

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

INTELLIGENT AGENCY, LLC,

Plaintiff,

v.

NEIGHBORFAVOR, INC.,

Defendant.

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Case No. 6:20-cv-00039-ADA

JURY TRIAL DEMANDED

**RESPONSE OF PLAINTIFF INTELLIGENT AGENCY, LLC TO DEFENDANT
NEIGHBORFAVOR, INC.'S MOTION TO DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT**

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I. STATEMENT OF FACTS

In its Motion, Defendant claims that it has “filed this 12(b)(6) motion as a last resort.”

While Defendant is certainly entitled to file its motion, the suggestion that Intelligent Agency has in any way been anything but cooperative in attempting to resolve the issues raised by Defendant is directly contrary to the facts. After Defendant asked for additional detail beyond what was included in its Original Complaint,¹ Intelligent Agency filed a First Amended Complaint providing additional detail as to Defendant’s infringing activity.²

In the wake of the filing of the First Amended Complaint, Counsel for Intelligent Agency engaged with Defendant’s counsel again and again, in an ongoing dialogue hoping to address the issues being raised by Defendant without wasting this Court’s time. While Intelligent Agency’s Original Complaint and First Amended Complaint were sufficient under Rule 8, 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 filed a Second Amended Complaint that identified and explained the functional attributes of Defendant’s infringing software, identified at least one claim infringed for each patent, expressly addressed each and every element of each identified claim, and mapped each such element to the functions of Defendant’s software.³

Unfortunately, Intelligent Agency’s effort to accommodate Defendant and avoid bringing this before the Court was ultimately fruitless. Defendant demands a heightened pleading standard that is far in excess of anything found in the relevant case law. Intelligent Agency’s Second Amended Complaint clearly and unequivocally alleges that each and every element of at least one

¹ Dkt #1, filed January 21, 2020.

² Dkt #10, filed April 25, 2020.

³ Dkt #12, filed May 25, 2020.

asserted claim in each asserted patent is practiced by Defendant. Defendant's assertion to the contrary is simply contrary to the available facts. Shortly after the filing of the Second Amended Complaint, Defendant filed the present motion. Thus, Defendant's suggestion that it was forced to file this motion "as a last resort" simply does not square with the facts.

II. THE SECOND 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 argues for a heightened "element-by-element" pleading standard for patent infringement complaints. Specifically, Defendant argues that "a claim of patent infringement that does not address all the claim elements of an asserted claim does not meet the Rule 12(b)(6) threshold."⁴ As shown below, Defendant's proposed heightened pleading standard is inconsistent with the relevant precedents of the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit.

In *Bell Atl. Corp. v Twombly*,⁵ 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,'"⁶ 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]."⁷

⁴ Defendant Neighborfavor, Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint, Dkt # 13, p. 4.

⁵ 550 U.S. 544 (2007).

⁶ *Twombly*, 550 U.S. 544 at 555 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

⁷ *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.

In *Erickson v. Pardus*,⁸ 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.⁹

In *Ashcroft v. Iqbal*¹⁰ 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.”¹¹ 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.’”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

⁸ 551 U.S. 89 (2007).

⁹ 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.’”)

¹⁰ 556 U.S. 662 (2009).

¹¹ *Iqbal*, 556 U.S. 662, 663, citing *Twombly*.

¹² *Iqbal*, 556 U.S. 662, 663, quoting *Twombly* at 555, 570.

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

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 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 argues that this Court ought to adopt and apply a heightened “element-by-element” pleading standard for patent complaints. 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

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 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.”)

process and provide an explanation of plaintiff's theory of infringement as to each individual element of each claim.²⁰

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 courts 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.*,²¹ the Federal Circuit made clear that 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."²² The Court reiterated the holding of *Phonometrics* in *McZeal v. Sprint Nextel Corp.*,²³ 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."²⁴

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

²⁰ See, e.g., Defendant's Motion, p. 3, insisting that the complaint must "identify how each claim element of at least one claim of each asserted patent is practiced by NeighborFavor." See also Defendant's Motion, p. 4 arguing that a complaint not that does not address all claim elements is insufficient.

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

²² See *Phonometrics*, 203 F.3d at 794.

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

²⁴ *McZeal*, 501 F.3d at 1357.

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.*²⁵ The Court once again rejected the proposition that any heightened “element-by-element” showing was required,²⁶ and explained that the plaintiff had no burden to even identify the infringed claims.²⁷ This rule was again endorsed in *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc.*,²⁸ 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.”²⁹

In *Lifetime Indus., Inc. v. Trim-Lok, Inc.*,³⁰ 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 sufficient 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.³¹

In *Disc Disease Sols. Inc. v. VGH Sols., Inc.*,³² the Federal Circuit again addressed this question. The district court had dismissed the plaintiff’s complaint on the grounds that the complaint

²⁵ 681 F.3d 1323 (Fed. Cir. 2012).

²⁶ *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.”)

²⁷ *In re Bill of Lading*, 681 F.3d at 1335 (“Indeed, a plaintiff need not even identify which claims it asserts are being infringed.”)

²⁸ 714 F.3d 1277 (Fed. Cir. 2013).

²⁹ *K-Tech*, 714 F.3d at 1284 (quoting *McZeal*, 501 F.3d at 1357).

³⁰ 869 F.3d 1372 (Fed. Cir. 2017).

³¹ *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).

³² 888 F.3d 1256 (Fed. Cir. 2018).

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.³³

Most recently, the Federal Circuit was called upon to revisit this pleading standard in *Nalco Co. v. Chem-Mod, LLC*.³⁴ 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.”³⁵

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 reveal

³³ *Disc Disease*, 888 F.3d at 1260 (internal citations omitted).

³⁴ 883 F.3d 1337 (Fed. Cir. 2018).

³⁵ *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).

that Intelligent Agency has gone far beyond this threshold in its Second Amended Complaint.

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

In its Motion, Defendant claims that, “District courts have held that a claim of patent infringement that does not address all the claim elements of an asserted claim does not meet the Rule 12(b)(6) threshold.”³⁶ There are 94 federal district courts in the United States.³⁷ Of all the opinions issued by all of these 94 district courts in recent years, Defendant has managed to identify only a small handful district court opinions that, according to Defendant, lend at least some support to Defendant’s position.

Two of the three district court cases cited by Defendant in support of this proposition were rendered prior to the recent Federal Circuit decisions in *Lifetime*, *Disc Disease* and *Nalco*—all of which made abundantly clear that there is no “element-by-element” heightened pleading standard for patent infringement complaints. The third case, *De La Vega v. Microsoft Corp.*³⁸ was decided more recently by this Court.

The facts of the *De La Vega* case were very different from the present circumstances. In the Court’s opinion dismissing the complaint in *De La Vega*, the Court made quite clear that the plaintiff’s complaint was internally-inconsistent and failed to state a claim for relief even if its allegations could be accepted as true. The Court noted, for example, that the asserted claims clearly required multiple actors, but that Plaintiff failed to allege joint infringement by the combined acts of multiple parties.³⁹ The Court pointed out that the plaintiff argued that the named defendants performed all of the steps while at the same time illogically contending that actors other than the

³⁶ See Defendant’s Motion, p. 4.

³⁷ See <https://www.uscourts.gov/about-federal-courts/court-role-and-structure>

³⁸ Civ. No. W-19-cv-00612-ADA, Dkt. 29, pp. 4-14 (W.D. Tex. Feb. 11, 2020).

³⁹ See *De La Vega*, pp. 4, 6.

named defendants performed some of the claim steps.⁴⁰ The Court also found that the timeframe of the alleged infringement by testing pre-dated the issue date of the patent.⁴¹ In sum, the Court found no shortage of strong rationales for dismissing the complaint in *De La Vega*.

The case of *Parity Networks v. Cisco Systems, Inc.*,⁴² also decided by this Court, presented a fact pattern much closer to the present circumstances. As in the present case, the Plaintiff in *Parity Networks* had filed a complaint identifying and providing a description of the defendants' allegedly-infringing technology, followed by an assertion that the identified technology infringed the asserted patents. Notably, the complaint did not include "element-by-element" infringement contentions. The defendant had moved to dismiss the plaintiff's complaint on the grounds that it failed to provide the "short and plain statement" required under Rule 8. In ruling on the defendants' motion to dismiss, the Court set out the appropriate legal standard as follows:

Rule 8 of the Federal Rules of Civil Procedure requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A party that believes a complaint fails to meet this standard may move to dismiss under Rule 12(b)(6). Such a motion may be granted only if, accepting the well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the claimant, a court concludes that those allegations "could not raise a claim of entitlement to relief."⁴³

Specifically, 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. The Court 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

⁴⁰ See *De La Vega*, p. 5.

⁴¹ See *De La Vega*, p. 8.

⁴² 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.).

⁴³ *Parity Networks*, p. 2.

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.⁴⁴

Judge Rodriguez rendered a similar ruling in *Encoditech, LLC v. Citizen Watch Co. of Am., Inc.*⁴⁵

This Court is not the only court to reject the “element-by-element” heightened pleading standard advanced by Defendant. The Eastern District of Texas has addressed this question numerous times in recent years, and has explained, time and again, that there is no requirement that a complaint include element-by-element infringement contentions.⁴⁶

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

Upon a review of the Second Amended Complaint in the present case, it is clear that the Second Amended Complaint goes well beyond the complaints found sufficient in *Parity Networks* and the above-referenced Federal Circuit cases. According to the Federal Circuit precedent, Plaintiff had no burden to even *identify* the infringed claims, but the Second Amended Complaint clearly does so anyway. Plaintiff had no burden to separately recite the individual claim elements, but the Second Amended Complaint clearly does so. Plaintiff had no burden to map individual claim elements to Defendant’s accused offerings, but the Second Amended Complaint clearly does so. In short, the Second Amended Complaint goes well above and beyond the pleading standards set out by the

⁴⁴ *Parity Networks*, p. 3.

⁴⁵ Civil Action No. SA-18-CV-1335-XR at 7 (W.D. Tex. June 25, 2019) (“Encoditech only needed to identify and 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)).

⁴⁶ See, e.g., *Uniloc USA, Inc. v. Avaya, Inc.* 6:15-cv-1168-JRG at 5 (E.D. Tex. May 13, 2016) “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.”); *Solocron Educ., LLC v. Healthstream, Inc.*, No. 2:16-cv-16-JRG, 2016 WL 9137458, at *3 (E.D. Tex. June 7, 2016) (holding that plaintiffs must satisfy the standards of *Twombly* and *Iqbal*, but do not have an obligation to “augment their complaints with element-by-element infringement contentions...”); *Cywee Grp. Ltd. v. Huawei Device Co.*, No. 2:17-CV-495-WCB at 10 (E.D. Tex. Aug. 10, 2018)(“[T]he Federal Rules of Civil Procedure do not require a plaintiff to plead facts establishing that each element of an asserted claim is met.”).

Federal Circuit and by this Court.

Defendant asserts that the Second Amended Complaint is insufficient because it fails to explain in 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 to no case law requiring that claim constructions be included in a patent infringement complaint. Defendant objects that the Second Amended Complaint doesn't fully explain "how" Defendant's software works, knowing full well that Intelligent Agency is not yet in possession of the source code for Defendant's software, and is not in a position to provide such a detailed explanation at this point. Based on publicly-available information, Intelligent Agency has determined *what* Defendant's software does, but not necessarily *how* it is done, internally.

Again and again, Defendant demands that the complaint explain "how" Defendant's own software operates. As an example, Defendant objects that the Second Amended Complaint fails to explain *how* Defendant's software compiles the "set of attributes" relating to Favor users. Defendant sets out a standard under which any party could completely insulate itself from any assertion of patent infringement by simply keeping its source code secret and out of the hands of potential plaintiffs. Lacking direct knowledge of *how* the defendant's software works internally, a patent holder would be unable to prepare a complaint sufficient to meet Defendant's standard.

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. The Second Amended Complaint addresses each element of each asserted claim, sets 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 Second Amended Complaint goes far beyond what is required under the law.

E. Claim Construction is Not Appropriate at the Pleading Stage

In its Motion, Defendant 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 “wherein said generation of indicia is regulated by at least: an agent-user matching algorithm using predefined data selected from the group consisting of...” must necessarily be construed in a very narrow, specific way, and that construction of the claim language in the narrow manner argued by Defendant renders the Second 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*,⁴⁷ 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.⁴⁸

The Eastern District echoed this sentiment in *Gestion Proche, Inc. v. Dialight Corp.*,⁴⁹ 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 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

⁴⁷ 681 F.3d 1323 (2012).

⁴⁸ *In re Bill of Lading*, 681 F.3d at 1343, fn 13.

⁴⁹ Civil Action No. 4:16-CV-00407 (E.D. Tex. May 1, 2017) (internal citations omitted).

briefing, in compliance with the established procedures for claim construction, from both sides.⁵⁰

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. At this stage, the asserted claims are entitled to their broadest possible construction. 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.

In its Motion, Defendant asserts that the language “wherein said generation of indicia is regulated by at least: an agent-user matching algorithm using predefined data selected from the group consisting of...” can have one and only one construction, which, according to Defendant, this Court is bound to adopt. Defendant oversimplifies the present situation.

As this Court is aware, claim construction is rarely a simple, straightforward matter. The scope and meaning of a claim term depends 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.⁵¹ Accordingly, construction of claim language is normally undertaken in the course of a formal process wherein both sides have the opportunity 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 language “regulated by *at least...*” Even if the “consisting of” language were interpreted as “closed,” the use of “open” “*at*

⁵⁰ *Gestion Proche* at *5.

⁵¹ See, e.g., *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

least” language renders claim construction considerably more complicated than Defendant suggests, as the Federal Circuit noted in *Amgen Inc. v. Amneal Pharm. LLC*.⁵²

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.⁵³

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: July 8, 2020

Respectfully Submitted,

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⁵² 945 F.3d 1368 (Fed. Cir. 2020).

⁵³ *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 this 8th day of July 2020, with a copy of this document via the Court's CM/ECF system. 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