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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 NEO4J, INC., a Delaware corporation,
14 NEO4J SWEDEN AB, a Swedish
15 corporation,

16 Plaintiffs,

17 v.

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

19 Defendants.

20
21 AND RELATED COUNTERCLAIMS.

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

23 **PLAINTIFFS' REPLY BRIEF IN
24 SUPPORT OF MOTION FOR JUDGMENT
25 ON THE PLEADINGS RE: DEFENDANTS'
26 SECOND AMENDED COUNTERCLAIMS
27 AND ANSWER TO THIRD AMENDED
28 COMPLAINT**

29 **[Fed. R. Civ. P. 12(c)]**

30 Date: January 13, 2022
31 Time: 9:00 a.m.
32 Dept.: Courtroom 4, 5th Floor
33 Judge: Hon. Edward J. Davila

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1 **I. INTRODUCTION**

2 Defendants skirt around the main defect in their Intentional Interference with Prospective
 3 Economic Advantage (“IIPEA”) claim identified by Plaintiffs in their moving papers – they can no
 4 longer rely on allegations the restrictions in Section 4.3.2 of the Partner Agreement are
 5 automatically void as a matter of public policy in light of *Ixchel Pharma, LLC v. Biogen, Inc.*,
 6 9 Cal.5th 1130 (2020). Since this is the only allegation in Defendants’ Second Amended
 7 Counterclaim (“SACC”) purporting to establish an independent wrongful act by Neo4j, Inc.
 8 (“Neo4j USA”), their IIPEA claim fails as a matter of law. For this same reason, Defendants’ Fifth
 9 Cause of Action for Declaratory Relief and First Affirmative Defense asserted in their Answer to
 10 the Third Amended Complaint (“Answer”) are no longer legally viable.

11 Defendants’ unsupported assertion that these claims and affirmative defense can be
 12 salvaged under the “rule of reason” is fundamentally flawed. There are no facts alleged – and none
 13 proposed to be added via amendment – that establish the relevant market and that Neo4j USA has
 14 market power within such market, which is necessary under California law to establish that Section
 15 4.3.2 violates the rule of reason. Nor can Defendants establish that Section 4.3.2 amounts to an
 16 unlawful restraint on trade because a manufacturer’s own products cannot as a matter of law
 17 comprise a relevant product market. Likewise, Defendants’ allegations that they were injured as
 18 competitors of Neo4j USA would negate any attempt by them to establish a violation of the rule of
 19 reason. To establish an unlawful restraint on trade based on the rule of reason, Defendants must
 20 allege harm to competition in the market. Consequently, granting them leave to amend their First
 21 and Fifth Causes of Action and First Affirmative Defense would be futile.

22 Defendants also fail to recognize their admission that the restrictions in Section 4.3.2
 23 expired in July 2020 means there is no current case and controversy that would give this Court
 24 jurisdiction over their Fifth Causes of Action and First Affirmative Defense under the Declaratory
 25 Judgment Act. The same is true with Defendants’ Sixth Cause of Action, and Second and Sixth
 26 Affirmative Defenses, which seek a declaration that Sections 4.3.1 and 4.3.2 of the Partner
 27 Agreement constitute “additional restrictions” and violate the terms of the AGPL. Since these
 28 restrictions are no longer in force or effect by their own terms, the question of whether these

1 provisions violate the AGPL is moot. Accordingly, the Court should grant a judgment on the
 2 pleadings in favor of Neo4j USA and dismiss these claims and defenses with prejudice as there are
 3 no set of facts alleged by Defendants that could revive these claims and defenses.

4 **II. LEGAL ARGUMENT**

5 **A. The SACC Fails to Allege an Independently Wrongful Act**

6 Defendants allege that Neo4j USA interfered with their prospective economic relationships
 7 by telling potential customers Defendants could not provide support services to licensees of open
 8 source versions of Neo4j software for a period of 36 months pursuant to Section 4.3.2 of the Partner
 9 Agreement. Dkt. No. 72, ¶ 27. There is no debate that Defendants must plead and prove that these
 10 acts are wrongful apart from the interference itself. *See Korea Supply Co. v. Lockheed Martin*
 11 *Corp.*, 29 Cal.4th 1134, 1154 (2003).

12 Defendants concede that *Biogen* confirms non-compete provisions in contracts entered into
 13 between businesses are not void as a matter of public policy pursuant to Section 16600. *See* Dkt.
 14 No. 137 at 5:11-6:1. Remarkably, Defendants then claim the SACC does not allege Section 4.3.2
 15 of the Partner Agreement amounts to a per se violation of Section 16600. *Id.* at 6:2-3. This is
 16 contrary to their prior representation to the Court that “this provision restricting them from engaging
 17 in certain business practices for three years violated public policy pursuant to [] §16600.” Dkt. No.
 18 58 at 3:19-21. Defendants also conclusively allege in the SACC that

19 The Partner Agreement seeks to restrict partners from working with
 20 the open source version of Neo4j software during the Partner
 21 Agreement and for 3 years after termination. But these restrictions
 22 are invalid under California Business and Professions Code §16600.

23 * * *

24 NEO4J USA’s interference was an independent wrongful act as it
 25 violated California Business and Professions Code §16600

26 *See* Dkt. No. 137, ¶¶ 13, 29; *see also* Dkt. No. 137, ¶¶ 55-57 and Dkt. No. 91 at 14:4-22. Since
 27 Defendants do not allege any other independently wrongful act, their IIPEA claim must fail as a
 28 matter of law. *See Korea Supply Co.*, 29 Cal.4th at 1154; *accord Name.Space, Inc. v. Internet*
Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1134 (9th Cir. 2015) (recognizing that under
Korea Supply “the failure to sufficiently allege a wrongful act outside of the interference itself

1 forecloses an interference with prospective economic advantage claim”).

2 **1. Defendants Fail to Allege Facts Establishing Section 4.3.2 Violates the**
 3 **Rule of Reason Governing Commercial Contracts**

4 Defendants claim that *Biogen* still allows businesses to challenge contractual restrictions as
 5 a restraint on trade under the “rule of reason.” Dkt. No. 137 at 5:12-6:1. Yet, assert “it is unclear
 6 if claims by entities must now allege the restriction violates the rule of reason.” *Id.* at 6:3-5. This
 7 is a disingenuous assertion because it was conclusively established long ago that Defendants must
 8 allege facts establishing an independent wrong to maintain their IIPEA claim. *See Korea Supply*,
 9 29 Cal.4th at 1154; *Name.Space, Inc.*, 795 F.3d at 1134.

10 Defendants claim the now-expired restriction imposed by Section 4.3.2 is a restraint on
 11 trade because it prevents them from using or supporting Neo4j Sweden’s open source software.
 12 Dkt. No. 137 at 5:14-19. This somehow constitutes a “total suppression of competition” because
 13 Neo4j USA is “preventing knowledge [sic] people from supporting the open source software” and
 14 “can charge money for the same software.” *Id.* at 5:16-18. Other than not making any sense, this
 15 argument is untethered to any ultimate facts alleged in the SACC. *See Schneider v. Calif. Dep’t of*
 16 *Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (“‘new’ allegations contained in the
 17 [plaintiff]’s opposition … are irrelevant for Rule 12(b)(6) purposes”).

18 More importantly, Defendants do not understand what constitutes an unlawful restraint on
 19 trade. A contract amounts to a restraint on trade where it creates a monopoly, restricts supply, or
 20 fixes prices. *Biogen*, 9 Cal.5th at 1154. However, “[c]ontracts with the purpose and effect of
 21 promoting trade and competition are valid even if their terms incidentally restrain commercial
 22 freedom in some way.” 9 Cal.5th at 1156. As recognized by the *Biogen* court, “[b]usinesses
 23 engaged in commerce routinely employ legitimate partnership and exclusive dealing arrangements,
 24 which limit the parties’ freedom to engage in commerce with third parties. *Id.* at 1160–61. Thus,
 25 the reasonableness of contractual restraints on business operations and commercial dealings, must
 26 “be read in accordance with the Cartwright Act....” *Id.*

27 “The rule of reason weighs the anticompetitive effects of the conduct in the relevant market
 28 against its procompetitive effects, and determines whether, on balance, the practice harms

1 competition. *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 55 Cal.App.5th
 2 381, 400 (2020). In particular, the court examines “facts peculiar to the business in which the
 3 restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the
 4 reasons for its adoption.” *In re Cipro Cases I & II*, 61 Cal.4th 116, 146 (2015) (cited by
 5 Defendants); *accord Biogen*, 9 Cal. 5th at 1151 (quoting same). To state a valid antitrust claim
 6 based on the rule of reason,

7 a plaintiff must allege that the defendant has market power within a
 8 legally cognizable relevant market. “[T]he plaintiff must allege both
 9 that a ‘relevant market’ exists and that the defendant has power
 10 within that market.” A plaintiff must delineate a relevant market and
 show that the defendant plays enough of a role in that market to
 impair competition significantly.

11 *Dang v. San Francisco Forty Niners*, 964 F.Supp.2d 1097, 1104 (N.D. Cal. 2013) (internal citations
 12 omitted). Thus, a plaintiff fails to state a claim based on the rule of reason when it fails to identify
 13 the relevant market or fails to allege defendant has market power within such market. *See Tanaka*
 14 *v. University of Southern California*, 252 F.3d 1059, 1062–63 (9th Cir. 2001) (affirming dismissal
 15 where plaintiff failed to identify an “appropriately defined” market and failed to allege defendant’s
 16 conduct had “significant anticompetitive effects within a relevant market”); *see also Nova Designs,*
 17 *Inc. v. Scuba Retailers Ass’n*, 202 F.3d 1088, 1092 (9th Cir. 2000) (“[t]he Cartwright Act is
 18 patterned after the Sherman Act, and federal cases interpreting the Sherman Act are applicable to
 19 problems arising under the Cartwright Act”) (internal quotes and citations omitted).

