

FEB 04 2000 EC

Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

H - 00 - 0359

DOV KLEIN, On Behalf of Himself and All)
Others Similarly Situated,)

Plaintiff,)

v.)

BMC SOFTWARE, INC., RICHARD P.)
GARDNER, STEPHEN B. SOLCHER, ROY)
J. WILSON, KEVIN M. WEISS, KEVIN M.)
KLAUSMEYER, MAX P. WATSON, JR.,)
WILLIAM M. AUSTIN, WAYNE S.)
MORRIS, M. BRINKLEY MORSE, ROBERT)
E. BEAUCHAMP, and THEODORE W.)
VAN DUYN,)

Defendants.)

Civil Action No. _____

CLASS ACTION

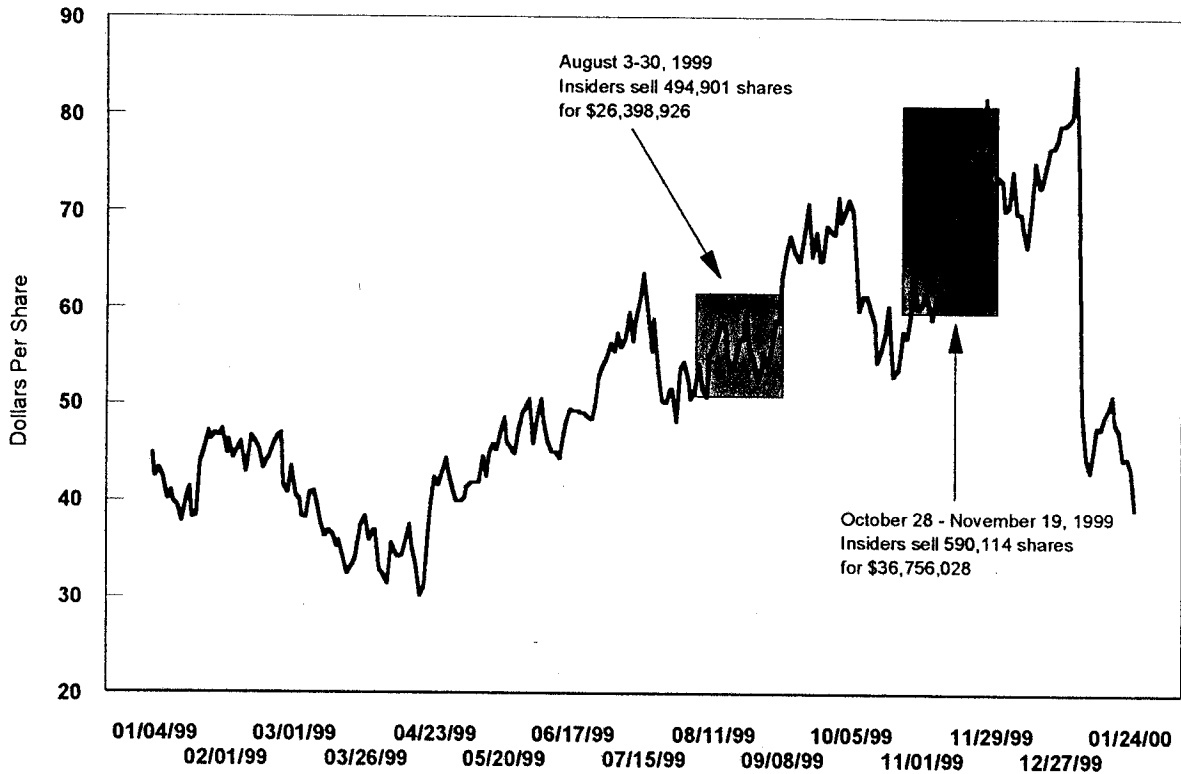
JURY TRIAL DEMANDED

COMPLAINT FOR VIOLATION OF
THE SECURITIES EXCHANGE ACT OF 1934

OVERVIEW

1. This is an action on behalf of purchasers of BMC Software, Inc. ("BMC") stock between 7/29/99-1/4/00 (the "Class Period"). Defendants' false and misleading statements about strong sales of BMC's existing software products, the successful integration of its acquisitions of Boole & Babbage and New Dimension Software earlier in 1999, strong demand for its mainframe MIPS software, notwithstanding a slow down in sales of IBM mainframe computers, and the lack of customer deferrals of orders or purchases due to Y2K concerns, which would result in 25%-30% EPS growth for BMC during F00-F01 and 3rd and 4thQ F00 EPS of \$.52-\$.55 and \$.58-\$.64, respectively, artificially inflated its stock to a Class Period high of \$86-5/8 on 1/3/00. During the Class Period, BMC insiders and controlling shareholders sold 1,085,015 shares of their BMC stock at as high as \$78.83 for \$63.1 million in illegal insider-trading proceeds. On 1/5/00, just two days after BMC's stock hit its all-time high, BMC revealed that, due to problems integrating the BMC, Boole & Babbage and New Dimension sales forces, sales execution procedures in Europe and the U.S., and weakness in demand for mainframe MIPS software products, its 3rdQ F00 results would be much worse than earlier forecast. BMC's stock fell from \$85-1/8 on 1/4/00 to \$47, an almost 50% drop in one day, and when BMC reported 3rdQ F00 EPS of just \$.41 – a *decline* from its 2ndQ F00 EPS and its year-earlier 3rdQ F99 EPS – its stock continued to fall to just \$36:

**BMC Software Inc.
January 2, 1999 - January 26, 2000
Daily Share Prices**



JURISDICTION AND VENUE

2. The claims asserted arise under §§10(b) and 20(a) of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5. Jurisdiction is conferred by §27 of the 1934 Act. Venue is proper pursuant to §27 of the 1934 Act.

THE PARTIES

3. Plaintiff Dov Klein purchased shares of BMC common stock as shown in the attached certification and was damaged thereby.

4. Defendant BMC is headquartered in Houston, Texas. BMC's common stock traded in an efficient market on the NASDAQ National Market System.

5. (a) Defendant Max P. Watson, Jr. ("Watson") was President, Chief Executive Officer and Chairman of BMC. During the Class Period, Watson sold 230,000 shares of his BMC stock based on inside information, pocketing over \$12.9 million in illegal insider-trading proceeds.

(b) Defendant William M. Austin ("Austin") was, at all relevant times, Senior Vice President and Chief Financial Officer of BMC. During the Class Period, Austin sold 45,000 shares of his BMC stock based on inside information, pocketing over \$2.5 million in illegal insider-trading proceeds.

(c) Defendant Richard P. Gardner ("Gardner") was, at all relevant times, Senior Vice President – Field Operations of BMC. During the Class Period, Gardner sold 190,800 shares of his BMC stock based on inside information, pocketing over \$11.3 million in illegal insider-trading proceeds.

(d) Defendant Robert E. Beauchamp ("Beauchamp") was, at all relevant times, Senior Vice President – Research and Development of BMC. During the Class Period, Beauchamp sold 73,852 shares of his BMC stock based on inside information, pocketing over \$4.2 million in illegal insider-trading proceeds.

(e) Defendant M. Brinkley Morse ("Morse") was, at all relevant times, Senior Vice President, Corporate Development of BMC. During the Class Period, Morse sold 120,000 shares of his BMC stock based on inside information, pocketing over \$7 million in illegal insider-trading proceeds.

(f) Defendant Kevin M. Weiss ("Weiss") was, at all relevant times, Senior Vice President – Americas of BMC. During the Class Period, Weiss sold 36,000 shares of his BMC stock based on inside information, pocketing over \$2.2 million in illegal insider trading proceeds.

(g) Defendant Roy J. Wilson ("Wilson") was, at all relevant times, Senior Vice President – Human Resources of BMC. During the Class Period, Wilson sold 15,078 shares of his BMC stock based on inside information, pocketing \$959,520 in illegal insider-trading proceeds.

(h) Defendant Wayne S. Morris ("Morris") was, at all relevant times, Vice President – Marketing of BMC. During the Class Period, Morris sold 16,000 shares of his BMC stock based on inside information, pocketing \$939,080 in illegal insider-trading proceeds.

(i) Defendant Theodore W. Van Duyn ("Van Duyn") was, at all relevant times, Chief Technology Officer of BMC. During the Class Period, Van Duyn sold 232,605 shares of his

BMC stock based on inside information, pocketing over \$13.2 million in illegal insider-trading proceeds.

(j) Defendant Kevin M. Klausmeyer ("Klausmeyer") was, at all relevant times, Vice President and Chief Accounting Officer of BMC. During the Class Period, Klausmeyer sold 57,680 shares of his BMC stock based on inside information, pocketing over \$3.4 million in illegal insider-trading proceeds.

(k) Defendant Stephen B. Solcher ("Solcher") was, at all relevant times, Vice President and Treasurer of BMC. During the Class Period, Solcher sold 68,000 shares of his BMC stock based on inside information, pocketing over \$4.1 million in illegal insider-trading proceeds.

(l) Defendant Watson acted as a controlling person of BMC within the meaning of §20(a) of the 1934 Act. By reason of his positions as CEO and Chairman of BMC and ownership of BMC stock, Watson had the power and authority to cause BMC to engage in the wrongful conduct complained of herein. BMC controlled each of the individual defendants and all of its employees. By reason of such conduct Watson and BMC are liable pursuant to §20(a) of the 1934 Act.

SCIENTER AND SCHEME ALLEGATIONS

6. Each defendant is liable for making false statements or for failing to disclose adverse facts while selling BMC stock and for participating in a scheme which operated as a fraud or deceit on purchasers of BMC stock.

7. Because of their top executive positions with BMC and involvement in the day-to-day management of its business, each individual defendant actually knew from internal corporate documents and conversations with other corporate officers and employees and their attendance at management and Board meetings, the adverse non-public information about the poor demand for sales of BMC's mainframe MIPS software products, serious problems integrating the Boole & Babbage and New Dimension acquisitions, the problems with BMC sales forces in Europe and the U.S., customer deferrals and refusals to purchase software products due to Y2K concerns, and BMC's deteriorating revenue and EPS prospects. Thus, each defendant actually knew or recklessly

disregarded that the public statements about BMC pleaded herein were false or misleading when made.

8. In addition to knowing or recklessly disregarding the falsity of their public statements, each of the defendants had the motive and the opportunity to perpetrate the fraudulent scheme and course of business described herein. Defendants' fraudulent scheme was successful. During the Class Period, while the defendants were continuing to issue false and misleading statements about BMC, they sold 1,085,015 shares of their BMC stock for illegal insider trading proceeds of \$63.1 million, thereby personally profiting from the artificial inflation in BMC's stock price their false statements caused.

FALSE OR MISLEADING STATEMENTS

9. During mid-7/99 and late 7/99 BMC stock fell sharply, declining from \$64-7/8 on 7/16/99 to as low as \$47-1/2 on 7/29/99 on investor fears that BMC's revenue and EPS growth would be below forecasted levels due to Y2K concerns, slowing demand for BMC's products and problems integrating the Boole & Babbage and New Dimension acquisitions. BMC's executives knew that investors would focus on BMC's 1stQ F00 results – the quarter ended 6/30/99 – to be announced in late 7/99 to see if the results indicated that investor concerns over BMC were correct.

10. On 7/29/99 BMC reported much better than expected 1stQ F00 results – EPS of \$.42. BMC's release stated:

"Our first quarter for fiscal 2000 was the one in which BMC Software completed its transition into a top-tier systems software provider. Following the merger with Boole & Babbage in March 1999, we successfully completed the acquisition of New Dimension Software. We have spent the quarter bringing the three companies together into what we believe is a powerful, integrated company," said Max Watson, chairman, president and chief executive officer of BMC Software.

11. On 7/29/99, subsequent to the release of its 1stQ F00 results, BMC held a conference call for analysts, money and portfolio managers, institutional investors and large BMC shareholders to discuss BMC's 1stQ F00 results, its business and its prospects. During the call – and in follow-up conversations with analysts – Watson and Austin stated:

- BMC was successfully integrating New Dimension and Boole & Babbage into its operations and business was performing better than expected.
- European sales were below plan due to slowness in integrating the Boole & Babbage merger, but operations there were now well integrated and would not interfere with BMC achieving forecasted F00 results.

- While BMC's days sales outstanding ("DSO") had increased to 86, this was due to the acquisition of Boole and Babbage and New Dimension, which had higher DSOs than BMC; BMC's DSOs would fall back to BMC's traditional 60s during the balance of F00.
- BMC was enjoying continued strong demand for its mainframe MIPS software.
- BMC expected its operating margins would reach 34%-36% by year-end F00.
- BMC was forecasting 3rdQ F00 and 4thQ F00 EPS of \$.52-\$.56 and \$.58-\$.64 and F00 EPS of \$1.97-\$2.05 and 25%-30% EPS growth going forward.

12. On 7/30/99, CIBC World Markets issued a report on BMC by Eisenstat, which was based on and repeated information provided in the 7/29/99 conference call and in follow-up conversations with Watson or Austin. The report increased the forecasted F00 and F01 EPS to \$1.98 and \$2.47 and forecasted the following quarterly F00 EPS for BMC:

	<u>F00</u>
Q1	\$.42A
Q2	\$.40
Q3	\$.53
Q4	<u>\$.63</u>
Year	\$1.98

It also stated:

BMC blew away 1Q00

... These results allay much of our concern about execution risk as the company melded New Dimension and Boole & Babbage into its fold, and still posted strong top and bottom line results.

* * *

We are raising our EPS for FY00 and FY01 to \$1.98 and \$2.47....

* * *

We were somewhat surprised that international fared as poorly as it did given Boole's strength in Europe. Management noted that the Boole transaction in Europe was looked upon as a merger of equals, resulting in some turf wars in the region and therefore negatively impacting results. Management noted that the integration of its acquisitions abroad was behind that in the US and that *for the fiscal year, there is no change in the outlook.*

The balance sheet remains solid....

DSO trended up slightly to 86 days from last quarter's 84 days. At 86 days DSO is above the BMC's traditional range in the mid- to low-60s. *The higher DSO is the result of the receivables from Boole and ND, both of which averaged DSO in excess of 100 days.* Management noted on the call that it expects to bring DSO back to its traditional range by the end of this fiscal year.

The Outlook

BMC is firing on all cylinders. Its high-margin mainframe business continues to grow at rates which one company insider characterized to us as "surprising."... We believe this quarter's strong results indicate that the acquisitions it made over the last year are coming together. More than simply adjusting parts of the organization, the cross selling opportunities between its products are bearing fruit.

13. On 7/30/99, Warburg Dillon Read issued a report on BMC by Moody, which was based on and repeated information provided in the 7/29/99 conference call and in follow-up conversations with Watson and Austin. The report forecast F00 and F01 EPS of \$1.99 and \$2.53, a 25% five-year EPS growth rate and the following quarterly F00 and F01 EPS for BMC:

	<u>F00</u>	<u>F01</u>
Q1	\$.42	\$.54
Q2	\$.43	\$.55
Q3	\$.55	\$.70
Q4	<u>\$.58</u>	<u>\$.74</u>
Year	\$1.99	\$2.53

It also stated:

SUMMARY:

Large deals and tightened integration of recent acquisitions (Boole & Babbage and New Dimension (ND) Software) characterized a strong fiscal Q1-00 earnings report by BMC Software ... well above management's previous 35% guidance, while earnings exceeded consensus by \$0.02 to reach \$0.42 versus \$0.32 in the year ago quarter. DSOs were up by 3 days to 87 days, reflecting the 125+ day DSO of ND, which closed during Q1. We expect DSOs to trend down in the future quarters. The balanced (and we believed sustainable due to the growth of e-commerce) strength of BMC's mainframe and client server business has prompted us to raise both revenues and EPS for fiscal 2000 and 2001.

14. On 7/30/99, Bear Stearns issued a report on BMC by Scocozza, which was based on and repeated information provided in the 7/29/99 conference call and in follow-up conversations with Watson or Austin. The report forecast F00 and F01 EPS of \$2.00 and \$2.50 and the following quarterly F00 and F01 EPS for BMC:

	<u>F00</u>	<u>F01</u>
Q1	\$.42	\$.59
Q2	\$.43	\$.60
Q3	\$.53	\$.64
Q4	<u>\$.63</u>	<u>\$.68</u>
Year	\$2.00	\$2.50

It also stated:

What We Liked About The Quarter:

Good Market Fundamentals. BMC management reports that the market is healthy, and that MIPs growth (fueling BMC's mainframe revenues) may even be accelerating.

* * *

Acquisitions Increase Momentum. The integration of Boole & Babbage and New Dimension are going smoothly in North America, where revenue was up 63% year over year. These acquisitions directly add to BMC's strength in enterprise systems management and in our view solidify the company as a major force in the market.

15. On 7/30/99, Deutsche Bank Alex. Brown issued a report on BMC by Mortenson, which was based on and repeated information provided in the 7/29/99 conference call and in follow-up conversations with Watson or Austin. The report forecast F00 and F01 EPS of \$2.00 and \$2.50, a 26% three-year EPS growth rate and the following quarterly F00 EPS for BMC:

	<u>F00</u>
Q1	\$.42 A
Q2	\$.43
Q3	\$.56
Q4	<u>\$.59</u>
Year	\$2.00

It also stated:

DETAILS:

After the close on 7/29, BMC reported very strong results for its F1Q (Jun) that by most metrics met or exceeded all our expectations and, we believe, those of the rest of the Street. With Boole and Babbage acquired on 3/30/99 and New Dimension Software acquired on 4/14/99, BMC faced a lot of operational challenges in the quarter and, in our opinion, met them successfully. While there are a few nits in the results that can be picked on – Europe and New Dimension revenues were below plan and deferred revenue did not grow sequentially – we view the overall results as positive. Moreover, we believe that they support our view that BMC is successfully transitioning itself from a very successful but niche software company to a strategic enterprise software vendor.

16. On 7/30/99, Josephthal & Co. issued a report on BMC by Hochfeld, which was based on and repeated information provided in the 7/29/99 conference call and in follow-up conversations with Watson or Austin. The report forecast F00 and F01 EPS of \$2.05 and \$2.50, and the following quarterly F00 EPS for BMC:

	<u>F00</u>
Q1	\$.42 A
Q2	\$.44
Q3	\$.54
Q4	<u>\$.64</u>
Year	\$2.05

It also stated:

We are raising our FY00 EPS estimate

* * *

Recent concerns by members of the investment community are overdone, in our view. There were several issues on the conference call that may, on the surface, raise some concern among more pessimistic members of the investment community. However, we do not believe that any of the concerns signal a negative change in the fundamental outlook of BMC. Below, we attempt to anticipate the specific concerns and address them with relevant responses.

Concern #1: "BMC needed a very large deal to make the quarter."

Response: BMC recognized more than \$40 million of a very large deal in the quarter. This accounted for more than 10% of total revenues. Some investors may postulate that had BMC not signed this uncharacteristically large deal, it wouldn't have made its quarter. This is unrealistic, in our view. BMC has been somewhat reliant on large deals for years now....

Concern #2: "DSOs were relatively high."

Response: In the past six months, BMC has merged with both Boole & Babbage and New Dimension. These companies each had a historical DSO range of well over 100 days. Therefore, the blended range of DSOs is bound to be higher. BMC expects the blended DSO to decrease gradually over the next few years as customers become accustomed to the BMC way of doing business. On a comparable basis, DSOs of 87 days are well within the pro forma blended range.

Concern #3: "Deferred license revenues declined in the quarter."

Response: Total deferred revenues as reported on the balance sheet increased from \$709 million to \$743 million. However, deferred license revenues (excluding the addition of New Dimension) declined by \$25 million. While this may raise concern among some investors, it is well within the guidance provided by company management following 4Q99. Deferred license revenues were expected to decline by approximately \$30 million in 1H00 as the company dealt with seasonal weakness in Europe and the integrations of Boole and New Dimension....

Concern #4: "The operating margin was lower than usual."

Response: The operating margin was 32.8%, exactly in line with our expectations. Historically, BMC has enjoyed better than 34% operating margins. However, BMC just completed two mergers of companies with historically lower operating margins.... We expect operating margins to return to the historical range of 34%-36% in 2H99.

Concern #5: "The New Dimension contribution was weak, as was European sales."

Response: New Dimension contributed a little more than \$15 million in the quarter, which was slightly behind the company's expectation. However, the New Dimension group signed a mid-seven figure contract in the quarter but couldn't recognize it. We fully expect BMC to recognize the contract in 2Q00. As of Europe, growth was weak (*i.e.*, International license revenues were up 17% year over year while Japan and Asia/Pacific were very strong). International integration of the New Dimension and Boole international sales forces is likely to take longer than the domestic sales force integration. We would be more concerned if we believed that European sales would continue to grow so anemically; however, we believe that sales are likely to pick up in 2H00 as the sales integration issues are resolved. BMC has already booked two large international license transactions early in the September quarter.

17. On 7/30/99, A.G. Edwards issued a report on BMC by Puricelli, which was based on and repeated information provided in the 7/29/99 conference call and in follow-up conversations with Watson or Austin. The report forecast F00 and F01 EPS of \$1.97 and \$2.47, a 30% three-year EPS growth rate and the following quarterly F00 EPS for BMC:

	<u>F00</u>
Q1	\$.42
Q2	\$.43
Q3	\$.52
Q4	<u>\$.60</u>
Year	\$1.97

It also stated:

Revenue exceeded our expectations While there were a number of highlights this quarter we won't go in to them in detail. Suffice it to say that BMC management did a great job this quarter not only integrating New Dimension in to the fold but it was also the first quarter for the combined Boole & Babbage/BMC entity. Despite this obvious and easy distraction they were still able to surprise most of us on the Street with a really good quarter. They are to be commended.

BMC management had never done an acquisition as large as Boole before this and we were a little cautious about them doing two so close together. Integration/execution risk was our main reason for sticking with the Accumulate rating as long as we did. *Now that they have proven their ability to integrate all these new parts we are raising our rating to Buy.*

18. BMC's better-than-expected 1stQ F00 EPS and its very positive representations about the current state of its business and its future prospects, halted the decline in BMC stock and pushed it higher. BMC stock jumped from \$47-1/2 on 7/29/99 to \$53-7/8 on 7/30/99 on very large volume and continued to move higher, reaching \$59-3/4 on 8/25/99. The BMC insiders named as defendants sold off 494,901 shares for \$26.3 million in illegal insider-trading proceeds between 8/3/99-8/30/99.

19. On 8/3/99, Watson (BMC's CEO) appeared at the Systems Management Software Conference in Santa Clara, California. In a formal presentation and break-out session, Watson told

the assembled analysts, money and portfolio manager, institutional investors, brokers and stock traders that:

- BMC was successfully integrating New Dimension and Boole & Babbage into its operations and business was performing better than expected.
- European sales were below plan due to slowness in integrating the Boole & Babbage merger, but operations there were now well integrated and would not interfere with BMC achieving forecasted F00 results.
- While BMC's DSOs had increased to 86, this was due to the acquisition of Boole & Babbage and New Dimension, which had higher DSOs than BMC; BMC's DSOs would fall back to BMC's traditional 60s during the balance of F00.
- BMC was enjoying continued strong demand for its mainframe MIPS software.
- BMC expected its operating margins would reach 34%-36% by year-end F00.
- BMC was forecasting 3rdQ F00 and 4thQ F00 EPS of \$.52-\$.56 and \$.58-\$.64 and F00 EPS of \$1.97-\$2.05 and 25%-30% EPS growth going forward.

20. On 9/20/99, Credit Suisse First Boston issued a report on BMC by Laidley, after a BMC presentation at the First Boston 1999 Enterprise Software Tour by Saverio Merlo and discussions with Merlo, which was based on and repeated information provided by him. The report stated:

Last Thursday, Saverio Merlo (VP of PMD Applications) presented at our Fall '99 Enterprise Software Tour with an emphasis on integration issues following the Company's recent large acquisitions, as well as future product direction.

* * *

Management pointed out that there continues to be significant cross-selling opportunities between the Patrol and CommandPost customer bases, with only a 30-40% overlap between the two sets of clients. This opportunity remains relatively untapped for BMCS.

Fundamental growth opportunities also exist within market segments such as eBusiness, as well as within the sub-Fortune 1000/2000 market. *The Company believes that the integration of the additional Boole sales people, which has been smooth to date with low turnover*, will greatly help impact these market opportunities by increasing BMC' [sic] feet on the street one of BMCS' biggest revenue growth constraints in the past.

* * *

Y2K concerns aren't delaying purchases or extending sales cycles. On the competitive front, competition with CA is extremely rare, Tivoli is more prevalent in the head to head deals. This is partly due to CA's multi year licenses, which offer a small window for a Patrol salesperson to enter an account.

... BMCS is well positioned to deliver revenue and earnings growth in the 30% plus range over the next several years with significant potential upside from new products.

21. Each of the statements made between 7/29/99-9/20/99 were false or misleading when issued. The true but concealed facts were:

(a) BMC was encountering substantial and increasing resistance from customers to purchasing its mainframe software systems – especially large or big-ticket systems – due to Y2K concerns on the part of customers;

(b) Demand for BMC's mainframe MIPS software was softening due to customer concerns regarding Y2K issues and a desire to delay substantial software purchases until after the end of 1999;

(c) BMC's weakness in European sales was not due to seasonal factors. BMC was, in fact, having very significant problems integrating its Boole & Babbage and New Dimension acquisitions, especially in integrating the sales forces of the three organizations in Europe;

(d) BMC was encountering increasing difficulty in closing big-ticket or large sales because of its inadequately trained and ineffective sales force, Y2K concerns on the part of customers and increasing competition from Computer Associates, making the Company's ability to achieve its forecasted quarterly EPS increasingly doubtful and even more dependent upon closing a number of very large sales at or near the end of the quarter;

(e) Due to the attempt to integrate the sales forces of BMC, Boole & Babbage and New Dimension, especially in Europe, BMC had lost control of its ability to manage the sales execution process there and of its ability to accurately forecast sales or EPS on a quarterly basis;

(f) Because of the attempt to rapidly integrate the sales forces of BMC, Boole & Babbage and New Dimension, the integrated sales force had several different sales persons to trying to sell different BMC products to the same potential customer as opposed to a unified sales approach through one sales representative. This was resulting in customer confusion and complaints due to inconsistent BMC actions toward the customers which was hurting sales;

(g) Due to the attempt to rapidly integrate sales personnel of BMC, Boole & Babbage and New Dimension, a large number of former Boole & Babbage and New Dimension sales

personnel were attempting to sell what had historically been BMC products; these former Boole & Babbage and New Dimension sales personnel were inadequately trained to sell these BMC products and as a result their sales productivity was extremely poor which was adversely affecting BMC's results from operations;

(h) In order to cover up and conceal the true nature and extent of the adverse factors which were negatively impacting its business as set forth above, BMC was artificially inflating its reported revenues and EPS by inducing customers to accept large software packages while promising them unusually extended payment terms or other side agreements delaying or even forgiving payment under specified circumstances;

(i) By 7/99, only 40% of BMC's sales force had been with BMC for 18 months – a drastic reduction from before – leading to BMC's being dependent on inexperienced, youthful and inadequately trained sales persons which, given BMC's increasing reliance on large, complex and hard-to-close transactions, was having a very adverse impact on BMC;

(j) The rise in BMC's DSOs was not due only to the acquisition of Boole & Babbage and New Dimension, but also to BMC's own activities in covering up and concealing the weakness in and problems with its business by generating "sales" by promising customers extremely extended payment terms and other special conditions and terms resulting in non-payment for products for many months;

(k) The problems with BMC's sales force and sales force execution was not confined to Europe but extended to North America as well;

(l) BMC's product specialization sales organization was resulting in several different BMC sales persons calling on and attempting to sell products to BMC customers, resulting in customer complaints, confusion and refusals to purchase; and

(m) As a result of the foregoing, the defendants actually knew that BMC's EPS forecasts of \$.52-\$.56 for 3rdQ F00, \$.58-\$.64 for 4thQ F00 and \$1.97 for F00, as well as for 25%-30% EPS growth over the next three years, were false when made as those forecasted results could not and would not be achieved in light of the negative factors adversely impacting BMC's business as set forth above.

22. On 10/6/99, BMC disclosed that its EPS for 2ndQ F00, ended 9/30/99, would be about \$.40-\$.42 compared to previous forecasts of \$.43-\$.45. BMC's stock fell from \$72-3/8 on 10/6/99 to \$60-1/2 on 10/7/99 and continued to fall to as low as \$50-1/4 on 10/21/99, as investors were concerned over the impact of a slow down in demand for IBM-MIPS (millions of instructions per second) mainframe computers due to Y2K issues and other concerns, sales execution difficulties in Europe and difficulties in integrating the Boole & Babbage and New Dimension acquisitions. BMC's top executives were very concerned over the intensity of investor reaction to its 10/6/99 announcement and the extent of BMC's stock decline. They were determined to halt that decline and push BMC stock back up to much higher levels so that they could complete the insider selling binge they began in 8/99.

23. As rumors circulated that BMC would report very positive results in late 10/99, its stock rallied, moving up to \$60-1/8 on 10/28/99. On 10/29/99, BMC reported its actual results for the 2ndQ F00, ended 9/30/99, reporting EPS that were higher than indicated in the 10/6/99 announcement and in line with earlier forecasts. BMC issued a release stating that the strength of its flagship PATROL products had offset a "*seasonally weak performance by our European operation.*" In fact, BMC achieved its surprisingly good results by reclassifying millions in legal expenses as "non-recurring" expenses and by drawing down on \$35 million in previously deferred revenue. In addition to reporting better-than-expected EPS, BMC (Watson or Austin) had conversations with analysts from Morgan Stanley, Dean Witter, Hoak BreeLove Wesneski, Bear Stearns, Josephthal & Co. and others on 10/25-26/99 in which they told them that:

- BMC had achieved a stellar quarter with very strong demand for its core products.
- IBM's recent announcement of a slowdown in mainframe sales due to Y2K concerns was not an indicator of any problems with demand for BMC's products.
- BMC was not seeing any slowdown of demand for its products due to Y2K concerns.
- While the integration of the Boole & Babbage and New Dimension acquisitions – especially in Europe – had been disruptive and more difficult than expected, BMC was now about done with the integration of the sales forces and European operations would improve.
- European sales execution now conformed to BMC's standards and Europe would perform much better in the 3rdQ and 4thQ F00.

- The European sales problem had been an *execution issue* and *did not* represent any fundamental problems with BMC's European operations or demand for its products there.
- As a result of the foregoing factors, BMC expected 3rdQ and 4thQ F00 EPS of \$.53-.54 and \$.59-.60 – leading to F00 EPS of *at least* \$1.93.

24. On 11/1/99, Watson appeared at the Deutsche Banc Alex. Brown 1999 Technology Conference and spoke with securities analysts, money managers and institutional investors who were present. Watson told the analysts and others that BMC was comfortable with the previous 3rdQ F00 EPS forecast of \$.53, that the execution issues with BMC's sales force that occurred in the 2ndQ F00 were largely resolved, that BMC was successfully integrating the Boole & Babbage and New Dimension acquisitions and he was "bullish" on the outlook for BMC's 3rdQ F00 and beyond.

25. On 11/12/99, Dain Rauscher Wessels issued a report "initiating coverage" on BMC by Mattson. Because this was Dain Rauscher Wessels' first report on BMC, it was issued only after Mattson had extensive discussions with Watson or Austin and was based on and repeated information proved by them. Watson or Austin reviewed this report before it was issued and assured Mattson it was accurate. The report forecast F00 and F01 EPS of \$1.96 and \$2.52, a 25% three-year EPS growth rate and the following F00 and F01 quarterly EPS for BMC:

QTR	<u>EPS/F00</u>	<u>EPS/F01</u>
1st	\$.42A	\$.54
2nd	\$.44A	\$.57
3rd	\$.52	\$.66
4th	<u>\$.58</u>	<u>\$.74</u>
	\$1.96	\$2.52

It also stated:

BMC Software completed two major acquisitions last year (Boole & Babbage and New Dimension), and ... has entered the upper echelons of system management, we believe.

