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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DEERPOINT GROUP, INC.,

Plaintiff,

v.

ACQUA CONCEPTS, INC., et al.,

Defendants.

Case No. 1:14 -cv-01503-SAB

ORDER GRANTING DEERPOINT GROUP, INC.'S MOTION TO DISMISS ACQUA CONCEPTS, INC.'S COUNTERCLAIM AND VACATING DECEMBER 17, 2014 HEARING

(ECF Nos. 14, 15, 16, 25, 26)

FOURTEEN-DAY DEADLINE

Currently before the Court is Deerpoint Group, Inc.'s motion to dismiss for failure to state a claim. The Court, having reviewed the record, finds this matter suitable for decision without oral argument. See Local Rule 230(g). Accordingly, the hearing set on December 17, 2014 will be vacated and the parties will not be required to appear at that time.

I.

PROCEDURAL HISTORY

Plaintiff Deerpoint Group, Inc. ("Deerpoint") filed the complaint in this action on September 25, 2014, against Defendants Acqua Concepts, Inc. ("Acqua"), Andres Barrera, and Eduardo Erenas alleging patent infringement, misappropriation of trade secrets, and breach of confidentiality agreements. On October 25, 2014, Acqua filed a counterclaim against Deerpoint seeking declaratory relief finding the patents to be invalid and non-infringement.

On November 14, 2014, Deerpoint filed a notice of motion to dismiss and memorandum

1 under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. On
2 November 26, 2014, the parties consented to the jurisdiction of a Magistrate Judge. Acqua filed
3 an opposition to the motion to dismiss on December 12, 2014, and Deerpoint filed a reply on
4 December 9, 2014.

5 **II.**

6 **LEGAL STANDARD**

7 Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss on
8 the grounds that a complaint “fail[s] to state a claim upon which relief can be granted.” A
9 complaint must contain “a short and plain statement of the claim showing that the pleader is
10 entitled to relief.” Fed. R. Civ. P. 8(a)(2). “[T]he pleading standard Rule 8 announces does not
11 require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-
12 unlawfully harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell
13 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). In assessing the sufficiency of a
14 complaint, all well-pleaded factual allegations must be accepted as true. Iqbal, 556 U.S. at 678-
15 79. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere
16 conclusory statements, do not suffice.” Id. at 678.

17 In deciding whether a complaint states a claim, the Ninth Circuit has found that two
18 principles apply. First, to be entitled to the presumption of truth the allegations in the complaint
19 “may not simply recite the elements of a cause of action, but must contain sufficient allegations
20 of underlying facts to give fair notice and to enable the opposing party to defend itself
21 effectively.” Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011). Second, so that it is not unfair
22 to require the defendant to be subjected to the expenses associated with discovery and continued
23 litigation, the factual allegations of the complaint, which are taken as true, must plausibly
24 suggest an entitlement to relief. Starr, 652 F.3d at 1216.

25 **III.**

26 **DISCUSSION**

27 Deerpoint moves to dismiss Acqua’s counterclaim contending that it does not contain
28 sufficient factual detail to meet the pleading requirements of Rule 8. Acqua counters that it need

1 not meet the pleading standard established by Twombly. Acqua contends that the cases cited by
2 Deerpoint concern actions for direct or indirect patent infringement and they are not bringing
3 such claims.

4 **A. To State a Claim, Plaintiff's Counterclaim Must Meet the Plausibility**
5 **Pleading Standard**

6 When the Supreme Court decided Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007),
7 they announced what is generally considered to be a new pleading standard. Simply stated the
8 new pleading standard requires that the complaint must contain sufficient factual allegations for
9 the court to determine that the plaintiff is entitled to relief. Starr v. Baca, 652 F.3d 1202, 1216
10 (9th Cir. 2011). While Twombly dealt with an antitrust action, the Supreme Court clarified in
11 Iqbal that the standard announced was based on the interpretation of Rule 8 and governs "all civil
12 actions and proceedings in the United States district courts." Iqbal, 556 U.S. at 684.

13 While Acqua has not cited any legal authority to support the argument that the standard
14 announced in Twombly does not apply to patent claims, the Court is aware that whether the
15 standard applies in patent actions is an undecided issue. The cause of the confusion is that Rule
16 84 of the Federal Rule of Civil Procedure states that the forms in the Appendix suffice under the
17 rules and illustrate the simplicity and brevity that the rules contemplate. The Appendix contains
18 a sample complaint for patent infringement. Fed. R. Civ. P. Form 18. Since Iqbal was decided
19 courts have struggled with whether patent cases are required to comply with the Twombly
20 pleading standard, and the Ninth Circuit has never addressed the issue.

