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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

11 CELLSPIN SOFT, INC.,

12 Plaintiff,

13 v.

14 CANON U.S.A., INC.,

15 Defendant.

CASE NO. 3:17-CV-05938-YGR

**DEFENDANT CANON'S NOTICE OF
MOTION AND MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(B)(6);
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: January 23, 2018

Time: 2:00 P.M.

Courtroom: Oakland Courthouse, Fourth
Floor, Courtroom 1

Action Filed: December 18, 2017

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TO PLAINTIFF CELLSPIN SOFT, INC. AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 2:00 P.M. on January 23, 2018, or as soon as the matter may be heard, in the courtroom of the Honorable Yvonne Gonzalez Rogers at the United States District Court for the Northern District of California, Courtroom 1, Fourth Floor, 1301 Clay Street, Oakland, CA 94612, Defendant Canon U.S.A., Inc. (“Canon”) shall and hereby does move the Court for an order dismissing the complaint filed by Plaintiff Cellspin Soft, Inc. (“Cellspin”) for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Canon seeks relief in the form of an order dismissing the complaint. Canon’s motion is based on this notice and the supporting memorandum of points and authorities, any reply briefing in further support of the motion, and any other written or oral argument that Canon may present to the Court.

DATED: December 18, 2017

QUINN EMANUEL URQUHART & SULLIVAN, LLP

BY: /s/ Ryan S. Goldstein

Ryan S. Goldstein
Attorney for Defendant Canon U.S.A., Inc.

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1 **I. INTRODUCTION**

2 This is an action for alleged patent infringement filed by Cellspin Soft, Inc. (“Cellspin”)
3 against Canon U.S.A., Inc. (“Canon”). The single patent at issue is directed to wireless transfer of
4 media files from a digital camera to a cellular phone, which then uploads the files to a publishing
5 website. Each asserted claim requires a digital camera, cellular phone, and publishing website.
6 Each claim also describes specific procedures that the camera and phone follow to create, request,
7 transfer, store, and upload the media files to the website.

8 Cellspin’s complaint makes no attempt to map these specific claim requirements to the
9 accused products—here, *eighty* different models of Canon cameras. Instead, the complaint
10 generalizes the claim language in a single paragraph, and then suggests a variety of mixed-and-
11 matched theories under which the accused products might meet this formulation when used in
12 combination with a third-party cellular phone, a Canon mobile application, and an unspecified
13 website. This approach fails to comply with the applicable pleading standards set forth in *Iqbal*,
14 *Twombly*, and this Court’s precedent applying the same.

15 ***First***, the complaint fails to show that every limitation of any asserted claim is found in the
16 accused products. This is because the complaint’s generalized formulation of the asserted claims
17 omits specific limitations like the requirement that the digital camera cryptographically
18 authenticate the cellular phone or receive a data transfer request for a specific media file. This
19 Court’s precedent requires, at a minimum, that the complaint contain factual allegations that an
20 accused product practices every element of at least one claim. Cellspin has failed to meet this
21 minimum standard.

22 ***Second***, the complaint fails to plead facts and allegations to show any instance of direct
23 infringement. The complaint appears to offer three theories in this regard. The first is that Canon
24 is a direct infringer because, even though Canon does not make or sell cellular phones, it allegedly
25 undertakes “efforts to test, demonstrate, and otherwise use Canon devices” in a way that infringes
26 the asserted claims. The complaint does not provide any description of the alleged tests or
27 demonstrations, let alone factual evidence to support these allegations. The second theory is that
28 Canon directly infringes the asserted method claims because it allegedly “direct[s] or control[s]”

1 some unidentified users and “conditions use of [Canon] mobile applications upon performance of
2 the remaining method steps.” Here, the complaint does not identify any specific users or provide
3 factual evidence to support the bare allegations of direction, control, and conditioning. The third
4 theory is that the users themselves are direct infringers because they allegedly operate the accused
5 cameras in combination with their cellular phones and Canon mobile applications. (In this
6 scenario, Canon is allegedly liable for induced infringement.) Here again, the complaint fails to
7 identify any specific user or explain how his or her “use of the Canon products and software”
8 allegedly meets the requirements of the asserted claims.

9 *Third*, the complaint fails to plead factual allegations sufficient to show the other elements
10 of induced infringement. The complaint fails to provide any credible factual allegation that Canon
11 had pre-suit knowledge of the asserted patent. It also fails to plead facts sufficient to support its
12 assertion that Canon “instruct[s]” and “encourage[s]” users to operate the accused products with
13 the specific intent to cause infringement, another requirement for an indirect infringement claim.

14 *Finally*, the complaint fails to plead factual allegations sufficient to show willful
15 infringement. The complaint vaguely alleges “willful, wanton, malicious, bad-faith, deliberate,
16 and/or consciously wrongful” conduct by Canon, but does not identify *any* specific conduct, let
17 alone the level of “egregious . . . misconduct beyond typical infringement” that is required under
18 the Supreme Court’s *Halo v. Pulse* standard. This is woefully insufficient to support a claim for
19 treble damages.

20 For these reasons, as set forth in further detail below, the complaint should be dismissed
21 for failure to state a claim upon which relief may be granted.

22 **II. STATEMENT OF FACTS**

23 Cellspin filed this lawsuit on October 16, 2017, alleging that Canon infringes claims 1, 3-5,
24 7, 8, 10-13, and 15-20 of U.S. Patent No. 9,258,698 (the “’698 patent”). Dkt. No. 1 ¶¶ 8-10. On
25 the same day that Cellspin filed its complaint against Canon, it filed six other lawsuits in the
26 Northern District asserting the ’698 patent against companies that manufacture digital cameras or
27 other image-capture devices. *See generally* Case Nos. 17-5934, -5936, -5937, -5939, -5940, and -
28 5941.

1 The '698 patent is titled, "Automatic multimedia upload for publishing data and
2 multimedia content." Dkt. No. 1-1. The patent describes "a method and system for utilizing a
3 digital data capture device in conjunction with a Bluetooth (BT) enabled mobile device for
4 publishing data and multimedia content on one or more websites automatically or with minimal
5 user intervention." *Id.* at Abstract. Asserted claims 1, 5, 8, and 13 are independent claims. *Id.* at
6 claims 1, 5, 8, 13. Claim 1 is reproduced below with limitations relevant to this motion
7 emphasized:

8 1. A machine-implemented method of media transfer, comprising:

9 for a digital camera device having a short-range wireless capability to connect
10 with a cellular phone, wherein the cellular phone has access to the internet,
performing in the digital camera device:

11 ***establishing a short-range paired wireless connection between the digital***
12 ***camera device and the cellular phone***, wherein establishing the short-range
13 paired wireless connection comprises, ***the digital camera device***
cryptographically authenticating identity of the cellular phone;

14 acquiring new-media, wherein the new-media is acquired after establishing the
15 short-range paired wireless connection between the digital camera device and the
cellular phone;

16 creating a new-media file using the acquired new-media;

17 storing the created new-media file in a first non-volatile memory of the digital
18 camera device;

19 ***receiving a data transfer request initiated by a mobile software application on***
20 ***the cellular phone***, over the established short-range paired wireless connection,
wherein the data transfer request is for the new-media file, and wherein the
21 new-media file was created in the digital camera device before receiving the data
transfer request; and

22 ***transferring the new-media file to the cellular phone***, over the established short-
23 range paired wireless connection, wherein the cellular phone is configured to
receive the new-media file, wherein the cellular phone is configured to store the
24 received new-media file in a non-volatile memory device of the cellular phone,
wherein the cellular phone is configured to use HTTP to upload the received
25 ***new-media file along with user information to a user media publishing website***,
26 and wherein the cellular phone is configured to provide a ***graphical user interface***
(GUI) in the cellular phone, wherein the graphical user interface (GUI) is for
27 ***the received new-media file and to delete the created new media file.***

28 *Id.* at claim 1 (emphasis added).

1 Independent claims 5, 8, and 13 include similar limitations as claim 1, but they are directed
2 to a device, system, and computer-readable medium, respectively. *Id.* at claims 5, 8, 13.

3 The complaint does not chart or list out the limitations of the asserted claims. Instead, it
4 includes a single paragraph that paraphrases the claim language as follows:

5 Claims of the ‘698 Patent comprise, generally, methods, devices, systems, and
6 computer-readable media comprising digital camera devices having a short-range
7 wireless capability to connect with a cellular phone; acquiring new-media after
8 establishing a secure wireless connection between the camera and the cellular
9 phone; creating a new-media file using the new-media; receiving a data transfer
10 request for the new-media file initiated by a mobile software application on the
11 cellular phone over the wireless connection after storing the created new-media
file in memory of the camera; and transferring the new-media file to be stored on
the cellular phone, over the wireless connection, wherein the cellular phone is
configured to use HTTP to upload the received new-media file along with user
information to a user media publishing website.

12 Dkt. No. 1 ¶ 10.

13 The complaint alleges that Canon infringes the asserted claims by making, using, offering
14 for sale, and selling eighty different models of digital cameras. *Id.* ¶ 11. The complaint further
15 alleges that these cameras are “used in conjunction with Canon mobile applications” and
16 “websites comprising media publishing sites, such as social media websites.” *Id.* The complaint
17 does not chart or otherwise provide an element-by-element analysis of any specific product to
18 show how it allegedly meets the specific requirements of the asserted claims. *Id.* ¶ 12. Instead, it
19 states—without citing a single piece of factual evidence—that the accused products practice or
20 comprise yet another paraphrased formulation of the asserted claim limitations. *Id.* The complaint
21 further alleges that “through Canon’s hardware, software, and efforts to test, demonstrate, and
22 otherwise use Canon devices, Canon has used the claimed devices, systems, and computer-
23 readable media” *Id.*

24 With respect to indirect infringement, the complaint alleges that “Canon has induced, and
25 continues to induce infringement of the ‘698 Patent ... by intentionally inducing direct
26 infringement of the ‘698 Patent, including by knowingly and actively aiding or abetting
27 infringement by users, by and through at least instructing and encouraging the use of the Canon
28 products and software noted above.” *Id.* ¶ 14. The complaint alleges that “the direct infringement

