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Metropolitan Life Ins. Co., The Prudential Ins. Co. of America,
Wellmark, Inc., and Aviva USA Corp.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

XimpleWare Corp., California
Corporation

Plaintiff,

v.

**Versata Software, Inc. f/k/a Trilogy
Software, Inc.; Trilogy Development
Group, Inc.; Ameriprise Financial, Inc.;;
Ameriprise Financial Services, Inc.,
Aurea Software, Inc. a/k/a Aurea, Inc.;;
Pacific Life Ins. Co; United Healthcare
Services, Inc.; Metropolitan Life Ins.
Co.; The Prudential Ins. Co. of America;
Wellmark, Inc.; Waddell & Reed
Financial, Inc.; and Aviva USA Corp.,**

Defendants.

Case No. 13-cv-05161-PSG

**DEFENDANTS VERSATA SOFTWARE, INC.
F/K/A TRILOGY SOFTWARE, INC.,
TRILOGY DEVELOPMENT GROUP, INC.,
AUREA SOFTWARE, INC. A/K/A AUREA,
INC. PACIFIC LIFE INS. CO.;
METROPOLITAN LIFE INS. CO.; THE
PRUDENTIAL INS. CO. OF AMERICA;
WELLMARK, INC. AND AVIVA USA CORP'S
REPLY IN SUPPORT OF THEIR MOTION
TO DISMISS**

Date: March 18, 2014
Time: 10:00 a.m.
Location: Courtroom 5
Judge: Hon. Paul S. Grewal

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INTRODUCTION

1
2 XimpleWare’s Amended Complaint fails for a very simple reason: XimpleWare does not
3 adequately allege direct, indirect or willful patent infringement and thus does not notify
4 Defendants of their alleged misconduct sufficiently to allow them to respond. XimpleWare’s
5 allegations regarding its copyrights are not relevant to this patent case. XimpleWare’s numerous
6 allegations and misinterpretations of the GPL do not suffice to meet the standing requirements of
7 either direct patent infringement under Form 18 or indirect or willful patent infringement under
8 *Iqbal* and *Twombly*. Tellingly, XimpleWare does not even try to address the primary and fatal
9 deficiencies that Versata Software, Inc., Trilogy Development Group, Inc., Aurea Software, Inc.,
10 (“Versata Defendants”) and Pacific Life Ins. Co., The Prudential Ins. Co. of America, Wellmark,
11 Inc. and Aviva USA Corps. (“Customer Defendants”) (collectively “Defendants”) have
12 identified in their Motions to Dismiss, and as such, Defendants’ Motions must be granted.
13 Furthermore, these pleading deficiencies, as well as the inapplicable and irrelevant arguments
14 made in XimpleWare’s Consolidated Opposition, are a clear indication that XimpleWare has not
15 carefully considered its claims of patent infringement prior to filing suit.

STATEMENT OF FACTS

16
17 1. On November 5, 2013, Plaintiff XimpleWare Corp. (“XimpleWare”) originally filed a
18 complaint alleging patent infringement against Versata Software, Inc., Trilogy Development, Inc.,
19 Aurea Software, Inc. (collectively “Versata Defendants), Pacific Life Insurance Company,
20 Metropolitan Life Insurance Company, The Prudential Insurance Company of America,
21 WellMark, Inc., Aviva USA Corporation (“Customer Defendants”), United HealthCare Service,
22 Inc., (“United”) and Ameriprise Financial Services, Inc. (“Ameriprise”) (“this Patent case”).¹

23 2. Also on November 5, 2013, XimpleWare filed a complaint alleging copyright
24 infringement against the Versata Defendants and Ameriprise (“the Copyright case” or “160
25 case”). See *XimpleWare Corp. v. Versata Software, Inc., f/k/a Software, Inc. et al.*, Civil Action
26 No. 3:13-cv-05160, pending in the United States District Court for the Northern District of
27 California, San Francisco Division, in front of Judge Susan Illston.

28 ¹ Waddell & Reed Financial, Inc. is also named in this suit but has not yet made an appearance.

1 3. In both cases, XimpleWare alleges that its VTD-XML or VTD-XML Extended software
2 (“XimpleWare Product”) is protected under both patent and copyright law, and that no defendant
3 has been granted a commercial license, permission, or authorization to use and redistribute any
4 XimpleWare Product or Source Code. XimpleWare alleges that it licenses its Source Code under
5 the GNU General Public License version 2 (“GPL”).

6 4. On December 3, 2013, Ameriprise filed Motions to Dismiss Pursuant to FRCP 12(b)(6)
7 in both this Patent Case (Doc. No. 15) and the Copyright Case (‘160 case, Doc. No. 41).

8 5. On December 17, 2013, in lieu of filing Oppositions to Ameriprise’s Motions to Dismiss,
9 XimpleWare filed First Amended Complaints in both this Patent case (Doc. No. 18) and the
10 Copyright case (‘160 case, Doc. No. 48).

11 6. On December 31, 2013, Ameriprise filed Renewed Motions to Dismiss in both this Patent
12 Case (Doc No. 25) and the Copyright Case (‘160 case, Doc. No. 52), seeking to dismiss in their
13 entirety the allegations against Ameriprise contained in the First Amended Complaints in both
14 cases, basing its arguments primarily on whether or not Ameriprise has a license from
15 XimpleWare to VTD-XML under the GPL.

16 7. On January 27, 2014, the Versata Defendants, Customer Defendants and United filed
17 three separate Motions to Dismiss in this Patent case (Doc. Nos. 39, 38, and 33 respectively). On
18 the same day, the Versata Defendants also filed a Motion to Dismiss in the Copyright Case. (‘160
19 case, Doc No. 59).

20 8. On February 4, 2014, Judge Illston denied Ameriprise’s Renewed Motion to Dismiss in
21 the Copyright case. (‘160 case, Doc. No. 61).

22 9. On February 10, 2014, XimpleWare filed a Consolidated Motion to Dismiss replying to
23 the three separate Motions to Dismiss filed by the Versata Defendants, the Versata Customers,
24 and United Healthcare. (“Consolidated Opposition”) (Doc. No. 43).

25 10. Judge Illston has not yet ruled on the Versata Defendants’ Motion to Dismiss in the
26 Copyright case.

27 11. The Versata Defendants and the Customer Defendants disagree with the facts that
28 XimpleWare has alleged, including XimpleWare’s assertions regarding the GPL that are made

1 both in the Statement of Facts section of its brief and its argument section, and including but not
2 limited to XimpleWare’s statement that: “The only license that the Versata Defendants purported
3 to have was from the GPL.” Doc No. 41 at ¶ 13.

4 ARGUMENT

5 **I. Direct Infringement**

6 It is well established that Form 18 governs allegations of direct patent infringement.
7 (“District courts must evaluate complaints alleging direct infringement by reference to Form 18 of
8 the Appendix of Forms to the Federal Rules of Civil Procedure (‘Form 18’”). *K-Tech*
9 *Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1279 (Fed Cir. 2013), US Supreme
10 Court certiorari denied by *DIRECTV v. K-Tech Telecomms., Inc.*, 2014 U.S. LEXIS 993 (U.S.,
11 Jan. 27, 2014); *see also In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681
12 F.3d 1323, 1336 (Fed. Cir. 2012). XimpleWare does not argue that it meets the requirements of
13 Form 18 and argues instead that the elements for stating a claim for direct patent infringement are
14 laid out in the Patent Act, specifically 35 U.S.C. § 271(a). This is not the law. As this Court
15 (among many others) has noted, Form 18 governs allegations of direct patent infringement.
16 *Guzik Tech. Enters. v. W. Digital Corp.*, 2012 U.S. Dist. LEXIS 66552 (N.D. Cal. 2012).

