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

SPACETIME3D, INC. **Plaintiff,** **v.** **LG ELECTRONICS INC., and LG ELECTRONICS U.S.A., INC.,** **Defendants.**	**Civil Action No. 2:22-CV-49-RWS** **JURY TRIAL DEMANDED**

PLAINTIFF SPACETIME3D, INC.'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

APPLE 1032
Apple v. SpaceTime3D, Inc.
IPR2023-00343

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INTRODUCTION

The Court should deny LG's meritless motion ("Mot.") that overlooks detailed factual allegations and well-established legal requirements that are inconvenient to its positions. The first such oversight is of the Complaint's explicit allegations that LG has continued to infringe the patents following the announcement of its exit from the mobile phone business. Compl., ¶¶ 38-39 & n.5, 41. Indeed, the Complaint specifically pleaded that LG continues to sell, advertise, and provide instructions for its infringing products. *Id.* at ¶ 41. In light of these allegations, LG's effort to paint this case as one only about pre-suit damages should be rejected out of hand.

The second of LG's oversight with regard to its marking argument is of its own initial burden under *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1368 (Fed. Cir. 2017), "to articulate the products it believes are unmarked 'patented articles' subject to § 287." *Id.* at 1368. Until the defendant provides *Arctic Cat* notice, a "Plaintiff should not be forced to plead compliance with the marking statute for products that are 'not yet rightly a part of the case.'" *Realtime Data LLC v. EchoStar Corp.*, No. 6:17-cv-00084-JDL, 2018 WL 11364376, at *4 (E.D. Tex. Oct. 16, 2018). LG's mere identification of SpaceTime3D, Inc.'s ("SpaceTime") former litigation settlement agreement with Samsung is patently insufficient to meet its *Arctic Cat* burden.

LG's effort to limit pre-suit damages is meritless also because there exist numerous material factual disputes on whether the marking requirement even applies to (1) a defunct SpaceTime website that LG unwittingly acknowledges pre-dates the asserted patents by many years, Mot. 17 n.4, and (2) Samsung's products as a result of a litigation settlement agreement. Even if the Court were to determine that the marking requirement applies, the Complaint sufficiently pleads SpaceTime's compliance with the marking statute. At minimum, it is wholly premature for the Court to limit pre-suit damages based on LG's marking argument at this juncture.

With regard to LG's arguments against the willful and induced infringement claims, LG wastes this Court's limited judicial resource by arguing that SpaceTime's pre-suit willful and induced infringement claims should be dismissed, when SpaceTime already voluntarily agreed to dismiss those claims without prejudice. *See* Ex. A. As to the post-suit claims, LG once again overlooks well-established caselaw from this district that post-suit knowledge is sufficient to plead post-suit willful and induced infringement claims. *See, e.g.*, *Plano Encryption Techs., LLC v. Alkami Tech., Inc.*, No. 2:16-cv-1032-JRG, 2017 WL 8727249, at *6 (E.D. Tex. Sept. 22, 2017); *Uniloc USA, Inc. v. Motorola Mobility LLC*, No. 2:16-cv-992-JRG, 2017 WL 3721064, at *4 (E.D. Tex. May 15, 2017). LG likewise overlooks detailed allegations in the Complaint of which exact functionalities of LG's accused products are at issue and the specific instructions that LG provided customers to use the infringing functionalities. See Compl., ¶¶ 43-48, 56-74, 81-100, 108-126. Of course, LG also ignores this Court's teaching that the intent necessary for an inducement claim can be found from evidence of "active steps" taken to encourage direct infringement, including "'advertising an infringing use,' 'instructing how to engage in an infringing use,' and assisting in performing an infringing use." *Motiva Patents, LLC v. Sony Corp*., 408 F. Supp. 3d 819, 828 (E.D. Tex. 2019).

The Court should reject LG's premature attempt to dismiss well-pleaded claims before full and fair discovery.

COUNTERSTATEMENT OF ISSUES TO BE DECIDED

(1) Whether LG's argument that this case is solely about pre-suit damages should be rejected in light of the Complaint's ample allegations about post-suit damages.

(2) Whether LG's argument that SpaceTime has failed to plead facts supporting its compliance with the marking statute should be rejected in light of (i) LG's failure to meet its

burden under *Arctic Cat*, (ii) the existence of numerous material factual disputes regarding the applicability of the marking requirement, and (iii) the Complaint's specific allegations about marking and notice were those requirements even applicable.

(3) Whether SpaceTime has sufficiently pleaded its claim for post-suit willful infringement.

(4) Whether SpaceTime has sufficient pleaded its claim for post-suit induced infringement.

BACKGROUND

SpaceTime is the assignee of U.S. Patent Nos. 8,881,048, 9,304,654, and 9,696,868 (together, the "asserted patents"). The asserted patents are in the same patent family and share a common parent in the 7,735,018 patent (the "'018 patent"). Eddie Bakhash is the sole inventor of the asserted patents and the founder of SpaceTime.

The specific graphical user interface configuration disclosed by the asserted patents provides an efficient way for users to organize and navigate through all open applications on their computing devices (including smartphones and tablets). Its use of both two-dimensional and three-dimensional spaces allows users to efficiently interact with and switch between open applications without compromising screen real estate. The teachings embodied in the asserted patents have now become ubiquitous technology in smartphones, including LG phones. Indeed, anyone who has used a smartphone has likely used the technology enabled by the asserted patents when scrolling through open apps, arranged in a 3D stack of overlapping tabs, to choose one to open. Similarly, web browsers on smartphones—like the Google Chrome browser which comes preloaded on LG smartphones and for which LG provides instructions on use—also make use of the technology by allowing users to quickly scroll through images of all open webpages and select one to open.

On February 10, 2022, SpaceTime filed the Complaint in this case alleging that LG has infringed and **continues to infringe** the asserted patents by making, using, offering to sell, selling, and/or importing into the United States products and systems that infringe the asserted patents. *See, e.g.*, Compl. ¶¶ 54, 79, 106.

I. The Complaint's Allegations on LG's Continued Mobile Business After the Announcement of Its Exit

The Complaint pleaded that "[e]ven after announcing its anticipated exit from the mobile business, LG continues to advertise its infringing products on its website and makes available user guides for its infringing products on its website. LG's infringing products continue to be available for purchase at various retailer websites, including but not limited to Amazon and Sears." *Id.* at ¶ 41. Quoting from LG's website, the Complaint further alleged that "[n]otwithstanding its announced exit from the mobile phone business, LG has stated that its 'mobile phones will continue to be available while supplies last'; that it 'will fully honor [its] product limited warranties'; and that it 'will continue to provide software and security updates as well as replacement parts in accordance with application regulations and contractual obligations.'" *Id.* at ¶ 39 n.5 (quoting LG, https://www.lg.com/us/notice).

II. The Complaint's Allegations on LG's Provision of Support, Instructions, and Other Information on Infringing Features

The Complaint also contains specific factual allegations about the ways in which LG directed its end users to use the infringing features of the accused devices. For instance, Paragraph 47 asserts that "LG provides instructions on how users can use the three-dimensional viewer to access open applications in its user manuals available for download through its website" and includes a screenshot of and link to the LG K10's owner manual that contains such instructions on "us[ing] and switch[ing] between several open applications." *See id.* at ¶ 47 & n.7; Fig. 7. The

Complaint further alleges that beyond the user manual of LG K10, "[u]ser manuals of other Accused Products likewise instruct users on how they can use the three-dimensional viewer to access and switch between open applications." *Id.* at ¶ 48.

LEGAL STANDARD

Rule 8 requires that a pleading contain "a short and plain statement of [each] claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A Rule 12(b)(6) motion to dismiss "is a purely procedural question not pertaining to patent law" and is governed by "the law of the regional circuit." *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1355-56 (Fed. Cir. 2007). When considering a motion to dismiss pursued under Rule 12(b)(6), the Court "accepts all well-pleaded facts as true, views them in the light most favorable to the plaintiff, and draws all reasonable inferences in the plaintiff's favor." *Johnson v. BOKF Nat'l Ass'n*, 15 F.4th 356, 361 (5th Cir. 2021). "In the Fifth Circuit, motions to dismiss under Rule 12(b)(6) are viewed with disfavor and are rarely granted." *Arigna Tech. Ltd. v. Bayerische Motoren Werke AG*, No. 2:21-cv-00172-JRG, 2022 WL 610796, at *2 (E.D. Tex. Jan. 24, 2022).

ARGUMENT

I. SpaceTime Seeks Both Pre-Suit And Post-Suit Damages.

As a threshold matter, LG's motion is premised on the incorrect assertion that this case involves only pre-suit damages. *See* Mot. 14. That is a false premise which ignores key allegations in the Complaint. First of all, while the Complaint recognized LG's *announcement* in 2021 that it would exit the mobile phone business, the Complaint did not acknowledge that LG did in fact exit that business. *See* Compl., ¶ 38 ("2021 press release stating that LG would be exiting from the mobile phone business"); *id.* at ¶ 39 ("anticipated exit from the mobile business"). Quoting from LG's website, the Complaint further alleged that "[n]otwithstanding its announced exit from the

mobile phone business, LG has stated that its 'mobile phones will continue to be available while supplies last'; that it 'will fully honor [its] product limited warranties'; and that it 'will continue to provide software and security updates as well as replacement parts in accordance with application regulations and contractual obligations.'" *Id.* at ¶ 39 n.5 (quoting https://www.lg.com/us/notice).

The Complaint stated in no uncertain terms that "[e]ven after announcing its anticipated exit from the mobile business, LG continues to advertise its infringing products on its website and makes available user guides for its infringing products on its website." *Id.* at ¶ 41. The Complaint further alleged that "LG's infringing products continue to be available for purchase at various retailer websites, including but not limited to Amazon and Sears." *Id.* at ¶ 41. SpaceTime has specifically alleged the availability of post-suit damages and actively pursues such damages in light of the continued sale of LG phones that infringe the asserted patents.

Given this availability of post-suit damages, even if the Court were to rule on the marking issue in LG's favor, the Complaint still survives the motion to dismiss.

II. LG's Marking Argument Is Meritless and Premature.

A. LG Has Failed to Meet Its Burden of Production to Identify Specific Unmarked Products.

LG's marking arguments should be rejected because they overlook LG's own failure to meet its initial burden of production. "[A]n alleged infringer who challenges the patentee's compliance with § 287 bears an initial burden of production to articulate the products it believes are unmarked 'patented articles' subject to § 287." *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1368 (Fed. Cir. 2017). To meet this initial burden, LG "must produce evidence that the identified products were sold or offered for sale in the United States." *Pavo Sols. LLC v. Kingston Tech. Co., Inc.*, No. 8:14-cv-01352-JLS-KES, 2019 WL 4390573, at *2 (C.D. Cal. June 26, 2019). Only once this initial burden of production is satisfied does the "patentee

bear[] the burden of proof to demonstrate compliance with the notice requirements of Section 287(a)." *Realtime Data LLC v. EchoStar Corp.*, No. 6:17-CV-00084-JDL, 2018 WL 11364376, at *2 (E.D. Tex. Oct. 16, 2018). Where, as here, "the unmarked products alleged by Defendants were all allegedly sold by third party licensees," "the alleged infringer bears the initial burden of production to identify allegedly unmarked products, [and] **Plaintiff should not be forced to plead compliance with the marking statute for products that are 'not yet rightly a part of the case.'**" *Id.* at *4 (emphasis added) (quoting *Lexos Media IP, LLC v. Jos. A. Bank Clothiers, Inc.*, No. 17-cv-1317-LPS-CJB, 2018 WL 2684104, at *2 (D. Del. June 5, 2018), *report and recommendation adopted*, 2018 WL 4629184 (D. Del. Sept. 27, 2018)).

