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FLEX LOGIX TECHNOLOGIES, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KONDA TECHNOLOGIES, INC., a
California corporation,

Plaintiff,

vs.

FLEX LOGIX TECHNOLOGIES, INC., a
Delaware Corporation; DEJAN MARKOVIC,
PH.D., an individual; and CHENG C. WANG,
PH.D., an individual,

Defendants.

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

**FLEX LOGIX TECHNOLOGIES, INC.'S
NOTICE OF MOTION AND MOTION TO
DISMISS FIRST AMENDED
COMPLAINT PURSUANT TO FED. R.
CIV. P. 12(b)(6) AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: July 11, 2019
Time: 1:30 pm
Judge: Lucy H. Koh
Ct. No.: 8, 4th Floor

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

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

3 PLEASE TAKE NOTICE that on July 11, 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 will, pursuant to Federal Rule of Civil Procedure 12(b)(6), move the Court for an Order dismissing
7 with prejudice all Counts of Konda Technologies, Inc.’s (“Konda Tech”) First Amended
8 Complaint in this action that are asserted against Flex Logix.

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

10 [1] Konda Tech’s Third, Fourth, and Sixth Causes of Action because those Causes of
11 Action fail to state a claim for patent infringement due to the invalidity of each of the patents
12 under 35 U.S.C. § 102;

13 [2] Portions of Konda Tech’s Second, Third, Fourth, Fifth, and Sixth Causes of Action
14 because those Causes of Action do not plead facts sufficient to state a plausible claim for indirect
15 or willful patent infringement;

16 [3] Konda Tech’s First Cause of Action for Unfair Business Practices pursuant to
17 California Business & Professions Code Section 17200 et seq. as preempted and as barred by the
18 statute of limitations; and

19 [4] Konda Tech’s Ninth Cause of Action for Misappropriation of Trade Secrets as
20 barred by the statute of limitations and for failure to plead the use of reasonable efforts to maintain
21 the secrecy of the alleged trade secrets.

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

26
27 _____
28 ¹ Defined terms in this Motion are also used in the accompanying Memorandum of Points and
 Authorities.

1 DATED: March 18, 2019

MUNGER, TOLLES & OLSON LLP

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3
4 By: /s/ Gregory P. Stone
5 GREGORY P. STONE

6 Attorneys for Defendant FLEX LOGIX
7 TECHNOLOGIES, INC.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Konda Tech's original complaint in this action was filed on December 17, 2018. Dkt. 1. Flex Logix moved to dismiss that complaint in its entirety. Dkt. 21. In response, Konda Tech sought to amend its complaint. Dkt. 26; Dkt. 28-1. The parties stipulated that Konda Tech could file an amended complaint, and Flex Logix's motion to dismiss was dismissed as moot. Dkt. 30. Konda Tech filed its First Amended Complaint ("FAC") on March 4, 2019. Dkt. 31. Flex Logix now moves to dismiss the seven causes of action asserted against it in the FAC.¹

A. The Court Should Dismiss Konda Tech's Patent Claims Against Flex Logix

The FAC alleges that Flex Logix infringes five patents purportedly assigned to Konda Tech, a company founded by Dr. Venkat Konda in 2007. *See* Dkt. 31 (FAC), Counts 2-6, ¶ 13. Dr. Konda is the sole named inventor on each of the five asserted patents. *See id.* Exs. 4-8. The FAC alleges that Konda Tech's patents generally relate to "field-programmable gate array ('FPGA') routing fabric" and "interconnection networks technology." *See id.* ¶ 13.

Konda Tech's patent claims are deficient in numerous respects. 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. 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 judicially noticeable at this stage. 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. The Court may properly dismiss Konda Tech's patent infringement claims based on invalidity of the asserted patents at this stage because no further proceedings are necessary in order to permit this Court to conclude that each of these patents is invalid.

¹ Konda Tech's FAC purports to add two additional defendants, Dr. Dejan Markovic and Dr. Cheng Wang. These defendants were not served until a few days before the filing of this motion. The present motion is brought solely on behalf of Defendant Flex Logix.

1 The sole disputed issue is whether the disclosures of the patents were made available to the
2 public under the governing regulation and thus constitute prior art—a pure question of law. There
3 is no reason to delay—this Court can and should dismiss Counts Three, Four, and Six of Konda
4 Tech’s complaint due to the invalidity of each of the three patents asserted in those claims.

5 Second, Konda Tech fails to plead a plausible claim for indirect or willful infringement
6 under *Twombly* and *Iqbal* with respect to *any* of the five asserted patents. Konda Tech’s
7 allegations rely on vague generalities and recitations of statutory language instead of specific
8 factual allegations. Konda Tech’s indirect and willful patent infringement claims are clearly
9 inadequate and should be dismissed.

10 **B. The Court Should Dismiss Konda Tech’s Non-Patent Claims Against Flex**
11 **Logix**

12 Third, Konda Tech’s misappropriation of trade secrets claim is barred by the statute of
13 limitations. Konda Tech had actual and/or inquiry notice of the alleged misappropriation within
14 the 3-year statute of limitations period for such claims, but elected to wait to file suit until after the
15 limitations period had run. The running of the statute of limitations is manifest from Konda
16 Tech’s own complaint and other materials judicially noticeable at this stage. Furthermore, Konda
17 Tech has failed to adequately plead the use of reasonable efforts to maintain the secrecy of its
18 alleged trade secret information. To the contrary, Konda Tech’s complaint clearly alleges the
19 voluntary disclosure of any purported trade secrets. Accordingly, the misappropriation claim
20 should be dismissed with prejudice.

21 Fourth, Konda Tech’s UCL claim is predicated solely on the alleged “tortious behavior”
22 otherwise pled in the complaint. FAC ¶ 34. The only “tortious behavior” by Flex Logix that is
23 alleged in the complaint is patent infringement and misappropriation of trade secrets. Because
24 Konda Tech’s UCL claim against Flex Logix is based solely on alleged patent infringement or
25 misappropriation of trade secrets, the UCL claim is preempted by federal patent law and by
26 California’s statute governing trade secrets claims. The UCL claim is also clearly barred by the
27 applicable statute of limitations.
28

1 **II. FACTUAL BACKGROUND**

2 Flex Logix's motion to dismiss is based on Konda Tech's FAC, on publicly available
3 patent applications and publications, and on the February 21, 2019 Declaration of Venkat Konda
4 ("Konda Declaration") filed in this matter (Dkt. 27). The Court may take judicial notice of each of
5 these documents in considering this motion. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442
6 F.3d 741, 746 n.6 (9th Cir. 2006); *see also* Request for Judicial Notice ("RJN") (filed currently
7 herewith).