1 of the claimed methods by users that occurs in connection with Canon’s applications and/or
2 websites occurs under the direction or control of Canon, including Canon software and hardware,
3 including because user devices perform said steps in order to receive the benefits of Canon’s
4 mobile application, and/or because Canon conditions use of its mobile applications upon
5 performance of the remaining method steps.” *Id.* The complaint does not allege that Canon had
6 actual notice or knowledge of the ’698 patent prior to service of the complaint. Instead, it states,
7 “[u]pon information and belief, Canon has had at least constructive notice of the ’698 patent
8 pursuant to the Patent Act.” *Id.* ¶ 13.

9 Finally, the complaint alleges, “Plaintiff believes and contends that Canon’s continuance of
10 its clear and inexcusable infringement of the ’698 patent post notice is willful, wanton, malicious,
11 bad-faith, deliberate, and/or consciously wrongful.” *Id.* ¶ 15. The complaint does not identify any
12 specific conduct. And again, the complaint does not allege that Canon had actual notice or
13 knowledge of the ’698 patent.

14 **III. LEGAL STANDARD**

15 **A. Motion to Dismiss for Failure to State a Claim**

16 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for
17 failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Dismissal for
18 failure to state a claim is proper if there is a “lack of a cognizable legal theory or the absence of
19 sufficient facts alleged under a cognizable legal theory.” *Conservation Force v. Salazar*, 646 F.3d
20 1240, 1242 (9th Cir. 2011) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
21 Cir. 1988)). The complaint must provide “enough facts to state a claim to relief that is plausible on
22 its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A “pleading that offers ‘labels
23 and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor
24 does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’”
25 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555-557). (alteration in
26 original) (internal citations omitted). “Threadbare recitals of the elements of a cause of action,
27 supported by mere conclusory statements, do not suffice.” *Id.*

28

1 Following abrogation of Federal Rule of Civil Procedure 84 and Form 18, patent
2 infringement claims became subject to the pleading standards set forth in *Twombly* and *Iqbal*. See
3 *XpertUniverse, Inc. v. Cisco Sys., Inc.*, 2017 WL 4551519, at *5 (N.D. Cal. Oct. 11, 2017). “In
4 light of this change, several district courts have taken the view that a complaint does not satisfy
5 the standard of *Twombly* and *Iqbal* where it does not at least contain factual allegations that the
6 accused product practices every element of at least one exemplary claim.” *Id.* (internal quotations
7 omitted). Courts in the Northern District have found “this reasoning persuasive, since, if a
8 complaint does not contain factual allegations that would permit a court to infer that a required
9 element of the patent claim was satisfied, it is hard to see how infringement would be
10 probable.” *Novatiz, Inc. v. inMarket Media, LLC*, 2017 WL 2311407, at *3 (N.D. Cal. May 26,
11 2017) (internal quotations omitted); see also *Atlas IP LLC v. Pac, Gas & Elec. Co.*, 2016 WL
12 1719545, at *2 (“[S]imply reciting some of the elements of a representative claim and then
13 describing generally how an accused product operates, without specifically tying the operation to
14 any asserted claim or addressing all of the claim requirements, is insufficient.”).

15 **B. Direct Infringement**

16 Under 35 U.S.C. § 271(a), “whoever without authority makes, uses, offers to sell, or sells
17 any patented invention, within the United States or imports into the United States any patented
18 invention during the term of the patent therefor, infringes the patent.” 35 U.S.C. § 271(a). Direct
19 infringement of an apparatus claim occurs when a device practices each and every limitation of an
20 asserted claim. *Cross Med. Prods., Inc. v. Medtronic Sofamor Danek*, 424 F.3d 1293, 1310 (Fed.
21 Cir. 2005). Direct infringement through “use” of a system claim occurs when a single party
22 “put[s] the invention into service, *i.e.*, control[s] the system as a whole and obtains benefit from
23 it.” *Centillion Data Sys., LLC v. Qwest Commn’s Int’l, Inc.*, 631 F.3d 1279, 1284 (Fed. Cir.
24 2008); *Intellectual Ventures I LLC v. Motorola Mobility, LLC*, 870 F.3d 1320, 1328 (Fed. Cir.
25 2017) (“Thus, under *NTP* and *Centillion*, to prove an infringing ‘use’ of a system under § 271(a), a
26 patentee must demonstrate ‘use’—that is, ‘control’ and ‘benefit’—of the claimed system by an
27 accused direct infringer.”). Direct infringement of a method claim occurs when a single actor
28 performs each step of the method. *BMC Resources, Inc. v. Paymentech, Lp*, 498 F.3d 1373, 1379

1 (Fed. Cir. 2007). When more than one entity is involved in practicing the steps, one entity will be
2 responsible for the other’s performance “(1) where that entity directs or controls other’s
3 performance, and (2) where the actors form a joint enterprise.” *Akamai Techs. v. Limelight*
4 *Networks*, 797 F.3d 1020, 1022 (Fed. Cir. 2015). One entity “directs or controls” another when it
5 “conditions participation in an activity or receipt of a benefit upon performance of a step or steps
6 of a patented method and establishes the manner or timing of that performance.” *Id.* at 1023.