Recent Acquisitions Enhance Traditional Business And Introduce New Opportunity: BMC's primary target markets performance management and database optimization generated combined revenues of more than \$4.8 billion in 1998, and represent, we believe two of the hottest opportunities in systems and data management software. The addition of the Boole and New Dimension product lines enhances BMC's product portfolio in these core markets, represents cross-selling opportunities, and provides entry into new software categories (e.g., storage management).

26. After BMC reported its better-than-expected 2ndQ F00 results, BMC stock jumped to \$65-1/2 on 10/29/99 and continued to climb to \$84-1/16 on 11/29/99 and on to its Class Period high of \$86-5/8 on 1/3/00. As BMC's stock moved up to its Class Period high, BMC's insiders renewed their massive insider selling, unloading 590,114 shares of their BMC stock, pocketing \$36.7 million in illegal insider-trading proceeds between 10/28/99-11/19/99.

27. On 11/30/99, Prudential Securities issued a report "initiating coverage" on BMC by Crook. Because this was Prudential's first report on BMC, it was issued only after Crook had extensive discussions with Watson and Austin and was based on and repeated information proved by them. The report forecast the following F00 results for BMC:

	<u>EPS/F00</u>
QTR	
1st	\$.42A
2nd	\$.44A
3rd	\$.53
4th	<u>\$.60</u>
	\$2.02

It also stated:

After speaking with the company, we believe BMC is continuing to benefit from two very important themes. This includes the recentralization of computing and the net imperative to move to an e-business model. We believe this is driving growth as demand for system reliability and scalability is increasing as business embrace e-commerce.

In addition, we believe BMC's recent repositioning with an e-business management solution will be favorably viewed. The suite is designed to ensure 24 x 7 Internet access and offers a cohesive view of the enterprise through the company's three primary products and services; Patrol, Mainview and Service Assurance Center. The product suite is designed to reduce network downtime and handle volume spikes with less IT personnel.

28. On 12/1/99, First Boston issued a report on BMC by Laidley, after discussions with Watson or Austin at the Hi-Tech conference which was based on and repeated information provided by them. It stated:

Business tracking in line to ahead of our December quarter expectations of \$475 million and \$0.55.

Europe is improving

* * *

Large deal pipeline looks strong

Integration of sales force in April should produce better coordinated organization and broader coverage, while the pipeline of integrated products over the next 6 months should drive incremental demand.

29. On 12/7/99, Warburg Dillon Read issued a report on BMC by Klein, after discussions with Watson and Austin, which was based on and repeated information provided by them. Watson or Austin reviewed this report before it was issued and assured Klein it was accurate. The report forecast 27% five-year EPS growth and the following F00 and F01 results for BMC:

	<u>EPS/F00</u>	<u>EPS/F01</u>
QTR		
1st	\$.42 A	\$.53
2nd	\$.44 A	\$.54
3rd	\$.53	\$.68
4th	<u>\$.59</u>	<u>\$.75</u>
Year:	\$1.98	\$2.50

It stated:

As we enter the home stretch of BMCS's fiscal Q3 and final weeks preceding Y2K

HIGHLIGHTS:

- * We believe *near-term conditions for BMCS are positive and should continue to improve as we approach the end of the year and the company's fiscal Q3 results in January....*
- * First, we believe BMCS should meet and possibly exceed our fiscal Q3 EPS estimate of \$0.53. *On November 23, CEO Max Watson stated BMCS remains comfortable with the \$0.53 consensus estimate.* With five weeks to go in the quarter at that point, we find Watson's public comfort level meaningful, especially since enterprise software vendors typically generate over half their quarterly revenues in the last month or weeks of each quarter.
- * *Additionally, after speaking with management, we believe BMCS has corrected European sales force issues related to the integration [of] Boole & Babbage that caused Q2 revenue to fall short of internal estimates.*

30. On 12/17/99, PaineWebber issued a report "initiating coverage" on BMC by Buttigieg. Because this was PaineWebber's first report on BMC, it was issued only after Buttigieg had extensive discussions with Watson and Austin and was based on and repeated information provided by them. Watson or Austin reviewed this report before it was issued and assured Buttigieg it was accurate. The report forecast F00 and F01 EPS of \$1.96 and \$2.48 and the following F00 and F01 quarterly results for BMC:

	<u>EPS/F00</u>	<u>EPS/F01</u>
QTR		
1st	\$.42 A	\$.52
2nd	\$.44 A	\$.55
3rd	\$.53	\$.68
4th	<u>\$.58</u>	<u>\$.72</u>
Year	\$1.96	\$2.48

It also stated:

* Acquisitions over the last two years have rounded out the company's systems management product line and made the company a more direct competitor of Computer Associates and Tivoli.

* * *

Acquisitions of BGS ... and Boole and Babbage and New Dimension in 1999 rounded out BMC's systems management product line and made the company a more direct competitor Boole added the Storage Resource Manager (formerly SpaceView) backup offering and Command/Post console while New Dimension added production, security, and output management offerings.

31. Each of the statements made between 10/29/99-12/17/99 were false or misleading when issued. The true but concealed facts were:

(a) BMC was encountering substantial and increasing resistance from customers to purchasing its mainframe software systems – especially large or big-ticket systems – due to Y2K concerns on the part of customers;

(b) The decline in IBM mainframe/MIPS sales was indeed reflective of softening demand for BMC's mainframe/MIPS software products and due largely to the same causes – customer concerns regarding Y2K issues and a desire to delay substantial software purchases until after the end of 1999;

(c) BMC's weakness in European sales was not due to seasonal factors. BMC was, in fact, having very significant problems integrating its Boole & Babbage and New Dimension acquisitions, especially in integrating the sales forces of the three organizations in Europe;

(d) BMC was encountering increasing difficulty in closing big-ticket or large sales because of its inadequately trained and ineffective sales force, Y2K concerns on the part of customers and increasing competition from Computer Associates, making the Company's ability to achieve its forecasted quarterly EPS increasingly doubtful and even more dependent upon closing a number of very large sales at or near the end of the quarter;

(e) Due to the attempt to integrate the sales forces of BMC, Boole & Babbage and New Dimension, especially in Europe, BMC had lost control of its ability to manage the sales execution process there and of its ability to accurately forecast sales or EPS on a quarterly basis;

(f) Because of the attempt to rapidly integrate the sales forces of BMC, Boole & Babbage and New Dimension, the integrated sales force had several different sales persons to trying to sell different BMC products to the same potential customer as opposed to a unified sales approach through one sales representative. This was resulting in customer confusion and complaints due to inconsistent BMC actions toward the customers which was hurting sales;

