

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EMC CORPORATION AND EMC ISRAEL)
DEVELOPMENT CENTER, LTD.,)
)
Plaintiffs,)
)
v.) C.A. No. 12-956 (GMS)
)
ZERTO, INC.,) **DEMAND FOR JURY TRIAL**
)
Defendant.)

FIRST AMENDED COMPLAINT

Plaintiffs EMC Corporation (“EMC”) and EMC Israel Development Center, Ltd. (“EIDC”), by and through their undersigned counsel, for their Complaint against defendant Zerto, Inc., hereby demand a jury trial and allege as follows:

NATURE OF THE ACTION

1. Founded in 1979, EMC is the global leader in data storage and management, servicing a broad range of customers around the world, in every major industry, in the public and private sectors, and of sizes ranging from the Fortune Global 500 to small- and medium-sized businesses. EMC products and services provide the foundation for organizations to store, manage, protect, analyze and secure their vast and increasing quantities of information, improve business agility, lower cost of ownership and enhance their competitive advantage.

2. Among its many product and service offerings, EMC provides customers with data protection and replication solutions. EMC’s data protection and replication solutions allow customers to replicate their data in a manner that allows efficient and precise recovery of data in the event of problems such as server failures, data corruption, and catastrophic events. One of

EMC's replication products is the RecoverPoint™ family of data protection and replication solutions.

3. In 2001, Ziv Kedem founded Kashya Inc. ("Kashya"). Kashya was a software company that developed data protection and replication software, including continuous data protection (CDP) technology.

4. In 2006, EMC acquired Kashya, and Ziv Kedem became an EMC employee. Specifically, Ziv Kedem became EMC's Vice President and Chief Technology Officer for RecoverPoint™. In that role, Ziv Kedem worked on incorporating Kashya's data protection and replication software, including continuous data protection technology, into EMC's RecoverPoint™ product and developing next-generation versions of RecoverPoint™. Accordingly, Ziv Kedem had intimate knowledge of EMC's RecoverPoint™ family of data protection technology, and contributed to that technology as evidenced by being named as an inventor on EIDC patents related to RecoverPoint™. After the acquisition by EMC, Kashya's Israel-based research and development operations became EIDC.

5. After terminating his employment with EMC in 2007, Ziv Kedem co-founded Zerto Ltd. in November of 2009 with his brother Oded Kedem, who was an EMC Director of Engineering and managed EMC's RecoverPoint™ research and development organizations until October 2009. Oded Kedem, like his brother, had intimate knowledge of EMC's RecoverPoint™ family of data protection technology. Ziv Kedem serves as Zerto Ltd.'s Chief Executive Officer, while Oded Kedem serves as its Chief Technology Officer. In May of 2011, Zerto Ltd. founded Zerto, Inc. as a U.S. entity owned by Zerto Ltd.

6. Zerto, Inc. now offers data protection and replication products that incorporate RecoverPoint™ technology and, more specifically, technology that is covered by at least one

EIDC patent for which EMC has an exclusive license and at least four EMC patents. Ziv Kedem is an inventor of the EIDC patent. Accordingly, EMC and EIDC bring this patent infringement litigation.

THE PARTIES

7. EMC is a Massachusetts corporation with a place of business at 176 South Street, Hopkinton, Massachusetts 01748.

8. EIDC is an Israeli corporation with a place of business at 7 Hamada Street, Herzliya, Israel.

9. EIDC is substantially a wholly-owned subsidiary of EMC.

10. Upon information and belief, Zerto, Inc. is a Delaware corporation with a place of business at 27-43 Wormwood Street, Suite 530, Boston, MA 02210.

JURISDICTION, VENUE AND NATURE OF ACTION

11. This is an action for patent infringement arising under the patent laws of the United States, 35 U.S.C. § 100 *et seq.*

12. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

13. Venue is proper in this District under 28 U.S.C. §§ 1391 and 1400(b).

14. Zerto, Inc. is subject to this Court's personal jurisdiction because Zerto, Inc. is a Delaware corporation and has purposely availed itself of the rights and benefits of the laws of Delaware.

BACKGROUND

I. EMC Acquires Kashya

15. Ziv Kedem and Oded Kedem are brothers.

16. Ziv Kedem was among the founders of Kashya in 2001 and was Kashya's Chief Technology Officer.

17. Oded Kedem was among Kashya's earliest employees and led its Storage Group.

18. Kashya developed enterprise-class data protection and replication software, including market-leading continuous data protection technology.

19. Kashya's technology allows for the continuous replication of an organization's data. Rather than replicating an organization's data at specific intervals (e.g., every 24 hours), an organization's data is automatically replicated every time a change is made to the data.

20. The Kashya technology is agnostic to the underlying storage platform which means it allows for remote replication across heterogeneous environments, e.g., allows data stored on one type of storage system to be replicated onto a different type of storage system.

21. Both Ziv Kedem and Oded Kedem worked on developing Kashya's data protection and replication software, including its continuous data protection technology.

22. On May 9, 2006, EMC acquired Kashya in a cash transaction valued at approximately \$153 million.

23. In its press release announcing the acquisition, EMC stated: "Kashya also brings its market-leading continuous data protection (CDP) technology to EMC to be used as the engine in future releases of EMC RecoverPoint™ software."

24. After the acquisition, Kashya employees, including Ziv Kedem, Oded Kedem and others, became employed by EMC's Software Group at EIDC.

25. Ziv Kedem joined EMC as a Vice President.

26. Oded Kedem joined EMC as a Senior Manager of Software Development. Oded Kedem was later promoted to Senior Manager of Software Engineering and eventually to Director of Engineering.

27. As employees of EMC, Ziv Kedem and Oded Kedem held leadership positions in the development of future releases of EMC's RecoverPoint™ software that incorporated and built on Kashya's data protection and replication technology, including its technology for allowing continuous data protection in a heterogeneous environment.

28. The RecoverPoint™ products released after EMC's acquisition of Kashya store overwritten data in a journal which can be used to provide rapid point-in-time recovery to any of multiple points in time, and employ tagging for consistent data recovery.

29. The United States Patent and Trademark Office has awarded EIDC numerous patents on innovative data protection and replication technology that resulted from these development efforts, including U.S. Patent No. 7,577,867 ("the '867 patent").

30. The '867 patent, entitled "Cross Tagging to Data for Consistent Recovery," was filed on February 17, 2006 and issued on August 18, 2009.

31. Ziv Kedem is a named inventor on the '867 patent.

32. Ziv Kedem assigned his rights to the '867 patent to EIDC.

33. In filing the application that issued as the '867 patent, Ziv Kedem declared under oath: "I believe the inventor(s) named below to be the original and first inventor(s) of the subject matter which is claimed" in the application. The declaration identifies Ziv Kedem as one of the "inventor(s) named below."

34. EIDC owns the '867 patent.

35. EMC is the exclusive licensee of the '867 patents.

II. Ziv Kedem and Oded Kedem Left EMC and Founded Zerto Ltd. and Zerto, Inc. to Compete Against EMC.

36. On January 4, 2007, Ziv Kedem terminated his employment with EMC.

37. Ziv Kedem left EMC after working on and developing intimate knowledge of EMC's data protection and replication technology, including new versions of RecoverPoint™.

38. On October 8, 2009, Oded Kedem terminated his employment with EMC.

39. Oded Kedem left EMC after working on and developing intimate knowledge of EMC's data protection and replication technology, including new versions of RecoverPoint™.

40. In November of 2009, Ziv Kedem and Oded Kedem founded Zerto Ltd.

41. In May of 2011, Zerto, Inc. was founded as a U.S. entity owned by Zerto, Ltd.

42. Ziv Kedem is the President and Secretary of Zerto, Inc. and is a co-founder and the CEO of Zerto Ltd.

43. Oded Kedem is a member of Zerto, Inc.'s Board of Directors and is a co-founder and the CTO of Zerto Ltd.

44. Zerto, Inc. is a wholly-owned subsidiary of Zerto Ltd.

45. Upon information and belief, Zerto Ltd. controls the operations of Zerto, Inc.

46. Six of the seven members of Zerto Inc.'s Board of Directors are also members of Zerto Ltd.'s Board of Directors.

47. Zerto, Inc. provides data replication software for the enterprise market.

48. Zerto, Inc. and Zerto Ltd.'s software product, Zerto Virtual Replication, became commercially available on August 15, 2011.

49. Zerto Ltd. designs and develops the Zerto Virtual Replication software product.

50. Zerto, Inc. markets, sells, and offers for sale the Zerto Virtual Replication software product in the United States.

51. Zerto, Inc.'s Annual Report filed on February 15, 2012 with the Massachusetts Secretary of the Commonwealth describes Zerto, Inc.'s business as "develops software for data recovery."

52. Upon information and belief, Zerto, Inc. has imported and continues to import into the United States the Zerto Virtual Replication software product from Zerto Ltd.

53. Zerto, Inc. and Zerto Ltd. compete with EMC.

54. Zerto, Inc. and Zerto Ltd. incorporated EMC's fundamental and patent-protected technologies into their Zerto Virtual Replication software.

55. For example, the Zerto Virtual Replication software provides application consistent point-in-time recovery, mirrors data over a network connection, and provides journal-based continuous data protection and instant point-in-time recovery to any one of multiple recovery points. These are technologies that EMC invented and patented before Zerto Ltd. or Zerto, Inc. was founded.

