

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

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| |) | |
| INTEL CORPORATION, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. 2:08-cv-319 |
| |) | |
| NEGOTIATED DATA SOLUTIONS LLC, |) | JURY TRIAL DEMANDED |
| |) | |
| Defendant. |) | |
| |) | |

**INTEL CORPORATION’S COMPLAINT FOR
DECLARATORY JUDGMENT AND RELATED CAUSES**

TO THE HONORABLE JUDGE OF SAID COURT:

Intel Corporation (“Plaintiff” or “Intel”) alleges the following as its Complaint against Defendant Negotiated Data Solutions LLC (“Defendant” or “N-Data”):

Parties

1. Intel is a Delaware corporation with its principal place of business located at 2200 Mission College Boulevard, Santa Clara, California. Intel, originally founded in 1968 in Mountain View, California, is a leader in semiconductor technology, working towards creating the next revolutionary steps in mobile, desktop, and data center computing.

2. On information and belief, N-Data is an Illinois limited liability company, formed in or about 2003, with its principal place of business located at 1550 North Lake Shore Drive, Unit 16C, Chicago, Illinois, a residential condominium apartment owned by Alan R. Loudermilk. On information and belief, Mr. Loudermilk, founder, manager, and sole member of N-Data, is the California agent for service of process for N-Data, and his residence located at 13212 Peacock Court, Cupertino, California is the address for service of process for N-Data.

Jurisdiction and Venue

3. This Court has personal jurisdiction over N-Data at least because it has purposefully directed activities to this District and because N-Data has availed itself of the privileges and benefits of this forum by filing a complaint in this District, *Negotiated Data Solutions LLC v. Dell, Inc.*, Civil Action No. 2:06-CV-528 (CE) (“Related Action”).

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 2201-2202, 1331, 1332, 1338, and/or 1367.

5. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(a), 1391(b), 1391(c), and/or 1400(b).

Background

6. On June 1, 1976, Intel and National Semiconductor Corporation (“National”) entered into a patent cross-license agreement (“Intel-National License”), which granted Intel licenses to National’s patents and patent applications and which survives for the lives of those patents and patent applications.

7. Vertical Networks, Inc. (“Vertical”) was formed in or about 1998 by a group that included former National engineers to develop and market PBX/telephony systems. On information and belief, Mr. Loudermilk was the patent attorney and/or agent of Vertical.

8. National purportedly assigned various patents and patent applications to Vertical, including U.S. Patent No. 5,361,261, which N-Data has asserted in the Related Action, as well as U.S. Patent No. 5,533,018, U.S. Patent No. 5,594,734, and U.S. Patent No. 5,566,169, the reissues of which N-Data has asserted in the Related Action (collectively “Patents-in-Suit”). On information and belief, Mr. Loudermilk was involved in, or is otherwise knowledgeable about, the negotiations between Vertical and National regarding Vertical’s purported acquisition of National’s patents and patent applications.

9. On information and belief, Vertical purportedly assigned the patents and patent applications it had acquired from National to N-Data, sold its remaining business assets, and ceased operations some time during the last quarter of 2003.

10. On information and belief, N-Data was formed in or about 2003 for the purpose of licensing and enforcing the patents it purportedly acquired from National through Vertical, in order to recoup the investment of venture capitalists who had invested in Vertical.

11. On information and belief, prior to the purported assignment of the Patents-in-Suit, National provided to Vertical a copy of National's June 7, 1994 letter, which set forth National's licensing commitment to the Institute of Electrical and Electronics Engineers ("IEEE"), a standard setting organization. In exchange for IEEE's adoption of an autodetection standard based on National's architecture known as "NWay," National had agreed to license its NWay technology to any requesting party for a one-time fee of one thousand dollars (\$1,000.00). On information and belief, the patents asserted by N-Data are included in the \$1,000 one-time license fee commitment by National.

12. On information and belief, Vertical sent a letter to IEEE on or about March 27, 2002 regarding licensing, in which Vertical sought to repudiate National's prior commitment to license the NWay technology by claiming that "the assurances provided in this letter supersede any assurances provided by National Semiconductor Corporation relevant to the above-identified patents."

13. On information and belief, Vertical identified a list of target companies that practiced the IEEE standards incorporating NWay technology. Between 2002 and 2004, Mr. Loudermilk sent letters on behalf of Vertical to most of those companies, demanding licensing fees substantially in excess of the \$1,000.00 one-time licensing fee commitment by National, and threatened or initiated legal actions against those companies that refused to pay Vertical's royalty demands.

14. To the extent Vertical and N-Data have been proper assignees of the Patents-in-Suit, Vertical and N-Data each assumed and was bound by National's promises and contractual obligations relating to the Patents-in-Suit.

15. On or about December 19, 2003, N-Data filed a complaint in the Northern District of California against one of Intel's customers, Dell, Inc. ("Dell"), alleging infringement of certain patents purportedly acquired from National through Vertical, *Negotiated Data Solutions LLC v. Dell, Inc.*, Case No. 3:03-cv-05755 JSW (the "California Action").

16. On December 13, 2006, N-Data filed the Related Action against Dell. On or about February 23, 2007, Dell filed its answer and counterclaims in response thereto and a third-party complaint against National relating to National's prior commitment to the IEEE.

17. On or about August 10, 2007, N-Data served its Rule 3-1 Disclosure of Asserted Claims and Infringement Contentions in the Related Action. Those infringement contentions are directed to systems sold by Dell, many of which incorporate Intel components licensed under the Patents-in-Suit pursuant to the Intel-National License. Consequently, Dell demanded indemnification from Intel with respect to N-Data's infringement allegations to the extent they are directed at Dell systems incorporating Intel components.

18. On January 23, 2008, the Federal Trade Commission announced a complaint and proposed consent order with N-Data, *In the Matter of Negotiated Data Solutions LLC*, File No. 051 0094. N-Data's course of conduct was alleged to have caused and likely to continue to cause substantial injury to consumers that could not reasonably be avoided and is not outweighed by countervailing benefits to consumers or competition, and the acts and practices of N-Data were alleged to constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. According to the Federal Trade Commission's Complaint against N-Data, the final agreement between Vertical and National stated that the assignment is "subject to any existing licenses and other encumbrances that [National] may have granted."

19. On June 9, 2008, the United States Supreme Court issued its decision in *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109 (2008), regarding the scope of the doctrine of patent exhaustion, causing the issues of license and exhaustion to be front and center of the ongoing dispute between N-Data, Dell, National, and Intel. The Supreme Court had granted certiorari in *Quanta Computer, Inc. v. LG Elecs., Inc.* on September 25, 2007, and oral argument took place on January 16, 2008.

20. Consequently, Intel sought to intervene in the Related Action with a third-party complaint for declaratory judgment on the limited issues of license and exhaustion, which should be dispositive of at least the infringement allegations of N-Data directed to Dell systems incorporating licensed Intel components.

21. To preserve its rights and avoid any waiver of its claims and defenses relating to the patents wrongfully asserted by N-Data against Intel's customer, Dell, in the Related Action, and to obtain relief against N-Data threatening Intel or any other Intel customer, Intel hereby brings this Complaint.

COUNT I

Declaratory Judgment of Non-infringement

22. Intel realleges and incorporates herein by reference the matters alleged in paragraphs 1 through 21 above.

23. An actual and justiciable controversy has arisen between N-Data and Intel with respect to the Patents-in-Suit. Absent a declaration and order as sought by Intel, N-Data will continue to wrongfully assert the Patents-in-Suit against Dell and threaten Intel and its customers, thereby causing Intel irreparable injury and damage.

24. Intel has not infringed and does not infringe any of the claims of the Patents-in-Suit, either directly or indirectly, literally or under the doctrine of equivalents, willfully or otherwise, and Intel is entitled to a declaration to that effect.

COUNT II

Declaratory Judgment of Invalidity

25. Intel realleges and incorporates herein by reference the matters alleged in paragraphs 1 through 24 above.

26. An actual and justiciable controversy exists between N-Data and Intel with respect to the Patents-in-Suit. Absent a declaration and order as sought by Intel, N-Data will continue to wrongfully assert the Patents-in-Suit against Dell and threaten Intel and its customers, thereby causing Intel irreparable injury and damage.

27. The Patents-in-Suit are invalid for failure to comply with the requirements of 35 U.S.C. §§ 101, 102, 103, 112, and/or 251, and Intel is entitled to a declaration to that effect.

COUNT III

Declaratory Judgment of Unenforceability Due to Unclean Hands

28. Intel realleges and incorporates herein by reference the matters alleged in paragraphs 1 through 27 above.

29. In view of the Intel-National License and the Supreme Court's recent decision in *Quanta Computer, Inc. v. LG Elecs., Inc.*, 128 S. Ct. 2109 (2008), N-Data's continued assertion of the Patents-in-Suit against Intel's customer, Dell, constitutes an impermissible attempt to expand the scope of the Patents-in-Suit. Such unlawful and unfair conduct on the part of N-Data constitutes patent misuse and, thus, unclean hands.

30. The demands made by Mr. Loudermilk on behalf of Vertical and/or N-Data against targeted companies, in order to extort unreasonable and unfair licensing fees for the unjust enrichment of Vertical and/or N-Data in breach of National's prior commitment to the IEEE, constitute unclean hands.

