

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

SAP AMERICA, INC.,

Plaintiff,

v.

**WELLOGIX, INC. and WELLOGIX
TECHNOLOGY LICENSING, LLC,**

Defendants.

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Civil Action No. _____

COMPLAINT FOR DECLARATORY RELIEF

SAP America, Inc. (“SAP”) hereby brings this action for declaratory judgment against Wellogix, Inc. and Wellogix Technology Licensing, LLC (collectively, “Wellogix”). Specifically, SAP seeks, amongst other things, declaratory judgment of non-infringement and invalidity of U.S. Patent No. 7,991,680 (“the ’680 Patent”).

INTRODUCTION AND BACKGROUND

1. Along with its affiliates and parent company, SAP comprises one of the world’s largest business software companies. Founded in 1972 as Systems Applications and Products (SAP) in Data Processing, SAP has a history of innovation and growth that has made it the recognized leader in providing collaborative business solutions for all types of industries, in every major market. In particular, SAP provides business software and solutions. SAP’s parent company, SAP AG, employs people in more than 50 countries and serves more than 36,200 customers worldwide.

2. SAP America, Inc. is a United States subsidiary of SAP AG. SAP America, Inc. services customers throughout the United States by, among other things, providing business software to oil and gas companies, as well as to many other types of businesses.

3. On information and belief, Wellogix had provided software and related services that are targeted to the oil and gas industry.

4. On information and belief, since around 2007, Wellogix's primary business has been licensing patents.

5. On information and belief, Wellogix is the owner by assignment of the '680 Patent, which is entitled "Method and Process for Providing Relevant Data, Comparing Proposal Alternatives, and Reconciling Proposals, Invoices, and Purchase Orders with Actual Costs in a Workflow Process," and which issued at 12:00 AM Eastern Standard Time on August 2, 2011, by the United States Patent and Trademark Office ("USPTO"). The '680 Patent issued from U.S. Patent Application No. 09/801,016, filed in the USPTO on March 6, 2001. The '680 Patent identifies Jeffrey A Livesay, Robert Bodnar, and Thomas A. Lopus as its inventors. Brad Hattenbach of Dorsey and Whitney LLP, Denver, Colorado filed the application that issued as the '680 Patent, and the application was prosecuted by William E. Johnson, Jr., Jacob S. Mattis, Guy E. Matthews, and Alton W. Payne of The Matthews Firm, Houston, Texas, and D. Richard Anderson of Birch, Stewart, Kolasch & Birch, LLP, Falls Church, Virginia. A copy of the USPTO Issue Notification for the '680 Patent is attached hereto as Exhibit A.

6. On or about March 15, 2005, SAP AG and Wellogix entered into a Powered by NetWeaver Cooperation Agreement (the "NetWeaver Agreement"). The NetWeaver Agreement permitted Wellogix, on a nonexclusive basis, to integrate its software with SAP's software through NetWeaver, a type of "middleware" software provided by SAP that allows other companies to integrate their software with SAP's software. The NetWeaver Agreement also contained provisions relating to the parties' marketing and promotional activities for the integrated software. A copy of the NetWeaver Agreement is attached as Exhibit B.

7. On or about June 4, 2007, Mr. J. Ike Epley, CEO of Wellogix, sent e-mail correspondence to SAP (the "June 4, 2007 email"). A copy of the June 4, 2007 email is attached as Exhibit C.

8. In the June 4, 2007 email, Mr. Epley stated that Wellogix had “co-marketed with SAP” for over one-and-a-half years. Mr. Epley stated that Wellogix was “trying to find a way to benefit from a potential working relationship with SAP that would have included, in the near term, closing at least a couple of major contracts.” Mr. Epley further stated: “We [Wellogix] were not included in those contracts that closed late last year. SAP was included.” Mr. Epley alleged that SAP was responsible for Wellogix’s failure to obtain contracts in 2006.

9. In the June 4, 2007 email, Mr. Epley stated that Wellogix “had nothing to show for” its co-marketing effort with SAP and that, “as a result,” Wellogix had to let “33 people go in mid-December.” Mr. Epley alleged that SAP was to blame for Wellogix’s lay-offs.