17 Form 18 requires: “(1) an allegation of jurisdiction; (2) a statement that the plaintiff owns
18 the patent; (3) a statement that defendant has been infringing the patent ‘by making, selling, and
19 using [the device] embodying the patent’; (4) a statement that the plaintiff has given the defendant
20 notice of its infringement; and (5) a demand for injunction and damages.” *McZeal v. Sprint*
21 *Nextel Corp.*, 501 F.3d 1354, 1357 (emphasis added) (Fed. Cir. 2007). XimpleWare has failed to
22 meet requirements 3 and 4 of Form 18, and has not even attempted to address these deficiencies
23 in its Consolidated Opposition.

24 **a. XimpleWare does not properly provide a statement that “defendant has 25 been infringing the patent by making, selling, and using [the device] 26 embodying the patent” as required by Form 18.**

26 XimpleWare cannot point to any place in the Amended Complaint where it completely
27 and clearly lays out the admittedly bare bones requirements of Form 18 against each Defendant,
28 and instead, as predicted by the Versata Defendants, attempts to cobble together intelligible

1 allegations by pointing to no less than 20 different paragraphs which the Defendants must parse in
2 order to get an idea of what XimpleWare's accusations specific to each Defendant might be.
3 Even after a careful reading, the import of these allegations with respect to each Defendant is not
4 clear as these allegations are made collectively, and are not specific to each Defendant. Again,
5 the most direct allegation of patent infringement in the Amended Complaint is Paragraph 81:

6 On information and belief, Defendants have infringed and continue to infringe
7 XimpleWare's Patents and each of them by making, using, selling, and/or offering
8 for sale in the United States a number of products that practice the claims
9 contained in the Patent, and will continue to do so unless enjoined by this Court.
(emphasis added) Doc. No. 18.

10 Simply saying that Defendants' "products" infringe is not sufficient, even under the
11 lenient criteria of Form 18. *Acco Brands USA LLC v. Hewlett Packard Co.*, 2011 U.S. Dist.
12 LEXIS 67420, 6-7 (C. D. Cal. 2011). *See also Winstron v. Phillip M. Adams Associates, LLC*,
13 2011 U.S. Dist. LEXIS 102237 (N. D. Ca. 2011) and *Infineon Techs. AG v. Volterra*
14 *Semiconductor Corp.*, 2012 U.S. Dist. LEXIS 128660 (N.D. Cal. 2012). (both finding allegation
15 of infringement based on "other products" insufficient.) Further, lumping together all Defendants
16 does not meet the standard, as XimpleWare's allegations seem to be based on several different
17 transactions. It is not clear which Defendant is accused of performing which allegedly infringing
18 activity.

19 The paragraph that XimpleWare points to similarly does not provide the required detail
20 and further is not limited to activity within the United States:

21 Defendants have infringed, and are still infringing on XimpleWare's intellectual
22 property rights by making, selling, and using the DCM product that practices the
23 XimpleWare Patents, and the Defendants will continue to do so until this Court
enjoins them. (Doc. No. 18, ¶ 73).

24 Given XimpleWare's allegations regarding "products" generally, Defendants cannot
25 ascertain the limitations of XimpleWare's allegations of infringement. And again, and as
26 explained further below, it is also not clear which Defendant is being accused of performing
27 which allegedly infringing action. While Form 18 provides the bare minimum required, it in no
28

1 way relaxes the clear principal of Rule 8, that each potential infringer be placed on notice of what
2 activity is being accused of infringement. *K-Tech Telecomms., Inv. v. Time Warner Cable, Inc.*,
3 714 F.3d 1277, 1284 (Fed. Cir. 2013).

4
5 **b. XimpleWare does not provide “a statement that the plaintiff has given the
6 defendant notice of its infringement” as required by Form 18.**

7 With respect to notice, a requirement of Form 18, XimpleWare has alleged only:

8 XimpleWare uses the patent numbers on its Product and its documentation to give
9 actual and constructive notice of the existence of the XimpleWare patents. (Doc.
10 No. 18, ¶ 57.)

