

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

PRAGMATUS AV, LLC,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Civil Action No. 2:10-cv-00560-HCM/FBS

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

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TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT	1
II. BACKGROUND	2
III. ARGUMENT	3
A. Legal Principles	3
B. The Court Should Dismiss the Complaint Because Pragmatus Has Failed to Accuse Specific Systems or Services and Specify Its Theory of Infringement.....	5
C. The Court Should Dismiss Pragmatus’s Insufficiently Pled Claims of Indirect Infringement	7
D. Alternatively, the Court Should Order Pragmatus to Provide a More Definite Statement	8
IV. CONCLUSION.....	9

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Agilent Techs., Inc. v. Micromuse, Inc.</i> , No. 04 Civ. 3090 (RWS), 2004 U.S. Dist. LEXIS 20723 (S.D.N.Y. Oct. 19, 2004)	9
<i>Aro Mfg. Co. v. Convertible Top Replacement Co.</i> , 377 U.S. 476 (1964).....	8
<i>Ashcroft v. Iqbal</i> , 129 S. Ct. 1937 (2009).....	1, 3, 5
<i>Associated General Contractors of California, Inc. v. Carpenters</i> , 459 U.S. 519 (1983).....	7
<i>Bay Industries, Inc. v. Tru-Arx Manufacturing LLC</i> , Case No. 06-C-1010, 2006 U.S. Dist. LEXIS 86757 (E.D. Wis. Nov. 29, 2006)	5, 8
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	1, 3, 5
<i>Classen Immunotherapies, Inc. v. Biogen IDEC</i> , 381 F. Supp. 2d 452 (D. Md. 2005).....	5
<i>eSoft, Inc. v. Astaro Corp.</i> , No. 06-cv-00441-REB-MEH, 2006 U.S. Dist. LEXIS 52336 (D. Colo. July 31, 2006).....	9
<i>Fischer & Porter Co. v. Sheffield Corp.</i> , 31 F.R.D. 534 (D. Del. 1962)	4
<i>Gen-Probe, Inc. v. Amoco Corp.</i> , 926 F. Supp. 948 (S.D. Cal. 1996).....	3, 4, 6, 9
<i>Hewlett-Packard Co. v. Bausch & Lomb Inc.</i> , 909 F.2d 1464 (Fed. Cir. 1990).....	7
<i>Hewlett-Packard Co. v. Intergraph Corp.</i> , No. C03-2517-MJJ, 2003 WL 23884794 (N.D. Cal. Sept. 6, 2003)	8
<i>In re Papst Licensing GmbH Patent Litigation</i> , No. Civ. A. MDL 1298 & Civ. A. 99-3118, 2001 WL 179926 (E.D. La. Feb. 22, 2001)	4, 5
<i>Martek Biosciences Corp. v. Nutrinova Inc.</i> , Civ. A. No. 03-896 GMS, 2004 US	4

<i>Ondeo Nalco Co. v. Eka Chemicals, Inc.</i> , No. Civ.A. 01-537-SLR, 2002 WL 1458853 (D. Del. June 10, 2002)	4, 6
<i>Quito Enterprises, LLC v. Netflix, Inc.</i> , No. 08-23543-CIV	4
<i>Rembrandt Data Technologies, LP v. AOL, LLC</i> , No. 1:08-cv-1009-GBL (E.D. Va.) (D.I. 1 Compl. ¶¶ 15 and 21 dated Sept. 26, 2008 and D.I. 113 Order dated Dec. 12, 2008)	6
<i>Ricoh Co. v. ASUSTeK Computer, Inc.</i> , 481 F. Supp. 2d 954 (W.D. Wis. 2007)	1, 5
<i>Taurus IP, LLC v. Ford Motor Co.</i> , 539 F. Supp. 2d 1122 (W.D. Wis. 2008)	5
<i>United States ex. rel. Westfall v. Axiom Worldwide, Inc.</i> , No. 8:06-cv-571-T-33TBM, 2009 WL 764528 (M.D. Fla. Mar. 20, 2009)	4
<i>View Engineering, Inc. v. Robotic Vision Systems, Inc.</i> , 208 F.3d 981 (Fed. Cir. 2000)	5
<i>Wilkerson v. Wendover, Inc.</i> , Civ. A. No. 06-450-JJF, 2007 U.S. Dist. LEXIS 53299 (D. Del. July 23, 2007)	4

STATUTES

35 U.S.C. § 271(c)	8
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OTHER AUTHORITIES

Federal Rule of Civil Procedure

Rule 8	5
Rule 8(a)	1
Rule 8(a)(2)	3
Rule 12(b)(6)	passim
Rule 12(e)	passim

On November 15, 2010, Plaintiff Pragmatus AV, LLC (“Pragmatus”) brought this action against Defendant Facebook, Inc. (“Facebook”) for alleged infringement of U.S. Patent Nos. 7,421,470 (“the ‘470 patent”) and 7,433,921 (“the ‘921 patent”) (collectively, “patents-in-suit”). Facebook hereby moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff’s Complaint for failure to state a claim upon which relief may be granted, or in the alternative, for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e).

I. SUMMARY OF ARGUMENT

Plaintiff’s Complaint fails to satisfy the pleading standards under Federal Rule of Civil Procedure 8(a), as articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Under Rule 8(a), a complaint must make “a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” *Twombly*, 550 U.S. at 556 n.3. Such a showing “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). This standard applies equally to complaints alleging patent infringement. *See Ricoh Co. v. ASUSTeK Computer, Inc.*, 481 F. Supp. 2d 954, 959 (W.D. Wis. 2007).

Plaintiff’s Complaint merely makes the general allegation that Facebook infringes each of the patents-in-suit by “making, using, offering for sale, selling and/or practicing” unidentified methods or systems “covered by one or more claims ... , **including** through Facebook Chat.” (Compl. ¶¶ 8, 12 (emphasis added).) Not only does Plaintiff fail to identify the systems that are allegedly sold or the specific instrumentality or service that it accuses of infringement, its ambiguous, open-ended allegations of the Complaint could apply to any aspect of Facebook’s services and, thus, they unfairly prejudice Facebook’s ability to investigate the claims and answer the Complaint.

Accordingly, pursuant to Rule 12(b)(6), this Court should dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted. Alternatively, should the Court deny Facebook's motion to dismiss, it should at the very least require Plaintiff to provide a more definite statement of its claims pursuant to Rule 12(e).

II. BACKGROUND

Plaintiff Pragmatius alleges that it holds all right, title, and interest in and to the patents-in-suit. (Compl. ¶¶ 5-6.) Pragmatius's Complaint offers no explanation or guidance about the technology at issue in the patents-in-suit or the scope and nature of the claims that Pragmatius intends to assert.

Rather than identify the specific products or services that purportedly infringe its patents-in-suit, Pragmatius merely alleges for each patent-in-suit, that Facebook "has and continues to infringe directly ... by making, using, offering for sale, selling and/or practicing" unidentified methods or systems "covered by one or more claims ... , *including* through Facebook Chat." (Compl. ¶¶ 8, 12 (emphasis added).) Pragmatius also uses similar stock language to accuse Facebook of alternative theories of indirect infringement: "[Facebook] has and continues to infringe indirectly one or more claims ... by inducing others to infringe *and/or* contributing to the infringement of others, *including* users of Facebook Chat." (*Id.* ¶¶ 9, 13 (emphases added).) Pragmatius's allegations are conclusory, circular, and lack any substance regarding how the unspecified accused systems, services, and methods relate to the claims of the patents-in-suit. In addition, Pragmatius fails to allege certain required elements for its theories of indirect infringement, such as knowledge and/or specific intent to cause infringement of the patents-in-suit.

