

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PRAGMATUS AV, LLC,

Plaintiff,

v.

FACEBOOK, INC., YOUTUBE, LLC,
LINKEDIN CORPORATION, and
PHOTOBUCKET.COM, INC.,

Defendants.

Civil Action No. 1:10-cv-1288 (LMB/JFA)

**REPLY IN SUPPORT OF DEFENDANT FACEBOOK, INC.'S RULE 12(b)(6) MOTION
TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT**

I. INTRODUCTION

Plaintiff's Complaint fails to satisfy the pleading standards under Federal Rule of Civil Procedure 8(a), as clarified in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Plaintiff asserts that its direct infringement allegations comply with Form 18, and therefore satisfy the pleading standards of *Twombly* and *Iqbal*, but this argument is unavailing because: (1) federal courts have repeatedly held that Form 18 does not govern the sufficiency of a patent infringement complaint under *Twombly* and *Iqbal*; and (2) Plaintiff's Complaint provides less detail than what is set forth in the exemplary Form 18. Plaintiff has also failed to justify the deficiencies in its indirect infringement allegations. For the reasons expressed below and in Facebook's opening brief, Facebook's motion should be granted.

II. PRAGMATUS’S DIRECT INFRINGEMENT CLAIMS ARE DEFICIENT BECAUSE THEY FAIL TO IDENTIFY ANY ACCUSED SYSTEMS OR SERVICES

Pragmatus’s failure to identify any specific accused infringing systems or services renders the Complaint deficient under *Twombly* and *Iqbal*. Pragmatus attempts to excuse its failure to identify specific accused products by arguing that its Complaint complies with Form 18. Opp’n at 2-3. Pragmatus relies heavily on *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007), which Pragmatus claims “held that complaints that comply with Form 18 meet the notice pleading standard under Federal Rule 8(a) and *Twombly*.” *Id.* at 3. However, the Federal Circuit in *McZeal* did not hold that Form 18 complied with *Twombly*. *McZeal*, 501 F.3d at 1357 (holding that “a plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent”); *see also Bender v. Motorola, Inc.*, No. C 09-1245-SBA, 2010 WL 726739, at *3 (N.D. Cal. Feb. 26, 2010) (concluding that *McZeal* did not “reaffirm the validity of” Form 18 under the *Twombly* pleading standards). But even if it had, Pragmatus’s Complaint fails to provide the level of specificity required by Form 18. In fact, courts applying the *McZeal* decision have held plaintiffs to the higher standard of identifying specific accused products or services. *See e.g., Bender*, 2010 WL 726739, at *3 (requiring plaintiff to identify “which device is at issue”); *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114 FJ, 2010 WL 889541, at *3 (N.D. Cal. Mar. 11, 2010) (“By pointing to broad categories of products ... Bender simply does not state a plausible claim for relief.”) (internal quotation omitted); *Interval Licensing LLC v. AOL, Inc.*, No. C10-1385 MJP, 2010 WL 5058620, at *3 (W.D. Wash. Dec. 10, 2010) (“Plaintiff’s complaint does not satisfy Rule 8 or Form 18 because Plaintiff has failed to identify the infringing products or devices with any specificity.”).

Pragmatus’s attempt to rely on *McZeal* to argue that its broad-brush mentioning of various “social networking” features—“video Upload, Record, and linking features”—somehow

provides the level of specificity required to comply with Form 18 must be rejected. *See* Opp’n at 5. The facts of *McZeal* do not support Pragmatus’s contention. First, the appeal in *McZeal* addressed the pleading sufficiency of a *pro se* complaint to which a more deferential pleading standard applies. *McZeal*, 501 F.3d at 1358 (“*McZeal* met the **low bar** for *pro se* litigants to avoid dismissal”) (emphasis added). Second, unlike Pragmatus, the plaintiff in *McZeal* specifically identified the accused infringing product—the “Motorola i930 ‘INTERNATIONAL WALKIE TALKIE.’” *Id.* at 1357. Because Pragmatus did not identify any specific accused product, its reliance on *McZeal* is unavailing.¹

Indeed, current case law confirms that Pragmatus’s identification of purportedly infringing features of the otherwise ambiguous reference to “social network services” is too generic to satisfy Form 18. The court in *Interval Licensing* addressed a similar situation where the plaintiff accused unidentified products and services that allegedly included features, such as the capabilities to “categorize, compare and display segments of a body of information as claimed in the patent.” 2010 WL 5058620, at *1. The court concluded that the plaintiff’s infringement allegations failed to satisfy both Rule 8 and Form 18 because they did not provide adequate notice to the defendants and were too “generic” to satisfy Form 18. *Id.* at *3. The court dismissed the complaint without prejudice, but made clear that an amended complaint must include the identification of defendants’ “products, devices, or schemes” that allegedly infringe the patents-in-suit and should “set forth the specific websites that are at issue and identify the hardware and software with adequate detail for [d]efendants to know what portions of their business operations are in play in this litigation.” *Id.* at *4. Likewise, other courts have recently

¹ Pragmatus’s reliance on Rule 84 is also misplaced. Opp’n at 2-3. Although Rule 84 provides that “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate,” it cannot save a pleading that is otherwise deficient under the pleading standards as clarified by the Supreme Court in *Twombly* and *Iqbal*.

dismissed similar patent infringement complaints that failed to identify the specific accused infringing products or services. *Bender*, 2010 WL 889541, at *6; *Motorola*, 2010 WL 726739, at *4; *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531 RS, 2009 WL 2972374, at *4 (N.D. Cal. Sept. 14, 2009). Accordingly, this Court should dismiss Pragmatus's insufficiently pled direct infringement allegations.

III. THE COURT SHOULD DISMISS PRAGMATUS'S INSUFFICIENTLY PLED CLAIMS OF INDIRECT INFRINGEMENT

Pragmatus also insufficiently claims that Facebook indirectly infringed the patents-in-suit: "Facebook has and continues to infringe indirectly one or more claims ... by inducing others to infringe *and/or* contributing to the infringement by others, including users of Facebook's social network services that include video Upload, Record and linking features." (Compl. ¶¶ 17, 21, 25 (emphasis added).) In its opening brief, Facebook argued that the Court should dismiss these insufficiently pleaded claims of induced and contributory infringement for three reasons: (1) Pragmatus failed to identify its specific theory of indirect infringement, accusing Facebook of alternative theories of induced and contributory infringement; (2) Pragmatus failed to state a claim for induced infringement because Pragmatus does not allege that Facebook had specific intent to cause acts that constitute direct infringement; and (3) Pragmatus failed to state a claim for contributory infringement because Pragmatus does not allege that Facebook offered to sell or sold any particular component or that such component was a material part of an infringing device. Significantly, in its Opposition, Pragmatus responds directly to only the second reason for dismissal, improperly arguing that it is not required to plead the element of specific intent. Opp'n at 5-7. However, that argument is contrary to controlling Federal Circuit law.

It is undisputed that specific intent is a required element of a claim for induced infringement. *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990); *see* Opp’n at 5-7. Here, Pragmatius did not allege that Facebook had specific intent to cause acts that constitute direct infringement of the patents-in-suit, much less that Facebook even had knowledge of the patents-in-suit. Because Pragmatius failed to plead facts sufficient to support all the elements of its induced infringement claim, the Court should dismiss that claim. *See Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765-66 (4th Cir. 2003) (dismissing claim for failure to plead all required elements).

Pragmatius’s argument that Federal Circuit precedent does not require plaintiffs to allege specific intent to plead a viable claim of induced infringement is meritless. Opp’n at 6. Indeed, the three cases upon which Pragmatius relies to support that argument are inapposite because the Federal Circuit did not address the issue of induced infringement pleading standards in any of those cases. *See Hewlett-Packard Co.*, 909 F.2d at 1469 (analyzing whether patentee had satisfied its burden of proving specific intent on summary judgment); *Met-Coil Sys. Corp. v. Korners Unlimited, Inc.*, 803 F.2d 684, 686-87 (Fed. Cir. 1986) (analyzing implied license issues, not pleading standards for induced or contributory infringement); *Phonometrics, Inc. v. Hospitality Franchise Sys. Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000) (analyzing pleading standards for direct infringement, not induced or contributory infringement). Indeed, multiple district courts have recently dismissed induced infringement claims where plaintiffs have failed to allege specific intent. *See, e.g., Koninklijke Philips Elecs. N.V. v. The ADS Group*, 694 F. Supp. 2d 246, 253 (S.D.N.Y. 2010) (dismissing induced infringement claim where plaintiff failed to allege specific intent); *Halton Co. v. Streivor, Inc.*, No. C 10-00655-WHA, 2010 WL 2077203, at *2-3 (N.D. Cal. May 21, 2010) (same); *Motorola*, 2010 WL 726739, at *4 (same).

Finally, Pragmatus makes no attempt to defend its failure to allege that (a) Facebook offered to sell or sold any particular component, or (b) such component was a material part of an infringing device. But the law is clear that to state a viable claim for contributory infringement, a plaintiff must allege that the accused infringer offered to sell or sold a “component of a patented machine ... constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent.” 35 U.S.C. § 271(c); *see also Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 488 (1964). Courts have dismissed similarly deficient contributory infringement claims. *Halton*, 2010 WL 2077203, at *1-2 (plaintiff failed to allege that accused product was a “component of a patented machine ... constituting a material part of the [patented] invention”); *Hewlett-Packard Co. v. Intergraph Corp.*, No. C03-2517-MJJ, 2003 WL 23884794, at *2 (N.D. Cal. Sept. 6, 2003) (“Plaintiff fails to allege that Defendant offered to sell or sold any particular component or that such component was a material part of an infringing device.”).²

Accordingly, the Court should dismiss Pragmatus’s claims of induced and contributory infringement because Pragmatus has failed to state claims upon which relief may be granted.

IV. ALTERNATIVELY, THE COURT SHOULD ORDER PRAGMATUS TO PROVIDE A MORE DEFINITE STATEMENT

If the Court does not dismiss Pragmatus’s Complaint, it should require Pragmatus to provide a more definite statement under Rule 12(e) to identify the specific products or methods alleged to infringe the patents-in-suit.

Pragmatus argues that a more definite statement is not required because its Complaint

² To the extent that Pragmatus relies on Form 18 to justify its indirect infringement allegations, such reliance is misplaced. “Form 18 is silent as to any theory of patent infringement besides direct infringement. ... Nowhere in Form 18 are theories and elements of induced infringement or contributory infringement referenced.” *Halton*, 2010 WL 2077203, at *3 (rejecting plaintiff’s reliance on Form 18 to demonstrate sufficiency of its indirect infringement allegations and dismissing those allegations); *see, e.g., Bender*, 2010 WL 889541, at *5-6 (same); *Elan*, 2009 WL 2972374, at *2 (same).

satisfies the “basic pleading requirements of Rule 8.” Opp’n at 7. But, as explained above, Pragmatus has not satisfied the Rule 8 pleading standard for several reasons. Pragmatus has not identified any specific product or system that allegedly directly infringes the patents-in-suit. Nor has Pragmatus specifically identified the precise services or features that it accuses of direct infringement. Furthermore, Pragmatus has failed to allege all the required elements of induced and contributory infringement.

Pragmatus also argues that a more definite statement is not necessary because “Facebook can fully explore the basis for Pragmatus’s claims of infringement during the discovery phase” of this case. *Id.* at 9. However, the law is clear that Facebook should not have to wait until discovery to learn (a) which of its products Pragmatus accuses of infringement, and (b) the particular theory of infringement. *See Bay Indus., Inc. v. Tru-Arx Mfg. LLC*, Case No. 06-C-1010, 2006 U.S. Dist. LEXIS 86757, at *5 (E.D. Wis. Nov. 29, 2006) (“Defendant should not have to guess which of its products infringe nor guess how its products might fall within plaintiff’s interpretation of the claims of the patent.”). Especially in this Court, where there is little time between the filing of a complaint and the commencement of discovery, the provision of such basic information to the accused infringer is critical.

Accordingly, if the complaint is not dismissed outright, the Court should grant Facebook’s alternative request for a more definite statement.

V. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court dismiss Pragmatus’s Complaint pursuant to Rule 12(b)(6), or in the alternative, require Pragmatus to provide a more definite statement pursuant to Rule 12(e).

Dated: January 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 11th day of January 2011, I will electronically file the foregoing REPLY IN SUPPORT OF DEFENDANT FACEBOOK, INC.'S RULE 12(B)(6) MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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