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 OCEAN GARDEN PRODUCTS, INC.

7
 8 UNITED STATES DISTRICT COURT
 9 SOUTHERN DISTRICT OF CALIFORNIA

10 OCEAN GARDEN PRODUCTS, INC., a
 California corporation,

Case No. 01CV00301 J (RBB)

11 Plaintiff,

**FIRST AMENDED COMPLAINT FOR
 RESCISSION, BREACH OF CONTRACT,
 BREACH OF THE IMPLIED COVENANT OF
 GOOD FAITH AND FAIR DEALING,
 NEGLIGENCE, FRAUD, NEGLIGENT
 MISREPRESENTATION AND VIOLATION
 OF CALIFORNIA BUSINESS &
 PROFESSIONS CODE § 17200**

12 v.

13 IBM GLOBAL SERVICES, INC., a
 14 corporation doing business in California,
 and DOES 1-50, inclusive,

15 Defendant.

16
17 Plaintiff OCEAN GARDEN PRODUCTS, INC. alleges:

18 **PARTIES**

19 1. Plaintiff OCEAN GARDEN PRODUCTS, INC. ("OGP" and "Plaintiff") is a
 20 corporation organized and existing under the laws of the State of California, with its principal
 21 place of business at 3585 Corporate Court, San Diego, California 92123.

22 2. Defendant IBM GLOBAL SERVICES ("IBM GLOBAL") is a division of
 23 International Business Machines Corporation ("IBM"), a New York corporation. At all times
 24 relevant to the facts alleged in this Complaint, IBM GLOBAL conducted its business with OGP
 25 from IBM GLOBAL's California offices in Los Angeles, Orange and San Diego counties, and
 26 signed contracts bearing addresses in those counties. At certain relevant times, IBM GLOBAL
 27 conducted its business with OGP from its interim office established at OGP's premises in San
 28 Diego County.

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JURISDICTION AND VENUE

3. The actions and transactions complained of herein occurred in San Diego County, California.

4. This action was filed December 26, 2000 in San Diego Superior Court. The Superior Court of the State of California originally had jurisdiction over this action pursuant to California Code of Civil Procedure section 410.10.

5. IBM GLOBAL removed this action to the Southern District of California on or about February 22, 2001 based upon diversity of citizenship pursuant to 28 U.S.C. § 1441(a). This is a civil action of which this Court has jurisdiction under 28 U.S.C. § 1332(a).

GENERAL ALLEGATIONS

OGP Consults With IBM Regarding Its Computer System Needs

6. OGP is a well-established seafood supplier in the United States and abroad. It processes, packages, imports and sells a full line of frozen and canned seafood products, including frozen shrimp. Due to its substantial marketing and sales effort, OGP has achieved a worldwide reputation for high quality food products.

7. As is the case for any substantial company doing business in the current world economy, OGP's computer hardware and software information systems are essential to its ability to conduct its business. Without a reliable computer system compatible with OGP's operations, OGP lacks the ability to accurately track inventory, settle accounts with its suppliers around the world, account for purchase and sale transactions, monitor and adapt to variations in pricing and advertising, and create critical sales and financial reports necessary to run its business. Unfortunately, like many companies dependent on its computer systems, OGP was, at the times alleged herein, inexperienced and unsophisticated regarding computers and computer systems.

8. In or about late 1996, OGP began to consider the age of its computer hardware and software systems, and whether a change or upgrade was necessary. Concerned about whether its system was "Y2K compliant," OGP decided to retain an expert computer consultant to assess its system and recommend a plan to update or replace its aging, but nonetheless functioning, computer hardware and software systems. Considering the importance of its computer system to

1 its business operations, OGP was prepared to retain the best consultants available and to spend
2 what it needed to spend to modernize the system.

3 9. OGP required a reliable, complex and sophisticated computer system, which
4 included the following features: (1) a highly customized "Sales Order Entry Application," to
5 record sales orders from OGP customers; (2) a highly customized and complex "Supplier
6 Settlement" software system, set up to handle the unique way OGP buys and sells its inventory;
7 (3) an inventory allocation system for making the company's inventory available to its offices to
8 sell; (4) multiple unit of measure capability, to handle OGP's method of using different units of
9 measure for acquisitions and sales of merchandise; (5) reporting systems that customize and
10 report executive information needed to manage the business; (6) a special advertising, promotions
11 and pricing system, to track discounts, credits or other promotions; and (7) a Decision Support
12 System, which allows managers access to key information.

13 10. In or about late 1996, OGP contacted IBM GLOBAL to explore retaining IBM
14 GLOBAL to review OGP's computer needs and recommend changes or upgrades to its system.
15 IBM GLOBAL promotes itself as the leading computer systems and software consulting firm
16 worldwide, with expertise in information technology consulting, outsourcing, hosting and
17 systems integration in 160 countries. Recently, IBM GLOBAL was labeled the world's largest
18 consultancy. Reported estimates of its worldwide annual revenues have exceeded \$9 billion.
19 OGP ultimately selected IBM GLOBAL as its consultant based on its reputation as among the
20 best, if not the best, consulting firm for this project.

