

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

CLARUS DATA, INC. D/B/A KORCETT  
HOLDINGS, INC., KHI-TW, LLC,  
and NETWORK APPAREL GROUP, LP,

Plaintiffs,

V.

TIME WARNER CABLE, INC. and  
TIME WARNER CABLE TEXAS, LLC,

Defendants.

Civil Action No. 6:15-CV-00139-WSS-JCM

**PLAINTIFFS' FIRST AMENDED COMPLAINT**

Plaintiffs Clarus Data, Inc. d/b/a Korcett Holdings, Inc., KHI-TW, LLC (Clarus Data, Inc. d/b/a Korcett Holdings, Inc. and KHI-TW, LLC are collectively referred to as “Korcett”), and Network Apparel Group, LP (“Network Apparel”) (collectively, “Plaintiffs”), file this First Amended Complaint against Defendants Time Warner Cable, Inc. (“TWC”), and Time Warner Cable Texas, LLC (“TWC-Texas”) (collectively, “Time Warner”), and allege as follows:

## SUMMARY OF THE CASE

1. This is an action to recover both monetary damages and injunctive relief, as well as other appropriate relief, as a result of Time Warner's infringement of Network Apparel's United States Patent No. 7,631,079, as well as for Time Warner's breach of certain agreements with Korcett, and illegal actions taken by Time Warner. Korcett entered into agreements with Time Warner pursuant to which Korcett provided services to Time Warner, including installing and granting Time Warner permission to use Korcett's proprietary data management technology ("intellectual property"). Time Warner agreed to pay Korcett for its services, and, importantly, also agreed not to use Korcett's proprietary data management technology, which is not

completely coextensive with the invention covered by the '079 Patent, other than as permitted under the agreements. Many of the agreements between Korcett and Time Warner have since terminated. However, Time Warner has continued to use Korcett's proprietary intellectual property in violation of the agreements.

### **PARTIES**

2. Plaintiff Clarus Data, Inc. d/b/a Korcett Holdings, Inc. is a corporation organized under the laws of the State of Texas and having its principal place of business at 13501 Galleria Circle, Suite W-300, Bee Cave, Texas 78738.

3. Plaintiff Network Apparel is a limited partnership organized under the laws of the State of Texas and having its principal place of business at 13501 Galleria Circle, Suite W-300, Bee Cave, Texas 78738.

4. Plaintiff KHI-TW, LLC is a limited liability company organized under the laws of the State of Texas and having its principal place of business at 13501 Galleria Circle, Suite W-300, Bee Cave, Texas 78738.

5. Defendant TWC is a corporation organized under the laws of the State of Delaware, and may be served with process by serving its registered agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange St., Wilmington, Delaware, 19801. TWC does business throughout the United States, including through internet sales, promotional events, and advertising, but advertises a principle place of business at 60 Columbus Circle, New York, New York 10023.

6. Defendant TWC-Texas is a limited liability company organized under the laws of the State of Delaware, and may be served with process by serving its registered agent, CT Corporation System, 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136. TWC-Texas does

business throughout the United States, including through internet sales, promotional events, and advertising, but advertises a principle place of business at 60 Columbus Circle, New York, New York 10023.

#### **JURISDICTION AND VENUE**

7. This action arises under the patent laws of the United States, Title 35 of the United States Code. The Court's jurisdiction over this action is proper under these statutes, including 35 U.S.C. § 271 et seq. and 28 U.S.C. §§ 1331 and 1338(a).

8. The Court has supplemental jurisdiction over the subject matter of Plaintiffs' claims arising under Texas law because Plaintiffs' state-law claims are so related to Plaintiffs' federal-law claims "that they form part of the same case or controversy under Article III of the United States Constitution." *See* 28 U.S.C. § 1367.

9. Upon information and belief, personal jurisdiction exists generally over the Defendants because they have sufficient minimum contacts with the forum as a result of conducting business within the State of Texas and the Western District of Texas, Waco Division. For instance, Defendants intentionally mailed fliers to the Western District of Texas advertising their services and soliciting purchases. Defendants also provide equipment and services to properties within the State of Texas and the Western District of Texas, Waco Division. Personal jurisdiction also exists specifically over Defendants because they make, use, sell, offer to sell, and/or import infringing products within the State of Texas and the Western District of Texas, Waco Division.

