

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

GREATGIGZ SOLUTIONS, LLC,

Plaintiff,

v.

FREELANCER LIMITED,

Defendant.

Case No. 6:20-cv-00738-ADA

JURY TRIAL DEMANDED

**DEFENDANT FREELANCER LIMITED'S MOTION TO DISMISS
AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM
OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT**

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I. INTRODUCTION

Defendant Freelancer Limited (“Defendant” or “Freelancer”) hereby moves this Court to dismiss the entirety of Plaintiff GreatGigz Solutions, LLC’s (“Plaintiff” or “GreatGigz”) First Amended Complaint for Patent Infringement, ECF No. 15, (“Complaint”) under Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief can be granted. In the alternative, if the Court does not dismiss the Complaint with prejudice, Freelancer moves the Court to require a more definite statement under Fed. R. Civ. P. 12(e).

The Complaint fails to put Freelancer on proper notice of how its products or services infringe either of the two asserted patents. Instead, the Complaint only provides the barest description of how Freelancer allegedly infringes the asserted patents and merely identifies general components such as “servers, hardware, software, and a collection of related and/or linked web pages and mobile application” as “The Accused Instrumentalities” without providing factual allegations that allow identification of such components. Complaint at ¶36. This generic, non-specific language fails to meet the pleading standard set forth by *Twombly*, *Iqbal*, and the Federal Rules of Civil Procedure.

After considering Freelancer’s original motion to dismiss, GreatGigz did not oppose the motion, but instead filed the Complaint in an attempt to moot the motion. GreatGigz did not take the opportunity to correct the deficiencies in factual pleadings, but instead added further language parroting the patent claims without adding the factual allegations that the rules require. Moreover, not only is the Complaint deficient, it is internally inconsistent and contradictory, alleging both that the accused instrumentalities are data centers of Amazon Web Services (“AWS”) (Complaint at ¶¶41, 60) and that “[e]ach element of the infringing apparatus is, on information and belief, owned and controlled by Defendant...” (*Id.* at ¶¶60 and 67). Such inconsistent and contradictory allegations cannot support the types of plausible and probable inferences that GreatGigz asks the Court to draw.

Based upon the deficiencies in this amendment that do not cure the underlying problems, Freelancer respectfully moves this Court to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6).

If the Court does not dismiss with prejudice and allows an opportunity to amend, Freelancer respectfully moves this Court to require a more definite statement under Fed. R. Civ. P. 12(e), as set forth below.

II. STATEMENT OF FACTS

GreatGigz filed this lawsuit against Freelancer on August 14, 2020, alleging infringement of U.S. Patent Nos. 6,662,194 (“the ’194 Patent”) (filed as ECF No. 11-1) and 7,490,086 (“the ’086 Patent”) (filed as ECF No. 11-2) (hereinafter collectively referred to as “the Asserted Patents”), each in a separate count. *See* ECF No. 1 at ¶¶ 14, 37-53 and 54-66. Freelancer moved to dismiss the original complaint under Fed. R. Civ. P. 12(b)(6). ECF No. 11. Rather than respond to the motion, Greatgigz filed a new Complaint. (ECF No. 15). The Complaint alleges infringement of the ’194 patent at ¶¶ 37-55 (Count I) and alleges infringement of the ’086 patent at ¶¶ 56-72 (Count II).

Count I of GreatGigz’s Complaint alleges that Freelancer directly infringes claim 1 of the ’194 Patent but fails to address a number of claim limitations or plausibly allege how Freelancer could practice them. Complaint at ¶¶ 37–55. The allegations in Count I include screenshots allegedly from Freelancer.com and third-party websites checkhost.net and amazon.com, without an explanation of how those screenshots support GreatGigz’s infringement allegations. *See, e.g.*, Complaint at ¶ 47.

Count II suffers from the same infirmities—failing to provide sufficient descriptions of how Freelancer allegedly practices claim 18 of the ’086 Patent. Instead, Count II makes conclusory allegations that some (but not all) of the claim limitations of claim 18 are met and cites to paragraphs 41-47 that are themselves conclusory. Complaint at ¶¶ 56-72.

The Complaint also alleges willful infringement of the ’194 and the ’086 Patents. *Id.* at ¶¶ 53, 70. But the Complaint does not allege that Freelancer had knowledge of these patents prior to the filing of this lawsuit, and instead states that Freelancer had knowledge of the ’194 and the ’086 Patents “at least as early as the date it received service of [‘this’ or ‘the’] Original Complaint.” *Id.* at ¶¶ 38, 53, 57, 70. (Technically, service was waived, so there is no such date.)

III. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain 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.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (internal quotations omitted). While a complaint need not allege detailed factual allegations to survive a Rule 12(b)(6) motion, it is the pleader’s obligation to state the grounds of entitled relief requires “more than labels and conclusions.” *Twombly*, 550 U.S. at 555.