11 This appears to be an attempt to comply with marking requirements. There is simply no
12 allegation in the Amended Complaint that any of the Defendants, much less all of them, had
13 notice of the XimpleWare patents. The Versata Defendants are accused of downloading the
14 Source Code, which does not contain notice of the patents. In fact, XimpleWare later alleges
15 that:

16 The only copyright or license notices that XimpleWare has ever placed on its
17 VTD-XML source code give notice that the Source Code is licensed under the
18 GPL for those strictly complying with all conditions of the GPL, and that it is
19 otherwise commercially available through license directly from XimpleWare.

20 The Source Code, XimpleWare alleges, is not marked with the patent and does not
21 provide notice. XimpleWare states that it has records of the Versata Defendants (though which
22 Versata Defendant is unclear) visiting the SourceForge project page. However, XimpleWare
23 never alleges that the SourceForge project page contains any notice of the patents. XimpleWare
24 provides no plausible theory to support an assertion that the Versata Defendants, or any
25 Defendant, had notice of the XimpleWare patents. While this is clearly fatal to their claims of
26 induced and willful infringement, as detailed more fully below, it also is fatal to their claims of
27 direct infringement against all defendants, as it is the 4th requirement of Form 18. XimpleWare
28 never alleges that the Customers had any notice that any product they allegedly received or used
was protected by valid patents owned by XimpleWare. In its Consolidated Opposition,
XimpleWare specifically states: “The software that the Versata Defendants provided to

1 Ameriprise and other customers did not contain the requisite notices and disclaimers. Am.
2 Compl. ¶ 63.” Consolidated Opposition at pg. 10.

3 **II. Indirect Infringement**

4 XimpleWare also errs in its assessment of its allegations regarding indirect infringement.
5 First, the Versata Defendants note that XimpleWare has not disputed that its contributory
6 infringement claims are deficient and as such those should be dismissed for the reasons explained
7 in the Versata Defendants’ Motion to Dismiss.

8 XimpleWare also fails to provide the required specificity with respect to its claims for
9 induced infringement. XimpleWare states: “The key to XimpleWare’s patent inducement claim
10 is simple: the Versata Defendants have not given their customers notice or means to comply with
11 the GPL.” Consolidated Opposition at pg. 16. It concludes that: “This is a classic inducement of
12 patent infringement, for which all Defendants are strictly liable under well-settled patent law
13 principles.” Doc. 43 at pg. 16. This Court is well-versed in the elements required for patent
14 inducement, and this is far from the “classic” case.

15 Allegations of inducement of patent infringement are evaluated under *Iqbal* and *Twombly*,
16 and not the more lenient standard of Form 18. *Superior Indus., LLC v. Thor Global Enters.*, 700
17 F.3d 1287, 1295. Specifically for inducement of infringement, XimpleWare must allege facts to
18 support a reasonable inference that one of the Versata Defendants specifically intended to induce
19 infringement or knew that it had induced acts that constitute infringement. *Id.* at 1296.
20 XimpleWare has not alleged that any of the Versata Defendants had notice of the XimpleWare
21 patents, and thus they cannot be liable for inducement of infringement. Induced infringement
22 under §271(b) requires knowledge that the induced acts constituted patent infringement. *Global-*
23 *Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011).

24 What XimpleWare seems to be arguing is that while initially licensed, the Customers’
25 license was terminated. Arguing that a defense of license is not meritorious does not make a case
26 of inducement of patent infringement. Far from being the classic case of inducement, these
27 allegations are simply not relevant to the issue of whether indirect infringement has been properly
28

1 pled.² As such, the Court should dismiss those claims, to the extent they have been pled.