10. Upon information and belief, the products at issue in this case are being used at various multi-dwelling units and single-family residential properties within the State of Texas

and the Western District of Texas. Venue is proper in this Court under 28 U.S.C. §§ 1391(b), (c), and (d), as well as 28 U.S.C. § 1400(b).

**FACTS**

11. Plaintiffs repeat and re-allege the allegations in the foregoing paragraphs as though fully set forth herein.

12. Network Apparel is the owner of all rights, title, and interest in and under United States Patent No. 7,631,079 (“the ‘079 Patent”), titled “System and Method of Messaging and Obtaining Message Acknowledgement on a Network,” which duly and legally issued on December 8, 2009. A true and correct copy of the ‘079 Patent is attached hereto as **Exhibit A.**,

13. The ‘079 Patent is valid and enforceable.

14. On information and belief, all requisite maintenance fees have been paid, and Network Apparel has complied with the requirements of 35 U.S.C. § 287.

15. Time Warner is a telecommunications company that provides television, internet, and phone services to a variety of customers, including individual residences and MDU properties such as apartment complexes and dormitories.

16. Time Warner provides services that allow the managers of MDU properties to suspend, slow-down, or resume internet services and send out customized communications, such as emails and/or text messages to residents, among other features.

17. Specifically, and for example, on information and belief, Time Warner’s services allow the MDU property manager to send a message to a resident who is delinquent on rent payments and reduce the internet bandwidth speed of that resident until the past-due rent is paid.

18. Further, and for example, on information and belief, Time Warner’s services allow the MDU property manager to send messages, including, without limitation, to one or

more residents relating to inappropriate network use, such as potential copyright infringement, pursuant to the Digital Millennium Copyright Act's "safe-harbor" provision.

19. On information and belief, the system components and functionality of systems offered by Time Warner satisfy each and every element of at least one apparatus claim of the '079 Patent, as such elements are believed to be applied according to their plain and ordinary meaning, or as properly construed by this Court under prevailing law.

20. On information and belief, the system components and functionality of systems offered by Time Warner include at least a network management device attached to a wide area network.

21. On information and belief, the system components and functionality of systems offered by Time Warner include at least a network management device attached to a limited area network, which is capable of connective network devices identified by a unique attribute to the network management device

22. On information and belief, the system components and functionality of systems offered by Time Warner include at least a controller attached to a network management device.

23. On information and belief, the system components and functionality of systems offered by Time Warner include at least a controller that authenticates a particular network device identified by its unique attribute.

24. On information and belief, the system components and functionality of systems offered by Time Warner include at least a controller which, responsive to authenticating a particular network device identified by its unique attribute, creates a first access rule within a network management device for providing a first level of wide area network access for the particular network device.

25. On information and belief, the system components and functionality of systems offered by Time Warner include at least a network management device that provides a first level of access to a wide area network from a limited area network for a particular network device pursuant to a first access rule.

26. On information and belief, the system components and functionality of systems offered by Time Warner include at least a controller that creates a second access rule—responsive to a message sent to a particular network device identified by its unique attribute—for providing a second level of wide area network access for the particular network device within a network management device.

27. On information and belief, the system components and functionality of systems offered by Time Warner effect at least a changing of the level of access for a particular network device identified by its unique access to a wide area network, from a first level of access to a second level of access, pursuant to a second access rule.

28. On information and belief, the system components and functionality of systems offered by Time Warner includes a network management device that at least provides a second level of access to a wide area network from a limited area network pursuant to a second access rule until a message sent to a particular network device is acknowledged by a user of the particular network device.

29. On information and belief, the system components and functionality of systems offered by Time Warner includes at least a network management device which, responsive to a user acknowledging a message, effects a return from a second level of access to a first level of access to a wide area network from a limited area network pursuant to a first access rule.

30. On information and belief, the system components, component functionalities, and methods carried out through use of Time Warner's systems satisfy each and every element of at least one process claim of the '079 patent, as such elements are believed to be applied according to their plain and ordinary meaning, or as properly construed by this Court under prevailing law.

31. On information and belief, Time Warner has the assistance of both inside and outside patent counsel, itself holds numerous patents, and has been involved in patent litigation, both as a plaintiff and as a defendant.

32. On information and belief, Time Warner either has known of the '079 Patent, or has been "willfully blind" to its existence since at least near the time that it issued.

33. Time Warner actively promotes the sales to, and use by, third parties, including the managers of MDU properties, of Time Warner's "Community Solutions." *See, e.g.,* [www.twcmdu.com/](http://www.twcmdu.com/).

34. On information and belief, Time Warner sells components of, and/or accessories for use with, its "Community Solutions" for the MDU market, which are not a staple article and have no substantial non-infringing use.

35. Time Warner is liable for direct and/or indirect infringement of one or more claims of the '079 Patent by virtue of its making, using, selling, offering for sale, and/or importing in or into the United States, without authority, products or substantial portions of products, that fall within the scope of one or more of the claims of the '079 Patent, including the making, using, selling, offering for sale, and/or importing in or into the United States of one or more of its solutions, including its messaging and bandwidth management services, for the MDU and individual resident markets and/or substantial portions of such products.

36. Korcett is a Texas company that provides distribution services to facilitate internet service providers' ("ISPs") delivery of internet and media services to customers. Korcett specifically works with ISPs to provide service to MDUs, such as apartments, dormitories, and multi-family housing.

37. Korcett entered into several agreements with Time Warner and other entities related to Time Warner that provide internet service. Pursuant to these contracts, Korcett provided distribution services and the use of hardware and software to Time Warner.

38. The services provided under the agreements included installing Korcett's proprietary intellectual property and granting permission to Time Warner to use the technology at specific MDU sites. In exchange, Time Warner agreed to pay Korcett for its services and the use of Korcett's technology.

39. The agreements include provisions defining the scope of Korcett's intellectual property:

**IP Rights** means all forms of intellectual property rights and protections, whether currently existing or hereafter developed or acquired, and whether now known or hereafter recognized, including all right, title and interest arising under Law, in and to all: (i) patents and all filed, pending or potential applications for **patents, including any patent disclosure, reissue, reexamination, division, continuation or** continuation-in-part applications now or hereafter filed; (ii) trade secret rights and equivalent rights and all goodwill associated therewith; (iii) copyrights, copyright registrations, design registrations and applications therefor, moral rights, other literary property or authors' rights, whether or not protected by copyright or as a mask work; and (iv) proprietary indicia, trademarks, service marks, trade names, trade dress, logos, symbols, know-how, technical information, domain names, rights in databases, logos and/or brand names.

...

KHI Data Management Technology means all software, hardware, equipment, facilities, equipment configurations, network design, operations, connectivity and support installed, deployed or provided by



KHI to provide the Services, including all updates, modifications, and changes thereto made available by KHI to any customer during the Term, excluding the Company Server.

### Section 3.1

40. The agreements also state that Time Warner does not acquire any right, title, ownership, or interest in Korcett's intellectual property:

Right to Use KHI Data Management Technology. KHI hereby grants to Company a non-exclusive, irrevocable (except as provided in this Agreement), non-transferable (except as provided in this Agreement), non-sublicensable, royalty-free, license during the Term to (i) use the KHI Data Management Technology, including the software contained therein, that Company will have access to in connection with its provision of the Data Services to residents at the Property and (ii) use and copy the Documentation with respect to the Property as reasonably necessary to exercise the license granted in clause (i) above and to use the Services. No other license agreement, terms of use, use restrictions or other conditions for the subject matter covered by this Agreement, regardless of whether executed by Company contemporaneously herewith, or purporting to become effective upon opening the delivery wrapper or via electronic acceptance prior to or after access, shall alter, supplement, modify or amend the terms of the licenses and rights granted pursuant to this Section or specifically in this Agreement.

