

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

PB&J Software, LLC	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 4:12-cv-00691-CDP
	)	
BackupAgent, B.V.,	)	Judge Catherine Perry
	)	
Defendant.	)	JURY TRIAL DEMANDED

**AMENDED COMPLAINT FOR PATENT INFRINGEMENT**

PB&J Software, Inc. (PB&J) states the following for its Amended Complaint against BackupAgent BV (BackupAgent):

**Jurisdiction and Venue**

1. This is an action for patent infringement under Title 35 of the United States Code. PB&J is seeking injunctive relief as well as damages.
2. Subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (federal question) and 1338(a) (patents).
3. Venue is proper under 28 U.S.C. §§ 1391(c).
4. Plaintiff is a Missouri limited liability company with its principal place of business at 11880 Conway Road, St. Louis, MO 63131.
5. On information and belief, Defendant BackupAgent B.V. is a Netherlands corporation with its principal place of business at Staalweg 44, 2612 KK Delft, The Netherlands. On information and belief, BackupAgent does business throughout the United States, including within this judicial district.
6. This Court has personal jurisdiction over Defendant because, on information and

belief, Defendant does business in this district and/or has systematic and continuous contacts in this district.

### **The Infringed Patent**

7. The United States Patent and Trademark Office duly and legally issued United States Patent No. 7,356,535 (“the ‘535 Patent”) entitled “Method and System for Sharing Storage Space on a Computer” on April 8, 2008. A copy of the ‘535 Patent is attached as Exhibit A.

8. The ‘535 Patent discloses and claims a tangible computer readable storage medium having computer executable instructions for execution by a processor for facilitating the transfer of back-up copies of one or more files from a first computer to a second computer via a communications network or via a portable computer readable storage medium and also a computer implemented method for facilitating the transfer of back-up copies of one or more files from a first computer via a communications network to a destination computer at a remote location from the first computer.

9. PB&J owns all rights, title and interest in the ‘535 Patent via assignment.

### **Actions Giving Rise to this Complaint**

10. BackupAgent provides backup services and software for both home and enterprise users.

11. BackupAgent licenses software, including its BackupAgent client software, to end users for backing up the user’s computer to media attached to the computer directly or through a computer network and for subsequently backing up the user’s computer files to BackupAgent’s servers and equipment across a wide area network (“online backup”).

12. In conjunction with BackupAgent’s software, BackupAgent provides a service called BackupAgent cloud backup that incorporates a featured that it calls “seed loading.” “Seed

Loading” allows a user to back up the user’s files to a portable storage medium and then ship that storage medium to BackupAgent to “seed” the online backup. See Exhibit B (BackupAgent software description); Exhibit C (BackupAgent software “How to backup and restore data using offline media”).

13. By using initial seeding, users can write their first backup to a removable hard drive and then ship it to BackupAgent for seeding the initial backup onto BackupAgent’s servers, thus avoiding the need to send a lot of data via a slow and potentially costly internet connection.

14. In conjunction with BackupAgent’s software, BackupAgent’s client software allows file recovery to be performed via a portable storage medium as well. See Exhibit C.

15. BackupAgent provides instructions for its users to obtain, license and use its software, to obtain a license from it for an initial seed backup, to access and utilize its services, servers and equipment, to obtain a portable storage medium, and to ship the portable storage medium to BackupAgent to “seed” an online backup.

16. A reasonable inference to be drawn from the facts set forth above is that BackupAgent and BackupAgent’s customers are using BackupAgent’s software, equipment and services to perform “seed” backups and large scale file recovery. PB&J hereby asserts this reasonable inference as true.

17. Since no later than on or about May 15, 2012 and likely prior to this date, BackupAgent has been aware of PB&J’s rights in the ‘535 Patent and continues to license its software, distribute copies thereof, provide access to its servers for initial seed and recovery services, and upon information and belief, with full knowledge that doing is in violation of PB&J’s rights.

18. These facts and reasonable inferences establish that BackupAgent actively

encourages customers to use its software, equipment and services to utilize initial seed and recovery features to use apparatus claimed in the '535 Patent and to practice the methods claimed in the '535 Patent.

19. These facts and reasonable inferences also establish that BackupAgent is affirmatively intending to contribute to and actively inducing the infringement of the '535 Patent by marketing, providing and licensing its software and services and using its equipment and to provide access to BackupAgent's initial seed and recovery services as components of a patent machine, manufacture or combination and to practice the methods claimed in the '535 Patent, knowing the same to be especially made or especially adapted for infringement of the '535 Patent, and the initial seed and recovery portions of its software and services are not staple articles or commodities of commerce for substantial noninfringing use, and BackupAgent encouraging users to do so without leave or license of PB&J, and in violation of PB&J's rights.