(g) Due to the attempt to rapidly integrate sales personnel of BMC, Boole & Babbage and New Dimension, a large number of former Boole & Babbage and New Dimension sales personnel were attempting to sell what had historically been BMC products; these former Boole & Babbage and New Dimension sales personnel were inadequately trained to sell these BMC products and as a result their sales productivity was extremely poor which was adversely affecting BMC's results from operations;

(h) In order to cover up and conceal the true nature and extent of the adverse factors which were negatively impacting its business as set forth above, BMC was artificially inflating its reported revenues and EPS by inducing customers to accept large software packages while promising them unusually extended payment terms or other side agreements delaying or even forgiving payment under specified circumstances;

(i) By 7/99, only 40% of BMC's sales force had been with BMC for 18 months – a drastic reduction from before – leading to BMC's being dependent on inexperienced, youthful and inadequately trained sales persons which, given BMC's increasing reliance on large, complex and hard-to-close transactions, was having a very adverse impact on BMC;

(j) The rise in BMC's DSOs was not due only to the acquisition of Boole & Babbage and New Dimension, but also to BMC's own activities in covering up and concealing the weakness in and problems with its business by generating "sales" by promising customers extremely extended payment terms and other special conditions and terms resulting in non-payment for products for many months;

(k) The problems with BMC's sales force and sales force execution was not confined to Europe but extended to North America as well;

(l) BMC's product specialization sales organization was resulting in several different BMC sales persons calling on and attempting to sell products to BMC customers, resulting in customer complaints, confusion and refusals to purchase; and

(m) As a result of the foregoing, the defendants actually knew that BMC's EPS forecasts of \$.53-\$.55 for 3rdQ F00, \$.59-\$.60 for 4thQ F00 and at least \$1.93 for F00, as well as for 25%-30% EPS growth over the next three years, were false when made as those forecasted results could not and would not be achieved in light of the negative factors adversely impacting BMC's business as set forth above.

32. On 1/4/00, BMC stock traded as high as \$85-1/8 before closing at \$77, as rumors of a negative announcement by BMC circulated. On 1/5/00, before the market opened, BMC revealed that its 3rdQ F00 results would be *much worse* than earlier forecast by and for BMC. BMC admitted to analysts the short fall was due to serious problems with BMC's sales force, a failure to close several large potential transactions, an absence of large mainframe software deals which had caused a major revenue shortfall, customer refusals to purchase due to Y2K concerns and serious weakness in BMC's European operations. BMC's stock immediately collapsed, falling to \$47 on astronomical volume of 60 million shares on 1/5/00 and continued to fall to just \$41-1/4 on 1/7/00, on additional volume of 42 million shares on 1/6-7/00.

33. On 1/25/00, BMC revealed horrible 3rdQ F00 results – EPS of only \$.41, far below the levels forecast throughout the Class Period, and *a decline* from 3rdQ F99 and 2ndQ F00 EPS. BMC's revenues for the 3rdQ F00 were just \$426 million – \$50 million below forecasted levels – while its DSOs increased to 86 from 84 at the end of 2ndQ F00 – virtually the same level as 87 days at the end of 1stQ F00. Watson admitted "*Shame on us*," while several top BMC sales executives and managers were fired. On 1/26/00 the *Houston Chronicle* reported:

Three weeks ago BMC ... shocked Wall Street with the announcement that its earnings would not meet analysts' expectations of 53 cents per share.

* * *

Last year, BMC completed the acquisitions of the Tel Aviv-based New Dimension Software, and the San Jose, Calif.-based Boole & Babbage. The "new BMC" came up with an *overly complex sales plan, and its young sales force was unable to close enough deals.*

"Shame on us. We learned our lesson," Watson said in a conference call.

Meanwhile, the large companies that are BMC's most important customers hesitated to make software purchases before the quarter's close because of fears of the Y2K bug. About \$50 million in expected deals did not get signed.

One week after the earnings warnings, BMC announced the resignation of the *president of BMC Europe, one of the geographic trouble spots.* Replacing him is a senior vice president for international field operations from New Dimension who has lots of remote management experience.

Meanwhile, *BMC is simplifying its sales processes, putting one experienced salesperson in charge of selling different products to a company instead of unleashing a barrage of inexperienced sales people touting different products on prospective clients.*

INSIDER SELLING

34. While BMC's top insiders were issuing favorable statements about BMC, the individual defendants sold 1,085,015 shares of BMC stock, for more than \$63.1 million – to personally profit from the artificial inflation in BMC's stock price. Notwithstanding their access to material non-public information and their duty to disclose the same before trading in BMC stock, they sold significant amounts of their BMC stock at artificially inflated prices. Defendants' insider selling during the Class Period is detailed below:

<u>NAME</u>	<u>SHARES SOLD</u>	<u>% OF HOLDINGS SOLD¹</u>	<u>PROCEEDS FROM SALE</u>
Austin	45,000	20%	\$ 2,534,150
Beauchamp	73,852	46%	4,203,127
Gardner	190,800	50%	11,313,864
Klausmeyer	57,680	73%	3,473,941
Morris	16,000	39%	939,080
Morse	120,000	21%	7,052,350
Solcher	68,000	79%	4,128,120
Van Duyn	232,605	71%	13,285,601
Watson	230,000	8%	12,991,200
Weiss	36,000	31%	2,274,000
Wilson	15,078	42%	959,520
TOTALS:	1,085,015	N/A	\$63,154,953

¹ Includes shares owned and vested options.