21 Courts that have considered the pleading standard to be applied in patent cases have come
22 to different conclusions. See K-Tech Telecommunications, Inc. v. Time Warner Cable, Inc., 714
23 F.3d 1277, 1285 (Fed. Cir. 2013) (Form 18 controls where there is a conflict between the form
24 and Twombly); Microsoft Corporation v. Phoenix Solutions, Inc., 741 F.Supp.2d 1156 (C.D.
25 Cal. 2010) (declaratory judgment claim of no direct infringement and invalidity of patent need
26 not meet pleading standard of Twombly); Intermetro Industries Corp. v. Capsa Solutions, LLC,
27 ___ F.Supp.3d ___, 2014 WL at 49196737, *4 (M.D. Penn. Sept. 30, 2014) (Twombly standard
28 does not apply in patent cases); Virginia Innovation Sciences, Inc. v. Samsung Electronics Co.,

1 Ltd. 983 F.Supp.2d 700 (E.D. Vir. 2013) (Twombly standard does not apply to direct
2 infringement claims, but does apply to indirect or willful infringement claims); Gradient
3 Enterprises, Inc. v. Skype Technologies, S.A., 932 F.Supp.2d 447, 452 (W.D.N.Y. 2013)
4 (finding Twombly standard does not apply to direct infringement claims, but does apply to
5 indirect infringement claims); Tyco Fire Products LP v. Victaulic Co., 777 F.Supp.2d 893, 905
6 (E.D. Penn. 2011) (counterclaim must comply with Twombly pleading standard); Ingeniador,
7 LLC v. Interwoven, 874 F.Supp.2d 56, 66-67 (D.P.R. 2012) (Twombly pleading standard applies
8 to all infringement claims); Macronix Intern. Co., Ltd v. Spansion Inc. (“Macronix”), 4
9 F.Supp.3d 797, 803-4 (E.D. Vir. 2014) (same); see also Sony Corp. v. LG Electronics U.S.A.,
10 Inc., 768 F.Supp.2d 1058, 1064 (C.D. Cal. 2011) (generally courts deny motion to dismiss where
11 complaint contains enough specificity to provide defendant with notice of the product or aspects
12 of the products allegedly infringed); Rain Gutter Pros, LLC v. MGP Mfg., LLC, ___ F.Supp.3d
13 ___, 2014 WL 5439863 (W.D. Wash. Oct. 28, 2014) (applying plausibility standard in patent
14 infringement action without discussion).

15 The Court agrees with those courts who recognize that the problem with the reasoning in
16 cases that find Form 18 to be legally sufficient is that they accord no force to Twombly and Iqbal
17 which set the pleading standard under Rule 8. Macronix, 4 Fed. Supp.3d at 801. The cases
18 originally finding that Form 18 was controlling were based on the view that Twombly did not
19 really change the pleading requirement of Rule 8. Macronix, at 801. While the Supreme Court
20 stated that Twombly did not apply a “heightened” pleading standard, Twombly, 550 U.S. at 569
21 n.14, the Ninth Circuit and hundreds of district courts have read Twombly as at least appearing
22 to announce a higher pleading standard to be applied in federal cases to measure whether a
23 complaint states a claim, Starr, 652 F.3d at 1213; Macronix, at 801.¹ While this does not require
24 detailed factual allegations, the pleading standard does require “sufficient allegations of
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26 ¹ This discussion and the use of the term “heightened pleading” applying to cases now under Iqbal and Twombly has
27 created a great deal of confusion and jurisprudence in and of itself. The Court sees the analysis as simply the
28 Supreme Court defining what Rule 8 required in terms of pleading one’s complaint. This did not impose a
“heightened pleading” standard such as found in the text of Rule 9 where matters involving fraud must be pled with
particularity. The law around the so-called “heightened pleading” requirement is really a comparison of what the
courts thought Rule 8 required and what is now required in light of Iqbal and Twombly.

1 underlying facts to give fair notice and to enable the opposing party to defend itself effectively.”
2 Starr, 652 F.3d at 1216.

3 Further, the holding in Twombly did not announce a new procedural rule, but explained
4 how to apply Rule 8. Rule 84 states forms in the Appendix suffice under the Federal Rules, but
5 Form 18 was added in April 2007, prior to Twombly being decided. Fed. R. Civ. P. Form 18.
6 As stated in Macronix:

7 Rule 84 has been in effect since 1937. It was amended in 1946 and remained
8 intact in that form from then until a stylistic amendment was made in 2007.
9 Surely, the Supreme Court was aware of Rule 84 and the conclusory, talismanic
10 language of the forms when it decided Twombly and Iqbal. Indeed, Conley itself
11 had taken the view that the illustrative forms demonstrated what was sufficient to
12 give notice of, and show the grounds for, the claim. Conley v. Gibson, 355 U.S.
13 at 47, 78 S.Ct. 99. And, it was that view of what was sufficient under Rule 8(a) to
14 accomplish the notice and showing requirements of the rule that Twombly
15 rejected. It is neither logical nor reasonable to accept that the Supreme Court did
16 not appreciate that the forms in the Appendix would not meet the standard for
17 sufficiency set by Twombly and Iqbal. Having explained in those cases how to
18 apply Rule 8(a), the rule that addresses when a complaint suffices, the Supreme
19 Court had no need to also instruct that an insufficient form could no longer be
20 used.

21 Macronix, 4 F.Supp.3d at 802-803.

22 While some courts have held that different standards apply to direct, indirect, and willful
23 infringement claims, the better rule is to apply the plausibility standard to all patent claims.
24 Ingeniador, LLC, 874 F.Supp.2d at 67. The Supreme Court made clear in Twombly that the
25 required application of Rule 8 was necessary to assume that expensive litigation would not occur
26 unless the plaintiff had made a plausible case in the complaint. Twombly, 550 U.S. at 558-59.
27 That reasoning is no less persuasive in a patent action. This Court finds no logical reason to
28 exempt patent actions from the plausibility requirements that apply to all other federal
complaints. The Court finds that Acqua's counterclaim must meet the pleading standard
addressed in Twombly. When Form 18 was added in 2007, they did not have the benefit of Rule
8's pleading requirement in light of Iqbal and Twombly.

Applying Rule 8's definition to this case, this means that to survive a motion to dismiss
the claims must be facially plausible, which requires sufficient factual detail to allow the Court to
reasonably infer that the defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-

1 79, 129 S. Ct. at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The
2 “sheer possibility that a defendant has acted unlawfully” is not sufficient, and “facts that are
3 ‘merely consistent with’ a defendant’s liability” falls short of satisfying the plausibility standard.
4 Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949; Moss, 572 F.3d at 969. There are two requirements to
5 survive a motion to dismiss for failure to state a claim under Rule 12(b)(6): (1) while accepting
6 factual allegations in the complaint as true, the court is not required to accept legal conclusions
7 as true, and (2) the factual allegations must state a plausible claim for relief. Maya v. Centex
8 Corp., 658 F.3d 1060, 1067 (9th Cir. 2011).

9 **B. Plaintiff’s Counterclaim Alleges Only Conclusory Allegations Insufficient to**
10 **State a Plausible Claim**

11 In the counterclaim, Acqua sets forth sixteen reasons to invalidate the patent or find that
12 there was no infringement. However, each paragraph only sets forth conclusory statements with
13 no supporting factual allegations that are insufficient to state a plausible claim for relief. Iqbal,
14 556 U.S. at 678.

15 For example, Acqua contends that as shown by the file wrappers, during the prosecution
16 of the application that related to 573 and 064 Patents, Deerpoint is estopped from claiming that
17 the patents cover or include any apparatus or device or product or method manufactured, used, or
18 sold by Ag Water Chemical. (Counterclaim ¶ 9(a), ECF No. 14.) Acqua further states that “the
19 patentees did not invent the subject matter patented, nor did they make any invention or
20 discovery –novel, original, or otherwise – within the meaning of United States Code, Title 35.”
21 (Id. at ¶ 9(b).) The counterclaim alleges that the “inventions were made by another in this
22 country before the patentee’s alleged inventions and such other person(s) had not abandoned,
23 suppressed, or concealed them.” (Id. at ¶ 9(c).) Review of the remainder of the counterclaim
24 reveals that all the allegations are merely conclusory statements without any factual allegations
25 to support them. Conclusory statements and recitation of the elements of a claim are not
26 sufficient to state a cognizable claim. Iqbal, 556 U.S. at 678.

27 In the opposition, Acqua argues that since Deerpoint did not specifically address
28 paragraphs ten and eleven this is fatal to the motion to dismiss. However, Deerpoint’s motion to

1 dismiss clearly addresses that the entire counterclaim lacks plausibility. Further, paragraphs ten
2 and eleven suffer from the same deficiencies as the remaining paragraphs in the counterclaim. In
3 paragraph ten, Acqua claims that Deerpoint failed to assert its patents for three years and is
4 guilty of laches, and paragraph eleven contends that the patents were misused and therefore are
5 unenforceable. (ECF No. 14 at ¶¶ 10, 11.)

6 While detailed factual allegations are not required, such conclusory allegations without
7 any facts alleged to support the claims are insufficient to state a plausible claim. Accordingly,
8 Deerpoint's motion to dismiss shall be granted, and Acqua will be provided with an opportunity
9 to file an amended counterclaim that meets the Twombly pleading standard.

10 Accordingly, IT IS HEREBY ORDERED that:

- 11 1. Deerpoint's motion to dismiss, filed November 14, 2014 is granted;
- 12 2. Acqua's counterclaim, filed October 25, 2014, is dismissed for failure to state a
13 claim; and
- 14 3. If Acqua wishes to file a counterclaim, an amended counterclaim shall be filed
15 within fourteen days from the date of service of this order.

16 IT IS SO ORDERED.

17 Dated: December 16, 2014

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UNITED STATES MAGISTRATE JUDGE

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