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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION**

UNION HOSPITAL, INC.,)	
)	
Plaintiff,)	Case No. 2:14-cv-45
)	
vs.)	
)	
ATTACHMATE CORPORATION,)	
)	
Defendant.)	

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Union Hospital, Inc. (“Union Hospital”), brings this action against Defendant Attachmate Corporation (“Attachmate”), and states as follows:

INTRODUCTION

1. Since at least 1997, Union Hospital, a not-for-profit regional hospital, has been licensed to use Attachmate software for which it paid tens of thousands of dollars. In 2013, Attachmate conducted an audit of Union Hospital’s use of Attachmate software products. Despite the fact that the audit revealed that in most instances Union Hospital’s actual usage did not exceed the licenses purchased, Attachmate, for the first time, alleged that Union Hospital had used the software beyond the alleged terms of the licenses and demanded that Union Hospital pay Attachmate over \$2,000,000 in license fees, interest and other charges. Consistent with its history and reputation with other customers, Attachmate has threatened to initiate litigation against Union Hospital. Union Hospital disagrees with both the charge of liability and the existence and extent of Attachmate’s alleged damages. Therefore, to resolve these disagreements, Union Hospital brings this Complaint for declaratory and other relief.

THE PARTIES

2. Plaintiff, Union Hospital, is a not-for-profit Indiana corporation whose principal place of business is Terre Haute, Indiana.

3. As a not-for-profit regional hospital, Union Hospital exists to provide compassionate healthcare to all residents of the Wabash Valley community, regardless of their ability to pay. Further, as a not-for-profit, all excess revenues of Union Hospital are reinvested in the community it serves.

4. Defendant, Attachmate, is a Washington corporation whose principal place of business is located in Seattle, Washington.

5. According to its website, Attachmate is one of the largest PC software companies in the world, with 40 offices doing business in 145 countries around the world. In 2011, Attachmate purchased Novell for 2.2 billion dollars. Upon information and belief, Attachmate is one of four business units in a privately held enterprise software holding company called The Attachmate Group.

JURISDICTION AND VENUE

6. There is a case of actual controversy between the parties for which declaratory relief is sought, pursuant to 28 U.S.C. §§ 2201 and 2202, regarding their respective rights and other legal relations arising under the Copyright Act, 17 U.S.C. §§ 101 et seq.

7. This Court has original subject matter jurisdiction over this action under the following statutes: 28 U.S.C. § 1331, in that this is an action arising under the laws of the United States; 28 U.S.C. § 1332, in that the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and Union Hospital and Attachmate are citizens of different states; 28 U.S.C. § 1338(a), in that this is a civil action arising under an Act of Congress relating to copyrights; and U.S.C. § 1367, because these claims are so related to the claims in the action

within this Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution

8. The parties' dispute is an actual controversy existing between parties having adverse legal interests and is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

9. The Court has jurisdiction over Attachmate pursuant to Indiana Trial Rule 4.4(A).

10. Attachmate has purposefully directed its activities toward residents of Indiana and otherwise purposefully availed itself of the privileges of conducting activities within Indiana, thus invoking the benefits and protections of its laws. Additionally, Attachmate is registered to do business in Indiana.

11. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391 and 1400(a).

12. For venue purposes, Attachmate resides in this judicial district. At the time this action is being commenced, Attachmate is subject to personal jurisdiction in Indiana and in this judicial district.

13. A substantial part of the events or omissions giving rise to Union Hospital's claims occurred within this judicial district with respect to this civil action.

THE FACTS

14. Union Hospital has used Attachmate software products for many years pursuant to its various licenses without complaint from Attachmate.

15. During the time that Union Hospital used the licenses for Attachmate software, these products have been marketed under different names, including various versions of products named "EXTRA!" and "Reflection."

16. Until August 2013, Union Hospital cannot recall Attachmate ever requesting an audit of Union Hospital's computer systems for licensing compliance.

17. Thereafter, in November 2013, Attachmate provided to Union Hospital spreadsheet data showing the alleged shortfalls in the number of purchased licenses claimed by Attachmate for its various software products.

18. Through correspondence between the parties from November 2013 to the present, Attachmate demanded that Union Hospital pay Attachmate over \$2 million in license fees, pre-judgment interest at a 12% interest rate dating back for over ten years, and other costs.

19. Union Hospital disputes several of the grounds on which Attachmate bases its claims for payment.

20. According to Attachmate's spreadsheet data from which it calculates the alleged license shortfalls, the vast majority of alleged over-deployments was for the EXTRA! Personal Client.

21. Attachmate based its claim of over-deployment of this software item, not upon the actual usage of Attachmate's product, but upon the potential total number of users who could have used Attachmate software on Union Hospital's Citrix server regardless of whether the user ever accessed or used the product. This is a common scheme utilized by Attachmate in an attempt to reap windfall profits from its customers.

22. In fact, actual access to and use of Attachmate's EXTRA! software by Union Hospital personnel is far less than estimated by Attachmate.

23. In response to Attachmate's claim that its audit revealed Union Hospital had deployed more units of Attachmate's software than allowed by the respective license agreements, Union Hospital immediately corrected the problem so that only those users with licenses for Attachmate's software and who actually used it had access to it on Union Hospital's Citrix server.

24. Nevertheless, Attachmate continued to insist that Union Hospital purchase over a thousand more licenses for units of Attachmate software than Union Hospital was using or would ever require – plus maintenance fees and interest.

25. During the course of the parties' discussions, Attachmate's representatives have expressly or impliedly threatened litigation for breach of contract and/or copyright infringement if the parties could not resolve their differences.

26. Upon information and belief, Attachmate has a documented history of predatory enforcement against its customers: failing to conduct an audit for years, alleging copyright infringement and breach of contract based upon potential rather than actual usage, and then threatening and bringing claims against customers who refuse to pay windfall profits to Attachmate for alleged over-access (not over use) of its Attachmate software products. Customers against whom Attachmate has litigated against include at least: Northwest Community Hospital (Case No. 1:11-cv-06915, United States District Court for the Northern District of Illinois); Tarmac Ltd. (Case No. 2:08-cv-01370, United States District Court for the Western District of Washington); Sentry Insurance (Case No. 2:08-cv-01035-RAJ, United States District Court for the Western District of Washington); Jeld-Wen Inc. (Case No. 2:08-cv-00897-MJP, United States District Court for the Western District of Washington); United Technologies Corp. (Case No. 2:08-cv-00799-RSL, United States District Court for the Western District of Washington); Windstream Communications Inc. (Case No. 2:08-cv-00190-RSM, United States District Court for the Western District of Washington); Dell Inc. (Case No. 2:07-cv-00283-MAT, United States District Court for the Western District of Washington); Juniper Networks, Inc. (Case No. 2:07-cv-00802-RSM, United States District Court for the Western District of Washington); Carnival Corporation (Case No. 2:07-cv-01730-MJP, United States District Court

for the Western District of Washington); Health Net, Inc. (Case No. 2:09-cv-01161-MJP, United States District Court for the Western District of Washington); Public Heath Trust of Miami-Dade County Florida d/b/a Jackson Memorial Hospital (Case No. 2:09-cv-01180-JLR, United States District Court for the Western District of Washington); Celcom Axiata Berhad (Case No. 2:10-cv-00526-RSM, United States District Court for the Western District of Washington); and others.

27. Union Hospital's preliminary inquiry reveals that the online database of the United States Copyright Office suggests that some of Attachmate's alleged copyrights were not timely registered and therefore Attachmate is not entitled to claim statutory damages or to an award of attorneys' fees for those particular registrations. *See* 17 U.S.C § 412. For example, Union Hospital was unable to find any copyright registration for EXTRA! X-treme v. 9.3.

28. All conditions precedent to the prosecution of Union Hospital's claims have occurred, have been performed, or have been excused or waived.

**FIRST CAUSE OF ACTION
(Declaratory Judgment on Copyright Infringement Claims)**

29. Union Hospital repeats and re-alleges by reference Paragraphs 1 through 28 of this Complaint as if fully set forth herein.

30. The dispute created by Attachmate's repeated claims as to the software licensing is an actual, substantial, and justiciable controversy between the parties requiring resolution by the Court.

31. Upon information and belief, Attachmate contends that Union Hospital has infringed on Attachmate's copyrights including:

- a. EXTRA! Personal Client 6.7, Copyright Registration No. TX0005717997
(registered on March 26, 2002);

- b. EXTRA! X-treme v. 9.2, Copyright Registration No. TX0007377752 (registered on February 2, 2011);
- c. EXTRA! X-treme v. 9.3 (no copyright registration found);
- d. Reflection for IBM 10.00 (no copyright registration found); and
- e. Reflection Multi-Host Standard 14.10 (no copyright registration found).

32. Further, based on the dates Attachmate is alleging infringement, Union Hospital believes the present dispute may involve other software products including the following:

- a. EXTRA! Personal Client v.6.3, Copyright Registration No. TX0007439038 (registered on October 31, 2011); and
- b. Reflection for IBM 14.1, Copyright Registration No. TX0007351951 (registered on August 6, 2010).

33. Union Hospital contends any claims for copyright infringement brought by Attachmate are barred, as Union Hospital is licensed to use the software products at issue and has only actually used the copyrights consistent with the licenses granted.

34. Union Hospital further contends that any claims brought by Attachmate for copyright infringement are barred by estoppel, waiver, laches, and/or acquiescence. Attachmate unreasonably and inexcusably delayed taking action on its purported claims for copyright infringement— for example, by failing to design and/or monitor the use of its software for the possibility of customer over-deployment, and by failing to conduct timely license compliance audits of Union Hospital’s computer systems.

35. Attachmate’s copyright infringement claims are further barred to the extent they are asserted in violation of the three-year statute of limitations of the Copyright Act, 17 U.S.C. § 507(b).

SECOND CAUSE OF ACTION
(Declaratory Judgment on Copyright Infringement Claims for Unregistered Copyrights)

36. Union Hospital repeats and re-alleges by reference Paragraphs 1 through 35 of this Complaint as if fully set forth herein.

