

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

DIEM LLC;	§	
	§	Civil Action No. 6:17-cv-00186
Plaintiff,	§	
	§	
v.	§	PATENT CASE
	§	
BIGCOMMERCE, INC.;	§	JURY TRIAL DEMANDED
	§	
Defendant.	§	
	§	

FIRST AMENDED COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff, Diem LLC (“Diem”), as and for their complaint against Defendant BigCommerce, Inc. (“BigCommerce”), alleges as follows:

THE PARTIES

1. Diem is a Delaware Corporation available for service of process at 8 The Green Suite #4960, Dover, DE 19901.
2. Upon information and belief, Defendant BigCommerce, Inc. is a Texas corporation having a regular and established place of business at 11305 Four Points Dr., Bldg. 2, Ste. 300, Austin, TX 78726. BigCommerce, Inc. may be served via its registered agent for service of process: Jeffrey Mengoli, 11305 Four Points Dr., Bldg. 2, Ste. 300, Austin, TX 78726.

JURISDICTION AND VENUE

3. Diem brings this action for patent infringement under the patent laws of the United States, 35 U.S.C. § 271 *et seq.* This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(a), and 1367.

4. Venue is proper in this judicial district pursuant to 28 U.S.C. §1400(b). Upon information and belief, BigCommerce is deemed to reside in this judicial district, has committed acts of infringement in this judicial district, and/or has purposely transacted business involving the accused products in this judicial district, including offering and providing the accused products to one or more customers in Texas.¹

5. BigCommerce is subject to this Court's jurisdiction pursuant to due process and/or the Texas Long Arm statute due at least to its substantial business in this State and judicial district, including: (A) at least part of their past infringing activities, (B) regularly doing or soliciting business in Texas, and/or (C) engaging in persistent conduct and/or deriving substantial revenue from goods and services provided to customers in Texas.

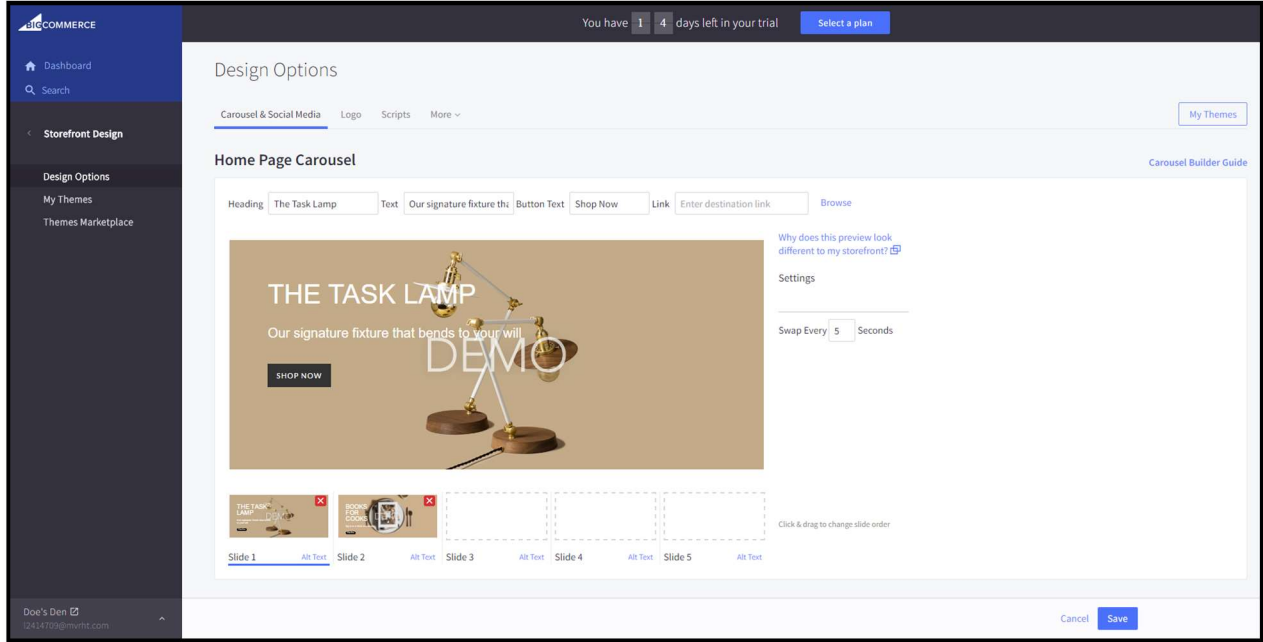
COUNT I
(INFRINGEMENT OF U.S. PATENT NO. 7,770,122)

6. Diem incorporates paragraphs 1-6 above by reference.

7. Diem is the owner, by assignment, of U.S. Patent No. 7,770,122 (“the ’122 Patent”), entitled CODELESS DYNAMIC WEBSITES INCLUDING GENERAL FACILITIES that issued on October 3, 2010. A true and correct copy of the ’122 Patent is attached as Exhibit A hereto.

¹ The Supreme Court of the United States addressed the issue of patent litigation venue earlier this week in its May 22, 2017 opinion: *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 581 U.S. ____ (2017). The Court's holding in *TC Heartland* essentially reaffirmed the *Fourco* interpretation of 28 U.S.C. §1400(b) and clarified that “[a]s applied to domestic corporations, ‘reside[nce]’ in §1400(b) refers only to the State of incorporation.” *Id.* at 10. As of now, this Court has not interpreted the *TC Heartland* opinion as it applies to defendants such as BigCommerce – unlike the Petitioner in both *Fourco* and *TC Heartland*, BigCommerce is incorporated under the laws of the same state in which this proceeding is initiated: Texas. Diem believes *TC Heartland* dictates that BigCommerce is determined to “reside” in the state of Texas, making venue appropriate under 28 U.S.C. §1400(b).

8. Upon information and belief, the following, *inter alia*, identifies BigCommerce’s Storefront Manager service offered to the public on its website, www.bigcommerce.com:



9. Upon information and belief, the following describes, at least in part, various features of the Storefront Manager

Features				
Responsive website	✓	✓	✓	✓
Single-page checkout	✓	✓	✓	✓
Coupons, discounts, and gift cards	✓	✓	✓	✓
Shipping label discounts	✓	✓	✓	✓
Real time shipping quotes	✓	✓	✓	✓
Professional reporting tools	✓	✓	✓	✓
Blog	✓	✓	✓	✓
Product ratings and reviews	✓	✓	✓	✓

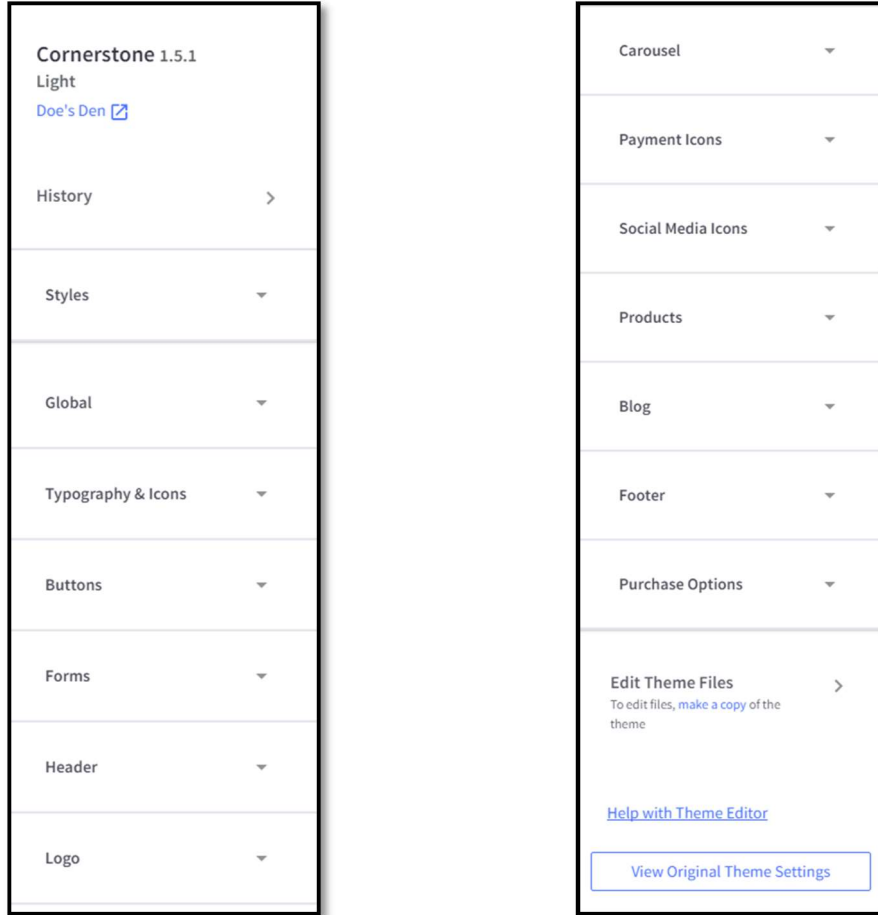
10. Upon information and belief, the following describes, at least in part, various Storefront Manager packages and respective features offered to users:

Get access to these features	Standard	Plus	Pro	Enterprise
Transaction Fees	0%	0%	0%	0%
Products, file storage, and bandwidth	Unlimited	Unlimited	Unlimited	Unlimited
Staff accounts	Unlimited	Unlimited	Unlimited	Unlimited
Sales Channels				
Branded Online Store	✓	✓	✓	✓
eBay and Amazon	✓	✓	✓	✓
Point of sale (Square)	✓	✓	✓	✓
Facebook	✓	✓	✓	✓
Pinterest	✓	✓	✓	✓
Google Trusted Stores			✓	✓

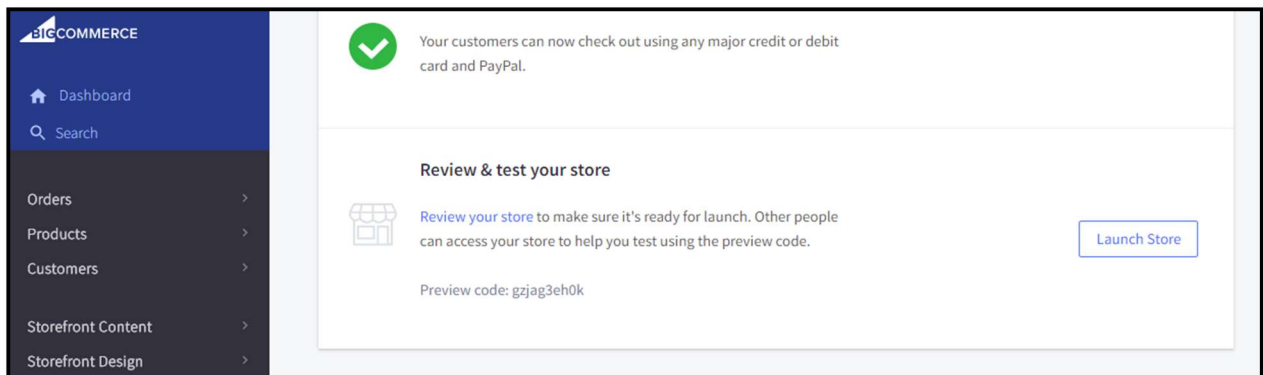
11. Upon information and belief, the following describes, at least in part, configurable features of the Storefront Manager that can be edited by users to change a default website template:

The screenshot shows the BigCommerce 'My Themes' interface. On the left is a dark sidebar with navigation options: 'Dashboard', 'Search', 'Storefront Design', 'Design Options', 'My Themes', and 'Themes Marketplace'. The main content area is titled 'My Themes' and features a 'Current Theme' section. This section displays a preview of the 'Cornerstone Light' theme, which includes 3 styles and is version 1.5.1. It is developed and supported by BigCommerce. Below the preview are three buttons: 'Customize', 'Theme Details', and 'Advanced'. A note at the bottom states, 'You can't edit your active theme's files. You'll need to make a copy first. Learn more'. At the top right of the interface, a notification indicates 'You have 14 days left in your trial' with a 'Select a plan' button.