21 **IBM GLOBAL's Representations to OGP**

22 11. IBM GLOBAL recommended to OGP that its existing, 15-year-old system be
23 entirely replaced with new hardware and software. IBM GLOBAL represented that it could meet
24 OGP's business needs and would assist OGP to select appropriate hardware and software to
25 replace its existing system. IBM GLOBAL represented that it would implement the system,
26 giving assurances that it had a "solid understanding" of OGP's requirements and would be able to
27 develop an integrated turnkey system customized to fit OGP's needs. These representations were
28 made orally at presentations to OGP personnel and at meetings of senior OGP officers and Board

1 members by IBM GLOBAL representative Kevin Smith and others, and in writing by IBM
 2 GLOBAL personnel. For example, in a letter to OGP's then-president, Alfonzo Salazar, dated
 3 August 4, 1997, IBM GLOBAL's Jane Howard, Todd Michaud, Kevin Smith and Rob Ponnwitz
 4 stated IBM GLOBAL could provide a system "inclusive of all the required components such as
 5 the various hardware and software products...all offered as an integrated total solution!" In that
 6 same letter, IBM GLOBAL assured OGP that it had selected an approach to the implementation
 7 of OGP's new system only after a thorough evaluation of OGP's business requirements (for
 8 which OGP paid IBM GLOBAL considerable consulting fees). The letter assured OGP there was
 9 little risk of failure of the project. It stated the approach IBM GLOBAL selected would "mitigate
 10 the implementation risks that would otherwise be owned by Ocean Garden" and pledged its
 11 commitment to complete the project on time, on budget and with a minimum of expensive change
 12 orders resulting from unanticipated "out-of scope" requirements. IBM further pledged "to hold
 13 our subcontractors to very high standards!" The letter concluded that these "pledges are what you
 14 should expect from the extended IBM team." Similar promises were made in earlier
 15 correspondence: IBM's Todd Michaud stated in a May 8, 1997 to OGP's then-president, Alfonso
 16 Salazar, that, "Simply put, IBM has developed a turn-key Year 2000 compliant solution where we
 17 will assume primary responsibility for the successful completion of this project. We are
 18 committed to implement this project on-time and on-budget!" In a May 15, 1997 letter
 19 agreement, IBM GLOBAL stated, "The IBM team has taken responsibility to design a total
 20 solution on behalf of OGP." In a July 9, 1997 letter to OGP, IBM GLOBAL assured OGP that it
 21 would employ its "best efforts" in performing its July and August 1997 consulting obligations to
 22 OGP.

23 12. In reliance on these and other representations, including IBM GLOBAL's
 24 marketing and promotional materials and IBM GLOBAL's reputation, OGP entered into several
 25 written contracts with IBM GLOBAL in or about late 1996 through August 1997, including but
 26 not limited to: (1) an I/T planning and selection engagement (a \$105,100 letter agreement
 27 regarding the software package selection signed December 4, 1996 and incorporating a
 28 November 20, 1996 package software selection engagement proposal); (2) a May 15, 1997 letter

1 agreement for IBM GLOBAL consulting services; (3) an agreement dated July 9, 1997 for pre-
2 planning consulting work for implementation of the system; (4) The IBM International Customer
3 Agreement ("Customer Agreement") signed by OGP on August 12, 1997 and by IBM GLOBAL
4 on August 18, 1997; and (5) an agreement dated August 4, 1997 entitled IBM Proposal for the
5 Implementation of the QAD Food Distribution System ("Implementation Agreement"). These
6 contracts are referred to collectively herein as "the IBM-OGP Agreements."

7 13. Each of the IBM-OGP Agreements was entered into by all parties in the State of
8 California. IBM GLOBAL listed its address on agreements as a location in either Los Angeles,
9 Orange or San Diego counties. OGP entered into the agreements from its address in San Diego
10 County. Although one of the Agreements, the Customer Agreement, incorporated a choice of law
11 provision stating that New York law would apply to that Agreement, this is the only reference to
12 New York in the document. Rather, the subject of the contracts has no relationship to New York.
13 The other documents signed by OGP and IBM GLOBAL during the course of the relationship do
14 not contain choice of law provisions, and were executed by parties in California operating their
15 respective business from California locations and entering into contracts to perform work in San
16 Diego County, California. Therefore, California law is the proper law to be applied to all causes
17 of action herein.

18 14. The IBM-OGP Agreements obligated IBM GLOBAL to provide the management
19 and oversight of the entire process of selecting the right hardware and software, implementing
20 these selections and ultimately converting OGP's existing computer system to a modernized
21 "Y2K compliant" system tailored to its needs. IBM GLOBAL estimated the total cost of the
22 project, including hardware, software and consulting services, to be \$3.2 million.

23 15. Under the terms of the IBM-OGP Agreements, IBM GLOBAL directly and
24 through its subcontractor (Puestow & Associates) was to provide "project management" services,
25 and evaluate, recommend and ultimately supply software and hardware products. These services
26 were to include consulting services to select the best software solution for OGP's needs, assist in
27 the evaluation and selection of alternatives, customize the selected software (QAD's MFG/PRO
28 and Puestow & Associates' Grower Settlement and Lot Management software) to adapt it to

1 OGP's business systems, and provide "management oversight and coordination of the other IBM
2 projects" at OGP.

3 16. Under the terms of the IBM-OGP Agreements, IBM GLOBAL promised to
4 provide "executive vision," define "implementation strategies" for the project, present project
5 estimates and a plan, provide consulting services to develop the system, provide training, install
6 the software, and perform a hands-on "conference room pilot program" to test the software under
7 real operating conditions. IBM GLOBAL promised to customize the Grower Settlement
8 Application and Lot Management modules, test the system and complete the work when the
9 modules were modified and tested. Taken as a whole, the IBM-OGP agreements obligated IBM
10 GLOBAL to competently guide OGP through an evaluation and selection process to select
11 hardware and software systems most suited to OGP's business requirements, and implement and
12 customize those selections to OGP's unique computer needs. This IBM GLOBAL failed to do.

13 17. In performing its obligations under the IBM-OGP Agreements, IBM GLOBAL
14 reviewed and evaluated OGP's business requirements and available software products. After an
15 extended search process, IBM GLOBAL presented to OGP a number of systems for
16 consideration. None of the software packages IBM GLOBAL presented to OGP could meet
17 OGP's unique business needs without substantial and costly modification or customization. The
18 QAD MFG/Pro software package and Puestow & Associates' Grower Settlement and Lot
19 Management System modules were selected using an evaluation process developed by IBM
20 GLOBAL. IBM GLOBAL represented that it could make these systems work for OGP, by
21 customizing the programming for OGP's Sales Order Entry and Inventory Allocation needs, and
22 by supplying additional software packages for OGP's supplier settlement, unit of measurement,
23 reporting and advertising/special pricing needs. IBM GLOBAL represented that gaps in the
24 system could be resolved promptly. These representations were made orally and in writing, and
25 were reinforced May 8, 1997, May 15, 1997, July 9, 1997 and August 4, 1997 as referenced in
26 paragraph 11 above.

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1 **IBM GLOBAL's Fraudulent Scheme**

2 18. IBM GLOBAL had no intention to honor any of the representations it made to
3 OGP set forth in paragraphs 11 and 17 above. In fact, unbeknownst to OGP, IBM GLOBAL, in
4 conspiracy with its subcontractor, Puestow & Associates, formulated a scheme to induce OGP
5 into entering into the IBM-OGP Agreements based on false assertions concerning the existence of
6 commercially viable Grower Settlement and Lot Management software and estimates of costs to
7 modify these non-existent "vaporware" products. IBM GLOBAL and Puestow & Associates
8 knew these products to be in the "concept" stage of development and inadequate to function as
9 part of a system that would meet OGP's unique requirements. IBM GLOBAL was well aware
10 that if the costs actually anticipated by IBM GLOBAL to customize the system to meet OGP's
11 requirements were known to OGP, OGP would have chosen from among less expensive
12 alternatives, such as upgrading its existing system. IBM GLOBAL saw in OGP a huge
13 opportunity to ensnare OGP into a series of agreements and earn millions of dollars in consulting
14 fees to "manage" the customization of the system. IBM GLOBAL understood that the estimated
15 cost for the implementation of the system it had provided to OGP (approximately \$3.2 million),
16 while expensive, would be tolerable to OGP. Once OGP was under contract to IBM GLOBAL
17 and had invested in the new system, IBM GLOBAL assumed there would be no turning back for
18 OGP. IBM GLOBAL then would be able to impose expensive new consulting fees on OGP
19 based on assertions and representations that the completion of the tasks covered by the contract
20 would not meet OGP's requirements. IBM GLOBAL chose intentionally vague and indefinite
21 language to describe the "scope of work" under the Implementation Agreement, to set up later
22 assertions the Implementation Agreement did not "cover" the tasks necessary to meet OGP's
23 business requirements.

24 19. With carefully crafted, one-sided agreements in hand, IBM GLOBAL's plan might
25 have succeeded, had it not disclosed its plans in internal memoranda. For example, in an undated
26 document that appears to have been prepared in either July or September, 1997 (a few weeks
27 before or after execution of the Implementation Agreement) IBM GLOBAL's Steve Ragow, one
28 of the IBM GLOBAL executives on the project, alerted IBM GLOBAL Project Manager Rob

1 Ponnwitz to the opportunity to obtain more consulting fees from OGP. Mr. Ragow pointed out
2 that OGP was inexperienced in large projects and lacked resources. Mr. Ragow commented that
3 OGP was "not experienced in working through large projects," that OGP did not fully grasp "the
4 size of the task" to write custom reports, and that there was "no way that OGP fully grasps the
5 scope of the situation" regarding data conversion. Mr. Ragow then outlined a strategy to take
6 advantage of OGP's lack of sophistication and lack of resources. Having recently assured OGP
7 that there was little chance of expensive "project creep," IBM GLOBAL, through Mr. Ragow,
8 alerted Mr. Ponnwitz to the fact that, "With the reengineering project underway there (was) no
9 telling what new business issues will arise that might force a customization to be done."

10 20. Even before the project was under way, and despite IBM GLOBAL's recent
11 representation that its extensive prior work had given it a "solid understanding" of OGP's
12 business requirements, Mr. Ragow alerted IBM GLOBAL that hours estimates were "falling
13 short" to cover OGP's requirements for customizing the software. Mr. Ragow then set out the
14 "strategy" to sell OGP on the need for this alleged new work and the obligation of OGP to pay for
15 it. Mr. Ragow's internal memo stated that IBM GLOBAL could claim OGP was demanding
16 features of the system not contemplated by the original "scope of work" specified in the
17 Implementation Agreement. This would set up IBM GLOBAL's argument that all of this
18 necessary work must be paid for by OGP, in addition to the payments for the customized system
19 specified in the Implementation Agreement. Mr. Ragow stated in the internal IBM GLOBAL
20 memo: "We are the experts so we cannot just say we missed the estimate. We have to look for
21 reasons why the estimate is off and sell the rationale for more hours (for example, "the scope did
22 not cover that," etc.). We need to focus on this situation immediately. Every weekly review
23 should address possibilities of increasing hourly estimates." IBM GLOBAL and Puestow &
24 Associates executed the plan, taking at least \$1.8 million more through change orders from OGP
25 for so called "out-of scope" work. IBM GLOBAL and Puestow & Associates fraudulently
26 concealed their plan by attempting to make it appear they had simply miscalculated OGP's needs
27 and had incorrectly concluded the proposed customization and additional software would result in
28 a system that would meet OGP's needs.

1 **IBM GLOBAL Implements Its Fraudulent Scheme**

2 21. IBM GLOBAL initially promised OGP the new system would be completed and
3 ready for operation prior to the start of the shrimp fishing season (which starts in late August each
4 year) in 1998. The promised date for completion was on or about August 3, 1998. As IBM
5 GLOBAL presented OGP with demands for Project Change Orders for massive new hours
6 budgets to cover "out-of scope" work, the project completion date continued to slip. The
7 completion date was rescheduled to April 1999 when it became apparent IBM GLOBAL could
8 not complete its performance on time. At that point, IBM GLOBAL and OGP signed an
9 agreement extending IBM GLOBAL's services through the new "go-live" date.

10 22. By the end of 1999, OGP had paid IBM GLOBAL approximately \$4 million in
11 total consulting fees, and approximately \$1.4 million for software, far exceeding the original
12 project estimates. Despite the escalating payments, IBM GLOBAL failed to perform as promised
13 and a functioning system was not delivered.

