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

ELBIT SYSTEMS LAND AND C4I LTD. and ELBIT SYSTEMS OF AMERICA, LLC, Plaintiffs, v. HUGHES NETWORK SYSTEMS, LLC, BLACK ELK ENERGY OFFSHORE OPERATIONS, LLC, BLUETIDE COMMUNICATIONS, and COUNTRY HOME INVESTMENTS, INC., Defendants.	)	C.A. No. 2:15-cv-00037-RWS-RSP **JURY TRIAL DEMANDED**

PLAINTIFFS' SUR-REPLY TO DEFENDANT'S
RENEWED PARTIAL MOTION TO DISMISS AS TO WILLFULNESS
AND INDIRECT INFRINGEMENT FOR FAILURE TO STATE A CLAIM

Defendant Hughes Network Systems, LLC ("Hughes") challenges Plaintiffs' allegations of its knowledge of asserted U.S. Patent No. 6,240,073 ("'073 Patent" or "*Reichman*") and the direct infringement by its customers, arguing they are based solely on a "patent examiner citation" of the '073 Patent. *See, e.g.*, Dkt. 76 at 1. But Hughes disregards the allegations that it gained a working knowledge of the '073 Patent during the prosecution of several Hughes patent applications. In one instance, Hughes even submitted a detailed analysis of the '073 Patent to the U.S. Patent & Trademark Office ("PTO"). Hughes nevertheless relies on cases with materially different facts, in which notice was based *solely* on an examiner's citation of the asserted patent. But much more occurred here; Hughes thoroughly reviewed the '073 Patent and, with its working knowledge of the patent, surely must have known that any manufacture, use, or sale of the accused broadband satellite systems would directly infringe. The Complaint also details Hughes' knowledge and encouragement of the direct infringement, explaining how Hughes fully implemented, supported, and managed its customers' infringing use. These allegations amply support the reasonable inference that Hughes knew of the '073 Patent (for Plaintiffs' willfulness and indirect infringement claims), and of the infringing acts (for Plaintiffs' indirect infringement claims).

I. PLAINTIFFS ADEQUATELY PLEADED KNOWLEDGE OF THE PATENT.

Plaintiffs sufficiently pleaded Hughes' pre-suit knowledge of the '073 Patent, which supports their willfulness and indirect infringement claims. In seeking dismissal of those claims, Hughes ignores the extent of Plaintiffs' allegations. Instead, Hughes incorrectly recasts them and then seeks shelter in case law inapposite to how Plaintiffs actually pleaded the facts. But the allegations establish Hughes' pre-suit knowledge and the faults of its position; a reasonable inference of notice is certainly plausible. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

At minimum, Hughes gained an extensive knowledge of the '073 Patent during the prosecution of its own patent. Dkt. 53 ("Compl.") ¶ 46. Hughes thoroughly analyzed the '073 Patent in a response to a PTO rejection,[1] leaving no doubt that Hughes *knew of* the '073 Patent:[2]

> Claims 1–5, 8, 10, 23–28, 31 and 32 were rejected under 35 U.S.C. § 102(e) as being anticipated by *Reichman* et al. (US Patent 6,240,073). Claims 11 and 33 were rejected under 35 U.S.C. § 103(a) as being unpatentable over *Reichman* et al. (US Patent 6,240,073) in view of *Heath* et al. (US Patent 6,564,274). Applicant traverses these rejections.
>
> Specifically, *Reichman* does not teach or suggest the feature of a network control cluster configured to dynamically manage available bandwidth associated with the plurality of return channels during transmission as recited in independent claim 1, and similarly recited in independent claim 23.
>
> *Reichman* discloses a multiple access configuration for the reverse link of a two way satellite communication system, where the reverse link accommodates various data rates in accordance with the transmitter power and the size of the antennae in addition to the type of information to be transmitted (col. 9, lines 38-44). The reverse link is utilized to transmit three different types of communication to the hub. A first message type includes short messages that require transmission rates lower than a certain number of bytes/sec and typically requires immediate access to the channel. A second message type requires transmission rates higher than a certain number of bytes/sec and includes large files of information. A third message type include messages that are known to require a continuous type communications channel, and includes messages generated from two way bandwidth intensive applications such as video conferencing, Internet phone, etc. (col. 9, line 52-col. 10, line 7).
>
> The multiple access configuration of *Reichman* has two modes of operation: random access (RA) and a channel assignment (CA) mode. Communications always start in the random access mode using the random access frequency sub band in such a way that the user is able to start communications at any

[1] The rejection over the '073 Patent was not a routine event: all claims of Hughes' application had previously been allowed to pass to issue, but the PTO withdrew the application from issue on July 14, 2005 (in a communication personally signed by the Director of the Technology Center), Decl. of Ranganath Sudarshan, Ex. 1, U.S. Patent Appl. 09/785,755, July 14, 2005 Miscellaneous Communication, at 1, in order to issue the rejection over the '073 Patent, Dkt. 72-2, U.S. Patent Appl. 09/785,755, July 28, 2005 Final Rejection, at 2–5.

