

defendant is liable for the misconduct alleged,” based on “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* However, in resolving a motion to dismiss for failure to state a claim, the question is “not whether [the plaintiff] will ultimately prevail, . . . but whether [the] complaint was sufficient to cross the federal court’s threshold.” *Skinner v. Switzer*, 562 U.S. 521, 530 (2011). “The court’s task is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff’s likelihood of success.” *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (citing *Iqbal*, 556 U.S. at 678).

To allege indirect infringement, the plaintiff must plead specific facts sufficient to show that the accused infringer had actual knowledge of the patents-in-suit, or was willfully blind to the existence of the patents-in-suit. *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766, 769 (2011) (“[I]nduced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement” or at least “willful blindness” to the likelihood of infringement.); *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 639 (2015) (“Like induced infringement, contributory infringement requires knowledge of the patent in suit and knowledge of patent infringement.”). A showing of willful blindness requires that “(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.” *Glob.-Tech*, 563 U.S. at 769.

Similarly, to allege willful infringement, the plaintiff must plausibly allege the “subjective willfulness of a patent infringer, intentional or knowing.” *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S.Ct. 1923, 1933 (2016). This requires a plaintiff to allege facts plausibly showing that the accused infringer: “(1) knew of the patent-in-suit; (2) after acquiring that

knowledge, it infringed the patent; and (3) in doing so, it knew, or should have known, that its conduct amounted to infringement of the patent.” *Parity Networks, LLC v. Cisco Sys., Inc.*, No. 6:19-CV-00207-ADA, 2019 WL 3940952, at *3 (W.D. Tex. July 26, 2019).

II. ANALYSIS

A. RFCyber Has Not Sufficiently Pleaded Pre-Suit Willful Infringement

To state a claim for willful infringement, a plaintiff must allege facts plausibly showing that the accused infringer: “(1) knew of the patent-in-suit; (2) after acquiring that knowledge, it infringed the patent; and (3) in doing so, it knew, or should have known, that its conduct amounted to infringement of the patent.” *Id.* Apple contends that RFCyber has not sufficiently alleged pre-suit knowledge for the ’046 and ’724 patents. ECF No. 31. Additionally, Apple asserts that for all asserted patents, RFCyber has not sufficiently alleged pre-suit knowledge of any allegedly infringing acts. *Id.*

As for Apple’s knowledge of the ’046 and ’724 patents, the Amended Complaint recites that LogicPatents, a broker, contacted Apple regarding RFCyber’s applications that eventually issued as the ’046 and ’724 patents. ECF No. 18 ¶ 16. Apple asserts that notice of a pending patent application is not sufficient to provide notice of a not-yet-issued patent. ECF No. 31 at 7. RFCyber counters that because Apple was already aware of the ’046 and ’724 applications, it is highly plausible that Apple would monitor the respective applications and become aware of those patents when they issued. ECF No. 36 at 7. RFCyber’s Amended Complaint does not plead sufficient facts that would support an allegation of pre-suit knowledge of the ’046 and ’724 patents.

Additionally, RFCyber alleges that Apple had pre-suit knowledge of all other asserted patents because two of the asserted patents were cited during prosecution of certain Apple patents.

ECF No. 36 at 9; *see also* ECF No. 18 ¶¶ 21–22. RFCyber’s Amended Complaint does not plead sufficient facts that would support an allegation of pre-suit knowledge of the patents.

B. RFCyber Has Not Sufficiently Pleaded Pre-Suit Indirect Infringement

Like a willful infringement claim, indirect infringement claims require a showing that the accused infringer knew of its infringement. *See Commil*, 575 U.S. at 639 (“Like induced infringement, contributory infringement requires knowledge of the patent in suit and knowledge of patent infringement.”). RFCyber’s pre-suit indirect infringement claims therefore fail for the same reasons its pre-suit willful infringement claims fail.

C. RFCyber Has Sufficiently Pleaded Post-Suit Indirect and Willful Infringement

Apple also argues that RFCyber insufficiently pleads post-filing/post-suit indirect and willful infringement. ECF No. 31 at 9. This Court disagrees.¹ *See USC IP P’ship, L.P. v. Facebook, Inc.*, No. 6:20-CV-00555-ADA, 2021 WL 3134260, at *2 (W.D. Tex. July 23, 2021). Serving a complaint will, in most circumstances, notify the defendant of the asserted patent and the accused

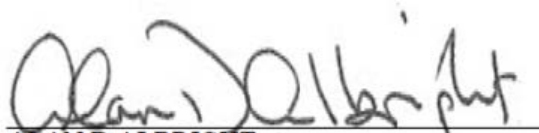
¹ This Court is not alone in holding that post-filing conduct can support a willfulness claim. *See, e.g., BillJCo, LLC v. Cisco Sys. Inc.*, No. 2:21-CV-00181-JRG, 2021 WL 6618529 (E.D. Tex. Nov. 30, 2021); *Longhorn Vaccines & Diagnostics, LLC v. Spectrum Sols. LLC*, No. 220CV00827DBBJCB, 2021 WL 4324508, at *14 (D. Utah Sept. 23, 2021); *Ravgen, Inc. v. Ariosa Diagnostics, Inc.*, No. CV 20-1646-RGA-JLH, 2021 WL 3526178, at *4 (D. Del. Aug. 11, 2021); *Team Worldwide Corp. v. Acad., Ltd.*, No. 219CV00092JRGRSP, 2021 WL 1897620, at *6 (E.D. Tex. May 3, 2021), *order clarified*, 2021 WL 1854302 (E.D. Tex. May 10, 2021), *R&R adopted*, 2021 WL 1985688 (E.D. Tex. May 18, 2021); *KIPB LLC v. Samsung Elecs. Co.*, No. 219CV00056JRGRSP, 2020 WL 1500062, at *5 (E.D. Tex. Mar. 9, 2020), *R&R adopted*, No. 2:19-CV-56-JRG-RSP, 2020 WL 1495725 (E.D. Tex. Mar. 27, 2020); *AMG Prods., Inc. v. Dirt Cheap, LLC*, No. 6:18-CV-00267-JDK, 2019 U.S. Dist. LEXIS 63370, at *12 (E.D. Tex. Mar. 12, 2019); *Preferential Networks IP, LLC v. AT&T Mobility, LLC*, No. 2:16-cv-01374-JRG-RSP, 2017 U.S. Dist. LEXIS 140979, at *10 (E.D. Tex. July 15, 2017), *R&R adopted*, No. 2:16-cv-01374-JRG-RSP, 2017 U.S. Dist. LEXIS 140516 (E.D. Tex. Aug. 31, 2017); *T-Rex Prop. AB v. Regal Ent. Group*, No. 16-927, 2017 WL 4229372 (E.D. Tex. Aug 31, 2017); *Blitzsafe Tex., LLC v. Volkswagen Grp. of Am., Inc.*, 2016 U.S. Dist. LEXIS 124144, at *25 (E.D. Tex. Aug. 19, 2016); *Clouding IP, LLC v. Amazon.com, Inc.*, No. CA 12-641-LPS, 2013 WL 2293452, at *4 (D. Del. May 24, 2013).

conduct. So long as the complaint also adequately alleges that the defendant is continuing its purportedly infringing conduct, it will sufficiently plead a post-filing/post-suit willful infringement claim. RFCyber's Amended Complaint complies with that standard. ECF No. 18 ¶¶ 23–24. Additionally, RFCyber's Amended Complaint sufficiently alleges that Apple intended for others to infringe by making, using, offering to sell, selling, or importing into the United States the infringing products with the knowledge that such activities infringed. *Id.*, ¶¶ 40–41, 59–60, 76–77, 94–95, 116–17, 136–37. Because RFCyber alleges that Apple has knowledge of the asserted patent and of the alleged infringement at least at the commencement of this action, the Court finds that RFCyber has sufficiently alleged its post-suit indirect and willful infringement claims.

III. CONCLUSION

Because RFCyber's Amended Complaint does not plead sufficient facts that would support an allegation of pre-suit knowledge of the patents, the Court **GRANTS-IN-PART** and **DENIES-IN-PART** Apple's Motion to Dismiss. The Court **GRANTS** Apple's Motion to Dismiss as to RFCyber's pre-suit indirect and willful infringement claims without prejudice. In accordance with the Court's usual practice, the Court permits RFCyber to amend its Complaint within ninety (90) days after the start of fact discovery to include pre-suit indirect and willful infringement claims, if it is able to elicit sufficient facts to support such allegations under Federal Rule of Civil Procedure 11. The Court **DENIES** Apple's Motion as to RFCyber's post-suit indirect and willful infringement claims, having found them sufficiently pleaded.

SIGNED this 12th day of September, 2022.


ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE