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HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,

 Plaintiff,

 v.

AOL, INC, et al.,

 Defendants.

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

DEFENDANTS GOOGLE INC. AND
YOUTUBE, LLC’S REPLY IN
SUPPORT OF THEIR MOTION TO
DISMISS FOR FAILURE TO STATE
A CLAIM UPON WHICH RELIEF
CAN BE GRANTED PURSUANT TO
FED. R. CIV. P. 12(B)(6)

Note on Motion Calendar:

November 12, 2010
Oral Argument Requested

Defendants Google Inc. and YouTube, LLC (together “Google”), submit this reply in support of their motion to dismiss Interval Licensing LLC’s (“Interval”) Complaint for Patent Infringement (the “Complaint”) for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

Interval has asserted four patents containing nearly two hundred claims against eleven disparate Defendants, yet has failed to identify a single specific product that it accuses of infringement. If Interval has conducted the Rule 11 investigation it was required to perform before bringing its Complaint, it should easily be able to at least identify the specific products

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1 accused of infringement. It is Interval’s refusal to do so that necessitates this motion practice
2 and any resulting delay is squarely the fault of Interval.

3 Because the filing of a complaint begins the “litigation clock,” it is unfair to Google (and
4 the other Defendants) to allow this clock to run without notice being given as to what products,
5 services, or offerings are alleged to infringe. While Google can begin to investigate defenses
6 such as invalidity and unenforceability, Google cannot properly begin to analyze its non-
7 infringement defenses because Plaintiff has failed to identify accused products or services.
8 Plaintiff’s argument that the Local Rules require infringement contentions does not excuse or
9 mitigate the flaws in its Complaint. For example, the local rules of the Northern District of
10 California have similar infringement contention requirements and its courts have not hesitated to
11 dismiss deficient complaints regardless of this discovery device. *See generally, e.g., Bender v.*
12 *LG Elecs. U.S.A., Inc.*, No. 09-cv-02114, 2010 WL 889541 (N.D. Cal. Mar. 11, 2010);
13 *California Inst. of Computer Assisted Surgery, Inc. v. Med-Surgical Servs., Inc.*, No. 10-cv-
14 02042, 2010 WL 3063132 (N.D. Cal. Aug. 3, 2010); *Enlink Geoenergy Servs., Inc. v. Jackson &*
15 *Sons Drilling & Pump, Inc.*, No. 09-cv-03524, 2010 WL 1221861 (N.D. Cal. Mar. 24, 2010);
16 *Bender v. Motorola, Inc.*, No. 09-cv-1245, 2010 WL 726739 (N.D. Cal. Feb. 26, 2010).

17 I. ARGUMENT

18 A. Interval’s Complaint Does Not Identify a Specific Product Accused of 19 Infringement

20 Plaintiff does not dispute that a complaint for patent infringement must, in order to satisfy
21 the requirements of notice pleading, put a defendant on notice of both the patents alleged to be
22 infringed and the defendant’s products, services, or offerings that are alleged to infringe. (Dkt.
23 No. 123 at 4:17-21). Plaintiff’s argument that its disclosure of Google’s “website” as the
24 allegedly infringing instrumentality somehow satisfies the minimal standards of notice pleading
25 should be seen for what it is – a disingenuous and unproductive end-run around the requirements
26 of Rule 8 of the Federal Rules of Civil Procedure. Plaintiff’s allegations are fatally deficient and,
27 as a matter of black letter law, Plaintiff’s Complaint should be dismissed.

1 Plaintiff's argument with respect to continued sufficiency of Form 18 is a red herring –
2 Plaintiff has not satisfied even the minimal pleading requirements suggested by the form.
3 Moreover, as explained in Google's opening brief, following the Supreme Court decisions in
4 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("*Twombly*") and *Ashcroft v. Iqbal*, 129 S.
5 Ct. 1937 (2009) ("*Iqbal*"), several courts have questioned whether Form 18 is sufficient to meet
6 the pleading requirements for a patent infringement matter. (Dkt. No. 62 at 6:21-7:9).¹

7 Notwithstanding Interval's assertions to the contrary, generically referencing a website
8 (for only two of the four asserted patents) and other unspecified "products that display
9 information in a way that occupies the peripheral attention of the user as claimed in the patent"
10 (for the '652 and '314 patents), does not identify a specific product accused of infringement.
11 (Dkt. No. 123 at 8:17-22 & 10:5-14). Such generic statements that Google's "website" infringes
12 no more satisfies the requirement of notice pleading than if Plaintiff had accused a conglomerate
13 with allegations that it infringes because it manufactures "things."

14 Websites are not specific products. Even a cursory inspection of www.Google.com
15 shows that there are dozens if not hundreds of products and services accessible through Google's
16 numerous websites and webpages. (See, e.g., www.googlelabs.com and
17 www.google.com/intl/en/options). Interval's Complaint never identifies any specific products,
18 services, or offerings that it accuses of infringement. Thus, Interval has been no more specific in
19 its identification of the products accused of infringement, or the bases for such claims, than the
20 deficient plaintiffs in the cases cited in Google's opening brief. (Dkt. No. 62 at 5:1 to 7:9).

21 As part of its argument, Interval also suggests that its "website" allegations are sufficient
22 because "the patent itself is attached to and incorporated in the Complaint." (Dkt. No. 123 at
23 10). This argument is specious. Merely attaching the patent does not give a defendant notice of
24 what is accused of infringement. Even under the minimal pleading of Form 18, it is not
25

26 ¹ In this regard, Interval's reliance on *Ware v. Circuit City Stores, Inc.*, 4:05-CV-0156, 2010 WL 767094 (N.D. Ga.
27 Jan. 5, 2010), as suggesting that Form 18 is sufficient following the decisions in *Twombly* and *Iqbal*, is misplaced as
the court in *Ware* never even references the *Twombly* or *Iqbal* decisions.

1 sufficient to merely identify a patent without also identifying a specific product or offering
2 alleged to infringe the patent.

3 **B. Form 18 Does Not Supplant the *Iqbal* and *Twombly* Pleading Standards**

4 This Court need not address the question of whether Form 18 satisfies the pleading
5 requirements for a patent case in light of the Supreme Court’s decisions in *Twombly* and *Iqbal*
6 because Plaintiff’s Complaint fails to meet even the minimal requirements for pleading in a
7 patent case suggested by Form 18. Nevertheless, Plaintiff misstates the Federal Circuit’s holding
8 in *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007) (split decision). *McZeal* was
9 decided prior to the Supreme Court’s decision in *Iqbal* and involved the “low bar for *pro se*
10 litigants.” See *Koninklijke Philips Elecs. N.V. v. The ADS Grp.*, 694 F. Supp. 2d 246, 252 n.8
11 (S.D.N.Y. 2010) (“The decision in *McZeal*, however, was motivated by a (perhaps) misplaced
12 indulgence of the pleadings of a *pro se* plaintiff.”). Most importantly, the Federal Circuit in
13 *McZeal* never “expressly upheld the continuing validity of Form 18 and notice pleading in patent
14 cases” as Interval alleges. (Dkt. No. 123 at 5:21-24.) In fact, numerous courts have noted and
15 held to the contrary. See, e.g., *Bender v. Motorola, Inc.*, No. C 09-1245, 2010 WL 726739, at *3
16 (N.D. Cal. Feb. 26, 2010) (criticizing plaintiff for “misplaced” reliance on *McZeal* as “read[ing]
17 too much into” that case); *Bender v. LG Elecs. U.S.A., Inc.*, No. C 09-02114, 2010 WL 889541,
18 at *3 (N.D. Cal. Mar. 11, 2010) (discounting *McZeal*’s precedential authority because it was
19 decided before *Iqbal*). Interval’s Complaint, which does not even satisfy the requirements of
20 Form 18, much less the pleading requirements set forth in *Twombly* and *Iqbal*, should be
21 dismissed.

