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Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

Case No. 2:10-cv-01385-MJP

v.

**INTERVAL LICENSING LLC
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED**

AOL, INC.; APPLE, INC.; eBAY, INC.;
FACEBOOK, INC.; GOOGLE INC.;
NETFLIX, INC.; OFFICE DEPOT, INC.;
OFFICEMAX INC.; STAPLES, INC.;
YAHOO! INC.; AND YOUTUBE, LLC,

Defendants.

JURY DEMAND

Plaintiff Interval Licensing LLC (“Interval”) responds to the motion to dismiss for failure to state a claim filed by defendants Google Inc. and YouTube LLC. and joined by the other defendants in this litigation (the moving parties are referred to collectively in this brief as “Google.”)

INTRODUCTION

With service of detailed infringement contentions only a few weeks away, Google seeks dismissal of the Complaint in this case because it fails to state a claim of patent infringement with sufficient specificity for Google to prepare its defense. (Br. at 2:11-13).

The motion is nothing more than a delay tactic. Any alleged vagueness in the Complaint—

1 which conforms to well-established patent practice—will be cured by Interval’s
2 infringement contentions. Google faces no meaningful prejudice from the nature of the
3 allegations in the Complaint. Google and its fellow defendants seek only to slow the
4 progress of this case on the merits through a distracting sideshow of baseless procedural
5 objections.
6

7 To make its argument for dismissal, Google misstates the applicable legal standard
8 and misreads Interval’s Complaint. Google insists that the Supreme Court’s 12(b)(6)
9 decisions in *Twombly* and *Iqbal* have re-written the rules of patent pleading. Google fails to
10 acknowledge that there is no binding authority adopting this view of *Twombly* and *Iqbal*,
11 and other District Courts have been inconsistent, at best, in the application of these
12 precedents to patent cases.
13

14 Google also repeatedly insists that Interval’s Complaint fails to name the accused
15 products. Again, Google is wrong. The Complaint explicitly alleges that each of the
16 defendants’ websites, and associated software and hardware, perform specified functions
17 claimed in Interval’s patents. The Complaint could not be more clear that the websites are
18 the accused products, that they are accused because they execute certain functions, and that
19 the associated hardware and software which allows the websites to perform these functions
20 is also accused.
21

22 Google’s argument that the Complaint in this case is too vague to allow it to prepare
23 a response is utterly without merit. This motion should be denied.
24

25 **BACKGROUND**

26 Interval filed its Complaint in this case on August 27, 2010, asserting claims for
27 patent infringement against eleven defendants. As explained in the Complaint, Plaintiff
28

1 Interval Licensing is the assignee of Interval Research, a high-tech research company
2 founded in 1992 by Paul Allen and David Liddle. Interval Research focused its
3 development efforts on consumer-oriented applications with a pioneering emphasis on the
4 Internet.

5 Interval's Complaint asserts claims of infringement under four patents, each of
6 which protects technology developed by engineers at Interval Research in the mid- or late-
7 1990s. All four of the patents describe advances in methods of displaying information,
8 typically displaying information to users of computer systems. Since the 1990s, when
9 engineers at Interval first developed these techniques, they have been adopted by a wide-
10 range of businesses, including the eleven defendants in this case.

11 Interval's Complaint properly alleges this Court's jurisdiction and Interval's
12 ownership of the patents-in-suit. Cmpl't ¶¶ 13, 19, 31, 37, and 43. Google does not
13 challenge the sufficiency of these allegations but argues that the Complaint's allegations that
14 Google's products infringe the four named patents are so lacking in specificity that Google
15 (and the other defendants who have joined the motion) are unable to prepare a response and
16 the Complaint must therefore be dismissed under Fed. R. Civ. P. 12(b)(6). The defendants
17 are wrong about the standard and wrong about the content of this Complaint.

18 ARGUMENT

19 **A. Motions to Dismiss a Complaint Are Disfavored and Must Meet a 20 Strict Standard.**

21 Notice pleading has long been a bedrock principle of the Federal Rules. Federal
22 Rule of Civil Procedure 8(a) requires only a "short and plain statement of the claim showing
23 that the pleader is entitled to relief," in order to "give the defendant fair notice of what the .
24

1 . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
2 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

3 Because the standard for pleading a claim is minimal, the standard for granting a
4 motion to dismiss for failure to state a claim is correspondingly strict. Motions to dismiss at
5 the pleading stage are “viewed with disfavor and are rarely granted.” *Eriksen v. Serpas*,
6 2009 WL 2406171 at *1 (E.D. Wa. 2009) (citing *Hall v. City of Santa Barbara*, 833 F.2d
7 1270 (9th Cir. 1986)). The Complaint is construed in the plaintiff’s favor and all non-
8 conclusory facts are accepted as true. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009).
9

