

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

HEALTHIER CHOICES
MANAGEMENT CORP.,

Plaintiff,

v.

R.J. REYNOLDS VAPOR COMPANY,

Defendant.

Civil Action No.: 1:23-cv-00813-LCB-LPA

DEMAND FOR JURY TRIAL

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM OF PATENT INFRINGEMENT**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTS.....	3
III. LEGAL STANDARD	4
IV. ARGUMENT	7
A. Rule 8(a)(2) Requires Only That The Complaint Give The Defendant Fair Notice Of The Claim—Even After <i>Iqbal/Twombly</i>	7
B. HCMC’s Complaint States More Than A Plausible Claim For Relief For Patent Infringement	12
C. RJRV’s Motion Is Contrary To This Court’s Local Rules.....	17
D. RJRV’s “tube element” Argument Is Baseless And Without Merit	19
E. In The Alternative, HCMC Should Be Granted Leave To Amend Its Complaint	21
V. CONCLUSION	23

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Artrip v. Ball Corp.</i> , No. 1:14CV00014, 2017 WL 5037470 (W.D. Va. Nov. 3, 2017).....	10
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	<i>passim</i>
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	<i>passim</i>
<i>In re Bill of Lading Transmission & Processing Sys. Patent Litig.</i> , 681 F.3d 1323 (Fed. Cir. 2012).....	6, 19, 20
<i>Bot M8 LLC v. Sony Corp. of Am.</i> , 4 F.4th 1342 (Fed. Cir. 2021)	6, 13
<i>CoreBrace LLC v. Star Seismic LLC</i> , 566 F.3d 1069 (Fed. Cir. 2009).....	4
<i>Deering Precision Instruments, L.L.C. v. Vector Distrib. Sys., Inc.</i> , 347 F.3d 1314 (Fed. Cir. 2003).....	6
<i>Disc Disease Sols. Inc. v. VGH Sols., Inc.</i> , 888 F.3d 1256 (Fed. Cir. 2018).....	<i>passim</i>
<i>Edwards v. City of Goldsboro</i> , 178 F.3d 231 (4th Cir. 1999)	22
<i>Erickson v. Pardus</i> , 551 U.S. 89 (2007).....	5, 16
<i>Feminist Majority Found. v. Hurley</i> , 911 F.3d 674 (4th Cir. 2018)	5
<i>Foman v. Davis</i> , 371 U.S. 178 (1962).....	22
<i>Golden v. Apple, Inc.</i> , No. 6:20-cv-04353-JD-KFM, 2021 WL 5074739 (D.S.C. Nov. 2, 2021).....	10

<i>JDS Uniphase Corp. v. CoAdna Photonics, Inc.</i> , No. 14-cv-01091-JST, 2014 WL 2918544 (N.D. Cal. June 26, 2014)	8
<i>K-Tech Telecomm., Inc. v. Time Warner Cable, Inc.</i> , 714 F.3d 1277 (Fed. Cir. 2013).....	8, 9, 10
<i>Lifetime Indus., Inc. v. Trim-Lok, Inc.</i> , 869 F.3d 1372 (Fed. Cir. 2017).....	9
<i>Macronix Int’l Co. v. Spansion Inc.</i> , 4 F.Supp.3d 797 (E.D. Va. 2014)	8, 9
<i>Markman v. Westview Instruments, Inc.</i> , 52 F.3d 967 (Fed. Cir. 1995).....	5
<i>McZeal v. Sprint Nextel Corp.</i> , 501 F.3d 1354 (Fed. Cir. 2007).....	17
<i>N. Star Innovations v. Micron Tech., Inc.</i> , No. 17-506-LPS-CJB, 2017 WL 5501489 (D. Del. Nov. 16, 2017)	11
<i>Nalco Co. v. Chem-Mod, LLC</i> , 883 F.3d 1337 (Fed. Cir. 2018).....	6, 20
<i>PanOptis Patent Mgmt, LLC v. BlackBerry Corp.</i> , No. 2:16-CV-00059-JRG-RSP, 2017 WL 780885 (E.D. Tex. Feb. 10, 2017)	19
<i>Prime Focus Creative Servs. Canada Inc. v. Legend3D, Inc.</i> , No. CV-15-2340-MWF, 2016 WL 6678009 (N.D. Cal. Mar. 1, 2016).....	8
<i>T.G. Slater & Son, Inc. v. Donald P. & Patricia A. Brennan LLC</i> , 385 F.3d 836 (4th Cir. 2004)	7
<i>Teva Pharms. USA, Inc. v. Sandoz, Inc.</i> , 574 U.S. 318 (2015).....	5
<i>Warner-Lambert Co. v. Teva Pharms. USA, Inc.</i> , 418 F.3d 1326 (Fed. Cir. 2005).....	5
<i>Windy City Innovations, LLC v. Microsoft Corp.</i> , 193 F.Supp.3d 1109 (N.D. Cal. 2016)	18

<i>Zak v. Chelsea Therapeutics Int'l, Ltd.</i> , 780 F.3d 597 (4th Cir. 2015)	13
--	----

Statutes

35 U.S.C. § 271(a)	12
--------------------------	----

Other Authorities

Fed. R. Civ. P. 8.....	<i>passim</i>
Fed. R. Civ. P. 12(b)(6)	<i>passim</i>
Fed. R. Civ. P. 15(a)(2)	22
Fed. R. Civ. P. 84.....	9
L.R. 101.2	18
L.R. 103.1	18, 21, 22

I. INTRODUCTION

Healthier Choices Management Corp.’s (“HCMC”) Complaint alleges that R.J. Reynolds Vapor Company (“RJRV”) infringes, either literally or under the doctrine of equivalents, HCMC’s U.S. Patent No. 9,538,788 (“the ’788 patent”), entitled “Electronic Cigarette” and attached as Exhibit A to the Complaint. See D.E. 1 (“Complaint”).

