

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

VIRTAMOVE, CORP.,	§	Case No. 2:24-cv-00093-JRG
	§	(Lead Case)
Plaintiff,	§	
	§	
v.	§	JURY TRIAL DEMANDED
	§	
HEWLETT PACKARD ENTERPRISE COMPANY,	§	
	§	
Defendant.	§	

VIRTAMOVE, CORP.,	§	Case No. 2:24-cv-00064-JRG
	§	(Member Case)
Plaintiff,	§	
	§	
v.	§	JURY TRIAL DEMANDED
	§	
INTERNATIONAL BUSINESS MACHINES CORP.,	§	
	§	
Defendant.	§	
	§	
	§	

**DEFENDANT INTERNATIONAL BUSINESS MACHINES CORP.'S CORRECTED
SUPPLEMENTAL OBJECTIONS AND RESPONSES TO PLAINTIFF'S
INTERROGATORIES (NOS. 1, 2, 5, 6, 8, 9, 10, 11, 12, 13, 19, AND 21) AND
OBJECTIONS AND RESPONSES TO PLAINTIFF'S SIXTH SET OF
INTERROGATORIES (NO. 22)**

<https://www.hava.io/blog/2024-cloud-market-share-analysis-decoding-industry-leaders-and-trends>; <https://www.6sense.com/tech/web-and-application-servers/ibm-cloud-market-share>; <https://www.gartner.com/reviews/market/strategic-cloud-platform-services/vendor/ibm/product/ibm-cloud/alternatives>; <https://zesty.co/blog/battle-of-clouds-aws-vs-azure/>.

IBM reserves all rights to amend, modify, and/or supplement this response.

INTERROGATORY NO. 10:

State the date and provide a detailed description of all facts and circumstances relating to how You contend VirtaMove first became aware of each Counterclaim Patent or was provided with notice of the alleged infringement. If You contend that You provided actual notice to VirtaMove before filing the Complaint(s) in this Action, Your answer should include an identification of all Documents and things evidencing and Persons knowledgeable about such actual notice.

RESPONSE TO INTERROGATORY NO. 10 (July 29, 2024):

IBM incorporates by reference all General Objections as well as its objections to the definitions and instructions as if fully stated herein. IBM objects to this Interrogatory as vague, overbroad, and unduly burdensome, and not proportional to the needs of the case to the extent it seeks Defendants to identify “all facts and circumstances” without restriction. IBM objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege and/or attorney work product immunity, or other applicable protection privilege. IBM further objects to this Interrogatory as compound and containing multiple subparts asserted in a single Interrogatory.

Subject to and without waiver of these and its General Objections, IBM responds as follows:

VirtaMove first became aware of U.S. Patent Nos. 9,722,858 (the “’858 Patent”), 9,697,038 (the “’038 Patent”), 10,606,634 (the “’634 Patent”), and 8,943,500 (the “’500 Patent”) (collectively, the “Counterclaim Patents”) at the latest on June 5, 2024, upon the filing of IBM’s Answer, Affirmative Defenses, and Counterclaims to VirtaMove’s Second Amendment Complaint for Patent Infringement (Dkt. 49).

IBM’s investigation is ongoing, and IBM reserves all rights to amend, modify, and/or supplement this response.

FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 10 (May 29, 2025):

Subject to and without waiver of these and its General Objections, IBM responds as follows:

VirtaMove had actual and/or constructive knowledge of the Counterclaim Patents through its partnership with IBM. From 2012 to the end of 2023, VirtaMove and IBM worked together in a partnership or a cooperative relationship. Stokes Tr., at 457:11-17. One of the partnerships between IBM and VirtaMove involved helping IBM customers migrate their applications into IBM’s SmartCloud system. Stokes Tr., at 451:25-452:6; *see also* IBM_VM_000095682 (November 2015 document adding AppZero into IBM’s hosted environment). VirtaMove interacted with IBM customers and IBM field migration team, and IBM was “considered an important partner of AppZero[,]” VirtaMove’s predecessor. O’Connor May 15, 2025 Tr. 222:18-23. Stokes Tr., at 458:10-14. Through these interactions, VirtaMove learned that IBM held migration and application isolation related patents, and VirtaMove chose to ignore that fact when VirtaMove decided to practice infringing technology. *See generally* Stokes May 21, 2025 Tr. and exhibits; O’Connor May 15, 2025 Tr. and exhibits.

Further, pursuant to Fed. R. Civ. P. 33(d), IBM further identifies the following documents

with information responsive to this request: VM_ IBM_0000809; VM_IBM_0000435; VM_IBM_0028843.

IBM is continuing to investigate the subject matter of this Interrogatory and, and IBM reserves all rights to amend, modify, and/or supplement this response.

