

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

<p>POLARIS IP, LLC,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>(1) GOOGLE INC.; (2) YAHOO! INC.; (3) AMAZON.COM, INC.; (4) A9.COM, INC.; (5) BORDERS, INC.; (6) BORDERS GROUP INC.; (7) AOL LLC; (8) AMERICA ONLINE, INC.; (9) IAC/INTERACTIVECORP; and (10) IAC SEARCH AND MEDIA, INC.,</p> <p style="text-align: center;">Defendants.</p>	<p>CIVIL ACTION NO. 2:07-cv-371[TJW-CE]</p>
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DEFENDANT YAHOO! INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR MORE DEFINITE STATEMENT

Instead of responding to the merits of Yahoo!'s motion, Polaris attempts to shift the focus to Yahoo! by suggesting that Yahoo!'s motion requests a decision on the merits and is a veiled attempt at early discovery. Nothing could be further from the truth. A claim of patent infringement is no different than any other claim in that it must give the defendant fair notice of what the claim is and the grounds upon which it is based. Polaris failed to meet its obligations in this regard, and Yahoo! is well within its rights to seek dismissal of the complaint, or alternatively, a clear, unambiguous allegation of infringement.

In responding to the merits of Yahoo!'s motion, Polaris largely ignores the case law cited by Yahoo!, including recent U.S. Supreme Court precedent that supports Yahoo!'s contention that the complaint fails to meet the pleading requirements of Rule 8(a)(2) of the Federal Rules of

Civil Procedure. Instead, Polaris urges the Court to follow case law that predates the controlling U.S. Supreme Court precedent. In the end, Polaris fails to refute the fact that its pleadings are deficient, and the Court should dismiss Polaris' claims of patent infringement against Yahoo!, or in the alternative, order Polaris to file a more definite statement of its claims, including an identification of the specific aspects of Yahoo!'s websites that allegedly infringe the '947 patent, and an explanation of how those aspects of Yahoo!'s websites allegedly infringe the '947 patent.

I. POLARIS' CLAIMS AGAINST YAHOO! SHOULD BE DISMISSED FOR FAILING TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Polaris' Infringement Pleadings are Deficient and Should be Dismissed

As noted in Yahoo!'s motion, the U.S. Supreme Court recently held that a complaint must contain "more than labels and conclusions," and "factual allegations must be enough to raise a right to relief above the speculative level" in order to survive a Rule 12(b)(6) motion to dismiss. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (internal citations omitted). In its opposition, Polaris ignores this controlling precedent and urges this Court to follow the pre-*Bell Atlantic* ruling in *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.* 203 F.3d 790, 794 (Fed. Cir. 2000), which is based on the "no set of facts" standard articulated in *Conley v. Gibson*. 355 U.S. 41, 47 (1957). However, the Fifth Circuit held that "in *Bell Atlantic*, the Supreme Court made clear that the *Conley* rule is not 'the minimum standard of adequate pleading to govern a complaint's survival.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 n.10 (5th Cir. 2007) (quotations omitted).¹ Accordingly, under the *Bell Atlantic* standard,

¹ The Federal Circuit applies the law of the regional circuit when reviewing a Rule 12(b)(6) ruling. *C & F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1306 (Fed. Cir. 2000). Thus, while the Federal Circuit may have stated that "*Bell Atlantic* [did not change] the pleading standard articulated in *Conley*," *McZeal v. Sprint Nextel Corp.* 2007 U.S. App. LEXIS 22025, at *6 n.4 (Fed. Cir. Sept. 14, 2007), *Bell Atlantic* clearly rejected the literal interpretation of *Conley*'s "no set of facts" language as applied to Rule 8, clarifying a phrase that "puzzled the [legal]

Polaris was required to plead facts that allege how Yahoo! purportedly infringes the '947 patent – an obligation that it failed to meet.