8 **A. Konda Tech's Patent Infringement Allegations**

9 Konda Tech alleges that Flex Logix infringes five patents assigned to Konda Tech. *See*
10 FAC, Counts 2-6. The FAC alleges direct infringement by Flex Logix under 35 U.S.C. § 271(a)
11 as well as induced and contributory infringement under 35 U.S.C. § 271(b) and (c), respectively.
12 *Id.*

13 With respect to Konda Tech's induced infringement allegations, the FAC states that "Flex
14 Logix's website is replete with written directions instructing users on how to use Flex Logix's
15 Accused Products in an infringing manner" and references purported "detailed documentation
16 instructing users on how to use [the] Accused FPGA Devices in an infringing manner." *See, e.g.*,
17 FAC ¶¶ 60-61 (allegations regarding '523 patent). The complaint provides no additional
18 specificity regarding these alleged "written directions" and "detailed documentation."² For
19 alleged contributory infringement, the complaint simply parrots portions of the statute and
20 provides no factual allegations in support. *See, e.g., id.* ¶ 59 (allegations regarding '523 patent).
21 Konda Tech includes no specific factual allegations in support of its claims of willful
22 infringement. *See, e.g., id.* ¶ 67 (allegations regarding '523 patent).

23 **B. The '611 Patent, the '958 Patent, and the '904 Patent and Their Relationship**
24 **to Each Other**

25 Konda Tech alleges that Flex Logix infringes the '611 patent, the '958 patent, and the '904
26 patent. FAC, Count 3 ('611 patent), Count 4 ('958 patent), Count 6 ('904 patent); FAC Exs. 5, 6,
27
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1 8. All three of these patents belong to the same family. The '904 patent is a continuation of the
2 '958 patent, which is a continuation of the '611 patent. *See id.* (Related U.S. Application Data).

3 Each of the '611, '958, and '904 patents ultimately claims priority to U.S. Provisional
4 Patent Applications 61/252,603 ("the '603 provisional application") and 61/252,609 ("the '609
5 provisional application"). *See id.* Exs. 5, 6, 8 (Related U.S. Application Data). The '611 patent is
6 characterized as a continuation-in-part with respect to the '603 and '609 provisional applications.
7 *See id.* Ex. 5 ('611 patent) at 1:8-21. Both the '603 and '609 provisional applications were filed
8 on October 16, 2009, which is the earliest priority date possible for each of the '611, '958, and
9 '904 patents. *See id.* Exs. 5, 6, 8 (Related U.S. Application Data).

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

17 **C. Konda Tech's Allegations of Misappropriation of Trade Secrets**

18 Konda Tech generally alleges that Flex Logix founders, Drs. Dejan Markovic and Cheng
19 Wang, while engaged in research at UCLA, "employed subterfuge and deceit to gain access to
20 Konda Tech IP, develop their fraudulent credibility in the technology through publications based
21 on Konda Tech IP, and then used Konda Tech IP to launch their own company—Flex Logix."
22 FAC ¶ 28. According to the FAC, Dr. Konda began to disclose the allegedly trade secret
23 information to Drs. Markovic and/or Wang (and others) some time in 2009 and ending some time
24 prior to January 2014. *Id.* ¶¶ 15-16, 23-24, 210. Specifically, Konda Tech alleges that Dr. Konda
25 made a presentation on its technology in October 2009 to "UCLA's Institute of Technology
26 Advancement ('ITA')." *Id.* ¶¶ 14-15. Konda Tech alleges that Dr. Markovic falsely represented
27

28 ² Konda Tech also cites to Exhibits 9-14 of the complaint but provides no allegations regarding the

1 to Konda Tech that the ITA might be able to “fund Konda Tech to bring Konda Tech’s IP to the
2 market.” *Id.* ¶ 185.³ Konda Tech also alleges that Dr. Konda gave “a seminar on the technology
3 to Dr. Markovic’s students” in October 2009, which Dr. Wang attended. *Id.* ¶ 16. Konda Tech
4 does not allege that any of the individuals in attendance at that presentations had agreed to be
5 subject to any confidentiality restrictions.

6 Konda Tech also alleges that Dr. Markovic submitted certain proposals to DARPA
7 containing Konda Tech IP. *Id.* ¶¶ 17-18. Konda Tech alleges that Dr. Markovic incorporated the
8 “Konda Tech IP” in the DARPA proposals “from the then published Konda Tech WIPO patent
9 applications.” *Id.* ¶ 17.⁴ Konda Tech identifies no alleged trade secrets in any DARPA proposals.

10 The FAC further alleges that as of January 2014, Dr. Konda was aware that Drs. Markovic
11 and Wang either had formed or were in the process of forming a startup company in the FPGA
12 space. Specifically, Konda Tech alleges that in January 2014, Dr. Konda was aware that Drs.
13 Markovic and Wang were “looking for funding for their separate startup” (which eventually
14 become Flex Logix) and that Dr. Markovic stated to Dr. Konda in January 2014 that “he *may* need
15 to license Konda Tech IP for [that] separate startup.” *Id.* ¶ 24 (emphasis in original). The FAC
16 alleges that Drs. Markovic and Wang co-founded Flex Logix in February 2014. *Id.* ¶ 29. Konda
17 Tech does not identify any specific wrongful conduct by either Drs. Markovic and Wang or by
18 Flex Logix allegedly occurring after February 2014. Konda Tech suggests that it did not discover
19 the allegedly improper use of “Konda Tech IP” until December 2015. *See id.* ¶¶ 202, 30.

20 The entirety of Konda Tech’s allegations regarding its efforts to maintain the secrecy of its
21 alleged trade secrets are as follows: “Konda Tech made reasonable efforts to keep Konda Tech’s
22 Trade Secrets secret. All presentations made by Konda Tech included a “Proprietary and
23 Confidential” statement. Additionally, DARPA states that all information submitted by way of the
24 BAA module is considered confidential. *See*, Exhibit 15 attached hereto.” FAC ¶ 213.

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27 import of these materials. *See, e.g.*, FAC ¶¶ 60-62.

28 ³ In his sworn declaration, Dr. Konda states that he learned that ITA would not provide funding to
Konda Tech in October 2009. Konda Decl. (Dkt. 27) ¶ 29.

LEGAL STANDARDS

To survive a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This Court need not “accept any unreasonable inferences or assume the truth of legal conclusions cast in the form of factual allegations.” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013) (citation omitted); *see also In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (“Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” (citation omitted)). Further, “[t]he court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.” *Gilead*, 536 F.3d at 1055 (citation omitted).

“[I]n deciding a Rule 12(b)(6) motion, courts may consider facts subject to judicial notice.” *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1058 (N.D. Cal. 2012). *Accord Wishnev v. Nw. Mut. Life Ins.*, 162 F. Supp. 3d 930, 935 (N.D. Cal. 2016); *Bullwinkle v. U.S. Bank, Nat’l Ass’n*, No. C13-03281 HRL, 2013 WL 5718451, at *2 (N.D. Cal. Oct. 21, 2013). The Court may also “take judicial notice of court filings and other matters of public record.” *Reyn’s Pasta Bella, LLC*, 442 F.3d at 746 n.6 (affirming dismissal under Rule 12(b)(6)). *Accord Grassi v. Moody’s Investor’s Servs.*, No. CIV S-09-0543 JAM DAD PS, 2011 WL 3439184, at *8 (E.D. Cal. Aug. 5, 2011), *aff’d*, 540 F. App’x 737 (9th Cir. 2013) (noting that “a court may take judicial notice of its own files and documents filed in other courts” when ruling on a 12(b)(6) motion); *Minor v. FedEx Office & Print Servs., Inc.*, 182 F. Supp. 3d 966, 974 (N.D. Cal. 2016) (holding that “[p]roper subjects of judicial notice include court documents in the public record” as well as “records of administrative agencies”); *Hott v. City of San Jose*, 92 F. Supp. 2d 996, 998 (N.D. Cal. 2000) (taking judicial notice of memoranda filed in related state court case). *See also* RJN (filed concurrently herewith).

⁴ The FAC does not specifically define “Konda Tech IP” other than to note that “IP” refers to “intellectual property.” FAC ¶ 15.

ARGUMENT

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

The '611 patent, '958 patent, and '904 patent are indisputably invalid over Konda Tech's own prior patent publication, International PCT Application No. WO 2008/109756 A1 ("the Konda PCT"). The invalidity of these patents is manifest in view of the FAC and materials attached thereto, and in view of Konda Tech's own prior patent publications and applications. While Flex Logix recognizes that it is a rare situation where the invalidity of a patent due to anticipation can be resolved on the pleadings, this is such a case.

A. The '611, '958, and '904 Patents Contain the Same Disclosures

Because the '958 and '904 patents are continuations of the '611 patent, all three patents must necessarily contain the same disclosures. *See, e.g., Tech. Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1321 n.2 (Fed. Cir. 2008) ("[A] continuation contains the same disclosure found in an earlier application."); *Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.*, 98 F.3d 1563, 1579 (Fed. Cir. 1996) (Archer, J., *concurring*) ("By definition, a continuation adds no new matter and is akin to an amendment of a pending application."); MPEP § 201.07 ("The disclosure presented in the continuation must not include any subject matter which would constitute new matter if submitted as an amendment to the parent application.").⁵

B. The Publication of the Konda PCT

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; *see* Konda Decl. ¶ 22 (Konda admitting that the Konda PCT incorporates by reference the '724 and '494 provisional

⁵ 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 patent, any such incorporation by reference cannot be used to introduce any new matter over and above that contained in the '611 patent. In a declaration submitted in response to Flex Logix's motion to dismiss Konda Tech's initial complaint, in which Flex Logix raised the same invalidity

1 applications). By incorporating the '724 and '494 provisional applications by reference, the
2 Konda PCT includes the entirety of their disclosures. *See Telemac Cellular Corp. v. Topp*
3 *Telecom, Inc.*, 247 F.3d 1316, 1329 (Fed. Cir. 2001) ("When a document is 'incorporated by
4 reference' into a host document, such as a patent, the referenced document becomes effectively
5 part of the host document as if it were explicitly contained therein."); *see also* MPEP
6 § 2163.07(b).

7 The Konda PCT was published on September 12, 2008. RJN Ex. 1 (Konda PCT) (noting
8 an "International Publication Date" of September 12, 2008). The publication of the Konda PCT
9 on September 12, 2008, which is more than one year before the October 16, 2009 filing of the
10 '603 and '609 provisional applications (the earliest priority date possible for the '611, '958, and
11 '904 patents), makes the Konda PCT indisputable prior art to each of the '611, '958, and '904
12 patents under pre-AIA 35 U.S.C. § 102(b) or under AIA 35 U.S.C. § 102(a)(1).⁶

13 The publication of the Konda PCT included the disclosures of the '724 and '494
14 provisionals based on their incorporation by reference in the Konda PCT, and made those
15 disclosures public as a matter of law. Specifically, under the regulations governing public
16 availability of patent applications, both of the '724 and '494 provisionals became available to the
17 public upon publication of the Konda PCT.

18 37 C.F.R. § 1.14 provides, in part, as follows:

19 (vi) Unpublished pending applications (including provisional applications) that are
20 **incorporated by reference or otherwise identified**. A copy of the application as
21 originally filed of an **unpublished pending application may be provided to any**
22 **person**, upon written request and payment of the appropriate fee (§ 1.19(b)), **if the**
23 **application is incorporated by reference or otherwise identified in a U.S.**
24 **patent, a statutory invention registration, a U.S. patent application publication, an**
25 **international publication of an international application under PCT Article**
26 **21(2), or a publication of an international registration under Hague Agreement**
27 **Article 10(3) of an international design application designating the United States.**

28 arguments presented in this motion, Dr. Konda admitted that "the claims of the '958 and '904
patents do not claim any subject matter of those cross-referenced applications." Konda Decl. ¶ 27.

⁶ See Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, 125 Stat. 284 (2011).

1 The Office will not provide access to the paper file of a pending application, except
2 as provided in paragraph (c) or (i) of this section.⁷

3 (Emphases added). Accordingly, when the Konda PCT (an international publication of an
4 international application under PCT Article 21(2)) published on September 12, 2008, “any person”
5 was entitled to obtain copies of both the ’724 and ’494 provisional applications from the U.S.
6 Patent & Trademark Office. And due to their incorporation by reference into the Konda PCT,
7 their contents were effectively contained in the Konda PCT itself.

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

9 A comparison of the ’603 and ’609 provisionals (to which the ’611, ’958, and ’904 patents
10 ultimately claim priority) and the ’724 and ’494 provisionals that were included in, and made
11 public by the publication of the Konda PCT, reveals that the ’603 and ’724 provisional
12 applications are *virtually identical* to each other (*compare* RJN Ex. 2 with RJN Ex. 4) and that the
13 ’609 and ’494 provisional applications are *virtually identical* to each other (*compare* RJN Ex. 3
14 with RJN Ex. 5). The sections pertaining to the “Cross Reference to Related Applications” (and
15 textual references to related applications) have been updated in the later-filed ’603 and ’609
16 provisional applications, but all of the figures and text describing the figures are the same between
17 the ’603 and ’724 provisional applications and the ’609 and ’494 provisional applications,
18 respectively. The disclosures of additional patent applications incorporated by reference in the
19 ’611, ’958, and ’904 patents in the “Cross Reference to Related Applications” sections, which
20 were not included in the provisionals, are also incorporated by reference in the Konda PCT.
21 (*Compare, e.g.,* FAC Ex. 5 (’611 patent) at 1:5-2:13 with RJN Ex. 1 (Konda PCT) at 1:5-2:17).⁸

22
23 ⁷ A substantively identical version of this regulation was in effect as of the date of publication of
24 the Konda PCT, September 12, 2008. *See* 37 C.F.R. § 1.14 (2008).

25 ⁸ The ’611 patent purports to incorporate by reference four patent applications that are not listed in
26 the Konda PCT. *See* FAC Ex. 5 (’611 patent at 1:5-2:13) (“Cross Reference to Related
27 Applications”). However, each of these additional cited applications claims priority to the
28 applications previously cited in the Konda PCT as follows: U.S. App. 12/530,207 claims priority
to U.S. provisionals 60/905,526 and 60/940,383 (FAC 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 (FAC 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 (FAC Ex. 5 at 1:51-

In other words, the two provisional applications which became public (the '724 and '494 applications) were essentially re-filed more than one year later as the '603 and '609 provisional applications, and then used to provide the disclosure for the patent family containing the '611, '958, and '904 patents now asserted against Flex Logix by Konda Tech. Konda Tech has admitted as much. *See* Dkt. 26 at 8 ("The '724 and '494 provisional applications were refiled as U.S. Provisional Patent Applications 61/252,603 ('the '603 provisional application') and 61/252,609 ('the '609 provisional application'), respectively, on October 16, 2009."). As a result of Konda Tech's actions, the disclosures of the '611, '958, and '904 patents (save the claims) were already 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.⁹

'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

2:3); and U.S. App. 12/601,275 claims priority to U.S. provisional 60/940,394 (FAC Ex. 5 at 2:4-13).

⁹ *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.

1	'611 Patent, '958 Patent, and '904 Patent (earliest priority date October 16, 2009)	Konda PCT (published September 12, 2008)
2	Description of Figures 1-7	'724 Provisional Application at 9:8-61:18
3	'611 patent at 8:47-41:4	(with docket numbers and references to
4	'958 patent at 9:31-44:32	applications updated) as incorporated by
5	'904 patent at 9:40-44:34	reference
6	Description of Figures 8-10	'494 Provisional Application at 7:16-42:2
7	'611 patent at 41:5-62:3	(with Figure numbers and labels changed
8	'958 patent at 44:33-66:61	appropriately to reflect renumbering and
9	'904 patent at 44:35-66:56	with docket numbers and references to
10	Description of Figures 11A1-11A4	'Konda PCT at 69:1-72:14 (with Figure
11	'611 patent at 62:5-64:20	numbers and labels changed appropriately
12	'958 patent at 66:63-69:16	to reflect renumbering)
13	'904 patent at 66:58-69:12	

13 In sum, all the disclosures of the '611, '958, and '904 patents (save the claims) were
14 already disclosed in the prior art more than one year prior to the earliest possible priority date, and
15 thus these patents are clearly invalid.

16 **D. This Court May Properly Invalidate the '611 Patent, '958 Patent, and '904**
17 **Patent at this Time**

18 Flex Logix's motion to dismiss is proper because the complaint, the exhibits attached
19 thereto, and materials that are properly the subject of judicial notice clearly demonstrate that the
20 '611 patent, the '958 patent, and the '904 patent are invalid. It is not often the case that the
21 invalidity of a patent is readily apparent at the motion to dismiss stage. However, when invalidity
22 is readily apparent, there is no just reason to delay in reaching such a determination. For example,
23 in *Select Controls v. American Electronic Components, Inc.*, the court granted a motion to dismiss
24 a patent infringement claim at the pleading stage because "the Complaint and the exhibits attached
25 thereto reveal unequivocally that the design covered by the [patent-in-suit] was both 'the subject
26 of a commercial offer for sale' and 'ready for patenting' prior to the Critical Date of April 18,
27 2001." No. 07 Civ. 1306(DLC), 2008 WL 216612, at *5 (S.D.N.Y. Jan. 22, 2008). The court
28 concluded that "[the patent-in-suit] is therefore invalid as a matter of law . . . , and SCI's Claim I,

1 alleging infringement of the '823 Patent, must be dismissed.” *Id.* (citation omitted). So too here,
2 the invalidity of the '611 patent, the '958 patent, and the '904 patent is manifest from materials
3 properly considered at the pleading stage and Konda Tech’s infringement claims should be
4 dismissed with prejudice.

