

Exhibit B

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

CLEAR WITH COMPUTERS, LLC

Plaintiff,

vs.

BERGDORF GOODMAN, INC., et al.,

Defendants.

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**CASE NO. 6:09CV481
PATENT CASE**

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants’ Motion to Dismiss (Docket No. 32). Having considered the parties’ written submissions, the Court **GRANTS** the motion in part and **DENIES** the motion in part. The Court **GRANTS** CWC leave to amend its complaint within fifteen days.

BACKGROUND

CWC’s Original Complaint accuses thirty-six defendants¹ of infringing U.S. Patent Nos. 7,606,739 B1, entitled “Electronic Proposal and Preparation System” and contains twenty-seven claims. CWC brought this suit the same day the patent issued on October 20, 2009. In this case, CWC brings suit against many of the same defendants it named in *Clear with Computers, LLC v. Bassett Furniture Industries, Inc., et al.*, 6:09-cv-95 (“*Bassett* case”), involving U.S. Patent Nos. 5,615,342 and 5,367,627. The ‘739 patent is a continuation of the ‘342 patent.

CWC makes substantially the same allegations against each Defendant:

¹ Some defendants have been dismissed by the parties’ agreement.

Upon information and belief, Defendant BERGDORF has been and now is directly, jointly and/or indirectly infringing, by way of inducing infringement and/or contributing to the infringement of the '739 Patent in the State of Texas, in this judicial district, and elsewhere in the United States by, among other things, methods practiced on various websites (including, but not limited to, www.bergdorfgoodman.com), making and using supply chain methods, sales methods, sales systems, marketing methods, marketing systems, and inventory systems covered by one or more claims of the '739 Patent to the injury of CWC. Defendant BERGDORF is thus liable for infringement of the '739 Patent pursuant to 35 U.S.C. § 271.

Defendants move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) arguing that CWC's complaint fails to adequately state a claim under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The defendants in the *Bassett* case also moved to dismiss, and Defendants here say their motion raises the same issues and that nothing in this complaint gives any indication as to how CWC differentiates between infringement of the '342 patent, asserted in the *Bassett* case, and the '739 patent, asserted here.

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).

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

Defendants contend that CWC's complaint is not adequate under the standard set forth in *Twombly* and *Iqbal*. Defendants claim they are not seeking early Patent Rule 3-1 disclosures, but are seeking to know what claims are being asserted against what specific accused instrumentality and in what manner CWC alleges those instrumentalities are infringing in sufficient detail to pass the Supreme Court's facial plausibility test.

Direct Infringement Claims

As in the *Bassett* case, CWC's direct infringement claims comply with the sample patent complaint in Form 18. Paragraphs 38–40 provide a statement of the Court's jurisdiction. Paragraph 41 contains statements of ownership of the patents in suit. The substantive paragraphs describing the claims against each Defendant contain a statement that the Defendant has infringed directly or indirectly by “methods practiced on various websites (including but not limited to, [Defendant's homepage]), making and using supply chain methods, sales methods, sales systems, marketing methods, marketing systems, and inventory systems covered by one or more claims of the ‘739 Patent to the injury of CWC.” Finally, CWC demands relief. While Defendants contend that this is too vague, CWC's complaint is no more vague than the sample form. *See* FED. R. CIV. P. Form 18 (accusing “electric motors”). CWC's complaint complies with the sample form, and no more is required. *See McZeal*, 501 F.3d at 1356–1357 (denying a motion to dismiss a pro se litigant's patent complaint that contained the elements in the sample form); FED. R. CIV. P. 84 (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules

contemplate.”); *see also Phonometrics, Inc. v. Hospitality Franchise Sys.*, 203 F.3d 790 (Fed. Cir. 2000) (under *Conley*, approving complaint that alleged ownership of asserted patent, named each defendant, cited the infringed patent, described the means by which defendants infringe, and pointed to specific sections of patent law invoked); *Fotomedia Techs., LLC v. AOL, LLC*, 2008 WL 4135906 (E.D. Tex. Aug. 29, 2008) (Everingham, Mag.).

Defendants contend that *McZeal* is not good law because the Federal Circuit erroneously concluded that *Twombly* did not change the liberal pleading standard articulated in *Conley*. Docket No. 32 at 8; *see McZeal*, 510 F.3d at 1357 n.4. Defendants are incorrect. In *McZeal*, the Federal Circuit recognized what the Supreme Court said about *Conley* in *Twombly*—that *Conley* did not state an erroneous standard, but that *Conley* had been read out of context to misstate the pleading standard. *See Twombly*, 550 U.S. at 562–63 (“To be fair to the *Conley* Court, the passage should be understood in light of the opinion’s preceding summary of the complaint’s concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival.”). Additionally, the Federal Circuit issued *McZeal* after *Twombly*, and *Iqbal* did not change the law set forth in *Twombly*, but further elaborated on it.

Defendants also imply that Form 18 is no longer sufficient under the Federal Circuit’s unpublished opinion of *Colida v. Nokia, Inc.*, 347 Fed. Appx. 568, 671 n.2 (Fed. Cir. Oct. 6, 2009) (“Form 18 is a sample pleading for patent infringement, but is not tailored to design patents and was last updated before the Supreme Court’s *Iqbal* decision.”). Defendants’ argument—that the generic pleading of patent cases is no longer sufficient under *Iqbal*—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). As *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374 (N.D. Cal. Sept. 24, 2009), which Defendants rely on for other propositions, and the dissent in *McZeal* acknowledge, despite *Twombly* and *Iqbal*, Form 18 remains adequate under Rule 84 to state a claim for direct patent infringement. *Elan Microelectronics Corp. v. Apple, Inc.*, 2009 WL 2972374 at **2 (N.D. Cal. Sept. 24, 2009) (“It is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a ‘short and plain statement,’ it offers little to ‘show’ that the pleader is entitled to relief. 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.”); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1360 (Fed. Cir. Sept. 14, 2007) (Dyk, J., dissenting in part) (“[U]nder 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.”). Accordingly, to the extent that Defendants argue Form 18 is inadequate under *Twombly* and *Iqbal*, the Court rejects that argument.

Defendants contend that CWC has accused them of patent infringement because they have a website. Defendants also point out that CWC has made the same allegation of infringement against each Defendant, regardless of what the Defendant sells on its website. Docket No. 32 at 6. Reviewing the patent-in-suit and using common sense, as instructed in *Iqbal*, it is obvious that what is sold through the websites—“e.g., helicopters, elevators, snowmobiles, or watches”—is irrelevant to infringement. *See* Docket No. 32 at 6. Given these considerations, and that CWC’s complaint complies with the sample complaint set forth in the Federal Rules of Civil procedure, CWC has

adequately stated a claim for which relief can be granted that puts Defendants on notice of what they must defend. *See Iqbal*, 129 S. Ct. at 1950 (“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.”).

Indirect Infringement Claims

Defendants also move to dismiss CWC’s indirect infringement claims. Form 18 does not expressly address indirect infringement claims, and courts are split on the pleading requirements of indirect infringement claims. *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, CWC’s indirect infringement allegations—which fail to identify which claims are indirectly infringed, fail to identify which methods or systems indirectly infringe, and fail to identify a direct infringer in reference to its indirect infringement claims—does not state a claim for indirect infringement that is plausible on its face. The complaint simply fails to inform Defendants as to what they must defend. 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 CWC

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 requirements, but some greater specificity is required here.

CONCLUSION

Accordingly, the Court **GRANTS** in part and **DENIES** in part the motion to dismiss. To the extent that the Court has granted the motion, the Court **GRANTS** CWC leave to amend its complaint within fifteen days.

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**