

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIALARRY GOLDEN,
Plaintiff,

v.

GOOGLE LLC,
Defendant.

Case No. 22-cv-05246-RFL

**ORDER GRANTING MOTION TO
DISMISS AND DENYING LEAVE TO
FILE A SURREPLY**

Re: Dkt. Nos. 44, 48

Larry Golden brings this action for patent infringement against Google LLC. Golden's original complaint was dismissed with leave to amend for failure to state a claim. (Dkt. No. 41.) Golden subsequently filed an amended complaint (Dkt. No. 42 ("FAC")), which Google now moves to dismiss for failure to state a claim (Dkt. No. 44 ("Mot.")). The motion to dismiss is **GRANTED WITHOUT LEAVE TO AMEND**. This ruling assumes the reader is familiar with the facts, the applicable legal standard, and the arguments made by the parties.¹

As an initial matter, Golden's motion for leave to file a sur-reply (Dkt. No. 48) is **DENIED**. Under the Civil Local Rules, once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval, except if new evidence has been submitted in the reply or a relevant judicial opinion was published after the date the opposition or reply was filed by filing. Civil L.R. 7-3(d). Google's reply did not submit new evidence, and Golden's proposed sur-reply does not reference a newly published relevant judicial opinion. To the extent

¹ This case is one of several patent infringement cases that Golden has filed against Google and other defendants. *See Golden v. Samsung Elecs. Am., Inc.*, No. 23-CV-00048-WHO, 2023 WL 3919466 (N.D. Cal. June 8, 2023), *cf.* No. 2023-2120, 2024 WL 539973 (Fed. Cir. Feb. 12, 2024) (describing Golden's litigation history over the past ten years in multiple jurisdictions).

Case 3:22-cv-05246-RFL Document 68 Filed 04/03/24 Page 2 of 40

Google raised new arguments on reply, such arguments are “not new evidence when [] submitted to rebut arguments raised in the opposition brief,” which was the case here. *Applied Materials, Inc. v. Demaray LLC*, No. 5:20-CV-05676-EJD, 2020 WL 8515132, at *1 (N.D. Cal. Dec. 16, 2020).

As for the merits, the Court previously dismissed Golden’s original complaint because it failed to allege either direct or indirect infringement of U.S. Patent Nos. 10,163,287 (“’287 Patent”), 9,589,439 (“’439 Patent”), and 9,096,189 (“’189 Patent”) by Google. (*See* Dkt. No. 41.) The complaint’s allegations made clear that whether Google’s smartphones (Google Pixel 3, 3 XL, 3a, 3a XL, 4a, 4a (5G), and 5) allegedly infringed on the patents-in-suit depended on the end user’s download of the Android Team Awareness Kit (“ATAK”), which is a third-party application not made by Google. (*Id.* at 5–6.) As the complaint did not allege that the Google smartphones *themselves* infringed on the patents, Golden failed to allege direct infringement. (*Id.* at 6.) As liability for indirect infringement is dependent on the existence of direct infringement, Golden also failed to allege indirect infringement. (*Id.* at 7.)

The FAC claims that newer models of Google’s smartphones (Google Pixel 6a, 7, 7a, 7 Pro and Fold) infringe on the ’287 Patent, the ’439 Patent, ’189 Patent, plus one additional patent, U.S. Patent No. 10,984,619 (“’619 Patent”). (*See* FAC at 2.) The FAC alleges five theories of direct infringement (*id.* ¶ 75, Exs. G & H), all of which suffer from the same defect for which the original complaint was dismissed: the theories all require that the accused products be modified in some way for them to infringe on the patents-in-suit. *See Golden v. Samsung Elecs. Am., Inc.*, No. 2023-2120, 2024 WL 539973, at *3 (Fed. Cir. Feb. 12, 2024) (“Mr. Golden’s allegations, even if true, at best establish that [defendant’s] smartphones might be modified post-sale to perform the accused detector/sensor functionality, which is not enough for direct infringement on the claims here.”). Thus, like the original complaint, the FAC fails to allege direct or indirect infringement. The FAC’s claims of joint infringement and willful infringement are conclusory and thus also not plausibly alleged, even applying the lenient pleading standards for *pro se* plaintiffs.

