IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CAVE CONSULTING GROUP, INC.	)	
	)	
Plaintiff,	)	
	)	Case No. 6:17-cv-00344
vs.	)	
	)	JURY TRIAL DEMANDED
HEALTH CARE SERVICE CORPORATION,	)	
	)	
Defendant.	)	

FIRST AMENDED COMPLAINT

Plaintiff Cave Consulting Group, Inc. alleges as follows for its First Amended Complaint for Patent Infringement against Defendant Health Care Service Corporation:

Nature of the Action

1. This is an action for infringement of U.S. Patent No. 8,340,981 brought by Cave Consulting Group, Inc. against Health Care Service Corporation.

Parties

2. Plaintiff Cave Consulting Group, Inc. ("CCGroup) is a California corporation with a principal place of business in San Mateo, California.

3. Defendant Health Care Service Corporation, a Mutual Legal Reserve Company ("HCSC") is an Illinois corporation with regular and established places of business in Tyler and Beaumont, Texas, among other places.

Jurisdiction and Venue

4. The Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338(a) because it arises under the patent laws of the United States.

5. The Court has personal jurisdiction over HCSC. HCSC is subject to general jurisdiction in this Court because HCSC has a continuous and systematic presence in Texas such that it is essentially at home in the State. HCSC has a division, Blue Cross and Blue Shield of Texas ("BCBSTX"), which is headquartered in Richardson, Texas, and BCBSTX has at least eight additional regional sales offices located throughout the State. Additionally, the Court has specific jurisdiction over HCSC in this matter because HCSC, through its division BCBSTX, has committed acts of infringement in this State as described below, and CCGroup's claims against HCSC arise out of at least those acts.

6. Venue is proper in this District under 28 U.S.C. § 1400(b) because HCSC, through its division BCBSTX, has committed acts of infringement in this District as described below, and because HCSC has multiple regular and established places of business in this District, including regional sales offices in Tyler and Beaumont, Texas.

Patent-in-Suit

7. On December 25, 2012, the U.S. Patent and Trademark Office duly and legally issued U.S. Patent No. 8,340,981 ("the '981 patent"), entitled *Method, System, and Computer Program Product for Physician Efficiency Measurement and Patient Health Risk Stratification Utilizing Variable Windows for Episode Creation*. An Ex Parte Reexamination Certificate was issued for the '981 patent on May 12, 2017. A copy of the '981 patent with the Reexamination Certificate is attached as Exhibit A.

8. CCGroup is the owner of all right, title, and interest in the '981 patent and has the right to sue for infringement thereof.

9. The '981 patent is valid and enforceable.

Infringement of the Asserted Patent

10. HCSC infringes the '981 patent when it uses its software for physician efficiency measurement, including the software-based method known as BlueCompare Physician Cost Assessment ("PCA") ("the Accused Method").

11. HCSC has had knowledge of the '981 patent since at least the date when CCGroup filed its Complaint.

12. HCSC's infringing acts will continue unless restrained by this Court.

Facts Relevant to Patent Validity under 35 U.S.C. § 101

13. The innovation of the '981 patent is not the use of a computer to implement known systems or methods. Stripping away the use of computers and computer software, the systems and methods recited in the claims of the '981 patent still did not exist in the prior art.

14. Rather, the innovation of the '981 patent is the specific systems and methods for measuring physician efficiency recited in the claims. The claims of the '981 patent are not directed to well-understood, routine, or conventional activities, as the claimed systems and methods did not exist in the prior art. The '981 patent recites specific and unique steps for measuring physician efficiency.

15. The systems and methods claimed in the '981 patent improved upon existing technology for measuring physician efficiency by describing new methodologies which correct, in different embodiments, various errors in the prior art, including errors that can result from measuring physician efficiency based on the entire universe of medical conditions a physician treats over a given period of time.

16. The '981 patent does not pose any preemption concern because there are many known ways of measuring physician efficiency that do not infringe the '981 patent. For instance,

there are known methods for measuring a physician's efficiency which analyze all medical claims data associated with that physician. In contrast, the claimed systems and methods organize medical claims data into episodes of care (e.g., all of the treatment associated with Susan's broken leg) and then only process those episodes which pertain to medical conditions in a predefined set of medical conditions for the physician's specialty type (e.g., a set of the most prevalent medical conditions, at various severity levels, for an orthopedist).

17. The inventions claimed in the '981 patent require computer technology. The claimed inventions presume the existence of electronically-stored medical claims data, with the unique characteristics of such data, as inputs to the claimed systems and methods. Additionally, practicing the inventions—including building episodes of care from medical claims data, assigning physicians to report groups, calculating condition-specific episode of care statistics, and calculating episode of care statistics utilizing a predefined set of medical conditions for a specific specialty type—requires a critical mass of medical claims data. This data set is necessarily so large that the inventions can only be practiced on a computer.

18. Evidence elicited in litigation concerning a related patent, U.S. Patent No. 8,768,726 ("the '726 patent"), further demonstrates that the '981 patent is directed to patent-eligible subject matter. That pending case ("the '726 Litigation") is styled *Cave Consulting Group, Inc. v. Truven Health Analytics Inc.*, No. 3:15-cv-02177 (N.D. Cal.).

19. The '726 patent is in the same family as the '981 patent, and both patents share the same specification and claim priority to the same parent application.

20. The '726 and '981 patents both include claims that recite software-based methods and systems for measuring physician efficiency.

21. The ‘726 and ‘981 patents contain limitations that recite similar elements, including:

a. Using “medical claims data to form episodes of care.”

b. Using longitudinal episodes of care.

c. “[A]ssigning at least one physician to a report group.”

d. Using a “predefined set of medical conditions for a specific specialty type.”

22. In the ‘726 Litigation, CCGroup offered expert testimony that the asserted claims of the ‘726 patent are directed to patent-eligible subject matter. This evidence, from Dr. Bryan Bergeron, is equally applicable to the claims of the ‘981 patent, and includes the declaration attached as Exhibit D and the opinions reflected in the (redacted) sworn report attached as Exhibit E.

23. Dr. Bergeron testified that the claims of the ‘726 patent cannot exist independent of computer technology because, among other reasons, they require the existence of electronically-stored medical claims data and a data set so large that the inventions cannot be practiced with pen and paper. In Dr. Bergeron’s opinion, if one uses a small enough data set that the invention can be practiced with pen and paper, then the results would be absolutely useless.

24. For these and other reasons, Dr. Bergeron opined that the claims of the ‘726 patent are not directed to an abstract idea. This reasoning and conclusion is equally applicable to the claims of the ‘981 patent.

25. Dr. Bergeron also opined that the claims of the ‘726 patent incorporate a number of inventive concepts, including the use of predefined sets of medical conditions and the exclusion of partial and incomplete episodes of care. This reasoning and conclusion is equally applicable to the claims of the ‘981 patent.

26. Dr. Bergeron further offered his opinion that the ‘726 patent does not preempt all ways of analyzing medical claims data to measure physician efficiency, and identified several known systems and methods that would not infringe the ’726 patent, including: (1) methods which examine all of a physician’s episodes of care, irrespective of whether they pertain to medical conditions in a predefined set, (2) methods that examine “services per thousand members” or similar measures, instead of the longitudinal, episode-based methods of the ‘726 patent, (3) methods that do not use report groups and instead compare a physician to another physician or to all physicians for whom data is available, and (4) methods that include partial or incomplete episode of care.

27. The systems and methods described in the preceding paragraph do not infringe the ‘981 patent.

28. In the ‘726 Litigation, the opposing expert, Dr. John Adams, agreed that the ‘726 patent does not preempt all ways of analyzing medical claims data to measure physician efficiency. Among other non-infringing methods, Dr. Adams identified a non-infringing method for measuring physician efficiency which he personally helped develop for RAND Corporation.

29. The non-infringing systems and methods identified by Dr. Adams also do not infringe the ‘981 patent.

Count I – Infringement of the ‘981 Patent

30. CCGroup realleges and incorporates by reference all of the other paragraphs of this Complaint.

31. HCSC infringes and has infringed literally or under the doctrine of equivalents at least claim 13 of the ‘981 patent by using the Accused Method.

32. The Accused Method, as described on the website for HCSC's Texas division BCBSTX in the documents attached as Exhibit B (at pages 5-9) and Exhibit C (at ¶¶ 2, 5-6), practices each limitation of claim 13.

33. Specifically, as described in the cited documents, the Accused Method uses computer software to obtain medical claims data on a computer system; form episodes of care from that claims data; assign episodes of care to physicians; apply static window periods to identify episodes of care; assign at least one physician to a report group; determine eligible physicians and episode of care assignments; calculate condition-specific episode of care statistics; calculate episode of care statistics across medical conditions utilizing a predefined set of medical conditions for a specific specialty type; and determine physician efficiency scores from those statistics.

34. On information and belief, the Accused Method, the computer software that embodies the Accused Method, and/or the computer-implemented system that performs the Accused Method, infringe(s) additional claims of the '981 patent. CCGroup will identify these claims once it has had the opportunity to obtain non-public information concerning the functionality of the Accused Method, which HCSC has not fully disclosed publicly.

35. HCSC, through its division BCBSTX, uses the Accused Method to assess the efficiency of physicians in Texas, and specifically in the Eastern District of Texas. *See* Exhibit B at page 5.

36. HCSC's actions have caused harm to CCGroup, which may not be fully compensable by monetary damages.

37. HCSC's infringement has occurred with full knowledge of the '981 patent since at least the date of the filing of this Complaint, and has been willful and deliberate since at least that time.

38. HCSC's past infringement has caused damage to CCGroup and its future use of CCGroup's patented methods, software, and/or systems will result in additional such damage.

Prayer for Relief

On motion or after a trial by jury, CCGroup requests that the Court grant the following relief:

A. Permanently enjoin HCSC and those in active concert or participation with them from further infringing the '981 patent pursuant to 35 U.S.C. § 283;

B. Enter judgment that HCSC infringes one or more claims of the '981 patent;

C. Enter judgment that HCSC infringement of the '981 patent has been willful;

D. Award CCGroup monetary damages in an amount sufficient to compensate CCGroup for the harm caused by HCSC's infringement, not less than a reasonable royalty for the use made of the inventions, along with pre- and post-judgment interest pursuant to 35 U.S.C. § 284;

E. Award CCGroup enhanced damages for HCSC's infringement pursuant to 35 U.S.C. § 284;

F. Award CCGroup supplemental monetary damages for any infringing acts after judgment and before entry of a permanent injunction;

G. Declare this case exceptional and award CCGroup its costs, expenses, and attorneys' fees pursuant to 35 U.S.C. § 285; and

H. Award CCGroup such other and further relief as the Court finds just and proper.

Demand for Jury Trial

CCGroup respectfully demands a jury trial on all claims and issues so triable.

Dated: August 25, 2017

Respectfully submitted,

ARMSTRONG TEASDALE LLP

By:/s/ Richard L. Brophy

Richard L. Brophy
Mark A. Thomas
Zachary C. Howenstine
7700 Forsyth Blvd., Suite 1800
St. Louis, Missouri 63105
(314) 621-5070 (telephone)
(314) 621-5065 (facsimile)
rbrophy@armstrongteasdale.com
mathomas@armstrongteasdale.com
zhowenstine@armstrongteasdale.com

Attorneys for Plaintiff Cave Consulting Group, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2017, I filed a copy of the foregoing with the Court's CM/ECF filing system, which delivered notice of the filing to all counsel of record in this matter.

/s/ Richard L. Brophy