This court and sister courts have uniformly denied premature motions to dismiss complaints for alleged failure to plead compliance with marking requirements where the defendants themselves failed to meet their initial burden of production. *See, e.g.*, *Realtime Data*, 2018 WL 11364376, at *4; *Lexos Media*, 2018 WL 2684104, at *2-3 & n.5 (denying motion to dismiss where defendant failed to meet initial burden under *Arctic Cat* and where, even if defendant had met that burden, plaintiffs' disagreement that those products actually read on the patents-in-suit creates a disputed question of fact that cannot be resolved at 12(b)(6) stage); *Int'l Bus. Machines Corp. v. Priceline Grp. Inc.*, 271 F. Supp. 3d 667, 688 (D. Del. 2017) (holding that plaintiff "was not required to plead compliance with § 287" where defendants "failed to meet th[e] burden" to "come forward with particular unmarked products allegedly triggering § 287"), *aff'd sub nom. Int'l Bus. Machines Corp. v. Booking Holdings Inc.*, 775 F. App'x 674 (Fed. Cir. 2019).

LG flips the *Arctic Cat* burden, arguing that SpaceTime had previously sued and settled a case against Samsung and that the "Complaint is devoid of any allegations that the 'Settlement Agreement and License Agreement' included a requirement that Samsung mark its products and

that SpaceTime3D 'made reasonable efforts to ensure [Samsung's] compliance with the marking requirements.'" Mot. 8-9 (citation and capitalization omitted). LG effectively argues that SpaceTime should have anticipated what LG's pre-suit damages allegations would have been based on the Samsung settlement and preemptively rebutted them. But that is entirely backwards and deprives SpaceTime of the notice and opportunity that *Arctic Cat* affords: "Without some notice of what market products [LG] believes required marking, [SpaceTime's] universe of products for which it would have to establish compliance would be unbounded." 876 F.3d at 1368.

The mere identification of SpaceTime's settlement agreement with Samsung is woefully insufficient to meet LG's *Arctic Cat* burden. *Freeny v. Fossil Group, Inc.*, No. 2:18-cv-00049-JRG, 2019 WL 8688587 (E.D. Tex. July 24, 2019), is instructive. In that case, the defendant, Fossil, sought to limit the plaintiffs', the Freenys', damages by using against them their admissions that they had never sold any patented articles, that the license agreements they previously executed with licensees did not require the licensees to mark any product, and that they have no knowledge of anyone ever marking a product with the asserted patent. *See id.* at *1. Notwithstanding these admissions, the Court held that Fossil could not use "the Freenys' own allegations in their complaints and the settlement agreements that the Freenys produced during discovery" to meet Fossil's initial burden of production. *Id.* at *2. Even where the Freenys did not affirmatively seek discovery on the basis of Fossil's marking defense, Fossil still had an obligation, under *Arctic Cat* and under the Court's discovery order requiring initial disclosures, to disclose "which accused products from the Freenys' prior lawsuits gave rise to non-compliance with § 287(a)." *Id.* at *3. Given Fossil's failure meet its initial production burden, the Court denied its summary judgment motion to limit the scope of the Freenys' damages base. So too here. LG's identification of the previous SpaceTime-Samsung settlement agreement, without any additional allegations on the

specific unmarked products that LG believes practice the asserted patents, is insufficient to meet its *Arctic Cat* burden.

B. At Best, Material Factual Disputes Exist on Whether the Marking Requirement Even Applies.

Ignoring the well-pleaded allegations in the Complaint and its own obligations under *Arctic Cat*, LG insists that its motion be granted because SpaceTime failed to mark a website that pre-dated the issuance of the earliest-issued patent-in-suit by years and because the Complaint does not include allegations about a requirement that Samsung, as licensee, mark its products. But LG's motion lays bare the numerous material factual disputes that preclude a ruling as a matter of law on whether the marking requirement even applies.

First, LG asserts that http://www.spacetime3d.com does not identify patent numbers and thus demonstrates SpaceTime's failure to mark. This argument is lacking for numerous reasons. First of all, as LG admits, that website "is not found in the text of the Complaint." Mot. 10 n.2. Instead, LG dug up the website from a 2007 review of a SpaceTime beta web browser that is quoted in the Complaint. *Id.*; Compl., ¶¶ 36-37. But nowhere in the Complaint is this review "incorporated by reference," as LG misleadingly asserts. Mot. 10 n.2. In fact, because the review was not incorporated in the Complaint and because it is not "central to [SpaceTime's] claim," the review—and the website linked in it—should not be considered part of the pleadings on a motion to dismiss. *See, e.g.*, *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007).

Even if the Court were to take into account the website, it does not demonstrate SpaceTime's need or failure to mark. Indeed, nowhere in the Complaint does it allege that the 2007 beta browser reads on the patents-in-suit. LG misrepresents the Complaint when it says that SpaceTime "tout[ed] having a publicly available browser that included patented technology (Dkt. No. 1 at ¶ 34)." Mot. 12; *see also* Mot. 13 (wrongly characterizing the Complaint as having alleged

a browser that "includes patented technology"). Consistent with SpaceTime's position that it has not made or sold "patented articles" for the asserted patents, Paragraph 34 actually alleged that "SpaceTime3D released a public beta version of a browser using its published, **patent-pending** technology on June 4, 2007." Compl., ¶ 34 (emphasis added). Further, the patent to which the "patent-pending" referred was not one of the three patents-in-suit but their parent patent, the '018 patent, which is not asserted in the case. *Id.*; *see* Mot. 16 (LG acknowledging that '018 patent is not asserted in this case). The Court should not countenance LG's misrepresentation of the Complaint to suit their meritless motion.

The timeline laid out in the Complaint, as well as the website on which LG relies, further makes clear that SpaceTime could not have marked the browser or website as practicing the asserted patents. The Complaint pleads that the browser was released in 2007, *see* Compl., ¶ 34, while the face of the website itself makes clear that the website has not been updated since 2009.[1] The earliest-issued asserted patent, the '048 patent, was not issued until over five years later, on November 4, 2014.[2] Compl., ¶ 19. In light of this timeline, LG's insistence that the "patent pending" marking on the website is insufficient, Mot. 9-10, falls flat: The undisputable fact is that

[1] The latest article linked on the website is dated July 15, 2009, and the blog linked on the website was last updated on October 16, 2009. *See* SpaceTime3D, News, http://www.spacetime3d.com/news.html; SpaceTime3D, http://spacetime3d.blogspot.com/. Contrary to LG's characterization that "the website continues to invite users to try the beta version of the SpaceTime3D browser," Mot. 9, the browser can no longer be downloaded from the website.

[2] While ignoring this timeline for its marking argument, LG's motion acknowledges the timeline elsewhere when it is convenient for them. Namely, in its argument that the SpaceTime browser and accompanying press coverage could not have put LG on notice of the patents-in-suit, LG emphasizes that "such press coverage predates the filing and issuance of the asserted patents by many years and therefore could not have provided knowledge of the asserted patents." Mot. 17 n.4. By LG's own logic, the website from which the browser could be downloaded also "predates the filing and issuance of the asserted patents by many years" and could not have been marked with the asserted patents' numbers.

the website or the beta browser that once could be downloaded from the website by definition cannot be "patented articles" that trigger any duty to mark because the patents had not even issued at that point. *See* 35 U.S.C. § 287(a) (imposing duty to mark only where patentees selling or importing any "patented article"); *Mass. Inst. of Tech. v. Abacus Software, Inc.*, No. 501-cv-344, 2004 WL 5268123, at *31 (E.D. Tex. Aug. 4, 2004) ("patented article" means "an 'article' covered by one or more claims of an issued patent").

At best, whether SpaceTime was required to mark the website is a disputed issue of fact that cannot be resolved on a motion to dismiss. *See, e.g.*, *CoreLogic Info. Sols., Inc. v. Fiserv, Inc.*, No. 2:10-cv-132-RSP, 2012 WL 4635994, at *2 (E.D. Tex. Sept. 29, 2012) (denying summary judgment limiting applicable damages period because "[t]here is a genuine issue of material of fact regarding whether there was a patented article that [plaintiff] failed to mark"); *In re Mobile Telecommc'ns Techs., LLC*, No. 16-MD-02722-LPS-CJB, 2017 WL 1053099, at *6 (D. Del. Mar. 20, 2017) ("As [the licensee] had no products to mark, the provisions of Section 287(a) cannot apply to bar pre-suit damages." (quoting *In re Elonex Phase II Power Mgmt. Litig.*, 2002 WL 242363, at *2 (D. Del. Feb. 20, 2002))).

<u>*Second*</u>, LG's mere identification of the SpaceTime-Samsung settlement agreement hardly demonstrates a duty to mark. In *Blitzsafe Tex., LLC v. Honda Motor Co.*, No. 2:15-cv-1274-JRG-RSP (E.D. Tex. Jan. 26, 2017) (Dkt. 403), the Court refused to rule on the plaintiff's alleged failure to mark at summary judgment where the parties disputed whether the products of the plaintiff's licensees practiced the patents-in-suit. The previous owner of the asserted patent, MPH, had brought two previous lawsuits against AAMP and Ford, asserting infringement of the asserted patent. Both cases ended with settlement agreements, neither of which contained marking requirements. *See id.* at pp. 1-2. The court nonetheless held that "there is a genuine issue of material

fact concerning whether any AAMP or Ford product practices the patents-in-suit," for the following reasons:

- "While it is true that in prior lawsuits MPH previously *alleged* that AAMP and Ford products practiced the '786 patent, those allegations alone fall short of conclusively establishing the existence of an unmarked patented product, at least because both AAMP and Ford specifically denied MPH's infringement allegations." *Id.* at pp. 3-4.
- "[I]n neither of those cases did the court issue any finding that the products practiced either of the patents-in-suit." *Id.* at p. 4.
- "Nor do the licenses that ended those lawsuits lend credence to the existence of an unmarked patent product. The Ford Agreement denied liability." *Id.*
- "The AAMP license is silent as to which products it covers and it also does not contain any acknowledgement that any AAMP product practices the '786 patent." *Id.*

These factors apply here as well. Samsung specifically denied SpaceTime's infringement allegations throughout the litigation, filing motions to exclude SpaceTime's experts and summary judgment motions contesting liability for willful and pre-suit induced infringement. *See SpaceTime v. Samsung*, No. 2:19-cv-372 (E.D. Tex. 2019), at Dkts. 124, 128-130. Before the settlement of the lawsuit, the court had not issued any finding that Samsung's accused products practiced the patents-in-suit. It is further a disputed question of fact whether, as in the Ford and AAMP licenses in *Blitzsafe*, Samsung denied liability in the settlement agreement. Just as in *Blitzsafe*, these factual disputes preclude a ruling on the marking issue at this early stage of the litigation. Indeed, these issues that LG raises are not appropriate for the summary judgment stage, let alone for a motion to dismiss. *See Barkan Wireless IP Holdings, L.P. v. T-Mobile US, Inc., et al.*, No. 2:21-cv-00034-JRG-RSP, 2021 WL 8441751, at *3 (E.D. Tex. Dec. 10, 2021) (denying summary judgment because "a genuine dispute of material fact exists as to whether the Samsung Products practice the asserted patents" and the Court thus "cannot clearly say that Barkan failed to comply with the marking requirement"); *accord Acticon Techs. LLC v. Creative Labs Inc.*, No. 2:08-cv-194-RSP,

2012 WL 708059, at *3 (E.D. Tex. Mar. 5, 2012) (denying summary judgment motion on marking issue and noting that where plaintiff's "alleged failure to mark is the result of its licensees' actions, [plaintiff's] compliance with the marking statute is evaluated under a **fact-intensive rule of reason test**" (emphasis added)); *Tyco Healthcare Grp. LP v. Applied Med. Res. Corp.*, No. 9:09-cv-176, 2010 WL 11469880, at *4 (E.D. Tex. Feb. 26, 2010) (refusing to limit pre-suit damages based on alleged failure to mark "without first giving Tyco the opportunity to present its case at trial").

