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APPENDIX A

United States Court of Appeals
for the Federal Circuit

VDPP, LLC,
Plaintiff-Appellant

v.

VOLKSWAGEN GROUP OF AMERICA, INC.,
Defendant-Appellee

2024-2226

Appeal from the United States District Court for the Southern District of Texas in No. 4:23-cv-02961, Judge Lee H. Rosenthal.

Decided: August 19, 2026

WILLIAM PETERSON RAMEY, III, Ramey LLP, Houston, TX, argued for plaintiff-appellant.

DANIEL C. TUCKER, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Reston, VA, argued for defendant-appellee. Also represented by ELLIOT COOK, JOSEPH MICHAEL SCHAFFNER, TAYLOR LAIN STARK.Before MOORE, *Chief Judge*, LOURIE and CUNNINGHAM, *Circuit Judges*.

MOORE, *Chief Judge*.

VDPP, LLC (VDPP) appeals orders of the United States District Court for the Southern District of Texas (1) dismissing VDPP's complaint without granting leave to amend, (2) awarding attorney fees to Volkswagen under 35 U.S.C. § 285, and (3) sanctioning VDPP's counsel, William Peterson Ramey, III. For the following reasons, we affirm-in-part and dismiss-in-part.

BACKGROUND

In 2023, VDPP, represented by Mr. Ramey, sued Volkswagen Group of America, Inc. (Volkswagen) for alleged infringement of U.S. Patent No. 9,426,452, which relates to electrically controlled spectacles. J.A. 85–89. Volkswagen moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and for improper venue under Rule 12(b)(3). J.A. 136–53. VDPP responded to the motion, including a request for leave to amend its complaint and a proposed amended complaint. J.A. 174–84; J.A. 186–90. The district court dismissed the case with prejudice on the 12(b)(6) ground and denied VDPP's motion for leave to amend because it concluded the proposed amended complaint was futile.[1] J.A. 13–24. The court then (1) denied VDPP's subsequent motion to amend the judgment under Rule

[1] The court did not dismiss for improper venue under Rule 12(b)(3) because it concluded the proposed amended complaint was futile on other grounds. J.A. 17–18.

59(e); (2) awarded Volkswagen $207,543.60 in attorney fees under 35 U.S.C. § 285; and (3) sanctioned Mr. Ramey under 28 U.S.C. § 1927 and the court's inherent power, holding VDPP and Mr. Ramey jointly and severally liable for the awarded attorney fees. J.A. 5–11; J.A. 1–4. VDPP appeals, and the parties dispute whether Mr. Ramey timely appealed on his own behalf. *See* VDPP Br. 1–2; Volkswagen Br. 1. While we generally have jurisdiction over this appeal under 28 U.S.C. § 1295(a)(1), we consider below whether Mr. Ramey's purported failure to appeal deprives this Court of jurisdiction to review the issue of his sanctions. *See infra* Discussion § III.

DISCUSSION

On appeal, VDPP argues the district court abused its discretion in (1) denying VDPP leave to amend its complaint before dismissal and (2) awarding attorney fees to Volkswagen under 35 U.S.C. § 285. Mr. Ramey separately argues that we have jurisdiction to review the court's decision to sanction him, and the court abused its discretion in doing so. We address each issue in turn.

I. Dismissal Without Leave to Amend

VDPP first argues the district court abused its discretion by dismissing VDPP's complaint without giving VDPP an opportunity to amend. We do not agree.

We review a district court's Rule 12(b)(6) dismissal under the law of the regional circuit—here the Fifth Circuit—which reviews such dismissals de novo. *Adnexus Inc. v. Meta Platforms, Inc.*, 160 F.4th 1216, 1220 (Fed. Cir. 2025) (applying Fifth Circuit law). We also apply regional circuit law to review district court decisions on motions for leave to amend. *Bot M8 LLC v. Sony Corp. of Am.*, 4 F.4th 1342, 1357 (Fed. Cir. 2021). The Fifth Circuit reviews denials of leave to amend for abuse of discretion. *Ariyan, Inc. v. Sewerage & Water Bd. of New Orleans*, 29 F.4th 226, 229 (5th Cir. 2022). When denial is based on the futility of amendment, the Fifth Circuit "appl[ies] the same standard of legal sufficiency as applies under Rule 12(b)(6)." *Id.* (quoting *Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000)). "If the complaint, as amended, would be subject to dismissal, then amendment is futile and the district court was within its discretion to deny leave to amend." *Id.*

As an initial matter, VDPP implicitly *agreed* not to amend its complaint in exchange for Volkswagen's consent to an extension of time for VDPP to respond to Volkswagen's motion to dismiss. J.A. 1664. After securing the extension, VDPP presented its proposed amended complaint to the district court anyway with no justification. J.A. 183; J.A. 186–90. This alone would have provided a basis for the court's denial of leave to amend.

Setting this aside, the court also correctly rejected VDPP's proposed amended complaint as futile because it too was subject to dismissal. *See Ariyan*, 29

F.4th at 229. Because VDPP sought pre-suit damages, VDPP had a burden to plead compliance with the notice provision of 35 U.S.C. § 287(a), including compliance by VDPP's licensees. *See Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 950 F.3d 860, 863–64 (Fed. Cir. 2020). This provision states in relevant part:

> Patentees, and persons making, offering for sale, or selling within the United States any patented article for or under them, or importing any patented article into the United States, may give notice to the public that the same is patented . . . by fixing thereon the word "patent" . . . . In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.

35 U.S.C. § 287(a).

VDPP's proposed amended complaint failed to meet its burden of showing compliance with 35 U.S.C. § 287, saying nothing more than the following:

> Plaintiff is a non-practicing entity, with no products to mark. Plaintiff has pled all statutory requirements to obtain pre-suit

> damages. Further, all conditions precedent to recovery are met.

J.A. 186. While VDPP is correct that "a patentee who never makes or sells a patented article may recover [pre-suit] damages even absent notice to an alleged infringer," VDPP ignores that the law requires that "[a] patentee's licensees must also comply with § 287." *Arctic Cat*, 950 F.3d at 864.

Here, VDPP entered into eleven settlement agreements licensing the '452 patent to various parties. J.A. 1030–178. Yet the proposed amended complaint does not allege facts showing compliance with 35 U.S.C. § 287 by *any* of VDPP's licensees. This silence is particularly conspicuous given VDPP was on notice of Volkswagen's argument that VDPP could not show compliance in view of its prior settlement agreements. J.A. 155–57; J.A. 146–50. And to the extent VDPP argues the proposed amended complaint should not be dismissed simply because it states "Plaintiff has pled all statutory requirements to obtain pre-suit damages" and "all conditions precedent to recovery are met," J.A. 186, these statements are bare legal conclusions we need not—and do not—accept as true in view of the proposed amended complaint's lack of any supporting factual allegations, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (second alteration in original)).

Contrary to VDPP's contention, there is nothing special about its licenses that excuses VDPP from alleging it made "reasonable efforts to ensure [its licensees'] compliance with [35 U.S.C. § 287]." *Arctic Cat*, 950 F.3d at 864. For example, VDPP argues its licenses did not trigger § 287's marking provision because (1) VDPP's licenses were entered into to settle litigation, and (2) none of VDPP's licensees admitted infringement. VDPP Br. 30–31. Our precedent, however, suggests there is no difference between a license entered into under a settlement agreement and any other patent license agreement. *See TransCore, LP v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271, 1275 (Fed. Cir. 2009) ("[A] patent license agreement is in essence nothing more than a promise by the licensor not to sue the licensee."); *see also id.* at 1276 ("[W]hether an agreement is framed in terms of a 'covenant not to sue' or a 'license'" is a difference "only . . . of form, not substance. . . ."). Nor does the subjective view of the accused infringer matter. *See Lubby Holdings LLC v. Chung*, 11 F.4th 1355, 1360 (Fed. Cir. 2021) ("It is irrelevant under § 287 whether the defendant knew . . . of his own infringement" because "[t]he correct approach to determining notice under § 287 must focus on the action of the patentee, not the knowledge or understanding of the infringer." (quoting *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994)) (cleaned up)).

Here, all eleven settlement agreements were fashioned as standard licensing agreements to make,

use, and sell licensed products, J.A. 1030–178, with one agreement going as far as specifying VDPP's licensee has *no* obligation to mark, J.A. 1070. Moreover, VDPP continues to maintain that all the licensed products covered under its prior settlement agreements infringe. VDPP Br. 25. Under the facts of this case, we see no way for VDPP to amend its complaint to plausibly allege it made reasonable efforts to ensure its licensees complied with 35 U.S.C. § 287.

