

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

**STRAGENT, LLC and SEESAW
FOUNDATION,**

Plaintiffs,

v.

CLASSMATES ONLINE, INC., *et al.*,

Defendants.

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Civil Action No. 6:10-CV-242-LED

JURY TRIAL REQUESTED

**PLAINTIFFS' RESPONSE TO CLASSMATES ONLINE, INC.'S
MOTION TO DISMISS (DKT. NO. 70)**

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Stragent, LLC and SeeSaw Foundation (collectively, “Stragent”) submit this Response to Defendant, Classmates Online, Inc.’s (“Classmates”) Motion to Dismiss for Failure to State a Claim, Fed. R. Civ. P. 12(b)(6) Based on the Failure of the Patent-in-Suit to Claim a Patentable Subject Matter Under 35 U.S.C. § 101 (Dkt. No. 70) (“Motion”).

I. Introduction

Classmates’ Motion, filed pursuant to Rule 12(b)(6), challenges the patentability of the patent-in-suit, U.S. Patent No. 6,665,722 (“the ‘722 patent”), under 35 U.S.C. §101. For at least the following reasons, Stragent respectfully requests that the Court deny Classmates’ Motion.

First, Classmates has not met its burden of proving that each of the forty-eight claims of the ‘722 patent are invalid under 35 U.S.C. § 101. Substantively, on their face, the claims of the ‘722 patent do not disclose abstract ideas. Further, each of the claims clearly satisfies the machine-or-transformation test, which provides strong evidence that the patent is not invalid. Through attempting to demonstrate otherwise, Classmates ignores the statutory presumption of validity accorded to issued patents; uses a flawed analysis by failing to view the claims as a whole; and otherwise cherry-picks case law, omitting the context under which each case was decided. Moreover, granting Classmates’ Motion would effectively invalidate software patents, an act contrary to the expressly stated intent of the Federal Circuit.

Second, this case is in its infancy. Proper adjudication of this issue requires the facts disclosed via the established methods set forth in this District’s Local Patent Rules. At this stage of the case, Stragent has not yet disclosed its infringement contentions pursuant to Local Patent Rules 3-1 and 3-2, and Classmates has not yet disclosed its invalidity contentions pursuant to Local Patent Rules 3-3 and 3-4.¹ Additionally, neither party has disclosed its claim construction

¹ In fact, this case has not even had a scheduling conference.

positions pursuant to Local Patent Rules 4-1 through 4-4. Not only is the information gleaned by virtue of these processes essential to the resolution of this issue, but following them will preserve judicial time and resources. As one example, dismissing the complaint at this time will necessarily require the Court to separately assess each of the forty-eight claims of the '722 patent in order to reach the merits of Classmates' Motion.

Finally, this case is not appropriate for disposition pursuant to Rule 12(b)(6). The standard explained by the Fifth Circuit under which a Court may dismiss a complaint under Rule 12(b)(6) is a fundamentally improper vehicle for alleging patent invalidity. Classmates' motion reaches beyond the four corners of the Complaint to improperly introduce unsupported allegations, each of which Stragent disputes. Resolution of this issue will require the Court to look outside the pleadings, which is an improper exercise in analyzing a Rule 12(b)(6) motion to dismiss.

Accordingly, Stragent respectfully requests that the Court deny Classmates' Motion.

II. Statement of Facts

A. The Pleadings

Analysis of Classmates' Rule 12(b)(6) Motion is limited to the facts that are contained within the pleadings, and no more. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000). Stragent filed its complaint on May 6, 2010, accusing Classmates of infringing the '722 patent.² Stragent's pleadings are set forth in Stragent's Original Complaint (Dkt. No. 1), First Amended Complaint (Dkt. No. 17), and Second Amended Complaint (Dkt. No. 51) (collectively, "Complaint"). The pleadings include the one patent-in-suit – the '722 patent, attached as Exhibit A to Stragent's Complaint. Classmates has not yet answered

² In addition to Classmates, Stragent also accused twelve additional defendants of infringing the '722 patent. Of the original defendants, only Classmates; Gannett Co., Inc.; MTV Networks; Viacom Inc.; and MySpace, Inc. remain— notably, no other defendant joins Classmates in the present motion.

Stragent's Complaint. Stragent's Complaint sets forth a "short and plain statement of the claim showing that [Stragent] is entitled to relief." Fed. R. Civ. P. 8(a)(2).

B. The Claimed Invention

The '722 patent concerns data delivery technology. Utilizing communication devices and methods that incorporate this technology, one may send and re-send data that is uniquely generated, based on user-inputted information. More specifically, one may utilize communications devices, processes, and/or software to transform certain inputs – e.g., user input and information associated with device identifiers – into a destination for the message. One may also utilize specially programmed processors to transform raw data into unique device identifier data, which is data or information that corresponds to identification of one or more physical object(s). Exemplary wireless communication devices that may be configured to implement the patented technology include cellular telephones, personal computers, and personal digital assistants. The '722 patent contemplates much more than a "method for storing and sending a message." Mot. at 1. Put another way, there is no fundamental law of nature, physical phenomena, or abstract idea that is taken from the public domain by virtue of the '722 patent.