10. In the June 4, 2007 email, Mr. Epley stated that although Wellogix was still in the business of selling software and services, **“We are also in the business of licensing our patented technology.”** Mr. Epley stated that Wellogix had “embarked on the early stages of a licensing program, which includes a substantial initial success” and claimed “tremendous potential value in this business model.” Mr. Epley demonstrated Wellogix’s intent to license its patents.

11. In the June 4, 2007 email, Mr. Epley solicited “business proposals from SAP regarding either the software and/or [the] intellectual property” of Wellogix. Mr. Epley stated that “[o]ffers to buy, sell or license . . . are open for discussion.”

12. On information and belief, Wellogix believes that SAP needs to license the ’680 Patent.

13. SAP does not need to license the ’680 Patent to continue its business activities.

14. Notwithstanding Mr. Epley’s statement in the June 4, 2007 email that “[w]e [Wellogix] have not and are not threatening litigation against anyone at this time,” Wellogix filed suit against SAP America, Inc., SAP AG, BP America, Inc. (“BP”), Accenture LLP (“Accenture”), and two individuals in the 10th Judicial District Court of Galveston County, Texas on or about April 23, 2008. The case is styled *Wellogix, Inc. v. BP America, Inc. et al.*,

Case No. 08CV0287-10th (hereinafter, “Wellogix State Court Complaint”). A copy of the Wellogix State Court Complaint is attached as Exhibit D.

15. In the Wellogix State Court Complaint, Wellogix alleged various causes of action under Texas state law and federal law, including claims for breach of the NetWeaver Agreement, breach of fiduciary duty, tortious interference with contract, business disparagement, violation of the Lanham Act, and trade secret misappropriation. *See* Wellogix State Court Complaint at 11–12, ¶ 41–44; 15–16 ¶ 55–57.

16. In the Wellogix State Court Complaint, Wellogix blamed SAP for Wellogix’s own business failures, alleging that SAP failed to fulfill obligations as a partner to Wellogix and that Wellogix was improperly excluded from business dealings between SAP, Accenture, and BP. *See* Wellogix State Court Complaint at 3, 5-6, 10 ¶¶ 11, 18, 20–24, 36–37.

17. SAP denied all of the allegations of the Wellogix State Court Complaint.

18. The Texas court case was removed to the United States District Court for the Southern District of Texas, Galveston Division. The removed case was styled *Wellogix, Inc. v. BP America, Inc. et al.*, Case No. 3:08-CV-119. The district court dismissed all of Wellogix’s claims against SAP, holding that the forum selection clause in the NetWeaver Agreement required Wellogix to bring those claims against SAP in Germany. A copy of the court’s Memorandum and Order, dated December 8, 2008, is attached as Exhibit E.

19. Wellogix appealed the district court’s dismissal to the United States Court of Appeals for the Fifth Circuit but later withdrew its appeal. A copy of the Fifth Circuit’s order dismissing the appeal, dated June 24, 2009, is attached as Exhibit F.

20. Wellogix did not allege that SAP infringed any of its patents in the lawsuit that was dismissed by the Southern District of Texas.

21. On February 13, 2009, John Chisholm, a corporate officer of Wellogix, testified in a hearing before Judge Keith Ellison of the Southern District of Texas (the “February 13 hearing”) regarding Wellogix’s then-pending claims against Accenture. Guy Matthews appeared

22. The following statements were made by Mr. Chisholm and Mr. Matthews concerning Wellogix's plans to sue SAP:

THE COURT: How many patents does Wellogix or one of its -- or any of its predecessors hold?

THE WITNESS: We have four. We've been told the fifth one will be issued any day. And we have about six others in a pending status.

THE COURT: And how many have you applied for and been rejected on, finally rejected?

THE WITNESS: None.

THE COURT: Is litigation proceeding against SAP? Or do you know?

THE WITNESS: Against SAP?

THE COURT: SAP.

MR. MATTHEWS: Actually, if the Court will recall, in this proceeding --

THE COURT: I know what happened in this proceeding.

MR. MATTHEWS: So far, nothing else is going on with respect to SAP, but something might be planning.

THE COURT: Okay. All right.

MR. MATTHEWS: I just don't want to mislead you --

THE COURT: I know. I know.

MR. MATTHEWS: -- that nothing is going to happen.

February 13 hearing Transcript at 89-90.

23. At the deposition of a representative of SAP on March 25, 2010, in connection with Wellogix's pending claims against Accenture, outside counsel to Wellogix told outside counsel for SAP that Wellogix was planning to file a patent suit against SAP.

24. On April 15, 2010, SAP filed a declaratory judgment action in the United States District Court for the Southern District of Texas seeking a declaration of noninfringement and

invalidity of U.S. Patent Nos. 7,043,486, 7,096,223, 7,155,439, 7,293,029, and 7,669,133. All five of these patents were assigned to Wellogix Technology Licensing LLC at the time. That case is currently pending before Judge Sim Lake, as Civil Action No. 4:10-cv-1224.

25. Wellogix filed a motion to dismiss SAP's declaratory judgment action, alleging that there was no justiciable case or controversy. Judge Lake denied Wellogix's motion, finding that, *inter alia*, the statement made by Wellogix's outside counsel during the March 25th, 2010 deposition showed that there was a substantial controversy between SAP and Wellogix. *See* Transcript of the July 30, 2010 Scheduling Conference before Hon. Sim Lake (relevant excerpts attached as Exhibit H).

26. On September 27, 2010, Wellogix filed patent infringement counterclaims against SAP, SAP AG, and Accenture LLP, alleging infringement of all five patents. At the time of Wellogix's filing, the five patents constituted the entirety of Wellogix's U.S. issued patent portfolio.

27. In a November 30, 2010 hearing before the District Court, Scott Hemingway, counsel for Wellogix, stated that "there are patents that are still in the process of being applied for at the Patent Office that are continuations of the patents that are currently involved in the case before Judge [Sim] Lake. One of those patents just got issued or got a notice of allowance on November 29th of this year." A copy of relevant excerpt from the transcript of the November 30, 2010 hearing is attached as Exhibit I.

28. On January 4, 2011, Judge Lake stayed the patent infringement suit pending the result of *inter partes* reexamination proceedings on each of the five patents pending before the U.S. Patent Office.

29. The patent application referenced by Scott Hemingway at the hearing is U.S. Patent Application No. 09/801,016 ("the '016 application"). In a recent court filing, Wellogix described the '016 application as being "related" to the five patents at issue in the now stayed

lawsuit. Wellogix described the '016 application as having “similar claims” to the five patents.¹ See Cause No. 4:10-cv-01224, Docket Entry No. 51, pending in the U.S. District Court for Southern District of Texas, Houston Division, attached hereto as Exhibit J, at 2.

30. The '016 application issued as the '680 Patent on August 2, 2011. It is currently the only patent owned by Wellogix that has not been asserted against SAP.

31. Wellogix has engaged in a course of conduct that shows a willingness to enforce its patents through litigation.

32. On information and belief, and in view of SAP and Wellogix's clear history of adverse legal interests, SAP expects that Wellogix will initiate suit against SAP for patent infringement of the '680 Patent if SAP continues its current business activities.

33. Based on the foregoing, there is a substantial and justiciable controversy between SAP and Wellogix as to the infringement and validity of the '680 Patent that is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

34. SAP hereby brings this action for declaratory judgment against Wellogix, seeking declarations that (i) SAP does not infringe any valid claim of the '680 Patent, and (ii) each claim of the '680 Patent is invalid.

THE PARTIES

35. SAP America, Inc. is a corporation organized and existing under the laws of Delaware, with corporate headquarters at 3999 West Chester Pike, Newtown Square, Pennsylvania 19073.

36. On information and belief, Wellogix, Inc. is a corporation organized and existing under the laws of Delaware, with its principal place of business at 440 Louisiana Street, Suite 1818, Houston, Texas 77002.