2 **III. Willfulness**

3 Infringement is willful when the infringer was aware of the asserted patent, but
4 nonetheless acted despite an objectively high likelihood that its actions constituted infringement
5 of a valid patent. *i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831, 861 (Fed. Cir. 2010).
6 Despite the clear identification of what is required to plead willfulness contained in the Motions
7 to Dismiss, XimpleWare mentions willfulness with respect to patent infringement only once in its
8 Consolidated Opposition to the Motions to Dismiss:

9 “This clear knowledge of VTD-XML’s licensing status, coupled with the failure
10 to even attempt to negotiate a commercial license with XimpleWare, makes the
11 Versata Defendants liable for willful patent infringement – and it also provides a
12 further basis for XimpleWare’s claim for inducing patent infringement.” Doc.
13 No. 43 at pg. 19.

14 The GPL itself does not provide notice of any patents, including XimpleWare’s patents
15 and indeed, XimpleWare has not alleged that it does. Therefore, any allegations regarding
16 knowledge of the GPL are not relevant to whether or not any Defendant had knowledge of the
17 patents. This bare statement clearly is insufficient to allege willfulness and as such this claim, to
18 the extent it was pled originally, must be dismissed.

19 **IV. XimpleWare’s Allegations regarding the GPL**

20 XimpleWare continues to argue that the customers are not licensed under the GPL. In so
21 doing XimpleWare relies heavily on Judge Illston’s Order regarding Ameriprise’s Motion to
22 Dismiss in the Copyright case. However, that decision merely highlights the inadequacy of
23 XimpleWare’s pleading against the non-Ameriprise customers. Judge Illston found that
24 XimpleWare had alleged copyright infringement against Ameriprise because “XimpleWare has
25 alleged Ameriprise reproduced and distributed the software outside of Ameriprise . . . thereby
26 acting outside the scope of the GPL.” Order at 5:3-7. Key to this order was the fact that
27

28 ² Versata notes that it does not agree that any license, patent or otherwise, under the GPL has been terminated.

1 XimpleWare has made numerous specific factual allegations that Ameriprise breached the GPL.
2 Am. Comp. ¶¶ 69-71. However, there is no similar set of facts alleged against any other
3 customers.

4 Despite XimpleWare's lengthy and belabored argument that the customers lack a license
5 under the GPL, the GPLv2 (the version XimpleWare alleges controls) is clear. "[T]he recipient
6 [of the Program] automatically receives a license from the original licensor to copy, distribute or
7 modify the Program subject to these terms and conditions." GPL § 6. Section 6 would be
8 rendered meaningless if any breach by a distributor could void the license received by the
9 recipient. Moreover, Section 0 of the GPL clearly indicates that "the act of running the program is
10 not restricted." These two sections taken together grant the customers a license to use
11 XimpleWare regardless of any actions taken or not taken by the Versata Defendants. To survive
12 a motion to dismiss on this point, XimpleWare must plead specific facts, sufficient to satisfy
13 *Iqbal* and *Twombly*, which establish a breach of the GPL by the customers through distribution of
14 XimpleWare to third parties. XimpleWare has not alleged any facts supporting such an allegation
15 for any defendant apart from Ameriprise.

16 **V. XimpleWare's Impermissible Group Pleading**

17 **a. Versata Defendants**

18
19 In their Motion to Dismiss, the Versata have Defendants argued that XimpleWare has not
20 adequately alleged alter ego against the Versata Defendants. Under Fed. R. Civ. P. 8 a plaintiff
21 must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v.*
22 *Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility" if the plaintiff pleads facts
23 that "allow[] the court to draw the reasonable inference that the defendant is liable for the
24 misconduct alleged." In making this determination the court must accept all well pleaded factual
25 allegations as true, but "[t]hreadbare recitals of the elements of a cause of action, supported by
26 mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Nor
27 must the court "accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S.

1 at 678 (quoting *Twombly*, 550 U.S. at 555).

