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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

INDECT USA CORP.,

Plaintiff,

v.

PARK ASSIST, LLC,

Defendant.

Case No.: 18-CV-2409-BEN-MDD

**PARK ASSIST'S MEMORANDUM
IN SUPPORT OF MOTION TO
DISMISS**

Date: December 17, 2018

Time: 10:30 a.m.

Courtroom 5A

The Hon. Roger T. Benitez

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Defendant Park Assist, LLC (“Park Assist”) hereby moves the Court, pursuant to Civil L.R. 7.1 for an order granting Defendant’s Motion to Dismiss (1) Counts I and II (declaratory judgment of non-infringement) of Plaintiff’s Amended Declaratory Judgment Complaint (“DJ Complaint”) under Fed. R. Civ. P. 12(b)(1) and (h)(3) for lack of subject matter jurisdiction, and (2) Count III (unfair competition) of Plaintiff’s DJ Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim due to a lack of any allegations sufficient to plausibly plead the required objective and subjective bad faith.

I. PRELIMINARY STATEMENT

Indect USA Corp.’s (“Indect”) DJ Complaint is the latter of two cases relating to the operation of an infringing parking guidance system at the San Diego County Regional Airport Terminal 2 Parking Plaza (“Airport Parking System”). In the earlier case (the “Airport Case”; No. 18-cv-2068), Park Assist filed a complaint in this Court against the San Diego County Regional Airport Authority and Ace Parking Management, Inc. (collectively “the Airport”) for infringement of U.S. Patent No. 9,594,956 (“’956 Patent”). In the Airport Case, Park Assist alleged that the Airport infringes the ’956 Patent by using the Airport Parking System to practice the claimed method of the ’956 Patent.

The Indect DJ Complaint has three Counts. Counts I and II assert that neither Indect, nor any of its customers, infringe the ’956 Patent. There is no case or controversy between Indect and Park Assist that can support declaratory judgment jurisdiction for either of these Counts. Park Assist’s suit against the Airport does not create a controversy under established Federal Circuit law, because there is no dispute between Indect and Park Assist about Indect’s liability for the Airport’s infringement. And since Park Assist has never accused Indect or any of its other customers of infringement, there is no basis for declaratory judgment in that regard, either. Lacking any basis for jurisdiction, Counts I and II should be dismissed.

Count III of the DJ Complaint accuses Park Assist of violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). This count fails to state a claim on which relief can

1 be granted, because the Lanham Act provides no cause of action for enforcement of
 2 patent rights unless the assertions were made in both objective and subjective bad faith.
 3 Indect's DJ Complaint lacks any allegations sufficient to plausibly assert bad faith, and
 4 thus the Lanham Act claim should also be dismissed.

5 **II. FACTUAL BACKGROUND**

6 **A. Park Assist And Its Patented Parking Guidance Technology**

7 Park Assist is a leading developer and provider of innovative camera-based
 8 intelligent parking systems and software, and pioneered the industry's first camera-based
 9 system for parking guidance in 2010. *See* Declaration of Tod M. Melgar ("Melgar
 10 Dec."), Ex. 1 (Park Assist Amended Complaint ("Airport Complaint")), at ¶¶ 10-11 and
 11 Ex. A. Park Assist filed a patent application disclosing its innovative technology the
 12 same year, and that patent application matured into U.S. Patent No. 9,594,956 granted
 13 March 14, 2017. *Id.*, Ex. A. The '956 Patent contains two claims both of which are
 14 directed to *methods* of managing parking spaces. *Id.* at col. 22, lines 31-32. The methods
 15 include the use of cameras to monitor a parking space, detecting occupancy of the space
 16 and illuminating an indicator collocated with the camera to indicate occupied status. *Id.* at
 17 col. 22, lines 33-42. Because camera-based systems are based on machine vision, they
 18 are not completely accurate and so the claims include steps for correcting erroneous
 19 indications of occupancy, which helps the system learn and reduce errors.

20 **B. The Airport's Infringement**

21 The Airport Case arose out of the Airport's construction and operation of an
 22 infringing parking guidance system at the San Diego International Airport Terminal 2
 23 Parking Plaza ("Parking Plaza"). *See* Melgar Dec., Ex. 1 (Airport Complaint), at ¶ 22.

24 On August 1, 2016 the Airport issued a request for proposals ("RFP") for the
 25 Parking Plaza, which included specifications and requirements for a Parking Guidance
 26 System ("PGSR"). *Id.* at ¶ 22 and Ex. C. In response to the RFP, at least Park Assist and
 27 Indect submitted bids for the parking guidance system through the Airport's general
 28 contractor, Swinerton Builders, Inc. Melgar Dec., Ex. 1 (Airport Complaint), at ¶¶ 23-25.

Park Assist's bid proposed to meet the Airport specification using Park Assist's innovative camera-based technology, and advised the Airport that the technology offered was addressed by a pending patent application. *Id.* at ¶ 26. On March 14, 2017, the application issued as the '956 Patent. *Id.*, Ex. A. The Airport decided to use an Indect parking guidance system, despite the Park Assist patent. *Id.* at ¶ 32.

The Airport parking guidance system was constructed and built using Indect components to meet the Airport specifications. DJ Complaint, at ¶ 40. The Parking Plaza opened, and its parking guidance system began operation, at least as early as June 2018. Melgar Dec., Ex. 1 (Airport Complaint), Ex. D. The Airport's agent Ace Parking Management, Inc. ("Ace") manages and operates the Parking Plaza. *Id.*, Ex. E.

III. THE COURT LACKS SUBJECT MATTER JURISDICTION FOR INDECT'S NON-INFRINGEMENT COUNTS I AND II BECAUSE THERE IS NO ACTUAL CONTROVERSY

The Court should dismiss Indect's declaratory judgment claims under Fed. R. Civ. P. 12(b)(1) and 12(h)(3) because there is no actual controversy between Park Assist and Indect.

To maintain its declaratory judgment claims, Indect has the burden of showing a "case of actual controversy." 28 U.S.C. § 2201(a); *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 126 (2007); *Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1343 (Fed. Cir. 2007). The Supreme Court has framed the question of "actual controversy" as "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127.¹

¹ In resolving a motion to dismiss for lack of subject matter jurisdiction, the court may consider affidavits or other evidence outside the pleadings, and review of such extrinsic evidence does not convert the motion to dismiss into a motion for summary judgment. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S.

1 **A. Park Assist Has Not Accused Indect Of Infringement**

2 To muster some basis for its DJ Complaint, Indect appears to have spun allegations
3 of infringement from whole cloth. At least six times in the DJ Complaint, Indect baldly
4 asserts that Park Assist accused it and its products of infringement:

- 5 • “Park Assist has claim[ed] that Indect infringes the ’956 Patent” (DJ
6 Complaint, at ¶ 6);
- 7 • “Park Assist communicat[ed] and advertis[ed] to ... customers about
8 Indect’s parking system purportedly infringing the ’956 Patent” (*id.* at ¶
9 51);
- 10 • “Park Assist has no good faith that [Indect’s parking guidance systems] do
11 infringe” (*id.* at ¶ 54);
- 12 • “even before the ’956 Patent was issued, Park Assist began ... claiming
13 that Indect’s products would infringe the ’956 Patent and communicating
14 such ... claims ... through, *inter alia*, press releases, online news and other
15 media outlets” (*id.* at ¶ 56);
- 16 • “Park Assist[] claims that Indect’s products would infringe the ‘956
17 Patent” (*id.* at ¶ 59); and
- 18 • “Park Assist ... ma[de] ... claims of patent infringement against Indect’s
19 products” (*id.* at ¶ 196).

20 These allegations cannot be substantiated; and, repeating them six times does not
21 make them true. It is no surprise that Indect’s allegations provide no detail. For
22 example, in the only apparent pleading of substance, Indect alleges “even before the ’956
23 Patent was issued, Park Assist began ... claiming that Indect’s products would infringe
24 the ‘956 Patent and communicating such ...claims ... through, *inter alia*, **press releases,**
25 **online news and other media outlets.**” *Id.* at ¶ 56 (emphasis added). Even here however,
26 Indect could not muster a single factual detail identifying who made the alleged

27 1052, 103 L. Ed. 2d 581, 109 S. Ct. 1312 (1989); *Laughlin v. United States*, No. 99-CV-
28 810 H (POR), 1999 U.S. Dist. LEXIS 16582, at *5 (S.D. Cal. Oct. 1, 1999); *see also*
Creative Compounds, LLC v. Starmark Labs., 651 F.3d 1303, 1315 (Fed. Cir. 2011).

