

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

QEXEZ, LLC,

Plaintiff,

v.

KEYNOTE SYSTEMS, INC.,

Defendant.

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§ **CIVIL ACTION NO. 2:12-cv-751**
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§ **JURY TRIAL DEMANDED**
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PLAINTIFF’S FIRST AMENDED COMPLAINT

Plaintiff Qexez, LLC (“QE” or “Plaintiff”) by and through its undersigned counsel, files this Original Complaint against Defendant Keynote Systems, Inc. (“Keynote” or “Defendant”), as follows:

NATURE OF THE ACTION

1. This is a patent infringement action to stop Defendant’s infringement of Plaintiff’s United States Patent No. 7,596,373 entitled “*Method and System For Quality of Service (QOS) Monitoring For Wireless Devices*” (“the ‘373 patent”; referred to as “the Patent-in-Suit”). A copy of the ‘373 Patent is attached hereto as Exhibit A. QE is the assignee of the Patent-in-Suit. Plaintiff seeks injunctive relief and monetary damages.

PARTIES

2. Plaintiff Qexez LLC is a limited liability company organized and existing under the laws of Texas with its principal place of business at 430 North Center Street, Suite 100, Longview, Texas 75601. QE is the assignee of all title and interest of the Patent-in-suit and possesses the entire right to sue for infringement and recover past damages.

3. Upon information and belief, Defendant Keynote Systems, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 777 Mariners Island Boulevard, San Mateo, CA 94404.

JURISDICTION AND VENUE

4. This action arises under the Patent Laws of the United States, 35 U.S.C. § 1 *et seq.*, including 35 U.S.C. §§ 271, 281, 283, 284, and 285. This Court has subject matter jurisdiction over this case for patent infringement under 28 U.S.C. §§ 1331 and 1338(a).

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 their 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 businesses in Texas and in this Judicial District.

6. More specifically, Defendant, directly and/or through intermediaries, utilizes, distributes, offers for sale, sells, advertises, uses, performs, and/or maintains wireless test solutions that practice methods of monitoring quality of service associated with a packet-based wireless network in the United States, the State of Texas, and the Eastern District of Texas. Defendant has committed patent infringement in the State of Texas and in the Eastern District of Texas, and/or has induced others to commit patent infringement in the State of Texas and in the Eastern District of Texas. Defendant solicits customers in the State of Texas and in the Eastern District of Texas. Defendant has paying customers who are residents of the State of Texas and the Eastern District of Texas and who use the Defendant's products and services in the State of Texas and in the Eastern District of Texas.

7. Venue is proper in the Eastern District of Texas pursuant to 28 U.S.C. §§ 1391 and 1400(b).

COUNT I – PATENT INFRINGEMENT

8. QE refers to and incorporates herein the allegations of Paragraphs 1-7 above.

9. United States Patent No. 7,596,373 entitled “*Method and System For Quality of Service (QOS) Monitoring For Wireless Devices*” was duly and legally issued by the United States Patent and Trademark Office on September 29th, 2009 after full and fair examination. Plaintiff is the assignee of all rights, title, and interest in and to the ‘373 patent and possesses all rights of recovery under the ‘373 patent including the right to sue for infringement and recover past damages.

10. Defendant utilizes, uses, performs, maintains, operates, advertises, controls, sells, and otherwise provides hardware and software that infringes the ‘373 patent. The ‘373 patent provides, among other things, a “method of monitoring quality of service associated with a packet-based wireless network, the wireless network including at least one wireless device and a fixed transceiver wherein the wireless device comprises a mobile handset having an internal processor, an internal memory and a user input for input of data by a user of the wireless device, the method comprising: embedding a program in the processor for processing quality of service data in the handset, monitoring, by the wireless device, communication data packets associated with a communication link established between the wireless device and the wireless network; determining at least one quality of service metric to measure with respect to a user of the wireless device; receiving quality of service data from the communication data packets relevant to determine a quality of service; storing quality of service data in the memory of the handset; processing the quality of service data in the handset in a manner relevant to determining the

quality of service sing the embedded quality of service program in the processor; and, wirelessly providing the processed data to the fixed transceiver wherein at least one quality of service data is input by the user using the wireless device.”

11. Defendant has infringed and continues to infringe one or more claims of the ‘373 patent by making, using, providing, offering to sell, selling, utilizing, using, performing, and/or maintaining (directly or through intermediaries), in this district and elsewhere in the United States, systems and methods to monitor quality of service data for wireless devices by way of a mobile handset, transreceiver, and wireless device. More particularly, Defendant sells and/or requires and/or directs users to access and/or use hardware components communicating with a software system on a wireless device that formulates quality of service data to assesses health of Defendant’s customers applications and websites as used by mobile devices over wireless networks in a manner claimed in the ‘373 patent.