20 Defendants do not allege that Neo4j Software is the only graph database software available
 21 in that market. Indeed, there are ***no facts*** alleged in the SACC identifying the relevant market or
 22 that Neo4j USA has market power therein. The SACC also fails to explain how Section 4.3.2 of
 23 the Partner Agreement restricts ***overall competition*** or otherwise harms competition in ***any*** relevant
 24 market. Rather, citing to Neo4j USA’s email informing the IRS it had terminated its agreement
 25 with PureThink, Defendants allege that Section 4.3.2 restricted only PureThink’s ability to support
 26 open source Neo4j Software for a period of 36 months. *See* SACC at 5:18-22, 9:11-20, 11:1-15
 27 and Exh. D. This is insufficient as a matter of law because “antitrust law generally does not view
 28 the elimination of a particular competitor—without more—as harm to competition.” *Flagship*

1 *Theatres*, 55 Cal.App.5th at 420; *see also Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1200
 2 (9th Cir. 2012) (plaintiff claiming unlawful restraint on trade based on the rule of reason must allege
 3 harm to competition in the market and cannot succeed by merely showing harm to itself as a
 4 competitor); *Austin v. McNamara*, 979 F.2d 728, 738–739 (9th Cir. 1992) (plaintiff “was required
 5 to show not merely injury to himself as a competitor, but rather injury to competition”).

6 Defendants also misapprehend the additional authority cited by Plaintiffs establishing that
 7 the contractual provision in question does not violate Section 16600 as a matter of law. In
 8 particular, Plaintiffs argued that PureThink cannot claim that Section 4.3.2 is invalid because
 9 PureThink agreed to be bound by a specific license to support and distribute Neo4j Software in
 10 exchange for good and valuable consideration. *See* Dkt. No. 132 at 7:26-8:7. Rather than directly
 11 address this point, Defendants argue by analogy that “firing a person who refuses to sign an
 12 agreement with a restrictive covenant is actionable.” *See* Dkt. No. 137 at 3:23-4:3.

13 This analogy misses the mark because, as discussed above, contractual limitations on
 14 business operations and commercial dealings are treated differently under Section 16600 than
 15 contracts between employers and employees. *See Biogen*, 9 Cal. 5th at 1158-60. Thus, *D’sa v.*
 16 *Playhut, Inc.*, 85 Cal.App.4th 927 (2000), a wrongful termination case brought by an employee
 17 against their employer, is inapplicable. It is also distinguishable because Defendants do not allege
 18 in the SACC that Neo4j USA coerced PureThink to enter into the Partner Agreement. *See Epstein*
 19 *v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) (“unwarranted inferences are insufficient
 20 to defeat a motion to dismiss for failure to state a claim”).

21 Defendants’ attempt to distinguish *Universal Gym* by arguing it did not involve “an
 22 unlawful restrictive covenant” also misses the mark. *See* Dkt. No. 137 at 4:4-12. This case stands
 23 for the proposition that it is **lawful** to limit a party’s right to use the features and designs of product
 24 it obtained a license to manufacture after termination of that agreement. *Universal Gym Equip.,*
 25 *Inc. v. ERWA Exercise Equip. Ltd.*, 827 F.2d 1542, 1550 (Fed. Cir. 1987). Contrary to Defendants,
 26 *King v. Gerold*, 109 Cal.App.2d 316 (1952) similarly holds that barring a licensee from making the
 27 licensed product if the license was not renewed does not violate Section 16600 since the licensee
 28
 ///

1 could still make other competing products.¹

2 These cases are instructive here. Prior to entering into the Partner Agreement, PureThink
 3 was free to provide support services to licensees using Neo4j Software under the AGPL. *See* Dkt.
 4 No. 72, ¶¶ 9, 30. PureThink voluntarily entered into the Partner Agreement and obtained tangible
 5 benefits, such as a 25% commission and access to confidential sales and customer information, in
 6 exchange for giving up the right to offer or provide support services to licensees of open source
 7 Neo4j Software for 36 months after termination of that agreement. *See* Dkt. No. 72, ¶ 12 and Exh.
 8 B (p. 53 of 63). If anything, the Partner Agreement is *less* restrictive than those in *Universal Gym*
 9 and *King*, which imposed indefinite post-termination restrictions on the licensees.

10 Defendants further ignore that there were no restrictions in Section 4.3.2 on PureThink's
 11 right to provide support services for end-users that purchase a commercial license for Neo4j
 12 Software or end-users of any other graph database software. As a result, Defendants cannot claim
 13 establish the necessary independent wrong because Section 4.3.2 is not a restraint on trade and thus
 14 does not violate Section 16600.