statements, when they were made or where they were published, nor did it attach or even reference a single supporting document. *Id.*^{2,3} Such bald, conclusory allegations are insufficient to establish jurisdiction. *See, e.g., St. Paul Mercury Indem. v. Red Cab Co.*, 303 U.S. 283, 287 n.10 (1938), *superseded by statute on other grounds* (“it is plaintiff’s burden ... to allege with sufficient particularity the facts creating jurisdiction...”); *West Interactive Corp. v. First Data Resources, Inc.*, 972 F.2d 1295, 1297 (Fed. Cir. 1992) (dismissal of insufficient pleading: “the record does not contain enough evidence” of alleged threat); *SanDisk Corp. v. Audio MPEG, Inc.*, 2007 U.S. Dist. LEXIS 3079, at *11-17 (N.D. Cal. Jan. 3, 2007) (“descriptions of accusations of infringement made by representatives of [declaratory judgment] defendants at the Consumer Electronics Show, does not support” plaintiff’s claim.... “As an initial matter, the factual support does not make clear who from [defendants] purportedly made the accusations.”).

B. Park Assist Has Not Accused Others Of Infringement

Like its assertion that Park Assist accused Indect of infringement, Indect’s baseless allegations of Park Assist’s threats against its other customers do not support a substantial controversy to warrant declaratory judgment jurisdiction. Here, Indect makes a similar pattern of unsupported allegations, lacking any details or specifics about when, where, or who made the alleged assertions against customers or potential customers. For example, Indect baldly alleges:

- “Park Assist began telling Indect’s customers and potential customers about the [Airport Case] and threatening similar litigation against them if they did business with Indect” (DJ Complaint, at ¶ 4);

² The only communication Park Assist had with Indect regarding the ’956 Patent is a letter Park Assist sent on May 17, 2017. The Notice Letter merely gave Indect notice that the ’956 Patent issued. Melgar Dec., Ex. 2.

³ Park Assist issued a press release on October 3, 2018 regarding its patent infringement suit against the Airport and Ace. The press release, however, did not accuse Indect products of infringing and was issued long after the patent issued – not before. Melgar Dec., Ex. 3.

- 1 • “Park Assist[] threat[ened] to sue anyone using Indect’s products or any
2 products other than Park Assist’s for patent infringement” (*id.* at ¶ 59);
- 3 • “Park Assist has ... threatened similar litigation on others” (*id.* at ¶ 193);
- 4 • “Park Assist ... terroriz[ed] Indect’s existing and prospective customers
5 with ... threats of similar litigation” (*id.* at ¶ 196); and
- 6 • “Park Assist ... advised... Waltry and Walker against doing business with
7 Indect or else Park Assist would bring similar litigations against them” (*id.*
8 at ¶ 202).

9 It is not surprising that Indect again fails to plead with any specificity or attach any
10 supporting documents. It is Indect’s burden to establish subject matter jurisdiction, and
11 based on these thin allegations, Park Assist is left without notice from what cloth Indect
12 is fabricating these allegations. For example, Park Assist can hardly guess what
13 foundation Indect had for its allegation that Park Assist is “terrorizing” Indect’s
14 customers, nor is it Park Assist’s burden to do so. Communications from Park Assist to
15 any of these entities merely notified them of the patent – no threats of a patent
16 infringement suit were made. Indeed, the only instance of assertion of its patent was
17 against Airport and Ace when Park Assist actually filed suit for infringement.

18 Even if Park Assist had accused other customers of infringement (it has not), that
19 would still be insufficient to establish declaratory judgment jurisdiction for Indect. Such
20 jurisdiction only exists if there is a controversy between Indect and Park Assist as to
21 Indect’s liability for induced or contributory infringement. *Microsoft Corp. v. DataTern,*
22 *Inc.*, 755 F.3d 899, 903 (Fed. Cir. 2011). There is no such controversy, nor has Indect
23 alleged otherwise.

24 **C. The Airport Case Does Not Create Subject Matter Jurisdiction**

25 Park Assist’s suit against the Airport for infringement of the ’956 Patent also
26 cannot establish an actual controversy between Indect and Park Assist. In the absence of
27 any act directed toward the declaratory judgment plaintiff, the fact that a patent owner
28 has filed infringement suits against other parties does not meet the minimum standard for

1 declaratory judgment of a “case of actual controversy” set forth in *MedImmune*. *See, e.g.*,
2 *Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377, 1382 (Fed. Cir.
3 2010).

4 Even where the patent owner has filed an infringement action against a declaratory
5 judgment plaintiff’s customer for use of a declaratory judgment plaintiff’s product, there
6 is no subject matter jurisdiction in the absence of supplier liability for induced or
7 contributory infringement or an obligation to indemnify. *Microsoft Corp. v. DataTern,*
8 *Inc.*, 755 F.3d 899, 903-04 (Fed. Cir. 2014); *Dow Chem. Co. v. Viskase Corp.*, 892 F.
9 Supp. 991, 995 (N.D. Ill. 1995) (“a manufacturer generally can establish jurisdiction
10 based on a threat of suit against its customer only when the manufacturer is itself
11 involved in infringing the patent and the customer is ‘merely a conduit for the
12 manufacturer’”) (citations omitted). It is Indect’s burden to establish subject matter
13 jurisdiction, and it has neither pled any real dispute regarding contributory or induced
14 infringement nor that Indect is obligated to indemnify the Airport or Ace.

15 *First*, Indect has not pled or pointed to any evidence of a substantial controversy
16 between it and Park Assist for induced or contributory infringement.

17 As the Federal Circuit has made clear:

18 Certainly it is not the case that definitive proof must exist that would establish
19 each element. But, to establish a substantial controversy regarding
20 inducement, there must be allegations by the patentee or other record evidence
21 that establish at least a reasonable potential that such a claim could be brought.

22 *Microsoft*, 755 F.3d at 905.

23 Indeed, Indect has not made any allegation that there was a reasonable potential
24 that such a suit could be brought. What is more, the situation here is analogous to other
25 cases finding there was no substantial controversy supporting declaratory judgment
26 plaintiff’s request for declaratory relief.

27 For example, the Federal Circuit has previously held that where infringement
28 charts cite exclusively to third party documents for key claim limitations there can be no

controversy of induced infringement to support a declaratory judgment action. *Id.* (where claim charts cite exclusively to third party documents for key limitations they cannot impliedly assert induced infringement to create a substantial controversy.) Here, as in *Microsoft*, Park Assist’s claim charts regarding the Airport’s and Ace’s infringement rely exclusively on the Airport’s specification for key elements. *See, e.g., Melgar Dec., Ex. 1* (Airport Complaint), at ¶ 45(i)-(k); *Microchip Tech. Inc. v. Chamberlain Grp., Inc.*, 441 F.3d 936, 943-44 (Fed. Cir. 2006) (finding no declaratory judgment jurisdiction because “there is no indication that [the declaratory judgment plaintiff] is inducing or contributing to infringement by its customers”). Indect has not pled that it induces or contributes to the Airport’s or Ace’s practice of these limitations or that Park Assist could have accused Indect of inducement or contributory infringement.

Second, while Indect may have had standing to bring a declaratory judgment suit if it had an obligation to indemnify the Airport or Ace, Indect has not alleged any such obligation. *See Arris Group, Inc. v. British Telecomms. PLC*, 639 F.3d 1368, 1375 (Fed. Cir. 2011); *see also, generally* DJ Complaint. Instead, Indect has plead only what the Federal Circuit has previously held is not sufficient –namely, that “Indect’s existing customers have **demand ed indemnification ...**” (DJ Complaint ¶ 204 (emphasis added)); *cf. Microsoft*, 755 F.3d at 904 (customer **indemnification requests** without more cannot create standing or jurisdiction over DJ plaintiff’s declaratory judgment action) (emphasis added).

IV. INDECT’S UNFAIR COMPETITION COUNT III FAILS TO STATE A CLAIM BECAUSE IT HAS NOT PLED SUFFICIENTLY TO GIVE FAIR NOTICE AND ESTABLISH PLAUSIBILITY UNDER *TWOMBLY*

“Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal.” *Virtue v. Creamery Package Mfg. Co.*, 227 U.S. 8, 37-38 (1913). Accordingly, “Federal patent law bars the imposition of liability for publicizing a patent in the marketplace unless the plaintiff can show that the patent holder acted in bad faith.” *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1336

(Fed. Cir. 1998), *cert. denied*, 143 L. Ed. 2d 45, 119 S. Ct. 1037 (1999), *overruled on other grounds by* *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999). Proving bad faith requires proof of both objective and subjective components. *Mikohn Gaming Corp. v. Acres Gaming, Inc.*, 165 F.3d 891, 897 (Fed. Cir. 1998); *Pactiv Corp. v. Perk-Up, Inc.*, No. 08-05072 (DMC), 2009 U.S. Dist. LEXIS 72796, at *22-23 (D.N.J. Aug. 18, 2009).

