

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

PILOT ENERGY SOLUTIONS, LLC,

and

**PILOT INTELLECTUAL
PROPERTY, LLC,**

Plaintiffs,

V.

**CHEVRON U.S.A. INC., dba
CHEVRON NORTH AMERICA
EXPLORATION AND
PRODUCTION COMPANY,**

and

SCOUT ENERGY MANAGEMENT, LLC,

Defendants.

CIVIL ACTION NO. 4:23-cv-02505-AHB

**PLAINTIFFS' RESPONSE
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM UNDER FRCP 12(B)(6)**

Plaintiffs Pilot Energy Solutions, LLC (“Pilot”) and Pilot Intellectual Property, LLC (“PIP”) file this Response in Opposition to Defendants Chevron U.S.A. Inc. (“Chevron”) and Scout Energy Management, LLC (“Scout”) (collectively “Defendants”)’s Motion to Dismiss for Failure to State a Claim under FRCP 12(b)(6).¹ For the reasons set forth below, Plaintiffs respectfully request that this Court deny Defendants’ Motion to Dismiss.

¹ Defendants agreed to a two-day extension (from Oct. 23 to Oct. 25) for Plaintiffs to file this Response.

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LEGAL STANDARD

To state a claim for relief, “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.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). To survive a 12(b)(6) motion to dismiss, “a complaint must 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). This plausibility standard is met when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* When conducting its inquiry, a court “accepts all well-pleaded facts as true and views those facts in the light most favorable to the plaintiff.” *Bustos v. Martini Club Inc.*, 599 F.3d 458, 461 (5th Cir. 2010). In considering a motion to dismiss, a court may consider the complaint and its proper attachments. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008).

ARGUMENT

A. Plaintiffs Have Stated a Claim for Patent Infringement

To state a claim for patent infringement under 35 U.S.C. § 271, a plaintiff need only give the defendant “fair notice” of the infringement claim and “the grounds upon which it rests.” *Disc Disease Sols. Inc. v. VGH Sols., Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018). A defendant has fair notice of a direct infringement claim if the complaint specifically identifies the allegedly infringing product and the patent the product infringes. *Id.* “[T]here is no requirement that the facts alleged mimic the precise language used in a claim; what is necessary is that facts, when considered in their entirety and in context, lead to the common-sense conclusion that a patented method is being practiced.” *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323,

1343 (Fed. Cir. 2012).

1. Plaintiffs Identified the Accused Facility and Infringers

Here, Plaintiffs specifically identify the infringing facility as the Defendants' Mabee gas plant near Midland, Texas (the "Mabee Plant"), and allege that the Defendants' operation of the Mabee Plant infringes at least Claim 1 of Plaintiffs' U.S. Patent No. 8,505,332 ("the '332 Patent"). Complaint, Doc. #1 ¶¶ 16-17, 38-39. Because Plaintiffs do not have access to the accused facility, this is not a typical patent infringement case where the accused product can be purchased and reverse engineered. Nevertheless, based on two publicly available documents describing portions of the gas processing facility at the Mabee Plant, which are included as exhibits (P-2, Chevron Mabee Plant Air Permit Application ("Air Permit"); P-6, Hydrate Formation in Chevron Mabee Unit ("Hydrate Formation Paper")), the Complaint details Plaintiffs' allegations of infringement through a claim chart included as an exhibit (P-7 Claim Chart). In light of Plaintiffs' limited access to the Mabee Plant and looking at the Complaint in its entirety, Plaintiffs respectfully request that the Court find these allegations sufficient to give Defendants "fair notice" of the direct infringement claim against them and the grounds upon which it rests. *See Disc Disease*, 888 F.3d at 1260.

2. Plaintiffs Have Sufficiently Alleged How the Defendants' Operation of the Accused Facility Infringes the Asserted '332 Patent

Defendants contend that Plaintiffs' detailed allegations of infringement in their Exhibit P-7 Claim Chart are insufficient "conclusory assertions as to several claim limitations." Defendants further assert that Plaintiffs' allegations in the Claim Chart, along with the attached exhibits referenced in the Claim Chart (the P-2 Air Permit and the P-6 Hydrate Formation Paper), contradict Plaintiff's infringement theory. Defendants assert that a "plaintiff can thus 'plead itself out of court' when the allegations in the complaint or exhibits attached to the complaint contradict the plaintiff's infringement theory." (citing *Bot M8 LLC v. Sony Corp. of Am.*, 4 F.4th 1342, 1353-

54 (Fed. Cir. 2021), and *Keane v. Fox Television Stations, Inc.*, 297 F. Supp. 2d 921, 932–33 (S.D. Tex. 2004).