**COUNT I—DIRECT PATENT INFRINGEMENT UNDER 35 U.S.C. § 271(a)**

20. Plaintiff incorporates the above paragraphs 1-19 herein by reference.

21. Plaintiff is the assignee of and owns all right, title and interest in and has standing to sue for infringement of the '535 Patent.

22. The '535 Patent is valid, enforceable and was duly issued in full compliance with Title 35 of the United States Code.

23. Defendant is infringing in the United States and this District, at least one claim of the '535 Patent. Such infringing activities by Defendant include making, using, importing, selling and/or offering its backup software products, servers and equipment and initial seeding and recovery features. The infringing activities include, but are not limited to, offering those services, distributing and licensing at least its BackupAgent client software and providing access

to its servers and equipment for its BackupAgent cloud backup and recovery service which implements the initial seeding and recovery features.

24. Defendant has derived substantial revenue from its infringement.

25. Defendant's actions as described herein constitute infringement of at least one claim of the '535 Patent in violation of 35 U.S.C. §§ 271(a), 281-285.

26. Defendant's infringement is willful because Defendant has infringed the '535 Patent as alleged herein, with knowledge of the '535 Patent.

27. This case is exceptional pursuant to the provisions of 35 U.S.C. § 285.

28. Defendant's actions complained of herein are causing irreparable harm and monetary damage to Plaintiff and will continue to do so unless and until Defendant is enjoined and restrained by this Court.

**COUNT II—CONTRIBUTORY PATENT INFRINGEMENT UNDER 35 U.S.C. § 271(c)**

29. PB&J repeats and realleges the allegations contained in Paragraphs 1-28 above as if fully set forth herein.

30. BackupAgent markets its BackupAgent client software and its BackupAgent cloud backup service, having the initial seed and recovery features, on its website and elsewhere to potential customers and computer users.

31. BackupAgent describes how to utilize its access its software and services to perform initial seed backups.

32. Without BackupAgent's software, equipment and services, BackupAgent's customers would not be able to perform initial seeding of backups.

33. Thus, BackupAgent's software, equipment and services are a critical component and material part of a patented machine, manufacture or combination claimed in the '535 Patent and

a critical component and material part of a combination practicing the process claimed in the '535 Patent.

34. Since no later than on or about May 15, 2012 and prior to this Amended Complaint, BackupAgent has been aware of PB&J's rights in the '535 Patent and continues to license its software, distribute copies thereof, provide access to its servers and equipment for initial seed and recovery services, and upon information and belief, with full knowledge that doing is in violation of PB&J's rights.

35. BackupAgent is affirmatively intending to contribute to infringement of the '535 Patent by marketing, providing and licensing its software and services and using its equipment and to provide access to BackupAgent's initial seed and recovery services as components of a patented machine, manufacture or combination as claimed in the '535 Patent and to practice the methods claimed in the '535 Patent, knowing the same to be especially made or especially adapted for infringement of the '535 Patent, and software code for performing the initial seed and recovery features of its software and services are not staple articles or commodities of commerce for substantial noninfringing use, and BackupAgent is encouraging users to infringe without leave or license of PB&J, and in violation of PB&J's rights.

36. Upon information and belief, BackupAgent has profited and will continue to profit from contributing to the infringement of the '535 Patent.

37. BackupAgent's actions with regard to contributing to the infringement of the '535 Patent has caused and will continue to cause PB&J substantial and irreparable injury, for which PB&J is entitled to receive injunctive relief and adequate compensatory damages.

38. Further, the actions of BackupAgent with regard to contributing to the infringement of the '535 Patent are willful such that PB&J is entitled to treble damages under 35 U.S.C. § 284.

**COUNT III—ACTIVE INDUCEMENT OF PATENT INFRINGEMENT**  
**UNDER 35 U.S.C. § 271(b)**

39. PB&J repeats and realleges the allegations contained in Paragraphs 1-38 above as if fully set forth herein.

40. BackupAgent's website, found at <http://www.BackupAgent.com> provides a comprehensive description of BackupAgent's services and software, including BackupAgent client software and BackupAgent cloud backup service, partnerships, press releases, contact information, corporate structure, company history, business successes, job openings, and privacy policies. Upon information and belief, BackupAgent regularly updates its website.

41. BackupAgent's website is publicly accessible, and nearly all of BackupAgent's webpages can be viewed without providing login or password information. BackupAgent's website is targeted to, and viewed by, potential home and enterprise computer users who desire to backup their computer files online and recover their computer files saved on an online source.

42. BackupAgent's website includes a product description of its software and services, including BackupAgent client software and BackupAgent cloud backup services having initial seeding and recovery. The website provides descriptions of the initial seeding and recovery features. See Exhibit B-C. BackupAgent uses its website to announce new innovations and partnerships of relevance to its backup customers.