To meet the standard of objectively baseless, there must be clear and convincing evidence that “no reasonable litigant could realistically expect success” in the patent infringement allegation. *GP Indus., Inc. v. Eran Indus., Inc.*, 500 F.3d 1369, 1374 (Fed. Cir. 2007) (*citing Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 113 S. Ct. 1920 (1993)). This test has been interpreted by the Federal Circuit to require either actual knowledge that the patent was invalid or unenforceable, or that no reasonable basis exists to believe it could be enforced. *Golan v. Pingel Enters., Inc.*, 310 F.3d 1360, 1371 (Fed. Cir. 2002). “The law recognizes a presumption that the assertion of a duly granted patent is made in good faith ... [and] this presumption is overcome only by affirmative evidence of bad faith.” *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1369 (Fed. Cir. 1998).

Requirements for pleading bad faith reflect these high burdens and Supreme Court’s directives about necessary specificity. As the Supreme Court has made clear, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions...” and pleadings must “give the defendant fair notice of ... the grounds upon which [the claim] rests.” *Twombly*, 550 U.S. at 555 (citations omitted). *Twombly* requires allegations, including necessary allegations of subjective and objective components of bad faith, to include “enough facts to state a claim to relief that is plausible on its face,” such that the claim crosses “the line from conceivable to plausible.” *Id.* at 570. Indect’s DJ Complaint falls far short of these standards.

In its failed effort to plead the required “bad faith,” Indect relies on unsupported, dubious, and conclusory allegations that Park Assist: (1) accused Indect and its products

1 of infringement and threatened Indect with suit (DJ Complaint, at ¶¶ 219, 220); (2)
 2 threatened Indect's customers with infringement (*id.* at ¶ 219); (3) has advertised that
 3 Indect products infringe (*id.* at ¶ 220); and (4) should have known about a letter Indect
 4 handed to its customers [but not to Park Assist] (*id.* at ¶ 53).

5 Indect does not provide a hint of support for any of these allegations. Thus, the
 6 Court and Park Assist are left in the dark about the actual grounds for these claims, in
 7 plain violation of the pleading requirements of *Twombly*, which necessitates a complaint
 8 to have "enough facts to state a claim to relief that is plausible on its face," so as to "give
 9 the defendant fair notice of ... the grounds upon which [the allegation] rests."
 10 *Twombly*, 555 U.S. at 555, 570 (emphases added).

11 **A. The Alleged Threats Against Indect And Its Products Are**
 12 **Not Pled Sufficiently To Give Fair Notice**

13 For the alleged threat of infringement against Indect, there are many unknowns in
 14 Indect's allegations. These include whether there was actually any accusation of
 15 infringement against Indect or its products, or a threat to sue for patent infringement or
 16 some other more innocuous statement; the identities of the Indect personnel who received
 17 this alleged threat; the identities of the Park Assist personnel who issued the threat;
 18 whether the Park Assist personnel were authorized to issue the statement; what the
 19 alleged "threat" actually said; and whether it was oral or in writing. Indeed, from the DJ
 20 Complaint, it is impossible to determine anything about the basis for the alleged threat.
 21 *See supra* § III(A) (e.g., "Park Assist claims that Indect's products would infringe the
 22 '956 Patent" (DJ Complaint, at ¶ 59)).

23 Indect's approach – vaguely referencing alleged communications and labeling
 24 them "claims" and "threats" rather than disclosing any substance – is fatal to Indect's
 25 pleading. Only from the substance and circumstances of the alleged communications
 26 could this Court or Park Assist possibly know whether they meet the high standards
 27 required to show a plausible case of bad faith. If these communications are only giving
 28 notice of the patent, for example, they cannot possibly meet this standard. *See, e.g.,*

1 *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1354-55 (Fed. Cir. 1999) (bad faith
2 must be determined on a “case by case” basis, and confirming relevance of “patentee’s
3 particular statements”), *citing Gaming*, 165 F.3d at 897.

4 Park Assist has not accused Indect or its products of infringing and cannot possibly
5 respond to Indect’s bald, unspecific, and conclusory allegations, and thus this pleading is
6 insufficient as a matter of law.⁴ *Twombly*, 550 U.S. at 555 (“[A] plaintiff’s obligation to
7 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
8 conclusions....”; pleadings must “give the defendant fair notice of . . . the grounds upon
9 which [the allegation] rests.”) (citations omitted); *cf. St. Paul Mercury Indem. V. Red Cab*
10 *Co.*, 303 U.S. 283, 287 (1938) (“plaintiff’s burden . . . to allege with sufficient
11 particularity the facts creating jurisdiction...”); *West Interactive*, 972 F.2d at 1297
12 (dismissal of insufficient pleading: “the record does not contain enough evidence” of
13 alleged threat); *SanDisk Corp. v. Audio MPEG, Inc.*, 2007 U.S. Dist. LEXIS 3079, at
14 *11-17 (N.D. Cal. Jan. 3, 2007) (“descriptions of accusations of infringement made by
15 representatives of [declaratory judgment] defendants at the Consumer Electronics Show”
16 insufficient without details: “As an initial matter, the factual support does not make clear
17 who from [defendants] purportedly made the accusations.”)