7 **C. Induced Infringement**

8 Under 35 U.S.C. § 271(b), “Whoever actively induces infringement of a patent shall be
9 liable as an infringer.” 35 U.S.C. § 271(b). Induced infringement requires a threshold finding of
10 direct infringement. *Kyocera Wireless Corp. v. ITC*, 545 F.3d 1340, 1353-54 (Fed. Cir. 2008);
11 *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1272 (Fed. Cir. 2004) (“Indirect
12 infringement, whether inducement to infringe or contributory infringement, can only arise in the
13 presence of direct infringement . . .”). It also requires “a showing that the alleged inducer knew
14 of the patent, knowingly induced the infringing acts, and possessed a specific intent to encourage
15 another's infringement of the patent.” *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1328
16 (Fed. Cir. 2009). “[T]he specific intent necessary to induce infringement requires more than just
17 intent to cause the acts that produce direct infringement. Beyond that threshold knowledge, the
18 inducer must have an affirmative intent to cause direct infringement.” *Kyocera*, 545 F.3d at 1354
19 (quoting *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (*en banc*)).

20 **D. Willful Infringement**

21 Pursuant to 35 U.S.C. § 284, courts may “increase the damages up to three times the
22 amount found or assessed” for a finding of infringement. 35 U.S.C. § 284. “Section 284 allows
23 district courts to punish the full range of culpable behavior,” but “such punishment should
24 generally be reserved for egregious cases typified by willful misconduct.” *Halo Elecs., Inc. v.*
25 *Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933-34 (2016). The Federal Circuit has explained that,
26 following *Halo*, “[k]nowledge of the patent alleged to be willfully infringed continues to be a
27 prerequisite to enhanced damages.” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1341 (Fed. Cir.
28 2016).

1 **IV. ARGUMENT**

2 Cellspin's complaint fails to meet the applicable pleading standards for direct
3 infringement, induced infringement, and willful infringement. The single count of alleged patent
4 infringement should therefore be dismissed in its entirety under Rule 12(b)(6).

5 **A. Under Any Theory of Infringement, the Complaint Fails to Show Every**
6 **Element of At Least One Asserted Claim Is Practiced**

7 The complaint fails to plead facts sufficient to show that every element of at least one
8 claim is present in the accused products. Cellspin's complaint advances different theories under
9 which Canon allegedly infringes the asserted claims of the '698 patent. Under one theory, Canon
10 directly infringes through alleged testing and demonstration of the claimed invention. Under
11 another theory, Canon directly infringes by allegedly directing and controlling users to practice the
12 asserted method claims. Under yet another theory, the users themselves are direct infringers and
13 Canon allegedly induces their infringement. These theories are addressed individually in Sections
14 IV.B and IV.C below.

15 Regardless of which theory is considered, however, the single paragraph in the complaint
16 that describes the alleged operation of the accused products is plainly insufficient. It is black letter
17 law that a complaint must show that infringement is plausible on its face. *See XpertUniverse*,
18 2017 WL 4551519, at *5; *Novatiz*, 2017 WL 2311407, at *3. To meet this requirement, a
19 complaint should at least contain factual allegations that an accused product practices every
20 element of at least one exemplary claim. *XpertUniverse*, 2017 WL 4551519, at *5. Although the
21 common thread among Cellspin's infringement theories is that Canon cameras are used in
22 combination with a third-party cellular phone running a Canon mobile application, Dkt. 1, ¶ 12,
23 the complaint fails to show that this combination of hardware and software meets all of the
24 elements of any single claim.

25 The complaint does not provide a chart or other element-by-element comparison of the
26 accused combination of hardware and software to any single claim. Instead, it alleges that the
27 combination includes a paraphrased recitation of some—but not all—of the asserted claim
28 elements. *Id.* These allegations fail to address the following claim requirements: (1) the digital

1 camera and cellular phone establish a *short-range paired* wireless connection; (2) the digital
2 camera *cryptographically authenticates the identity* of the cellular phone; (3) the created new-
3 media file is stored in *non-volatile* memory of the digital camera; (4) the cellular phone is
4 configured to provide a *graphical user interface (“GUI”)* in the cellular phone; and (5) the *GUI is*
5 *for the received new-media file and to delete the created new media file*. *Id.* These elements are
6 present in each of the asserted claims, either directly or through dependency. *See generally* Dkt.
7 1-1 at claims 1, 5, 8, 13. By failing to provide factual allegations to show that the elements are
8 present in the accused combination of hardware and software, the complaint fails to make a
9 plausible showing of infringement. *See XpertUniverse*, 2017 WL 4551519, at *5; *see also*
10 *Novatiz*, 2017 WL 2311407, at *3; *Atlas IP*, 2016 WL 1719545, at *2; *e.Digital Corp. v. iBaby*
11 *Labs, Inc.*, 2016 WL 4427209, at *5 (N.D. Cal. Aug. 22, 2016) (“While e.Digital has attempted to
12 map most of the elements in the exemplary claim onto its description of the accused products in
13 the FAC, e.Digital has not attempted to map this limitation onto any allegations in the FAC
14 Accordingly, the Court concludes that the FAC fails to state a claim.”).