15 **2. Defendants' Remaining Arguments Fail to Establish a Violation of
 16 Section 16600.**

17 In an attempt to save their IIPEA claim, Defendants make additional arguments that are not
 18 supported by allegations in the SACC or are contrary to law. In this regard, Defendants assert the
 19 restrictions in Section 4.3.2 are unlawful because Neo4j Software source code licensed on an open
 20 source basis is not a trade secret. *See* Dkt. No. 137 at 5:5-10. This ignores that in exchange for
 21 agreeing to the restrictions imposed by the Partner Agreement, PureThink obtained access to Neo4j
 22 USA's proprietary customer database, sales and marketing material and pricing information

23 ¹ Defendants attempt to distinguish this case by arguing that it speaks to an employer's right to
 24 protect its proprietary information by restricting its employee's use thereof. *See* Dkt. No. 137 at
 25 4:18-5:4. Defendants misconstrue *King*, which involved a trailer designer granting a license to a
 26 trailer manufacturer. This was a commercial relationship, not an employer-employee relationship.
King, 109 Cal.App.2d at 317-18 ("Appellant is not thereby prohibited from carrying on his lawful
 27 business of manufacturing trailers but is barred merely from manufacturing and selling trailers of
 28 the particular design and style invented by respondent who in the first instance licensed appellant
 to use such design for a limited time only.").

1 pursuant to the confidentiality provisions therein. *See* Dkt. No. 72, Exh. B at § 3 and Dkt. No. 72
 2 at p. 53 of 63. As such, it was reasonable for Neo4j USA to restrict PureThink's ability to use such
 3 proprietary and confidential information to compete with Neo4j USA in providing support for
 4 Neo4j Software for a certain period of time after termination. *See Universal Gym Equip.*, 827 F.2d
 5 at 1551 (non-compete clause was valid under California law despite its lack of "temporal and
 6 geographic limitations" because it did not prohibit defendant from competing altogether—rather,
 7 merely limited the use of plaintiffs' actual confidential and non-confidential proprietary features,
 8 designs, technical knowledge, and know-how); *see also King*, 109 Cal.App.2d at 318.

9 Defendants' attempt to turn their IIPEA claim into an employee mobility case fares no
 10 better. Without citing to any facts alleged in the SACC, Defendants suggest that because Neo4j
 11 USA alleges that Suhy is the alter ego of PureThink, Section 4.3.2 can be construed as unlawful
 12 restriction on employee mobility, which is a per se violation of Section 16600. Dkt. No. 137 at 6:8-
 13 22. This is untenable since immediately before making this argument, Defendants assert that the
 14 SACC does **not** allege such a per se violation. *Id.* at 6:2-3. It is also irrelevant what Plaintiffs may
 15 allege in their complaint since the Court only looks to the legal sufficiency of the allegations in the
 16 challenged pleadings for the purposes of ruling on the present motion. *See Chavez v. United States*,
 17 683 F.3d 1102, 1108 (9th Cir. 2012); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In this
 18 regard, Defendants only allege that PureThink is a signatory to the Partner Agreement, and do not
 19 assert the IIPEA claim on behalf of Suhy. *See* Dkt. No. 72, ¶¶ 15, 35-43. Thus, Defendants are
 20 asking the Court to make an unwarranted inference. *See Epstein*, 83 F.3d at 1140.

21 Even if Plaintiffs' alter ego allegations could be considered part of the SACC, Defendants
 22 are misrepresenting them to the Court. In their operative complaint, Plaintiffs only allege that iGov
 23 is the alter ego of PureThink, and do not allege that Suhy is the alter ego of PureThink or iGov. *See*
 24 Dkt. No. 90, ¶¶ 9-14, 42, 141. Consequently, Defendants' "employee alter ego" arguments are
 25 based on a false premise, and as a result, the Court should disregard them.

26 Finally, Defendants do not dispute that *Arntz Contracting Co. v. St. Paul Fire & Marine*
 27 *Ins. Co.*, 47 Cal.App.4th 464 (1996) stands for the proposition that truthful statements about
 28 standard business practices are "not wrongful conduct actionable as intentional interference with

1 prospective economic relations.” Dkt. No. 137 at 6:24-7:7. In doing so, Defendants effectively
 2 concede that if the restrictions imposed by Section 4.3.2 do not violate Section 16600, then Neo4j
 3 USA’s alleged communications to potential customers about those restrictions **cannot** constitute
 4 an independent wrong. *See* Dkt. No. 72, ¶¶ 27-29. It then logically follows that because the SACC
 5 fails to plausibly allege any other independently wrongful act, their IIPEA fails as a matter of law.
 6 *See Name.Space, Inc.* 795 F.3d at 1133 (recognizing that an IIPEA claim “requires that the
 7 defendant’s conduct be ‘wrongful by some legal measure other than the fact of interference itself’”)
 8 (quoting *Korea Supply*, 29 Cal.4th at 1154).

9 **B. Defendants Do Not Address the Other Defects in their IIPEA Claim**

10 Plaintiffs argue in their moving papers that the SACC fails to allege sufficient facts
 11 establishing that a real economic relationship was actually disrupted. *See* Dkt. No. 132 at 9:28-
 12 11:2. In response, Defendants argue that their listing specific entities and the purported “exclusivity
 13 agreement” with Neo4j USA to sell Government Edition meets this requirement. Dkt. No. 137 at
 14 7:14-22. These allegations fall well short of what is required to plead an IIPEA claim.

15 First, Defendants cannot predicate their claim on the exclusivity agreement for the
 16 Government Edition of Neo4j Software because Neo4j USA was a party to that agreement. *See*
 17 *Korea Supply Co.*, 29 Cal. 4th at 1153. That agreement is alleged to be “a separate and distinct
 18 agreement from the Partner Agreement” for that version of the software and does not contain any
 19 post-termination restrictions. *See* Dkt. No. 72, ¶¶ 16, 50 and Exh. C. It also cannot logically
 20 establish any **prospective** relationship with third parties because Defendants allege that Neo4j USA
 21 terminated it **prior** to engaging in the alleged acts of interference. *See* Dkt. No. 72 at 9:11-14.

22 Second, Defendants fail to address that the SACC merely alleges in a conclusory manner
 23 that Defendants had “an economic relationship with the possibility of future economic
 24 relationships” and were “working on potential business opportunities” with a laundry list of third
 25 parties. Dkt. No. 72 at ¶¶ 23-25. The economic relationship element of an IIPEA claim “has two
 26 parts: (1) an existing economic relationship that (2) contains the probability of an economic benefit
 27 to the plaintiff.” *Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.*, 2 Cal.5th 505, 512 (2017). An
 28 IIPEA claim “protects the expectation that the relationship eventually will yield the desired benefit,

1 not necessarily the more speculative expectation that a potentially beneficial relationship will
 2 eventually arise.” *Id.* at 516 (internal quotations and citation omitted); *see also Westside Ctr. Assoc.*
 3 *v. Safeway Stores 23, Inc.*, 42 Cal.App.4th 507, 523 (1996) (plaintiffs must plead facts showing
 4 that it is reasonably probable that they would have received some expected benefit).

5 There are also no facts alleged in the SACC plausibly establishing that these “business
 6 opportunities” were real, i.e. Defendants were in actual contractual negotiations or had responded
 7 to request for proposal for supporting open source Neo4j Software. Rather, these allegations are
 8 speculative and conclusory, and thus are insufficient to establish it was reasonably probable that
 9 Defendants would have received some expected benefit had it not been for Neo4j USA’s wrongful
 10 interference. *See Sybersound Recs., Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008)
 11 (affirming dismissal of interference claim that set forth only general allegations of relationships
 12 being disrupted, as opposed to a lost contract or failed negotiation); *accord Dooley v. Crab Boat*
 13 *Owners Ass’n*, 271 F.Supp.2d 1207, 1216-17 (N.D. Cal. 2003) (“economic relationship must be
 14 either in the form of a contract or an existing relationship with an identifiable third party”).

15 Defendants’ reliance on Paragraph 31 as evidencing Neo4j USA’s communications with
 16 third parties does not change things. *See* Dkt. No. 137 at 7:21-22. This paragraph merely alleges
 17 that “PureThink and iGov’s relationship with the Agencies and companies was actually and totally
 18 disrupted by NEO4J USA’s wrongful interference.” *See* Dkt. No. 72, ¶ 31. There are no substantive
 19 facts alleged elsewhere in the SACC to support such conclusory allegations.

20 Finally, Defendants’ reliance on allegations about its relationship with the IRS do not save
 21 its IIPEA claim. *See* Dkt. No. 137 at 7:23-8:8. While the SACC alleges that PureThink had a
 22 contract with the IRS, it does not allege any facts plausibly establishing that Neo4j USA’s July 11,
 23 2017 letter to the IRS disrupted a ***future economic benefit*** expected from the IRS. *See* Dkt. No. 72,
 24 ¶ 20. Defendants argue that this letter was dated before the expiration of that contract, but there
 25 are no facts alleged in the SACC that would permit a reasonable inference that IRS terminated the
 26 existing contract, let alone refuse to renew or enter into a new contract due to that letter.

27 Even if it were sufficient to establish an IIPEA claim as to the IRS, there are still no facts
 28 alleged in the SACC that PureThink had a lost contract or a failed negotiation with any of the other

1 entities identified in the SACC.² *See* Dkt. No. 72, ¶¶ 23-24. Likewise, there are no such facts
 2 alleged for any of the entities iGov claims to have had prospective economic relations. *See id.*, ¶
 3 25. Instead, Defendants conclude that they were “working on potential business opportunities with
 4 the possibility of future economic relationships,” and that Neo4j USA’s “interference was intended
 5 to and did disrupt the economic relationship between PureThink, iGov and the Agencies and
 6 companies.” This is not enough to establish a reasonable inference. *See Westside Ctr. Assoc.*, 42
 7 Cal.App.4th 507, 522 (1996) (“[t]he law precludes recovery for overly speculative expectancies by
 8 initially requiring proof the business relationship contained the probability of future economic
 9 benefit to the plaintiff”) (internal quotes and citations omitted); *Silicon Knights, Inc. v. Crystal*
 10 *Dynamics, Inc.*, 983 F.Supp. 1303, 1311-12 (N.D. Cal. 1997) (dismissing IIPEA claim where
 11 complaint did not provide facts alleging an actual disruption to negotiations or potential contracts).³
 12 Therefore, at minimum, the Court should dismiss the IIPEA claim asserted by iGov, and to the
 13 extent PureThink bases its IIPEA claim on “agencies and companies” other than the IRS.

14 **C. Defendants Fail to Address There is No Longer Any Case or Controversy to
 15 Assert their Fifth Cause of Action and First Affirmative Defense**

16 Defendants argue that they can still seek a determination that Section 4.3.2 violates Section
 17 16600 because it will allow them to revive prior relationships “tarnished” by Neo4 USA’s alleged
 18 enforcement of that provision. *See* Dkt. Not. 137 at 8:24-9:8. This defies logic since nothing has
 19 stopped them from reviving them after it expired over a year ago, and there is nothing in the SACC
 20 to allow a reasonable inference to the contrary. *See* Dkt. No. 100 at 17:19-23 (Defendants admitting
 21 that the restrictions in Section 4.3.2 of the Partner Agreement “invalid or not, expired July 11,
 22 2020”). Indeed, Defendants do not allege in the SACC that a customer refused to retain them *after*
 23

24 ² While Defendants allege PureThink “did deals” with MPO, Sandia National Laboratories, the FBI
 25 and the IRS in the past, they only allege facts suggesting that an existing deal with the IRS was
 26 allegedly disrupted by Neo4j USA and say nothing as to any future, concrete opportunity with these
 27 other entities. *See* Dkt. No. 72, ¶¶ 18, 20-21.

28 ³ Ironically, Defendants attempt to distinguish *Silicon Knights* by arguing that the IIPEA claim in
 29 that case was dismissed because the defendant “did not explain the nature of the relationship or
 30 how they were disrupted.” Dkt. No. 137 at 8:10-12. This is exactly what Defendants fail to do here.

1 Defendants were no longer restricted by that provision.

2 Defendants also completely ignore the legal precedent cited in Plaintiffs' moving papers
 3 that "an actual controversy must be extant at all stages of review, not merely at the time the
 4 complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10 (1974). Because Defendants
 5 admit this provision, "invalid or not," has expired, the issue is moot thereby depriving this Court
 6 jurisdiction under the Declaratory Judgment Act. *See Kremens v. Bartley*, 431 U.S. 119, 128–29
 7 (1977); *see also Foster v. Carson*, 347 F.3d 742, 747 (9th Cir.2003) ("[w]e do not have the
 8 constitutional authority to decide moot cases"); *Cath. Charities CYO v. Chertoff*, 622 F.Supp.2d
 9 865, 879 (N.D. Cal. 2008) ("[a] federal court has no authority to give opinions on moot questions").

10 Even assuming jurisdiction remained, Defendants' Fifth Cause of Action and First
 11 Affirmative Defense still fail as a matter of law. As detailed above, Defendants concede that a
 12 commercial contract restricting one party from competing with the other is **not** automatically void
 13 pursuant to Section 16600. Since there are no facts alleged plausibly establishing that Section 4.3.2
 14 constitutes an unlawful restraint on trade by violating the rule of reason, Defendants' declaratory
 15 relief claim and mirror defense fail as a matter of law. *See Tanaka*, 252 F.3d at 1062–63.

16 Nonetheless, Defendants assert that they are still entitled to assert an affirmative defense
 17 based on the "illegality" of Section 4.3.2. See Dkt. No. 137 at 9:5-8. FRCP 8(c)(1) requires the
 18 assertion of such a defense to avoid waiver, and has no bearing on the legal merits of such a defense.
 19 In this regard, it is not legally viable in light of Defendants' previous admission that Neo4j USA is
 20 not asserting a breach of contract claim based on Section 4.3.2. *See* Dkt. No. 72, ¶ 13; *see also*
 21 Dkt. No. 90 at ¶¶ 134–147 (Neo4j USA's claim for breach of contract based on only Sections 3.1,
 22 4.1 and 7.3 of the Partner Agreement).

23 Finally, Defendants reliance on *Applied Materials, Inc. v. Advanced Micro-Fabrication*
 24 *Equip. (Shanghai) Co.*, 630 F.Supp.2d 1084 (N.D. Cal. 2009) for the proposition that they may
 25 continue to assert a declaratory relief claim based on Section 16600 is misplaced. This was a
 26 summary judgment case where the plaintiff-employer sought to enforce an inventions assignment
 27 provision in an employment agreement and defendant-employees sought declaratory relief that the
 28 provision violated Section 16000. The issue of whether jurisdiction under Declaratory Judgment

1 Act over this claim was not decided by the court in that case. Moreover, unlike the present case
 2 where the provision in question has expired and Neo4j USA is not asserting a claim based thereon,
 3 there was an actual case and controversy over the enforceability of that provision. Accordingly,
 4 the Court should grant a judgment on the pleadings in favor of Neo4j USA on Defendants' Fifth
 5 Cause of Action and First Affirmative Defense and dismiss them with prejudice.

