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Majority Opinion >

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

WILLIAM ARAUJO, Plaintiff, -against- E. MISHAN &  
SONS, INC., et al., Defendants.

19-CV-5785 (GHW)(SN)

August 7, 2020, Filed August 7, 2020, Decided

For William Araujo, Plaintiff: Stanley H Kremen, LEAD  
ATTORNEY, East Brunswick, NJ; Amirali Y Haidri, Law  
Offices of Amirali Y. Haidri, Springfield, Springfield, NJ.

For E. Mishan & Sons, Inc., Forgot My Souvenirs LLC,  
Defendants: Brian Joseph Doyle, LEAD ATTORNEY,  
Alan Federbush, John Zaccaria, Notaro, Michalos &  
Zaccaria P.C., Orangeburg, NY.

SARAH NETBURN, United States Magistrate Judge.  
HONORABLE GREGORY H. WOODS.

SARAH NETBURN

**REPORT AND RECOMMENDATION**

SARAH NETBURN, United States Magistrate Judge.

TO THE HONORABLE GREGORY H. WOODS:

Plaintiff William Araujo ("Plaintiff") brings this suit pursuant to [35 U.S.C. § 281](#), alleging defendants E. Mishan & Sons, Inc. ("E. Mishan & Sons"), Forgot My Souvenirs LLC ("Forgot My Souvenirs"), Robin Roe [1-10](#), and ABC CORPORATION 1-10 infringe upon the claims of Plaintiff's [U.S. Patent No. 9, 446, 276](#) (the "[276 Patent](#)") for an "Exercise Apparatus for Strengthening Abdominal Muscles." E. Mishan & Sons and Forgot My Souvenirs (together, "Defendants") filed a pre-answer motion to dismiss under [Rule 12\(b\)\(6\)](#)

(the "Motion"), which has been referred to me for a Report and Recommendation. For the reasons herein, I recommend the Motion be DENIED in part and GRANTED in part.

**BACKGROUND**

**I. Factual Background**

The Court takes as true all well-pleaded factual allegations in the Amended Complaint and draws all inferences in the plaintiff's favor for purposes of deciding a motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#). See [Allaire Corp. v. Okumus](#), [433 F.3d 248](#), [249-50](#) (2d Cir. 2006). Here, the Amended Complaint attaches a copy of the [276 Patent](#) (see ECF No. 46, "Am. Compl.," Ex. A), which the Court may consider in connection with this motion without converting it into a motion for summary judgment. See [iSentium, LLC v. Bloomberg Fin. L.P.](#), [343 F. Supp. 3d 379](#), [383](#) (S.D.N.Y. 2018); [Chambers v. Time Warner, Inc.](#), [282 F.3d 147](#), [152](#) (2d Cir. 2002) (in deciding a [Rule 12\(b\)\(6\)](#) motion, the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference); see also [Fed. R. Civ. P. 10\(c\)](#) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

Plaintiff owns a patent on an exercise apparatus that helps a user do sit-ups or abdominal crunches. Specifically, Plaintiff is the sole owner of the [276 Patent](#), entitled, "Exercise Apparatus for Strengthening Abdominal Muscles," that was issued by the United States Patent and Trademark Office ("USPTO") on September 20, 2016. The Abstract of the [276 Patent](#) describes the subject matter of the patent as "[a]n exercise apparatus that lies flat on the floor having a back rest rises up [*sic*] when supported by two springs. The lower part of the back and buttocks lies horizontal while the upper part of the back is inclined at an angle to the horizontal." See Am. Compl., Ex. A. In other words, the device has two elements, joined together by hinges and springs. One element rests on the floor; the second element rests at an angle to the first element. To perform an assisted sit-up with the device, a user sits upon the first [\*2] element resting her back against the second element. Then, the user pushes backwards against the second element (meeting resistance provided by springs) to recline that part of the device, bringing it closer to the floor (and closer to parallel with the first element). Springs in the

device assist the user in returning to a more upright, seated, or resting position. See generally, id., ¶¶ 10-11, Ex. A.

Defendants manufacture, market, and sell two devices, the "Ab Rocket" and the "Ab Rocket Twister" (together, the "Accused Products"). Plaintiff alleges these two devices violate claim 1 of the '[276 Patent](#)' due to their similar design, namely the use of two elements—one which rests horizontally on the floor and one against which the user rests her back—connected by hinges and springs that assist the user by providing resistance during the reclining phase of a sit-up or abdominal crunch. Id., ¶¶ 14, 18; id. at Ex. B.

## DISCUSSION

### I. Legal Standard

Until recently, courts analyzed the sufficiency of a complaint alleging patent infringement by comparing the allegations in the complaint with Form 18 of the Federal Rules of Civil Procedure. See Bobcar Media, LLC v. Aardvark Event Logistics, Inc., 16-cv-885 (JPO), [[2017 BL 1835](#)], 2017 U.S. Dist. LEXIS 1243 , [[2017 BL 1835](#)], 2017 WL 74729 , at \*3 (S.D.N.Y. Jan. 4, 2017); Crypto Research, LLC v. Assay Abloy, Inc., [236 F. Supp. 3d 671](#) , [685](#) (E.D.N.Y. 2017). As of December 1, 2015, the Federal Rules of Civil Procedure no longer included Form 18. Now, to determine whether a patent pleading survives a [Rule 12\(b\)\(6\)](#) motion to dismiss, courts in this Circuit apply Second Circuit law and follow the pleading standard set out in Bell Atl. Corp. v. Twombly, [550 U.S. 544](#) , [570](#) , [127 S. Ct. 1955](#) , [167 L. Ed. 2d 929](#) (2007), and Ashcroft v. Iqbal, [556 U.S. 662](#) , [678](#) , [129 S. Ct. 1937](#) , [173 L. Ed. 2d 868](#) (2009). See Bobcar Media, LLC, [[2017 BL 1835](#)], 2017 U.S. Dist. LEXIS 1243 , [[2017 BL 1835](#)], 2017 WL 74729 , at \*3 (citations omitted); Crypto Res., LLC, [236 F. Supp. 3d at 685](#) . To survive a [Rule 12\(b\)\(6\)](#) motion to dismiss, a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." Twombly, [550 U.S. at 570](#) . A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, [556 U.S. at 678](#) .

### II. Direct Patent Infringement

Liability for direct patent infringement arises when a party "without authority makes, uses, offers to sell, or

sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent." [35 U.S.C. § 271\(a\)](#) . A plaintiff "need not prove its case at the pleading stage." Nalco Co. v. Chem-Mod, LLC, [883 F.3d 1337](#) , [1350](#) (Fed. Cir. 2018) (citation omitted). The complaint must only provide the alleged infringer notice of what activity is being accused of infringement, as the Federal Rules of Civil Procedure do not require a plaintiff to plead facts establishing that each element of an asserted claim is met. See Signify N. Am. Corp. v. Axis Lighting Inc., 19-cv-5516 (DLC), [[2020 BL 81587](#)], 2020 U.S. Dist. LEXIS 37899 , [[2020 BL 81587](#)], 2020 WL 1048927 , at \*2 (S.D.N.Y. Mar. 4, 2020), order amended on reconsideration, [2020 U.S. Dist. LEXIS 76368](#) , [[2020 BL 161985](#)], 2020 WL 2079844 (S.D.N.Y. Apr. 30, 2020) (citation omitted). Therefore, a complaint for direct infringement survives a motion to dismiss if it: (1) attaches the asserted patents to the complaint, (2) specifically identifies the accused products and attaches photographs of them to the complaint, and (3) alleges that "the accused products meet each and every element [\*3] of at least one claim" of the asserted patents. Id. (citing Disc Disease Sols. Inc. v. VGH Sols., Inc., [888 F.3d 1256](#) , 1260 (Fed. Cir. 2018)). These disclosures and allegations are enough to provide a defendant fair notice of infringement of the asserted patents. Id.

Here, Plaintiff has satisfied the pleading standards under the Federal Rules. The single count in the Amended Complaint alleges infringement of the '[276 Patent](#)' . Plaintiff asserts that Forgot My Souvenirs is "involved in the chain of marketing" the Accused Products and that E. Mishan & Sons is "engaged in the manufacture and/or sales" of the Accused Products. Am Compl. ¶¶ 23-25. The patent statute states that "whoever without authority makes, uses, offers to sell, or sells any patented invention" is liable for direct infringement. [35 U.S.C. § 271\(a\)](#) . Thus, manufacturing, marketing, and selling are infringing activities and Plaintiff has adequately pleaded each of the Defendants' engagement in such activities.

The count also states that the Accused Products infringe at least one claim, claim 1 of the '[276 Patent](#)' , and sets forth a detailed basis for that belief without merely reciting the elements of claim 1. See Am Compl. ¶¶ 14, 18; id. at Ex. B. In support of its direct infringement claim, Plaintiff alleges that the Accused Products are composed of two elements, connected by

hinges or springs, and assist a user in performing sit-ups by providing resistance in the same manner described in the ['276 Patents](#)—that is, by providing resistance when a user pushes backwards against the second element (and providing spring assistance to the user to return to a more upright position). The Amended Complaint attaches the allegedly infringed upon patent along with a chart detailing the ways in which the Ab Rocket infringes on the elements of claim 1. *See* Am. Compl. at Ex. A, B. Together, these allegations are sufficient to plead direct infringement. *See* [Crypto Res., LLC](#), [236 F. Supp. 3d at 686](#). While Plaintiff does not provide the same level of description to his allegations of the Ab Rocket Twister's infringement, I find that the Amended Complaint adequately compares and contrasts the Ab Rocket and the Ab Rocket Twister. Drawing all inferences in Plaintiff's favor as the Court is required to do in resolving this motion, the Amended Complaint provides enough information to allege plausibly Ab Rocket Twister's infringement as well.

Further, although Plaintiff does not attach photographs of the Accused Products to the Amended Complaint, the products are sufficiently identified to give Defendants notice of the direct infringement claims. For example, Plaintiff names the products specifically—the Ab Rocket and the Ab Rocket Twister (*see* Am. Compl. ¶¶ 23, 31), describes the Ab Rocket as having two hinged elements, a seat and handles (*id.* ¶¶ 14, 15), and describes the Ab Rocket Twister by stating that its seat "swivels horizontally around a vertical axis on the first element" and "arrives unassembled and assembly is required" (*id.* ¶ 18). Furthermore, Plaintiff alleges the accused products are sold at [www.abrocket.com](#) and [www.abrockettwister.com](#). *Id.* ¶ 22. Because websites named in the [\*4] Amended Complaint are incorporated by reference, any photographs depicting the accused products on those websites were included in the Amended Complaint for purposes of determining whether the pleadings are sufficient. *See* [Gregory v. ProNAi Therapeutics Inc.](#), [297 F. Supp. 3d 372](#), [410](#) (S.D.N.Y.), *aff'd*, [757 F. App'x 35](#) (2d Cir. 2018) (noting that website cited in an amended complaint is effectively incorporated into it). In any case, Defendants are able to produce photos of the Accused Products in their Memorandum of Law in Support of the Motion, eradicating any doubt that Defendants did not have sufficient notice of the Accused Products. *See* ECF No. 48 "Def. Mem.") at 5-8, 10-15.

Defendants challenge the sufficiency of Plaintiff's direct infringement claim by arguing that the allegations in the Amended Complaint are mere conclusory statements of liability and fail to allege adequately infringement because a comparison of the asserted patent and the Accused Products indicates that "at least five required features of the patent are absent from the accused products." *Id.* at 1. First, Defendant argues that the Accused Products lack a "first member" that "lays flat on a floor or other essentially planar surface," as required by claim 1. *Id.* at 8. Second, Defendants argue the Accused Products lack a seat with a "top surface at a height that is essentially not greater than the heights of the plurality of edge surfaces." *Id.* at 10. Third, Defendants argue that the Accused Products lack "a second member . . . hinged only to the first member." *Id.* at 11. Fourth, Defendants contend that the Accused Products lack a "spring" attached only to the "first member and second members." *Id.* at 13. Finally, Defendants argue that the Accused Products "consist of" more components than allowed by claim 1. *Id.* at 13.

While the parties disagree on the interpretation of the ['276 Patent](#)'s claim 1 and whether the Accused Products infringe on claim 1 in its entirety, Plaintiff nonetheless alleges that Defendants have infringed upon claim 1 in its entirety. *See* Am. Compl. ¶¶ 13. Exhibit B, attached to the Amended Complaint, bolsters this claim. At this stage, the Plaintiff is not required to plead "direct infringement of each and every element of the allegedly infringed claim[]." *See* [Crypto Res., LLC](#), [236 F. Supp. 3d at 686](#); *see also* [Uni-Sys., LLC v. United States Tennis Ass'n, Inc.](#), [350 F. Supp. 3d 143](#), [161](#) (E.D.N.Y. 2018). The Amended Complaint's descriptions of the allegedly infringing products sufficiently identify the factual connections between those products and the claim protected by the ['276 Patent](#). In doing, the Amended Complaint provides Defendants "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, [550 U.S. at 555](#) (internal quotation marks omitted). Defendants' arguments regarding the specific comparisons between the Accused Products and the ['276 Patent](#) claim 1 should not be resolved by motion to dismiss under [Rule 12\(b\)\(6\)](#). Similarly, Defendants' argument that Plaintiff should be precluded from seeking damages based on extraterritorial infringement fails at the motion to dismiss stage because I find that Plaintiff has

adequately stated a basis for recovery. [\*5] At the pleading stage, the Court cannot as a matter of law determine that Plaintiff will not recover any of the damages he alleges. For these reasons, I recommend the Court deny the Defendants' Motion with regard to the claims of direct infringement.

### III. Inducing Infringement

[Subsection \(b\) of 35 U.S.C. § 271](#) deals with inducing infringement, providing: "Whoever actively induces infringement of a patent shall be liable as an infringer." In contrast to direct infringement, liability for inducing infringement attaches only if the defendant knew of the patent and that the induced acts constitute patent infringement. See *Commil USA, LLC v. Cisco Sys., Inc.*, [575 U.S. 632](#) , [135 S. Ct. 1920](#) , [191 L. Ed. 2d 883](#) (2015). To state a claim for induced infringement pursuant to [35 U.S.C. § 271\(b\)](#) , a plaintiff must plead facts showing: (1) there has been a direct infringement; (2) that the alleged infringer knowingly induced infringement; and (3) that the alleged infringer possessed specific intent to encourage another's infringement. See *Conair Corp. v. Jarden Corp.*, 13-cv-6702 (AJN), [\[2014 BL 223696\]](#), 2014 U.S. Dist. LEXIS 112252 , [\[2014 BL 223696\]](#), 2014 WL 3955172 , at \*2 (S.D.N.Y. Aug. 12, 2014) (quoting *Vita—Mix Corp. v. Basic Holding, Inc.*, [581 F.3d 1317](#) , [1328](#) (Fed. Cir. 2009)). I find the Amended Complaint fails to meet this pleading requirement.

The Amended Complaint alleges that "Defendants . . . encourage others to practice infringing methods" and that "Defendants knowingly induced infringement and are continuing to knowingly induce infringement of the ['276 Patent](#) by specifically encouraging and inducing others to practice the patented invention within the United States." Am. Compl. ¶¶ 31, 34. Without more, these conclusory assertions lack the requisite specific factual allegations to sufficiently state a claim supporting infringement liability. See *Lyda v. Fremantle Media N. Am., Inc.*, 10-cv-4773 (DAB), [\[2012 BL 447538\]](#), 2012 U.S. Dist. LEXIS 39316 , [\[2012 BL 447538\]](#), 2012 WL 957498 , at \*2 (S.D.N.Y. Mar. 8, 2012) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and formulaic recitation of the elements of a cause of action will not do." (citation omitted)). Plaintiff does not allege that Defendants had knowledge of Plaintiff's patents at the time it began manufacturing, marketing, or selling the Accused

Products, as is required to state a claim for inducing infringement. Nor does Plaintiff state facts from which a Court could draw an inference of knowledge, let alone intent to encourage another's infringement. Accordingly, I recommend the Court deny Plaintiff's claim of inducing infringement.

### CONCLUSION

For the reasons above, I recommend that the motion filed by defendants E. Mishan & Sons, Inc. and Forgot My Souvenirs, Inc. be DENIED as to Plaintiff's claims of direct patent infringement and GRANTED as to Plaintiff's claims for inducing infringement.

DATED: August 7, 2020

New York, New York

/s/ Sarah Netburn

SARAH NETBURN

United States Magistrate Judge

## Notes

No Notepad Content Found

Araujo v. E. Mishan & Sons, Inc., No. 19-CV-5785 (GHW)  
(SN), 2020 BL 301877 (S.D.N.Y. Aug. 07, 2020), Court Opinion

**Direct History**

- 1  [Araujo v. E. Mishan & Sons, Inc., No. 19-CV-5785 \(GHW\)\(SN\), 2020 BL 301877 \(S.D.N.Y. Aug. 07, 2020\)](#)  
*report submitted*

Direct History Summary	
 Caution	0
 Negative	0
<b>Total</b>	<b>0</b>

**Case Analysis**

No Treatments Found

Case Analysis Summary	
 Positive	0
 Distinguished	0
 Caution	0
 Superseded	0
 Negative	0
<b>Total</b>	<b>0</b>

**Table Of Authorities ( 18 cases )**

- 1   Cited  [Signify N. Am. Corp. v. Axis Lighting Inc., No. 19cv5516 \(DLC\), 2020 BL 161985 \(S.D.N.Y. Apr. 30, 2020\)](#)

Liability for direct patent infringement arises when a party "without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent." [35 U.S.C. § 271\(a\)](#) . A plaintiff "need not prove its case at the pleading stage." *Nalco Co. v. Chem-Mod, LLC* , [883 F.3d 1337](#) , [1350](#) (Fed. Cir. 2018) (citation omitted). The complaint must only provide the alleged infringer notice of what activity is being accused of infringement, as the Federal Rules of Civil Procedure do not require a plaintiff to plead facts establishing that each element of an asserted claim is met. *See Signify N. Am. Corp. v. Axis Lighting Inc.* , 19-cv-5516 (DLC), [ [2020 BL 81587](#) ], 2020 U.S. Dist. LEXIS 37899 , [ [2020 BL 81587](#) ], 2020 WL 1048927 , at \*2 (S.D.N.Y. Mar. 4, 2020), *order amended on reconsideration* , 2020 U.S. Dist. LEXIS 76368 , [ [2020 BL 161985](#) ], 2020 WL 2079844 (S.D.N.Y. Apr. 30, 2020) (citation omitted). Therefore, a complaint for direct infringement survives a motion to dismiss if it: (1) attaches the asserted patents to the complaint, (2) specifically identifies the accused products and attaches photographs of them to the complaint, and (3) alleges that "the accused products meet each and every element of at least one claim" of the asserted patents. *Id.* (citing *Disc Disease Sols. Inc. v. VGH Sols., Inc.* , [888 F.3d 1256](#) , 1260 (Fed. Cir. 2018)). These disclosures and allegations are enough to provide a defendant fair notice of infringement of the asserted patents. *Id.*

Authorities Summary	
 Positive	18
 Distinguished	0
 Caution	0
 Superseded	0
 Negative	0
<b>Total</b>	<b>18</b>