15 Moreover, the allegations contained in Paragraph 12 of the complaint—and the complaint
16 overall—are conclusory and unsupported by any factual evidence. The complaint does not cite
17 any public materials for the accused Canon digital cameras and mobile applications, such as user
18 manuals or online brochures. Nor does it provide any evidence to show that Cellspin has tested or
19 operated the cameras, alone or in combination with a cellular phone and Canon’s mobile
20 applications, in order to show that each element of an asserted claim is met. The complaint fails to
21 identify any evidence of a “user media publishing website” to where the cellular phone allegedly
22 uploads the “received new-media” as required by the asserted claims. *Id.* And, despite accusing
23 eighty different models of Canon cameras of infringement, the complaint fails to identify evidence
24 of a GUI for the received “new-media file” and to delete the “created new media file.” *Id.*

25 Finally, the complaint provides no evidence of how the accused products operate in order
26 to meet the many functional requirements of the asserted claims. For example, it is entirely
27 unclear from the complaint what Cellspin alleges is a “received new-media file” and “created new-
28 media file,” and whether Cellspin believes there is a distinction between them. For example,

1 Canon cannot determine from the complaint whether Cellspin contends that products that delete a
2 file having been transferred from the digital camera to the cellular phone and stored in the cellular
3 phone allegedly infringe the asserted patent.

4 Without factual evidence to support its allegations, the complaint amounts to “naked
5 assertion[s] devoid of further factual enhancement.” *Iqbal*, 556 U.S. at 678. Such assertions are
6 insufficient under the applicable pleading standards and must be dismissed. *See PageMelding,*
7 *Inc. v. ESPN, Inc.*, 2012 WL 1534844, *2-*3 (N.D. Cal. 2012) (“Plaintiff has made no attempt to
8 explain why it hasn’t attempted to reverse engineer defendant’s publicly available information, nor
9 that such an attempt would be futile Plaintiff must engage in a good faith investigation,
10 consistent with Rule 11, as to *how* defendant [infringes]. Merely explaining how plaintiffs’ patent
11 works and stating that defendant produces a similar end product, is not enough. There are many
12 ways to reach a destination and not everyone necessarily traveled the same path Just because
13 defendant creates an end product similar to that created by plaintiff’s patent does not give rise to a
14 reasonable inference of infringement. Plaintiff’s pleading approach still smacks too much of
15 ‘shoot first and ask questions later.’”) (hereinafter, *PageMelding II*).

16 **B. The Complaint Does Not Allege Facts Sufficient to Show Direct Infringement**

17 As discussed above, the complaint includes different theories of direct infringement,
18 including some where Canon is the alleged direct infringer and others where “users” of the
19 accused products are direct infringers. Each theory is unsupported by sufficient factual allegations
20 or evidence.

21 **1. The Complaint Does Not Allege Facts Sufficient to Show that Canon**
22 **Directly Infringes**

23 The facts alleged cannot support a claim that Canon directly infringes. Each asserted claim
24 requires, *inter alia*, a cellular phone that performs specific actions, such as executing a mobile
25 software to initiate a “data transfer request” for a specific media file stored on a digital camera.
26 *See* Dkt. 1-1 at claims 1, 5, 8, 13. The cellular phone must also be configured to receive, store,
27 and upload the media file, and provide a user interface. *Id.*

1 Initially, the complaint does not allege that Canon makes, sells, offers for sale, or imports
2 cellular phones, Dkt. No. 1, ¶ 11, and therefore it fails to plead that Canon is a direct infringer
3 based on those actions. *See Rotec Industries, Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1252 n.2
4 (Fed. Cir. 2000) (“[A]s to claims brought under § 271(a), *Deepsouth [Packing Co. v. Laitram*
5 *Corp.*, 406 U.S. 518, 526-28 (1972)] remains good law: one may not be held liable under § 271(a)
6 for ‘making’ or ‘selling’ less than a complete invention.”).

7 Furthermore, any allegations that Canon directly infringes the claims by testing,
8 demonstrating or otherwise “using” its devices in an infringing manner are insufficient. The
9 complaint alleges that “through Canon’s hardware, software, and efforts to test, demonstrate, and
10 otherwise use Canon devices, Canon has used the claimed devices, systems, and computer-
11 readable media via at least the use of the Canon devices, comprising at least the foregoing steps.”
12 Dkt. No. 1, ¶ 12. The complaint does not, however, identify any specific testing, demonstration,
13 or other specific use of the Canon devices. Nor does it show or allege how any such testing,
14 demonstration, or other use results in practicing each element of the claimed invention. The
15 complaint does not show that Canon performs every aspect of any such testing, demonstration, or
16 use necessary to practice the claimed invention. And, as with all of Cellspin’s allegations, the
17 complaint does not cite any factual evidence to support the bare allegations of “testing,
18 demonstration, or use.”

