

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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PCS SALES (U.S.A.), INC., )  
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 Plaintiff )  
 )  
 v. ) Civil Action No. 2:11-cv-01113-CNC  
 )  
 LODSYS, LLC, )  
 )  
 Defendant )

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**DEFENDANT LODSYS, LLC’S MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS UNDER FRCP 12(b)(1) AND 12(b)(6) OR, IN THE ALTERNATIVE, FOR  
MORE DEFINITE STATEMENT UNDER FRCP 12(e)**

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Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, defendant Lodsys, LLC (“Lodsys”) respectfully moves to dismiss for lack of subject matter jurisdiction the Second Claim for Relief, Fourth Claim for Relief, Sixth Claim for Relief, and Eighth Claim for Relief in the Complaint for Declaratory Judgment [Dkt. No. 1] (the “Complaint”) filed by plaintiff PCS Sales (U.S.A.), Inc. (“PCS”). Pursuant to Rule 12(b)(6), Lodsys also respectfully moves to dismiss for failure to state a claim upon which relief can be granted PCS’s Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief. In the alternative, Lodsys respectfully moves for a more definite statement of those claims pursuant to Rule 12(e). As permitted by Rule 12(b), Lodsys files this motion in lieu of an answer and without waiving its right to answer the allegations in PCS’s Complaint and assert any applicable defenses, affirmative defenses, and counterclaims.

**I. INTRODUCTION**

PCS’s Second Claim for Relief, Fourth Claim for Relief, Sixth Claim for Relief, and Eighth Claim for Relief seek a declaration of non-infringement and invalidity of U.S. Patent Nos.

7,133,834 (the “‘834 patent”) and 7,620,565 (the “‘565 patent”). But those claims fail to present a case or controversy among the parties regarding the ‘834 patent or ‘565 patent. Accordingly, those claims must be dismissed under Rule 12(b)(1) for lack of declaratory judgment subject matter jurisdiction.

Moreover, PCS’s Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief should be dismissed under Rule 12(b)(6) because PCS failed to sufficiently allege those purported invalidity claims. Alternatively, in the event the Court does not dismiss, PCS should be ordered under Rule 12(e) to provide a more definite statement of its Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief.

## **II. STATEMENT OF FACTS**

In its Complaint, PCS seeks a declaratory judgment regarding four patents — U.S. Patent No. 5,999,908 (the “‘908 patent”), the ‘834 patent, U.S. Patent No. 7,222,078 (the “‘078 patent”), and the ‘565 patent. *See* Complaint at ¶¶ 1, 16-47. Specifically, PCS’s First Claim for Relief, Second Claim for Relief, Third Claim for Relief, and Fourth Claim for Relief seek a declaratory judgment that PCS does not infringe the ‘908 patent, the ‘834 patent, the ‘078 patent, and the ‘565 patent, respectively. *See* Complaint at ¶¶ 16-19, 20-23, 24-27, 28-31. And PCS’s Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief seek a declaratory judgment of invalidity of the ‘908 patent, the ‘834 patent, the ‘078 patent, and the ‘565 patent, respectively. *See* Complaint at ¶¶ 32-35, 36-39, 40-43, 44-47.

In contending there is an actual controversy between the parties sufficient to furnish this Court with declaratory judgment subject matter jurisdiction, PCS asserts the general allegation that “[o]n or about November 9, 2011, Defendant sent a letter ... to PCS, alleging that PCS infringed the ‘078, ‘908, ‘834, and ‘565 patents.” Complaint at ¶ 15. But PCS has not alleged

that Lodslys made specific allegations of infringement of the ‘834 patent or ‘565 patent against PCS. In fact, PCS attaches a copy of the November 19, 2011 letter to its Complaint, which merely states as follows: “We have reviewed your use of the Lodslys Patents and have prepared the enclosed claim chart demonstrating at least one instance of how you utilized the inventions embodied in the Lodslys Patents.” Complaint at Ex. E (p. 3).

Moreover, PCS admits that the November 19, 2011 “letter contained a claim chart titled ‘Infringement Claim Chart’” (Complaint at ¶ 15), which detailed PCS’s infringement of *only* the ‘078 patent. *See id.* at Ex. E (pp. 5-10). PCS does not allege that Lodslys’s letter or the attached claim chart detailed any specific allegations of infringement of the ‘834 patent or ‘565 patent. In fact, the November 19, 2011 letter does not include any claim chart describing infringement of the ‘834 patent or ‘565 patent. *See id.*<sup>1</sup>

Similarly, although PCS has asserted conclusory allegations that all four patents are invalid, PCS has not alleged any bases supporting its allegations of invalidity. *See* Complaint at ¶¶ 32-35, 36-39, 40-43, 44-47.