The cases on which LG relies are inapposite and if anything support SpaceTime's position. First, LG cites *e-Watch, Inc. v. Avigilon Corp.*, No. 4:13-cv-00347, 2013 WL 5231521 (S.D. Tex. Sept. 16, 2013) (Mot. 12-13), but that opinion is devoid of any reasoning that would make it persuasive here. Further, going beyond the opinion to the underlying pleadings reveals that, unlike here, the existence of products that required marking was undisputed. In fact, the plaintiff in *e-Watch* expressly pleaded that it "develops and markets" "digital camera and surveillance systems" that "incorporate claims included [in] these [asserted] patents" *See id.* at Dkt. 27, at ¶¶ 6-7; Dkt. 30, at 11. Yet the complaint included no allegations that these digital cameras and surveillance systems were properly marked. By contrast, SpaceTime has no products subject to the marking requirement or, at minimum, vigorously disputes the applicability of the marking requirement to either its own 2007 web browser or Samsung's products.[3]

LG's reliance on *Infernal Tech., LLC v. Ubisoft, Inc.*, No. 5:20-cv-223-D, 2021 WL 4037835 (E.D.N.C. Sept. 3, 2021) (Mot. 13-14), is likewise misplaced. Unlike the plaintiff in *Infernal* that did not plead any facts to support its legal conclusion that the marking statute is

[3] Further, in *e-Watch*, the defendant's argument seeking to bar pre-suit damages was essentially unopposed, with the plaintiff's response to the motion to dismiss devoting a single sentence to the argument. *See e-Watch, Inc. v. Avigilon Corp.*, no. 4:13-cv-00347 (S.D. Tex. 2013), Dkt. 34, at 10 (arguing only "[r]ecovery of pre-suit damages is not a 'claim,' and therefore is not addressable via a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted").

inapplicable to their claims, SpaceTime here expressly pleaded in its Complaint facts that support why the 2007 beta browser need not be marked: The browser did not read on the patents-in-suit (but only the parent '018 patent) and, in fact, predated the earliest-issued patent-in-suit by seven years. Compl., ¶ 34. As to Samsung's products, as argued above, SpaceTime had no obligation to "plead compliance with the marking statute for products that are 'not yet rightly a part of the case.'" *Realtime Data*, 2018 WL 11364376, at *4. Even the *Infernal* court recognizes that "plaintiffs had to comply with the marking requirement . . . , **unless there was no tangible item to mark**." 2021 WL 4037835, at *5 (emphasis added); *see also id.* at *3 ("[R]ecovery of damages is not limited where there are no products to mark." (alteration and citation omitted)).

C. <u>In the Alternative, the Complaint Sufficiently Pleads Compliance with the Marking Statute.</u>

LG acknowledges the Complaint's allegation that "SpaceTime3D has complied with 35 U.S.C. § 287(a) with respect to the patents-in-suit." Mot. 7 (quoting Compl., ¶ 23). This allegation is sufficient to survive the motion to dismiss—even if the Court were to find at this pre-discovery stage that the marking requirement applies. In *Estech Systems, Inc. v. Target Corp.*, this Court held that a single allegation in a complaint—namely that the plaintiff "has 'satisfied all statutory obligations required to collect pre-filing damages for the full period allowed by law for infringement of the [] patent'"—was sufficient to survive a motion to dismiss because **the plaintiff is "pleading that it can and will show that it complied with § 287 for the [] patent if needed to collect pre-filing damages. At this stage, that is sufficient.**" No. 2:20-cv-00123-JRG-RSP, 2020 WL 6534094, at *7 (E.D. Tex. Aug. 27, 2020), *report and recommendation adopted*, 2021 WL 966017 (E.D. Tex. Mar. 12, 2021) (emphasis added). Paragraph 23 of SpaceTime's Complaint is sufficient to withstand LG's motion.

In fact, even if the Complaint did not include Paragraph 23's pleading that SpaceTime has complied with § 287(a), the Complaint would still not be subject to dismissal in light of its separate allegations that LG had knowledge of the asserted patents. In *Applied Materials, Inc. v. Muto Tech., Inc.*, No. A-17-cv-00519-LY, 2018 WL 4999972, at *3 (W.D. Tex. Sept. 5, 2018), plaintiff Applied Materials' allegations that the defendant had knowledge of asserted patents "from at least the filing of the complaint" was sufficient "[w]ith regard to Applied's claims for pre-suit damages related to these patents." *Id.* at *3. Indeed, after reviewing Section 287(a)'s marking requirement, the court noted: "Although the patent holder has the burden of pleading and proving at trial that it has complied with the statutory requirements for notice, **at the pleading stage it is sufficient to allege that the accused infringer had knowledge of the asserted patents**." *Id.* (emphasis added) (citing *Sentry Protection Prods., Inc. v. Eagle Mfg. Co.*, 400 F.3d 910, 918 (Fed. Cir. 2005)). "At this point in the proceedings and for now, the court concludes that the issue of whether Applied can ultimately recover pre-suit damages is not definitively determinable." *Id.*; *see also Realtime Data*, 2018 WL 11364376, at *3-4 ("pleading infringement to be 'willful and with full knowledge' is sufficient to plead constructive notice of compliance with the marking statute").

