

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FIRESTAR SOFTWARE, INC.,

Plaintiff,

v.

RED HAT, INC.,
RED HAT MIDDLEWARE LLC,

Defendants

Civil Action No. 2-06CV-258 (TJW)

**FIRST AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM
OF DEFENDANTS RED HAT, INC., AND RED HAT MIDDLEWARE LLC**

Defendants Red Hat, Inc. and Red Hat Middleware LLC (collectively “Red Hat”) pursuant to Fed. R. Civ. P. 7, 8, 12, and 13, file their First Amended Answer, Affirmative Defenses, and Counterclaim to the Third Amended Complaint (“Complaint”) of Plaintiff FireStar Software, Inc. (“FireStar”), as follows:

ANSWER

1.

Red Hat admits that FireStar’s Complaint alleges infringement of U.S. Patent No. 6,101,502 (“the ‘502 Patent”), and that a copy of the ‘502 Patent was attached to the copy of the Complaint that Red Hat received. However, Red Hat denies that the ‘502 Patent is valid or enforceable, denies FireStar’s allegation that Red Hat has infringed the ‘502 Patent, and denies the remaining allegations of Paragraph 1 of FireStar’s Complaint.

2.

Red Hat admits the allegations of Paragraph 2 of FireStar’s Complaint.

3.

Red Hat is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 3 of the Complaint, and therefore denies the same.

4.

Red Hat admits the allegations of Paragraph 4 of FireStar's Complaint.

5.

Red Hat admits the allegations of Paragraph 5 of FireStar's Complaint.

6.

Red Hat admits that this Court has subject matter jurisdiction over the allegations in the Complaint.

7.

Red Hat admits that it is subject to the jurisdiction of this Court, but denies that it has engaged in any infringing activity related to the '502 Patent and denies the remaining allegations of Paragraph 7 of FireStar's Complaint.

8.

Red Hat admits that venue is proper since it is subject to the jurisdiction of this Court, but Red Hat denies that it has engaged in any infringing activity related to the '502 Patent.

9.

Red Hat is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9 of the Complaint, and therefore denies the same.

10.

Red Hat admits that the '502 Patent is titled "Object Model Mapping and Runtime Engine for Employing Relational Database with Object Oriented Software," and that it issued on

August 8, 2000. Red Hat further admits that a copy of the '502 Patent was attached to the copy of the Complaint that Red Hat received. Red Hat denies that the '502 Patent was duly and legally issued and denies the remaining allegations of Paragraph 10 of FireStar's Complaint.

11.

Red Hat is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11 of the Complaint, and therefore denies the same.

12.

Red Hat is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12 of the Complaint, and therefore denies the same.

13.

Red Hat admits that JBoss received a letter from FireStar dated May 26, 2006, and that the letter itself is the best evidence of its contents. Red Hat denies that JBoss has infringed the '502 Patent at any time, and denies the remaining allegations of Paragraph 13 of the Complaint.

14.

Red Hat admits that Red Hat, Inc. issued a press release on June 5, 2006, and that the press release itself is the best evidence of its contents, but Red Hat denies that the remaining allegations of Paragraph 14 of the Complaint.

15.

Red Hat admits the allegations of Paragraph 15 of FireStar's Complaint.

16.

Red Hat denies the allegations of Paragraph 16 of FireStar's Complaint.

17.

Red Hat denies the allegations of Paragraph 17 of FireStar's Complaint.

18.

Red Hat admits the allegations of Paragraph 18 of FireStar's Complaint.

19.

Red Hat admits that Red Hat, Inc. received a letter from FireStar dated June 7, 2006, and that the letter itself is the best evidence of its contents. Red Hat denies that Red Hat, Inc. has infringed the '502 Patent at any time, and denies the remaining allegations of Paragraph 19 of the Complaint.

20.

Red Hat denies the allegations of Paragraph 20 of FireStar's Complaint.

21.

Red Hat incorporates its responses made in Paragraphs 10-20 above as if fully set forth herein.

22.

Red Hat denies the allegations of Paragraph 22 of the Complaint.

23.

Red Hat denies the allegations of Paragraph 23 of the Complaint.

24.

Red Hat denies the allegations of Paragraph 24 of the Complaint.

25.

Red Hat denies the allegations of Paragraph 25 of the Complaint.

26.

Red Hat denies the allegations of Paragraph 26 of the Complaint.

27.

Red Hat denies the allegations of Paragraph 27 of the Complaint.

28.

Red Hat denies the allegations of Paragraph 28 of the Complaint.

29.

Red Hat denies any express or implied allegations of FireStar's Complaint not otherwise responded to, and denies that FireStar is entitled to any relief sought in its Prayer for Relief or any other relief.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

30.

FireStar has failed to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

31.

Red Hat has not directly infringed and is not directly infringing the '502 Patent either literally or under the doctrine of equivalents. Red Hat has not induced or contributed to, and is not inducing or contributing to, infringement of the '502 Patent either literally or under the doctrine of equivalents.

THIRD AFFIRMATIVE DEFENSE

32.

The '502 Patent and all of the claims thereof are invalid and unenforceable for failure to comply with one or more of the requirements of the Patent Act, 35 U.S.C. §§ 1 et seq., including, but not limited to, 35 U.S.C. §§ 102, 103, and 112.

FOURTH AFFIRMATIVE DEFENSE

33.

Upon information and belief, the equitable doctrines of waiver, estoppel, unclean hands, and/or laches bar some or all of FireStar's claim for damages and other relief.

FIFTH AFFIRMATIVE DEFENSE

34.

FireStar is estopped by virtue of prior art or its conduct and representations during the prosecution of the '502 Patent from presenting an interpretation of the claims necessary to find infringement by Red Hat.

SIXTH AFFIRMATIVE DEFENSE

35.

FireStar cannot recover any damages for any alleged infringement of the '502 Patent before filing of the Complaint because FireStar had made, offered for sale, or sold in the United States or imported into the United States, products covered by these patents without properly marking them according to 35 U.S.C. § 287.

SEVENTH AFFIRMATIVE DEFENSE

36.

The '502 Patent is unenforceable due to inequitable conduct by one or more individuals associated with the filing and/or prosecution of the applications leading to the '502 Patent.

37.

Under 37 C.F.R. § 1.56, every person associated with the filing or prosecution of a patent application has a duty of candor and good faith in dealing with the U.S. Patent and Trademark Office ("PTO"). This duty includes a duty to disclose to the PTO all information known to the

individual to be material to the patentability of that which is claimed in the patent application. The intentional failure by any individual associated with the filing or prosecution of a patent application to disclose information material to patentability constitutes inequitable conduct and renders any resulting patent unenforceable.

38.

Information is material to patentability if, among other things, (1) it is not cumulative and it establishes by itself or in combination with other information a prima facie case of unpatentability, (2) it is not cumulative and it refutes or is inconsistent with a position the applicant takes in either opposing an argument of unpatentability or asserting an argument of patentability, or (3) there is a substantial likelihood that a reasonable examiner would consider the information important in deciding whether to allow the application to issue as a patent.

39.

The application for the '502 Patent, Serial No. 09/161,028, was filed on September 25, 1998, claiming priority to a first provisional application, No. 60/059,939, filed on September 26, 1997, and a second provisional application, No. 60/069,157, filed on December 9, 1997.

40.

Persons associated with the filing and/or prosecution of the patent applications leading to the '502 Patent include Stanley M. Schurgin, the patent attorney who filed and prosecuted the applications leading to the '502 Patent.

41.

Mr. Schurgin did not disclose certain material information to the PTO, specific examples of which include the following items of material information described below in paragraphs 42-44.

42.

Before the patent applications to which the '502 Patent claims priority were filed, Ontos made, used, offered for sale and/or sold products – including at least versions of Object Integration Server (“OIS”) 1.0, OIS 2.0, OIS 2.5, Ontos*DB/Explorer, and Ontos*Integrator – used for interfacing an object oriented software application with a relational database. These products were the subject of various presentations, articles, manuals, and other publications and disclosures. Mr. Schurgin did not disclose to the PTO the products, the associated publications and disclosures, or Ontos's activities relative to these products during prosecution of the applications leading to the '502 Patent. Upon information and belief, Mr. Schurgin knew of this information and its materiality and intentionally failed to disclose the information to the PTO.

43.

Before the patent applications to which the '502 Patent claims priority were filed, U.S. Patent Application No. 08/879,241 (“the '241 Application”), “System for enabling access to a relational database from an object oriented program,” was filed for Ontos by Mr. Schurgin. The '241 Application issued as U.S. Patent No. 5,937,402 (“the '402 Patent”), on August 10, 1999. More than fifty-eight prior art references, including patents and publications, were cited during prosecution of the '402 Patent. Several of the cited references were material to the patentability of the '502 Patent, including without limitation U.S. Patent No. 5,499,371, “Method and apparatus for automatic generation of object oriented code for mapping relational data to objects,” assigned to Persistence Software, Inc. Mr. Schurgin did not disclose to the PTO the '241 Application, the '402 Patent, the prosecution documents of the '241 Application, or prior art referenced during the prosecution of the '402 Patent during prosecution of the applications

leading to the '502 Patent. Upon information and belief, Mr. Schurgin knew of this information and its materiality and intentionally failed to disclose the information to the PTO.

44.

Before the patent applications to which the '502 Patent claims priority were filed, Subtle Software Inc. made, used, offered for sale, and sold a product called Subtleware which was used for interfacing an object oriented software application with a relational database. Ontos conducted due diligence on Subtle Software in considering whether to purchase the company and this due diligence included evaluating Subtleware and its functionality. Mr. Schurgin represented Subtle Software before the PTO in obtaining a federal trademark registration for SUBTLEWARE in 1995. Mr. Schurgin also represented Ontos during this time period. Mr. Schurgin did not disclose to the PTO any information pertaining to Subtleware during prosecution of the applications leading to the '502 Patent. Upon information and belief, Mr. Schurgin knew of at least some of this information and its materiality and intentionally failed to disclose the information to the PTO.

45.

Each of the items of information described above in paragraphs 42-44 is separately material to the patentability of one or more claims of the '502 Patent under 37 C.F.R. § 1.56 and otherwise at least because it establishes, individually and/or in combination with other information, a prima facie case of unpatentability of one or more claims of the '502 Patent, and/or because it refutes, or is inconsistent with, a position the applicants took in opposing an argument of unpatentability relied on by the PTO, and/or in asserting an argument of patentability. In addition, each of the items of information described in paragraphs 42-44 is separately material to the patentability of one or more claims of the '502 Patent because there is

a substantial likelihood that a reasonable examiner would have considered that information important in deciding whether to allow the application to issue as the '502 Patent.

46.

Upon information and belief, Mr. Schurgin knew of the materiality of each of the items of information in Paragraphs 42-44.

47.

Upon information and belief, Mr. Schurgin intentionally failed to disclose each of the items of information in Paragraphs 42-44 during the prosecution of the applications leading to the '502 Patent.

48.

Since at least one person associated with the filing and/or prosecution of the patent applications leading to the '502 Patent knew of information material to the patentability of one or more claims of the '502 Patent and intentionally failed to disclose that information to the PTO, the '502 Patent is unenforceable due to inequitable conduct. The intentional failure to disclose any one of the items of information described in paragraphs 42-44 is sufficient to render the '502 Patent unenforceable for inequitable conduct.

EIGHTH AFFIRMATIVE DEFENSE

49.

The '502 Patent is invalid and unenforceable based on the improper naming of inventors and/or the failure to include the proper inventors, which was done with deceptive intent.

50.

The '502 Patent claims priority to three applications: a first provisional application filed September 26, 1997, a second provisional application filed December 9, 1997, and a utility

patent application filed September 25, 1998. The same five people were named as inventors on each of the two provisional patent applications. Of these five, only one person is also named as an inventor on the utility application that issued as the '502 Patent. Upon information and belief, three of the five inventors named on the provisional patent applications stopped working for Ontos a few months before the utility patent application was filed. Those three persons were not named as inventors on the utility patent application by Mr. Schurgin. Upon information and belief, those three persons were intentionally, improperly, and with deceptive intent not named as inventors on the utility application that issued as the '502 Patent.

COUNTERCLAIM

Counterclaim Plaintiffs Red Hat, Inc. and Red Hat Middleware LLC (collectively "Red Hat") assert the following Counterclaim against Counterclaim Defendant FireStar Software, Inc. ("FireStar").

1.

Red Hat seeks a declaration by this Court that U.S. Patent No. 6,101,502 ("the '502 Patent") is invalid and/or unenforceable and, in any event, has not been infringed by Red Hat.

JURISDICTION AND VENUE

2.

This is an action for declaratory judgment under 28 U.S.C. § 2201 *et seq.* This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1338(a). This counterclaim arises under the patent laws of the United States. Therefore, venue is proper in this judicial district under 28 U.S.C. § 1391 and 28 U.S.C. § 1400(b).

PARTIES

3.

Red Hat, Inc. is a Delaware corporation, with a place of business in North Carolina. Red Hat Middleware LLC is a Delaware limited liability company.

4.

FireStar claims to be a Delaware corporation having a place of business in Massachusetts.

BACKGROUND FACTS

5.

FireStar claims to be the current owner of the '502 Patent, which issued on August 8, 2000 and is titled "Object Model Mapping and Runtime Engine for Employing Relational Database with Object Oriented Software." The '502 Patent was originally assigned to Ontos, Inc ("Ontos").

6.

Upon information and belief, FireStar acquired Ontos and its assets around September 2001.

7.

The first version of the allegedly infringing Hibernate software was publicly available as an open source program in late November 2001. In October 2003, JBoss hired the lead developers of Hibernate.

8.

Red Hat publicly announced its intent to acquire JBoss in the Spring of 2006, and FireStar first contacted JBoss claiming it infringed the '502 Patent after that announcement was made.

9.

On June 5, 2006, Red Hat announced the completion of its acquisition of JBoss, and two days later FireStar contacted Red Hat for the first time regarding its alleged infringement of the '502 Patent.

10.

Thus, FireStar never asserted any claim of infringement regarding the publicly available Hibernate software until nearly five years after its first release, choosing to do so only after Red Hat announced its intent to acquire JBoss.

'502 PATENT PROSECUTION

11.

Under 37 C.F.R. § 1.56, every person associated with the filing or prosecution of a patent application has a duty of candor and good faith in dealing with the U.S. Patent and Trademark Office ("PTO"). This duty includes a duty to disclose to the PTO all information known to the individual to be material to the patentability of that which is claimed in the patent application. The intentional failure by any individual associated with the filing or prosecution of a patent application to disclose information material to patentability constitutes inequitable conduct and renders any resulting patent unenforceable.

12.

Information is material to patentability if, among other things, (1) it is not cumulative and it establishes by itself or in combination with other information a prima facie case of unpatentability, (2) it is not cumulative and it refutes or is inconsistent with a position the applicant takes in either opposing an argument of unpatentability or asserting an argument of patentability, or (3) there is a substantial likelihood that a reasonable examiner would consider

the information important in deciding whether to allow the application to issue as a patent.

13.

The application for the '502 Patent, Serial No. 09/161,028, was filed on September 25, 1998, claiming priority to a first provisional application, No. 60/059,939, filed on September 26, 1997, and a second provisional application, No. 60/069,157, filed on December 9, 1997.

14.

Persons associated with the filing and/or prosecution of the patent applications leading to the '502 Patent include Stanley M. Schurgin, the patent attorney who filed and prosecuted the applications leading to the '502 Patent.

15.

Mr. Schurgin did not disclose certain material information to the PTO, specific examples of which include the following items of material information described below in paragraphs 16-18.

16.

