

inducing others to use, importing, offering for sale, and/or selling, without license certain products that consist of and/or incorporate infringing wireless network products, including, without limitation, wireless network technology similar to that found in its **wireless industrial control systems and components thereof**, in violation of 35 U.S.C. § 271 patent, in this district and elsewhere in the United States.

...

Defendant SmartLabs has infringed and continues to infringe one or more claims of the '511 Patent, directly, contributorily, and/or by inducement by making, using, inducing others to use, importing, offering for sale, and/or selling, without license certain products that consist of and/or incorporate infringing wireless network products, including, without limitation, wireless network technology similar to that found in its **energy monitoring and home automation systems and components thereof**, in violation of 35 U.S.C. § 271 patent, in this district and elsewhere in the United States.

...

Defendant's directly contribute and induce infringement through supplying the infringing systems and components to customers. Defendant's customers who purchase systems and components thereof in accordance with Defendant's instructions directly infringe one or more claims of the '511 Patent in violation of 35 U.S.C. § 271.

(Doc. No. 1), at ¶¶ 38, 44, 45.

ABB and SmartLabs independently move to dismiss Sipco's claims for direct infringement and for inducing and contributory infringement. Defendants argue that because Sipco failed to identify a specific system or product, the complaint neither complies with Form 18 nor does it comply with general *Iqbal* pleading standards. ABB MOTION at 6-7; SMARTLABS MOTION at 2-3. In particular, ABB takes exception to Sipco's use of the phrase "similar to" to describe the accused infringing products and SmartLabs argues that the use of the phrase "and/or other products" is too vague. ABB MOTION at 7; SMARTLABS MOTION at 3. ABB also argues that Sipco failed to adequately plead indirect infringement because the complaint did not identify the underlying

infringing product, the direct infringer, or the alleged infringing claims. ABB MOTION at 10. SmartLabs similarly argues that the indirect infringement contentions should be dismissed because the identification of “customers” as the direct infringer is insufficient. SMARTLABS MOTION at 4-5. Moreover, ABB further argues that Sipco failed to plead any facts to show that ABB knew of the patent and intended to encourage infringement. (Doc. No. 53) (“ABB REPLY”), at 2.

Sipco contends that it properly identified the infringing product as those “similar to” ABB’s industrial wireless control systems. (Doc. No. 52) (“RESPONSE I”), at 5; *see also* (Doc. No. 80) (“RESPONSE II”), at 5-6. As for indirect infringement, Sipco argues that it complied with the Federal Rules and case law by identifying ABB’s and SmartLabs “customers” as the direct infringers and that it is not required to identify the specific claims that ABB is indirectly infringing. RESPONSE I, at 6-9; RESPONSE II, at 7-9.

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

Sipco’s allegations of direct and indirect infringement are sufficient. ABB argues that it cannot identify the infringing goods because Sipco used the phrase “similar to.” ABB cites to several decisions from this Court for the proposition that “complaints so deficient that they even fail

to identify a specific product or system accused of infringement have been dismissed under Rule 8.” MOTION at 5. However, most cases Defendants cite involved boilerplate pleadings where plaintiffs merely alleged that Defendant’s “products” or “services” were infringing their patents.¹ In the instant case, however, Sipco identifies the infringing products and services as wireless network systems “similar to” ABB’s wireless industrial remote systems. Further, this is not a case where plaintiff simply asserted generic allegations across all defendants.

Lastly, given the nature of patents in suit, Sipco’s identification is sufficient. *See Eolas Techs, Inc., v. Adobe Sys.*, No. 6:09-cv-446, 2010 WL 2026627, at *3 (E.D.Tex May 6, 2010) (finding sufficient identification where plaintiff identified defendant’s website generally); *cf. Landmark Tech. LLC v. Aeropostale*, No. 6:09-cv-262, 2010 WL 5174954, at *1, 3 (E.D. Tex. Mar. 29, 2010) (finding a common allegation of infringing “electronic commerce systems” insufficient).

Form 18 does not address indirect infringement claims, and courts are split on the pleading requirements for indirect infringement. *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 a 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 a whole, however, Sipco’s indirect infringement allegations state a claim plausible

¹ *See, e.g., Bedrock Computer Techs, LCC v. Softlayer Techs., Inc.*, No. 6:09-cv-269, 2010 WL 575172, at *1,3 (E.D.Tex. Mar. 29, 2010) (alleging that defendant’s “products and/or services” infringe); *Joao Bock Transaction Sys of Texas v. AT&T, Inc.*, No 6:09-cv-2010, 2010 WL 5343173, at *1,3 (E.D.Tex. Mar. 29, 2010) (identifying only “infringing products and services”).

on its face. As explained above, Sipco adequately identified the underlying infringing product. Moreover, Sipco properly identified a direct infringer, “[d]efendant’s customers.”² Additionally, Sipco’s failure to specifically plead each individual element of its indirect infringement claim is not fatal. *See Atwater Partners of Tex, LLC v. AT&T, Inc.*, No: 2:10-cv-175, 2011 WL 1004880, at *3 (E.D. Tex. Mar. 18, 2011). Moreover, given that there is no form for pleading indirect infringement nor has the Federal Circuit interpreted *Twombly/Iqbal* to require specific pleading requirements for indirect infringement, the Court finds Sipco’s allegations sufficient. *See id.*

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 any ambiguity in the pleadings were resolved when Sipco served its preliminary infringement contentions on June 20, 2011, rendering this motion superfluous for all practical purposes. *See* (Doc. No. 90).

CONCLUSION

Accordingly, the Court **RECOMMENDS** that ABB’s Motion to Dismiss for Failure to State a Claim (Doc. No. 44) and SmartLabs’ Rule 12(b)(6) Motion to Dismiss (Doc. No. 68) be **DENIED**.

Within fourteen (14) days after receipt of the magistrate judge’s report, any party may serve and file written objections to the findings and recommendations contained in this report. A party’s

² *Cf. Clear with Computers, LLC, v. Bergdorf Goodman, Inc.*, No. 6:09-cv-481, 2010 WL 3155888, at *1, 4 (E.D. Tex. Mar. 29, 2010) (failing to identify a direct infringer); *Joao Bock Transaction Sys. Of Tex.*, 2010 WL 5343179, at *1, 3 (finding that “induced others” did not properly identify a direct infringer); *Landmark Tech. LLC*, 2010 WL 5174954, at *1, 3 (dismissing indirect infringement claims where plaintiff made common allegations against thirteen defendants and failing to identify the accused products.).

failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that party from de novo review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United States Auto. Ass'n*, 79 F.3d 11415. 1430 (5th Cir. 1996) (en banc).

So ORDERED and SIGNED this 12th day of September, 2011.



JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE