

APPENDIX A

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

JERRY ARTRIP,
Plaintiff-Appellant

v.

BALL CORPORATION, BALL METAL BEVERAGE
CONTAINER CORPPRATION, ALCOA, INC.,
Defendants-Appellees

2018-1277

Appeal from the United States District Court for
the Western District of Virginia in No. 1:14-cv-00014-
JPJPMS, Judge James P. Jones.

Decided: May 23, 2018

JERRY ARTRIP, Bluff City, TN, pro se.

JOHN DAVID LUKEN, Dinsmore & Shohl LLP,
Cincinnati, OH, for defendants-appellees Ball
Corporation, Ball Metal Beverage Container
Corporation.

MARK MICHAEL SUPKO, Crowell & Moring, LLP, Washington, DC, for defendant-appellee Alcoa, Inc. Also represented by MARK A. KLAPOW.

Before DYK, O'MALLEY, and STOLL, *Circuit Judges*.

STOLL, *Circuit Judge*.

Jerry Artrip appeals the district court's dismissal of his case. Mr. Artrip asks us to reverse the district court and remand so that he may file a fourth amended complaint charging Appellees Alcoa, Inc. ("Alcoa"), Ball Corp., and Ball Metal Beverage Container Corp. (together, "Ball") with patent infringement.

We lack jurisdiction to review the dismissal of Mr. Artrip's claims against Alcoa. And because we find that Mr. Artrip's third amended complaint does not satisfy the legal pleading standard and that the district court did not abuse its discretion in denying leave for further amendments, we affirm the district court's dismissal of Mr. Artrip's claims against Ball with prejudice.

BACKGROUND

In 1996, Donald Artrip, Mr. Artrip's son, obtained U.S. Patent No. 5,511,920, covering a press assembly and method for forming the lift-tab can ends used for opening beverage cans. Donald Artrip continued his work on lift-tab can end production

techniques until his death in 2007, and obtained an additional seven patents for improvements related to this technology: U.S. Patent Nos. 5,660,516, 6,022,179, 7,063,492, 7,234,907, 7,237,998, 7,237,999, and 7,344,347. The patented assemblies and systems changed the lift-tab can end assembly process and eliminated the need for a human tab press operator to turn and move the tabs between machines.

In 2014, Mr. Artrip, the patents' assignee, filed a *pro se* complaint accusing Alcoa and Ball¹ of infringing the '347 patent. A few months later, after obtaining counsel, Mr. Artrip filed a first amended complaint asserting that Alcoa indirectly infringed and Ball directly infringed all eight of the Artrip patents. In early 2015, Mr. Artrip filed a second amended complaint modifying these allegations.

The second amended complaint accused Alcoa and Ball of infringing the '179, '492, '907, '998, '999, and '347 patents. For each of the patents, the complaint alleged that Alcoa induced infringement because it supplied material, particularly “food grade coiled aluminum sheets with special coating” in knowing aid of direct infringement of the patents. J.A. 272–78, ¶¶ 5, 8, 11, 14, 17, 20. And it alleged that Alcoa contributorily infringed because the aluminum

¹ This complaint identified different Alcoa and Ball entities than those here on appeal. By the second amended complaint, however, the parties had been finally identified as Mr. Artrip and the Appellees. For simplicity, we do not distinguish between the earlier and later entities here.

met “required specifications for said invention” and “constitut[ed] a material part of the invention,” and Alcoa knew the aluminum “to be especially made or especially adapted for use in an infringement.” *Id.* The complaint further alleged that the Alcoa aluminum was not a staple article or commodity suitable for substantial noninfringing use. And the complaint stated that Ball directly infringed the patent by using a system “that embodies the patented invention.” J.A. 272–77, ¶¶ 4, 7, 10, 13, 16, 19.