19 These conclusory allegations, unsupported by facts, are insufficient to state a claim to
20 relief that is plausible on its face. *Iqbal*, 556 U.S. at 678; *see also PageMelding, Inc. v. ESPN,*
21 *Inc.*, 2012 WL 851574, at *2 (N.D. Cal. 2012) (“Simply alleging that plaintiff is the owner of a
22 patent, stating in the most general terms what that product does without identifying how the
23 product accomplishes any of its functions, and alleging two potentially infringing products are
24 owned by defendant, without explanation as to the how or why these products infringe, does not
25 lead to any inference that plaintiff may be entitled to relief.”); *California Inst. of Computer*
26 *Assisted Surgery, Inc. v. Med-Surgical Servs., Inc.*, 2010 WL 3063132, at *2 (N.D. Cal. Aug. 3,
27 2010) (“Plaintiff’s complaint merely reiterates the bare elements of patent infringement. It fails to
28 allege with any specificity what CBYON systems is and how it infringes upon any of its four

1 patents. Because it fails to provide the factual grounds on which its infringement claims rest, it
2 does not state a legally cognizable claim. Defendant’s motion to dismiss is, therefore, granted.”).

3 With respect to the asserted method claims, to the extent the complaint intends to advance
4 a theory of direct infringement by Canon under *Akamai*, it fails to plead factual allegations
5 sufficient to support the theory. In *Akamai*, the *en banc* Federal Circuit explained that one actor is
6 responsible for another’s performance of claimed method steps when it “directs or controls” the
7 other’s performance. 797 F.3d at 1022. It further explained that one actor “directs or controls”
8 another when it “conditions participation in an activity or receipt of a benefit upon performance of
9 a step or steps of a patented method and establishes the manner or timing of that performance.”
10 *Id.* at 1023. Here, the complaint contains nothing more than bare allegations that users practice
11 each step of the claimed methods under the “direction or control of Canon,” and that “Canon
12 conditions use of its mobile applications upon performance of the remaining method steps.” Dkt.
13 No. 1, ¶ 14.

14 This formulaic recitation of elements is plainly insufficient. The complaint does not offer
15 any explanation—let alone factual evidence—to show *how* Canon allegedly “directs,” “controls,”
16 or “conditions” the use of its cameras and mobile applications in a manner that meets the
17 requirements of the asserted claims. Dkt. No. 1, ¶ 14. The complaint does not identify any actions
18 that Canon takes to exercise direction or control. *Id.* It does not identify any specific conditions
19 that Canon places on the use of its mobile applications. *Id.* It does not even identify which
20 “remaining method steps” are attributable to the users versus which method steps are attributable
21 to Canon. *Id.* These “[t]hreadbare recitals of the elements of a cause of action, supported by mere
22 conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (2009) (citing *Twombly*, 550 U.S.
23 at 555); *see also Lyda v. CBS Corp.*, 838 F.3d 1331, 1340 (Fed. Cir. 2016) (“[T]he Amended
24 Complaint does not allege any relationship between the Defendants and the unnamed third parties,
25 who own or borrow cell phones, in a way that the actions of these unnamed third parties should be
26 attributed to Defendants. Rather, the Amended Complaint alleges conclusively and without
27 factual support that CBS directed or controlled the independent contractors who then directed or
28 controlled the unnamed third parties. There are thus no allegations in the Amended Complaint that

1 can form the basis of a reasonable inference that each claim step was performed by or should be
2 attributed to Defendants. The Amended Complaint fails to plausibly plead sufficient facts to
3 ground a joint infringement claim under this court's *Akamai* decision and does not satisfy the
4 *Iqbal/Twombly* pleading standard.”).

5 **2. The Complaint Does Not Allege Facts Sufficient to Show that “Users”**
6 **Directly Infringe**

7 The complaint generally alleges that “Canon has induced, and continues to induce,
8 infringement of the ‘698 Patent . . . by intentionally inducing direct infringement of the ‘698
9 Patent, including by knowingly and actively aiding or abetting infringement by users” Dkt.
10 No. 1, ¶ 14. The complaint fails, however, to allege facts sufficient to show that any such user has
11 practiced each and every element of any asserted claim. The complaint does not include any
12 specific description to show how users use the accused Canon digital cameras and mobile
13 applications in combination with cellular phones and media publishing websites. *Id.* Nor does it
14 explain how any such use would result in the practice of each element of an asserted claim. *Id.*
15 The complaint also fails to cite any factual evidence to support the generic allegation that users are
16 direct infringers. *Id.*