2 Instead, “[t]o invoke the alter ego doctrine, Plaintiffs must allege facts that allow a court
3 to draw a reasonable inference: (1) that there is such a unity of interest and ownership that the
4 separate personalities of the two corporations no longer exist; and (2) that if the acts are treated as
5 those of only one of the corporations, an inequitable result will follow.” *Walsh v. Kindred*
6 *Healthcare*, 798 F.Supp.2d 1073, 1082 (N.D. Cal. June 15, 2011). In an effort to meet this
7 standard XimpleWare identifies four allegations from its Amended Complaint. *See* Response at 7,
8 8 (listing allegations). These allegations are insufficient: XimpleWare has alleged that Versata
9 and Aurea are both owned by Trilogy (Am. Compl. ¶¶ 5, 6) and that Ameriprise is a customer of
10 Trilogy and Versata. (Am. Compl. ¶ 7). This only alleges common ownership of Aurea and
11 Versata by Trilogy.³ This is insufficient. Pleading alter ego, “requires more than a showing that [a
12 Subsidiary] is wholly owned by [a Parent]. *Sandoval v. ZillionTV Corp.*, 2010 U.S. Dist. LEXIS
13 133804 at *7-9 (N.D. Cal. Dec. 17, 2010)(citing *M/V Am. Queen v. San Diego Marine Constr.*
14 *Corp.*, 708 F.2d 1483, 1489-90 (9th Cir. 1983)).

15
16
17 The remaining paragraph identified by XimpleWare contains a legal conclusion couched
18 as a fact. *Iqbal*, 556 U.S. at 678 (Court need not accept as true legal conclusions couched as
19 facts). XimpleWare alleges that Trilogy has control over Versata and Aurea. Am. Compl. ¶ 16.
20 However, XimpleWare alleges no facts from which that control could be inferred by this Court.
21 Without the allegation of facts to support this legal conclusion, the legal conclusion is not entitled
22 to deference.
23

24 The only remaining alter ego allegation the Versata Defendants can locate in the Amended
25 Complaint are found in paragraphs 17 and 18. There, XimpleWare alleges a laundry list of legal
26 conclusions including: “failure to segregate funds,” “misrepresentations of the identity and
27

28 ³ Note that these allegations are not true. However, they are sufficiently pled for Motion to Dismiss purposes.

1 ownership of the corporations,” “contracting with one another with intent to avoid performance
2 by use of a corporate entity as a shield” and so forth. Am. Compl. ¶18. Although these are all
3 factors a Court could consider when deciding whether to pierce the corporate veil, XimpleWare
4 has again not pled a single fact in support of any of these allegations. Instead, XimpleWare has
5 merely recited the legal conclusions relevant to alter ego determination. This is not sufficient.
6 *Iqbal* 556 U.S. at 678. *See Jamison v. Royal Caribbean Cruises, Ltd.*, 2009 WL 559722 at *4
7 (S.D. Cal. Mar. 4, 2009) (The Complaint alleges a formulaic recitation of the elements of alter
8 ego law, which is insufficient under the pleading standard articulated in Rule 8) (Not Reported).

9
10 Finally, even if the Court concludes that these allegations are sufficient to meet the first
11 prong of alter ego, unity of interest, the Amended Complaint is still insufficient because it is
12 entirely absent any allegations to support the second prong of alter ego, “that if the acts are
13 treated as those of only one of the corporations, an inequitable result will follow.” *Walsh v.*
14 *Kindred Healthcare*, 798 F.Supp.2d at 1082. *See also Sandoval v. ZillionTV Corp.*, 2010 U.S.
15 Dist. LEXIS 133804, at *7-9; *Wehlage v. EmpRes Healthcare, Inc.*, 791 F. Supp. 2d 774, 783
16 (N.D. Cal. 2011) (“These broad allegations are not sufficient to show a unity of interest and
17 ownership. Even if they were, Plaintiff does not satisfy the second prong; she fails to allege facts
18 to suggest that an inequitable result will occur if the [parent defendant is] not held liable for her
19 injuries.”). Since XimpleWare has identified no injustice that would result from just holding
20 Versata liable, its alter ego allegations should be dismissed.