The screenshot displays the 'Doe's Den' storefront using the Cornerstone 1.5.1 Light theme. The page features a navigation menu with links for 'SHOP ALL', 'BATH', 'GARDEN', 'KITCHEN', 'PUBLICATIONS', 'UTILITY', 'SHIPPING & RETURNS', 'CONTACT US', 'BLOG', and 'RSS SYNDICATION'. A search bar and links for 'GIFT CERTIFICATES', 'SIGN IN or REGISTER', and 'CART' are also present. The main content area is dominated by a large banner for 'The Task Lamp', described as 'Our signature fixture that bends to your will', with a 'Shop Now' button. A yellow warning box on the left states, 'Your store has not launched. Only administrators or guests who have your preview code can view your store. Visit the Getting Started page in your Control Panel to launch your store. Click here to see your Coming Soon page.' A sidebar on the left provides theme customization options for 'Cornerstone 1.5.1 Light', including 'History', 'Styles', 'Global', 'Typography & Icons', 'Buttons', 'Forms', 'Header', 'Logo', 'Carousel', and 'Payment Icons'. At the bottom, there are mobile device icons and buttons for 'Clear Changes', 'Save Changes', and 'Apply Theme'.



12. Upon information and belief, the following describes, at least in part, the publishing feature of the Standard package for the Storefront Manager:



BigCommerce

Dashboard
Search

Store Setup

Store Profile
Store Settings
Payments
Shipping
Tax
Currencies
Point of Sale
Accounting

Store Settings

Update the settings in the form below and click "Save", or click "Cancel" to keep the current settings.

Website | Display | Share | Date & Timezone | URL Structure | Search | Miscellaneous

Store Status

Open Down for Maintenance ?

If set to 'Down for Maintenance', the store will become unavailable to visitors and a customizable message will be displayed.

Physical Dimension Settings

Weight Measurement: Ounces ?

Length Measurement: Inches ?

Decimal Token: . ?

Thousands Token: , ?

Decimal Places: 2 ?

Factoring Dimension: Product Depth ?

Details

Current Domain: does-den3.mybigcommerce.com
[Change mybigcommerce.com Domain Name](#)

Custom Domain: You don't own a custom domain. [Buy one](#)

Permanent Address: <https://store-aw00osrwpn.mybigcommerce.com>

Control Panel: <https://store-aw00osrwpn.mybigcommerce.com/admin>

You can access your stores administration by visiting /admin on any of the above links.

13. Upon information and belief, BigCommerce's Storefront Manager allows users to create, edit, publish, and host websites in each of the Standard, Plus, Pro, and Enterprise plans in substantially the same manner.

14. BigCommerce has directly infringed, and continues to directly infringe one or more claims of the '122 Patent in this judicial district and elsewhere in Texas, including at least Claims 1, 3, 5, 6, 8, 9, and 11 literally and/or under the doctrine of equivalents, by or through making, using, importing, offering for sale, and/or selling their Storefront Manager service during the pendency of the '122 Patent which software *inter alia* comprises instructions for sending a template to be displayed on a customer's computer in response to a customer request, allowing customers to edit the features and content of the template, storing said edits to send back to the server for storage, and allowing customers to publish and host their edited website which then can be viewed by a third party that sends a request to the server.