III. ARGUMENT

A. Legal Principles

Rule 12(b)(6) provides that a party may move to dismiss a complaint for “failure to state a claim upon which relief can be granted.” “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions.” *Twombly*, 550 U.S. at 555 (citation omitted). The Supreme Court made clear in *Twombly* that “a formulaic recitation of the elements of a cause of action will not do,” and a plaintiff must include factual allegations sufficient to “raise a right to relief above the speculative level.” *Id.*

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). Moreover, 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.* (citing *Twombly*, 550 U.S. at 556). The sheer possibility that a defendant has acted unlawfully is not enough. *Id.* Such a complaint “has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

A plaintiff in a patent infringement case must provide sufficient facts in the complaint to “outline or adumbrate a viable claim for relief.” *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996) (internal quotation omitted). Although Rule 8(a)(2) provides that a pleading “that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief,” “mere boilerplate sketching [of] the elements of a cause of action” is not sufficient to provide fair notice of a patentee’s claims. *Gen-Probe*, 926 F. Supp. at 961 (citation omitted). The Federal Rules “require that the defendant be given ‘fair

notice of (1) what the plaintiff's claim is and (2) the grounds upon which it rests.'" *Id.* at 960. Courts have consistently dismissed patent infringement actions under Rule 12(b)(6), where the plaintiff failed to identify specifically the accused infringing product in the complaint or the type of alleged infringement. *See, e.g., Quito Enters., LLC v. Netflix, Inc.*, Case No. 08-23543-CIV, slip op. (S.D. Fla. Aug. 4, 2009) (dismissing patent infringement claims) (attached as Exhibit A); *Gen-Probe, Inc.*, 926 F. Supp. at 961; *Ondeo Nalco Co. v. Eka Chems., Inc.*, No. Civ.A. 01-537-SLR, 2002 WL 1458853, at *1-2 (D. Del. June 10, 2002) (counterclaims for patent infringement dismissed because they were "too vague to provide plaintiff with fair notice of which products are accused of infringing defendant's patents"); *see also Wilkerson v. Wendover, Inc.*, Civ. A. No. 06-450-JJF, 2007 U.S. Dist. LEXIS 53299, at *3-4 (D. Del. July 23, 2007).

If a complaint fails to specify the allegations in a manner that provides sufficient notice, a defendant can and should move for a more definite statement under Rule 12(e) before responding. *See United States ex. rel. Westfall v. Axiom Worldwide, Inc.*, No. 8:06-cv-571-T-33TBM, 2009 WL 764528, at *9 (M.D. Fla. Mar. 20, 2009); *see also Martek Biosciences Corp. v. Nutrinova Inc.*, Civ. A. No. 03-896 GMS, 2004 U.S. Dist. LEXIS 20469, at * 5 (D. Del. Oct. 8, 2004), *reversed in part on other grounds*, (granting plaintiffs motion for a more definite statement of counterclaim). Rule 12(e) provides that a party "may move for a more definite statement of a pleading" where the pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." Rule 12(e) is applicable where, as here, a pleading is unintelligible or the issues cannot be determined. *See Fischer & Porter Co. v. Sheffield Corp.*, 31 F.R.D. 534, 536 (D. Del. 1962). Courts have consistently granted motions for more definite statement in patent cases where pleadings failed to identify specifically the products accused of infringement. *See, e.g., Martek Biosciences Corp.*, 2004 U.S. Dist. LEXIS 20469, at *5; *In re*

Papst Licensing GmbH Patent Litig., No. Civ. A. MDL 1298 & Civ. A. 99-3118, 2001 WL 179926, at *2 (E.D. La. Feb. 22, 2001) (concluding that the plaintiff’s complaint must be amended to identify specifically which of the defendant’s products are alleged to have infringed the plaintiff’s patents); *Bay Indus., Inc. v. Tru-Arx Mfg. LLC*, Case No. 06-C-1010, 2006 U.S. Dist. LEXIS 86757, at *3-4 (E.D. Wis. Nov. 29, 2006) (“courts have found Rule 12(e) relief appropriate where the complaint fails to identify any allegedly infringing product or at least set forth a limiting parameter”) (citation omitted).

B. The Court Should Dismiss the Complaint Because Pragmatius Has Failed to Accuse Specific Systems or Services and Specify Its Theory of Infringement

“Although pleading standards under [Rule] 8 are liberal, a plaintiff must provide notice of its claim so that the other side may prepare a defense. In the context of alleged patent infringement, this means at least that the plaintiff must tell the defendant which products allegedly infringe the plaintiff’s patent.” *Ricoh*, 481 F. Supp. 2d at 959. “[T]o meet even the broad Rule 8 notice requirements,” Plaintiff “must do more than give clues” as to the scope of its claim. *Taurus IP, LLC v. Ford Motor Co.*, 539 F. Supp. 2d 1122, 1127 (W.D. Wis. 2008).¹

Pragmatius’s direct infringement allegations do not meet the Rule 8 standard for pleading as clarified by *Twombly* and *Iqbal* because they fail to identify the specific instrumentality accused of infringement. For example, Pragmatius accuses Facebook of “selling ... the systems covered by one or more claims of the ‘921 patent” but fails to identify the actual system that is allegedly sold. (Compl. ¶ 12.) Significantly, Facebook does not sell or offer for sale any

¹ Prior to filing suit for patent infringement, a plaintiff must “apply the claims of each and every patent that is being brought into the lawsuit to an accused device and conclude that there is a reasonable basis for a finding of infringement of at least one claim of each patent so asserted.” *View Eng’g, Inc. v. Robotic Vision Sys., Inc.*, 208 F.3d 981, 986 (Fed. Cir. 2000). “If challenged, a patent holder bringing an infringement claim must be able to demonstrate to the court and the alleged infringer exactly why it believed *before* filing suit that it had a reasonable chance of proving infringement.” *Classen Immunotherapies, Inc. v. Biogen IDEC*, 381 F. Supp. 2d 452, 457 (D. Md. 2005) (citing *View Eng’g.*, 208 F.3d at 986) (emphasis added).

“system” to either the users of its website or advertisers. Furthermore, Pragmatius’s allegations point to unidentified “methods . . . , including through Facebook Chat.” (*Id.* ¶ 8.) Pragmatius should specifically identify the allegedly infringing methods that Facebook purportedly practices, and not hedge its bets through the use of alternative and open-ended language such as “and/or” and “including.” Indeed, Plaintiff’s vague allegations could arguably encompass the entirety of Facebook’s service offerings. Especially in this District where the time for investigation prior to commencement of discovery is quite limited, plaintiffs, such as Pragmatius, should be required to identify specifically the accused infringing instrumentalities and services at the commencement of litigation.

This and other courts have properly dismissed overly vague infringement allegations. For example, this Court granted a 12(b)(6) motion to dismiss where the complaint alleged that a defendant “uses and supplies dial-up technology” or the defendant’s “products contain and use dial-up technology”— similar to Pragmatius’s insufficient allegation that Facebook allegedly sells unidentified “systems” and practices unidentified “methods.” See *Rembrandt Data Techs., LP v. AOL, LLC*, Case No. 1:08-cv-1009-GBL (E.D. Va.) (D.I. 1 Compl. ¶¶ 15 and 21 dated Sept. 26, 2008 and D.I. 113 Order dated Dec. 12, 2008)²; see also *Ondeo Nalco Co. v. Eka Chems., Inc.*, Civ. A. No. 01-537-SLR, 2002 U.S. Dist. LEXIS 26195, at *4 (D. Del. Aug. 10, 2002) (granting a motion to dismiss counterclaims accusing unnamed products); *Gen-Probe*, 926 F. Supp. at 962 (granting Rule 12(b)(6) dismissal because “pointing vaguely to ‘products and/or kits’ . . . does not provide adequate notice as required by the Rules, and does not reflect the reasonable inquiry required by the Rules”).

² Judge Lee granted the defendants’ motions to dismiss under Rule 12(b)(6) “[f]or the reasons stated in open court.” *Rembrandt Data Techs.*, (D.I. 113 Order dated Dec. 12, 2008). Briefing setting out the defendants’ reasons can be found at Docket Nos. 25, 33, 70 and 74.

As the Supreme Court has cautioned, “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983). Facebook should not be required to engage in a time consuming investigation without knowing the specific products, services, and methods that Pragmatius believes infringe its patents-in-suit.

In short, the Court should dismiss Pragmatius’s Complaint because of its failure to identify the specific allegedly infringing instrumentalities.

C. The Court Should Dismiss Pragmatius’s Insufficiently Pled Claims of Indirect Infringement

The Court should also dismiss Pragmatius’s claims of induced and contributory infringement. As a threshold matter, Pragmatius again improperly hedges by accusing Facebook of “inducing others to infringe *and/or* contributing to the infringement of others.” (Compl. ¶¶ 9, 13 (emphasis added).) Based upon its pre-filing investigation, Pragmatius should know exactly which theory of indirect infringement it has a good-faith basis to pursue. Thus, Facebook should not be left to guess as to which theory (or both) it must defend against in this case. Furthermore, Pragmatius fails to set forth sufficient factual allegations to state claims of induced and contributory infringement.

To state a claim for induced infringement, a plaintiff must allege that (1) the inducer had specific intent to cause the acts that constitute direct infringement, and (2) the acts that constitute direct infringement were performed by a party other than the inducer. *See Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990). Here, Pragmatius has not alleged that Facebook had any specific intent, much less that Facebook even had knowledge of the patents-in-suit. Thus, Pragmatius has failed to state a claim for induced infringement. *See*

Hewlett-Packard Co. v. Intergraph Corp., No. C03-2517-MJJ, 2003 WL 23884794, at *2 (N.D. Cal. Sept. 6, 2003) (dismissing insufficiently pled induced infringement claim).

In order to state a claim for contributory infringement, Pragmatus must allege that Facebook 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). Pragmatus fails to allege that Facebook offered to sell or sold any particular component or that such component was a material part of an infringing device. Rather, Pragmatus merely alleges that Facebook has “contribut[ed] to the infringement of others, including users of Facebook Chat.” (Compl. ¶¶ 9, 13.) But that is not sufficient to state a claim of contributory infringement. *See Hewlett-Packard*, 2003 WL 23884794, at *2 (dismissing plaintiff’s contributory infringement claim for failure to identify material component of an infringing device).

Accordingly, the Court should dismiss Pragmatus’s claims for indirect infringement because Pragmatus has failed to state claims upon which relief may be granted.

D. Alternatively, the Court Should Order Pragmatus to Provide a More Definite Statement

At a minimum, Pragmatus should be required to provide a more definite statement. Rule 12(e) provides that “[a] party may move for a more definite statement of a pleading” where the pleading “is so vague or ambiguous that the party cannot reasonably prepare a response.” Here, Pragmatus failed to allege the most basic fact underlying its Complaint—the specific products or methods alleged to infringe the patents-in-suit.

Courts have granted motions under Rule 12(e) in patent cases for this very reason. *See, e.g., Bay Indus.*, 2006 U.S. Dist. LEXIS 86757, at *5 (“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."); *Agilent Techs., Inc. v. Micromuse, Inc.*, No. 04 Civ. 3090 (RWS), 2004 U.S. Dist. LEXIS 20723, at *15-16 (S.D.N.Y. Oct. 19, 2004) (granting a motion for a more definite statement where the complaint did not specify which products infringed the plaintiff's patents). By failing to identify the allegedly infringing products or methods in its Complaint, Pragmatus has impermissibly attempted to "foist the burden of discerning what products it believes infringe[] the patent onto defense counsel." *eSoft, Inc. v. Astaro Corp.*, No. 06-cv-00441-REB-MEH, 2006 U.S. Dist. LEXIS 52336, at *4 (D. Colo. July 31, 2006) (granting a motion for a more definite statement). Indeed, Pragmatus's Complaint leaves Facebook to guess what products, services, or methods allegedly infringe the patents-in-suit.

The Complaint in its current state prevents Facebook from framing a proper responsive pleading, conforming its conduct, if necessary, to avoid allegations of willful infringement, or alerting third parties to any indemnification obligations for the purported conduct at issue. *See Gen-Probe*, 926 F. Supp. at 960-61 & n.20. Accordingly, if the complaint is not dismissed outright, the Court should grant Facebook's alternative request for a more definite statement.

IV. 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 21, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 21st day of January 2011, I will electronically file the foregoing MEMORANDUM 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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