Alcoa and Ball each moved to dismiss the second amended complaint for failure to state a claim on which relief could be granted, and the district court granted the motions. Applying the plausibility standard set forth by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), the district court first concluded that Mr. Artrip’s claims for direct infringement were insufficient because they did not identify the infringing Ball equipment or explain how Ball’s use of that equipment infringes any claim. The court determined that it “would be unjust to permit [Mr.] Artrip to move forward with a complaint that does not alert Ball as to what it has done wrong.” *Artrip v. Ball Corp.*, No. 1:14-cv-00014-JPJ-PMS, 2017 WL 3669518, at *4 (W.D. Va. Aug. 24, 2017). Nevertheless, because Mr. Artrip’s second amended complaint had been filed before the *Iqbal/Twombly* plausibility standard clearly applied to direct infringement claims, the district court dismissed Mr. Artrip’s claims against Ball without prejudice. In doing so, it instructed Mr. Artrip that any amended

complaint “must comply with the pleading requirements of Rule 8(a), *Twombly*, and *Iqbal*. In particular, it must plead specific facts supporting [Mr.] Artrip’s claims.” *Id.* at *5.

The district court determined that Mr. Artrip’s indirect infringement claims were also deficient. It found that the second amended complaint did not plausibly allege facts supporting an inference that Alcoa knew of the patents, a prerequisite for indirect infringement claims. Relatedly, the district court found that the complaint did not allege facts supporting an inference that Alcoa specifically intended to aid any direct infringement (as required for induced infringement) or knew its aluminum was made to be used in infringement (as required for contributory infringement). It also found that Mr. Artrip’s second amended complaint did not show that the aluminum sheets allegedly supplied by Alcoa were not staple articles of commerce suitable for noninfringing use. Because the *Iqbal/Twombly* plausibility standard applied to Mr. Artrip’s indirect infringement claims when the second amended complaint was filed, the district court dismissed Mr. Artrip’s claims against Alcoa with prejudice, denied further leave to amend as to Alcoa, and ordered the clerk to terminate Alcoa from the case.

A few weeks later, Mr. Artrip filed his third amended complaint. In that complaint, he alleged that Ball directly infringed five of the patents—the ’492, ’907, ’998, ’999, and ’347 patents. The complaint stated that “one or more of the machines at least at the

Bristol Plant” infringed the patents because those machines were for forming and attaching lift-tabs to can ends and included each element of the independent claims. J.A. 324–35, ¶¶ 9, 11, 13, 15, 17. In addition, the complaint identified Ball facilities other than the Bristol plant and stated that on information and belief, “one or more machines in each of Ball’s Operating Plants infringe one or more of the Patents-in- Suit.” J.A. 335–36, ¶¶ 19–20.

Ball again moved to dismiss, arguing that Mr. Artrip did not state a claim on which relief could be granted. The district court found that the third amended complaint contained “minimal facts” and that the “conclusory” allegation that Ball infringed the patents by using “one or more machines” according to the claims did not meet the pleading standard. *Artrip v. Ball Corp.*, No. 1:14-cv- 00014-JPJ-JMS, 2017 WL 5037470, at *3 (W.D. Va. Nov. 3, 2017). Because it found that Mr. Artrip had “notice of the applicable pleading standard, had multiple opportunities to meet it, and has failed to do so,” the district court dismissed the third amended complaint with prejudice and denied leave to amend. *Id.* at *4. The same day, November 3, 2017, the court entered a final order dismissing Mr. Artrip’s action against Ball.

Acting pro se, Mr. Artrip filed a notice of appeal, after which his former counsel withdrew from the case. The notice listed both Alcoa and Ball in the case caption, but it specifically designated the district court’s November 3, 2017 order, which dismissed the third amended complaint against only Ball, as the

subject of the appeal.

DISCUSSION

We review the grant of a motion to dismiss for failure to state a claim under the law of the regional circuit. *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1124 (Fed. Cir. 2018) (citing *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat’l Ass’n*, 776 F.3d 1343, 1346 (Fed. Cir. 2014)). The Fourth Circuit reviews such dismissals de novo. *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013). De novo review requires an appellate court to look at the issues as though for the first time, with no deference to the trial court. *See Appeal*, Black’s Law Dictionary (10th ed. 2014) (defining “appeal de novo” as “[a]n appeal in which the appellate court uses the trial court’s record but reviews the evidence and law without deference to the trial court’s rulings”).

We also review the denial of leave to amend a pleading under regional circuit law. *See Chi. Bd. Options Exch., Inc. v. Int’l Sec. Exch., LLC*, 677 F.3d 1361, 1374 (Fed. Cir. 2012). When a district court denies leave to amend a complaint, the Fourth Circuit reviews that decision for an abuse of discretion. *See Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014). A court abuses its discretion “if it relies on an error of law or a clearly erroneous factual finding.” *E.E.O.C. v. Freeman*, 778 F.3d 463, 466 (4th Cir. 2015).

I

We first consider the district court’s dismissal of Mr. Artrip’s contributory infringement² claims against Alcoa, and its denial of leave to amend.

A

As a threshold issue, Alcoa contends that we have no jurisdiction to review the district court’s order dismissing the second amended complaint and denying Mr. Artrip leave to amend his complaint as to Alcoa.³ We agree.

We have jurisdiction only if Mr. Artrip filed a timely notice of appeal that complies with Rule 3 of the

² Mr. Artrip now concedes that the induced infringement allegations should not have been included in the case. Appellant’s Br. 2–3.

³ Ball does not expressly challenge jurisdiction but states in a footnote that Mr. Artrip’s notice of appeal was of uncertain effectiveness because he signed and filed it pro se before his counsel formally withdrew. An improperly signed notice of appeal does not impact our jurisdiction. *See Becker v. Montgomery*, 532 U.S. 757, 766 (2001) (finding signature on notice of appeal is required by Federal Rule of Civil Procedure 11, “render[ing] it nonjurisdictional”); *Republican Nat’l Comm. v. Taylor*, 299 F.3d 887, 890 n.1 (D.C. Cir. 2002) (declining to dismiss appeal for technical violation of signature requirement); *see also In re First Protection, Inc.*, 440 B.R. 821, 827 (B.A.P. 9th Cir. 2010) (finding pro se litigant’s declared intention to participate in appeal cured signature defect). We therefore consider Mr. Artrip’s notice of appeal to have been properly filed.

Federal Rules of Appellate Procedure. *See Smith v. Barry*, 502 U.S. 244, 248–49 (1992) (“Rule 3’s dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review.”). Whether a notice of appeal meets the standard imposed by Rule 3 “is a question of Federal Circuit law.” *See Minn. Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1308–09 (Fed. Cir. 2002).

Among other requirements, Rule 3 states that a notice of appeal must “designate the *judgment, order, or part thereof* being appealed.” *Int’l Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353, 1357 (Fed. Cir. 2008) (emphasis added) (quoting Fed. R. App. P. 3(c)(1)); *see also Durango Assocs., Inc. v. Reflange, Inc.*, 912 F.2d 1423, 1425 (Fed. Cir. 1990) (finding party “cannot now expand the scope of its specifically limited notice of appeal”). Our sister circuits have found that they do not have jurisdiction to review orders other than those identified in the notice of appeal. *See, e.g., Doran v. J.P. Noonan Trans., Inc.*, 853 F.3d 66, 69 (1st Cir. 2017) (finding “no basis to reverse an order” other than order designated in notice); *In re GNC Corp.*, 789 F.3d 505, 512 (4th Cir. 2015) (dismissing appeal as to order not identified in notice); *Stephens v. Jessup*, 793 F.3d 941, 943 (8th Cir. 2015) (finding no jurisdiction to review order dismissing first party where notice of appeal identified separate order only dismissing second party).

Here, Mr. Artrip’s notice of appeal identifies only the district court’s November 3, 2017 order dismissing the third amended complaint against Ball.

Alcoa is mentioned only in the notice’s case caption. Although we construe notices of appeal liberally, Mr. Artrip’s notice does not indicate an intent to appeal the district court’s earlier order dismissing the second amended complaint and terminating Alcoa. *See Smith*, 502 U.S. at 248 (permitting courts to find compliance “with the rule if the litigant’s action is the functional equivalent of what the rule requires” but explaining “[t]his principle of liberal construction does not, however, excuse noncompliance with the Rule. Rule 3’s dictates are jurisdictional” (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988))). Mr. Artrip’s letter requesting Alcoa’s addition to the case caption in this appeal might indicate intent to appeal Alcoa’s dismissal, but that letter was filed after the deadline for appeal. “There is no doctrine that permits an appellant to ‘amend’ a notice so that the time for appealing is extended beyond the prescribed statutory period.” *Durango*, 912 F.2d at 1425.