A. Direct Infringement

ATAK application. Golden’s first claim of direct infringement (*see* FAC, Ex. G (“Ex. G”) at 2–9) fails for the same reason as the original complaint: it requires the use of ATAK, a third-party application that the user must install on the accused product, for at least two elements of each asserted claim. (*See id.* at 6.) *See Nazomi Commc’ns, Inc. v. Nokia Corp.*, 739 F.3d 1339, 1346 (Fed. Cir. 2014) (finding that the defendants’ products “do not infringe without modification—the modification of installing the required software”).

NFC tags. Likewise, Golden’s second theory (*see* Ex. G at 10–17) requires combining “Google’s NFC sensor,” which are allegedly embedded in the accused products, with external NFC tags that have been converted to detect certain chemicals in order for there to be alleged infringement. Golden does not allege that the converted NFC tags are part of the accused smartphones. Thus, the FAC alleges only that the accused smartphones are capable of being modified to operate in an infringing manner, which is insufficient to support a finding of infringement. *Telemac Cellular Corp. v. Tcpp Telecom, Inc.*, 247 F.3d 1316, 1330 (Fed. Cir. 2001) (“[T]hat a device is capable of being modified to operate in an infringing manner is not sufficient, by itself, to support a finding of infringement.”).

Camera sensors. Golden’s third theory (*see* Ex. G at 18–25) relies on the combination of “Google’s camera lens” with a “microfluidic lens” that “uses a microscope to focus on a chemical sensor” (*id.* at 22) to support infringement. Again, though, the FAC alleges that the chemical sensor is an external component, not part of the smartphone camera. Specifically, the allegation is that “[t]he camera, screen, and LED flashlight of the smartphone can be employed as components of the sensor,” thus indicating that external sensor components beyond the smartphone are required. (FAC at 26.) The FAC also alleges that “[s]martphones provide hardware and software capability which can be incorporated with [CBR] sensors, enabling accurate on-site portable sensing,” further confirming that the sensors are separate devices that may be “incorporated” into the smartphone. (*Id.*) Therefore, this theory of infringement also fails because the accused products do not infringe without modification.

Smartphone biosensors. Golden’s fourth theory (*see* Ex. G at 26–33) is that “Google Smartphone Biosensors” detect various biomarkers, pathogens, and the like. The FAC does not specify how Google’s smartphones incorporate the listed biosensors, but instead references a diagram. (FAC at 27.) The diagram shows an “add on device” with the alleged biosensors (i.e., “capillary inlet,” “microfluidic cassette,” VIS-NIR spectrometer, and “NNAP electrodes”) attached to a nondescript smartphone. (*Id.*) As such, this theory also requires modification to the accused smartphones to state an infringement claim.

Furthermore, because Golden relies on the diagram to illustrate how Google allegedly infringes his patents, the Court may incorporate by reference into the FAC the journal article from which the diagram is derived. *See, e.g., ScfeCast Ltd. v. Google, LLC*, No. 23-CV-03128-PCP, 2023 WL 8108657, at *4 (N.D. Cal. Nov. 22, 2023) (incorporating by reference defendant’s policy webpages, which plaintiff selectively quoted in its claim chart, into complaint). Google provides a link to the article as the source of the diagram in its motion to dismiss (Mot. at 5), and Golden does not dispute in his opposition brief that the article is the source of the diagram. The article is attached as Exhibit A to this opinion, to preserve it for the record. The article describes the diagram as “an illustration of [a] futuristic sensing device indicating some possibilities for multiplex sensing” that could be used to colonize Mars, and notes that “this ideal galactic sensing system remains fictional and may seem farfetched.” (Ex. A at 20.) Accordingly, Golden’s allegation appears to be that Google may incorporate these biosensors in the future, which does not state a plausible claim that infringement has occurred or is imminent.

Google Beacon. Golden’s fifth theory (*see* Ex. G at 34–41) fails for the same reason, as it requires “Google Beacon,” which the FAC’s own illustrations show is a separate device from the accused smartphones (*see* FAC at 27).