14 **IBM's Contracts Are Structured by IBM to Avoid Accountability and Facilitate Its**
15 **Fraudulent Scheme**

16 23. IBM GLOBAL appears to have spent years refining its form consulting
17 agreements, which are one-sided and self-protective. Because of the technical nature of the
18 subject matter of these consultancies, it is difficult for clients such as OGP to protect themselves.
19 Clients such as OGP rely entirely on the professional reputation and good faith of IBM GLOBAL
20 much as one would rely on the advice of their doctor or lawyer. IBM GLOBAL drafted the IBM-
21 OGP agreements to attempt to avoid accountability for a successful result or even for performing
22 competently.

23 24. IBM GLOBAL attempts to achieve this result by structuring its written agreements
24 so as to break up the consultancy into a series of defined tasks, most of which are specified in the
25 Agreement as complete when the amount of hours assigned to the task expires and when a
26 "deliverable" (which is usually a written report prepared by IBM GLOBAL) is delivered to the
27 client. IBM GLOBAL marches through the performance of the contract billing hours and
28 preparing reports (which are often recycled and "cut and pasted" versions of earlier reports)

1 without ever having to account for the quality or value of the services it provides. In the end, if
2 clients challenge whether results were achieved or whether services were performed competently,
3 IBM GLOBAL points to the objective completion of defined "tasks."

4 25. In order to make sure it will never have to justify the hours it bills to its clients,
5 IBM GLOBAL structures its written agreements to provide for a client "sign off" as each task is
6 completed. Pursuant to the "sign off" procedures specified in the contracts, IBM bills the hours,
7 hands over a report to the client and has the client project manager sign off on the delivery of the
8 report. Having done so, it claims it has completed the task in accordance with the agreement of
9 the parties. If challenged later, IBM GLOBAL uses the contract against its customer and claims
10 it does not have to account for whether it advanced the interests of its client in the performance of
11 that task. With one important exception, this is how IBM GLOBAL structured the
12 Implementation Agreement with OGP.

13 **IBM GLOBAL and OGP Agree to Sever Their Relationship**

14 26. By August 1999, the project had been in crisis for months. Over a year had passed
15 since the original "go live" date and critical modifications to the software were still far from
16 complete. OGP was being charged for consulting services that included a markup by IBM on the
17 subcontractor's hourly charges as well as IBM's "management" fees. OGP was receiving little if
18 any benefit from IBM GLOBAL and determined that it would be cheaper and just as effective to
19 sever the relationship with IBM GLOBAL and work directly with the subcontractor, Puestow &
20 Associates. IBM GLOBAL acknowledged that it was unable to meet OGP's reasonable
21 requirements for a system. IBM GLOBAL and OGP agreed that IBM GLOBAL would
22 discontinue its work on the project (for which OGP had, as of that date, paid far more than the
23 \$3.2 million originally estimated by IBM GLOBAL).

24 27. IBM GLOBAL agreed and prepared a final Project Change Order to acknowledge
25 that it was relieved of responsibility for continuing to manage its subcontractor on the project.
26 IBM GLOBAL presented the form Project Change Order to the OGP project manager and he
27 signed it as presented.

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1 28. **Thereafter, OGP separately retained IBM GLOBAL's subcontractor, Puestow &**
 2 **Associates, to try to continue efforts to correct the deficiencies in the software and bring the**
 3 **system to minimum levels of acceptable performance. OGP continued spending sums to try to**
 4 **correct the system's deficiencies, but Puestow & Associates failed to correct the system's**
 5 **deficiencies.**

6 **The IBM-OGP Contracts Were Induced by Fraud, Failed of Their Essential**
 7 **Purpose, Failed for Lack of Consideration and Were Breached by IBM GLOBAL**

8 29. **Because of IBM GLOBAL's conduct as alleged above, the IBM-OGP contracts**
 9 **were fraudulently induced, failed for lack of consideration and failed of their essential purpose:**
 10 **to replace OGP's computer software system with an appropriate hardware and software package**
 11 **compatible with OGP's unique business requirements in accordance with the budget prepared by**
 12 **IBM GLOBAL.**

13 30. **IBM GLOBAL breached the IBM-OGP Agreements, including the implied**
 14 **covenant of good faith and fair dealing by, among other things, failing to use reasonable care and**
 15 **skill, let alone best efforts, and failing to competently perform its duties under the IBM-OGP**
 16 **Agreements, including without limitation: (1) providing false and deceptive representations to the**
 17 **effect that the Grower Settlement and Lot Management software were viable existing software**
 18 **products compatible with the MFG-Pro software system; (2) providing false and deceptive**
 19 **estimates of the consulting services that would be needed to customize the software to OGP's**
 20 **business requirements; and (3) creating vague "scope-of-work" standards to facilitate the**
 21 **imposition of substantial additional consulting fees for so-called "out-of-scope" change orders.**
 22 **IBM GLOBAL further breached the IBM-OGP Agreements including the implied covenant of**
 23 **good faith and fair dealing by: (4) miscalculating that the "software" could "fit" OGP's business**
 24 **requirements or could be modified to serve the company's needs at a price budgeted by IBM**
 25 **GLOBAL, approved by OGP and under reasonable time parameters; (5) completely**
 26 **underestimating and miscalculating the time and effort it would take to modify the software; (6)**
 27 **misleading OGP about the cost required to modify the software for it to "fit" the company's**
 28 **needs; (7) failing to assess OGP's business needs and/or failing to communicate OGP's business**

1 requirements to the subcontractor performing the software modifications; (8) subcontracting work
2 to an unqualified and apparently financially unstable subcontractor, Puestow & Associates, which
3 IBM GLOBAL knew or should have known was unqualified and understaffed, and which did not
4 understand OGP's needs and could not adequately modify the system to serve OGP's needs; (9)
5 consistently misrepresenting to OGP that the system could be corrected to meet its needs while
6 continuing to charge for the considerable time it was spending to attempt (unsuccessfully) to do
7 so; (10) failing to perform specific tasks under the Implementation Agreement in accordance with
8 their design including, without limitation, the "conference room pilot" (task 15) and the
9 customization of the software (task 17); and (11) failing to deliver a Decision Support System.
10 Moreover, rather than adapt a system to meet OGP's specific business needs, IBM GLOBAL, and
11 Puestow & Associates, ignored the company's unique business requirements and assumed and
12 urged that OGP's business procedures be changed, causing the failure of the purpose of the
13 contracts.

