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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IPVENTURE, INC.,

Plaintiff,

No. C 10-04755 JSW

v.

CELLCO PARTNERSHIP ET AL,

Defendants.

**ORDER GRANTING MOTIONS  
TO DISMISS WITH LEAVE TO  
AMEND**

Now before the Court is the motions to dismiss the claims for willful infringement and indirect infringement filed by Defendants AT&T Inc. and AT&T Mobility (“AT&T”), LLC, Cellco Partnership (“Cellco”), and Sprint Spectrum, LP and Nextel Operations, Inc. (“Sprint”) (collectively, “Defendants”). Having considered the parties’ papers, relevant legal authority, and the record in this case, the Court finds the matters suitable for disposition without oral argument. *See* N.D. Civ. L-R 7-1(b). Therefore, the hearing date of February 4, 2011 is **HEREBY VACATED**. The Court **GRANTS** the motions to dismiss and **GRANTS** Plaintiff leave to amend.

**BACKGROUND**

This litigation began on September 10, 2010 when Plaintiff’s predecessor in interest to the patent in suit, Guardian Location Systems, LLC, filed a lawsuit against Cellco and its co-defendants in the Eastern District of Texas (“Texas Action”). The original complaint in the Texas Action did not include a claim for willful infringement, which was only added in an amended complaint filed on September 24, 2010. Before having an opportunity to answer the

1 amended complaint in that action, Plaintiff dismissed the Texas Action without prejudice on  
2 October 12, 2010 and, after the patent-in-suit was reassigned to IpVenture, the same suit was re-  
3 filed in this District on October 20, 2010.

4 According to the undisputed facts in the record, the application for the patent-in-suit,  
5 U.S. Patent No. 7,366,522, was originally filed with the U.S. Patent and Trademark Office  
6 (“PTO”) on February 28, 2001. The pending application was published on March 27, 2003.  
7 The original application contained 23 claims. After seven years of prosecution, including ten  
8 amendments and three requests for continued examination filed in response to a series of PTO  
9 rejections, the patent-in-suit finally issued on April 29, 2008.

10 The complaint filed before this Court makes a claim for willful infringement, alleging  
11 that Defendants knew or should have known of the patent at least as early as April 29, 2008.  
12 (Compl. at ¶ 48.) However, the recitation of facts merely includes the allegation that the patent  
13 application was cited in Defendants’ patents. Defendants contend that the vague allegation of  
14 knowledge of the actually issued patent is insufficient as the only factual allegation is that the  
15 application was cited as a reference during the prosecution of Defendants’ patents.<sup>1</sup> On this  
16 basis, all Defendants move to dismiss the willful infringement claim. Sprint also moves to  
17 dismiss the claim for indirect infringement for failure to state a claim upon which relief can be  
18 granted.

19 The Court shall address additional facts as necessary in the remainder of this Order.

## 20 ANALYSIS

### 21 A. Applicable Legal Standards.

22 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the  
23 pleadings fail to state a claim upon which relief can be granted. The complaint is construed in  
24 the light most favorable to the non-moving party and all material allegations in the complaint

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26 <sup>1</sup> Cellco contends that the complaint makes allegations about Verizon Wireless, but  
27 has not demonstrated that Cellco prosecuted or owns the subject patent. Cellco states that  
28 the cover pages of the allegedly infringing patent indicate that Verizon Corporate Services  
Group Inc. and BBNT Solutions LLC were separate legal entities from Cellco and the legal  
assignees that prosecuted and owned the patents. (Motion at 5.) In their amended complaint,  
Plaintiffs should assert their claim against the proper corporate entity.

1 are taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). However, even  
2 under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), “a plaintiff’s  
3 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
4 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell*  
5 *Atlantic Corporation v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S.  
6 265, 286 (1986)).

7 Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but  
8 must instead allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at  
9 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
10 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
11 *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556).  
12 “The plausibility standard is not akin to a probability requirement, but it asks for more than a  
13 sheer possibility that a defendant has acted unlawfully. ... When a complaint pleads facts that  
14 are merely consistent with a defendant’s liability, it stops short of the line between possibility  
15 and plausibility of entitlement to relief.” *Id.* (quoting *Twombly*, 550 U.S. at 556-57) (internal  
16 quotation marks omitted). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss  
17 does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his  
18 ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of  
19 the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 544. If the allegations are  
20 insufficient to state a claim, a court should grant leave to amend, unless amendment would be  
21 futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss*  
22 *& Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

23 To state a claim for patent infringement, “a patentee need only plead facts sufficient to  
24 place the alleged infringer on notice. The requirement ensures that the accused infringer has  
25 sufficient knowledge of the facts alleged to enable it to answer the complaint and defend itself.”  
26 *Phonometrics, Inc. v. Hospitality Franchise System, Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000).  
27 Thus, a plaintiff is not required to specifically include each element of the claims of the asserted  
28 patent. *See id.*

1 **B. Defendants’ Motions to Dismiss Willful Infringement Claim Are Granted, with**  
2 **Leave to Amend.**

3 “In order to establish willful infringement, a patentee must show by clear and  
4 convincing evidence that the infringer acted despite an objective likelihood that its actions  
5 constituted infringement of a valid patent.” *In re Seagate Technology, LLC*, 497 F.3d 1360,  
6 1371 (Fed. Cir. 2007). “To willfully infringe *a patent*, the patent must exist and one must have  
7 knowledge of it .... Filing an application is no guarantee any patent will issue and a very  
8 substantial percentage of applications never result in patents. What the scope of claims in  
9 patents that do issue will be is something totally unforeseeable.” *State Industries, Inc. v. A. O.*  
10 *Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985) (emphasis in original).

11 Plaintiff’s current complaint merely alleges the factual predicate that Defendants had  
12 knowledge of Plaintiff’s patent application. (*See* Compl. at ¶¶ 48, 77, 111.) Because there are  
13 no facts to support the claim that Defendants actually had knowledge of the issued patent, and  
14 there is merely the bare recitation of the required legal elements for willful infringement, the  
15 Court finds that Plaintiff has failed to state a cause of action for willful infringement. However,  
16 Plaintiff has leave to amend to add facts to support its claim of knowledge of the issued patent  
17 should Plaintiff be able to assert such a factual predicate. The Court is not persuaded by  
18 Plaintiff’s argument that the burden of proof versus the burden of pleading makes a  
19 determinative distinction. In order to state a claim for willful infringement, Plaintiff must make  
20 out the barest factual assertion of knowledge of an issued patent. This Plaintiff has failed to do,  
21 but has leave to do so.

22 Accordingly, the Court GRANTS Defendants’ motions to dismiss the willful  
23 infringement claim and GRANTS Plaintiff leave to amend.

24 **C. AT&T’s and Sprint’s Motions to Dismiss Indirect Infringement Claim Are**  
25 **Granted, With Leave to Amend.**

26 AT&T and Sprint contend that Plaintiff fails to state a claim of indirect infringement  
27 based upon either inducement or contributory infringement as Plaintiff has failed to allege a  
28 third party who directly infringes the patent or the specific infringing activity. (*See* AT&T and

1 Sprint Motions at 7, citing *Dynacore Holdings Corp. v. U.S. Phillips Corp.*, 363 F.3d 1263,  
2 1272 (Fed. Cir. 2004); *Phonometrics*, 203 F.3d at 794.)

3 Again, Plaintiff contends that at the pleading stage, bare recitation of the elements of the  
4 claim are sufficient. (*See* Compl. at ¶¶ 45, 74, 108.) In its opposition, Plaintiff alludes to the  
5 length of the complaint and the volume of evidence submitted with it, in the form of charts and  
6 summaries, but admits that it has not made the factual allegations underlying this claim explicit  
7 in the complaint. Instead, Plaintiff contends that the additional submissions indicating that  
8 Defendants provided detailed explanations, instruction, and information to potential third  
9 parties, leads to the plausible inference that Defendants actively induced infringement. (Opp.  
10 Br. at 8.) The Court finds that, as currently drafted, the complaint fails to give Defendants  
11 sufficient notice of the specific conduct alleged to form the basis for Plaintiff's claim of indirect  
12 infringement.

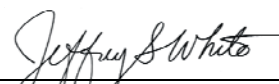
13 Accordingly, the motion to dismiss the indirect infringement action is GRANTED and  
14 Plaintiff is GRANTED leave to amend. By permitting Plaintiff leave to amend, the Court  
15 requires that Plaintiff's claim for indirect infringement be made explicit, in the text of the  
16 complaint itself, and provide the proper detail required for an indirect infringement allegation.

17 **CONCLUSION**

18 For the foregoing reasons, Defendants' motions to dismiss the willful infringement and  
19 indirect infringement claims are GRANTED. However, Plaintiff is granted leave to amend.  
20 Plaintiff shall file and serve an amended complaint within fourteen days of the date of this  
21 Order, and Defendants shall file their response within fourteen days thereafter.

22 **IT IS SO ORDERED.**

23  
24 Dated: January 21, 2011

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27 JEFFREY S. WHITE  
28 UNITED STATES DISTRICT JUDGE