GreatGigz must allege claims that “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570) (internal quotations omitted). Pleadings that are “no more than conclusions” are “not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679 (internal citations omitted). Instead, “[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.” *Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 227 (5th Cir. 2012). Finally, “every element of each cause of action must be supported by specific factual allegations.” *Carlton v. Freer Inv. Group.*, Case No. 5:14-CV-946-DAE, 2017 U.S. Dist. LEXIS 223685, at *23 (W.D. Tex. Aug. 8, 2017). Thus, to plead direct infringement, “[t]he complaint must place the potential infringer on notice of what activity is being accused of infringement.” *Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1350 (Fed. Cir. 2018) (internal quotation marks, alterations, and citation omitted). To provide notice, a plaintiff must generally do more than assert that the product infringes the claim; a plaintiff must show how the defendant plausibly infringes by alleging some facts connecting the allegedly infringing product to the claim elements. See *SIPCO, LLC v. Streetline, Inc.*, 230 F. Supp. 3d 351, 353 (D. Del. 2017) (granting the motion to dismiss because “[t]he complaint contains no attempt to connect anything in the patent claims to anything about any of the accused products”).

As this Court has previously held, a complaint does not meet the required pleading standard where the complaint fails to: (a) identify the actors who practiced each element of the allegedly infringed claim; or to (b) provide any description of how the allegedly infringing products meet all limitations of the allegedly infringed claims. *De La Vega v. Microsoft Corp.*, No. W-19-CV-00612-ADA, 2020 U.S. Dist. LEXIS 116081, at *16-17 (W.D. Tex. Feb. 11, 2020) (“Because Plaintiff does not include even a short written description of how the accused instrumentalities meet the ‘coupling’ limitation, his complaint fails to state a claim upon which relief can be granted”).

III. ARGUMENT

Plaintiff’s claims of direct and willful infringement fail to meet the minimum pleading standards recognized by this Court, the Federal Circuit, and the Supreme Court, and thus should be dismissed in their entirety.

A. Count I of the Complaint Fails to Plausibly Allege Direct Infringement and Should be Dismissed

GreatGigz alleges in its Complaint that Freelancer infringes apparatus claims.¹ To infringe an apparatus claim, the device must meet all of the structural limitations. *See Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1468 (Fed.Cir.1990) (“[A]pparatus claims cover what a device is, not what a device does.”); *In re Michlin*, 256 F.2d 317, 320 (C.C.P.A. 1958) (“It is well settled that patentability of apparatus claims must depend upon structural limitations and not upon statements of function.”).

GreatGigz accuses Freelancer of infringing “at least Claim 1 of the ’194 Patent.” Complaint at ¶40. GreatGigz premises its infringement allegations on a distributed system of its own imagination — the “Freelancer apparatus” — which requires input from customers, clients, and Freelancer, and which GreatGigz broadly defines to include “servers, hardware, software, and a collection of related and/or linked web pages and Mobile Applications for providing job search and/or recruitment services to individuals (including job seekers, contractors, and employers) in the United States.” Complaint at ¶36. GreatGigz further alleges that the “public-facing aspect of the

¹ The Complaint accused Freelancer of allegedly infringing claim 1 of the ’194 Patent (Count I) and claim 18 of the ’086 Patent (Count II).

Freelancer apparatus” includes (1) the “Freelancer website, which is available at www.freelancer.com”, and (2) the associated Freelancer Mobile Application for Consumers, and (3) the associated Freelancer Mobile Application for Contractors.² *Id.* The Complaint summarily combines these devices together as the “Accused Instrumentalities.” *Id.* (After substituting the words “Freelancer” and “Lyft”, these generic allegations are almost verbatim to the problematic allegations in another case before this Court, demonstrating that the Complaint here is not factually focused on Freelancer, but rather on generic allegations of infringement. *See* ECF No. 22 p. 5 in case no. 6:20-cv-651-ADA.)

This broad allegation alone makes it impossible to decipher specifically who or what is alleged to infringe claim 1 of the ’194 patent. GreatGigz, however, further compounds the issue by introducing alleged third-parties such as “[i]ndividual users of the Freelancer apparatus” and “contractors and/or service providers” (*see, e.g.*, Complaint at ¶44), but without any ability to explain which actors satisfy each part of the apparatus or Accused Instrumentality.

