

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIABIG BABOON, INC.,
Plaintiff,
v.
SAP AMERICA, INC., et al.,
Defendants.Case No. [17-cv-02082-HSG](#)**ORDER GRANTING MOTION TO
DISMISS AND DENYING MOTION
FOR SANCTIONS**

Re: Dkt. Nos. 19, 20

Pending before the Court is a motion to dismiss, Dkt. No. 20, and a related motion for sanctions, Dkt. No. 19, filed by Defendants SAP America, Inc. and HP Inc., (collectively, “Defendants”). The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. See Civil L.R. 7-1(b). For the reasons detailed below, the Court **GRANTS** Defendants’ motion to dismiss and **DENIES** Defendants’ motion for sanctions.

I. BACKGROUND

Plaintiff Big Baboon, Inc. filed this action on April 13, 2017, alleging infringement of United States Patent No. 6,343,275 (the “’275 Patent”). See Dkt. No. 1 (“Compl.”). Plaintiff is the owner by assignment of the ’275 Patent, entitled “Integrated Business-to-Business Web Commerce and Business Automation System.” Compl. ¶¶ 2, 20. According to the complaint, the ’275 Patent “may cover, among other things, ‘business-to-business web commerce between a first business acting as a supplier and a second business acting as a purchaser, using a computer net including a relational database server providing for real-time synchronized data update, in combination with the other limitations of the claims.’” Id. ¶ 21. Plaintiff asserts claims 15 and 20–34 of the ’275 Patent. The complaint sets forth the following allegations.

Plaintiff alleges that, within the past six years, Defendants have directly infringed and are

1 infringing claims 15 and 20–34 by making, using, or selling in this judicial district “the inventions
2 claimed in the ’275 Patent.” Id. ¶¶ 29, 35. Specifically, Plaintiff alleges that Defendant SAP
3 America has been a “major provider of business-to-business computer sales and services via the
4 Web, specifically including the R/3 system and upgrades thereof such as R/4, SAP ERP Central
5 Component (ECC), and other web-based enterprise resource planning products.” Id. ¶ 30.
6 Plaintiff also alleges that Defendant HP has been a “major provider of business-to-business
7 computer sales and services via the Web, specifically including its use of the enterprise resource
8 planning systems made and maintained by SAP America . . . such as R/3.” Id. ¶ 36. Plaintiff
9 alleges that SAP SE’s¹ and HP’s software systems “provide for automated integration and
10 provision of information via the Web from multiple traditionally distinct business domains
11 including those dealing with product information and financial status which incorporate aspects of
12 the inventions claimed in the ’275 Patent.” Id. ¶¶ 30, 36. Defendants SAP America and HP are
13 further alleged to have been “major provider[s] of supply chain, logistical, and technical support
14 services for business-to-business electronic commerce including those which incorporate aspects
15 of the inventions claimed in the ’275 Patent.” Id. Lastly, the complaint alleges that Defendants
16 knew of the ’275 Patent and Plaintiff’s infringement allegations thereof “as early as February 19,
17 2009 Therefore, all infringement is willful.” Id. ¶¶ 33, 39.

18 Based on these facts, Plaintiff alleges direct and willful infringement of the ’275 patent
19 against Defendants, and seeks damages as well as attorneys’ fees and costs. See Compl. ¶¶ 28–39;
20 see also id. at 7 (Prayer for Relief). On June 23, 2017, Defendants filed the pending motion for
21 sanctions and motion to dismiss. See Dkt. Nos. 19, 20.

22 **II. MOTION TO DISMISS**

23 **A. Pleading Standard**

24 The parties disagree about the pleading standard that applies to Plaintiff’s claims. Plaintiff
25 implies that, under Federal Rule of Civil Procedure Form 18 (“Form 18”)², notice pleading is still
26

27 ¹ SAP SE, the parent company of SAP America, Inc., is not a named Defendant in the current
case. See Dkt. No. 20 at 9.

28 ² Under Form 18, a plaintiff could assert: (1) an allegation of jurisdiction; (2) a statement that the
plaintiff owns the patent; (3) a statement that defendant has been infringing the patent “by making,

1 sufficient for patent infringement actions. Under this standard, Plaintiff posits that it need only
2 allege that Defendants make, use, offer to sell, or sell the patented invention within the United
3 States without Plaintiff’s authority during the term of the patent. Dkt. No. 23 at 5 (citing
4 *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc.*, 989 F. Supp. 1237, 1249 (N.D. Cal.
5 1997)). Plaintiff further argues that a claimant is not required “to set out in detail the facts upon
6 which he bases his claim,” but rather “need only plead facts sufficient to place the alleged
7 infringer on notice.” Dkt. No. 23 at 7 (citing *Phonometrics, Inc. v. Hospitality Franchise Sys.,*
8 *Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000)).

9 Until recently, Federal Rule of Civil Procedure 84 (“Rule 84”) provided that the Appendix
10 of Forms, including Form 18, “suffice[d] under these rules” to satisfy the pleading requirements of
11 Federal Rule of Civil Procedure 8(a)(2). Fed. R. Civ. P. 84 (abrogated); see *K-Tech Telecomm.,*
12 *Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013).

13 However, the Federal Rules of Civil Procedure were amended on December 1, 2015,
14 abrogating Rule 84 and the Appendix of Forms, including Form 18. The Federal Circuit stated
15 that the new rules “shall govern in all proceedings in civil cases thereafter commenced” *Lyda*
16 *v. CBS Corp.*, 838 F.3d 1331, 1337 n.2 (Fed. Cir. 2016) (quoting Supreme Court of the United
17 States, Order Regarding Amendments to the Federal Rules of Civil Procedure (U.S. Apr. 29,
18 2015)). Thus, post-abrogation, Form 18 “no longer maintains any force.” *Continental Circuits*
19 *LLC v. Intel Corp.*, No. CV16–2026 PHX DGC, 2017 WL 679116, at *3 (D. Ariz. Feb. 21, 2017);
20 accord *e.Digital Corp. v. iBaby Labs, Inc.*, No. 15–cv–05790–JST, 2016 WL 4427209, at *3
21 (N.D. Cal. Aug. 22, 2016) (“Absent Form 18 itself, there is simply no support in the Federal Rules
22 of Civil Procedure for a different pleading standard for direct patent infringement claims.”).

23 The Court agrees with Defendants that the pleading standard articulated in *Twombly* and
24 *Iqbal* apply in the patent context. Accord *Atlas IP LLC v. Pac. Gas & Elec. Co.*, No. 15–cv–
25 05469–EDL, 2016 WL 1719545, at *3 (N.D. Cal. Mar. 9, 2016) (“allegations of direct

26
27 selling, and using [the device] embodying the patent”; (4) a statement that the plaintiff has given
28 the defendant notice of its infringement; and (5) a demand for an injunction and damages. Fed. R.
Civ. P. Form 18; see *K-Tech Telecomm., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283
(Fed. Cir. 2013) (quoting *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007)).

1 infringement are now subject to the pleading standards established by Twombly and Iqbal”);
2 e.Digital Corp., 2016 WL 4427209, at *2–*3.

3 Under this standard, the Court must dismiss a complaint if it fails to allege “enough facts to
4 state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570
5 (2007). This “facial plausibility” standard requires “more than labels and conclusions, and a
6 formulaic recitation of the elements of a cause of action will not do.” Id. at 555. Rather, it
7 requires the plaintiff to allege facts that add up to “more than a sheer possibility that a defendant
8 has acted unlawfully.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); see Twombly, 550 U.S. at 555
9 (“factual allegations must be enough to raise a right to relief above the speculative level.”).
10 Although courts do not require “heightened fact pleading of specifics,” Twombly, 550 U.S. at 570,
11 a plaintiff must allege “enough fact[s] to raise a reasonable expectation that discovery will reveal
12 the defendant is liable for the misconduct alleged.” In re Bill of Lading Transmission &
13 Processing Sys. Patent Litig., 681 F.3d 1323, 1341 (Fed. Cir. 2012) (quoting Twombly, 550 U.S. at
14 556).

15 In reviewing the plausibility of a complaint, courts “accept factual allegations in the
16 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”
17 Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008). However,
18 courts “are not bound to accept as true a legal conclusion couched as a factual allegation.”
19 Twombly, 550 U.S. at 555. In assessing the sufficiency of a complaint on a motion to dismiss, a
20 court “can choose to begin by identifying pleadings that, because they are no more than
21 conclusions, are not entitled to the assumption of truth.” Iqbal, 556 U.S. at 678. “While legal
22 conclusions can provide the framework of a complaint, they must be supported by factual
23 allegations.” Id. at 679. A court next considers the complaint’s “well-pleaded, nonconclusory
24 factual allegations” and, assuming their veracity, determines whether “they plausibly give rise to
25 an entitlement to relief.” Id. at 679. Determining plausibility is a “context-specific task that
26 requires the reviewing court to draw on its judicial experience and common sense.” Id.

27 In patent cases, purely procedural issues of law are governed by the law of the regional
28 circuit. K-Tech, 714 F.3d at 1282. In the Ninth Circuit, to be entitled to the presumption of truth,

1 a complaint’s allegations “must contain sufficient allegations of underlying facts to give fair notice
2 and to enable the opposing party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216
3 (9th Cir. 2011), cert. denied, 132 S. Ct. 2101 (2012).

4 **B. Sufficiency of Complaint**

5 Defendants contend that the complaint fails to identify a specific product that infringes the
6 ’275 Patent. Specifically, they argue that “whenever the allegations assert infringement” in the
7 complaint, Plaintiff “fails to identify an infringing product. And whenever the allegations mention
8 product families . . . they do not state that the product families infringe.” Dkt. 20 at 6–7. The
9 Court agrees.