<u>Date</u>	<u>Insider</u>	<u>Shares</u>	<u>Price</u>	<u>Proceeds</u>
08/06/99	AUSTIN	10,000	\$53.88	\$538,800
08/12/99		20,000	54.94	\$1,098,800
10/28/99		<u>15,000</u>	59.77	<u>\$896,550</u>
TOTAL		45,000		\$2,534,150
08/04/99	BEAUCHAMP	15,000	\$52.06	\$780,900
08/11/99		7,096	54.69	\$388,080
08/11/99		10,000	54.63	\$546,300
10/28/99		6,400	58.25	\$372,800
10/28/99		23,356	58.25	\$1,360,487
11/01/99		<u>12,000</u>	<u>62.88</u>	<u>\$754,560</u>
TOTAL		73,852		\$4,203,127
08/06/99	GARDNER	76,800	\$53.43	\$4,103,424
10/29/99		60,000	64.27	\$3,856,200
11/01/99		34,000	62.76	\$2,133,840
11/02/99		<u>20,000</u>	<u>61.02</u>	<u>\$1,220,400</u>
TOTAL		190,800		\$11,313,864
08/03/99	KLAUSMEYER	18,400	\$52.25	\$961,400
10/28/99		10,000	59.88	\$598,800
11/11/99		<u>29,280</u>	<u>65.36</u>	<u>\$1,913,741</u>
TOTAL		57,680		\$3,473,941
08/30/99	MORRIS	4,000	\$52.88	\$211,520
11/05/99		<u>12,000</u>	<u>60.63</u>	<u>\$727,560</u>
TOTAL		16,000		\$939,080
08/04/99	MORSE	50,000	\$51.97	\$2,598,500
10/29/99		50,000	64.13	\$3,206,500
11/01/99		10,000	63.38	\$633,800
11/02/99		5,000	61.50	\$307,500
11/03/99		<u>5,000</u>	<u>61.21</u>	<u>\$306,050</u>
TOTAL		120,000		\$7,052,350
08/03/99	SOLCHER	30,000	\$54.48	\$1,634,400
08/12/99		5,000	57.06	\$285,300
10/28/99		6,000	59.88	\$359,280
10/29/99		12,000	63.62	\$763,440
11/10/99		5,000	68.00	\$340,000
11/18/99		5,000	70.31	\$351,550
11/19/99		<u>5,000</u>	<u>78.83</u>	<u>\$394,150</u>
TOTAL		68,000		\$4,128,120
08/06/99	VAN DUYN	33,151	\$52.38	\$1,736,449
08/06/99		66,303	54.21	\$3,594,286
08/06/99		33,151	53.75	\$1,781,866
11/01/99		<u>100,000</u>	<u>61.73</u>	<u>\$6,173,000</u>
TOTAL		232,605		\$13,285,601

0805/99	WATSON	30,000	\$50.94	\$1,528,200
08/06/99		20,000	53.38	\$1,067,600
08/10/99		40,000	52.04	\$2,081,600
08/12/99		10,000	55.75	\$557,500
10/28/99		100,000	58.00	\$5,800,000
11/10/99		<u>30,000</u>	<u>65.21</u>	<u>\$1,956,300</u>
TOTAL		230,000		\$12,991,200
08/13/99	WEISS	16,000	\$56.50	\$904,000
11/12/99		<u>20,000</u>	<u>68.50</u>	<u>\$1,370,000</u>
TOTAL		36,000		\$2,274,000
11/04/99	WILSON	9,594	\$60.00	\$575,640
11/18/99		<u>5,484</u>	<u>70.00</u>	<u>\$383,880</u>
TOTAL		15,078		\$959,520

SAFE HARBOR

35. The safe harbor provided for forward-looking statements ("FLS") does not apply to the false FLS pleaded. The safe harbor does not apply to BMC's allegedly false financial statements. None of the FLS pleaded herein were identified as "forward-looking statements" when made, it was not stated that actual results "could differ materially from those projected," nor did meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the FLS accompany those FLS. None of the *particular* oral FLS in BMC's 7/29/99 conference call or other oral presentations pleaded herein were so identified as required. The defendants are liable for the false FLS pleaded because, at the time each FLS was made, the speaker knew the FLS was false and the FLS was authorized and/or approved by an executive officer of BMC who knew that the FLS was false. None of the historic or present tense statements made by defendants were assumptions underlying or relating to any plan, projection or statement of future economic performance, as they were not stated to be such assumptions underlying or relating to any projection or statement of future economic performance when made nor were any of the projections or forecasts made by defendants expressly related to or stated to be dependent on those historic or present tense statements when made.

CLASS ACTION ALLEGATIONS

36. This is a class action on behalf of purchasers of BMC stock between 7/29/99-1/4/00 (the "Class"). Class members are so numerous that joinder of them is impracticable.

37. Common questions of law and fact predominate and include whether defendants: (i) violated the 1934 Act; (ii) omitted and/or misrepresented material facts; (iii) knew or recklessly disregarded that their statements were false; (iv) artificially inflated BMC's stock price; and (v) the extent of and appropriate measure of damages.

38. Plaintiff's claims are typical of those of the Class. Prosecution of individual actions would create a risk of inconsistent adjudications. Plaintiff will adequately protect the interests of the Class. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

CLAIM FOR RELIEF

39. Defendants violated §10(b) and Rule 10b-5 by:

(a) Employing devices, schemes and artifices to defraud;

(b) Making untrue statements of material facts and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and

(c) Engaging in acts, practices and a course of business that operated as a fraud or deceit upon the Class in connection with their purchases of BMC stock.

40. Class Members were damaged. In reliance on the integrity of the market, they paid artificially inflated prices for BMC stock.

PRAYER

WHEREFORE, plaintiff prays for judgment as follows: declaring this action to be a proper class action; awarding damages, including interest; and such other relief as the Court may deem proper.

JURY DEMAND

Plaintiff demands a trial by jury.

DATED: February 4, 2000



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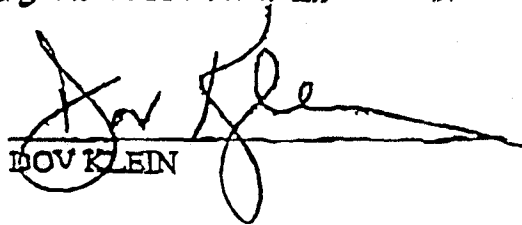
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CERTIFICATION OF DOV KLEIN
IN SUPPORT OF CLASS ACTION COMPLAINT

Dov Klein ("plaintiff") declares, as to the claims asserted under the federal securities laws, that:

1. Plaintiff has reviewed the complaint prepared by counsel in the above-captioned case and has authorized its filing.
2. Plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under the federal securities laws.
3. Plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary.
4. During the proposed Class Period plaintiff executed the following transactions relating to BMC Software, Inc. securities: See Attachment A
5. In the past three years, plaintiff has not sought to serve, nor has served as a representative party on behalf of a class in an action filed under the federal securities laws.
6. Plaintiff will not accept payment for serving as a representative party on behalf of a class beyond plaintiff's pro rata share of any recovery, except such reasonable costs and expenses (including lost wages) directly relating to the representation of the Class as ordered or approved by the Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of February, 2000.


DOV KLEIN

ATTACHMENT A

Date	Action	Amount	Price
9/27/99	BUY	3,000 sh.	865.83
9/30/99	SELL	3,000	67.482
10/22	BUY	3,000	57.049
10/22	BUY	1,000	56.955
11/2	SELL	4,000	59.920
11/10	BUY	3,000	60.517
1/6/2000	SELL	1,000	81.795
2/2/2000	SELL	2,000	40.000