Instead of providing the type of factual pleading required by the U.S. Supreme Court, Polaris offered nothing more than vague, open-ended allegations. This is precisely the type of pleading that courts have dismissed under Rule 12(b)(6) as providing insufficient notice under Rule 8(a)(2), and none of the cases cited by Polaris dictate a different result. *See, e.g., Ondeo Nalco Co. v. EKA Chemicals, Inc.*, No. 01-537-SLR, 2002 U.S. Dist. LEXIS 26195 (D. Del. Aug. 10, 2002) (dismissing an open-ended counterclaim of patent infringement by “Nalco's products, including the 8692 product” because it provided insufficient notice).²

Moreover, given the vagueness of Polaris' pleadings, Yahoo! will be prejudiced if forced to guess how it is allegedly infringing the '947 patent when preparing a responsive pleading.

profession for 50 years,” and the Federal Circuit's statements in this regard are not controlling. *Bell Atl.*, 127 S. Ct. at 1969. Moreover, in *McZeal v. Sprint Nextel Corp.*, the Federal Circuit held that a complaint specifically alleging infringement by a “technology cell phone product line called Motorola i930 ‘INTERNATIONAL WALKIE TALKIE’ offered by the defendants,” Sprint Nextel's “INTERNATIONAL WALKIE TALKIE machine,” and the “Motorola line of wireless VoIP products” satisfied notice pleading requirements. *McZeal v. Sprint Nextel Corp.* 2007 U.S. App. LEXIS 22025, at * 8 (Fed. Cir. Sept. 14, 2007). Polaris' open-ended allegations are clearly distinguishable from the closed universe of products alleged to infringe in *McZeal*.

² At least one case cited by Polaris in opposition to Yahoo!'s motion to dismiss is now an incorrect statement of law. *Compare digiGan, Inc. v. iValidate, Inc.*, 2004 U.S. Dist. LEXIS 1324, at *11-12 (S.D.N.Y. 2004) (“Complaints that merely track the statutory language may be sufficient to withstand a motion to dismiss.”) with *Bell Atl.*, 127 S. Ct. at 1964 (“[A] formulaic recitation of the elements of a cause of action will not do.”). Other cases cited by Polaris are factually distinguishable, or cite *Phonometrics* in denying a motion to dismiss a formulaic patent infringement claim. *See Interdigital Tech. Corp. v. OKI Am., Inc.*, 845 F. Supp. 276, 283 (E.D. Pa. 1994) (denying a Rule 12(b)(6) motion where defendant did not dispute that it could identify which of its products were compatible with the IS-95 standard alleged to infringe the plaintiff's patent); *One World Techs., Ltd. v. Robert Bosch Tool Corp.*, 2004 U.S. Dist. LEXIS 14035, at *6-7 (N.D. Ill. 2004) (citing *Phonometrics* in denying a Rule 12(b)(6) motion to dismiss a formulaic complaint of patent infringement); *Constellation IP, LLC v. Marriott International, Inc., et al.*, Case 9:06-cv-00162-RHC (E.D. Tex. Nov. 6, 2006) (order denying Rule 12(b)(6) motion to dismiss, citing *Phonometrics*).

Indeed, to attempt to answer the current allegations in the complaint, Yahoo! would, in theory, have to evaluate its entire portfolio of Internet products and services distributed across all of its webpages to try to determine how any of the “methods and systems” among any of its “various websites” allegedly infringe the ‘947 patent. This type of burden shifting is both inappropriate and one of the reasons why the pleading requirements exist. For at least these reasons, Polaris’ claims against Yahoo! are deficient and should be dismissed under Rule 12(b)(6).³

B. Polaris’ Complaint Does Not Meet the Requirements of Form 16

Another central argument in Polaris’ opposition is that Yahoo!’s motion should be denied because Polaris’ complaint provides the same notice as Form 16 of the Appendix of Forms in the Federal Rules of Civil Procedure. As a threshold matter, Form 16 was adopted prior to the U.S. Supreme Court’s ruling in *Bell Atlantic* and has not been amended since the ruling, so the guidance it provides is questionable, at best.