6 **D. Defendants' Sixth Cause of Action and Second and Sixth Affirmative
 7 Defenses Fail to State a Claim**

8 Defendants fail to provide a viable legal basis for their Sixth Cause of Action and Second
 9 and Sixth Affirmative Defenses, which seek a declaration that Sections 4.3.1 and 4.3.2 of the
 10 Partner Agreement constitute "additional restrictions" in violation of Section 10 of the AGPL. In
 11 particular, their assertion that Neo4j USA is somehow bound by the AGPL because Neo4j USA
 12 offered a commercial version of Neo4j Software based on Neo4j Sweden's open source version is
 13 not a legally cognizable basis to seek declaratory relief. *See* Dkt. No. 137 at 9:19-21.

14 As an initial matter, Neo4j USA is not a party to the AGPL. *See* Dkt. No. 72, ¶ 7 and Exh.
 15 A. Thus, Neo4j USA was not legally bound by the terms of the AGPL when it entered into the
 16 Partner Agreement with PureThink. *See Kendis v. Cohn*, 90 Cal. App. 41, 61 (1928) ("[i]t is a
 17 proposition of law, so well established as to be almost axiomatic, that a party cannot be charged
 18 upon a contract to which he is not a party"). Even if Neo4j USA were somehow legally bound,
 19 there is no inherent conflict. As recognized by another court in this District a licensor may
 20 distribute software on an open source basis via the APGL, while simultaneously requiring an end-
 21 user to obtain a commercial license. *See Artifex Software, Inc. v. Hancom, Inc.*, 2017 WL 1477373,
 22 at *3 (N.D. Cal. Apr. 25, 2017) (licensor could assert a breach of contract claim where it used a
 23 dual-licensing model based on the GPL and APGL, and includes a notice provision in those licenses
 24 where the a licensee must abide by the terms thereof or obtain a commercial license from the
 25 licensor). To be sure, PureThink acknowledged and accepted the validity of this dual-licensing
 26 model when it entered into the Partner Agreement. *See* Dkt. No. 72, Exh. B.

27 Conversely, Defendants do not cite any legal authority to support their "joint author
 28 ownership rights" theory. *See* Dkt. No. 137 at 9:21-22. Nor are there any plausible facts alleged

1 in the SACC explaining how the terms of the AGPL would subject Neo4j USA to joint author
 2 ownership rights or otherwise be bound by its terms.

3 Defendants' argument that Neo4j USA "cannot evade the limitations to restrictions in the
 4 AGPL by adding restrictions in a Partner Agreement" fares no better. This Court has already
 5 rejected Defendants' view that Sections 7 and 10 of the AGPL do not allow a licensor to add
 6 "further restrictions" to that license. Even under Defendants' reading of the AGPL, any such
 7 restrictions would have to be transmitted with the software in question, not in a separate agreement.
 8 Dkt. No. 72, Ex. A § 10 ("If the Program as you received it, or any part of it, contains a notice
 9 stating that it is governed by this License along with a term that is a further restriction, you may
 10 remove that term."). PureThink also voluntarily gave up their right to use open source Neo4j
 11 Software when it entered into the Partner Agreement, and cannot now claim there is any conflict
 12 between the terms of that agreement and the AGPL. *See Universal Gym Equip.*, 827 F.2d at 1550.

13 Finally, Defendants fail to reconcile that all of the provisions in the Partner Agreement they
 14 claim to be "further restrictions" are no longer in force by their own terms. The restrictions imposed
 15 by Section 4.3.1 only lasted for the term of the Partner Agreement, and as admitted by Defendants,
 16 the restrictions imposed by Section 4.3.2 expired in July 2020. *See* Dkt. No. 72, Exs. B, D; Dkt.
 17 No. 100 at 17:19-23. As discussed above and in Plaintiffs' moving papers, there is no jurisdictional
 18 basis under the Declaratory Judgment Act because the issue of whether these provisions violate the
 19 AGPL are moot. *See* Dkt. No. 132 at 11:4-12:7, 214:14-27. Accordingly, the Court should grant a
 20 judgment on the pleadings in favor of Plaintiffs on Defendants' Sixth Cause of Action, and Second
 21 and Sixth Affirmative Defenses, and dismiss them with prejudice.

22 **E. Granting Defendants Leave to Amend their SACC Would be Futile**

23 Defendants request leave to amend, while at the same time claiming that "[i]t is unclear if
 24 an entity claimant on an interference claim must also allege the restriction violates the rule of
 25 reason...." Dkt. No. 137 at 10:10-22. This rings hollow since the *Biogen* court explained at length
 26 that Defendants must allege facts establishing that Section 4.3.2 violates Section 16600 pursuant to
 27 long-standing "rule of reason" analysis under the Cartwright Act. *See Biogen*, 9 Cal.5th at 1150-
 28 1162. The *Biogen* court made clear that this was necessary to establish an independently wrongful

1 act for an intentional interference claim.⁴ *Id.* at 1148.

