

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

GUST, INC.,	:	
	:	
Plaintiffs	:	
	:	
v.	:	CIVIL ACTION NO.: 1:15-cv-06192
	:	
ALPHACAP VENTURES, LLC, RICHARD JUAREZ	:	
	:	
Defendants	:	

GUST’S FIRST AMENDED COMPLAINT

Plaintiff Gust, Inc. f/k/a AngelSoft LLC (“Gust”), by and through its attorneys, White and Williams LLP, hereby states the following for its Complaint for *inter alia* Declaratory Judgment against AlphaCap Ventures, LLC (“AlphaCap”) and Richard Juarez (AlphaCap and Richard Juarez collectively “Defendants”):

NOTICE OF RELATED CASE

Please note that the following case, currently before the Honorable Robert W. Schroeder, III of the United States District Court for the Eastern District of Texas, is related to this filing: *AlphaCap Ventures, LLC v. Gust, Inc. f/k/a Angelsoft LLC*, 15-cv-00056-RWS (“the Eastern District of Texas case”).

The instant case and the Eastern District of Texas involve the same patents and share some, but not all, parties and causes of action. While the Eastern District of Texas case includes AlphaCap’s claims of patent infringement and Gust’s declaratory judgment claims of invalidity and non-infringement, the Eastern District of Texas case does not include Gust’s claims of Abuse of Process, Patent Misuse, and Violation of Section 2 of the Sherman Act, included

herein. The Eastern District of Texas case does not include Mr. Richard Juarez as an individual party. The judge in the Eastern District of Texas case is currently considering Gust's motion to transfer to the Southern District of New York.

Gust, by and through their attorneys White and Williams LLP, submit the following Complaint against Defendants based on their knowing, willful and malicious assertion, in bad faith and with intent to extort rents from Gust and others through objectively baseless claims of infringement predicated upon invalid and unenforceable patents. Gust also seeks a declaration that AlphaCap's patents are invalid, unenforceable, and not infringed by Gust, seeks a declaration that AlphaCap's patents have been misused, and seeks relief under 28 U.S.C. § 2201 as well as relief under 15 U.S.C. § 2, 35 U.S.C. § 235, and the common law of New York.

NATURE OF THE ACTION

1. This Complaint is an action arising under *inter alia* the Declaratory Judgment Act 28 U.S.C. § 2201, *et seq.* and the patent laws of the United States, 35 U.S.C. § 1, *et seq.* for a judgment declaring that the claims of United States Patent No.'s 7,848,976 ("the '976 Patent"), 7,908,208 ("the '208 Patent"), and 8,433,630 ("the '630 Patent") (collectively "the Asserted Patents") are invalid, unenforceable and not infringed by Gust. True and correct copies of the '976 Patent, the '208 Patent, and the '630 Patent are attached hereto as Exhibit A.

THE PARTIES

2. Gust, Inc. is a corporation organized and existing under the laws of Delaware with a principal place of business at 44 West 28th Street 7th floor, New York, NY 10001-4212.

3. Defendant AlphaCap is a limited liability company organized and existing under the laws of the State of California, with its principal place of business at 695 Andrews Street, Livermore, California 94551.

4. AlphaCap's business is the licensing of intellectual property assets, including patents it does not practice.

5. AlphaCap is what is commonly referred as a Non-Practicing Entity ("NPE") or "patent troll" because it does not practice the Asserted Patents but sues others regardless of, or with direct knowledge of, the frivolity of such claims to extract at least the nuisance value of a patent infringement lawsuit.

6. Upon information and belief, Defendant Richard Juarez is an individual who owns, occupies and/or resides at 695 Andrews Street, Livermore, California 94551.

7. Upon information and belief, Richard Juarez unilaterally dominates and controls AlphaCap as its *de facto* sole director and officer.

8. Richard Juarez resides at 695 Andrews Street, Livermore, California 94551, which AlphaCap alleges to be its principal place of business.

9. 695 Andrews Street, Livermore, California 94551 is a residential address zoned for non-commercial use absent special dispensation by the relevant local authorities.

10. Richard Juarez is AlphaCap's registered agent for service of process with the California Secretary of State.

11. Upon information and belief, AlphaCap is undercapitalized.

12. AlphaCap "has no business in the investment industry".

13. AlphaCap has failed to file a Rule 7.1 Corporate Disclosure statement both in the Eastern District of Texas case and in the present action, thereby preventing Gust from

confirming details that are critical to a determination that AlphaCap is in fact an alter ego of Richard Juarez.

14. The domain name www.alphacapventures.com – which is associated with Richard Juarez’s email address “rick.juarez@alphacapventures.com” – does not resolve to any website.

15. Upon information and belief, AlphaCap lacks sufficient funds to cover the costs of Gust’s damages and attorneys’ fees in this matter. AlphaCap’s annual revenue is estimated to be approximately \$100,000 according to a Westlaw Company Investigator Report, a copy of which is attached hereto as Exhibit B.

16. Upon information and belief, Richard Juarez has abused AlphaCap’s corporate form by causing AlphaCap to institute frivolous and objectively baseless patent infringement litigation against *inter alios* Gust, and by doing it without disclosing the ownership structure of AlphaCap as required by Federal Rule of Civil Procedure 7.1 as well as the local rules of the Southern District of New York.

17. Gust is entitled to pierce the corporate veil of AlphaCap and requests that the Court disregard AlphaCap’s corporate form in order to reach Richard Juarez individually pursuant to satisfaction of a judgment against AlphaCap.

JURISDICTION AND VENUE

18. This is an action for claims arising under, *inter alia*, the United States patent statute, 35 U.S.C. § 1 *et seq.* This Court has subject matter jurisdiction over this action pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and under 38 U.S.C. § 1338(a).

19. This Court has supplemental jurisdiction over the state law claims made herein under 28 U.S.C. §§ 1332 and 1367 as the federal and state law claims arise out of a common

nucleus of operative fact, namely the frivolous lawsuits instituted by AlphaCap in the Eastern District of Texas.

20. This Court has personal jurisdiction over AlphaCap because AlphaCap has at least minimum contacts with the State of New York.

21. This Court has personal jurisdiction over Richard Juarez because AlphaCap has at least minimum contacts with the State of New York, and upon information and belief, AlphaCap is an alter ego and mere instrumentality of Richard Juarez.

22. Venue is proper in this judicial jurisdiction pursuant to 28 U.S.C. § 1391(b), (d) and 1400(b) because AlphaCap and Richard Juarez reside in this District for the purposes of venue, insofar as they are subject to personal jurisdiction in this District, have committed tortious acts in this District, solicit business in this District, and conduct other business in this District.

FACTS GIVING RISE TO THE COMPLAINT

23. The Asserted Patents purport to cover computer programs allowing investors to search for startup companies seeking investment. In one sense, these programs play “matchmaker” just as helpful grandmothers have done for their loved ones for thousands of years. Because multiple investors may invest in a single startup using these programs, such programs may be categorized under the recently-coined term “crowdfunding”. In addition to being ancient, these matchmaking and crowdfunding concepts are “abstract” and therefore unpatentable under current U.S. patent laws.

24. Upon information and belief, the concepts of matchmaking and crowdfunding are even older and more basic than the concepts of hedging financial transactions, which the U.S. Supreme Court addressed in *Bilski* (2008), or intermediated settlement, addressed by the Court in

Alice (2014). In those cases, the U.S. Supreme Court determined such abstract ideas did not constitute patentable subject matter under 35 U.S.C. § 101.

25. On April 5, 2012, the Jumpstart Our Business Startups Act was signed into law by President Barack Obama, which among other things was intended to promote equity crowdfunding by authorizing the Securities and Exchange Commission (“SEC”) to promulgate regulations authorizing crowdfunding activities practical for small and medium-sized businesses, thereby promoting job growth.

26. On June 19, 2014, the U.S. Supreme Court issued its decision in *Alice Corporation Pty. Ltd. v. CLS Bank International*, 134 S.Ct. 2347 (2014), finding abstract subject matter not eligible for patent protection merely because it requires “generic computer implementation.”

27. While the notion of crowdfunding has been in the public domain since at least the 1850s, and matchmakers long before that, AlphaCap’s Asserted Patents claim to have been invented in 2003 or later.