INTERROGATORY NO. 11:

Describe in detail any and all bases for Your claim for damages from VirtaMove resulting from your Counterclaims, including without limitation an identification and explanation of the damages theories in which Your calculations are grounded (e.g., lost profits, reasonable royalty, or any other measure of damages), any royalty rate that You contend applies, the amount of monetary damages to which You claim You are entitled from VirtaMove, whether the subject matter of the Asserted Claims constitute a substantial basis for consumer demand of any VirtaMove product or service, an identification of all facts that You contend or may contend support Your damages theories, an identification of all documents that support Your allegations with respect to damages, and an identification of all persons who have provided information that supports Your allegations with respect to damages.

RESPONSE TO INTERROGATORY NO. 11 (July 29, 2024):

IBM incorporates by reference all General Objections as well as its objections to the definitions and instructions as if fully stated herein. IBM objects to this Interrogatory as premature to the extent it calls for expert analysis or opinion. IBM objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege and/or attorney work product immunity, or other applicable protection privilege. IBM objects to this Interrogatory as overbroad and unduly burdensome, and not proportional to the needs of this action to the extent it purports to require “all” facts, documents, and persons related to the subject matter of the Interrogatory.

Further, pursuant to Fed. R. Civ. P. 33(d), IBM further identifies the following documents with information responsive to this request: VM_ IBM_0000809; VM_IBM_0000435; VM_IBM_0028843.

IBM is continuing to investigate the subject matter of this Interrogatory and, and IBM reserves all rights to amend, modify, and/or supplement this response.

INTERROGATORY NO. 13:

Identify all communications between You and VirtaMove and its predecessors before June 5, 2024.

RESPONSE TO INTERROGATORY NO. 13 (July 29, 2024):

IBM incorporates by reference all General Objections as well as its objections to the definitions and instructions as if fully stated herein. IBM objects to this Interrogatory as overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence. IBM further objects to this Interrogatory as overbroad and unduly burdensome to the extent it calls for information that is as easily obtained by VirtaMove as by IBM or is already in the possession of VirtaMove. IBM further objects to this Interrogatory as overly broad and unduly burdensome to the extent it seeks “all” communications without limitation or specification relevant to the claims or defenses in this action.

Subject to and without waiver of these and its General Objections, IBM responds as follows: IBM communicated with Greg O'Connor at VirtaMove's processor AppZero in September 2011 regarding a partnership between IBM and AppZero for IBM's SmartCloud product. IBM communicated with Cedric Burgins at VirtaMove in December 2023 regarding VirtaMove's services.

IBM is continuing to investigate the subject matter of this Interrogatory and, and IBM

reserves all rights to amend, modify, and/or supplement this response.

FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 13 (November 15, 2024):

Subject to and without waiver of the General and Specific Objections, IBM responds as follows: The following table identifies the individuals IBM believes to have previously communicated with VirtaMove and/or its predecessors before June 5, 2024, and the time periods during which IBM believes such interactions occurred.

Individuals	Date of Interaction
Mac Devine	2011-2012
Steve Astorino	2021
Brian McCarthy	2023
Vinay Parisa	2011-2014; 2023
L.K. Swift	2011-2014
Rakesh Rao	Unknown
Greg O'Connor	2011
Cedric Burgins	2023

IBM's investigation is ongoing, and IBM reserves all rights to amend, modify, and/or supplement this response.

SECOND SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 13 (May 29, 2025)

Subject to and without waiver of the General and Specific Objections, IBM responds as follows:

IBM incorporates by reference its Responses to VirtaMove's Interrogatory Nos. 1, 2, 5, 8, and 22 and documents cited therein. IBM further incorporates its November 4, 2024 Letter to

VirtaMove, its April 10, 2025 Letter to VirtaMove, its April 18, 2025 Letter to VirtaMove, its April 30, 2025 Letter to VirtaMove, and its May 9, 2025 Letter to VirtaMove. IBM further incorporates by reference the deposition testimony of at least Walter Falk, Troy Sprague, Michael Dorosh, Mac Devine, Nigel Stokes, and Greg O'Connor as given in this case.

IBM maintains that documents and communications relating to IBM's awareness of VirtaMove and/or the inventors of the Asserted Patent prior to the date of service of the Complaint fail to demonstrate that during the course of any interaction between IBM and VirtaMove, VirtaMove had provided "actual notice" of the Asserted Patents. *See Netlist, Inc. v. Micron Tech., Inc.*, No. 2:22-CV-203-JRG-RSP, 2024 WL 402182, at *4 (E.D. Tex. Jan. 11, 2024), *report and recommendation adopted*, No. 2:22-CV-00203-JRG-RSP, 2024 WL 387778 (E.D. Tex. Jan. 31, 2024) (holding that a slide deck identifying subject matter of an invention without identifying patents or products alleged to be infringing said patents is insufficient to provide actual notice); *see also General Access Solutions vs. Sprint Spectrum L.P.*, No. 2:20-CV-00007-RWS, 2021 WL 12343531 (E.D. Tex. Aug. 3, 2021). Indeed, VirtaMove cannot point to a single document and/or communication showing that VirtaMove not only specifically identified the Asserted Patents, but also provided IBM with notice of infringement of the Asserted Patents. *See, e.g.*, Falk Tr., at 23:21-24:20, 78:3-85:13; Stokes Tr., at 467:10-521:21; O'Connor Tr., at 258:22-259:24, 279:18-284:6, 341:23-343:6

Furthermore, as further discussed in IBM's Response to VirtaMove's Interrogatory No. 22, IBM maintains that during the course of the interactions between IBM and VirtaMove, IBM and AppZero entered into an IBM Assistance Agreement (Agreement #4914008281) in June 27, 2014. *See, e.g.*, VM_IBM_0000840; VM_IBM_0022070; *see also* VM_IBM_0000866. Section 5.3 ("Rights") provides that "[i]f Supplier [AppZero] provides IBM with materials or suggestions

(collectively called “Feedback”) related to the IBM systems during the course of this Agreement, Supplier [AppZero] grants to IBM a fully paid-up license to use such Feedback in any manner whatsoever and without accounting to Supplier.” VM_IBM_0022070 at -071. This Agreement remains in effect. *See, e.g.*, Stokes Tr., 488:19-492:22.

As to the nature and quality of “Feedback” provided to IBM by VirtaMove, Mr. O’Connor, VirtaMove’s former Chief Executive Officer, testified that such “Feedback” included or otherwise related to at least the “use of container technology rather than image-based migration,” “a video involving using Docker containers,” “[the] container lifecycle,” “a video involving using some form of containers, be it AppZero containers or Docker containers,” “technology to isolate applications from one another and from the underlying OS,” “the critical capabilities at issue in the [’058] identified patent[,],” “the critical capabilities underlying the AppZero technology,” “the technology to ‘package unmodified desktop and server-side applications from old operating systems (OS) for secure delivery to, and execution on, new OS versions,” “the technology to package ‘fully configured applications and their dependencies into a portable reusable OS-free Virtual Application Appliance which can be copied and run quickly without installation,” “how AppZero’s VAA and migration/isolation technologies worked,” “adopt[ing] AppZero’s way of isolating and containerizing applications,” “use [of] containers in the cloud environment,” and “adopt[ing] containers in IBM cloud to achieve the benefits of the containers.” *See, e.g.*, O’Connor Tr., at 242:17-273:12.

As further discussed in IBM’s Response to VirtaMove’s Interrogatory No. 22, IBM maintains that during the course of the interactions between IBM and VirtaMove, VirtaMove provided IBM with an implied license to use the claimed technologies of the Asserted Patents, and thus, VirtaMove is equitably estopped from asserting patent infringement of the Asserted Patents

against IBM. For example, VirtaMove’s own documents show that by 2014, VirtaMove knew IBM had entered into a strategic partnership with Docker and offered a “Containers service.” *See, e.g.,* VM_IBM_0036343. Despite having such knowledge, VirtaMove continued to pursue business arrangements with IBM at least until 2024, at times even promoting its work around Docker and Kubernetes. *See, e.g.,* VM_IBM_0000457 (Nigel Stokes explaining to Bill Lobig, “We work so much around containerization and Kubernetes at VirtaMove,” in 2021); VM_IBM_0034925; VM_IBM_0035227; VM_IBM_0035358. At not point during its interactions with IBM did VirtaMove indicate—either to IBM directly or to the general public—that IBM’s use of any containers, containerization, and application migration technology, including Docker and Kubernetes, infringes the Asserted Patents. *See, e.g.,* VM_IBM_0001915; VM_IBM_0001923; VM_IBM_0001958; O’Connor Tr., at 259:9-24, 282:19-25, 316:9-322:12. Nor did VirtaMove ever demand a license from IBM for its use of containers, containerization, and application migration technology, including Docker and Kubernetes. *See, e.g.,* O’Connor Tr., at 259:9-14; Stokes Tr., at 375:7-19. VirtaMove did not even accuse Docker of infringing the Asserted Patents, and instead, sought to establish a business relationship with Docker. *See, e.g.,* VM_IBM_0035059; VM_IBM_0035060; VM_IBM_0035063; VM_IBM_0035102 (VirtaMove explaining to Docker, “[W]e’d be happy to reconnect and discuss further how we can work together.”); Stokes Tr., at 556:23-557:9.