Defendants point to five specific claim limitations set forth in the P-7 Claim Chart, and the corresponding details alleging infringement with references to the P-2 Air Permit and P-6 Hydrate Formation Paper, to assert that Plaintiffs’ “patent infringement theories contradict the documents on which Plaintiffs rely and fail to state a claim.” Plaintiffs address each of these five claim limitations below, confirming that Plaintiffs’ patent infringement theories do not contradict the documents on which Plaintiffs rely, and sufficiently state a claim for patent infringement.

a. Plaintiffs’ Complaint Sufficiently Pleads the
“Heavy Hydrocarbon Separation” Limitation

The “Heavy Hydrocarbon Separation” limitation in Claim 1 recites the process step of separating the hydrocarbon feed stream into (i) a heavy hydrocarbon rich stream comprising the C₉₊ hydrocarbons, and (ii) a carbon dioxide recycle stream comprising the carbon dioxide, the NGL (C₃-C₈ hydrocarbons), and the acid gas. Ex. P-1 at 17:59-64. Plaintiffs in their Complaint accuse both Defendants Chevron and Scout of infringement of at least Claim 1, which includes this initial separation process step, through their operations of the infringing gas processing facility in their Mabee gas plant. Complaint, Doc. # 1, at ¶¶ 17-18, 39. Plaintiffs note in their Ex. P-7 Claim Chart that Defendants’ performance of this initial “Heavy Hydrocarbon Separation” step is done before the steps shown in the flow diagrams of the P-2 Air Permit and the P-6 Hydrate Formation Paper. Ex. P-7 at 3. Plaintiffs’ assertion that both Defendants performed this initial separation step through their operations of the Mabee Plant, and that they perform this step prior to the flow diagrams in the two publicly available documents detailing the accused process, is sufficient to plead the “Heavy Hydrocarbon Separation” limitation.

Defendants assert that Plaintiffs’ pleading of this “Heavy Hydrocarbon Separation” limitation is insufficient because the publicly available flow diagrams do not show the steps

performed before the flow diagrams. Defendants assert that Plaintiffs allege “no facts that would explain its belief that C₉₊ hydrocarbons had already been removed from the ‘plant feed gas’ in the Air Permit Application or the ‘Inlet gas’ in the Hydrate Formation Paper--it simply assumes that to be the case.” Plaintiffs respond that an assumption that the C₉₊ hydrocarbons are removed by Defendants prior to the flow diagrams illustrating the gas processing and NGL recovery steps in the process, is completely appropriate considering the fact that the Defendants’ gas processing facility is processing the CO₂ gas that comes out of an oil reservoir. The primary purpose of the Defendants’ operations at the oil reservoir is to get the oil out of the ground and sell it. And that is exactly what they do. Defendants inject the CO₂ recycle gas into the oil reservoir, capture the oil that is thereby extracted from the reservoir, separate the oil (C₉₊ hydrocarbons) and the carbon dioxide recycle stream, so they can sell the oil, then re-inject the carbon dioxide recycle stream back into the reservoir to get more oil out of the ground. This is the basic function of Defendants’ operations at their Mabee Plant.

To the extent that any further confirmation of this initial separation step in the process is necessary, one needs to look no further than Defendant Chevron’s description in its Pastor ‘666 patent, Complaint Ex. P-5, to see the components of the Feed gas at their Rangely facility (which should be similar to their Mabee Plant), showing the C₇₊ hydrocarbons as the smallest percentage of the composition, less than 1/2%. Ex. P-5, at Table 1, 6:26. This further confirms that Defendants are separating the C₉₊ hydrocarbons from the hydrocarbon feed stream before the steps shown in the flow diagrams of the P-2 Air Permit and the P-6 Hydrate Formation Paper. Plaintiffs’ infringement allegations for the “Heavy Hydrocarbon Separation” limitation therefore are sufficient to state a claim for patent infringement.

b. Plaintiffs’ Complaint Sufficiently Pleads the “Acid Gas Stream” Limitation

The “Acid Gas Stream” limitation in Claim 1 recites the process step of “separating the

sour NGL rich stream into a sweet NGL rich stream and an acid gas stream.” Ex. P-1 at 18:4-7. Plaintiffs’ P-7 Claim Chart confirms that the accused process at the Mabee Plant meets this claim limitation by pointing to the “Cooling Dehydration Sweetener” in the P-2 Air Permit, and the “NGL Sweetening” step in the P-6 Hydrate Formation Paper, and asserts that this “sweetening” process step separates the sour NGL rich stream into the sweet NGL rich stream and an acid gas stream. Hydrogen Sulfide (H₂S) is the acid gas which is separated from the sour NGL rich stream by the “sweetening” process. Ex. P-7 at 4-5. Plaintiffs’ specification that these two publicly available documents detailing the accused process show the “sweetening” process as the separation of “the sour NGL rich stream into a sweet NGL rich stream and an acid gas stream” is sufficient to plead the “Acid Gas Stream” limitation.

Defendants assert that “the Air Permit Application directly contradicts” Plaintiffs’ allegations, by pointing to a quote in the P-2 Air Permit which states that the “H₂S removed by the Sulfa-treat tower produces *solid* waste sulfur cakes.” Ex. P-2 at 15 (emphasis added). Defendants’ further assert that the step Plaintiffs accuse “of performing the Acid Gas Stream Limitation makes a solid, and claim 1 requires an ‘acid *gas stream*.’” Defendants’ reference to their processing of the acid gas that they remove through the “sweetening” process into a solid does not mean that the “sweetening” process has not met the “Acid Gas Stream” limitation. Once the Defendants’ have met the “Acid Gas Stream” limitation, through the “sweetening process” in the “Cooling Dehydration Sweetener” (“NGL Sweetening”), Defendants do not somehow escape infringement by then processing the acid gas into “solid waste sulfur cakes.” Plaintiffs’ infringement allegations for the “Acid Gas Stream” limitation therefore are sufficient to state a claim for patent infringement.