Moreover, what Polaris fails to realize is that its complaint contains *less* notice than that of Form 16. The example complaint included in Form 16 alleges that a defendant is infringing “an invention in an *electric motor*” by “making, selling, and using *electric motors* embodying the patented invention.” Fed. R. Civ. P., App. of Forms, Form 16 (emphasis added). Thus, the sample complaint includes a clear connection between the patented technology and a discrete list of accused products. In contrast, Polaris’ complaint describes an open-ended list of Yahoo! properties with no discernable connection to the patented technology, thereby forcing Yahoo! to guess what “methods and systems” among its “various websites” allegedly infringe a patent directed toward e-mail processing. Simply put, Polaris’ pleadings are inconsistent with Form 16, and its claims against Yahoo! should be dismissed.

³ Polaris also failed to address Yahoo!’s argument that Polaris’ claims of indirect infringement are deficient because Polaris failed to identify a direct infringer. Def.’s Mot. to Dismiss at 5 n.2.

C. Yahoo! Is Not Seeking a Decision on the Merits or Early Discovery

Polaris' opposition to Yahoo!'s motion also rests, in large part, on the misnomer that Yahoo!'s motion is seeking a decision on the merits. Polaris bases its argument on two sentences included in Yahoo's motion. Def's Mot. to Dismiss at 7 ("Adding to the confusion about Plaintiff's infringement allegations is that fact that the '947 patent is directed to an email processing system, yet the Plaintiff has failed to provide any indication of how this patent applies to Yahoo!'s Internet-based products and services."); *Id.* at 9 ("The Complaint . . . fails to explain how the patent, which is directed to an email processing system, applies to Yahoo!'s Internet-based products and services."). It can hardly be said that including these two, completely accurate, sentences in its motion somehow transforms Yahoo!'s motion to dismiss into a motion for a decision on the merits.⁴

Polaris' arguments that Yahoo!'s motion is a veiled attempt at early discovery are equally misplaced. As noted in Yahoo!'s motion and above, Yahoo! is simply asking that Polaris adhere to the mandated pleading requirements, and nothing more. To that end, Yahoo!'s motion to dismiss is well grounded both legally and factually, and Polaris' deficient claims against Yahoo should be dismissed in their entirety.⁵

⁴ The '947 patent is titled "Automatic Message Interpretation and Routing System," and the patent states that "the electronic messages are e-mail messages." *See* Compl. Ex. A. at Col. 4., ll. 10-11.

⁵ Polaris asserts, without citing any supporting authority, that the Court should consult the answers of co-defendants in this case, or Yahoo!'s answers to a complaint in an unrelated case asserting infringement of a completely different patent, in order to evaluate the merits of Yahoo!'s motion. However, each of those situations involved facts unique to those cases and have no application to the present motion. The fact that some of the other parties have framed a responsive pleading in this case is irrelevant, as is the fact that Yahoo! may have answered other complaints without filing a similar motion.

II. ALTERNATIVELY, POLARIS SHOULD BE ORDERED TO AMEND ITS PLEADINGS TO PROVIDE A CLEAR AND CONCISE ALLEGATION OF INFRINGEMENT

Polaris' complaint provides a quintessential example of infringement allegations that are so vague and ambiguous that they must be amended in order for the responding party to frame a responsive pleading. Fed. R. Civ. P. 12(e); *see also Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164 (5th Cir. 1999) (a more definite statement is appropriate “[i]f a complaint is ambiguous or does not contain sufficient information to allow a responsive pleading to be framed.” (emphasis added)); *see also Sefton v. Jew*, 204 F.R.D. 104, 106 (W.D. Tex. 2000). As noted above, to answer the current allegations in the complaint, Yahoo! would have to evaluate its entire portfolio of Internet products and services distributed across all of its webpages to determine whether any “methods and systems” among any of its “various websites” allegedly infringe the ‘947 patent. Compl. ¶ 18. Courts have held that such wild goose chases place unreasonable burdens on a defendant. *Bay Indus., Inc. v. Tru-Arx Mfg., LLC*, No. 06-C-1010, 2006 U.S. Dist. LEXIS 86757, at *5 (E.D. Wis. Nov. 29, 2006) (finding an unreasonable burden where the patent infringement complaint failed to identify any of the defendant’s approximately 40 products); *In re Papst Licensing GmbH Patent Litig.*, No. MDL 1298, 2001 U.S. Dist. LEXIS 2255, at *4-5 (E.D. La. Feb. 22, 2001) (finding an unreasonable burden where the patent infringement complaint identified “any IBM product that contains a disk drive” and IBM had several hundred hard disk drive models and part numbers); *eSoft v. Astaro Corp.*, No. 06-cv-00441-REB-MEH, 2006 U.S. Dist. LEXIS 52336, at *4-6 (D. Colo. July 31, 2006) (holding that it was improper to “foist the burden of discerning what products [the plaintiff] believes infringe