5 **E. The '611 Patent, '958 Patent, and '904 Patent Are Unquestionably Invalid**

6 As set forth in detail above, all of the figures in the '611, '958, and '904 patents and all of
7 the text describing those figures were included in the Konda PCT, which is indisputable prior art
8 to the '611, '958, and '904 patents under pre-AIA 35 U.S.C. § 102(b) or AIA 102(a)(1).
9 Therefore, if the claims in the '611, '958, and '904 patents are supported by the specification of
10 the '611, '958, and '904 patents, the claims are invalid as anticipated by the Konda PCT under
11 pre-AIA 35 U.S.C. § 102(b) or AIA 102(a)(1). Thus, the invalidity of the '611, '958, and '904
12 patents is readily apparent in view of the patents themselves, which are attached to Konda Tech’s
13 complaint, and materials that are judicially noticeable at the motion to dismiss stage. Neither
14 claim construction nor fact or expert discovery is needed to reach such a determination. The
15 above-cited materials constitute clear and convincing evidence of the invalidity of these patents,
16 and Konda Tech’s patent infringement claims based on the '611, '958, and '904 patents should be
17 dismissed because these patents are invalid.¹⁰

18 In response to Flex Logix’s motion to dismiss Konda Tech’s original complaint, Dkt. 21,
19 Konda Tech did not dispute any of the facts recited above. *See* Dkt. 26 at 6-9; Konda Decl. ¶¶ 21-
20 28. Instead, Konda Tech’s *only* argument in response was that, as a matter of law, the '724 and
21

22 ¹⁰ Flex Logix requests that in considering its motion, this Court take judicial notice of the Konda
23 Tech patent applications and publications referenced in this motion. *See* RJN (filed concurrently
24 herewith). Because these are documents of which this Court may properly take judicial notice at
25 the motion to dismiss stage, this Court may decide Flex Logix’s motion under Rule 12(b)(6). *See*
26 *id.*; *see also Gorski v. Gymboree Corp.*, No. 14-CV-01314-LHK, 2014 WL 3533324, at *3 n.1
27 (N.D. Cal. July 16, 2014). However, if the Court declines to decide Flex Logix’ motion under
28 Rule 12(b)(6), Flex Logix respectfully requests that its motion be converted to one for summary
judgment under Rule 12(d). There are no material disputed facts regarding the invalidity of the
'611 '958, and '904 patents in view of the Konda PCT and Flex Logix submits that it 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).

1 '494 provisional applications did not become available to the public under 37 C.F.R.
2 § 1.14(a)(1)(vi) with the publication of the Konda PCT. Specifically, Konda Tech argued that
3 because 37 C.F.R. § 1.14(a)(1)(vi) states that “[t]he Office will not provide access to the paper file
4 of a pending application, except as provided in paragraph (c) or (i) of this section,” a member of
5 the public must be granted permission under 37 C.F.R. § 1.14 (c) or (i) in order to obtain a copy of
6 provisional application as originally filed under 37 C.F.R. § 1.14(a)(1)(vi). Konda Tech argued
7 that because no such permission was ever granted, the '724 and '494 provisional applications were
8 not publicly available during the relevant time, and thus are not prior art. *See* Dkt. 26 at 6-9.

9 Konda Tech’s argument is baseless and relies upon a blatant misreading of the applicable
10 regulation. The regulation clearly states that “any person” “may be provided” a copy of a
11 provisional “*application as originally filed*” under this subsection. 37 C.F.R. § 1.14(a)(1)(vi)
12 (emphasis added). The regulation then goes on to specify that certain permissions are needed to
13 access “*the paper file of a pending application.*” *Id.* While a member of the public may require
14 certain permissions to access the entire “paper file,” of the application, under the plain language of
15 the regulation, *no permission* is needed to obtain a copy of the “application as originally filed.”
16 *See Hyatt v. U.S. Patent & Trademark Office*, 797 F.3d 1374, 1378 (Fed. Cir. 2015) (noting that
17 certain prosecution materials will “become publicly available in the ordinary course of
18 examination” under 37 C.F.R. § 1.14(a)(1)(v) which contains identical language to subsection (vi)
19 regarding access to the “paper file” of an application); *Nomadix, Inc. v. Second Rule LLC*, No.
20 CV-07-01946-DDP (VBKx), 2009 WL 10668158, at *26 (C.D. Cal. Jan. 16, 2009) (“[T]he '497
21 provisional application, though unpublished, was publicly available at the time the ['399] patent
22 issued”); *id.* at *19 (where the '399 patent’s specification incorporated by reference the '497
23 provisional application); *Ex Parte Xiaoming Bao & Stephen M. Allen*, No. 2016-006293, 2017 WL
24 1397726, *4 (P.T.A.B. Mar. 28, 2017) (“When Kovalic [an international application] published in
25 July 2009, the Kovalic Provisional published as well.”); *id.* at *5 (“[w]e are . . . unpersuaded that
26 the Kovalic Provisional was unpublished and unavailable”). The '724 and '494 provisional
27 applications are indisputably prior art to the '611, '958, and '904 patents, and the Konda PCT,
28 which incorporates them by reference, renders these patents invalid.

1 **II. KONDA TECH'S INDIRECT INFRINGEMENT ALLEGATIONS ARE**
2 **INADEQUATELY PLED AND SHOULD BE DISMISSED**

3 All of Konda Tech's indirect or willful patent infringement claims lack the necessary
4 factual allegations for such claims and accordingly must be dismissed. It is settled that "the rule
5 that '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
6 statements, do not suffice' appl[ies] in patent cases." *Hitachi Kokusai Elec. Inc. v. ASM Int'l, N.V.*,
7 No. 17-CV-06880-BLF, 2018 WL 3537166, at *2 (N.D. Cal. July 23, 2018). "[The] pleading
8 standards under *Iqbal* and *Twombly* apply to allegations of . . . indirect (i.e., induced and
9 contributory) infringement." *Id.* Konda Tech's indirect infringement allegations are conclusory
10 and manifestly lack the required factual specificity.

11 Konda Tech's inducement allegations as pled in its FAC remain devoid of any factual
12 content that could give rise to a reasonable inference that Flex Logix has induced infringement of
13 any of the asserted patents. The FAC states that "Flex Logix's website is replete with written
14 directions instructing users on how to use Flex Logix's Accused Products in an infringing
15 manner" and references purported "detailed documentation instructing users on how to use [the]
16 Accused Products in an infringing manner." *See, e.g.*, FAC ¶¶ 60-61 (allegations regarding '523
17 patent). However, the FAC provides no additional specificity regarding these alleged "written
18 directions" and "detailed documentation," nor does it allege how Flex Logix has knowledge that
19 the induced acts constitute patent infringement or how Flex Logix has the specific intent to induce
20 infringement. Konda Tech also cites to Exhibits 9-14 of the FAC but provides no allegations
21 regarding import of these materials. *See, e.g., Uniloc USA, Inc. v. Apple Inc.*, No. C 18-00359
22 WHA, 2018 WL 2047553, at *4 (N.D. Cal. May 2, 2018) ("Uniloc's vague and conclusory
23 allegations that Apple 'intentionally instructs its customers to infringe' using broad categories of
24 materials, coupled with a list of five generic websites, do not amount to *factual* content supporting
25 any reasonable inference that Apple possessed either 'knowledge that the induced acts constitute
26 patent infringement' or 'specific intent to encourage another's infringement.'"); *CAP Co. v.*
27 *McAfee, Inc.*, No. 14-CV-05068-JD, 2015 WL 3945875, at *5 (N.D. Cal. June 26, 2015) ("CAP
28 makes passing references to 'user manuals guides, and support articles,' without ever saying what

1 those materials contain, which is wholly inadequate for an inference of specific intent.”); *Avocet*
2 *Sports Tech., Inc. v. Garmin Int’l, Inc.*, No. C 11-04049 JW, 2012 WL 2343163, at *4 (N.D. Cal.
3 June 5, 2012) (holding that pleading that giving customers “specific instructions or training” is
4 insufficient to allege induced infringement).

5 Konda Tech’s contributory infringement allegations simply parrot portions of the statute
6 and allege no facts in support. *See, e.g.*, FAC ¶ 59 (allegations regarding ’523 patent). These
7 allegations are clearly inadequate, fail to allege a plausible claim for contributory infringement,
8 and should be dismissed. *See, e.g., Windy City Innovations, LLC v. Microsoft Corp.*, 193 F. Supp.
9 3d 1109, 1116–17 (N.D. Cal. 2016) (An allegation tracking the statute “is nothing but a bare
10 conclusion. Accordingly, the Court *Grants* defendant’s motion to dismiss the contributory
11 infringement claim.” (emphases & citation omitted)); *Uniloc USA, Inc. v. Logitech, Inc.*, No. 18-
12 CV-01304-LHK, 2018 WL 6025597, at *3 (N.D. Cal. Nov. 17, 2018) (“Uniloc’s fleeting
13 reference to the fact that the accused products have no substantial noninfringing uses does not
14 provide the requisite factual basis to support Uniloc’s claim, which merely paraphrases the
15 contributory infringement statute.”); *Uniloc*, 2018 WL 2047553, at *5 (Contributory infringement
16 allegations were “merely [a] formulaic recitation of Section 271(c) not entitled to the presumption
17 of truth.”).¹¹

18 **III. THIS COURT SHOULD DISMISS KONDA TECH’S MISAPPROPRIATION OF**
19 **TRADE SECRETS CLAIM**

20 Konda Tech’s claim of misappropriation of trade secrets is barred by the statute of
21 limitations because, as Dr. Konda’s sworn declaration states, Konda Tech knew or reasonably
22 should have known of the alleged misappropriation no later than February 2014, which is more

23
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 than three years before Konda Tech filed suit. Further, Konda Tech has failed to allege the use of
2 reasonable efforts to maintain the secrecy of its alleged trade secrets. Konda Tech's
3 misappropriation of trade secrets claim should also be dismissed.

4 **A. Konda Tech's Claim of Misappropriation of Trade Secrets Is Barred by the**
5 **Statute of Limitations**

6 Konda Tech's claim for misappropriation of trade secrets should be dismissed because it is
7 barred by the statute of limitations. "A claim may be dismissed under Rule 12(b)(6) on the ground
8 that it is barred by the applicable statute of limitations only when 'the running of the statute is
9 apparent on the face of the complaint.'" *Stanford Hosp. & Clinics v. Guarantee Trust Life Ins.*
10 *Co.*, No. 5:11-cv-01271 EJD, 2012 WL 694743, at *3 (N.D. Cal. Mar. 1, 2012) (quoting *Von*
11 *Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 969 (9th Cir. 2010)). Moreover, the phrase
12 "'face of the complaint' includes matters of which judicial notice may be taken." *Sims v. Wholers*,
13 No. CIV S-09-2582 GGH P, 2011 WL 3584455, at *2 (E.D. Cal. Aug. 12, 2011) (granting motion
14 to dismiss on statute of limitations grounds). Here, the untimeliness of Konda Tech's
15 misappropriation of trade secrets claim is readily apparent from a review of the complaint and the
16 Konda Declaration filed in this action.

17 "An action for misappropriation must be brought within three years after the
18 misappropriation is discovered or by the exercise of reasonable diligence should have been
19 discovered." Cal. Civ. Code § 3426.6. *See Portney v. CIBA Vision Corp.*, No. SACV 07-0854
20 AG (MLGx), 2008 WL 5505518, at *9 (C.D. Cal. Dec. 24, 2008) (dismissing trade secrets claim
21 because plaintiff "reasonably should have discovered the alleged violations" during the limitations
22 period). As set forth in the chart below, Konda Tech's FAC and the Konda Declaration
23 demonstrate that Konda Tech had either actual or constructive notice of the facts giving rise to its
24 allegations of trade secret misappropriation no later than February of 2014:

Allegation in FAC	Actual or Constructive Knowledge by Konda Tech
FAC ¶ 185: "Dr. Markovic represented to Konda Tech that he would assist Konda Tech to secure funding from UCLA/ITA to fund Konda Tech to bring Konda Tech's IP	Konda Decl. ¶ 29: "[A]fter I arrived in Los Angeles on October 12, 2009 to present my business plan to UCLA/ITA, Dr. Markovic for the first time said to me that I should not expect