28. Upon information and belief, prior to the Supreme Court determination in *Alice*, Defendants were monitoring the case and were aware that the Supreme Court’s ruling could have significant implications for some or all of its patent assets. As the validity of business method patents on computer-related applications is a critical and necessary component of AlphaCap’s continued viability as a going concern, the *Alice* case was one Defendants watched closely.

29. Upon information and belief, Defendants became aware of the invalidity of their patents almost immediately after the *Alice* decision was handed down by the Supreme Court. Specifically, after the *Alice* decision, Defendants received legal advice as to the ‘976 Patent, the

‘208 Patent, and the ‘630 Patent, which indicated that these patents would be found invalid if ever tested.

30. As early as June 19, 2014, and upon information and belief long before that time, Defendants knew the Asserted Patents do not cover any “inventive concept” under 35 U.S.C. § 101 that Gust makes, uses, sells, offers to sell or imports.

31. Defendants and their counsel knew or should have known the *Alice* decision would be applied by other courts and, when placed at issue, a court or the United States Patent & Trademark Office (“USPTO”) would formally render the Asserted Patents invalid.

32. Defendants also knew that they had to move the case along quickly so that they could reach a settlement with as many defendants as possible before post-*Alice* 35 U.S.C. § 101 invalidations of business-method patents became increasingly common, including those relying upon computer implementation of abstract ideas to “create” patentable subject matter.

33. As of September 16, 2014, summary judgment had been fully briefed in *Kickstarter, Inc. v. Fan Funded, LLC*, discussed *infra* herein, and addressed the issue of whether a patent could legally cover the mere implementation of crowdfunding activities through a computer. Upon information and belief, Defendants were aware of this development, and knew that a decision on the motion had the potential to substantially reduce if not completely obliterate the value of the Asserted Patents.

34. On January 23, 2015, Defendants instituted the above-referenced patent infringement litigations (“the Texas Actions”) in the United States District Court for the Eastern District of Texas against nearly every major crowdfunding entity in the United States, including Kickstarter, Indiegogo, CircleUp, RealtyMogul, Gust, AngelList, GoFundMe, LendingTree, iFunding (Innovational Funding), and RocketHub (collectively referred to hereinafter as “the

Crowdfunding Defendants”). All of those cases settled, except the pending case against Gust f/k/a Angelsoft. True and correct copies of the various complaints in these matters are attached hereto as Exhibit C.

35. Defendants intentionally filed ten (10) separate actions in the Eastern District of Texas that involved the exact same patents, the exact same causes of action, and were initiated by practically identical boilerplate complaints.

36. Defendants selected the Eastern District of Texas despite the fact that Gust and other Crowdfunding Defendants lacked contacts with or relationship to that forum. Defendants did this because it is a “rocket docket” jurisdiction known to be friendly to patent owners, that would facilitate Defendants’ plan to frivolously extract value from lawsuits against Gust and the Crowdfunding Defendants based on invalid patents before the full effects of the *Alice* decision were felt.

37. These sham litigation tactics allowed Defendants to avoid the potential precedential and/or estoppel effects of the decision handed down by the Honorable Katherine Polk Failla, of this District, in *Kickstarter, Inc. v. Fan Funded, LLC* (hereinafter “*Fan Funded*”), discussed *infra* herein, thereby maximizing Defendants’ potential to extract as much value as it could from the various lawsuits. The summary judgment motion in *Fan Funded* had been fully briefed before Judge Failla’s Court by the time Defendants filed the frivolous Texas Actions, but would not be decided until June 2015.

38. Defendants abused the legal process by filing ten (10) separate but identical lawsuits in the Eastern District of Texas against every major crowdfunding entity in the U.S., not to protect any valid intellectual property rights, but to achieve a collateral objective by using the legal process to force Gust and Crowdfunding Defendants to settle with Defendants before a

determination on merits revealed the frivolity of their claims. Upon information and belief, after a few successful settlements, Defendants hoped every current and future crowdfunding entity would fall in line and pay a licensing fee to AlphaCap to “practice” its invalid patents.

39. Upon information and belief, Defendants’ institution of patent litigation against Gust was carried out in bad faith and/or with willful blindness as Defendants knew or should have known of the invalidity of the Asserted Patents for a significant amount of time prior to, and at all times during, and/or after the institution of patent infringement litigation against Gust and the Crowdfunding Defendants.

40. Upon information and belief, Defendants’ institution of patent litigation against Gust was carried out in bad faith and/or with willful blindness as Defendants’ knew that Gust, as well as the other Crowdfunding Defendants, were not liable for infringing the Asserted Patents at any time, because the patents were invalid.

41. Upon information and belief, despite Defendants’ knowledge that the Asserted Patents were invalid after the Supreme Court’s ruling in *Alice*, they nonetheless persisted in attempting to extract as much value as possible from their frivolous lawsuits against Gust and the Crowdfunding Defendants.

42. On March 11, 2015, AlphaCap filed a Notice of Voluntary Dismissal with Prejudice thereby voluntarily dropping its claims against California Product Shop, Inc. d/b/a GoFundMe. Upon information and belief, Defendants’ were successful in extracting at least the nuisance value of its frivolous infringement lawsuit if not substantially more.

43. On April 21, 2015 AlphaCap filed a Notice of Voluntary Dismissal with Prejudice thereby voluntarily dropping its claims against Lending Tree. Upon information and belief,

Defendants were successful in extracting at least the nuisance value of its frivolous infringement lawsuit if not substantially more.

44. On April 30, 2015 AlphaCap filed a Notice of Voluntary Dismissal with Prejudice thereby voluntarily dropping its claims against AngelList, CircleUp, Indiegogo, Kickstarter and RealtyMogul. Upon information and belief, Defendants were successful in extracting at least the nuisance value of its frivolous infringement lawsuits if not substantially more.

45. On July 1, 2015, AlphaCap filed a Stipulation of Dismissal thereby voluntarily dropping its claims against iFunding (Innovational Funding). Upon information and belief, Defendants were successful in extracting at least the nuisance value of its frivolous infringement lawsuit if not substantially more.

46. On July 23, 2015, AlphaCap filed a Notice of Voluntary Dismissal with Prejudice thereby voluntarily dropping its claims against RocketHub. Upon information and belief, Defendants were successful in extracting at least the nuisance value of its frivolous infringement lawsuit if not substantially more.

47. Upon information and belief, from the time it filed the Texas Actions to the present Defendants were successful in extracting at least the nuisance value of its frivolous infringement lawsuits, and upon information and belief substantially more than that amount, from the following nine (9) Crowdfunding Defendants out of the ten (10) that were originally sued: AngelList, CircleUp, Indiegogo, Kickstarter, RealtyMogul, GoFundMe, Rockethub, iFunding, Lending Tree (“Settlement Defendants”).

48. Upon information and belief, Defendants had no intention of obtaining a determination on the merits, either as to the validity of the Asserted Patents or whether Gust or any of the Crowdfunding Defendants actually infringed those patents.

49. Not only were the Texas Actions frivolously filed, but Defendants' choices to continue the litigation to the present day constitute independent acts of bad faith and/or of willful blindness.

50. On June 29, 2015, the U.S. District Court for the Southern District of New York issued an opinion authored by the Honorable Katherine Polk Failla on the viability of infringement lawsuits based on patents purportedly covering Internet-based crowdfunding. In that decision, Judge Failla noted that "In only one case since the issuance of *Alice* has the Federal Circuit held a computer-implemented method patent to be eligible." *Kickstarter, Inc. v. Fan Funded, LLC*, 11 CIV. 6909 KPF, 2015 WL 3947178, at *10 (S.D.N.Y. June 29, 2015). As the court concluded, "While the concept of fan-funding may have been made a more realistic and fruitful endeavor with the advent of widespread Internet access, 'cloaking [that] otherwise abstract idea in the guise of a computer-implemented claim' does not bring it within Section 101." *Id* at *13.

51. The court further noted that any such similar patent would suffer a similar fate: "Whether the abstract idea in play here is defined as 'crowd-funding,' 'crowd-based funding,' 'fan-funding,' 'incentive-based patronage,' 'incentivized crowd-funding,' or some other combination of these words is of no moment: the abstract concept at play in the Patent remains the same" and is ineligible for protection. *Kickstarter, Inc. v. Fan Funded, LLC*, 11 CIV. 6909 KPF, 2015 WL 3947178, at *10 (S.D.N.Y. June 29, 2015).

52. Upon information and belief, Defendants were monitoring the *Fan Funded* case and were aware of the decision when it was issued. Defendants were further aware that the issuance of this decision only further confirmed the frivolity of patent infringement claims asserted against Internet crowdfunders.

53. Upon information and belief, Defendants abused the judicial process in an effort to cause harm to Gust when AlphaCap refused to drop its claims against Gust following Judge Failla's decision in *Fan Funded*, a decision that unequivocally illustrated the frivolity of any patent infringement suit against crowdfunders *based on their crowdfunding activity*.

54. Upon information and belief, Defendants knew at the time of that decision that the issue of patent infringement by an Internet crowdfunding platform had already been adjudicated and that it would likely be upheld on appeal.

55. Upon information and belief, Defendants knew that in order to avoid the implications of Judge Failla's decision they would have to reach a settlement with Gust before the decision was affirmed on appeal and before it could gain even greater precedential value.

56. Defendants have abused the judicial process by instituting a lawsuit they knew to be frivolous at the time it was filed, attempting to enforce the Asserted Patents before the full effects of the *Alice* decision could percolate through the courts, utilizing the Eastern District of Texas "rocket docket" in order to carry out their plan quickly, extracting at least the nuisance value of their frivolous claims from the Settlement Defendants, and persisting in the Texas action against Gust notwithstanding *Fan Funded* and the slew of decisions that effectively confirmed the invalidity of the Asserted Patents.

57. Such actions by Defendants entitle Gust to attorneys fees under 35 U.S.C. § 285, because Defendants' Texas action against Gust is objectively baseless under *Alice* and now *Fan Funded*, as it is a patent infringement suit against a crowdfunding platform premised on Internet crowdfunding, which is an abstract idea implemented through a computer. If not objectively baseless solely under *Alice* and *Fan Funded*, the Texas Actions are objectively baseless under

those decisions in conjunction with the complete lack of factual allegations in the Texas Actions that could materially distinguish them from the rulings in *Alice* and *Fan Funded*.

58. Gust has spent and will continue to spend considerable sums to defend itself in the Texas action unless Defendants are enjoined, adjudged against, and sanctioned for their frivolous, objectively baseless, and sham lawsuits against the Crowdfunding Defendants.

COUNT ONE
DECLARATION OF NON-INFRINGEMENT OF THE '976 PATENT

59. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

60. Exhibit A to this Complaint contains a true and correct copy of the '976 Patent.

61. Defendants have accused Plaintiff's product at Gust.com of infringing one or more claims of the '976 Patent.

62. No product made, used, sold, offered for sale, or imported by Plaintiff contains each and every element of any claim of the '976 Patent, either literally or under the doctrine of equivalents.

COUNT TWO
DECLARATION OF NON-INFRINGEMENT OF THE '208 PATENT

63. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

64. Exhibit A to this Complaint contains a true and correct copy of the '208 Patent.

65. Defendants have accused Plaintiff's product at Gust.com of infringing one or more claims of the '208 Patent.

66. No product made, used, sold, offered for sale, or imported by Plaintiff contains each and every element of any claim of the '208 Patent, either literally or under the doctrine of equivalents.

COUNT THREE
DECLARATION OF NON-INFRINGEMENT OF THE '630 PATENT

67. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

68. Exhibit A to this Complaint contains a true and correct copy of the '630 Patent.

69. Defendants have accused Plaintiff's product at Gust.com of infringing one or more claims of the '630 Patent.

70. No product made, used, sold, offered for sale, or imported by Plaintiff contains each and every element of any claim of the '630 Patent, either literally or under the doctrine of equivalents.

COUNT FOUR
DECLARATION OF INVALIDITY OF THE '976 PATENT

71. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

72. On information and belief, every element of every claim of the '976 Patent was patented, described in a printed publication or a combination of printed publications, or in public use, on sale, or otherwise available to the public before the effective filing date of the application that led to the '976 Patent.

