

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

HUNTS POINT VENTURES, INC.,

Plaintiff,

v.

DIGECOR, INC.,

Defendant.

OPINION AND ORDER

11-cv-319-bbc

In this case for patent infringement, defendant Digecor, Inc. has moved to dismiss plaintiff Hunts Point Ventures, Inc.'s complaint for failing to provide adequate notice of its claims as required by Fed. R. Civ. P. 8. I am granting the motion, but will give plaintiff an opportunity to file an amended complaint.

To comply with Rule 8, plaintiffs must "state a claim to relief that is plausible on its face," and plead "[f]actual allegations [that are] enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007). Conclusory allegations that simply list the elements of a claim are not sufficient. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951-54 (2009).

Defendant argues that the complaint violates Rule 8 because it does not identify the

accused products or which claims in the patent are being asserted. Defendant is correct that I have held repeatedly that the plaintiff must provide that information in the complaint. E.g., Synchronoss Technologies, Inc. v. Dashwire, Inc., 11-cv-2-bbc, dkt. #24 (dismissing complaint for failing to identify asserted claims and accused products); AlmondNet, Inc. v. Microsoft Corp., 10-cv-298-bbc, dkt. #23, at 5 (“Defendant’s counterclaim does not provide notice to plaintiff of the grounds for its infringement claim and does not identify either the claims of the ‘248 patent that plaintiff allegedly infringes or the allegedly infringing products. Therefore, I will grant plaintiff’s motion to dismiss defendant’s infringement counterclaim.”); Taurus IP, LLC v. Ford Motor Co., 539 F. Supp. 2d 1122, 1127 (W.D. Wis. 2008) (“[P]laintiff’s failure to specify which claims it believes are infringed by a defendant’s products places an undue burden on the defendant, who must wade through all the claims in a patent and determine which claims might apply to its products to give a complete response.”); Extreme Networks, Inc. v. Enterasys Networks, Inc., 2007 WL 5448209, *2 (W.D. Wis. Dec. 31, 2007) (“[I]f a defendant does not have notice of the asserted claims, it has no notice at all. If it does not know what it is accused of infringing, it cannot possibly prepare a defense.”).

I have analogized this requirement to civil rights cases, e.g., Ricoh Co., Ltd. v. Asustek Computer, Inc., 481 F. Supp. 2d 954, 959 (W.D. Wis. 2007), in which plaintiffs must identify their protected conduct and the particular act that violated their rights. Higgs v.

Carver, 286 F.3d 437, 439 (7th Cir. 2002) (“Had Higgs merely alleged that the defendants had retaliated against him for filing a suit, without identifying the suit or the act or acts claimed to have constituted retaliation, the complaint would be insufficient.”); Kyle v. Morton High School, 144 F.3d 448, 454 (7th Cir.1998) (“the complaint for a First Amendment violation must at least put the defendants on notice that some specific speech or conduct by the plaintiff led to the termination”). In other words, regardless of the type of case involved, it is the plaintiff’s initial burden to inform the defendant what it did to violate the plaintiff’s rights.

Plaintiff does not dispute that it failed to identify the asserted claims and the accused products in its complaint. However, it says that it did not need to do that because its complaint is similar to Form 18 in the appendix to the Federal Rules of Civil Procedure.

Plaintiff is correct that Form 18 does not explicitly require the complaint to include the asserted claims or a particular accused product. Instead, the form refers generally to the patent number and the type of accused product (“electric motors”). In fact, the lack of detail and use of conclusory allegations in Form 18 and other forms in the appendix have led some courts and commentators to question whether the forms can be reconciled with Twombly and Iqbal. Bender v. LG Electronics U.S.A., Inc., No. 09 Civ. 2114, 2010 WL 889541, *5 (N.D. Cal. Mar. 11, 2010) (noting difficulty in “reconcil[ing] the guidelines set forth in Twombly and Iqbal with Form 18” and collecting cases requiring identification of infringing

products); Elan Microelectronics Corp. v. Apple, Inc., No. C 09-01531 RS, 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”); Sharafabadi v. University of Idaho, No. C09-1043JLR, 2009 WL 4432367, at *3 n.5 (W.D. Wash. Nov. 27, 2009) (“This court agrees with the sentiment expressed by at least one other district court that it is difficult to reconcile Form 18 with the Supreme Court's guidance in [Twombly and Iqbal].”); Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 Iowa L. Rev. 873, 878 (2009) (“it is difficult to see the difference between [Form 11 for negligence claims] and the key allegations in Iqbal” and that “[if] anything, the key Iqbal allegations seem more specific.”); Minutes, Civil Rules Advisory Committee, at 35 (Apr. 7-8, 2008) (concluding that “[t]he illustrative pleading Forms appended to the rules . . . will deserve reconsideration” in light of Twombly), available at [http:// www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2008-min.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2008-min.pdf). See also Colida v. Nokia, Inc., 347 Fed. Appx. 568, 571 n.2 (Fed. Cir. 2009) (affirming of dismissal of complaint and noting that Form 18 “was last updated before the Supreme Court's Iqbal decision”).

I need not resolve the question whether Form 18 is consistent with Twombly and Iqbal because defendant’s complaint is not sufficient under any standard. As I explained in Synchronoss Technologies, “[i]n circumstances in which a defendant could determine the basis for the plaintiff's infringement contentions with relative ease, a complaint containing

only the information set forth in Form 18 may provide proper notice.” For example, when the plaintiff is asserting a patent with a single claim against a defendant that makes or sells a single accused device, additional detail is not necessary. However, when the patent includes multiple claims and the defendant manufactures and sells multiple accused products, it does not give the defendant adequate notice simply to allege that some unidentified product of the defendant infringed some unidentified claim. E.g., Lyda v. FremantleMedia North America, Inc., 2011 WL 2898313, *3 (S.D.N.Y. 2011) (even assuming that Form 18 is adequate model, “allusions to an ‘electronic voting’ system or ‘electrical systems’ are too vague to identify the infringing device or method at issue”).

Plaintiff relies on McZeal v. Sprint Nextel Corp., 501 F.3d 1354 (Fed. Cir. 2007), but that case is not on point because the court did not consider whether the complaint must identify the asserted claims or the accused products. Rather, the court held that “a plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent.” Id. at 1357. Neither this court nor defendant has suggested that plaintiff must include that level of detail in its complaint.

Because plaintiff has not given defendant adequate notice of its claims, I am granting the motion to dismiss. However, I will give plaintiff an opportunity to file an amended complaint to cure the deficiencies. Foster v. DeLuca, 545 F.3d 582, 584 (7th Cir. 2008) (“District courts . . . generally dismiss the plaintiff’s complaint without prejudice and give the

plaintiff at least one opportunity to amend her complaint."). In addition, to the extent plaintiff is not aware of all of the potentially infringing products at this time, it is free to file additional amended complaints within the schedule set by the magistrate judge in the preliminary pretrial conference order if it becomes aware of new claims after conducting discovery. However, plaintiff cannot simply file a complaint in which it generally accuses defendant of violating a patent. Under Fed. R. Civ. P. 11, plaintiff is required to conduct a reasonable investigation of its claims *before* filing its complaint. If it does not yet have a reasonable belief that a particular product violates a particular claim, it is questionable whether plaintiff has complied with that rule. Antonious v. Spalding & Evenflo Companies, Inc., 275 F.3d 1066, 1073 (Fed. Cir. 2002) ("Rule 11 requires an attorney who files a patent infringement action to compare the accused device with the construed patent claims."); Riley v. Vilsack, 665 F. Supp. 2d 994, 1005-06 (W.D. Wis. 2009) ("If [Rule 11] is used as a guide, it would mean that a complaint should include enough facts to suggest that the plaintiff has reasonable grounds to believe that discovery will lead to evidence that the defendant may be held liable for a particular violation of the law.").

ORDER

IT IS ORDERED that defendant Digecor, Inc.'s motion to dismiss, dkt. #4, is GRANTED and plaintiff Hunts Point Ventures, Inc.'s complaint is DISMISSED for its

failure to comply with Fed. R. Civ. P. 8. Plaintiff may have until September 8, 2011, to file an amended complaint that complies with Rule 8 as described in this opinion. If plaintiff does not respond by that date, the clerk of court is directed to close the case.

Entered this 24th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge