBM has further breached its contractual obligations by purporting to force Euro Brokers/BGC to accept new license terms in exchange for receiving Software upgrades that they were already entitled to receive, and which IBM was obligated to provide.

64. IBM's failure to provide such maintenance and support services creates a significant risk of disruption to BGC's business, that of its customers, as well as the risk of adverse consequences to the broader financial markets.

65. BGC has suffered and continues to suffer damages as a result of IBM's wrongful refusal to provide maintenance and technical support services for the Software, as well as IBM's breach of its obligation to provide regular Software upgrades to Euro Brokers/BGC without imposing new license terms.

66. BGC also requests a preliminary and permanent injunction enjoining IBM from failing to provide maintenance and technical support to BGC for the Software and BGC's Informix servers for one year following the Court's ruling on BGC's Counterclaims.

## **SECOND CAUSE OF ACTION**

### **DECLARATORY JUDGMENT**

67. BGC repeats and re-alleges the allegations in paragraphs 1 through 66 as if fully set forth herein.



68. Euro Brokers (later acquired by BGC) and Informix (whose database business was later acquired by IBM) entered into a license agreement for Euro Brokers's use of Informix software approximately twenty years ago.

69. IBM now contends that the original Euro Brokers/Informix license agreement has been amended or superseded subsequent to IBM's acquisition of Informix's database business by virtue of the purported actions of an unauthorized, junior technical staff employee of Euro Brokers, "clicking" through various on-screen dialog boxes during the course of a routine Software upgrade. IBM claims that as a result of this purported amendment or acceptance of new license terms, BGC owes approximately \$1.7 million to IBM for new licenses and back payments due to alleged "overdeployment" of the Informix software.

70. BGC denies that the original Euro Brokers/Informix license has been amended or superseded, and denies that it owes IBM approximately \$1.7 million.

71. A declaratory judgment will clarify the rights and obligations of BGC and IBM with respect to the foregoing issues. An actual, justiciable controversy exists with respect to these matters.

72. Accordingly, BGC seeks a declaration that:

(a) the original Euro Brokers/Informix license has not been amended or superseded;

(b) BGC is not bound by the International Program License Agreement or the International Passport Advantage Agreement; and

(c) BGC does not owe IBM approximately \$1.7 million in connection with its use of the Software.

**PRAYER FOR RELIEF**

WHEREFORE, BGC prays that judgment be awarded in its favor and against IBM as follows:

A. A preliminary and permanent injunction enjoining IBM from failing to provide maintenance and technical support to BGC for its Informix servers and the Software for one year following the Court's ruling on BGC's Counterclaims;

B. A declaration that BGC is not bound by any purported amendment to the original Euro Brokers/Informix license agreement, that its use of the Software is permissible, and that BGC does not owe IBM approximately \$1.7 million;

C. An award of compensatory and punitive damages in an amount to be proven at trial;

D. An award of attorneys' fees, costs and disbursements incurred in the prosecution of this action;

E. Interest on all above amounts at the highest rate allowed by law; and

F. Such other and further relief as the Court may deem just and proper.

Dated: New York, New York  
April 2, 2010

FRIEDMAN KAPLAN SEILER &  
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/s/ Mala Ahuja Harker

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