c. Plaintiffs’ Complaint Sufficiently Pleads the “CO₂ Removal” Limitation

The “CO₂ Removal” limitation in Claim 1 specifies that “the carbon dioxide is not removed

from the hydrocarbon feed stream and is not removed from the carbon dioxide recycle stream prior to separating the carbon dioxide recycle stream into the sour NGL rich stream and the purified carbon dioxide recycle stream.” Plaintiffs’ P-7 Claim Chart confirms that the accused process at the Mabee Plant meets this claim limitation because “[n]o carbon dioxide removal is performed between” the initial step in the process shown in the Process/Block Flow Diagrams (the “Plant Feed Gas” of the P-2 Air Permit, and the “Inlet gas” in the P-6 Hydrate Formation Paper), and the NGL recovery process step (the “Fractionation Unit” in the P-2 Air Permit, and the “NGL Distillation” in the P-6 Hydrate Formation Paper). Plaintiffs’ specification that these two publicly available documents detailing the accused process do not show any carbon dioxide removal performed in between these steps is sufficient to plead the “CO₂ Removal” limitation.

Defendants’ first complain that these allegations “ignore any potential carbon dioxide removal *before* the first steps of the diagrams.” Defendants further note that the “pre-diagram activity is significant” because the “Heavy Hydrocarbon Separation” step (the first step in Claim 1) occurs before the Process/Block Flow Diagrams shown in Exhibits P-2/P-6, suggesting that there could be some carbon dioxide removal as well before the first steps of the diagrams. Note that Defendants carefully phrase their suggestion that there could be some carbon dioxide removal before the first steps of the diagram, referring to a “potential” carbon dioxide removal, but do not affirmatively assert that there actually is any such carbon dioxide removal before the first steps of the diagram. Considering that the Defendants have exclusive access to their design and operations information at this stage of the case, and Plaintiffs have only the two publicly accessible documents that do not detail the “pre-diagram activity,” Plaintiffs’ allegations in their Complaint, including the P-7 Claim Chart, are sufficient to state a claim for patent infringement.

Furthermore, if Defendants’ design, build, and operations of the Mabee Plant are identical to their Rangely facility, as Defendant Chevron has asserted to Plaintiffs in the past, (except for

particular aspects of the design which Plaintiffs assert is their patented process), then the Feed gas composition shown in Table 1 of the Pastor '666 patent (Complaint Ex. P-5, at 5:12-26) confirms that there is no "pre-diagram" carbon dioxide removal from the hydrocarbon feed and carbon dioxide recycle streams (showing Feed gas composition as 83.9% CO₂).

Defendants next assert that the "Process Flow Diagram in the Air Permit Application directly contradicts" Plaintiffs' allegation that carbon dioxide is not removed from the carbon dioxide recycle stream prior to the NGL recovery process step. Defendants assert that the P-2 Air Permit "shows an arrangement expressly excluded from Claim 1," which Defendants specify as the "CO₂ stripper column [that] appears before the Fractionation unit." Defendants are apparently confused regarding the purpose and function of the "CO₂ stripper column." Defendants apparently believe that the "CO₂ stripper column" is stripping (removing) CO₂ from the carbon dioxide recycle stream.

Defendants are wrong on two points. First, the "CO₂ stripper column" is not removing CO₂ from anything. The "CO₂ stripper column" is using CO₂ to strip (remove) water from the triethylene glycol (TEG) solvent used in the "TEG CONTACTOR" step shown in the Air Permit Process Flow Diagram. And the "CO₂ stripper column" is not removing anything from the carbon dioxide recycle stream. The "TEG CONTACTOR" step shown in the Air Permit Process Flow Diagram, is the same step shown in the P-6 Hydrate Formation Paper Fig. 3 Block Flow Diagram as the "Glycol Dehydration" step. This dehydration step in the process is using the triethylene glycol (TEG) solvent to remove water from the carbon dioxide recycle stream. The water removed from the carbon dioxide recycle stream, absorbed by the triethylene glycol (TEG) solvent, is then removed from the triethylene glycol (TEG) solvent by the "CO₂ stripper column." The "CO₂ stripper column" uses CO₂ to strip (remove) water from the triethylene glycol (TEG) solvent before that triethylene glycol (TEG) solvent is then returned to the TEG CONTACTOR to remove

more water from the carbon dioxide recycle stream.

With this understanding of the process, it is clear that Defendants are simply confused regarding the purpose and function of the “CO₂ stripper column,” and have no basis for their mistaken assertion that P-2 Air Permit “shows an arrangement expressly excluded from Claim 1.”

d. Plaintiffs’ Complaint Sufficiently Pleads the
“Absence of Cryogenic Conditions” Limitation

The “Absence of Cryogenic Conditions” limitation in Claim 1 specifies that “the hydrocarbon feed stream, the carbon dioxide recycle stream, and the sour NGL rich stream are not subjected to cryogenic conditions ... between being received and being separated into the heavy hydrocarbon rich stream, the purified carbon dioxide recycle stream, the sweet NGL rich stream, and the acid gas stream.” (Emphasis added.) Plaintiffs’ P-7 Claim Chart confirms that the accused process at the Mabee Plant meets this claim limitation because there “are no cryogenic conditions . . . in the [accused] process,” as shown in both the P-2 Air Permit and the P-6 Hydrate Formation Paper. Plaintiffs’ specification that these two publicly available documents detailing the accused process do not show any cryogenic conditions in the process is sufficient to plead the “Absence of Cryogenic Conditions” limitation.