We have previously said 35 U.S.C. § 287 exists to "(1) help[] . . . avoid innocent infringement; (2) encourag[e] patentees to give public notice that the article is patented; and (3) aid[] the public [in] identify[ing] whether an article is patented." *Arctic Cat*, 950 F.3d at 865. If we were to accept VDPP's position that it need not ensure its licensees mark their products, all three of these purposes would be frustrated. Unmarked products that VDPP believes to infringe would enter the marketplace, giving a false impression that such articles are not patented. This, in turn, could encourage others to innocently produce similar products while exposing them to hidden litigation risk. Accordingly, we do not agree with VDPP that policy considerations weigh in its favor. *See* VDPP Br. 48–50. While we do not foreclose the possibility that a licensor can ever establish it made reasonable efforts to ensure licensee compliance with 35 U.S.C. § 287 in the absence of a marking obligation, that is certainly not the case here.

For the foregoing reasons, we conclude the district court did not abuse its discretion in dismissing VDPP's complaint without granting leave to amend.

II. Attorney Fees

VDPP next contests the district court's award of attorney fees to Volkswagen under 35 U.S.C. § 285. Section 285 states that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. We review a district court's decision to award attorney fees under this provision for abuse of discretion. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 564 (2014).

The district court did not abuse its discretion in determining this was an exceptional case. Specifically, the court reasonably determined that "[m]any of the positions VDPP took were frivolous and objectively unreasonable," including seeking future damages and an injunction on an expired patent, seeking past damages despite an inability to allege patent marking, failing to disclose relevant settlement agreements, and prolonging litigation with false statements about the settlement agreements. J.A. 8–9. The court also noted that "VDPP made sloppy errors, over and over" ranging from obviously incorrect venue allegations to initial disclosures about an unrelated patent, which made the case "even more cumbersome and difficult to handle." J.A. 9. Moreover, the court found a "need for meaningful deterrence" based in part on VDPP's pattern of repeat litigation

over the '452 patent involving "settlement demands far less than the costs of defense and unrelated to any damages theory." J.A. 9–10. The court further rejected VDPP's argument that the fee award should be limited to the exceptional portion of the case because "VDPP's misconduct infected the entire litigation." J.A. 1–4; *see also* J.A. 5–7 (listing a litany of VDPP errors and misconduct). We agree with the district court that this was ample justification for awarding attorney fees under 35 U.S.C. § 285.

VDPP raises several objections to the district court's order, but none gives reason to disturb the fee award. For example, VDPP argues its failure to disclose relevant settlement agreements was simply the result of a misunderstanding. VDPP Br. 31–36. According to VDPP, this misunderstanding was the result of VDPP's good faith reliance on a representation made to Mr. Ramey by VDPP's president, Dr. Karpf—an elderly man with a diagnosed memory disorder. *Id.* at 32. Even if this were true, VDPP was clearly unjustified in relying on Dr. Karpf's representation that no settlement agreements existed when Volkswagen previously *told* VDPP about those licenses on several occasions. J.A. 156 (Sept. 29, 2023 letter); J.A. 147–50 (Oct. 13, 2023 mot. to dismiss); J.A. 254–59 (Nov. 21, 2023 reply in support of mot. to dismiss); J.A. 1022 (Nov. 24, 2023 email). The court also did not abuse its discretion in taking issue with Dr. Karpf's failure to address those misrepresentations in his later filed declaration, which could have been done without

disclosing private medical information. J.A. 6 (citing J.A. 1508–09).

We also do not agree with VDPP's argument that the district court could not award attorney fees under 35 U.S.C. § 285 simply because the same conduct would not be sanctionable under Federal Rule of Civil Procedure 11. VDPP Br. 50–53. "[S]anctionable conduct is not the appropriate benchmark" for exceptionality, and "a district court may award fees" when "a party's unreasonable conduct—while not necessarily independently sanctionable—is nonetheless so 'exceptional' as to justify an award of fees." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555 (2014). "[A]n 'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigating position . . . or the unreasonable manner in which the case was litigated. District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." *Id.* at 554. Accordingly, the court did not abuse its discretion in considering conduct that may or may not be sanctionable under *other* rules or statutes in making its exceptionality finding under 35 U.S.C. § 285.

VDPP is additionally incorrect to criticize the district court for considering, in its totality-of-the-circumstances analysis, VDPP's pattern of filing many patent infringement lawsuits and making low-value settlement offers. VDPP Br. 42–47. To be sure, "filing a large number of suits does not, by itself, justify an

inference of . . . an improper motive," *Thermolife Int'l LLC v. GNC Corp.*, 922 F.3d 1347, 1363 (Fed. Cir. 2019), and "[t]he mere existence of these other suits does not mandate negative inferences about the merits or purpose of this suit," *SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344, 1351 (Fed. Cir. 2015). But we have also recognized that "a pattern of litigation abuses characterized by the repeated filing of patent infringement actions for the sole purpose of forcing settlements, with no intention of testing the merits of one's claims, *is* relevant to a district court's exceptional case determination under [35 U.S.C.] § 285," and "a district court *should* consider a patentee's pattern of litigation where adequate evidence of an abusive pattern is presented." *SFA*, 793 F.3d at 1350, 1352 (emphases added). We see no abuse of discretion in the district court's consideration of VDPP's litigation pattern here, especially given the abundance of other evidence demonstrating VDPP's unreasonable litigation conduct. *See AdjustaCam, LLC v. Newegg, Inc.*, 861 F.3d 1353, 1362 (Fed. Cir. 2017) (explaining plaintiff's "frivolous infringement argument and unreasonable manner of litigation" weighed in favor of considering the nuisance value of plaintiffs' settlement demands).

For the foregoing reasons, we decline to disturb the district court's award of attorney fees to Volkswagen.

III. Mr. Ramey's Sanctions

We next turn to Mr. Ramey's sanctions. Because we conclude (1) Mr. Ramey did not timely appeal on

his own behalf and (2) VDPP lacks standing to contest the sanctions for him, we dismiss this portion of the appeal for lack of jurisdiction and do not reach whether the district court abused its discretion in sanctioning Mr. Ramey.

A proper notice of appeal must "specify the party or parties taking the appeal by naming each one in the caption or body of the notice." FED. R. APP. P. 3(c)(1)(A). Although this rule is to be liberally construed, it is a jurisdictional requirement that cannot be waived. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316–17 (1988). We review whether a notice of appeal complies with this requirement under Federal Circuit law. *See Minn. Min. & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1308–09 (Fed. Cir. 2002).

Mr. Ramey filed notices of appeal on August 7, 2024 and August 13, 2024. J.A. 1658; J.A. 1660. Both notices list only "Plaintiff VDPP, LLC" as an appellant and thus fail to specify Mr. Ramey as a party taking the appeal. J.A. 1658; J.A. 1660. Mr. Ramey argues these notices adequately specify him as an appellant because they complied with Federal Rule of Appellate Procedure 3's requirement that his name appear in the "body of the notice." FED. R. APP. P. 3(c)(1)(A). But Mr. Ramey's misspelled name only appears once within a list of orders from which *VDPP* appeals. J.A. 1658; J.A. 1660. The notices, therefore, give no indication that Mr. Ramey intended to be an appellant; rather, Mr. Ramey's name serves only to identify a specific order that his client VDPP was

appealing. Because this order held both VDPP *and* Mr. Ramey jointly and severally liable for Volkswagen's attorney fees, J.A. 5–11, it was not clear that Mr. Ramey was also appealing the order on his own behalf rather than merely representing his client. We conclude that this lack of clarity prevents Mr. Ramey from satisfying Rule 3's jurisdictional requirement that a notice of appeal "specify the party or parties taking the appeal." FED. R. APP. P. 3(c)(1)(A). Mr. Ramey therefore failed to appeal the sanctions order on his own behalf.[2]

Our analysis is consistent with the view of multiple sister circuits, and Mr. Ramey fails to persuade us that a different approach is warranted. *See Batiste v. Lewis*, 976 F.3d 493, 509 (5th Cir. 2020); *Maerki v. Wilson*, 128 F.3d 1005, 1007–08 (6th Cir. 1997); *Agee v. Paramount Commc'ns, Inc.*, 114 F.3d 395, 399–400 (2d Cir. 1997); *CTC Imps. & Exps. v. Nigerian Petroleum Corp.*, 951 F.2d 573, 575–76 (3d Cir. 1991). Confronted with these sources of persuasive authority, Mr. Ramey relies primarily on *Garcia v. Wash*, 20 F.3d 608 (5th Cir. 1994), in which the Fifth Circuit concluded an attorney's intent to appeal was clear from the notice of appeal because the judgment at issue ordered sanctions solely against the attorney.

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[2] Mr. Ramey also filed "corrected" notices of appeal naming himself as an appellant on November 18, 2024—more than 90 days after the appealed orders issued. J.A. 1836–37; J.A. 1838–39. These notices do not change the analysis because they were undisputedly filed late under Federal Rule of Appellate Procedure 4. *See* FED. R. APP. P. 4(a)(1)(A) and 4(a)(5)(A).

Id. at 610. *Garcia*, however, was expressly cabined by the Fifth Circuit in *Batiste*, which held "the same is not true for a judgment [like the one at issue here] that orders both an attorney *and* his client to pay fees." *Batiste*, 976 F.3d at 509 (emphasis added). Mr. Ramey does not even attempt to address this fatal flaw in his argument despite being given multiple opportunities to do so. *See* Dkt. No. 29 (failing to address Volkswagen's argument regarding *Batiste*); VDPP Reply Br. 1–2 (relying on *Garcia* without discussing *Batiste*); Oral Arg. at 30:00–31:07 (same). Mr. Ramey's decision to double down on clearly inapplicable case law not only demonstrates the weakness of his position but presents yet another example of the unreasonable manner in which Mr. Ramey has litigated this case both before this Court and below.

Finally, to the extent VDPP's reply brief argues that VDPP has its own standing to appeal Mr. Ramey's sanctions, we do not agree. VDPP Reply Br. 28–29. VDPP has suffered no injury from Mr. Ramey's sanctions and, in fact, *benefited* from his sanctions because they make him jointly and severally liable for Volkswagen's attorney fees. Moreover, Mr. Ramey egregiously misrepresents *Thornton v. Gen. Motors Corp.*, 136 F.3d 450 (5th Cir. 1998) to argue that "[i]t has long been the law that where the rights of the lawyer and the client are inextricably intertwined, the client may have standing to appeal a sanction order against the lawyer." VDPP Reply Br. 28–29 (citing *Thornton*, 136 F.3d at 453–54).

Thornton explains that it may be appropriate to exercise pendant appellate jurisdiction if "a final appealable order is 'inextricably intertwined' with an unappealable order." 136 F.3d at 453. It has nothing to do with the intertwined interests of two co-parties when one of the co-parties fails to appeal a readily appealable sanctions order. *See id.* Mr. Ramey identifies no other authority suggesting VDPP has standing to contest his personal sanctions. VDPP Reply Br. 28–29. Accordingly, we reject this argument.

Having concluded that Mr. Ramey failed to timely appeal the district court's sanctions order on his own behalf and that VDPP lacks standing to contest the sanctions for him, we dismiss this portion of the appeal for lack of jurisdiction.[3]

[3] For the same reasons, we also deny VDPP's motion to modify the case caption to include Mr. Ramey as an appellant. Dkt. No. 21.

CONCLUSION

We have considered VDPP's and Mr. Ramey's remaining arguments and find them unpersuasive. For the foregoing reasons, we (1) affirm the district court's dismissal of VDPP's complaint without leave to amend, (2) affirm the award of attorney fees to Volkswagen under 35 U.S.C. § 285, and (3) dismiss the portion of the appeal relating to Mr. Ramey's sanctions.

AFFIRMED-IN-PART AND DISMISSED-IN-PART

COSTS

Costs to Volkswagen.

APPENDIX B

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

VDPP, LLC,
Plaintiff-Appellant

v.

VOLKSWAGEN GROUP OF AMERICA, INC.,
Defendant-Appellee

2024-2226

Appeal from the United States District Court for the Southern District of Texas in No. 4:23-cv-02961, Judge Lee H. Rosenthal.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, Chief Judge, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, Circuit Judges.[1]

[1] Circuit Judge Newman did not participate.

PER CURIAM.

O R D E R

VDPP, LLC and William Ramey separately filed a combined petitions for panel rehearing and rehearing en banc. The petitions were referred to the panel that heard the ap-peal, and thereafter the petitions were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petitions for panel rehearing are denied.

The petitions for rehearing en banc are denied.

FOR THE COURT

October 2, 2026
Date

Jarrett B. Perlow
Clerk of Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VDPP, LLC, Plaintiff,	§	
v.	§	CASE NO. H-23-2961
VOLKSWAGEN GROUP OF AMERICA, INC., Defendant.	§	

MEMORANDUM AND ORDER

The plaintiff, VDPP, LLC, filed a meritless patent infringement suit and continued to litigate it after the defendant, Volkswagen Group of America, pointed out its obvious lack of merit. The court dismissed the case with prejudice and held that VDPP and its counsel were liable for Volkswagen's attorneys' fees under 35 U.S.C. § 285 and 28 U.S.C. § 1927. (Docket Entry No. 47). The record amply supported the finding that this case was so lacking in merit as to make it exceptional for the purpose of awarding fees. (*Id.*).

Volkswagen has moved for an award of fees in the amount of $207,543.60. Volkswagen has supported its motion with a clear explanation of how it calculated the lodestar and with declarations from the lawyers

who worked to defend the case and achieve the dismissal. VDPP's only argument in response is that the fee award should be limited to the portion "expended to defend the exceptional portion of the case[.]" (Docket Entry No. 49 at 1).

VDPP misses the point of the court's prior findings. The factors for determining whether a patent case is exceptional include: "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *In re Rembrandt Techs. LP Patent Litigation*, 899 F. 3d 1254, 1277 (Fed. Cir. 2018) (internal citation omitted). This entire case was exceptional. VDPP sought an injunction and future damages that were clearly unrecoverable, because the patent was expired. *See Lans v. Digit. Equip. Corp.*, 252 F.3d 1320, 1328 (Fed. Cir. 2001). VDPP sought past damages that were clearly unrecoverable because VDPP could not plausibly allege marking compliance under 35 U.S.C. § 287. *See Arctic Cat Inc. v. Bombardier Recreational Prods., Inc.*, 876 F.3d 1350, 1366 (Fed. Cir. 2017). VDPP lied about the existence of prior licensing agreements that confirmed the meritless nature of its case. (Docket Entry No. 36).

VDPP wants the court to limit the attorneys' fee award to the portion of the case that is exceptional. (Docket Entry No. 49 at 1). The entire case was exceptional, from the outset, for reasons that VDPP and its counsel knew. There is no need to allocate the

fees between the frivolous and nonfrivolous aspects of the case. It was all frivolous.

The remaining tasks are to determine whether the number of hours Volkswagen expended and the hourly rates charges were reasonable. "In determining the appropriate amount of attorney's fees, a district court first must calculate the 'lodestar' by 'multiplying the reasonable number of hours expended on the case by the reasonable hourly rates for the participating lawyers.'" *Rodney v. Elliott Sec. Sols., L.L.C.*, 853 F. App'x 922, 924 (5th Cir. 2021) (quoting *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1047 (5th Cir. 1998)). Whether an hourly rate is reasonable depends on whether that rate is consistent with the "hourly rate in the community for the work at issue." *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 490 (5th Cir. 2012). The court finds that the number of hours spent and the rates charged by the three attorneys who represented Volkswagen are reasonable in light of the factors set out in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

Attorneys command high fees. Attorneys specializing in patent cases, which are often technically as well as legally complicated, are no exception. The hourly rates charged by the three lawyers who defended Volkswagen are reasonable in light of their years of experience and their expertise. The rates charged here were $979 per hour for the lead lawyer; $825 per hour for an of counsel lawyer; and $600 for local counsel. Volkswagen provides data from PricewaterhouseCoopers showing that these rates are

lower than the median 2023 rates for comparable lawyers. (Docket Entry No. 48-5). Similar surveys are routinely accepted by courts in this circuit. For example, many courts have used "the American Intellectual Property Law Association's 2021 Report of the Economic Survey, which notes average hourly rates for equity partners in Texas ranging from $339 to $900 and average hourly rates for partner-track attorneys ranging from $354 to $593." *Bobby Goldstein Prods., Inc. v. Habeeb*, No. 3:21-CV-01924, 2023 WL 8790284, at *2 (N.D. Tex. Nov. 27, 2023), report and recommendation adopted, No. 3:21-CV-1924-G, 2023 WL 8791178 (N.D. Tex. Dec. 19, 2023). Adjusting these 2021 figures for inflation yields similar results to the charges billed here. And Volkswagen has, if anything, been modest in seeking discounted 2023 rates for the entire case, even though much of the work took place in 2024.

The number of hours spent on the case is also reasonable. Although the facts of VDPP's litigation misconduct are egregious, they arose in a specialized area of patent law — marking requirements. Volkswagen had to do the work necessary to not only uncover the misconduct, but also to explain it to the court and to obtain appropriate relief. The fact that Volkswagen was able to do so in a motion to dismiss, rather than engaging in discovery and then moving for summary judgment, resulted in a reasonable number of hours spent. VDPP cannot successfully complain that it now has to pay fees for work that resulted from its misconduct in bringing the lawsuit, seeking

unrecoverable relief, taking frivolous and objectively unreasonable positions, and submitting false declarations. Volkswagen's work included researching, briefing, presenting, and arguing its motion to dismiss; engaging in early and targeted discovery; researching and briefing the motion to declare the case exceptional under § 285; and responding to VDPP's Rule 59(e) motion. The 256 hours billed by three lawyers was reasonable. See, e.g., *Ortiz & Assocs. Consulting, LLC v. VIZIO, Inc.*, No. 3:23-CV-791, Docket Entry No. 46 (N.D. Tex. Apr. 23, 2024) (finding 261.7 hours of attorney time reasonable for a case dismissed for lack of marking under § 287 in another case brought by Mr. Ramey). And Volkswagen has shown billing judgment by applying a 10% reduction across the board, billing at 2023 rates, and not including any paralegal time in the amounts it seeks.

VDPP's misconduct infected the entire litigation. It is entirely fitting to require VDPP to pay all of Volkswagen's fees to defeat a case that never should have been filed. Indeed, VDPP's protestations fit the classic definition of "chutzpah." VDPP displays some nerve in asking this court to relieve it of the consequences of its own misconduct.

Volkswagen's motion to recover $207,543.60 in fees is granted.

SIGNED on August 13, 2024, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VDPP, LLC,	§	
Plaintiff,	§	
	§	
v.	§	CASE NO. H-23-2961
	§	
VOLKSWAGEN GROUP	§	
OF AMERICA, INC.,	§	
Defendant.	§	

MEMORANDUM AND ORDER

VDPP, LLC, a nonpracticing entity, sued Volkswagen Group of America, alleging that Volkswagen's 2020 Backup Camera System infringed Patent '452, which VDPP had acquired by assignment. Volkswagen moved to dismiss, identifying a number of flaws in VDPP's claims, and the court granted dismissal. (Docket Entry No. 33). VDPP has moved to alter the judgment and for reconsideration, (Docket Entry No. 37), and Volkswagen has moved for a finding that this is an exceptional case entitling Volkswagen to attorney's fees. (Docket Entry No. 35). Volkswagen has identified, and the court finds, a number of flaws in VDPP's complaint, its response to Volkswagen's motion to dismiss, and its motion for reconsideration. These flaws include:

- The patent that VDPP asserted had expired on January 2, 2022, making VDPP's claims for a permanent injunction and damages for future infringement impossible. *Lans v. Digit. Equip. Corp.*, 252 F.3d 1320, 1328 (Fed. Cir. 2001).

- VDPP's claim for pre-suit damages could not succeed because VDPP could not claim marking compliance under 35 U.S.C. § 287. VDPP had previously accused multiple devices of infringing the '452 patent. Those cases settled and the defendants continued to sell the patented products, but VDPP produced no evidence that these entities marked the accused products. VDPP argued that as a nonpracticing entity, it was not required to comply with § 287. The law is clear, however, that licensees as well as patent holders must comply with the marking requirements. *Arctic Cat Inc. v. Bombardier Recreational Prods., Inc.*, 876 F.3d 1350, 1366 (Fed. Cir. 2017).

- VDPP served initial disclosures omitting its prior settlement agreements. VDPP represented that there were no settlement agreements, only "agreements in principle." This was a lie. In fact, there were 11 settlement agreements licensing the '452 patent, all executed before VDDP said that it had no settlement agreements to disclose. (Docket Entry Nos. 35-7, 35-8). In fact, seven of the eleven settlement agreements were signed by Ronald S. Karpf, President of VDPP. None of the settlement agreements required VDPP's

licensees to mark under § 287. (Docket Entry No. 36).

- Dr. Karpf signed a declaration as part of VDPP's opposition to the motion for attorney's fees, which did not mention, much less explain, his denial that settlement agreements licensing the '452 patent existed when he had signed seven out of the eleven. (Docket Entry No. 44-9).

- VDPP's failure to identify any evidence of compliance with § 287, along with the 11 settlement agreements that did not require licensees to comply with marking requirements, demonstrates that VDPP knew or should have known before suing Volkswagen that it could not allege marking compliance. VDPP's insistence that it could recover damages meant either that VDPP did not do any meaningful presuit investigation, or that VDPP knowingly asserted claims that had no merit. (Docket Entry No. 35 at 12).

- VDPP's initial disclosures addressed patents not at issue in this case, patents that pertained to a different plaintiff. (Docket Entry No. 35-7).

- VDPP had unsuccessfully presented similar allegations in other cases before leveling them against Volkswagen. See *VDPP, LLC v. Mazda Motor of Am., Inc.*, No. 8:24-cv-00571 (C.D. Cal.); *VDPP LLC v. NEC Corp. of Am.*, No. 3:24-cv-00566 (N.D. Tex.). VDPP's litigation strategy

appears to be one of throwing mud against several walls and hoping some sticks.

- VDPP renews arguments unsupported by the case law and the record in its motion to amend and for reconsideration. The arguments fail, for the reasons stated in the court's opinion granting Volkswagen's motion to dismiss. (Docket Entry No. 33).

- Volkswagen pointed out the futility of VDPP's allegations early in the case and gave VDPP an opportunity to withdraw the allegations. VDPP persisted.

- In moving for amendment of the judgment and for reconsideration, VDPP doubled down, continuing to make the unsupported arguments it had made in earlier briefs. (Docket Entry Nos. 37, 44). None of VDPP's arguments overcame or cast into doubt the conclusion that it could not plausibly allege marking.

- In its motion for amendment, VDPP asserted policy arguments regarding settlement that are inconsistent with the clear requirement imposed by § 287. VDPP quoted language from *Rude v. Westcott*, 130 U.S. 152 (1889) that is not actually in the case, and *Rude* does not discuss marking at all. (Docket Entry No. 37)

- In seeking relief under Rule 59(e), VDPP sought leave to assert a different patent (U.S. Patent

No. 10,021,380), the '380 Patent. This is not proper under Rule 59(e); this is a request to assert a new cause of action.

- One final point, small but indicative. VDPP was so sloppy in its preparation of the case that it alleged that Volkswagen was a Delaware corporation; it is a New Jersey corporation with a principal place of business in Virginia. VDPP claimed that Volkswagen had a place of business at a specific address in "San Antomio [sic]," in the Southern District of Texas. That address is of a Toyota location, not Volkswagen. And San Antonio is in the Western District of Texas, not the Southern. (See Docket Entry No. 33 at 5).

This is only a partial list of the flaws in VDPP's claims, flaws that VDPP knew or should have known. Perhaps the most egregious is the misstatement that there were no settlement agreements, when there were 11, most signed by VDPP's president, who nonetheless denied their existence. Counsel's failure to know the facts and present them accurately at a minimum shows a failure to conduct an adequate investigation either before or after filing suit. VDPP's insistence on doubling down on its positions after Volkswagen exposed their flaws adds to what makes VDPP's litigation positions offensive.

I. VDPP's Motion to Amend or for Reconsideration

Based on the points laid out above, the court denies VDPP's motion to amend the judgment or for

reconsideration under Rule 59(e). VDPP has not shown that grant of Volkswagen's motion to dismiss was a manifest disregard for the law. VDPP's argument in seeking reconsideration that marking compliance is a fact question is, as Volkswagen points out, wrong. Courts can and do resolve disputes over patent marking on the pleadings. See, e.g., *Lans v. Digit. Equip. Corp.*, 252 F.3d 1320, 1328 (Fed. Cir. 2001). Clear case law requires a patentee to plausibly plead compliance with § 287. *Arctic Cat Inc. v. Bombardier Recreational Prods., Inc.* 876 F.3d 1350, 1366 (Fed. Cir. 2017) ("*Arctic Cat I*"); *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 950 F.3d 860, 864 (Fed. Cir. 2020) ("*Arctic Cat II*"). It goes without saying, or should, that the patentee must be able to plead compliance with the § 287 marking requirement within the limits of Rule 11 and Rule 26(g) of the Federal Rules of Civil Procedure. VDPP did not do so. It attempted to plead compliance in a wholly conclusory way that Volkswagen readily exposed as inconsistent with the facts. The proposed amended complaint similarly failed to plausibly plead compliance with § 287, making the amendment futile.

The motion for amendment or reconsideration, (Docket Entry No. 37), is denied. The court next turns to Volkswagen's motion to declare this case exceptional.

II. An Exceptional Case under 35 U.S.C. § 285

The patent statute, 35 U.S.C. § 285, provides that a party can recover attorney's fees as a sanction

for litigation in "exceptional" cases—cases based on positions that are weak on the law and facts or conducted in an unreasonable manner. This case presents both grounds for finding it "exceptional" under 35 U.S.C. § 285 and for awarding Volkswagen the reasonable fees it incurred in the defense.

Courts asked to find a patent case exceptional consider the following factors: "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *In re Rembrandt Techs. LP Patent Litigation*, 899 F. 3d 1254, 1277 (Fed. Cir. 2018) (internal citation omitted). The partial list of VDPP's litigation offenses set out above are ample justification for finding this case exceptional.

Many of the positions VDPP took were frivolous and objectively unreasonable. VDPP filed suit seeking future damages and an injunction for an expired patent. VDPP sought past damages knowing that under the settled law, it could not plausibly and in good faith allege marking compliance. VDPP sought relief that was clearly precluded—future damages and a permanent injunction on a patent that had expired a year before, and past damages despite an inability to allege patent marking. VDPP failed to properly disclose the 11 settlement agreements covering the '452 patent that failed to require marking by its licensees. VDPP prolonged the litigation with false statements about its settlement agreements,

despite the fact that many had been signed by VDPP's president.

VDPP's legal theories were also flawed. It responded to Volkswagen's arguments by claiming that as a nonpracticing entity, it did not need to comply with the marking requirement by taking reasonable steps to enforce marking by its licensees. The law is to the contrary. *Arctic Cat I*, 876 F.3d at 1366-68; *Arctic Cat II*, 950 F.3d at 863. VDPP had 11 settlement agreements that granted licenses to the '452 patent with no marking obligation. VDPP could not plead marking compliance with § 287(a), and it did not. VDPP also attempted to respond to Volkswagen's arguments by contending that VDPP's licensees did not admit to making an infringing product. That is both irrelevant and inconsistent with VDPP's allegations that these licensees had settled VDPP's accusations of infringement.

The list goes on. VDPP made sloppy errors, over and over, from obviously incorrect venue allegations, to initial disclosures about an unrelated patent, to serving discovery despite an agreed-upon and court-ordered stay pending resolution of the motion to dismiss. These and other errors made the case even more cumbersome and difficult to handle. Such errors further support a finding of exceptionality. See, e.g., *Iris Connex, LLC v. Dell, Inc.*, 235 F. Supp. 826 (E.D. Tex. 2017).

Courts have also identified repeat litigation filed by a patentee as one indication of exceptionality,

especially when, as here, the plaintiff made repeated settlement demands far less than the costs of defense and unrelated to any damages theory. See, e.g., *Rothschild Connected Devices Innovations, LLC v. Guardian Protection Servs., Inc.*, 858 F.3d 1383, 1389 (Fed. Cir. 2017). VDPP has asserted the '452 patent in 21 cases, across a number of different technologies. If cases involving the '452 patent are added, the number rises to 58 cases. Most settled early, without any merits examination. And on March 18, 2024, shortly before Volkswagen asked this court to find VDPP's litigation conduct in this case exceptional, Unified Patents filed an ex parte reexamination proceeding against the '452 patent.

Volkswagen has shown by a preponderance of the evidence that this case is exceptional. There is a strong need for deterrence, not only of VDPP, but of its counsel. This is not the first time a court has found that VDPP's counsel filed exceptional lawsuits under section 285. Volkswagen has pointed out a number of cases in which courts have awarded attorneys' fees against the patent clients of VDPP's clients. (Docket Entry No. 35 at 18). The grounds ranged from deficient pre-suit investigations, ignoring pleading deficiencies for months after being informed of the error, and inaccurately citing a document either knowingly or without reviewing it. (*Id.*).

In sum, both VDPP and its counsel have made this case exceptional. Their repeated misconduct underscores the need for meaningful deterrence. The remaining issue is the consequence of that finding.

III. The Sanction

Section 285 authorizes an award of attorney's fees against the patentee in an exceptional case. This court also has authority to impose sanctions on counsel for the abusive litigation conduct that enabled VDPP to file and pursue this exceptional case. See 28 U.S.C. § 1927; *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

The court finds VDPP and its counsel, William P. Ramey, III of Ramey LLP, jointly and severally liable for the reasonable attorneys' fees that Volkswagen incurred in defending this case. No later than July 29, 2024, Volkswagen must submit proof of the amount and reasonableness of the fees it incurred in support of its request for fees. VDPP and its counsel may respond no later than August 19, 2024.

SIGNED on July 11, 2024, at Houston, Texas

Lee H. Rosenthal
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VDPP, LLC, Plaintiff,	§	
v.	§	CASE NO. H-23-2961
VOLKSWAGEN GROUP OF AMERICA, INC., Defendant.	§	

FINAL JUDGMENT

For the reasons set out in this court's Memorandum and Order entered on March 27, 2024, this civil action is dismissed with prejudice. This is a final judgment.

SIGNED on March 27, 2024, at Houston, Texas

Lee H. Rosenthal
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VDPP, LLC, Plaintiff,	§	
v.	§	CASE NO. H-23-2961
VOLKSWAGEN GROUP OF AMERICA, INC., Defendant.	§	

MEMORANDUM AND OPINION

VDPP, LLC sued Volkswagen Group of America, Inc. for patent infringement. Volkswagen moved to dismiss, and VDPP responded and moved in the alternative for leave to file an amended complaint. Based on the pleadings, the motion and responses, the record, and the applicable law, the court grants the motion to dismiss, (Docket Entry No. 13), with prejudice, and denies the motion for leave to amend, (Docket Entry No. 22), because amendment would be futile. The reasons for these rulings are set out below.

I. Background

VDPP is the owner by assignment of U.S. Patent No. 9,426,452 ("the '452 Patent").(Docket Entry No. 1 ¶ 6). The '452 Patent, dated August 23,

2016, and titled "Faster State Transitioning for Continuous Adjustable 3Deeps Filter Spectacles Using Multi-Layered Variable Tint Materials," claims an electrically controlled spectacle frame and optoelectronic lenses housed in eyeglass frames. (Docket Entry Nos. 1 ¶ 7; 1-1 at 2). The invention related to a system called 3Deeps, which allowed users to use the spectacles to see movies with three-dimensional effects. The '452 Patent expired on January 2, 2022. The '452 Patent was the final patent in a series of continuing applications dating back to U.S. Patent No. 7,030,902, filed on January 22, 2002. (Docket Entry Nos. 1-1 at 2; 13 at 8). See 35 U.S.C. § 154(a)(2) (specifying a patent's term as "ending 20 years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier filed application . . . , from the date on which the earliest such application was filed"). (Docket Entry No. 1-1 at 2). Because the '452 Patent was filed as a continuing application, the '452 Patent expired in January 2022 on the date the '902 Patent expired.

VDPP filed this lawsuit on August 11, 2023, and effected service of process on August 25, 2023. (Docket Entry Nos. 1, 8). VDPP alleged that Volkswagen "maintains, operates, and administers systems, products, and services in the field of motion pictures that infringes one or more of [sic] claims of the '452 Patent." (Docket Entry No. 1 ¶ 8). VDPP also claimed indirect and willful infringement because Volkswagen "has and continues to induce

infringement" and "contributorily infringe[s]" on the Patent. (Docket Entry No. 1 ¶¶ 10–11). VDPP alleged that Volkswagen has known of the '452 Patent and the underlying technology "from at least the filing date of the lawsuit," but "reserves the right to amend [this date] if discovery reveals an earlier date of knowledge." (Docket Entry No. 1 ¶¶ 10, 11, nn. 1–2).

Volkswagen has moved to dismiss under Rule 12(b)(3) for improper venue and Rule 12(b)(6) for failure to state a claim based on VDPP's failure to comply with the patent marking statute, 35 U.S.C. § 287(a). (Docket Entry No. 13 at 11–17). In its reply, VDPP dropped its allegations of indirect and willful infringement but maintained its other infringement claims. (Docket Entry No. 22 at 8–10).

II. The Applicable Legal Standards

A. Rule 12(b)(3)

Federal Rule of Civil Procedure 12(b)(3) allows a defendant to move to dismiss for improper venue. "Once a defendant files a Rule 12(b)(3) motion challenging venue, the burden of sustaining venue lies with the plaintiff." *Fernandez v. Soberon*, No. CIV.A. H-13-0325, 2013 WL 2483345, at *2 (S.D. Tex. June 10, 2013). "In deciding whether the venue is proper, the court may look at evidence in the record beyond those facts alleged in the complaint and its admissible attachments." *AllChem Performance Prod., Inc. v. Aqualine Warehouse, LLC*, 878 F. Supp. 2d 779, 788 (S.D. Tex. 2012). "The court must accept as true all the

allegations in the complaint and resolve all factual conflicts in favor of the plaintiff." *Id.*

For most claims brought in federal court, "[t]he general venue statute, 28 U.S.C. § 1391, governs a plaintiff's choice of venue." *Id.* Patent infringement claims are an exception. Venue for patent infringement claims is controlled by 28 U.S.C. § 1400(b). *In re Cray*, 871 F.3d 1355, 1360 (Fed. Cir. 2017) (("Section 1400(b) is unique to patent law and constitutes the exclusive provision controlling venue in patent infringement proceedings.") (cleaned up) (citing *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 581 U.S. 258, 259 (2017))). "Federal Circuit law, rather than regional circuit law, governs [the court's] analysis of what § 1400(b) requires." *Id.*

Under the patent venue statute, "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b)."[A] domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute." *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 581 U.S. 258, 262 (2017). Under the statute, "a regular and established place of business must be (1) a physical place in the district; (2) regular and established; and (3) the place of the defendant." *Tiare Tech., Inc. v. Dine Brands Global, Inc.*, No. 2:22-CV-00490-JRG-RSP, 2024 WL 607407, at *3 (E.D. Tex. Jan. 4, 2024) (quoting *In re Cray*, 871 F.3d at 1360) (internal quotation marks omitted).

B. Rule 12(b)(6)

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant unlawfully harmed me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556).

To withstand a Rule 12(b)(6) motion, a complaint must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Lincoln v. Turner*, 874 F.3d 833, 839 (5th Cir. 2017) (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (alteration in original) (quoting *Twombly*, 550 U.S. at 557). "A

complaint 'does not need detailed factual allegations,' but the facts alleged 'must be enough to raise a right to relief above the speculative level.'" *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 765 (5th Cir. 2019) (quoting *Twombly*, 550 U.S. at 555). "Conversely, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (alterations omitted) (quoting *Twombly*, 550 U.S. at 558).

A court reviewing a motion to dismiss under Rule 12(b)(6) may consider "(1) the facts set forth in the complaint, (2) documents attached to the complaint, and (3) matters of which judicial notice may be taken under Federal Rule of Evidence 201." *Inclusive Cmtys Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 900 (5th Cir. 2019).

III. Analysis

A. Improper Venue under Rule 12(b)(3)

VDPP alleges that Volkswagen is incorporated in Delaware and has a "regular and established place of business located at 1 Lone Star Pass, San Antomio [sic], Texas 78264." (Docket Entry No. 1 ¶ 2). Both statements are incorrect and neither make venue proper in the Southern District of Texas.

Volkswagen is a New Jersey corporation with its principal place of business in Reston, Virginia. It does not have a regular and established business at the location VDPP alleges in San Antonio. (Docket Entry No. 13 at 16–17). VDPP compounds its error by filing this case in the Southern District of Texas; San Antonio is in the Western District. See 28 U.S.C. § 124(d)(4) (establishing and defining the San Antonio Division of the Western District of Texas); *Gov. of Canal Zone v. Burjan*, 596 F.2d 690, 693 (5th Cir. 1979) ("In addition, this court has consistently adhered to the rule that venue as a jurisdictional fact is a proper subject for judicial notice.") (collecting cases). Although Volkswagen concedes "that it has an established place of business in Houston, Texas," VDPP did not plead venue based on Volkswagen's business operations in the Southern District. (Docket Entry No. 13 at 17, n. 4).

VDPP acknowledges that there was "a typographical error in the original complaint" but argues that given Volkswagen's admission of having a place of business in Houston, venue is proper. (Docket Entry No. 22 at 10). The court agrees that given Volkswagen's admission, venue could be proper if the defect in pleading was cured by amendment. However, because VDPP has failed to state a claim under Rule 12(b)(6), amendment would be futile on grounds other than improper venue.

B. Failure to State a Claim under 12(b)(6)

1. Patent Marking under 35 U.S.C. § 287(a)

Volkswagen argues that VDPP has not stated a claim because it failed to provide constructive or actual notice of alleged infringement before the '452 Patent expired and cannot obtain relief for infringement of an expired patent. The court agrees.

The patent marking statute, 35 U.S.C. § 287(a), sets out the requirements for obtaining pre-suit damages in an infringement action. "[A] patent owner is 'entitled to damages from the time when it either began marking its product in compliance with section 287(a)[, i.e., by providing constructive notice,] or when it actually notified the accused infringer of its infringement,' such as by filing suit." *Denneroll Holdings Pty Ltd. v. Chirodesign Grp., LLC*, No. 4:15-CV-740, 2016 WL 705207, at *7 (S.D. Tex. Feb. 23, 2016) (quoting *Am. Med. Sys., Inc. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1537 (Fed. Cir. 1993)). "If there is no marking, actual notice of infringement must consist of an 'affirmative communication of a specific charge of infringement by a specific accused product or device . . . It is irrelevant . . . whether the defendant knew of the patent or knew of his own infringement.'" *DynaEnergetics Europe GmbH v. Hunting Titan, Inc.*, 629 F. Supp. 3d 548, 591 (S.D. Tex. 2022) (quoting *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994)). Without this affirmative communication, "damages are limited to those incurred after the date the suit was filed." *Id.*;

35 U.S.C. § 287(a) ("Filing of an action for infringement shall constitute such notice."). "A patentee's licensees must also comply with § 287." *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 950 F.3d 860, 864 (Fed. Cir. 2020) ("*Arctic Cat II*").

The § 287(a) marking and notice requirements "do not apply where the patent is directed to a process or method." *Am. Med. Sys., Inc. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1538 (Fed. Cir. 1993) (collecting cases). "Where the patent contains both apparatus and method claims, however, to the extent that there is a tangible item to mark by which notice of the asserted method claims can be given, a party is obliged to do so if it intends to avail itself of the constructive notice provisions of section 287(a)." *Id.* at 1538–39.

The '452 Patent is subject to the requirements of § 287(a). This patent contains one "system" claim and three "apparatus" claims. (Docket Entry No. 1-1 at 55–56). VDPP alleges infringement related to all four claims but asserts only the second claim (an apparatus claim) in its "Patent Claims Analysis." (Docket Entry Nos. 1 ¶¶ 10–11; 1-2 at 2–7). Whether or not VDPP alleges infringement of all four claims or just of Claim 2, the § 287(a) marking and notice requirements apply to both VDPP and its licensees because the '452 Patent claims an apparatus. See *Am. Med. Sys., Inc.*, 6 F.3d at 1538–39.

When § 287(a) applies, "an alleged infringer who challenges the patentee's compliance with § 287 bears an initial burden of production to articulate the

products it believes are unmarked 'patented articles' subject to § 287." *DynaEnergetics*, 629 F. Supp. 3d at 591 (quoting *Arctic Cat Inc. v. Bombardier Recreational Prods., Inc.* 876 F.3d 1350, 1366 (Fed. Cir. 2017) ("*Arctic Cat I*")). This burden of production, "not one of persuasion or proof," is a "low bar." *Arctic Cat I*, 876 F.3d at 1368. "The alleged infringer need only put the patentee on notice that he or his authorized licensees sold specific unmarked products which the alleged infringer believes practice the patent." *Id.* The patentee then "bears the burden of pleading and proving he complied with § 287(a)'s marking requirement." *DynaEnergetics*, 629 F. Supp. 3d.

As the alleged infringer challenging VDPP's compliance with § 287, Volkswagen has the initial burden to put VDPP on notice of its sale of unmarked products that use the '452 Patent. Volkswagen meets this low bar. Volkswagen identifies several VDPP lawsuits against alleged infringers of the '452 Patent, including Facebook's Portal device, Acer's Liquid Smartphones and Iconia One tablets, and TTE Technology's Alcatel mobile phones and tablets. (Docket Entry No. 13 at 13); see *Arctic Cat I*, 876 F.3d at 1368 (finding that the alleged infringer met its burden when it produced a licensing agreement that identified unmarked products that it alleged should have been marked).

By contrast, VDPP fails to plead compliance with the § 287(a) marking requirement. (Docket Entry No. 1). VDPP argues—and seeks to amend its

complaint to add allegations—that it is "a non-practicing entity, with no products to mark." (Docket Entry No. 22-1 at 2). But even if VDPP "never makes or sells a patented article" subject to the marking requirement, the court "may consider whether [VDPP] made reasonable efforts to ensure [its licensees'] compliance with the marking statute" unless the licensing agreement "expressly states that [licensee] had no obligation to mark." *Arctic Cat II*, 950 F.3d at 864. VDPP's assertion that it never made or sold a patented product is therefore irrelevant, and VDPP offers no showing that the settlement agreements contain any such express statement. VDPP settled cases against Facebook, Acer, and TTE Technology, which continue to sell the technology, subject to undisclosed agreement with VDPP. "[C]ourts have previously found that § 287's marking requirement applies to a patentee's authorization of other persons to make and sell patented items in whatever form the authorization was given, regardless of whether the authorizations are settlement agreements, covenants not to sue or licenses." *U.S. Ethernet Innovations, LLC v. Acer, Inc.*, No. 10-CV-724, 2013 WL 4456161, at *8 (C.D. Cal. Aug. 16, 2013). VDPP must make at least a preliminary showing that these entities marked the patent, but VDPP instead argues incorrectly that it has no such obligation.

In order to obtain pre-suit damages without marking, VDPP must show that it made an affirmative communication to Volkswagen of specific instances of alleged infringement. See

DynaEnergetics, 629 F. Supp. 3d at 591 (quoting *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994)). The only communication VDPP pleads is the filing of this lawsuit. (Docket Entry No. 1 ¶¶ 10, 11, nn. 1–2). VDPP cannot recover damages against Volkswagen for alleged infringement before the date VDPP filed this lawsuit. See *DynaEnergetics*, 629 F. Supp. 3d at 591–92 (S.D. Tex. 2022) ("Absent such a communication, damages are limited to those incurred after the date the suit was filed" (citing 35 U.S.C. § 287(a))).

Nor can VDPP recover damages incurred after it filed this lawsuit. A patentee cannot recover damages—equitable or monetary—on an expired patent. See *Lans v. Dig. Equip. Corp.*, 252 F.3d 1320, 1328 (Fed. Cir. 2001) (finding that the district court correctly granted the alleged infringer's motion to dismiss because the patentee "did not inform the [alleged infringer] of infringement before the expiration of [the patent at issue], § 287(a) prevents [the patentee] from collecting damages from the [alleged infringer]," and "the district court cannot enjoin the [alleged infringer] from infringing an expired patent."). The '452 Patent had expired 18 months before VDPP filed this lawsuit. See 35 U.S.C. § 154(a)(2); (Docket Entry Nos. 1-1 at 2; 13 at 2). VDPP does not dispute this.

VDPP has not shown that its licensees marked products covered by the '452 Patent. Nor has VDPP shown that it gave Volkswagen actual notice of its

alleged infringement before the '452 Patent expired. VDPP lacks a basis for its patent infringement claims. See *e-Watch Inc. v. Avigilon Corp.*, No. H–13–0347, 2013 WL 5231521, at *3 (S.D. Tex. Sept. 16, 2013) ("The Federal Circuit . . . specifically allows addressing the § 287(a) issue through a motion to dismiss.") (dismissing a claim for pre-suit damages under Rule 12(b)(6)); *Lans*, 252 F.3d at 1328 (affirming a Rule 12(b)(6) dismissal on the same grounds under § 287(a)). The court grants Volkswagen's motion to dismiss based on VDPP's failure to comply with § 287(a).

2. Indirect and Willful Infringement

"Whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. § 271(b). Under § 271(c), "[c]ontributory infringement occurs if a party sells or offers to sell, a material or apparatus for use in practicing a patented process, and that 'material or apparatus' is material to practicing the invention, has no substantial non-infringing uses, and is known by the party 'to be especially made or especially adapted for use in an infringement of such patent.'" *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1337 (Fed. Cir. 2012) (quoting 35 U.S.C. § 271(c)). "To state a claim for contributory infringement, therefore, a plaintiff must, among other things, plead facts that allow an inference that the components sold or offered for sale have no substantial non-infringing uses." *Id.* To assert a claim of willful infringement, the patent holder must allege

facts that allow an inference "(1) that the accused infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent; and (2) that this objectively defined risk was either known or so obvious that the accused infringer should have known about it." *e-Watch Inc.*, 2013 WL 5231521, at *2 (quoting *K-TEC, Inc. v. Vita-Mix Corp.*, 696 F.3d 1364, 1378 (Fed. Cir. 2012)) (internal quotation marks omitted).

VDPP alleges that Volkswagen indirectly infringes the '452 Patent by inducing its customers or customers of related companies to infringe or by contributing to their infringement. (Docket Entry No. 1 at ¶¶ 10–11). VDPP alleges that Volkswagen "actively encouraged or instructed others . . . on how to use its products and services" that VDPP asserts are related to the '452 Patent. (*Id.*). These conclusory statements are insufficient to provide Volkswagen fair notice of the indirect and willful infringement claims. And, as Volkswagen notes, VDPP abandoned its allegations of indirect and willful infringement in its response to Volkswagen's motion to dismiss and in VDPP's proposed amended complaint. (Docket Entry No. 23 at 6); see (Docket Entry Nos. 22 at 6; 22-1). Although VDPP sets out a brief statement of law on indirect and willful infringement in its response, VDPP's proposed amended complaint "eliminate[s] allegations of willful and indirect infringement." (Docket Entry No. 22 at 8, 10). Because VDPP fails to allege a basis for its indirect and willful infringement claims and appears to forego the claims in response to

Volkswagen's motion, the court dismisses VDPP's claims of indirect and willful infringement.

C. Motion for Leave to Amend

In VDPP's response to the motion to dismiss, it asks in the alternative for leave to amend. (Docket Entry No. 22 at 10). Although leave of court to amend pleadings "shall be freely given when justice requires," Fed. R. Civ. P. 15(a), the decision to grant or deny leave "is entrusted to the sound discretion of the district court," *Pervasive Software Inc. v. Lexware GmbH & Co. KG*, 688 F.3d 214, 232 (5th Cir. 2012) (internal quotation marks omitted). When reviewing a motion to amend pleadings under Rule 15(a), a district court "should consider factors such as 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed undue prejudice to the opposing party, and futility of amendment.'" *In re Am. Int'l Refinery, Inc.*, 676 F.3d 455, 466–67 (5th Cir. 2012) (quoting *In re Southmark Corp.*, 88 F.3d 311, 315 (5th Cir. 1996)) (internal quotation marks omitted). A proposed amendment is futile if "the amended complaint would fail to state a claim upon which relief can be granted." *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000).

VDPP's proposed amended complaint does cure the deficiencies and state a claim for relief, because VDPP has not alleged facts showing patent marking before the patent expired. The court denies VDPP's motion for leave to amend.

IV. Conclusion

Based on the above, Volkswagen's motion to dismiss, (Docket Entry No. 13), is granted, with prejudice. VDPP's motion for leave to amend, (Docket Entry No. 22), is denied because amendment would be futile. Final judgment is separately entered.

SIGNED on March 27, 2024, at Houston, Texas

Lee H. Rosenthal
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

VDPP, LLC, **Plaintiff,** **v.** **VOLKSWAGEN GROUP OF AMERICA, INC.,** **Defendant**	**Case No. 4:23-cv-02961** **Jury Trial Demanded**

NOTICE OF APPEAL

Notice is hereby given that Plaintiff VDPP, LLC in the above-named case, hereby appeals to the United States Court of Appeals for the Federal Circuit from:

- The Memorandum of Decision (Doc. No. 33) granting Defendant, Volkswagen Group of America, Inc.'s Motion to Dismiss (Docket No. 13).
- Final Judgment (Doc. No. 34).
- The Memorandum and Order (Doc. No. 47) granting Defendant Volkswagen Group of America, Inc.'s Motion for Attorneys' Fees

(Doc. No. 35) finding Plaintiff VDPP, LLC and Willaim P. Ramey, III of Ramey LLP jointly and severally liable and denying Plaintiff's Motion to Amend the Judgment (Doc. No. 37).

- Any subsequent order that fixes the attorneys' fees assessed.[1]

Respectfully submitted,

RAMEY LLP

/s/ William P. Ramey, III
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(713) 426-3923 (telephone)
(832) 900-4941 (fax)

Attorneys for VDPP, LLC

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2024, a true and correct copy of the foregoing document was served

[1] Any subsequent order will be addressed with an amended notice of appeal but this notice is being filed within 30 days of the denial of the motion to amend in an abundance of caution.

electronically, via ECF, on all counsel of record who are deemed to have consented to such service under the Court's local rules.

/s/ William P. Ramey, III
William P. Ramey, III

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

VDPP, LLC, **Plaintiff,** **v.** **VOLKSWAGEN GROUP OF AMERICA, INC.,** **Defendant**	**Case No. 4:23-cv-02961** **Jury Trial Demanded**

AMENDED NOTICE OF APPEAL

Notice is hereby given that Plaintiff VDPP, LLC in the above-named case, hereby appeals to the United States Court of Appeals for the Federal Circuit from:

- The Memorandum of Decision (Doc. No. 33) granting Defendant, Volkswagen Group of America, Inc.'s Motion to Dismiss (Docket No. 13).

- Final Judgment (Doc. No. 34).

- The Memorandum and Order (Doc. No. 47) granting Defendant Volkswagen Group of America, Inc.'s Motion for Attorneys' Fees (Doc. No. 35) finding Plaintiff VDPP, LLC

and Willaim P. Ramey, III of Ramey LLP jointly and severally liable and denying Plaintiff's Motion to Amend the Judgment (Doc. No. 37).

- The Memorandum and Order (Doc. No. 52) granting fee award.

Respectfully submitted,

RAMEY LLP

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Attorneys for VDPP, LLC

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2024, a true and correct copy of the foregoing document was served electronically, via ECF, on all counsel of record who are deemed to have consented to such service under the Court's local rules.

/s/ William P. Ramey, III
William P. Ramey, III

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

VDPP, LLC, **Plaintiff,** **v.** **VOLKSWAGEN GROUP OF AMERICA, INC.,** **Defendant**	**Case No. 4:23-cv-02961** **Jury Trial Demanded**

CORRECTED AMENDED NOTICE OF APPEAL

Notice is hereby given that Plaintiff VDPP, LLC and William P. Ramey, III, in the above-named case, hereby appeals to the United States Court of Appeals for the Federal Circuit from:

- The Memorandum of Decision (Doc. No. 33) granting Defendant, Volkswagen Group of America, Inc.'s Motion to Dismiss (Docket No. 13).
- Final Judgment (Doc. No. 34).
- The Memorandum and Order (Doc. No. 47) granting Defendant Volkswagen Group of America, Inc.'s Motion for Attorneys' Fees

(Doc. No. 35) finding Plaintiff VDPP, LLC and Willaim P. Ramey, III of Ramey LLP jointly and severally liable and denying Plaintiff's Motion to Amend the Judgment (Doc. No. 37).

- The Memorandum and Order (Doc. No. 52) granting fee award.

Respectfully submitted,

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Attorneys for VDPP, LLC and William P. Ramey, III

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2024, a true and correct copy of the foregoing document was served electronically, via ECF, on all counsel of record who are deemed to have consented to such service under the Court's local rules.

/s/ William P. Ramey, III
William P. Ramey, III

APPENDIX I

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

VDPP, LLC,
Plaintiff-Appellant

v.

VOLKSWAGEN GROUP OF AMERICA, INC.,
Defendant-Appellee

2024-2226

Appeal from the United States District Court for the Southern District of Texas in No. 4:23-cv-02961, Judge Lee H. Rosenthal.

ON MOTION

Before REYNA, LINN, and STOLL, Circuit Judges.
PER CURIAM.

ORDER

VDPP, LLC moves[1] for relief from enforcement of the judgment. ECF Nos. 12 and 15. Volkswagen Group of America, Inc. responds. VDPP replies.

The district court set a bond in the amount of $249,602.32, due December 23, 2024, and stayed enforcement of the judgment until that date. It denied requests to stay discovery during that time, to set a $0.00 bond, or to accept an alternative bond constituting purported evidence of a retirement account of VDPP's attorney capable of satisfying the judgment. Movant(s) now seek that relief from this court or to set a bond of 10% or waive it entirely.

Rule 8(a)(2) of the Federal Rules of Appellate Proce-dure authorizes this court to grant a stay pending appeal. We consider four factors: "(1) whether the [movant] is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio v. Env't Prot. Agency*, 603 U.S. 279, 291 (2024) (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)); see also *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512–13 (Fed. Cir. 1990). On the basis of the papers submitted, we cannot

[1] The motion(s) purport to be made also on behalf of VDPP's attorney, William P. Ramey, III. Separately before the court is an opposed motion to amend the caption to include Mr. Ramey as an appellant. See ECF No. 21. The court will address that motion in due course. The briefing on this motion to stay, filed at least on behalf of VDPP, is sufficient for the court to decide ECF Nos. 12 and 15.

say movant(s) have shown entitlement to the re lief requested, and therefore deny the motion.

IT IS ORDERED THAT:

ECF Nos. 12 and 15 are denied.

APPENDIX J

17 U.S.C. § 505 Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

APPENDIX K

28 U.S. Code § 1254 - Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX L

28 U.S. Code § 1291 - Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

APPENDIX M

28 U.S. Code § 1294 - Circuits in which decisions reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

APPENDIX N

28 U.S.C.A. § 1295 Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

(1) of an appeal from a final decision of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents or plant variety protection;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Court of Federal Claims;

(4) of an appeal from a decision of--

(A) the Patent Trial and Appeal Board of the United States Patent and Trademark Office with respect to a patent application, derivation proceeding, reexamination, post-grant review, or inter partes review under title 35, at the instance of a party who exercised that party's right to participate in the applicable proceeding before or appeal to the Board, except that an applicant or a party to a derivation proceeding may also have remedy by civil action pursuant to section 145 or 146 of title 35; an appeal under this subparagraph of a decision of the Board with respect to an application or derivation proceeding shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;

(B) the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or

(C) a district court to which a case was directed pursuant to section 145, 146, or 154(b) of title 35;

(5) of an appeal from a final decision of the United States Court of International Trade;

(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States (relating to importation of instruments or apparatus);

(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 7107(a)(1) of title 41;

(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978; and

(14) of an appeal under section 523 of the Energy Policy and Conservation Act.

(b) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Court of Appeals for the Federal Circuit for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which the head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 7107(b) of title 41. The head of each executive department or agency shall make any referral under this section within one hundred and twenty days after the receipt of a copy of the final appeal decision.

(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in section 7107(b) of title 41. The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

APPENDIX O

28 U.S.C.A. § 1331 Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

APPENDIX P

28 U.S.C.A. § 1338 Patents, plant variety protection, copyrights, mask works, designs, trademarks, and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights. For purposes of this subsection, the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.

(c) Subsections (a) and (b) apply to exclusive rights in mask works under chapter 9 of title 17, and to exclusive rights in designs under chapter 13 of title 17, to the same extent as such subsections apply to copyrights.

APPENDIX Q

28 U.S.C.A. § 1927 Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

APPENDIX R

28 U.S.C.A. § 2107 Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is--

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds--

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

APPENDIX S

28 U.S. Code § 2071 Rule-making power generally

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

(b) Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment. Such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)

(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit.

(2) Any other rule prescribed by a court other than the Supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

APPENDIX T

35 U.S.C.A. § 285 Attorney fees

The court in exceptional cases may award reasonable attorney fees to the prevailing party.

APPENDIX U

Fed.R.App.P Rule 2. Suspension of Rules

(a) In a Particular Case. On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(b) In an Appellate Rules Emergency.

(1) Conditions of Emergency. The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(2) Content. The declaration must:

(A) designate the circuit or circuits affected; and

(B) be limited to a stated period of no more than 90 days.

(3) Early Termination. The Judicial Conference may terminate a declaration for one of more circuits before the termination date.

(4) Additional Declarations. The Judicial Conference may issue additional declarations under this rule.

(5) Proceedings in a Rules Emergency. When a rules emergency is declared the court may:

(A) suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2); and

(B) order proceedings as it directs**.**

APPENDIX V

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. §1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a

joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment—or the appealable order—from which the appeal is taken; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) An order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

(7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.

(8) Forms 1A and 1B in the Appendix of Forms are suggested forms of notices of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk sends copies, with the date of sending. Service is sufficient despite the death of a party or the party's counsel.

(e) Payment of Fees. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

APPENDIX W

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

APPENDIX X

Rule 26(b)(1) Computing and Extending Time

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

APPENDIX Y

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests,

responses, objections, and motions under Rules 26 through 37.

APPENDIX Z

Fed. R. Civ. P. 12(b)(6)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

APPENDIX AA

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay

the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) *Sanctions Sought in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in the District Where the Action Is Pending.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)—(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) *In General.*

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable,

unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)—(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

APPENDIX BB

Rule 10. Considerations Governing Review on Writ of Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be,

> settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

APPENDIX CC

Rule 12. Review on Certiorari: How Sought; Parties

6. All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by notifying the Clerk promptly, with service on the other parties, of an intention to remain a party. All parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents, with the following exception: A response of a party aligned with petitioner below who supports granting the petition shall be filed within 30 days after the case is placed on the docket, and that time will not be extended. Counsel for such respondent shall ensure that counsel of record for all parties receive notice of its intention to file a brief in support within 20 days after the case is placed on the docket. A respondent not aligned with petitioner below who supports granting the petition, or a respondent aligned

with petitioner below who takes the position that the petition should be denied, is not subject to the notice requirement and may file a response within the time otherwise provided by Rule 15.3 . Parties who file no document will not qualify for any relief from this Court.

APPENDIX DD

Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e. g.*, 28 U. S. C. §2101 (c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the

denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

4. A cross petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5 . However, a conditional cross petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be filed with the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. The application must clearly identify each party for whom an extension is being sought, as any extension that might be granted would apply solely to the party or parties named in the application. For the time and manner of presenting the application, see Rules 21 , 22 , 30 , and 33.2 . An application to extend the time to file a petition for a writ of certiorari is not favored.

APPENDIX EE

Rule 29.6 Filing and Service of Documents; Special Notifications; Corporate Disclosure Statement

6. Every document, except a joint appendix or amicus curiae brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock. If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document. If a statement has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier statement appeared in a document prepared under Rule 33.2), and only amendments to the statement to make it current need be included in the document being filed. In addition, whenever there is a material change in the identity of the parent corporation or publicly held companies that own 10% or more of the corporation's stock, counsel shall promptly inform the Clerk by letter and include, within that letter, any amendment needed to make the statement current.