14 31. During its time on the project, IBM GLOBAL also failed entirely in its role as
15 "project manager" and breached the IBM-OGP Agreements by, among other things, failing to
16 make appropriate recommendations for a software system, failing to adequately supervise
17 subcontractor Puestow & Associates (as IBM GLOBAL was also obligated to do in its
18 subcontract with Puestow & Associates), failing to share information regarding OGP's
19 requirements and business needs with subcontractor Puestow & Associates, failing to ensure that
20 an appropriate Conference Room Pilot was conducted, failing to ensure that an appropriate gap
21 analysis was conducted, and failing to take action to determine and resolve the project gaps.

22 32. As stated in paragraph 23 above, IBM GLOBAL generally structured the IBM-
23 OGP Agreements to provide objective criteria for the completion of the enumerated tasks with
24 one important exception — Task 17. It was the effort to complete Task 17, described as
25 "Customize the Puestow Supplier Settlement Application and Warehouse Management Modules"
26 that sent the project into crisis. Unlike most of the other tasks under the contract, the completion
27 of this task was not determined by the expiration of a specified number of hours or the delivery of
28 a document. The completion criteria were: "This task will be complete when the P&A Supplier

1 settlement and Lot Management modules have been modified and tested according the System
2 Validation Plan." It is beyond dispute that this task was never completed. At minimum, IBM
3 GLOBAL should be required to return to OGP all of the consulting fees it charged for its failed
4 attempts to complete this task.

5 **Conclusion**

6 33. As a result of IBM GLOBAL's actions, deceptions and failure to use reasonable
7 care and skill, let alone best efforts, and its failure to provide competent consulting services, the
8 software selected for OGP does not function appropriately, does not meet its business needs, and
9 the failure of the project has had a devastating impact on OGP's business and operations.

10 34. IBM GLOBAL and subcontractor Puestow & Associates, as computer consultants,
11 knew or should have known that modifications to QAD MFG-Pro and to Puestow's Grower
12 Settlement and Lot Management System modules to accommodate OGP's needs would be
13 impractical, if not impossible and that an expensive "complete customization" would be required.
14 IBM GLOBAL and Puestow & Associates should have told OGP of these facts, sparing the
15 company millions of dollars paid to IBM GLOBAL and years of delay. Rather, IBM GLOBAL
16 and Puestow & Associates concealed these facts while continuing to charge OGP for services to
17 modify, customize and adapt the system to OGP's known business requirements. In the end, the
18 code that constituted the original Grower Settlement and Lot Management System modules was
19 completely re-written for OGP.

20 35. Based on IBM GLOBAL's conduct as alleged above and the breach of its
21 obligations under the IBM-OGP Agreements, OGP was left with a deficient computer system that
22 was, at the time IBM GLOBAL withdrew from the project, unable to meet OGP's basic
23 requirements in that, among other things: (1) the Grower Settlement software provided to OGP
24 did not handle supplier settlement requirements; (2) the unit of measure conversion could be
25 accomplished; (3) OGP had to completely custom-write its reporting requirements; (4) OGP
26 could not track advertising and special pricing through its computer program, although this was
27 an important function to be accomplished by the new system; (5) the sales order entry and
28 inventory allocation were not customized satisfactorily due to the size of the gaps and specific

1 industry requirements; (6) the Decision Support System was not delivered, resulting in a complete
 2 lack of sales and inventory information; and (7) OGP's accounting processes were seriously
 3 backlogged, requiring the company to hire extra workers and spend extra sums to attempt to keep
 4 up with operations. At one point, OGP was forced to spend more than \$750,000 to hire
 5 temporary employees to keep the company operational because of delays in implementing the
 6 system and because of the inadequacy of the system when implemented.

7 36. OGP spent far more than promised by IBM GLOBAL. By the end of 1999, OGP
 8 had spent an estimated \$4 million for consulting fees from IBM GLOBAL and approximately
 9 \$1.4 million on software, then was forced to spend additional sums for Puestow & Associates and
 10 other consultants to try to complete the customization work and to repair the system (including
 11 approximately \$560,000 in the first seven months of 2000 alone). Along the way, OGP also
 12 incurred at least \$750,000 in additional costs for temporary employees to keep the company
 13 operational in light of the failed computer system. Instead of taking a year to implement, the
 14 project took more than three years, and never was completed according to plan. IBM GLOBAL
 15 deceived OGP and/or grossly underestimated the modification efforts, failed to provide an
 16 adequate plan, failed to recognize OGP's unique business requirements and failed to listen to
 17 OGP's needs.

18 **FIRST CAUSE OF ACTION**

19 **(Rescission Based on Fraud and Deceit and Failure of Consideration)**

20 37. OGP realleges and incorporates herein by reference paragraphs 1 through 36
 21 inclusive.

22 38. IBM GLOBAL made false and fraudulent representations as herein alleged at the
 23 time of and in connection with the signing of the IBM-OGP Agreements, knowing its
 24 representations to be false and with the intent to deceive OGP and to induce OGP to enter into the
 25 IBM-OGP Agreements. OGP would not have executed the IBM-OGP Agreements had it known
 26 that IBM did not intend to perform its legal obligations under the agreements.

27 39. The representations made by IBM GLOBAL were in fact false.

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1 40. At the time the representations were made by IBM GLOBAL, OGP did not know
2 that the representations were false but believed them to be true and reasonably relied upon them.

3 41. Further, IBM GLOBAL, in bad faith, materially failed to perform its legal
4 obligations under the IBM-OGP Agreements.

5 42. IBM's material failure to perform its legal obligations under the IBM-OGP
6 Agreements resulted in the failure of IBM's consideration under such agreements.

7 43. OGP will suffer substantial injury under the IBM-OGP Agreements if they are not
8 rescinded.

9 44. As a result of IBM GLOBAL's fraudulent representations, OGP is entitled to
10 rescind the IBM-OGP Agreements under California Civil Code Section 1689 and similar
11 provisions of New York law, if applicable, and does hereby demand rescission of the IBM-OGP
12 Agreements.

13 **SECOND CAUSE OF ACTION**

14 **(Alternative to the First Cause of Action)**

15 **(Breach of Contract)**

16 45. OGP incorporates by reference the allegations of paragraphs 1 through 36 as
17 though fully set forth herein.

18 46. OGP has fully performed all conditions and covenants required to be performed
19 under the terms of the IBM-OGP Agreements.

20 47. IBM GLOBAL failed to perform its obligations and covenants under the IBM-
21 OGP Agreements and has breached the agreements as set forth above and without limitation by:
22 failing to use reasonable care and skill, let alone best efforts, and failing to competently perform
23 its duties under the agreements, including without limitation: (1) providing false and deceptive
24 representations to the effect that the Grower Settlement and Lot Management software were
25 viable existing software products compatible with the MFG-Pro software system; (2) providing
26 false and deceptive estimates of the consulting services that would be needed to customize the
27 software to OGP's business requirements; (3) creating vague "scope-of-work" standards to
28 facilitate the imposition of substantial additional consulting fees for so-called "out-of-scope"

1 change orders. IBM GLOBAL further breached the IBM-OGP Agreements including the implied
2 covenant of good faith and fair dealing by: (4) miscalculating that the "software" could "fit" the
3 OGP's business requirements or could be modified to serve the company's needs at a price
4 budgeted by IBM GLOBAL, approved by OGP and under reasonable time parameters;
5 (5) completely underestimating and miscalculating the time and effort it would take to modify the
6 software; (6) misleading OGP about the cost required to modify the software for it to "fit" the
7 company's needs; (7) failing to assess OGP's business needs and/or failing to communicate
8 OGP's business requirements to the subcontractor performing the software modifications;
9 (8) subcontracting work to an unqualified and apparently financially unstable subcontractor,
10 Puestow & Associates, which IBM GLOBAL knew or should have known was unqualified and
11 understaffed, and which did not understand OGP's needs and could not adequately modify the
12 system to serve OGP's needs; (9) consistently misrepresenting to OGP that the system could be
13 corrected to meet its needs while continuing to charge for the considerable time it was spending
14 to attempt (unsuccessfully) to do so; (10) failing to perform specific tasks under the IBM-OGP
15 Agreement in accordance with their design including, without limitation, the "conference room
16 pilot" (task 15) and the customization to the software (task 17); and (11) failing to deliver a
17 Decision Support System. Moreover, rather than adapt a system to meet OGP's specific business
18 needs, IBM GLOBAL, and Puestow & Associates, ignored the company's unique business
19 requirements and assumed and urged that OGP's business procedures be changed, causing the
20 failure of the purpose of the contracts. During its time on the project, IBM GLOBAL also failed
21 entirely in its role as "project manager" and breached the IBM-OGP Agreements as set forth in
22 paragraph 31 above, and incorporated fully herein.

23 48. IBM GLOBAL further breached the agreements by concealing its true intentions,
24 including its plan to subject OGP to expensive Project Change Orders as alleged in paragraph 18
25 and failing to disclose and concealing the true state of the Grower Settlement and Lot
26 Management Software, and known defects in the selected software, that could not be effectively
27 modified or adapted to OGP's needs.

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1 49. All conditions precedent to OGP's right to maintain this claim, including but not
2 limited to allowing IBM GLOBAL and its subcontractor, Puestow & Associates, a full
3 opportunity to correct the deficiencies in the software, have occurred or otherwise been fulfilled.

4 50. As a direct and proximate result of these breaches by IBM GLOBAL, OGP has
5 suffered damages in an amount to be proven at trial, including but not limited to the full amount
6 of fees paid to IBM GLOBAL and its subcontractor for consulting services and software.

7 **THIRD CAUSE OF ACTION**

8 **(Breach of the Implied Covenant of Good Faith & Fair Dealing)**

9 51. OGP incorporates by reference paragraphs 1 through 36, and 45 through 49, as
10 though fully set forth herein.

11 52. Implied in every agreement entered into in California is an implied covenant of
12 good faith and fair dealing by which every party covenants to refrain from doing any action to
13 injure, frustrate or interfere with the right of the other party to receive the benefits of the
14 agreement. This implied promise imposed a duty of good faith and fair dealing on the parties to
15 the IBM-OGP Agreements. This implied promise imposed upon IBM GLOBAL a duty to act in
16 a fair and honest manner and to refrain from taking any action that could deprive OGP of the
17 benefits of the IBM-OGP Agreements.

18 53. The conduct by IBM GLOBAL as alleged above breached the implied covenant of
19 good faith and fair dealing in the IBM-OGP Agreements. As a direct and proximate result of
20 these breaches, OGP has suffered damages in an amount not yet ascertained but to be proven at
21 time of trial, including but not limited to the full amount of fees paid to IBM GLOBAL and its
22 subcontractor for consulting services and software.

23 **FOURTH CAUSE OF ACTION**

24 **(Negligence)**

25 54. OGP incorporates by reference the allegations of paragraphs 1 through 36 as
26 though fully set forth herein.

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1 55. IBM GLOBAL had a duty to OGP to perform its professional duties in accordance
2 with the standard of care, skill and ability applicable and appropriate to computer systems
3 consultants.

