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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE EASTERN DISTRICT OF VIRGINIA**

16 **UNITED STATES OF AMERICA** *ex rel.*
17 **DANE SMITH**, an individual,

18 Plaintiffs,

19 vs.

20 **VMWARE, INC.**, a Delaware corporation;
21 **CARAHSOFT TECHNOLOGY CORP.**, a
22 Maryland corporation;

23 Defendants.

Case No. 1:10cv769 (JCC/JFA)

**SECOND AMENDED COMPLAINT
DEMAND FOR JURY TRIAL**

**FILED UNDER SEAL
PURSUANT TO
31 U.S.C. § 3730(b)(2)**

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1 On behalf of Plaintiff UNITED STATES OF AMERICA, and on his own behalf, Plaintiff
2 and Relator DANE SMITH alleges as follows:

3 **I. INTRODUCTION**

4 1. This action alleges that, since at least 2000, Defendants have knowingly
5 defrauded, and continue to defraud the United States by not providing government purchasers
6 with comparable pricing, discounts, and sale terms as those received by Defendants' commercial
7 customers, in violation of law. As such, VMware, Inc. ("VMware") and Carahsoft Technology
8 Corp. ("Carahsoft") (collectively "Defendants") have knowingly submitted false claims, made
9 false statements, and conspired to defraud the federal government.

10 2. Among other things, Defendants have defrauded the government by furnishing
11 the General Services Administration ("GSA") with inaccurate pricing, inaccurate disclosures,
12 and incomplete information about the sales of VMware software, licenses, and related
13 maintenance, professional, and educational services. As a result of Defendants' knowing
14 submission of false pricing information, the government has paid higher prices on VMware
15 products and services than it should have paid.

16 3. Defendants' knowing submission of false and fraudulent claims for payment
17 constitutes a violation of the federal False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("FCA"). As a
18 result of their fraudulent conduct, Defendants have caused the United States to sustain a direct
19 loss of funds and damage to its interests.

20 4. Defendants made false claims to Plaintiff United States for payment for products
21 and services by misrepresenting the amounts that Defendants charged other customers for the
22 same products and services, and by over-representing to Plaintiff United States the quantity of
23 Defendants' products and services that Plaintiff needed.

24 5. Defendants concealed the fact that they did not have a right to those payments by
25 means of the false claims and representations described in this Complaint.

26 6. VMware is the market leader in "virtualization" software technology.
27 Virtualization software allows for the consolidation of multiple physical computers and servers
28 into one. For example, a company with 100 physical servers, after purchasing VMware's

1 virtualization products, will be able to perform the same amount of computing function with only
2 10 physical servers. The technology thus allows companies to cut down on hardware costs,
3 energy costs, and space dedicated to physical servers.

4 7. The technology is also useful to the government and its agencies, whose use of,
5 and need for, robust computing systems are comparable to the biggest private companies in the
6 world. In selling to the government, however, VMware and Carahsoft have systematically
7 charged more than they charge comparable commercial customers for the very same products and
8 services.

9 8. Defendants have done so by violating express federal laws, regulations, and
10 contractual terms that are designed to ensure that the government receives the best prices
11 available.

12 9. Defendants actively concealed the acts alleged herein from the government.
13 Defendants never informed the government of the discounted prices they charged their other
14 customers, and never informed the government that their prices on the GSA schedule were
15 falsely inflated.

16 10. This is precisely the type of conduct the False Claims Act is designed to combat.
17 The FCA was originally enacted at the request of President Lincoln during the Civil War. The
18 president believed that the Union Army was being defrauded by unscrupulous contractors. The
19 Act was substantially amended by Congress in 1986 and 2009 to enhance the government's
20 ability to recover losses sustained as a result of defendants' fraud. At those times, Congress
21 determined that fraud against the government was pervasive and that the FCA, which Congress
22 described as the primary tool for combating government fraud, was in need of strengthening.
23 Congress intended that the amendments create incentives for individuals with knowledge of
24 fraud against the United States to disclose the information without fear of reprisals or
25 government inaction, and to encourage the private bar to commit legal resources to prosecute
26 fraud on the government's behalf.

27 11. Any person who violates the FCA is liable for a civil penalty of up to \$11,000 for
28 each violation, plus three times the loss sustained by the United States. 31 U.S.C. § 3729(a); 64

1 Fed. Reg. 47099, 47103 (1999).

2 12. Based on the FCA, *qui tam* Plaintiff Dane Smith ("Smith" or "Relator") seeks to
3 recover treble damages, civil penalties, attorneys' fees and costs, and other relief for the federal
4 violations alleged herein, including retaliation in violation of the federal False Claims Act, 31
5 U.S.C. § 3730(h).

6 13. Defendant VMware also committed violations of state law, including wrongful
7 termination in violation of public policy. Smith seeks to recover all available damages, penalties,
8 and other relief for the state violations alleged herein.

9 **II. PARTIES**

10 14. The Plaintiffs in this action are the UNITED STATES OF AMERICA, through
11 Plaintiff and Relator DANE SMITH, who also brings claims on his own behalf.

12 15. Relator and Plaintiff DANE SMITH ("Smith") is a former employee of defendant
13 VMware.

14 16. Defendant VMWARE, INC. ("VMware") (NYSE: VMW) is a Delaware
15 corporation with its principal place of business at 3401 Hillview Ave., Palo Alto, California. At
16 all times relevant hereto, VMware conducted business in the Eastern District of Virginia.

17 17. Defendant CARAHSOFT TECHNOLOGY CORP. ("Carahsoft") is a privately
18 held Maryland corporation that distributes products, including those of VMware, to local, state,
19 and federal governments. It provides these products to the federal government through its
20 contract, GS-35F-0131R, with the GSA. Carahsoft's principal place of business is located at
21 12369 Sunrise Valley Drive, Suite D2, Reston, Virginia.

22 **III. JURISDICTION AND VENUE**

23 18. This Court has jurisdiction over the subject matter of this action pursuant to 28
24 U.S.C. § 1331 and 31 U.S.C. § 3732, the latter of which specifically confers jurisdiction on this
25 Court for actions brought pursuant to 31 U.S.C. §§ 3729 and 3730.

26 19. Personal jurisdiction and venue are proper in this district pursuant to 28 U.S.C. §§
27 1391(b) and 1395(a), and 31 U.S.C. § 3732(a), as one or more of the Defendants or their agents
28 can be found, reside, transact business, or otherwise engaged in fraudulent conduct within the

1 district.

2 **IV. THE BASICS OF VIRTUALIZATION**

3 20. VMware is the market leader in – and in fact has a near-monopoly on –
 4 “virtualization” software technology. Virtualization software allows for the consolidation of
 5 multiple physical computers and servers into one. For example, a company with 100 physical
 6 servers, after purchasing VMware’s virtualization products, will be able to perform the same
 7 amount of computing function with only 10 physical servers. The technology thus allows
 8 companies to cut down on hardware costs, energy costs, and space dedicated to physical servers.

9 21. The following pictures show a server room before use of VMware’s virtualization
 10 software, and after:

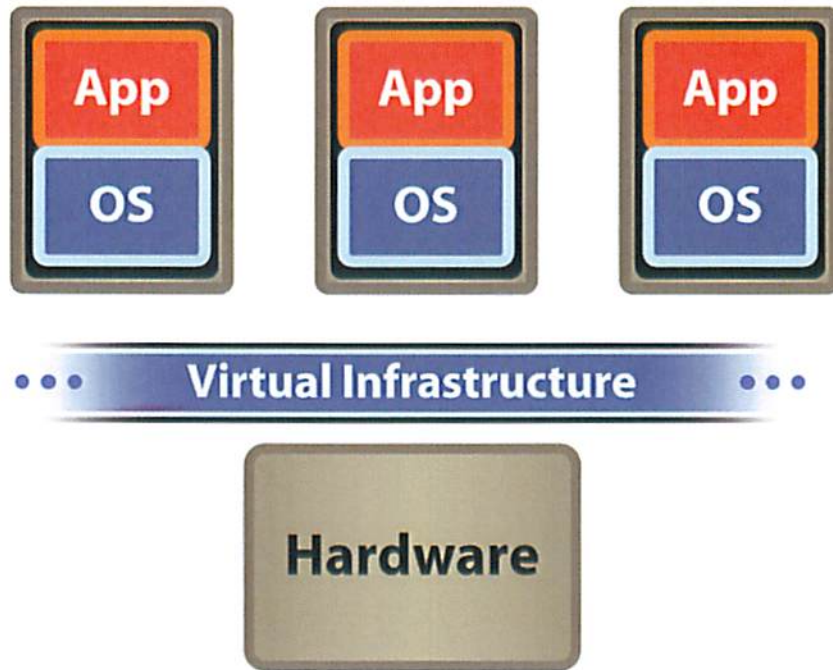


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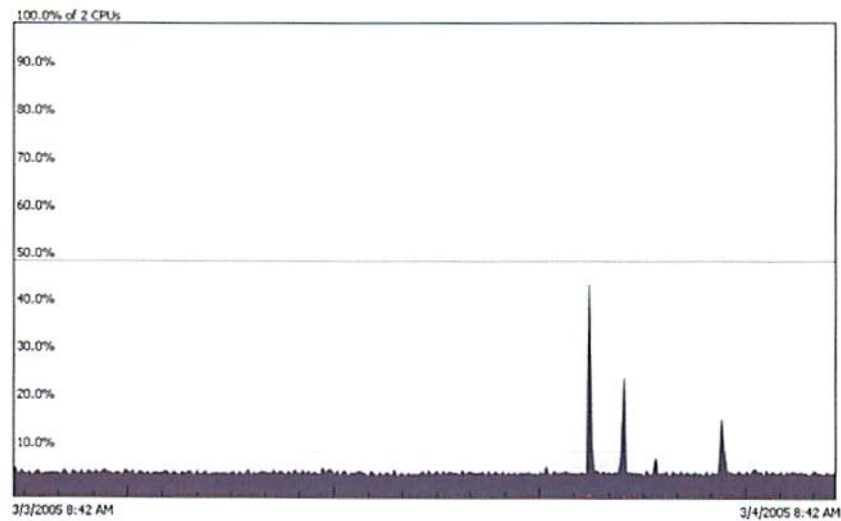


