

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

INTELLIGENT AGENCY, LLC,

Plaintiff,

v.

7-ELEVEN, INC.,

Defendant.

CIVIL ACTION NO.: 4:20-cv-185-ALM

JURY TRIAL DEMANDED

**RESPONSE OF PLAINTIFF INTELLIGENT AGENCY, LLC
TO DEFENDANT 7-ELEVEN, INC.'S MOTION
TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

TABLE OF CONTENTS

I. STATEMENT OF FACTS	1
II. THE AMENDED COMPLAINT FAR EXCEEDS THE THRESHOLD FOR SUFFICIENT PLEADING UNDER RULE 8(a)(2).	2
A. Rule 8(a)(2) Requires “A Short and Plain Statement of the Claim”	2
B. The Federal Circuit and District Courts have Repeatedly Rejected the Heightened Pleading Standard Advanced by Defendant.	5
C. The Element-by-Element Heightened Pleading Standard Proposed by Defendant has not Been Endorsed by this District.	8
D. The Detail Set Forth in the Amended complaint Goes Far Beyond the Requirements of Rule 8(a)(2).	12
E. Claim Construction is Not Appropriate at the Pleading Stage.	12
III. DEFENDANT’S MOTION SHOULD BE DENIED	15

TABLE OF AUTHORITIES

Cases

<i>Amgen Inc. v. Amneal Pharm. LLC</i> 945 F.3d 1368 (Fed. Cir. 2020).....	14, 15
<i>Ashcroft v. Iqbal</i> 551 U.S. 89 (2007).....	3, 4, 5, 6, 7
<i>Bell Atl. Corp. v Twombly</i> 550 U.S. 544 (2007).....	2, 3, 4, 5, 6, 7
<i>C & F Packing Co., Inc. v. IBP, Inc.</i> 224 F.3d 1296 (Fed. Cir. 2000).....	10
<i>Conley v. Gibson</i> 355 U.S. 41, 47 (1957).....	2
<i>Cywee Grp. Ltd. v. Huawei Device Co</i> No. 2:17-CV-495-WCB (E.D. Tex. Aug. 10, 2018).....	9
<i>DIFF Scale Operation Research, LLC v. MaxLinear, Inc.</i> Civ. No. 1:19-cv-2109-LPS-CJB, 2020 WL 2220031 (D. Del. May 7, 2020)	10, 11
<i>Disc Disease Sols. Inc. v. VGH Sols., Inc.</i> 888 F.3d 1256 (Fed. Cir. 2018).....	7, 8
<i>Encoditech, LLC v. Citizen Watch Co. of Am., Inc.</i> Civil Action No. SA-18-CV-1335-XR (W.D. Tex., June 25, 2019).....	9
<i>Erickson v. Pardus</i> 551 U.S. 89 (2007).....	3, 5
<i>Gestion Proche, Inc. v. Dialight Corp.</i> Civil Action No. 4:16-cv-0407 (E.D. Tex., May 1, 2017).....	13
<i>Hologram USA, Inc. v. Pulse Evolution Corp.,</i> No. 2:14-cv-0772-GMN-NJK, 2016 WL 199417 (D. Nev. Jan. 15, 2016)	4
<i>In re Bill of Lading Transmission & Processing Sys. Patent Litig.</i> 681 F.3d 1323 (Fed. Cir. 2012).....	4, 6, 13, 14
<i>Jones v. Bock</i> 549 U.S. 199 (2007).....	3
<i>K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.</i> 714 F.3d 1277 (Fed. Cir. 2013).....	4, 6, 7