The '722 patents disclose a total of forty-eight claims – seventeen independent claims and thirty-one dependent claims. Though Stragent believes that each of these forty-eight claims are not invalid under 35 U.S.C. § 101, notably, fifteen of these claims are software claims – claims of the type not addressed in the Federal Circuit's analysis in *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008) – and sixteen are apparatus claims – claims that easily meet the "machine or transformation test" and are obviously not abstract ideas.³ Common to each of these claims are

³ Claims 3, 17-21, 26, 27, 30, 41-45, and 48 are apparatus claims. Claims 4-6, 12-16, 24, 25, 29, 36-40 are software claims. The Federal Circuit indicated that, "we decline to adopt a broad exclusion over software or any other such category of subject matter beyond the exclusion of claims drawn to fundamental principles set forth by the Supreme Court." *Bilski*, 545 F.3d at 960. Regarding the apparatus claims, Stragent does not dispute that § 101 analysis

various terms and limitations that, when read as a whole, contemplate a transformation of a particular article into a different state or thing, a connection to a particular thing or apparatus, or both. Likewise, none of the claims of the '722 patent discloses an abstract idea.

Claims twelve and twenty-four are exemplary of the software claims of the '722 patent and provide as follows:

12. A computer-readable medium containing instructions for controlling at least one processor to perform a method of providing an identifier for a communication device, the method comprising:

inputting at least one of auditory, pictorial and video information into the communication device;

converting said at least one of auditory, pictorial and video information into device identifier data; and

storing said device identifier data in a memory of said communication device.

24. A computer-readable medium containing instructions for controlling at least one processor to perform a method of sending a message to one or more recipients in a communications network, the method comprising:

retrieving device identifiers from a list of device identifiers stored in a memory of a first communication device, said device identifiers comprising at least one of audio, pictorial and video data,

presenting the at least one of audio, pictorial and video data to a user of the first communication device in auditory or visual,

receiving user input in response to said presentation,

designating a second communication device as a destination for the message based on said user input, and

sending the message to the second communication device.

Claim seventeen is exemplary of the apparatus claims of the '722 patent and provides as follows:

17. A communication device comprising:

a memory;

an input device configured to receive at least one of auditory, pictorial and video information; and

a processor configured to:

convert said at least one of auditory, pictorial and video information into device identifier data, and

applies equally to method and apparatus claims; however, it is readily apparent that the apparatus claims of the '722 patent easily meet the "machine or transformation test" and are not abstract ideas.

- phenomena of nature, mental processes, and abstract intellectual concepts are not patentable;
- transformation and reduction of an article to a different state or thing is the clue to the patentability of a process claim that does not include particular machines;
- the machine-or-transformation test is not the sole test for determining patentability; and
- although the machine-or-transformation test is not the only test for patentability, this by no means indicates that anything which produces a useful, concrete, and tangible result, is patentable.

In re Bilski, 130 S.Ct. 3218, 3258-59 (2010). In reality, the Supreme Court did not substantially alter the landscape of the law—“[r]ather than adopting categorical rules that might have wide-ranging and unforeseen impacts, the Court resolves this case narrowly on the basis of this Court’s decisions in *Benson*, *Flook*, and *Diehr*, which show that the petitioners’ claims are not patentable processes because they are attempts to patent abstract ideas.” *Id.* at 3229.⁴ See also “*Interim Guidance for Determining Subject Matter Eligibility for Process Claims in View of Bilski v. Kappos*,” attached as Ex. A to Stragent’s Response (“Since claims directed to abstract ideas were not patent-eligible prior to *Bilski*, subject matter eligibility outcomes based on the *Interim Bilski Guidance* are not likely to change in most cases.”) (emphasis in original). Furthermore, as suggested by the Court in *LML Patent Corp. v. JP Morgan Chase & Co.*, Case No. 2:08-CV-448, at *6 (E.D. Tex. Sep. 20, 2010) (Dkt. No. 613) (J. Folsom), “the key task in

⁴ “*Benson* rejected what the Court characterized as an attempt to ‘wholly pre-empt [a] mathematical formula and in practical effect . . . patent . . . the algorithm itself.’” *LML Patent Corp. v. JP Morgan Chase & Co.*, Case No. 2:08-CV-448, at *8 (E.D. Tex. Sep. 20, 2010) (Dkt. No. 613) (quoting *Bilski*, 130 S.Ct. at 3230) (citing *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)). “*Flook* stated that the prohibition against patenting abstract ideas ‘cannot be circumvented by attempting to limit the use of the formula to a particular technological environment’ or adding ‘insignificant postsolution activity.’” *LML Patent Corp.*, Case No. 2:08-CV-448, at *8 (quoting *Bilski*, 130 S.Ct. at 3230); see *Parker v. Flook*, 437 U.S. 584 (1978). “*Diehr* explained that while an abstract idea, law of nature, or mathematical formula could not be patented, ‘an application of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection.’” *LML Patent Corp.*, Case No. 2:08-CV-448, *8-9 (citing *Bilski*, 130 S.Ct. at 3230); see *Diamond v. Diehr*, 450 U.S. 175 (1981).

evaluating a claim for patentable subject matter is resolving the point of generality at which a claim collapses into an underlying abstract idea and thereby become unpatentable.” *Id.* at *10.

Additionally, Classmates does not meet or address its burden to invalidate each of the forty-eight claims of the ‘722 patent under 35 U.S.C. §101. “A patent shall be presumed valid.” 35 U.S.C. § 282. By presenting its motion for invalidity of the ‘722 patent as a motion to dismiss, Classmates cannot avoid this presumption and its attendant burden of clear and convincing evidence. “Because [the patent] is an issued patent, the Court assumes that the statutory presumption of validity applies and that [the defendant] bears the burden of showing invalidity by clear and convincing evidence.” *LML Patent Corp.*, Case No. 2:08-CV-448, at *6 (denying a motion for summary judgment because the defendant “failed to show by clear and convincing evidence that [the claims of the patent-in-suit] . . . violate[d] the patentable subject matter requirements of Section 101”).⁵

With these guidelines in mind, Stragent now turns to the merits of Classmates’ substantive discussion regarding the patentability of the claims of the ‘722 patent.⁶

1. The Claims of the ‘722 Patent are Tied to a Particular Machine or Apparatus

Classmates asserts that “[t]he method claims fail the first prong of the [machine test] because they include no reference to any *particular* machine.” Mot. at 18 (emphasis in original). Embedded within each claim of the ‘722 patent, however, are a number of terms that require, either expressly or inherently, that each claim as a whole is tied to a particular machine or apparatus. Classmates either disregards or summarily rejects the repeated recitations of a number of “particular machines,” including, for example, a “communication device,” a

⁵ Classmates’ discussion of a lesser standard is not persuasive. See *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

⁶ The following analysis applies equally to each of the forty-eight claims of the ‘722 patent.

“memory,” a “device identifier,” or a “processor.”⁷ See ‘722 Patent at cls. 1, 3, 4, 7, 12, 17, 22, 24, 26, 28, 29-31, 36, 41, 46, and 48. As suggested by the ‘722 patent, the “communication device” of the ‘722 patent may include:

[a] cellular phone, a personal or portable computer, a personal digital assistant (PDA) or the like . . . [and] includes an antenna . . . , a wireless transceiver . . . , an output device . . . , an input device . . . , a processing unit . . . , a Random Access Memory . . . , a Read Only Memory . . . , a bus . . . , a vibration transducer . . . , a digital-to-analog (D/A) converter . . . , an analog-to-digital (A/D) converter . . . , a speaker . . . , and a microphone.

‘722 Patent at 3:56-65; see also *id.* at 4:10-12 (“Processing unit . . . performs all data processing functions for inputting, outputting, and processing data.”).

Classmates ignores the language of the claims and argues that mere recitation of a “general purpose computer” alone is not sufficient to satisfy the machine prong of the *Bilski* machine-or-transformation test. Mot. at 18-19. In fact, the claims of the ‘722 patent do not simply recite a general purpose computer; as an example, some claims recite a special purpose computer in that they call for a software program for controlling a processor to perform particular functions based on the software program. See *IP Innovation, LLC v. Red Hat, Inc.*, 2009 U.S. Dist. LEXIS 69682, *25 (E.D. Tex. Aug. 10, 2009) (J. Davis) (“A general purpose computer, or microprocessor, programmed to carry out an algorithm creates a new machine, because a general purpose computer in effect becomes a special purpose computer once it is programmed to perform particular functions pursuant to instructions from program software.”).⁸

⁷ Classmates’ reliance on *Benson* is inapposite in this context. *Benson* discussed the patentability of claims disclosing a method of “convert[ing] binary signals from binary-coded decimal form into pure binary form.” *Benson*, 409 at 63. The claims of the application at issue in *Benson*, unlike the claims of the ‘722 patent, disclosed a simple mathematical algorithm, that happened to take place in a general purpose computer. In essence, the algorithm could be performed by hand, “without a computer.” *Id.* at 63; see also *LML Patent Corp.*, Case No. 2:08-CV-448, at *12 (citing *Benson* in its analysis of the machine prong). Classmates does not suggest that the claims of the ‘722 patent can be performed in the absence of some type of computing device, such as a cell phone, personal computer, etc.

⁸ Classmates’ reliance on *Dealertrack* and *Ex parte Mitchell* is also inapposite in this context. In *Dealertrack*, the Court found, after construing the claims, that the patent-in-suit did “not specify precisely how the computer

For example, claim twenty-four discloses a specially programmed processor that is configured to control at least one processor for performing at least the following functions: retrieve device identifiers that are stored in memory; present the audio, pictorial and video data to a user of a communications device in auditory or visual form; receive user input; designate a second communication device; and send the message to the second communication device. '722 Patent at cl. 24. As another example, the specially programmed processors are configured to convert the auditory, pictorial, and video information into device identifier data, which is data or information that corresponds to identification of one or more physical object(s). *See, e.g., '722 Patent, cls. 7, 12 & 17.*

Additionally, each of the steps of the method claims are “performed on, or by” the claimed “particular machines.” *Compare, e.g., Ex Parte Mitchell*, No. 2009-6599 (B.P.A.I. Feb. 23, 2009) (finding that recitation of memory in the preamble, “[a] method for *identifying . . . in the memory . . .*” was inadequate) (emphasis added) *with '722 Patent at cl. 24* (disclosing, “one *processor to perform* a method . . .”) (emphasis added). *Classmates'* motion concedes as much, stating, “all of the steps claimed in the [*'722*] patent, at best . . . recite a method performed on a programmed computer . . .” *Mot. at 1*. Indeed, the claimed “machines” – e.g., “communication device,” a “memory,” a “device identifier,” a “processor,” or a programmed computer – are inextricably intertwined within the claims of the '*722* patent.