10 Here, Plaintiff generally alleges as the basis for both claims that Defendants directly
11 infringed and are infringing claims 15 and 20–34 of the ’275 Patent by “making, using, or
12 selling . . . the inventions claimed in the ’275 Patent.” Compl. ¶¶ 29, 35. To begin with, the Court
13 notes that such allegations are nothing more than a “formulaic recitation of the elements of” direct
14 infringement, *Iqbal*, 556 U.S. at 678, and “the Federal Rules do not require courts to credit a
15 complaint’s conclusory statements without reference to its factual content.” *Id.* at 686. Moreover,
16 “[t]he factual allegations in a patent infringement complaint must identify the specific products
17 accused.” *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09–02114 JF (PVT), 2010 WL 889541, at *4
18 (N.D. Cal. Mar. 11, 2010). The allegations in the complaint concerning Defendants’ infringing
19 activity are not only legal conclusions “couched as factual allegation[s],” *Twombly*, 550 U.S. at
20 555, but they also fail to specify any product that allegedly infringes. For this reason, the
21 complaint fails to state a claim of direct infringement because it does not “identify the specific
22 products accused.” See *Bender*, 2010 WL 889541, at *4.

23 To the extent Plaintiff posits that, because “paragraph 30 logically follows paragraph 29,”
24 the complaint sufficiently identifies the infringing products as SAP’s “R/3 system and upgrades
25 thereof such as R/4, [ECC], and other web-based enterprise planning products,” Compl. ¶¶30, 36,
26 the Court is not persuaded. See Dkt. No. 23 at 12–13. First, in the absence of a single factual
27 allegation identifying a specific infringing product, logic does not render the conclusion Plaintiff
28 advances here. Paragraph 30 of the complaint, as well as its reiteration in paragraph 36, alleges

1 only that SAP America “has been a major provider of business-to-business computer sales and
2 services via the Web, specifically including the R/3 system and upgrades thereof” Id. ¶¶ 30,
3 36. Then, it alleges generally, if not hypothetically, that SAP SE’s and HP’s systems provide for
4 various functions, “which incorporate aspects of the inventions claimed in the ’275 Patent.” Id.
5 Finally, Plaintiff alleges that both Defendants have been major providers of services, “which
6 incorporate aspects of the inventions claimed in the ’275 Patent.” Id. The Court finds it
7 unnecessary to delve into the myriad ways in which these allegations are insufficient because
8 nowhere do they allege that a specific product of Defendants’ infringes. The Court finds that
9 Plaintiff has failed to state a claim for direct patent infringement and the complaint must be
10 dismissed. See *MACOM Tech Solutions Holdings, Inc. v. Infineon Techs.*, No. 2:16-cv-02859-
11 CAS (PLAx), 2017 WL 3449596, at *5 (C.D. Cal. Jun. 5, 2017) (dismissing counterclaim for
12 infringement because, “[o]ther than the foregoing conclusory allegation, [it] contains no
13 description of the accused product(s) or how those products infringe upon Americas’ alleged
14 patented innovations.”).

15 Despite these deficiencies, the Court cannot say at this stage that amending the complaint
16 would be futile. See *Lopez v. Smith*, 203 F.3d 1122, 1127–31 (9th Cir. 2000). Plaintiff may still
17 be able to allege sufficient facts to state a claim. Id. at 1130. Since it is possible that the flaws in
18 the complaint can be cured by the allegation of other facts that support its claims of patent
19 infringement, such as facts identifying the specific infringing product and how such product
20 infringes the ’275 Patent, the Court grants Plaintiff leave to amend. See id. Any amended
21 complaint must clearly and concisely state the basis for all claims alleged.

22 **III. MOTION FOR SANCTIONS**

23 Defendants further seek sanctions against Plaintiff under Federal Rule of Civil Procedure
24 11 for filing a complaint that is legally and factually baseless without conducting a “reasonable
25 pre-suit investigation.” Dkt. No. 19 at 1, 3. Specifically, Defendants seek determination of
26 whether sanctions under Rule 11 should include dismissal of the action without prejudice, an order
27 that Plaintiff may not reassert the ’275 Patent against Defendants absent a complaint that complies
28 with Rule 8 and Rule 11, and an order that Plaintiff “and/or its attorneys” must pay a monetary

1 penalty to the Court. Id. at 3. As the basis for their motion, Defendants reiterate the arguments
2 made in their dismissal motion, see id. at 2–3, and reference events arising out of a 2009 lawsuit,
3 initiated by Plaintiff against Defendant HP, in the Central District of California to support their
4 contention that the complaint is factually baseless, id. at 3–7.


5 The Court has considered Defendants’ arguments and **DENIES** the motion. Given the
6 posture of the case, the Court cannot rule at this point that bringing this action is a sanctionable
7 event.

8 **IV. CONCLUSION**

9 Accordingly, the Court **GRANTS** without prejudice Defendant’s motion to dismiss and
10 **DENIES** Defendants’ motion for sanctions. Any amended complaint must be filed within 28 days
11 of the date of this Order.

12 **IT IS SO ORDERED.**

13 Dated: 3/20/2018

14
15 
16 HAYWOOD S. GILLIAM, JR.
17 United States District Judge
18
19
20
21
22
23
24
25
26
27
28