

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

EXCENTUS CORPORATION,

Plaintiff,

v.

THE KROGER CO.,

Defendant.

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Civil Action No. 3:10-cv-00483

ORIGINAL COMPLAINT

Plaintiff Excentus Corporation (“Excentus”), for its Original Complaint against Defendant The Kroger Co. (“Kroger”), alleges as follows:

PARTIES

1. Excentus is a Corporation duly organized and existing under the laws of the State of Texas, having a principal of business at 1255 Corporate Drive, Suite 100, Irving, Texas 75038.

2. Defendant The Kroger Co. (“Kroger”) is a corporation duly organized and existing under the law of the State of Ohio, having a principal place of business at 1014 Vine Street, Cincinnati, OH 45202.

JURISDICTION

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a) because this action arises under the patent laws of the United States, including 35 U.S.C. § 271 et seq.

4. The Court has personal jurisdiction over Kroger in that Kroger has committed acts within Texas and this judicial district giving rise to this action, and Kroger has established

minimum contacts with the forum such that the exercise of jurisdiction over Kroger would not offend traditional notions of fair play and substantial justice.

VENUE

5. Kroger has committed acts within this judicial district giving rise to this action and does business in this district, including offering for sale, making sales and providing service to its respective customers in this district. Acts of infringement and other tortious conduct have occurred in this district. Furthermore, the main inventor of the asserted patents conceived of and reduced his inventions to practice in the Northern District of Texas. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(a), (b) & (c) and 1400(b).

FACTS

6. Beginning in late 1996 and continuing until the filing of the patents, Randy Nicholson ("Nicholson") conceived of and worked continuously to develop the asserted claimed inventions in Abilene, Texas. Nicholson is a long-time Abilene resident. When Nicholson started his new business known as Auto-Gas in late 1986, he did so in Abilene. Auto-Gas has been based in Abilene since its inception.

7. Long before fuel rewards were used as they are today, Nicholson conceived of the inventions, reduced them to practice and sought patents for them. Nicholson is recognized as a pioneer of many aspects of the retail fuel industry including innovations such as unattended fuel sites for commercial fleets, pay-at-the-pump technology for which he was recognized by USA Today, and providing fuel rewards to customers (which he patented). In order to put his patents to work, Nicholson used Auto-Gas. Auto-Gas successfully implemented the patents in its business and by way of licensing the patents to third parties.

8. In addition to owning the patents, Auto-Gas expended great effort and expense to create and develop highly technical computerized systems to provide retailers with a way of providing rewards to their customers in the form of gasoline discounts. The Auto-Gas systems included information regarding how retailers could process and accumulate rewards for reduced prices for gasoline, how retailers promotional items could be used with gasoline credits, how each customer's rewards information could be accessed, stored, identified and retrieved for gasoline discounts, how limitations could be placed on such rewards, and how a retailer could allow the rewards to be used at gasoline pumps.

9. Excentus also is a pioneer in the fuel rewards industry. Excentus was started in 1996 for the purpose of developing and marketing fuel marketing technology and services to retailers. Today, Excentus is the market leader of providing such technology and services, including its own fuel reward program (called "fuelperks!"), to numerous retailers in the United States.

10. In September 2008, Excentus acquired the Nicholson Patents, Nicholson joined the Board of Excentus, and Auto-Gas became a shareholder of Excentus. Excentus also has acquired all of the Auto-Gas software, systems, trademarks, customers, business operations, trade secrets and confidential business or technical information related to the Auto-Gas fuel reward products and services.

11. In addition to owning the Auto-Gas patents, Excentus previously had expended and continues to expend great effort and expense to create and develop highly technical and market-specific software and computer systems to provide retailers with a way of developing highly effective rewards programs and providing rewards to their customers in the form of gasoline discounts in a cost-effective and timely manner.

12. The acquisition by Excentus of Auto-Gas' patents has aligned the critical patents in the fuel rewards industry with the market leader in the industry, and has combined both of their market-specific software and computer systems regarding how retailers can provide rewards to their customers in the form of gasoline discounts in the most efficient and effective manner.

INFRINGEMENT OF U.S. PATENT NO. 6,321,984

13. On November 27, 2001, United States Patent No. 6,321,984 ("the '984 Patent") was duly and legally issued for an invention entitled "Adjustable price fuel dispensing system." A copy of the '984 Patent is attached as Exhibit A.

14. The '984 Patent was assigned to Excentus, and Excentus holds all rights and interests in the '984 Patent.

15. Kroger has engaged and is engaging in unauthorized conduct and activities that violate 35 U.S.C. § 271 et seq., constituting direct infringement, contributory infringement and/or induced infringement of one or more claims of the '984 Patent, including but not limited to the Kroger Fuel program directly and/or indirectly infringing at least claims 1, 2 and 14 of the '984 Patent.

16. The acts of infringement by Kroger have caused damages to Excentus, and Excentus is entitled to recover from Kroger the damages sustained by Excentus as a result of its wrongful acts in an amount subject to proof at trial. Each of Kroger's infringement of Excentus' exclusive rights under the '984 Patent will continue to damage Excentus' business, causing irreparable harm (including loss of market share), for which there is no adequate remedy at law, unless it is enjoined by this Court.

17. Furthermore, the infringements of the '984 Patent by Kroger were willful and deliberate, entitling Excentus to increased damages under 35 U.S.C. § 284 and to attorneys' fees and costs incurred in prosecuting this action under 35 U.S.C. § 285.

INFRINGEMENT OF U.S. PATENT NO. 6,332,128

18. On December 18, 2001, United States Patent No. 6,332,128 ("the '128 Patent") was duly and legally issued for an invention entitled "System and method of providing multiple level discounts on cross-marketed products and discounting a price-per-unit-volume of gasoline." A copy of the '128 Patent is attached as Exhibit B.