RJRV’s Motion serves little purpose other than to multiply the proceedings. RJRV cannot in good faith argue that HCMC’s Complaint does not provide fair notice of HCMC’s infringement claim. The ’788 patent is straightforward—and claim 1 simply recites the structure of an electronic cigarette for heating a fluid. HCMC’s Complaint alleges that RJRV’s Vuse Alto product—which includes an electronic vape pen and pre-filled liquid pods—infringes at least claim 1 of the ’788 patent. Nothing more is required under the notice pleading standard set forth in Fed. R. Civ. P. 8(a) or the Supreme Court’s guidance in *Iqbal/Twombly*. HCMC’s Complaint includes not only the language of claim 1 of the ’788 patent, but also images of RJRV’s accused Alto Vuse product—including both the electronic vape pen and the pre-filled liquid pods used therein. See, e.g., Complaint, ¶¶ 13, 25 (reproduced below).

13. Independent Claim 1 of the '788 patent recites the following: 1. An electronic cigarette, comprising: a casing comprising a first chamber and a second chamber, the two chambers located sequentially within the casing; a battery located in the first chamber; a fluid containing member located in the second chamber; a heating assembly located in the second chamber, the heating assembly comprising a bulb containing a heating wire in communication with the battery; a fluid passageway communicating between the fluid containing member and the heating assembly; a tube element communicating between the first and second chambers, with a first distal end of the tube element located in the first chamber, and a second distal end of the tube element located in the second chamber and affixed to the bulb, the tube element providing an air passage between the first and second chambers; a sealing element forming a partition between the first and second chambers; and an air inlet provided on an external wall of the casing; wherein the heating wire heats the bulb, and wherein the bulb heats fluid introduced to and coming in contact with the bulb through the fluid passageway. (Exhibit A, '788 patent, 8:59-9:14).	25. As shown below, the Vuse Alto pre-filled liquid pods are specifically designed to be used together with a Vuse Alto vape pen, separately, as is apparent, neither the Vuse Alto vape pen nor the pre-filled liquid pods are suitable for substantial non-infringing use.  Vuse Alto Vape Pen and Pre-Filled Liquid Pod
---	---

Complaint, ¶ 13 ('788 patent, claim 1), ¶ 25 (RJRv's accused Vuse Alto electronic vape pen and pre-filled pod).

Rather than denying that HCMC's Complaint sufficiently pleads a claim for patent infringement, RJRV's Motion instead would have this Court require HCMC to provide element-by-element infringement contentions at the pleading stage. However, it is well-settled that a plaintiff need not plead patent infringement on an element-by-element basis or prove its case at the pleading stage. All that is required is to give the defendant notice of the claim—which HCMC more than satisfies here. Moreover, under this Court's Local Patent Rules, HCMC is required to serve on RJRV its preliminary infringement contentions within thirty days of the Initial Scheduling Conference, which reveals the wasteful nature of RJRV's Motion.

II. FACTS

Defendant RJRV is a wholly-owned subsidiary of Reynolds American Inc., which in turn is a wholly-owned subsidiary of British American Tobacco, p.l.c. Complaint, ¶ 6. RJRV imports, distributes, markets, offers for sale, sells, and commercially uses Vuse Alto vape pens and Vuse Alto pre-filled liquid pods throughout the United States, including in this District. Complaint, ¶ 15.

On September 26, 2023, HCMC filed this patent infringement action against RJRV, alleging RJRV's direct and indirect infringement of the '788 patent, either literally or under the doctrine of equivalents. Complaint, ¶¶ 27-30. Specifically, RJRV's manufacture, use, sale, offer for sale, and/or importation of the Vuse Alto vape pen in combination with Vuse Alto pre-filled liquid pods directly infringes one or more claims of the '788 patent. Complaint, ¶¶ 15-20, 27. Further, HCMC's Complaint identifies RJRV's indirect infringement. Complaint, ¶¶ 28-30. Specifically, RJRV advertises and promotes the Vuse Alto system and/or provides instructions for use to potential and actual purchasers of the Vuse Alto system, demonstrating that RJRV induces and/or contributes to infringement of one or more claims of the '788 patent. Complaint, ¶¶ 21-25, 28-30.

On September 27, 2023, RJRV was served through its registered agent. D.E. 8.

HCMC consented to RJRV's motion to extend its time to respond to the Complaint by thirty days (D.E. 11), which was granted on October 11, 2023.

