

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV15-3011 PSG (MRWx)	Date	February 4, 2016
Title	Incom Corp. v. The Walt Disney Company, <i>et al.</i>		

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez

Not Reported

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

Proceedings (In Chambers): Order GRANTING in Part and DENYING in Part Defendants' Motion to Dismiss

Before the Court is Defendant The Walt Disney Company ("TWDC") and Walt Disney Parks and Resorts Worldwide ("WDPR") (collectively, "Defendants") motion to dismiss Plaintiff InCom Corp.'s ("Plaintiff") First Amended Complaint ("FAC"). Dkt. # 32. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having considered the moving, opposing and reply papers, the Court GRANTS in part and DENIES in part the motion.

I. Background

Plaintiff brings this suit under 35 U.S.C. §§ 271(a) and 271(c) for infringement of US Patent Nos. 8,335,705 B2 ("705 patent"), 7,336,185 B2 ("185 patent") and 7,812,779 B2 ("779 patent") (together, "patents in suit"). Dkt. # 26 ["FAC"] ¶¶ 17, 20, 23, 26, 29. The 705 patent, entitled "Attendance Tracking System," the 185 patent, entitled "Combination ID/Tag Holder," and the 779 patent, entitled "RFID Transceiver Sensitivity Focusing System" are used to implement Attendance Tracking Systems at schools, colleges, universities, and other public venues. FAC ¶¶ 9, 10, 11, 13. Plaintiff asserts that a principal inventive concept of the patents in suit is the use of Radio Frequency Identification ("RFID") to recognize human beings and keep track of their attendance in conjunction with other apparatus. FAC ¶ 13. Plaintiff explains that prior to its inventions, such a system was unavailable because RFID did not work effectively while near human beings. *Id.* Because of Plaintiff's invention, attendance information for a large number of students rushing into a school entrance over a short time frame can be effectively logged, resulting in a mine of information that informs educational policies and school funding. *Id.*

Plaintiff alleges that Defendants' infringing activities include development, manufacture, and use of an attendance tracking device known as "MagicBand" which is incorporated as part

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of an infringing system known as “MyMagic+.” *Id.* ¶ 14, 20, 26. Plaintiff asserts that “My Magic+” is used to authorize admission at Defendants’ theme parks, track attendance at the parks, track attendance on a system known as the “FastPass,” monitor a record of attendees at the parks and hotels, maintain a record of those utilizing FastPass, track attendance at restaurants, and maintain a record of purchases made by attendees at the parks. *Id.* ¶¶ 16, 22, 28. Plaintiff claims that these activities utilize elements which infringe the patents in suit. *Id.*

Plaintiff also alleges that Defendants’ infringement was willful because after Plaintiff wrote to TWDC on December 9, 2013 offering to license the patents in suit, TWDC “specifically acknowledged notice of [the patents in suit] by correspondence on January 6, 2014.” *Id.* ¶¶ 15, 18, 21, 24, 27, 30. Plaintiff told TWDC that it had patented an Attendance Tracking System which might be of interest to TWDC and enclosed the patents in suit for TWDC’s review. *FAC*, Ex. D [“Incom Letter”]. TWDC responded that it had received Plaintiff’s letter, that it “takes intellectual property issues very seriously and would not knowingly use technology or designs covered by a valid and unlicensed patent claim,” and that after reviewing the patents in suit it had determined that it had no interest in licensing them. *FAC*, Ex. E [“TWDC Letter”].

Defendants move to dismiss the *FAC* for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Dkt. # 32 (“Mot.”).

II. Legal Standard

A motion to dismiss under Rule 12(b)(6) tests whether the complaint “contain[s] sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When deciding a Rule 12(b)(6) motion, the court must accept the facts pleaded in the complaint as true, and construe them in the light most favorable to the plaintiff. *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1019 (9th Cir. 2013); *Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th Cir. 2009). The court, however, is not required to accept “legal conclusions...cast in the form of factual allegations.” *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); *see Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

After accepting all non-conclusory allegations as true and drawing all reasonable inferences in favor of the plaintiff, the court must determine whether the complaint alleges a plausible claim to relief. *See Iqbal*, 556 U.S. at 679-80. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inferences that the defendant is liable for the misconduct alleged...The plausibility standard is not akin to a

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‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678.

III. Discussion

Defendants challenge the FAC on the grounds that Plaintiff has not pled sufficient facts to state a claim for direct, contributory, or willful infringement. *See Mot.*

A. Direct Infringement

The parties dispute whether the FAC, whose allegations of direct infringement mirror in part Federal Rule of Civil Procedure Form 18 (“Form 18”), states a claim for relief. Form 18 requires only (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 one or more of the activities proscribed under 35 U.S.C. § 271; (4) a statement that the plaintiff has given the defendant notice of its infringement; and (5) a demand for an injunction and damages. *See Fed. R. Civ. P. Form 18; K-Tech Telecomm., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1282-85 (Fed. Cir. 2013). Until recently, Federal Rule of Civil Procedure 84 (“Rule 84”) provided that forms such as Form 18 “suffice” to satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a). Fed. R. Civ. P. 84 (abrogated); *see K-Tech*, 714 F.3d at 1283 (noting that Rule 84 “made clear that a proper use of [Form 18] effectively immunize[d] a claimant from attack regarding the sufficiency of the pleading”). Since the Supreme Court’s decisions in *Twombly* and *Iqbal*, courts have struggled with how to reconcile the brevity reflected in Form 18 with the heightened “plausibility” standard of *Twombly* and *Iqbal*. *See In re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d 1323, 1334 (Fed. Cir. 2012) (addressing the potential conflict and finding that “to the extent...*Twombly* and its progeny conflict with the Forms and create different pleadings requirements, the Forms control.”) (citations omitted).