To put this in context, allegedly infringed claim 1 of the ’194 Patent requires a memory device, a processing device, and a transmitter. It requires that these components perform certain specific functions:

1. “a memory device for storing information regarding at least one of a job opening, a position, an assignment, a contract, and a project, and information regarding a job search request;”
2. “a processing device for processing information regarding the job search request upon a detection of an occurrence of a searching event, wherein the processing device is programmed to detect the occurrence of the searching event, wherein the processing device utilizes information regarding the at least one of a job opening, a position, an assignment, a contract, and a project, stored in the memory device, and further wherein the processing device generates a message containing information regarding at least one of a job opening, a position, an assignment, a contract, and a project, wherein the message is responsive to the job search request;” and
3. “a transmitter for transmitting the message to a communication device associated with an individual, wherein the message is transmitted to the communication device in real-time.”

ECF No. 11-1 at 41:56-42:11 (Claim 1).

² Notably, Freelancer does not offer separate applications. Thus, it is unsurprising that GreatGigz could not support the allegations of two mobile applications with factual pleading.

GreatGigz asserts in its Complaint that “[o]n information and belief, the Freelancer Accused Instrumentalities comprise data centers housing memory devices, processing devices, receivers and transmitters”, without providing sufficient factual support for this allegation. Complaint ¶42.

From there, the Complaint makes its allegations about the Accused Instrumentality using only language from the claim, devoid of factual recitations. Complaint at ¶¶43-47. For the “memory” limitation, GreatGigz offers no support for allegations that the “memory” is present in the Freelancer Accused Instrumentalities. Instead, GreatGigz simply states it is present in the Freelancer Accused Instrumentalities and offers a screenshot allegedly from the Freelancer.com website. *Id.* at ¶43. The screenshot does not offer any further details or clarification as to where GreatGigz believes the required “memory” is located, if anywhere, within the GreatGigz-concocted Freelancer apparatus. *Id.* GreatGigz refers to various services allegedly offered by Amazon Web Services at the amazon.com website,³ not services offered by Freelancer (Complaint ¶42 and Figures 2-6); and without even attempting to connect the dots between those Amazon services and Freelancer, GreatGigz alleges that the memory devices, processing devices, and transmitters are part of those Amazon services. *Id.* at ¶¶42, 43.

GreatGigz offers no factual allegation tying those Amazon services or their alleged devices or transmitters to Freelancer. And notably, GreatGigz later alleges that “Each element of the infringing apparatus is, on information and belief, owned and controlled by [Freelancer] in the United States, and such apparatus directly comprises all elements, and directly performs all functionality, as claimed.” *Id.* at ¶50. Yet, GreatGigz also alleges that Freelancer “has no primary place of business in the United States.” *Id.* at ¶2. GreatGigz does not explain how Freelancer owns and controls such devices in the United States without having a place of business in the United States, yet such devices are also “Amazon” services even though they are allegedly owned and controlled by Freelancer.

GreatGigz cannot decide what to allege, thereby rendering the allegations implausible. Even if GreatGigz tied the allegedly infringing Amazon devices to Freelancer (which it did not), the

³ Specifically, Amazon Aurora, Amazon Elasticache, Amazon Cloudwatch, Amazon Kinesis, and Amazon Redshift. *See* Complaint ¶42 and Figures 2-6.

follow-on allegation suggests that it is unidentified Freelancer devices, not Amazon devices that infringe. GreatGigz allegations lack any specificity with respect to Freelancer and are simply implausible due to their internal contradictions. *See Hernandez v. Select Portfolio Servicing, Inc.*, No. CV 15-01896 MMM (AJWx), 2015 U.S. Dist. LEXIS 82922, at *24 (C.D. Cal. June 25, 2015) (“Contradictory allegations such as these are inherently implausible, and fail to comply with Rule 8, *Twombly*, and *Iqbal*.”); *In re Riddell Concussion Reduction Litig.*, 77 F. Supp. 3d 422, 424 (D.N.J. 2015) (“The Court further finds that Plaintiffs’ essential theory of the case is so unclear and inconsistent that it fails to satisfy the plausibility standard under Rule 12(b)(6).”); *Pastoriza v. Keystone Steel & Wire*, No. 15-cv-1174, 2015 U.S. Dist. LEXIS 165392, at *19 n.3 (C.D. Ill. Dec. 10, 2015) (quoting a law review article for the proposition that “[The] assumption of truth rule leaves no room for a lower court to pick and choose which pleaded facts to accept as true; it must accept them all, regardless of the consequences to the pleader. If pleaded facts are inconsistent with one of the claims in the complaint and, taken as true, render that claim implausible, then that claim must be dismissed under *Twombly/Iqbal* ...”); *Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1199-200 (N.D. Cal. 2008) (dismissing internally inconsistent pleading as implausible). And if GreatGigz allegations are joint infringement claims, they lack the specific allegations of “direction or control” or a “joint enterprise” that are required in such claims. *Lyda v. CBS Corp.*, 838 F.3d 1331, 1339 (Fed. Cir. 2016) (“A claim of joint infringement thus requires pleading facts sufficient to allow a reasonable inference that all steps of the claimed method are performed and either (1) one party exercises the requisite ‘direction or control’ over the others’ performance or (2) the actors form a joint enterprise such that performance of every step is attributable to the controlling party.”).

In addition to the inconsistency, certain claim limitations are entirely missing from the allegations. For the “processing device” limitation, GreatGigz simply alleges that this is present in the “Freelancer Accused Instrumentalities”, without any allegations as to where (or even “what”) the “processing device” is within the Freelancer apparatus. *Id.* at ¶41, 42, 46. As with the preceding paragraphs, GreatGigz alleges that the “processing device” is in Amazon services not linked to

Freelancer and also, inconsistently, alleges that Freelancer owns and controls “[e]ach element of the infringing apparatus” without identifying any “processing device” owned by Freelancer. *Id.* at ¶ 50.

With respect to the “transmitter” limitation, GreatGigz alleges that “the Freelancer apparatus comprises a transmitter,” but does not offer any support for this assertion. Similar to its allegations regarding the “memory” limitation, GreatGigz simply states that it is present in the Freelancer Accused Instrumentalities and offers an unlabeled screenshot allegedly taken from the Freelancer.com website. *Id.* at ¶¶41,42, 47. The screenshot does not offer any details or clarification as to where GreatGigz believes the required “transmitter” is located, if anywhere, within the GreatGigz-concocted Freelancer apparatus. *Id.* at ¶47. And like the other limitations, GreatGigz cannot decide whether it is alleging that the “transmitter” is in the Amazon services that are not linked to Freelancer or in the unidentified apparatus allegedly “owned and controlled by” Freelancer in the United States. *Id.* at ¶50.

Providing screenshots without further elaboration falls short of the pleading requirements of *Twombly* and *Iqbal*. In fact, this Court recently dismissed ***with prejudice*** claims made by a plaintiff that “only presented three screenshots of evidence without explaining how that evidence show[ed]” how a defendant infringed an element of a claim. *De La Vega*, 2020 U.S. Dist. Lexis 116081 at *16-17. For each of the limitations, GreatGigz has done nothing more than “copy[] the language of a claim element, and then baldly stat[e]” that Freelancer’s Accused instrumentalities have such an element. *See Northstar Innovations, Inc. v. Micron Tech., Inc.*, No. 17-506-LPS-CJB, 2017 U.S. Dist Lexis 189624, *5 (D. Del. Nov. 16, 2017) (stating “There needs to be *some facts* alleged that articulate *why it is plausible* that the other party’s product infringes that patent claim – not just the patentee asserting, in conclusory fashion, that it is so.”).

Moreover, GreatGigz failed to even allege facts related to multiple elements of claim 1 of the ‘194 patent, further confirming that GreatGigz is unable to state a claim upon which relief can be granted. Claim 1 requires at least four things of the processing device: (a) “a processing device for processing information regarding the job search request upon a detection of an occurrence of a searching event”; (b) “the processing device is programmed to detect the occurrence of the

searching event”; (c) “the processing device utilizes information regarding the at least one of a job opening, ... stored in the memory device”; and (d) “the processing device generates a message containing information regarding at least one of a job opening, ... wherein the message is responsive to the job search request...” ECF No. 11-1 at col. 41 (claim 1). GreatGigz merely parrots this language without plausibly alleging facts, stating,

On information and belief, the Freelancer apparatus is programmed to detect the occurrence of such searching events in real-time. Further on information and belief, the processing device of the Freelancer apparatus is programmed to use the aforementioned stored information regarding the at least one of a job opening, position, assignment, contract, and/or project (i.e., the “Project Posting”) to generate a message containing information regarding such Project Posting. Such message is generated in response to the aforementioned job search request (see ¶ 45) in real-time upon the occurrence of the searching event (see ¶ 44).

Complaint ¶46. GreatGigz does not add any facts plausibly demonstrating anything about the “processing device.” Indeed, the Complaint is silent about how the unidentified “processing device” might “detect the occurrence of the searching event.” *See generally* Complaint. Nor does the Complaint identify the “message” of claim 1 in any manner. *See generally* Complaint.

In addition to lacking allegations about the processor, the Complaint is devoid of any factual allegation that would permit Freelancer to identify the alleged “transmitter”, a key element of the claim. ECF No. 11-1 at col. 41 (claim 1). The Complaint states, “the Freelancer apparatus comprises a transmitter...” Complaint ¶47. However, the Complaint merely parrots the language of the claim without identifying this alleged “transmitter.” *Id.* One cannot discern the identity of the accused transmitter from the allegations of the Complaint.

District Courts that have analyzed this issue have generally agreed that pleadings that boil down to “[y]our product infringes my patent claim” amount to “little more than a conclusory statement.” *See Modern Telecom Sys., LLC v. TCL Corp.*, Case No. 17-583-LPS-CJB, 2017 U.S. Dist. LEXIS 209717, at *5 (D. Del. Dec. 21, 2017), *L.M. Sessler Excavating & Wrecking, Inc. v. Bette & Cring, LLC*, Case No. 16-CV-06534-FPG, 2017 U.S. Dist. LEXIS 171708, at *10-11 (W.D.N.Y. Oct. 17, 2017) (concluding that plaintiff failed to satisfy the pleading standard for its direct infringement claim where, to the extent that plaintiff’s complaint alleged that defendant performed each step of the patent claim at issue, it only did so by “parroting the patent claim and prefacing it with an

introductory attribution to [d]efendant” and noting that by “describing [d]efendant’s conduct solely in the words of its own patent, [p]laintiff implicitly concludes that [d]efendant’s process necessarily meets every element of the patent claim—a legal determination, not a factual allegation”); *SIPCO*, 230 F. Supp. 3d at 353 (“Right now, Plaintiff makes two factual allegations. One, here are ten patents we own. Two, you sell some products, which we have identified. Plaintiff makes a legal conclusion, to wit, the sales of your products infringe ou[r] patents. This is insufficient to plausibly allege patent infringement.”).

A plaintiff must “articulate *why it is plausible* that the other party’s product infringes the patent claim.” *Northstar*, 2017 U.S. Dist. LEXIS 189624 at *5. GreatGigz has not done so. Instead, it merely described either Amazon’s or Freelancer’s Accused Instrumentalities and the use of those instrumentalities “solely in the words of its own patent,” and thus “implicitly conclude[d] that Defendant’s process necessarily meets every element of the patent claim—a legal determination, not a factual allegation.” *L.M. Sessler*, 2017 U.S. Dist. LEXIS 171708 at * 10. Because GreatGigz (a) has not provided any description of how the Freelancer Accused Instrumentalities allegedly meets any of the limitations found in claim 1 of the ’195 patent and (b) has not plausibly pleaded joint infringement, Count I should be dismissed for failure to state a claim upon which relief can be granted.

B. Count II of the Complaint Fails to Plausibly Allege Direct Infringement and Should Be Dismissed

Plaintiff’s allegation in Count II is also deficient and should be dismissed for the same reasons discussed above in reference to Count I. In fact, Count II is pled with fewer allegations than Count I.

In Count II, GreatGigz alleges that Freelancer directly infringes claim 18 of the ’086 patent. Complaint at ¶59. Similar to Claim 1 of the ’194 patent, Claim 18 of the ’086 patent also requires “a memory device”, “a processing device” and “a transmitter”. ECF No. 11-2 at 44:5-36 (claim 18). Plaintiff’s allegations in Count II refer generally to the allegations in Count I for support. Complaint at ¶¶60-66. Count II repeatedly instructs Freelancer to refer to what was “described above.” For

the same reasons as set forth above with respect to Count I, Count II is also fails to state a claim upon which relief should be granted; Count II should also be dismissed.

In addition to the deficiencies shared with Count I, Count II provides a separate basis for dismissal as Count II fails to address all the claim limitations found in Claim 18 of the '086 patent.

Count II alleges direct infringement of claim 18 of the '086 patent. Complaint at ¶59. Claim 18 requires “a memory device”, “a processing device” and “a transmitter.” ECF No. 11-2 at 44:5-36 (claim 18). In Count II, however, GreatGigz fails to identify in the “Accused Instrumentalities” a processing device that (1) “processes the information regarding a recruitment search request or inquiry upon a detection of an occurrence of a searching event” or (2) “utilizes the information regarding an individual stored in the memory device in processing the information regarding a recruitment search request or inquiry.” *Id.* at 44:12–30. The Complaint is wholly silent as to item 1, a “processing device [that] processes the information regarding a recruitment search request or inquiry upon a detection of an occurrence of a searching event.” No factual allegation is made. And the Complaint merely repeats claim language in conclusory fashion alleging, without support, that the “the processor of the Freelancer instrumentality is programmed to process the information regarding the recruitment search request and the stored information regarding the individual contractors in real-time to generate a message.” Complaint ¶ 64. But simply parroting claim language and alleging that “[y]our product infringes my patent claim” does not meet the plausibility pleading standard for these claim limitations. *See Modern Telecom Sys.*, 2017 U.S. Dist. LEXIS 209717, at *5.

Further, GreatGigz does not make even cursory factual allegations that would allow Freelancer to identify the accused “transmitter” limitation in the Freelancer Accused Instrumentalities. *See*, Complaint at ¶66.

