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

PROXENSE, LLC, **Plaintiff,** **v.** **MICROSOFT CORPORATION,** **Defendant.**	**Case No. 6:23-cv-319-ADA** **JURY TRIAL DEMANDED**

DEFENDANT MICROSOFT CORPORATION'S REPLY
IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

MICROSOFT 1015

I. INTRODUCTION

Proxense's Opposition attempts to improperly revise and recast its Complaint through motion practice, which is insufficient to save a pleading. Proxense now takes the position that there is actually a singular accused product, rather than the Complaint's interchangeable use of "Accused Product" and "Accused Products." Yet Proxense still does not identify the accused product. Instead, Proxense ties its allegations to an amorphous concept—"password-less architecture"—that injects even more confusion, since the concept apparently includes three more vague concepts of "identity platform," "authenticator," and "resource." Finally, Proxense seeks to excuse its Complaint's failure to plead required elements ("hybrid device" in a "proximity zone") by claiming "typographical errors." None of these meandering *ex post* explanations for its deficient Complaint meets the *Bot M8* standard that requires a defendant to be given fair notice of what products infringe—and how.

Through Proxense's unnecessarily confusing explanation of how the concept of a "password-less" architecture comprising three parts infringe the six patents-in-suit, Proxense manages to confirm that its allegations require actions performed by multiple entities. Specifically, Proxense's Opposition admits that its allegations involve "third party entities who utilize Microsoft's password-less architecture," "third-party websites," and "Microsoft users and customers." These are the quintessential type of allegations that violate the well-established divided infringement rule. Accordingly, Microsoft respectfully requests that Proxense's Complaint be dismissed.

II. ARGUMENT

A. "Password-less Architecture" and Components Such as "Resources" Are Not Defined Microsoft Products

Proxense's Opposition resorts to coining an abstract concept called "Microsoft's

password-less architecture" and characterizing it as the "infringing Microsoft technology and the accused product." *See* Opp. at 1, 2, 4-6, 8-13, 16-18, 20. However, Proxense's own vague term is insufficient for Microsoft to understand which of its products, services, or offerings is actually being accused, let alone how they allegedly practice the limitations of the six asserted patents.

Proxense's attempt to describe the "password-less architecture" by arbitrarily breaking it down into three more vague and generic concepts called "Microsoft Identity Platform," "authenticator," and "resource" only worsens the problem. ***First***, Proxense does not dispute that what it describes as "Microsoft Identity Platform" is not a discrete Microsoft product, but rather an offering with several products and services. *See* Mot. at 3 n. 2 ("Contrary to Proxense's suggestion-by-capitalization, the 'Microsoft identity platform' is not a discrete Microsoft product, but rather is an offering with several components. *See, e.g.*, Dkt. 1-26."). Therefore, by describing one of the components as the "Microsoft Identity Platform" without specifying which product or service within the platform is allegedly infringing, Proxense has not cured the deficiency. *See* Opp. at 1-2. ***Second***, although Proxense states that the "authenticator" component "may be the Microsoft Authenticator app [or] Windows Hello," it also states that the component can include authenticators which "meet the requirements set by Microsoft" or are "approved by Microsoft" —an undefined and boundless category. Opp. at 1, 4-5. ***Third***, Proxense describes the last component as a "resource" without offering any details whatsoever other than that it is "an application, website, or subscription." Opp. at 16; Compl. ¶ 47. Without sufficiently identifying the "password-less architecture" or which specific Microsoft components allegedly make up this "architecture," Proxense's "'kitchen sink' approach" fails to "articulate why it is plausible that the accused product infringes the patent claims." *See Bot M8 LLC v. Sony Corp. of Am.*, 4 F.4th 1342, 1352-54 (Fed. Cir. 2021). Failing to articulate this warrants

dismissal of the complaint. *See Artrip v. Ball Corp*., 735 F. App'x 708, 715 (Fed. Cir. 2018) (affirming dismissal of the complaint because it "d[id] not sufficiently identify . . . any of the particular machines that allegedly infringe other than by broad functional language").

