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

DIALECT LLC, *Plaintiff*, v. BANK OF AMERICA, N.A., *Defendant*.	Case No. 2:24-cv-00207-JRG **JURY TRIAL DEMANDED** **FILED UNDER SEAL**

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS SECOND AMENDED COMPLAINT

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This case concerns patent infringement by Defendant Bank of America N.A. ("Bank of America") through its virtual assistant application, Erica. Erica uses two distinct technologies, Automatic Speech Recognition ("ASR") and Natural Language Understanding ("NLU"), to respond intelligently to voice commands. ASR turns a *voice* command from a user into *text* a computer can engage with. Through NLU, the voice assistant can understand what the user's command means and thus what to say in response.

These two technologies can be developed separately. In this case, when Bank of America created Erica, [redacted] Coincidentally, [redacted] Plaintiff Dialect, LLC ("Dialect").

This is Bank of America's third motion to dismiss in this case. *See* Dkts. 20, 26; *see also* Dkt. 64 (the "Mot."). The first two motions sought to dismiss only Dialect's claims of willfulness, induced infringement, and contributory infringement, on the grounds that Dialect had not adequately alleged Bank of America's knowledge of the asserted patents. In response, Dialect twice amended its complaint to add additional allegations of Bank of America's knowledge. *See* Dkts. 22, 58. In the operative Second Amended Complaint, having received some relevant discovery from Bank of America, Dialect added allegations of knowledge based on [redacted] *See* Dkt. 58 ("SAC") ¶¶ 61-64.

Bank of America has now seized upon those allegations as a justification to import extrinsic evidence in support of its motion to dismiss—[redacted]—and to assert an entirely new defense based on [redacted]. Bank of

America now claims that, [redacted] Bank of America has not proven—based only on the pleadings, and taking all reasonable inferences in Dialect's favor, as required in adjudicating a motion to dismiss—that the allegedly infringing functionalities of Erica were [redacted] nor has it proven that the Asserted Patents were [redacted] Rather, Bank of America's licensing defense turns on a factual question about the scope of the [redacted] versus technology [redacted] a question that is being appropriately explored through discovery.

But even from the limited evidence Bank of America incorporates into its motion, it is already clear that Nuance did *not* develop Erica's Natural Language Understanding technology—the core technology covered by the Asserted Patents. [redacted] It is that NLU functionality that infringes Dialect's patents, and the infringement is therefore not covered by [redacted] Bank of America's licensing defense is thus directly rebutted by the evidence available at this early stage of the case. But at an absolute minimum, Bank of America has not met its heavy burden to show that its licensing defense must prevail as a matter of law,

taking all inferences in Dialect's favor.

For these reasons, Bank of America's [redacted] does not render it licensed to the asserted patents. But that evidence, along with the other evidence of Bank of America's knowledge of the asserted patents, does give rise to a plausible claim of willfulness. Bank of America cannot simultaneously claim that it was licensed to the Asserted Patents and that it was not even *aware* of those same patents. What the facts show—especially taken in the light most favorable to Dialect—is that Bank of America knew about or was willfully blind to the Asserted Patents, but it did not license them. For example, the evidence cited in Dialect's Second Amended Complaint demonstrates that, [redacted]. These facts, coupled with the fact that VoiceBox had previously presented its patented technology to Bank of America, support an inference that Bank of America became aware of the Asserted Patents, or at least subjectively believed that there was a high probability that the Asserted Patents existed and that it infringed them, and deliberately avoided learning of these facts.

LEGAL STANDARD

In adjudicating a motion to dismiss, the "court construes facts in the light most favorable to the nonmoving party, as a motion to dismiss under 12(b)(6) is viewed with disfavor and is rarely granted." *Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) (internal quotation marks and citation

omitted). "The Court accepts the factual allegations in the complaint as true." *Enventure Glob. Tech. Inc v. Weatherford U.S. L.P.*, No. 19-cv-2397, 2020 WL 6146565, at *1 (S.D. Tex. Oct. 2, 2020). It may also consider documents that are "sufficiently referenced in the complaint." *Id.* A complaint plausibly alleges a claim for relief when it pleads "enough fact to raise a reasonable expectation that discovery will reveal evidence" in support of the alleged claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). *Id.* at 559-60 (explaining that claims should only be dismissed at the pleading stage when there is "no 'reasonably founded hope that the [discovery] process will reveal relevant evidence.'") (citation omitted).

