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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KONDA TECHNOLOGIES, INC., a
California corporation,

Plaintiff,

vs.

FLEX LOGIX TECHNOLOGIES, INC.,

Defendant.

Case No. 5:18-cv-07581-LHK

**NOTICE OF MOTION AND MOTION TO
DISMISS COMPLAINT PURSUANT TO
FED. R. CIV. P. 12(b)(6) AND TO STRIKE
PORTIONS OF COMPLAINT
PURSUANT TO FED. R. CIV. P. 12(f);
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: May 9, 2019
Time: 1:30 p.m.
Judge: Lucy H. Koh
Ctm.: 8, 4th Floor

1 **NOTICE OF MOTION AND MOTION TO DISMISS AND TO STRIKE**

2 To Plaintiff Konda Technologies, Inc., and its counsel of record:

3 PLEASE TAKE NOTICE that on May 9, 2019, at 1:30 p.m., or as soon thereafter as the
4 matter may be heard, in Courtroom No. 8 of the above-captioned Court, located at 4th Floor, 280
5 South 1st Street, San Jose, CA 95113, Defendant Flex Logix Technologies, Inc. (“Flex Logix”)
6 hereby does move the Court for an Order dismissing with prejudice in its entirety Konda
7 Technologies, Inc.’s (“Konda Tech”) complaint in this action pursuant to Federal Rule of Civil
8 Procedure 12(b)(6) and/or for an Order striking or dismissing certain portions of Konda’s
9 Complaint under Federal Rule of Civil Procedure 12(f) and/or 12(b)(6).

10 Specifically, Flex Logix moves for an Order dismissing with prejudice:

11 [1] Konda Tech’s Third, Fourth, and Sixth Causes of Action because those Causes of
12 Action fail to state a claim for patent infringement due to the invalidity of each of the patents
13 under 35 U.S.C. § 102.

14 [2] Konda Tech’s Second, Third, Fourth, Fifth, and Sixth Causes of Action because
15 those Causes of Action do not plead facts sufficient to state a plausible claim for patent
16 infringement.

17 [3] Konda Tech’s First Cause of Action for Unfair Business Practices pursuant to
18 California Business & Professions Code Section 17200 et seq. as preempted by federal patent law
19 and as barred by the statute of limitations.

20 In the event that Konda Tech’s complaint is not dismissed in its entirety, Flex Logix also
21 moves for an Order striking and/or dismissing Konda Tech’s complaint’s references to “fraud”
22 due to the fact that the complaint’s references to fraud are immaterial and impertinent with respect
23 to the claims pled and scandalous and in view of the complaint’s failure to plead any alleged fraud
24 with particularity.

1 This motion is based upon this Notice of Motion and Motion; the attached Memorandum
2 of Points and Authorities¹; all other materials supporting this Motion or the Reply brief filed in
3 support thereof; all pleadings on file in this matter; and any other materials or arguments the Court
4 may receive at or before the hearing on this Motion.

5
6 DATED: January 24, 2019

MUNGER, TOLLES & OLSON LLP

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8
9 By: /s/ Gregory P. Stone
GREGORY P. STONE

10
11 Attorneys for Defendant FLEX LOGIX
TECHNOLOGIES, INC.

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28 ¹ Defined terms in this Motion are also used in the accompanying Memorandum of Points and Authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Konda Tech's complaint alleges that Flex Logix infringes five patents purportedly assigned to Konda Tech, a company founded by Dr. Venkat Konda in 2007. *See* Dkt. 1 (Complaint) at Counts 2-6, ¶ 11. Dr. Konda is the sole named inventor on each of the five asserted patents. *See* Complaint, Exs. 4-8. While the complaint offers few specifics, the complaint alleges that Konda Tech's patents generally relate to "field-programmable gate array ('FPGA') routing fabric" and "interconnection networks technology." *See* Complaint ¶ 11. Konda Tech also brings a state law claim for Unfair Business Practices under California's Unfair Competition law ("UCL") pursuant to California Business & Professions Code Section 17200 et seq. *See* Complaint, Count 1, ¶¶ 30-35.

Konda Tech's complaint fails to state a plausible claim for patent infringement, and its UCL claim is preempted by federal patent law and barred by the applicable statute of limitations. Because Konda Tech's complaint is manifestly deficient in numerous respects, Konda Tech's complaint should be dismissed in its entirety.

First, three of the patents asserted by Konda Tech (specifically, U.S. Patent 8,898,611 ("the '611 patent"); U.S. Patent 9,529,958 ("the '958 patent"); and U.S. Patent 10,050,904 ("the '904 patent")) are invalid in view of one of Konda Tech's *own* prior patent publications.¹ The invalidity of these patents can be straightforwardly determined by a review of Konda Tech's complaint in combination with Konda Tech's own patent applications and patent publications, which are properly judicially noticeable at this stage of the proceedings. In brief, the disclosures of these three patents were made publicly available more than one year prior to the earliest possible priority date for each patent, rendering each of the patents indisputably invalid. There is no subject matter that each of the patents could properly claim that was not publicly disclosed more than one year before each of the patent's earliest possible priority date. Flex Logix submits

¹ Flex Logix contends that each of the five asserted patents is invalid but has limited its motion to three of these patents at this time, because a mere review of the complaint and judicially noticeable materials unequivocally demonstrates the invalidity of those three patents.

1 this is a circumstance in which this Court may properly dismiss Konda Tech’s patent infringement
2 claims based on invalidity of the asserted patents at this stage in the litigation. No further
3 proceedings are necessary in order to permit this Court to reach the conclusion that each of these
4 patents is invalid. There is no reason to delay—this Court can and should dismiss Counts Three,
5 Four, and Six of Konda Tech’s complaint due to the invalidity of each of the asserted patents.²

6 Second, Konda Tech makes no attempt to plead a plausible claim for infringement under
7 *Twombly* and *Iqbal* with respect to *any* of the five asserted patents. Among Konda Tech’s
8 infringement allegations’ numerous deficiencies, Konda Tech fails to identify any accused
9 products, provides no comparison of any allegedly infringing products to the claims of the asserted
10 patents, and relies on mere (and incomplete) recitations of statutory language instead of specific
11 factual allegations. Konda Tech’s patent infringement claims are woefully inadequate and should
12 be dismissed.

13 Third, Konda Tech’s UCL claim asserts that “Flex Logix’s patent infringement, and other
14 tortious behavior, as described above and below in the causes of action listed in this Complaint, all
15 constitute unfair and unlawful business practices pursuant to California Business & Professions
16 Code Section 17200 *et seq.*” Complaint ¶ 31. However, the only “tortious” behavior alleged by
17 Konda Tech in its complaint is patent infringement. Because Konda Tech’s UCL claim is based
18 on and coextensive with its allegations of patent infringement, it is preempted by federal patent
19 law, and should be dismissed in its entirety. Moreover, the face of the complaint makes clear that
20 to the extent any of portion of this claim is not preempted by federal patent law, it is barred by the
21 4-year statute of limitations applicable to such claims.