4 56. IBM GLOBAL breached duties to OGP by conduct as set forth above without
5 limitation and by failing to perform its duties under the IBM-OGP Agreements in accordance
6 with the applicable standard of care to be exercised by those in its profession. Rather, IBM
7 GLOBAL negligently, carelessly and recklessly rendered services below the applicable standard
8 of care and failed to render the skill required of and commonly exercised by others in the
9 profession. IBM GLOBAL breached its duties to OGP by conduct including, without limitation:
10 (1) failing to act with the appropriate standard of care to determine what software could "fit" the
11 company or could be modified to serve the company's needs; (2) failing to act with the
12 appropriate standard of care to understand the time and effort it would take to modify the
13 software; (3) failing to act with the appropriate standard of care to assess OGP's business needs
14 and instead advising OGP to change business practices it could not reasonably change; (4) failing
15 to subcontract work to a qualified subcontractor; and (5) failing to provide competent project
16 management.

17 57. As a direct result of IBM GLOBAL's negligence, carelessness and recklessness in
18 performing its duties, and its failure to meet the appropriate standard of care in its profession,
19 OGP was harmed and has suffered damages in an amount to be determined at trial, including but
20 not limited to the costs OGP incurred to try to correct the problems caused by IBM GLOBAL's
21 failures to competently perform its duties.

22 **FIFTH CAUSE OF ACTION**

23 **(Fraud)**

24 58. OGP incorporates by reference the allegations of paragraphs 1 through 36 as
25 though fully set forth herein.

26 59. Prior to August 4, 1997, the effective date of the Implementation Agreement, IBM
27 GLOBAL knew that the software selected for OGP was not suitable to OGP's business operations
28 and that OGP was unsophisticated in large projects such as the project represented by the

1 Implementation Agreement. It knew that to complete the tasks necessary to deliver a system that
2 would meet OGP's business requirements, significant customization of the existing software
3 would be necessary. Rather than disclose the true scope of the project prior to August 4, 1997,
4 and most likely send OGP in a different direction that would not involve millions in consulting
5 fees paid to IBM GLOBAL, IBM GLOBAL made the representations set forth above specifically
6 including those set forth in paragraphs 11, 17 and 21 above and the misrepresentation that the
7 necessary customization work was not anticipated at the time the Implementation Agreement was
8 executed and was therefore "out-of scope." In addition, IBM concealed facts necessary to make
9 its prior disclosures not misleading and implemented the fraudulent scheme described in
10 paragraphs 18, 19 and 20 above.

11 60. Throughout the period from the execution date of the Implementation Agreement
12 in August 1997 through the termination of its services in August 1999, IBM GLOBAL concealed
13 its fraudulent scheme to extract millions in additional fees for consulting services and the critical
14 fact that IBM GLOBAL was making little progress in customizing the Supplier Settlement system
15 (OGP's name for its modified version of the Grower Settlement system) to OGP's needs as had
16 been represented, and the fact that IBM GLOBAL's efforts were so far from completion that the
17 software would not be ready to meet OGP's needs on August 31, 1999 or any reasonably
18 foreseeable date thereafter. The software was critical to OGP's ability to perform its business
19 operations, as it was to be used to report sales to suppliers, determine the costs of sales, allow
20 monthly reporting to suppliers and reconcile millions of dollars of preseason advances against
21 future receipts. IBM GLOBAL's representations of the progress of the customization of the
22 software were false. Rather IBM GLOBAL intentionally concealed its true intentions regarding
23 the vague "scope of work" description in the Implementation Agreement, its intention to assert
24 that necessary work to customize the software to OGP's requirements would be "out-of scope"
25 and that OGP would have to pay additional consulting fees for the completion of those tasks, and
26 continually misrepresented the lack of progress in order for IBM GLOBAL to avoid
27 acknowledging its failure to complete the work within time estimates previously provided and its
28 complete inability to customize the software to meet OGP's requirements on any reasonable

1 terms or timetable. It made these misrepresentations and concealed the true facts to realize
2 additional payments for consulting fees and an extended contract term and to avoid being
3 accountable for the disgorgement of fees previously collected from OGP.

4 61. The true facts, known to IBM GLOBAL through its project manager, Rob
5 Ponnwitz, and through other executives at IBM GLOBAL (including Steve Ragow, Kevin Smith
6 and Allison Pinto), and through its subcontractor's representatives, (including Peter Puestow, Bob
7 Sharpton, Chuck Burt and Laura Vaupel) are that the software system could not be customized to
8 meet OGP's needs without costly modifications for which OGP would be separately charged.
9 The true facts also were that, as the performance of the Implementation Agreement progressed,
10 the software modules had not and could not be customized to OGP's needs as had been
11 represented, the efforts were far from completion as of August 31, 1999, and additional sums paid
12 to IBM GLOBAL would not remedy the deficiencies. IBM GLOBAL did not disclose these true
13 facts, but concealed these true facts from OGP. The true facts were not completely discovered by
14 OGP until recently, when discovered through the production of documents and the deposition of
15 Peter Puestow.

16 62. IBM GLOBAL withheld this information from OGP with the intent to induce OGP
17 to enter into the Implementation Agreement and thereby become locked into the customization of
18 the MFG/Pro Puestow & Associates software and thereafter incur and continue to pay for IBM
19 GLOBAL's consulting services under the Implementation Agreement.

20 63. In reliance upon the misrepresentations and concealments alleged above, OGP
21 entered into the Implementation Agreement, accepted the so-called "out-of-scope" explanation
22 for charging millions for the customization of the software (even though Task 17 of the
23 Implementation Agreement already provided for that customization work), and has spent more
24 than twice the promised project cost on a system to attempt to transform the system to serve
25 OGP's business needs. Despite paying IBM GLOBAL for an extended contract, and continuing
26 to pay for consultants to "fix" the system, IBM GLOBAL never delivered an appropriately
27 functioning computer system tailored to OGP's needs and never completed several of the
28 specified tasks under the Implementation Agreement.

1 64. At all relevant times, OGP was ignorant of the true facts, the intentions of IBM
2 GLOBAL and the lack of progress of the customization of the software and believed that, so long
3 as more money was given to IBM GLOBAL and its subcontractor to "fix" the problems, the
4 system would be promptly customized to meet OGP's needs. Had OGP known the true facts, it
5 never would have entered into the IBM-OGP Agreements, including the Implementation
6 Agreement, and never would have allowed IBM GLOBAL to continue its efforts to modify the
7 system. Rather, it would have sought a different computer system or upgraded its existing system.

8 65. As a result of the deliberate misrepresentations and concealments of IBM
9 GLOBAL, OGP has suffered damages in an amount to be proven at trial, including payments
10 made to IBM GLOBAL for consulting services to attempt to "fix" the selected software to
11 accommodate OGP's needs.

12 66. IBM GLOBAL's conduct as described above was oppressive, malicious,
13 fraudulent and despicable and had the intent of injuring OGP. As a result, OGP is entitled to
14 recover damages from IBM GLOBAL by way of example pursuant to Civil Code section 3294.

15 **SIXTH CAUSE OF ACTION**
16 **(Negligent Misrepresentation)**

17 67. OGP incorporates by reference the allegations of paragraphs 1 through 36, and 59
18 through 64 as though fully set forth herein.

19 68. As an alternative cause of action to that pleaded in the Fifth Cause of Action for
20 Fraud above, IBM GLOBAL's representations set forth in Paragraphs 11, 17, 18 and 21
21 incorporated here, were not intentional, but rather negligent misrepresentations of existing facts.

22 69. IBM GLOBAL knew or should have known how difficult and complex it would
23 be and how long it would take to customize the selected software to meet OGP's needs, and knew
24 or should have known long before August 31, 1999 that the work had not progressed to meet
25 OGP's business needs by August 31, 1999 or any reasonably foreseeable date thereafter. IBM
26 GLOBAL had no reasonable ground for believing that its representations of the progress of the
27 work were correct, and IBM GLOBAL negligently continued to misrepresent the progress of the

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1 customization of the software. As a result, IBM GLOBAL realized additional payments and an
2 extended contract term.

3 70. IBM GLOBAL, through its project manager, subcontractor, and the other IBM
4 GLOBAL personnel identified above, negligently made these representations with the intent of
5 inducing OGP to act in reliance on the statements, enter into the IBM-OGP Agreements,
6 including the Implementation Agreement, and continue making payments under the IBM-OGP
7 agreements.

8 71. In reliance upon these misrepresentations, OGP has spent millions more than the
9 promised project cost on a system to attempt to transform the system to serve OGP's business
10 needs. Despite paying IBM GLOBAL for an extended contract, and continuing to pay for
11 consultants to "fix" the system, IBM GLOBAL never delivered an appropriately functioning
12 computer system tailored to its needs.

13 72. At all relevant times, OGP was ignorant of the true intentions of IBM GLOBAL
14 and the lack of progress of the customization of the software and believed that, so long as more
15 money was given to IBM GLOBAL and its subcontractor to "fix" the problems, the system would
16 be promptly customized to meet OGP's needs. Had OGP known the true facts, it never would
17 have entered into the IBM-OGP Agreements, including the Implementation Agreement, or
18 allowed IBM GLOBAL to continue its efforts to modify the system and would have upgraded its
19 existing computer system or sought a different computer system at less cost to OGP.

20 73. As a result of the negligent misrepresentations of IBM GLOBAL, OGP has
21 suffered damages in an amount to be proven at trial, including payments made to IBM GLOBAL
22 for consulting services to attempt to "fix" the selected software to accommodate OGP's needs.

23 **SEVENTH CAUSE OF ACTION**

24 **(Unfair Business Practices: Business & Professions Code § 17200 et seq.)**

25 74. OGP incorporates by reference the allegations of paragraphs 1 through 36, 47
26 through 48, and 59 through 64 as though fully set forth herein.

27 75. IBM GLOBAL's conduct as described above constitutes fraudulent and deceptive
28 business practices in violation of California Business & Professions Code section 17200 et seq.

1 76. As a result of the above-described fraudulent and deceptive business practices,
2 IBM GLOBAL has profited at the expense of OGP, and retained wrongful economic benefits for
3 itself and its subcontractor, Puestow & Associates.

4 77. OGP is entitled to recover from IBM GLOBAL the gains, profits and advantages
5 IBM GLOBAL has obtained as a result of these fraudulent and deceptive acts, in an amount to be
6 proven at trial. This amount includes, but is not limited to, the cost of consulting services from
7 IBM GLOBAL and its subcontractor Puestow & Associates from the time IBM GLOBAL knew
8 the software could not be made to "fit" the company's needs on reasonable terms, but nonetheless
9 misrepresented that the software could be customized to do so.

10 **ACCORDINGLY, OGP requests judgment for:**

11 As to the First Cause of Action (as an alternative to the Second Cause of Action)

- 12 1. A declaration that the IBM-OGP Agreements are rescinded;
- 13 2. Relief based on rescission including restoration of all sums paid to IBM

14 GLOBAL;

15 As to All Other Causes of Action

- 16 3. General damages according to proof;
- 17 4. Special damages according to proof;
- 18 5. Pre-judgment interest;
- 19 6. Punitive damages (as to the Fifth Cause of Action only);
- 20 7. Restitution and disgorgement of all gains IBM GLOBAL realized through its
- 21 fraudulent business practices alleged above (as to the Seventh Cause of Action only);
- 22 8. Attorney's fees, as may be allowed by statute;

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- 1 9. Costs of suit; and
- 2 10. Such further relief as the Court deems proper.

3 Dated: April __, 2002

4 GRAY CARY WARE & FREIDENRICH LLP

DRAFT

5
6 By _____
7 JEFFREY M. SHOHEIT
8 CHRISTOPHER M. YOUNG
9 SHARON B. SPIVAK
10 Attorneys for Plaintiff
11 OCEAN GARDEN PRODUCTS, INC.

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