17 **C. The Complaint Does Not Allege Facts Sufficient to Show Inducement**

18 The inducement claim is also unsupportable. Induced infringement requires a threshold
19 finding of direct infringement and a showing that the alleged inducer knew of the patent,
20 knowingly induced the infringing acts, and possessed a specific intent to encourage another’s
21 infringement of the patent. *See Vita-Mix Corp.*, 581 F.3d at 1328; *Dynacore Holdings Corp. v.*
22 *U.S. Philips Corp.*, 363 F.3d 1263, 1272 (Fed. Cir. 2004) (“Indirect infringement, whether
23 inducement to infringe or contributory infringement, can only arise in the presence of direct
24 infringement”); *e.Digital Corp.*, 2016 WL 4427209, at *5 (citing *Dynacore* and holding that
25 “because the Court has already concluded that e.Digital has failed to state a claim for direct
26 infringement, e.Digital's claims for indirect infringement must fail as well.”); *PageMelding II*,
27 2012 WL 1534844, at *3 (N.D. Cal. 2012) (“Because plaintiff has failed to allege direct
28 infringement by defendant ESPN, any similar allegation that a third party infringes is equally

1 deficient.”). Cellspin’s complaint fails to sufficiently plead direct infringement as discussed
2 above, so the induced infringement allegations should be dismissed for that reason alone. The
3 complaint also fails to sufficiently plead pre-suit knowledge of the patent and specific intent to
4 encourage infringement.

5 **1. The Complaint Does Not Allege Facts Sufficient to Show Canon’s**
6 **Pre-Suit Knowledge of the ’698 Patent**

7 The complaint does not include a credible allegation of pre-suit knowledge. The only
8 statement concerning pre-suit knowledge is the following: “Upon information and belief, Canon
9 has had at least *constructive* notice of the ’698 patent pursuant to the Patent Act.” (Emphasis
10 added). The complaint does not provide any explanation or factual evidence to support this
11 allegation. This is plainly deficient under this Court’s reasoning in *Nanosys, Inc. v. QD Vision,*
12 *Inc.*, 2016 WL 4943006 (N.D. Cal. Sept. 16, 2016) (“*Nanosys I*”). In *Nanosys I*, the plaintiffs
13 alleged pre-suit knowledge because the defendant’s “founders and key employees were, at least,
14 aware of and knowledgeable about developments and advances in the field and patent filings
15 through their activities conducted through industry conferences, research, and development.” *Id.*
16 at *3. The Court explained that “Plaintiffs fail to expound upon the connections which they argue,
17 but do not plead, exist given this particular market,” and that “[w]ithout more, the Court cannot
18 conclude that their claim is plausible.” *Id.* at *4-*5.

19 Here, Cellspin’s allegations are even more speculative than those in *Nanosys I*. Cellspin
20 does not offer any factual explanation or evidence that would allow the Court to conclude that it is
21 plausible Canon had pre-suit knowledge of the ’698 Patent. Dkt. No. 1, ¶ 13. For this reason,
22 Cellspin’s allegations of pre-suit inducement should be dismissed.¹ *See also Radware, Ltd. v. A10*
23 *Networks, Inc.*, 2013 WL 5373305, at *2 (N.D. Cal. Sept. 24, 2013) (“Radware’s laundry list of
24 allegations does not cure the problem that Radware fails to plead *actual* notice of the patents-in-

25 ¹ In *Nanosys I*, the Court explained that pleading knowledge of the asserted patent through
26 service of the complaint was sufficient for claims of post-suit inducement. *Nanosys I*, 2016 WL
27 4943006, at *5. In light of this holding, Canon does not challenge the sufficiency of the complaint
28 for the narrow issue of post-suit *notice* of the patent, but it does challenge post-suit *inducement*
based on Cellspin’s failure to plead facts sufficient to show direct infringement and specific intent.

1 suit and infringement thereof, including the accused products, prior to the filing of the lawsuit.”)
2 (emphasis in original).

3 **2. The Complaint Does Not Allege Facts Sufficient to Show Canon’s**
4 **Specific Intent to Cause Infringement**

5 The general allegation that Canon instructs or encourages its users to use the accused
6 products and software is insufficient to plead specific intent to cause infringement. Without a
7 minimum level of factual support, the statements in the complaint amount to “bare and conclusory
8 allegations that courts have found are insufficient to infer specific intent to induce infringement.”
9 *Nanosys I*, 2016 WL 5943006, at *5 (collecting cases that found a failure to plead specific intent).

10 The complaint’s only allegation of intent to cause infringement is the following:

11 Canon has induced, and continues to induce, infringement of the ‘698 Patent . . .
12 by intentionally inducing direct infringement of the ‘698 Patent, including by
13 knowingly and actively aiding or abetting infringement by users, by and through
14 at least instructing and encouraging the use of the Canon products and software
15 noted above. Such aiding and abetting comprises providing devices, software,
16 websites, and/or instructions regarding the use and/or operation of the Canon
17 devices and applications in an infringing manner, and further including providing
18 the accused Canon devices and applications to users who, in turn, use the claimed
19 devices, systems, and computer-readable media, including as noted above.

20 Dkt. No. 1, ¶ 14.

21 The complaint does not identify any specific instructions, manuals, or guides that Canon
22 provides to users or customers. Dkt. No. 1, ¶ 14. Nor does it explain how any such instructions
23 would cause a user to operate the accused products in a knowingly infringing manner. *Id.*

24 Cellspin’s allegations of specific intent fall far short of those in *Nanosys I*, where this
25 Court found the allegation sufficiently pled. There, the plaintiff alleged that the defendant
26 instructed its display manufacturer to show that the accused device met specific requirements of
27 the asserted claim. *Id.* The plaintiff also alleged that a video published by the defendant showed
28 that the accused products, when operated, performed a specific step of the asserted claim. *Id.* The
Court found these specific allegations sufficient to raise an inference of specific intent. *Id.* Here,
the complaint lacks any specific allegation that would lead to the same inference. Dkt. No. 1, ¶

1 14.² See *Unisone Strategic IP, Inc. v. Life Techs. Corp.*, 2013 WL 5729487, at *3 (S.D. Cal. Oct.
2 22, 2013) (finding insufficient allegation that defendant “intentionally designs, manufactures,
3 markets, promotes, sells, services, supports (including technical support), provides updated
4 software, and educates its customers and suppliers about its [] software”). Accordingly, the
5 complaint’s allegations of induced infringement should be dismissed for failure to sufficiently
6 plead specific intent. This applies to both pre- and post-suit inducement.

7 **D. The Complaint Does Not Allege Facts Sufficient to Show Willful Infringement**

8 Cellspin’s willful infringement allegations fare no better. This Court has explained that,
9 under *Halo*, a pleading of willful infringement is evaluated on the “totality of the allegations to
10 determine whether a claim of willfulness is plausible.” *Nanosys I*, 2016 WL 4943006, at *7.
11 Here, Cellspin’s allegations amount to the following two sentences: “To the extent Canon
12 continues, and has continued, its infringing activities noted above in an infringing manner post-
13 notice of the ‘698 patent, such infringement is necessarily willful and deliberate. Plaintiff believes
14 and contends that Canon’s continuance of its clear and inexcusable infringement of the ‘698 patent
15 post notice is willful, wanton, malicious, bad-faith, deliberate, and/or consciously wrongful.” *Id.*
16 ¶ 15. The totality of these allegations is plainly insufficient to raise a plausible inference that
17 Canon acted with the level of egregious misconduct required under the *Halo* standard. 136 S. Ct.
18 1933.

19 **First**, the allegations—and the complaint more broadly—fail to show that Canon had pre-
20 suit knowledge of the ‘698 patent. As discussed above, the complaint’s only allegation of pre-suit
21 knowledge is that, “[u]pon information and belief, Canon has had at least constructive notice of
22 the ‘698 patent pursuant to the Patent Act.” Dkt. No. 1, ¶ 13. The complaint does not provide any
23 explanation of factual evidence to support this allegation. *Id.* “Without more, the Court cannot

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25 ² The *Nanosys I* order also cited *In re Bill of Lading* as instructive for the pleading
26 requirements of specific intent. *Nanosys I*, 2016 WL 4943006, at *5-*7. In *Bill of Lading*, the
27 Federal Circuit found the pleading sufficient where it identified specific instructions and alleged
28 that the instructions touted the benefits of using the patents method and explained how to use the
same. See *In re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d
1323, 1346 (Fed. Cir. 2012). Again, Cellspin’s allegations fall short of this level of specificity.

1 conclude that their claim is plausible.” *Nanosys I*, 2016 WL 4943006, at *4. Knowledge of the
2 asserted patent is a prerequisite to a finding of willful infringement, *see WBIP*, 829 F.3d at 1341,
3 and this Court has instructed that a complaint should plead more than “mere knowledge” to
4 survive a motion to dismiss. *Nanosys Inc. v. QD Vision, Inc.*, No. , 2017 WL 35511, at *1 (N.D.
5 Cal. Jan. 4, 2017) (“*Nanosys II*”). Cellspin’s complaint fails to plead facts sufficient to show
6 knowledge at all, let alone something more.

7 **Second**, the complaint does not identify any specific “willful, wanton, malicious, bad-faith,
8 deliberate, and/or consciously wrongful” act on the part of Canon. Dkt. No. 1, ¶ 15. These are
9 simply conclusory allegations untied to any specific conduct or evidence of the same. The
10 allegations add nothing to the “totality of the circumstances,” and, together with Cellspin’s failure
11 to plead facts showing knowledge of the ’698 patent, fail to support a plausible claim of willful
12 infringement. *See Synopsys, Inc. v. ATopTech, Inc.*, 2013 WL 5770542, at *17 (N.D. Cal. Oct. 24,
13 2013) (“Plaintiff’s allegations of willfulness amount to nothing more than recitation of that claim’s
14 elements Such pleadings are insufficient to state a claim for willful infringement.”);
15 *Vasudevan Software, Inc. v. TIBCO Software Inc.*, 2012 WL 1831543, at *4 (N.D. Cal. May 18,
16 2012) (dismissing willful infringement claims where the complaint provides “no way to discern
17 what constitutes the basis for the averment of actual knowledge”).

18 **V. CONCLUSION**

19 Cellspin’s complaint does not set forth factual allegations sufficient to support its
20 infringement claim. Accordingly, the complaint should be dismissed in its entirety.

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QUINN EMANUEL URQUHART & SULLIVAN,
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