

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

GEMINI IP, LLC

Plaintiff,

v.

BMC SOFTWARE, INC.

Defendant.

Case No. 4:12-CV-590

**COMPLAINT FOR PATENT
INFRINGEMENT**

DEMAND FOR JURY TRIAL

Plaintiff Gemini IP, LLC (“Gemini”) hereby alleges for its Complaint against defendant BMC Software, Inc. (“Defendant”) on personal knowledge as to its own actions and on information and belief as to the actions of others, as follows:

PARTIES

1. Plaintiff Gemini is a Texas limited liability company with its principal place of business at 207C North Washington Avenue, Marshall, Texas 75670.

2. On information and belief, Defendant BMC Software, Inc. (“BMC”) is a Delaware corporation with its principal place of business at 2101 CityWest Boulevard, Houston, Texas 77042-2827. BMC may be served through their registered agent, CT Corporation, 350 N. St. Paul St. Ste. 2900, Dallas, Texas 75201.

JURISDICTION AND VENUE

3. This action arises under the patent laws of the United States, Title 35 of the United States Code. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

4. Personal jurisdiction and venue are proper in this district under 28 U.S.C. §§ 1391(b), 1391(c) and 1400(b). On information and belief, Defendant has transacted business in this district, and/or has committed, contributed to, and/or induced acts of patent infringement in this district.

5. On information and belief, Defendant is subject to this Court's specific and general personal jurisdiction pursuant to due process and/or the Texas Long Arm Statute, due at least to its substantial business in this forum, including: (i) at least a portion of the infringements alleged herein; and (ii) regularly doing or soliciting business, engaging in other persistent courses of conduct, and/or deriving substantial revenue from goods and services provided to individuals in Texas and in this judicial district.

COUNT I

INFRINGEMENT OF U.S. PATENT NO. 6,177,932

6. Gemini is the owner by assignment of United States Patent No. 6,177,932 ("the '932 Patent") entitled "Method and Apparatus for Network Based Customer Service." The '932 Patent originally issued on January 23, 2001 and a re-examination certificate issued on September 14, 2010. A true and correct copy of the '932 Patent is attached as Exhibit A and the re-examination certificate is attached as Exhibit B.

7. Messrs. Frank A. Galdes and Mark A. Ericson are listed as the inventors on the '932 Patent.

8. Upon information and belief, Defendant has been and now is directly, literally, and/or upon information and belief, jointly, equivalently, and/or indirectly infringing (by way of inducing infringement by others, and/or contributing to the infringement by others) the '932 Patent in the State of Texas, in this judicial district, and elsewhere in the United States by, among

other things, making, using, operating, offering to sell, and/or selling customer service, customer support, and/or customer care systems that provide remote access and support for consumers and businesses, examples of which are described online at <http://www.bmc.com/products/track-it/track-it.html>, that are covered by one or more claims of the '932 Patent, to the injury of Gemini. Defendant is thus liable for infringement of the '932 Patent pursuant to 35 U.S.C. § 271.

9. Defendant has been and now is indirectly infringing by way of inducing infringement by others and/or contributing to the infringement by others of the '932 Patent in the State of Texas, in this judicial district, and elsewhere in the United States, by, among other things, making, using, importing, offering for sale, and/or selling, without a license or authority, products for use in systems that fall within the scope of one or more claims of the '932 Patent ("The Accused Products"). The Accused Products include, without limitation, the BMC Track-IT! product. Such products have no substantial non-infringing uses and are for use in systems that infringe '932 Patent. By making, using, importing, offering for sale, and/or selling such products, Defendant injured Gemini and is thus liable to Gemini for infringement of the '932 Patent under 35 U.S.C. § 271. Those whom Defendant induces to infringe and/or whose infringement to which Defendant contributes are the end users of the Accused Products. Defendant had knowledge of the '932 Patent at least as early as the service of this complaint and is thus liable for infringement of one or more claims of the '932 Patent by actively inducing infringement and/or is liable as a contributory infringer of one or more claims of the '932 patent under 35 U.S.C. §271.

10. To the extent that facts learned in discovery show that Defendants' infringement is, or has been willful, Plaintiff reserves the right to request such a finding at time of trial.

11. On information and belief, to the extent any marking was required by 35 U.S.C. § 287, predecessors in interest to the '932 Patent complied with such requirements.

12. As a result of Defendant's infringement of the '932 Patent, Gemini has suffered monetary damages in an amount not yet determined, and will continue to suffer damages in the future unless Defendants' infringing activities are enjoined by this Court.

13. Unless a permanent injunction is issued enjoining Defendant and its agents, servants, employees, attorneys, representatives, affiliates, and all others acting on their behalf from infringing the '932 Patent, Gemini will be greatly and irreparably harmed.

14. On information and belief, Defendant has continued to infringe the '932 Patent since receiving notice of their infringement, at least by way of their receiving notice of this lawsuit. On information and belief, such continued infringement has been objectively reckless including because Defendant has (1) acted despite and objectively high likelihood that its actions constituted infringement of a valid patent and (2) knew or should have known of that objectively high risk. Accordingly, Gemini seeks a willfulness finding against Defendant relative to its infringement of the '392 Patent entitling Gemini to increase damages under 35 U.S.C. § 284 as well as attorneys' fees and costs under 35 U.S.C. § 285.

15. On information and belief, Defendant has at least had constructive notice of the '932 Patent by operation of law.

WHEREFORE, Gemini incorporates each of the allegations in paragraphs 1 through 15 above and respectfully requests that this Court enter:

1. A judgment in favor of Gemini that Defendant has infringed, directly, jointly, and/or indirectly (by way of inducing and/or contributing to the infringement) the '932 Patent;

2. A permanent injunction enjoining Defendant and its officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in concert or privity, with any of them, from infringing, directly, jointly, and/or indirectly (by way of inducing and/or contributing to the infringement) the '932 Patent;

3. A judgment and order requiring Defendant to pay Gemini its damages, costs, expenses, and prejudgment and post-judgment interest for Defendants' infringement of the '932 Patent as provided under 35 U.S.C. § 284;

4. A judgment and order finding that this is an exceptional case within the meaning of 35 U.S.C. § 285, and awarding to Gemini its reasonable attorney fees; and

5. Any and all other relief to which Gemini may show itself to be entitled.

DEMAND FOR JURY TRIAL

Plaintiff, under Rule 38 of the Federal Rules of Civil Procedure, requests a trial by jury of any issues so triable by right.

Dated: September 13, 2012

Respectfully submitted,

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