23 **b. Customer Defendants**

24
25 XimpleWare’s grouping together of all of the Customer Defendants makes even less sense
26 than its grouping of the Versata Defendants. A bare allegation such as “the Customer Defendants
27 have distributed without authorization DCM and VTD-XML to thousands of non-employee
28

1 independent contractor or franchisee advisors or ‘producers’” is not sufficient to place each
2 individual Defendant with notice of how it allegedly infringes. Am. Compl. at ¶85. Nor are
3 allegations such as: “The Customer Defendants infringed and continue to willfully infringe the
4 Patents by using the infringing Versata Products, incorporated into the Customer Defendants’
5 internal software systems” sufficient. *See PLS-Pac. Laser Sys. v. TLZ Inc.*, 2007 WL 2022020 at
6 *10 (N.D. Cal. July 9, 2007) (dismissing patent infringement based on plaintiff’s group pleading);
7 *Automated Transaction LLC v. New York Cmty. Bank*, 2013 WL 992423 at *4 (E.D.N.Y. Mar. 13,
8 2013)(same); *Via Vadis, L.L.C. v. Skype, Inc.*, No. 11–CV–0507, 2012 WL 2789733, at *1
9 (D.Del. July 6, 2012)(same).

11 **VI. Further Leave to Amend**

12
13 As Defendants have previously noted, XimpleWare has already amended its Complaint
14 once in response to a Motion to Dismiss. Because XimpleWare offers the Court no reason to
15 believe that any amendment would be anything other than futile, especially with respect to its
16 indirect and willful infringement claims, leave to amend should be denied. *Sealant Sys., Int’l v.*
17 *TEK Global*, 2012 U.S. Dist. LEXIS 752 (N.D. Ca. 2012). Given the lack of clarity in both the
18 Amended Complaint and XimpleWare’s Consolidated Opposition, Defendants respectfully
19 request that XimpleWare be denied further leave to amend, or in the alternative, only be granted
20 leave to amend once XimpleWare has reimbursed Defendants for the costs of this Motion.
21 Defendants note that there is precedent for this result in this District where a defendant has been
22 forced to respond to arguments regarding the wrong standard for pleading requirements.⁴

25 **CONCLUSION**

26 XimpleWare does not dispute Versata’s assertions that XimpleWare’s direct infringement
27

28 ⁴ *See Logic Devices, Inc. v. Apple, Inc.*, 2014 U.S. Dist. LEXIS 3157, 8-9 (N.D. Cal. 2014).

1 allegations fail under Form 18. In fact, XimpleWare does not mention Form 18 once in its
2 Consolidated Opposition. As such, it has waived any argument that the requirements of Form 18
3 are met. As they are clearly not, XimpleWare's claims of direct patent infringement should be
4 dismissed against all Defendants. Similarly, XimpleWare does not respond to Versata's
5 identification of the deficiencies of its indirect and willfulness claims under *Iqbal* and *Twombly*,
6 choosing instead to focus on allegations regarding the GPL, which the Court can clearly see does
7 not provide any notice of the patents. XimpleWare never alleges, either in its Consolidated
8 Opposition or in its Amended Complaint, that Versata or the Customers had notice of the patents,
9 and thus its indirect infringement and willfulness claims must be dismissed. Even after this
10 omission was pointed out in Versata's Motion to Dismiss, XimpleWare still does not (and cannot)
11 point the Court to where in the Amended Complaint XimpleWare has alleged notice of the
12 patents, and as such its indirect infringement claims must be dismissed.

13 Dated: February 18, 2014

Respectfully Submitted,

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/s/ Alisa Lipski

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's ECF System.

Dated: February 18, 2014

/s/ Alisa Lipski
Alisa Lipski