12. Defendant infringes the ‘373 patent by providing its Direct to Device technology, an Internet-based platform used by the Defendant’s DeviceAnywhere product line, to provide spot, manual, and/or automatic testing of communication performance over airwaves, including 3G and 4G wireless networks. Testing and monitoring of performance is assessed to insure the metrics are performing at a desired level, otherwise known as Quality of Service (QOS). Defendant’s technology combination monitors QOS associated with a packet-based wireless network for use by its customers in ascertaining the end-user experience in real-time when interacting with the customer’s technology and/or content over the Internet via a mobile device. Next generation wireless networks, such as 3G and 4G, are packet-based wireless networks that offer increased speeds and a continuous Internet connection. Packet-based networks consist of a base station (i.e. fixed transreceiver) and at least one wireless device, having an internal

processor (e.g. a MicroController Unit) and memory inside of the mobile handset. User input is achieved when the Defendant's technology detects the mobile handset user's usage, a salient feature of Defendant's DeviceAnywhere products. For example, the user inputs a URL address or downloads a mobile application from the Internet. The user has input data into the wireless device, allowing Defendant's technology to detect what data has been input (e.g. the URL address) for the purpose of ascertaining the end-user's experience in visiting that URL address or downloading that mobile application.

13. To monitor the user's experience with their mobile device, as the Defendant's DeviceAnywhere products do, it follows that a program (e.g. a third party software application) is embedded in the mobile device's processor inside of the handset. This program processes the data related to the end-user's experience (e.g. keystrokes, speed, connection failure) as the user interacts with their mobile device and the Internet over the wireless packet-based network.

14. Defendant's DeviceAnywhere products monitor, by the embedded program inside of the end-user's wireless device, communication information established between the device and the network; specifically, in the case of Defendant's DeviceAnywhere products, communication information related to QOS of customers websites and/or mobile applications over wireless networks.

15. Evidence of at least one QOS metric used to ascertain the end-user's experience is evident by the product line's testing capability. For example, Defendant markets its DeviceAnywhere Test Center Monitoring product as providing non-stop performance and responsiveness monitoring of application and websites. Real-time testing results of scripts, algorithms, mobile outages, transaction times, and user access are all evidence of QOS metrics

Defendant's DeviceAnywhere products measure with respect to an end-user of the wireless device.

16. Defendant can detect these service issues by receiving data relevant to determine the measurement criteria, as is necessary to achieve the testing and monitoring features of Defendant's DeviceAnywhere products.

17. Data relevant to QOS measurement criteria is collected and stored in the memory of the mobile handset. For example, Defendant's customers can retrieve screen shots and frame-by-frame views of the device and content interaction. To achieve this functionality, data relevant to QOS monitoring is recorded and stored in the mobile handset.

18. Defendant's performance tracking, test reporting, and screen shots are evidence that the QOS data is processed in the mobile handset using the embedded QOS program. The recorded data is attributed to QOS metrics according to the specifications of the Defendant's program.

19. After the QOS data is processed by the embedded application, the data is wirelessly sent to the base station (i.e. fixed transreceiver) where a network probe detects the processed QOS data, including at least one QOS data that is input by the end-user (e.g. the URL address). The processed data is then routed to Defendant's server to eventually be accessed by Defendant's customer as part of the Defendant's DeviceAnywhere real-time monitoring and testing.

20. Each of Defendant's aforesaid activities has been without authority and/or license from Plaintiff.

21. Plaintiff is entitled to recover from the Defendant the damages sustained by Plaintiff as a result of Defendant's wrongful acts in an amount subject to proof at trial, which, by

law, cannot be less than a reasonable royalty, together with interest and costs as fixed by this Court under 35 U.S.C. § 284.

22. Defendant's infringement of Plaintiff's exclusive rights under the '373 patent will continue to damage Plaintiff, causing irreparable harm for which there is no adequate remedy at law, unless enjoined by this Court.

JURY DEMAND

23. Plaintiff hereby requests a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure.

PRAYER FOR RELIEF

24. Plaintiff respectfully requests that the Court find in its favor and against Defendant, and that the Court grant Plaintiff the following relief:

- A. An adjudication that one or more claims of the '373 patent has been infringed, either literally and/or under the doctrine of equivalents, directly, by Defendant;
- B. An award to Plaintiff of damages adequate to compensate Plaintiff for the Defendant's acts of infringement together with pre-judgment and post-judgment interest;
- C. A grant of permanent injunction pursuant to 35 U.S.C. § 283, enjoining the Defendant from further acts of infringement with respect to the claims of the Patent-in-Suit;
- D. Any further relief that this Court deem just and proper.

Dated: April 1, 2013

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
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CERTIFICATE OF SERVICE

I hereby certify that counsel of record who are deemed to have consented to electronic service are being served this 1st day of April, 2013, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

/s/ James A. Fussell, III
James A. Fussell, III