15. Taking claim 1 of the '122 Patent as a representative claim, BigCommerce's Storefront Manager service directly infringes each element of the claim. For ease of discussion, the elements of claim 1 can be broken down into three discrete sections. The first six (6) hanging indented paragraphs under claim 1 (col. 37, ll. 6-31) comprise the "Template Request, Transmission, and Storage" section of the claim. The following six (6) hanging indented paragraphs under claim 1 (col. 37, ll. 32-65) comprise the "Template Modification and Data Submission" section of the claim. Finally, the last five (5) hanging indented paragraphs under claim 1 (col. 37, l. 66 - col. 38, l. 18)) comprise the "Data Receipt/Storage and Web Page Provision" section of the claim.

Template Request, Transmission, and Storage

16. The first element of Claim 1 (col. 37 ll. 6-9) requires that the practicing entity cause a user computer to request a template web page code file from a server in response to a user request made via a web browser program running on the user's computer. Upon information and belief, BigCommerce's Storefront Manager service performs this element when a user utilizes a web browser (Internet Explorer, Google Chrome, Safari, etc.) to visit the BigCommerce website seeking to create their own website. By using the Storefront Manager interface and indicating that they would like to edit a website template (called "themes" and/or "styles"), the user makes a request. Upon information and belief, BigCommerce's Storefront Manager service responds to this request by causing the user computer to submit a request (e.g., an HTTP request) to the BigCommerce server.

17. The second element of Claim 1 (col. 38 ll. 10-15) requires that the practicing entity supply the template web page code file in response to the request where the code file includes code representing a first plurality of control buttons, a second plurality of visible items, a host button, and a fourth plurality of hidden fields. After receiving a user request, the BigCommerce Storefront Manage service provides the user with a web page template file which is then rendered in full size on the user's browser. This code file includes code for control buttons, visible items, and a host button which are the features that allow the user to edit the template, to see the template, and to submit the modified template, respectively. Upon information and belief, the code files provided by the BigCommerce Storefront Manager service contain hidden fields through which the changes made to the visible items are communicated to the BigCommerce server when the "Launch Store" button is selected. Upon information and belief, such hidden fields may include HyperText Markup Language (HTML) hidden boxes or script variables, both of which are hidden in nature and not visible to users.

18. The third element of Claim 1 (col. 38 ll. 16-17) requires that the practicing entity store the template web page code file in temporary memory of the user computer. Upon information and belief, the BigCommerce Storefront Manager service stores its web page template code file in the user's temporary memory (e.g., random access memory) which is then read and rendered on-the-fly by the browser program as is typically done with websites. Upon information and belief, storing the web page code file in temporary memory allows for quicker processing compared to operating on data stored in traditional computer storage media (e.g., hard drives).

19. The fourth element of Claim 1 (col. 38 ll. 18-23) requires that the practicing entity cause the user computer to interpret the template web page code file to display a template web page on the user's monitor where the template web page display includes the first plurality of control buttons, the second plurality of visible items, and the host button. Upon information and belief, the web page template code file provided by the BigCommerce Storefront Manager service is coded in such a way that the user computer interpreting the file is directed to render the web page template in full size on the user computer's monitor. This template display on the user monitor includes control buttons, visible items, and a host button ("Launch Store" button) which are the features that allow the user to edit the template, to see the template, and to submit the modified template, respectively. *See supra* Paragraph 11.

20. The fifth element of Claim 1 (col. 38 ll. 24-28) requires that the practicing entity cause the first plurality of control buttons, the second plurality of visible items, and the host button of the web page display to be stored in a first location in the user computer's temporary memory. As explained in Paragraph 18, upon information and belief, the BigCommerce Storefront Manager service stores the template web page code file in the user computer's

temporary memory. Upon information and belief, the template web page code file includes the control buttons, visible items, and a host button (“Launch Store” button) which – when rendered by the user’s browser program – allow the user to edit the template, to see the template, and to submit the modified template, respectively.

21. The sixth element of Claim 1 (col. 38 ll. 29-31) requires that the practicing entity cause the fourth plurality of hidden fields to be located at a second location in the user computer’s temporary memory. Upon information and belief, the plurality of hidden fields are a part of the template web page code file stored in the user computer’s temporary memory – similar to the control buttons, visible items, and host button discussed in Paragraph 20. Upon information and belief, the BigCommerce Storefront Manager service stores these hidden fields in a distinct, known location within the user computer’s temporary memory, allowing for read/write access.

Template Modification and Data Submission

22. The seventh element of Claim 1 (col. 38 ll. 32-38) requires that the practicing entity modify the template web page display by executing functions of a script computer programming code of the template web page code file, where the modification is done by modifying one or more of the visible items of the template web page display on the user’s computer monitor. A BigCommerce Storefront Manager user can utilize many of the service’s control buttons and editing utilities to alter the content, appearance, and layout of the website template provided to them. *See supra* Paragraph 11. Upon information and belief, edits to the template are made by the Storefront Manager service in response to selections and inputs provided by the user. Upon information and belief, the Storefront Manager edits the template web page display by running certain pre-programmed scripts and subroutines that alter the

visible items depending on what edits a user seeks to make to the template web page display. For example, if a user indicates that it would like to change the display background to blue, the Storefront Manager service executes a pre-programmed script contained in the web page code file which modifies the template display by changing the background to blue

23. The eighth element of Claim 1 (col. 38 ll. 39-44) requires that the modified template web page display discussed in Paragraph 22 include the first plurality of control buttons, the host button, and a new third plurality of visible items comprising one or more modified visible items of the original second plurality of visible items as well as any non-modified visible items of the original second plurality of visible items. After the BigCommerce Storefront Manager modifies the template web page display by running scripts, the new modified template web page display will display whatever changes were made to the visible items and will also display the same visible items that were not altered by the scripts. For example, a user that causes the Storefront Manager to edit the text in a text box will receive a modified display on their monitor where the visible text has been changed while other visible features (e.g. the header, the menu options, the logo, etc.) will remain unchanged. This modified template web page display likewise contains the control buttons that allows users to initiate edits as well as the host button (“Launch Store” button).

24. The ninth element of Claim 1 (col. 38 ll. 45-47) requires that the practicing entity cause the third plurality of visible items of the modified template web page display be stored in the user computer’s temporary memory. Similar to the claim elements discussed in Paragraphs 18, 20 and 21, upon information and belief, the BigCommerce Storefront Manager service stores its web page template code file in the user’s temporary memory (e.g., random access memory) which is then read and rendered on-the-fly by the browser program as is typically done with

websites. Upon information and belief, this web page template code file originally includes the second plurality of visible items (i.e., unmodified visible items) as well as the control and host buttons. Following modifications of the template web page display, upon information and belief, the third plurality of visible items – which includes any modified visible items – is likewise stored in the web page template code file in the user computer’s temporary memory.

25. The tenth element of Claim 1 (col. 38 ll. 48-49) requires that the practicing entity receive at the user computer a user selection of the host button of the modified template web page display. After initiating edits to the default template, BigCommerce Storefront Manager users are presented with a modified template web page display which includes control buttons, the third plurality of visible items, and a host button. Once satisfied with the changes to the template, users then select the host button (“Launch store” button) that is displayed on their computer monitor. *See supra* Paragraph 12. Upon information and belief, the BigCommerce Storefront Manager receives this selection.

26. The eleventh element of Claim 1 (col. 38 ll. 50-56) requires that the practicing entity respond to the user selection of the host button by causing the content and attributes of the third plurality of visible items of the modified template web page display to be taken from the first location in the user computer’s temporary memory and placed in the hidden fields in the second location of the user computer’s temporary memory. After selecting the host button, the user represents that they are satisfied with any changes made to the visible items of the modified template web page display. Upon information and belief, after receiving the user selection of the “Launch Store” button, the BigCommerce Storefront Manager takes content and attributes of the third plurality of visible items (e.g., information regarding text, pictures, fonts, background color,

etc.) and moves this information into the hidden fields stored elsewhere in the user computer's temporary memory in anticipation of sending this information back to the BigCommerce servers.

27. The twelfth element of Claim 1 (col. 38 ll. 57-65) requires that the practicing entity respond to the user selection of the host button by further causing the content and attributes of the third plurality of visible items of the modified template web page display to be taken from the hidden fields in the user computer's temporary memory, wrapped in a request object containing no html file, and sending the request object containing no html file to the server computer. As explained in Paragraph 26, the user selection of the "Launch Store" button indicates satisfaction with changes to the visible items of the modified template web page display such that these changes can be sent back to BigCommerce for storage. Upon information and belief, BigCommerce responds to the user selecting the "Launch Store" button by causing the contents and attributes corresponding to these changes to be sent to its server computer. Upon information and belief, the Storefront Manager service does not transmit a complete HTML file corresponding to the user's modified website because no complete HTML file is stored on the user computer; instead, the contents and attributes corresponding to the visible changes are taken from the hidden fields in the user computer's temporary memory and bundled with additional data (the request object) that makes the data receivable by the BigCommerce server. After the request object has been created in the user computer's temporary memory, upon information and belief, the request object containing no html file is then sent to the BigCommerce server.

Data Receipt/Storage and Web Page Provision

28. The thirteenth element of Claim 1 (col. 38 ll. 66-67) requires that the practicing entity receive the request object containing no html file at the server computer. Upon information and belief, after the BigCommerce Storefront Manager service sends the request

object (containing no HTML file, only contents and attributes corresponding to the visible changes to the template), it is subsequently received by a BigCommerce server.

29. The fourteenth element of Claim 1 (col. 39 ll. 1-2) requires that the practicing entity store the request object containing no html file in temporary memory of the server computer. Upon information and belief, BigCommerce's server computer stores the request object in its temporary memory similar to the user computer's receipt of the web page computer code file in Paragraph 18. Upon information and belief, storing and manipulating the request object in temporary memory allows for quicker processing compared to operating on data stored in traditional computer storage (e.g., hard drives).

30. The fifteenth element of Claim 1 (col. 39 ll. 3-7) requires that the practicing entity take the contents and attributes of the third plurality of visible items of the modified template web page display out of the request object and store them as text in a database. Upon information and belief, the BigCommerce server extracts the contents and attributes corresponding to the visible changes from the request object that it receives from the user computer. Upon information and belief, the BigCommerce servers take this information regarding the contents and attributes corresponding to the visible changes and stores this information as text in one or more proprietary or commercially available databases (e.g., Oracle, MySQL, and Microsoft SQL Server).

31. The sixteenth element of Claim 1 (col. 39 ll. 8-13) requires that the practicing entity retrieve the contents and attributes of the third plurality of visible items of the modified template web page display from the database and transmit them to a visitor computer with print instructions in response to a visitor request for a web page comprising said contents and attributes. BigCommerce servers receive web page requests from visitor computers whenever a

visitor seeks a particular website corresponding to a store created in the Storefront Manager. *See supra* Paragraph 12. Upon information and belief, when a visitor makes a request for such a web page, a BigCommerce server responds by accessing its database(s) and retrieving the stored contents and attributes corresponding to the visible changes for the particular web page that the visitor seeks. Upon information and belief, the BigCommerce server then sends these retrieved contents and attributes corresponding to the visible changes to the visitor computer along with print instructions which direct the visitor's browser to render the particular web page display on the visitor computer.

32. The seventeenth and final element of Claim 1 (col. 39 ll. 14-18) requires that the practicing entity cause the browser computer running on the visitor computer to interpret the print instructions to display a visitor web page display that includes the third plurality of visible items of the modified template web page display. Upon information and belief, the print instructions transmitted from the BigCommerce server to the visitor computer are coded using a common language that maximizes compatibility by allowing numerous browser programs to successfully interpret the instruction and render the visitor web page display. Upon information and belief, the print instructions sent from the BigCommerce server to the visitor computer directs the visitor browser to display a web page that includes the same contents and attributes corresponding to the visible changes that were made when the web page template was originally modified, as discussed in Paragraph 23.