Instead of identifying allegations in its Complaint that state which Microsoft products infringe or how they allegedly infringe, Proxense suggests that the mere length of its Complaint and citation to Microsoft's documents satisfy its pleading obligations. *See* Opp. at 1, 6-7. The Federal Circuit has found Proxense's exact argument to be unavailing as "it is the quality of the allegations, not the quantity, that matters." *Bot M8*, 4 F.4th at 1354 (affirming dismissal of patents despite plaintiff's emphasis on the number of pages in its FAC); *see also Vervain, LLC v. Micron Tech., Inc*., No. 6:21-cv-00487-ADA, 2022 WL 23469, at *5 (W.D. Tex. Jan. 3, 2022) (granting motion to dismiss despite the numerous exhibits and claim charts with element-by-element mapping that plaintiff provided). Because the ***substance*** of Proxense's allegations is deficient, Proxense's prolix paper is an inadequate pleading under Rule 8.

Contrary to Proxense's suggestion, Microsoft does not take issue with or dispute that Proxense's Complaint points out multiple Microsoft products and that it knows its own product lineup. Opp. at 6-8. That is not the problem. In fact, for a case involving "authentication" technology, the relative complexity of that technology may even require a greater degree of detail. *See Vervain*, 2022 WL 23469, at *5 (granting dismissal of a pleading involving "complex" technology – software and firmware for using solid-state material); *Bot M8*, 4 F.4th at 1353 (granting dismissal of a pleading involving "authentication" technology, which was also found to be "complex"). But Proxense does not even meet the lowest threshold, which is for Microsoft to know ***what*** is being accused of infringement and ***how*** it is allegedly infringing to have a fair opportunity to prepare its defenses.

Proxense overstates and misapplies the holdings of the cases on which it relies. *Estech Sys*. is distinguishable because the defendant there "identifie[d] itself as one of several [] customers [plaintiff] has accused of infringing the patents in suit." *Estech Sys. IP, LLC v. Carvana LLC*, 2022 WL 17727751, at *1. By contrast, Microsoft has not made any similar admissions here. Also, unlike the defendant in the other *Estech Sys*. suit, Microsoft has identified additional information that it needs to understand which systems are accused, including specific missing limitations. *See Estech Sys., Inc. v. Target Corp*., 2020 WL 6496425, at *3 (E.D. Tex. Aug. 10, 2020); Opp. at 8. The other cases that Proxense relies on are also distinguishable because, unlike Proxense, the plaintiff(s) in the other cases clearly and specifically identify the accused product. *See Raytheon Co. v. Cray, Inc*., 2017 WL 1362700, at *4 (E.D. Tex. Mar. 13, 2017) ("Raytheon alleges that a specific supercomputer infringes the patents-in-suit."); *MAZ Encryption Techs. LLC v. BlackBerry, Ltd.*, 2016 WL 9275008, at *3 (E.D. Tex. June 7, 2016) ("Plaintiff has alleged that Defendants' BlackBerry Enterprise Solution infringes claims 1, 4, and 7"); *Solocron Edu., LLC v. Healthstream, Inc*., 2016 WL 9137458, at *3 (E.D. Tex. June 7, 2016) ("Solocron also specifically identifies the accused product: the "Topyx Learning Management System[.]""). Lastly, *K-Tech* does not support Proxense's argument. In *K-Tech*, the Federal Circuit reversed the district court's ruling, finding that the district court erroneously held the plaintiff to a standard where the "patent holder must prospectively anticipate [] noninfringement arguments." *K-Tech Telecomms., Inc. v. Time Warner Cable, Inc*., 714 F.3d 1277, 1286 (Fed. Cir. 2013). Microsoft has not made any similar arguments holding Proxense to such a standard.

Put simply, Proxense has failed to meet the minimum pleading requirements, especially when considering the relative complexity of the technology at issue. *See also Bell Atl. Corp v.*

Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level.")

B. Proxense Concedes That It Fails to Even Address—Let Alone Properly Allege—Key Limitations

Instead of alleging that any Microsoft product meets certain required limitations of the Asserted Patents, Proxense improperly attempts to "low[er] [the] standard applicable for plausibly alleging infringement." Opp. at 9. As a preliminary matter, Proxense suggests that it only needs to provide "notice" to Microsoft (*see* Opp. at 10) while ignoring that "[f]air notice, in turn, requires the plaintiff to plausibly allege that the accused products meet ***each and every*** element" of the asserted patents' claim(s)—a showing that Proxense fails to make. *See Qwikcash, LLC v. Blackhawk Network Holdings, Inc.*, No. 4:19-CV-876-SDJ, 2020 WL 6781566 (E.D. Tex. Nov. 17, 2020) (internal citations omitted) (granting motion to dismiss direct infringement claim); *see also Nu-You Techs., LLC v. Beauty Town Int'l Inc.*, No. 3:15-CV-03433-N, 2016 WL 4717991, at *2 (N.D. Tex. July 7, 2016) (dismissing plaintiff's "conclusory allegations [and] unwarranted factual inferences" of direct infringement because plaintiff did not plausibly allege defendant performed every step of a method claim).