hardware . . . [is] specially programmed, and the claimed central processor is nothing more than a general purpose computer that has been programmed in some unspecified manner.” *Dealertrack, Inv. v. Huber*, 657 F. Supp. 2d 1152, 1156 (C.D. Cal. July 7, 2009) (internal quotes omitted). Unlike the patent in *Dealertrack*, the '*722* patent discloses a “[p]rocessing unit [within the communication device] . . . [that] performs all data processing functions.” '*722 Patent at Figs. 12-21, 3:56 – 4:13*. Additionally, unlike the claims of the '*722* patent, the claims at issue in *Ex parte Mitchell*, did “not require that a computer do anything” and “require[d] no more than the human mind.” *Ex parte Mitchell*, No. 2008-2012 (B.P.A.I. Feb. 23, 2009). *See also Ex Parte Proudler*, No. 2009-6599 (B.P.A.I. July 8, 2009) (finding that, in the rejected claims, “no true hardware structure is recited”), and *Ex Parte Birger*, No. 2009-6556 (B.P.A.I. July 13, 2010) (“[N]o computer is directly claimed either in the preamble or the body of the claims.”).

For example, claim thirty-one requires “receiving a message at the first communication device.”⁹ The method is, therefore, tied to a communication device, which itself is obviously a machine, and further tied to the hardware and/or software required to receive a message. Perhaps most clearly, the “presenting of the . . . audio, pictorial and video data to a user of the first communication device *in auditory or visual form*”¹⁰ necessarily ties the method to a graphical or audio enabled aspect of a machine to perform the presenting. Additionally, “receiving user input in response to said presentation”¹¹ will necessarily tie the method to the mechanical ability of the “communication device” (which is, of course, a machine itself) to accept the “user input.”

Because each of the claims of the ‘722 patent are tied to a particular machine, via either a “communication device,” a “memory,” a “device identifier,” a “processor,” or a programmed computer, the machine prong is satisfied.

2. The Claims of the ‘722 Patent Transform a Particular Article Into a Different State or Thing

Largely ignored by *Classmates*, each of the claims of the ‘722 patent, when read as a whole, also transforms a particular article into a different state or thing. Moreover, in its application of the transformation prong to the claims of the ‘722 patent, *Classmates* fails to acknowledge the analyses of Courts within this District.

As a primary example, there should be no legitimate dispute that claims seven, twelve, and seventeen require transformation of “device identifiers” into “audio, pictorial and video data.” Each of claims seven, twelve, and seventeen disclose, “a processor configured to: **convert** said at least one of auditory, pictorial and video information into device identifier data . .

⁹ See also ‘722 Patent at cl. 36.

¹⁰ See also *id.* at cls. 1, 3, 22, 24, 36 & 46.

¹¹ *Id.*

..” ‘722 Patent, cls. 7, 12 & 17 (emphasis added). A device identifier is data or information that corresponds to identification of one or more physical object(s) – e.g., an identified device. *See, e.g., id.* at 4:35 – 5:9. Indeed, the specification discloses a digital-to-analog (D/A) converter (which includes “circuitry for converting digital audio signals from digital to analog signal form”); an analog-to-digital (A/D) converter (which includes circuitry for “converting analog audio input signals . . . to digital signal form”); and a microphone (which includes “a conventional mechanism for converting auditory input into analog signals”). ‘722 Patent at 4:21-32.¹²

That the above transformation, intrinsic to the claims of the ‘722 patent, meets the transformation prong is additionally supported by the Federal Circuit’s discussion in *In re Bilski* and subsequent analyses by Courts within this District.

[In *Abele*], we held unpatentable a broad independent claim reciting a process of graphically displaying variances of data from average values. That claim did not specify any particular type or nature of data; nor did it specify how or from where the data was obtained or what the data represented. In contrast, we held one of *Abele*’s dependent claims to be drawn to patent-eligible subject matter where it specified that “said data is X-ray attenuation data produced in a two dimensional field by a computed tomography scanner.” This data clearly represented physical and tangible objects, namely the structure of bones, organs, and other body tissues. Thus, the transformation of that raw data into a particular visual depiction of a physical object on a display was sufficient to render that more narrowly-claimed process patent eligible.

In re Bilski, 545 F.3d at 962-63 (internal citations omitted) (citing *Abele*, *Meyer*, *Grams*, *Arrhythmia Research Technology, Inc. v. Corazonix Corp.*, 958 F.2d 1053 (Fed. Cir. 1992)); *see also Abstrax, Inc. v. Dell, Inc.*, 2009 U.S. Dist. LEXIS 93605, *5-12 (E.D. Tex. Oct. 7, 2010) (J. Folsom) (adopting J. Everingham’s Report and Recommendation); *see id.* at Case No. 2:07-CV-221, Dkt. No. 224 (J. Everingham’s Report and Recommendation). In *Abstrax*, both the District

¹² Each of these components are disclosed as comprising at least a portion of a “communication device” in one embodiment. *See* ‘722 Patent at 3:53-65.

Court Judge and the Magistrate Judge applied the above analysis to a method claim directed towards “a method for assembling a product.” *Abstrax*, 2009 U.S. Dist. LEXIS 93605, *7-8. Both Courts appropriately held, pursuant to *In re Bilski*, that “the raw data is transformed into assembly instructions for assembling the product to have the requested configuration.” *Id.* at 2009 U.S. Dist. LEXIS 93605, *11. Much like the claim in *Abele* and *Abstrax*, claims seven, twelve, and seventeen of the ‘722 patent transform raw data (e.g., “auditory, pictorial and video information”) into device identifier data, which is data or information that corresponds to identification of one or more physical object(s).

Claim twenty-four also exemplifies another transformation accorded merit under *Abele*, *Bilski*, and *Abstrax*. Claim twenty-four discloses a computer-readable medium containing instructions for controlling a specially programmed processor that retrieves device identifiers. The identifiers can be comprised of audio, pictorial, or video data. The instructions cause the processor to present the audio, pictorial, or video data to a user in visual form. In other words, the instructions cause the processor to receive raw data or information that corresponds to identification of one or more physical object(s) and then transform that raw data into a format suitable for presentation in visual or auditory form. Additionally, claim twenty-four requires the ability to “designate a second communication device” based on “user input.” Such a process will necessarily require instructions to cause the processor to control the transformation of data input by the user into a format readable by the communication device for making such a designation. As another example, claim forty-six calls for “transmitting a request,” wherein the request includes a device identifier. Such a process will necessarily require the transformation of a request message and a device identifier into a request signal/information that is sent to a “second communication device.”

As yet another example, it should be equally apparent that information associated with a device identifier and user input disclosed in certain claims are paired and transformed into a destination for the message. ‘722 Patent, cl. 24. See ‘722 Patent at cls. 1, 3, 4, 22, 24, 26, 28, 29-31, 36, 41, 46, and 48. That this transformation also passes muster is apparent by analogizing the above claims to the Court’s discussion in *LML Patent Corp.*

An exemplary claim at issue in *LML Patent Corp.* discloses as follows:

67. A method of processing consumer payment from a checking account comprising:
receiving **account information** via a communication network, the account information relating to a checking account;
storing the account information;
verifying the account information;
receiving **transaction event information**;
storing the transaction event information; and
transmitting the account information and the transaction event information to a financial institution to **initiate an electronic funds transfer**.

Id. at Case No. 2:08-CV-448, at *3 (emphasis added). Assessing the above claim in light of the transformation prong, the Court reasoned that, “[t]wo distinct sets of information, namely the account information and the transaction event information, are transformed into a request for an electronic funds transfer.” *Id.* at Case No. 2:08-CV-448, at *12.

Much like in *LML Patent Corp.*, for each of the above claims, at least two distinct sets of information – the device identifier data and user input data – are transformed into a destination for the message for sending to the second communication device. See *LML Patent Corp.*, Case No. 2:08-CV-448, at *11-12.¹³ For example, claim twenty-four discloses a computer-readable medium containing instructions for controlling a specially programmed processor that receives

¹³ The Court’s analysis in *Ultramercial, LLC v. Hulu, LLC*, 2010 U.S. Dist. LEXIS 93453 (C.D. Cal. Aug. 13, 2010), is factually distinguishable. First, the plaintiff relied on “internet,” “facilitator,” and “storing on a memory” in support of the machine prong. Second, the claims did not disclose a transformation and the only argued transformation was a “transfer of data from one memory to another.” *Id.* at 2010 U.S. Dist. LEXIS 93453, *15. As discussed above, and unlike the claims at issue in *Ultramercial*, the claims of the ‘722 patent do not rely on such tenuous grounds.

both device identifier data and user input data in response to a visual or auditory presentation of the device identifier data. The instructions then cause the processor to transform both the user input data and the device identifier data into a destination for the message. *See* '722 Patent 4:35 – 5:45.

Each of the above examples clearly demonstrate that the claims of the '722 patent transform a particular article into a different state or thing.

3. The Claims of the '722 Patent Do Not Merely Recite an Abstract Idea

While the machine-or-transformation test is informative of patentability, it is not the sole test. Certainly, to the extent the Supreme Court, in *In re Bilski*, broadly affected the patentability analysis, it held that the “machine-or-transformation test” is not the exclusive test of patentability. *Bilski*, 130 S.Ct. at 3227. In this case, the claims of the '722 patent do not merely recite an abstract idea—i.e., they do not recite a matter prohibited by 35 U.S.C. § 101. For example, the claims do not recite a “mathematical equation,” a “new mineral,” a “new plant,” “Einstein’s celebrated law that $E=mc^2$,” or “the law of gravity.” *See LML Patent Corp.*, Case No. 2:08-CV-448, at *11-16 (citing *Diehr*, 450 U.S. at 187-88).

Further, the claims of the '722 patent disclose more than a mere series of algorithms. This is readily apparent by comparing the method claim at issue in a case cited by *Classmates*, *Perfect Web Tech., Inc. v. InfoUSA, Inc.*, 2008 WL 6153736 (S.D. Fla. 2008), with claim twenty-four of the '722 patent. Method claim one of *Perfect Web* recites as follows:

1. A method for managing bulk e-mail distribution comprising the steps:
 - (A) matching a target recipient profile with a group of target recipients;
 - (B) transmitting a set of bulk e-mails to said target recipients in said matched group;
 - (C) calculating a quantity of e-mails in said set of bulk e-mails which have been successfully received by said target recipients; and,
 - (D) if said calculated quantity does not exceed a prescribed minimum quantity of successfully received e-mails, repeating steps (A)-(C) until said calculated quantity exceeds said prescribed minimum quantity.