33. In addition, should BigCommerce's Storefront Manager service be found not to literally infringe the asserted claims of the '122 Patent, the Storefront Manager service would nevertheless infringe the asserted claims of the '122 Patent. More specifically, the BigCommerce Storefront Manager service performs substantially the same function (allowing a

user to receive and edit a website template which is then sent to a server for storage), in substantially the same way (comprising computer readable instructions contained in or loaded into non-transitory memory) to yield substantially the same result (storing the edited website template on servers which can be accessed by a third party request to the server). BigCommerce would thus be liable for direct infringement under the doctrine of equivalents.

34. BigCommerce may have infringed the '122 Patent through other software, currently unknown to Diem, utilizing the same or reasonably similar functionality, including other versions of the Storefront Manager service. Diem reserves the right to discover and pursue all such additional infringing software.

35. BigCommerce has indirectly infringed and continues to indirectly infringe at least claims 1, 3, 5, 6, 8, 9, and 11 of the '122 Patent in this judicial district and elsewhere in the United States by, among other things, actively inducing the using, offering for sale, selling, and/or importation of at least the Storefront Manager service. BigCommerce's customers who use such software in accordance with BigCommerce's instructions directly infringe one or more of the above identified claims of the '122 Patent in violation of 35 U.S.C. § 271.

36. BigCommerce instructs its users directly and/or indirectly in the use of the Storefront Manager through Internet demonstrations, training videos, brochures and administration, maintenance, installation and/or user guides, such as those listed at the following:

www.bigcommerce.com

<https://play.google.com/store/apps>

BigCommerce is thereby liable for infringement of the '122 Patent pursuant to 35 U.S.C. § 271(b).

37. BigCommerce has indirectly infringed and continues to indirectly infringe at least claims 1, 3, 5, 6, 8, 9, and 11 of the '122 Patent, by among other things, contributing to the direct infringement by others, including without limitation users of the Storefront Manager service, by making, using, offering to sell, or selling, in the United States, and/or importing a component of a patented machine, manufacture, or combination, or an apparatus for use in the practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in infringement of the '122 Patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use.

38. For example, BigCommerce's Storefront Manager service that allows users to receive and edit a website template is a component of a patented machine, manufacture, or combination, or an apparatus for use in practicing a patented process. Furthermore, such software is a material part of the invention and upon information and belief is not a staple article or commodity of commerce suitable for substantial non-infringing use. Thus, BigCommerce is liable for infringement pursuant to 35 U.S.C. § 271(c).

39. BigCommerce will have been on notice of the '122 Patent since, at the latest, the service of the initial complaint. By the time of trial, BigCommerce will thus have known and intended (since receiving such notice), that its continued action would actively induce and contribute to actual infringement of at least claims 1, 3, 5, 6, 8, 9, and 11 of the '122 Patent.

40. Diem has been damaged, reparably and irreparably, by BigCommerce's infringement of the '122 Patent and such damage will continue unless BigCommerce is enjoined.

PRAYER FOR RELIEF

Diem requests the Court enter judgment against BigCommerce as follows:

(A) that BigCommerce has infringed the '122 Patent;

(B) awarding Diem its damages suffered as a result of BigCommerce's infringement of the '122 Patent pursuant to 35 U.S.C. § 283;

(C) enjoining BigCommerce, their officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries and parents, and all others acting in concert or privity with them from infringing the '122 Patent pursuant to 35 U.S.C. § 283;

(D) awarding Diem its costs, attorneys' fees, expenses and interest, and

(E) granting Diem such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Diem hereby demands trial by jury on all issues so triable pursuant to Fed. R. Civ. P. 38.

Dated : May 26, 2017

Respectfully submitted,

/s/ Brett Rismiller

Brett Rismiller

CA State Bar No. 295634

Admitted Pro Hac Vice

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ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned certifies that on May 26, 2017, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3).

/s/ Brett Rismiller

Brett Rismiller