UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CIVIL MINUTES – GENERAL

Case No. SACV 11-1681 DOC (ANx) Date: May 16, 2012

Title: PROXYCONN INC. –V- CORPORATION, ET AL.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Julie Barrera	N/A
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
None Present	None Present

PROCEEDINGS: (IN CHAMBERS): ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court is a Motion to Dismiss ("Motion") filed by Defendants Microsoft Corporation ("Microsoft"), Hewlett-Packard Company ("Hewlett-Packard"), Acer America Corporation ("Acer"), and Dell Inc. ("Dell"). (Dkt. 34). The Court finds the matter appropriate for decision without oral argument. Fed R. Civ. P. 78; Local R. 7-15. After considering the moving, opposing, and replying papers, the Court GRANTS the Motion.

I. Background

The gravamen of the Consolidated Complaint filed by Plaintiff Proxyconn Inc. ("Plaintiff") is that each of four Defendants are directly and indirectly infringing Plaintiff's method patent.

a. The Court Consolidated Four Lawsuits

Plaintiff filed four separate complaints against four individual Defendants Microsoft, Hewlett-Packard, Acer, and Dell. On January 3, 2012, the Court ordered all parties to show cause why these four cases should not be combined into one and stated that, if there were no objections, Plaintiff "shall file an Amended Complaint." *See* Order (Dkt. 9).

On January 17, 2012, the Court ordered that these four separate lawsuits be combined into one because no party objected to consolidation. *See* Order (Dkt. 14). As per the January 3, 2012, Order, Plaintiff filed an amended complaint against all four Defendants. *See* Consolidated Compl. (Dkt. 23).

b. Allegations of Direct Patent Infringement

The Consolidated Complaint brings four "Counts" of infringement of U.S. Patent No. 6,757,717 ("'717 Patent"); one count against each Defendant. The '717 Patent is attached to the complaint.

Each count has virtually identical language, with the only difference being the substitution of a different Defendant's name and different allegedly infringing technology, described as "personal computers" or "computer systems." Each count alleges that the individual Defendant:

> . . . has been and still is directly . . . infringing at least claims 1, 10, 11 and 22 of the '717 patent . . . by making, using, selling, offering to sell, or importing, without license or authority, [infringing technology] . . . .

See id. ¶¶ 15-16 (Microsoft), 21-23 (Hewlett-Packard), 29-30 (Acer), 35-37 (Dell).

Each count alleges that each Defendant's infringing technology "include[s]" computers using a method; the method's description parrots the description of Plaintiff's method patent. *See id.* Ex. A. Specifically, each count alleges that Defendant's infringing technology:

> . . . include[s] a sender computer and a receiver computer communicating through a network, with each computer equipped with a method for creating digital digests on data and the receiving computer including a means for comparing digital digests.

Each count goes on to allege that:

> In particular, these [infringing technologies] contain software including, but not limited to, the Remote Differential Compression ("RDC") technology used in at least Microsoft's Windows Server 2003 R2, Windows Server 2008, Windows Small Business Server 2003, Windows Small Business Server 2008, Windows Small Business Server 2011, Windows XP with Service Pack 3, Windows Vista, and Windows 7 operating systems.

See id. ¶¶ 14 (Microsoft), 21 (Hewlett-Packard), 28 (Acer), 35 (Dell).

c. Allegations of Indirect Patent Infringement

Each count alleges that the individual Defendant:

> . . . has been and still is indirectly infringing, by way of inducing infringement by others of the '717 patent, by . . . making, using, importing, offering for sale, and/or selling, without license or authority, software for use in systems that thereby fall within the scope of at least claims 1, 10, 11 and 22 of the '717 patent.

See id. ¶¶ 15 (Microsoft), 22 (Hewlett-Packard), 29 (Acer), 36 (Dell).

Nearly verbatim allegations also follow each count alleging that the individual Defendant is "contributing to the infringement by others of the '717 patent . . . ." *See id.* ¶¶ 16 (Microsoft), 23 (Hewlett-Packard), 30 (Acer), 37 (Dell).

d. Allegations of Knowledge of Indirect Patent Infringement

In addition, each count alleges that the individual Defendant "[s]ince at least the filing of the complaint, . . . has knowledge of the '717 patent and has had the specific knowledge that the combination of its software and computer systems described above infringe the '717 patent." *See id.* ¶¶ 15-16 (Microsoft), 22-23 (Hewlett-Packard), 29-30 (Acer), 36-37 (Dell).

e. The Present Motion to Dismiss

All four Defendants filed the present Motion to Dismiss (Dkt. 34). While Acer, Dell, and Hewlett-Packard moved only as to the claims directed against their respective entities, Microsoft moved as to the claims directed against all four Defendants. Mot. at 2 n.2.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts which, if true, would entitle the complainant to relief.[1] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, this court accepts as true a plaintiff's well-pled factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). The court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, the court may also consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by* 307 F.3d 1119, 1121 (9th Cir. 2002).

A motion to dismiss under Rule 12(b)(6) can not be granted based upon an affirmative defense unless that "defense raises no disputed issues of fact." *Scott v.*

[1] A Rule 12(b)(6) motion raises a "purely procedural question" that is controlled by law of the circuit in which the federal court sits, not the law of the Federal Circuit. *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 793 (Fed. Cir. 2000).

Kuhlmann, 746 F.2d 1377, 1378 (9th Cir. 1984). For example, a motion to dismiss may be granted based on an affirmative defense where the allegations in a complaint are contradicted by matters properly subject to judicial notice. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). In addition, a motion to dismiss may be granted based upon an affirmative defense where the complaint's allegations, with all inferences drawn in Plaintiff's favor, nonetheless show that the affirmative defense "is apparent on the face of the complaint." *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010).

Additionally, Federal Rule of Evidence 201 allows the court to take judicial notice of certain items without converting the motion to dismiss into one for summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994). The court may take judicial notice of facts "not subject to reasonable dispute" because they are either: "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201; *see also Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (noting that the court may take judicial notice of undisputed "matters of public record"), *overruled on other grounds by* 307 F.3d 1119, 1125-26 (9th Cir. 2002). The court may disregard allegations in a complaint that are contradicted by matters properly subject to judicial notice. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

Dismissal without leave to amend is appropriate only when the court is satisfied that the deficiencies in the complaint could not possibly be cured by amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be granted even if no request to amend was made). Rule 15(a)(2) of the Federal Rules of Civil Procedure states that leave to amend should be freely given "when justice so requires." This policy is applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

III. Discussion

Defendants argue that dismissal under Rule 12(b)(6) is appropriate because Plaintiff fails to plead: (1) facts other than the threadbare recitation of Federal Rule of Civil Procedure Form 18, and such facts are necessary to put Defendants on notice of

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