Defendants assert that the P-2 Air Permit and P-6 Hydrate Formation Paper both show cryogenic conditions in the accused process, pointing to a “chiller” in the Hydrate Formation Paper “cold enough to condense propane,” and a “Propane Refrigeration Unit” in the Air Permit. Defendants note that the “Hydrate Formation Paper ... lists the ‘Condenser Temp’ to be 5.7° F (which is -14.6° C).” Defendants apparently are asserting a claim construction for the “cryogenic conditions” limitation in Claim 1 to include a temperature of 5.7° F (-14.6° C). This is wrong. The well-accepted definition for “cryogenic conditions” is at a significantly lower

temperature, -130° F (-90° C).² Defendants’ assertions that the “chiller” in the Hydrate Formation Paper and the “Propane Refrigeration Unit” in the Air Permit are “cryogenic conditions” in the accused process are thus incorrect, and do not support Defendants’ assertions that the P-2 Air Permit and P-6 Hydrate Formation Paper contradict Plaintiffs’ infringement theory.

e. Plaintiffs’ Complaint Sufficiently Pleads the
“Purified Carbon Dioxide Recycle Stream” Limitation

The “Purified Carbon Dioxide Recycle Stream” limitation in Claim 1 recites the step of separating the carbon dioxide recycle stream into (i) a purified carbon dioxide recycle stream comprising carbon dioxide; and ii) a sour NGL rich stream comprising C₃-C₈ hydrocarbons and the acid gas. Ex. P-1 at 17:65-18:3. Plaintiffs’ P-7 Claim Chart confirms that the accused process at the Mabee Plant meets this claim limitation by pointing to the P-2 Air Permit “Fractionation Unit,” and the P-6 Hydrate Formation Paper “NGL Distillation” block, where the Defendants perform this process step. Ex. P-7 at 3-4. Plaintiffs further note in the Claim Chart that Table 1 in the Hydrate Formation Paper confirms that the composition of the “sour NGL rich stream” (“NGL Composition”) includes propane, i-butane, n-butane, i-pentane, n-pentane, and hexane plus (e.g., C₃-C₆₊) (“Table 1: Model Validation of Plant Data” on page 4). The Claim Chart also references the Hydrate Formation Paper’s confirmation that the “sour NGL rich stream” includes acid gas, which is the Hydrogen Sulfide (H₂S) that the Paper refers to as “increased H₂S content in the NGL product.” Ex. P-7 at 4. Plaintiffs’ specification that these two publicly available documents detailing the accused process shows the performance of this separation step sufficiently pleads the

² This Court may take judicial notice of this well-accepted meaning of “cryogenic conditions.” *See, e.g.*, EPA Definition of Cryogenic Conditions (“Some gases are stored under “cryogenic conditions,” which means that they are stored at very low temperatures (-130 degrees Fahrenheit or less)” (emphasis added)), available at <https://www.epa.gov/epcra/what-considered-cryogenic-conditions>. The American Institute of Chemical Engineers (“AIChE”) defines a “cryogenic liquid” as a “refrigerated liquid gas having a boiling point below -130 F (-90 C) at atmospheric pressure” (emphasis added). *See* <https://www.aiche.org/ccps/resources/glossary/process-safety-glossary/cryogenic-liquid>.

“Purified Carbon Dioxide Recycle Stream” limitation in Claim 1, and sufficiently states a claim for this step of the patent infringement.

Defendants assert that the Hydrate Formation Paper contradicts Plaintiffs’ “assertion that the fractionation unit and NGL distillation step separates the CO₂, on the one hand, from the C₃-C₈ and acid gas, on the other hand.” Defendants base their assertions on an unsupported and incorrect contention that the Hydrate Formation Paper “indicates that Mabee Plant generates a carbon dioxide stream with H₂S.” Defendants attempt to support their incorrect contention with references to the Hydrate Formation Paper that instead support and confirm Plaintiffs’ contentions that the “sour NGL rich stream” includes Hydrogen Sulfide (H₂S) acid gas.

The Hydrate Formation Paper refers to “increased H₂S content in the NGL product that occurred from corrective measures taken to address “reflux events.” Defendants misconstrue this to mean that H₂S content in the NGL product only exists when the corrective measures are taken, when in fact the corrective measures merely “increased” the normal H₂S content in the NGL product. As detailed above in the Section A(2)(b) discussion of the “Acid Gas Stream” limitation in Claim 1, we know from the existence of the “NGL Sweetening” step that the NGL product has acid gas, because the purpose of the “NGL Sweetening” step is to remove the H₂S acid gas from the “sour NGL rich stream.” The Hydrate Formation Paper reference to “increased H₂S content in the NGL product” supports Plaintiffs’ contentions regarding the presence of acid gas in the “sour NGL rich stream,” not Defendants’ contentions, and confirms that Plaintiffs’ have sufficiently stated their claim for patent infringement.

B. Plaintiffs Sufficiently Plead Willful Infringement

In Part III.B of their Motion, Defendants argue that Plaintiffs failed to adequately plead

willful infringement. To plead a claim of willful infringement, the complaint must simply allege that the accused infringer knew of the patent-in-suit, and knowingly or intentionally infringed the patent after acquiring that knowledge. *Eko Brands, LLC v. Adrian Rivera Maynez Enterps., Inc.*, 946 F.3d 1367, 1378-79 (Fed. Cir. 2020) (noting that “the concept of ‘willfulness’ requires a jury to find no more than deliberate or intentional infringement”); *see also Bayer Healthcare LLC v. Baxalta Inc.*, 989 F.3d 964, 988 (Fed. Cir. 2021) (same).