B

In any event, even if we were to construe Mr. Artrip’s pro se notice of appeal to include all prior orders in the case, we would affirm the district court’s dismissal of Mr. Artrip’s contributory infringement claims and its denial of leave to amend. *See, e.g., Elliott v. City of Hartford*, 823 F.3d 170, 173 (2d Cir. 2016) (holding in the Second Circuit “a pro se appellant’s appeal from an order closing the case [constitutes] an appeal from all prior orders”).

To survive a motion to dismiss, a plaintiff

alleging contributory infringement must plausibly allege that the accused infringer knew of the asserted patents, *see Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926 (2015), and must “plead facts that allow an inference that the components sold or offered for sale have no substantial non-infringing uses,” *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1337 (Fed. Cir. 2012). Mr. Artrip alleged that Alcoa supplies “food grade coiled aluminum sheets with special coating, that meet required specifications for [the patented] invention[s].” J.A. 272–78, ¶¶ 5, 8, 11, 14, 17, 20; *see also* J.A. 265, ¶ 9 (alleging in declaration that aluminum sheets were “precut” to “[d]ifferent widths and thickness”). But these facts do not suggest that Alcoa knew of the Artrip patents or that the aluminum Alcoa supplied could not be used “for purposes *other than* infringement.” *Bill of Lading*, 681 F.3d at 1338. While the complaint recited that Alcoa acted despite “knowing [the aluminum] to be especially made or especially adapted for . . . infringement” and that the aluminum is “a material part” of the claimed invention that is not a “staple article” and is not “suitable for substantial noninfringing use,” J.A. 272–78, ¶¶ 5, 8, 11, 14, 17, 20, the second amended complaint did not plausibly assert facts to suggest that Alcoa was aware of the patents or facts to suggest that the aluminum it supplied had no substantial noninfringing use. *See Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). We have considered Mr. Artrip’s remaining arguments, but we find them unpersuasive.

C

We would also affirm the district court's denial of leave to amend as to Alcoa.

The Federal Rules of Civil Procedure encourage courts to freely give leave to amend when justice so requires. *See* Fed. R. Civ. P. 15(a)(2). Nevertheless, where a party repeatedly does not cure defects in its pleadings, a court does not abuse its discretion by refusing to allow further amendments. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *David v. Alphin*, 704 F.3d 327, 344 (4th Cir. 2013) (finding no abuse of discretion where district court dismissed already amended complaint with prejudice).

Mr. Artrip's second amended complaint was his third complaint presented to the court and his second filed by counsel. Alcoa had already alerted Mr. Artrip to potential deficiencies in the contributory infringement allegations in his first amended complaint, including a lack of adequate support for his assertion that the aluminum provided by Alcoa had no substantial noninfringing use. But Mr. Artrip was nevertheless unable to state a plausible claim for contributory infringement in his second amended complaint. In these circumstances, we cannot say the district court abused its discretion in denying further leave to amend.

II

We now consider the dismissal of Mr. Artrip's

third amended complaint against Ball and the court’s denial of further leave to amend.

A

A motion to dismiss should be granted if a complaint does not contain “sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).⁴ To meet the plausibility standard, a plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Merely pleading facts that are consistent with liability or stating legal conclusions is not sufficient. *Id.*

We recently applied these requirements in *Disc Disease Solutions Inc. v. VGH Solutions, Inc.*, No. 17-1483, 2018 WL 2011468 (Fed. Cir. May 1, 2018). The plaintiff in that case plausibly pled direct infringement by specifically identifying the infringing products and alleging those specific products included each element of the patented claims. *Id.* at *3. The complaint provided the defendants fair notice of how they infringed—the plaintiff had named each of the three

⁴ As of December 1, 2015, the plausibility standard applies to direct infringement claims. *Lifetime Indus., Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1376–77 (Fed. Cir. 2017). Though this case has been pending for years, Mr. Artrip’s third amended complaint was filed on September 14, 2017, after the district court directed him to comply with the plausibility standard and almost two years after that standard clearly came into effect. We therefore apply the plausibility standard to our review here.