22 To compound Interval’s misstatement of the law, Interval tries to distinguish *Iqbal* as
23 factually inapposite because it was not a patent infringement case. (D.I. 123, at 5.) This
24 argument is meritless because, as Interval acknowledges, the Supreme Court in *Iqbal* held that
25 the plausibility pleading standards of *Twombly* “applied to any civil case.” (*Id.*) Therefore,
26 patent pleadings must be assessed in view of these Supreme Court cases.

1 **C. Interval’s Preliminary Infringement Contentions Are Not a Substitute for**
2 **Compliance with Rule 8**

3 Interval improperly suggests that providing preliminary infringement contentions
4 somehow supersedes its obligation to comply with Rule 8 of the Federal Rules of Civil
5 Procedure. (Dkt. No. 123 at 6:14-24, 10:17-11:4.) Interval cites no authority to suggest that
6 because this district has adopted local rules that require disclosure of infringement contentions
7 Rule 8 is no longer applicable. Common sense and Supreme Court precedent mandate the
8 contrary conclusion. *See, e.g., Iqbal*, 129 S. Ct. at 1950 (“Rule 8 ... does not unlock the doors of
9 discovery for a plaintiff armed with nothing more than conclusions.”) & 1953 (“[T]he question
10 presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the
11 controls placed on the discovery process.”).

12 Several courts, including the Northern District of California, have (for years) had patent
13 local rules that required certain disclosures as part of discovery. Nonetheless, as shown by the
14 decisions Google cited in its opening brief, courts in such districts have repeatedly dismissed
15 complaints that fell short of the pleading requirements of Rule 8. (Dkt. No. 62 at 5:15-16, 6:9-12
16 & 7:10-18.) Moreover, infringement contentions are due months after the complaint and Google
17 is already being prejudiced in the preparation of its defenses by not having a specific
18 identification of the products accused of infringement. If Interval has done the proper
19 investigation under Rule 11, it should have had no problem indentifying accused products with
20 specificity.

21 Interval’s self-serving proposal to have the Court pardon its deficient Complaint in favor
22 of preliminary infringement contentions should be rejected.

23 **D. Interval Could Avoid Any Alleged “Delay” by Amending Its Complaint Now**

24 Lacking legal authority for its other arguments, Interval tries to frame Google’s motion to
25 dismiss as a delay tactic. It is not.

26 Google simply seeks to have Interval comply with the Federal Rules by giving Google
27 notice, based on factual allegations rather than legal conclusions, of what it is that Google is

1 doing that is allegedly harming Interval. *Cf. Iqbal*, 129 S. Ct. at 1949 (“Threadbare recitals of
2 the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).
3 Interval’s Complaint provides no notice as to what Google (or any of the other named disparate
4 Defendants) does that purportedly infringes the patents-in-suit. Google is not seeking such
5 information for the purposes of delay; instead, Google is seeking such information so that it can
6 properly prepare its defenses, as is its right. Any delay caused by Interval’s failure to meet the
7 pleading requirements is both irrelevant and of Interval’s own making. If Interval was truly
8 concerned with delay, it should have pleaded sufficient facts in its original Complaint or
9 amended its Complaint immediately to conform to the requirements of Rule 8. Interval should
10 not now complain of a delay that it alone caused.

11 II. CONCLUSION

12 For the reasons stated above and in Google’s original motion to dismiss, the Court should
13 dismiss Interval’s Complaint against Google because Interval’s Complaint fails to meet the
14 pleading standards of Rule 8 of the Federal Rules of Civil Procedure.

15 DATED this 12th day of November, 2010.

16 STOKES LAWRENCE, P.S.

17
18 By: s/ Shannon M. Jost
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on November 12, 2010, I caused the foregoing DEFENDANTS GOOGLE
3 INC. AND YOUTUBE, LLC'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS
4 FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
PURSUANT TO FED. R. CIV. P. 12(b)(6) to be:

5 electronically filed with the Clerk of the Court using the CM/ECF system which will send
6 notification of such filing to the following:

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