Before the patent applications to which the '502 Patent claims priority were filed, Ontos made, used, offered for sale and/or sold products – including at least versions of Object Integration Server (“OIS”) 1.0, OIS 2.0, OIS 2.5, Ontos*DB/Explorer, and Ontos*Integrator – used for interfacing an object oriented software application with a relational database. These products were the subject of various presentations, articles, manuals, and other publications and disclosures. Mr. Schurgin did not disclose to the PTO the products, the associated publications and disclosures, or Ontos's activities relative to these products during prosecution of the applications leading to the '502 Patent. Upon information and belief, Mr. Schurgin knew of this information and its materiality and intentionally failed to disclose the information to the PTO.

17.

Before the patent applications to which the '502 Patent claims priority were filed, U.S. Patent Application No. 08/879,241 ("the '241 Application"), "System for enabling access to a relational database from an object oriented program," was filed for Ontos by Mr. Schurgin. The '241 Application issued as U.S. Patent No. 5,937,402 ("the '402 Patent"), on August 10, 1999. More than fifty-eight prior art references, including patents and publications, were cited during prosecution of the '402 Patent. Several of the cited references were material to the patentability of the '502 Patent, including without limitation U.S. Patent No. 5,499,371, "Method and apparatus for automatic generation of object oriented code for mapping relational data to objects," assigned to Persistence Software, Inc. Mr. Schurgin did not disclose to the PTO the '241 Application, the '402 Patent, the prosecution documents of the '241 Application, or prior art referenced during the prosecution of the '402 Patent during prosecution of the applications leading to the '502 Patent. Upon information and belief, Mr. Schurgin knew of this information and its materiality and intentionally failed to disclose the information to the PTO.

18.

Before the patent applications to which the '502 Patent claims priority were filed, Subtle Software Inc. made, used, offered for sale, and sold a product called Subtleware which was used for interfacing an object oriented software application with a relational database. Ontos conducted due diligence on Subtle Software in considering whether to purchase the company and this due diligence included evaluating Subtleware and its functionality. Mr. Schurgin represented Subtle Software before the PTO in obtaining a federal trademark registration for SUBTLEWARE in 1995. Mr. Schurgin also represented Ontos during this time period. Mr.

Schurgin did not disclose to the PTO any information pertaining to Subtleware during prosecution of the applications leading to the '502 Patent. Upon information and belief, Mr. Schurgin knew of at least some of this information and its materiality and intentionally failed to disclose the information to the PTO.

19.

Each of the items of information described above in paragraphs 16-18 is separately material to the patentability of one or more claims of the '502 Patent under 37 C.F.R. § 1.56 and otherwise at least because it establishes, individually and/or in combination with other information, a prima facie case of unpatentability of one or more claims of the '502 Patent, and/or because it refutes, or is inconsistent with, a position the applicants took in opposing an argument of unpatentability relied on by the PTO, and/or in asserting an argument of patentability. In addition, each of the items of information described in paragraphs 16-22 is separately material to the patentability of one or more claims of the '502 Patent because there is a substantial likelihood that a reasonable examiner would have considered that information important in deciding whether to allow the application to issue as the '502 Patent.

20.

Upon information and belief, Mr. Schurgin knew of the materiality of each of the items of information in Paragraphs 16-18.

21.

Upon information and belief, Mr. Schurgin intentionally failed to disclose each of the items of information in Paragraphs 16-18 during the prosecution of the applications leading to the '502 Patent.

22.

The '502 Patent claims priority to three applications: a first provisional application filed September 26, 1997, a second provisional application filed December 9, 1997, and a utility patent application filed September 25, 1998. The same five people were named as inventors on each of the two provisional patent applications. Of these five, only one person is also named as an inventor on the utility application that issued as the '502 Patent. Upon information and belief, three of the five inventors named on the provisional patent applications stopped working for Ontos a few months before the utility patent application was filed. Those three persons were not named as inventors on the utility patent application by Mr. Schurgin. Upon information and belief, those three persons were intentionally, improperly, and with deceptive intent not named as inventors on the utility application that issued as the '502 Patent.

COUNT I

(Declaratory Judgment of Non-Infringement, 28 U.S.C. §§ 2201-2202)

23.

Red Hat repeats the allegations of paragraphs 1 through 22 of this Counterclaim as if set forth herein in full.

24.

FireStar has alleged in this action that Red Hat has infringed and is continuing to infringe the '502 Patent either directly, contributorily, or by inducement. Red Hat denies that it has infringed the '502 Patent either directly, contributorily, or by inducement.

25.

There accordingly is an actual, immediate, and justiciable controversy between the parties.

26.

Red Hat is entitled to a declaration by this Court that Red Hat has not infringed and is not infringing the '502 Patent either directly, contributorily, or by inducement.

27.

Red Hat is entitled to further necessary or proper relief based on the Court's declaratory judgment or decree.

COUNT II

(Declaratory Judgment of Invalidity, 28 U.S.C. §§ 2201-2202)

28.

Red Hat repeats the allegations of paragraphs 1 through 22 of this Counterclaim as if set forth herein in full.

29.

FireStar has alleged in this action that Red Hat has infringed and is continuing to infringe the '502 Patent either directly, contributorily, or by inducement. Red Hat denies these allegations, among other reasons, because the claims of the '502 Patent are invalid under the United States patent laws.

30.

Accordingly, there is an actual, immediate, and justiciable controversy between the parties.

31.

Red Hat is entitled to a declaration by this Court rendering some or all of the claims of the '502 Patent invalid.

32.

Red Hat is also entitled to further necessary or proper relief based on the Court's declaratory judgment or decree.

COUNT III

(Declaratory Judgment of Unenforceability, 28 U.S.C. §§ 2201-2202)

33.

Red Hat repeats the allegations of paragraphs 1 through 22 of this Counterclaim as if set forth herein in full.

34.

FireStar has alleged in this action that Red Hat has infringed and is continuing to infringe the '502 Patent either directly, contributorily, or by inducement. Red Hat denies these allegations, among other reasons, because the '502 Patent is unenforceable.

35.

There accordingly is an actual, immediate, and justiciable controversy between the parties.

36.

Red Hat is entitled to a declaration by this Court that the '502 Patent is unenforceable since at least one person associated with the filing and/or prosecution of the patent applications leading to the '502 Patent knew of information material to the patentability of one or more claims of the '502 Patent and intentionally failed to disclose that information to the PTO, the '502 Patent is unenforceable due to inequitable conduct. The intentional failure to disclose any one of the items of information described in paragraphs 16-18 is sufficient to render the '502 Patent unenforceable for inequitable conduct.

37.

Red Hat is also entitled to a declaration by this Court that the '502 Patent is unenforceable because of the improper naming of inventors and/or the failure to include the proper inventors, which was done with deceptive intent.

38.

In light of the conduct carried out as described in paragraphs 36-50 of this Answer and paragraphs 11-22 and 33-37 of this Counterclaim in obtaining the '502 Patent and other factors, this case is an exceptional case under 35 U.S.C. § 285. Accordingly, the Court should order the Plaintiff to pay the Defendants' attorneys fees and costs in litigating this case.

39.

Red Hat is entitled to further necessary or proper relief based on the Court's declaratory judgment or decree.

Wherefore, Red Hat respectfully prays that the Court enter judgment:

1. Declaring that Red hat has not infringed or is not infringing the '502 Patent;
2. Declaring that the '502 Patent is invalid and/or unenforceable;
3. Dismissing FireStar's Complaint;
4. Declaring this case exceptional under 35 U.S.C. § 285 and awarding Red Hat its costs, including attorney's fees, in defending this action;
5. Awarding Red Hat such other relief as the Court deems just and proper.

Red Hat demands a trial by jury.

Respectfully submitted, this the 13th day of March, 2008.

/s/ Jon R. Pierce
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*Attorneys for Defendants Red Hat, Inc. and Red
Hat Middleware LLC*

CERTIFICATE OF SERVICE

I hereby certify that the counsel of record who are deemed to have consented to electronic service are being served this 13th day of March, 2008, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by first class U.S. mail on this same date.

/s/ Jon R. Pierce

Jon R. Pierce

*Attorney for Defendants Red Hat, Inc. and Red Hat
Middleware LLC*