22 Finally, Konda Tech’s complaint does not purport to state a claim for fraud. Nonetheless,
23 the complaint refers to purported “subterfuge and deceit” by Flex Logix’s founders, Drs. Dejan
24 Markovic and Cheng Wang, and references their alleged “fraudulent credibility” in FPGA

25
26 ² Flex Logix has informed Konda Tech’s counsel of the clear invalidity of these patents (as well as
27 of the two other asserted patents) and reserves the right to seek relief pursuant to Federal Rule of
28 Civil Procedure 11, a determination that this case is exceptional under 35 U.S.C. § 285, and
recovery of its attorneys’ fees based on Konda Tech’s continued assertion of its patent
infringement claims.

1 technology. Complaint ¶ 26. The complaint's references to fraud are irrelevant to the claims pled
2 and scandalous and in view of the complaint's failure to plead any alleged fraud with particularity.
3 The complaint's references to fraud should be stricken and/or dismissed.

4 SUMMARY OF COMPLAINT AND FACTUAL BACKGROUND

5 Flex Logix provides the following brief summary of Konda Tech's complaint as well as
6 additional factual background based on publicly available patent applications and publications,
7 which this Court may take judicial notice of in considering this motion. *See* Request for Judicial
8 Notice (filed currently herewith) ("RJN"); *see also* Argument Section 1.B, *infra*.

9 I. KONDA TECH'S ALLEGATIONS OF INFRINGEMENT OF THE '611 PATENT, 10 THE '958 PATENT, AND THE '904 PATENT

11 A. The Asserted Patents and Their Relationship to Each Other

12 Konda Tech alleges that Flex Logix infringes the '611 patent, the '958 patent, and the '904
13 patent. Complaint, Count 3 ('611 patent), Count 4 ('958 patent), Count 6 ('904 patent); Complaint
14 Exs. 5, 6, 8. All three of these patents belong to the same family. The '904 patent is a
15 continuation of the '958 patent, which in turn is a continuation of the '611 patent. *See id.* (Related
16 U.S. Application Data). Because the '958 and '904 patents are continuations of the '611 patent,
17 all three patents must necessarily contain the same disclosures. *See, e.g., Tech. Licensing Corp. v.*
18 *Videotek, Inc.*, 545 F.3d 1316, 1321 n.2 (Fed. Cir. 2008) ("[A] continuation contains the same
19 disclosure found in an earlier application."); *Applied Materials, Inc. v. Advanced Semiconductor*
20 *Materials Am., Inc.*, 98 F.3d 1563, 1579 (Fed. Cir. 1996) ("By definition, a continuation adds no
21 new matter and is akin to an amendment of a pending application.") (Archer, J., *concurring*);
22 MPEP § 201.07 ("A continuation application is an application for the invention(s) disclosed in a
23 prior- filed copending nonprovisional application The disclosure presented in the
24 continuation must not include any subject matter which would constitute new matter if submitted
25 as an amendment to the parent application.").³

26
27
28 ³ Accordingly, while the '958 and '904 patents purport on their face to cross-reference and
incorporate by reference additional patent applications in addition to those listed in the '611

Each of the '611, '958, and '904 patents ultimately claims priority to U.S. Provisional Patent Applications 61/252,603 ("the '603 provisional application") and 61/252,609 ("the '609 provisional application"). *See* Complaint Exs. 5, 6, 8 (Related U.S. Application Data). The '611 patent is characterized as a continuation-in-part with respect to the '603 and '609 provisional applications.⁴ *See* Complaint Ex. 5 ('611 patent) at 1:8-21. Both the '603 and '609 provisional applications were filed on October 16, 2009, which is the earliest priority date possible for each of the '611, '958, and '904 patents. *See* Complaint Exs. 5, 6, 8 (Related U.S. Application Data).

The disclosures of the '611, '958, and '904 patents correspond directly to the two provisional applications to which they claim priority. For example, Figures 1-7 of the '611, '958, and '904 patents (Complaint Exs. 5, 6, 8) match Figures 1-7 of the '603 provisional (RJN Ex. 2); and Figures 8-10 of the '611, '958, and '904 patents match Figures 1-3 of the '609 provisional (RJN Ex. 3). The text describing Figures 1-10 of the '611 '958, and '904 patents is also the same as that in the corresponding provisional applications with appropriate updating to reflect different numbering of Figures 8-10 in the '611 patent, which were Figures 1-3 in the '609 provisional.

B. The Publication of the Konda PCT

International PCT Application No. WO 2008/109756 A1 ("the Konda PCT") incorporates by reference, among other patent applications, U.S. Provisional Patent Applications 60/984,724 ("the '724 provisional application") and 61/018,494 ("the '494 provisional application"). RJN Ex. 1 (Konda PCT) at 2:18-25. By incorporating the '724 and '494 provisional applications by reference, the Konda PCT includes the entirety of the disclosure of those provisional applications. *See Telemac Cellular Corp. v. Topp Telecom, Inc.*, 247 F.3d 1316, 1329 (Fed. Cir. 2001) ("When a document is 'incorporated by reference' into a host document, such as a patent, the referenced document becomes effectively part of the host document as if it were explicitly contained therein." (citation omitted)).

patent, any such incorporation by reference cannot be used to introduce any new matter over and above that contained in the '611 patent.

⁴ This is because Figures 11A1-11A4 of the '611 patent, and the corresponding description of those Figures, were not included in either of the '603 and '609 provisional applications. However, as set forth below, they were included in the Konda PCT.

1 The Konda PCT was published on September 12, 2008. RJN Ex. 1 (Konda PCT) (noting
2 an “International Publication Date” of September 12, 2008). The publication of the Konda PCT
3 on September 12, 2008, which is more than one year before the October 16, 2009 filing of the
4 ’603 and ’609 provisional applications (the earliest priority date possible for the ’611, ’958, and
5 ’904 patents), makes the Konda PCT indisputable prior art to each of the ’611, ’958, and ’904
6 patents under pre-AIA 35 U.S.C. § 102(b) or under AIA 35 U.S.C. § 102(a)(1).⁵

7 The publication of the Konda PCT included the disclosures of the ’724 and ’494
8 provisionals based on their incorporation by reference in the Konda PCT, and made those
9 disclosures public as a matter of law. Specifically, under the regulations governing public
10 availability of patent applications, both of the ’724 and ’494 provisionals became available to the
11 public upon publication of the Konda PCT.

12 37 C.F.R. § 1.14 provides, in part, as follows:

13 (vi) Unpublished pending applications (including provisional applications) that are
14 **incorporated by reference or otherwise identified**. A copy of the application as
15 originally filed of an **unpublished pending application may be provided to any**
16 **person**, upon written request and payment of the appropriate fee (§ 1.19(b)), **if the**
17 **application is incorporated by reference or otherwise identified in a U.S.**
18 **patent, a statutory invention registration, a U.S. patent application publication, an**
19 **international publication of an international application under PCT Article**
20 **21(2), or a publication of an international registration under Hague Agreement**
21 **Article 10(3) of an international design application designating the United States.**
22 The Office will not provide access to the paper file of a pending application, except
23 as provided in paragraph (c) or (i) of this section.⁶

24 (Emphases added). Accordingly, when the Konda PCT (an international publication of an
25 international application under PCT Article 21(2)) published on September 12, 2008, “any person”
26 was entitled to obtain copies of both the ’724 and ’494 provisional applications from the U.S.

27 ⁵ See Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284 (2011).

28 ⁶ A substantively identical version of this regulation was in effect as of the date of publication of
the Konda PCT, September 12, 2008. See 37 C.F.R. § 1.14 (2008).

1 Patent & Trademark Office. And due to their incorporation by reference into the Konda PCT,
2 their contents were effectively contained in the Konda PCT itself.

3 **C. The Konda PCT Anticipates Each of the '611, '958, and '904 Patents**

4 A comparison of the '603 and '609 provisionals (to which the '611, '958, and '904 patents
5 ultimately claim priority) and the '724 and '494 provisionals that were included in, and made
6 public by the publication of the Konda PCT, reveals that the '603 and '724 provisional
7 applications are *virtually identical* to each other (*compare* RJN Ex. 2 with RJN Ex. 4) and that the
8 '609 and '494 provisional applications are *virtually identical* to each other (*compare* RJN Ex. 3
9 with RJN Ex. 5). The sections pertaining to the “Cross Reference to Related Applications” (and
10 textual references to related applications) have been updated in the later-filed '603 and '609
11 provisional applications, but all of the figures and text describing the figures are the same between
12 the '603 and '724 provisional applications and the '609 and '494 provisional applications,
13 respectively. The disclosures of certain additional patent applications incorporated by reference in
14 the '611, '958, and '904 patents in the “Cross Reference to Related Applications” sections, which
15 were not included in the provisionals, are also incorporated by reference in the Konda PCT.
16 (*Compare, e.g.,* Complaint Ex. 5 ('611 patent) at 1:5-2:13 with RJN Ex. 1 (Konda PCT) at 1:5-
17 2:17).⁷

18 In other words, the two provisional applications which became public (the '724 and '494
19 applications) were essentially re-filed more than one year later as the '603 and '609 provisional
20 applications, and then used to provide the disclosure for the patent family containing the '611,
21 '958, and '904 patents now asserted against Flex Logix by Konda Tech. As a result of Konda
22 Tech's actions, the disclosures of the '611, '958, and '904 patents (save the claims) were already

23
24 ⁷ The '611 patent purports to incorporate by reference four patent applications that are not listed in
25 the Konda PCT. *See* Complaint Ex. 5 ('611 patent at 1:5-2:13) (“Cross Reference to Related
26 Applications”). However, each of these additional cited applications claims priority to the
27 applications previously cited in the Konda PCT as follows: U.S. App. 12/530,207 claims priority
28 to U.S. provisionals 60/905,526 and 60/940,383 (Complaint Ex. 5 at 1:22-36); U.S. App.
12/601,273 claims priority to U.S. provisionals 60/940,387 and 60/940,390 (Complaint Ex. 5 at
1:37-50); U.S. App. 12/601,274 claims priority to U.S. provisionals 60/940,391 and 60/940,392
(Complaint Ex. 5 at 1:51-2:3); and U.S. App. 12/601,275 claims priority to U.S. provisional
60/940,394 (Complaint Ex. 5 at 2:4-13).

disclosed in the prior art more than one year prior to the earliest priority date claimed by each of the patents, October 16, 2009, rendering each of these patents invalid. *See* pre-AIA 35 U.S.C. § 102(b) and AIA 35 U.S.C. § 102(a)(1).

The following chart summarizes where in the Konda PCT each of the disclosures of the alleged inventions of the '611, '958, and '904 patents can be found.⁸

'611 Patent, '958 Patent, and '904 Patent (earliest priority date October 16, 2009)	Konda PCT (published September 12, 2008)
Figures	
Figures 1-7	Figures 1-7 of '724 Provisional Application (RJN Ex. 4) as incorporated by reference in Konda PCT (RJN Ex. 1)
Figures 8-10	Figures 1-3 of the '494 Provisional Application (RJN Ex. 5) as incorporated by reference in Konda PCT
Figures 11A1-11A4	Figures 4A1-4A4 of Konda PCT
Detailed Description of the Invention	
Introductory text '611 patent at 7:16-8:46 '958 patent at 7:63-9:30 '904 patent at 8:6-9:39	'724 Provisional Application at 6:17-9:6 (with docket numbers and references to applications updated) as incorporated by reference
Description of Figures 1-7 '611 patent at 8:47-41:4 '958 patent at 9:31-44:32 '904 patent at 9:40-44:34	'724 Provisional Application at 9:8-61:18 (with docket numbers and references to applications updated) as incorporated by reference
Description of Figures 8-10 '611 patent at 41:5-62:3	'494 Provisional Application at 7:16-42:2 (with Figure numbers and labels changed appropriately to reflect renumbering and with docket numbers and references to applications updated) as incorporated by

⁸ *See also* Exhibit 6 to the attached Declaration of Elizabeth A. Laughton, which provides a detailed visual color-coded comparison of the disclosures of the Konda PCT to the representative '611 patent.

'611 Patent, '958 Patent, and '904 Patent (earliest priority date October 16, 2009)	Konda PCT (published September 12, 2008)
'958 patent at 44:33-66:61 '904 patent at 44:35-66:56	reference
Description of Figures 11A1-11A4 '611 patent at 62:5-64:20 '958 patent at 66:63-69:16 '904 patent at 66:58-69:12	Konda PCT at 69:1-72:14 (with Figure numbers and labels changed appropriately to reflect renumbering)

II. KONDA TECH'S INFRINGEMENT CLAIMS ARE INADEQUATELY PLED

Konda Tech alleges that Flex Logix infringes five patents purportedly assigned to Konda Tech. *See* Complaint, Counts 2-6. The complaint alleges direct infringement by Flex Logix under 35 U.S.C. § 271(a) as well as induced and contributory infringement under 35 U.S.C. § 271(b) and (c), respectively. The complaint alleges almost no specific facts in support of its infringement claims and instead relies on vague statements and mere legal conclusions.

