

AO 120 (Rev. 3/04)

**SOLICITOR**

TO: <b>Mail Stop 8</b> Director of the U.S. Patent and Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450	SEP 25 2007 <b>REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK</b>
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In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court Nebraska on the following  Patents or  Trademarks:

DOCKET NO. 8:07CV375	DATE FILED 9/20/07	U.S. DISTRICT COURT Nebraska
PLAINTIFF Election Systems & Software, Inc.		DEFENDANT Avante International Technology Corporation
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 6,892,944		
2 7,077,313		
3		
4		
5		

In the above—entitled case, the following patent(s)/ trademark(s) have been included:

DATE INCLUDED	INCLUDED BY <input checked="" type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading		
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK	
1			
2			
3			
4			
5			

In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT
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CLERK Denise M. Lucks	(BY) DEPUTY CLERK s/ Jeri A. Bierbower	DATE 9/20/07
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Copy 1—Upon initiation of action, mail this copy to Director Copy 3—Upon termination of action, mail this copy to Director  
 Copy 2—Upon filing document adding patent(s), mail this copy to Director Copy 4—Case file copy

United States Patent and Trademark Office by failing to disclose material, non-cumulative information, and provided misleading and false information to the United States Patent and Trademark Office concerning known material prior art, with an intent to deceive the United States Patent and Trademark Office by such omissions and misleading and false information.

34. 37 C.F.R. § 1.56 provides that “each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the [Patent Office], which includes a duty to disclose to the [Patent Office] all information known to that individual to be material to patentability.” Avante and the named inventors of the patents in suit, including, but not limited to, Chung, failed to comply this duty of candor and good faith in dealing with the Patent Office.

35. The ‘313 patent resulted from a continuation-in-part application of the patent application from which the ‘944 patent issued. As such, the inequitable conduct committed during prosecution of the ‘944 patent application applies equally to the related ‘313 patent, rendering the ‘313 patent unenforceable.

36. As detailed in a complaint filed on June 15, 2007 against Chung and AI Technology, Inc., one of the related companies of Avante, in a Texas State District Court (a copy of which is attached hereto as Exhibit C), Chung, in July 2001, contacted the financial advisor firm for a company then known as Global Election Systems, Inc., which had manufactured and sold voting machines. At that time, Global Election Systems was seeking to raise capital for its business. Chung falsely indicated that he was interested in making an investment in Global Election Systems and wanted to review information about Global Election Systems’ products and finances for purposes of determining whether to make an investment in

Global Election Systems. Notwithstanding his representations, upon information and belief, Chung was, in fact, seeking to obtain Global Election Systems' purported trade secrets and other proprietary information as well as other information relating to Global Election Systems' election management and equipment business through improper means so he could start his own competing business.

37. In reliance on and in response to Chung's false representation and pretext, Global Election Systems' financial advisor sent a confidentiality agreement to Chung that he would have to sign before receipt of the requested information. Chung signed the confidentiality agreement on July 24, 2001 and returned it to Global Election Systems' financial advisor.

38. After signing the confidentiality agreement, Chung received from Global Election Systems, among other things, a document entitled "Global Election Systems Confidential Memorandum July 2001" (hereinafter referred to as the "Global Memorandum"). Although the Global Memorandum contained some information that was non-public and proprietary to Global Election Systems such as financial information relating to its election management business, the Memorandum also included information that was openly known to the public, including, an identification of voting machine products that Global and its competitors had been offering for sale no later than 1999, as well as the identification of several patents and other publicly available information pertaining to voting machines and related technology.

39. Global subsequently became a company now known as Diebold Election Systems, Inc. ("Diebold"). On March 28, 2007, Diebold became aware for the first time that Chung obtained the Global Memorandum for improper competitive purposes rather than for legitimate investment purposes, as had been falsely represented by Chung. Diebold then sued Chung and

AI Technology, Inc., one of the related companies of Avante, on June 15, 2007 in Texas State Court for: (a) breach of the confidentiality agreement; (b) trade secret misappropriation; (c) violation of the Texas Theft Liability Act; and (d) fraudulent inducement (see Exhibit C). Because the parties are citizens of different states and the amount in controversy exceeds \$75,000, Chung and his company removed the case to the United States District Court for the Eastern District of Texas where it is presently pending.

40. Among the products which Global and its competitors had offered for sale prior to the preparation and receipt by Chung and Avante of the Global Memorandum and which were the subject matters of the Global Memorandum were products previously sold and then being offered by Global under the name "AccuVote OS." The AccuVote OS had been publicly sold no later than June 1999 and well before the earliest possible filing date of any patent application to which Chung and Avante can claim priority for their '944 and '313 patents. Chung and Avante, through Chung's dealings with Global, had actual knowledge of the AccuVote OS, and other voting machine products that had been sold previously by Global and its competitors and which constitute material, non-cumulative prior art to his '944 patent application.

41. Because they were publicly offered for sale in the United States more than one year before the earliest effective filing date of any of the patents in suit, the AccuVote OS, as well as the other voting machine products that were offered for sale publicly by Global and its competitors, are prior art to the patents in suit. Avante and Chung had knowledge of these prior art products during the prosecution of the applications that resulted in the patents in suit.

42. In the Missouri Patent Lawsuit, Avante has accused, among other things, the prior art AccuVote OS voting machine (now sold by Global Election Systems' successor in interest,

Diebold) of infringing the patents in suit. Avante's allegations that this equipment infringes the patents in suit is Avante's affirmative admission that the equipment was material prior art.

43. Although Avante and Chung were aware of the prior art AccuVote OS product, as well as the voting machine products that had been offered for sale publicly by Global and its competitors, during the prosecution of the applications that resulted in the patents in suit, Avante and Chung intentionally withheld part or all of this information from the United States Patent and Trademark Office in an attempt to mislead and deceive the United States Patent and Trademark Office.

44. Avante's and Chung's failure to cite relevant, material and non-cumulative art during prosecution of the patents in suit, among other things, constitutes inequitable conduct which renders the patents in suit unenforceable.

45. In addition, on September 29, 2002, the two named inventors of the patent application that led to the issuance of the '944 patent, Chung and Dong, executed and filed with the Patent Office a *Declaration, Power of Attorney and Power to Inspect*, stating that their statements made in the document were "true and that all statements made on information and belief [were] believed to be true, and further that these statements were made with the knowledge that willful false statements and the like so made [were] punishable by fine or imprisonment ... and that such willful false statements may jeopardize the validity of the application or any patent issued thereon."

46. Similarly, on April 8, 2003, the three named inventors of the patent application that led to the issuance of the '944 patent, Chung, Dong and Xiaoming Shi, executed and filed with the Patent Office a *Declaration, Power of Attorney and Power to Inspect*, stating that their

statements made in the document were “true and that all statements made on information and belief [were] believed to be true, and further that these statements were made with the knowledge that willful false statements and the like so made [were] punishable by fine or imprisonment ... and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.”

47. In the Declaration for the ‘944 patent application, Chung and Dong purported to “claim the benefit under 35 U.S.C. § 120 of the prior United States application(s) listed ...” in that declaration.

48. Again, in the Declaration for the ‘313 patent application, Chung, Dong and Shi purported to “claim the benefit under 35 U.S.C. § 120 of the prior United States application(s) listed ...” in that declaration.

49. As part of the bargain between the United States Government and the inventors of the patents in suit, who were seeking to claim the benefit under 35 U.S.C. § 120 of the filing dates of the earlier filed United States applications, the named inventors of the patents in suit represented to the United States Patent and Trademark Office in each of their declarations that “insofar as the subject matter of each of the claims of this application is not disclosed in the prior United States application in the manner provided by the first paragraph of Title 35, United States Code, §112, [the named inventors] acknowledge the duty to disclose information which is material to patentability as defined in Title 37, Code of Federal Regulations, §1.56 which became available between the filing date of the prior application and the national or PCT international filing date of this application.”

50. All of the applications to which Chung and Dong claimed priority for the applications leading to the patents in suit had been filed after the July 24, 2001 execution of the confidentiality agreement by Chung and Global Elections Systems, Inc. As detailed above, pursuant to this agreement, at least Chung and Avante were made aware of, among other things, material, non-cumulative prior art information relating to their patent applications such as prior art voting equipment offered for sale and sold more than one year before the earliest possible filing or priority date of any of the applications for the patents in suit.

51. Notwithstanding this duty of candor and good faith in dealing with the Patent Office, including, but not limited to, that arising under 37 C.F.R. 56(a) and that arising specifically as a result of their declarations submitted to the Patent Office acknowledging "the duty to disclose information which is material to patentability as defined in Title 37, Code of Federal Regulations, §1.56 which became available between the filing date of the prior application and the national or PCT international filing date of this application" and further acknowledging that "willful false statements may jeopardize the validity of the application or any patent issued thereon," Chung, Dong, Shi or anyone else involved in the prosecution of the '944 and '313 patent applications failed to disclose to the Patent Office the prior dealings between Chung and Global, Chung's and Avante's knowledge of the existence of the prior art voting equipment, the existence, design, operations and commercial activities in the United States relating to such material prior art voting equipment and other material prior art information that Chung, Avante and others associated with Avante obtained which became available between the filing date of the prior application to which the named inventors of the patents in suit sought to claim priority and the national or PCT

international filing date of the applications for the '944 and '313 patents.

52. These omissions and misrepresentations by or on behalf of Chung, Avante and others associated with Chung or Avante and their repeated failures to bring to the attention of the United States Patent and Trademark Office Chung's prior dealings with Global and Chung's knowledge of, among other things, the existence of the prior art voting equipment were made, in part, to obtain patent rights to which Chung, Dong and Avante were not entitled under the United States Patent Laws.

53. These material omissions and misrepresentations by or on behalf of Chung, Avante and others associated with Chung or Avante and their repeated failures to bring to the attention of the United States Patent and Trademark Office Chung's prior dealings with Global and Chung's knowledge of, among other things, the existence of the prior art voting equipment were made with an intent to mislead the United States Patent and Trademark Office.

54. As a critical requirement for obtaining the patent rights purportedly claimed and described in the patents in suit, the true nature and state of the prior art voting management systems and equipment then in existence and the prior commercial activities relating to the prior art voting management systems and equipment which had been made known to Chung and Avante were material to the patentability of the patents in suit and such information withheld or misrepresented by Chung, Done, Shi and Avante would have been important to a reasonable examiner's consideration of the patentability of the patents in suit during the prosecution of the patent applications.

55. Particularly in view of the high level of materiality of the omissions and misrepresentations, at least Chung, for himself and on behalf of Avante, made these omissions and misrepresentations with an intent to deceive and induce the United States Patent and Trademark Office into allowing patent rights to which the named inventors of the patents in suit were not entitled.

56. ES&S is entitled to a judgment declaring that the patents in suit are unenforceable as a result of inequitable conduct committed during the prosecution of the applications for the patents in suit.

**RELIEF SOUGHT**

WHEREFORE, ES&S demands judgment against Avante, including its affiliates, officers, agents, servants, employees, and all persons in active concert or participation with Avante as follows:

A. A declaration that the claims of the patents in suit are invalid for failure to comply with one or more of the requirements of Title 35 including, without limitation, §§ 101, 102, 103 and 112 thereof;

B. A declaration that the claims of the patents in suit are unenforceable due to the inequitable conduct committed by those persons involved in the prosecution of the applications that resulted in the patents in suit;

C. A declaration that the DS200 product does not infringe any claim of the patents in suit, either literally or under the doctrine of equivalents;

D. A declaration that ES&S has not committed any act of infringement, direct or indirect, of the patents in suit as a result of its commercial activities relating to the DS200 product; and

E. A determination that this case is exceptional within the meaning of 35 U.S.C. § 285, and an award to ES&S of the costs of this action and its reasonable attorneys' fees; and

F. Such other relief as ES&S is entitled to recover under any applicable law and as this Court and/or a jury may determine to be proper and just.

**JURY DEMAND**

ES&S hereby demands a trial by jury on all issues triable to a jury in this case. ES&S designates Omaha, Nebraska as the location for the trial.

Respectfully submitted,

s/ Michael C. Cox

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**Attorneys for Plaintiff  
Election Systems & Software, Inc.**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

ELECTION SYSTEMS & SOFTWARE, INC.,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	
v.	)	
	)	
	)	<b>JURY TRIAL DEMANDED</b>
AVANTE INTERNATIONAL	)	
TECHNOLOGY CORPORATION,	)	
	)	
Defendant.	)	
	)	

**COMPLAINT FOR DECLARATORY JUDGMENT OF  
PATENT INVALIDITY, UNENFORCEABILITY AND NON-INFRINGEMENT**

Plaintiff, Election Systems & Software, Inc. ("ES&S"), complains of Defendant, Avante International Technology Corporation ("Avante"), as follows:

1. This is a claim for declaratory judgment of patent invalidity, unenforceability and non-infringement of United States Patent Nos. 6,892,944 ("the '944 patent") and 7,077,313 ("the '313 patent") (collectively referred to as "the patents in suit") which purport to pertain to electronic voting machines and methods of using electronic voting machines. Copies of the patents in suit are attached hereto as Exhibits A and B, respectively.

2. This Declaratory Judgment Complaint arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and under the patent laws of the United States, Title 35 of the United States Code. This Court has jurisdiction over the subject matter of this Complaint under 28 U.S.C. § 1338(a), along with 28 U.S.C. § 2201.

3. This Court may declare the rights and other legal relations of the parties in this case under 28 U.S.C. §2201, and Rule 57, Fed. R. Civ. P., because there exists an actual and justiciable controversy concerning the rights of, and legal relations between, ES&S and Avante.

4. ES&S is a Delaware Corporation having its principal place of business at 11208 John Galt Blvd., Omaha, Nebraska 68137.

5. Upon information and belief, Avante is a New Jersey corporation having its principal place of business at 70 West Washington Road, Princeton Junction, New Jersey 08550.

6. Avante has held itself out to be the owner by assignment of the patents in suit.

7. ES&S, headquartered in Omaha, Nebraska, has been in the election business for more than 30 years. ES&S is the world's largest and most experienced provider of total election management solutions with more than 170,000 systems installed worldwide. Over the past decade, ES&S has handled more than 30,000 elections around the world.

8. As part of its business, ES&S innovates, designs, develops, manufactures and sells voting equipment and solutions. Among the latest product offerings of ES&S is its next generation paper-based vote tabulation machine designed and developed by ES&S to better capture voter intent and improve election experience and marketed under the name "intElect DS200" ("DS200").

9. Avante, in turn, is headquartered in Princeton Junction, New Jersey, and claims to be in the business of designing, developing, manufacturing, and selling election management systems and equipment.

10. Unlike ES&S, Avante did not consider entering the election management systems and solutions market until, at the very earliest, late 2000 or early 2001. At that time, Avante was

not experienced in this specialized industry and lacked detailed knowledge of election laws and the market for election equipment. Beginning in late 2000 or early 2001, Avante attempted to obtain information about the election management and equipment market by, among other things, attending trade shows, watching public demonstrations of voting machine equipment and contacting established manufacturers and suppliers of election management systems and equipment. For example, as detailed below, Avante attempted to obtain information about the industry by obtaining certain purported confidential business information of one company in the industry and improperly exploiting that confidential and trade secret information for its own commercial purposes in violation of a confidentiality agreement signed by Avante's President named Kevin Kwong-Tai Chung ("Chung").

11. Unlike ES&S, Avante's election management systems and equipment business has been a commercial failure, partly because of its unfamiliarity with various state election laws in the United States. Having failed in the marketplace, Avante is now attempting to license and enforce its purported patent rights in the election equipment area which are invalid, not infringed and unenforceable as a result of its inequitable conduct before the United States Patent and Trademark Office.

12. In at least one instance, Avante (through one of its related companies named AI Technologies, Inc.) and Chung, as detailed below, have misappropriated certain purported trade secrets and other proprietary information of an established voting systems and equipment company and then attempted to obtain United States patent rights based on that company's purported trade secrets and proprietary information without fully disclosing to the United States Patent and Trademark Office the other information Avante and Chung have also obtained from

the same business dealings relating to the existence of, the true nature of and commercial activities in the United States for the prior art voting equipment.

13. Avante has created an actual case or controversy concerning the invalidity, unenforceability and non-infringement of the patents in suit by engaging in a course of conduct that shows a preparedness and willingness to enforce the patents in suit against ES&S with respect to the DS200 product which includes, among other things, (a) its prior communications regarding its purported patent rights directed to ES&S and others, (b) its subsequent assertion of these purported patent rights by pursuing litigation against ES&S with respect to ES&S's other and earlier generation election management products in the United States District Court for the Eastern District of Missouri in *Avante International Technology Corporation v. Diebold Election Systems, Sequoia Voting Systems, and Election Systems & Software, Inc.*, Cause No. 4:06CV00978 TCM (the "Missouri Patent Lawsuit"), and (c) its counsel's representation that Avante intends to make infringement contentions against the DS200 product.

14. Based on Avante's prior and current conduct that shows a preparedness and willingness to enforce the patents in suit against ES&S and its statements, through its litigation counsel, that ES&S's new DS200 product is covered by the patents in suit, ES&S has a reasonable apprehension of being sued by Avante for allegedly infringing the patents in suit because of its commercial activities with respect to its new DS200 product.

15. Venue is proper under 28 U.S.C. §§ 1391 and 1400 because Avante is subject to personal jurisdiction in this judicial district.

16. Avante is subject to personal jurisdiction in this Court because it has purposefully availed itself of the privileges and benefits of conducting business in this Judicial District by, among other things, obtaining State certification in an attempt to sell its voting machines, which Avante claims are covered and protected by the patents in suit, in this District. Such certification process required, at a minimum, Avante to write the Nebraska Secretary of State requesting certification of the voting machines and for an authorized representative of Avante to travel to Nebraska to conduct an in-person demonstration of the voting machines to the Nebraska Secretary of State Office.

17. Avante has also directed, directly and through its agents, written and other forms of communications into the State of Nebraska for the express purpose of conducting its stated business of licensing and enforcing its patent rights, including, but not limited to, sending letters to ES&S regarding Avante's purported patent rights and ES&S's election management and equipment business on April 7, 2005 and May 3, 2006.

18. Avante's representatives, including Chung, have also traveled to the State of Nebraska to license and enforce its purported patent rights. Such travel by Avante to Nebraska includes, but is not limited to, a trip to Omaha, Nebraska by Chung and others to attend a May 2007 meeting with ES&S's representatives in an attempt to license and enforce its purported patent rights, including the patents in suit. Avante has also requested an in-person demonstration of the DS200 product in Omaha, Nebraska and sent its agents, including its counsel and a retained consultant, to inspect the DS200 product at the demonstration held in Omaha, Nebraska in May 2007. Avante's conduct that shows and constitutes its preparedness and willingness to enforce the patents in suit against ES&S with respect to the DS200 product, including its allegations that

the DS200 product infringes the patents in suit and indicating to ES&S that ES&S may be liable for infringing the patents in suit, arises substantially from Avante's inspection of the DS200 product which took place in Omaha, Nebraska at Avante's request.

19. Venue and jurisdiction are proper in this Court notwithstanding the June 2006 filed Missouri Patent Lawsuit because that case has substantially progressed through discovery, and dispositive motions on most substantive issues in that case are due to be filed on November 1, 2007. The Missouri Patent Lawsuit has been pending since June 2006 – more than 15 months.

20. There are issues in this case that are not currently before the district court in the Missouri Patent Lawsuit – specifically, the issue of whether the DS200 product is covered by any claims of the patents in suit, the issue of whether ES&S's commercial activities in connection with the DS200 constitute acts of direct or indirect infringement of the patents in suit, and the associated invalidity and unenforceability issues with respect to the patents in suit based on Avante's allegations of infringement with respect to the DS200 product.

21. Such associated invalidity and unenforceability issues include, but are not limited to, the facts and circumstances surrounding the dealings between Chung, a named inventor on both patents in suit and, as stated above, Avante's president, and Global Election Systems, Inc., (subsequently known as Diebold Election Systems, Inc.) that led to the filing of a complaint against Chung and a related company of Avante named "AI Technology, Inc." by Diebold Election Systems, Inc. in the District Court of Collin County, Texas on June 27, 2007, which alleges breach of contract, trade secret misappropriation, theft and fraudulent inducement, and which details Chung's deceptive conduct to induce Global Election Systems to release certain purported confidential and non-confidential information relating to Global Election Systems'

election systems and equipment business to him and Avante, including information that constitutes material, non-cumulative prior art information regarding prior art voting equipment, which Chung and other named inventors failed to disclose to the United States Patent and Trademark Office in breach and violation of their duty of candor and good faith in dealing with the Patent Office.

**COUNT I – DECLARATORY JUDGMENT  
OF NON-INFRINGEMENT OF THE PATENTS IN SUIT**

22. ES&S incorporates by reference and realleges Paragraphs 1-21 as if fully set forth herein.

23. An actual and justiciable controversy exists between ES&S and Avante as to the infringement of the patents in suit with respect to the DS200 product.

24. ES&S's manufacture, use, offer for sale, or sale of the DS200 product has not infringed, contributed to the infringement of, or induced infringement of any valid and enforceable claim of the patents in suit.

25. The allegations of patent infringement by Avante and its conduct with respect to the DS200 product place a cloud over ES&S's business in general and, in particular, ES&S's business with respect to the DS200 product, and likely will cause uncertainty among others in the marketplace, leading ES&S to lose revenues and/or business opportunities. Therefore, Avante's actions and assertions that the DS200 product is covered by the patents in suit have caused and will continue to cause irreparable injury to ES&S.

26. ES&S is entitled to a judgment declaring that the patents in suit are not infringed by the DS200 product.

**COUNT II – DECLARATORY JUDGMENT  
OF INVALIDITY OF THE PATENTS IN SUIT**

27. ES&S incorporates by reference and realleges Paragraphs 1-26 as if fully set forth herein.

28. An actual and justiciable controversy exists between ES&S and Avante as to the validity of the patents in suit.

29. The claims of the patents in suit are invalid for failure to meet one or more of the requirements of patentability set forth in 35 U.S.C. §§ 101 et seq, including, but not limited to, §§ 101, 102, 103 and 112 thereof.

30. ES&S is entitled to a judgment declaring that the patents in suit are invalid.

**COUNT III – DECLARATORY JUDGMENT  
OF UNENFORCEABILITY OF THE PATENTS IN SUIT**

31. ES&S incorporates by reference and realleges Paragraphs 1-30 as if fully set forth herein.

32. Those persons involved in or otherwise associated with the preparation, filing, and/or prosecution of the applications that resulted in the patents in suit, including but not limited to Avante, Avante's predecessors-in-interest and related companies, Avante's President, Chung who is also one of the named inventors of the patents in suit, Victor Dun Dong ("Dong"), another named inventor on both patents in suit and Xiaoming Shi ("Shi"), a named inventor on the '313 patent in suit, committed inequitable conduct before the United States Patent and Trademark Office ("the Patent Office"), rendering the patents in suit unenforceable.

33. During the prosecution of the applications that resulted in the patents in suit, Avante and the inventors of the patents in suit failed to comply with their duty of candor to the