allegedly infringing products and had attached their photographs as exhibits to the complaint. *Id.*

Here, Mr. Artrip's third amended complaint described the patents and the parties and alleged that Ball infringes the '492, '907, '998, '999, and '347 patents "by use of one or more of the machines at least at the Bristol Plant." J.A. 324–34, ¶¶ 9, 11, 13, 15, 17. The third amended complaint did not otherwise identify the accused machines, but it stated that these machines are systems for "forming and attaching lift-tabs to can ends" that include each element of each patent's single independent claim, which the complaint recited. *Id.* The complaint also identified additional Ball packaging plants across the country, and alleged that on information and belief, machines in each of these plants similarly infringe one or more of the asserted patents.

We agree with the district court that these allegations are insufficient to state a plausible claim for direct infringement. Even taken as true, the facts alleged in the third amended complaint are insufficient to state a plausible, rather than merely possible, claim for relief. *See Iqbal*, 556 U.S. at 678. Mr. Artrip's attorney received access to Ball's Bristol plant, toured the factory, and photographed Ball's equipment. But the third amended complaint does not sufficiently identify, for example, by photograph or name, any of the particular machines that allegedly infringe other than by broad functional language. Unlike the plaintiff in *Disc Disease*, Mr. Artrip did not fairly identify the accused machines. The third amended complaint is

thus insufficient; under any pleading standard, a complaint must put a defendant “on notice as to what he must defend.” *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007); *see also Peralta v. Cal. Franchise Tax Bd.*, 673 F. App’x 975, 980 (Fed. Cir. 2016) (affirming dismissal of complaint containing only “[t]he boilerplate allegation that defendants infringe”) (nonprecedential).

B

Finally, we consider and affirm the district court’s denial of leave to amend the complaint as to Ball for a fourth time.

A district court does not abuse its discretion where it denies leave after “repeated failure to cure deficiencies by amendments previously allowed.” *Foman*, 371 U.S. at 182. When the district court dismissed the direct infringement allegations in Mr. Artrip’s second amended complaint, it identified particular deficiencies in that complaint and instructed Mr. Artrip to plead specific facts supporting his infringement allegations going forward. As discussed above, the third amended complaint did not do so. In these circumstances, the district court did not abuse its discretion in denying further leave to amend. *See Glaser v. Enzo Biochem, Inc.*, 464 F.3d 474, 480 (4th Cir. 2006) (finding no abuse of discretion in denying leave to amend where plaintiff has “already set forth four iterations of their complaint”).

CONCLUSION

We have considered Mr. Artrip's remaining arguments and find them unpersuasive. Accordingly, we affirm the decision of the district court.

AFFIRMED

COSTS

Costs to Appellees.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

JERRY ARTRIP,
Plaintiff,

v.

BALL CORPORATION, ET AL.,
Defendant.

Case No. 1:14CV00014

OPINION

By: James P. Jones
United States District Judge

Dale R. Jensen, Dale Jensen, PLC, Staunton, Virginia, and Stephen C. Swift, Swift & Swift, Attorneys at Law, P.L.L.C., Alexandria, Virginia, for Plaintiff; John D. Luken, Jeffrey P. Hinebaugh, and Nicole S. Nan, Dinsmore & Shohl LLP, Cincinnati, Ohio, and Steven R. Minor, Elliott Lawson & Minor, Bristol, Virginia, for Defendants Ball Corporation and Ball Metal Beverage Container Corp.

The plaintiff, Jerry Artrip, has asserted claims

of direct patent infringement against defendants Ball Corporation and Ball Metal Beverage Container Corp. in violation of 35 U.S.C. § 271. The defendants have moved to dismiss the Third Amended Complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). For the reasons that follow, I will grant the Motion to Dismiss.