IBM also notes that VirtaMove identified Meiosys as a competitor that offered containers, containerization, and application migration technology since at least 2004. *See, e.g.,* VM_IBM_0021833 (“MetaCluster ... Virtualizes Application ... Offers stateful Application relocation ... Allows Applications to be dynamically moved among servers.”); VM_IBM_0024667 (“Definitely someone to watch.”), (“[T]here’s a bunch of API work under way

in order to integrate with Tivoli[.]”); VM_IBM_0026305; VM_IBM_0026306 (“IBM ... look[s] the most interested at this stage ... It’s already working closely with IBM’s Tivoli ... MetaCluster runs in a middleware layer between the OS and application ... Containers surround each application and provide resource isolation.”); Stokes Tr., at 433:24-441:9 (discussing interactions with IBM over the past two decades). Indeed, VirtaMove cannot dispute that it had knowledge of Meiosys’s use of containers, containerization, and application migration technology and that IBM was working closely with Meiosys by 2004. *See, e.g.*, VM_IBM_0026306 (“IBM ... look[s] the most interested at this stage ... It’s already working closely with IBM’s Tivoli ... MetaCluster runs in a middleware layer between the OS and application ... Containers surround each application and provide resource isolation.”); *see also* IBM_VM_000193117. In fact, in 2005, IBM had purchased Meiosys, thereby acquiring the technology VirtaMove believed to have been in competition with. IBM_VM_000193127. Therefore, for almost two decades, IBM reasonably relied on VirtaMove’s conduct, including its silence as to whether IBM infringes the Asserted Patents, and VirtaMove’s assertion of patent infringement materially prejudices IBM.

Pursuant to Fed. R. Civ. P. 33(d), IBM further identifies the following documents that provide information responsive to this request, which include email correspondences, presentations, and other documents relating to communications, partnerships, interactions, and/or engagements between IBM and VirtaMove:

VM_IBM_0000808;	VM_IBM_0000849;	VM_IBM_0000866;	VM_IBM_0001182;
VM_IBM_0001187;	VM_IBM_0001212;	VM_IBM_0001219;	VM_IBM_0001232;
VM_IBM_0001233;	VM_IBM_0001234;	VM_IBM_0001235;	VM_IBM_0001238;
VM_IBM_0001240;	VM_IBM_0001241;	VM_IBM_0001242;	VM_IBM_0001244;
VM_IBM_0001264;	VM_IBM_0001268;	VM_IBM_0001269;	VM_IBM_0001270;

system. Stokes Tr., at 451:25-452:6; *see also* IBM_VM_000095682 (November 2015 document adding AppZero into IBM's hosted environment). VirtaMove interacted with IBM customers and IBM field migration team, and IBM was "considered an important partner of AppZero[,]" VirtaMove's predecessor. O'Connor May 15, 2025 Tr. 222:18-23. Stokes Tr., at 458:10-14. Through these interactions, VirtaMove learned that IBM held migration and application isolation related patents, and VirtaMove chose to ignore that fact when VirtaMove decided to practice infringing technology. *See generally* Stokes May 21, 2025 Tr. and exhibits; O'Connor May 15, 2025 Tr. and exhibits.

Further, pursuant to Fed. R. Civ. P. 33(d), IBM further identifies the following documents with information responsive to this request: VM_ IBM_0000809; VM_IBM_0000435; VM_IBM_0028843.

IBM is continuing to investigate the subject matter of this Interrogatory and, and IBM reserves all rights to amend, modify, and/or supplement this response.

INTERROGATORY NO. 22:

For each affirmative defense asserted by IBM in its Answer to VirtaMove's Third Amended Complaint, describe the factual and legal basis for your contention, identify and describe all documents supporting your contention, and identify all witnesses knowledgeable.

RESPONSE TO INTERROGATORY NO. 22 (May 29, 2025):

IBM incorporates its General Objections as if set forth verbatim herein. IBM further objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs of the case to the extent it seeks "all documents supporting your contention" and "all witnesses knowledgeable." IBM further objects to this Interrogatory on the grounds and to the extent that VirtaMove has failed to adequately identify or define the purported

Accused Products or show how each of those products meets every claim limitation. IBM also objects to the Interrogatory to the extent it seeks information not within IBM's possession, custody, or control, or that is publicly available. IBM objects to this Interrogatory to the extent it is duplicative of Interrogatory Nos. 1, 2, 5, 6, and 13. IBM further objects to this Interrogatory because it prematurely seeks content that is typically included in an expert report. IBM will provide its expert opinions in accordance with the Docket Control Order and/or Discovery Order entered by the Court. IBM reserves the right to rely on the detailed opinions of its experts as set forth in its forthcoming expert reports.

Subject to IBM's objections, it further responds as follows:

IBM asserts the following affirmative defenses in its Answer and Counterclaims to VirtaMove's Third Amended Complaint: Failure to State a Claim; No Infringement; Invalidity; Prosecution History Estoppel and/or Disclaimer; Ensnarement and/or Claim Vitiating; License and/or Exhaustion; Limitation on Damages; Unenforceability, Equitable Estoppel, and/or Implied License; No Willful Infringement; No Injunctive Relief; and Equitable Defenses.

IBM describes the factual and legal bases for its contentions as follows:

1. VirtaMove's Failure to State a Claim:

IBM incorporates by reference its Responses to VirtaMove's Interrogatory Nos. 1, 2, 3, 5, 8, and 13 and documents cited therein. IBM further incorporates by reference VirtaMove's Responses to IBM's Interrogatory No. 4 and documents cited therein.

IBM maintains that VirtaMove's infringement contentions fail to sufficiently provide notice of VirtaMove's infringement theories, at least with respect to IBM Cloud Private and IBM Hybrid Cloud Mesh. *See, e.g.,* VirtaMove's March 10, 2025 Infringement Contentions. Specifically, VirtaMove has failed to show how IBM Cloud Private and IBM Hybrid Cloud Mesh

VM_IBM_0044194; VM_IBM_0044203; VM_IBM_0044206; VM_IBM_0044212;
 VM_IBM_0044216; VM_IBM_0044220; VM_IBM_0044238; VM_IBM_0044243;
 VM_IBM_0044274; VM_IBM_0044282; VM_IBM_0044284; VM_IBM_0044288;
 VM_IBM_0044291; VM_IBM_0044292; VM_IBM_0044293; VM_IBM_0044294;
 VM_IBM_0044297; VM_IBM_0044299; VM_IBM_0044301; VM_IBM_0044303;
 VM_IBM_0030300; VM_IBM_0035045; VM_IBM_0036020; VM_IBM_0036050;
 VM_IBM_0036616; VM_IBM_0036872; VM_IBM_0037226; VM_IBM_0038222;
 VM_IBM_0038226; VM_IBM_0038235; VM_IBM_0038239; VM_IBM_0038243;
 VM_IBM_0038316; VM_IBM_0038319; VM_IBM_0041749; VM_IBM_0041956;
 VM_IBM_0042019; VM_IBM_0042401; VM_IBM_0042651; VM_IBM_0042795;
 VM_IBM_0043438; VM_IBM_0043802; VM_IBM_0000003; VM_IBM_0035059;
 VM_IBM_0035061; VM_IBM_0035063; VM_IBM_0035065; VM_IBM_0035067;
 VM_IBM_0035102; VM_IBM_0035105; VM_IBM_0035108; VM_IBM_0035111.

6. License and/or Exhaustion:

IBM incorporates by reference its Response to VirtaMove's Interrogatory Nos. 1, 2, 5, 8, and 13 and documents cited therein. IBM further incorporates its responses for its bases for its Defenses of Unenforceability, Equitable Estoppel, and/or Implied License and No Willfulness Infringement. IBM further incorporates by reference the deposition testimony of at least Paul O'Leary, Nigel W. Stokes, and Greg O'Connor as given in this case. *See, e.g.*, O'Leary Tr., at 462:23-463:12; Stokes Tr., at 433:23-521:4; 525:12-581:17; O'Connor Tr., at 221:1-291:14, 316:9-322:20, 340:4-359:25.

IBM has an express license to use the claimed technologies of the Asserted Patents as well as the technologies VirtaMove has accused of infringing the Asserted Patents. For example, IBM

and AppZero entered into an IBM Assistance Agreement (Agreement #4914008281) in June 27, 2014. *See, e.g.*, VM_IBM_0000840; VM_IBM_0022070; *see also* VM_IBM_0000866. Section 5.3 (“Rights”) provides that “[i]f Supplier [AppZero] provides IBM with materials or suggestions (collectively called “Feedback”) related to the IBM systems during the course of this Agreement, Supplier [AppZero] grants to IBM a fully paid-up license to use such Feedback in any manner whatsoever and without accounting to Supplier.” VM_IBM_0022070 at -071. This Agreement remains in effect. *See, e.g.*, Stokes Tr., 488:19-492:22.

As to the nature and quality of “Feedback” provided to IBM by VirtaMove, Mr. O’Connor, VirtaMove’s former Chief Executive Officer, testified that such “Feedback” included or otherwise related to at least the “use of container technology rather than image-based migration,” “a video involving using Docker containers,” “[the] container lifecycle,” “a video involving using some form of containers, be it AppZero containers or Docker containers,” “technology to isolate applications from one another and from the underlying OS,” “the critical capabilities at issue in the [’058] identified patent[],” “the critical capabilities underlying the AppZero technology,” “the technology to ‘package unmodified desktop and server-side applications from old operating systems (OS) for secure delivery to, and execution on, new OS versions,” “the technology to package ‘fully configured applications and their dependencies into a portable reusable OS-free Virtual Application Appliance which can be copied and run quickly without installation,” “how AppZero’s VAA and migration/isolation technologies worked,” “adopt[ing] AppZero’s way of isolating and containerizing applications,” “use [of] containers in the cloud environment,” and “adopt[ing] containers in IBM cloud to achieve the benefits of the containers.” *See, e.g.*, O’Connor Tr., at 242:17-273:12; VM_IBM_0029997.

Further, IBM asserts that it has an implied license to use the claimed technologies of the

Asserted Patents and/or that VirtaMove is equitably estopped from asserting patent infringement of the Asserted Patents against IBM. For example, VirtaMove’s own documents show that by 2014, VirtaMove knew IBM had entered into a strategic partnership with Docker and offered a “Containers service.” *See, e.g.*, VM_IBM_0036343. Despite having such knowledge, VirtaMove continued to pursue business arrangements with IBM at least until 2024, at times even promoting its work around Docker and Kubernetes. *See, e.g.*, VM_IBM_0000457 (Nigel Stokes explaining to Bill Lobig, “We work so much around containerization and Kubernetes at VirtaMove,” in 2021); VM_IBM_0034925; VM_IBM_0035227; VM_IBM_0035358. At not point during its interactions with IBM did VirtaMove indicate—either to IBM directly or to the general public—that IBM’s use of any containers, containerization, and application migration technology, including Docker and Kubernetes, infringes the Asserted Patents. *See, e.g.*, VM_IBM_0001915; VM_IBM_0001923; VM_IBM_0001958; O’Connor Tr., at 259:9-24, 282:19-25, 316:9-322:12. Nor did VirtaMove ever demand a license from IBM for its use of containers, containerization, and application migration technology, including Docker and Kubernetes. *See, e.g.*, O’Connor Tr., at 259:9-14; Stokes Tr., at 375:7-19. VirtaMove did not even accuse Docker of infringing the Asserted Patents, and instead, sought to establish a business relationship with Docker. *See, e.g.*, VM_IBM_0035059; VM_IBM_0035060; VM_IBM_0035063; VM_IBM_0035102 (VirtaMove explaining to Docker, “[W]e’d be happy to reconnect and discuss further how we can work together.”); Stokes Tr., at 556:23-557:9.

Furthermore, IBM notes that VirtaMove identified Meiosys as a competitor that offered containers, containerization, and application migration technology since at least 2004. *See, e.g.*, VM_IBM_0021833 (“MetaCluster ... Virtualizes Application ... Offers stateful Application relocation ... Allows Applications to be dynamically moved among servers.”);

VM_IBM_0024667 (“Definitely someone to watch.”), (“[T]here’s a bunch of API work under way in order to integrate with Tivoli[.]”); VM_IBM_0026305; VM_IBM_0026306 (“IBM ... look[s] the most interested at this stage ... It’s already working closely with IBM’s Tivoli ... MetaCluster runs in a middleware layer between the OS and application ... Containers surround each application and provide resource isolation.”); Stokes Tr., at 433:24-441:9 (discussing interactions with IBM over the past two decades). Indeed, VirtaMove cannot dispute that it had knowledge of Meiosys’s use of containers, containerization, and application migration technology and that IBM was working closely with Meiosys by 2004. *See, e.g.*, VM_IBM_0026306 (“IBM ... look[s] the most interested at this stage ... It’s already working closely with IBM’s Tivoli ... MetaCluster runs in a middleware layer between the OS and application ... Containers surround each application and provide resource isolation.”); *see also* IBM_VM_000193117. In fact, in 2005, IBM had purchased Meiosys, thereby acquiring the technology VirtaMove believed to have been in competition with. IBM_VM_000193127. Therefore, for almost two decades, IBM reasonably relied on VirtaMove’s conduct, including its silence as to whether IBM infringes the Asserted Patents, and VirtaMove’s assertion of patent infringement materially prejudices IBM.

Pursuant to Fed. R. Civ. P. 33(d), IBM further identifies the following documents that provide information responsive to this request, which include email correspondences, presentations, and other documents relating to communications, partnerships, interactions, and/or engagements between IBM and VirtaMove:

VM_IBM_0000808;	VM_IBM_0000849;	VM_IBM_0000866;	VM_IBM_0001182;
VM_IBM_0001187;	VM_IBM_0001212;	VM_IBM_0001219;	VM_IBM_0001232;
VM_IBM_0001233;	VM_IBM_0001234;	VM_IBM_0001235;	VM_IBM_0001238;
VM_IBM_0001240;	VM_IBM_0001241;	VM_IBM_0001242;	VM_IBM_0001244;

IBM_VM_000017745; IBM_VM_000017752; IBM_VM_000017754; IBM_VM_000017758;
IBM_VM_000017761; IBM_VM_000017763; IBM_VM_000017766; IBM_VM_000018052;
IBM_VM_000018055; IBM_VM_000142702–IBM_VM_000143625; IBM_VM_000144262–
IBM_VM_000144842; BM_VM_000018171; IBM_VM_000018266; IBM_VM_000018864;
IBM_VM_000016471; IBM_VM_000018889; IBM_VM_000020309; IBM_VM_000020360;
IBM_VM_000024995; IBM_VM_0000001405; IBM_VM_0000001026;
IBM_VM_0000001624; VM_IBM_0023533.