<i>Lifetime Indus., Inc. v. Trim-Lok, Inc.</i> 869 F.3d 1372 (Fed. Cir. 2017).....	5, 7
<i>Macronix Intern. Co., Ltd. v. Spansion, Inc.</i> 4 F. Supp. 3d 797 (E.D. Va. 2014).....	10, 11
<i>Markman v. Westview Instruments, Inc.</i> 52 F.3d 967 (Fed. Cir. 1995).....	14
<i>McZeal v. Sprint Nextel Corp.</i> 501 F.3d 1354 (Fed. Cir. 2007).....	4, 6, 10
<i>Nalco Co. v. Chem-Mod, LLC</i> 883 F.3d 1337 (Fed. Cir. 2018).....	7, 8
<i>Parity Networks v. Cisco Systems, Inc.</i> Civ. Nos. 6:19-cv-207-ADA; 6:19-cv-209-ADA (W.D. Tex., July 26, 2019)	9
<i>Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.</i> 203 F.3d 790 (Fed. Cir. 2000).....	5, 6
<i>Script Sec. Solutions LLC v. Amazon.Com, Inc.</i> No. 2:15-CV-1030-WCB (E.D. Tex. Mar. 16, 2016)	3
<i>Semcon IP Inc. v. Kyocera Corp.</i> Civil Action No. 2:18-CV-00197-JRG (E.D. Tex., May 3, 2019).....	3
<i>SIPCO, LLC v. Streetline, Inc.</i> 230 F. Supp. 3d 351 (D. Del. 2017)	10, 11
<i>Skinner v. Switzer</i> 562 U.S. 521 (2011)	3, 7, 8
<i>Solocron Educ., LLC v. Healthstream, Inc.</i> Civ. Action No. 2:16-cv-16-JRG, 2016 WL 9137458 (E.D. Tex. June 7, 2016).....	9
<i>Super Interconnect Techs. LLC v. HP Inc.</i> Civ. No. 19-cv-0169-CFC, 2019 WL 6895877 (D. Del. Dec. 18, 2019).....	10, 11
<i>Uniloc 2017 LLC v. ZenPayroll, Inc.</i> Civ. No. 1:19-cv-1075-CFC-SRF (D. Del. July 23, 2020)	10, 12
<i>Uniloc USA, Inc. v. Avaya, Inc.</i> 6:15-cv-1168-JRG (E.D. Tex. May 13, 2016)	8
<i>Wooten v. McDonald Transit Assocs., Inc.</i> 788 F.3d 490 (5th Cir. 2015).....	4

Rules

FED. R. CIV. P. 84.....	7
FED. R. CIV. P. 8(a)(2).....	2, 5, 6, 13, 14, 15

I. STATEMENT OF FACTS

As set forth below, Intelligent Agency's original Complaint in this case set forth a "short and plain statement" pursuant to Rule 8(a)(2), which was sufficient in all respects to place Defendant on notice of the patents being asserted and of its infringing activity. After receiving the original Complaint, Defendant asked Intelligent Agency to supplement its Complaint with additional detail beyond what was included in the original Complaint. While Intelligent Agency was, and is, satisfied that the original Complaint was more than sufficient under Rule 8(a)(2), it nevertheless, in good faith and in the interest of moving the case forward without unnecessary delay, filed an Amended Complaint providing additional details as to Defendant's infringing activity.

Intelligent Agency was willing to engage with Defendant and amend its complaint in good faith, to plead beyond what is required by the law, in an attempt to avoid wasting this Court's time and energy on this issue. Plaintiff's Amended Complaint further identified and explained certain functional attributes of Defendant's infringing software, identified at least one claim infringed for each patent, and expressly addressed each and every element of each identified claim.

Unfortunately, Intelligent Agency's effort to accommodate Defendant and avoid bringing this matter before the Court was ultimately fruitless. Defendant insists upon a heightened pleading standard that is well in excess of the standards set forth in the relevant case law of the Federal Circuit and this Court. In essence, Defendant's position is that a Plaintiff has a burden to provide detailed *infringement contentions* within the body of its complaint. Neither the Federal Circuit nor this Court has ever endorsed that position. Intelligent Agency's Amended Complaint clearly and unequivocally identifies the infringing software and properly sets forth the allegations necessary for Defendant to answer the Complaint.

II. THE AMENDED COMPLAINT FAR EXCEEDS THE THRESHOLD FOR SUFFICIENT PLEADING UNDER RULE 8(a)(2)

A. Rule 8(a)(2) Requires “A Short and Plain Statement of the Claim”

In its Motion, Defendant essentially argues for a heightened “element-by-element” pleading standard for patent infringement complaints. Defendant cites to a handful of district court opinions, mostly from districts far from the Eastern District of Texas, while largely ignoring the relevant precedents of the Federal Circuit and of this District. There is a reason Defendant largely ignores the most relevant precedents. As shown below, Defendant’s proposed heightened pleading standard is inconsistent with the relevant precedents of the U.S. Supreme Court, of the U.S. Court of Appeals for the Federal Circuit, and of this District.

In *Bell Atl. Corp. v Twombly*,¹ the Supreme Court explained that “‘Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’”² The *Twombly* Court went on to explain that “[a]sking for plausible grounds to infer [alleged behavior] does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [alleged behavior].”³ The plausibility standard is met when the complaint pleads “enough fact to raise a reasonable expectation that discovery will reveal evidence” in support of the alleged claims.⁴

¹ 550 U.S. 544 (2007).

² *Twombly*, 550 U.S. 544 at 555 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

³ *Twombly*, 550 U.S. 544 at 556 (2007). *Twombly* dealt with antitrust rather than patent infringement allegations, but key questions involved alleged activities by the Defendants, including alleged anticompetitive agreements.

⁴ *Twombly*, 550 U.S. at 556; *accord id.* at 559 (explaining that claims should only be dismissed at the pleading stage when there is “no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’” (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005))); *See also Motiva Patents, LLC v. Sony Corp.*, 408 F. Supp. 3d 819, 827 (E.D. Tex. 2019).

In *Erickson v. Pardus*,⁵ decided in the wake of *Twombly*, the Supreme Court elaborated further on what is required of a plaintiff in federal court. Notably, the Court explained that the complaint must plead sufficient detail to give the defendant “fair notice” of the basis of the plaintiff’s claim, but that specific facts are not necessary.⁶

In *Ashcroft v. Iqbal*⁷ the Supreme Court provided additional explanation as to the “plausibility” standard set out in *Twombly* and *Erickson*. In *Iqbal*, the Court explained that “[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁸ The Court further explained that “[d]etailed factual allegations’ are not required [in a complaint], but the Rule does call for sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”⁹

The Supreme Court has made clear that, under Rule 8(a)(2), a plaintiff is generally required to provide “only a plausible ‘short and plain’ statement of the plaintiff’s claim, not an exposition of [the plaintiff’s] legal argument.”¹⁰ Where it is apparent from the face of the complaint that some insurmountable bar to relief exists, and the plaintiff is not entitled to relief, the court is justified in dismissing the claim,¹¹ but in cases where relevant information is beyond the access of the plaintiff, courts should generally permit discovery to proceed unless the complaint recites no more than sheer

⁵ 551 U.S. 89 (2007).

⁶ See *Erickson*, 551 U.S. at 93 (“Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’”)

⁷ 556 U.S. 662 (2009).

⁸ *Iqbal*, 556 U.S. 662, 663 (citing *Twombly*); *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009); *Voit Techs., LLC v. Drucker Labs, L.P.*, Civil Action No. 4:16-CV-695 (E.D. Tex., May 4, 2017).

⁹ *Iqbal*, 556 U.S. 662, 663, quoting *Twombly* at 555, 570; *RFC Lenders of Tex., LLC v. Progressive Cas. Ins. Co.*, Civil Action No. 4:19-CV-727 at p. 2 (E.D. Tex. May 27, 2020) (quoting *Twombly*, 550 U.S. at 570).

¹⁰ *Skinner v. Switzer*, 562 U.S. 521, 530 (2011); see also *Script Sec. Solutions LLC v. Amazon.Com, Inc.*, No. 2:15-CV-1030-WCB, at p. 11 (E.D. Tex. Mar. 16, 2016) (quoting *Skinner*).

¹¹ See *Jones v. Bock*, 549 U.S. 199, 215 (2007); *Semcon IP Inc. v. Kyocera Corp.*, Civil Action No. 2:18-CV-00197-JRG, at p. 2 (E.D. Tex., May 3, 2019).

speculation about the plaintiff's entitlement to relief.¹²

While *Twombly* and *Iqbal* appeared to set out a “plausibility” rule of general applicability for all federal pleadings, many courts, including the U.S. Court of Appeals for the Federal Circuit,¹³ continued to apply Rule 84 of the Federal Rules, which provided, “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”¹⁴ In the context of patent infringement complaints, this meant that a complaint for direct infringement of a patent crafted in accordance with Form 18 of the Appendix to the Federal Rules necessarily set forth a sufficient showing under the Federal Rules.¹⁵ In the words of the Federal Circuit, compliance with Form 18 “effectively immunize[d] a claimant from attack regarding the sufficiency of the pleading.”¹⁶

In 2015, the Supreme Court abrogated Rule 84,¹⁷ thus resolving at least some of the perceived tension between the “plausibility” standard of *Twombly* and *Iqbal* and the “notice” standard embodied in Form 18. In the wake of the abrogation of Rule 84 and Form 18, some have embraced the view that now-abrogated Form 18 no longer serves as a “safe harbor” for an assertion of direct infringement, but courts have continued to apply pleading standards aligned with Form 18.¹⁸ For its

¹² See *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 498 (5th Cir. 2015).

¹³ See, e.g., *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323 (Fed. Cir. 2012).

¹⁴ FED. R. CIV. P. 84 (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Apr. 30, 2007, eff. Dec. 1, 2007, abrogated eff. Dec. 1, 2015).

¹⁵ See, e.g., *In re Bill of Lading*, *supra* (“Form 18 and the Federal Rules of Civil Procedure do not require a plaintiff to plead facts establishing that each element of an asserted claim is met.”) Form 18 required only the following five elements in a patent infringement complaint for direct infringement: an allegation of jurisdiction, a statement that the plaintiff owns the patent, a statement that defendant has been infringing the patent by making, selling, and using the device embodying the patent, a statement that the plaintiff has given the defendant notice of its infringement, and a demand for an injunction and damages. See *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007).

¹⁶ *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013) (internal citation omitted).

¹⁷ Supreme Court of the United States, *Order Regarding Amendments to the Federal Rules of Civil Procedure* (U.S. Apr. 29, 2015).

¹⁸ See, e.g., *Hologram USA, Inc. v. Pulse Evolution Corp.*, No. 2:14-cv-0772-GMN-NJK, 2016 WL 199417, at *1 n.1 (D. Nev. Jan. 15, 2016) (noting that the abrogation of Rule 84 does not alter existing pleading standards, and Form 18 is an

part, the Federal Circuit has not endorsed the view that the “plausibility” standard of *Twombly*, *Erickson* and *Iqbal* is materially different from the standard set out in Form 18.¹⁹

B. The Federal Circuit Has Consistently Rejected the Element-by-Element Heightened Pleading Standard Proposed by Defendant

As noted above, Defendant essentially argues that this Court ought to adopt and apply a heightened “element-by-element” pleading standard for patent infringement complaints—in effect, insisting that a complaint must include the plaintiff’s infringement contentions in order to provide the “short and plain statement” required under Rule 8(a)(2). Under the heightened element-by-element pleading standard advanced by Defendant, a patent owner alleging patent infringement would have a heightened burden to individually plead each and every element of each asserted claim, map each element of each asserted claim to some functional aspect of the defendant’s product or process and provide an explanation of plaintiff’s theory of infringement as to each individual element of each claim. As noted, this is equivalent to demanding detailed, element-by-element infringement contentions at the pleading stage.

A review of the relevant case law reveals that the heightened element-by-element pleading standard proposed by Defendant has been proposed by patent defendants again and again—and has been rejected by the Federal Circuit and this District again and again. In particular, the Federal Circuit has *consistently rejected* the proposition that a patent owner has a heightened burden to separately plead and explain each and every element of an asserted patent claim.

In *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*,²⁰ the Federal Circuit made clear that

existing pleading standard).

¹⁹ See *Lifetime Indus., Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1377 (Fed. Cir. 2017) (“The parties assume that there is a difference between the requirements of Form 18 and *Iqbal/Twombly*; however, we have never recognized such a distinction.”)

²⁰ 203 F.3d 790, 794 (Fed. Cir. 2000).

a patent owner has no burden to specifically include each and every element of the claims of the asserted patent within the complaint in order to provide “a short and plain statement of the claim.” The panel explained, in very clear terms, that “[t]he Rule 12(b)(6) pleading requirements for a complaint of infringement cannot be extended to require a plaintiff to specifically include each element of the claims of the asserted patent.”²¹ The Court reiterated the holding of *Phonometrics* in *McZeal v. Sprint Nextel Corp.*,²² wherein the court stated, unequivocally, “a plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent.”²³

Defendants attempt to characterize the law in such a way that the standard for pleading patent infringement changed significantly after *Twombly* and *Iqbal*, but a review of the relevant case law reveals that this was not so. In the wake of *Twombly* and *Iqbal*, the Federal Circuit again addressed the “element-by-element” standard in *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*²⁴ The Court once again rejected the proposition that any heightened “element-by-element” showing was required,²⁵ and explained that the plaintiff had no burden to even identify the infringed claims.²⁶ This rule was again endorsed in *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*,²⁷ in which the court, once again explained, “a plaintiff in a patent infringement suit is not required to specifically include each element of the claims of the asserted patent.”²⁸

²¹ See *Phonometrics*, 203 F.3d at 794.

²² 501 F.3d 1354, 1357 (Fed Cir. 2007).

²³ *McZeal*, 501 F.3d at 1357.

²⁴ 681 F.3d 1323 (Fed. Cir. 2012).

²⁵ *In re Bill of Lading*, 681 F.3d at 1335 (“As we held in *McZeal*, Form 18 and the Federal Rules of Civil Procedure do not require a plaintiff to plead facts establishing that each element of an asserted claim is met.”)

²⁶ *In re Bill of Lading*, 681 F.3d at 1335 (“Indeed, a plaintiff need not even identify which claims it asserts are being infringed.”)

²⁷ 714 F.3d 1277 (Fed. Cir. 2013).

²⁸ *K-Tech*, 714 F.3d at 1284 (quoting *McZeal*, 501 F.3d at 1357).

In *Lifetime Indus., Inc. v. Trim-Lok, Inc.*,²⁹ the Federal Circuit was presented with another defendant urging the Court to dismiss the plaintiff’s complaint on the grounds that it failed to allege element-by-element details as to the defendant’s infringing activities. The panel rejected that argument, as follows:

Trim-Lok’s complaints concerning lack of detail ask for too much. There is no requirement for Lifetime to “prove its case at the pleading stage.” Our precedent requires that a complaint place the alleged infringer “on notice of what activity ... is being accused of infringement.” The [Second Amended Complaint] meets that requirement.³⁰

In *Disc Disease Sols. Inc. v. VGH Sols., Inc.*,³¹ the Federal Circuit again addressed this question. The district court had dismissed the plaintiff’s complaint on the grounds that the complaint had failed to sufficiently explain how the defendant’s product infringed the patent’s claims. The Federal Circuit reversed the dismissal and remanded, explaining as follows:

The district court determined that Disc Disease failed to “explain how Defendants’ products infringe on any of Plaintiff’s claims” because it “merely alleges that certain of Defendants’ products ‘meet each and every element of at least one claim’ of Plaintiff’s patents.” We disagree. Disc Disease’s allegations are sufficient under the plausibility standard of *Iqbal/Twombly*. This case involves a simple technology. The asserted patents, which were attached to the complaint, consist of only four independent claims. The complaint specifically identified the three accused products—by name and by attaching photos of the product packaging as exhibits—and alleged that the accused products meet “each and every element of at least one claim of the ’113 [or ’509] Patent, either literally or equivalently.” These disclosures and allegations are enough to provide VGH Solutions fair notice of infringement of the asserted patents. The district court, therefore, erred in dismissing Disc Disease’s complaint for failure to state a claim.³²

Most recently, the Federal Circuit was called upon to revisit this pleading standard in *Nalco*

²⁹ 869 F.3d 1372 (Fed. Cir. 2017).

³⁰ *Lifetime*, 869 F.3d at 1379 (internal citations omitted) (citing *Bill of Lading*, 681 F.3d at 1339; *Skinner v. Switzer*, 562 U.S. 521, 529 (2011); *K-Tech*, 714 F.3d at 1284).

³¹ 888 F.3d 1256 (Fed. Cir. 2018).

³² *Disc Disease*, 888 F.3d at 1260 (internal citations omitted).

Co. v. Chem-Mod, LLC.³³ As in *Disc Disease*, the district court had dismissed plaintiff's complaint for failing to sufficiently state a claim upon which relief could be granted. The Federal Circuit reversed and remanded, explaining the appropriate pleading standard as follows:

Nalco need not “prove its case at the pleading stage.” The complaint must place the “potential infringer ... on notice of what activity ... is being accused of infringement.” Nalco's pleading clearly exceeds the minimum requirements under Rule 12(b)(6), especially as “the Federal Rules of Civil Procedure do not require a plaintiff to plead facts establishing that each element of an asserted claim is met.”³⁴

Thus, the pleading standard consistently set out by the Federal Circuit, in case after case, is one in which a patent owner has a burden to file a “short and plain statement” placing an accused infringer on fair notice of what activity is being accused of infringement, with sufficient information to show that it is plausible that the infringement is indeed occurring. A review of the facts of this case reveals that Intelligent Agency has gone far beyond this threshold in its Amended Complaint.

C. The Element-by-Element Heightened Pleading Standard Proposed by Defendant has not Been Endorsed by this District

Prior defendants in the Eastern District have repeatedly asserted a heightened element-by-element pleading standard in case after case, but that standard has been repeatedly rejected. In *Uniloc USA, Inc. v. Avaya, Inc.*,³⁵ the defendant asserted that the plaintiff had a burden to include element-by-element contentions in its complaint. Judge Gilstrap rejected that assertion, as follows:

In essence, Avaya is asserting that Uniloc must include element-by-element infringement contentions within the original complaint to properly state a claim for direct infringement. The Court declines to infuse Federal Rule of Civil Procedure 8(a)'s well-established pleading standard with such a heightened burden at the initial pleading stage.³⁶

³³ 883 F.3d 1337 (Fed. Cir. 2018).

³⁴ *Nalco*, 883 F.3d at 1350 (internal citations omitted) (citing *Bill of Lading*, 681 F.3d at 1335, 1339; *Skinner*, 562 U.S. at 529–30, 131 S.Ct. 1289; *K-Tech*, 714 F.3d at 1284).

³⁵ 6:15-cv-1168-JRG (E.D. Tex. May 13, 2016).

³⁶ *Uniloc*, *supra* at p. 5.

The defendant in *Solocron Educ., LLC v. Healthstream, Inc.*³⁷ made the same argument as the defendant in *Uniloc USA*. The Court held that while plaintiffs must satisfy the standards of *Twombly* and *Iqbal*, they do not have an obligation to “augment their complaints with element-by-element infringement contentions...”³⁸ In *Cywee Grp. Ltd. v. Huawei Device Co.*,³⁹ Judge Bryson reiterated this position, explaining that, “the Federal Rules of Civil Procedure do not require a plaintiff to plead facts establishing that each element of an asserted claim is met.”⁴⁰

This line of reasoning is not limited to the Eastern District. In *Parity Networks v. Cisco Systems, Inc.*,⁴¹ the plaintiff had filed a complaint in the Western District of Texas identifying and providing a description of the defendants’ allegedly-infringing technology, followed by an assertion that the identified technology infringed the asserted patents. The defendant argued that the plaintiff’s complaint was insufficient because it failed to include infringement contentions specifying the claim elements and mapping them to the accused products. Judge Albright responded to that argument as follows:

Defendant contends that Plaintiff merely references asserted claims in the patents but fails to specify any of the claim elements or map them to the accused products in any way. Notwithstanding Defendant's argument to the contrary, the Court finds that Plaintiff's pleadings are sufficient and that any deficiencies will necessarily be addressed when Plaintiff serves its infringement contentions as is required. Accordingly, the Court DENIES Defendant's Motion as it relates to Plaintiff's claims of direct infringement.⁴²

Judge Rodriguez rendered a similar ruling in *Encoditech, LLC v. Citizen Watch Co. of Am., Inc.*⁴³

³⁷ Civ. Action No. 2:16-cv-16-JRG, 2016 WL 9137458, at *3 (E.D. Tex. June 7, 2016)

³⁸ *Solocron, supra*, at p. 3.

³⁹ No. 2:17-CV-495-WCB (E.D. Tex. Aug. 10, 2018).

⁴⁰ *Cywee, supra*, at p. 6.

⁴¹ See *Order Denying Defendant’s Motion to Dismiss*, Civ. Nos. 6:19-cv-207-ADA, 6:19-cv-209-ADA, (W.D. Tex. July 26, 2019) (Albright, J.).

⁴² *Parity Networks*, p. 3.

⁴³ Civil Action No. SA-18-CV-1335-XR at 7 (W.D. Tex. June 25, 2019) (“Encoditech only needed to identify and

In support of its argument that this Court should impose a heightened element-by-element standard for patent infringement complaints, Defendant relies primarily on one district court opinion from the Eastern District of Virginia⁴⁴ and four from the District of Delaware.⁴⁵

As a threshold matter, the legal sufficiency of a complaint presented under Rule 8(a) is considered a procedural question governed by the law of the regional circuit.⁴⁶ The Eastern District of Virginia and District of Delaware weigh the sufficiency of a complaint under the procedural law of the Fourth Circuit and Third Circuit, respectively, while this District applies the procedural law of the Fifth Circuit. Defendants have not explained why this Court should consider itself bound—or even persuaded, for that matter—by courts in other circuits applying completely different bodies of procedural law.

In *Macronix Intern. Co., Ltd. v. Spansion, Inc.*,⁴⁷ a case from the Eastern District of Virginia, the court’s opinion made abundantly clear that the decision, which directly rejected the Federal Circuit’s decisions in *McZeal* and *In re Bill of Lading*, was dictated by the applicable procedural law of the Fourth Circuit.⁴⁸ Accordingly, this decision, founded upon Fourth Circuit procedural law, has no particular relevance to a case pending in the Fifth Circuit.

include product by name, allege that defendants make, sell, offer to sell, sell, import or use in the United States that accused product, and to allege that the accused product satisfies each and every limitation of at least one claim.”) (quoting *Encoditech, LLC v. Qardio, Inc.*, C.A. No. 1:18-864, 2019 WL 2526725 (D. Del. June 19, 2019)).

⁴⁴ *Macronix Intern. Co., Ltd. v. Spansion, Inc.*, 4 F. Supp. 3d 797, 804 (E.D. Va. 2014).

⁴⁵ *SIPCO, LLC v. Streetline, Inc.*, 230 F. Supp. 3d 351,353 (D. Del. 2017); *Super Interconnect Techs. LLC v. HP Inc.*, Civ. No. 19-cv-0169-CFC, 2019 WL 6895877 (D. Del. Dec. 18, 2019); *DIFF Scale Operation Research, LLC v. MaxLinear, Inc.*, Civ. No. 1:19-cv-2109-LPS-CJB, 2020 WL 2220031 (D. Del. May 7, 2020); *Uniloc 2017 LLC v. ZenPayroll, Inc.*, Civ. No. 1:19-cv-1075-CFC-SRF (D. Del. July 23, 2020).

⁴⁶ See *C & F Packing Co., Inc. v. IBP, Inc.*, 224 F.3d 1296, 1306 (Fed. Cir. 2000) (“The question of whether a Rule 12(b)(6) motion was properly granted is purely a procedural question not pertaining to patent law to which [courts apply] the rule of the regional ... circuit.”); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1355–56 (Fed. Cir. 2007).

⁴⁷ 4 F. Supp. 3d 797, 804 (E.D. Va. 2014).

⁴⁸ See *Macronix*, 4 F. Supp. At 801: “[*McZeal* and *Bill of Lading* are] at odds with how the Fourth Circuit has understood the effect of *Twombly* and *Iqbal* on Rule 8(a).”

Defendant cites to *SIPCO, LLC v. Streetline, Inc.*,⁴⁹ for the proposition that a complaint should be dismissed if it “contains no attempt to connect anything in the patent claims to anything about any of the accused products.” As with *Macronix*, *SIPCO* was decided based on the procedural law of the circuit—in that case, the Third Circuit. Further, the facts of *SIPCO* bear little resemblance to those of the present case. The court in *SIPCO* summarized the plaintiff’s complaint as follows: “Plaintiff makes two factual allegations. One, here are ten patents we own. Two, you sell some products, which we have identified.”⁵⁰ That situation bears no resemblance to the present case. The Amended Complaint goes well beyond that showing. Further, the court in *SIPCO* squarely rejected the defendants’ argument that a plaintiff has a burden to produce infringement contentions within a patent infringement complaint.⁵¹

Defendant cites to another Delaware case, *Super Interconnect Techs. LLC v. HP Inc.*,⁵² for the proposition that merely alleging that an accused product complies with an industry standard is an insufficient showing in a patent infringement complaint. Intelligent Agency’s infringement allegations are not based on any allegations relating to industry standards, so the relevance of *Super Interconnect* to the present case is not readily apparent.

Defendant cites to *DIFF Scale Operation Research, LLC v. MaxLinear, Inc.*⁵³ for the proposition that merely “parroting back” the claim elements in the complaint is insufficient. As with the other Delaware cases, this case was decided based on the procedural law of the Third Circuit. Further, even if the rule in *DIFF Scale* were applied here, the Amended Complaint clearly goes

⁴⁹ 230 F. Supp. 3d 351,353 (D. Del. 2017).

⁵⁰ *SIPCO*, 230 F. Supp. 3d at 353.

⁵¹ See *SIPCO*, p. 353, fn 2 (“I think Defendants go too far in saying or implying Plaintiff has to produce infringement contentions.”)

⁵² Civ. No. 19-cv-0169-CFC, 2019 WL 6895877 (D. Del. Dec. 18, 2019).

⁵³ Civ. No. 1:19-cv-2109-LPS-CJB, 2020 WL 2220031, at *2 (D. Del. May 7, 2020).

beyond merely “parroting back” claim language, identifying the specific software product accused of infringement, explaining the manner in which Defendant’s software operates and associating elements set forth in the claims with functional elements of Defendant’s software.

Finally, Defendant cites to *Uniloc 2017 LLC v. ZenPayroll, Inc.*,⁵⁴ another Delaware case decided based on the procedural law of the Third Circuit and the specific precedents of that district. Its relevance to the present case is limited for the same reasons as those set forth above in connection with the other cases cited by Defendant.

D. The Detail Set Forth in the Amended Complaint Goes Far Beyond the Requirements of Rule 8.

Upon a review of the Amended Complaint in the present case, it is clear that the Amended complaint goes well beyond the complaints found sufficient in the above-referenced precedents of the Federal Circuit and this District. Intelligent Agency had no burden to even *identify* infringed claims, but the Amended Complaint clearly does so anyway. Intelligent Agency had no burden to *separately recite* individual claim elements, but the Amended Complaint clearly does so. Plaintiff had no burden to associate claimed elements with elements of Defendant’s software, but the Amended Complaint clearly does so. In short, the Amended Complaint goes well above and beyond the pleading standards set out by the Federal Circuit and by this Court as being sufficient.

As explained above, Defendant advocates for a pleading standard far in excess of the “short and plain statement” and “fair notice” required under Rule 8, setting forth the reasons why Intelligent Agency alleges the infringement and places the Defendant on clear notice of the infringing activity. The detail set forth in the Amended Complaint goes far beyond what is required under the law.

E. Claim Construction is Not Appropriate at the Pleading Stage

Defendant asserts that the Amended Complaint is insufficient because it fails to explain in

⁵⁴ Civ. No. 1:19-cv-1075-CFC-SRF (D. Del. July 23, 2020).

adequate detail the *meaning* of certain claim terms. In essence, Defendant is objecting that Intelligent Agency has not set forth its claim constructions within the body of its complaint. Defendant cites no case law requiring that claim constructions be included in a patent infringement complaint. In its Motion, Defendant essentially urges this Court to engage in early claim construction as to certain claim language set forth in the independent claims of the ‘610 Patent. Specifically, Defendant urges that the language of the claims of the ‘610 Patent must necessarily be construed in a very narrow, specific way, and that the construction of the claim language in the narrow and specific manner argued by Defendant renders the Amended Complaint insufficient.

The Federal Circuit has previously addressed what role, if any, claim construction should play as part of a court's consideration of a motion to dismiss. In *In re Bill of Lading*,⁵⁵ the Federal Circuit noted that when a district court considers the plausibility of the facts alleged in a complaint, it should not “base[] its assessment of the ‘reasonableness’ of a given inference of infringement on a narrow construction of the patent's claims”:

We agree with R+L that, to the extent the district court based its assessment of the “reasonableness” of a given inference of infringement on a narrow construction of the patent's claims, claim construction at the pleading stage—with no claim construction processes undertaken—was inappropriate. We afford the claims their broadest possible construction at this stage of the proceedings.⁵⁶

The Eastern District echoed this sentiment in *Gestion Proche, Inc. v. Dialight Corp.*,⁵⁷ in which the court reiterated that a district court is to afford claims their “broadest possible construction” when evaluating the pleadings:

[I]t would be inappropriate for a district court to engage in “claim construction at the pleading stage—with no claim construction processes undertaken.” Instead, a district court should afford claims their broadest possible construction. To engage in the claim construction process upon review of a motion to dismiss would be to go beyond the

⁵⁵ 681 F.3d 1323 (2012).

⁵⁶ *In re Bill of Lading*, 681 F.3d at 1343, fn 13.

⁵⁷ Civil Action No. 4:16-CV-00407 (E.D. Tex. May 1, 2017) (internal citations omitted).

scope of a court's traditional gatekeeping role in reviewing such a motion. Accordingly, the Court refuses to construe this key term without the benefit of full briefing, in compliance with the established procedures for claim construction, from both sides.⁵⁸

As in *In re Bill of Lading* and *Gestion Proche*, it would be inappropriate for this Court to engage in claim construction at the pleading stage with no formal claim construction processes undertaken. As this Court is well-aware, Markman hearings exist specifically for the purpose of determining the meaning of claim terms. To engage in the claim construction process at this stage would be, in the words of the court in *Gestion Proche*, “to go beyond the scope of a court’s traditional gatekeeping role in reviewing such a motion.” Accordingly, the Court should undertake claim construction with the benefit of full briefing, in compliance with the established procedures for claim construction, from both sides.

As this Court is aware, claim construction is rarely a simple, straightforward matter. The scope and meaning of a claim term depend on the structure of the claim language, the content of the specification, the prosecution history and the level of skill of a person of skill in the art, among other factors.⁵⁹ Accordingly, construction of claim language is normally undertaken in the course of a formal process wherein both sides have the opportunity to fully brief their constructions and present their arguments in a formal hearing. By urging the Court to adopt a narrow claim construction at this early stage, Defendant seeks to short-circuit this entire process.

In this case, Defendant seems to be completely ignoring the claim language reciting “regulated by *at least*...” Even if the “consisting of” language was to be interpreted as “closed,” the use of “open” “*at least*” language renders claim construction considerably more involved than

⁵⁸ *Gestion Proche* at *5.

⁵⁹ See, e.g., *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

Defendant suggests, as the Federal Circuit noted in *Amgen Inc. v. Amneal Pharm. LLC*:⁶⁰

There is no language in Amgen’s claim indicating that every binder or disintegrant in the claimed formulation must be within the Markush groups. Instead, the claim recites “at least one” binder or disintegrant “selected from the group consisting of” various excipients. And the limitations merely require that those particular binders or disintegrants meet the specified weight-percentage requirements, which is not inconsistent with the overall composition containing other binders or disintegrants. The plain language of this claim requires “at least one” of the Markush members and certainly does not indicate that the only binders and disintegrants in the claimed formulation are those listed in the groups. And we do not see a sufficient basis for a different conclusion in the specification or in the prosecution history we have recited.⁶¹

Accordingly, the claim construction issue is not the simple matter Defendant asserts, and Intelligent Agency respectfully submits that it would be inappropriate for this Court to impose Defendant’s narrow claim construction on the parties at this early stage of the litigation.

III. DEFENDANT’S MOTION SHOULD BE DENIED

For the foregoing reasons, Intelligent Agency respectfully requests that this Court deny Defendant’s Motion.

Dated: August 17, 2020

Respectfully Submitted,

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⁶⁰ 945 F.3d 1368 (Fed. Cir. 2020).

⁶¹ *Amgen*, 945 F.3d at 1378 (Fed. Cir. 2020).

CERTIFICATE OF SERVICE

I hereby certify 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 on the date set forth above. Any other counsel of record will be served by electronic mail, facsimile transmission and/or first-class mail on this same date.

/s/ Kenneth Thomas Emanuelson