[2] Hughes nevertheless implies the Complaint is insufficient "to infer that the applicant even looked at the content of [the prior] art." Dkt. 76 at 4.

> point in time. After communications have begun, the system decides whether to continue in random access mode such as when the user is browsing, for example, or whether to assign a channel with optimal bandwidth in accordance with the users application/message type, e.g., video conferencing or Internet phone applications (col. 10, lines 30-40). Once the system goes into CA mode, a FDMA technique is applied to allocate a single user (col. 14, lines 26-29) to a specific frequency band to administer bandwidth allocation among the various users (col. 14, lines 49-57).[3]
>
> Thus, *Reichman* does not manage available bandwidth, but merely allocates frequencies to users based on a detected application or message type. *Reichman* calculates a total bandwidth (B_T), and divides it by the average data rate (R) to determine the maximum number of users (N) that may be assigned a specific frequency band (col. 14, lines 29-47). *Reichman* has no way of determining what available bandwidth exists during transmission – it follows that *Reichman* also cannot teach the management of available bandwidth as well.

Dkt. 72-4, U.S. Patent Appl. 09/785,755, Oct. 20, 2005 Response, at 9–10 (emphasis in original). Against this backdrop, Hughes somehow asserts that there was only a "patent examiner citation" to the '073 Patent. *See, e.g.*, Dkt. 76 at 1. Hughes cannot brush off the prolonged prosecution exchange as a mere one-way citation by a patent examiner.[4]

The cases on which Hughes relies are thus readily distinguishable. For example, *Chalumeau Power Systems LLC v. Alcatel-Lucent*, No. 11-1175-RGA, 2012 WL 6968938, at *1 (D. Del. July 18, 2012), according to Hughes, involved a complaint that "alleged only that a patent examiner asserted that the patent-in-suit was prior art in three patent applications assigned to defendant." Dkt. 76 at 2. By contrast, Hughes had an extensive dialogue with the PTO about

[3] Hughes' descriptions of their accused systems closely resemble Hughes' analysis of the '073 patent. *See, e.g.*, Decl. of Ranganath Sudarshan, Ex. 2, HX System, System Overview at 17 ("The Hughes HX System is a dynamic bandwidth-assignment system. If a remote site has no traffic, system resources are not assigned to that site. Once a site receives a traffic assignment (via the aloha channel) the remote terminal goes into a *stream* (noncontention) mode, and the amount of bandwidth assigned is based on the QoS plan of the individual remote terminal.").

[4] The Complaint also explains that the '073 Patent was cited as relevant prior art during the prosecution of two other Hughes patents. Compl. ¶¶ 45, 47.

the '073 Patent. Moreover, the complaint in *Chalumeau* was inadequate because "[t]he connection between the moving defendants and the patent applications from nearly a decade ago are not explained sufficiently to make plausible that either of the defendants had actual knowledge," not because the prosecution failed to give notice. 2012 WL 6968938, at *1.

Hughes also makes much of a distinction drawn in the cases that has no bearing here—that a PTO examiner's citation to a later-asserted patent is insufficient to support an inference of knowledge, whereas an applicant's own citation may be sufficient. Dkt. 76 at 3. Here, there was much more than an examiner's citation. And even before the rejection based on the '073 Patent, Hughes ***did*** identify the international counterpart of the '073 Patent (WO 99/26422), which contains substantially the same disclosure as the '073 Patent, to the PTO. Decl. of Ranganath Sudarshan, Ex. 3, U.S. Patent Appl. 09/785,755, Nov. 15, 2001 Information Disclosure Statement, at 1. Hughes can thus find no relief in the case law. [5]

II. PLAINTIFFS ADEQUATELY PLEADED KNOWLEDGE OF INFRINGEMENT.

The Complaint contains detailed allegation of Hughes' collaboration in its customers' infringement, establishing Hughes' knowledge of the direct infringement. Compl. ¶¶ 15–23, 31–37, 44–45, 65–67. Detailed factual support is not needed for every element of indirect infringement, and specific intent to encourage infringement can be shown through circumstantial evidence. *See DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006); *InMotion Imagery Techs. v. Brain Damage Films*, No. 2:11-CV-414-JRG, 2012 WL 3283371, at *3 (E.D. Tex. Aug. 10, 2012). Factual allegations plausibly showing the identity of the direct infringer, knowledge and encouragement of the infringing acts, notice of the asserted patent, and notice

[5] Hughes also proffers an inapposite policy argument, that imposing a duty to investigate every reference cited during prosecution discourages patent applications. Dkt. 76 at 4. Plaintiffs seek no such duty, and Hughes *did* actually investigate the '073 Patent to further its interests.

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