Furthermore, as explained above in IBM’s response to its bases for its defense License and/or Exhaustion, IBM asserts that it has an express and/or implied license to use the claimed technologies of the Asserted Patents and/or that VirtaMove is equitably estopped from asserting patent infringement of the Asserted Patents against IBM.

9. No Willful Infringement:

IBM incorporates by reference its Responses to VirtaMove’s Interrogatory Nos. 1, 2, 5, 8, and 13 and documents cited therein. IBM further incorporates by reference its responses to its bases for its defense of License and/or Exhaustion and Unenforceability, Equitable Estoppel, and/or Implied License.

IBM maintains that VirtaMove has failed to show that it had provided “actual notice” of the Asserted Patents prior to the filing of its Complaint. *See Netlist, Inc. v. Micron Tech., Inc.*, No. 2:22-CV-203-JRG-RSP, 2024 WL 402182, at *4 (E.D. Tex. Jan. 11, 2024), *report and recommendation adopted*, No. 2:22-CV-00203-JRG-RSP, 2024 WL 387778 (E.D. Tex. Jan. 31, 2024) (holding that a slide deck identifying subject matter of an invention without identifying patents or products alleged to be infringing said patents is insufficient to provide actual notice); *see also General Access Solutions vs. Sprint Spectrum L.P.*, No. 2:20-CV-00007-RWS, 2021 WL

12343531 (E.D. Tex. Aug. 3, 2021). Indeed, VirtaMove cannot point to a single document, communication, and/or testimony showing that VirtaMove identified the Asserted Patents, let alone provided IBM with notice of infringement of the Asserted Patents. *See, e.g.*, Falk Tr., at 23:21-24:20, 78:3-85:13; Stokes Tr., at 467:10-521:21; O'Connor Tr., at 258:22-259:24, 279:18-284:6, 341:23-343:6. Indeed, despite VirtaMove's own knowledge of the asserted patents and years-long investigation into and study of the accused Kubernetes and Docker technologies, VirtaMove did not believe or understand that those technologies (or IBM's use or distribution of them) infringed VirtaMove's patents. VirtaMove has further not identified any evidence that IBM or the contributors to Docker and Kubernetes copied VirtaMove's products or otherwise used VirtaMove's technology when developing the technology employed in the accused products. Nor is there evidence that the developers of the accused technology were even aware of Trigence, AppZero, or VirtaMove during such development. Instead, the accused technology was independently developed, leveraging decades of research into and development of containerization and application virtualization, including in products and technologies that existed well before the priority date of the asserted patents. *See, e.g.*, IBM_VM_000183959; VM_IBM_0030101.

Furthermore, IBM denies any purported willful infringement of the Asserted Patents to the extent that IBM has an express license to use the claimed technologies of the Asserted Patents as well as the technologies VirtaMove has accused of infringing the Asserted Patents. For example, IBM and AppZero entered into an IBM Assistance Agreement (Agreement #4914008281) in June 27, 2014. *See, e.g.*, VM_IBM_0000840; VM_IBM_0022070; *see also* VM_IBM_0000866. Section 5.3 ("Rights") provides that "[i]f Supplier [AppZero] provides IBM with materials or suggestions (collectively called "Feedback") related to the IBM systems during the course of this Agreement, Supplier [AppZero] grants to IBM a fully paid-up license to use such Feedback in any

manner whatsoever and without accounting to Supplier.” VM_IBM_0022070 at -071. This Agreement remains in effect. *See, e.g.,* Stokes Tr., 488:19-492:22.

As to the nature and quality of “Feedback” provided to IBM by VirtaMove, Mr. O’Connor, VirtaMove’s former Chief Executive Officer, testified that such “Feedback” included or otherwise related to at least the “use of container technology rather than image-based migration,” “a video involving using Docker containers,” “[the] container lifecycle,” “a video involving using some form of containers, be it AppZero containers or Docker containers,” “technology to isolate applications from one another and from the underlying OS,” “the critical capabilities at issue in the [’058] identified patent[,],” “the critical capabilities underlying the AppZero technology,” “the technology to ‘package unmodified desktop and server-side applications from old operating systems (OS) for secure delivery to, and execution on, new OS versions,” “the technology to package ‘fully configured applications and their dependencies into a portable reusable OS-free Virtual Application Appliance which can be copied and run quickly without installation,” “how AppZero’s VAA and migration/isolation technologies worked,” “adopt[ing] AppZero’s way of isolating and containerizing applications,” “use [of] containers in the cloud environment,” and “adopt[ing] containers in IBM cloud to achieve the benefits of the containers.” *See, e.g.,* O’Connor Tr., at 242:17-273:12.

Furthermore, IBM denies any purported willful infringement of the Asserted Patents to the extent that IBM has an implied license to use the claimed technologies of the Asserted Patents and/or that VirtaMove is equitably estopped from asserting patent infringement of the Asserted Patents against IBM. For example, VirtaMove’s own documents show that by 2014, VirtaMove knew IBM had entered into a strategic partnership with Docker and offered a “Containers service.” *See, e.g.,* VM_IBM_0036343. Despite having such knowledge, VirtaMove continued to pursue

business arrangements with IBM at least until 2024, at times even promoting its work around Docker and Kubernetes. *See, e.g.*, VM_IBM_0000457 (Nigel Stokes explaining to Bill Lobig, “We work so much around containerization and Kubernetes at VirtaMove,” in 2021); VM_IBM_0034925; VM_IBM_0035227; VM_IBM_0035358. At not point during its interactions with IBM did VirtaMove indicate—either to IBM directly or to the general public—that IBM’s use of any containers, containerization, and application migration technology, including Docker and Kubernetes, infringes the Asserted Patents. *See, e.g.*, VM_IBM_0001915; VM_IBM_0001923; VM_IBM_0001958; O’Connor Tr., at 259:9-24, 282:19-25, 316:9-322:12. Nor did VirtaMove ever demand a license from IBM for its use of containers, containerization, and application migration technology, including Docker and Kubernetes. *See, e.g.*, O’Connor Tr., at 259:9-14; Stokes Tr., at 375:7-19. VirtaMove did not even accuse Docker of infringing the Asserted Patents, and instead, sought to establish a business relationship with Docker. *See, e.g.*, VM_IBM_0035059; VM_IBM_0035060; VM_IBM_0035063; VM_IBM_0035102 (VirtaMove explaining to Docker, “[W]e’d be happy to reconnect and discuss further how we can work together.”); Stokes Tr., at 556:23-557:9.

Furthermore, IBM notes that VirtaMove identified Meiosys as a competitor that offered containers, containerization, and application migration technology since at least 2004. *See, e.g.*, VM_IBM_0021833 (“MetaCluster ... Virtualizes Application ... Offers stateful Application relocation ... Allows Applications to be dynamically moved among servers.”); VM_IBM_0024667 (“Definitely someone to watch.”), (“[T]here’s a bunch of API work under way in order to integrate with Tivoli[.]”); VM_IBM_0026305; VM_IBM_0026306 (“IBM ... look[s] the most interested at this stage ... It’s already working closely with IBM’s Tivoli ... MetaCluster runs in a middleware layer between the OS and application ... Containers surround each

application and provide resource isolation.”); Stokes Tr., at 433:24-441:9 (discussing interactions with IBM over the past two decades). Indeed, VirtaMove cannot dispute that it had knowledge of Meiosys’s use of containers, containerization, and application migration technology and that IBM was working closely with Meiosys by 2004. *See, e.g.*, VM_IBM_0026306 (“IBM ... look[s] the most interested at this stage ... It’s already working closely with IBM’s Tivoli ... MetaCluster runs in a middleware layer between the OS and application ... Containers surround each application and provide resource isolation.”); *see also* IBM_VM_000193117. In fact, in 2005, IBM had purchased Meiosys, thereby acquiring the technology VirtaMove believed to have been in competition with. IBM_VM_000193127. Therefore, for almost two decades, IBM reasonably relied on VirtaMove’s conduct, including its silence as to whether IBM infringes the Asserted Patents, and VirtaMove’s assertion of patent infringement materially prejudices IBM.

10. No Injunctive Relief:

VirtaMove makes no reference to irreparable harm suffered in its Third Amended Complaint. VirtaMove only refers to the monetary damages it is allegedly owed. Instead, VirtaMove only includes an injunction as one of its 7 types of relief sought against IBM. Rather than clarify its basis for injunctive relief in its response to IBM’s Interrogatory No. 21, VirtaMove identified only its complaint as a basis for irreparable harm, which itself makes no reference to any irreparable harm suffered. In its first supplemental response to Interrogatory No. 21, VirtaMove asserts boilerplate language with no basis in the facts of this case. VirtaMove cites case law, with little to no language relating that case law to IBM’s actions or why VirtaMove has suffered irreparable harm as a result of IBM’s actions. VirtaMove has not answered regarding the “significant time and money” it has invested in its intellectual property. Moreover, VirtaMove has not provided sufficient facts or testimony to support any allegation that VirtaMove and IBM are