10 **B. *Twombly* and *Iqbal* Have Not Altered the Notice Pleading**
11 **Requirements for Patent Cases.**

12 The requirements for pleading a claim of patent infringement consistent with Rule
13 8(a) are demonstrated by the template patent complaint contained in the Appendix of Forms
14 to the Federal Rules of Civil Procedure. Form 18 contains only four short paragraphs of
15 factual allegations: (1) statement of the court’s jurisdiction; (2) a statement of the date of
16 issuance and plaintiff’s ownership of the patents; (3) a statement that the defendant is
17 infringing the patents by “making selling, and using [specified devices] that embody the
18 patented invention and the defendant will continue to do so unless enjoined by this court”;
19 and (4) a statement that the plaintiff has complied with notice requirements. This standard
20 has governed the pleading of patent cases for years with no apparent impairment of
21 defendants’ ability to answer the complaint or prepare a proper defense.
22
23

24 Google’s motion is premised on the argument that the Supreme Court’s recent
25 decisions in *Twombly* and *Iqbal* radically revised the pleading requirements for patent
26 infringement claims, effectively invalidating the notice pleading exemplified by Form 18.
27

28 *Twombly* and *Iqbal* established a plausibility standard for pleadings under Rule 8(a) and held

1 that a Complaint must contain sufficient non-conclusory factual allegations to render the
2 plaintiff's claim "plausible." See *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at
3 556.) The standard was first described in *Twombly*, but *Iqbal* clarified that it applied to any
4 civil case. *Iqbal*, 129 S.Ct. at 1953. *Iqbal* emphasized that the plausibility analysis on a
5 motion to dismiss should be "a context specific task." *Id.* at 1950.

7 Proper application of these principles in the *patent* context remains an open issue.
8 Neither *Twombly* nor *Iqbal* addressed patent claims or, for that matter, intellectual property
9 claims of any sort. *Twombly* was an anti-trust case involving allegations that defendants had
10 conspired to divide markets and keep out new entrants and *Iqbal* was a *Bivens* action
11 alleging that the plaintiff prisoner had suffered physical abuse while in Federal custody. See
12 *Twombly*, 550 U.S. at 550-51; *Iqbal*, 129 S.Ct. at 1943-44.

14 Price-fixing and prisoner abuse allegations are inherently different from patent
15 infringement in many ways, including the types of allegations necessary to render the claim
16 plausible. But the courts have not definitively addressed "context specific" implementation
17 of the *Twombly* plausibility test in patent cases, as mandated by *Iqbal*. In particular, there
18 has been no determination that the notice pleading standard exemplified by Form 18 no
19 longer satisfies Rule 8(a). No Circuit Court has applied *Twombly* or *Iqbal* to a patent case
20 and held that those decisions invalidate Form 18.¹ The only Circuit-level authority on the
21 issue is a Federal Circuit case decided after *Twombly* but before *Iqbal* that expressly upheld
22 the continuing validity of Form 18 and notice pleading in patent cases. *McZeal v. Sprint*
23
24
25

26 ¹ Google argues that the Federal Circuit "questioned" whether compliance with Form
27 18 remains sufficient to state a claim for patent infringement. The unreported case on which
28 Google relies for this point says only, in a footnote, that Form 18 is inapplicable to a claim

1 *Nextel Corp.*, 501 F.3d 1354, 1356-57 (Fed. Cir. 2008). Since *Iqbal*, some district courts
2 considering the issue have questioned the continued validity of Form 18 as a template,
3 others have reaffirmed it. *Compare, Bender v. LG Electronics USA, Inc.*, 2010 WL 889541,
4 *5 (N.D. Cal.) (questioning the continuing viability of Form 18); *with Ware v. Circuit City*
5 *Stores, et al.*, 2010 WL 767094, *2 (N.D. Ga.) (citing Form 18 as a complaint that “meets
6 the requirements of Rule 8”).
7

8 Google would replace notice pleading with a requirement that the Complaint contain
9 a detailed explanation of *how* the allegedly infringing product satisfies each of the claim
10 limitations contained in the patents in suit (*see, e.g.*, Br. at 6:9-10). Several context specific
11 factors in patent cases suggest that such detailed claim-by-claim analysis is not necessary or
12 justified at the pleading stage.
13