On November 1, 2023, counsel for RJRV sent a fourteen-page letter to counsel for HCMC providing publicly-available information concerning the accused Vuse Alto

system, summarizing the claims of the '788 patent, and providing three different non-infringement arguments based on RJRV's claim constructions of the '788 patent claims. See D.E. 16-2, Exhibit B, RJRV's Letter to HCMC. HCMC responded to RJRV's letter on November 9, 2023, explaining that HCMC's Complaint was sufficiently pled, as demonstrated by RJRV's ability to undertake the detailed non-infringement analysis set forth in its letter. See D.E. 17-3, Exhibit C, HCMC's Letter to RJRV. HCMC's letter also explained to RJRV that under this Court's Local Patent Rules, the parties' contentions and claim construction positions will be exchanged expeditiously after the Initial Scheduling Conference. *Id.*

On November 17, 2023, RJRV filed the instant motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). D.E.15-17.

On December 7, 2023, the Court granted the parties' consented motion to extend the briefing schedule (D.E. 18) such that HCMC's Response is due December 22, 2023. D.E. 19.

III. LEGAL STANDARD

Rule 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) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Motions to dismiss are procedural questions to which the Federal Circuit applies the law of the regional circuit. *CoreBrace LLC v. Star Seismic LLC*, 566 F.3d 1069, 1072 (Fed. Cir. 2009). In the Fourth

Circuit, “[a] district court can properly grant a Rule 12(b)(6) dismissal only if the complaint fails to contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 685 (4th Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (cleaned up). At the pleading stage, Rules 8(a)(2) and 12(b)(6) merely require a plaintiff to provide “only enough facts to state a claim for relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.

A complaint meets the pleading standard when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 679 (citing *Twombly*, 550 U.S. at 556). “Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the ... claim is and the ground upon which it rests.’” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555).

Proving patent infringement requires the patentee to demonstrate that RJRV’s Vuse Alto system meets each limitation of an asserted patent claim literally or under the doctrine of equivalents. Specifically, the two-step infringement analysis includes “determining the meaning and scope of the patent claims[,]” “known as claim construction[,]” and then “comparing the properly construed claims to the [accused infringing product].” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995). The first step—claim construction—is an issue of law that is exclusively within the province of the court. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 325 (2015); *Warner-Lambert Co. v. Teva Pharms. USA, Inc.*, 418 F.3d 1326, 1340 (Fed. Cir. 2005). The second step—comparing

the properly construed claims to the accused infringing product to determine infringement—is a question of fact. *Deering Precision Instruments, L.L.C. v. Vector Distrib. Sys., Inc.*, 347 F.3d 1314, 1324 (Fed. Cir. 2003).

In a patent infringement complaint, there is no requirement for the plaintiff to “plead infringement on an element-by-element basis.” *Bot M8 LLC v. Sony Corp. of Am.*, 4 F.4th 1342, 1352 (Fed. Cir. 2021) (citation omitted). “The level of detail required in any given case will vary depending on a number of factors, including the complexity of the technology, the materiality of any given element to practicing the asserted claim(s), and the nature of the allegedly infringing device.” *Id.* at 1353. Nor is there a requirement for the plaintiff to “prove its case at the pleading stage.” *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012). To sufficiently plead direct infringement, “specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the ground upon which it rests.” *Disc Disease Sols. Inc. v. VGH Sols., Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555)) (cleaned up). Moreover, dismissal of a patent complaint under Rule 12(b)(6) is inappropriate where claim construction could affect the disputes between the parties. *See Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1349-50 (Fed. Cir. 2018) (denying Rule 12(b)(6) motion because the disputes concerning the infringement allegations hinged on claim construction, which goes to the merits rather than the sufficiency of the complaint); *see In re Bill of Lading*, 681 F.3d at 1343, n.13 (citation omitted) (explaining that it would be

“inappropriate” for a district court to engage in “claim construction at the pleading stage—with no claim construction process undertaken.”).

As the Fourth Circuit has stated, “a motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief.” *T.G. Slater & Son, Inc. v. Donald P. & Patricia A. Brennan LLC*, 385 F.3d 836, 841 (4th Cir. 2004) (citation omitted).

IV. ARGUMENT

A. Rule 8(a)(2) Requires Only That The Complaint Give The Defendant Fair Notice Of The Claim—Even After *Iqbal*/*Twombly*

RJRV’s motion is based on a false premise, and should be denied. Specifically, RJRV argues (at 2-5) that the Supreme Court’s *Twombly* and *Iqbal* cases raised the bar for pleading patent infringement, and based on that purportedly new pleading standard, HCMC’s Complaint falls short of plausibly pleading direct infringement. But that is not the case.

As an initial matter, neither *Twombly* nor *Iqbal* were patent cases, but more importantly, neither case addressed the pleading standard itself. Instead, both cases addressed “the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.” *See Iqbal*, 556 U.S. at 669. The pleading standard in all civil cases was—and continues to be—governed by Rule 8(a)(2), which “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 grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

The cornerstone of RJRV’s argument is a single decision from the Eastern District of Virginia, styled *Macronix Int’l Co. v. Spansion Inc.*, 4 F.Supp. 3d 797 (E.D. Va. 2014). But *Macronix* does not control here and conflicts with the Federal Circuit’s post-*Iqbal/Twombly* precedent for assessing the sufficiency of a patent infringement complaint. In its Motion, RJRV cites *Macronix* for its pronouncement that “the assessment of the pleadings for sufficiency after *Twombly* and *Iqbal* was quite a different proposition than it previously had been.” See Motion at 2-3 (quoting *Macronix*, 4 F.Supp.3d at 801). RJRV does this to set up its straw man argument that *Iqbal/Twombly* overruled the pleading standard set forth in Rule 8(a)(2). But that is not the case. RJRV’s reliance on *Macronix* here fails for the same reasons that other district courts have declined to be persuaded by litigants relying on *Macronix* and others still have gone so far as to criticize its flawed reasoning.