31. An actual and justiciable controversy exists between N-Data and Intel with respect to the Patents-in-Suit because N-Data has improperly filed the Related Action against Intel's customer, Dell, triggering a claim of indemnification by Dell against Intel.

32. By filing infringement actions against Dell and by threatening Intel and its customers with patents that N-Data knows to be licensed under the Intel-National License, any infringement claims N-Data has asserted or seeks to assert with respect to any of the patents purportedly acquired from National are barred by N-Data's unclean hands.

33. Absent a declaration and order as sought by Intel, N-Data will continue to wrongfully assert the Patents-in-Suit against Dell and threatening Intel and its customers, thereby causing Intel irreparable injury and damage.

34. In view of Intel's indemnification obligation to Dell as Intel's customer, this issue is real and substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. The dispute as to whether N-Data may seek to enforce the Patents-in-Suit against Intel and its customer, Dell, given N-Data's patent misuse and unclean hands, is definite and concrete and touches the legal relations of the parties to this dispute and the Related Action.

35. For the reasons set forth herein, the Patents-in-Suit are unenforceable due to unclean hands on the part of N-Data, and Intel is entitled to a declaration to that effect.

COUNT IV

Breach of Covenant of Good Faith and Fair Dealing

36. Intel realleges and incorporates herein by reference the matters alleged in paragraphs 1 through 35 above.

37. The Intel-National License provides that the agreement and matters connected with the performance thereof shall be construed and governed in all respects by the law of California.

38. Under California law, every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. As a result, any successor or assignee of the Intel-National License owes Intel a duty of good faith and fair dealing.

39. As the purported successor-in-interest to the Patents-in-Suit which are subject to the terms of the Intel-National License, N-Data owes Intel a duty of good faith and fair dealing.

40. By improperly seeking to enforce licensed patents, N-Data has breached the duty of good faith and fair dealing of the Intel-National License.

41. All conditions precedent have been met.

42. Intel has suffered damages and will continue to suffer damages as a result of N-Data's breach of the covenant of good faith and fair dealing alleged herein, in an amount to be determined at trial.

COUNT V

Breach of Contract

43. Intel realleges and incorporates herein by reference the matters alleged in paragraphs 1 through 42 above.

44. The Intel-National License is a binding contract supported by adequate consideration.

45. To the extent N-Data purports to be the successor-in-interest to the patents acquired from National, N-Data is bound by the terms of the Intel-National License.

46. By its conduct alleged herein, N-Data has breached its obligations under the Intel-National License.

47. Intel has performed all conditions, covenants, and promises required on its part to be performed in accordance with the terms and conditions of the Intel-National License.

48. Intel has suffered damages and will continue to suffer damages as a result of N-Data's breach as alleged herein, in an amount to be determined at trial.

COUNT VI

Estoppel, Waiver, and Implied License

49. Intel realleges and incorporates herein by reference the matters alleged in paragraphs 1 through 48 above.

50. The Intel-National License is a binding contract supported by adequate consideration.

51. In adopting several auto-detection and auto-negotiation standards that are based upon National's NWay technology, the IEEE relied upon and provided consideration for the assurances and obligations from National, including those in its June 7, 1994 letter.

52. To the extent Vertical and N-Data have been proper assignees of the Patents-in-Suit, Vertical and N-Data each assumed and was bound by National's promises and contractual obligations relating to the Patents-in-Suit and received valuable consideration thereof.

53. Intel will be materially prejudiced if N-Data is not required to honor and fulfill the promises and contractual obligations of National with respect to the Patents-in-Suit which N-Data assumed as the purported assignee of the Patents-in-Suit. As a result, N-Data should be enjoined from enforcing the Patents-in-Suit against Intel or any Intel customer based on estoppel, waiver, and/or implied license as alleged herein.

54. Intel has suffered damages and will continue to suffer damages as a result of N-Data's breach of its obligations as alleged herein, in an amount to be determined at trial.

COUNT VII

Intentional Interference With Contract

55. Intel realleges and incorporates herein by reference the matters alleged in paragraphs 1 through 54 above.

56. On information and belief, N-Data is and was at all relevant times aware of Intel's contractual relationships with its customers, including but not limited to Dell.

57. On information and belief, N-Data knew that the components Intel supplied to its customers, including Dell, were properly licensed under the Intel-National License and that neither Intel nor its customers infringe any valid or enforceable claim of the Patents-in-Suit.

58. As a result of N-Data's knowing and intentional course of conduct and harassment alleged herein, Intel's relationships with its customers have been disrupted and harmed, making performance under those contracts more difficult and/or expensive.

59. On information and belief, N-Data intentionally interfered with Intel's contractual relationships with Dell and with Intel's other customers by N-Data's course of conduct and harassment alleged herein, which constitutes tortious interference with contract.

60. Unless and until such unlawful and unfair conduct is enjoined, N-Data will continue to engage in such tortious inference with Intel's contractual relationships and cause Intel irreparable injury and damage.

61. As a result of the tortious interference on the part of N-Data as alleged herein, Intel has been damaged and will continue to be damaged in an amount to be determined at trial.

COUNT VIII

Intentional Interference With Business Relations/Prospective Economic Advantage

62. Intel realleges and incorporates herein by reference the matters alleged in paragraphs 1 through 61 above.

63. On information and belief, N-Data is and was at all relevant times aware of Intel's existing and/or prospective business relationships with its customers and the probability of continuing future economic benefit to Intel from those relationships.

64. On information and belief, N-Data knew that the components Intel supplied to its customers, including Dell, were properly licensed under the Intel-National License and that neither Intel nor its customers infringe any valid or enforceable claim of the Patents-in-Suit.

65. As a result of N-Data's knowing and intentional course of conduct and harassment alleged herein, Intel's existing and/or prospective business relationships with its customers have been disrupted and harmed, making Intel's performance more difficult and/or expensive.

66. On information and belief, N-Data intentionally interfered with Intel's existing and/or prospective business relationships with its customers by N-Data's course of conduct and harassment alleged herein, which constitutes tortious interference with Intel's business relationships and prospective economic advantage.

67. Unless and until such unlawful and unfair conduct is enjoined, N-Data will continue to engage in such tortious interference with Intel's existing and/or prospective business relationships and cause Intel irreparable injury and damage.

68. As a result of the tortious interference on the part of N-Data as alleged herein, Intel has been damaged and will continue to be damaged in an amount to be determined at trial.

COUNT IX

Unfair Competition in Violation of Cal. Bus. & Prof. Code § 17200

69. Intel realleges and incorporates herein by reference the matters alleged in paragraphs 1 through 68 above.

70. On information and belief, N-Data's conduct alleged herein has been found to be unlawful, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

71. On information and belief, N-Data purposefully and intentionally made or disseminated, or caused to be made or disseminated, unfair, deceptive, untrue and/or misleading statements to Intel's customers regarding the scope, infringement, and enforceability of the Patents-in-Suit and regarding the Intel-National License.

72. The conduct of N-Data as alleged herein, including but not limited to its improper allegations of exhausted patent claims against Dell and other Intel customers, as well as N-Data's demands for licenses to the Patents-in-Suit in excess of National's prior licensing commitment to the IEEE, constitutes unfair competition in violation of Section 17200 of the California Business & Professions Code.

73. As a result of the unlawful and unfair conduct of N-Data as alleged herein, Intel has suffered actual injury, including but not limited to indemnification demanded by Intel's customer, Dell, for N-Data's assertion of exhausted patent claims.

74. N-Data has unlawfully and unfairly acquired, and continues to enjoy on an ongoing basis, an unfair competitive advantage to the detriment of Intel and Intel's customers, including but not limited to Dell.

75. Unless and until such unlawful and unfair conduct is enjoined, N-Data will continue to engage in such unfair competition, causing Intel and its customers, including but not limited to Dell, irreparable injury and damage.

76. Intel is entitled to restitution and disgorgement of any unlawful profits or gains obtained by N-Data as a result of its unlawful and unfair conduct alleged herein.

Demand for Jury Trial

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and Local Rule CV-38, Intel demands a trial by jury of this action of all issues so triable.

Prayer for Relief

WHEREFORE, Intel respectfully requests the Court to enter judgment in its favor and against N-Data and grant the following relief:

- A. A declaration that Intel does not infringe any of the Patents-in-Suit;
- B. A declaration that the Patents-in-Suit are invalid;
- C. A declaration that the Patents-in-Suit are unenforceable due to unclean hands;
- D. A preliminary and permanent injunction barring N-Data and its agents, representatives, attorneys, and any persons in active concert or participation with them from enforcing the Patents-in-Suit against Intel, Dell, or any other Intel customer;
- E. A finding that N-Data has breached the covenant of good faith and fair dealing;
- F. A finding that N-Data breached its obligations to Intel under the Intel-National License;
- G. A finding that Intel and its customers have an implied license to the Patents-in-Suit;
- H. A finding that any claims N-Data may seek to assert under the Patents-in-Suit against Intel or any Intel customer are barred by estoppel and waiver;
- I. A finding that N-Data has intentionally interfered with Intel's contractual relationship with Dell and other Intel customers;