73. On information and belief, every element of every claim of the '976 Patent was patented, described in a printed publication or a combination of printed publications, or in public

use, on sale, or otherwise available to the public more than a year before the effective filing date of the application that led to the '976 Patent.

74. Every claim of the '976 Patent is directed to non-statutory subject matter.

75. Every claim of the '976 Patent fails to point out and distinctly claim the invention.

76. The '976 Patent does not enable a person having ordinary skill in the art to make and use the invention.

77. Every claim of the '976 Patent is invalid under 35 U.S.C. §§ 101, 102, 103 and/or 112.

COUNT FIVE
DECLARATION OF INVALIDITY OF THE '208 PATENT

78. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

79. On information and belief, every element of every claim of the '208 Patent was patented, described in a printed publication or a combination of printed publications, or in public use, on sale, or otherwise available to the public before the effective filing date of the application that led to the '208 Patent.

80. On information and belief, every element of every claim of the '208 Patent was patented, described in a printed publication or a combination of printed publications, or in public use, on sale, or otherwise available to the public more than a year before the effective filing date of the application that led to the '208 Patent.

81. Every claim of the '208 Patent is directed to non-statutory subject matter.

82. Every claim of the '208 Patent fails to point out and distinctly claim the invention.

83. The '208 Patent does not enable a person having ordinary skill in the art to make and use the invention.

84. Every claim of the '208 Patent is invalid under 35 U.S.C. §§ 101, 102, 103 and/or 112.

COUNT SIX
DECLARATION OF INVALIDITY OF THE '630 PATENT

85. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

86. On information and belief, every element of every claim of the '630 Patent was patented, described in a printed publication or a combination of printed publications, or in public use, on sale, or otherwise available to the public before the effective filing date of the application that led to the '630 Patent.

87. On information and belief, every element of every claim of the '630 Patent was patented, described in a printed publication or a combination of printed publications, or in public use, on sale, or otherwise available to the public more than a year before the effective filing date of the application that led to the '630 Patent.

88. Every claim of the '630 Patent is directed to non-statutory subject matter.

89. Every claim of the '630 Patent fails to point out and distinctly claim the invention.

90. The '630 Patent does not enable a person having ordinary skill in the art to make and use the invention.

91. Every claim of the '630 Patent is invalid under 35 U.S.C. §§ 101, 102, 103 and/or 112.

COUNT SEVEN
ABUSE OF PROCESS AGAINST ALPHACAP AND RICHARD JUAREZ

92. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

93. AlphaCap, at the direction of Richard Juarez, has filed frivolous infringement actions and asserted and/or threatened to assert patents that Defendants knew were invalid, unenforceable, and not infringed, and asserted other baseless causes of action.

94. The foregoing actions were taken, and assertions and threats were made, without excuse or justification.

95. Defendants abused and sought to abuse the legal process in a perverse and illegitimate manner, not to protect any valid intellectual property rights, but to achieve one or more collateral objectives.

96. Defendants abused and sought to abuse the legal process to achieve the collateral objective of forcing Gust to incur legal expense so that it would pay a license to AlphaCap while avoiding a determination on the merits.

97. Defendants abused and sought to abuse legal process to achieve the collateral objective of forcing Gust pay a sizable settlement to AlphaCap while avoiding a determination on the merits.

98. Defendants abused and sought to abuse the legal process to damage Gust's reputation, to harm Gust's relationships with customers and prospective customers, and to place Gust at a competitive disadvantage so that AlphaCap and/or Richard Juarez could enter the nascent equity crowdfunding market with a concomitant competitive advantage while avoiding a determination on the merits.

99. Defendants abused and sought to abuse the legal process to set a market precedent in the nascent equity crowdfunding market for the licensing of its invalid Asserted Patents while avoiding a determination on the merits.

100. Defendants abused and sought to abuse the legal process to set a market precedent in the nascent equity crowdfunding market as the “inventor” of equity crowdfunding based on its invalid Asserted Patents while avoiding a determination on the merits.

101. Defendants abused and sought to abuse the legal process by utilizing the Asserted Patents purely as litigation weapons rather than as a means to practice the technology these patents purport to cover.

102. Defendants abused and sought to abuse the legal process by attempting to extract a sizeable settlement before the full legal and precedential implications of the *Alice* and *Fan Funded* decisions rendered the Asserted Patents overtly invalid.