### **III. ARGUMENT**

#### **A. The Court should dismiss the Second Claim for Relief, Fourth Claim for Relief, Sixth Claim for Relief, and Eighth Claim for Relief of the Complaint because PCS has failed to present the requisite case or controversy between the parties with respect to the ‘834 patent or ‘565 patent.**

For the Court to have subject matter jurisdiction to award declaratory relief, there must be “a case of actual controversy” among the parties. *See, e.g.*, 28 U.S.C. § 2201(a); *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 770-71 (2007). In particular, “the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial

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<sup>1</sup> The November 19, 2011 letter also does not include any specific allegations or claim chart describing infringement of the ‘908 patent. Accordingly, while PCS’s claims concerning the ‘908 patent should also be dismissed for lack of subject matter jurisdiction, following additional review, Lodslys believes PCS does infringe the ‘908 patent and, therefore, does not seek in this motion dismissal of PCS’s First Claim for Relief under Rule 12(b)(1).

controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Id.* at 771 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 61 S. Ct. 510, 512 (1941)).

A party seeking declaratory judgment bears the burden of showing there is an actual case or controversy adequate to support jurisdiction. *See Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1344 (Fed. Cir. 2007) (“The burden is on the party claiming declaratory judgment jurisdiction to establish that such jurisdiction existed at the time the claim for declaratory relief was filed and that it has continued since.”); *see also Applera Corp. v. Michigan Diagnostics, LLC*, 594 F. Supp. 2d 150, 158 (D. Mass. 2009); *Furminator, Inc. v. Ontel Prods. Corp.*, 246 F.R.D. 579, 584-85 (E.D. Mo. 2007).

Here, PCS’s Second Claim for Relief, Fourth Claim for Relief, Sixth Claim for Relief, and Eighth Claim for Relief seek a declaratory judgment regarding non-infringement and invalidity of the ‘834 patent and ‘565 patent. *See* Complaint at ¶¶ 20-23, 28-31, 36-39, 44-47. But PCS has not met its burden of showing there is an actual case or controversy between PCS and Lodsys regarding those particular patents. Instead, PCS has merely alleged generally and imprecisely that Lodsys “sent a letter” to PCS purportedly “alleging that PCS infringed the ‘078, ‘908, ‘834, and ‘565 patents” and that Lodsys’s letter to PCS included a claim chart detailing PCS’s infringement of *only* the ‘078 patent. *See id.* at ¶ 15 & Ex. E.

Tellingly however, PCS has not alleged that Lodsys made specific allegations of infringement of the ‘834 patent or ‘565 patent against PCS. For example, the letter states that Lodsys has “prepared the enclosed claim chart demonstrating at least one instance of how you utilized the inventions embodied in the Lodsys Patents.” *Id.* at Ex. E (p. 3). But the letter does *not* detail any specific allegations of infringement of the ‘834 patent or ‘565 patent. Likewise,

the enclosed claim chart described PCS's infringement of the '078 patent, but did *not* include any claim chart describing infringement of the '834 patent or '565 patent. *See id.*

PCS's allegations are not sufficient to create an actual case or controversy between the parties regarding the '834 patent or '565 patent. For example, in *Applera Corporation, Applied Biosystems* (the owner of sixty-two patents) sent letters to Michigan Diagnostics, in which Applied Biosystems (1) advised of its extensive patent portfolio; (2) listed the sixty-two patents; (3) urged Michigan Diagnostics to review those patents; (4) notified Michigan Diagnostics that it may be infringing Applied Biosystems' patents; and (5) suggested that the parties enter into licensing discussions. *See* 594 F. Supp. 2d at 158-59. After the parties' further discussions regarding the patents, Applied Biosystems sued Michigan Diagnostics for infringement of seven of the sixty-two patents. *See id.* at 159-60. Michigan Diagnostics counterclaimed for declaratory judgment of non-infringement as to all sixty-two Applied Biosystems patents. *See id.* at 155. But since Applied Biosystems had not made any specific allegations of infringement beyond the seven patents upon which it sued, the Court dismissed Michigan Diagnostics' declaratory judgment counterclaim as to all but those seven patents. *See id.* at 160. The Court held that it was "far from clear" from the parties' interactions "that any dispute actually exists as to the fifty-five patents [and that a]s to them it may be fairly said that Michigan Diagnostics is essentially seeking an advisory opinion." *Id.*

Other courts have similar held that more is required to create an actual case or controversy. *See, e.g., SanDisk Corp. v. Audio MPEG, Inc.*, C06-02655 RMW, 2007 WL 30598 at \*4 (N.D. Cal. Jan. 3, 2007) ("The letter makes no specific assertion that any of the nine patents-in-suit here were being infringed or that infringement action would be brought as to the nine patents-in-suit. SanDisk's emphasis that the notice accused all of its MP3 products and made general references to the need for a patent license is not adequate to show that there was an

objectively reasonable apprehension of suit as to the specific nine patents at issue.”); *Research Elecs. & Devices Co. v. Neptune Meter Co.*, 156 F. Supp. 484, 485 (S.D.N.Y. 1957) (“The law is sufficiently clear that the mere act of calling a competitor’s attention to his alleged infringement of a specific patent does not by itself call into contest the infringement of other patents, and as to these other patents no justiciable controversy exists.”).

To create declaratory judgment jurisdiction, a patent owner must make specific, particularized assertions of infringement, which are not present here regarding the ‘834 patent or ‘565 patent. *See Applera*, 594 F. Supp. 2d at 160 (“The problem that arises when the other side does not sue ... is not a problem, or at least not the same problem, when the other side has not made any particularized suggestion of infringement and may never sue. [The patent owner] broadly, and with some palpable bravura, suggested a review of its entire patent portfolio, but it did not make any specific allegations of infringement except within its pleading in this lawsuit.”) (internal quotation omitted); *Furminator, Inc.*, 246 F.R.D. at 589-90 (dismissing declaratory judgment counterclaims as to plaintiff’s patents that plaintiff had not explicitly indicated defendant was infringing, since “there is no evidence plaintiff has made a demand to the defendants that identifies how any new product infringes *specific claims* of any of plaintiff’s patents ... there is no evidence in this case that plaintiff has *explicitly identified* the patents it believes the defendants are infringing, the *relevant claims* of those patents, or the *relevant product* that it alleges infringes those patents”) (emphasis added); *Black & Decker Inc. v. Robert Bosch Tool Corp.*, 371 F. Supp. 2d 965, 968-69 (N.D. Ill. 2005) (“Courts have found that no actual controversy existed regarding patent claims that the patentee did not assert, even when the patentee was asserting other claims *from that same patent.*”) (emphasis added).

Because PCS has failed to meet its burden of showing a sufficient case or controversy for declaratory relief jurisdiction regarding the ‘834 patent or ‘565 patent, PCS’s Second Claim for

Relief, Fourth Claim for Relief, Sixth Claim for Relief, and Eighth Claim for Relief should be dismissed under Rule 12(b)(1).

**B. The Court should dismiss PCS's Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief because PCS has not alleged any bases for its claims that Lodsys's patents are invalid, and PCS has therefore failed to state a claim upon which relief can be granted.**

Rule 12(b)(6) provides that a party may move for dismissal of an action "for failure to state claim upon which relief can be granted." A cause of action fails to state a claim upon which relief can be granted if it fails to comply with the requirements of Rule 8(a). *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("naked assertion[s] devoid of further factual enhancement is insufficient to withstand a motion to dismiss").

In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the Supreme Court addressed requirements of Rule 8(a) and the standards for granting a Rule 12(b)(6) motion and stated that:

[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

127 S. Ct. at 1964-65 (internal citations and footnote omitted). The Supreme Court thus "rais[ed] the bar for what must be included in the complaint." *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1147 (7th Cir. 2010). "*Twombly* and *Iqbal* establish two new principles of pleading in all cases: (1) 'fair notice' alone will not suffice; a complaint must be 'plausible' as well; and (2) a court may not accept 'conclusory' allegations as true." *Riley v. Vilsack*, 665 F. Supp. 2d 994, 1002 (W.D. Wis. 2009) (Crabb, J.).

