

Cypress identified the accused products as “computers and tablets that employ the Microsoft Windows 10 operating system,” and provided a non-exclusive list of specific models. *Id.* ¶ 8. Cypress’s complaint also identified Miracast and Snap Assist as the specific Windows 10 features that infringed the asserted patents. *Id.* at 9. The *Cypress Lake I* complaint then alleged infringement of each asserted patent by Dell’s “products and devices that embody the patented invention, including, without limitation, one or more of the Accused Products.” Docket No. 33-1 ¶¶ 15, 23, 31, 39, 47, 55. In August 2017, Cypress and Dell jointly moved to dismiss that case with prejudice. *Cypress Lake I*, Docket No. 82. The Court granted the motion, ordering that “Plaintiff’s claims against Defendant Dell Inc. in the above-captioned matter are DISMISSED WITH PREJUDICE.” *Cypress Lake I*, Docket No. 89.

Cypress brought the instant action against Dell on March 22, 2018, alleging infringement of the previously asserted ’299, ’361, ’264, and ’954 Patents, and also asserting U.S. Patent Nos. 8,422,858; 8,787,731; and 9,817,558. *Cypress Lake Software, Inc. v. Dell, Inc.*, No. 6:18-cv-138, Docket No. 1 at 1–2. In its 2018 complaint, Cypress identified the accused devices as “‘Chromebook’ laptops, laptop computers that employ the Chrome operating system rather than Microsoft Windows,” and provided a non-exclusive list of specific devices. *Id.* ¶ 11.¹ On May 29, 2018, Dell moved to dismiss Cypress’s claims under Rule 12(b)(6), arguing that claim preclusion bars Cypress’s claims because Cypress’s prior lawsuit, *Cypress Lake I*, was dismissed with prejudice.

¹ Cypress later amended its complaint, adding additional products to its non-exclusive list of accused devices, but not altering its general allegation against “Chromebook” laptops. Docket No. 83 ¶ 11.

II. GOVERNING LAW

Res judicata, or claim preclusion, “bars the litigation of claims that either have been litigated or should have been raised in an earlier suit.” *Duffie v. United States*, 600 F.3d 362, 372 (5th Cir. 2010) (quoting *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005)). Regional circuit law generally governs claim preclusion. *Senju Pharm. Co., Ltd. v. Apotex Inc.*, 746 F.3d 1344, 1348 (Fed. Cir. 2014). In the Fifth Circuit, claim preclusion has four elements: (1) the parties in the subsequent action are identical to, or in privity with, the parties in the prior action; (2) the judgment in the prior case was rendered by a court of competent jurisdiction; (3) there has been a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits. *Duffie*, 600 F.3d at 372.

While regional circuit law generally governs claim preclusion, Federal Circuit law applies to the fourth element in patent cases. *Senju*, 746 F.3d at 1348 (“[W]hether a particular cause of action in a patent case is the same as or different from another cause of action has special application to patent cases, and we therefore apply our own law to that issue.”) (citing *Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1323 (Fed. Cir. 2008)). In patent cases, claim preclusion applies “when a patentee seeks to assert the same patent against the same party and the same subject matter.” *Id.* (citing *Kearns v. Gen. Motors Corp.*, 94 F.3d 1553, 1557 (Fed. Cir. 1996)). Further, claim preclusion applies only when the products or processes accused in the instant action are essentially the same as the products or processes accused in the prior action. *Id.* at 1349 (citing *Acumed*, 525 F.3d at 1324).

III. ANALYSIS

A.

As an initial matter, the Court considers whether Federal Rule of Civil Procedure 12(d) requires it to treat Dell's motion to dismiss as a summary judgment motion. Both Dell and Cypress submitted materials outside the pleadings in support of their respective positions. Dell attached to its Motion the *Cypress Lake I* complaint and two terminal disclaimers from the prosecution history of certain asserted patents. Docket Nos. 33-1, 33-2, 33-2. Cypress provided the declaration of Randall T. Garteiser and Dell's Initial and Additional Disclosures from *Cypress Lake I*. Docket Nos. 47-1, 47-2.

The Court, however, holds that the only relevant documents outside the pleadings in the instant action are the *Cypress Lake I* complaint and the order dismissing that case. The parties appear to agree. *See* Mar. 14, 2019 Hr'g Tr. at 10:24–11:3 (Dell's counsel: "The 12(b)(6) context that we are in requires that the Court simply look to the complaint, to the applicable order; and I think those—that is all the Court needs, frankly, in this case. I think the Court need not and should not look beyond those."); Docket No. 56 at 1 (Cypress's surreply: "A complaint contains the 'claims' subject to res judicata . . ."). Accordingly, the Court will not consider materials outside the pleadings, except for the *Cypress Lake I* complaint and dismissal order. And because those documents are public records directly relevant to the issue at hand, the Court may take judicial notice of them without treating Dell's motion to dismiss as a summary judgment motion. *Funk v. Stryker Corp.*, 631 F.3d 777, 782–83 (5th Cir. 2011).

B.

Here, Dell asserts—and Cypress does not dispute—that the first three elements of the res judicata test are met. Docket No. 33 at 6–7. The Court agrees. Cypress Lake Software, Inc. and Dell Inc. are the parties in both actions. This Court had proper jurisdiction over the prior case. And a dismissal with prejudice, based on the consent of the parties, is considered a final judgment on the merits. *Brain Life, LLC v. Elekta Inc.*, 746 F.3d 1045, 1053 (Fed. Cir. 2014) (citing *Nystrom v. Trex Co.*, 580 F.3d 1281, 1285 (Fed. Cir. 2009)).