14 First, at least in this District and in most districts with patent-specific local rules,
15 plaintiffs are required to provide a more detailed description of their infringement
16 allegations in their initial infringement charts very early in the litigation. These more
17 detailed early disclosures of infringement contentions undermines Google’s overwrought
18 claim that it would be “impossible” for it to “reasonably prepare a defense” to the current
19 Complaint. (Br. at 2:12-13). *See PA Advisors v. Google, Inc.*, 2008 WL 4136426 at *6
20 (E.D. Tex). Requiring patent plaintiffs to incorporate infringement charts in every
21 complaint would be duplicative and unwieldy and would extend *Iqbal* to the point of
22 virtually eliminating the principle of notice pleading in patent cases.
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28 involving a design patent and that the form has not been updated since *Iqbal*. *Colida v.*
Nokia, Inc., 347 Fed.Appx. 568, 571 n.2 (Fed. Cir. 2009).

1 Second, the extensive disclosure contained in patents themselves (which in this case
2 are attached to the Complaint) provide additional detail supporting allegations of
3 infringement in a patent complaint. As a result of the specification and claim language in
4 any patent, defendants and their counsel are provided with a level of detail about the
5 allegations in patent cases that goes far beyond that provided in almost any other kind of
6 case.
7

8 Third, requiring patent plaintiffs to accurately plead infringement based on a detailed
9 understanding of the operation of the defendant's accused product would erect an
10 unjustifiable barrier to enforcement of patent rights. The Federal Circuit has rejected the
11 argument that patent complaints must describe how the accused device satisfies each
12 limitation of each asserted claim, and it has reiterated this position in a decision issued after
13 *Twombly*. *McZeal*, 501 F.3d at 1357 (citing *Phonometrics, Inc. v. Hospitality Franchise*
14 *Sys. Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000)). Notably, the Circuit Court recognized the
15 importance of allowing the plaintiff to develop evidence in discovery about how the
16 infringing device works. *Id.* at 1358. Detailed knowledge about the operation of the
17 defendant's products is uniquely within the defendant's possession. Requiring the plaintiff
18 to somehow obtain this level of detail about the defendant's products *before* bringing suit
19 would prevent many patent owners from asserting legitimate claims because infringers
20 manage to conceal details about how their products function.
21
22

23
24 Given these unique characteristics of patent litigation, *Twombly* and *Iqbal* should not
25 be interpreted to have modified the well-established notice pleading requirements for patent
26 cases, as exemplified by Form 18.
27

28 **C. Interval's Complaint Satisfies the Notice Pleading Requirements
of Fed. R. Civ. P. 8(a).**

1 Google complains repeatedly, indeed it is virtually the foundation of its motion, that
2 Interval has failed to identify the specific product that allegedly infringes. (Br. at 2:10-11,
3 13-14; 5:5, 25-26; 6:1-2, 21; 7:11-12, 19-20). Google insists that because Interval has not
4 identified any products, the Complaint fails to satisfy the notice pleading requirements
5 exemplified by Form 18, much less the heightened pleading standard Google contends
6 derives from *Twombly* and *Iqbal*. (Br. at 6:21-23).
7

8 Google misreads the Complaint and its characterization of the infringement
9 allegations is simply incorrect. Interval *has* identified, with specificity, particular products
10 that infringe Interval's patents. In most instances, the infringement is manifested by the
11 defendant's website and the Complaint states exactly that. For example, the '682 patent
12 protects technology that provides alerts to users about current information of interest to the
13 user. Defendants AOL, Apple, eBay, Facebook, Google, Netflix, Office Depot, OfficeMax,
14 Staples, Yahoo, and YouTube all operate websites that infringe claims in this patent by
15 providing such alerts to users. The Complaint alleges in each case that the defendant is
16 liable for "making and using websites and associated hardware and software to provide
17 alerts that information is of current interest to a user as claimed in the patent." The claimed
18 functionality is present in the websites operated by these defendants and so no more specific
19 disclosure of the accused "product" is necessary.
20

21 Google also argues that the Complaint is vague because it accuses both hardware and
22 software. (Br. at 6:1-2). In support of this argument, Google cites a case in which a patent
23 plaintiff accused products including:
24

25 without limitation, cell phones, computers, network drivers, high definition
26 television sets, ultrasound machines, MRI machines, lab equipment, arbitrary
27 waveform generators, audio amplifiers, video amplifiers, hard disc drives,
28

1 ADC/DAC converters, DVD-RW players, DSL modems, CCD cameras,
2 satellite communication technology, and other products where high
3 performance, high speed analog circuits are used, and/or components thereof.

4 *Bender v. LG Electronics USA, Inc.*, 2010 WL 889541 at *2 (N.D. Cal.) (cited in Br. at 6:2-
5 3). But Interval’s allegations are not remotely similar to this lengthy but seemingly random
6 laundry list of electronics (and “lab equipment”). Interval accuses hardware and software
7 not because Interval is unable to determine which of the two infringes, but because *both* do.
8 Interval’s patents include both claims that read on software and claims that read on
9 hardware. As the Complaint indicates, Interval will provide claim charts explaining how the
10 limitations of certain claims in the patents are met by software for each defendant who is
11 accused of operating infringing software, and how limitations of other claims are met by
12 hardware for each defendant who is accused of operating infringing hardware. Ironically,
13 this element of the pleading, which Google criticizes for vagueness, is an example of
14 precisely the sort of specificity Google claims to need in order to prepare a defense.
15
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17 Other cases cited by Google also fail to establish that the allegations here are
18 insufficient. The District Court for the Northern District of Georgia, for example, granted a
19 motion to dismiss a patent complaint that identified the accused products with no more
20 specificity than as “apparatuses covered by one or more claims of the ‘592 patent.” *Ware v.*
21 *Circuit City Stores, et al.*, 2010 WL 767094, *1 (N.D. Ga.) This allegation lacks the
22 specificity about the accused product provided by Interval’s allegation that the defendants’
23 websites and associated hardware and software infringe the patents. Similarly, a plaintiff
24 who alleged that the defendants “use of CYBON Systems infringes” one or more claims of
25 the patent in suit, without explaining what CYBON Systems is, how it works, or what
26 functionality is claimed by the patent, had not stated a claim sufficiently to withstand a
27
28

1 motion to dismiss. *Calif. Institute of Computer Assisted Surgery, Inc. v. Med-Surgical*
2 *Services, Inc.*, 2010 WL 3063132 (N.D. Cal.) Interval’s Complaint, by contrast, identifies
3 the product and provides an explanation of the functionality that infringes one or more
4 claims of the patent.

5 Interval’s allegations concerning the ‘652 and ‘314 patents—which are asserted
6 against only four of the eleven defendants in this case—do not accuse the defendants’
7 websites of infringement, but accuse “products that display information in a way that
8 occupies the peripheral attention of the user as claimed in the patent.” *See, e.g.*, Cmpl’t ¶ 32.
9 In context, and given that the patent itself is attached to and incorporated in the Complaint,
10 these allegations are sufficient to satisfy Rule 8 and to put defendants AOL, Apple, Google,
11 and Yahoo on notice about which features of which products are being accused of
12 infringement.
13
14

15 **D. If Necessary, Interval Will Provide a More Definite Statement**
16 **Incorporating Detailed Infringement Contentions.**

17 Google’s motion appears to serve no purpose other than delay. As a sophisticated,
18 repeat patent litigant, Google is well aware that it will receive a more detailed description of
19 Interval’s allegations in the initial infringement contentions. Under the Court’s scheduling
20 order, these infringement contentions will be due within weeks. Google has suffered no
21 cognizable prejudice from any claimed lack of specificity in Interval’s Complaint. Indeed,
22 Interval has agreed, at the defendants’ request, to refrain from serving any discovery
23 requests until two weeks after the initial infringement contentions are served.²
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27 ² Defendant Yahoo submitted a declaration from its in-house counsel in support of its joinder
28 with Google’s motion to dismiss claiming that Yahoo is unable to place a “litigation hold” on
destruction of potentially relevant documents because it is unable to identify the nature of the claims

1 If the Court determines that any of the allegations in the Complaint are not sufficient
2 to state a claim, Interval asks that instead of dismissing the case, the Court give Interval
3 leave to file a more definite statement incorporating the initial infringement contentions and
4 that the current calendar for the case be maintained.

5 **CONCLUSION**

6
7 For the reasons stated above, Interval respectfully requests that Google's motion to
8 dismiss for failure to state a claim be denied.

9 Dated: November 8, 2010

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26 asserted against it. This position is disingenuous at best; Yahoo is a sophisticated technology
27 company and the language in the complaint and language in the patents is more than sufficient to put
28 Yahoo on notice of the general scope of the claims. However, in the interest of compromise and of
moving this case forward, Interval will stipulate not to raise any spoliation arguments based on the
non-malicious destruction of documents caused by Yahoo's failure to impose a litigation hold
between the time of the filing of the Complaint and service of the initial infringement contentions.

INTERVAL OPPOSITION TO MOTION TO DISMISS

FOR FAILURE TO STATE A CLAIM

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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