

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

QUICKER CONNECTIONS LLC,

Plaintiff,

v.

CISCO SYSTEMS, INC.,

Defendant.

Civil Action No. 2:24-cv-01074-JRG

JURY TRIAL DEMANDED

**DEFENDANT'S PARTIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR
PATENT INFRINGEMENT PURSUANT TO FED. R. CIV. P. 12(B)(6)**

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Defendant Cisco Systems, Inc. (“Cisco”) moves to dismiss Plaintiff Quicker Connections LLC’s (“QC”, “Quicker Connections”, or “Plaintiff”) claims of (1) willful and indirect infringement of U.S. Patent Nos. 6,822,943 (the “’943 Patent”), 6,834,038 (the “’038 Patent”), 7,054,264 (the “’264 Patent”), and 7,061,859 (the “’859 Patent”) (collectively, the “Expired Asserted Patents”); and (2) claims for damages on the ’943 and ’038 Patents.

I. INTRODUCTION

Quicker Connections is the latest in a string of shell companies to file infringement claims on patents tracing back to the long-bankrupt Israeli company Orckit Communications Ltd. (“Orckit”).¹ In a thinly veiled effort to prolong litigation against Cisco through that network of entities, Quicker Connections rushed to file its Complaint (Dkt. 1, hereinafter the “Complaint”) on Christmas Eve—just one day after the stipulated dismissal of the *Portsmouth* case.² QC’s hastily drafted Christmas Eve filing is riddled with conclusory statements and legally unsound claims, reflecting a blatant disregard for the law and the judicial process. For example, the Complaint defines six “QC Patents” while only asserting infringement counts on five of those patents. More egregiously, QC inexplicably seeks willful and indirect infringement of expired patents where Cisco’s only alleged knowledge of those patents—through QC’s Complaint—arose *after* those patents had already expired. Accordingly, Cisco respectfully requests that the Court dismiss *with prejudice* QC’s claims of willful and indirect infringement for the Expired Asserted Patents.

¹ According to a previous complaint referenced in QC’s Complaint (Complaint, ¶ 16), Orckit was a telecommunications company that created “infrastructure-level networking products” in the 1990s and 2000s. *See Orckit Corp. v. Cisco Sys., Inc.*, No. 2-22-cv-276 (the “*Orckit Corp.* case”), Dkt. 26, ¶¶ 10-13 (E.D. Tex. Oct. 28, 2022). After Orckit went bankrupt, the Orckit patent portfolio was transferred to Orckit IP in 2016. *See* Exhibit A. Orckit IP then began dividing patents from the Orckit portfolio into newly formed entities, such as Quicker Connections, allegedly. *See, e.g.*, Exhibit B.

² *See Portsmouth Network Corp. v. Cisco Sys., Inc.*, No. 2-23-cv-00441, Dkt. 95 (E.D. Tex. Dec. 23, 2024). Portsmouth Network Corp. is another shell company has asserted patents originating from Orckit. *See* Exhibit C.

Cisco also requests that the Court dismiss QC's claims for damages on the two patents for which it asserts apparatus claims—the '943 and '038 Patents. In its eagerness to recover damages on those expired patents, QC pleads both that no compliance with 35 U.S.C. § 287 is required and, alternatively, that any requirements of 35 USC § 287 were fulfilled—yet it fails to include a single factual allegation supporting either theory. QC's unsupported pleadings provide no meaningful notice of any legal basis for recovering such pre-suit damages and instead appear to be yet another attempt to inflate the claims of its hastily filed Complaint. Accordingly, Cisco also respectfully requests that the Court dismiss QC's claims for damages on the '943 and '038 Patents.

II. FACTUAL BACKGROUND

The Complaint was filed on December 24, 2024. Although the Complaint initially names six patents from the Orckit portfolio as the “QC Patents,” it only asserts counts of infringement for five patents.³ Complaint, ¶¶ 7, 32-109. Four of the five expired before Quicker Connections filed its Complaint. The '264 Patent expired eight months before the filing of this suit, the '038 Patent almost a year before, the '859 Patent a year before, and the '943 Patent expired two full years before the filing of this suit. Despite that, QC audaciously seeks a “preliminary and permanent injunction,” on all of the QC Patents, along with a judgment that Cisco “continues to directly infringe, . . . continues to induce infringement,” and “continues to contributorily infringe” all the QC Patents—claims that, by definition, encompass both the expired patents and the patent QC never even formally asserts. Complaint, 18-19.

A cursory review of the Complaint exposes the fatal flaws that form the basis for Cisco's motion to dismiss. Although the Complaint alleges willful and induced infringement for the Expired Asserted Patents, it only alleges knowledge of the Asserted Patents by Cisco since the

³ The complaint provides Counts for the '943 Patent, the '038 Patent, the '264 Patent, the '859 Patent, and U.S. Patent No. 7,483,399 (the “'399 Patent”) (collectively, the “Asserted Patents”).

date of the Complaint:

30. Defendant has knowingly (*since at least the date of this Complaint*), intentionally and actively aided, abetted, and induced others to directly infringe each of the Patents-in-Suit (such as its customers in this District and throughout the United States).

31. Defendant has knowingly (*since at least the date of this Complaint*) and willfully infringes [sic] the Patents-in-Suit and have [sic] actively aided, abetted and induced others to directly infringe the Patents-in-Suit (such as its customers in this District and throughout the United States).

Complaint, ¶¶ 30-31.⁴

Then, in its infringement counts, the Complaint baldly alleges that Cisco indirectly and willfully infringed each expired patent, merely parroting the legal standards without any additional factual support. *See, e.g.,*:

34. Defendant also indirectly infringed the ‘943 patent by actively inducing the direct infringement by third parties under 35 U.S.C. § 271(b).

35. Defendant knowingly, intentionally, and actively aided, abetted, and induced others to directly infringe at least on claim of the ‘943 patent (such as its customers in this District and throughout the United States).

36. Defendant contributorily infringed and is contributory infringers [sic] because, with knowledge of the ‘943 patent, Defendant supplied a material part of a claimed combination, where the material part was not a staple article of commerce and was incapable of substantial non-infringing use.

37. Defendant contributed to its customers’ infringement because, with knowledge of the ‘943 patent, Defendant supplied the technology that allowed its customers to infringe the ‘943 patent.

38. Defendant had knowledge that its activities concerning the Accused Products infringed one or more claims of the ‘943 patent. . . .

41. Alternatively, Defendant knew that there was a high probability

⁴ All emphasis has been added throughout unless otherwise noted.

that the importation, distribution, sale, offer for sale, and use of the Accused Products constituted direct infringement of the '943 patent but took deliberate actions to avoid learning of these facts.

42. On information and belief, Defendant knew that their activities concerning the Accused Products infringed one or more claims of the '943 patent. . . .

45. Defendant's infringement of the '943 patent was willful and merits increased damages.

Complaint, ¶¶ 34-38, 41-42, 45 (the '943 Patent); *see also* ¶¶ 49-53, 56-57, 60 (the '038 Patent); ¶¶ 64-68, 71-72, 75 (the '264 Patent); ¶¶ 79-83, 86-87, 90 (the '859 Patent).⁵

The Complaint's allegations regarding the marking statute (35 U.S.C. § 287) are also deficient. The Complaint references the marking statute twice:

17. Plaintiff has fulfilled its obligations, *if any*, under 35 U.S.C. § 287. . . .

24. . . . Marking was not required under 35 U.S.C. § 287, and to the extent it was, such requirement has been fulfilled.

Complaint, ¶¶ 17, 24. Thus, the Complaint pleads two theories regarding the marking statute: (1) "Marking was not required under 35 U.S.C. § 287"; or in the alternative (2) if any marking obligation existed, it was "fulfilled." Yet for the '943 and '038 Patents, QC explicitly asserts apparatus claims (Complaint, Exs. F and G) without providing any factual allegations regarding its predecessors' products or their marking practices. Specifically, the Complaint does not address whether Orckit's products were marked with the Asserted Patents. The *Orckit Corp.* complaint, referenced in the Complaint in this case (Complaint, ¶ 16), claims that Orckit's solutions addressed industry shortcomings, and further asserts that "[t]he capacity, reliability, and resilience offered

⁵ Tellingly, for the only active patent—the '399 Patent—the Complaint concedes that it only asserts willful infringement "after at least the date of this Complaint," and similarly only alleges that Cisco acted with the requisite knowledge for indirect infringement "since at least the date of this Complaint." Complaint, ¶¶ 95, 96, 104, 107-08. Although Cisco disputes the propriety of that allegation, this motion focuses on QC's plainly frivolous claims.

by Orckit Communications Ltd.’s inventions opened up the possibility of” . . . “hugely valuable” services. *Orckit Corp.* case, Dkt. 26, ¶ 12. It further alleges that Orckit invested significant sums “in research and development of those solutions” and that “[i]t earned recognition around the world for those innovations and won contracts to rebuild national telecommunications infrastructures systems along with hundreds of patents” *Id.*, ¶ 13.

III. LEGAL STANDARDS

A complaint must include “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “To survive dismissal at the pleading stage, a complaint must state ‘enough facts such that the claim to relief is plausible on its face.’” *VirtaMove, Corp. v. Hewlett Packard Enter. Co.*, No. 2:24-cv-00093, 2024 WL 4519761, at *1 (E.D. Tex. Oct. 17, 2024) (citing *Thompson v. City of Waco*, 764 F.3d 500, 502 (5th Cir. 2014)). “A claim is facially plausible when the plaintiff pleads enough facts to allow the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Dismissal is thus appropriate if the factual allegations do not “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

The Supreme Court established a two-step approach to assess the sufficiency of a complaint in the context of a Rule 12(b)(6) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). First, the Court “identif[ies] the allegations in the complaint that are not entitled to the assumption of truth.” *Id.* at 680. “The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555-56). Second, the Court “consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief.” *Id.* at 681. “[T]he Court accepts well-pleaded facts as true and views them in the light most favorable to the plaintiff but is not required to accept

the plaintiff's legal conclusions as true." *VirtaMove*, 2024 WL 4519761, at *1. Dismissal is appropriate where an "allegation amounts to no more than a legal conclusion and therefore fails to state a plausible claim for relief." *Implicit, LLC v. NETSCOUT Sys., Inc.*, No. 2-18-cv-00053, 2019 WL 127115, at *2 (E.D. Tex. Jan. 8, 2019) (dismissing claims where the plaintiff "failed to plead sufficient facts" to support its claims) (citing *Thompson*, 764 F.3d at 503).

A. Willful Infringement

A claim for willful infringement requires the alleged infringer to have knowledge of the patent *at the time of alleged infringement*. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93, 105–06 (2016); *see also Bayer HealthCare LLC v. Baxalta Inc.*, 989 F.3d 964, 987 (Fed. Cir. 2021) ("To establish willfulness, the patentee must show the accused infringer had a specific intent to infringe at the time of the challenged conduct."). Expired patents cannot be legally infringed, willfully or otherwise. *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 451 (2015) ("[W]hen the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public.") (citing *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964)).

At the 12(b)(6) stage, a plaintiff alleging pre-suit willful infringement must "plead facts plausibly showing that Defendant knew of the asserted patents prior to this lawsuit." *Dialect v. Bank of America*, No. 2:24-cv-00207, 2024 WL 4980794, at *3 (E.D. Tex. Dec. 4, 2024); *Arigna Tech. Ltd. v. Bayerische Motoren Werke AG*, No. 2:21-cv-00174, 2022 WL 610796, at *7 (E.D. Tex. Jan. 24, 2022) ("Faced with a total absence of facts in the [c]omplaint to suggest that [defendant] had pre-suit knowledge of the [asserted patent], the Court concludes that [plaintiff] has failed to state a claim for pre-suit willful infringement.").

B. Indirect Infringement

Like willfulness, indirect infringement has a knowledge requirement. *Commil USA, LLC*

v. Cisco Sys., Inc., 575 U.S. 632, 639 (2015). Specifically, a defendant can only induce or contribute to infringement if the defendant knew of the patent and knew that another's acts constituted patent infringement. *See id.* at 638-642 (quoting *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011)). Although knowledge may be plead generally, for indirect infringement the complaint must still "allege sufficient underlying facts from which a court may reasonably infer that that a party acted with the requisite state of mind." *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1329 (Fed. Cir. 2009).

C. Marking

If a patentee or its licensee makes, offers for sale, or sells a patented article in the United States, the patentee must plead and prove compliance with the notice requirements of the marking statute—i.e., 35 U.S.C. § 287(a)—to recover damages. 35 U.S.C. § 287(a); *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1365–66 (Fed. Cir. 2017) ("*Arctic Cat I*").

The marking statute provides two forms of notice—constructive and actual. *Arctic Cat I*, 876 F.3d at 1366; 35 U.S.C. § 287(a). To provide constructive notice, a patentee making, offering for sale, or selling the patented article must appropriately mark those articles with the patent number. *VirtaMove*, 2024 WL 4519761, at *2 (citing *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 950 F.3d 860, 864 (Fed. Cir. 2020) ("*Arctic Cat II*"). If the patentee fails to mark such patented articles—and to make reasonable efforts to ensure its licensees marked such products—its damages are limited to infringement occurring after actual notice. 35 U.S.C. § 287(a); *Arctic Cat I*, 876 F.3d at 1366; *see also Team Worldwide Corp. v. Acad., Ltd.*, No. 2:19-cv-00092, 2021 WL 1854302, at *1–*2 (E.D. Tex. May 10, 2021), *adopted*, 2021 WL 1985688 (E.D. Tex. May 18, 2021). "Actual notice requires the affirmative communication of a specific charge of infringement by a specific accused product or device." *Arctic Cat II*, 950 F.3d at 864 (quoting *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994)).

When the patentee fails to provide this notice before the patent expires, the patentee cannot recover damages. *See, e.g., Lans v. Digit. Equip. Corp.*, 252 F.3d 1320, 1328 (Fed. Cir. 2001) (“[B]ecause [plaintiff] did not mark their products and . . . did not inform [defendants] of infringement before expiration of the [] patent, § 287(a) prevents [plaintiff] from collecting damages.”). The notice provisions of the marking statute do not apply when: (1) the patents are directed to methods; or (2) when the patentee and its licensees never made, offered for sale, or sold any patented articles. *Arctic Cat II*, 950 F.3d at 864–65; *VirtaMove*, 2024 WL 4519761, at *2.

“At the Rule 12(b)(6) stage, the plaintiff has the burden of pleading compliance with section 287(a).” *VirtaMove*, 2024 WL 4519761, at *2 (quoting *Arctic Cat II*). To plead compliance with § 287(a), the complaint must plead non-conclusory facts sufficient to show actual notice, or “otherwise establish [p]laintiff’s compliance with the marking statute.” *See Spin Master Ltd. v. Aomere-US*, No. 1-23-cv-07099, 2024 WL 3030405, at *14 (S.D.N.Y. June 17, 2024) (holding that the plaintiff failed to plead compliance with § 287 because it did not sufficiently plead actual notice or explain, for example, that the plaintiff’s patented articles were actually marked); *VDPP, LLC v. Volkswagen Group of America, Inc.*, No. 4:23-cv-2961, 2024 WL 1313899, at *5 (S.D. Tex. Mar. 27, 2024) (dismissing when the plaintiff “has not shown that its licensees marked products covered by the [asserted patent,] nor . . . that it gave [defendant] actual notice of its alleged infringement”).

This Court has previously analyzed alternate theories of compliance with § 287 separately, partially dismissing individual theories that were improperly plead. *See VirtaMove*, 2024 WL 4519761, at *3–*7.

IV. THE COURT SHOULD DISMISS QC’S WILLFUL AND INDIRECT INFRINGEMENT CLAIMS FOR THE EXPIRED ASSERTED PATENTS BECAUSE QC ONLY PLEADS POST-EXPIRY KNOWLEDGE.

The Court should dismiss QC’s claims for willful and indirect infringement of the four

expired patents—the '943, '038, '264, and '859 Patents—because QC fails to plead any knowledge of those patents before their expiration. QC's assertion of knowledge based solely on the Complaint itself—*well after those patents had expired*—cannot support claims of willful or indirect infringement, both of which require pre-expiry knowledge of the alleged infringement. Moreover, QC's conclusory assertion that it is entitled to willful and indirect infringement does nothing to remedy this fatal deficiency.

First, because the Expired Asserted Patents expired *before* the Complaint, the only infringement QC could possibly allege—whether willful, indirect, or otherwise—is pre-suit. *See AstraZeneca AB v. Apotex Corp.*, 782 F.3d 1324, 1343 (Fed. Cir. 2015) (“We have long held that ‘there can be no infringement once the patent expires,’ because ‘the rights flowing from a patent exist only for the term of the patent.’”) (quoting *Kearns v. Chrysler Corp.*, 32 F.3d 1541, 1550 (Fed. Cir. 1994)); *VDPP*, 2024 WL 1313899, at *5 (“A patentee cannot recover damages—equitable or monetary—on an expired patent”) (citing *Lans*, 252 F.3d at 1328). But QC does not sufficiently plead pre-suit willful or indirect infringement of those patents because the Complaint only alleges *post-suit* knowledge of them. More specifically, QC only alleges that “Defendant has knowingly (*since at least the date of this Complaint*) and willfully infringes the Patents-in-Suit . . .” (Complaint, ¶ 31) and “Defendant has knowingly (*since at least the date of this Complaint*), intentionally, and actively aided, and abetted, and induced other to directly infringe each of the Patents-In-Suit. . .” (Complaint, ¶ 30). Thus, because the only purported knowledge of the Asserted Patents arises post-suit, the Court should dismiss QC's claims of willful and indirect infringement for the Expired Asserted Patents. *See Signode Indus. Grp. LLC v. Samuel, Son & Co., Ltd. et al.*, No. 2:24-cv-00080, 2024 WL 3543408, *2 (E.D. Tex. July 25, 2024) (“To sufficiently plead pre-suit willful infringement, a plaintiff must plausibly allege that the defendant

knew of an asserted patent before the plaintiff filed the lawsuit.”); *Commil*, 575 U.S. at 638–42 (“Like induced infringement, contributory infringement requires knowledge of the patent in suit and knowledge of patent infringement”); *see also Touchstream Techs., Inc. v. Altice USA*, No. 2:23-cv-00060, 2024 WL 1117930, at *2–*3 (E.D. Tex. Mar. 14, 2024).

Second, QC’s conclusory assertions that Cisco committed pre-suit willful and indirect infringement that parrot the legal standards without any factual support cannot cure these deficiencies. *Iqbal*, 556 U.S. at 678–79 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” are “not entitled to the assumption of truth.”). For example, Plaintiff concludes without support that “Defendant also indirectly infringed the ‘943 patent by actively inducing the direct infringement by third parties. . .” (Complaint, ¶ 34), “Defendant knowingly, intentionally, and actively aided abetted, and induced others to directly infringe. . .” (Complaint, ¶ 35), and “Defendant’s infringement of the [asserted patent] was willful, and merits increased damages” (Complaint, ¶ 45) (*see also* ¶¶ 36–38, 41). The Plaintiff makes similar conclusory allegations with respect to the other Expired Asserted Patents. *See* Complaint, ¶¶ 51–53, 56–57, 60 (’038 Patent); ¶¶ 66–68, 71–72, 75 (’264 Patent); ¶¶ 81–83, 86–87, 90 (’859 Patent). But these conclusions, devoid of supporting allegations of pre-suit knowledge, cannot sustain a claim of willful or indirect infringement. *See, e.g., Doe v. Robertson*, 751 F.3d 383, 388, 393 (5th Cir. 2014) (The court first “distill[s] the well-pleaded factual allegations—whose truth we are bound to presume at this stage—from any unsupported legal conclusion—whose truths we cannot assume.”); *NXP USA Inc. v. MediaTek Inc. et al.*, No. 2-21-cv-00318, 2022 WL 799071, at *3 (E.D. Tex. Mar. 15, 2022) (dismissing pre-suit willfulness claims when the complaint only

alleged conclusory allegations of knowledge)⁶; *Chapterhouse, LLC v. Shopify, Inc.* No. 2-18-cv-00300, 2018 WL 6981828, at *4 (E.D. Tex. Dec. 11, 2018) (dismissing indirect infringement claims for failure to provide factual support for the complaint allegations). In sum, QC’s legal conclusions do not save its insufficient pre-suit willful or indirect infringement claims.

Notably, this Court has dismissed willful and indirect infringement claims even in cases where the plaintiff alleged some facts about the defendant’s pre-suit activities—whereas QC’s threadbare allegations offer *no facts* to support claims of pre-suit knowledge. *See, e.g., Dialect v. Bank of America*, 2024 WL 4980794, at *2–*4. For example, in *Dialect*, the plaintiff pled that the defendant met with a prior owner of the patents, that the prior owner gave a presentation to the defendant referencing the portfolio but not the specific asserted patents, and that the plaintiff sent the defendant a pre-suit letter that did not mention the patents. *Id.* at *2–*3. This Court found that those facts were too thin to plausibly support pre-suit knowledge regarding an asserted patent that was not specifically identified in the presentation or the letter. *Id.* at *2–*4. Here, QC’s Complaint is significantly thinner, failing to allege even a single fact or interaction that would support the inference that Cisco had pre-suit knowledge of the Expired Asserted Patents. Thus, QC’s Complaint cannot plausibly support willful or indirect infringement.

Because the ’943, ’038, ’264, and ’859 Patents have expired and QC failed to plead pre-suit knowledge, this Court should dismiss QC’s willfulness and indirect infringement claims for the Expired Asserted Patents.⁷

⁶ The NXP complaint, like QC’s Complaint here, alleged that “Defendants have had knowledge of the [asserted patent] and its infringement of the [asserted patent] at least since the filing of this complaint, . . . the Defendants have willfully infringed each of the [a]sserted [p]atents”, and “Defendants actively, knowingly, and intentionally have induced infringement. . . .” *NXP USA Inc. v. MediaTek Inc. et al.*, No. 2-21-cv-00318, Dkt. 1 at 12, 26, 27 (E.D. Tex. Aug. 24, 2021).

⁷ Although QC apparently only alleges *post-suit* willfulness and indirect infringement for the

V. QC INSUFFICIENTLY PLEADS COMPLIANCE WITH 35 U.S.C § 287 FOR THE '943 AND '038 PATENTS, AND THUS NO DAMAGES ARE AVAILABLE FOR THOSE PATENTS.

The Court should dismiss QC's claims for damages on the expired '943 and '038 Patents because in its either/or allegations, that "[m]arking was not required under 35 U.S.C. § 287, and to the extent it was, such requirement has been fulfilled" (Complaint, ¶ 24), Plaintiff fails to plead sufficient facts to support *either* theory.

A. QC's Allegation That "marking was not required" Lacks Sufficient Factual Support To Meet The Plausibility Standard.

Plaintiff's first theory, that "marking was not required," fails because it is conclusory and unsupported by any factual basis. This Court has dismissed pled theories for pre-suit damages where a plaintiff asserts apparatus claims—like QC does here for the '943 and '038 Patents (Complaint, Exs. F and G)⁸—and merely pleads that "no requirement for marking applies," without providing any factual support for why marking was not required. *VirtaMove*, 2024 WL 4519761, at *5–*6 ("VirtaMove's second alternative theory is insufficient as to the '058 patent because neither the method exception applies *nor does the pleading state sufficient facts to support or explain that no marking is required.*"). Similarly, the Court should dismiss QC's theory here that "marking was not required" for the patents asserting apparatus claims because QC fails to state any facts at all to support or explain that no marking is required.

unexpired '399 Patent (Complaint, ¶¶ 95, 97, 104, 107, 108), to the extent QC contends it intended to plead pre-suit willfulness or indirect infringement, such claims would be deficient for the same reason. *See, e.g., Advanced Coding Technologies LLC v. Google LLC*, No. 2-24-cv-00353, 2024 WL 5110058 at *4 (E.D. Tex. Dec. 13, 2024) (dismissing pre-suit willfulness on an active patent when the plaintiff pled knowledge "at least as of the filing date of this First Amended Complaint," but failed to plead any facts to support pre-suit knowledge); *Cyboenergy v. Hoymiles Power Elec.*, No. 2:23-cv-00311, 2024 WL 1219725, at *6 (E.D. Tex. Mar. 20, 2024) (same).

⁸ Based on the Complaint, QC appears to have strategically chosen to assert method claims only for the other three Asserted Patents. To the extent QC asserts apparatus claims from those patents, its pleading that no marking requirement applies would be insufficient for those patents also.

Plaintiff's failure to support its statement that "marking was not required" is particularly problematic here, where the original owner of the '943 and '038 Patents, Orckit, indisputably had relevant products. The Complaint references the *Orckit Corp.* complaint (Complaint, ¶ 16), which discusses Orckit's "infrastructure-level networking products," and Orckit's "inventions" leading to "hugely valuable 'bundled services' or 'triple-play services.'" *Orckit Corp.* case, Dkt. 26, ¶¶ 10-13.⁹ In the presence of those products, QC needed to have some explanation as to why marking was not required. *See VDPP*, 2024 WL 1313899, at *4 (dismissing based on failure to plead compliance with §287 where plaintiff stated it had "no products to mark," but failed to explain why its licensees' products did not need to be marked). Indeed, in *VirtaMove*, this Court distinguished another case upholding a conclusory pleading that no marking was required because in that prior case, there was no reference to products that may have practiced the patent-in-suit. *VirtaMove*, 2024 WL 4519761, at *5. Thus here, where QC's own Complaint suggests products that practiced its patents, but QC ignores those products in its conclusory assertion that "marking was not required," QC's Complaint is "deficient to plead compliance with the marking statute." *VirtaMove*, 2024 WL 4519761, at *5.

Accordingly, the Court should dismiss QC's allegation that "marking was not required" for the '943 and '038 Patents.

B. Plaintiff's Alternative Theory, That "To the extent [marking was required], such requirement has been fulfilled" Also Fails To Satisfy QC's Burden.

QC's alternative theory, that *if marking was required, such a requirement has been fulfilled*, also fails for the '943 and '038 Patents because QC failed to plead actual notice or that QC's predecessor's products were marked. Under 35 U.S.C § 287, there are two ways for a

⁹ When deciding a motion to dismiss the court may consider "the complaint, any documents attached to the complaint, and any document attached to the motion to dismiss that are central to the claim and referenced by the complaint." *VirtaMove*, 2024 WL 4519761, at *1.

plaintiff to fulfill the marking requirement: (1) marking any patent-embodying product with the number of each asserted patent; or (2) providing actual notice. *See Arctic Cat II*, 950 F.3d at 864 (citing *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1345 (Fed. Cir. 2001)). QC pleads neither.

First, QC fails to plead compliance with § 287 through constructive notice because it does not plead that any patented products were marked. The Complaint never alleges that any products practicing the Asserted Patents were marked, despite the existence of Orckit’s “infrastructure-level networking products”, whose “inventions opened up the possibility of . . . hugely valuable ‘bundled services,’” that were sold around the world “to rebuild national telecommunications infrastructure systems.” *See Orckit Corp.* case, Dkt. 26, ¶¶ 10-13. Accordingly, QC has insufficiently pled compliance with § 287 through constructive notice. *See Spin Master*, 2024 WL 3030405, at *14 (finding failure to plead compliance with § 287 **when complaint did not explain that the plaintiff’s patented articles were actually marked** or plead actual notice); *VDPP*, 2024 WL 1313899, at *5 (dismissing where plaintiff “**has not shown that its licensees marked products covered by the [asserted patent,]** nor . . . that it gave [defendant] actual notice of its alleged infringement”).

Second, QC did not plead compliance with § 287 through actual notice. Because QC did not plead that marking occurred, it had to sufficiently allege actual notice during the lives of the patents to sufficiently plead compliance with § 287. 35 U.S.C. § 287(a); *Arctic Cat I*, 876 F.3d at 1366. As discussed in **Section IV** above, the Complaint does not assert any facts supporting pre-suit knowledge—let alone notice—of any kind. Moreover, “[a]ctual notice requires the affirmative communication of a specific charge of infringement by a specific accused product or device.” *See Arctic Cat II*, 950 F.3d at 864 (citing *Amsted*, 24 F.3d at 187). QC’s Complaint does not allege communications about the Asserted Patents nor any specific act of infringement.

Accordingly, QC did not plead actual notice.

Finally, QC's allegations fall far short of the types of marking allegations that this Court has found to be sufficient. For example, in *VirtaMove*, the Court found the plaintiff's pleading **how** plaintiff allegedly complied with constructive notice under § 287(a)—plaintiff's patent-practicing AppZero products “were marked before this lawsuit”—to be sufficient. *See VirtaMove*, 2024 WL 4519761, at *3–*5. *VirtaMove* also pled additional facts regarding the parties' pre-suit interactions. *Id.* at *3. Neither of those additional allegations are present here. Instead, QC claims “[m]arking was not required under 35 U.S.C. § 287, and **to the extent it was, such requirement has been fulfilled**,” without explaining how the requirement was allegedly fulfilled.

Accordingly, the Court should find both of Plaintiff's marking theories insufficient and dismiss QC's claims for damages on the '943 and '038 Patents.

VI. CONCLUSION

For the foregoing reasons, QC's failure to plead pre-suit knowledge dooms its allegations of willful and indirect infringement for the Expired Asserted Patents. And QC's alternate theories of compliance—and no requirement for compliance—with the marking statute, without any factual allegations cannot support its request for damages on the '943 and '038 Patents. Accordingly, Cisco respectfully requests that the Court grant its motion to dismiss **with prejudice** QC's willfulness and indirect infringement claims on the Expired Asserted Patents and also dismiss QC's claims for damages on the '943 and '038 Patents.

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