22. VMware's virtualization technology is based on the fact that the vast majority of computer hardware is underutilized. For example, a typical desktop computer or server, at any given moment, will typically only be utilizing 10% or less of its Central Processing Unit's (CPU's) capacity. Virtualization allows multiple "virtual machines" to run on one CPU, thereby maximizing use of the CPU, and making the entire system more efficient. The virtualization technology consists of a layer of software that slides between the operating system and the hardware, allowing one physical machine to act as several machines, each with their own operating system and applications, as illustrated here:

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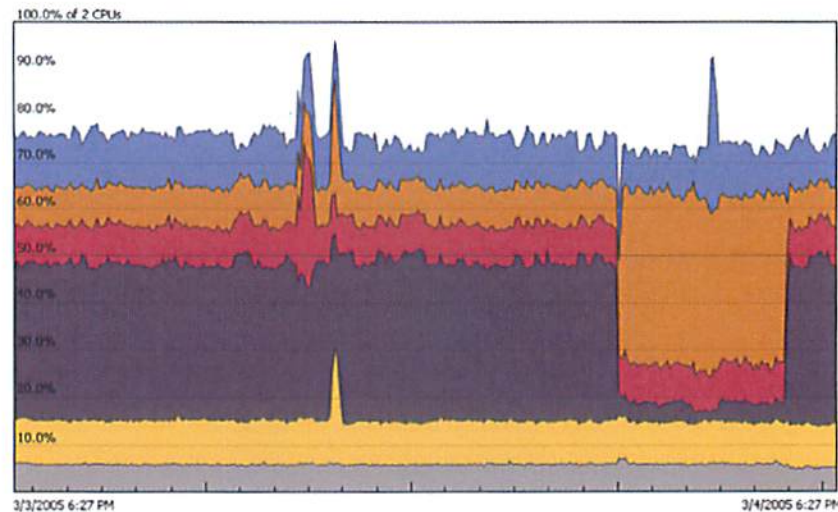


23. CPU efficiency can thus be increased from this:



To this:

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24. As the world rapidly increases its need for computing capacity, VMware's virtualization technology has become indispensable to entities of all sizes. As a result, VMware has grown into the fourth most valuable software company in the world. According to its most recent Form 10-K filed with the SEC, VMware had total revenues in 2010 of over **\$2.8 billion**, and has reported total revenues for 2011 of over **\$3.77 billion**. VMware's growth has been explosive, having had only \$700 million in revenues in 2006.

25. Much of this growth is due to VMware's sales to the federal government. As stated in a 2009 VMware press release:

"Our solid third quarter results were driven by strength in the US Federal sector, increased transaction volumes and particularly robust growth in our maintenance renewals," said Mark Peek, chief financial officer.

26. In 2011, VMware's CEO, Paul Maritz, emphasized how deeply VMware had penetrated the federal government, stating:

VMware is deployed throughout the Executive, Legislative, and Judicial branches of the U.S. Federal Government, including the Department of Defense and all branches of military and joint commands, all Cabinet-level agencies, and many quasi-governmental agencies and NGOs. The VMware vision for cloud computing in the federal government focuses on enabling agencies to adopt cloud while preserving existing investments. With virtualization as the foundation, agencies can build cloud architectures that are flexible enough to support a unified private and hybrid cloud model.

**IV. DEFENDANTS VIOLATED THE FALSE CLAIMS ACT BY FALSELY
INFLATING THEIR GSA SCHEDULE PRICE**

A. The Federal Supply Schedule

27. A plurality of VMware's sales to the federal government are through the General Services Administration's ("GSA") "Federal Supply Schedule" ("FSS"), or "Multiple Award Schedule" ("MAS"). Federal agencies can utilize the MAS to buy goods and services at a fixed price. The MAS is created from hundreds of pre-negotiated contracts. Procurement managers from government agencies can view these agreements and make purchases from the schedule, knowing that the contract terms and legal provisions have already been negotiated on their behalf.

28. In order to participate in the MAS program, vendors must agree to disclose their "commercial sales practices" ("CSP"), which include: (1) past commercial and government sales data, (2) discounts and concessions offered to their most favored customers, and (3) current published commercial catalogs and/or price lists from which such discounts are offered. GSA also requires vendors to disclose if they deviate from their standard written pricing policies, and to include a discussion of the frequency and nature of those deviations. In addition, GSA requires that vendors provide pricing information that is current, accurate, and complete. 48 C.F.R. § 515.408, 48 C.F.R. § 552.212 70.

29. GSA contracting officers determine whether the potential vendor's prices are fair and reasonable by comparing the prices and discounts that a company offers the government with the prices and discounts that the company offers to its commercial customers, as reported by the company. GSA attempts to obtain "Most Favored Customer" status for individual government purchasers, which means it seeks to obtain prices comparable to a vendor's best price to its most favored customers making similar purchases. 48 C.F.R. § 538.270.

30. When the vendor does not have commercial sales to the general public, it must provide to GSA the manufacturer's sales data if the manufacturer's sales under any resulting contract are expected to exceed \$500,000. The vendor must also obtain written authorization from the manufacturer for government access to the manufacturer's sales records for the purpose

1 of verifying the sales data submitted by the manufacturer. *See* 48 C.F.R. § 515.408(b)(5).

2 31. Another contract provision designed to protect the government is the “price
3 reductions clause” (“PRC”), which ensures that initially awarded prices remain fair and
4 reasonable throughout the life of the contract. Under the PRC, the contracting officer and the
5 vendor agree, before the contract is awarded, on: (1) the customer (or category of customers) that
6 will be the basis of the award (called the “tracking customer”), and (2) the government’s price or
7 discount relationship to the tracking customer (or category of customers). This relationship is
8 maintained throughout the contract period. If the contractor reduces the tracking customer’s
9 price at any time during the contract period, the government also receives the benefit of any such
10 reduction. 48 C.F.R. § 552.238-75(a), (c).

11 32. VMware has sold its products to federal agencies through the MAS program for
12 several years. Various entities have entered into MAS contracts through which VMware
13 products have been sold, and the allegations set forth herein apply to those entities.

14 **B. Carahsoft’s GSA Contract**

15 33. Currently, Carahsoft holds a GSA contract, number GS-35F-0131R, for sales of
16 general purpose commercial information technology equipment, software, and services. The
17 period covered by the contract is November 19, 2004, through May 7, 2012.

18 34. In January 2007, VMware products were added to Carahsoft’s GSA contract. As
19 such, Carahsoft became the exclusive seller for VMware products to the federal government.

20 35. During the fourth quarter of 2007 alone, VMware had approximately 10,000 sales
21 transactions totaling \$264 million. Of this amount, about 680 transactions, totaling \$27 million,
22 were sales to the federal government through the Carahsoft GSA contract.

23 **C. Carahsoft’s Sales of VMware Products Through the MAS**

24 36. VMware and Carahsoft knowingly violated the GSA regulations by failing to
25 provide the federal government with accurate and complete pricing information for their
26 commercial and government sales, and by failing to report subsequent price reductions and
27 discounts offered to commercial customers. As a result, the federal GSA schedule contains
28 falsely inflated prices for VMware’s products (sold through Carahsoft, as described below).

1 37. As a result, all of Defendants' sales to the federal government through the MAS
2 are based on fundamentally false information, and all claims for payment under those sales
3 therefore constitute false claims.

4 **D. The Disparity Between Commercial Pricing and Government Pricing**

5 38. VMware's pricing structure is heavily discount-based. VMware maintains a
6 standard list price, which is decreased based on multiple discount programs.

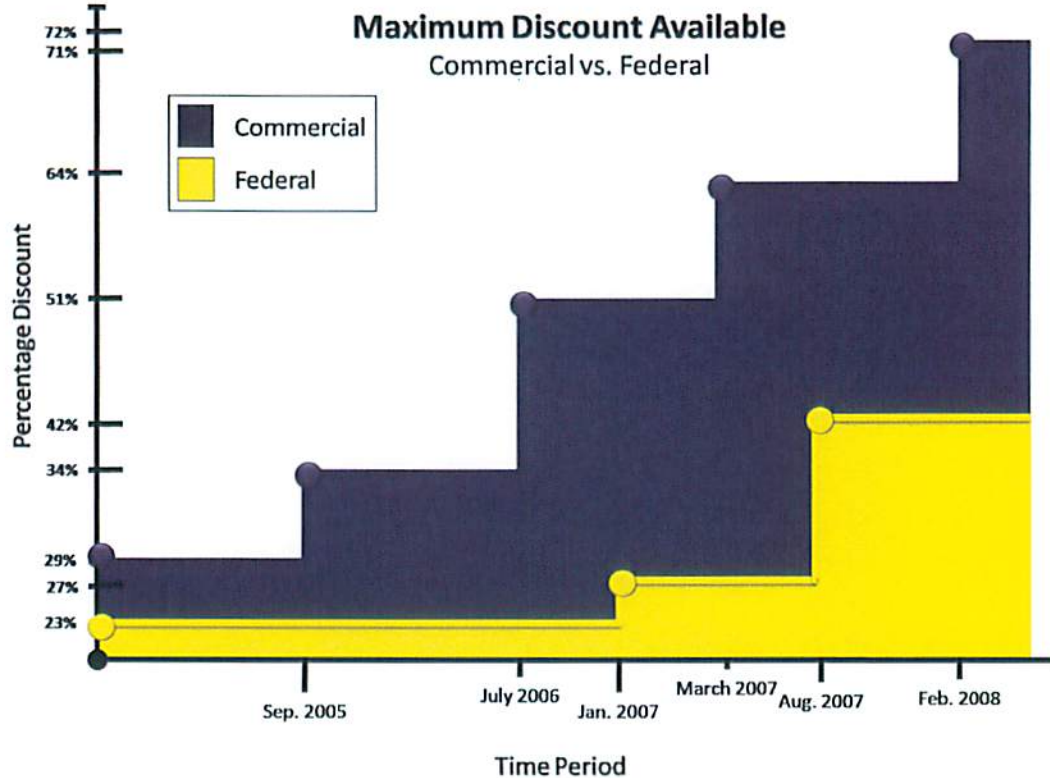
7 39. The list price for VMware's products is generally the same for commercial
8 customers and government customers. The discounts provided, however, vary wildly, with
9 commercial customers receiving far more discounts.

10 40. Based on the incomplete and inaccurate pricing data provided by VMware to the
11 federal GSA, Defendants' listing in the federal GSA schedule provides for a 12% discount off of
12 VMware's main product.

13 41. This 12% discount does not even approach VMware's most favorable discount to
14 commercial customers. Indeed, the 12% discount is far less than VMware's average or median
15 discount to commercial customers, and there are few, if any, commercial customers who do not
16 receive a more favorable discount.

17 42. Over the past several years, VMware has added multiple standard discount
18 programs for commercial customers. VMware has also added a few limited, discretionary
19 discount programs for federal customers on top of the 12%. Nonetheless, the disparity between
20 VMware's standard discounts for commercial customers, and federal customers, remains
21 staggering. The following chart illustrates the disparity between VMware's standard discount
22 programs:

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43. There was never any legitimate justification for this discrepancy. Indeed, VMware offered governments outside of the United States **better** discounts than were offered to commercial customers.

44. In addition to VMware's standard discount programs, VMware often negotiates *ad hoc* discounts for commercial customers in the form of contracts called Enterprise License Agreements ("ELAs"). ELAs typically provide discounts even greater than are available through VMware's standard discount programs.

45. VMware also arranges some commercial deals through "Special Pricing Forms" (SPFs), which provide additional *ad hoc* discounts on top of VMware's standard discounts.

46. VMware did not report ELA or SPF pricing to the federal GSA, nor has VMware updated the GSA with the commercial discount programs that it has rolled out since the GSA price was set. Accordingly, the GSA schedule, which was initially based on false information, has grown even more fraudulent, and fails to provide the government with the best discounts available.

1 47. As a result, all of Defendants' sales to the federal government through the GSA
2 schedule are based on fundamentally false information, and all claims for payment under those
3 sales therefore constitute false claims.

4 **E. Defendants' Non-GSA Sales Are Also Based on False Claims and**
5 **Information**

6 48. In addition to defrauding the federal government on sales made directly through
7 the GSA schedule, the false information contained on the GSA schedule materially impacted
8 Defendants' sales to the federal government that did not go directly through the GSA process.
9 The GSA schedule price is the starting point for the negotiation of prices on government
10 contracts that are greater than \$500,000, which do not go directly through the GSA procurement
11 process. Accordingly, the false information upon which the GSA schedule is based materially
12 impacts and infects all such negotiations and resulting contracts, and any claims for payment
13 under those contracts constitute false claims.

14 49. For example, on March 29, 2009, Carahsoft entered into a "Blanket Purchase
15 Agreement, DoD Enterprise Software Agreement (ESA)" (hereinafter, "BPA"), with the United
16 States Department of Defense, for the sale of VMware products and services. Enterprise
17 Software Agreements and Blanket Purchasing Agreements are a program of the Department of
18 Defense's ("DoD") "Enterprise Software Initiative" ("ESI"). According to the DoD ESI's
19 website, the ESI was formed in 1998, and its mission is to provide additional discounts off of the
20 GSA schedule, as follows:

21 DoD ESI is an official DoD initiative sponsored by the DoD Chief
22 Information Officer (CIO) to save time and money on commercial
23 software, IT hardware, and services. Through its joint team of experts,
24 requirements are consolidated and agreements are established with IT
25 providers resulting in a unified contracting and vendor management
26 strategy across the entire department. **In its first ten years of operation,**
27 **DoD ESI achieved a cost avoidance of over \$3 Billion off prices**
28 **established on the GSA Federal Supply Schedule.**

26 (Emphasis added).

27 50. The Carahsoft BPA is consistent with this mission and methodology. The
28 Carahsoft BPA explicitly states its purpose as "to further reduce the administrative costs of

1 acquiring commercial items from the General Service Administration (GSA) Federal Supply
 2 Schedule (FSS) Contract GS35F-0131R.” As described above in paragraphs 17 and 33, GS35F-
 3 0131R is the Carahsoft GSA contract through which it sells VMware’s products and services,
 4 and which is based on materially false information. The DoD BPA thus used the Carahsoft GSA
 5 prices as a starting point, and was explicitly designed to provide slightly better prices to the DoD
 6 than are available through the GSA contract.

7 51. Unlike the Carahsoft GSA contract, the DoD BPA is **not** limited to purchases
 8 under \$500,000. Instead, it applies to deals of any size, and provides the following additional
 9 discounts off of the GSA schedule, as follows:

10	License Orders under \$50,000	1/2%
11	License Orders over \$50,000	1%
12	License Orders over \$300,000	2%
13	License Orders over \$1,000,000	4%
14	License Orders over \$5,000,000	5%
15	License Orders over \$10,000,000	6%
16	License Orders over \$20,000,000	7%
17	License Orders over \$50,000,000	8%

18 The BPA explicitly states that these “[d]iscounts are off of the GSA Schedule Prices in effect at
 19 time of order.”

20 52. In addition to misrepresenting to the DoD that it would receive VMware’s best
 21 prices by adding a slight discount on top of the GSA schedule prices, Defendants were careful to
 22 exclude from the additional discounts its most lucrative product: “Support and Subscription”
 23 (“SnS”) charges. As discussed below, ongoing SNS charges are the real money-maker for
 24 Defendants. By excluding SnS from the additional discounts provided through the DoD BPA,
 25 Defendants further limited any benefit conferred to DoD.

26 53. Defendants’ efforts to secure the DoD BPA were spearheaded by VMware, and
 27 specifically Aileen Black, the head of VMware’s federal sales division (referred to as the “federal
 28 channel”). In a December 17, 2005 e-mail to her staff and supervisors, including Carl

1 Eschenbach, Karthik Rau (then-head of VMware Product Management and Worldwide
 2 Marketing), and Yael Zheng (then-Vice President of Corporate/Worldwide Marketing), Black
 3 emphasized the importance of the DoD program and VMware's intention to apply for a BPA,
 4 writing:

5 I am giving you a heads up on the VMware Federal effort for the
 6 Enterprise Software Agreement for the Department of Defense. In the
 7 short term I just need to make you aware. There is a ton of content on our
 8 web site. But if you can think of something that may help us please send.
 We will be coming to you over the next months for help on this effort.
 Having this in place puts VMWARE in a unique position against any
 competition.

9 Very few companies have asked or make it on the list of companies
 10 with ESAs. (ORACLE , Microsoft, Symantec are a few) This is
 11 something the federal team has been working on for a year. We have been
 12 fast tracked by the OSD CIO Dennis Clem. This very important to our
 13 effort in the federal space. This makes us a standard with a contract
 vehicle that all DOD organization and a few Civilian can automatically use
 without competing the award. **This is like heaven in the federal space.**
 We currently have customers pressuring this office. **We need to act fast**
 if we want this very incredible opportunity.

14 54. Black attached to her e-mail a summary of the DoD ESI program, which
 15 highlighted the purpose of the program to provide DoD with the best prices available.
 16 Specifically, the summary stated:

17 **Considerations in Transition to ESI Environment.** Among other terms
 18 and conditions ESI includes in its standard template for ESI ESAs are the
 following:

19 1. Most Favored Customer Prices. The prices under the ESI ESA will be
 20 at least as low as the prices that the publisher has under any other contract
 21 instrument under like terms and conditions. If at any time the prices under
 any other contract instrument become lower than the prices in the ESI
 ESA, the ESI ESA will be modified to include the lower prices.

22

23 (Emphasis in original).

24 55. From the very outset, Black and other upper-level VMware management,
 25 including Carl Eschenbach, thus knew that the purpose of the DoD ESI program was to provide
 26 DoD with the best pricing available. Despite this knowledge, VMware management actively
 27 pursued the DoD BPA, allowing it to be based on the false information underlying the GSA
 28 schedule. The BPA was signed by Craig Abod, President of Carahsoft.

1 56. As anticipated by Aileen Black, the DoD BPA has been highly lucrative for
2 VMware and Carahsoft. In just the past three years, the Federal Government has made over 700
3 purchases of VMware products and services through the Carahsoft BPA, totaling over
4 \$142,000,000, all at falsely inflated prices. This amount even exceeded the expectations of the
5 signatories of the Carahsoft BPA, which explicitly states: "The Government estimates, but does
6 not guarantee, that the volume of purchases through this agreement will be \$100,000,000."

7 57. Worse still, on May 19, 2010, the Carahsoft BPA was converted into a "GSA
8 SmartBUY agreement," and thereby was opened to the entire Executive Branch of the United
9 States Government. As of May 19, 2010, Defendants' false prices contained on the GSA
10 schedule thus became the explicit basis for essentially all federal government purchases – both
11 below and above the \$500,000 threshold.

12 58. VMware's products, services, and its false GSA pricing have become so pervasive
13 that their virtualization technology is now embedded into government-wide Information
14 Technology (IT) consolidation and cost reduction programs such as the U.S. Chief Information
15 Officer's "25 Point Implementation Plan to Reform Federal Information Technology
16 Management," as well as the U.S. Department of Commerce and National Institute of Standards
17 and Technology's "NIST Cloud Computing Standards Roadmap" and NIST's "Guidelines on
18 Security and Privacy in Public Cloud Computing" which provide the core direction in the United
19 States Government's most aggressive IT plan ever to reduce costs by migrating key applications
20 to the Cloud.

21 59. On information and belief, in addition to the DoD BPA, there are other non-GSA
22 contracts between Defendants and the Government that are directly based on the false GSA
23 schedule, or that contain provisions that require Defendants to provide the Government with the
24 best prices made available to commercial customers for the same products. Defendants
25 knowingly violated such contractual requirements by systematically charging the Government
26 more than their other customers.

27
28 ///

F. Use of “Consolidation Ratios” and Other Means to Further Inflate Prices to the Government

60. In addition to charging the Government more per license of VMware’s virtualization software than they should have, Defendants overcharged the Government in a second way: intentionally over-representing the number of units that government customers needed to buy.

61. For example, for a commercial customer needing to virtualize 100 physical servers, VMware might advise the customer that those 100 physical machines can be consolidated through virtualization onto only 10 physical servers. Hence the customer will only need to purchase 10 licenses. The number of physical machines that can be consolidated onto one machine is referred to by VMware as the “consolidation ratio.” In this example, the consolidation ratio would be 10:1.

62. VMware’s internally published acceptable consolidation ratio standard is between 4:1 and 6:1. Any ratio higher than that was to be substantiated in writing and spelled out in detail in the ELA Template Worksheet circulated internally for approvals. Ranges above 6:1 were intended to be permitted only under the most exceptional circumstances. However, consolidation ratios far in excess of 6:1 for commercial customers were commonplace and there was no enforcement of internal policy requiring detailed rationale or explanations for the exceptionally high discounting for commercial customers.

63. For a government customer, however, with the same number of physical servers, and the same basic computing needs, VMware will advise a lower consolidation ratio, such as 4:1. With a 4:1 consolidation ratio, the government would have to buy 25 licenses, rather than just 10. Moreover, the government would still be left with 25 physical servers, and all of the energy, hardware, and support costs associated therewith.

64. Due to VMware’s dominance of the market for virtualization software, most government purchasers lack the negotiating leverage, and the knowledge, to challenge VMware’s assertion of the appropriate consolidation ratio.

65. VMware thus essentially disguises additional discounts to its commercial

1 customers, and sells the government more licenses than it wants or needs, by misrepresenting the
2 appropriate consolidation ratios for government purchasers. This occurs in many contracts with
3 the Government – not just those that are established through the MAS.

4 66. However, the impact is compounded in the MAS program, because Defendants
5 fail to report the discrepancies in consolidation ratios to the federal GSA. The GSA schedule
6 price is therefore higher than it would be otherwise.

7 67. Consequently, Defendants' charges to the Government for VMware licenses and
8 attendant services violate the False Claims Act.

9 68. Defendants' upper-level management, executives, and directors were well aware
10 of the discrepancies between consolidation ratios provided to commercial customers and those
11 provided to the government. Among those to whom these discrepancies were reported were
12 VMware's Vice President of Audit and Compliance, Susan Insley, the Audit Committee of the
13 Board of Directors (including Michael Browne, Dennis Powell and Renee James), and CEO Paul
14 Maritz.

15 69. VMware management knew that the manipulation of consolidation ratios was
16 potentially problematic, but believed that if the terms of commercial ELAs remained hidden, the
17 manipulation would not be caught. Accordingly, VMware Senior Management often referred to
18 ELA commercial pricing as "black box" ELA pricing. For example, VMware entered into an
19 ELA with the UK Ministry of Defense that was far more favorable than a larger ELA entered into
20 with the United States Navy Marine Corps Internet (NMCI) during the same time period. Jeff
21 Littlejohn, then the Director of Systems Integrators and Outsourcing for VMware, expressed to
22 Aileen Black and Carl Eschenbach his concern that the more-favorable terms of the UK deal
23 would come to light. Littlejohn sought reassurance that the consolidation ratios and other key
24 components of the UK ELA were hidden via the "black box ELA price" model. Eschenbach
25 responded by confirming that: "On ELA's we do not disclose discounting, it's a black box
26 pricing model."

27 70. Even worse than the consolidation ratio disparity, VMware offers many of its
28 commercial customers contracts that allow for the **unlimited** addition of licenses during the term

1 of the contract, at no extra cost.

2 71. For example, in September of 2007, VMware offered eBay a contract for 1,000
3 licenses, at a discount of 53% off the list price. The 1,000 license figure was based on a
4 recommended consolidation ratio of 8:1. In addition, VMware allowed eBay to add an unlimited
5 number of additional licenses to the contract, at no further charge, for the two-year term of the
6 contract.

7 72. The terms of this eBay deal are of the type offered by Defendants' to their most
8 favored commercial customers. The federal government should have received comparable terms,
9 but did not.

10 **G. Defendants Overcharge the Government Further on Support and**
11 **Subscription Services**

12 73. Much of Defendants' revenues come in the form of "Support and Subscription"
13 ("SnS") charges. All buyers of VMware's software must purchase SnS packages along with the
14 software. Among other things, SnS services provide support, software upgrades, and software
15 patches. The SnS packages vary in their term (usually one to three years) and in the level of
16 support (e.g., 12 hours per day phone support versus 24 hours a day phone support).

17 74. Generally, the price for SnS services for commercial customers is set as a
18 percentage of the net price of the software purchased (the list price less the discounts). Thus, for
19 example, a commercial customer will be offered SnS for 20% of the net price of all of the
20 software purchased. If the customer pays \$10,000 for software (discounted from a list price of
21 \$20,000), the customer will pay an additional \$2,000 per year for SnS.

22 75. Government customers, however, will typically be offered SnS based on a
23 percentage of the list price of the software purchased. Thus, if a government customer pays
24 \$15,000 for software (discounted from a list price of \$20,000), Defendants will charge the
25 government customer 20% of the \$20,000 list price for SnS: \$4,000 per year.

26 76. SnS thus compounds the disparity between the discounts Defendants offer
27 commercial customers and the discounts Defendants offer the government. Moreover, as with
28 the software prices, SnS prices are listed on Defendants' federal GSA schedule, at an inflated

price based on false and incomplete information.

H. Additional Examples of Pricing Disparities

77. A typical commercial purchase is illustrated by Defendants' sale to Commercial Customer A ("Customer A") on December 28, 2007. The sale was for 794 VI3 licenses. The contract used a consolidation ratio of 7 to 1, offered a discount of 56% (actually 56.1828%) off the list price of the licenses, and priced the SnS services at 18% of the net price of the software for the 3-year term of the contract.

78. Defendants also provided Customer A with an ELA that allowed an unlimited number of licenses to be obtained for free, meaning that it could legally download an infinite number of VI3 licenses and an infinite amount of SnS services on those licenses within the next 3 years at no additional cost. The unlimited ELA provision was valuable to Customer A because it had 8,000 servers with 16,000 CPUs and thus was likely to need additional licenses.

79. For this sale, the average cost of each of the original 794 VI3 licenses was \$2,519.50 ($\$5,750 \text{ list price} \times 794 \text{ licenses} = \$4,565,500$; $\$4,565,500 - [\$4,565,500 \times .561828 \text{ discount}] = \$2,000,474$; $\$2,000,474 / 794 \text{ licenses} = \$2,519.50$). The SnS services for 3 years totaled \$1,092,087.

80. A typical federal purchase comparable to the above commercial sale is illustrated by Carahsoft's sale to the United States Central Command ("CENTCOM") on January 24, 2008. The sale was for 460 VI3 licenses. This sale used a consolidation ratio of 4 to 1, a discount of only 39% on the licenses, and pricing at 21% of net on the SnS services for the 3-year term. In addition, the ELA was capped at 460 licenses. Thus, if CENTCOM wanted additional licenses, it would need to make another purchase, incurring additional costs for the licenses and additional costs for the SnS services on those licenses.

81. The average cost of each VI3 license on this federal sale was \$3,507.50 ($\$5,750 \text{ list price} \times 460 \text{ licenses} = \$2,645,000$; $\$2,645,000 - [\$2,645,000 \times .39 \text{ discount}] = \$1,613,450$; $\$1,613,450 / 460 \text{ licenses} = \$3,507.50$). Thus, federal purchaser CENTCOM paid 38% more on a per VI3 license basis than did commercial Customer A above.

82. In summary, the comparable characteristics of the two sales were:

	Customer A	CENTCOM
Number of VI3 Licenses	794	460
Consolidation Ratio Used	7 to 1	4 to 1
Discount on VI3 Licenses	56%	39%
Cost of SnS Services	18%	21%
Average Cost of VI3 License	\$2,547.50	\$3,507.50
ELAs	Unlimited number	Limited to 460

83. In addition to CENTCOM paying 38% more per VI3 license, CENTCOM's future SnS costs after the third year would be \$569,381 per year for only a maximum of 460 licenses. By comparison, Customer A's future SnS costs each year after the third year would be \$598,520 for *as many licenses* as it had wanted to download during the 3 previous years. Of particular significance in the federal sale is that CENTCOM's ELA was capped at 460 licenses. Thus, the risk to VMware that CENTCOM would download additional VI3 licenses was not as great as that of Customer A, since CENTCOM only had 600 servers and 1,500 CPUs, compared to Customer A's 8,000 servers and 16,000 CPUs.

84. If the lower 4 to 1 consolidation ratio—the ratio provided to the government—had been given to Customer A, this commercial customer would have had to purchase 1,389 licenses at an additional cost of \$3,421,250, or 75% higher than it actually did.

85. A table listing additional sales that demonstrate the difference in Defendants' charges to commercial customers and federal agencies is attached hereto as Exhibit A.

I. VMware Set Up Carahsoft as a Sham to Attempt to Avoid False Claims Act Liability

86. VMware was aware that it faced false claims act liability for failing to provide federal and state governments with the same prices and discounts that it offered commercial customers. Accordingly, in January 2007, in a misguided attempt to shield itself from liability, rather than list itself on the federal GSA schedule, it made a separate company, Carahsoft, the

1 sole GSA schedule holder for VMware's products.

2 87. This scheme is evidenced in e-mails written by Aileen Black, the head of
3 VMware's federal sales division (referred to as the "federal channel"). For example, in her
4 weekly report dated November 17, 2006, Black wrote: "Carahsoft plan moving but need to keep
5 on track for Jan 1. We have got to move on the [Carahsoft] GSA business plan. ORACLE had
6 huge fine this week due to not handling this properly (I might add this is the second time!!). If
7 we set this up now correctly we will avoid difficult issues for the future."

8 88. Similarly, in an e-mail dated January 23, 2007, from Aileen Black to CEO Diane
9 Greene and other upper-management, Black officially announced the Carahsoft arrangement, and
10 incorrectly stated that it "provides VMware with some added protection from the legal issues
11 regarding best pricing practices to the government." VMware and Black mistakenly believed
12 that if they did not have a direct contract with GSA, they would not be caught overcharging the
13 federal government.

14 89. Carahsoft was thus nothing but a sham to attempt to shield VMware from liability
15 for its knowing violations of pricing rules. VMware of course maintains tight control over
16 Carahsoft and its practices. Carahsoft performs marketing functions controlled directly by
17 VMware, and unlike a truly independent reseller, all deals made by Carahsoft with the
18 government must be approved by VMware.

19 90. As a result of this relationship, Carahsoft has quickly grown to be one of the top
20 100 government technology contractors in the United States. Carahsoft's revenues jumped from
21 merely \$91.9 million in 2006, to \$834.5 million in 2010, and over **\$1 billion in 2011**.

22 91. Defendants also attempted to shield themselves from liability and justify the vast
23 pricing disparity between commercial and government by falsely claiming that the software sold
24 to the government was different than the software sold to commercial customers. It was and is
25 not; the software is exactly the same. Defendants attempted to concoct a differentiation by
26 labeling software sold to the government with a different SKU number – referred to as
27 "Government SKUs". As discussed in the interview responses below, however, there was
28 absolutely no difference between software products that carried Government SKU numbers, and

1 the products sold commercially under standard SKUs. In fact, during much of the time that
 2 Defendants claimed to the government to have unique products with Government SKUs,
 3 internally Defendants had not even set up a separate Government SKU product line. The
 4 existence and legitimacy of Government SKUs was another false and fraudulent claim made by
 5 Defendants to the federal Government, for both GSA and non-GSA sales.

6 **VII. DEFENDANTS KNEW THAT THEIR PRACTICES WERE ILLEGAL**

7 92. Defendants knew that the foregoing practices were illegal, as evidenced in
 8 multiple internal documents in Relator's possession.

9 93. For example, in an e-mail from the head of VMware's federal sales, Aileen Black,
 10 to VMware's then-CEO Diane Greene, dated May 27, 2008, Black pitched a new proposed
 11 discretionary discount program for federal customers, and plainly informed Greene of the
 12 discrepancy between government discounts and commercial discounts, stating: **"BTW the max**
 13 **discount on this program is much less than the non-federal program (46% vs 67%)."**

14 94. Black attached to the e-mail an executive summary of the proposed discount
 15 program. In that executive summary, provided to then-CEO Diane Greene, Black plainly
 16 acknowledged the effect of the disparity between available discount programs, stating: **"Federal**
 17 **margins have been significantly higher than commercial margins in the US . . ."**

18 95. In the executive summary, Black also emphasized that a goal of her proposed new
 19 discount structure was to **"[c]onvert automatic Government discounts into discretionary**
 20 **discounts . . ."** In that way, Black could further limit and control the amount of discounts
 21 provided to government customers.

22 96. Concerned that Black's new program perpetuated unlawful discrepancies between
 23 commercial and government discounts, two VMware employees, Leigh Madden and Steven
 24 Houck, put a hold on Aileen Black's proposed new program in order to conduct an internal
 25 investigation into VMware's federal pricing practices. In response, Aileen Black, and her
 26 superior, Carl Eschenbach, expressed great frustration at the delay, and inquired about the
 27 reasons for the investigation. Houck's response was as follows:

1 As we were putting the program together Leigh and partners were
 2 raising concerns about the ethics and legality of our pricing practices
 3 in Federal. The team was meeting with disti prior to launch this past
 4 [week] and more serious concerns were raised. I checked with Leigh
 5 again and he expressed concern with us pricing our government deals
 6 at a higher price than what is Commercially available. This coming to
 7 a head on a current deal with EPA and Dell. I am being told that
 8 Aileen is strong arming pricing that violates GSA requirements. I
 9 have not verified this.

10 Short of it. I don't want to put me You or VMware at financial or
 11 legal risk through the program.

12 97. A follow-up e-mail string from the same evening reiterated the same concerns
 13 regarding the discrepancy between federal and commercial pricing. In that string, Houck wrote:
 14 "My concern is that we are institutionalizing a pricing practice that could be off sides." At
 15 the time of these e-mails, Carl Eschenbach was the Executive Vice President of World Wide
 16 Field Operations at VMware.

17 98. In another e-mail from the same period, Madden wrote Houck as follows:

18 The original Federal program was based on pricing to our distributors at
 19 the same discount levels (20% or 25% depending on VIP tier) as the
 20 commercial program. There was concern amongst the VMware Finance
 21 team that this discount level would negatively impact our margins and the
 22 maximum distribution discount level approved by VMware Finance was
 23 15%. The 12% or 15% distribution discount for the Federal program will
 24 put any partner using this pricing at an 8-10% disadvantage to any similar
 25 partner quoting commercial pricing **Our higher pricing to the US
 26 Government is not the industry norm and regularly results in
 27 questions from our partners as to why we charge the Government
 28 more than commercial customers. . . .**

**We are required to disclose pricing differences between Federal and
 commercial pricing in our commercial sales practices chart which
 Carahsoft must submit to GSA as a part of their letter of supply
 submission.**

(Emphasis added.)

29 99. As part of Madden and Houck's investigation, they conducted a series of
 30 interviews with VMware employees and resellers. The interviewees' responses reflect
 31 widespread knowledge and concern regarding the discrepancies between commercial and
 32 government prices. For example, Question 4 asked: "Do you have any concerns about
 33 VMware's current partner programs or pricing practices?" Among the responses were the

1 following:

- 2 • Yes. . . VMW positioning high pricing to Fed customer and partner
- 3 knows we provide better pricing to commercial. Counter to what
- 4 is expected.
- 5 • . . . The disparity between our Fed and Commercial programs
- 6 creates a risk for VMware. Immix key tenet - Fed and commercial
- 7 programs should look alike to minimize risk.
- 8 • I like seeing a program being prepared to develop standard
- 9 practices. Advice - if Fed discount standards are different from
- 10 commercial, need to justify w/ GSA. . .

11 100. Question 5 of the survey asked: "Were you made aware of the differences between
12 our VMW Govt product vs. our commercial product and the additional warranties/benefits
13 associated with the VMW Govt product?" The responses were as follows:

- 14 • No.
- 15 • **No. There is really no difference. Smoke and mirrors.**
16 Different SKUs helped us w/ GSA and to eventually have tracking
17 of Gov't business. It has never been clear. No write-up that I am
18 aware of. Should include warranties in the EULA. All VIP
19 agreements must specify use of appropriate SKU.
- 20 • No. Partners don't perceive any difference. They look at the
21 comm. vs. Fed delta and quote commercial pricing open market.
- 22 • No.
- 23 • No
- 24 • Yes. It was explained one year ago. Customers are not aware. HP
25 has different SKU structure for Federal - common criteria etc.
- 26 • No
- 27 • No

28 101. Question 8 asked: "Is there anything else you would like to address regarding
29 VMware or the VMware Federal partner program?" Among the answers were the following:

- 30 • To remove ambiguity - have GSA come in to review program
31 before we launch it. Ensure collaboration w/ GSA. **Parity**
32 **between commercial and Fed programs. Must justify any**
33 **deltas.**

34 ///

- **Pricing to Fed Govt is higher than commercial - I am aware of this perception . . . We are seeing most vendors w/ Commercial/Fed pricing parity. . .**

102. In a power point document summarizing the results of the interviews, several suggestions were made to alter VMware's federal pricing practices. Among those were to: "Remove commercial pricing advantage to create incentive for partners to use program pricing," and "Address concerns about pricing inequity to Gov't."

103. The results of the investigation and interviews were shared with upper management at VMware, all of whom knew of the GSA most favored customer requirements. For example, in the executive summary Aileen Black provided to then-CEO Diane Greene on May 27, 2008, discussed above, Black wrote that one of the "Program Objectives" was to "[m]aintain compliance with Government [*sic*] Services Administration (GSA) commercial practices comparison requirements." (This, of course, was a purely self-serving, false statement – management and executives knew that neither the original nor proposed discount programs complied with GSA requirements.)

104. Because of the vast discrepancy in discount programs between commercial and federal, independent VMware resellers sometimes quoted the better commercial discounts to federal government customers. Doing so put Defendants at risk; they did not want federal government customers knowing about the much greater discounts available to commercial customers. Accordingly, VMware management responded aggressively when resellers quoted commercial discounts to federal customers. For example, in or about April 2006, Defendants rolled out a "VPP" discount program. Aileen Black vehemently prohibited application of the VPP discounts to government sales, despite internal opposition, including from Relator Smith. In an e-mail to Relator Smith, dated July 13, 2006, Black stated: "Fyi due to several issues including legal. This program will not be rolled out to FED."

105. In March 2007, enhancements were made to the VPP discount program which increased the discounts in the first three bands by an additional 5% and lowered the management approval levels. However, the discounts were still not permitted to be used in sales to the government.

106. Just a month later, in April 2007, the commercial channel launched a new discount program called "Advantage+" which provided discounts not related to volume of purchases. It increased a prior discount of 6% to a potential discount of 19%, representing a 10% base discount, an additional 6% rebate for selling to a new VMware customer, and an additional 3% when the sale involved the new "Solution Track" methodology. Elliot Fliesler, VMware's Senior Channel Demand Program Manager, sought to obtain Smith's signature on the Advantage+ program guide on April 4, 2007. In response to Fliesler's email to Smith and Black, Black sent an email to Smith on April 5, 2007, stating:

These need to clearly state that these are not applicable to the Government sales direct or indirect. We already offer rebates in our program. You need to alter this before it goes out. Ed [Edward Gibson, Inside Sales Rep and later Federal Channel Sales Manager] can you make the suggested changes and send back to Dane. This is extremely important!!!!!!!!!!!!!!!!!!!!

Smith replied to Black the next day with "cc's" to Jennifer Baker ("Baker"), formerly employed by VMware as Channels Sales Manager, and Edward Gibson that: "First I heard that this should not count. I do not agree." As a result, Baker emailed to Smith that same day:

Colleen (and Brandon and Alan) [Colleen Lenihan, Director of Channel Development, Brandon Sweeney, Director of Americas Channel Sales, and Alan Geary] are very aware that this new program can't be used for Fed customers When we first developed the Government Opp Reg program, we were unaware that this new program was being developed ... I think it's a huge disadvantage for Fed that the programs are different and that the new program is better than ours.

107. Black continued to remind VMware management that the federal channel did not have the same volume discounts and prices as the commercial channel. She sent Amaury Gallisa, formerly employed by VMware as Vice President of World Wide Channels, an email regarding the VPP on June 25, 2007, stating:

Again, I have pointed this out time and time again. Do these documents note that this [does] not apply to the government? I don't want to be chapter 2 in the investigation under EMC's situation. WE still haven't gotten any response on the TPP program [the government's volume pilot plan that was rolled out in July 2007]. I am more than just [a] little frustrated and without being clear on this issue we are putting the company at risk.

108. Black continued to be upset that VMware resellers were quoting government

1 buyers with the commercial discounts, and worried that by doing so, it would become clear to the
 2 Government that it was not receiving the same prices offered to commercial customers. In her
 3 Weekly Report - Public Sector ("Report") to Smith and his management team on August 11,
 4 2007, she stated:

5 VPP continued to be "accidentally" used with government accounts. This is
 6 a serious issue. TPP promo rolled out to help but still has continued.
 7 GSA is spending more time finding companies to fine (just ask SUN,
 8 EMC, and Oracle) than working on their day job. It is very profitable
 9 when you fine folks 100 million. This is serious. The times have changed
 10 and they are cracking down and cracking down hard.

11 109. In March 2008, sales representatives from AltTech, one of VMware's authorized
 12 resellers, sought to sell VMware products to the United States Department of Agriculture
 13 ("USDA") utilizing the Carahsoft GSA contract. AltTech had provided pricing information to
 14 USDA based upon the standard commercial discounts it had previously used in its commercial
 15 sales. However, VMware's federal channel prohibited AltTech from offering the standard
 16 commercial discounts to the USDA. Leigh Madden ("Madden"), VMware's Director, Public
 17 Sector Partner Sales, sent an email, dated March 13, 2008, to Brian Johnson and John Stubbs of
 18 AltTech stating:

19 There appears to be some confusion on your end. Reviewing our
 20 conversation yesterday:

21 1. I stated that Federal transactions were not eligible for commercial
 22 pricing/programs. This is clearly stated in VMware partner central and on
 23 the opportunity registration page. Currently we have only one dealer
 24 approved for Federal business - Carahsoft. We mistakenly accepted the S1
 25 - USDA registration with AltTech manually added to the preferred
 26 distributor box, so we agreed to provide an AltTech discount of 25% for
 27 an Enterprise VAR plus an additional 6% for this transaction only. There
 28 was no discussion of any further discount or rebate nor applicability to any
 other deal.

1 110. In a subsequent email to Brian Johnson and John Stubbs on March 20, 2008,
 2 Madden stated:

3 I want to follow up to our recent conversation regarding USDA with an
 4 email highlighting the specific programs referenced during those
 5 discussions. The following commercial discounts/programs are not
 6 applicable to VMware's US Federal Government business:

- 7 1. Advantage + Opportunity Registration
- 8 2. Advantage + New Account
- 9 3. VPP
- 10 4. Influence +

1 5. ELA Registration

2 All existing VMware Federal Government channel discount programs are
 3 run through our Government Dealer Program. Carahsoft is currently the
 4 only authorized VMware Government Dealer. All reselling partners must
 5 register and transact Federal Government business using Federal
 Government discount programs through Carahsoft.
 We discussed the USDA and DOE/INL transactions that were improperly
 priced by AltTech using commercial discount programs.

6 **VIII. THE COVER UP: RETALIATION AGAINST RELATOR**

7 111. As Relator Smith reported, investigated, and attempted to stop the fraudulent
 8 conduct of Defendant VMware, VMware attempted to cover up its scheme by threatening,
 9 discriminating against, and ultimately discharging Relator.

10 112. Beginning in January 2009, Smith was asked to fully cooperate with VMware's
 11 ethics and compliance investigation involving Eschenbach and other VMware executives'
 12 fraudulent pricing practices of overcharging the federal government, partner and employee claims
 13 of unethical price fixing and restraints of trade, age and gender discrimination, and other acts of
 14 illegal workplace practices and corporate malfeasance. The investigation was led by Susan
 15 Insley, Vice President of Internal Audit at VMware ("Insley").

16 113. Smith took action to stop VMware's fraudulent practices and other illegal acts by
 17 fully cooperating with VMware Human Resources, Internal Audit, Compliance, and Ethics
 18 departments' requests for information by providing them with detailed reports when such
 19 violations occurred.

20 114. As part of VMware's ethics and compliance investigation, Smith met with Lori
 21 Martinez, VMware's Director of Ethics and Compliance ("Martinez"), and Insley in February
 22 2009 to report VMware's fraudulent pricing practices of overcharging the federal government, as
 23 well as other fraudulent and unlawful conduct by senior VMware executives. These sessions
 24 took place during the course of three (3) days for approximately 18 hours. Additionally, Smith
 25 exchanged emails and participated in phone calls with Martinez and Insley concerning VMware's
 26 fraudulent pricing practices and other unlawful conduct by senior VMware executives.

27 115. During these internal federal pricing investigation sessions, Smith explained how
 28 Eschenbach and other senior executives at VMware manipulated federal pricing so that the

1 federal government paid more than VMware's commercial customers. They manipulated federal
2 pricing by offering commercial customers a higher consolidation ratio (such as 10:1) than the
3 consolidation ratio offered to the government (such as 4:1); providing greater discounts when
4 selling to commercial buyers than when selling to the government through the Carahsoft
5 contract; using different methods to price their support services for commercial customers and
6 government purchasers, which resulted in lower annual maintenance prices for commercial
7 clients than for government customers; and employing different terms and conditions in
8 VMware's commercial business contracts than in Carahsoft's contracts for sales of VMware's
9 products to the government. Smith also presented detailed spreadsheets which evidenced the
10 manipulation of the consolidation ratios by Eschenbach and other senior VMware executives.

11 116. Beginning in or about the week of February 16, 2009, Insley met with, among
12 others, Steve Houck and Carl Eschenbach to discuss VMware's internal federal pricing
13 investigation into fraudulent pricing practices of overcharging the federal government, as well as
14 other fraudulent and unlawful conduct by senior VMware executives, including Eschenbach and
15 Scott Aronson, Vice President of Global Accounts.

16 117. During the height of this internal federal pricing investigation, Smith was told to
17 watch out and be careful around Eschenbach and Aronson because Eschenbach suspected that
18 Smith had reported fraudulent federal pricing practices at VMware and blamed him for getting
19 investigated in the first place.

20 118. Aware of the dangers that Eschenbach, Aronson, and other senior VMware
21 executives presented, Smith gave his wife specific written instructions in the event that he was
22 harmed during a business trip to Europe.

23 119. Several months later, Smith continued to take action to stop VMware's fraudulent
24 practices and other illegal acts by giving deposition testimony in a matter filed by another former
25 VMware employee, John Wheeler, against VMware. VMware's in-house and outside counsel
26 were present at the deposition. On August 11, 2009, he testified regarding VMware's fraudulent
27 federal pricing practices:

- 1 Q: Have you ever seen or heard of any unfair pricing practices at
2 VMware? (163:12-13)
- 3 THE WITNESS: Yes. (163:16)
- 4 Q: Okay. Who has shared with you that they have seen unfair pricing
5 practices at VMware? (163:22-23)
- 6 A: My federal organization when I was in the role of the Americas.
7 (163:24-25)
- 8 Q: Who in your federal organization shared with you that they
9 perceived or saw unfair pricing practices at VMware? (164:1-3)
- 10 A: Steve Hauck. (164:4)
- 11 Q: Anyone else beside Steve Hauck within the federal organization
12 that shared with you his or her belief that there were unfair pricing
13 practices within VMware? (164:18-21)
- 14 A: Leigh Madden. (164:22)
- 15 Q: Anyone else? (165:3)
- 16 A: Joel Davis. (165:4)
- 17 Q: Anyone else? (165:5)
- 18 A: Jennifer Baker. (165:6)
- 19 Q: What did Steve Hauck tell you about what he perceived or saw at
20 VMware in terms of unfair pricing practices? (165:9-11)
- 21 A: He had received complaints from his channels employees that
22 supported the federal group. He had spoken with partners - this is
23 what he shared with me - that were making strong claims of unfair
24 pricing or trying to prevent partners from being involved in
25 opportunities.
- 26 He suggested that he knew that we were pricing the products
27 differently in the federal space and that we had not done our due
28 diligence on how to do that appropriately without creating an issue
for same product, different price for the government. (165:12-22)
- 29 ...
- 30 Q: Okay. When he was sharing these concerns with you about
channel employees complaining, partners pricing in the federal
space, and it just needed to be fixed quickly, was he asking you to
support him in raising this with upper management? (166:15-19)
- A: Yes. (166:20)
- Q: And did you support him in raising this issue with upper
management? (166:21-22)

1 A: Yes. (166:23)

2 Q: Who in upper management at VMware did you raise Steve
3 Hauck's concerns about the channel employees complaining and
4 the partners complaining about pricing-related issues and that it
5 needed to be fixed quickly? (167:18-22)

6 A: Brian Almas. (168:10)

7 Q: Okay. (168:11)

8 A: Carl Eschenbach, Leigh Madden, Brandon Sweeney, Joel Davis.
9 There is no one else. (168:12-13)

10 Q: During what period of time were you talking to Brian, Carl, Leigh,
11 Brandon and Joel about the subject of these pricing issues at
12 VMware? (169:1-3)

13 A: Late spring, let's say May, June of 2008, July, August 2008.
14 (169:4-5)

15 Q: So why don't you tell me what the message you delivered to Joel,
16 Brandon, Carl and Leigh meant. (169:13-14)

17 A: Was that we had had a number of instances where people were
18 concerned, that maybe we needed to look into this more deeply.
19 That Steve was assembling a team, which I think was just a small
20 group of people, to look into this in detail. (169:15-19)

21 Q: What is "this"? (169:20)

22 A: The potential Sarbanes-Oxley price - pricing parody or pricing
23 concerns for the federal government, as well as channel conflict
24 issues. (169:21-23).

25 120. Approximately five months later, on January 10, 2010, Smith took further action
26 to stop VMware's fraudulent practices and other illegal acts. He sent a detailed email to
27 VMware employees Insley, Betsy Sutter, and Michelle Brennan, detailing numerous retaliatory
28 acts by Eschenbach and other VMware employees against him for reporting VMware's
fraudulent federal pricing practices and other illegal conduct and activities. Smith also expressed
concern that he would suffer additional retaliation by Eschenbach and other senior VMware
executives.

26 121. Four days later, on January 14, 2010, VMware terminated Smith.

27 122. VMware terminated Smith's employment as a retaliatory act against Smith for
28 engaging in lawful acts in furtherance of an action under section 31 U.S.C. § 3729. (I) Smith

1 cooperated with VMware Human Resources, Internal Audit, Compliance, and Ethics
 2 departments, and its internal federal pricing investigation in early 2009 into fraudulent VMware
 3 practices involving overcharges to the federal government. (ii) Smith gave truthful deposition
 4 testimony regarding VMware's fraudulent federal pricing practices in the John Wheeler matter in
 5 August 2009. (iii) Smith sent emails and made other reports to VMware concerning VMware's
 6 fraudulent federal pricing practices and overcharging of the federal government, and documented
 7 the retaliation and other discrimination he suffered by VMware through January 10, 2010.

8 123. Shortly after Smith was terminated, Houck was forced to resign from VMware
 9 because he led the investigation in 2008 into VMware's federal pricing issues and enlisted Smith
 10 to raise his federal pricing concerns to VMware's upper management (Brian Almas and
 11 Eschenbach). Houck, who reported to VMware, Eschenbach, Black, and Smith, also reported his
 12 concerns regarding VMware's federal pricing issues to his subordinates, including Leigh
 13 Madden, Brandon Sweeney, and Joel Davis, and others at VMware. Smith reported Houck's
 14 concerns regarding VMware's federal pricing practices to VMware's Human Resources (Brian
 15 Almas and Michelle Brennan), Insley, and Martinez, and was told that they had brought this
 16 matter to the attention of the Audit Committee of VMware's Board of Directors. In fact,
 17 everyone who conducted the 2008 investigation led by Houck was forced out of VMware.

18 124. Thus at all times relevant hereto, each Defendant "knew" or acted "knowingly," as
 19 those terms are defined in 31 U.S.C. section 3729, subdivision (b)(1), in making, presenting, or
 20 submitting false claims. In that respect, each Defendant acted:

- 21 (a) With actual knowledge of the information; or
- 22 (b) In deliberate ignorance of the truth or falsity of the information; or
- 23 (c) With reckless disregard of the truth or falsity of the information.

24 125. This case demonstrates a carefully orchestrated scam designed to abscond with
 25 taxpayer dollars.

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IX. CAUSES OF ACTION

FIRST CAUSE OF ACTION

On Behalf of the United States

Federal False Claims Act, Presenting False Claims

31 U.S.C. § 3729(a)(1)(A)

126. Plaintiff incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 125 of this Complaint as though fully set forth herein.

127. Defendants knowingly (as defined in 31 U.S.C. § 3729(b)(1)) presented or caused to be presented false claims for payment or approval to an officer or employee of the United States.

128. Through the acts described above, Defendants knowingly presented or caused to be presented, false or fraudulent claims to officers, employees or agents of the United States, within the meaning of 31 U.S.C. § 3729(a)(1)(A)(this provision replaces 31 U.S.C. § 3729(a)(1), which was in effect until the False Claims Act was amended on May 20, 2009).

129. The conduct of Defendants violated 31 U.S.C. § 3729(a)(1)(A) and was a substantial factor in causing the United States to sustain damages in an amount according to proof.

SECOND CAUSE OF ACTION

On Behalf of the United States

Federal False Claims Act, Making or Using False Records or Statements

Material to Payment or Approval of False Claims

31 U.S.C. § 3729(a)(1)(B)

130. Plaintiff incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 125 of this Complaint as though fully set forth herein.

131. Defendants knowingly (as defined in 31 U.S.C. § 3729(b)(1)) made, used, or caused to be made or used false records or statements material to false or fraudulent claims.

132. Through the acts described above, Defendants knowingly made, used, or caused to be made or used, false or fraudulent records and statements material to a false and fraudulent

1 claim, within the meaning of 31 U.S.C. § 3729(a)(1)(B)(this provision replaces 31 U.S.C. §
2 3729(a)(2), which was in effect until the False Claims Act was amended on May 20, 2009).

3 133. The conduct of Defendants violated 31 U.S.C. § 3729(a)(1)(B) and was a
4 substantial factor in causing the United States to sustain damages in an amount according to
5 proof.

6 **THIRD CAUSE OF ACTION**

7 **On Behalf of the United States**

8 **Federal False Claims Act, Conspiracy to Commit Violations**

9 **31 U.S.C. § 3729(a)(1)(C)**

10 134. Plaintiff incorporates by reference and reallege all of the allegations contained in
11 paragraphs 1 through 125 of this Complaint as though fully set forth herein.

12 135. Defendants knowingly (as defined in 31 U.S.C. § 3729(b)(1)) conspired to
13 commit violations of substantive portions of the False Claims Act, including but not limited to
14 subparagraphs (A), (B), and (G) of 31 U.S.C. § 3729.

15 136. Defendants conspired to: (1) knowingly present false records and statements; (2)
16 knowingly make, use, and/or cause to be made and used false records and statements; and (3)
17 knowingly make, use, or cause to be made or used, a false record or statement material to an
18 obligation to pay or transmit money or property to the Government, or knowingly concealed or
19 knowingly and improperly avoided or decreased an obligation to pay or transmit money or
20 property to the Government.

21 137. The conduct of Defendants violated 31 U.S.C. § 3729(a)(1)(C) and was a
22 substantial factor in causing the United States to sustain damages in an amount according to
23 proof.

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FOURTH CAUSE OF ACTION

(In the Alternative)

On Behalf of the United States

Federal False Claims Act, Retention of Proceeds to Which Not Entitled

31 U.S.C. § 3729(a)(1)(G)

138. Plaintiff incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 125 of this Complaint as though fully set forth herein.

139. In the alternative, Defendants knowingly made, used, or caused to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to the Government.

140. As discussed above, Defendants received far more money from the Government than they were entitled to. Defendants knew that they had received more money than they were entitled to, and avoided their obligation to return the excess money to the Government.

141. The conduct of Defendants violated 31 U.S.C. § 3729(a)(1)(G) and was a substantial factor in causing the United States to sustain damages in an amount according to proof.

FIFTH CAUSE OF ACTION

On Behalf of Relator

Federal False Claims Act, Retaliation

31 U.S.C. § 3730(h)

142. Relator repeats and realleges each and every allegation contained in paragraphs 1 through 125 above as though fully set forth herein.

143. VMware is covered by this retaliatory discharge statute, 31 U.S.C. §3730(h), because it sells information technology products and services to the federal government.

144. Through reporting, investigating, and attempting to stop the fraudulent conduct of Defendant VMware, Relator Smith was threatened, discharged and discriminated against in the terms and conditions of his employment by VMware because of lawful acts done by the Relator

1 in furtherance of an action under section 31 U.S.C. § 3729.

2 145. Relator is entitled to all relief necessary to make him whole, including but not
3 limited to reinstatement with the same seniority to the position he had before the unlawful
4 termination, total target compensation as Vice President and General Manager of Americas Field
5 Operations from 2008 to present, over-goal commissions from 2008 to present, annual merit
6 increases from 2008 to present, continuation of all benefits from 2008 to present, 2 times the
7 amount of back pay lost, annual merit increases that were earned but unpaid for 2008, 2009, and
8 2010, interest on the back pay, payment for the gains earned on non-qualified and restricted
9 stock options, payment for the gains earned on non-qualified stock options and restricted stock
10 units which were earned but not actually received, damage to his reputation and ability to find
11 comparable employment in the future, compensation for any other special damages sustained as a
12 result of the discrimination, and attorney's fees and costs.

13 SIXTH CAUSE OF ACTION

14 On Behalf of Relator

15 Wrongful Termination in Violation of Public Policy

16 146. Relator repeats and realleges each and every allegation contained in paragraphs 1
17 through 125 above as though fully set forth herein.

18 147. In doing the things herein alleged, Defendant VMware threatened, harassed and
19 discriminated against Smith in the terms and conditions of his employment and ultimately
20 terminated that employment.

21 122. This conduct was in violation of public policies pursuant to various state and
22 federal laws, and to punish Smith for his opposition to Defendant VMware's fraudulent and
23 illegal practices.

24 123. In doing the things herein alleged, Defendant violated public policy by retaliating
25 against Smith, including creating an intolerable working environment and ultimately terminating
26 his employment.

27 124. As a direct and proximate cause of Defendant VMware's wrongful conduct, Smith
28 has suffered damages, including, but not limited to, loss of salary, commissions, annual merit

1 increases, benefits, stock options, and other valuable employee benefits. Additionally, the
 2 actions of defendant VMware were carried out in a deliberate manner in conscious disregard of
 3 the rights of Smith and were malicious, despicable and were intended to harm him. Relator is
 4 therefore entitled to punitive damages against Defendant VMware in an amount sufficient to
 5 punish defendant, and to deter future similar misconduct.

6 **X. PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs, by and through Relator Dane Smith, pray judgment in their
 8 favor and against Defendants as follows:

9 1. That judgment be entered in favor of plaintiff UNITED STATES OF AMERICA
 10 ex rel. DANE SMITH, and against Defendants VMWARE, INC. and CARAHSOFT
 11 TECHNOLOGY CORP., according to proof, as follows:

12 a. On the First Cause of Action (Presenting False Claims (31 U.S.C. §
 13 3729(a)(1)(A))) damages as provided by 31 U.S.C. § 3729(a)(1), in the amount of:

- 14 I. Triple the amount of damages sustained by the Government;
- 15 ii. Civil penalties of Eleven Thousand Dollars (\$11,000.00) for each false
- 16 claim;
- 17 iii. Recovery of costs;
- 18 iv. Pre- and post-judgment interest;
- 19 v. Such other and further relief as the Court deems just and proper;

20 b. On the Second Cause of Action (False Claims Act; Making or Using False
 21 Records or Statements Material to Payment or Approval of False Claims (31
 22 U.S.C. § 3729(a)(1)(B))) damages as provided by 31 U.S.C. § 3729(a)(1) in the
 23 amount of:

- 24 I. Triple the amount of damages sustained by the Government;
- 25 ii. Civil penalties of Eleven Thousand Dollars (\$11,000.00) for each false
- 26 claim;
- 27 iii. Recovery of costs;
- 28 iv. Pre- and post-judgment interest;

- 1 v. Such other and further relief as the Court deems just and proper;
- 2 c. On the Third Cause of Action (False Claims Act; Conspiracy to Commit
- 3 Violations (31 U.S.C. § 3729(a)(1)(C))) damages as provided by 31 U.S.C. §
- 4 3729(a)(1) in the amount of:
 - 5 I. Triple the amount of damages sustained by the Government;
 - 6 ii. Civil penalties of Eleven Thousand Dollars (\$11,000.00) for each false
 - 7 claim;
 - 8 iii. Recovery of costs;
 - 9 iv. Pre- and post-judgment interest;
 - 10 v. Such other and further relief as the Court deems just and proper; and
- 11 d. On the Fourth Cause of Action (False Claims Act, Retention of Proceeds to
- 12 Which Not Entitled (31 U.S.C. § 3729(a)(1)(G))) damages as provided by 31
- 13 U.S.C. § 3729(a)(1) in the amount of:
 - 14 I. Triple the amount of damages sustained by the Government;
 - 15 ii. Civil penalties of Eleven Thousand Dollars (\$11,000.00) for each false
 - 16 claim;
 - 17 iii. Recovery of costs;
 - 18 iv. Pre- and post-judgment interest;
 - 19 v. Such other and further relief as the Court deems just and proper.

20 2. Further, Relator, on his own behalf, pursuant to 31 U.S.C. section 3730(d),
 21 requests that he receive such maximum amount as permitted by law, of the proceeds of this
 22 action or settlement of this action collected by the United States, plus an amount for reasonable
 23 expenses incurred, plus Relator's attorneys' fees and costs of this action. Relator requests that
 24 his percentage be based upon the total value recovered, including any amounts received from
 25 individuals or entities not parties to this action.

26 3. Further, Relator requests that, as a result of VMware's unlawful employment
 27 actions, Relator receive all relief necessary to make him whole pursuant to 31 U.S.C. § 3730(h),
 28 including reinstatement, lost earnings, commissions, merit increases, benefits, back-pay, interest,

1 losses on stock options, damage to reputation and other consequential damages, compensation
2 for any other special damages, double damages, and attorneys' fees and costs;

3 4. That, as a result of VMware's unlawful employment actions, Relator receive all
4 relief necessary to make him whole pursuant to federal and state causes of action for wrongful
5 employment conduct, retaliation, and termination;

6 5. That, as a result of VMware's violation of public policy, Relator receive all relief
7 necessary to make him whole pursuant to federal and state law, including punitive damages;

8 6. That Relator be awarded all costs of this action, including attorneys' fees and
9 expenses; and

10 7. That Relator recover such other and further relief as the Court deems just and
11 proper.

12
13 Dated: June 9, 2012

FRIEDLANDER, FRIEDLANDER & EARMAN, P.C.

14
15 By: 

MARK P. FRIEDLANDER, JR.

Attorneys for Relator and Plaintiff Dane Smith

16
17
18 Dated: June 1, 2012

COTCHETT, PITRE & McCARTHY, LLP

19
20 By: 

**NIALL P. MCCARTHY
JUSTIN T. BERGER**

Attorneys for Relator and Plaintiff Dane Smith

21
22
23 Dated: June 3, 2012

LAW OFFICES OF JEFFREY F. RYAN

24
25 By: 

JEFFREY F. RYAN

Attorneys for Relator and Plaintiff Dane Smith

EXHIBIT A

EXHIBIT A

EXHIBIT A										Net	Effective	Out Year
COMMERCIAL CUSTOMER	Date	Number of Licenses of VI3	Average Cost Per License of VI3	Term	Consol. Ratio	VI3 Discount	SnS Discount	SnS Method	ELA	Revenue to Vmware	SnS Discount Off List	SnS Annual Renewals
2006 (pre-Carahsoft)												
B	9/06	500	1840.00	5 yrs	5 to 1	68	22	net	unlimited	\$4,500,000	72	\$639,701
C	11/06	120	2702.50	3 yrs	8 to 1	53	25	net	unlimited	885,770	53	187,157
D	12/06	80	2932.50	3 yrs	4 to 1	49	25	net	unlimited	595,051	49	71,779
E	12/06	72	2760.00	3 yrs	6 to 1	52	23	net	capped 72	985,000	56	202,803
F	12/06	300	2300.00	3 yrs	7 to 1	60	20	net	unlimited	1,770,000	68	242,755
G	12/06	180	2587.50	3 yrs	5 to 1	55	22	net	capped 180	932,364	60	139,788
H	12/06	56	3220.00	3 yrs	6 to 1	44	23	net	unlimited	390,977	48	42,322
2007												
I	3/07	305	2587.50	3 yrs	4 to 1	55	14	net	unlimited	2,875,000	75	198,034
J	3/07	350	2530.00	3 yrs	unknown	56	14	net	capped 350	1,430,000	75	124,894
K	7/07	25	4140.00	3 yrs	8 to 1	28	22	net	unlimited	351,000	37	41,073
L	8/07	30	3220.00	3 yrs	10 to 1	44	22	net	capped 30	317,000	51	44,235
M	8/07	10	3565.00	3 yrs	10 to 1	38	23	net	unlimited	152,000	43	33,261
N	9/07	150	2932.50	3 yrs	14 to 1	49	22	net	capped 150	929,000	55	176,468
O	9/07	60	3162.50	3 yrs	12 to 1	45	22	net	capped 60	581,000	52	106,642
P	12/07	153	2645.00	1 yrs	unknown	54	21	net	capped 153	489,000	61	84,984
Q	12/07	872	1782.50	3 yrs	10 to 1	69	18	net	unlimited	3,880,000	78	419,979
2008												
R	2/08	225	2472.50	3 yrs	6 to 1	57	22	net	unlimited	1,650,000	62	286,143
S	2/08	80	2415.00	3 yrs	7 to 1	58	23	net	unlimited	654,258	61	82,611
T	2/08	250	2472.50	1 yr	5 to 1	57	22	net	capped 250	1,320,000	62	342,792
U	2/08	202	2645.00	3 yrs	6 to 1	54	22	net	unlimited	2,480,000	60	538,344
V	2/08	99	2357.50	2.75 yrs	5 to 1	59	21	net	unlimited	949,000	66	242,216
W	2/08	2068	2185.00	3 yrs	unknown	62	20	net	capped 2068	9,000,000	70	1,124,703
X	3/08	43.5	2530.00	3 yrs	7 to 1	56	25	net	unlimited	410,000	56	61,428
Y	3/08	99	2990.00	3 yrs	5 to 1	48	24	net	capped 99	1,680,000	50	348,097
Z	3/08	41	3162.50	3 yrs	8 to 1	45	25	net	Unlimited	748,000	45	141,349
AA	3/08	5080	632.50	4 yrs	1 to 1	89	22	net	capped 5080	7,440,000	90	899,578
AB	3/08	50	2127.50	1.5 yrs	7 to 1	63	57	net	capped 50	235,000	16	93,425
AC	3/08	360	2990.00	3 yrs	5 to 1	48	22	net	unlimited	2,740,000	54	529,300
AD	3/08	20	2702.50	3 yrs	6 to 1	53	25	net	capped 20	268,682	53	67,035

FEDERAL CUSTOMER												
2006 (pre-Carahsoft)												
Headquarters, Dept of the Army	8/06	100	3737.50	4 yrs	8 to 1	35	25	net	capped 100	1,471,000	35	234,502
FDIC	11/06	75	3737.50	3 yrs	5 to 1	35	25	net	capped 75	1,446,000	35	347,641
2007												
Hill Air Force Base	3/07	100	2961.25	2 yrs	3 to 1	48.5	22	net	capped 100	452,000	55	72,397
Army & Air Force Exchange Service	8/07	57	3622.50	2 yrs	3 to 1	37	23	net	unlimited	705,000	42	154,978
Navy Marine Corps Intranet	12/07	2000	2363.66	2.75 yrs	4 to 1	60	25	net	capped 2000	11,000,000	60	1,227,315
2008												
Hanscom AFB	2/08	765	3507.50	3 yrs	1 to 1	39	23	net	capped 765	8,900,000	44	
Fort Monmouth NJ	3/08	500	3277.50	2 yrs	.5 to 1	43	22	net	capped 500	3,790,000	50	537,498
FAA	3/08	300	3162.50	1 yr	4 to 1	45	25	net	capped 300	1,410,000	45	259,875