Proxense's analysis of Microsoft's cited cases is flawed. In *Bot M8*, although the complaint alleged that the PS4 contains "multiple storage and multiple authentication programs," including the PS4's hard drives, Blu-ray game discs, and PlayStation Network Servers, the Federal Circuit found that Bot M8 "never sa[id] which one or ones satisfy the mutual authentication limitation." *Bot M8*, 4 F.4th at 1354-55. Proxense attempts to distinguish this case by arguing that it surpasses Bot M8's allegations by describing how Microsoft Authenticator App, Windows Hello, and the identity platform work. However, just as *Bot M8*, Proxense commits the fatal flaw of failing to describe ***which*** Microsoft product(s) purportedly

satisfy ***which*** limitations. *See id.*; Opp. at 12. Similarly, Proxense attempts to distinguish *Vervain* on the basis that the plaintiff's mapping of the limitations to the accused product "only spanned two paragraphs" while ignoring the fact that Proxense dedicated ***no*** paragraphs in its Complaint to map the "hybrid device" in a "proximity zone" limitation. Opp. at 12.

Proxense attempts to distinguish the *Ruby Sands* case on the basis that the plaintiff pled "no allegations that the defendant *bank* makes uses, offers to sell, or sells mobile devices." But Proxense similarly fails to provide any allegation that ***Microsoft*** practices every element of the claim. *See* Opp. at 12 (international citations omitted); Mot. at 7-9. Proxense also inaccurately reduces *De La Vega* to a case about "Rule 11" (*see* Opp. at 12-13), when the Court actually focused on plaintiff's failure to explain and allege the "coupling" limitation, as well as the fact that the asserted claims required multiple actors in granting Microsoft's motion to dismiss for failure to state a claim. *De La Vega v. Microsoft Corp*., No. 19-cv-00612- ADA, 2020 WL 3528411, at *3-6 (W.D. Tex. Feb. 7, 2020). In sum, Proxense's failure to plausibly plead infringement of "each and every element" of the asserted patents' claims is exactly the type of failing that the courts in these cases held warranted dismissal.

Setting aside Proxense's flawed legal analysis, Proxense's other excuses in its Opposition only confirm that it has not adequately alleged that Microsoft "persistently stor[es] biometric data" or communicates with a "hybrid device" in a "proximity zone." With respect to the first limitation of "persistently storing biometric data," Proxense ignores that its Complaint predominantly describes "Android devices" or "iOS devices" as meeting this limitation—neither of which are ***Microsoft*** products. Compl. ¶¶ 59, 60, 85-87, 119-121, 153-155. Out of the four instances, set forth below, where Proxense alleges that it maps specific Microsoft products to the "persistently stor[ing] biometric data" limitation (*see* Opp. at 10), ***none*** are adequate:

- Compl. ¶ 57 broadly refers to "Windows devices . . . ". This fails to adequately identify which ***particular*** Microsoft devices satisfy the limitation. *See Artrip*, 735 F. App'x at 715 (Fed. Cir. 2018) (affirming the dismissal of plaintiff's third amended complaint because it "d[id] not sufficiently identify . . . any of the ***particular*** machines that allegedly infringe") (emphasis added). To confuse matters more, Proxense alleges that these "Windows devices" include "laptops produced by Microsoft's ***partners***"—not Microsoft itself. *See* Opp. at 10 (emphasis added). The one Microsoft product that Proxense does identify is the "Microsoft Surface," however, Proxense never attempts to fit this into its contrived rubric of: the Microsoft identity platform, a resource, and an authenticator. *See* Opp. at 4-5. Proxense's newfound reliance on the "Microsoft Surface" only solidifies that its alleged accused product cannot satisfy this particular limitation.

