

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

NOVELPOINT TRACKING LLC

Plaintiff,

v.

DELL INC.

Defendant.

Case No. 2:12-cv-743-JRG

PATENT CASE

JURY TRIAL DEMANDED

SECOND AMENDED COMPLAINT

NovelPoint Tracking LLC files this Second Amended Complaint as a matter of course pursuant to Fed. R. Civ. P. 15(a)(1)(B) against Dell Inc. (“Defendant”) for infringement of United States Patent No. 6,442,485.

THE PARTIES

1. Plaintiff NovelPoint Tracking LLC (“NPT”) is a Texas limited liability company with its principal place of business at 1300 Ballantrae Dr., Allen TX, 75013 in the Eastern District of Texas.

2. Defendant Dell Inc. is a Delaware Corporation with a principal place of business at One Dell Way, Round Rock, Texas 78682. Defendant’s Registered Agent in the State of Texas is Corporation Service Company located at 211 E. 7th Street, Suite 620, Austin, Texas 78701.

3. Dell has complex and deep ties to the Eastern District of Texas, including a principal place of business within the District. For example, Dell Services Corporate Headquarters is located at 2300 West Plano Parkway, Plano, TX 75075; a Dell Direct or Dell

Showcase store at 6121 W Park Blvd., Plano, TX 75093 sold Dell products directly in the District up through 20 February, 2013; Dell continues to operate an online direct-order business which offers products for sale to customers in the District, including the 75013 zip code; and Dell products are offered for sale through retailers and distributors within the District such as Best Buy (whose website directs visitors such as NPT with an zip code of 75013 to its stores in the District such as its store at 8720 State Hwy. 121, McKinney, Texas 75070).

NATURE OF THE ACTION

4. This is a civil action for infringement of United States Patent No. 6,442,485 (the “Patent-in-Suit”), arising under the Patent Laws of the United States, 35 U.S.C. § 1 *et seq.*

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 (Federal Question) and 1338(a) (Patents).

6. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and 1400(b) because Defendant has committed acts of infringement in the United States and maintains a place of business in this district and is deemed to reside in this district for purposes of this action.

7. This Court has personal jurisdiction over Defendant and venue is proper in this district because Defendant has committed, and continues to commit, acts of infringement in the State of Texas, including in this district and/or has engaged in continuous and systematic activities in the State of Texas, including in this district.

THE PATENT-IN-SUIT

8. The Patent-in-Suit, entitled “Method and Apparatus for an Automatic Vehicle Location, Collision Notification, and Synthetic Voice,” was duly and legally issued by the

United States Patent and Trademark Office on August 27, 2002. A copy of the Patent-in-Suit is attached hereto as Exhibit A.

9. NPT is the exclusive owner of all rights, title, and interest in the Patent-in-Suit, including the right to exclude others and to enforce, sue and recover damages for past and future infringement thereof.

KNOWLEDGE OF THE PATENT-IN-SUIT

10. NPT filed its original Complaint in this matter on 2 December 2013 asserting the Patent-in-Suit.

11. There are circumstances NPT is entitled to explore in discovery raising a question as to whether Defendant was aware of the Patent-in-Suit some time prior to the filing of NPT's original Complaint.

COUNT I: DIRECT INFRINGEMENT OF THE PATENT-IN-SUIT

12. NPT incorporates paragraphs 1 through 11 by reference as if fully stated herein.

13. The Patent-in-Suit is valid and enforceable.

14. Defendant has directly infringed, and continues to directly infringe, one or more claims of the Patent-in-Suit under 35 U.S.C. § 271(a), either literally and/or under the doctrine of equivalents, by making, using, selling, offering for sale, and/or importing products and/or methods encompassed by those claims.

15. Defendant's Dell Venue smartphone is an example of an infringing product and/or method.

COUNT II: INDUCED INFRINGEMENT

16. NPT incorporates paragraphs 1 through 15 by reference as if fully stated herein.

17. Third party resellers and retailers including WalMart and Fry's Electronics have infringed, and continue to infringe, one or more claims of the Patent-in-Suit under 35 U.S.C. § 271(a), either literally and/or under the doctrine of equivalents, by using, selling, and/or offering for sale in the United States, and/or importing into the United States, products supplied by Defendant.

18. The Dell Venue, for example, is currently in stock and being offered for sale by numerous retailers and distributors, including WalMart and Fry's Electronics.

19. Defendant currently encourages members of the public to "try out and purchase Dell products faster and easier than ever. Stop by one of our partner store locations and experience Dell products for yourself." Defendant's website currently includes links to at least 27 partner retailers and resellers of Defendant's products, including WalMart and Fry's Electronics. These links are not limited to store location finders, but include the current Dell products offered for sale by many of Defendant's partners. For example, Defendant provides a link encouraging website users to "View Available Products," including the Dell Venue, from its partner WalMart's website.

20. Retailers and resellers of Defendant's products are not limited to those linked and promoted on Defendant's website. Others include familiar US-based names like Staples, and lesser-known names with English-language websites such as the Syria-based Mabco. Unlisted retailers and resellers such as Amazon and eBay are currently offering the Dell Venue for sale in the US.

21. Defendant encourages companies in almost 200 countries to "Become... Dell Partner[s]," noting that the support to many of its partners is extensive, systematic, planned, and tailored to the needs of particular partners. Defendant "provides its Partners with strong market

differentiation and growth opportunities through various programs” for Value Added Resellers, Technology Partners, OEM Partners, Global Allies, and Express Ship Affiliates.

22. Some Dell products offered for sale on English-language websites such as Mabco, including Dell products listed on Defendant’s own website, cannot be purchased directly from Defendant. Instead, users are directed to “Buy [them]... from a Dell Express Ship Affiliate.”

23. Value-Added Resellers of Dell enjoy benefits such as “Deal Registration [to] protect qualified opportunities... high-value, low-cost training & Competencies... Marketing: access to co-branding marketing materials... Financing: flexible Partner & customer financing... [and a] PartnerDirect Portal [with] Partner resources consolidated at one location.” The website further promises “[a]dditional benefits for our most committed and valued Partners.” Dell’s Partners include companies in Athens, Ben Wheeler, and Murphy, Texas within the Eastern District of Texas.

24. Defendant has induced infringement, and continues to induce infringement, of one or more claims of the Patent-in-Suit under 35 U.S.C. § 271(b) by actively, knowingly, and intentionally inducing current infringement of the Patent-in-Suit by making, using, importing, and selling or otherwise supplying products to other parties such as WalMart and Fry’s, with the knowledge and intent that such third parties are using, selling, or offering for sale products supplied by Defendant to infringe the Patent-in-Suit; and with the knowledge and intent to encourage and facilitate such infringement through Defendant’s website and extensive, tailored partner benefit programs.

25. Defendant’s Dell Venue smartphone is an example of an infringing product and/or method.

COUNT III: CONTRIBUTORY INFRINGEMENT

26. NPT incorporates paragraphs 1 through 25 by reference as if fully stated herein.

27. Defendant currently directly offers non-staple products for sale to the general public in the United States that it specifically identifies and describes as components for use or inclusion in other products, including components constituting a material part of the inventions of the Patent-in-Suit such as the Dell Wireless 5540 HSPA Mobile Broadband Mini-Card (the “Dell Card”), the AT&T Wireless 5540 HSPA Mobile Broadband Mini-Card (the “AT&T Card”), and the Garmin GPS 18x USB.

28. Components offered directly for sale by Defendant, including the Dell Card and the AT&T Card, are especially made or adapted for use with specific Dell products identified by Defendant, including products for sale directly by Defendant, and products available through retailers, resellers, and other partners of Dell.

29. On information and belief, such components, including the Dell Card and the AT&T Card, have no substantial non-infringing use.

30. Defendant and/or its subsidiaries have contributed, and continue to contribute, to the infringement by one another, and by their resellers, retailers, and other partners, of one or more claims of the Patent-in-Suit under 35 U.S.C. § 271(c) by making, using, selling, offering for sale, and/or importing Defendant’s products, knowing that those products constitute a material part of the inventions of the Patent-in-Suit, knowing that those products are especially made or adapted to infringe the Patent-in-Suit, and knowing that those products are not staple articles of commerce suitable for substantial noninfringing use.

REMEDIES ISSUES COMMON TO ALL COUNTS

31. NPT incorporates paragraphs 1 through 30 by reference as if fully stated herein.

32. Dell's business model and corporate structure have become increasingly complex in recent years, embracing more than 250 subsidiaries including numerous holding companies located in the Cayman Islands, Bermuda, and Switzerland; Express Ship Affiliates, at least some of whom (such as CompuIndia.com) have websites comparable to and integrated with Defendant's own website; four categories of "PartnersDirect," including Value Added Resellers, Technology Partners, OEM Partners, and Global Allies, that offer a variety of specific program benefits from Dell; and numerous resellers and retailers, some of which have websites integrated with Defendant's own website, and others of whom do not.

33. Defendant is a global company with many functionally distinct facilities in different countries which could be associated with Dell or any one of its subsidiaries, but any or all of which could be associated with revenues related to the US manufacture, use, sale, offer for sale, or import of infringing products such as the Dell Venue. For example, Defendant's "principal executive offices, including global headquarters" are located in the U.S., while Defendant sole-sources many components and assembly processes outside the U.S.

34. Defendant publicly discloses special tax treatment with respect to certain foreign subsidiaries and that it reports "supplemental measures of... performance... which are not presented in our consolidated financial statements prepared in accordance with accounting principles generally accepted in the United States of America ('GAAP').".

35. NPT has been and continues to be damaged by Defendant's infringement of the Patent-in-Suit. These damages are governed by patent law, not by tax- or government-contractor-accounting considerations, and NPT is entitled to damages-related discovery based on patent law.

36. Defendant's actions complained of herein are causing irreparable harm and damages to NPT and will continue to do so unless and until Defendant is enjoined and restrained by the Court.

37. Defendant's conduct in infringing the Patent-in-Suit renders this case exceptional within the meaning of 35 U.S.C. § 285.

38. NPT reserves its rights to amend this complaint as and to the extent that additional claims may come to light in discovery, including amendments relating to the issue of willfulness.

JURY DEMAND

39. Plaintiff NPT hereby demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, NPT prays for judgment as follows:

- A. That Defendant has infringed one or more claims of the patent-in-suit;
- B. That Defendant account for and pay all damages necessary to adequately compensate NPT for infringement of the patent-in-suit, such damages to be determined by a jury, and that such damages be awarded to NPT with pre-judgment and post-judgment interest;
- C. That Defendant and its officers, directors, agents, servants, affiliates, employees, divisions, branches, subsidiaries, parents, and all others acting in concert or actively participating with them, be permanently enjoined from directly or indirectly infringing the patent-in-suit; or, in the alternative, judgment that Defendant account for and pay to NPT an ongoing post-judgment royalty reflecting Defendant's deliberate continuing infringement;
- D. That this case be declared an exceptional case within the meaning of 35 U.S.C. § 285 and that NPT be awarded the attorney fees, costs, and expenses that it incurs prosecuting this action; and

E. That NPT be awarded such other and further relief as this Court deems just and proper.

DATED: April 4, 2013

Respectfully submitted,

/s/ Everett Upshaw
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically on April 4, 2013 pursuant to Local Rule CV-5(a) and has been served on all counsel who are deemed to have consented to electronic service.

By: /s/ Everett Upshaw
Everett Upshaw