U.S. Patent No. 6, 631, 400 (“the *Perfect Web* patent”) at cl. 1; *Perfect Web Tech.*, 2008 WL 6153736, *9-10 (stating, “[c]laim 1 is merely a series of algorithms[;] [t]he first algorithm is matching profiles with data entries, the second is calculating how many e-mails have been received, and the third merely consists of repeating previous algorithms.”). A cursory review of the above claim reveals no ties to a particular machine, no transformation of an article, and no disclosure other than a simple and abstract series of algorithms. Further, claim one of the *Perfect Web* Patent could be performed by hand. *See Benson*, 409 U.S. at 67. Claim twenty-four of the ‘722 patent, however, consists of more than a series of algorithms “to make determinations as to when messages are stored and forwarded.” Mot. at 13. Such a statement omits entire limitations from the claim; disregards the transformation of data; and ignores the ties to a “device,” “processor,” and “memory.”

Likewise, the claims of the ‘722 patent do not collapse into a single point of generality. As exemplified by claim twenty-four, the patent discloses a complex, specially programmed computer system, programmed to receive information, transform the information into a format suitable for presentation on a first device, receive additional information from a user, and then transform those two sets of information into a destination for the message for transmission to a second device. As analogized to the claims at issue in *LML Patent Corp.*, the “retrieving,” “presenting,” and “receiving” steps “further take the claim beyond an abstract idea . . . regardless of whether these and other particular steps of the claims were themselves well-known.” *LML Patent Corp.*, Case No. 2:08-CV-448, at *12.

In sum, the claims of the ‘722 patent **do not** wholly pre-empt the act of “storing and/or forwarding messages,” as characterized by Classmates. Such an argument oversimplifies the claims and fails to appreciate their breadth and scope as enlightened by the specification.

B. This Motion Seeks to Prematurely Adjudicate the Validity of the Claims of the '722 Patent, Contrary to Both Federal Circuit Case Law and This District's Local Patent Rules

Classmates' substantive analysis relies on an improper and premature construction of the claims of the '722 patent, and such construction analysis is not suited for Classmates' Motion. In an attempt to define the scope of the claims in support of its arguments, Classmates ignores the language of the claims, places too much emphasis on the preferred embodiment, and relies heavily on attorney argument. Further, Classmates performs its improper claim construction analysis outside the boundaries and procedures as set forth by the District. Indeed, deciding Classmates' Motion necessarily requires this Court to construe the claims of the '722 patent in order to dismiss Stragent's complaint. As suggested by Classmates, "the steps claimed in the patent . . . just recite a method . . . that fails to impose any meaningful limits on the claim's scope" Mot. at 1 (emphasis added).

Where the scope and meaning of the claims are disputed, claim construction "is an important first step" in analyzing the validity of an issued patent pursuant to 35 U.S.C. § 101. *In re Bilski*, 545 F.3d at 951 (citing *State St. Bank & Trust Co. v. Signature Fin. Gr.*, 149 F.3d 1368, 1370 (1998) (noting that whether a claim is invalid under §101 "is a matter of both claim construction and statutory construction")). "While it is true that claim construction is a matter of law to be determined by the Court, the process for properly construing a patent claim is unsuited for a motion to dismiss." *Deston Therapeutics LLC v. Trigen Labs. Inc.*, 2010 WL 2773317 at *4 (D. Del. July 12, 2010). To determine the meaning of claims, Courts consider the patent, the prosecution history and extrinsic evidence. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317-18

(Fed. Cir. 2005); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995).¹⁴ As suggested aptly by the Maryland Court in *Technology Patent, LLC*:

Although the parties have not presented extrinsic evidence in their briefs, the Court sees no need for the parties to hamstring their arguments solely to resolve the claim construction issues at such an early phase of the litigation. Furthermore, the piecemeal arguments raised in various briefs have not afforded the parties a proper opportunity to assert their arguments in a coherent and complete fashion. In light of the size of this case, a better approach is to have the claim construction issues fully briefed and presented to the court at a later date.

Analysis pursuant to 35 U.S.C. § 101 requires claim construction and Classmates has not even begun to adequately address the scope of the claims under the applicable judicial constructs.¹⁵ As one example, Classmates summarizes the claims by pointing to the “Summary of the Invention” and concluding that “the ‘722 patent is for storing and/or forwarding messages . . . [t]hus, the invention as a whole is entirely abstract” Mot. at 11. In another example, Classmates summarily pronounces that, “if the unpatentable abstract idea of an algorithm to retrieve a machine address and store and forward messages under certain conditions is removed from the ‘722 claims, nothing patentable remains.” Mot. at 12. For each of its arguments, Classmates ignores the language of the claims as a whole and substitutes a proper analysis of the claims with self-serving attorney argument. Such myopic analysis and unilateral construction of

¹⁴ The prospective need for a Court to rely on extrinsic evidence in construing claims – evidence not available to them on a Rule 12(b)(6) motion – has also counseled many courts to decline construing claims on a motion to dismiss. See, e.g., *Deston Therapeutics*, 2010 WL 2773317 at *4; *Bird Barrier Am., Inc. v. Bird-B-Gone, Inc.*, 2010 WL 761241 at *2-3 (C.D. Cal. Mar. 1, 2009) (“Although claim construction is a matter of law for the Court to decide, claim construction is inappropriate at this state in the litigation.”) (internal cites omitted) ; *Tech. Patents, LLC v. Deutsche Telekom AG*, 573 F. Supp. 2d 903, 920 (D. Md. 2008) (“Consideration of extrinsic evidence is inappropriate in a 12(b)(6) ruling, as the inquiry is limited to the complaint and the documents attached thereto or incorporated by reference.”).