Therefore, the parties’ dispute centers on the fourth element—whether the instant suit and prior suit involve the same cause of action.

1.

Dell argues that, because “Cypress concedes that it could have asserted infringement against Dell’s Chromebook products” in *Cypress Lake I*, “it makes no difference whether [] Cypress’s current claims were actually litigated or asserted in the prior case.” Docket No. 54 at 4. The Court disagrees.

Common shorthand explains that “claim preclusion bars both claims that were brought as well as those that could have been brought.” *Brain Life*, 746 F.3d at 1053. But the Federal Circuit has explained how this common refrain can be misread. *Acumed*, 525 F.3d at 1325–26. “[T]he phrase ‘claims that were raised or could have been raised,’ refers to legal theories arising out of the same transactional nucleus of facts, rather than to distinct causes of action.” *Id.* (quoting *Hells Canyon Pres. Counsel v. U.S. Forest Serv.*, 403 F.3d 683, 686 n.2 (9th Cir. 2005)). And patent-

infringement claims “do not arise from the same transactional facts unless the accused devices in each claim are ‘essentially the same.’” *Id.* (citing *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 479–80 (Fed. Cir. 1991)).

Accordingly, even if Cypress “could have” accused Dell’s Chromebook products in *Cypress Lake I*, claim preclusion does not apply unless Cypress actually accused them in that case, or the products accused in *Cypress Lake I* are essentially the same as the Chromebook products accused here.

2.

Dell does not argue that the Chromebook products accused in this case are essentially the same as the Windows-based products accused in *Cypress Lake I*. Docket No. 132 at 12:2–17. Rather, Dell argues that the broad language in the *Cypress Lake I* complaint encompassed any and all Dell products and devices. Docket No. 33 at 7, 8–9; Docket No. 132 at 12:23–24 (“[W]e believe that all of Dell’s products were accused in the first lawsuit.”). Dell cites the following paragraph, which Cypress included for each asserted patent in the *Cypress Lake I* complaint:

Without a license or permission from Cypress, Defendant has infringed and continues to infringe on one or more claims of the [asserted] Patent—directly, contributorily, or by inducement—by importing, making, using, offering for sale, or selling **products and devices that embody the patented invention, including, without limitation, one or more of the Accused Products**, in violation of 35 U.S.C. § 271.

Docket No. 33-1 ¶¶ 15, 23, 31, 39, 47, 55 (emphasis added). Dell interprets the emphasized language as asserting infringement against any Dell product that embodies the asserted patents, whether or not Cypress identified it—either specifically or by category—in the *Cypress Lake I* complaint.

Cypress responds that the “accused products in each case are different, have different functionality, and employing [sic] different technology.” Docket No. 47 at 10. Cypress argues that *Cypress Lake I* accused only Dell’s Windows 10-based products, while the current case accuses Dell’s Chromebook products. *Id.* at 9.

The Court finds that the *Cypress Lake I* complaint is narrower than Dell contends. Federal Circuit law requires a complaint alleging patent infringement to accuse some specific product or service of the defendant. *Addiction & Detoxification Inst. L.L.C. v. Carpenter*, 620 F. App’x 934, 937 (Fed. Cir. 2015); *see also Disc Disease Sols. Inc. v. VGH Sols., Inc.*, 888 F.3d 1256, 1258 (Fed. Cir. 2018) (finding a complaint that specifically identified defendant’s accused products sufficient). “It is not enough to say ‘you infringe my patent.’” *Addiction & Detoxification*, 620 F. App’x at 937; *see also Artrip v. Ball Corp.*, 735 F. App’x 708, 714 (Fed. Cir. 2018) (finding a complaint that did not identify the accused product failed to state a claim for direct infringement); *i2 Techs., Inc. v. Oracle Corp.*, No. 6:09-cv-194, 2010 WL 8669837, at *3 (E.D. Tex. Mar. 29, 2010) (dismissing as insufficient a complaint that failed to identify any accused products or services).

In *Cypress Lake I*, Cypress specifically identified Windows 10-based computers and tablets as the category of products it accused. Docket No. 33-1 ¶ 8. Cypress provided a non-exclusive list of specific models within that category. *Id.* And Cypress identified the specific features of Windows 10 that allegedly infringed the asserted patents. *Id.* ¶ 9. The *Cypress Lake I* complaint never mentioned Chromebook

products or included any specific allegations regarding anything other than the Windows 10 products.

Here, Dell argues that the language “including, without limitation” in the *Cypress Lake I* complaint is broad enough to encompass any and all Dell products. But Dell would essentially require reading the *Cypress Lake I* complaint as stating: you infringe my patent. Federal Circuit law forecloses that type of pleading in patent-infringement cases. *See, e.g., Addiction & Detoxification*, 620 F. App’x at 937. And the phrase “including, without limitation” does not “state a claim to relief that is plausible on its face” as to Chromebook products. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Because Dell’s Chromebook products were not included in *Cypress Lake I*, claim preclusion does not bar Cypress’s present suit.

C.

Dell argues that claim preclusion applies not only to the previously asserted patents, but also bars Cypress from asserting three additional related patents. Because the Court finds that the accused products in each case differ, the Court need not address whether claim preclusion would apply as to the newly asserted.

IV. CONCLUSION

Cypress’s *Cypress Lake I* complaint accused Dell’s Windows 10-based products. In the current case, Cypress accuses Dell’s Chromebook products. Because Cypress does not accuse products in the current suit that are essentially the same as the products accused by Cypress in the prior suit, claim preclusion does not apply. Accordingly, the Court **DENIES** Dell’s Motion.

So **ORDERED** and **SIGNED** this **25th** day of **March, 2019**.



JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE