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 16 MARK SUHY

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA

19 NEO4J, INC., a Delaware corporation,
 20 NEO4J SWEDEN, AB,

Plaintiffs,

21 v.

22 PURETHINK LLC, a Delaware limited
 23 liability company, IGOV INC., a Virginia
 24 corporation, and JOHN MARK SUHY, an
 individual,

25 Defendants.

CASE NO. 5:18-cv-07182-EJD

**SECOND STIPULATION AND
~~PROPOSED~~ ORDER RE DISMISSAL OF
 DEFENDANTS' COUNTERCLAIMS AND
 AFFIRMATIVE DEFENSES**

26 AND RELATED COUNTERCLAIMS.
 27

STIPULATION

1
2 This Stipulation is made between Plaintiffs and Counter-Defendants Neo4j, Inc. and
3 Neo4j Sweden AB (collectively “Plaintiffs”) and Defendants and Counterclaimants PureThink
4 LLC, iGov Inc. and John Mark Suhy (collectively “Defendants”) through their respective
5 attorneys:

6 WHEREAS, Defendants appealed the Court’s Order Granting Plaintiffs’ Motion for
7 Partial Summary Judgment; Denying Defendants’ Cross-Motion For Summary Judgment
8 (“Preliminary Injunction Order”), which is based, in part, on this Court’s determination that the
9 Neo4j Sweden Software License did not permit Defendants to remove the Commons Clause from
10 that license. *See* Dkt. No. 118 at 6:18-26, 24:7-25:19; Dkt. No. 121.

11 WHEREAS, on September 2, 2021, the parties stipulated to narrowing the scope of their
12 claims to streamline Phase 2, and the Court adopted that stipulation as an order. Dkt. No. 133.
13 Defendants therein agreed that should the Court of Appeal affirm that ruling, Defendants would
14 no longer pursue and take all necessary steps to dismiss their Seventh Cause of Action for
15 Declaratory Relief, which seeks a determination as to whether Neo4j Sweden AB’s inclusion of
16 Common Clause in the Neo4j Sweden Software License violated its terms, and similarly pled
17 Fifth, Sixth and Thirteenth Affirmative Defenses. *Id.* at 3:1-9.

18 WHEREAS, on February 18, 2022, the Ninth Circuit issued a Memorandum Disposition,
19 affirming the Preliminary Injunction Order. Dkt. No. 140. The Ninth Circuit further indicated
20 this Memorandum Disposition was subject to Ninth Circuit Rule 36-3, which provides that such a
21 decision is precedential for purposes of the doctrine of law of the case, or rules of claim
22 preclusion and/or issue preclusion. CTA9 Rule 36-3(a).

23 WHEREAS, in light of the Ninth Circuit’s Memorandum Disposition affirming this
24 Court’s interpretation of the Neo4j Sweden Software license (Dkt. No. 140) and the Ninth
25 Circuit’s denial of Defendants’ petition for rehearing (Dkt. No. 141), and as previously stipulated,
26 Defendants’ Seventh Cause of Action for Declaratory Relief (Dkt. No. 72, ¶¶ 62-69), and Fifth,
27 Sixth and Thirteenth Affirmative Defenses (Dkt. No. 91 at 19:9-20:9, 22:22-24:5) are no longer
28 legally viable.

1 WHEREAS, Fed. R. Civ. P. 41 only permits the complete dismissal of a complaint or
2 counterclaim, and does not permit the dismissal of only certain claims “from a multi-claim
3 complaint.” *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1392 (9th Cir. 1988). Instead,
4 where a party seeks to drop certain claims, the proper procedure is to either amend the complaint
5 pursuant to Fed. R. Civ. P. 15(a) or stipulate that certain claims will not be pursued or will be
6 dismissed. *See Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 688 (9th Cir.
7 2005) (“Federal Rule of Civil Procedure 15(a) is the appropriate mechanism ‘[w]here a plaintiff
8 desires to eliminate an issue, or one or more but less than all of several claims, but without
9 dismissing as to any of the defendants’”) (internal citations omitted).

10 WHEREAS, on September 3, 2021, Plaintiffs filed a motion for a judgment on the
11 pleadings on (a) the First, Fifth and Sixth Causes of Action asserted by Defendants in their
12 Second Amended Counterclaim (“SACC”); and (b) the First, Second and Sixth Affirmative
13 Defenses asserted in Defendants’ Answer to the Third Amended Complaint (“Answer”), which
14 are based on the same theories as and/or seek the same relief sought in their Fifth and Sixth
15 Causes of Action. *See* Dkt. No. 132.

16 WHEREAS, after being fully briefed by the parties, the Court took Plaintiffs’ Motion for
17 a Judgment on the Pleadings under submission on January 4, 2022. *See* Dkt. No. 139.

18 ACCORDINGLY, IT IS HEREBY STIPULATED THAT:

19 1. Defendants will no longer pursue and agree to dismiss with prejudice their (a)
20 Seventh Cause of Action for Declaratory Relief asserted in their SACC (Dkt. No. 72, ¶¶ 62-69);
21 and (b) Fifth, Sixth and Thirteenth Affirmative Defenses asserted in Defendants’ Answer (Dkt.
22 No. 91 at 19:9-20:9, 22:22-24:5).

23 2. Defendants stipulate to a judgment on the pleadings in favor of Plaintiffs with
24 respect to Defendants’ Sixth Affirmative Defense (*id.* at 20:2-9), and a dismissal of that defense
25 with prejudice.

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1 3. Plaintiffs’ Motion for a Judgment on the Pleadings as to (a) the First, Fifth and
2 Sixth Causes of Action asserted by Defendants in the SACC; and (b) the First and Second
3 Affirmative Defenses asserted in Defendants’ Answer remains under submission and is still
4 subject to being ruled on by the Court in conjunction with that Motion.

5 4. Plaintiffs and Defendants will further amend their pleadings consistent with the
6 foregoing stipulation and the parties’ prior stipulation (Dkt. No. 133), and in a manner consistent
7 with the Court’s forthcoming ruling on Plaintiffs’ Motion for a Judgment on the Pleadings within
8 twenty-one (21) days after the Court issues an order ruling on that motion.

9 **IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.**

10 Dated: March 30, 2022

HOPKINS & CARLEY
A Law Corporation

By: /s/ Jeffrey M. Ratinoff

John V. Picone III
Jeffrey M. Ratinoff
Attorneys for Plaintiffs and
Counter-Defendants
NEO4J, INC. and NEO4J SWEDEN AB

16 Dated: March 30, 2022

/s/ Adron W. Beene

Adron W. Beene
Adron G. Beene
Attorneys for Defendants and Counter-
Claimants
PURETHINK LLC, IGOV INC., and
JOHN MARK SUHY

21 **IT IS SO ORDERED.**

23 Dated: March 30, 2022



EDWARD J. DAVILA
United States District Court Judge