

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

_____)	
CELLCAST TECHNOLOGIES, LLC)	
)	
and)	
)	
ENVISIONIT, LLC)	
)	
Plaintiffs,)	
)	
v.)	No. 15-1307
)	
THE UNITED STATES,)	Judge Victor J. Wolski
)	
Defendant,)	
)	
and)	
)	
INTERNATIONAL BUSINESS MACHINES)	
CORP.,)	
)	
Third-Party Defendant)	
_____)	

ANSWER OF INTERNATIONAL BUSINESS MACHINES CORPORATION

Pursuant to Rule 14(c) of the Rules of the United States Court of Federal Claims, and the Court’s Notice to Interested Third Party dated April 5, 2016, International Business Machines Corporation (“IBM”), by and through its attorneys, hereby answers Plaintiffs CellCast Technologies, LLC’s (“CellCast’s”) and EnvisionIT, LLC’s (“EnvisionIT’s”) (collectively “Plaintiffs”) Complaint. IBM has an interest in this case for at least the reasons specified in the United States’ Unopposed Motion to Notice Third Parties, filed March 4, 2016 [D.I. 10]. Except as expressly admitted herein, IBM denies each allegation in the Complaint.

NATURE OF ACTION

1. IBM admits that the Complaint alleges an action to recover reasonable and entire compensation for the allegedly unlicensed use and manufacture by and for the United States of alleged inventions described in and covered by U.S. Patent Nos. 7,693,938 (“the ’938 patent”),

8,103,719 (“the ’719 patent”), 8,438,221 (“the ’221 patent”), 8,438,212 (“the ’212 patent”) and 9,136,954 (“the ’954 patent”) (collectively, “the patents-in-suit”), but otherwise denies the allegations of Paragraph 1.

JURISDICTION

2. IBM admits that this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1498(a). IBM denies that this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1491(a).

PARTIES

3. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 3 of the Complaint and therefore denies them.

4. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 4 of the Complaint and therefore denies them.

5. IBM admits that the Complaint identifies the United States as the Defendant. IBM lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 5 of the Complaint and therefore denies them.

ASSERTED PATENTS

6. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 6 of the Complaint and therefore denies them.

7. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 7 of the Complaint and therefore denies them.

8. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 8 of the Complaint and therefore denies them.

9. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 9 of the Complaint and therefore denies them.

10. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 10 of the Complaint and therefore denies them.

11. IBM admits that EnvisionIT is listed on the face of the patents-in-suit as the named assignee. Based on information and belief, IBM further admits that EnvisionIT is the named assignee for additional pending U.S. patent applications related to the patents-in-suit. IBM lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 11 of the Complaint and therefore denies them.

12. IBM admits that the United States Patent and Trademark Office issued the '938 patent on April 6, 2010, and that the '938 patent is entitled "Message Broadcasting Admission Control System and Method." IBM admits that a copy of the '938 patent is attached to the Complaint as Exhibit A. To the extent that there are any remaining allegations, IBM denies the same.

13. IBM admits that the United States Patent and Trademark Office issued the '719 patent on January 24, 2012, and that the '719 patent is entitled "Message Broadcasting Control System and Method." IBM admits that a copy of the '719 patent is attached to the Complaint as Exhibit B. To the extent that there are any remaining allegations, IBM denies the same.

14. IBM admits that the United States Patent and Trademark Office issued the '221 patent on May 7, 2013, and that the '221 patent is entitled "Broadcast Alerting Message Aggregator/Gateway System and Method." IBM admits that a copy of the '221 patent is attached to the Complaint as Exhibit C. To the extent that there are any remaining allegations, IBM denies the same.

15. IBM admits that the United States Patent and Trademark Office issued the '212 patent on May 7, 2013, and that the '212 patent is entitled "Message Broadcasting Control System and Method." IBM admits that a copy of the '212 patent is attached to the Complaint as Exhibit D. To the extent that there are any remaining allegations, IBM denies the same.

16. IBM admits that the United States Patent and Trademark Office issued the '954 patent on September 15, 2015, and that the '954 patent is entitled "Broadcast Alerting Message Aggregator/Gateway System and Method." IBM admits that a copy of the '954 patent is attached to the Complaint as Exhibit E. To the extent that there are any remaining allegations, IBM denies the same.

17. Denied.

18. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 18 of the Complaint and therefore denies them.

19. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 19 of the Complaint and therefore denies them.

SUMMARY OF GROUNDS FOR RELIEF

20. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 20 of the Complaint and therefore denies them.

21. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 21 of the Complaint and therefore denies them.

22. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 22 of the Complaint and therefore denies them.

KNOWLEDGE OF THE PATENTS-IN-SUIT BY THE UNITED STATES

23. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 23 of the Complaint and therefore denies them.

FACTUAL ALLEGATIONS

24. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 24 of the Complaint and therefore denies them.

25. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 25 of the Complaint and therefore denies them.

26. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 26 of the Complaint and therefore denies them.

27. IBM admits that it worked with FEMA to develop aspects of the Integrated Public Alert Warning System (“IPAWS”). To the extent that there are any remaining allegations, IBM denies the same.

28. IBM admits that the Warning, Alert, and Response Network Act (“WARN Act”) was enacted in 2006. IBM otherwise lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in Paragraph 28 of the Complaint and therefore denies them.

29. IBM admits that President George W. Bush signed Executive Order 13407, which states that “[i]t is the policy of the United States to have an effective, reliable, integrated, flexible, and comprehensive system to alert and warn the American people in situations of war, terrorist attack, natural disaster, or other hazards to public safety and well-being (public alert and warning system)” IBM further admits that the Order States that the Secretary of Homeland Security shall, *inter alia*:

(i) inventory, evaluate, and assess the capabilities and integration with the public alert and warning system of Federal, State, territorial, tribal, and local public alert and warning resources;

(ii) establish or adopt, as appropriate, common alerting and warning protocols, standards, terminology, and operating procedures for the public alert and warning system to enable interoperability and the secure delivery of coordinated messages to the American people through as many communication pathways as practicable, taking account of Federal Communications Commission rules as provided by law

To the extent that there are any remaining allegations, IBM denies the same.

30. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 30 of the Complaint and therefore denies them.

31. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 31 of the Complaint and therefore denies them.

32. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 32 of the Complaint and therefore denies them.

33. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 33 of the Complaint and therefore denies them.

34. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 34 of the Complaint and therefore denies them.

35. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 35 of the Complaint and therefore denies them.

36. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 36 of the Complaint and therefore denies them.

37. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 37 of the Complaint and therefore denies them.

38. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 38 of the Complaint and therefore denies them.

39. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 39 of the Complaint and therefore denies them.

40. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 40 of the Complaint and therefore denies them.

41. Denied.

42. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 42 of the Complaint and therefore denies them.

43. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 43 of the Complaint and therefore denies them.

44. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 44 of the Complaint and therefore denies them.

45. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 45 of the Complaint and therefore denies them.

46. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 46 of the Complaint and therefore denies them.

ALLEGED UNLICENSED USE BY THE UNITED STATES

47. The allegations in paragraph 47 are conclusions of law to which no response is required. To the extent a response is deemed to be required, IBM denies the allegations of Paragraph 47 and, further, incorporates by reference its responses to paragraphs 48–72, as set forth below, regarding CellCast’s infringement contentions as to the patents-in-suit.

COUNT 1

48. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 48 of the Complaint and therefore denies them.

49. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 49 of the Complaint and therefore denies them.

50. To the extent Paragraph 50 alleges that any IBM product, system or service, either alone or in combination with any other product or system, infringes the '938 patent, IBM denies that any IBM product, system or service infringes any valid and enforceable claim of the '938 patent. Otherwise, IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 50 of the Complaint and therefore denies them.

51. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 51 of the Complaint and therefore denies them.

52. The allegations in paragraph 52 are conclusions of law to which no response is required. To the extent that they may be deemed allegations of fact, they are denied.

COUNT 2

53. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 53 of the Complaint and therefore denies them.

54. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 54 of the Complaint and therefore denies them.

55. To the extent Paragraph 55 alleges that any IBM product, system or service, either alone or in combination with any other product or system, infringes the '719 patent, IBM denies that any IBM product, system or service infringes any valid and enforceable claim of the '719 patent. Otherwise, IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 55 of the Complaint and therefore denies them.

56. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 56 of the Complaint and therefore denies them.

57. The allegations in paragraph 57 are conclusions of law to which no response is required. To the extent that they may be deemed allegations of fact, they are denied.

COUNT 3

58. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 58 of the Complaint and therefore denies them.

59. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 59 of the Complaint and therefore denies them.

60. To the extent Paragraph 60 alleges that any IBM product, system or service, either alone or in combination with any other product or system, infringes the '221 patent, IBM denies that any IBM product, system or service infringes any valid and enforceable claim of the '221 patent. Otherwise, IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 60 of the Complaint and therefore denies them.

61. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 61 of the Complaint and therefore denies them.

62. The allegations in paragraph 62 are conclusions of law to which no response is required. To the extent that they may be deemed allegations of fact, they are denied.

COUNT 4

63. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 63 of the Complaint and therefore denies them.

64. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 64 of the Complaint and therefore denies them.

65. To the extent Paragraph 65 alleges that any IBM product, system or service, either alone or in combination with any other product or system, infringes the '212 patent, IBM denies

that any IBM product, system or service infringes any valid and enforceable claim of the '212 patent. Otherwise, IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 65 of the Complaint and therefore denies them.

66. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 66 of the Complaint and therefore denies them.

67. The allegations in paragraph 67 are conclusions of law to which no response is required. To the extent that they may be deemed allegations of fact, they are denied.

COUNT 5

68. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 68 of the Complaint and therefore denies them.

69. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 69 of the Complaint and therefore denies them.