56. Neither Zerto, Inc. nor Zerto Ltd. has obtained permission or a license from EMC or EIDC to use RecoverPoint™ technology.

COUNT I
INFRINGEMENT OF U.S. PATENT NO. 7,577,867

57. The allegations of the paragraphs above are restated and re-alleged as though fully set forth herein.

58. EIDC is the owner by assignment of the '867 patent. A copy of the '867 patent is attached to this Amended Complaint as Exhibit A.

59. EMC is the exclusive licensee of the '867 patent.

60. Zerto, Inc. and Zerto Ltd. do not have a license to the '867 patent.

61. On information and belief, Zerto, Inc. has infringed, and continues to infringe, literally or under the doctrine of equivalents, the '867 patent at least by making, using, importing, offering to sell, and/or selling software and/or components, including but not limited to the Zerto Virtual Replication software offerings, as well as by actively and intentionally inducing others, including but not limited to customers, to use said software and/or components in a manner that infringes the '867 patent and contributing to the infringement of the '867 patent by supplying said software and/or components to others, including but not limited to customers. There are no substantial non-infringing uses for the Zerto software and/or components, including the Zerto Virtual Replication software offerings.

62. On information and belief, Zerto, Inc. has been aware of the '867 patent because Ziv Kedem, the President of Zerto, Inc. and the co-founder of Zerto Ltd., is a named inventor of the patent.

63. On information and belief, at all relevant times, Zerto, Inc. had actual or constructive notice and knowledge that its conduct infringed the claims of the '867 patent, but Zerto, Inc. nevertheless continued its willful infringing conduct.

64. On information and belief, at all relevant times, Zerto, Inc. had actual notice and knowledge that the conduct of others, including but not limited to Zerto, Inc.'s customers, directly infringed the claims of the '867 patent.

65. Zerto, Inc.'s infringement of the '867 patent has caused and continues to cause EMC and EIDC to suffer damages and irreparable harm for which there is no adequate remedy at law, unless the Court enjoins Zerto, Inc. from continuing its infringing activities.

66. Upon information and belief, Zerto, Inc.'s infringement of the '867 patent was and remains willful and deliberate.

COUNT II
INFRINGEMENT OF U.S. PATENT NO. 7,647,460

67. The allegations of the paragraphs above are restated and re-alleged as though fully set forth herein.

68. EMC is the owner by assignment of the U.S. Patent No. 7,647,460 (“the ‘460 patent”), entitled “Method and Apparatus for Implementing a Remote Mirroring Data Facility Without Employing a Dedicated Leased Line to Form the Link Between Two Remotely Disposed Storage Devices,” which issued on January 12, 2010. A copy of the ‘460 patent is attached to this Amended Complaint as Exhibit B.

69. Zerto, Inc. and Zerto Ltd. do not have a license to the ‘460 patent.

70. On information and belief, Zerto, Inc. has infringed, and continues to infringe, literally or under the doctrine of equivalents, the ‘460 patent at least by making, using, importing, offering to sell, and/or selling software and/or components, including but not limited to the Zerto Virtual Replication software offerings, as well as by actively and intentionally inducing others, including but not limited to customers, to use said software and/or components in a manner that infringes the ‘460 patent and contributing to the infringement of the ‘460 patent by supplying said software and/or components to others, including but not limited to customers. There are no substantial non-infringing uses for the Zerto software and/or components, including the Zerto Virtual Replication software offerings.

71. Zerto, Inc.’s infringement of the ‘460 patent has caused and continues to cause EMC to suffer damages and irreparable harm for which there is no adequate remedy at law, unless the Court enjoins Zerto, Inc. from continuing its infringing activities.

COUNT III
INFRINGEMENT OF U.S. PATENT NO. 6,073,222

72. The allegations of the paragraphs above are restated and re-alleged as though fully set forth herein.

73. EMC is the owner by assignment of U.S. Patent No. 6,073,222 (“the ‘222 patent”), entitled “Using a Virtual Device to Access Data As It Previously Existed in a Data Storage System,” which issued on June 6, 2000. A copy of the ‘222 patent is attached to this Amended Complaint as Exhibit C.

74. Zerto, Inc. and Zerto Ltd. do not have a license to the ‘222 patent.

75. On information and belief, Zerto, Inc. has infringed, and continues to infringe, literally or under the doctrine of equivalents, the ‘222 patent at least by making, using, importing, offering to sell, and/or selling software and/or components, including but not limited to the Zerto Virtual Replication software offerings, as well as by actively and intentionally inducing others, including but not limited to customers, to use said software and/or components in a manner that infringes the ‘222 patent and contributing to the infringement of the ‘222 patent by supplying said software and/or components to others, including but not limited to customers. There are no substantial non-infringing uses for the Zerto software and/or components, including the Zerto Virtual Replication software offerings.