SpaceTime's Complaint more than meets this lenient standard with its specific pleading that "LG's infringement of the patents-in-suit was and continues to be willful and deliberate." Compl., ¶ 52; *see also id.* at ¶ 132 ("LG's infringement of the patents-in-suit was and continues to be willful, intentional, deliberate, and/or in conscious disregard of SpaceTime3D's rights under the patents-in-suit"), ¶ 134 ("[T]he filing of this lawsuit provides LG with further notice of each of the Asserted Patents such that any continued infringement by LG after the filing date of this lawsuit constitutes willful infringement."), ¶ 135 ("LG willfully infringed and continues to infringe the patents-in-suit having actual knowledge of the patents.").

D. Actual Notice of Infringement Was Unnecessary.

For the reasons argued above, the marking requirement does not apply to this case. Even if it does apply, SpaceTime sufficiently pleaded its compliance with that requirement. Accordingly, SpaceTime had no obligation to provide LG with actual notice of infringement. *Estech*, 2020 WL 6534094, at *7; *Blitzsafe*, No. 2:15-cv-1274-JRG-RSP (E.D. Tex. Jan. 26, 2017) (Dkt. 403), at 4.

III. The Complaint Sufficient Pleads Post-Suit Willful and Indirect Infringement.

A. LG Ignored SpaceTime's Offer to Voluntarily Dismiss Its Pre-Suit Willful and Indirect Infringement Claims.

LG's motion leaves out the critical detail that SpaceTime agreed to dismiss without prejudice its pre-suit willful and indirect infringement claims without LG's filing a motion. *See* Ex. A. SpaceTime did so in an effort to avoid burdening the Court with unnecessary motion practice, notwithstanding the fact that the Complaint pleads LG's pre-suit knowledge of the application of one of the patents-in-suit, as well as their parent patent. *See* Compl., ¶ 133. In any event, SpaceTime will still dismiss its pre-suit claims of willful and indirect infringement under terms consistent with its original proposal to LG—*i.e.*, without prejudice, with leave to re-plead those allegations with specificity if supported by a good-faith basis under Rule 11 within three months after fact discovery opens, where the parties agree to permit fact discovery on indirect and willful infringement during those three months. *See* Ex. A.

In light of LG's mistaken assertion that this case is "only about pre-suit damages," *see supra* Sec. I, LG fails to include any argument whatsoever on the sufficiency of SpaceTime's post-suit willful and indirect infringement claims. Given that failure alone, the Court should rule that SpaceTime's post-suit claims of willful and indirect infringement survive. Even had LG's motion encompassed the post-suit claims, however, the motion should still be denied, for the following reasons.

B. The Complaint Sufficiently Pleads Post-Suit Willful Infringement.

LG's motion on willful infringement focuses solely on the lack of allegations on LG's pre-suit knowledge of the patents and of their infringement, without addressing at all the Complaint's allegations of post-suit knowledge.

This court has made clear that post-suit knowledge is sufficient to state a claim for [post-suit] willful infringement. *See, e.g.*, *Plano Encryption Techs., LLC v. Alkami Tech. Inc.*, No. 2:16-cv-1032-JRG, 2017 WL 8727249, at *6 (E.D. Tex. Sept. 22, 2017) ("[A]n allegation that a defendant continues its allegedly infringing conduct even after receiving notice of a complaint is sufficient to at least state a claim for willful infringement."); *see also KIPB LLC v. Samsung Elecs. Co.*, No. 2:19-cv-00056-JRG-RSP, 2020 WL 1500062, at *4-5 (E.D. Tex. Mar. 9, 2020), *report and recommendation adopted*, 2020 WL 1495725 (E.D. Tex. Mar. 27, 2020) (same); *Ultravision Techs., LLC v. Govision, LLC*, No. 2:18-cv-00100-JRG-RSP, 2020 WL 1158606, at *11 (E.D. Tex. Mar. 9, 2020), *report and recommendation adopted*, 2020 WL 1528521 (E.D. Tex. Mar. 30, 2020) (same); *Raytheon Co. v. Cray, Inc.*, No. 2:16-cv-00423-JRG-RSP, 2017 WL 1362700, at *5 (E.D. Tex. Mar. 13, 2017), *report and recommendation adopted,* 2017 WL 1344900 (E.D. Tex. Apr. 12, 2017) ("T]o the extent Cray contends that only pre-complaint intent qualifies for the willfulness scienter requirement, the Court disagrees. Post-complaint knowledge is sufficient under *Halo*."); *BlitzSafe Texas, LLC v. Volkswagen Grp. of Am., Inc.*, No. 2:15-cv-1274-JRG-RSP, 2016 WL 4778699, at *7 (E.D. Tex. Aug. 19, 2016) (finding that "Complaint states a claim to post-suit willful infringement" where it "notifies the [] Defendants of the patents that they are accused of infringing").

SpaceTime's Complaint meets this standard, where it alleges that "[t]he filing of this lawsuit provides LG with further notice of each of the Asserted Patents such that any continued

infringement by LG after the filing date of this lawsuit constitutes willful infringement," Compl. ¶ 134, and that "LG exploited this technology without a license to use SpaceTime3D's patents-in-suit, and continues to do so in its Accused Products to the present day," *id.* at ¶ 42; *see also id.* at ¶ 52 ("LG's infringement of the patents-in-suit was and continues to be willful and deliberate."), ¶ 132 ("LG's infringement of the patents-in-suit was and continues to be willful, intentional, deliberate, and/or in conscious disregard of SpaceTime3D's rights under the patents-in-suit."), ¶ 135 ("LG willfully infringed and continues to infringe the patents-in-suit having actual knowledge of the patents.").

C. The Complaint Sufficiently Pleads Post-Suit Induced Infringement.

"Whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. § 271(b). "To state a claim for induced infringement, a plaintiff must allege facts to plausibly support the assertion that the defendant specifically intended a third party to directly infringe the plaintiff's patent and knew that the third party's acts constituted infringement." *Arigna*, 2022 WL 610796, at *4. "The intent necessary for a claim of '[i]nducement can be found where there is [e]vidence of active steps taken to encourage direct infringement.'" *BillJCo, LLC v. Cisco Sys., Inc.*, No. 2:21-cv-00181-JRG, 2021 WL 6618529, at *5 (E.D. Tex. Nov. 30, 2021) (quoting *Barry v. Medtronic, Inc.*, 914 F.3d 1310, 1334 (Fed. Cir. 2019)). "These 'active steps' include 'advertising an infringing use,' 'instructing how to engage in an infringing use,' and assisting in performing an infringing use." *Motiva Patents, LLC v. Sony Corp.*, 408 F. Supp. 3d 819, 828 (E.D. Tex. 2019) (denying motion to dismiss induced infringement claim and noting that "[i]n this context, *Twombly* is met when a plaintiff identifies a specific class of information that it expects discovery will reveal").

This court has likewise denied motions to dismiss an induced infringement claim where the plaintiff alleged that defendants "'provide support, product literature, and other information enabling infringing uses' with citations thereto," *NXP USA Inc. v. Mediatek Inc., et al.*, No. 2:21-cv-00318-JRG, 2022 WL 799071, at *2 (E.D. Tex. Mar. 15, 2022), and that the defendant "advertised the infringing product on its website and gave instructions on how to use it," *Titanide Ventures, LLC v. Int'l Bus. Machines Corp.*, No. 4:12-cv-196, 2012 WL 5507327, at *4 (E.D. Tex. Oct. 18, 2012).

LG's assertion that the induced infringement claim should be dismissed for "fail[ure] to plead specific intent to cause infringement," Mot. 19, overlooks the above caselaw, as well as the Complaint's specific factual allegations. SpaceTime's Complaint specifically identifies and cites the active steps that LG took to instruct end users on how to engage in an infringing use and assist in performing an infringing use. In Paragraph 47, the Complaint pleads that "LG provides instructions on how users can use the three-dimensional viewer to access open applications in its user manuals available for download through its website. For instance, for the LG K10, LG's user manual instructs users to 'switch between several open applications' by tapping on a certain icon." Compl., ¶ 47. It then cites to LG's official website through which LG makes available for download that owner manual. *Id.* at ¶ 47 n.7. It includes a screenshot from that user manual with specific instructions on how users can engage in the infringing use. *See id.* at Fig. 7. Finally, the Complaint specifically pleads that "[u]ser manuals of other Accused Products likewise instruct users on how they can use the three-dimensional viewer to access and switch between open applications." *Id.* at ¶ 48. These pleadings are more than sufficient to defeat a motion to dismiss. *See Motiva Patents*, 408 F. Supp. 3d at 828.

LG cites a litany of inapposite cases, *see* Mot. 19-21, but the "generalized allegations" found insufficient in those allegations are nothing like those in SpaceTime's Complaint:

- The Complaint in *Affinity Labs of Texas, LLC v. Toyota Motor N. Am., Inc.*, No. W:13-cv-365, 2014 WL 2892285 (W.D. Tex. May 12, 2014), "not[ed] only that 'on information and belief, Toyota has actively induced and is actively inducing others, such as Toyota's customers, to directly infringe the'" asserted patents. *Id.*, at *4.

- The Complaint in *Addiction & Detoxification Inst. L.L.C. v. Carpenter*, 620 F. App'x 934 (Fed. Cir. 2015), "contain[ed] no allegations regarding intent or any specific acts caused by Defendants" to support its indirect infringement claims. *Id.* at 938.

- The Second Amended Complaint in *Joao Control & Monitoring Sys., LLC v. Protect Am., Inc.*, No. 1:14-cv-134, 2015 WL 3513151, at *5 (W.D. Tex. Mar. 24, 2015), even after two tries to amend to plead more detailed allegations, contained only conclusory allegations that the defendant infringed "one or more" of 901 total claims across six patents-in-suit. *Id.* at *1. Unlike SpaceTime's specific citation to and screenshot of the LG K10, Joao alleged no specific examples or facts, pleading only that "[d]espite knowledge of the [] Patent as early as the date of service of the Original Complaint in this action, February 20, 2014, Defendant, upon information and belief, continues to encourage, instruct, enable, and otherwise cause its customers to use its systems and methods, in a manner which infringes the '076 Patent." No. 1:14-cv-134, Dkt. 63 (filed Jan. 28, 2015), at ¶ 15.

- The Complaint in *Core Wireless Licensing S.A.R.L. v. Apple Inc.*, No. 6:14-cv-752-JRG-JDL, 2015 WL 4910427 (E.D. Tex. Aug. 14, 2015), "fail[ed] to allege any facts identifying, even at a basic level, which functionalities of the accused products are at issue, or how the instructions direct customers to use those products in an infringing manner." *Id.* at *4. By contrast, SpaceTime's Complaint identifies in detail, replete with step-by-step screenshots, which exact functionalities of the accused products are at issue and how the instructions direct customers to use that exact accused functionality. *See* Compl., ¶¶ 43-48, 56-74, 81-100, 108-126.

- The Complaint in *Am. Vehicular Scis. LLC v. Mercedes-Benz U.S. Int'l, Inc.*, No. 6:13-CV-307-MHS-JDL, 2014 WL 10291478 (E.D. Tex. Feb. 7, 2014), "d[id] not allege that the 'detailed explanations, instructions, and information' directed customers to act in an infringing manner.'" *Id.* at *4.

  In stark contrast, SpaceTime includes a screenshot of LG's user manual that touts that "[m]ultitasking is easy with Android" and that users can "[u]se and switch between several open application"—the exact accused functionality described in the Complaint. *Compare, e.g.*, Compl., Fig. 7, *with id.* at ¶¶ 45-46. The Complaint's screenshot of the LG user manual further includes its boasting that "Android manages each application, stopping and starting them as needed to make sure that idle applications don't consume resources unnecessarily"—the exact innovation and value proposition behind the patented technology described in the Complaint. *Compare, e.g.*, Compl., Fig. 7, *with id.* at ¶ 24 ("By

switching between individual, active applications in a two-dimensional space and images of a plurality of applications in a three-dimensional space . . . , the claimed invention improves the functionality of the computing (e.g., UMPC) devices by requiring less power, minimal (or reduced) processing, and smaller screen sizes."), ¶ 28 (similar).

- In *U.S. Ethernet Innovations, LLC v. Cirrus Logic, Inc.*, No. 6:12-cv-366-MHS-JDL, 2013 WL 8482270 (E.D. Tex. Mar. 6, 2013), the Court found insufficient the amended complaint's allegation only that the defendant had "knowledge of the asserted patents, yet continues to infringe"; that the defendant supplies "infringing systems and components" to customers; and that the customer directly infringe the asserted claims. *Id.* at *4. As discussed above, SpaceTime's detailed allegations go beyond merely alleging that LG supplies infringing systems and components to customers.

- *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), is a **copyright**, not patent, case. In any event, *Grokster* recognizes that even in the copyright context, "[t]he classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations." *Id.* at 937.

- The Complaint in *Michigan Motor Techs. LLC v. Volkswagen Aktiengesellschaft*, 472 F. Supp. 3d 377 (E.D. Mich. 2020), included only conclusory allegations about defendants' "distributing the Accused Instrumentalities and providing materials and/or services related to the Accused Instrumentalities" with no more detail. *Id.* at 385. It also suffered from a "lack of pleaded facts"—even circumstantial—"that might show specific intent," asserting only that "defendants induced others to infringe MMT's patents 'with specific intent' to do so, 'or with willful blindness to the resulting infringement.'" *Id.* at 386. Once again, SpaceTime's detailed allegations, replete with images, are nothing like the threadbare recitations in *Michigan Motor*. *See, e.g.*, Compl., ¶¶ 43-48, 56-74, 81-100, 108-126.

At bottom, none of LG's cited cases feature well-pleaded allegations like those of SpaceTime. SpaceTime's post-suit induced infringement claim meets the requirements of *Motiva Patents*, *NXP USA*, and *Titanide Ventures* that such a claim can be pleaded with allegations of defendants' advertisement of, instruction of, or assistance in performing an infringing use.

Finally, with regard to the knowledge requirement of an induced infringement claim, just as with willful infringement, post-suit knowledge is sufficient to plead a post-suit induced infringement claim. *See, e.g.*, *Uniloc USA, Inc. v. Motorola Mobility LLC*, No. 2:16-cv-992-JRG, 2017 WL 3721064, at *4 (E.D. Tex. May 15, 2017) ("[T]his Court has long recognized that failing to allege pre-suit knowledge of the patent is not an adequate basis upon which to dismiss indirect

infringement claims."); *Script Sec. Sols. L.L.C. v. Amazon.com, Inc.*, 170 F. Supp. 3d 928, 937 (E.D. Tex. 2016) ("[A] complaint provides sufficient notice of the existence of the patent-in-suit to support a claim of indirect infringement as to conduct following the filing of the initial complaint in the case."); *Corydoras Techs., LLC v. Apple Inc., et al.*, No. 2:16-cv-00538-JRG, 2016 WL 9242435, at *2 (E.D. Tex. Nov. 23, 2016) ("The Court has previously . . . concluded that a patentee need not allege pre-suit knowledge of the patent to state a claim for post-suit induced infringement.").

Indeed, the Federal Circuit has found that post-suit knowledge is sufficient to state an indirect infringement claim. *See In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1342–43 (Fed. Cir. 2012) (holding that district court erred by dismissing induced infringement claims based on allegations that defendant "became aware of the [asserted] patent in November of 2009 when the complaint was filed."). The Complaint here meets this standard. *See* Compl., at ¶¶ 52, 132, 134, 135. The Court should deny LG's motion as to the post-suit induced infringement claim.

IV. If the Court Grants Dismissal of Any Claim in Whole or in Part, It Should Grant Plaintiff Leave to Amend.

Should the Court grant any part of LG's motion, SpaceTime requests leave to amend. "Rule 15(a) 'evinces a bias in favor of granting leave to amend.'" *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016). Accordingly, "in the absence of any apparent reason (*e.g.*, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previously allowed amendments, undue prejudice to the opposing party, futility), leave to amend should be freely given, as Rule 15 requires." *CODA Dev. S.R.O. v. Goodyear Tire & Rubber Co.*, 916 F.3d 1350, 1362 (Fed. Cir. 2019). There is no reason to depart from Rule 15 here. SpaceTime respectfully

requests that if the Court dismisses any of SpaceTime's claims, that it do so without prejudice and grant SpaceTime leave to amend its Complaint, including leave to amend through fact discovery.

CONCLUSION

For the foregoing reasons, SpaceTime respectfully requests that the Court (1) deny LG's motion to dismiss as to pre-suit damages, post-suit willful infringement, and post-suit indirect infringement, and (2) dismiss SpaceTime's pre-suit willful infringement and indirect infringement claims without prejudice with leave to re-plead those allegations after discovery.

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Respectfully submitted,

/s/ Max L. Tribble, Jr.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 19th day of July 2022, 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 under Local Rule CV-5.

/s/ Max L. Tribble, Jr.
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