70. To the extent Paragraph 70 alleges that any IBM product, system or service, either alone or in combination with any other product or system, infringes the '954 patent, IBM denies that any IBM product, system or service infringes any valid and enforceable claim of the '954 patent. Otherwise, IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 70 of the Complaint and therefore denies them.

71. IBM lacks knowledge or information sufficient to form a belief about the truth of the allegations in Paragraph 71 of the Complaint and therefore denies them.

72. The allegations in paragraph 72 are conclusions of law to which no response is required. To the extent that they may be deemed allegations of fact, they are denied.

PRAYER FOR RELIEF

A–F. Paragraphs (A) through (F) of the Complaint state Plaintiffs’ prayer for relief, to which no response is required. Nonetheless, to the extent Paragraphs (A) through (F) are deemed to contain allegations, IBM denies each such allegation. IBM further denies that Plaintiffs are entitled to any of the relief requested in Paragraphs (A) through (F).

DEFENSES

FIRST DEFENSE (NON-INFRINGEMENT)

1. IBM has not infringed any valid and enforceable claim of the patents-in-suit, either literally or under the doctrine of equivalents.

SECOND DEFENSE (INVALIDITY)

2. The claims of the patents-in-suit are invalid because they do not comply with one or more of the requirements for patentability, including those identified in 35 U.S.C. §§ 101, 102, 103, and 112.

THIRD DEFENSE (NO LIABILITY FOR ANY INFRINGING ACTIVITIES CAUSED BY THE UNITED STATES OR OTHERS)

3. To the extent the alleged infringing acts were caused by, or performed pursuant to acts by the United States, or others, IBM is not liable for those activities and has no obligation to indemnify the United States.

FOURTH DEFENSE (WAIVER, LACHES, AND ESTOPPEL)

4. Plaintiffs’ claims are barred by the doctrine of waiver, equitable estoppel, and and/or laches.

FIFTH DEFENSE (LIMITATION OF DAMAGES)

5. To the extent that Plaintiffs seek recovery for any of IBM's alleged unauthorized use occurring more than six years before the filing of the Complaint, Plaintiffs are precluded from any such recovery, as set forth in 35 U.S.C. § 286 and/or 28 U.S.C. §§ 2401 and 2501.

SIXTH DEFENSE (LICENSE TO THE PATENTS-IN-SUIT)

6. To the extent the alleged inventions claimed by the patents-in-suit were invented in the performance of work under a funding agreement with the Government or using Government resources, the United States is entitled to an express or implied license in the alleged inventions.

SEVENTH DEFENSE (USE OR MANUFACTURE BY OR FOR THE UNITED STATES)

7. Plaintiffs' claims are barred by 28 U.S.C. § 1498 to the extent they relate to use or manufacture of the alleged inventions of the patents-in-suit by or for the United States. However, should Plaintiffs be awarded compensation, such compensation may include delay compensation, but shall not include pre-judgment or post-judgment interest or costs provided by 35 U.S.C. § 284 and 28 U.S.C. § 1961.

EIGHTH DEFENSE (CONTRACTUAL LIMITATION OF DAMAGES)

8. To the extent Plaintiffs or the United States seek recovery from IBM, IBM is not liable for any amount in excess of the aggregate amount payable by the United States to IBM under the applicable work order.

NINTH DEFENSE (RECOVERY BARRED BY ANTI-ASSIGNMENT ACT)

9. To the extent that Plaintiffs seek recovery for infringement that occurred prior to the assignment of the patents-in-suit to EnvisionIT, such recovery is barred by the Anti-Assignment Act, 31 U.S.C.A. § 3727.

TENTH AFFIRMATIVE DEFENSE (SOVEREIGN IMMUNITY AS APPLIED TO GOVERNMENT CONTRACTORS)

10. To the extent that Plaintiffs seek recover for acts performed by the United States based on a theory of indirect or joint infringement, Plaintiffs cannot recover because the United States has not waived sovereign immunity as to infringement based on such a theory.

ELEVENTH AFFIRMATIVE DEFENSE (FAILURE TO STATE A CLAIM)

11. Plaintiffs fail to state a claim upon which relief can be granted as to the patents-in-suit.

RELIEF REQUESTED BY THIRD-PARTY DEFENDANT

WHEREFORE, IBM respectfully requests that this Court:

- (a) Deny any and all relief requested by Plaintiffs, as set forth in the Complaint and dismiss Plaintiffs' Complaint with prejudice;
- (b) Enter judgment that the patents-in-suit are invalid;
- (c) Enter judgment that the patents-in-suit have not been infringed;
- (d) Enter judgment that Plaintiffs are not entitled to any compensation;
- (e) Declare that this is an exceptional case in favor of IBM under 35 U.S.C. § 285, award IBM its reasonable attorneys' fees and expenses, and hold Plaintiffs jointly and severally liable for this award;
- (f) Award IBM its costs of suit, and hold Plaintiffs jointly and severally liable for this award; and
- (g) Award IBM such other and further relief as this Court deems just and appropriate.

Dated: May 18, 2016

Respectfully submitted,

Of Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and served electronically to those indicated as non-registered participants on May 18, 2016.

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