19. The '128 Patent was assigned to Excentus, and Excentus holds all rights and interests in the '128 Patent.

20. Kroger has engaged and is engaging in unauthorized conduct and activities that violate 35 U.S.C. § 271 et seq., constituting direct infringement, contributory infringement and/or induced infringement of one or more claims of the '128 Patent, including but not limited to the Kroger Fuel program directly and/or indirectly infringing at least claims 1, 3 and 20 of the '128 Patent.

21. The acts of infringement by Kroger have caused damages to Excentus, and Excentus is entitled to recover from Kroger the damages sustained by Excentus as a result of its wrongful acts in an amount subject to proof at trial. Each of Kroger's infringement of Excentus' exclusive rights under the '128 Patent will continue to damage Excentus' business, causing irreparable harm (including loss of market share), for which there is no adequate remedy at law, unless it is enjoined by this Court.

22. Furthermore, the infringements of the '128 Patent by Kroger were willful and deliberate, entitling Excentus to increased damages under 35 U.S.C. § 284 and to attorneys' fees and costs incurred in prosecuting this action under 35 U.S.C. § 285.

INFRINGEMENT OF U.S. PATENT NO. 6,732,081

23. On May 4, 2004, United States Patent No. 6,732,081 ("the '081 Patent") was duly and legally issued for an invention entitled "Method for providing price-per-unit discounts for fuel to a customer." A copy of the '081 Patent is attached as Exhibit C.

24. The '081 Patent was assigned to Excentus, and Excentus holds all rights and interests in the '081 Patent.

25. Kroger has engaged and is engaging in unauthorized conduct and activities that violate 35 U.S.C. § 271 et seq., constituting direct infringement, contributory infringement and/or induced infringement of one or more claims of the '081 Patent, including but not limited to the Kroger Fuel program directly and/or indirectly infringing at least claim 11 of the '081 Patent.

26. The acts of infringement by Kroger have caused damages to Excentus, and Excentus is entitled to recover from Kroger the damages sustained by Excentus as a result of its wrongful acts in an amount subject to proof at trial. Each of Kroger's infringement of Excentus' exclusive rights under the '081 Patent will continue to damage Excentus' business, causing irreparable harm (including loss of market share), for which there is no adequate remedy at law, unless it is enjoined by this Court.

27. Furthermore, the infringements of the '081 Patent by Kroger were willful and deliberate, entitling Excentus to increased damages under 35 U.S.C. § 284 and to attorneys' fees and costs incurred in prosecuting this action under 35 U.S.C. § 285.

INFRINGEMENT OF U.S. PATENT NO. 7,383,204

28. On June 3, 2008, United States Patent No. 7,383,204 (“the ‘204 Patent”) was duly and legally issued for an invention entitled “System and method to provide customer incentive to provide non-fuel products and services.” A copy of the ‘204 Patent is attached as Exhibit D.

29. The ‘204 Patent was assigned to Excentus, and Excentus holds all rights and interests in the ‘204 Patent.

30. Kroger has engaged and is engaging in unauthorized conduct and activities that violate 35 U.S.C. § 271 et seq., constituting direct infringement, contributory infringement and/or induced infringement of one or more claims of the ‘204 Patent, including but not limited to the Kroger Fuel program directly and/or indirectly infringing at least claims 1 and 5 of the ‘204 Patent.

31. The acts of infringement by Kroger have caused damages to Excentus, and Excentus is entitled to recover from Kroger the damages sustained by Excentus as a result of its wrongful acts in an amount subject to proof at trial. Each of Kroger’s infringement of Excentus’ exclusive rights under the ‘204 Patent will continue to damage Excentus’ business, causing irreparable harm (including loss of market share), for which there is no adequate remedy at law, unless it is enjoined by this Court.

32. Furthermore, the infringements of the ‘204 Patent by Kroger were willful and deliberate, entitling Excentus to increased damages under 35 U.S.C. § 284 and to attorneys’ fees and costs incurred in prosecuting this action under 35 U.S.C. § 285.

PRAYER

WHEREFORE, Excentus respectfully prays that upon final trial a judgment be entered and that the following relief be granted.

(1) For judgment that the '984 Patent has been and will continue to be infringed by Defendant Kroger;

(2) For judgment that the '128 Patent has been and will continue to be infringed by Defendant Kroger;

(3) For judgment that the '081 Patent has been and will continue to be infringed by Defendant Kroger;

(4) For judgment that the '204 Patent has been and will continue to be infringed by Defendant Kroger;

(5) For an accounting of all damages sustained by Excentus as a result of the acts of infringement by Defendant Kroger;

(6) For preliminary and permanent injunctions enjoining the aforesaid acts of infringement by Kroger, its officers, agents, servants, employees, subsidiaries and attorneys, and those persons acting in concert with them, including related individuals and entities, customers, representatives, dealers, and distributors;

(7) For actual damages together with prejudgment interest against Defendant Kroger;

(8) For enhanced damages pursuant to 35 U.S.C. § 284 against Defendant Kroger;

(9) For an award of attorneys' fees pursuant to 35 U.S.C. § 285 or as otherwise permitted by law against Defendant Kroger;

(10) For exemplary damages against Defendant Kroger;

(11) For all costs of suit, prejudgment and post-judgment interest as allowed by law;

and

(12) For such other and further relief as the Court may deem just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38, Plaintiff Excentus Corporation demands a trial by jury.

Dated: March 9, 2010

Respectfully submitted,

/s/ Brett C. Govett

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Lead Attorney

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