

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

Actus, LLC)
)
Plaintiff,) Civil Action No. 2:09-cv-102-TJW
)
v.)
)
(1) Blaze Mobile, Inc.;)
(2) Capital One Financial Corp.;)
(3) Enable Holdings, Inc.;)
(4) Javien Digital Payment Solutions, Inc.;) JURY TRIAL DEMANDED
(5) Meta Financial Group, Inc.;)
(6) M&T Bank Corp.;)
(7) Visa, Inc.;)
(8) Western Union, Financial Services, Inc.;)
Defendants.)

DEFENDANT CAPITAL ONE FINANCIAL CORPORATION'S ANSWER TO
PLAINTIFF'S THIRD AMENDED COMPLAINT FOR PATENT INFRINGEMENT

Defendant Capital One Financial Corporation ("COFC") files this answer to the Third Amended Complaint for Patent Infringement ("Complaint") of Plaintiff Actus, LLC ("Actus") and states as follows:

1. COFC admits that Actus purports to bring an action for patent infringement against COFC. COFC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 1 and therefore denies those allegations.

PARTIES

2. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 and therefore denies those allegations.

3. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3 and therefore denies those allegations.

4. COFC admits the allegations in paragraph 4.
5. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 and therefore denies those allegations.
6. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 and therefore denies those allegations.
7. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 and therefore denies those allegations.
8. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 and therefore denies those allegations.
9. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 and therefore denies those allegations.
10. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 and therefore denies those allegations.

JURISDICTION AND VENUE

11. Paragraph 11 states a legal conclusion and requires no response.
12. COFC denies committing, directly nor indirectly, any acts of patent infringement. COFC asserts that the remaining allegations in paragraph 12 are legal conclusions for which no response is required.
13. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13 and therefore denies those allegations.
14. COFC denies committing, directly nor indirectly, any acts of patent infringement. COFC asserts that the remaining allegations in paragraph 14 are legal conclusions for which no response is required.

15. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 and therefore denies those allegations.

16. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 and therefore denies those allegations.

17. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17 and therefore denies those allegations.

18. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18 and therefore denies those allegations.

19. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19 and therefore denies those allegations.

20. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 and therefore denies those allegations.

COUNT I

21. COFC admits that on February 5, 2008, U.S. Patent No. 7,328,189 (“the ‘189 Patent”), entitled “Method and Apparatus for Conducting Electronic Commerce Transactions Using Electronic Tokens,” was issued by the United States Patent and Trademark Office. COFC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 21 and therefore denies those allegations.

22. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 and therefore denies those allegations.

23. COFC denies the allegations in paragraph 23.

24. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24 and therefore denies those allegations.

25. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25 and therefore denies those allegations.

26. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26 and therefore denies those allegations.

27. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27 and therefore denies those allegations.

28. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28 and therefore denies those allegations.

29. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29 and therefore denies those allegations.

COUNT II

30. COFC admits that on July 24, 2007, U.S. Patent No. 7,249,099 (“the ‘099 Patent”), entitled “Method and Apparatus for Conducting Electronic Commerce Transactions Using Electronic Tokens,” was issued by the United States Patent and Trademark Office. COFC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 30 and therefore denies those allegations.

31. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31 and therefore denies those allegations.

32. COFC denies the allegations in paragraph 32.

33. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33 and therefore denies those allegations.

34. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34 and therefore denies those allegations.

35. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35 and therefore denies those allegations.

36. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36 and therefore denies those allegations.

37. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37 and therefore denies those allegations.

38. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38 and therefore denies those allegations.

COUNT III

39. COFC admits that on February 13, 2007, U.S. Patent No. 7,177,838 (“the ‘838 Patent”), entitled “Method and Apparatus for Conducting Electronic Commerce Transactions Using Electronic Tokens,” was issued by the United States Patent and Trademark Office. COFC lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 39 and therefore denies those allegations.

40. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40 and therefore denies those allegations.

41. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41 and therefore denies those allegations.

COUNT IV

42. COFC admits that on May 20, 2008, U.S. Patent No. 7,376,621 (“the ‘621 Patent”), entitled “Method and Apparatus for Conducting Electronic Commerce Transactions Using Electronic Tokens,” was issued by the United States Patent and Trademark Office. COFC

lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 42 and therefore denies those allegations.

43. COFC lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 43 and therefore denies those allegations.

PRAYER FOR RELIEF

The Prayer for Relief requires no response. To the extent that any response is required, COFC denies that Actus should be granted any of the “relief” sought in paragraphs 1-15 of the Prayer for Relief in the Complaint.

DEMAND FOR JURY TRIAL

COFC admits that Actus, by and through its attorneys, demands a trial by jury.

AFFIRMATIVE DEFENSES

Capital One Financial Corporation (“COFC”) asserts the following defenses to the Third Amended Complaint for Patent Infringement (“Complaint”) of Actus, LLC (“Actus”). Assertion of a defense is not a concession that COFC has the burden of proving the matters asserted. COFC reserves the right to rely upon such other additional defenses as may become available or apparent during discovery.

FIRST AFFIRMATIVE DEFENSE

COFC does not infringe, has not infringed, and does not and has not induced infringement or contributed to infringement of any claim of the ‘189 Patent under any theory of infringement, including direct infringement, indirect infringement, literal infringement, or infringement under the doctrine of equivalents.

SECOND AFFIRMATIVE DEFENSE

COFC does not and has not infringed any claim of the '189 Patent under any theory of joint infringement, as set forth at least in *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008), and *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007).

THIRD AFFIRMATIVE DEFENSE

Each claim of the '189 Patent is invalid and/or unenforceable for failure to meet one or more of the conditions and requirements for patentability specified in 35 U.S.C. §§ 1 *et seq.*, including without limitation, §§ 101, 102, 103, and/or 112.

FOURTH AFFIRMATIVE DEFENSE

Each claim of the '189 Patent is invalid for failure to meet the requirements of 35 U.S.C. § 101, as set forth in *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008).

FIFTH AFFIRMATIVE DEFENSE

Actus is estopped, based on statements, representations, and admissions made during the prosecution of the patent application resulting in the issuance of the '189 Patent, from maintaining that any claim of the '189 Patent covers any of COFC's articles, methods, services, equipment, products, devices, or components, or other activity engaged in by COFC, or from asserting any interpretation of the '189 Patent claims that would be broad enough to cover any of COFC's articles, methods, services, equipment, products, devices, or components, or other activity engaged in by COFC.

SIXTH AFFIRMATIVE DEFENSE

Actus's claims for relief and/or ability to recover for any alleged infringement of the '189 Patent are limited by the failure of Actus, predecessors in interest, and/or one or more licensees to properly mark or give proper notice as required by 35 U.S.C. § 287.

SEVENTH AFFIRMATIVE DEFENSE

COFC does not infringe, has not infringed, and does not and has not induced infringement or contributed to infringement of any claim of the '099 Patent under any theory of infringement, including direct infringement, indirect infringement, literal infringement, or infringement under the doctrine of equivalents.

EIGHTH AFFIRMATIVE DEFENSE

COFC does not and has not infringed any claim of the '099 Patent under any theory of joint infringement, as set forth at least in *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008), and *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007).

NINTH AFFIRMATIVE DEFENSE

Each claim of the '099 Patent is invalid and/or unenforceable for failure to meet one or more of the conditions and requirements for patentability specified in 35 U.S.C. §§ 1 *et seq.*, including without limitation, §§ 101, 102, 103, and/or 112.

TENTH AFFIRMATIVE DEFENSE

Each claim of the '189 Patent is invalid for failure to meet the requirements of 35 U.S.C. § 101, as set forth in *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008).

ELEVENTH AFFIRMATIVE DEFENSE

Actus is estopped, based on statements, representations, and admissions made during the prosecution of the patent application resulting in the issuance of the '099 Patent, from maintaining that any claim of the '099 Patent covers any of COFC's articles, methods, services, equipment, products, devices, or components, or other activity engaged in by COFC, or from asserting any interpretation of the '099 Patent claims that would be broad enough to cover any of

COFC's articles, methods, services, equipment, products, devices, or components, or other activity engaged in by COFC.

TWELFTH AFFIRMATIVE DEFENSE

Actus's claims for relief and/or ability to recover for any alleged infringement of the '099 Patent are limited by the failure of Actus, predecessors in interest, and/or one or more licensees to properly mark or give proper notice as required by 35 U.S.C. § 287.

THIRTEENTH AFFIRMATIVE DEFENSE

Actus's claims for relief are barred by the doctrines of waiver, laches, license, implied license, estoppel, patent misuse, and/or prosecution history estoppel.

FOURTEENTH AFFIRMATIVE DEFENSE

Actus's claims for relief are barred by the fact that Actus lacks standing to bring this action.

FIFTEENTH AFFIRMATIVE DEFENSE

Some or all of the defendants have been improperly joined in a single action, and COFC asserts its right to a separate trial.

JURY DEMAND

COFC respectfully demands a trial by jury on any and all issues legally triable by right by jury in the above action.

Dated: April 1, 2010

Respectfully Submitted,

SMITH & GILSTRAP

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**ATTORNEYS FOR DEFENDANT CAPITAL
ONE FINANCIAL CORPORATION**

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this the 1st day of April, 2010.

/s/ J. Rodney Gilstrap