- Compl. ¶ 58 again refers only to "Windows device . . . ", which fails for the same reasons as the first.

- Compl. ¶ 90 refers only to "Windows compatible systems." Not only does this fail to identify a particular Microsoft device, but a system ***compatible*** with Windows is yet another undefined and boundless group that implicates third parties.

- Compl. ¶ 96 is even less detailed than the previous three, and makes ***no*** mention of Microsoft at all—let alone a Microsoft product.

With respect to the second limitation of "hybrid device" in a "proximity zone[,]" Proxense plainly concedes that it has not alleged this limitation. *See* Opp. at 9-13. Instead, Proxense avers that it no longer asserts a claim with this limitation, and dismisses the allegations in its Complaint as a typo. *See* Opp. at 9 n. 4 ("[d]ue to a typographical error, the Complaint identified Claim 1 rather than Claim 10 of the [']042 Patent"—where claim 1 contains this limitation but claim 10 does not. *See* Compl. ¶¶ 186, 187).[1] However, the Complaint alleges that "Microsoft infringes ***at least*** claim 1 of the 042 Patent[,]" which shows that Proxense did not limit its infringement allegations to only one claim. Compl. ¶ 186 (emphasis added). Further, Proxense attached "illustrative claim charts" of Apple and Samsung products to its Complaint

[1] Further, on August 10, 2023, the due date for Microsoft's Reply, Proxense served "Amended Preliminary Infringement Contentions" where it "corrected" this same "typographical" error. In particular, Proxense alleged that it "mistakenly omitted the '0'" in asserting claim 1, rather than claim 10 for the '042 patent. This only underscores the deficiency of Proxense's Complaint.

that included this exact limitation. Compl., Ex. 7 ("Illustrative Claim Charts").

Instead of pleading the "hybrid device" in a "proximity zone" limitation, Proxense alleges that for the '042, '289, and '960 patents, "the Patents' 'claims include a controller placing within memory information that can only be accessed by a corresponding access key . . . " *See* Opp. at 11. These asserted patents, however, do not include a claim that involves a "controller" and it is unclear which claim(s) Proxense is referring to. *See id.* Moreover, Proxense's recently-served infringement contentions introduce even more third-party devices into the picture. As an example, Proxense refers to an authenticator developed by yet another third party company, the Feitan AllinPass, to meet the "hybrid device including . . . the integrated RDC" limitation, and a third party company, Yubico, to meet the "creating a first wireless link between an integrated receiver-decoder circuit (RDC) of a hybrid device and an external personal digital key (PDK)" limitation. *See* Ex. 1 (Proxense's Amended Infringement Contentions for '042 Patent) at 3-10. At best, Proxense's infringement contentions further muddies the water.

C. Proxense's Direct Infringement Allegations Require Independent Third Party Actions and/or Devices

Proxense's admission that an infringing product requires the acts and/or devices of third party mobile device manufactures, third party "authenticators," third party "resources," and/or third party developers shows that its Complaint violates the single actor rule.

In its Opposition, Proxense fails to show that it is ***Microsoft*** that performs all the steps of a claim, while conveniently failing to address its repeated reliance on "Android devices" and "iOS devices" throughout the Complaint. *See* Mot. at 9-10. Instead, Proxense's Opposition compounds the problem by pointing to "laptops produced by Microsoft's ***partners***" and the "[u]sers['] … phone"—neither of which consists of Microsoft itself—in an attempt to counter Microsoft's arguments. *See* Opp. at 15 (emphasis added); *see Chapterhouse, LLC v. Shopify,*

Inc., No. 2:18-CV-00300-JRG, 2018 WL 6981828, at *4 (E.D. Tex. Dec. 10, 2018) (granting motion to dismiss because "there is no allegation that one entity performs every step of Claim 1 of the '356 Patent").[2] Notably, Proxense does not allege any contractual obligation[3] or other relationship between Microsoft and the third parties, including third party device manufacturers and developers.[4]

Proxense's attempt to frame this dispute as a claim construction issue *(see* Opp. at 13-14) has been rejected by courts before. That is, claim construction cannot save a case when the claims in the Complaint are implausible or patently unworkable on its face. *See Qwikcash*, 2020 WL 6781566, at *5 ("the Court need not engage in claim construction to decide [the] dismissal motion because Qwikcash's allegations of direct infringement are patently unworkable").