¹⁵ See *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317-18 (Fed. Cir. 2005) (urging courts to consider the claims, the specification, the prosecution history, and extrinsic evidence); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

the claims at issue short shrifts the full breadth of the scope and meaning of the claims of the '722 patent.¹⁶

The above points notwithstanding, at this point in the case, **no** infringement or invalidity contentions have been served, and **no** claim construction positions been exchanged pursuant to the Local Patent Rules. To allow Classmates to circumvent a necessary and proper step in the assessment of an invalidity defense – and effectively force claim construction outside the strictures of the Patent Local Rules – would frustrate the purposes for which the Patent Rules were created.¹⁷ In short, granting Classmates' Motion would turn the natural progression of crystallizing infringement and invalidity theories and issues – afforded by the Local Patent Rules – into an “exercise in futility.” *Teirstein*, 2009 U.S. Dist. LEXIS 125002 at *15.

As presented by Classmates, resolution of Classmates' Motion necessarily requires claim construction, which includes “the necessary inquiries . . . not appropriate for the motion to dismiss stage.” *Tech. Patents*, 573 F. Supp. 2d at 920 (denying motion to dismiss pursuant to 35

¹⁶ Classmates' analysis of the claims is further flawed because it fails to follow the Supreme Court and the Federal Circuit's admonition to focus on the “claim as a whole” and not on “any individual step or limitation.” *In re Bilski*, 545 F.3d at 958 (“[T]he [Supreme] Court has made clear that it is inappropriate to determine the patent-eligibility of a claim as a whole based on whether selected limitations constitute patent-eligible subject matter [I]t is irrelevant that any individual step or limitation . . . by itself would be unpatentable under § 101.” (citing *Diehr*, 450 U.S. at 188) (“It is inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis.”)). Instead of focusing on the entire claim, Classmates disregards claim elements, selects others, and attempts to apply the *Bilski* patent-eligibility guideposts to its selections. For example, Classmates alleges that the '722 patent is directed at “storing and/or forwarding messages[, and] [t]hus the invention as a whole is entirely abstract” Mot. at 11. However, this assertion disregards the complexity and breadth of the claims. The '722 patent discloses systems, apparatuses, software programs, and methods, each of which satisfy 35 U.S.C. § 101.

¹⁷ See, e.g., *Teirstein*, 2009 U.S. Dist. LEXIS 125002 at *7-17. In *Teirstein*, the Court denied the plaintiff's Rule 12(b)(6) motion to dismiss the defendant's counterclaim, requesting declaratory judgment of invalidity of the patent-in-suit. The Court denied the motion, indicating that, “[d]uring the early stages of the litigation, the Local Patent Rules require parties to serve Invalidity Contentions, which detail anticipating and obviating prior art; disclose grounds for indefiniteness; and include an claim chart regarding invalidity. [Granting the plaintiff's motion] would turn the Invalidity Contentions required by the Local Patent Rules into an exercise in futility.” *Teirstein* also reiterated, “this Court has adopted a Discovery Order which mandates disclosure of ‘the legal theories and, in general, the factual bases of the disclosing party's claims or defenses’ within thirty days after the Scheduling Conference . . . , further supporting the conclusion that pleadings serve the purpose of notifying opposing parties of claims, while discovery and pretrial hearings narrowed the issues and legal theories for trial.” *Id.* (citing *O2 Micro Int'l Ltd. v. Monolithic Power Systems, Inc.*, 467 F.3d 1355, 1365-66 (Fed. Cir. 2006)).

U.S.C. § 101); *see also Schreiber v. Eli Lilly & Co.*, 2006 U.S. Dist. LEXIS 13477, *17 (E.D. Pa. Mar. 27, 2006) (declining to construe claims of the asserted patent in the context of a Rule 12(b)(6) motion); *see also Yangaroo Inc. v. Destiny Media Technologies Inc.*, 2009 U.S. Dist. LEXIS 82052, *6-7 (E.D. Wis. Aug. 31, 2009) (same); *Cima Labs, Inc. v. Actavis Group HF*, 2007 U.S. Dist. LEXIS 41516, *9 (D.N.J. June 7, 2007) (same).

Adopting Classmates' analysis of the merits of invalidity at such an early stage of the case would circumvent the Local Patent Rules; frustrate the purposes for which Local Patent Rules were adopted; and demand that the Court engage claim construction without the benefit of full briefing and presentation from the parties.

For at least these reasons, the Court should deny Classmates' Motion.

C. Under the Fifth Circuit Standard for Rule 12(b)(6) Motions, This is Not an Appropriate Case for Dismissal Because the Information Within the Pleadings Does Not Dispose of the Dispute as a Matter of Law

“A motion to dismiss under Rule 12(b)(6) is purely procedural – not pertaining to patent law – and therefore the law of the regional circuit controls.” *Teirstein v. AGA Med. Corp.*, 2009 U.S. Dist. LEXIS 125002, *7-17 (E.D. Tex. 2009) (J. Love); *see Clear with Computers, LLC v. Hyundai Motor Am., LLC*, 2010 U.S. Dist. LEXIS 92408, *6 (E.D. Tex. Mar. 29, 2010) (J. Davis) (citing *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1355-56 (Fed. Cir. 2007)). A Rule 12(b)(6) motion to dismiss for failure to state a claim “is viewed with disfavor and is rarely granted.” *Morgan v. Plano Indep. Sch. Dist.*, 2007 WL 1030633 at *2 (E.D. Tex. March 22, 2007); *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009). “The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief.” *McZeal*, 501 F.3d at 1356. “In ruling on a Rule 12(b)(6) motion, a court construes the complaint in favor of the plaintiff and takes all pleaded facts as true.” *Boone v. Hollis*, 2010 U.S. Dist.

LEXIS 99740, *5 (E.D. Tex. Aug. 25, 2010) (J. Davis) (citing *Hernandez v. Moore*, 326 Fed. Appx. 878, 879 (5th Cir. 2009)). The Court may consider the pleadings, attachments to the pleadings, documents incorporated into the complaint by reference, and documents attached to Classmates' motion "if [those] documents are referred to in the plaintiff's complaint and are central to [its] claim." *Collins*, 224 F.3d at 498-99.

The dispute between Stragent and Classmates is a factually intensive patent litigation, and the material allegations pertaining to the defense of patentable subject matter have not been raised by Classmates in its pleadings. Consequently, there are no pertinent allegations on the record that would support Classmates' Motion. Classmates chooses to instead rely upon assertions in its Motion – e.g., that the claims “are nothing more than an unpatentable abstract idea,” that the steps of the method claims “just recite a method performed on a programmed computer that fails to impose any meaningful limitations on the claim’s scope,” or that the steps of the method claims, “do not purport to transform any article”. The only pleadings related to this Motion contain Stragent’s assertion that the USPTO duly and legally issued the ‘722 patent and nothing to the contrary. Complaint at ¶¶ 21, 20, and 17, respectively. “A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is to be evaluated **only** on the pleadings.” *Jackson v. Proconier*, 789 F.2d 307, 309-10 (5th Cir. 1986) (emphasis added) (citing 5C WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356, at 592 (1969)).

Moreover, Classmates bears the burden on a Rule 12(b)(6) motion of demonstrating that all material issues of fact have been put to rest in the pleadings. As stated in *Chatham Condominium Associations v. Century Village, Inc.*, 597 F.2d 1002, 1011 (5th Cir. 1979):

Because 12(b)(6) results in a determination on the merits at an early stage of plaintiff’s case, the plaintiff is afforded the safeguard of having all its allegations

taken as true and all inferences favorable to plaintiff will be drawn. The decision disposing (of) the case is then purely on the legal sufficiency of plaintiff's case: even were plaintiff to prove all its allegations, he or she would be unable to prevail.

(emphasis added). *See also Versata Software, Inc. v. Sun Microsystems, Inc.*, 2009 U.S. Dist. LEXIS 37811 (E.D. Tex. Mar. 31, 2009) (denying the defendant's Rule 12(c) motion for judgment on the pleadings under 35 U.S.C. § 101, stating, "[the defendant] has not met its burden to prove there are 'no disputed issues of material fact and only questions of law remain.'").¹⁸ Classmates' motion is not an appropriate application of Rule 12(b)(6). The material allegations of fact that Classmates relies upon in its Motion certainly were not admitted or even raised in Stragent's Complaint. These allegations appear in Classmates' Motion for the first time. Moreover, Stragent vigorously disputes each of these. Under controlling Fifth Circuit law, Rule 12(b)(6) has no applicability when there is a dispute outside of the four corners of the pleadings that must be resolved.

Taking Stragent's allegation that the '722 patent was duly and legally issued as true, the '722 patent is not invalid, and the Court should not dismiss Stragent's complaint. Classmates has provided no pertinent evidence and/or binding case law to the contrary and, accordingly, the inquiry ends pursuant to the standards established by the Fifth Circuit.

For at least these reasons, the Court should deny Classmates' Motion.

IV. Conclusion

In conclusion, the claims of the '722 patent do not claim an abstract idea pursuant to 35 U.S.C. § 101. Further, analysis under the machine-or-transformation test, although not dispositive, is "a useful and important clue" as to their patentability because each of the claims

¹⁸ "A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a Rule 12(b)(6) motion to dismiss." *Clear with Computers*, 2010 U.S. Dist. LEXIS 92408 at *6 (citing *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008)).

satisfy both the machine and transformation prong of the machine-or-transformation test, as articulated in *Benson*, 409 U.S. 63; *Flook*, 437 U.S. 584; and *Diehr*, 450 U.S. 175; see *Bilski*, 130 S.Ct. at 3221. Additionally, not only is Rule 12(b)(6) an improper procedural mechanism for determining invalidity, but determining invalidity at this time is premature.

For all of the foregoing reasons, Stragent respectfully requests that the Court deny Classmates' Motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to 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). Any other counsel of record will be served by facsimile transmission and/or first class mail on December 2, 2010

/s/ Mark Dunlinson

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