Here, PCS's Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief seek a declaratory judgment of invalidity of the '908 patent, the '834 patent, the '078 patent, and the '565 patent, respectively. *See* Complaint at ¶¶ 32-35, 36-39, 40-

43, 44-47. But for each patent, PCS has made only the following conclusory allegation of invalidity:

PCS denies that it infringes any valid and enforceable claim of the [ ] patent, and avers that the assertions of infringement cannot be maintained consistently with statutory conditions of patentability and the statutory requirements for disclosure and claiming that must be satisfied for patent validity under at least one of 35 U.S.C. §§ 101, 102, 103, and 112.

Complaint at ¶¶ 34, 38, 42, 46. Although Rule 8(a)'s pleading standard is not high, PCS's bare allegations of invalidity — without indicating the bases for the alleged invalidity of Lodsyst's patents — are not sufficient to satisfy Rule 8(a)'s standard. *See Genetic Technologies Ltd. v. Interleukin Genetics Inc.*, No. 10-cv-69-BBC, 2010 WL 3362344, at \*1 (W.D. Wis. August 24, 2010) (Rule 8(a) standard not met by allegation that “[t]he claims believed to be at issue in this case are all invalid and/or unenforceable under one or more of 35 U.S.C. § 101, 102, 103 and 112”); *Boehringer Ingelheim Vetmedica, Inc. v. Merial, Ltd.*, Civ. No. 3:09CV212 (AWT), 2010 WL 174078, (D. Conn., January 14, 2010) (Rule 8(a) standard not met by allegation that “[t]he claims of the ‘882 Patent are invalid for failure to meet the conditions of patentability and/or otherwise comply with one or more of 35 U.S.C. §§ 101 *et seq.*, including 35 U.S.C. §§ 102, 103, and 112”).

Because PCS has failed to satisfy Rule 8(a)'s pleading standard, PCS's Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief should be dismissed under Rule 12(b)(6) for failing to state a claim upon which relief can be granted.

**C. In the alternative, the Court should order PCS to provide a more definite statement of the purported invalidity alleged in the Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief in PCS's Complaint.**

In the event this Court determines that PCS's Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief should not be dismissed, Lodsyst

alternatively requests under Rule 12(e) that the Court order PCS to provide a more definite statement of the purported invalidity alleged in those claims.<sup>2</sup>

Rule 12(e) provides that “[a] party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.” A Rule 12(e) motion is appropriate where (as here) the complaint is “so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself.” *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1376 (2d ed. 1990).

Because PCS’s conclusory allegations of invalidity fail to provide proper notice, PCS should be ordered to provide a more definite statement of the purported invalidity alleged in the Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief.

#### **IV. CONCLUSION**

For all of the above reasons, Lodsys respectfully requests that the Court dismiss PCS’s Second Claim for Relief, Fourth Claim for Relief, Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief. In the alternative, PCS should be ordered to provide a more definite statement of the Fifth Claim for Relief, Sixth Claim for Relief, Seventh Claim for Relief, and Eighth Claim for Relief.

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<sup>2</sup> As discussed above, PCS’s Sixth Claim for Relief and Eighth Claim for Relief should be dismissed under both Rule 12(b)(6) for failing to state a claim upon which relief can be granted and Rule 12(b)(1) for the independent reason that declaratory judgment jurisdiction is lacking with respect to the ‘834 patent and ‘565 patent.

RESPECTFULLY SUBMITTED this 16th day of March, 2012.

s/Aaron T. Olejniczak

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Aaron T. Olejniczak (#1034997)

ANDRUS, SCEALES, STARKE & SAWALL, LLP

100 East Wisconsin Avenue, Suite 1100

Milwaukee, WI 53202

Telephone: 414-271-7590

Facsimile: 414-271-5770

E-mail: [aarono@andruslaw.com](mailto:aarono@andruslaw.com)

Michael A. Goldfarb

Christopher M. Huck

Kit W. Roth

KELLEY, DONION, GILL,

HUCK & GOLDFARB, PLLC

701 Fifth Avenue, Suite 6800

Seattle, WA 98104

Telephone: 206-452-0260

Facsimile: 206-397-3062

E-mail: [goldfarb@kdg-law.com](mailto:goldfarb@kdg-law.com)

[huck@kdg-law.com](mailto:huck@kdg-law.com)

[roth@kdg-law.com](mailto:roth@kdg-law.com)

Attorneys for Defendant Lodsys, LLC