Lastly, Proxense's repeated reliance on *Textile* does not rectify the fundamental flaw in these allegations. As a preliminary matter, in *Textile,* this Court recognized that "direct infringement by use of a system claim requires a party to use each and every element of the claimed system"—a showing that Proxense is unable to make for the reasons discussed above.

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[2] Similarly, in *De La Vega*, even though the plaintiff "explain[ed] how Microsoft and Google each perform[ed] all steps, Plaintiff also illogically contend[ed] that actors other than Microsoft or Google perform[ed] some of the claim steps." *De La Vega,* 2020 WL 3528411, at *3 (granting Microsoft's motion to dismiss with prejudice). The plaintiff's allegations in *De La Vega* are analogous to Proxense's allegations here: "Microsoft provides an application for ***users' mobile devices*** to view and filter live streaming videos" (*see id.)* (emphasis added) compared to Proxense's allegation that "***[u]sers*** wanting the benefit of biometric authentication via the Microsoft Authenticator App or Windows Hello have no choice but to store on ***their phone*** or Windows device a credentialed ID …" *See* Opp. at 15 (emphasis added).

[3] Though Proxense references a "Terms of Use[,]" Exhibit 12 cited by Proxense does not mention anything about a "Terms of Use" or "contract." Compl. ¶ 50, Ex. 12; Mot. at 12-13.

[4] Proxense ignores the standard to show direction or control: "the level of 'direction or control' the Federal Circuit intended was not mere guidance or instruction in how to conduct some of the steps of the method patent. Instead, the court indicates that the third party must perform the steps of the patented process by virtue of a contractual obligation or other relationship that gives rise to vicarious liability in order for a court to find 'direction or control.'" *See, Emtel, Inc. v. Lipidlabs, Inc., et al.*, 583 F.Supp.2d 811, 837-38 (S.D. Tex. 2008).

See Textile Computer Sys., Inc. v. Broadway Nat'l Bank, 620 F. Supp. 3d 557, 563 (W.D. Tex. 2022). Moreover, unlike the facts here, *Textile* involved claim elements that "likely do not require that anyone other than [defendant] to practice the limitations" and the plaintiff had sufficiently pled "that each of the claim elements may be hosted by [defendant] directly." *Id.* The Court also found that Textile had adequately pled joint infringement by alleging that defendant and its affiliates were part of an "interrelated group of companies which together comprise one of the country's largest banking and financial service entities." *Id*. Microsoft is, of course, not related to any of the identified third parties such as Google, Apple, Dell, Feitan, or Yubico, among others. *See id*. Accordingly, Proxense's reliance on *Textile* is inapposite.[5]

D. Dismissal with Prejudice is Warranted as Any Amendment Would Be Futile

Proxense simply requests leave to amend without explanation or even indication of what its potential amendments might be. *See* Opp. at 20. Moreover, Proxense's recently-served infringement contentions not only fail to fix any deficiencies, but introduce even more third parties necessary for its infringement allegations. Accordingly, "dismissal with prejudiced [i]s warranted because further amendment would be futile." *See, e.g., See Burke v. Ocwen Loan Servicing*, 855 F. App'x 180, 187 (5th Cir. 2021).

III. CONCLUSION

For these reasons, Microsoft respectfully requests dismissal of Proxense's Complaint in its entirety with prejudice.

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[5] Proxense relies on other cases that can be readily distinguished. In *Georgetown Rail*, the Federal Circuit ruled on the defendant's appeal following not only claim construction, but also a jury trial, while making no mention of the 12(b)(6) pleading standard, and in *Garrett*, the court focused on whether the "development and testing of the accused products" constituted an infringing use. *See Georgetown Rail Equipment Co. v. Holland L.P.*, 867 F.3d 1229, 1239 (Fed. Cir. 2017); *Garrett v. TP-Link Res. Am. Corp.*, 2020 WL 6873419, at *6 (N.D. Cal. Nov. 23, 2020). Neither of these cases are applicable here.

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CERTIFICATE OF SERVICE

The hereby certify that a true and correct copy of the foregoing document was filed electronically in compliance with Local Rule CV-5 on August 10, 2023. As of this date, all counsel of record have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3)(A).

/s/ Betty Chen
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