ARGUMENT

I. The Court Should Deny Bank of America's Motion to Dismiss Based on Its Alleged Licensing Defense.

Licensing defenses are not typically suitable for resolution on a motion to dismiss. When "[t]here are disputed issues regarding the correct interpretation of" a license, "[t]hese disputed issues are not proper for resolution on a motion to dismiss." *Enventure*, 2020 WL 6146565, at *2. As long as "there is a genuine dispute concerning the proper interpretation" of a license, "it is possible that [the plaintiff's] interpretation of the [license] is the correct interpretation and thus [plaintiff] could prove a set of facts entitling it to relief," warranting the denial of a motion to dismiss. *MLR, LLC v. Motorola, Inc.*, No. 08-cv-357, 2008 WL 11383386, at *3 (E.D. Va. Dec. 15, 2008); *see also Symbol Techs., Inc. v. Hand Held Prods., Inc.*, No. 03-cv-102-SLR, 2003 WL 22750145, at *2 (D. Del. Nov. 14, 2003) (denying motion to dismiss because the plaintiff argued the defendant "exceed[ed] the scope of its license"). Indeed, Bank of America cites no case granting a motion to dismiss based on a licensing defense.

Here, the available evidence—especially when construed in the light most favorable to Dialect, as required at this stage of litigation—proves that Bank of America's narrow license does

not cover the Asserted Patents or the functionalities accused of infringement here. But at an absolute minimum, there is ambiguity in how to interpret that license or how it applies to the alleged facts. Any such ambiguity would mean that Bank of America has not met its burden to show that Dialect has not pled a plausible claim of infringement, and the motion to dismiss should be denied.

A. Bank of America Has Not Proven It Has an Express License to the Patents-In-Suit.

Bank of America relies on two paragraphs to demonstrate an express license, [redacted].[1] To be clear, these are the only two contractual provisions that Bank of America relies upon in its argument for an express license. *See* Mot. at 15-17. Neither of these paragraphs granted Bank of America an unlimited license [redacted] that would cover the Asserted Patents and their use in the many aspects of Erica [redacted].

<u>First</u>, [redacted] Mot., Ex. C, ¶ 1.2 at BOFA0010893. [redacted]

[1] Neither party's argument appears to depend on the nuances of a particular state's law of contract interpretation, but to the extent relevant, [redacted] is governed by New York law. *See* Mot., Ex. C, ¶ 23 at BOFA0013212.

Second, [redacted]

Bank of America's paraphrasing of these terms attempts to broaden them. For example, Bank of America claims that [redacted]

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[2] [redacted] The accused product here, Erica, is [redacted] available to Bank of America's customers.

See Mot. at 18 (emphasis added).

Rather, the key question in applying is

As an initial matter, this question simply cannot be answered at the pleadings stage based on the complaint and contracts alone. At most, indicate what work product Bank of America . But there is no evidence in the record yet as to what exactly . Without discovery, there is no way of knowing whether these contracts were subsequently amended or whether

Nonetheless, even assuming that Nuance ultimately , the asserted claims would not be , while the Asserted Patents cover many other functionalities of Erica, including the NLU functionality. could provide a license for the Asserted

[3]

Patents only if [redacted]. But the documents Bank of America relies on show otherwise.

The facts available so far indicate that [redacted]. *See* SAC ¶ 61 ([redacted]). [redacted] *Id.* ¶ 62.

Similarly, [redacted] cited by Bank of America repeatedly makes clear that [redacted]

The NLU functionalities—[redacted]—are essential to the asserted patents. The asserted patents are not limited to transcribing a user's voice input into text—the ASR technology [redacted]. Rather, each of the asserted patents covers technology to *understand the meaning* of the voice command in context—the NLU

technology [redacted]. For example, claim 12 of the asserted '160 patent recites a "method for interpreting natural language utterances" by "determin[ing] an intent" of the user. *See* SAC ¶ 36. That claim recites taking a transcribed utterance from a user and *analyzing it* to determine what it means: identifying possible contexts using context description grammar and a context stack, scoring the contexts, and selecting the most likely context. *Id.* That claim further recites communicating a user request to a domain agent that is configured to process the request in the most likely context. *Id.* In other words, that asserted patent claim involves technology far beyond merely transcribing the user's voice input—[redacted]. It is about what is done *with* that text transcription to understand and respond to the user in context—the heart of the NLU technology [redacted]. *See, e.g.*, *id.* ¶¶ 79-89 (describing how Erica infringes this claim when it analyzes a user utterance to understand the user's intended meaning).

At an absolute minimum, Bank of America fails to show, based only [redacted] and the complaint, that its license [redacted] covers the Asserted Patents as a matter of law. To the contrary, the available evidence shows that many infringing functionalities of Erica were [redacted], and therefore the Asserted Patents do not fall under the license grant. That alone is enough to deny Bank of America's motion to dismiss.[4]

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[4] If the Court were to convert Bank of America's motion to dismiss into a summary judgment motion, Dialect would provide additional evidence demonstrating that [redacted]. For example, Bank of America has produced evidence about [redacted]

B. No Broader Implied License Supplants the Express Terms of the Written Agreement Between the Parties.

Bank of America's argument for an implied license is essentially that [redacted] Bank of America was creating a virtual assistant, and [redacted] for that virtual assistant, so it must have implicitly licensed the *entire* virtual assistant. This argument is directly contradicted by the agreement Bank of America relies upon for its express license argument, which states, [redacted] Mot., Ex. C, ¶ 27.1 at BOFA0013214.

Bank of America cites evidence to suggest that [redacted] technology for its virtual assistant. But even assuming that "[redacted]," *see* Mot. at 17, does not mean [redacted] *licensed* everything Bank of America did. Rather, the license Bank of America negotiated was limited to [redacted]. *See* Mot., Ex. C, ¶ 27.1 at BOFA0013214. [redacted] *Id.*

Bank of America cites no case finding that an implied license superseded the express terms of a written license agreement, let alone a case granting a motion to dismiss on that basis. Bank of America first cites *Wells Fargo* for the premise that "[redacted] established an implied license that runs with the Asserted Patents . . . ." *See*

[redacted] Dialect has also subpoenaed [redacted], which has agreed to produce relevant documents and appear for a deposition. If there is any doubt about the scope of the work product [redacted] and covered by Bank of America's license, this motion cannot be granted based on the pleadings alone, and discovery into those issues is appropriate and necessary.

Mot. at 17 (citing *Datatreasury Corp. v. Wells Fargo & Co.*, 522 F.3d 1368, 1371 (Fed. Cir. 2008)). But *Wells Fargo* says nothing about the requirements to establish an implied license. *Wells Fargo* is about whether the interpretation of a written licensing agreement is subject to arbitration.

Bank of America next cites *Wang Laboratories* as a case "finding an implied license on facts similar to those here." Mot. at 18 (citing *Wang Lab'ys, Inc. v. Mitsubishi Elecs. Am., Inc.*, 103 F.3d 1571, 1578-79 (Fed. Cir. 1997)). But the facts of *Wang Laboratories* are not similar to those here. There was no written license at issue in *Wang Laboratories*, so neither the jury nor the appellate court found that any implied license overrode the terms of a written license agreement between the parties. Here, the written license governs its scope and disclaims any further implied license. Bank of America has not proven that [redacted] somehow overrode those terms. Indeed, an alleged implied license cannot override the terms of a written agreement between the parties. *See, e.g.*, *TexasLDPC Inc. v. Broadcom Inc.*, No. 18-cv-1966-SB, 2021 WL 3422358, at *4 (D. Del. Aug. 5, 2021).

Further, in *Wang Laboratories*, the court affirmed a *jury verdict* finding an implied license—an entirely different procedural posture than granting a motion to dismiss based on allegations of an implied license. *Wang Lab'ys*, 103 F.3d at 1578-79. The analysis in *Wang Laboratories* was deeply intertwined with the facts surrounding the parties' relationship and conduct—exactly the sort of question *least* amenable to resolution by a motion to dismiss or even a motion for summary judgment. *See, e.g.*, *Lautzenhiser Techs., LLC v. Sunrise Med. HHG, Inc.*, 752 F. Supp. 2d 988, 1014 (S.D. Ind. 2010) (denying summary judgment on implied license defense, and citing *Wang Laboratories* for the proposition that, although "the existence of an implied license is normally a question of law," "there is a factual component to the implied license review"); *Theta IP, LLC v. Samsung Elecs. Co.*, No. 20-cv-160-ADA, 2021 WL 5229382, at *5

(W.D. Tex. June 11, 2021) (finding that parties' intent was a question of fact precluding summary judgment on an implied license defense); *Oster v. Grant-Southern Iron & Metal Co.*, 381 F. Supp. 290, 293 (E.D. Mich. 1974) (denying summary judgment because "the extent of an implied license must depend upon the peculiar facts of each case" and presented a genuine issue of material fact) (quotation omitted). At a minimum, Bank of America's motion to dismiss based on an implied license should be denied because discovery is likely to reveal more facts relevant to the issue.

II. The Court Should Deny Bank of America's Motion to Dismiss Dialect's Pre-Suit Willful Infringement Allegations.

Dialect's Second Amended Complaint plausibly alleges facts supporting a claim of willful infringement based on a theory that Bank of America was willfully blind to the existence of the Asserted Patents and the fact that it infringed them. The facts alleged, which come directly from documents Bank of America produced, demonstrate that, [redacted] SAC ¶ 59. [redacted] *Id.* ¶¶ 61, 62. [redacted] *Id.* [redacted]. *Id.* ¶ 63. In 2015, during the course of Bank of America's investigation, [redacted] VoiceBox. *Id.* [redacted]. *Id.* ¶ 61. [redacted]. *Id.* In 2018, [redacted], [redacted] VoiceBox. *Id.* ¶ 63.

[redacted],

coupled with facts showing that [redacted] VoiceBox, [redacted]

[redacted],

support an inference that Bank of America subjectively believed that there was a high probability that the Asserted Patents existed and that it infringed those patents, and that it took deliberate action to avoid learning of these facts. Indeed, several of the Asserted Patents issued from an application that was cited during the prosecution of a Bank of America patent application that it filed after VoiceBox provided a presentation indicating it had a patent portfolio covering its NLU technology to Bank of America. *Id.* ¶ 60.

Bank of America summarily dismisses these allegations, arguing that the Second Amended Complaint is still missing a "plausible, constructive showing that there existed a level of knowledge and understanding adequate to cause a reasonable person to question their continued use of the plaintiff's invention." Mot. at 20. As an initial matter, Bank of America cannot square its position that Dialect has not adequately pled that Bank of America knew of or was willfully blind to the existence of the Asserted Patents with its argument that it believes it was actually ***licensed*** to the Asserted Patents. *Id.* at 16. If Bank of America believes it was licensed to the Asserted Patents by virtue of [redacted], surely it knew of the patents' existence and that Erica practiced them.

Bank of America appears to take issue with the fact that none of the documents Dialect relies on in the Second Amended Complaint explicitly mentions the Asserted Patents. *See* Mot. at 6-7. But that is not what is required to sufficiently plead pre-suit knowledge for purposes of willful infringement, particularly where the pleading contains allegations of willful blindness. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011) ("The traditional rationale" for treating

willful blindness as a form of knowledge "is that defendants who behave in this manner are just as culpable as those who have actual knowledge."); *see also Motiva Pats., LLC v. Sony Corp.*, 408 F. Supp. 3d 819, 833 (E.D. Tex. 2019) ("While Motiva does not allege actual knowledge for the pre-suit period, Motiva is not required to do so.").

The facts alleged in the Second Amended Complaint more than plausibly support an inference that Bank of America was willfully blind to the existence of the Asserted Patents because they show that Bank of America (1) knew that VoiceBox owned patents covering its NLU technology; (2) [redacted]; (3) [redacted]; and (4) has [redacted]. Based on these facts, the Second Amended Complaint alleges that Bank of America had reason to know of the Asserted Patents or, at the very least, that "Bank of America subjectively believed that there was a high probability that the Asserted Patents existed and that it infringed those patents, and took deliberate action to avoid learning of these facts." SAC ¶ 64; *see Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 106 (2016) (defendant's conduct was willful when it acted "knowing or having reason to know of facts which would lead a reasonable [defendant] to realize" that its conduct was "unreasonably risky") (emphasis omitted). Additionally, the Second Amended Complaint pleads "enough fact to raise a reasonable expectation that discovery will reveal evidence" showing that Bank of America either knew of the Asserted Patents or deliberately chose to turn a blind eye to their existence, knowing there was an objectively high likelihood they infringed. *Bell Atl. Corp.*, 550 U.S. at 556. That is all that is required at the pleading stage.

The facts here also differ entirely from the *Touchstream* case cited in Bank of America's

original Motion to Dismiss (Dkt. 20). In *Touchstream*, the complaint alleged that the plaintiff simply notified the defendant of an earlier-filed, pending application without any further allegation that the defendant monitored Plaintiff's patent applications or portfolio, or that the pending patent applications resulted in a issuance and notice of allowance of any of the Asserted Patents. *Touchstream Techs., Inc. v. Altice USA, Inc.*, No. 23-cv-60, 2024 WL 1117930, at *2-3 (Mar. 14, 2024). The court also noted that the allegations "fail[ed] to identify any patent applications mentioned during these meetings that resulted in the grant of the Asserted Patents, or the Asserted Patents themselves." *Id.*, at *3. Here, by contrast, Dialect's allegations show that (1) [redacted]; (2) VoiceBox made clear during a presentation to Bank of America that it had a patent portfolio covering its NLU technology; (3) Bank of America cited a VoiceBox patent publication that eventually issued into several of the Asserted Patents during the prosecution of its own patents; (4) [redacted] in 2015; (5) [redacted]; and (6) [redacted]

CONCLUSION

Dialect respectfully requests that the Court deny Bank of America's Motion to Dismiss.

Dated: February 4, 2025

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically and served on all counsel of record e-mail on February 4, 2025.

By: */s/ Claire Henry*
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CERTIFICATE OF AUTHORIZATION TO SEAL

I certify that the foregoing document is being filed under seal pursuant to the Protective Order entered in this matter on August 22, 2024.

By: */s/ Claire Henry*
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