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- 2   Cited , Quoted  [Signify N. Am. Corp. v. Axis Lighting Inc., 2020 U.S.P.Q.2d 10114 \(S.D.N.Y. 2020\)](#)

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- 3   Cited  [Gregory v. ProNAi Therapeutics Inc., 757 Fed. Appx. 35 \(2d Cir. 2018\)](#)

Further, although Plaintiff does not attach photographs of the Accused Products to the Amended Complaint, the products are sufficiently identified to give Defendants notice of the direct infringement claims. For example, Plaintiff names the products specifically—the Ab Rocket and the Ab Rocket Twister ( *see* Am. Compl. ¶¶ 23, 31), describes the Ab Rocket as having two hinged elements, a seat and handles ( *id.* ¶¶ 14, 15 ), and describes the Ab Rocket Twister by stating that its seat "swivels horizontally around a vertical axis on the first element" and "arrives unassembled and assembly is required" ( *id.* ¶ 18 ). Furthermore, Plaintiff alleges the accused products are sold at [www.abrocket.com](#) and [www.abrockettwister.com](#). *Id.* ¶ 22 . Because websites named in the Amended Complaint are incorporated by reference, any photographs depicting the accused products on those websites were included in the Amended Complaint for purposes of determining whether the pleadings are sufficient. *See Gregory v. ProNAi Therapeutics Inc.* , [297 F. Supp. 3d 372](#) , [410](#) (S.D.N.Y.), *aff'd* , [757 F.](#)

## Table Of Authorities ( 18 cases )

**App'x 35** (2d Cir. 2018) (noting that website cited in an amended complaint is effectively incorporated into it). In any case, Defendants are able to produce photos of the Accused Products in their Memorandum of Law in Support of the Motion, eradicating any doubt that Defendants did not have sufficient notice of the Accused Products. See ECF No. 48 "Def. Mem.") at 5-8, 10-15.

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- 4   Cited , (See)  [iSentium, LLC v. Bloomberg Fin. LP, 343 F. Supp. 3d 379, 128 U.S.P.Q.2d 1452 \(S.D.N.Y. 2018\)](#)

The Court takes as true all well-pleaded factual allegations in the Amended Complaint and draws all inferences in the plaintiff's favor for purposes of deciding a motion to dismiss pursuant to **Rule 12(b)(6)** . See *Allaire Corp. v. Okumus* , **433 F.3d 248** , **249-50** (2d Cir. 2006). Here, the Amended Complaint attaches a copy of the '**276 Patent** ( see ECF No. 46, "Am. Compl.," Ex. A), which the Court may consider in connection with this motion without converting it into a motion for summary judgment. See *iSentium, LLC v. Bloomberg Fin. L.P.* , **343 F. Supp. 3d 379** , **383** (S.D.N.Y. 2018); *Chambers v. Time Warner, Inc.* , **282 F.3d 147** , **152** (2d Cir. 2002) (in deciding a **Rule 12(b)(6)** motion, the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference); see also **Fed. R. Civ. P. 10(c)** ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

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- 5   Cited , (See also)  [Uni-Sys., LLC v. U.S. Tennis Ass'n, 350 F. Supp. 3d 143 \(E.D.N.Y. 2018\)](#)

While the parties disagree on the interpretation of the '**276 Patent** 's claim 1 and whether the Accused Products infringe on claim 1 in its entirety, Plaintiff nonetheless *alleges* that Defendants have infringed upon claim 1 in its entirety. See Am. Compl. ¶¶ 13. Exhibit B, attached to the Amended Complaint, bolsters this claim. At this stage, the Plaintiff is not required to plead "direct infringement of each and every element of the allegedly infringed claim[]." See *Crypto Res., LLC* , **236 F. Supp. 3d at 686** ; see also *Uni-Sys., LLC v. United States Tennis Ass'n, Inc.* , **350 F. Supp. 3d 143** , **161** (E.D.N.Y. 2018). The Amended Complaint's descriptions of the allegedly infringing products sufficiently identify the factual connections between those products and the claim protected by the '**276 Patent** . In doing, the Amended Complaint provides Defendants "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly* , **550 U.S. at 555** (internal quotation marks omitted). Defendants' arguments regarding the specific comparisons between the Accused Products and the '**276 Patent**

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claim 1 should not be resolved by motion to dismiss under [Rule 12\(b\)\(6\)](#) . Similarly, Defendants' argument that Plaintiff should be precluded from seeking damages based on extraterritorial infringement fails at the motion to dismiss stage because I find that Plaintiff has adequately stated a basis for recovery. At the pleading stage, the Court cannot as a matter of law determine that Plaintiff will not recover any of the damages he alleges. For these reasons, I recommend the Court deny the Defendants' Motion with regard to the claims of direct infringement.