Doctrine of equivalents. The doctrine of equivalents does not save Golden’s claims. (*See* FAC at 10.) “Under the doctrine of equivalents, a product that does not literally infringe a patent claim may still infringe if each and every limitation of the claim is literally or equivalently

present in the accused device.” *Bus. Objects, S.A. v. Microstrategy, Inc.*, 381 F. Supp. 2d 1107, 1109 (N.D. Cal. 2005), *aff’d*, 197 F. App’x 941 (Fed. Cir. 2006). Equivalence “requires a showing that the difference between the claimed invention and the accused product or method was insubstantial or that the accused product or method performs the substantially same function in substantially the same way with substantially the same result as each claim limitation of the patented product or method.” *AquaTex Indus., Inc. v. Techniche Sols.*, 479 F.3d 1320, 1326 (Fed. Cir. 2007). The FAC lacks allegations explaining how the doctrine applies, as does Exhibit G. In any event, the doctrine of equivalents is inapplicable because, as described above, each of the theories under which Golden has sued requires significant modifications to the accused products in order to state a claim for infringement. As such, by Golden’s own allegations, there is no equivalence between the claimed inventions and the accused products.

The FAC therefore fails to allege direct infringement by Google on the patents-in-suit.

B. Indirect Infringement

Golden fails to allege indirect infringement. “There are two types of indirect patent infringement: inducement and contributory infringement.” *Redd Grp., LLC v. Glass Guru Franchise Sys., Inc.*, No. 12-CV-04070-JST, 2013 WL 3462078, at *4 (N.D. Cal. July 8, 2013) (citing 35 U.S.C. §§ 271(b)-(c)). “Liability for either active inducement of infringement or for contributory infringement is dependent upon the existence of direct infringement,” and “[t]here can be no inducement or contributory infringement without an underlying act of direct infringement.” *Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1326 (Fed. Cir. 2004) (citation and internal quotation marks omitted).

Golden alleges indirect infringement on two theories: (1) contributory infringement based on the Google Tensor Chipset (FAC, Ex. G at 2), and (2) inducement and contributory infringement involving Draper Laboratory, Inc., the developers of “ATAK-CIVILIAN,” and the Defense Threat Reduction Agency (“DTRA”), the developers of “ATAK-MILITARY” (FAC, Ex. H). However, Golden does not allege that Google, Draper Laboratory, or the DTRA directly infringed the patents-in-suit. To the contrary, Golden concedes that there was no such direct

infringement by any of those parties: “Plaintiff has alleged Joint or Divided infringement between Google and Draper; and, Google and DTRA, because no single party carried out all the steps of Plaintiff’s patented inventions, that would constitute infringement.” (FAC, Ex. H at 3.)

The indirect infringement claims are inadequately pleaded for additional reasons. “For an allegation of induced infringement to survive a motion to dismiss, a complaint must plead facts plausibly showing that the accused infringer specifically intended another party to infringe the patent and knew that the other party’s acts constituted infringement.” *Lifetime Indus., Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1379 (Fed. Cir. 2017) (citation and internal quotation marks and brackets omitted). Golden fails to allege facts plausibly supporting an inference that Google purposely induced Draper Laboratory or DTRA to infringe the patents-in-suit. (See FAC at 3, Ex. H.) The FAC’s allegations are entirely conclusory. Golden’s mere invocation of the “doctrine of willful blindness” (*id.* at 4) is insufficient to allege the requisite intent without factual allegations supporting the theory’s application.

Likewise, for contributory infringement, the FAC fails to plead facts supporting any of the elements of that claim against Google: “(1) selling a device capable of infringing the patent, which is not suitable for substantial non-infringing use; (2) with knowledge that the infringing device was especially adapted for use in an infringement of such patent; and (3) actual infringement by another. *Golden v. Qualcomm, Inc.*, No. 22-CV-03283-HSG, 2023 WL 2530857, at *3 (N.D. Cal. Mar. 15, 2023). For example, the FAC lacks factual allegations regarding Google’s knowledge of the patents-in-suit and patent infringement. Also, the FAC does not explain to whose infringement the Tensor Chipset contributes, and his allegations that the Tensor Chipset lacks any substantial non-infringing uses are entirely conclusory. (See FAC at 3–4.)

C. Joint Infringement

Golden fails to allege joint infringement. “A claim of joint infringement . . . requires pleading facts sufficient to allow a reasonable inference that all steps of the claimed method are performed and either (1) one party exercises the requisite ‘direction or control’ over the others’

performance or (2) the actors form a joint enterprise such that performance of every step is attributable to the controlling party.” *Lyda v. CBS Corp.*, 838 F.3d 1331, 1339 (Fed. Cir. 2016) (citation omitted). A joint enterprise has four elements: “(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.” *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1023 (Fed. Cir. 2015) (citing Restatement (Second) of Torts § 491 cmt. c). The FAC’s allegations regarding joint infringement are sparse. (See FAC at 4, Ex. H.) It appears that Golden is alleging joint infringement by Google and Draper Laboratory, or possibly by Google and DTRA, but there are no factual allegations regarding the degree of control that Google had over Draper Laboratory or DTRA, or vice versa, or supporting that those entities formed a joint enterprise.

D. Willful Infringement

Google fails to allege willful infringement. “To state a claim for willful infringement, the plaintiff must plead that the defendant acted with knowledge of the patent and of his alleged infringement, or equivalent facts.” *OpenTV, Inc. v. Apple, Inc.*, No. 14-1622, 2015 WL 1535328, at *7 (N.D. Cal. Apr. 6, 2015) (citing *Sentry Prot. Prods., Inc. v. Eagle Mfg. Co.*, 400 F.3d 910, 918 (Fed. Cir. 2005)). As discussed above for indirect infringement, the FAC makes only conclusory statements about Google’s alleged willful infringement. (See FAC at 4.) There are no factual allegations supporting that Google knew about the patents-in-suit or any alleged infringement. See, e.g., *Hypermedia Navigation LLC v. Google LLC*, No. 18-CV-06137-HSG, 2019 WL 1455336, at *4 (N.D. Cal. Apr. 2, 2019) (“Nothing in the complaint provides specific factual allegations about Google’s subjective intent or details about the nature of Google’s conduct to render a claim of willfulness plausible, and not merely possible.”).

E. Leave to Amend

Leave to amend may be denied for “repeated failure to cure deficiencies by previous amendment.” *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 742 (9th Cir. 2008). Golden

asks for leave to amend but lists no specific facts that would cure the deficiencies at issue in the motion to dismiss. (Dkt. No. 46 at 27.) *See Salameh v. Tarsadia*, 726 F.3d 1124, 1133 (9th Cir. 2013) (“A plaintiff may not in substance say ‘trust me’ and thereby gain a license for further amendment when prior opportunity to amend has been given.”). The flaws in the FAC are the same as those identified in the order dismissing Golden’s original complaint. As Golden was already granted leave to amend once in this case but was unable to correct the deficiencies, further leave to amend would be futile.

Furthermore, Golden has had multiple suits with similar allegations dismissed, some as frivolous. *See, e.g., Golden v. Samsung Elecs. Am., Inc.*, No. 23-CV-00048-WHO, 2023 WL 3919466 (N.D. Cal. June 8, 2023), *cf. d.*, No. 2023-2120, 2024 WL 539973 (Fed. Cir. Feb. 12, 2024); *Golden v. Qualcomm, Inc.*, No. 22-CV-03283-HSG, 2023 WL 2530857 (N.D. Cal. Mar. 15, 2023) *Golden v. Apple Inc.*, No. 20-cv-04353-JD-KFM, 2021 WL 5074739 (D.S.C. Nov. 2, 2021) (dismissing complaint as “frivolous”); *Golden v. Apple Inc.*, No. 20-cv-02270-JD-KFM, 2021 WL 4260782 (D.S.C. Sept. 20, 2021) (dismissing complaint as “frivolous”).


As such, leave to amend is denied.

F. Conclusion

Based on the foregoing, the motion to dismiss the amended complaint is **GRANTED WITHOUT LEAVE TO AMEND**. The Clerk of the Court shall enter judgment in favor of Google and close the case.

IT IS SO ORDERED.

Dated: April 3, 2024



RITA F. LIN
United States District Judge