the patent onto defense counsel” where the complaint failed to identify any particular product that infringed the plaintiff’s patent).⁶

At this point in the proceedings, Polaris should be well able to correct this deficiency, at a minimum expenditure of time and money by the parties and the Court, in order to promote the “just, speedy, and inexpensive determination” of this action. Fed. R. Civ. P.1; *see also Bay Indus., Inc.* 2006 U.S. Dist. LEXIS 86757, at *5-6. In filing its complaint, Polaris represented to the Court that “a reasonable inquiry had been made to insure that the factual allegations had evidentiary support.” *Id.* (citing Fed. R. Civ. P. 11(b)(3)). If Polaris cannot identify the specific aspects of Yahoo!’s websites that allegedly infringe the ‘947 patent, and cannot explain how those aspects of Yahoo!’s websites allegedly infringe the ‘947 patent, the validity of this representation is questionable. *Id.*

Accordingly, in the event that the Court denies Yahoo!’s motion to dismiss, the Court should grant Yahoo!’s motion for a more definite statement and order Polaris to clarify what aspect or aspects of Yahoo!’s websites and its products and services allegedly infringe the ‘947 patent, and explain how those aspects of Yahoo!’s websites, products, and services allegedly infringe the ‘947 patent.

⁶ The cases cited by Polaris in opposition to Yahoo!’s alternative Rule 12(e) motion are distinguishable from the facts at issue. *See Symbol Techs., Inc. v. Hand Held Prods.*, 2003 U.S. Dist. LEXIS 21002, at *9 (D. Del. 2003) (rejecting a Rule 12(e) motion where there were a finite number of *tangible* accused products); *Home & Nature Inc. v. Sherman Specialty Co.*, 322 F. Supp. 2d 260, 266-67 (E.D.N.Y. 2004) (denying a Rule 12(e) motion with a “primary purpose . . . to obtain more detailed copies of the plaintiff’s patents and copyrights” where the complaint included the cover pages of the patents and copyrights, and to “secure additional evidence of the plaintiff’s ownership of the copyrights” where the plaintiff already “list[ed] the copyright registration numbers [in the complaint], and annex[ed] copies of the five copyright registrations [to the complaint.]”); *J&J Manuf. Inc. v. Logan*, 24 F.Supp.2d 692, 703 (E.D. Tex. 1998) (denying a Rule 12(e) motion where the “[c]omplaint is *rife* with specific facts and dates forming the basis of its claims” (emphasis added)).

III. CONCLUSION

For the reasons set forth above and in its original motion, Yahoo! respectfully requests that the Court dismiss Polaris' claims of patent infringement against Yahoo!. In the alternative, Yahoo! requests that Polaris be ordered to provide a more definite statement of its claims, including an identification of the particular aspect or aspects of Yahoo!'s websites and its products and services that allegedly infringe the '947 patent, and an explanation of how those aspects of Yahoo!'s websites, products, and services allegedly infringe the '947 patent.

Dated: November 15, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV 5(a)(3) on this the 15th day of November, 2007. Any other counsel of record will be served by first class U.S. mail on this same date.

/s/ Jason C. White