76. Zerto, Inc.’s infringement of the ‘222 patent has caused and continues to cause EMC to suffer damages and irreparable harm for which there is no adequate remedy at law, unless the Court enjoins Zerto, Inc. from continuing its infringing activities.

COUNT IV
INFRINGEMENT OF U.S. PATENT NO. 7,603,395

77. The allegations of the paragraphs above are restated and re-alleged as though fully set forth herein.

78. EMC is the owner by assignment of U.S. Patent No. 7,063,395 (“the ‘395 patent”), entitled “Using Pseudosnapshots For Continuous Data Protection Systems to Surface a Copy of Data,” which issued on October 13, 2009. A copy of the ‘395 patent is attached to this Amended Complaint as Exhibit D.

79. Zerto, Inc. and Zerto Ltd. do not have a license to the ‘395 patent.

80. On information and belief, Zerto, Inc. has infringed, and continues to infringe, literally or under the doctrine of equivalents, the ‘395 patent at least by making, using, importing, offering to sell, and/or selling software and/or components, including but not limited to the Zerto Virtual Replication software offerings, as well as by actively and intentionally inducing others, including but not limited to customers, to use said software and/or components in a manner that infringes the ‘395 patent and contributing to the infringement of the ‘395 patent by supplying said software and/or components to others, including but not limited to customers. There are no substantial non-infringing uses for the Zerto software and/or components, including the Zerto Virtual Replication software offerings.

81. Zerto, Inc.’s infringement of the ‘395 patent has caused and continues to cause EMC to suffer damages and irreparable harm for which there is no adequate remedy at law, unless the Court enjoins Zerto, Inc. from continuing its infringing activities.

COUNT V
INFRINGEMENT OF U.S. PATENT NO. 7,971,091

82. The allegations of the paragraphs above are restated and re-alleged as though fully set forth herein.

83. EMC is the owner by assignment of U.S. Patent No. 7,971,091 (“the ‘091 patent”), entitled “Network Configuration Backup and Restore Operations Using Continuous Data Protection,” which issued on June 28, 2011. A copy of the ‘091 patent is attached to this Amended Complaint as Exhibit E.

84. Zerto, Inc. and Zerto Ltd. do not have a license to the ‘091 patent.

85. On information and belief, Zerto, Inc. has infringed, and continues to infringe, literally or under the doctrine of equivalents, the ‘091 patent at least by making, using, importing, offering to sell, and/or selling software and/or components, including but not limited to the Zerto Virtual Replication software offerings, as well as by actively and intentionally inducing others, including but not limited to customers, to use said software and/or components in a manner that infringes the ‘091 patent and contributing to the infringement of the ‘091 patent by supplying said software and/or components to others, including but not limited to customers. There are no substantial non-infringing uses for the Zerto software and/or components, including the Zerto Virtual Replication software offerings.

86. Zerto, Inc.’s infringement of the ‘091 patent has caused and continues to cause EMC to suffer damages and irreparable harm for which there is no adequate remedy at law, unless the Court enjoins Zerto, Inc. from continuing its infringing activities.

RELIEF REQUESTED

WHEREFORE, plaintiffs EMC and EIDC pray that this Court:

- a) Enter judgment that Zerto, Inc. has directly and indirectly infringed the ‘867, ‘460, ‘222, ‘091, and ‘395 patents;
- b) Preliminarily and permanently enjoin Zerto, Inc., and its officers, agents, servants, employees, representatives, and all persons acting in concert or participation with any of them, from committing further direct infringement of the ‘867, ‘460, ‘222, ‘091, and ‘395 patents, or contributing to or inducing the infringement of the ‘867, ‘460, ‘222, ‘091, and ‘395 patents by others;
- c) Award EMC and EIDC damages in accordance with 35 U.S.C. § 284, including all damages adequate to compensate them for Zerto, Inc.’s infringement, in no event less than a reasonable royalty, such damages to be determined by a jury, and if necessary to adequately compensate EMC and EIDC, an accounting, and that such damages be awarded EMC and EIDC, together with interest, including prejudgment and post-judgment interest, and costs;
- d) Determine that Zerto, Inc. has willfully and deliberately committed acts of patent infringement, and award EMC and EIDC treble damages in light of Zerto, Inc.’s willful infringement, pursuant to 35 U.S.C. § 284;
- e) Determine that this is an “exceptional case” pursuant to 35 U.S.C. § 285 and award EMC and EIDC their reasonable legal fees, costs, and expenses that they incur in prosecuting this action;
- f) Award EMC and EIDC their costs, pre-judgment interest and post-judgment interest;
- g) Award such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

EMC and EIDC request a trial by jury on all issues so triable.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

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