

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

**BEDROCK COMPUTER  
TECHNOLOGIES, LLC**

**Plaintiff,**

**vs.**

**SOFTLAYER TECHNOLOGIES, INC.,  
et al.**

**Defendants.**

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**CASE NO. 609 CV 269  
PATENT CASE**

**MEMORANDUM OPINION AND ORDER**

MySpace, Amazon.com, AOL, CME Group, and Yahoo!’s Motion to Dismiss for Failure to State a Claim (Docket No. 71) is before the Court. Defendants’ motion addressed Bedrock’s Original Complaint. While the motion to dismiss was pending, Bedrock amended its complaint to correctly identify the Match.com Defendant. Bedrock’s substantive allegations of patent infringement were unchanged. Defendants renewed their motion as to Bedrock’s First Amended Complaint (Docket No. 113). Having considered the parties’ written submissions, the Court **GRANTS** the motions and **GRANTS** Bedrock leave to amend its complaint within fifteen days.

**BACKGROUND**

In its Original and First Amended Complaint for Patent Infringement, Bedrock accuses ten defendants of infringing its U.S. Patent No. 5,893,120, entitled “Methods and Apparatus for Information Storage and Retrieval Using a Hashing Technique with External Chaining and On-the-Fly Removal of Expired Data.” In its substantive paragraphs regarding infringement, Bedrock

alleges direct and indirect infringement claims:

17. Defendants infringe the Patent-in-Suit directly, contributorily and/or by active inducement by importing, manufacturing, using, marketing, distributing, selling, and/or supporting products and/or services that fall within one or more claims of the '120 Patent.

....

19. Defendants have infringed and continue to infringe the '120 Patent in this District and elsewhere in the United States by their manufacture, importation, sale, offering for sale, and/or use of the claimed method and apparatus of the '120 Patent without authority or license of Bedrock.

20. Defendants have contributorily infringed and/or induced others to infringe and continue to contributorily infringe and/or to induce others to infringe the '120 Patent in this District and elsewhere in the United States by their manufacture, importation, sale, offering for sale, and/or use of the claimed method and apparatus of the '120 Patent without authority or license of Bedrock.

Defendants move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) and the Supreme Court's decisions in *Twombly* and *Iqbal*. Defendants contend that Bedrock's complaint does not provide sufficient facts to state a claim that is plausible on its face. Specifically, Defendants complain that Bedrock did not identify any accused products or allege any facts supporting indirect infringement. Defendants contend that because of these deficiencies, Defendants cannot evaluate indemnity claims that they may have and are hampered in developing their defenses and collecting relevant documents.

Bedrock contends that its complaint complies with the Federal Rules and case law. Bedrock argues that it is not required to identify any accused products because Bedrock is not alleging direct infringement for the sale of a product, but is alleging that Defendants' support or use of products gives rise to liability for direct and infringement.

#### **APPLICABLE LAW**

Regional circuit law applies to motions to dismiss for failure to state a claim. *McZeal v.*

*Sprint Nextel Corp.*, 501 F.3d 1354, 1355–56 (Fed. Cir. 2007). “The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief.” *Id.* at 1356 (internal quotations omitted); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008).

Under Rule 8(a)(2), a pleading must contain “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 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, but a plaintiff must plead sufficient factual allegations to show that he is plausibly entitled to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S 544, 555–56, 570 (2007) (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50, 1953 (2009) (discussing *Twombly* and applying *Twombly* generally to civil actions pleaded under Rule 8). “Determining whether the complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S. Ct. at 1950.

Under Rule 84, “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” FED. R. CIV. P. 84. Form 18 provides a sample complaint for patent infringement and does not require extensive factual pleading:

(Caption—See Form 1.)

1. (Statement of Jurisdiction--See Form 7.)
2. On date, United States Letters Patent No. \_\_\_\_\_ were issued to the plaintiff for an invention in an electric motor. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.
3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.
4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all electric motors it manufactures and sells and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

- (a) a preliminary and final injunction against the continuing infringement;
- (b) an accounting for damages; and
- (c) interest and costs.

(Date and sign—See Form 2.)

FED. R. CIV. P. Form 18 (2007); *see also McZeal*, 501 F.3d at 1356–57 (describing the requirements of the 2006 form, then Form 16).

The Supreme Court’s decisions in *Twombly* and *Iqbal* have not affected the adequacy of complying with Form 18. To hold otherwise would render Rule 84 and Form 18 invalid. This cannot be the case. *See Twombly*, 550 U.S. at 569 n.14 (acknowledging that altering the Federal Rules of Civil Procedure cannot be accomplished by judicial interpretation); *McZeal*, 501 F. at 1360 (Dyk, J., concurring-in-part and dissenting-in-part) (“I agree that under Rule 84 of the Federal Rules of Civil Procedure, we would be required to find that a bare allegation of literal infringement in accordance with Form 16 would be sufficient under Rule 8 to state a claim. One can only hope that the rulemaking process will eventually result in eliminating the form, or at least in revising it to require allegations specifying which claims are infringed, and the features of the accused device that correspond to the claim limitations.”) (footnote omitted); *see also Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374 at \*2 (N.D. Cal. Sept. 14, 2009) (“It is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal* . . . . Under Rule 84 of the Federal Rules of Civil Procedure, however, a court must accept as sufficient any pleading made in conformance with the forms.”). *But see Colida v. Nokia, Inc.*, 347 Fed. Appx. 568 (Fed. Cir. 2009) (unpublished) (in dicta, questioning the viability of Form 18).

Thus, a patent complaint that complies with Form 18 will suffice to state a claim that is plausible on its face. *See* FED. R. CIV. P. 84. However, a complaint that does not perfectly comply

with Form 18 may still suffice to state a claim that is plausible on its face. The Court determines whether the complaint states a plausible claim for relief by examining the complaint in context and relying on the Court's own judicial experience and common sense. *Iqbal*, 129 S. Ct. at 1950.

### ANALYSIS

Bedrock's allegation of direct infringement does not adhere to Form 18 in that it does not identify any accused products, services, or methods or other infringing acts for the patent-in-suit. *See* FED. R. CIV. P. Form 18 (accusing "electric motors" of infringement). As to its indirect infringement claims, Bedrock also does not identify any accused products or services, nor does Bedrock expressly identify a direct infringer. Form 18 does not address indirect infringement claims, and courts are split on whether a direct infringer must be at least generically identified. *Compare PA Advisors v. Google Inc.*, 2008 WL 4136426 at \*8 (E.D. Tex. Aug. 8, 2008)(Folsom, J.) (granting a motion for more definite statement requiring the plaintiff to at least generically identify the end user) *with Fotomedia Techs., LLC v. AOL, LLC*, 2008 WL 4135906 (E.D. Tex. Aug. 29, 2008) (Everingham, Mag.) (denying motion to dismiss indirect infringement because neither the sample complaint form nor the Federal Circuit require pleading every element of a claim for indirect infringement).

Taken as whole Bedrock's complaint does not state a claim for relief that is plausible on its face. The complaint simply fails to inform Defendants as to what they must defend. While Form 18 does not set a high bar for what must be alleged, Bedrock has not met that bar. The Court has high expectations of a plaintiff's preparedness before it brings suit. *See Am. Video Graphics, L.P. v. Elec. Arts, Inc.*, 359 F. Supp. 2d 558, 560 (E.D. Tex. 2005) (Davis, J.) ("The Patent Rules demonstrate high expectations as to plaintiffs' preparedness before bringing suit, requiring plaintiffs

to disclose their preliminary infringement contentions before discovery has even begun.”). Thus, the Court expects that Bedrock already has sufficient knowledge of facts that it can include in its complaint that would give Defendants sufficient notice of the claims alleged against them. The Court does not require in a complaint the specificity that P.R. 3-1 requires, as that would go far beyond Rule 8's and Form 18's requirements, but some greater specificity is required here.

### **CONCLUSION**

Accordingly, the Court **GRANTS** Defendants' motions, but **GRANTS** Bedrock leave to amend its complaint within the next fifteen days to comply with Rule 8. The Court notes that Bedrock served its Patent Rule 3-1 disclosures while this motion was being briefed. Rule 3-1 disclosures are far more detailed than Rule 8's pleading requirements. Thus, before this motion was fully briefed, Defendants had already received greater specificity than what they sought in this motion, rendering this motion superfluous for all practical purposes. The Court strongly encourages the parties to try this case on the merits and not unnecessarily burden the Court with technical issues that lack practical substance.

**So ORDERED and SIGNED this 29th day of March, 2010.**

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS  
UNITED STATES DISTRICT JUDGE**