43. The reasonable inference to be drawn from the facts set forth above is that BackupAgent actively and intentionally updates its website to promote its products and services to encourage potential customers to use those products in the manner described by BackupAgent. PB&J hereby asserts this reasonable inference as true.

44. Upon information and belief, BackupAgent also announces and advertises its product and service offerings through trade journals, industry newsletters, and other websites visited by

its file backup customers.

45. The further reasonable inference to be drawn from the facts set forth above is that BackupAgent actively takes steps to update its website to promote BackupAgent client software and BackupAgent cloud backup services to encourage customers to utilize the apparatus claimed in the '535 Patent and practice the process claimed in the '535 Patent. PB&J hereby asserts this reasonable inference as true.

46. Upon information and belief, BackupAgent regularly participates in and displays its products and services at national and international trade shows for demonstration to potential customers, vendors and resellers in the computer file backup industry.

47. Upon information and belief, BackupAgent encourages customers and potential customers to meet with company representatives during any of its scheduled appearances at trade shows and conventions.

48. The reasonable inference to be drawn from the facts set forth above is that BackupAgent participates in national and international trade shows and conferences to actively encourage potential customers to purchase its products and services. PB&J hereby asserts this reasonable inference as true.

49. Another reasonable inference to be drawn from the facts set forth above is that BackupAgent actively takes steps to display its software and services at national and international trade shows and conferences and demonstrate how it can be used in a manner that infringes the '535 Patent. PB&J hereby asserts this reasonable inference as true.

50. Since no later than on or about May 15, 2012 and likely prior to this date, BackupAgent has been aware of PB&J's rights in the '535 Patent and continues to license its software, distribute copies thereof, provide access to its servers for initial seed and recovery



services, and upon information and belief, with full knowledge that doing is in violation of PB&J's rights.

51. Nevertheless, BackupAgent continues to take active steps to market and sell its software and services to potential customers.

52. BackupAgent maintained and created strategic partnerships and alliances, after May 15, 2012, to promote and sell its software and services to potential customers.

53. Based upon the facts and reasonable inferences contained herein, BackupAgent and BackupAgent's backup customers continue to use the initial seed and large file recovery services in a manner that infringes the apparatus and process claimed in the '535 Patent.

54. The reasonable inference to be drawn from the facts set forth above is that BackupAgent knowingly and affirmatively intends to actively induce infringement of the '535 Patent.

55. Based upon the facts and reasonable inferences contained herein, BackupAgent knowingly sells, offers to sell, encourages, and intends for its customers to use its software, equipment and services in a manner that causes infringement of the patented apparatus and process claimed in the '535 Patent. BackupAgent's conduct amounts to active inducement of infringement in violation of 35 U.S.C. § 271(b).

56. Upon information and belief, BackupAgent has profited and will continue to profit from actively inducing the infringement of the '535 Patent.

57. BackupAgent's actions with regard to actively inducing the infringement of the '535 Patent has caused and will continue to cause PB&J substantial and irreparable injury, for which PB&J is entitled to receive injunctive relief and adequate compensatory damages.

58. Further, BackupAgent's actions with regard to actively inducing the infringement of

the '535 Patent are willful such that PB&J is entitled to treble damages under 35 U.S.C. § 284.

**Demand for Relief**

WHEREFORE, PB&J respectfully requests that this Court enter judgment as follows:

- A. Enter judgment for Plaintiff on this Complaint;
- B. Enjoin Defendant, its agents, officers, servants, employees, attorneys and all persons in active concert or participation with Defendant who receive notice of the order from further infringement of the '535 Patent under 35 U.S.C. § 271(a)-(c);
- C. Award Plaintiff damages resulting from Defendant's infringement in accordance with 35 U.S.C. § 284;
- D. Award treble the damages in accordance with the provisions of 35 U.S.C. § 284;
- E. Find the case to be exceptional under the provisions of 35 U.S.C. § 285;
- F. Award Plaintiff reasonable attorney fees under 35 U.S.C. § 285;
- G. Award Plaintiff interest including, but not limited to, prejudgment and post judgment interest, and costs; and
- H. Award Plaintiff such further relief to which the Courts finds Plaintiff entitled under law or equity.

**Jury Demand**

PB&J demands a trial by jury to the extent permitted by applicable law.

Respectfully Submitted,

Date: November 8, 2012

POLSTER, LIEDER, WOODRUFF & LUCCHESI, L.C.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2012, the foregoing document was electronically filed with the United States District Court for the Eastern District of Missouri using the CM/ECF system, which sent notification of such filing to all counsel of record who have registered with the CM/ECF system. Any other counsel of record will be served by U.S. mail.

/s/ Nelson D. Nolte