Konda Tech's complaint does not specify what Flex Logix products are accused of infringing the asserted patents. Rather, it simply states that "certain FPGA devices ('Accused FPGA Devices')" are alleged to infringe. *See* Complaint ¶ 44; *see also, e.g.,* Complaint ¶ 56 (referring to, but nowhere defining, "Infringing Products"). With respect to its allegations of infringement, for each of the patents, the complaint makes *no* attempt to compare the patented claims to any allegedly infringing products. Instead, the complaint recites claim language and states that "[o]n information and belief," they are met by the "Accused FPGA Devices." *See* Complaint, Counts 2-6.⁹

The complaint's induced and contributory infringement allegations are equally unsupported and conclusory. With respect to its induced infringement allegations, for each patent,

⁹ At times, the claim language recited is not even the actual claim language from the patent. *Compare, e.g.,* Complaint ¶¶ 48, 49, 135 with Complaint Ex. 4 ('523 patent) at claim 1 and Complaint Ex. 7 ('553 patent) at claim 1.

1 the complaint states that “[f]or example, Flex Logix’s website is replete with written directions
2 instructing users on how to use the Accused FPGA Devices in an infringing manner” and
3 references purported “detailed documentation instructing users on how to use the Accused FPGA
4 Devices in an infringing manner.” *See, e.g.*, Complaint ¶¶ 57-58 (allegations regarding ’523
5 patent). It provides no additional specificity regarding these alleged “written directions” and
6 “detailed documentation.” The rest of Konda Tech’s inducement allegations merely recite some
7 (but not all) of the elements of a claim for induced infringement. *See, e.g.*, Complaint ¶¶ 57-59.
8 For alleged contributory infringement, the complaint simply parrots some (but not all) the
9 elements of the statute: “Flex Logix contributes to infringement of the same under 35 U.S.C.
10 § 271(c) inasmuch as the Infringing Products offered for sale and sold by Flex Logix are each a
11 component of a patented machine or an apparatus used in practicing a patented process,
12 constituting a material part of Konda’s invention, knowing the same to be especially made or
13 especially adapted for use in infringement of the ’523 patent.” Complaint ¶ 56 (allegations
14 regarding ’523 patent). The complaint provides no factual allegations in support of these
15 contentions.

16 **III. KONDA TECH’S UNFAIR BUSINESS PRACTICES CLAIM IS BASED ON**
17 **ALLEGED PATENT INFRINGEMENT**

18 Konda Tech’s complaint alleges that Flex Logix founders, Drs. Dejan Markovic and
19 Cheng Wang, “employed subterfuge and deceit to gain access to Konda Tech IP, develop their
20 fraudulent credibility in the technology through publications based on Konda Tech IP, and then
21 used Konda Tech IP to launch their own company—Flex Logix.” Complaint ¶ 26. The complaint
22 does not define Konda Tech IP other than to note that “IP” refers to “intellectual property.”
23 Complaint ¶ 13. The complaint never specifically identifies any alleged “Konda Tech IP” other
24 than the patents asserted in the complaint. The complaint also alleges that Dr. Markovic stated to
25 Dr. Konda that Dr. Markovic “would incorporate *the Konda Tech IP* into [a grant] application
26
27
28

1 *from the then published Konda Tech WIPO patents.”* Complaint ¶ 15 (emphases added). Thus,
2 the only “Konda Tech IP” referenced in the complaint consists of patents.¹⁰

3 The complaint alleges that as of January 2014, Konda was aware that Drs. Wang and
4 Markovic were “looking for funding for their separate startup” (which eventually become Flex
5 Logix) and that Dr. Markovic stated to Dr. Konda in January 2014 that “he *may* need to license
6 Konda Tech IP for [that] separate startup.” Complaint ¶ 22 (emphasis original). The complaint
7 alleges that Drs. Markovic and Wang ultimately co-founded Flex Logix in February 2014.
8 Complaint ¶ 27. The complaint does not identify any alleged wrongful conduct by either Drs.
9 Markovic and Wang or by Flex Logix (save its allegations of patent infringement by Flex Logix)
10 allegedly occurring after February 2014.

11 Konda Tech’s complaint articulates the basis for its UCL claim as follows: “Flex Logix’s
12 patent infringement, and other tortious behavior, as described above and below in the causes of
13 action listed in this Complaint, all constitute unfair and unlawful business practices pursuant to
14 California Business & Professions Code Section 17200 *et seq.*” Complaint ¶ 31. While the
15 complaint references alleged “other tortious behavior,” the complaint provides no specificity
16 regarding the nature of said tortious behavior nor does it allege the commission of any torts.

17 LEGAL STANDARDS

18 To survive a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter,
19 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
20 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This Court
21 need not “accept any unreasonable inferences or assume the truth of legal conclusions cast in the
22 form of factual allegations.” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013)
23 (citation omitted); *see also In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)

24
25 ¹⁰ Patents and patent publications are publicly available. Because Konda Tech does not allege the
26 existence of any protectable intellectual property other than patents, Flex Logix notes that Konda
27 Tech’s allegations are illogical since the disclosures in patents and patent publications are
28 available to the public. *See Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998) (“[T]he patent
system represents a carefully crafted bargain that encourages both the creation and the public
disclosure of new and useful advances in technology, in return for an exclusive monopoly for a
limited period of time.”).

1 (“Nor is the court required to accept as true allegations that are merely conclusory, unwarranted
2 deductions of fact, or unreasonable inferences.” (citation omitted)). Further, “[t]he court need not
3 . . . accept as true allegations that contradict matters properly subject to judicial notice or by
4 exhibit.” *Gilead*, 536 F.3d at 1055.

5 “[I]n deciding a Rule 12(b)(6) motion, courts may consider facts subject to judicial notice.”
6 *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1058 (N.D. Cal.
7 2012); *Wishnev v. Nw. Mut. Life Ins.*, 162 F. Supp. 3d 930, 935 (N.D. Cal. 2016) (same);
8 *Bullwinkle v. U.S. Bank, Nat’l Ass’n*, No. C13-03281 HRL, 2013 WL 5718451, at *2 (N.D. Cal.
9 Oct. 21, 2013) (same).

10 Federal Rule of Civil Procedure 12(f) provides that the court “may strike from a pleading
11 an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
12 Civ. P. 12(f). “The function of a motion to strike is to avoid the expenditure of time and money
13 that must arise from litigating spurious issues by dispensing with those issues prior to trial.”
14 *Colgate v. JUUL Labs, Inc.*, No. 18-CV-02499-WHO, 2018 WL 5619679, at *3 (N.D. Cal. Oct.
15 30, 2018) (internal citation and quotation omitted). “Immaterial matter is that which has no
16 essential or important relationship to the claim for relief or the defenses being pleaded.” *Zep Solar*
17 *Inc. v. Westinghouse Solar Inc.*, No. C 11-06493 JSW, 2012 WL 1293873, at *1 (N.D. Cal. Apr.
18 16, 2012) (internal citation and quotation omitted). “Impertinent material consists of statements
19 that do not pertain, or are not necessary, to the issues in question.” *Id.* (internal citation and
20 quotation omitted). “Allegations are considered ‘scandalous’ when they unnecessarily reflect on
21 the moral character of an individual, including allegations that cast a cruelly derogatory light on a
22 party or other person.” *Gilbert v. MoneyMutual, LLC*, No. 13-CV-01171-JSW, 2015 WL
23 12953231, at *1 (N.D. Cal. Aug. 24, 2015) (internal citation and quotation omitted).

24 ARGUMENT

25 I. THIS COURT SHOULD DISMISS KONDA TECH’S INFRINGEMENT CLAIMS 26 BASED ON THE ’611 PATENT, ’958 PATENT, AND ’904 PATENT BECAUSE THESE PATENTS ARE INDISPUTABLY INVALID

27 The ’611 patent, ’958 patent, and ’904 patent are indisputably invalid over Konda Tech’s
28 own prior patent publication, the Konda PCT. The invalidity of these patents is manifest in view

1 of the complaint itself and materials attached thereto, and in view of Konda Tech's own prior
2 patent publications and applications. While Flex Logix recognizes that it is a rare situation where
3 invalidity of a patent due to anticipation can be resolved on the pleadings, Flex Logix submits that
4 this is such a case.

5 **A. This Court May Properly Invalidate the '611 Patent, '958 Patent, and '904**
6 **Patent at This Time**

7 Flex Logix's motion to dismiss is proper because the complaint, the exhibits attached
8 thereto, and materials that are properly the subject of judicial notice clearly demonstrate that the
9 '611 patent, the '958 patent, and the '904 patent are invalid. It is not often the case that the
10 invalidity of a patent is readily apparent at the motion to dismiss stage. However, when invalidity
11 is readily apparent, there is no just reason to delay in reaching such a determination. For example,
12 in *Select Controls v. Am. Elec. Components, Inc.*, the court granted a motion to dismiss a patent
13 infringement claim at the pleading stage because "the Complaint and the exhibits attached thereto
14 reveal unequivocally that the design covered by the [patent-in-suit] was both 'the subject of a
15 commercial offer for sale' and 'ready for patenting' prior to the Critical Date of April 18, 2001."
16 *Select Controls v. American Electronic Components, Inc.*, No. 07 Civ. 1306(DLC), 2008 WL
17 216612, at *5 (S.D.N.Y. Jan. 22, 2008). The court concluded that "[the patent-in-suit] is therefore
18 invalid as a matter of law . . . , and SCI's Claim I, alleging infringement of the '823 Patent, must be
19 dismissed." *Id.* So too here, the invalidity of the '611 patent, the '958 patent, and the '904 patent
20 is manifest from materials properly considered at the pleading stage and Konda Tech's
21 infringement claims should be dismissed.

22 **B. This Court May Take Judicial Notice of and Consider Konda Tech's Patent**
23 **Publications and Applications on a Motion to Dismiss**

24 Flex Logix requests that in considering its motion, this Court take judicial notice of the
25 Konda Tech patent applications and publications referenced in this motion. *See* RJN (filed
26 concurrently herewith). Here, because Konda Tech's patent applications and publications are
27 documents of which this Court may properly take judicial notice at the motion to dismiss stage,
28 this Court may decide Flex Logix's motion under Rule 12(b)(6). *See id.*; *see also Gorski v. The*
Gymboree Corp., No. 14-CV-01314-LHK, 2014 WL 3533324, at *3 n.1 (N.D. Cal. July 16,

2014). However, if the Court declines to decide Flex Logix' motion under Rule 12(b)(6), Flex Logix respectfully requests that its motion be converted to one for summary judgment under Rule 12(d). Flex Logix submits that there are no material disputed facts regarding the invalidity of the '611 patent, the '958 patent, and the '904 patent in view of the Konda PCT and that Flex Logix is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56; *Chestnut v. Juel*, No. C 96-3422 JSB, 1997 WL 68538, at *1 (N.D. Cal. Feb. 12, 1997).

C. The '611 Patent, '958 Patent, and '904 Patent Are Unquestionably Invalid

As set forth in detail above, *supra*, Background Section I, all of the figures in the '611, '958, and patents and all of the text describing those figures were included in the Konda PCT, which is indisputable prior art to the '611, '958, and '904 patents under pre-AIA 35 U.S.C. § 102(b) or AIA 102(a)(1). Therefore, if the claims in the '611, '958, and '904 patents are supported by the specification of the '611, '958, and '904 patents, the claims are invalid as anticipated by the Konda PCT under pre-AIA 35 U.S.C. § 102(b) or AIA 102(a)(1). Any attempt by Konda Tech to contend that the claims are directed to subject matter that was not previously publicly disclosed would, at a minimum, mean that Konda Tech's claim of priority to the '603 and '609 provisionals is wholly improper. Moreover, any such argument would almost certainly render Konda Tech's patents invalid for a lack of written description, because they claim subject matter that is not disclosed in the supporting patent specification. *See* 35 U.S.C. § 112. Thus, the invalidity of the '611, '958, and '904 patents is readily apparent in view of the patents themselves, which are attached to Konda Tech's complaint, and materials that are judicially noticeable at the motion to dismiss stage. No claim construction is needed to reach such a determination. Nor is any fact or expert discovery needed. The above-cited materials constitute clear and convincing evidence of the invalidity of these patents, and Konda Tech's patent infringement claims based on the '611, '958, and '904 patents should be dismissed because these patents are invalid.

II. KONDA TECH'S INFRINGEMENT ALLEGATIONS ARE INADEQUATELY PLED AND SHOULD BE DISMISSED

All of Konda Tech's infringement claims lack sufficient factual allegations that would give rise to a plausible claim of patent infringement and accordingly must be dismissed. "[T]he rule

1 that ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
2 statements, do not suffice’ appl[ies] in patent cases.” *Hitachi Kokusai Elec. Inc. v. ASM Int’l, N.V.*,
3 No. 17-CV-06880-BLF, 2018 WL 3537166, at *2 (N.D. Cal. July 23, 2018). “[The] pleading
4 standards under *Iqbal* and *Twombly* apply to allegations of direct and indirect (i.e., induced and
5 contributory) infringement.” *Id.* Konda Tech’s infringement allegations are conclusory and
6 manifestly lack the required factual specificity.