However, the most recent amendments to the Federal Rules abrogated Rule 84. *See Fed. R. Civ. P. 84 (abrogated)*. Accordingly, Form 18 no longer provides a safe harbor for pleading direct infringement. Plaintiff argues that because it filed the FAC six days before the amendments took effect on December 1, 2015, Rule 18 should be the standard against which the Court judges the FAC. *Opp.* 5. The Court disagrees. In submitting the amended Federal Rules to Congress on April 29, 2015, the Supreme Court noted that the amended Federal Rules would take effect on December 1, 2015 and would “govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.” Supreme Court of the United States, *Order Regarding Amendments to the Federal Rules of Civil Procedure* (Apr. 29, 2015), available at [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf) (last visited February 1, 2015). Because this case was pending when Rule 84 was

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abrogated, the Court must, to the extent “just and practicable,” look beyond the contours of Form 18 to assess whether the FAC states an adequate claim for relief.

Plaintiff urges the Court to apply Form 18 in spite of recent developments because “Defendants can tell” what they are being sued for. *Opp.* 5. The Court declines to do so. The thrust of the Supreme Court’s decisions in *Twombly* and *Iqbal* was to recognize that Fed. R. Civ. P. 8(a)(2) obligates a plaintiff to provide not only “fair notice of what the...claim is,” but also “the ‘grounds’ of his ‘entitlement to relief.’” *Twombly*, 550 U.S. at 555. Those decisions, the abrogation of Rule 84, and the Supreme Court’s admonition to apply the new rules where practicable persuade the Court that here, where the issue is not case dispositive, Plaintiff’s FAC should be held to *Iqbal* and *Twombly*’s “plausibility” standard.

Even so, Plaintiff’s allegations of direct infringement are sufficient under that standard. Defendants assert that the FAC is too conclusory because it merely alleges that Defendants’ infringing activities “include development, manufacture, and use of an attendance tracking system, including an attendance tracking device known as the ‘MagicBand.’” *Compl.* ¶¶ 14, 20, 26. Defendants correctly note that “[m]erely naming a product and providing a conclusory statement that it infringes a patent is insufficient to meet the ‘plausibility’ standard set forth in *Twombly* and *Iqbal*.” *Medsquire LLC v. Spring Medical Sys., Inc.*, No. 2:11-cv-04504-JHN-PLA, 2011 WL 4101093, at *3 (C.D. Cal. Aug. 31, 2011); *see Proxycorr Inc. v. Microsoft Corp.*, No. SACV 11-1681 DOC (ANx), 2012 WL 1835680, at *4 (C.D. Cal. May 16, 2012) (bare allegations that Defendant is infringing by making, using, or selling technology that infringes Plaintiff’s patent are too conclusory under *Iqbal* and *Twombly*).

However, the FAC does more than name a product and baldly conclude that it infringes a patent which belongs to Plaintiff. Plaintiff attaches the patents in suit to the FAC and describes how its Attendance Tracking System uses RFID technology and ID badges to track human presence in large volumes. Plaintiff asserts that prior to its invention, such technology was unavailable because RFID did not work effectively near human beings. Plaintiff then names specific products developed, manufactured and used by Defendants which, like Plaintiff’s system, track human presence in large volumes. Plaintiff has stated a plausible claim for direct infringement by specifically identifying Defendants’ products and alleging that they perform the same unique function as Plaintiff’s patented system. *See Bender v. LG Electronics U.S.A., Inc.*, No. C 09-02114 JF (PVT), 2010 WL 889541, at *6 (N.D. Cal. Mar. 11, 2010) (*Twombly* and *Iqbal* require plaintiffs to include “a brief description of what the patent at issue does and an allegation that certain named and specifically identified products or product components also do what the patent does, thereby raising a plausible claim that the named products are infringing”).

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Lastly, Defendants argue that the FAC fails because to succeed on its claim for direct infringement, Plaintiff must prove that a single entity practiced each and every element of the claimed invention. *Mot. 5* (citing *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015) (en banc)). The Federal Circuit’s decision in *Akamai* is procedurally inapposite, however, because it involved an evaluation of whether the district court had properly granted judgment of noninfringement as a matter of law. *Id.* At the pleading phase, Plaintiff need only allege that both TWDC and WDPR were responsible for directly infringing the patents in suit. Plaintiff does so. *See FAC* ¶¶ 14, 16, 20, 22, 26, 28. Although discovery may reveal that either TWDC or WDPR was not responsible for developing, manufacturing, or using the “MagicBand” or “MyMagic+” system, it is not the Court’s place to conduct factual investigation into the truthfulness of Plaintiff’s allegations. At this stage, it is sufficient that Plaintiff has made plausible allegations that each Defendant is responsible for direct infringement.