Section 3.5. The agreements further state that:

Subject to the license and other use rights set forth in this Agreement, Company acknowledges and agrees that by reason of this Agreement Company does not acquire any, right, title, ownership or interest in the KHI Data Management Technology and its underlying technology, whether original or derivative. Company may access the software associated with the KHI Data Management Technology only during the Term and only in furtherance of this Agreement. Company shall not reverse engineer, decompile, disassemble, or otherwise attempt to discover the source code of any portion of the KHI Data Management Technology.

Section 6.1. On information and belief, the referenced, relevant sections are identical or nearly identical in each of the breached agreements.

41. Further, Time Warner agreed that it would not use Korcett's proprietary intellectual property in any manner other than as permitted under the agreements.

42. At multiple MDU projects, Time Warner has impermissibly removed Korcett from the project and stopped paying Korcett amounts due under the agreements, in violation of section 4.1, thereby injuring Korcett. Time Warner has therefore breached the contracts by improperly terminating them prior to the expiration of their initial terms, in violation of section 2.1. Notably, regardless of the breaches, Time Warner's promise to not use Korcett's intellectual property, except as permitted by Korcett, survives the termination of the agreements.

43. In addition, Time Warner has replaced Korcett on certain properties covered by an agreement prior to the expiration of the initial term. On these properties, the services previously provided by Korcett are provided by Time Warner or a third party operating pursuant Time Warner's instructions. These services provided by Time Warner, or the third party on behalf of Time Warner, utilize Korcett's intellectual property. Therefore, Time Warner has breached the agreements by impermissibly using Korcett's intellectual property.

44. Korcett performed its obligations under the agreements until Time Warner breached the agreements by removing Korcett's equipment from the properties, which excused any further performance by Korcett.

45. At this time, without discovery, on information and belief, Time Warner has breached agreements with Korcett for the following properties: Quarters 4 Nueces, University Estates, Pembroke Pointe, Camden Miramar, College Inn, Cardinal Village, Legacy Landing Apartment, Campus Court at Red Mile, Axis West Campus, Quarters 1 – Sterling, Quarters 5 – Cameron, The Edge/The Zone at East End; Triangle Apartments; University Village at Austin (Crossing Place); Dakota Ranch; Town Lake Apartments; Post Road Apartments (I&II); Spring West Apartments; Quarters 2 – Grayson; Quarters 3 – Karnes; The Outpost San Marcos; Uptown Square; Heritage Quarters; AMLI on 2nd, among others. True and correct copies of the

agreements covering these properties have been filed contemporaneously under seal as Exhibits B-1 & B-2.

46. In addition, Time Warner provides internet and distribution services at many MDU properties where it did not enter into a contract with Korcett. Upon information and belief, Time Warner, or a third party acting on behalf of Time Warner, has been improperly using Korcett's proprietary intellectual property even though Korcett is neither providing services on the project, nor being compensated for the use of its intellectual property. Such improper use of Korcett's intellectual property breaches the contracts.

47. Specifically, Time Warner has enlisted Korcett's direct competitors to provide services that are identical or nearly identical to the services that Korcett provided to Time Warner under the agreements. In violation of the agreements, Time Warner has continued to use Korcett's intellectual property, thereby injuring Korcett. Furthermore, Time Warner has permitted—and even enabled—Korcett's competitors to use Korcett's proprietary intellectual property to provide services in direct competition with Korcett. Time Warner's breach of the parties' agreements has harmed Korcett in an amount in excess of the minimum jurisdiction of this Court.

### **COUNTS**

#### **I. INFRINGEMENT OF THE '079 PATENT UNDER 35 U.S.C. § 271(a)**

48. Plaintiffs repeat and incorporate by reference preceding Paragraphs 1-47.

49. By making, using, selling, offering for sale, and/or importing in or into the United States, and/or providing to others, without authority, products, including its messaging and bandwidth management services, which fall within the scope of one or more claims of the '072 Patent, and/or the use of which falls within the scope of one or more of the claims of the '079

Patent, Time Warner is liable for infringing one or more of the claims of the '079 Patent, pursuant to 35 U.S.C. 271(a).

50. As a direct and proximate result of Time Warner's acts of patent infringement, Network Apparel has been and continues to be injured and has sustained and will continue to sustain substantial damages in an amount not presently known.

51. Network Apparel has suffered from Time Warner's infringement, and has lost and will continue to lose profits and/or royalties as a result of Time Warner's infringement.

52. Network Apparel has no adequate remedy at law against these acts of patent infringement. Unless Time Warner is permanently enjoined from its unlawful and willful infringement of the '079 Patent, Network Apparel will suffer irreparable harm.

53. Network Apparel has incurred and will incur attorneys' fees, costs, and expenses in the prosecution of this action.

54. The circumstances of this dispute create an exceptional case within the meaning of 35 U.S.C. § 285, and Network Apparel is entitled to recover its reasonable and necessary fees and expenses.

## **II. INFRINGEMENT OF THE '079 PATENT UNDER 35 U.S.C. § 271(b)**

55. Plaintiffs repeat and incorporate by reference preceding Paragraphs 1-47.

56. By inducing third parties, such as the MDU property managers, to use products, including its messaging and bandwidth management services, which fall within the scope of one or more claims of the '079 Patent, and practice methods of using products, including its messaging and bandwidth management services, the use of which falls within the scope of one or more claims of the '079 Patent, with knowledge of (or "willful blindness" to) the '079 Patent, and knowledge that (or "willful blindness" to the fact that) such actions of third parties directly

infringe one or more claims of the '079 Patent, Time Warner is liable for induced infringement of one or more claims of the '079 Patent, pursuant to 35 U.S.C. § 271(b).

57. As a direct and proximate result of Time Warner's acts of patent infringement, Network Apparel has been and continues to be injured and has sustained and will continue to sustain substantial damages in an amount not presently known.

58. Network Apparel has suffered from Time Warner's infringement, and has lost and will continue to lose profits and/or royalties as a result of Time Warner's infringement.

59. Network Apparel has no adequate remedy at law against these acts of patent infringement. Unless Time Warner is permanently enjoined from its unlawful and willful infringement of the '079 Patent, Network Apparel will suffer irreparable harm.

60. Network Apparel has incurred and will incur attorneys' fees, costs, and expenses in the prosecution of this action.

61. The circumstances of this dispute create an exceptional case within the meaning of 35 U.S.C. § 285, and Network Apparel is entitled to recover its reasonable and necessary fees and expenses.

### **III. INFRINGEMENT OF THE '079 PATENT UNDER 35 U.S.C. § 271(c)**

62. Plaintiffs repeat and incorporate by reference preceding Paragraphs 1-47.

63. By selling and/or offering to sell within the United States and/or importing into the United States components of products, including components of its messaging and bandwidth management services, that are material parts of the systems claimed in the '079 patent, and/or are for use in practicing material parts of the methods claimed in the '079 patent, with knowledge of (or "willful blindness" to) the '079 patent, and knowing (or "willfully blind" to the fact) that such components are especially adapted for use in infringement of the claims of the '079 patent,

and knowing that such components are not staple articles or commodities of commerce for substantial non-infringing use, Time Warner is liable for contributory infringement of one or more claims of the '079 patent, pursuant to 35 U.S.C. § 271(c)

64. As a direct and proximate result of Time Warner's acts of patent infringement, Network Apparel has been and continues to be injured and has sustained and will continue to sustain substantial damages in an amount not presently known.

65. Network Apparel has suffered from Time Warner's infringement, and has lost and will continue to lose profits and/or royalties as a result of Time Warner's infringement.

66. Network Apparel has no adequate remedy at law against these acts of patent infringement. Unless Time Warner is permanently enjoined from its unlawful and willful infringement of the '079 Patent, Network Apparel will suffer irreparable harm.

67. Network Apparel has incurred and will incur attorneys' fees, costs, and expenses in the prosecution of this action.

68. The circumstances of this dispute create an exceptional case within the meaning of 35 U.S.C. § 285, and Network Apparel is entitled to recover its reasonable and necessary fees and expenses.

#### **IV. BREACH OF CONTRACT**

69. Plaintiffs repeat and incorporate by reference preceding Paragraphs 1-47.

70. As shown above, valid, enforceable contracts existed between Korcett and Time Warner.

71. Time Warner breached the contracts at least by terminating the contracts prior the expiration of the term, failing to pay Korcett amounts due under the contracts, using Korcett's

proprietary intellectual property, and disclosing Korcett's proprietary intellectual property to third parties, among other actions.

72. All conditions precedent under the contracts have been satisfied, and Korcett is a proper party to sue under the contracts.

73. Korcett has performed or was excused from performing its contractual obligations under the contracts.

74. Time Warner has breached the contracts, causing injury to Korcett in an amount to be determined at trial. Because of Time Warner's breach, Korcett has been forced to retain counsel to enforce its contractual rights. Pursuant to Chapter 38 of the Texas Civil Practice & Remedies Code, Korcett seeks its reasonable and necessary attorneys' fees, costs, and expenses.

#### **PRAYER FOR RELIEF**

Plaintiffs respectfully request the Court grant judgment in their favor against Time Warner, and grant Plaintiffs the following relief:

- A. Declare that each of the asserted claims of the '079 Patent is valid and enforceable;
- B. Grant judgment in Network Apparel's favor that Time Warner has directly infringed the asserted claims of the '079 Patent under 35 U.S.C. § 271(a);
- C. Grant judgment in Network Apparel's favor that Time Warner has induced infringement of the asserted claims of the '079 Patent under 35 U.S.C. § 271(b);
- D. Grant judgment in Network Apparel's favor that Time Warner has contributorily infringed the asserted claims of the '079 Patent under 35 U.S.C. § 271(c);
- E. Award damages to Network Apparel to which it is entitled for Time Warner's patent infringement;
- F. Declare that Time Warner's infringement has been willful and award Network Apparel increased damages in an amount that is three times the

amount of damages found by the jury or assessed by this Court, for Time Warner's willful infringement, pursuant to 35 U.S.C. § 284

- G. Enter a preliminary, and thereafter a permanent, injunction against Time Warner's infringement of the '079 Patent;
- H. Award Network Apparel its expenses, costs, and attorneys' fees pursuant to 35 U.S.C. § 285;
- I. Award interest on Network Apparel's damages;
- J. Award Korcett all damages, interest, and attorneys' fees for which it is entitled for breach of the contract(s); and
- K. Award such other relief as the Court deems just and proper.

**JURY DEMAND**

In accordance with Rules 38 and 39 of the Federal Rules of Civil Procedure, Plaintiffs assert their rights under the Seventh Amendment of the United States Constitution and demand a trial by jury on all issues triable to a jury.

Respectfully submitted,

By: /s/ David G. Henry, Sr.  
David G. Henry, Sr.  
State Bar No. 09479355  
dhenry@grayreed.com  
James L. Reed, Jr.  
State Bar No. 16679200  
jreed@grayreed.com  
Michael D. Ellis  
State Bar No. 24081586  
mellis@grayreed.com  
1300 Post Oak Blvd., Suite 2000  
Houston, Texas 77056  
(713) 986-7000  
(713) 986-7100 (Facsimile)  
Russell E. Jumper  
State Bar No. 24050168  
rjumper@grayreed.com  
1601 Elm Street; Suite 4600  
Dallas, Texas 75201



(214) 954-4135  
(214) 953-1332 (Facsimile)  
GRAY REED & MCGRAW, P.C.

John P. Palmer  
State Bar No. 15430600  
palmer@namanhowell.com  
P.O. Box 1470  
400 Austin Ave, 8th Floor  
Waco, TX 76703-1470  
(254) 755-4100  
(254) 754-6331 (Facsimile)  
NAMAN, HOWELL, SMITH & LEE, PLLC

**ATTORNEYS FOR PLAINTIFFS  
CLARUS DATA, INC. d/b/a KORCETT  
HOLDINGS, INC., KHI-TW, LLC, and  
NETWORK APPAREL GROUP, LP.**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on September 4, 2015, a true and correct copy of the foregoing document was served upon all known counsel of record through the Court's ECF system pursuant to Federal Rule of Civil Procedure 5(b)(3) and Local Rule CV-5.

/s/ Michael D. Ellis  
Michael D Ellis