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- 6   Cited  [Disc Disease Sols., Inc. v. VGH Sols., Inc., 888 F.3d 1256, 126 U.S.P.Q.2d 1494 \(Fed. Cir. 2018\)](#)

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- 7   Discussed , (See)  [Gregory v. ProNAi Therapeutics, Inc., 297 F. Supp. 3d 372 \(S.D.N.Y. 2018\)](#)

Further, although Plaintiff does not attach photographs of the Accused Products to the Amended Complaint, the products are sufficiently identified to give Defendants notice of the direct infringement claims. For example, Plaintiff names the products specifically—the Ab Rocket and the Ab Rocket Twister ( see Am. Compl. ¶¶ 23, 31), describes the Ab Rocket as having

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- 8   Cited , Quoted  [Nalco Co. v. Chem-Mod, LLC, 883 F.3d 1337, 125 U.S.P.Q.2d 1832 \(Fed. Cir. 2018\)](#)

Liability for direct patent infringement arises when a party "without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent." [35 U.S.C. § 271\(a\)](#) . A plaintiff "need not prove its case at the pleading stage." *Nalco Co. v. Chem-Mod, LLC* , [883 F.3d 1337](#) , [1350](#) (Fed. Cir. 2018) (citation omitted). The complaint must only provide the alleged infringer notice of what activity is being accused of infringement, as the Federal Rules of Civil Procedure do not require a plaintiff to plead facts establishing that each element of an asserted claim is met. See *Signify N. Am. Corp. v. Axis Lighting Inc.* , 19-cv-5516 (DLC), [ [2020 BL 81587](#) ], 2020 U.S. Dist. LEXIS 37899 , [ [2020 BL 81587](#) ], 2020 WL 1048927 , at \*2 (S.D.N.Y. Mar. 4, 2020), *order amended on reconsideration* , 2020 U.S. Dist. LEXIS 76368 , [ [2020 BL 161985](#) ], 2020 WL 2079844 (S.D.N.Y. Apr. 30, 2020) (citation omitted). Therefore, a complaint for direct infringement survives a motion to dismiss if it: (1) attaches the asserted patents to the complaint, (2) specifically identifies the accused products and attaches photographs of them to the complaint, and (3) alleges that "the accused products meet each and every element of at least one claim" of the asserted patents. *Id.* (citing *Disc Disease Sols. Inc. v. VGH Sols., Inc.* , [888 F.3d 1256](#) , 1260 (Fed. Cir. 2018)). These disclosures and allegations are enough to provide a defendant fair notice of infringement of the asserted patents. *Id.*

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9   Cited , (See) ,  [Crypto Research, LLC v. Assay Abloy, Inc.](#), 236 F. Supp. 3d 671 (E.D.N.Y. 2017) Quoted

Until recently, courts analyzed the sufficiency of a complaint alleging patent infringement by comparing the allegations in the complaint with Form 18 of the Federal Rules of Civil Procedure . See *Bobcar Media, LLC v. Aardvark Event Logistics, Inc.* , 16-cv-885 (JPO), [ [2017 BL 1835](#) ], 2017 U.S. Dist. LEXIS 1243 , [ [2017 BL 1835](#) ], 2017 WL 74729 , at \*3 (S.D.N.Y. Jan. 4, 2017); *Crypto Research, LLC v. Assay Abloy, Inc.* , [236 F. Supp. 3d 671](#) , [685](#) (E.D.N.Y. 2017). As of December 1, 2015, the Federal Rules of Civil Procedure no longer included Form 18. Now, to determine whether a patent pleading survives a [Rule 12\(b\)\(6\)](#) motion to dismiss, courts in this Circuit apply Second Circuit law and follow the pleading standard set out in *Bell Atl. Corp. v. Twombly* , [550 U.S. 544](#) , [570](#) , [127 S. Ct. 1955](#) , [167 L. Ed. 2d 929](#) (2007), and *Ashcroft v. Iqbal* , [556 U.S. 662](#) , [678](#) , [129 S. Ct. 1937](#) , [173 L. Ed. 2d 868](#) (2009). See *Bobcar Media, LLC* , [ [2017 BL 1835](#) ], 2017 U.S. Dist. LEXIS 1243 , [ [2017 BL 1835](#) ], 2017 WL 74729 , at \*3 (citations omitted); *Crypto Res., LLC* , [236 F. Supp. 3d at 685](#) . To survive a [Rule 12\(b\)\(6\)](#) motion to dismiss, a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Twombly* , [550 U.S. at 570](#) . A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* , [556 U.S. at 678](#) .

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The court also states that the Accused Products infringe at least one claim, claim 1 of the ['276 Patent](#) , and sets forth a detailed basis for that belief without merely reciting the elements of claim 1. See Am Compl. ¶¶ 14, 18; *id.* at Ex. B . In support of its direct infringement claim, Plaintiff alleges that the Accused Products are composed of two elements, connected by hinges or springs, and assist a user in performing sit-ups by providing resistance in the same manner described in the ['276 Patents](#) —that is, by providing resistance when a user pushes backwards against the second element (and providing spring assistance to the user to return to a more upright position). The Amended Complaint attaches the allegedly infringed upon patent along with a chart detailing the ways in which the Ab Rocket infringes on the elements of claim 1. See Am. Compl. at Ex. A, B. Together, these allegations are sufficient to plead direct infringement. See *Crypto Res., LLC* , [236 F. Supp. 3d at 686](#) . While Plaintiff does not provide the same level of description to his allegations of the Ab Rocket Twister's infringement, I find that the Amended Complaint adequately compares and contrasts the

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Ab Rocket and the Ab Rocket Twister. Drawing all inferences in Plaintiff's favor as the Court is required to do in resolving this motion, the Amended Complaint provides enough information to allege plausibly Ab Rocket Twister's infringement as well.