The Northern District of California explained the misgivings of *Macronix*:

The Court is not persuaded by the reasoning of *Macronix* because it fails to grapple with the Federal Circuit’s explicit statement in *K-Tech* that “to the extent any conflict exists between *Twombly* (and its progeny) and the Forms regarding pleading requirements, the Forms control.”

Prime Focus Creative Servs. Canada Inc. v. Legend3D, Inc., No. CV-15-2340-MWF, 2016 WL 6678009, at *6 (N.D. Cal. Mar. 1, 2016) (citing *K-Tech Telecomm., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1283 (Fed. Cir. 2013)); see also *JDS Uniphase Corp. v. CoAdna Photonics, Inc.*, No. 14-cv-01091-JST, 2014 WL 2918544, at *2 (N.D. Cal.

June 26, 2014) (denying motion to dismiss and explaining that “[t]his court is unpersuaded by the opinion in *Macronix*, since it provides no argument for how K-Tech, which again reinforced the Federal Circuit’s understanding of Form 18, can be distinguished.”).

In *K-Tech*, the Federal Circuit considered whether a complaint drafted to the satisfaction of Form 18 of the Federal Rules of Civil Procedure was sufficient to overcome a motion to dismiss. Form 18—which was repealed in 2015—set forth a sample complaint for direct patent infringement. And as the Federal Circuit explained, pursuant to Rule 84, the “proper use of a form contained in the Appendix of Forms [such as Form 18] effectively immunizes a claimant from attack regarding the sufficiency of a pleading.” *K-Tech*, 714 F.3d at 1283 (citation omitted). Form 18 merely required: (1) a statement of jurisdiction; (2) a statement of ownership of the asserted patent; (3) a statement that the defendant has been infringing the patent by “making, selling, and using [devices] that embody the patented invention; (4) a statement that the plaintiff has given notice of the infringement; and (5) a demand for relief. *See* Fed. R. Civ. P. App. Form 18 (2014) (repealed 2015). Because HCMC’s Complaint meets all of these requirements, it should be immunized from attack regarding its sufficiency. *See K-Tech*, 714 F.3d at 1283.

RJRV’s argument notwithstanding, *Iqbal/Twombly* did not change the pleading requirements set forth in Rule 8(a)(2). Nor did the repeal of Form 18. Indeed, even after *Iqbal/Twombly*, and after the repeal of Form 18, the Federal Circuit maintains that it has “never recognized” a distinction between the requirements of Form 18 and *Iqbal/Twombly*. *Lifetime Indus., Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1377 (Fed. Cir. 2017). For simple

technology, the plausibility standard of *Iqbal/Twombly* can be met by a patent complaint that identifies the patents and the accused products, and alleges that the accused products infringe one or more claims of the asserted patent. *See Disc Disease Sols.*, 888 F.3d at 1260. “[P]lausible allegations conforming to Form 18 are adequate to satisfy the requisite *Iqbal* and *Twombly* standard.” *K-Tech*, 714 F.3d at 1289 (Wallach, J., concurring).

RJRV attempts to prop up its “heightened requirements” argument by citing to outlier cases where the court found the patent infringement complaints fell short of the Rule 8 standard, but those cases are distinguishable from the facts here. *See* Motion at 4-5. In both *Golden* and *Artrip* the courts found that the complaints lacked the requisite specificity because the plaintiff had failed to identify the specific product that was being accused of infringement. In *Golden*, the court dismissed the *pro se* plaintiff’s complaint because it failed to “describe specific systems developed and manufactured by [the defendant] that are like [the plaintiff’s] patent.” *See Golden v. Apple, Inc.*, No. 6:20-cv-04353-JD-KFM, 2021 WL 5074739, at *2 (D.S.C. Nov. 2, 2021), *aff’d*, 2022 WL 4103285 (Fed. Cir. Sept. 8, 2022). And in *Artrip*, despite the court having instructed the plaintiff to specifically identify in its *third* amended complaint which equipment at the defendant’s plant was accused of infringing plaintiff’s patent, the complaint still did “not state which specific machine or machines at the [defendant’s plant] allegedly infringe each patent claim.” *See Artrip v. Ball Corp.*, No. 1:14CV00014, 2017 WL 5037470, at *2-3 (W.D. Va. Nov. 3, 2017), *aff’d*, 735 F. App’x 708 (Fed. Cir. 2018).

The reasoning in RJRV's cases does not apply to the situation here for at least two reasons. First, the '788 patent is directed to a simple technology, and the asserted claims are directed to the structure of a simple electronic cigarette. And second, unlike the situation in RJRV's cases, HCMC specifically identifies RJRV's Vuse Alto electronic vape pen and liquid pods as infringing at least claim 1 of the '788 patent. HCMC's complaint, therefore—unlike the complaints in RJRV's cases—meets the Rule 8 standard because it provides RJRV fair notice of HCMC's claim.

RJRV's reliance on *N. Star Innovations* is similarly misplaced. There, the asserted patents were directed to complex electronic memory devices. *See N. Star Innovations v. Micron Tech., Inc.*, No. 17-506-LPS-CJB, 2017 WL 5501489, at *2 (D. Del. Nov. 16, 2017), *report and recommendation adopted*, 2018 WL 11182741 (D. Del. Jan. 3, 2018). The claims required, *inter alia*, a “timing circuit” and a “clock-free latch” but the complaint did not identify which structure in the accused products corresponded to those claimed circuits. *Id.* The court therefore found that the complaint lacked the requisite specificity to meet the plausibility standard to survive a motion to dismiss. *Id.* Notably, the court made clear its recognition that “[s]ome courts have declined to require that a plaintiff plead direct infringement on an element-by-element basis.” *Id.* at *1, n.2. And unlike the complex nature of circuitry within an electronic memory device, the court conceded that it “can imagine that as to some types of straightforward apparatus claims, for example, simply setting out what the patent claims require and then reproducing a picture of an accused product (perhaps with a little explanation of what is depicted) might be all that is

needed.” *Id.* at *3. Such is the case here where the asserted claims are straightforward claims directed to the structure of an electronic cigarette apparatus. HCMC’s Complaint specifically sets out what the claims of the ’788 patent require and reproduces pictures of RJRV’s accused Vuse Alto electronic vape product. Nothing more is required to provide RJRV fair notice of HCMC’s claim under Rule 8.

B. HCMC’s Complaint States More Than A Plausible Claim For Relief For Patent Infringement

HCMC’s Complaint identifies both the ’788 patent and RJRV’s accused product that infringes the ’788 patent, and therefore, the Complaint provides RJRV the requisite knowledge of HCMC’s claim. The Rules require nothing more.

HCMC’s Complaint specifically identifies RJRV’s Vuse Alto vaping system as the accused system, and specifically alleges that RJRV is directly infringing “at least claim 1 of the ’788 patent” “by making, using, selling, or offering for sale ..., or importing into the United States ... vape systems, ..., including those sold under the name Vuse Alto ... in violation of 35 U.S.C. § 271(a).” Complaint, ¶¶ 15, 16, 27. The Complaint further describes the accused Vuse Alto vaping system, including by providing photographs of the accused commercial product and product packaging that infringes at least claim 1 of the ’788 patent, which was attached to the Complaint. See Complaint, ¶¶ 15-25. Thus, HCMC has satisfied its burden of explicitly pleading facts to plausibly support its assertion that RJRV “without authority makes, uses, offers to sell, or sells any patented invention during the term” of the ’788 patent. 35 U.S.C. § 271(a); see *Disc Disease Sols.*, 888 F.3d at 1260 (finding complaint sufficient under Rule 8 where the case “involves a simple technology”

and the complaint attached the asserted patent, identified the accused products “by name and by attaching photos of the product packaging” and alleged that the accused products infringe at least one claim of the asserted patent).

RJRV complains (at 7) that HCMC’s Complaint does not “identify or explain where in the Alto product” certain claim limitations are found.¹ But there is no requirement for the plaintiff to “plead infringement on an element-by-element basis.” *Bot M8*, 4 F.4th at 1352 (citation omitted). And in this case, the claims of the ’788 patent are straightforward and directed to the structure of an electronic cigarette—which is not complex—so the level of detail required to plausibly allege that RJRV’s Vuse Alto infringes the ’788 patent is lower than would be necessary for a patent directed to complex technology. *See id.* at 1353.

For example, RJRV argues that the Complaint does not identify the “first chamber” in the Alto product. But as set forth in ¶ 13 of the Complaint (reproduced below), claim 1 requires “a battery located in the first chamber,” and ¶ 17 of the Complaint alleges and shows that the Vuse Alto pen ... is a battery-powered vape pen that includes a rechargeable lithium battery.” HCMC’s Complaint more than sufficiently identifies the claimed “first

¹ RJRV’s purported inability to understand HCMC’s claim is belied by the fact that it sent HCMC a 14-page letter setting forth multiple claim construction and non-infringement arguments based thereon, which demonstrate that HCMC’s Complaint gave RJRV fair notice of its claim. *See* D.E. 16-2, Exhibit B. That said, “when a defendant moves to dismiss a complaint under Rule 12(b)(6), courts are limited to considering the sufficiency of allegations set forth in the complaint and the documents attached or incorporated into the complaint,” so none of the exhibits attached to RJRV’s Motion are properly considered in deciding this Motion. *See Zak v. Chelsea Therapeutics Int’l, Ltd.*, 780 F.3d 597, 606-07 (4th Cir. 2015).

chamber” in RJRV’s accused Vuse Alto vape pen to state a claim that is plausible on its face. *See Twombly*, 550 U.S. at 570.

13. Independent Claim 1 of the '788 patent recites the following: 1. An electronic cigarette, comprising: a casing comprising a first chamber and a second chamber, the two chambers located sequentially within the casing; a battery located in the first chamber; a fluid containing member located in the second chamber; a heating assembly located in the second chamber, the heating assembly comprising a bulb containing a heating wire in communication with the battery; a fluid passageway communicating between the fluid containing member and the heating assembly; a tube element communicating between the first and second chambers, with a first distal end of the tube element located in the first chamber, and a second distal end of the tube element located in the second chamber and affixed to the bulb, the tube element providing an air passage between the first and second chambers; a sealing element forming a partition between the first and second chambers; and an air inlet provided on an external wall of the casing; wherein the heating wire heats the bulb, and wherein the bulb heats fluid introduced to and coming in contact with the bulb through the fluid passageway. (Exhibit A, '788 patent, 8:59-9:14).	17. The Vuse Alto vape pen and charger is a battery-powered vape pen that includes a rechargeable lithium battery and a USB charging port. RJR Vapor sells the Vuse Alto vape pens separately in a package that includes the rechargeable vape pen and a USB charger.  Vuse Alto Vape Pen and USB Charger Packaging
---	--

Complaint, ¶¶ 13, 17.

Next, RJRV argues that the Complaint does not identify the “second chamber” in the Alto product. But as set forth in ¶ 13 of the Complaint (reproduced below), claim 1 requires “a fluid containing member located in the second chamber,” and ¶ 16 of the Complaint alleges that the Vuse Alto includes the vape pens “as well as Vuse Alto pre-filled liquid pods, which are specifically designed for use with the Vuse Alto vape pen.” And ¶ 25 of the Complaint alleges and shows that the “Vuse Alto pre-filled liquid pods are specifically designed to be used together with a Vuse Alto Vape pen.” HCMC’s Complaint more than sufficiently identifies the claimed “second chamber” in RJRV’s accused Vuse Alto vape pen to state a claim that is plausible on its face. *See Twombly*, 550 U.S. at 570.

13. Independent Claim 1 of the '788 patent recites the following: 1. An electronic cigarette, comprising: a casing comprising a first chamber and a second chamber, the two chambers located sequentially within the casing; a battery located in the first chamber; a fluid containing member located in the second chamber; a heating assembly located in the second chamber, the heating assembly comprising a bulb containing a heating wire in communication with the battery; a fluid passageway communicating between the fluid containing member and the heating assembly; a tube element communicating between the first and second chambers, with a first distal end of the tube element located in the first chamber, and a second distal end of the tube element located in the second chamber and affixed to the bulb, the tube element providing an air passage between the first and second chambers; a sealing element forming a partition between the first and second chambers; and an air inlet provided on an external wall of the casing; wherein the heating wire heats the bulb, and wherein the bulb heats fluid introduced to and coming in contact with the bulb through the fluid passageway. (Exhibit A, '788 patent, 8:59-9:14).	25. As shown below, the Vuse Alto pre-filled liquid pods are specifically designed to be used together with a Vuse Alto vape pen, separately, as is apparent, neither the Vuse Alto vape pen nor the pre-filled liquid pods are suitable for substantial non-infringing use.  Vuse Alto Vape Pen and Pre-Filled Liquid Pod
---	--

Complaint, ¶¶ 13, 25.

As for the “heating assembly” and “tube element” claim limitations, RJRV cherry picks excerpts from claim 1—which is recited in full in ¶ 13 of HCMC’s Complaint—to feign confusion about “where in the Alto product” these limitations are found. But absent from the claim language excerpts in RJRV’s Motion is that the “heating assembly” is recited in the claim as “a heating assembly **located in the second chamber**,” and that the “tube element” not only communicates between the first and second chambers, but as recited in the claim, “the tube element **provid[es] an air passage between the first and second chambers**.” See Complaint, ¶ 13. Read as a whole, claim 1 of the '788 patent—as set forth in ¶ 13 of HCMC’s Complaint—together with the description of RJRV’s accused Vuse Alto product, is more than sufficient to give RJRV fair notice of HCMC’s claim and

the ground upon which it rests—which is all that is required at the pleading stage. See *Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555).

In its motion, RJRV asserts that it has not been provided sufficient notice as to HCMC’s infringement claim, but that argument cannot be reconciled with a fair reading of the Complaint as just discussed. But given the simplicity of the patented technology, RJRV cannot in good faith argue that it does not have fair notice that its Vuse Alto product is accused of infringing at least claim 1 of the ’788 patent. RJRV includes a two-page string cite (at 9-10) of cases from the Fourth Circuit where patent infringement complaints were dismissed, but the pertinent inquiry here is whether HCMC’s Complaint is sufficient to provide RJRV fair notice of infringement. While the complaints in RJRV’s cited cases suffered from a host of deficiencies such as failing to identify the specific asserted patent claims or the allegedly infringing products, the sufficiency of HCMC’s Complaint should be assessed based on the facts of this case.