7 First, Konda Tech does not identify what products are accused of infringement. The
8 complaint states only that “certain FPGA devices (‘Accused FPGA Devices’)” are alleged to
9 infringe. *See* Complaint ¶ 44; *see also, e.g.*, Complaint ¶ 56 (referring to, but nowhere defining,
10 “Infringing Products”). “Within the Ninth Circuit, to plead a plausible claim for direct
11 infringement, a plaintiff must identify the accused products with at least minimal specificity.”
12 *Avocet Sports Tech., Inc. v. Garmin Int’l, Inc.*, No. C 11-04049 JW, 2012 WL 1030031, at *2
13 (N.D. Cal. Mar. 22, 2012). Because Konda Tech’s complaint provides no specific identification
14 of accused infringing products, its infringement claims should be dismissed. *See, e.g., Lantiq N.*
15 *Am., Inc. v. Ralink Tech. Corp.*, No. CV 11-00234 EJD, 2011 WL 2600747, at *7 (N.D. Cal. June
16 30, 2011) (“This Court disagrees with Plaintiffs that the broad categories of products listed in the
17 Complaint put Ralink California on notice as to what it is to defend with respect to Counts I and
18 II. Plaintiffs must provide more specific identification of the products in any given category that
19 are allegedly infringing Plaintiffs’ patents.”); *Cal. Inst. of Comput. Assisted Surgery, Inc. v. Med-*
20 *Surgical Servs., Inc.*, No. 10-02042 CW, 2010 WL 3063132, *1–3 (N.D. Cal. Aug. 3, 2010)
21 (granting motion to dismiss complaint because the complaint failed to identify specifically an
22 accused product and how that product allegedly infringed, where complaint generally identified
23 one system); *Avocet*, 2012 WL 1030031, at *2 (similar).

24 The complaint also makes *no attempt* to compare the patented claims to any allegedly
25 infringing products. The complaint merely parrots the claim language and states that “[o]n
26 information and belief,” certain claim elements are met by the (unidentified) “Accused FPGA
27 Devices.” *See* Complaint, Counts 2-6. This type of pleading, which is entirely devoid of factual
28 specificity, fails to state a plausible claim for relief. “[A] complaint does not satisfy the standards

1 of *Twombly* and *Iqbal* where it does not at least contain *factual allegations* that the accused
2 product practices every element of at least one exemplary claim.” *Novitaz, Inc. v. inMarket*
3 *Media, LLC*, No. 16-CV-06795-EJD, 2017 WL 2311407, at *3 (N.D. Cal. May 26, 2017)
4 (emphasis added) (dismissing direct infringement claims as inadequately pled). Konda Tech’s
5 claims for infringement should be dismissed for this reason as well. *See, e.g., id.* at *4
6 (“[A]llegations [which] merely parrot claim language . . . are not factual allegations, as the claim
7 language is what [plaintiff] must show in order to prove infringement. Instead, they are
8 ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
9 statements,’ which ‘do not suffice.’” (quoting *Iqbal*, 556 U.S. at 678); *e.Digital Corp. v. iBaby*
10 *Labs, Inc.*, No. 15-CV-05790-JST, 2016 WL 4427209, at *5 (N.D. Cal. Aug. 22, 2016) (finding
11 complaint failed to state a claim where plaintiff “ha[d] not attempted to map [a] limitation onto
12 any allegations in the [complaint]” and “based on the Court’s own independent review, it cannot
13 discern how the [complaint] could be said to plausibly allege this limitation”); *see also L.M.*
14 *Sessler Excavating & Wrecking, Inc. v. Bette & Cring, LLC*, No. 16-CV-06534-FPG, 2017 WL
15 4652709, at *4-5 (W.D.N.Y. Oct. 17, 2017) (“Reliance on the patent language alone to describe
16 Defendant’s alleged conduct renders Plaintiff’s claim a legal conclusion insufficient to meet the
17 pleading standard of *Twombly* and *Iqbal*.”).

18 Konda Tech’s inducement allegations are similarly devoid of any factual content that could
19 give rise to a reasonable inference that Flex Logix has induced infringement of any of the asserted
20 patents. The complaint states that “[f]or example, Flex Logix’s website is replete with written
21 directions instructing users on how to use the Accused FPGA Devices in an infringing manner”
22 and references purported “detailed documentation instructing users on how to use the Accused
23 FPGA Devices in an infringing manner.” *See, e.g.,* Complaint ¶¶ 57-58 (allegations regarding
24 ’523 patent). However, the complaint provides no additional specificity regarding these alleged
25 “written directions” and “detailed documentation,” nor does it allege how Flex Logix has
26 knowledge that the induced acts constitute patent infringement or how Flex Logix has the specific
27 intent to induce infringement. *See, e.g., Uniloc USA, Inc. v. Apple Inc.*, No. C 18-00359 WHA,
28 2018 WL 2047553, at *4 (N.D. Cal. May 2, 2018) (“Uniloc’s vague and conclusory allegations

1 that Apple ‘intentionally instructs its customers to infringe’ using broad categories of materials,
2 coupled with a list of five generic websites, do not amount to *factual* content supporting any
3 reasonable inference that Apple possessed either ‘knowledge that the induced acts constitute
4 patent infringement’ or ‘specific intent to encourage another’s infringement.’”); *CAP Co. v.*
5 *McAfee, Inc.*, No. 14-CV-05068-JD, 2015 WL 3945875, at *5 (N.D. Cal. June 26, 2015) (“CAP’s
6 problem is that it fails to allege any statements by McAfee or Symantec at all. CAP makes
7 passing references to ‘user manuals guides, and support articles,’ without ever saying what those
8 materials contain, which is wholly inadequate for an inference of specific intent.”); *Avocet Sports*
9 *Tech., Inc. v. Garmin Int’l, Inc.*, No. C 11-04049 JW, 2012 WL 2343163, at *4 (N.D. Cal. June 5,
10 2012) (holding that pleading that giving customers “specific instructions or training” is
11 insufficient to allege induced infringement).

12 Turning to Konda Tech’s allegations of contributory infringement, the complaint simply
13 parrots *some* of the elements of the relevant statute and provides *no* factual allegations. *See, e.g.*,
14 Complaint ¶ 56 (allegations regarding ’523 patent). Notably, the complaint does not even attempt
15 to allege that the accused products have no substantial non-infringing uses, a required element of a
16 contributory infringement claim. *See* 35 U.S.C. § 271(c). Again, these allegations are
17 unquestionably inadequate, fail to plausibly allege a claim for contributory infringement, and
18 should be dismissed. *See, e.g., Windy City Innovations, LLC v. Microsoft Corp.*, 193 F. Supp. 3d
19 1109, 1116–17 (N.D. Cal. 2016) (An allegation tracking the statute “is nothing but a bare
20 conclusion. Accordingly, the Court *Grants* defendant’s motion to dismiss the contributory
21 infringement claim.”) (internal citation omitted); *Uniloc USA, Inc. v. Logitech, Inc.*, No. 18-CV-
22 01304-LHK, 2018 WL 6025597, at *3 (N.D. Cal. Nov. 17, 2018) (“Uniloc’s fleeting reference to
23 the fact that the accused products have no substantial noninfringing uses does not provide the
24 requisite factual basis to support Uniloc’s claim, which merely paraphrases the contributory
25 infringement statute.”); *Uniloc*, 2018 WL 2047553, at *5 (Contributory infringement allegations
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1 were “merely [a] formulaic recitation of Section 271(c) not entitled to the presumption of
2 truth.”).¹¹

3 **III. THIS COURT SHOULD DISMISS KONDA TECH’S UNFAIR BUSINESS**
4 **PRACTICES CLAIM**

5 Konda Tech’s sole non-patent cause of action is in fact a patent infringement claim in
6 disguise. Because Konda Tech’s unfair business practices claim under UCL Section 17200 et seq.
7 is preempted by federal patent law, it should be dismissed with prejudice. Further, Konda Tech’s
8 complaint itself also demonstrates that the claim is barred by the 4-year statute of limitations. For
9 this reason as well, this claim should be dismissed with prejudice.

10 **A. Konda Tech’s Unfair Business Practices Claim Is Preempted by Federal**
11 **Patent Law**

12 “Federal patent and copyright laws limit the states’ ability to regulate unfair competition.”
13 *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys., Inc.*, 7 F.3d 1434, 1439 (9th Cir. 1993).
14 “According to the Supreme Court, state law is preempted when it enters ‘a field of regulation
15 which the patent laws have reserved to Congress.’” *Id.* (quoting *Bonito Boats, Inc. v. Thunder*
16 *Craft Boats, Inc.*, 489 U.S. 141, 167 (1989)). “[A] violation of federal patent law—without
17 more—cannot serve as the basis of [a Section 17200] claim.” *Halton Co. v. Streivor, Inc.*, No. C
18 10-00655 WHA, 2010 WL 2077203, at *4 (N.D. Cal. May 21, 2010). Instead, “[a] state-law
19 claim must be ‘qualitatively different from a copyright or patent infringement claim’ or else it is
20 preempted.” *Id.* (quoting *Summit Mach Tool*, 7 F.3d at 1439-40).

21 Courts routinely dismiss state law claims which are premised solely on a violation of
22 federal patent law as preempted by federal law. *See, e.g., Halton*, 2010 WL 2077203, at *4
23 (dismissing California unfair competition claim under Section 17200 as preempted by federal

24 ¹¹ Konda Tech’s willful infringement claims are similarly devoid of any factual allegations, and
25 should also be dismissed. Konda Tech simply alleges that “Flex Logix’s infringement of the ’523
26 patent has been willful and deliberate and, pursuant to 35 U.S.C. § 284, Konda Tech is entitled to
27 treble damages.” *See, e.g., Elec. Scripting Prods., Inc. v. HTC Am. Inc.*, No. 17-CV-05806-RS,
28 2018 WL 1367324, at *7 (N.D. Cal. Mar. 16, 2018) (“ESPI falls woefully short of sufficiently
pleading egregious behavior and willfulness. ESPI must provide factual allegations that are
specific to HTC’s conduct and do not merely recite the elements of the statutory violations, but
rather provide factual material that puts HTC on notice of its allegedly unlawful actions.”).

1 patent law); *AntiCancer, Inc. v. CellSight Techs., Inc.*, No. 10CV2515 JLS (RBB), 2012 WL
2 3018056, at *7-8 (S.D. Cal. July 24, 2012) (dismissing California common law and unfair
3 competition claims which were “predicated on [defendant’s] alleged violation of federal patent
4 laws”); *JAT Wheels, Inc. v. DB Motoring Grp., Inc.*, No. CV 14-5097-GW(AGRx), 2016 WL
5 9453798, at *3 (C.D. Cal. Feb. 11, 2016) (“Because Plaintiff has not alleged any additional
6 tortious conduct that is separate from the patent law cause of action, preemption applies.”); *TMC*
7 *Aerospace, Inc. v. Elbit Sys. of Am. LLC*, No. CV 15-07595-AB (Ex), 2016 WL 3475322, at *8
8 (C.D. Cal. Jan. 29, 2016) (dismissing quasi-contract claim where “this claim is substantively no
9 different than Plaintiff’s patent infringement claim”).

10 The basis for Konda Tech’s UCL claim as articulated in the complaint is as follows:
11 “Flex Logix’s patent infringement, and other tortious behavior, as described above and below in
12 the causes of action listed in this Complaint, all constitute unfair and unlawful business practices
13 pursuant to California Business & Professions Code Section 17200 *et seq.*” Complaint ¶ 31. To
14 the extent that Konda Tech’s claim is based on “Flex Logix’s patent infringement,” it is clearly
15 preempted under the authority set forth above. Konda Tech’s complaint refers to “other tortious
16 behavior” but nowhere does the complaint allege that Flex Logix committed any other purported
17 torts. Thus, Konda Tech’s claim is preempted by federal patent law and should be dismissed.

18 **B. Konda Tech’s Unfair Business Practices Claim Is Also Barred by the Statute**
19 **of Limitations**

20 Further, to the extent not preempted by federal patent law, Konda Tech’s unfair business
21 practices claim under the UCL is barred by the statute of limitations. “Claims under the UCL are
22 subject to a four year statute of limitations that begins to run on the date the cause of action
23 accrues.” *Zanze v. Snelling Servs., LLC*, 412 F. App’x 994, 996 (9th Cir. 2011); Cal. Bus. & Prof.
24 Code § 17208 (“Any action to enforce any cause of action pursuant to this chapter shall be
25 commenced within four years after the cause of action accrued.”). “A statute of limitations
26 defense may be raised by a motion to dismiss if ‘the running of the statute is apparent on the face
27 of the complaint.’” *Zanze*, 412 F. App’x at 996 (*quoting Von Saher v. Norton Simon Museum of*
28 *Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010)).

1 Save Konda Tech’s allegations of patent infringement, all of the alleged wrongs
2 complained of by Konda Tech took place more than four years before Konda Tech filed its
3 complaint in this action on December 17, 2018. Indeed, the complaint does not identify any
4 alleged specific wrongful conduct by Dr. Markovic, Dr. Wang, or by Flex Logix (save its
5 allegations of patent infringement by Flex Logix) allegedly occurring after February 2014. And
6 Konda Tech alleges no facts to support the application of the discovery rule or equitable tolling in
7 the complaint. Accordingly Konda Tech’s unfair business practices claim should be dismissed for
8 this reason as well. *See, e.g., Moran v. Wash. Mut. Bank*, No. 12-CV-04974 NC, 2012 WL
9 12920636, at *5 (N.D. Cal. Nov. 8, 2012) (“As Moran filed his complaint more than six years
10 after the alleged violations, and he asserts no theory of tolling in the complaint or the amended
11 complaint, defendant’s motion to dismiss Moran’s § 17200 claims is GRANTED WITH
12 PREJUDICE.”); *Montes v. U.S. Bank Nat’l Ass’n*, No. CV 10-0022 PSG (Jcx), 2010 WL
13 11597507, at *3 (C.D. Cal. July 21, 2010) (dismissing § 17200 claim as time-barred where
14 “Plaintiff’s allegations involve disclosures that occurred on or before August 27, 2004, when the
15 mortgage was obtained” and “Plaintiff did not file his complaint until December 2, 2009, beyond
16 the four-year statute of limitations for this cause of action”).

17 **IV. THIS COURT SHOULD STRIKE AND/OR DISMISS THE COMPLAINT’S**
18 **REFERENCES TO FRAUD**

19 Konda Tech’s complaint does not include any claims for fraud nor does it allege that Flex
20 Logix engaged in any allegedly fraudulent conduct. However, the complaint does state that “Drs.
21 Markovic and Wang’s conduct make clear that they employed *subterfuge and deceit* to gain access
22 to Konda Tech IP, develop their *fraudulent* credibility in the technology through publications
23 based on Konda Tech IP.” Complaint ¶ 26 (emphases added). These allegations should be
24 stricken because they are immaterial and impertinent to the claims pled and are scandalous in that
25 they baselessly impugn the character of Drs. Wang and Markovic.

26 The above-referenced statement in the complaint is not specific to any of the claims pled.
27 However, to the extent that these allegations are somehow construed to refer to one of those
28 claims, they are woefully deficient, and should be dismissed. “[C]laims that ‘sound in fraud’ or

1 are ‘grounded in fraud . . . must be pled with particularity under FRCP 9(b).’ *Halton*, 2010 WL
2 2077203, at *4; *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). “To
3 satisfy the rule, a plaintiff must allege the ‘who, what, where, when, and how’ of the charged
4 misconduct.” *Plascencia v. Wachovia Bank*, No. C 10-03552 RS, 2011 WL 249492, at *1 (N.D.
5 Cal. Jan. 26, 2011) (citing *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)). “The plaintiff
6 must set forth what is false or misleading about a statement, and why it is false.” *Vess v. Ciba-*
7 *Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal citation and quotation omitted).
8 “[T]he circumstances constituting the alleged fraud must be specific enough to give defendants
9 notice of the particular misconduct so that they can defend against the charge and not just deny
10 that they have done anything wrong.” *Vess v. Ciba–Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th
11 Cir. 2003). Konda Tech makes no effort to do so in its complaint.

12 Because Konda Tech does not state a claim for fraud nor attempt to plead fraud with the
13 requisite specificity, Konda Tech’s allegations relating to “subterfuge and deceit” and “fraudulent
14 credibility” are irrelevant to the claims at issue and unfairly impugn the character of both Drs.
15 Markovic and Wang, both non-parties to this action. *See Dallas & Lashmi, Inc. v. 7-Eleven, Inc.*,
16 112 F. Supp. 3d 1048, 1056 (C.D. Cal. 2015) (noting that one of the purposes of Rule 9(b)’s
17 heightened pleading standard is to “protect defendants from unwarranted damage to their
18 reputations”). Konda Tech’s complaint’s references to “subterfuge and deceit” and “fraudulent
19 credibility” should be stricken. *See, e.g., SecuriMetrics, Inc. v. Hartford Cas. Ins.*, No. C 05-
20 00917 CW, 2005 WL 2463749, at *6 (N.D. Cal. Oct. 4, 2005) (striking portion of affirmative
21 defense that referenced “fraudulent conduct” where “Defendant’s seventh affirmative defense
22 includes fraud and thus is subject to fraud’s pleading requirement, which it does not fulfill”);
23 *Daniel v. Richards*, No. 13-CV-02426-VC, 2014 WL 2768624, at *3 (N.D. Cal. June 18, 2014)
24 (striking complaint’s references to fraud as “irrelevant”); *Siegel v. Lyons*, No. C-95-3588 DLJ,
25 1996 WL 634206, at *7-8 (N.D. Cal. Sept. 16, 1996) (granting motion to dismiss and/or strike
26 fraud allegations as deficient); *Felix v. State*, No. 1:13-CV-0561 LJO SKO, 2013 WL 3730176, at
27 *11 (E.D. Cal. July 12, 2013) (granting motion to strike fraud allegations where “Plaintiffs’
28

1 allegations regarding overtime fraud do not state an independent claim and will only confuse the
2 trier of fact as to the actual basis for Plaintiffs' retaliation claims").

3 **CONCLUSION**

4 For the reasons set forth above, Konda Tech's complaint should be dismissed in its
5 entirety.

6 DATED: January 24, 2019

MUNGER, TOLLES & OLSON LLP

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8
9 By: /s/ Gregory P. Stone
GREGORY P. STONE

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11 Attorneys for Defendant FLEX LOGIX
TECHNOLOGIES, INC.
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

KONDA TECHNOLOGIES, INC., a
California corporation,

Plaintiff,

vs.

FLEX LOGIX TECHNOLOGIES, INC.,

Defendant.

CASE NO. 5:18-cv-07581-LHK

**[PROPOSED] ORDER GRANTING
FLEX LOGIX TECHNOLOGIES, INC.'S
MOTION TO DISMISS**

Date: May 9, 2019
Time: 1:30 p.m.
Judge: Lucy H. Koh
Ct. No.: 8, 4th Floor

1 Before this Court is Defendant Flex Logix Technologies, Inc.’s (“Flex Logix”)
2 Motion to Dismiss Plaintiff Konda Technologies, Inc.’s complaint. On consideration of
3 the briefs filed in support and opposition thereto, and all other papers on file herein, Flex
4 Logix’s Motion is hereby GRANTED. Plaintiff’s complaint is DISMISSED in its entirety
5 WITH PREJUDICE.

6 **IT IS SO ORDERED.**

7
8
9 DATED: _____, 2019

Hon. Lucy H. Koh
United States District Judge