In their Motion, Defendants argue that Plaintiffs’ “bare assertion that ‘Defendants’ acts of infringement are willful,’ is “threadbare” and insufficient. Mot. at 10. Here, the trouble with this argument is that Defendants entirely neglect to address the specific factual allegations in Plaintiffs’ Complaint. In the Background of their Complaint, Plaintiffs have alleged that Chevron had a long history of reviewing the ‘332 patented technology for use in Chevron’s Mabee plant. Doc. # 1 ¶¶ 10-30. Pilot specifically warned Chevron not to use this technology in 2012, *id.* ¶¶ 23-25, and later in 2013 Pilot accused Chevron of infringing the ‘332 patent, *id.* ¶¶ 26-27 (*see also id.*, Ex. P-3 Notice Letter). Each time that Chevron was confronted with allegations of its infringement, rather than attempt to explain how the actual design of this plant would not infringe, Chevron instead misrepresented the design and claimed that the design was from an older plant in Rangely, Colorado. *Id.* ¶¶ 24, 28-29. The implication of relying on such a scheme is that Chevron knew that the actual design was infringing. In 2021, Defendant Scout Energy acquired the Mabee plant from Chevron and took over operations. *Id.* ¶¶ 17-18. Plaintiffs then summarized by pleading that Defendants Chevron and Scout Energy have infringed, and Scout Energy continues to infringe, the ‘332 Patent by performing the methods recited in one or more of the claims of the ‘332 Patent” and that these “acts of infringement are willful because Defendants deliberately continued their infringing conduct after having received notice of Plaintiffs’ ‘332 Patent.” *Id.* ¶ 41.

Plaintiffs’ allegations are far beyond “threadbare” and instead provide specific facts to

show that Chevron knew of the patent-in-suit at least as early as 2013, that Scout knew of the patent-in-suit at least as early as service of the Complaint, and that both Defendants deliberately infringed the patent after acquiring that knowledge. These allegations sufficiently allege willful infringement. *Bayer Healthcare*, 989 F.3d at 988; *Eko Brands*, 946 F.3d at 1378-79; *see also ACQIS Ltd. Liab. Co. v. Lenovo Grp. Ltd.*, No. 6:20-CV-00967-ADA, 2022 U.S. Dist. LEXIS 122565, at *11-18 (W.D. Tex. 2022) (patent owner’s notice of the patents sent to the infringer “clearly indicates concerns of infringement and the hope to find a resolution [such that the plaintiff] has met the pleading standard regarding knowledge of the infringing activity”); *Enovsys LLC v. T-Mobile USA, Inc.*, No. 2:21-cv-00368-JRG, 2022 U.S. Dist. LEXIS 152691, at *7 (E.D. Tex. 2022) (“Plaintiff has alleged that Defendant had knowledge of the Asserted Patents since 2011 and that such infringement was willful.”); *Parity Networks, LLC v. Cisco Sys.*, No. 6:19-CV-00207-ADA, 2019 U.S. Dist. LEXIS 144094, at *8-9 (W.D. Tex. 2019) (noting similarly); *Ioengine, LLC v. Paypal Holdings, Inc.*, C.A. No. 18-452-WCB, 2019 U.S. Dist. LEXIS 12195, at *22 (D. Del. 2019) (noting that “there is no requirement that the plaintiff plead additional facts, beyond knowledge of the patent or patents, in order for a claim of willful infringement to survive a motion to dismiss”) (citing cases).

C. Pilot’s Claim for “Fraudulent (or at Least Negligent) Misrepresentations” in Count II Should Not Be Dismissed

In Part III.C of its Motion, Defendants seek to dismiss Pilot’s Count II claim for fraudulent or negligent misrepresentation. This Court should deny Defendants’ Motion. The tort of negligent misrepresentation has the following elements:

(1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies “false information” for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.

Fed. Land Bank Ass'n v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991). In overview, Pilot alleges that it shared the ‘332 patented technology with Chevron over the course of a several year relationship beginning in 2007, for Chevron to consider using to build its new Mabee gas processing plant. Doc. # 1 ¶¶ 16, 19-21. After numerous meetings and proposals, Chevron appeared to lose interest in 2010. *Id.* ¶¶ 21-22.

Two years later, in 2012, Pilot heard through industry contacts that Chevron might be using Pilot’s ‘332 patented technology at its new Mabee plant, despite that the technology was proprietary to Pilot and was disclosed under confidentiality agreements. Pilot contacted Chevron to investigate the issue, and Chevron responded that it would check into the matter. *Id.* ¶ 23. Pilot reiterated these concerns later in 2012. In response, Chevron reassured Pilot that it was not using Pilot’s technology, but was instead using its own technology from an older gas plant in Rangely, Colorado. *Id.* ¶ 24.

Pilot continued to have concerns that Chevron may be using Pilot’s technology. In 2013, Pilot wrote again to Chevron to express these concerns that Chevron may be using Pilot’s proprietary technology and to request a meeting with Chevron to review the ‘332 patent and compare it to the technology used at the Mabee plant. Pilot told Chevron that “‘we will be happy to drop the matter’ if it is determined that Chevron is not using Pilot’s technology.” *Id.* ¶ 27.

Chevron responded in an August 2013 letter, stating that they had reviewed the ‘332 patent and confirmed that the technology used at the Mabee plant does not infringe the patent. Attached to the letter was a copy of Chevron’s own Pastor ‘666 Patent explicitly describing the technology used at Chevron’s older Rangely plant. *Id.* ¶¶ 28-29. Chevron concluded the letter by stating that they therefore “consider this matter to be closed.” *Id.* ¶ 30. As promised, Pilot dropped the matter, relying on Chevron’s confirmation that they were not using Pilot’s technology in the Mabee Plant. *Id.*

In 2022, Pilot learned that Chevron’s statements were false. Chevron had not been using the older technology from its Rangely plant and was instead using Pilot’s ‘332 patented technology. Pilot justifiably relied on Chevron’s statement that it was using its own, older Rangely technology, especially when Chevron sent Pilot a copy of its “Pastor” patent describing this Rangely technology, and because the design and operation of these gas plants is not open to the public. *Id.* ¶¶ 30, 31, 34, 45, 47. Pilot suffered pecuniary loss by justifiably relying on Chevron’s false representations. *Id.* ¶¶ 45, 47-48.

1. Chevron’s Statement that It Was Merely Using Older Technology from the Rangely Plant Was a False and Material Misrepresentation

Defendants first allege that Pilot has failed to identify a false and material misrepresentation. Mot., Part III.C.1. Here, Defendants assert that Chevron’s statements were merely non-actional opinions about the legal effect of a matter. *Id.* (citing *Walton Pond Joint Venture v. Hiawatha Sav. & Loan Ass’n*, No. 01-88-00719-CV, 1990 Tex. App. LEXIS 443, at *25-26 (Tex. App.—Houston [1st Dist.] Mar. 1, 1990, writ denied) (“The reason for the rule is that everyone is presumed to know the law and has no right to rely on another’s representations, which should be considered only opinions.”)). The Court should reject this argument for two independent reasons. First, Chevron’s statement that its Mabee plant was using Chevron’s older technology from its Rangely plant and as described in the Pastor patent has nothing to do with a legal opinion. They are purely factual statements about the non-public internal design and operation of a gas plant.

Second, Chevron’s statement that it does not infringe is also not merely an opinion about the legal effect of a given matter. Rather, the statement is an additional factual characterization of the non-public design and operation of Chevron’s Mabee gas plant and was made in conjunction with Chevron’s representation that this Mabee plant used Chevron’s older Rangely technology described by the Pastor patent. In contrast, a hypothetical statement that the technology disclosed

by the Pastor patent does not infringe would be a non-actionable legal opinion because all parties could judge for themselves the “legal effect” of given facts, i.e., whether the matter described by the Pastor patent infringed. *Cf. Taub v. Houston Pipeline Co.*, 75 S.W.3d 606, 621 (Tex. App.—Texarkana 2002) (noting that the non-actionable “comments clearly refer to the legal status of the sites, not to physical facts about the sites”). In the present case, Chevron represented that it does not infringe because it used the older Rangely technology as described in the Pastor patent—a false statement of fact.

Defendants next allege that Pilot has insufficiently alleged motive or scienter. Mot. at 13 (citing *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994)). In the present case, scienter or motive to misrepresent the design of the Mabee plant is plainly inferred from Pilot’s offer “to drop the matter if it is determined that Chevron is not using Pilot’s technology,” Doc. # 1 ¶ 27, and Chevron’s affirmative representation that they had investigated the matter and confirmed that Chevron does not infringe the ‘332 Patent. *See Tuchman*, 14 F.3d 1061 at 1068 (“The factual background adequate for an inference of fraudulent intent can be satisfied by alleging facts that show a defendant’s motive to commit securities fraud.”) (emphasis added).

Defendants next argue that Pilot has failed to allege the falsity of Chevron’s representation that its Mabee plant was using the same technology as its older Rangely plant and described in the Pastor patent. Mot. at 13. Defendants are again incorrect. For example, Pilot alleges that

Despite continuing to perpetuate Chevron’s assertions that its Chevron Mabee Plant uses its own proprietary processes described in the Pastor patent, the details regarding the processes as described in this 2017 paper have led Pilot to conclude that Chevron’s Mabee plant uses Pilot’s patented technology claimed in its ‘332 Patent, and as provided to Chevron in Pilot’s proposals for building the Mabee Plant. . . . Chevron’s representations described above regarding the processes that is used in its Mabee Plant were false.

Doc. # 1 ¶¶ 31, 33, 44.

Similarly, and contrary to Defendant’s argument, Mot. at 13-14, Pilot also does not

somehow admit that Chevron's Mabee plant merely uses Chevron's own technology from the Rangely plant. Rather, Pilot has alleged that "Chevron's Mabee plant uses Pilot's patented technology claimed in its '332 Patent, as provided to Chevron in Pilot's proposals for building the Mabee Plant." Doc. # 1 ¶ 33.³ Thus,

"Chevron's representations described above regarding the processes that [are] used in its Mabee Plant were false. The processes used in the Mabee Plant include Pilot's patented technology that was provided to Chevron in Pilot's proposals for building the Plant, not Chevron's own proprietary technology described in Chevron's Pastor patent and used in Chevron's Rangely, Colorado facility, as represented by Chevron.

Id. ¶ 44 (emphasis added).