I. PROCEDURAL HISTORY.

Artrip initially filed this case pro se, alleging that “The Ball Company” and “Alcoa Aluminum Company” had infringed one of his assigned patents. Some months later, Artrip obtained counsel, who subsequently filed a First Amended Complaint alleging that the defendants had infringed eight of Artrip’s assigned patents.¹ Both defendants filed motions to dismiss pursuant to Rule 12(b)(6) for failure to state a claim. It was asserted, among other things, that Artrip’s suit was barred by the doctrine of laches. In accord with Rule 12(d), I converted the motions to dismiss into motions for summary judgment and permitted the parties to further respond to the laches.

Before I had ruled on summary judgment, Artrip sought leave to further amend his lawsuit, asserting that a “proposed Second Amended Complaint [would] better state his claims.” Mot. Amend 1, ECF

¹ The defendants also assert that Artrip served, but never filed, a revised pro se complaint asserting claims of infringement of three additional patents. See Alcoa’s Mot. Dismiss 2, ECF No. 37; Ball’s Mem. Supp. Mot. Dismiss 1, ECF No. 39.

No. 59. I granted the motion, and the Second Amended Complaint added Ball Metal Beverage Container Corp. as a third defendant and alleged that all three defendants — Ball Corporation, Ball Metal Beverage Container Corp., and Alcoa Inc. — had infringed six of Artrip’s assigned patents.²

Two days later, following appropriate notice to the parties, I stayed the case pending the Federal Circuit’s en banc reconsideration of its long-standing adherence to laches as a defense in patent cases. The en banc court upheld the defense, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1315 (Fed. Cir. 2015), but the Supreme Court granted certiorari, eventually overruling the Federal Circuit, holding that laches is not a viable defense where the alleged infringement occurred within the Patent Act’s six-year limitations period. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 967 (2017). Based on the Supreme Court’s decision, I lifted the stay and overruled the defense of laches.

Ball and Alcoa then filed new motions to dismiss under Rule 12(b)(6) as to Artrip’s Second Amended Complaint.³ I granted Alcoa’s Motion to Dismiss,

² Hereafter, Ball Corporation and Ball Metal Beverage Container Corp. will be collectively referred to as “Ball.”

³ Ball also included in the Motion to Dismiss arguments that five of the asserted patents were invalid as indefinite. I denied Ball’s Motion to Dismiss on this basis, finding that it would

dismissing Artrip’s claims of induced infringement and contributory infringement against Alcoa with prejudice and terminated Alcoa as a party to the action. *Artrip v. Ball Corp.*, No. 1:14CV00014, 2017 WL 3669518 (W.D. Va. Aug. 24, 2017). I granted Ball’s Motion to Dismiss to the extent the Second Amended Complaint failed to state a facially-plausible claim for relief, finding that Artrip’s allegations were merely conclusory and insufficient under *Twombly* and *Iqbal*.⁴ However, because Artrip’s Second Amended Complaint was governed by Form 18 at the time it was filed, I allowed him to file an amended complaint. *Id.* at *5. I directed that “[a]ny such amended complaint must comply with the pleading requirements of Rule 8(a), *Twombly* and *Iqbal*,” and “must plead specific facts supporting Artrip’s claims.” *Id.* Artrip has now filed a Third Amended Complaint, and Ball has filed a new Motion to Dismiss under Rule 12(b)(6). Artrip opposes the motion. The motion has been fully briefed and is ripe for consideration.⁵

be premature to decide the question. *Artrip v. Ball Corp.*, No. 1:14CV00014, 2017 WL 3669518 at *6 (W.D. Va. Aug. 24, 2017).

⁴ In determining the correct pleading standard to apply, I found that “it would be both just and practicable to retroactively apply the *Twombly* and *Iqbal* pleading standard” to Artrip’s claims. *Id.* at *4; see *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

⁵ I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

II. FACTUAL SUMMARY.

The Third Amended Complaint alleges the following facts, which I must accept as true for the purpose of deciding the present motion.

Between June 2006 and March 2008, Donald Artrip was issued five patents related to the manufacture of lift-tab can ends. “Lift-tabs” are the metal tabs used to open metal beverage cans. “Lift-tab can ends” are the ends of the cans with the lift-tabs attached. These patents were assigned to Donald Artrip’s father, plaintiff Jerry Artrip, throughout 2006. The five patents claimed in the Third Amended Complaint are as follows:⁶

- U.S. Patent No. 7,063,492 (the “492 Patent”), for an invention of a System for Forming and Attaching Lift-Tabs to Can Ends;
- U.S. Patent No. 7,234,907 (the “907 Patent”), for an invention of a System for Forming and Securing Lift-Tabs to Can Ends Having a Drive Belt;
- U.S. Patent No. 7,237,998 (the “998 Patent”), for an invention of a System for Forming and Securing Lift-Tabs to Can Ends Having

⁶ In his Second Amended Complaint, Artrip included a sixth patent, which was “a System and Method When Forming Lift-Tab Can Assemblies – No. 6,022,179 (’179).” Second Am. Compl. ¶ 3, ECF No. 64.

Independent Tab Press and Conversion Press;

- U.S. Patent No. 7,237,999 (the “999 Patent”), for an invention of a System for Forming and Securing Lift-Tabs to Can Ends Having Two Frames; and
- U.S. Patent No. 7,344,347 (the “347 Patent”), for an invention of a System for Forming and Securing Lift-Tabs to Can Ends Having a Bridge.

Third Am. Compl. ¶ 1, ECF No. 111.

Artrip alleges that Ball directly infringed each of these patents by use of “one or more of the machines at least at the Bristol Plant” because such machines are systems “for forming and attaching lift-tabs to can ends to form easy opening lift-tab can ends, wherein each of said can ends includes a rivet to which a lift-tab may be attached.” *Id.* at ¶¶ 9, 11, 13, 15, and 17. For each claim, Artrip then includes a verbatim description of every claim limitation for the applicable patent. He does not make any additional allegations. Importantly, he does not state which specific machine or machines at the Bristol Plant allegedly infringe each patent claim. He also does not allege how Ball’s use of the unspecified equipment infringes each claim.

III. APPLICABLE LAW.

The Federal Rules of Civil Procedure require a claim for relief to contain “a short and plain statement

of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Generally, “[t]o survive a motion to dismiss” under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678 (citing *Twombly*, 550 U.S. at 556). In ruling on a motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint, *Twombly*, 550 U.S. at 572, and it must view those facts in the light most favorable to the plaintiff. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002).

However, this “tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S. at 555). Although legal conclusions can “provide the framework of a complaint, they must be supported by factual allegations.” *Id.* at 679.

IV. ANALYSIS.

Ball seeks dismissal of the direct infringement claims against it on the ground that the Third Amended Complaint fails to meet the *Twombly* and *Iqbal* pleading requirements.

Section 271(a) states that “whoever without authority . . . uses . . . any patented invention . . . during the term of the patent therefor, infringes the patent.” 35 U.S.C. § 271(a). A plaintiff claiming direct infringement need only prove “unauthorized use of a patented invention”; the defendant’s knowledge or intent is “irrelevant.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 761 n.2 (2011) (citing *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 484 (1964)). Thus, to survive a Rule 12(b)(6) motion to dismiss, a plaintiff need only allege facts giving rise to a reasonable inference that the defendant used the patented invention.

As was the case for Artrip’s prior complaints, the Third Amended Complaint contains minimal facts and falls short of the pleading standard. With respect to his claims of direct infringement, Artrip alleges only that Ball has infringed the patents by “using” the patented systems and quotes verbatim the claim limitations for each applicable patent. This allegation is merely conclusory and thus, by itself, insufficient under *Twombly* and *Iqbal*.

I previously directed that Artrip’s Third Amended Complaint must plead specific facts supporting his claims, and in particular, should identify, “what equipment at Ball infringes” and “how Ball’s use of the unspecified equipment supposedly infringes”. *Artrip*, 2017 WL 3669518, at *5; *see Iqbal*,

556 U.S. at 679. Artrip has failed to do so.⁷ Alleging how the offending machines infringe is “required to put [Ball] on notice of what it has to defend and to make a plausible showing of infringement.” *Macronix Int’l Co., Ltd. v. Spansion Inc.*, 4 F. Supp. 3d 797, 804 (E.D. Va. 2014). Artrip simply alleges that each element of a cited claim is infringed “by use of one or more machines” and quotes the claim language. Third Am. Compl. ¶¶ 9, 11, 13, 15, 17, ECF No. 111. That does not satisfy the pleading standard. “Without some factual allegation in the complaint, it is hard to see how a complainant could satisfy the requirement of providing not only fair notice of the nature of the claim, but also grounds upon which the claim rests.” *Macronix*, 4 F. Supp. 3d at 800 (citing *Twombly*, 550 U.S. at 555 n. 3) (internal quotations omitted).

Artrip argues that a complaint that tracks the language of the patent claims is not insufficient per se. He attaches two complaints as exhibits in support of this argument and contends that the Third Amended Complaint is “substantially similar” to these complaints. Brief Opp’n Mot. Dismiss 9, ECF No. 117. Artrip’s first exhibit is the complaint filed in *Jenkins v. LogicMark, LLC*, No. 3:16-CV- 751-HEH, 2017 WL 376154 (E.D. Va. Jan. 25, 2017). Unlike the Third Amended Complaint, that complaint included a section

⁷ It is particularly difficult to understand why Artrip failed to include specific facts as to what equipment at the Bristol Plant allegedly infringes his patents. Artrip’s attorney was given access to the plant and he observed and photographed a variety of equipment at the plant.

entitled “The Accused Products”, which specifically identified the “Guardian Alert”, “Life Sentry”, and “Freedom Alert” systems as the potentially infringing products.⁸ Brief Opp’n Mot. Dismiss, Ex. 1, 14-15, ECF No. 117. Similarly, the second attached complaint filed in *Avago Techs Gen. IP (Singapore) PTE Ltd. v. Asustek Comput., Inc.*, Nos. 15-cv- 04525-EMC, 16-cv-00451-EMC, 2016 WL 1623920 (N.D. Cal. Apr. 25, 2016), included a lengthy list of potentially infringing products.⁹ *Id.*, Ex. 2, ¶ 21, ECF No. 117-2. Therefore, although it is true that the attached complaints are similar to Artrip’s Third Amended Complaint in that they all track the language of the patent claims, the attached complaints both identify the specific, infringing products. Artrip fails to do this. He also fails to allege how each allegedly infringing machine infringes any of the patents. Accordingly, his Third Amended Complaint is insufficient because it fails to allege specific facts supporting Artrip’s claims. Any

⁸ Notably, the court in *Jenkins* found the claims in the complaint to be insufficient because the plaintiff “failed to identify which specific patent claims [were] alleged to be infringed” and “[did] not identify with any particularity *how* each allegedly infringing feature...infringes any of the named patents.” 2017 WL 376154, at *3. Therefore, Artrip’s reliance on this complaint is misplaced.

⁹ *Avago* does suggest that a patent infringement complaint is not “insufficient per se” simply because it repeats the language of the claims. 2016 WL 1623920 at *4. However, *Avago* does not hold that a patent infringement complaint that “*only* tracks the language of the asserted claims is *sufficient per se*.” *Comcast Cable Commc’ns, LLC v. OpenTV, Inc.*, 319 F.R.D. 269, 275 (N.D. Cal. 2017).

argument regarding the language of the patent claims does nothing to remedy this deficiency.

Dismissal of all claims against Ball will be with prejudice, and further leave to amend is denied. The Third Amended Complaint is Artrip's fourth complaint and the third complaint filed by counsel. I directed Artrip as to the factual allegations that must be included when I granted him leave to amend his Second Amended Complaint. Artrip was therefore on notice of the applicable pleading standard, had multiple opportunities to meet it, and has failed to do so. *See Allen v. FCA US LLC*, No. 6:17-CV-00007, 2017 WL 1957068, at *4 (W.D. Va. May 10, 2017) (denying leave to amend and dismissing complaint with prejudice where plaintiff had "multiple opportunities" to allege fraud with specificity and was "on clear notice that she was required to do so"). In light of the above, I will grant Ball's Motion to Dismiss and dismiss Artrip's claims against Ball with prejudice.

A separate order will be entered forthwith.

DATED: November 3, 2017

/s/ James P. Jones
United States District Judge