37. The dispute created by Attachmate's repeated claims as to the software licensing is an actual, substantial, and justiciable controversy between the parties requiring resolution by the Court.

38. Attachmate contends that Union Hospital has infringed on Attachmate's software products including the following:

- a. EXTRA! X-treme v. 9.3;
- b. Reflection for IBM 10.00; and
- c. Reflection Multi-Host Standard 14.10.

39. Upon information and belief, Attachmate has failed to register copyrights for the EXTRA! X-treme v. 9.3; Reflection for IBM 10.00; and; Reflection Multi-Host Standard 14.10.

40. Union Hospital therefore contends that any claims for copyright infringement brought by Attachmate based on these products are barred for failure to satisfy the precondition of registration for bringing a copyright infringement action. 17 U.S.C. §§ 411 and 412.

41. Union Hospital contends that Attachmate's alleged copyrights on these products have not been timely registered, and therefore Attachmate is not entitled to claim statutory damages or to an award of attorneys' fees for those particular copyrights. *See* 17 U.S.C § 412.

42. Union Hospital contends any claims for copyright infringement brought by Attachmate concerning these products are barred, as Union Hospital is licensed to use the software products at issue and has only actually used the copyrights consistent with the licenses granted.

43. Union Hospital further contends that any claims brought by Attachmate for copyright infringement are barred by estoppel, waiver, laches, and/or acquiescence. Attachmate unreasonably and inexcusably delayed taking action on its purported claims for copyright infringement— for example, by failing to design and/or monitor the use of its software for the possibility of customer over-deployment, and by failing to conduct timely license compliance audits of Union Hospital’s computer systems.

44. Attachmate’s copyright infringement claims are further barred to the extent they are asserted in violation of the three-year statute of limitations of the Copyright Act, 17 U.S.C. § 507(b).

**THIRD CAUSE OF ACTION
(Declaratory Judgment on Breach of Contract Claims)**

45. Union Hospital repeats and re-alleges by reference Paragraphs 1 through 44 of this Complaint as if fully set forth herein.

46. The dispute created by Attachmate’s repeated claims as to the software licensing is an actual, substantial, and justiciable controversy between the parties requiring resolution by the Court.

47. Attachmate contends that Union Hospital has breached alleged license agreements with Attachmate.

48. Union Hospital denies that its conduct constitutes a breach of Attachmate’s license agreements.

49. Union Hospital contends that several of the alleged license agreements are not legally binding because no one with authority to bind Union Hospital to the alleged license agreements accepted their terms.

50. Union Hospital further contends that the license agreements are invalid because there was no meeting of the minds concerning what constitutes Union Hospital's deployment of Attachmate's software and the fees that Union Hospital was to pay therefor.

51. Union Hospital further contends that any claims brought by Attachmate for breach of contract are barred by estoppel, waiver, laches, and/or acquiescence. Attachmate unreasonably and inexcusably delayed taking action on its purported claims for breach of contract – for example, by failing to design and/or monitor the use of its software for the possibility of customer over-deployment, and by failing to conduct timely license compliance audits of Union Hospital's computer systems

52. Attachmate's breach of contract claims are further barred to the extent they are asserted in violation of the applicable statute of limitations.

53. Alternatively, even if the license agreements were valid contracts, they assert legal and/or equitable rights that are equivalent to the exclusive rights provided under the federal Copyright Act, such that the claims are preempted by the Copyright Act, 17 U.S.C. § 301.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Union Hospital, Inc., respectfully requests that the Court provide judgment as follows:

- a. Declare that one or more of Attachmate's breach of contract claims are preempted by the Copyright Act;
- b. Declare that Attachmate's asserted license agreements are invalid and unenforceable;
- c. Declare that Union Hospital is not liable to Attachmate for copyright infringement, as Union Hospital's use of Attachmate's software was licensed;

d. Declare that Attachmate's copyright infringement and/or breach of contract claims are barred by estoppel, waiver, laches, and/or acquiescence;

e. Declare that Attachmate's copyright infringement and/or breach of contract claims are barred by the applicable statute(s) of limitations;

f. Declare that, if Attachmate's claims are allowed to proceed, any damages for Attachmate's copyright and/or breach of contract claims be substantially reduced due to Attachmate's failure to mitigate its damages;

g. Declare that Attachmate's alleged copyrights were not timely registered and therefore Attachmate is barred from seeking statutory damages and attorneys' fees for its copyright infringement claims;

h. Declare that Attachmate's copyright infringement claims based on unregistered copyrights are barred;

i. Alternatively, declare that Attachmate's is only entitled to *de minimis* damages because Union Hospital's uses did not exceed the total number of uses that it contracted for with Attachmate; and

j. Provide for any other and further relief that is just and proper.

Respectfully submitted,

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s/ Stephen E. Reynolds

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DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38, Plaintiff, Union Hospital, Inc., herein demands a trial by jury for all issues so triable.

Respectfully submitted,

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