The situation here is analogous to the situation in *Disc Disease Sols.* In *Disc Disease Sols.*, the Federal Circuit found the allegations in the complaint to be “sufficient under the plausibility standard of *Iqbal/Twombly*.” *Disc Disease Sols.*, 888 F.3d at 1260. Applying the same analysis here, this case involves a simple technology—an electronic cigarette. See *id.* The asserted ’788 patent, which was attached to the complaint, consists of only two independent claims. *Id.* HCMC’s Complaint specifically identified the single accused product by name—RJRV’s Vuse Alto—and by attaching photos of the product packaging, and alleges that the Vuse Alto infringes “at least claim 1 of the ’788 patent,” either “literally

or under the doctrine of equivalents.” *Id.*; Complaint, ¶ 27. Based on analogous disclosures and allegations in *Disc Disease Sols.*, the Federal Circuit found that the complaint set forth “enough to provide [defendant] fair notice of infringement of the asserted patents.” *Disc Disease Sols.*, 888 F.3d at 1260. This Court should find that HCMC’s Complaint is similarly enough to provide RJRV fair notice of infringement of the ’788 patent, and deny RJRV’s Motion.

RJRV’s suggestion that HCMC must include element-by-element contentions to properly state a claim runs contrary to controlling precedent. HCMC’s “complaint contains enough detail to allow [RJRV] to answer, and thus meets the notice pleading required to survive a Rule 12(b)(6) motion. Nothing more is required.” *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007).

C. RJRV’s Motion Is Contrary To This Court’s Local Rules

At bottom, RJRV’s motion amounts to a demand for detailed infringement contentions in HCMC’s Complaint. For the reasons discussed *supra*, neither Rule 8 nor *Iqbal/Twombly* nor controlling precedent requires that level of detail to sufficiently plead a claim for patent infringement. Indeed, RJRV’s Motion does not dispute that HCMC’s Complaint provides fair notice of what HCMC’s claim is—RJRV’s Vuse Alto infringes HCMC’s ’788 patent. Given the specific identification of HCMC’s asserted patent and RJRV’s accused product, RJRV cannot complain that it needs additional factual information to defend against HCMC’s claim.

But beyond the reasons that HCMC's Complaint should survive RJRV's Rule 12(b)(6) Motion, the Motion is at odds with this Court's Local Patent Rules, which "are intended to facilitate the speedy, fair and efficient resolution of patent disputes." L.R. 101.2. To that end, under the Local Patent Rules, HCMC will serve its "Disclosure of Asserted Claims and Preliminary Infringement Contentions," not later than 30 days after the Initial Scheduling Conference. L.R. 103.1. HCMC's Preliminary Infringement Contentions will include the same element-by-element claim chart detailing HCMC's infringement read that RJRV is improperly demanding at the pleading stage.

Given the expeditious exchange of infringement contentions provided for under a local patent rule regime, other district courts have questioned the propriety of engaging in motions practice on the sufficiency of a complaint. For example, in denying a motion to dismiss, Judge Gonzales Rogers in the Northern District of California stated:

The complaint's allegations relating to plaintiff's direct infringement claim against defendant are sufficient to withstand a motion to dismiss. Moreover, under the patent rules, the plaintiff is required to serve detailed disclosures later this summer. The Court is not inclined to belabor the Rule 12 motion practice.

Windy City Innovations, LLC v. Microsoft Corp., 193 F.Supp.3d 1109, 1115 (N.D. Cal. 2016). Voicing a similar sentiment, Magistrate Judge Payne in the Eastern District of Texas noted that given that local patent rules facilitate the early exchange of contentions, motions practice on the sufficiency of a complaint may be wasteful:

In sum, because infringement contentions are provided early in a patent infringement case, parties should seriously question whether it is worth expending resources challenging the sufficiency of a complaint as detailed as [plaintiff's]. There may be cases in which real prejudice has resulted from

a defendant's lack of notice (beyond the reality that in every case, the plaintiff has a head-start). But in most cases, the result will be a command to the Plaintiff to amend. If that command comes after the plaintiff has served infringement contentions, a defendant gains nothing beyond whatever nuisance the motion creates for plaintiff.

PanOptis Patent Mgmt, LLC v. BlackBerry Corp., No. 2:16-CV-00059-JRG-RSP, 2017 WL 780885, at *4 (E.D. Tex. Feb. 10, 2017), *report and recommendation adopted*, No. 2:16-CV-00059-JRG-RSP, 2017 WL 780880, (E.D. Tex. Feb. 28, 2017).

It cannot be said that HCMC's Complaint does not provide RJRV with sufficient notice to defend its case. Given that HCMC's preliminary infringement contentions will be due shortly after the closing of the pleadings, RJRV's Motion seeking the details of HCMC's infringement allegations beyond those required by Rule 8 serves little purpose other than to multiply the proceedings at the expense of the parties' and the Court's resources.

D. RJRV's "tube element" Argument Is Baseless And Without Merit

RJRV improperly asks the Court to decide the merits of the case on its Rule 12(b)(6) Motion challenging the sufficiency of the Complaint. RJRV's argument merely serves to prove that HCMC's Complaint provides sufficient notice of its claim. RJRV's argument (at 11-14) that its Vuse Alto product does not have the claimed "tube element" is a premature non-infringement argument seemingly based on RJRV's premature claim construction positions. But pertinent to the issue before the Court now, HCMC was not required to "prove its case at the pleading stage." *In re Bill of Lading*, 681 F.3d at 1339. And in situations like this where RJRV has raised a non-infringement argument based on

claim construction, it is inappropriate to dismiss HCMC's Complaint under Rule 12(b)(6). *See Nalco*, 883 F.3d at 1349-50 (denying Rule 12(b)(6) where disputes went to the merits rather than the sufficiency of the complaint).

