

In the United States Court of Federal Claims

SCIENCE APPLICATIONS
INTERNATIONAL CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

MICROSOFT CORPORATION,

Intervenor-Defendant,

and

L3 TECHNOLOGIES, INC.,

Third-Party Defendant.

No. 17-cv-825

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14, 2023

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Gwendolyn Tawresey, Troutman Pepper LLP, Washington, D.C. argued for Plaintiff. With her on the briefs were *Orion Armon*, Cooley LLP, Denver, C.O.; and *DeAnna D. Allen* and *Stephen R. Smith* of Cooley LLP, Washington, D.C.

Hayley A. Dunn, United States Department of Justice, Civil Division, Washington, D.C. argued for Defendant. With her on the briefs were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, Washington, D.C.; and *Matthew D. Tanner*, *Scott Bolden*, and *Gary L. Hausken* of the United States Department of Justice, Civil Division, Washington, D.C.

Thomas L. Halkowski of Fish & Richardson P.C., Washington, D.C. for Intervenor-Defendant. With him on the briefs were *Ahmed J. Davis*, *W. Freeman, Jr.*, *Daniel Y. Lee*, and *Laura C.*

¹ This Memorandum and Order was filed under seal, in accordance with the Protective Order entered in this case (ECF No. 34) and was publicly reissued after incorporating all appropriate redactions proposed by the parties (ECF No. 418-1). The two versions are substantively identical, except for the publication date and this footnote.

Whitworth of Fish & Richardson P.C., Washington, D.C.; and *John Thornburgh*, Fish & Richardson P.C., San Diego, C.A.

William C. Bergmann of Baker & Hostetler LLP, Washington, D.C. argued for Third-Party Defendant. With him on the briefs were *Charles C. Carson* and *Cassandra Simmons* of Baker & Hostetler LLP, Washington, D.C.; and *Phillip D. Wolfe* of Baker & Hostetler LLP, Philadelphia, P.A.

MEMORANDUM AND ORDER

I. Introduction

On June 19, 2017, Plaintiff Science Applications International Corporation (SAIC) filed the present action alleging literal patent infringement pursuant to 28 U.S.C. § 1498(a) against Defendant the United States (the Government). Complaint (ECF No. 1) (Compl.) ¶¶ 1–3.² SAIC contends that the Government has infringed SAIC’s patents “by entering into contracts with Plaintiff’s competitors for the manufacture and subsequent use of night vision goggle weapon systems with specialized heads up displays that allegedly use Plaintiff’s patented technology.” *Sci. Applications Int’l Corp. v. United States*, 148 Fed. Cl. 268, 269 (2020); see Compl. ¶¶ 2, 37.

This Court has issued several opinions throughout the course of this litigation, familiarity with which is presumed.³ See, e.g., *Sci. Applications Int’l Corp. v. United States*, 135 Fed. Cl. 661 (2018); *Sci. Applications Int’l Corp.*, 148 Fed. Cl. at 268; *Sci. Applications Int’l Corp. v. United States*, 154 Fed. Cl. 594 (2021); *Sci. Applications Int’l Corp. v. United States*, 156 Fed. Cl. 486 (2021); *Sci. Applications Int’l Corp. v. United States*, 161 Fed. Cl. 373 (2022); *Sci. Applications*

² Citations throughout this Memorandum and Order reference the ECF-assigned page numbers, which do not always correspond to the pagination within the document.

³ Since its inception in June 2017, this action has been reassigned four times to different judges. See *Sci. Applications Int’l Corp.*, 148 Fed. Cl. at 270; see also ECF No. 25 (Notice of Reassignment, dated April 5, 2018); ECF No. 68 (Notice of Reassignment, dated June 21, 2019); ECF No. 85 (Notice of Reassignment, dated July 23, 2019); ECF No. 113 (Notice of Reassignment to undersigned judge, dated February 27, 2020).

Int'l Corp. v. United States, 162 Fed. Cl. 213 (2022); *Sci. Applications Int'l Corp. v. United States*, 163 Fed. Cl. 257 (2022); *Sci. Applications Int'l Corp. v. United States*, No. 17-825 (Fed. Cl. Sept. 28, 2023) (ECF No. 401) (Combined Summary Judgment Opinion). The following three motions are pending before this Court and are ripe for adjudication:

- Plaintiff SAIC's Daubert Motion to Exclude Testimony Regarding Alleged Non-Infringing Alternatives (ECF No. 350) (SAIC Daubert)⁴
- Plaintiff SAIC's Motion to Strike Untimely Non-Infringing Alternatives and Non-Infringement Theories (ECF No. 352) (SAIC MTS)⁵
- Defendants' Joint Rule 702 Motion to Partially Exclude the Amended Expert Damages Report of David A. Haas (ECF No. 353) (Def. Daubert)⁶

The Court heard argument on these motions, and the motions are now ripe for adjudication.

Oral Argument Transcript, dated June 22, 2023 (ECF No. 400) (OA Tr.). A background summary pertinent to the current motions follows.

⁴ See Defendants' Response in Opposition to SAIC's Daubert Motion to Exclude Testimony Regarding Alleged Non-Infringing Alternatives (ECF No. 366) (SAIC Daubert – Def. Resp.); SAIC's Reply in Support of its Daubert Motion to Exclude Testimony Regarding Alleged Non-Infringing Alternatives (ECF No. 383) (SAIC Daubert – SAIC Reply).

⁵ See Defendants' Opposition to SAIC's Motion to Strike Non-Infringing Alternatives and Non-Infringement Theories (ECF No. 367) (SAIC MTS – Def. Resp.); SAIC's Reply in Support of its Motion to Strike Untimely Non-Infringing Alternatives and Non-Infringement Theories (ECF No. 382) (SAIC MTS – SAIC Reply). In the Court's Memorandum and Opinion dated September 28, 2023, the Court denied, in part, Plaintiff SAIC's Motion to Strike Untimely Non-Infringing Alternatives and Non-Infringement Theories (ECF No. 352), solely as it pertains to Microsoft's non-infringement theory. Combined Summary Judgment Opinion at 19. As such, the remainder of that motion is addressed by the present Memorandum and Order.

⁶ See SAIC's Opposition to Defendants' Joint Rule 702 Motion to Partially Exclude the Amended Expert Damages Report of David A. Haas (ECF No. 365) (Def. Daubert – SAIC Resp.); Joint Reply in Support of Defendants' Rule 702 Motion to Partially Exclude the Damages Report of David A. Haas (ECF No. 384) (Def. Daubert – Def. Reply).

A. Background

a. The Alleged Infringing Parties

The Government has entered into several contractual arrangements with various parties to develop and manufacture the accused technology. On May 9, 2014, the Government, acting by and through the Department of the Army (the Army), awarded two contracts for the procurement of the Enhanced Night Vision Goggle-III (ENVG-III) and the Family of Weapon Sights – Individual (FWS-I) to BAE Systems, Inc. (BAE) and DRS Networks & Imaging Systems, LLC (DRS). Compl. ¶¶ 2, 37. Neither BAE nor DRS have joined this suit.

On November 20, 2018, Intervenor-Defendant Microsoft Corporation (Microsoft) entered into a contract with the Government to develop an [REDACTED], which includes implementation of the Rapid Target Acquisition (RTA) feature relevant to SAIC's infringement claims. *See* Microsoft's Unopposed Motion to Intervene Pursuant to Rule 24 (ECF No. 59) at 1. On April 30, 2019, Microsoft filed an unopposed Motion to Intervene in this action under Rule 24 of the Rules of the United States Court of Federal Claims (Rules), which this Court granted on May 6, 2019. *See id.*; Order Granting Intervention and Amending the Schedule, dated May 6, 2019 (ECF No. 60) (granting Microsoft's Motion to Intervene). On September 28, 2023, this Court granted Microsoft's Motion for Summary Judgment of Non-Infringement. Combined Summary Judgment Opinion at 98.

On May 30, 2019, the Army entered into two separate other transaction agreements (OTAs) with L3 Technologies, Inc. (L3) and Harris Corporation (Harris) to develop a prototype for an Enhanced Night Vision Goggle-Binocular (ENVG-B) that also requires implementation of the RTA technology at issue in this action. *See* Memorandum and Order, dated May 12, 2020 (ECF No. 120) (May 12, 2020 Memorandum and Order) at 3. Defendant filed a Motion to Notify L3

and Harris as interested third parties pursuant to Rule 14(b) on March 10, 2020, which this Court granted on May 12, 2020. *See* Motion to Notify Interested Party L3 Technologies, Inc. and Harris Corporation Pursuant to RCFC 14(b) (ECF No. 114); May 12, 2020 Memorandum and Order at 9–10 (granting Defendant’s Motion to Notify L3 and Harris). Accordingly, Rule 14(b) notices were issued to L3 and Harris, care of Elbit Systems of America, LLC (Elbit),⁷ on May 12, 2020. *See* Notice to Third Parties (L3 and Harris) pursuant to Rule 14(b)(1) (ECF No. 122). On July 14, 2020, L3 filed its Answer to SAIC’s Complaint, entering the case as a third-party defendant. L3 Technologies, Inc. Answer (ECF No. 131). In contrast, Elbit filed a Notice with the Court declining to file any third-party pleadings. *See* Notice by Elbit Systems of America, LLC, dated July 29, 2020 (ECF No. 135).

b. The ’230 Patent

The only patent remaining at issue in this action is U.S. Patent No. 9,229,230 (the ’230 Patent). *See* Joint Stipulation of Invalidity and Motion for Partial Summary Judgment Regarding the Asserted Patents (ECF No. 208) at 2. The ’230 Patent includes forty-two total claims, three of which are independent claims: claims 1, 15, and 29. *See generally* ’230 Patent. Familiarity with the ’230 Patent is presumed, as is this Court’s September 28, 2023 Memorandum and Opinion, which includes a detailed explanation of the patent. Combined Summary Judgment Opinion at 8–16.

⁷ Though the Government awarded Harris one of the May 30, 2019 OTAs, the division of Harris responsible for developing the company’s night vision technology was spun-off and purchased by Elbit Systems of America, LLC (Elbit), which is the U.S. subsidiary of Elbit Systems, Ltd. *See* May 12, 2020 Memorandum and Order at 3 n.1.

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