2 Defendants have known about the impact of *Biogen* on the claims and defenses subject to
 3 this Motion for over a year and did nothing to address it in their pleadings. *See* Dkt. No. 62 at 3:15-
 4 7, 6:11-18. They also acknowledged during meet and confer that they would need to establish
 5 that the restrictions at issue violated the rule of reason. Dkt. No. 132-1, Ex. 2 (“We disagree *Ixchel*’s
 6 holding is as you stated. In that case, they apply the rule of reason which considers the
 7 anticompetitive nature of the restrictions.”). Thus, there is no excuse for Defendants’ continuing
 8 failure to allege facts that plausibly establish that Section 4.3.2 actually harmed competition in the
 9 relevant market and that any procompetitive justifications for the conduct did not outweigh that
 10 harm. *See Biogen*, 9 Cal.5th at 1150-1151. Defendants’ failure to identify facts in their Opposition
 11 that would plausibly establish the violation of the rule of reason reconfirms that granting them leave
 12 to amend would be futile. *See Somers v. Apple, Inc.*, 729 F.3d 953, 960 (9th Cir. 2013) (plaintiff’s
 13 claim she “might later establish some set of undisclosed facts” establishing antitrust injury not
 14 enough to survive Rule 12(b)(6) motion).

15 As noted in Plaintiffs’ moving papers, the Court should deny leave to amend where the
 16 “allegation of other facts consistent with the challenged pleading could not possibly cure the
 17 deficiency.” *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). Such is the case
 18 here. In particular, Defendants’ claims and defenses asserting that Section 4.3.2 violates Section
 19 16600 are premised on how Neo4j USA contracts with partners in the sale and support of Neo4j
 20 Software. This cannot as a matter of law establish an unlawful restraint on trade because “a
 21 manufacturer’s own products do not themselves comprise a relevant product market.” *See Apple,*
 22 *Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008) (recognizing that a company
 23 does not violate antitrust laws “by virtue of the natural monopoly it holds over its own product”).

24 Moreover, Defendants allege that Section 4.3.2 only prevented them from competing with
 25

26 ⁴ *Biogen* addressed the question whether a plaintiff asserting an intentional interference claim based
 27 on an at-will contract needed to allege an independently wrongful act. The *Biogen* court concluded
 28 that such a claim was akin to claim intentional interference prospective economic advantage, and
 thus required such a showing. 9 Cal.5th at 1140-1148.

1 Neo4j USA in supporting open source Neo4j Software, not commercially licensed Neo4j Software
 2 or any other graph database software. Thus, they cannot establish as a matter of law that this
 3 provision amounted to an unlawful restraint on trade. *See Flagship Theatres*, 55 Cal.App.5th at
 4 420; *Brantley*, 675 F.3d at 1200. Accordingly, it would be futile to grant Defendants leave to amend
 5 their IIPEA claim, Fifth Cause of Action for Declaratory Relief and First Affirmative Defense,
 6 which all hinge on them establishing that Section 4.3.2 violates the rule of reason. *See Low v.*
 7 *LinkedIn Corp.*, 900 F.Supp.2d 1010, 1033 (N.D. Cal. 2012) (a court should not grant leave to
 8 amend “where doing so would be an exercise in futility”); *see also Weisbuch v. Cty. of L.A.*, 119
 9 F.3d 778, 783 n.1 (9th Cir. 1997) (recognizing that a party may plead itself out of court where that
 10 party alleges facts establishing that it cannot prevail on its claim).

11 The Court should also deny Defendants leave to amend their Fifth and Sixth Causes of
 12 Action, along with related First, Second and Sixth Affirmative Defenses. There is no dispute that
 13 the cited provisions in the Partner Agreement are no longer enforceable by their own terms.
 14 Defendants’ request for declaratory judgment deeming those restrictions void is therefore moot and
 15 must be dismissed for lack of jurisdiction. As a result, granting Defendants leave to amend would
 16 be futile. *See Albrecht v. Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

17 **III. CONCLUSION**

18 For the foregoing reasons, Plaintiffs respectfully request that Court grant this motion for
 19 judgment on the pleadings and dismiss (a) the First, Fifth and Sixth Causes of Action asserted in
 20 the SACC; and (b) the First, Second, and Sixth Affirmative Defenses asserted in Defendants’
 21 Answer to the Third Amended Complaint with prejudice.

22 Dated: October 7, 2021

HOPKINS & CARLEY
 23 A Law Corporation

24
 25 By: /s/ Jeffrey M. Ratinoff
 26 Jeffrey M. Ratinoff
 27 Attorneys for Plaintiffs and Counter-
 28 Defendants
 NEO4J, INC. and NEO4J SWEDEN AB