

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

Profectus Technology LLC,

Plaintiff,

v.

**Acer Inc. and
Acer America Corporation,**

Defendants.

Case No. 6:11-cv-00677-MHS

Jury Trial Demanded

**PROFECTUS TECHNOLOGY LLC'S FIRST AMENDED COMPLAINT
FOR PATENT INFRINGEMENT**

Plaintiff Profectus Technology LLC ("Profectus") files this First Amended Complaint for Patent Infringement against Acer Inc. and Acer America Corporation and (collectively referred to herein as "Acer" or "Defendants") for infringement of United States Patent Number 6,975,308 ("the '308 Patent") pursuant to 35 U.S.C. § 271.

NATURE OF THE ACTION

1. This is an action for patent infringement under Title 35 of the United States Code.
2. Defendants make, use, sell, offer for sale, and/or import into the United States products that fall within the scope of one or more claims of the '308 Patent.
3. Profectus seeks damages pursuant to 35 U.S.C. § 284, among other relief, for Defendants' acts of infringement and/or inducing infringement of the '308 Patent.

THE PARTIES

4. Plaintiff Profectus is a limited liability company organized and existing under the laws of the State of Texas with its principal place of business in Dix Hills, New York.

5. Defendant Acer Inc. is a corporation organized and existing under the laws of Taiwan, Republic of China, with its principal place of business located at 8F, 88, Sec. 1, Hsin Tai Wu Rd., Hsichih, Taipei Hsien 221, Taiwan, R.O.C.

6. Defendant Acer America Corporation is a corporation organized and existing under the laws of the State of California, with its principal place of business located at 333 West San Carlos Street, Suite 1500, San Jose, California 95110. Defendant Acer America Corporation is a wholly owned subsidiary of Defendant Acer Inc.

7. Acer has been and is designing, marketing, manufacturing, using, importing, selling, and/or offering for sale products, including but not limited to Acer's ICONIA TAB A and ICONIA TAB W, that infringe one or more claims of the '308 Patent.

8. Acer is doing business in the United States and, more particularly, in the Eastern District of Texas by designing, marketing, manufacturing, using, importing, selling, and/or offering for sale products, including but not limited to Acer's ICONIA TAB A and ICONIA TAB W, that infringe one or more claims of the '308 Patent.

JURISDICTION AND VENUE

9. This is a civil action for patent infringement arising under the patent laws of the United States, Title 35, United States Code, including 35 U.S.C. §§ 271 and 281-285. Subject matter jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331 and 1338(a).

10. Venue is proper in the Tyler Division of the Eastern District of Texas under 28 U.S.C. §§ 1391(b)-(d) and 1400(b).

11. This court has personal jurisdiction over Acer. Acer has purposefully established minimum contacts with the State of Texas. Acer, directly and/or through third-party manufacturers, manufactures or assembles products that are and have been offered for sale, sold, purchased, and used within the Eastern District of Texas, the products falling within the scope of one or more claims of the '308 Patent. Acer, directly or through intermediaries (including distributors, retailers, and others), ships, distributes, offers for sale, sells, and advertises infringing products in the Eastern District of Texas. Additionally, Acer, directly and/or through distribution networks, regularly places infringing products within the stream of commerce, with the knowledge and/or understanding that such products will be sold in the Eastern District of Texas. Upon information and belief, Acer has purposefully and voluntarily sold one or more infringing products with the expectation that they will be purchased by consumers in the Eastern District of Texas. Acer's infringing products have been and continue to be purchased by consumers in the Eastern District of Texas. Acer has committed acts of patent infringement within the State of Texas and, more particularly, within the Eastern District of Texas. Acer has purposefully availed itself of the benefits of the State of Texas and the exercise of jurisdiction over Acer would not offend traditional notions of fair play and substantial justice.

COUNT I

DIRECT PATENT INFRINGEMENT

12. Profectus incorporates by reference the paragraphs 1-11 above as if fully set forth herein.

13. On December 13, 2005, the United States Patent and Trademark Office (“USPTO”) duly and legally issued the ‘308 Patent, entitled “Digital Picture Display Frame” and listing Frank W. Bitetto and James J. Bitetto as the named inventors, after full and fair examination. A true and correct copy of the ‘308 Patent is attached as Exhibit A. Profectus is the assignee of all rights, title, and interest in and to the ‘308 Patent and possess all rights of recovery under the ‘308 Patent, including the right to recover damages for past infringement.

14. The ‘308 Patent is valid and enforceable. Profectus and its predecessors in interest have complied with the marking requirements of 35 U.S.C. § 287(a).

15. Acer has been and, upon information and belief, is now directly infringing the ‘308 Patent by making, using, selling, offering for sale, and/or importing into the United States products, including without limitation Acer’s ICONIA TAB A and ICONIA TAB W, (the “Accused Acer Products”) that fall within the scope of at least one claim of the ‘308 Patent, either literally or under the doctrine of equivalents.

16. Defendants, as set forth above, have been and, upon information and belief, are now infringing one or more claims of the ‘308 Patent under 35 U.S.C. § 271(a). Defendants are liable for infringement for the ‘308 Patent as set forth above.

17. Defendants’ acts of direct infringement have caused Profectus monetary damage. Profectus is entitled to recover from Defendants monetary damages under 35 U.S.C. § 284 adequate to compensate Profectus for direct infringement of the ‘308 Patent.

COUNT II

INDIRECT INFRINGEMENT—ACTIVE INDUCEMENT

18. Profectus incorporates by reference the paragraphs 1-17 above as if fully set forth herein.

19. In addition to and/or in the alternative to direct infringement, upon information and belief, Acer's customers directly infringe the '308 Patent by using the Accused Acer Products in the United States, and Acer indirectly infringes by actively inducing its customers' infringement.

20. Acer encourages and intends for its customers to use the Accused Acer Products in a manner that infringes one or more claims of the '308 Patent. Indeed, in User Guides and on its public website, Acer advises and instructs its customers on how to use the Accused Acer Products in a manner that infringes one or more claims of the '308 Patent.

21. Furthermore, upon information and belief, Acer knew its actions would induce infringement of the '308 Patent. Since at least as early as the service date of the original Complaint for Patent Infringement in this case to the present, Acer has had actual knowledge of the '308 Patent and Profectus's allegations of infringement. On October 19, 2012, Profectus served Acer with Profectus's Disclosure of Asserted Claims and Infringement Contentions in this case under P.R. 3-1. Since at least as early as October 19, 2012 to the present, Acer has had actual knowledge of the '308 Patent and actual knowledge of Profectus's allegations that the Accused Acer Products infringe one or more claims of the '308 Patent. Upon information and belief, since at least as early as October 19, 2012 to the present, Acer has known that it encourages and intends for its customers to use the Accused Acer Products in a manner that constitutes infringement of one or more claims of the '308 Patent and/or has been and continues to be willfully blind to the infringing nature of such use of the Accused Acer Products by its customers. Acer is thus liable for actively inducing its customers' infringement of the '308 Patent under 35 U.S.C. § 271(b).

22. Defendants' acts of actively inducing infringement have caused Profectus monetary damage. Profectus is entitled to recover from Defendants monetary damages under 35 U.S.C. § 284 adequate to compensate Profectus for indirect infringement of the '308 Patent.

DEMAND FOR A JURY TRIAL

23. Profectus hereby demands a trial by jury, under Rule 38 of the Federal Rules of Civil Procedure, for all issues triable of right by a jury.

PRAYER

WHEREFORE, Plaintiff Profectus respectfully prays for the following:

- A. A judgment that Defendants have infringed the '308 Patent;
- B. A judgment and order that Profectus be awarded its actual damages under 35 U.S.C. § 284, including supplemental damages for any continuing post-verdict infringement;
- C. A judgment and order requiring Defendants to pay Profectus pre-judgment and post-judgment interest on the damages awarded, including an award of prejudgment interest, pursuant to 35 U.S.C. § 284, from the date of each act of infringement of the '308 Patent by Defendants to the day a damages judgment is entered, and further an award of post-judgment interest, pursuant to 28 U.S.C. § 1961, continuing until such judgment is paid, at the maximum rate allowed by law;
- D. A judgment and order requiring Defendants to pay the costs of this action; and
- E. Such other and further relief in law or in equity to which Profectus may be justly entitled.

Dated: August 1, 2013.

Respectfully submitted,

/s/ Steven E. Ross

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**ATTORNEYS FOR PLAINTIFF
PROFECTUS TECHNOLOGY LLC**

CERTIFICATE OF SERVICE

In accordance with Federal Rule of Civil Procedure 5 and Local Rule CV-5(a), I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document through the Court's CM/ECF system on August 1, 2013.

/s/ Steven E. Ross

Steven E. Ross