A closer look at RJRV's non-infringement argument reveals that it is nothing more than a premature argument on the merits, and has no relevance to the sufficiency of HCMC's Complaint. If anything, it demonstrates that HCMC's Complaint gives RJRV fair notice of what its claim is. RJRV argues (at 12) that the image of the Vuse Alto in ¶ 25 of the Complaint shows "the complete absence of any 'tube element' as recited in the '788 patent claims." But RJRV's argument is both premature and misleading.

RJRV's argument is premature because it is a non-infringement argument—which goes to the merits of the case, and there is no requirement for HCMC to prove infringement at the pleading stage. *In re Bill of Lading*, 681 F.3d at 1339. It is also premature because prior to making an infringement determination, the Court must first construe the claims, and it would be inappropriate for the Court to engage in claim construction at the pleading stage. *Id.* at 1343, n.13.

And RJRV's "tube element" argument is misleading because it seeks to entice the Court into finding that a "tube element" must be a structure tethering the Vuse Alto vape pen to the Vuse Alto liquid pod. But that is a claim construction argument—which as discussed *supra*—is not appropriate for consideration on a Rule 12(b)(6) motion. In making its premature non-infringement argument, RJRV omits a key material point: if RJRV's Vuse Alto has "no 'tube element' that provides 'an air passage between the first

and second chambers’ as required by each and every claim of the ’788 patent,” how then does air enter Vuse Alto liquid pod? RJRV’s Motion is silent on this point. RJRV did not argue in its Motion—nor will it argue in its Reply—that air does not enter the Vuse Alto liquid pod. It has to—or the user would not be able to inhale. This then begs the question as to whether the structure in the Vuse Alto that provides an air passage to the second chamber is a “tube.” Again, that goes to the merits of the claim, and not to the sufficiency of HCMC’s Complaint. And as discussed *supra*, pursuant to Patent Local Rule 103.1, HCMC’s preliminary infringement contentions providing these details will be served on RJRV “no later than thirty days after the Initial Scheduling Conference.”

E. In The Alternative, HCMC Should Be Granted Leave To Amend Its Complaint

Based on the foregoing, HCMC submits that its Complaint, as written, is more than sufficient to provide RJRV adequate notice of the claimed infringement, which is all that is required to satisfy Rule 8 and RJRV’s Motion should be denied. Nevertheless, if the Court believes that the Complaint does not sufficiently plead its patent infringement claim with necessary facts, then HCMC requests that the Court grant Plaintiff leave to amend its Complaint.

Even if RJRV’s arguments regarding the sufficiency of HCMC’s Complaint were meritorious—which they are not—HCMC could readily cure the alleged “deficiencies” with an amended pleading. RJRV’s primary argument is that HCMC was required to include in its pleading element-by-element infringement contentions. But this is not required under Rule 8. In the unlikely event that the Court were to agree with RJRV’s

position, HCMC requests leave to amend its Complaint to provide a claim chart such as that provided for under the Court's Patent Local Rule 103.1(c). As discussed *supra*, that this Court's Patent Local Rules specifically provide for this information to be served by HCMC "[n]ot later than thirty (30) days after the Initial Scheduling Conference," demonstrates that it is not required to sufficiently plead a claim for patent infringement. In any event, HCMC could provide such information in an amended complaint, which also serves to establish that—contrary to RJRV's Motion—an amendment would not be futile.

Under Rule 15(a)(2), "[t]he court should freely give leave [to amend] when justice so requires." The Supreme Court has stated that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). "The law is well settled that leave to amend a pleading should be denied *only when* the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (cleaned up). In this case, there would be no prejudice to RJRV, and there has been no bad faith on the part of HCMC, so there is no reason to deny HCMC's request in the alternative for leave to amend. RJRV has not yet answered the Complaint, discovery has not opened, depositions have not been scheduled, and no pre-trial conference or trial date has been set. Granting leave to amend would be appropriate under the circumstances because this case is still at the pleadings stage.

V. CONCLUSION

For the foregoing reasons, HCMC respectfully requests that the Court deny RJRV's Motion. Alternatively, if the Court believes that HCMC's claim is legally insufficient, the Court should provide HCMC with leave to amend its Complaint and supplement its existing allegations at this time.

Dated: December 22, 2023

Respectfully submitted,

By: /s/ Kurt E. Lindquist II

Kurt E. Lindquist II
North Carolina State Bar No. 10973
COZEN O'CONNOR
301 South College Street, Suite 2100
Charlotte, NC 28202
Phone: (202) 747-0776
klindquist@cozen.com

Of Counsel:

Barry P. Golob (by Special Appearance)
Thomas J. Fisher (by Special Appearance)
COZEN O'CONNOR
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
Phone: (202) 912-4800
bgolob@cozen.com
tfisher@cozen.com.

*Counsel for Plaintiff Healthier Choices
Management Corp.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon all parties of record by filing it electronically with the Court through the CM/ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted, this the 22nd day of December 2023.

/s/ Kurt E. Lindquist II
Kurt E. Lindquist II

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3, I HEREBY CERTIFY that the foregoing document complies with the word limit set forth in Local Rule 7.3(d)(1).

/s/ Kurt E. Lindquist II
Kurt E. Lindquist II