18 **B. The Alleged Threats Against Customers Are Not Pled**
19 **Sufficiently To Give Fair Notice**

20 Indect’s allegations that improper “threats” were made against customers also
21 suffer from a vast array of deficiencies. While the allegations of threats against Indect’s
22 customers lack any specifics, just like the alleged threats against Indect itself, one
23 specific pleading deficiency is common to all the “customer threat” allegations – ***nothing***
24 ***is pled about the parking systems of these alleged customers.*** That is, even if Park
25 Assist did expressly threaten infringement to any of these customers (it did not), this
26

27
28 ⁴ Park Assist did notify Indect of the issuance of the ’956 Patent, but did not accuse
Indect of any infringement. *See supra* note 2.

1 could only be a basis for a bad faith claim if Park Assist had no reasonable basis to
 2 believe there was infringement. But the Indect allegations are completely barren on this
 3 critical issue.

4 For example, Indect identifies customer SKIDATA, but the entirety of the
 5 allegation is that Park Assist “browbeat” SKIDATA into using the Park Assist products.
 6 DJ Complaint, at ¶¶ 57-58. Apart from this nebulous “browbeat” label and that nothing
 7 is provided about the substance of the communication itself, there is absolutely nothing
 8 pled about the system SKIDATA was implementing, or whether Park Assist had any
 9 reason to believe it was not infringing. Without any facts pled that could plausibly lead
 10 to a conclusion that (i) there was no infringement by SKIDATA, and (ii) Park Assist
 11 knew there no infringement, there is no basis for the bad faith allegation. Similarly,
 12 Indect claims that Park Assist contacted two consulting firms, Watry Design, Inc. and
 13 Walker Consultants, Inc. *Id.* at ¶¶ 201-03. One of these firms was involved with the
 14 construction of the infringing Airport Parking System, which Indect expressly concedes.
 15 *Id.* at ¶ 201. Indect then alleges that some unidentified Park Assist person said it would
 16 bring “similar litigation” against them or their clients. *Id.* at ¶ 202 (emphasis added).
 17 These allegations are false, but even if Park Assist had made such statements, they would
 18 provide no basis for a bad faith claim because parking systems operated like the Airport’s
 19 Parking System would literally infringe the patent. *See infra* § VI(D).

20 Other pleading deficiencies abound. The DJ Complaint does not identify any other
 21 customers allegedly accused of infringement; it does not identify a single person from
 22 Park Assist who allegedly made any of these accusations; it does not provide any basis
 23 from which it could be concluded that the mystery Park Assist person had authority for
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 25
 26
 27
 28

1 such allegations; and nowhere is any person identified who allegedly received any such
2 statements.⁵ *See Twombly*, 127 S.Ct. at 1974.

3 **C. The Alleged Media Threats Are Not Pled Sufficiently To**
4 **Give Fair Notice**

5 Indect claims that Park Assist has made improper representations in the media
6 about alleged infringement. DJ Complaint, at ¶ 220. Indect does not identify or attach
7 even a single document evidencing these alleged threats. This lack of specifics dooms the
8 Indect pleading, as the alleged grounds are not provided to put Park Assist on notice. And
9 like its allegations that customers were improperly threatened, Indect pleads nothing
10 about what parking facility operator was alleged to infringe in these media statements,
11 whether those operators actually infringe, or what basis there could be to believe Park
12 Assist knew there was no infringement. If there were any statements that amounted to
13 “threats” sufficient to support Indect’s claims, Indect would have no reason to conceal
14 them so thoroughly.

15 **D. The Infringement Case Against The Airport Is Fully**
16 **Supported By The Airport’s and Indect’s Own Document**

17 Indect’s only other alleged basis for its “bad faith” claim is that the patent
18 infringement case Park Assist brought against the Airport was allegedly “objectively
19 baseless.” *Id.* at ¶ 221. But Indect’s DJ Complaint falls far short of the pleading
20 standards for bad faith here, too.

21 The facts supporting the infringement allegations against the Airport are clear, and
22 have been out in the open for months. On August 1, 2016, the Airport issued an RFP for
23 the new Airport terminal, which specifically included a Parking Guidance System
24 requirements document issued by the Airport itself. DJ Complaint, Ex. C. Those

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26 ⁵ Park Assist did provide notice of the patent to a few third parties, but such notices do
27 not remotely approach “threats” or “accusations” of infringement and would never
28 support the Indect claims. Melgar Dec., Ex. 4.

requirements combined with Indect's own documents describing the hardware implemented by the Airport to meet those requirements, unambiguously demonstrate that the Airport is literally infringing claim 1 of the '956 patent in its operation of the facility. Melgar Dec., Ex. 1 (Airport Complaint) at Exs. G (UPSOLUT Datasheet) and J (IVIS Datasheet). The PGSR was attached to Park Assist's original Complaint.⁶

On October 26, 2018, in response to correspondence from counsel for the Airport and seven days before Indect filed its amended declaratory judgment complaint, Park Assist filed an amended infringement complaint, providing even more detail of the Airport's infringement and specifically identifying how each and every element of claim 1 is literally met by the Airport and Ace in operating the Airport Parking System. Fifteen pages of detailed analyses were provided – showing quotes about the Airport Parking system from the Airport's PGSR and Indect's own documents and matching them up precisely with every element of the patent claim. *The Court is encouraged to review pages 9-24 of the attached Airport Complaint to see the very strong bases for Park Assist's claim of literal infringement.* See Melgar Dec., Ex. 1 (Airport Complaint), at ¶¶ 45(a)-(k).

Indect's DJ Complaint completely fails to provide a plausible story about why the Park Assist infringement allegations against the Airport are supposedly baseless. First, it provides a laundry list of the positions Indect presumably intends to argue if this case is not dismissed. DJ Complaint, at ¶¶ 61-116. There is nothing in the DJ Complaint, however, that explains why or how the Airport Parking System deviates from the actual documentary evidence outlining and describing the Airport Parking System and site photos that were attached to the Park Assist's Airport Complaint, and if there were some deviation, how Park Assist would have known.

⁶ See original Complaint, *Park Assist, LLC v. San Diego County Regional Airport Authority*, 18-cv-2068-LAB-MDD (Sept. 5, 2018).

After its laundry list of potential arguments, the DJ Complaint periodically addresses its own interpretation of the Airport's PGSR (which was only one of the several documents relied on by Park Assist – Indect ignores the others). *Id.* at ¶¶ 117-191. Sporadically throughout these paragraphs, the DJ Complaint recites the same refrain – the Airport's PGSR does not “require” certain claim features. But whether classified as “requirements” or not, the PGSR explains the operation of the parking system in great detail, and indeed this document is precisely what the Airport itself provided to the world to explain the requirements and operation of the system. Indect's DJ Complaint concedes this fact, repeatedly confirming the PGSR cited in support of Park Assist's Airport Complaint shows the “specifications for the Airport Parking System.” *See, e.g., id.* at ¶¶ 117, 119, 125.

E. Indect's Letter To Its Customers (And Only To Its Customers) Was Never Given To Park Assist And Cannot Support Bad Faith

Indect cites to a May 19, 2017 document that Indect refers to as an “industry statement.” DJ Complaint, at ¶ 42, Ex. B.

This document is not an “industry statement,” it is a letter that Indect admits it only sent to its “customers and potential customers” (not to Park Assist). *Id.* at ¶ 51. The letter alleges, in conclusory fashion, that Indect does not review and correct erroneous indications of occupied status, which the letter reports to be requirements of the claim. *Id.*, Ex. B. Apparently, the Indect argument is that a patent owner's infringement allegations may be in bad faith and objectively baseless simply because an adverse party expresses a view that there is no infringement. If this could be enough to establish the required bad faith, it would make of mockery of the bad faith requirement. One would be hard pressed indeed to find any case that could not be alleged to be in bad faith under Indect's fanciful theory.

Even if such a letter could plausibly establish bad faith, this particular letter would fail in that regard for many reasons. *First*, Indect can only say that this document was disseminated to its “existing and prospective customers” (*id.* at ¶ 51) – the letter was not

addressed to Park Assist, it was never sent to Park Assist, and there is nothing in the DJ Complaint from which it could plausibly be believed that it was known to Park Assist (Park Assist has never seen this document before this case). *Second*, the letter is entirely about the Indect system, which Park Assist has never accused of infringement – the letter says absolutely nothing about the Airport’s and Ace’s infringing operation of the Airport Parking System. *Third*, the letter relies heavily on smoke and mirrors, stating only that Indect itself does not perform these steps – Park Assist has never alleged otherwise because the Airport and its agents perform these steps. *Fourth*, even if the letter had been sent to Park Assist, and even if the letter addressed the Airport Parking System, it is not even remotely enough to draw a plausible conclusion of bad faith, especially in light of the documents attached to the Park Assist Airport complaints showing a one-to-one match of the Airport Parking System to the claims. *Fifth*, like this DJ Complaint, the letter is entirely conclusory and does not provide any evidence of its allegations (compare the substantial documentary evidence attached to the Park Assist Airport Complaint). *Sixth*, the letter is intentionally evasive of critical facts in that it does not even address Indect’s and the Airport’s own documents (cited in the Park Assist Airport Complaint) showing that the Airport Parking System was specifically designed to allow users like the Airport to perform precisely these steps of reviewing and correcting erroneous indications of occupied status. *See, e.g.*, Melgar Dec., Ex. 1 (Airport Complaint), Ex. H (Indect website) (“you are always in control of your parking administration system. Quickly change ... colors [indicating occupancy] ... from your desktop”); *id.*, Ex. J (Indect IVIS Data Sheet) (“GUI shows level floor plans, allowing you to control virtually any aspect dealing with signage ...” and “manually override configuration”).

F. Courts Have Held Similarly Pled Unsupported Allegations Cannot Support A Claim For Unfair Competition

It is hardly surprising that this is not the first instance of an unsubstantiated unfair competition claim. Other courts have had no difficulty dismissing conclusory bad faith allegations like those of Indect. As one district court has noted on similar pleadings:

1 The unfair competition counterclaim does not adequately allege bad faith. It
 2 broadly asserts that when it brought its infringement suit and announced it to
 3 the market, Applied Biosystems knew its patents were invalid or that
 4 Michigan Diagnostics' products did not infringe the patents. Such a
 5 conclusory allegation of guilty knowledge is not sufficient as a matter of
 6 pleading. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964–
 65 (2007) (“[A] plaintiff’s obligation to provide the ‘grounds’ of his
 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a
 formulaic recitation of the elements of a cause of action will not do.”).

7 * * *

8 Pleading knowledge of non-infringement or invalidity in broad conclusory
 9 terms without specifics would enable an accused infringer to add a Lanham
 10 Act claim to almost every case. To forestall that eventuality, Zenith requires
 11 an allegation of bad faith. *Id.* at 1353. *Twombly* requires this allegation to
 12 include “enough facts to state a claim to relief that is plausible on its face,”
 such that the claim crosses “the line from conceivable to plausible.” *See*
Twombly, 127 S.Ct. at 1974.

13 *Applera Corp. v. Mich. Diagnostics, LLC*, 594 F. Supp. 2d 150, 161-62 (D. Mass. 2009).

14 In another case that was similarly deficient, the District Court for the District of
 15 New Jersey dismissed an inadequately pled unfair competition claim:

16 Although knowledge of non-infringement alone is sufficient to demonstrate
 17 bad faith, that allegation must nevertheless be supported by enough
 18 information “to give the defendant fair notice of . . . the grounds upon which
 [the allegation] rests.” *Twombly*, 550 U.S. at 555. Defendants allege Plaintiffs
 19 knew the '420 Patent was not being infringed, but Defendants fail to provide
 20 any facts that would suggest Plaintiffs actually gained the alleged knowledge
 21 or that discovery would reveal evidence of knowledge. Defendants have not
 22 sufficiently alleged that Plaintiffs publicized their patent in the marketplace in
 bad faith to survive a motion to dismiss.

23 *Pactiv Corp.*, 2009 U.S. Dist. LEXIS 72796, at *24 (D.N.J. Aug. 18, 2009).

24 Indect’s vague pleadings fall far short of the heightened pleading requirements for
 25 a claim for unfair competition, and cannot withstand a motion to dismiss because they do
 26 not provide any reasonable or plausible basis for bad faith. Accordingly, this claim
 27 should be dismissed.

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2
3
4 **V. CONCLUSION**

5 For the foregoing reasons the Court should dismiss the DJ Complaint in its
6 entirety, or in the alternative join or consolidate Count I with the previously pending
7 Airport Case.

8
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Respectfully submitted,

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