

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

<p style="text-align:center">PRAGMATUS AV, LLC,</p> <p style="text-align:center">Plaintiff,</p> <p style="text-align:center">v.</p> <p style="text-align:center">FACEBOOK, INC.,</p> <p style="text-align:center">Defendant.</p>	<p style="text-align:center">Civil Action No. 2:10-cv-00560 (HCM/FBS)</p>
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**PRAGMATUS' MEMORANDUM IN OPPOSITION
TO FACEBOOK, INC.'S RULE 12(b)(6) MOTION TO DISMISS**

Plaintiff, Pragmatius AV, LLC ("Pragmatius"), by counsel, submits the following Opposition to Facebook, Inc.'s ("Facebook") Motion to Dismiss:

ARGUMENT

Facebook's Motion to Dismiss Pragmatius' Complaint ("Complaint") under Rule 12(b)(6) of the Federal Rules of Civil Procedure should be denied because Pragmatius has met the pleading requirements set forth under the Federal Rules.

As set forth in more detail below, a complaint alleging a patent infringement claim is sufficient if it contains the elements set forth in Form 18 of the Federal Rules. Form 18 consists of only four short paragraphs, consistent with the Federal Rules' emphasis on brevity in pleading patent suits. The Pragmatius Complaint contains all of the information in Form 18.

Indeed, Pragmatius' Complaint actually includes more information than Form 18 requires.

Because Pragmatius has met the pleading requirements under the Federal Rules, Facebook's motion should be denied.

A. Pragmatus Has Met the Pleading Requirements Under Rule 8, and Therefore Dismissal is Inappropriate Under Rule 12(b)(6).

Under the liberal pleading standard in Rule 8, Pragmatus' Complaint is more than sufficient to put Facebook on notice of the claims asserted against it. Specifically, Rule 8(a) of the Federal Rules requires that a pleading contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8(a).

Consistent with the requirement that a pleading be "short and plain," the Federal Rules contain a form complaint that may be used in patent infringement cases. Under Rule 84 of the Federal Rules, these forms "are sufficient under the rules." Fed. R. Civ. P. 84. The approved form, in its entirety, reads as follows:

1. (Statement of Jurisdiction - See Form 7)
2. On date, United States Letters Patent No. were issued to the plaintiff for an invention in an *electric motor*. The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.
3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention, and the defendant will continue to do so unless enjoined by this court.
4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all *electric motors* it manufactures and sells and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands: (a) a preliminary and final injunction against continued infringement; (b) an accounting for damages; and (c) interests and costs.

Fed. R. Civ. P., Form 18.

Pragmatus must plead these elements to satisfy the requirements for pleading a claim of patent infringement. Contrary to what Facebook argues in support of its motion, this standard has not changed despite the United States Supreme Court's ruling in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

The Federal Circuit has held that patent infringement complaints that include the elements of Form 18 meet the notice pleading standard under Rule 8(a) and Twombly. In McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1355-56 (Fed. Cir. 2007), the Federal Circuit held that a complaint stating a patent infringement cause of action is sufficiently pled under the Twombly standard if it:

(1) asserts that the plaintiff owns the patent at issue; (2) names the defendants; (3) states that the defendant infringed the patent; (4) describes, in general terms, the means by which the patent was infringed; and (5) identifies the specific parts of patent law that are implicated.

According to McZeal, fulfilling each of these elements is sufficient to put the defendant on notice and permit the action to survive a Rule 12(b)(6) motion. Nothing more is required. Id. at 1357.

Numerous District Courts, including the Eastern District of Virginia, have followed McZeal. See, e.g., Taltwell, LLC v. Zonet USA Corp., 2007 WL 4562874 at 14 (E.D. Va. 2007) (each of the McZeal factors were identified in the complaint, thus the court found the complaint set forth sufficient allegations to state a claim upon which relief can be granted); Sikes Cookers & Grill, Inc. v. Vidalia Outdoor Products, Inc., 2009 WL 427227 at 3 (N.D. Ga. 2009) (court found complaint to be sufficiently pled because it stated each McZeal factor including that defendants had been making, selling and using a product embodying the patent-in suit); Eidos Communications, LLC v. Skype Technologies SA, 2010 WL 4642062 at 1, 2 (D. Del. 2010) (complaint found to be sufficient because McZeal factors pled); Fotomedia Technologies, LLC

v. AOL, LLC, 2008 WL 4135906 at 1, 2 (E.D. Tex. 2008) (complaint sufficient because it alleged that defendants own and operate photosharing website services that infringed patents in suit); S.O.I.TEC Silicon On Insulator Technologies S.A. v. MEMC Electronic Materials, Inc., 2009 WL 423989 at 2 (D. Del. 2009) (complaint provided level of detail sufficient to satisfy Form 18 and McZeal).

Indeed, Pragmatus' Complaint is more specific than the complaints in McZeal and Taltwell, both of which were found to meet the requirements of Rule 8. In Taltwell, for example, the complaint alleged that the defendant infringed:

directly or under the doctrine of equivalents, one or more claims of the '660 patent by making, using, offering for sale, and/or selling ***the communication devices in the United States that are within the scope of the claims of the '660 patent.***

Taltwell, 2007 WL 4562874 at 14 (emphasis added).

If general descriptions such as "electric motors" (Form 18) and "communication devices" (Taltwell) are sufficient to describe an accused product under Rule 8, so is a description that actually includes a reference to a ***specific service*** ("Facebook Chat").

Pragmatus has not only met the requirements of Form 18, it has also met the essential requirements for pleading under both Twombly and the Supreme Court's more recent decision in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009). As the Supreme Court held in Iqbal, there are two basic "principles" that must be met under Rule 8: first, a complaint cannot merely assert "legal conclusions." Iqbal, 129 S.Ct. at 1949-50. Second, a complaint must state a "plausible" claim for relief. Id. at 1950. Whether a claim is "plausible" requires the reviewing court to "draw on its judicial experience and common sense." Id.

In this case, Pragmatus' Complaint does not merely cite "legal conclusions." Nor are the claims within it inherently "implausible." In light of the technology disclosed in the patents-in-

suit and the nature of the accused services set forth in the Complaint, Pragmatius' infringement allegations are certainly plausible and do not constitute "threadbare recitals of the elements" of patent infringement. Iqbal, 129 S.Ct. at 1949.

In fact, in another recent case, Xpoint Technologies, Inc. v. Microsoft Corp., 2010 WL 3187025 (D. Del., Aug. 12, 2010), decided after Iqbal, the Court noted that the "Federal Circuit Court of Appeals in McZeal held that, for a direct infringement claim, [Form 18] meets the Twombly pleading standard." 2010 WL 3187025 at 2 (emphasis added). The court in Xpoint further noted that Form 18 only refers to "electric motors," and then stated:

no further detail regarding said electric motors is provided. As this court has previously held, *it is not necessary to identify specific products, i.e. model names, but plaintiffs [sic] pleadings must mimic Form 18 and identify a general category of products.*

....

A plaintiff is not required to specifically include each element of the asserted patent's claims or even identify which claims it is asserting; *nor is it required to describe how the allegedly infringing products work.*

2010 WL 3187025 at 3 (emphasis added).

Thus, Pragmatius is not required to identify a specific product, nor must it show how the accused product works. Pragmatius exceeded this standard by identifying the specific Facebook service that infringes.

Furthermore, Pragmatius is not required to specify which claims are infringed at the pleading stage. See McZeal, 501 F.3d at 1357 ("a plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent"); Taltwell, 2007 WL 4562874 at 14 (a plaintiff does not have to "specify which claims of the [patent-in-suit] have been performed by the allegedly infringing products"); Xpoint Technologies, Inc., 2010 WL 3187025 at 3 ("A plaintiff is not required to specifically include each element of the asserted

patent's claims or even identify which claims it is asserting . . .")

Accordingly, Facebook's assertion that the Complaint is not sufficiently specific is wrong. As noted above, Pragmatius has accused a *specific Facebook service* of infringing the patents-in-suit ("Defendant has and continues to infringe directly one or more claims of the '470 Patent by making, using, offering for sale, selling and/or practicing the methods covered by one or more claims of the '470 Patent, including through Facebook Chat." (Complaint, ¶ 8; see also Complaint, ¶¶ 9, 12 and 13)). Moreover, the Complaint attaches the two patents-in-suit, both of which provide very detailed descriptions of the inventions, including dozens of drawings demonstrating the scope and features of the inventions. When the specific accused service, Facebook Chat, is considered in the context of the detailed descriptions of the inventions, Facebook is clearly on notice of the nature of Pragmatius' infringement allegations at the pleading stage.

Accordingly, Facebook's argument that Pragmatius has not met the required pleading standard should be rejected.

B. Pragmatius Is Not Required To Plead Intent for Indirect Infringement.

Facebook argues that Pragmatius failed to plead the element of "intent" in connection with its indirect infringement claims, but cites to no binding authority that shows that such pleading is required.

As noted above, in satisfying the elements of Form 18, Pragmatius sufficiently alleged a claim for direct and indirect infringement under Rule 8. Moreover, the cases Facebook cites for its contention that Pragmatius' Complaint must contain facts illustrating "intent" are distinguishable.

In Intergraph Corp., supra, for example, the authority the court cites for the proposition

that the elements of knowledge and intent must be specifically pled does not support that holding. In one of the principal cases relied upon by the court in Intergraph Corp., Hewlett-Packard Co. v. Bausch & Lomb, 909 F.2d 1464, 1469 (Fed. Cir. 1990), the Federal Circuit held that "*proof* of actual intent to cause the acts which constitute the infringement is a necessary prerequisite to *finding* active inducement" (emphasis added). The Federal Circuit did not hold that actual intent must be *alleged* in the complaint.

Here, Pragmatus alleged that Facebook is an infringer under 35 U.S.C. § 271 by infringing directly and indirectly the claims of the patents-in-suit by making, using, offering to sell, and/or selling the systems and/or practicing the methods covered by one or more claims of the patents-in-suit, including through its Facebook Chat service. As part of its indirect infringement claims, Pragmatus further alleged that Facebook "has and continues to infringe indirectly one or more claims of the [patents-in-suit] by inducing others to infringe and/or contributing to the infringement of others, including *users of Facebook Chat*. Complaint, ¶¶ 9, 13 (emphasis added). Thus, Pragmatus identified both a specific service (Facebook Chat) and the persons directly infringing (users of Facebook Chat).

These allegations are enough to satisfy the liberal pleading standard for indirect infringement.

C. Alternatively, Pragmatus Should Be Granted Leave To Amend.

In the event the Court finds that Pragmatus' patent infringement claims are not sufficiently pled, Pragmatus should be granted leave to amend its Complaint.

Rule 15(a) of the Federal Rules grants parties leave to amend, which should be interpreted liberally. See U.S. v. Universal Healthcare Serv's, Inc., 2010 WL 4323082 (W.D. Va., Oct. 31, 2010) (citing Laber v. Harvey, 438 F.3d 404, 426 (4th Cir. 2006)) (remaining

citations omitted). Leave to amend should only be denied if it is shown that (1) the amendment would be prejudicial to the opposing party, (2) there has been bad faith on the party requesting leave to amend, or (3) the amendment would be futile. Id.

There would be no prejudice whatsoever to Facebook if Pragmatius were granted leave to amend its Complaint, nor has Facebook argued there would be. Further, Facebook has not – and cannot – argue that such an amendment would be in bad faith or futile. For these reasons, the Court should grant Pragmatius leave to amend its Complaint in the event the Court finds that Pragmatius' infringement claims are not sufficiently pled.

CONCLUSION

Wherefore, Pragmatius respectfully requests that Facebook's Motion to Dismiss or, in the alternative, for a More Definite Statement, be denied. Alternatively, Pragmatius requests that the Court grant it leave to amend the Complaint against Facebook.

PRAGMATIUS AV, LLC
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2011, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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