2. Pilot Justifiably Relied on Chevron's Statement that It Was Merely Using Older Technology from the Rangely Plant

Defendants next allege that Pilot could not have justifiably relied on Chevron's misrepresentations. Mot. at 14-16. Here, Defendants argue that reliance could not be considered "justified" because, even after Chevron represented in February 2012 that it was merely using the older Rangely technology, Doc. #1 ¶ 24, Pilot still sought additional confirmation, Mot. at 14. Pilot still requested a meeting with Chevron, investigated an air quality statement about the Mabee plant, and sent Chevron a follow-up letter in 2013. Mot. at 14 (citing Doc. # 1 ¶¶ 25-27). Contrary to Defendants' argument, the entirety of Chevron's misrepresentations and the surrounding circumstances do plausibly support justifiable reliance. Pilot was simply exercising diligence and seeking confirmation. In Pilot's letter from August 2013, it offered to drop the matter if Chevron investigated and confirmed its earlier representations. Doc. # 1 ¶ 27. At the time, the design of the Mabee plant was non-public, so Pilot also had no other choice but to rely on Chevron's

³ As one example of the contradiction, the Rangely plant / Pastor patent splits a recycle stream "at the C₄ level" (Ex. P-5 at 2:67-3:25 (referring to Rangely plant / Pastor patent)), sending the C₃ propane out the top of the distillation column, whereas the Mabee Plant splits the recycle stream at C₃ level, sending the C₃ propane out the bottom of the distillation column. Doc. # 1, Ex. P-7 at 1-3 (referring to Mabee plant / Hydration Formation paper).

representations. *Id.* ¶ 34. In a response to Pilot’s letter, Chevron again confirmed its earlier representations and Pilot thus dropped the matter. *Id.* ¶¶ 28, 29.

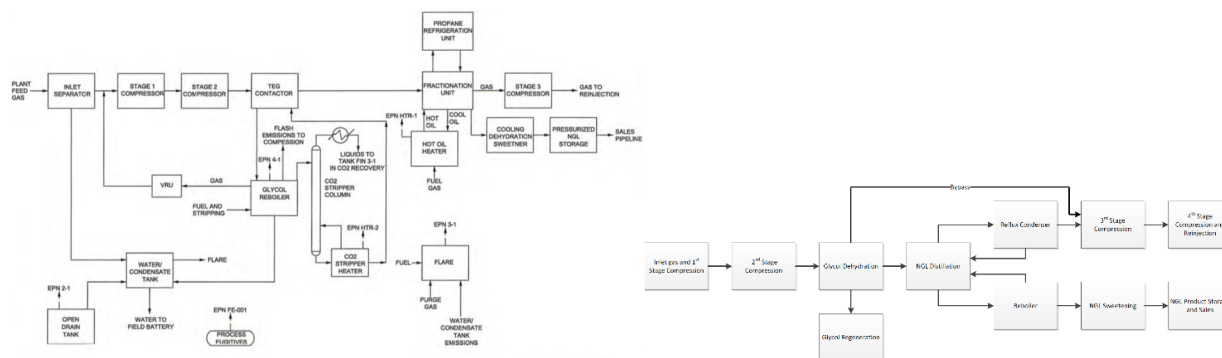
These specific allegations plausibly support Pilot’s justifiable reliance on Chevron’s misrepresentations. In reviewing Pilot’s pleadings, the court “must accept all well-pleaded facts as true, and . . . view them in the light most favorable to the plaintiff.” *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th. Cir. 1986). Further, “[a]ll questions of fact . . . must be resolved in the plaintiff’s favor.” *Lewis v. Fresne*, 252 F.3d 352, 357 (5th Cir. 2001). Here, justifiable reliance is a question of fact. *Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 584 (Tex. App.—San Antonio 2011). In the present case, Defendants’ arguments “at best raise fact questions not suitable for disposition under Rule 12(b)(6).” *Petrobras Am., Inc. v. Samsung Heavy Indus. Co.*, 9 F.4th 247, 256 (5th Cir. 2021).

Defendants next argue that Chevron’s misrepresentations in its August 29, 2013 letter could not be justifiably relied upon because the letter was from Chevron’s attorney written in response to Pilot’s request to compare Chevron’s technology used in the Mabee plant to the technology described in ‘332 patent. Mot. at 14-15. Importantly, however, the misrepresentations by Chevron’s attorney only confirmed the same misrepresentations made by Chevron’s ordinary business personnel in February 2012. Doc. # 1 ¶¶ 24, 29. In fact, reliance on these misrepresentations was more justifiable because the same misrepresentations were made by two different sources at Chevron.

In their Motion, Defendants next argue that reliance could not have been justified because “Pilot had the same knowledge and basis in 2013” for suspecting infringement as it does now. Mot. at 15. Contrary to Defendants’ argument, Pilot first discovered the facts supporting infringement in 2022 when it discovered the Hydrate Formation Paper, which indicated that the Mabee plant was using Pilot’s ‘332 patented technology, and not the older Rangely technology.

Doc. # 1 ¶ 33, Ex. P-7 (infringement chart).

Defendants next argue Pilot's reliance was not justified simply because a diagram from the Mabee plant's 2013 air permit application purportedly looks "similar" to a figure from the Hydrate Formation Paper. Mot. at 16. Contrary to Defendants' argument, the diagram and the figure do not look similar.



Mabee Air Permit Diagram (Ex. P-2)

Hydrate Formation Paper Fig. 3 (Ex. P-6)

Moreover, numerous new aspects of the Hydrate Formation Paper that are relied upon to show infringement are identified in Pilot's Claim Chart, attached as Exhibit P-7 to the Complaint. Thus, the Hydrate Formation Paper is not merely cumulative as Defendants allege.

3. Pilot's Misrepresentation Claim Is Not Barred by the Statute of Limitations

Defendants next argue that Pilot's claim for fraud or negligent misrepresentation is barred by the applicable statute of limitations. Here, Defendants argue that Pilot's Complaint has failed to describe how the Hydrate Formation Paper could not have been found earlier by exercising reasonable diligence. Mot. at 17. In its Complaint, Pilot alleges that,

In July of 2022, Pilot discovered a paper on the Internet that described the technology being used in Chevron's Mabee Plant. Attached as Exhibit P-6 is the paper entitled "Hydrate Formation in Chevron Mabee Unit for NGL Recovery and CO₂ Purification for EOR." . . . [T]he details regarding the processes as described in this 2017 paper have led Pilot to conclude that Chevron's Mabee plant uses Pilot's patented technology claimed in its '332 Patent, and as provided to Chevron in Pilot's proposals for building the Mabee Plant.

The Chevron Mabee Plant is not a public facility and members of the public are not able to view the processes used within the Plant. From the time of Chevron's misrepresentations regarding the processes that were actually used in the Mabee Plant, until the time of Pilot's

July 2022 discovery of the Hydrate Formation paper, details sufficient to contradict Chevron's misrepresentations were not available to Pilot. Prior to its discovery of the Hydrate Formation paper, Pilot could not have acquired knowledge in the exercise of reasonable care sufficient to lead to the discovery of Chevron's misrepresentations.

Doc. # 1 ¶¶ 32, 33 (emphasis added).

Contrary to Defendants' argument, Pilot has alleged sufficient facts to make it plausible that it could not have discovered the Hydrate Formation Paper by exercising reasonable diligence. The paper itself states that it was simply "Submitted to Gas Processors Association 2017." *Id.* ¶ 32. Thus, the paper was not submitted to Pilot (either by Chevron or others) nor posted on Pilot's website, nor was it published by Chevron or even mentioned on Chevron's website. The paper (Ex. P-6 to the Complaint) also does not indicate that it was published at all in any type of regular industry or scientific publication, that it was indexed among other plant designs, nor even that it was locatable by search engines before 2022. *Cf. Tu Nguyen v. Duy Tu Hoang*, 318 F. Supp.3d 983, 1012-13 (S.D. Tex. 2018) (defamatory posts about plaintiff were made on Facebook). Moreover, at the time, details regarding the Chevron Mabee plant were not public and the plant itself could not be viewed by the public. *Id.* ¶ 34. Thus, Pilot would have no reason to watch for similar papers disclosing the inner details of the Mabee plant. It is thus highly plausible that the paper was first located by Pilot in 2022 by happenstance and not by some failure to exercise reasonable diligence.

4. Pilot's Misrepresentation Claim Is Not an End Run Around the Statutory Limit on Patent Damages

Defendants lastly argue that Pilot's claim for common law fraud or negligent misrepresentation should be dismissed at the pleading stage simply because one type of actual damage sought by Pilot for these state law claims is the damage that otherwise would have been recoverable as patent infringement damages.⁴ Mot. at 18-19. Here, Defendants argue that 35

⁴ Damages for patent infringement are not unique or unusual, they are typically either lost profits or a reasonable royalty for use of the technology. *Smithkline Diagnostics, Inc. v. Helena*

U.S.C. § 286 bars patent infringement damages for infringement more than six years before suit is filed, and that the application of § 286 may not be avoided by equitable tolling. *Id.* at 19 (citing *A. Stucki Co. v. Buckeye Steel Castings Co.*, 963 F.2d 360, 363 n.3 (Fed. Cir. 1992)).

The *A. Stucki* case simply found that the bar under § 286 may not be avoided by equitable principles like laches and estoppel. 963 F.2d at 363. The *A. Stucki* case did not apply § 286 to bar independent state law claims for fraud or negligent misrepresentation which seek damages akin to patent damages. Moreover, Pilot has so far found no reported case that has done so. The distinction is significant because the court in *A. Stucki* viewed § 286 not as a statute of limitations, but a condition or limitation on the “statutorily-created right” of patent infringement. *Id.* at 363 n.3. In contrast, state law claims for fraud and negligent misrepresentation are not statutorily created rights. In fact, even for statutory patent infringement claims, the suit itself may still proceed, even though damages beyond six years are barred. *Std. Oil Co. v. Nippon Shokubai v. Kagaku Kogyo Co.*, 754 F.2d 345, 348 (Fed. Cir. 1985). Accordingly, Pilot’s claims for fraud and negligent misrepresent should not be dismissed.

D. In the Alternative, this Court Should Grant Leave to Amend

While Plaintiffs have set forth above the sufficiency of their allegations, Plaintiffs respectfully request leave to amend should this Court find any of their causes of action to be insufficiently pled, so that Plaintiffs may consider and implement this Court’s guidance. Fed. R. Civ. P. 15(a)(2).

CONCLUSION

For the foregoing reasons and authorities cited, Plaintiffs respectfully request that this Court deny Defendants’ Motion to Dismiss.

Laboratories Corp., 926 F.2d 1161, 1163 (Fed. Cir. 1991).

Respectfully submitted this 25th day of October, 2023,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2023, I electronically filed the foregoing *Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss for Failure to State a Claim under FRCP 12(b)(6)*, with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the following attorneys of record who are Filing Users of the Court's Electronic Filing System.

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