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While the parties disagree on the interpretation of the **'276 Patent'** 's claim 1 and whether the Accused Products infringe on claim 1 in its entirety, Plaintiff nonetheless *alleges* that Defendants have infringed upon claim 1 in its entirety. See Am. Compl. ¶¶ 13. Exhibit B, attached to the Amended Complaint, bolsters this claim. At this stage, the Plaintiff is not required to plead "direct infringement of each and every element of the allegedly infringed claim[]." See *Crypto Res., LLC* , **236 F. Supp. 3d at 686** ; see also *Uni-Sys., LLC v. United States Tennis Ass'n, Inc.* , **350 F. Supp. 3d 143** , **161** (E.D.N.Y. 2018). The Amended Complaint's descriptions of the allegedly infringing products sufficiently identify the factual connections between those products and the claim protected by the **'276 Patent'** . In doing, the Amended Complaint provides Defendants "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly* , **550 U.S. at 555** (internal quotation marks omitted). Defendants' arguments regarding the specific comparisons between the Accused Products and the **'276 Patent'** claim 1 should not be resolved by motion to dismiss under **Rule 12(b)(6)** . Similarly, Defendants' argument that Plaintiff should be precluded from seeking damages based on extraterritorial infringement fails at the motion to dismiss stage because I find that Plaintiff has adequately stated a basis for recovery. At the pleading stage, the Court cannot as a matter of law determine that Plaintiff will not recover any of the damages he alleges. For these reasons, I recommend the Court deny the Defendants' Motion with regard to the claims of direct infringement.

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- 10   Cited , (See)  [Bobcar Media, LLC v. Aardvark Event Logistics, Inc., No. 16-CV-885 \(JPO\), 2017 BL 1835, 2017 Us Dist Lexis 1243, 2017 WL 74729 \(S.D.N.Y. Jan. 04, 2017\)](#)

Until recently, courts analyzed the sufficiency of a complaint alleging patent infringement by comparing the allegations in the complaint with Form 18 of the Federal Rules of Civil Procedure . See *Bobcar Media, LLC v. Aardvark Event Logistics, Inc.* , 16-cv-885 (JPO), [ **2017 BL 1835** ], 2017 U.S. Dist. LEXIS 1243 , [ **2017 BL 1835** ], 2017 WL 74729 , at \*3 (S.D.N.Y. Jan. 4, 2017); *Crypto Research, LLC v. Assay Abloy, Inc.* , **236 F. Supp. 3d 671**

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, [685](#) (E.D.N.Y. 2017). As of December 1, 2015, the Federal Rules of Civil Procedure no longer included Form 18. Now, to determine whether a patent pleading survives a [Rule 12\(b\)\(6\)](#) motion to dismiss, courts in this Circuit apply Second Circuit law and follow the pleading standard set out in *Bell Atl. Corp. v. Twombly*, [550 U.S. 544](#), [570](#), [127 S. Ct. 1955](#), [167 L. Ed. 2d 929](#) (2007), and *Ashcroft v. Iqbal*, [556 U.S. 662](#), [678](#), [129 S. Ct. 1937](#), [173 L. Ed. 2d 868](#) (2009). See *Bobcar Media, LLC*, [ [2017 BL 1835](#) ], 2017 U.S. Dist. LEXIS 1243, [ [2017 BL 1835](#) ], 2017 WL 74729, at \*3 (citations omitted); *Crypto Res., LLC*, [236 F. Supp. 3d at 685](#). To survive a [Rule 12\(b\)\(6\)](#) motion to dismiss, a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Twombly*, [550 U.S. at 570](#). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, [556 U.S. at 678](#).

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- 11   Cited, (See)  [Commil USA, LLC v. Cisco Sys., Inc.](#), [575 U.S. 632](#), [135 S. Ct. 1920](#), [191 L. Ed. 2d 883](#), [114 U.S.P.Q.2d 1577](#), [83 U.S.L.W. 4331](#) (2015)

[Subsection \(b\) of 35 U.S.C. § 271](#) deals with inducing infringement, providing: "Whoever actively induces infringement of a patent shall be liable as an infringer." In contrast to direct infringement, liability for inducing infringement attaches only if the defendant knew of the patent and that the induced acts constitute patent infringement. See *Commil USA, LLC v. Cisco Sys., Inc.*, [575 U.S. 632](#), [135 S. Ct. 1920](#), [191 L. Ed. 2d 883](#) (2015). To state a claim for induced infringement pursuant to [35 U.S.C. § 271\(b\)](#), a plaintiff must plead facts showing: (1) there has been a direct infringement; (2) that the alleged infringer knowingly induced infringement; and (3) that the alleged infringer possessed specific intent to encourage another's infringement. See *Conair Corp. v. Jarden Corp.*, 13-cv-6702 (AJN), [ [2014 BL 223696](#) ], 2014 U.S. Dist. LEXIS 112252, [ [2014 BL 223696](#) ], 2014 WL 3955172, at \*2 (S.D.N.Y. Aug. 12, 2014) (quoting *Vita—Mix Corp. v. Basic Holding, Inc.*, [581 F.3d 1317](#), [1328](#) (Fed. Cir. 2009)). I find the Amended Complaint fails to meet this pleading requirement.

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- 12   Cited, (See)  [Conair Corp. v. Jarden Corp.](#), No. 13-cv-6702 (AJN), [2014 BL 223696](#), 2014 Us Dist Lexis 112252, 2014 WL 3955172 (S.D.N.Y. Aug. 12, 2014)

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- 13   Cited , (See) , Quoted  [Lyda v. Fremantle Media N. Am., Inc., No. 10 Civ. 4773 \(DAB\), 2012 BL 447538, 2012 Us Dist Lexis 39316, 2012 WL 957498 \(S.D.N.Y. Mar. 08, 2012\)](#)

The Amended Complaint alleges that "Defendants . . . encourage others to practice infringing methods" and that "Defendants knowingly induced infringement and are continuing to knowingly induce infringement of the ['276 Patent](#) by specifically encouraging and inducing others to practice the patented invention within the United States." Am. Compl. ¶¶ 31, 34. Without more, these conclusory assertions lack the requisite specific factual allegations to sufficiently state a claim supporting infringement liability. See *Lyda v. Fremantle Media N. Am., Inc.*, 10-cv-4773 (DAB), [[2012 BL 447538](#)], 2012 U.S. Dist. LEXIS 39316, [[2012 BL 447538](#)], 2012 WL 957498, at [\\*2](#) (S.D.N.Y. Mar. 8, 2012) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and formulaic recitation of the elements of a cause of action will not do." (citation omitted)). Plaintiff does not allege that Defendants had knowledge of Plaintiff's patents at the time it began manufacturing, marketing, or selling the Accused Products, as is required to state a claim for inducing infringement. Nor does Plaintiff state facts from which a Court could draw an inference of knowledge, let alone intent to encourage another's infringement. Accordingly, I recommend the Court deny Plaintiff's claim of inducing infringement.

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- 14   Cited , Quoted  [Vita-Mix Corp. v. Basic Holding, Inc., 581 F.3d 1317, 92 U.S.P.Q.2d 1340 \(Fed. Cir. 2009\)](#)

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- 15   Cited , Quoted  [Ashcroft v. Iqbal](#), [556 U.S. 662](#), [129 S. Ct. 1937](#), [173 L. Ed. 2d 868](#), [77 U.S.L.W. 4387](#) (2009)

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- 16   Cited , Quoted  [Bell Atl. Corp. v. Twombly](#), [550 U.S. 544](#), [127 S. Ct. 1955](#), [167 L. Ed. 2d 929](#), 2007 ILRC 1829, 23 ILRD 11, 41 CR 567, [75 U.S.L.W. 4337](#) (2007)

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for recovery. At the pleading stage, the Court cannot as a matter of law determine that Plaintiff will not recover any of the damages he alleges. For these reasons, I recommend the Court deny the Defendants' Motion with regard to the claims of direct infringement.

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- 17   Cited , (See)  [Allaire Corp. v. Okumus, 433 F.3d 248 \(2d Cir. 2006\)](#)

The Court takes as true all well-pleaded factual allegations in the Amended Complaint and draws all inferences in the plaintiff's favor for purposes of deciding a motion to dismiss pursuant to [Rule 12\(b\)\(6\)](#) . See *Allaire Corp. v. Okumus* , [433 F.3d 248](#) , [249-50](#) (2d Cir. 2006). Here, the Amended Complaint attaches a copy of the '[276 Patent](#) ( see ECF No. 46, "Am. Compl.," Ex. A), which the Court may consider in connection with this motion without converting it into a motion for summary judgment. See *iSentium, LLC v. Bloomberg Fin. L.P.* , [343 F. Supp. 3d 379](#) , [383](#) (S.D.N.Y. 2018); *Chambers v. Time Warner, Inc.* , [282 F.3d 147](#) , [152](#) (2d Cir. 2002) (in deciding a [Rule 12\(b\)\(6\)](#) motion, the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference); see also [Fed. R. Civ. P. 10\(c\)](#) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

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- 18   Discussed , (See)  [Chambers v. Time Warner, Inc., 282 F.3d 147, 61 U.S.P.Q.2d 1761, 10 ILRD 32 \(2d Cir. 2002\)](#)

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