B. Contributory Infringement

Defendants also challenge the factual allegations in the FAC as insufficient to state a claim for contributory infringement under 35 U.S.C. § 271(c). *Mot. 7*. Plaintiff reassures the Court that it “does not allege contributory infringement and is not alleging contributory infringement as a cause of action against the Defendants” and that any such allegations in the FAC are inadvertent. *Opp. 11*. Accordingly, Plaintiff will be precluded from proceeding on any claims of contributory infringement. *See First Intercontinental Bank v. Ahn*, 798 F.3d 1149, 1154 (9th Cir. 2015) (“Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.”) (citations and internal quotations omitted). To the extent any claims for contributory infringement exist in the FAC, Defendants’ motion to dismiss them is granted.

C. Willful Infringement

Finally, Defendants argue that Plaintiff has pled insufficient facts to support a plausible claim for willful infringement, which is a prerequisite to an award of enhanced damages under 35 U.S.C. § 284. *Mot. 10*; *see OpenTV, Inc. v. Apple*, No. 14-cv-01622-HSG, 2015 WL 1535328, at *7 (N.D. Cal. Apr. 6, 2015) (citing *In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007)). “When a complaint is filed, a patentee must have a good faith basis for alleging willful infringement.” *In re Seagate*, 497 F.3d at 1374. “Infringement is willful when the infringer was aware of the asserted patent, but nonetheless acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.” *I4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 860 (Fed. Cir. 2010). “California federal courts have taken the view that a plaintiff must plead presuit knowledge in order to adequately plead willful

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infringement.” *MyMedicalRecords, Inc. v. Jardogs, LLC*, No. 2:13-cv-03560-ODW (SHx), 14 WL 32157, at *3-4 (C.D. Cal. Jan. 6, 2014) (citations omitted).

Here, Defendants argue that dismissal is warranted because even if Plaintiff pled that Defendants knew the patents existed, Plaintiff did not plead specific facts to show that Defendants knew their actions were objectively likely to infringe those patents. *Mot.* 11. However, Defendants’ pre-suit knowledge of the patents in suit is sufficient to support a plausible inference that they also knew, or should have known, that their subsequent actions posed an objective risk of infringement. Plaintiff alleges that the patents in suit were sent to TWDC on December 9, 2013, that TWDC acknowledged receipt of the patents in suit, and that, knowing the risk of infringement, Defendants went on to install the allegedly infringing system at their parks. *Incom Letter; TWDC Letter; FAC* ¶¶ 16, 22, 28. Because Plaintiff has pled facts sufficient to support its claim that TWDC acted in the face of a known and objectively identifiable risk of infringement, TWDC’s motion to dismiss Plaintiff’s claim for willful infringement is denied. *Cf. Avocet Sports Tech., Inc. v. Garmin Int’l, Inc.*, No. C 11-04049 JW, 2012 WL 1030031, at *4 (N.D. Cal. Mar. 22, 2012) (granting motion to dismiss willful infringement claim against individual defendant where plaintiff did not allege any facts to suggest that the specific defendant had knowledge of plaintiff’s patent prior to filing the complaint); *see Seoul Laser Dieboard System Co., Ltd. v. Serviform, S.r.l.*, 957 F.Supp.2d 1189, 1197 (S.D. Cal. 2013) (plaintiff stated a claim for willful infringement because plaintiff’s allegation that it sent defendant a letter regarding its patents was sufficient to allege pre-suit knowledge of those patents).

The same cannot be said of Plaintiff’s willful infringement claim against WDPR. Unlike Plaintiff’s claims for direct infringement, which assert that both TWDC and WDPR are responsible for developing, manufacturing and using the allegedly infringing “MyMagic+” system, Plaintiff does not allege that WDPR had any pre-suit knowledge of the patents in suit. Plaintiff sent its December 9, 2013 letter to TWDC, not WDPR, and it has not alleged any facts to assert that TWDC’s knowledge can be imputed to WDPR. Accordingly, the claim for willful infringement against WDPR must be dismissed. *See Avocet Sports*, 2012 WL 1030031, at *4.

IV. Conclusion

For the foregoing reasons, Defendants’ motion to dismiss is DENIED in part and GRANTED in part. The motion is DENIED as to Plaintiff’s claims for direct infringement against both Defendants and Plaintiff’s claim for willful infringement against TWDC. Because Plaintiff concedes it has no contributory infringement claim, the motion is GRANTED without leave to amend that claim. The motion is also GRANTED as to Plaintiff’s claim for willful infringement against WDPR. Plaintiff may submit a Second Amended Complaint amending its

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willful infringement claim against WDPR no later than **February 25, 2016**. Failure to amend the claim by that date will result in dismissal of the willful infringement claim against WDPR with prejudice.

IT IS SO ORDERED.