103. Defendants abused and sought to abuse the legal process by attempting to extract a sizeable settlement, an illegitimate license, or an illegitimately obtained competitive advantage in the nascent equity crowdfunding market to obtain a return on the investment Defendants made in terms of legal fees expended in order to prosecute the Asserted Patents before the USPTO.

104. Defendants abused and sought to abuse the legal process by filing identical separate actions based on identical patents and practically identical factual allegations against similarly situated Crowdfunding Defendants with the intent to avoid a determination on the merits, including but not limited to the legal effects of the *Alice* and *Fan Funded* decisions.

105. Defendants abused and sought to abuse the legal process by attempting to set a *de facto* precedent that would encourage all future entrants into the crowdfunding market to pay

AlphaCap licensing fees to “practice” its invalid patents while avoiding a determination on the merits that would reveal the invalidity of those patents.

106. Defendants’ actions were intentional, willful, and malicious, and constitute abuse of process.

107. Unless enjoined, Defendants, by and through their attorneys, will continue to make threats against Gust and all future entrants into the crowdfunding market through objectively baseless assertions that such crowdfunders are infringing invalid and unenforceable patents.

108. By reason of the foregoing, Gust has been damaged in an amount to be proven at trial and is entitled to suitable injunctive relief.

COUNT EIGHT
PATENT MISUSE

109. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

110. The Texas Actions are objectively baseless; the U.S. Supreme Court in *Alice* completely obliterated any non-frivolous basis to assert patent rights over longstanding financial techniques merely because they were implemented through a computer. This court’s ruling in *Fan Funded* further supports this position. No reasonable litigant would persist in litigation after so many indications that the litigation was objectively baseless.

111. Defendants know of the *Alice* case.

112. Defendants knew about the *Alice* case prior to initiating the Texas Litigation.

113. Defendants know that the Asserted Patents are invalid under 35 U.S.C. § 101 as interpreted by the Supreme Court in *Alice*.

114. Defendants' assertion of patents they know to be invalid, in order to coax settlements for the nuisance value of litigation they know is baseless, is an attempt to extend a patent monopoly beyond the valid coverage of any patent AlphaCap owns.

115. The actions of Defendants described above were intentional, willful, and malicious.

116. The actions of Defendants described above constitute patent misuse.

117. By reason of the foregoing, Gust is entitled to a declaration that every claim of the Asserted Patents, whether asserted against Gust or not, is unenforceable due to patent misuse.

COUNT NINE
VIOLATION OF SECTION 2 OF THE SHERMAN ACT AGAINST ALPHACAP AND RICHARD JUAREZ

118. Plaintiff realleges and incorporates by reference the above paragraphs of this Complaint, inclusive, as though fully set forth herein.

119. The relevant upstream (technology) market for the purposes of this litigation is the market for crowdfunding effectuated through the use of a computer that the Asserted Patents purport to cover. AlphaCap has enormous market power in this field because if successful in this or any of the related cases, it will have the power to either extract illegitimate licensing revenues from every competitor in the industry and/or force that competitor out of the industry. This market includes all services available by way of computer-implemented crowdfunding and all reasonably interchangeable goods of that kind.

120. AlphaCap retains even more market power due to the timing of this lawsuit prior to the implementation of the SEC regulations authorized under the JOBS Act that will authorize equity crowdfunding in the U.S. on a massive scale. The precedential effect of a successful

infringement decision would corner the entire nascent equity crowdfunding market in AlphaCap's favor.

121. On October 30, 2015, the Securities and Exchange Commission adopted final rules permitting companies to offer and sell securities through crowdfunding. Under these rules, the forms enabling crowdfunding portal registration will become effective January 29, 2016. The SEC final rules become effective on May 16, 2016.

122. Upon information and belief, allowing AlphaCap's lawsuits to proceed would significantly impede current as well as future but as yet unrealized competition in the equity crowdfunding space, as it will allow AlphaCap to collect rents from every company currently in or attempting to enter the Internet crowdfunding space. AlphaCap has the power to directly control prices in this market and/or exclude competition from this market; AlphaCap may charge a licensing fee substantial enough to force a crowdfunding entity to 1) pass those costs onto end users, 2) reduce costs by limiting its offerings to end-users, and/or 3) or close its doors. In each case, AlphaCap's actions in this regard would operate to increase prices in the market and/or exclude competition from the market.

123. The outcome of the Texas Actions against the Settlement Defendants has markedly increased AlphaCap's power to directly control prices in the relevant market. This is because AlphaCap's confidential settlements with each of the Settlement Defendants indicates to all current and future crowdfunding entities, including those seeking to operate under the rules effective as of May 16, 2016: (1) that well-known crowdfunding platforms like Kickstarter have already decided AlphaCap's Asserted Patents are strong enough to warrant settlement and payment of licensing fees to AlphaCap; (2) that each of the Settlement Defendants (which together represent a very substantial percentage, if not a majority, of the current U.S.

crowdfunding space) paid a confidential sum to AlphaCap for this purpose; (3) that paying a license to AlphaCap to practice the Asserted Patents is a cost of doing business in the relevant market and is not worth the cost of further legal scrutiny.

124. There are barriers to entry into the downstream product market defined above, including, but not limited to, the royalties AlphaCap would charge to enter the Internet crowdfunding downstream market and AlphaCap's ability to exclude any competitor they wish from the downstream Internet crowdfunding market. AlphaCap has shown through its conduct in instituting the Texas Actions that it will act on its ability to control prices in this market and/or exclude competition from this market.

125. The relevant geographic market for the purposes of this litigation is the entire United States.

126. The Texas Actions are objectively baseless; the U.S. Supreme Court in *Alice* completely obliterated any non-frivolous basis to assert patent rights over longstanding financial techniques merely because they were implemented through a computer. This court's ruling in *Fan Funded* further supports this position. No reasonable litigant would persist in litigation after so many indications that the litigation was objectively baseless.

127. AlphaCap's institution of objectively baseless litigation and continuation of that same litigation against Gust and the remaining Crowdfunding Defendants has the ability to cause severe injury not only to Gust but to the entire nascent equity crowdfunding industry, thereby frustrating Congress' intent in passing the JOBS Act by limiting the availability of crowdfunding activities that could promote job growth.

128. The actions of AlphaCap described above were intentional, willful and malicious, and constitute a violation of Section 2 of the Sherman Act.

129. Unless enjoined, AlphaCap will continue to damage Gust's ability to compete in the markets in the United States for crowdfunding.

130. By reason of the foregoing, Gust has been damaged in an amount to be proven at trial and are entitled to suitable injunctive relief.

PRAYER FOR RELIEF

WHEREFORE, Gust prays for the entry of judgment:

- a. Declaring that each claim of the United States Patent No. 7,848,976 is invalid and/or unenforceable.
- b. Declaring that each claim of the United States Patent No. 7,908,208 is invalid and/or unenforceable.
- c. Declaring that each claim of the United States Patent No. 8,433,630 is invalid and/or unenforceable.
- d. Declaring that Gust does not infringe any claim of the United States Patent No. 7,848,976.
- e. Declaring that Gust does not infringe any claim of the United States Patent No. 7,908,208.
- f. Declaring that Gust does not infringe any claim of the United States Patent No. 8,433,630.
- g. An injunction prohibiting Defendants and their officers, agents, employees and attorneys, and all those persons in active concert or participation with them, from alleging infringement of the '976, '208, and '630 Patents; and
- h. Compensatory damages in the amount to be determined at trial;
- i. Statutory damages pursuant to Section 4 of the Clayton Act (15 U.S.C. § 15) equal to three times the damages actually sustained by the Crowdfunding Defendants, in an amount to be proven at trial; and
- j. Punitive damages based on Defendants' willful and malicious conduct; and
- k. A declaration that this case is exceptional pursuant to 35 U.S.C. § 285 and awarding Gust its reasonable attorneys' fees, expenses and costs incurred in this action and the Texas Action; and
- l. Awarding Gust such other relief as may be properly awarded by this court.

JURY DEMAND

Plaintiff respectfully requests a jury on all issues presented in this matter.

Dated: November 27, 2015

By: /s/ Samuel V. Eichner
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