Allegation in FAC	Actual or Constructive Knowledge by Konda Tech
<p>to the market. Dr. Markovic's representation was false."</p> <p>FAC ¶ 199: "Dr. Markovic hid the fact that UCLA/ITA would not fund outside technology."</p>	<p>UCLA/ITA to fund Konda Tech, because UCLA/ITA will not fund technologies built outside UCLA."</p>
<p>FAC ¶ 199: "Dr. Markovic intentionally hid the fact that his students had started to develop FPGA chips using Konda Tech IP without authorization from Konda Tech."</p>	<p>Konda Decl. ¶ 32: " In 2010 when Dr. Markovic told me that his students had begun implementing Konda Tech's technology, I told him to stop. Dr. Markovic's answer was, as a university professor, he could implement any publicly available technology including any technology disclosed in patents or patent applications. I told Dr. Markovic that without a license from Konda Tech, I did not agree that he or UCLA had a right to implement Konda Tech's technology."</p> <p>FAC ¶ 21: "In 2010, Dr. Markovic told Dr. Konda over the phone that his students, including Dr. Wang, were implementing Konda Tech IP as an academic project, specifically the 2D layout, on an FPGA chip."</p>
<p>FAC ¶ 199: "Drs. Markovic and Wang published papers and received awards for those papers without acknowledging that their work was essentially based on the work by Dr. Konda and Konda Tech IP."</p>	<p>FAC ¶ 21: "In June 2011, unbeknownst to Dr. Konda, Drs. Markovic and Wang presented a paper at the 2011 VLSI Circuits Symposium titled 'A 1.1 GOPS/mQ FPGA Chip with Hierarchical Interconnect Fabric'—based on Konda Tech IP."</p> <p>FAC ¶ 25: "A couple of weeks later [in January or February of 2014], Drs. Markovic and Wang published a paper titled 'A Multi-Granularity FPGA with Hierarchical Interconnects for Efficient and Flexible Mobile Computing'—again, based on Konda Tech IP—at the 2014 International Solid State Circuits Conference (the 'ISSCC paper')."</p>
<p>FAC ¶¶ 200-201: "Drs. Markovic and Wang also started a company, Hier Logic, and subsequently Flex Logix using Konda Tech IP without disclosing these facts to Konda Tech.</p> <p>Dr. Markovic and Dr. Wang concealed that their aim was to build their own company by misappropriating Konda Tech IP."</p>	<p>FAC ¶ 24: "Dr. Konda met with Drs. Markovic and Wang at the home of Dr. Bonomi in January 2014. . . . Over the course of their discussions, Drs. Markovic and Wang stated that they were looking for funding for their separate startup, but when queried, refused to disclose the technological focus of their startup. Cryptically, Dr. Markovic later stated that he <i>may</i> need to license Konda Tech IP for their separate startup</p>

Allegation in FAC	Actual or Constructive Knowledge by Konda Tech
<p>FAC ¶ 191: “Dr. Markovic always represented to Konda Tech that he was helping Konda Tech get funded. Dr. Markovic intended that Konda Tech rely on his telling Dr. Konda that he was helping Konda Tech so that Konda Tech would provide him with Konda Tech’s business plan and technical know-how and customer experience information over a period of years based on his intentionally misrepresenting his true intentions.”</p> <p>FAC ¶ 192: “Dr. Markovic used the information provided by Konda Tech to develop FPGA chips which later became the basis [sic] Drs. Markovic and Wang to found Flex Logix.”</p>	<p>as well.”</p> <p>Konda Decl. ¶ 34: “[Dr. Markovic] himself said in January 2014 at Dr. Bonomi’s house that he may need to take a license from Konda Tech.”</p>

As detailed in the chart above, Konda Tech’s FAC and the Konda Declaration make clear that Konda Tech had either actual or inquiry notice of the facts of the allegedly improper use of its IP no later than February of 2014.¹² As of February 2014, Dr. Konda had actual knowledge of Dr. Wang and Dr. Markovic’s alleged implementation of Konda Tech IP *and* knew that Drs. Wang and Markovic were in the process of forming a startup in the FPGA space (otherwise there would be no reason why they “may need to take a license from Konda Tech” for that startup).

Rather than investigate at this point, Dr. Konda did nothing. If Dr. Konda had performed *any* investigation in February 2014, he would have discovered the publically available 2011 and 2014 papers cited as allegedly evidencing the improper use of Konda Tech’s IP. Thus, Konda Tech had actual knowledge or reasonably should have known of all of the alleged wrongdoing no later than February 2014, and yet waited more than three years to file suit. Konda Tech’s trade

¹² Also, as the chart makes clear, the allegations in Konda Tech’s complaint are at times directly contradicted by Dr. Konda’s sworn declaration, and to the extent they do so, they should be disregarded as implausible. *See Benedict v. Hewlett-Packard Co.*, No. 13-CV-00119-LHK, 2014 WL 234218, at *4 (N.D. Cal. Jan. 21, 2014) (“[A] court need not accept as true allegations contradicted by judicially noticeable facts.”); *Martinez v. Allstar Fin. Servs., Inc.*, No. CV 14-04661 MMM (MRWx), 2014 WL 12597333, at *8 (C.D. Cal. Oct. 9, 2014) (concluding that “no plausible inference can arise from the conflicting allegations”).

secrets claim is thus barred by the statute of limitations. *See, e.g., Arunachalam v. Apple, Inc.*, No. 5:18-CV-01250-EJD, 2018 WL 5023378, at *4 (N.D. Cal. Oct. 16, 2018) (dismissing trade secrets claim because “Plaintiff was or should have been aware of the alleged conduct by Defendants” during the limitations period); *Micrel Inc. v. Monolithic Power Sys., Inc.*, No. C 04-04770 JSW, 2005 WL 6426678, at *6 (N.D. Cal. Dec. 9, 2005) (dismissing trade secrets claim because plaintiff had constructive notice during limitations period); *MedioStream, Inc. v. Microsoft Corp.*, 869 F. Supp. 2d 1095, 1110 (N.D. Cal. 2012) (similar).¹³

B. Konda Tech Fails to Allege Reasonable Efforts to Maintain the Secrecy of Its Alleged Trade Secrets

Under California law, in order for information to qualify as a trade secret, it must be “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Cal. Civ. Code § 3426.1(d). Here, Konda Tech merely alleges that “[a]ll presentations made by Konda Tech included a ‘Proprietary and Confidential’” statement and “DARPA states that all information submitted by way of the BAA module is considered confidential.” FAC ¶ 213.

With respect to the first allegation, regardless of whether Konda Tech labeled any presentations as “Proprietary and Confidential,” Konda Tech alleges that Dr. Konda made a presentation on its technology to UCLA’s ITA and also gave a “a seminar on the technology to Dr. Markovic’s students” including Dr. Wang. *Id.* ¶¶ 15-16. Konda Tech does not allege that any of the individuals in attendance at either of these presentations was subject to any confidentiality restrictions. Because Dr. Konda voluntarily disclosed, absent restriction, any allegedly trade secret information in its “presentations,” Konda Tech’s first allegation regarding its secrecy measures fails. *See Logtale, Ltd. v. IKOR, Inc.*, No. C 11-5452 CW, 2013 WL 4427254, at *6 (N.D. Cal. Aug. 14, 2013) (“Because IKOR has alleged that it voluntarily granted Logtale or NEWAI access to its proprietary information, leave to amend would be futile. This claim is therefore dismissed with prejudice.”). With respect to Konda Tech’s second allegation, Konda Tech alleges that Dr. Markovic incorporated the “Konda Tech IP” in the DARPA proposals “from

¹³ The result would be the same even if the 4-year statute of limitations for UCL claims were used.

1 the then published Konda Tech WIPO patent applications.” FAC ¶ 17. Accordingly, as pled,
2 there can be no trade secret information in those proposals, rendering any confidentiality
3 associated with those proposals is irrelevant. Konda Tech’s misappropriation of trade secrets
4 claim should be dismissed with prejudice for this reason as well.

5 **IV. THIS COURT SHOULD DISMISS KONDA TECH’S UNFAIR BUSINESS**
6 **PRACTICES CLAIM**

7 Konda Tech identifies the basis for its UCL claim as follows: “Flex Logix’s *tortious*
8 *behavior*, as described above and below in the causes of action listed in this Complaint, all
9 constitute unfair and unlawful business practices.” FAC ¶ 34 (emphasis added). The *only* tortious
10 behavior allegedly committed by Flex Logix that is identified in the FAC is alleged violations of
11 patent law and misappropriation of trade secrets. Accordingly, Konda Tech’s UCL claim is
12 preempted. The claim is also barred by the applicable 4-year statute of limitations.

13 **A. Konda Tech’s UCL Claim Is Preempted by Federal Patent Law**

14 “[A] violation of federal patent law—without more—cannot serve as the basis of [a
15 Section 17200] claim.” *Halton Co. v. Streivor, Inc.*, No. C 10-00655 WHA, 2010 WL 2077203, at
16 *4 (N.D. Cal. May 21, 2010). Instead, “[a] state-law claim must be ‘qualitatively different from a
17 copyright or patent infringement claim’ or else it is preempted.” *Id.* (quoting *Summit Mach Tool*
18 *Mfg. Corp. v. Victor CNC Sys., Inc.*, 7 F.3d 1434, 1439-40 (9th Cir. 1993)). Courts routinely
19 dismiss state law claims which are premised solely on a violation of federal patent law as
20 preempted. *See, e.g., Halton*, 2010 WL 2077203, at *4 (dismissing California unfair competition
21 claim under Section 17200 as preempted by federal patent law); *AntiCancer, Inc. v. CellSight*
22 *Techs., Inc.*, No. 10CV2515 JLS (RBB), 2012 WL 3018056, at *7-8 (S.D. Cal. July 24, 2012)
23 (dismissing California unfair competition claims which were “predicated on [defendant’s] alleged
24 violation of federal patent laws”); *JAT Wheels, Inc. v. DB Motoring Grp., Inc.*, No. CV 14-5097-
25 GW(AGRx), 2016 WL 9453798, at *3 (C.D. Cal. Feb. 11, 2016) (“Because Plaintiff has not
26 alleged any additional tortious conduct that is separate from the patent law cause of action,
27 preemption applies.”). If and to the extent that Konda Tech’s UCL claim is based on alleged
28 patent infringement, it is preempted.

B. Konda Tech's UCL Claim Is Preempted by CUTSA

If and to the extent Konda Tech’s UCL claim is based on alleged misappropriation of trade secrets, it is also preempted by the California Uniform Trade Secrets Act (“CUTSA”). “Under California law, CUTSA provides the exclusive civil remedy for conduct falling within its terms and supersedes other civil remedies based upon misappropriation of a trade secret. It therefore supersedes claims—including Section 17200 claims—based on the same nucleus of facts as trade secret misappropriation.” *Alta Devices, Inc. v. LG Elecs., Inc.*, 343 F. Supp. 3d 868, 888 (N.D. Cal. 2018) (internal quotation and citation omitted) (emphasis omitted) (“The Court agrees with LGE that Alta’s UCL claim is preempted to the extent that it is based on trade secret misappropriation.”); *NetApp, Inc. v. Nimble Storage, Inc.*, 41 F. Supp. 3d 816, 839 (N.D. Cal. 2014) (same); *see also* Cal. Civ. Code. § 3426.7. Accordingly, because there is no alleged tortious conduct by Flex Logix that could provide the basis for its UCL claim, this claim should be dismissed with prejudice.

C. Konda Tech’s Unfair Business Practices Claim Is Also Barred by the Statute of Limitations

Konda Tech’s UCL claim is also barred by the statute of limitations. “Claims under the UCL are subject to a four year statute of limitations that begins to run on the date the cause of action accrues.” *Zanze v. Snelling Servs., LLC*, 412 F. App’x 994, 996 (9th Cir. 2011); Cal. Bus. & Prof. Code § 17208. As set forth above, *see*, Section II.C, *supra*, save Konda Tech’s allegations of patent infringement, all of the alleged wrongs complained of by Konda Tech took place more than four years before Konda Tech filed its complaint in this action, and Konda Tech had notice of the alleged wrongs no later than February 2014. Accordingly, Konda Tech’s unfair business practices claim should be dismissed for this reason as well. *See, e.g., Moran v. Wash. Mut. Bank*, No. 12-CV-04974 NC, 2012 WL 12920636, at *5 (N.D. Cal. Nov. 8, 2012) (“As Moran filed his complaint more than six years after the alleged violations, and he asserts no theory of tolling in the complaint or the amended complaint, defendant’s motion to dismiss Moran’s § 17200 claims is GRANTED WITH PREJUDICE.”); *Montes v. U.S. Bank Nat’l Ass’n*, No. CV 10-0022 PSG (Jcx), 2010 WL 11597507, at *3 (C.D. Cal. July 21, 2010) (dismissing § 17200 claim as time-barred).

CONCLUSION

For the reasons set forth above, Konda Tech's complaint should be dismissed with prejudice with the exception of Konda Tech's allegations of direct patent infringement as pled in Counts 2 and 5.

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