And similar to Count I, GreatGigz’s allegations are internally inconsistent. While GreatGigz identifies Amazon services (*see* Complaint ¶¶60, 61 (referring to ¶¶41, 42)), GreatGigz offers no factual allegation tying those Amazon services or their devices or transmitters to Freelancer. And notably, GreatGigz later alleges that “Each element of the infringing apparatus is, on information

and belief, owned and controlled by [Freelancer] in the United States, and such apparatus directly comprises all elements, and directly performs all functionality, as claimed.” *Id.* at ¶67. Yet, GreatGigz also alleges that Freelancer “has no primary place of business in the United States.” *Id.* at ¶2. GreatGigz does not explain how Freelancer owns and controls such devices in the United States without having a place of business in the United States, yet such devices are also “Amazon” services even though they are allegedly owned and controlled by Freelancer.

GreatGigz cannot decide what to allege, thereby rendering the allegations implausible. Even if GreatGigz tied the allegedly infringing Amazon devices to Freelancer (which it did not), the follow-on allegation suggests that it is unidentified Freelancer devices, not Amazon devices that infringe. GreatGigz allegations lack any specificity with respect to Freelancer and are simply implausible due to their internal contradictions. *See Hernandez*, 2015 U.S. Dist. LEXIS 82922, at *24 (“Contradictory allegations such as these are inherently implausible, and fail to comply with Rule 8, *Twombly*, and *Iqbal*.”); *Riddell Concussion Reduction*, 77 F. Supp. 3d at 424 (inconsistent pleading is not plausible); *Pastoriza*, 2015 U.S. Dist. LEXIS 165392, at *19 n.3 (all pled facts are accepted as true regardless of consequences to pleader); *Apple*, 586 F. Supp. 2d at 1199-200 (dismissing internally inconsistent pleading as implausible). And if GreatGigz allegations are joint infringement claims, they lack the specific allegations of “direction or control” or a “joint enterprise” that are required in such claims. *Lyda*, 838 F.3d at 1339.

Therefore, because Count II of the Complaint fails to support every element of claim 18 of the ‘086 patent, the allegations contained within Count II must be dismissed. *See Carlton*, 2017 U.S. Dist. LEXIS 223685 at *23-26.

C. Plaintiff’s Allegations of Willful Infringement are Deficient and Should be Dismissed

1. The Complaint’s allegations of pre-suit willfulness should be dismissed

To the extent GreatGigz alleges pre-suit willful infringement, such allegations should be dismissed because Plaintiff’s allegation failed to plead pre-suit knowledge of any of the Asserted Patents.

The Complaint does not allege that Freelancer knew about any of the Asserted Patents before the filing of this lawsuit. *See* Complaint at ¶¶ 38, 57. This Court explained the appropriate standard to adequately plead a claim of willful infringement in *Parity Networks*:

To state a claim for willful infringement a plaintiff must allege facts plausibly showing that *as of the time of the claim's filing*, the accused infringer: (1) knew of the patent-in-suit; (2) after acquiring that knowledge, it infringed the patent; and (3) in doing so, it knew, or should have known, that its conduct amounted to infringement of the patent. Further, a plaintiff should plead willfulness with sufficient articulation of the relevant fact.

Parity Networks, LLC v. Cisco Sys., Inc., No. 6:19-cv-00207-ADA, 2019 U.S. Dist. LEXIS 144094, at *7 (W.D. Tex. July 26, 2019) (emphasis added) (*quoting Valinge Innovation AB v. Halstead New England Corp.*, No. 16-1082-LPS-CJB, 2018 U.S. Dist. LEXIS 88696, 2018 WL 2411218, at *13 (D. Del. May 29, 2018)). In contrast to the complaint in *Parity Networks*, which “adequately allege[d] that Defendant had knowledge of infringement prior to the filing of the complaint,” GreatGigz concedes the absence of facts to show such pre-suit knowledge by alleging only that Freelancer “has been on actual notice of the [’194 Patent and the ’086 Patent] at least as early as the date it received service of this Original Complaint.” Complaint at ¶¶ 38, 57. Even if it this allegation was sufficient (which it is not), it cannot be correct, because Freelancer waived service and was never served.

Because GreatGigz did not allege that Defendant “knew of” the ’194 and ’086 Patents *prior* to the filing of the lawsuit, Plaintiff failed to allege at least one of the requisite components of willful infringement. *Parity Networks*, 2019 U.S. Dist. LEXIS 144094 at *7 (“a plaintiff must allege facts plausibly showing that *as of the time of the claim's filing*, the accused infringer ... knew of the patent-in-suit”) (emphasis added); *Valinge*, 2018 U.S. Dist. LEXIS 88696 at *35-36 (granting defendants’ motion to dismiss allegations of willful infringement where plaintiff did not plausibly allege that defendants had knowledge of that patents as of the date of the filing of the original complaint).

Plaintiff’s allegations of willful infringement should therefore be dismissed.

2. The allegations of post-filing willfulness should be dismissed

Plaintiff’s allegations also do not meet the standard for supporting a claim for willfulness based on post-filing conduct. This Court and others have dismissed claims for enhanced damages

where the complaint alleges nothing more than a garden-variety patent case, as GreatGigz has done. *See Flash-Control, LLC v. Intel Corp.*, C.A. No 1:19-cv-1107-ADA, No. 35 at p. 16 (W.D. Tex. Oct. 31, 2019) (dismissing without prejudice allegations regarding post-suit willfulness and citing to its decision in *Parity Networks* as the standard for sufficient allegations); *VLSI Tech. LLC v. Intel Corp.*, C.A. No. 6:19-cv-00254-ADA, No. 52 (W.D. Tex. Aug. 6, 2019) (dismissing without prejudice an enhanced damages claim based on willful infringement); *Meetrix IP, LLC v. Cisco Sys., Inc.*, No. 1-18-CV-309-LY, 2018 U.S. Dist. LEXIS 225719, at *8 (W.D. Tex. Nov. 30, 2018) (dismissing willful infringement claim and agreeing that “the complaint does not allege any facts raising a plausible inference of the egregious behavior required under Halo”); *see also M & C Innovations, LLC v. Igloo Prod. Corp.*, No. 4:17-CV-2372, 2018 U.S. Dist. LEXIS 152075, at *14-15 (S.D. Tex. July 31, 2018) (dismissing willful infringement claim as the patent claims were “garden-variety”).

As discussed above, Plaintiff’s only allegation of Freelancer’s actual knowledge of the patent is by way of service of the original complaint. Plaintiff’s remaining willfulness allegations are simply that Freelancer, without any additional explanation, continues to willfully infringe. To this allegation, this amended version of the Complaint has added an unfounded allegation made “on information and belief” about alleged instructions, policies or practices of which GreatGigz either has no knowledge or chose not to support with any facts:

53. Defendant has been on notice of infringement of the ’194 Patent at least as early as the date it received service of the Original Complaint. As such, to the extent Defendant continues its infringing activity post-notice, then all such activity is necessarily willful and deliberate.

54. On information and belief, Defendant has a policy or practice of not reviewing the patents of others. Further on information and belief, Defendant instructs its employees to not review the patents of others for clearance or to assess infringement thereof. As such, Defendant has been willfully blind to the patent rights of Plaintiff.

...

70. Defendant has been on notice of infringement of the ’086 Patent at least as early as the date it received service of the Original Complaint. As such, to the extent Defendant continues its infringing activity post-notice, then all such activity is necessarily willful and deliberate.

71. On information and belief, Defendant has a policy or practice of not reviewing the patents of others. Further on information and belief, Defendant instructs its

employees to not review the patents of others for clearance or to assess infringement thereof. As such, Defendant has been willfully blind to the patent rights of Plaintiff.

Complaint at ¶¶ 53, 54, 70, 71.

The Complaint alleges no facts to support a plausible inference that Freelancer knew or should have known that it was purportedly infringing the '194 Patent or the '086 Patent. *Id.* at ¶¶ 53, 70. Nor does Complaint identify any facts supporting the allegations about policies, practices, or instructions (*id.* at ¶¶ 54, 71); if such policy, practice, or instruction actually existed and GreatGigz had a basis for the allegation, such facts should be identified in the Complaint, but are not. *See generally* Complaint. Rather, the allegations merely parrot a legal standard and are verbatim copies of conclusory allegations made in a complaint against another defendant in this court. *Compare* Complaint ¶¶ 54, 71 to ECF No. 18 (at ¶¶ 62, 80, 96, 113) in case no. 6:20-cv-00651-ADA. In short, the Complaint fails to provide any factual support or reasoning for Plaintiff's bald allegations of willful infringement, much less "with sufficient articulation of the relevant facts." *See Parity Networks*, 2019 U.S. Dist. LEXIS 144094 at *7-8.

Moreover, to the extent that GreatGigz attempts to rely upon an allegation of "willful blindness", even if its conclusory allegations were accepted by the Court (which they should not be), GreatGigz failed to plead facts sufficient to permit an inference that both prongs of the willful blindness test were met. The Supreme Court held that there are:

... two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.

Glob.-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011) ("[A] willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts."). Even if the Court construes the allegations in the manner most generous to GreatGigz and does not require any factual support, it is apparent that the Supreme Court's requirement number one is completely absent from the pleadings. GreatGigz makes no allegation regarding a subjective belief by Freelancer of a "high probability that a fact exists." That is, even if Freelancer had a general policy, practice, or instruction as GreatGigz baselessly alleges, such allegation would not be sufficient. *See, e.g., VLSI Tech. LLC v.*

Intel Corp., Case No. 18-0966-CFC, 2020 U.S. Dist. LEXIS 112901, at *11 (D. Del. June 26, 2020) (“[H]aving a general policy with respect to thousands of patents in a field of technology does not plausibly establish or imply that Intel subjectively believed there was a high probability that its acts constituted infringement of two specific patents.”).

Because the Complaint fails to plead sufficient factual support for its allegations of willful infringement, Plaintiff’s willful infringement allegations are necessarily insufficient and should be dismissed.

D. In the Alternative, The Court Should Require a More Definite Statement Under Fed. R. Civ. P. 12(e)

If the Court does not dismiss the Complaint with prejudice, Freelancer respectfully moves for a more definite statement under Fed. R. Civ. P. 12(e), as set forth herein. “A Rule 12(e) motion requires a court to determine whether the complaint is ‘so vague or ambiguous that the party cannot reasonably prepare a response.’” *Estech Sys. v. Regions Fin. Corp.*, No. 6:20-cv-00322-ADA, 2020 U.S. Dist. LEXIS 200484, at *5 (W.D. Tex. Oct. 28, 2020). In this case, the following items are so vague and ambiguous that Freelancer cannot reasonably prepare a response.

GreatGigz alleges in Complaint paragraphs 54 and 71, “on information and belief” that Freelancer (1) has “a policy or practice” and (2) “instructs its employees” regarding review of patents. Freelancer is not aware of any such policies, practices, or instructions, and requests that the Court require GreatGigz to identify the specific policies, practices, and instructions alleged and to state the basis for making the allegation “on information and belief” so that Freelancer can reasonably attempt to prepare a response.

GreatGigz alleges in Complaint paragraphs 41 and 60 that the Accused Instrumentalities include “Amazon Web Services,” a service of a third-party company. GreatGigz alleges in Complaint paragraph 2 that Freelancer has no place of business in the United States. Yet in paragraphs 50 and 67, GreatGigz alleges that “Each element of the infringing apparatus is, on information and belief, owned and controlled by [Freelancer] in the United States.” These allegations are vague and ambiguous insofar as they state both that Amazon and that Freelancer each

separately own, control, and operate the entirety of the accused devices, such that Freelancer cannot reasonably attempt to respond to the conflicting allegations. The allegations are further vague and ambiguous in that they state both the Freelancer does not have a place of business in the United States and that Freelancer does have a place of business in the United States (i.e., the alleged location of the devices allegedly owned and controlled by Freelancer). Freelancer requests that the Court require GreatGigz to specifically identify what devices are accused and whether the accused devices are owned and operated by Amazon alone, by Freelancer alone, or by both in concert, such that Freelancer can reasonably attempt to prepare a response.

GreatGigz alleges the existence of a memory, a processor, and a transmitter, as detailed above in this motion, but does not provide facts that would allow Freelancer to identify any of these devices. And GreatGigz, as detailed above, does not provide facts that would allow Freelancer to identify many of the required functional capabilities of the claims. Freelancer requests that the Court require GreatGigz to specifically identify each of the devices required by the claim limitations and specifically identify facts that allow Freelancer to understand what functionality is being accused with respect to each of the devices. Such detail is expected to permit Freelancer to reasonably attempt to prepare a response.

GreatGigz alleges that the “infringing apparatus comprises servers, hardware, software, and a collection of related and/or linked web pages and mobile applications for providing recruitment information and services to individuals” (Complaint ¶ 41), but remains vague and ambiguous about how these various devices (e.g., servers and hardware) and software (e.g., software, web pages, and mobile applications) allegedly infringe, thereby preventing Freelancer from reasonably attempting to respond. Freelancer requests that the Court require GreatGigz to specifically identify how each of these devices and software forms part of the allegedly infringing devices so that Freelancer can reasonably attempt to prepare a response.

For the foregoing reasons, if the Complaint is not dismissed with prejudice, Freelancer respectfully requests that the Court order a more definite statement as to each of the items listed in this section.

IV. CONCLUSION

For the foregoing reasons, Freelancer respectfully requests that the Court grant its motion and dismiss GreatGigz's Complaint in its entirety for failure to plausibly state a claim for relief. If the Court does not dismiss the Complaint with prejudice, Freelancer respectfully requests that the Court order GreatGigz to provide a more definite statement with respect to each of the categories of vague and ambiguous allegations listed above.

Respectfully submitted,

Dated: January 21, 2021

By: /s/ Andrew T. Oliver
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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record who have consented to electronic service.

/s/ Andrew T. Oliver
Andrew T. Oliver