¹ The '016 application is listed as a “related” application on the face of four of the five patents, but is not a parent, child, or sibling application to any of the five patents. See Docket Entry No. 55, attached as Exhibit K.

37. On information and belief, Wellogix Technology Licensing LLC is a limited liability company organized and existing under the laws of Texas, with its principal place of business at 440 Louisiana Street, Suite 2100, Houston, Texas 77002.

JURISDICTION AND VENUE

38. This is a declaratory judgment action brought pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, for patent non-infringement and invalidity arising under the patent laws of the United States, Title 35, U.S.C. § 1 *et seq.* An actual, substantial, and continuing justiciable controversy exists between SAP and Wellogix, requiring a declaration of rights by this Court. The technology at issue generally involves computer software products.

39. This Court has subject matter jurisdiction over the causes of action stated herein under 28 U.S.C. §§ 1331 and 1338 because this action concerns a federal question arising under the patent laws of the United States.

40. Wellogix is subject to personal jurisdiction in this judicial district because Wellogix has purposefully availed itself of the privilege of doing business in this judicial district and has sufficient minimum contacts with Texas to render the exercise of jurisdiction over Wellogix compatible with due process. Wellogix, Inc. maintains its corporate headquarters in this judicial district and transacts business in Texas, including targeting sales and marketing of its products in this judicial district. Wellogix Technology Licensing LLC has a principal place of business in this judicial district.

41. Venue is proper in this judicial district under 28 U.S.C. §§ 1391 and 1400(a) and (b) because Wellogix, Inc. and Wellogix Technology Licensing LLC have engaged in significant activity in this district and are subject to personal jurisdiction in this judicial district.

COUNT I: NON-INFRINGEMENT OF THE '680 PATENT

42. SAP incorporates by reference and re-alleges paragraphs 1 through 41 above, as if fully set forth herein.

43. SAP's SRM software does not infringe and has not infringed, either directly or indirectly, any claim of the '680 Patent under 35 U.S.C. § 271.

44. As a result of the acts described in the foregoing paragraphs, a substantial and justiciable controversy exists between SAP and Wellogix of sufficient immediacy and reality to warrant the issuance of a declaratory judgment that SAP does not infringe any claim of the '680 Patent under 35 U.S.C. § 271.

COUNT II: INVALIDITY OF THE '680 PATENT

45. SAP incorporates by reference and re-alleges paragraphs 1 through 44 above, as if fully set forth herein.

46. The claims of the '680 Patent are invalid for failure to comply with the conditions set forth in Title 35 of the United States Code, including, but not limited to, §§ 101, 102, 103, and 112.

47. By way of example, the claims of the '680 Patent are invalid as being anticipated by the ORACLE® PURCHASING USER'S GUIDE (Oracle Corp. Mar. 1998), *available at* http://download.oracle.com/docs/cd/A60725_05/pdf/poug.pdf (the "Oracle reference"), or would have been obvious to a person of ordinary skill in the art in view of the Oracle reference in combination with the prior art cited during the prosecution of the '016 application.

48. Had the patent examiner known of prior art methods that are substantially similar and/or identical to the subject matter described in the Oracle reference, the claims of the '680 Patent would not have been allowed and the '680 Patent would not have issued.

PRAYER FOR RELIEF

WHEREFORE, SAP prays for judgment against Wellogix as follows:

(a) Declare that SAP does not infringe, either directly or indirectly, any claim of the '680 Patent under 35 U.S.C. § 271;

(b) Declare that the '680 Patent is invalid;

(c) Issue an Order awarding SAP its costs, expenses and reasonable attorney fees as provided by law; and

(d) Award SAP any other and further relief as this Court may deem just and proper.

SPECIFIC RELIEF NOT REQUESTED

SAP does not request any additional relief with respect to the claims adjudicated in this Court's Order of December 8, 2008 (see Exhibit E) beyond that which has already been granted to SAP, all such claims being separate and distinct from the non-infringement and invalidity of the '680 Patent.

JURY TRIAL DEMAND

SAP demands trial by jury on all issues triable by a jury in this case.

Respectfully submitted,

Dated: August 2, 2011

/s/ Michael P. Graham

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