IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

REALTIME ADAPTIVE STREAMING LLC, Plaintiff, v. NETFLIX, INC. AND NETFLIX STREAMING SERVICES, INC., Defendants.	C.A. No. 17-1692-CFC-SRF

PLAINTIFF REALTIME ADAPTIVE STREAMING LLC'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

June 26, 2019

BAYARD, P.A.

Stephen B. Brauerman (No. 4952)
600 N. King Street, Suite 400
Wilmington, DE 19801
(302) 655-5000
sbrauerman@bayardlaw.com

Attorneys for Plaintiff Realtime Adaptive Streaming LLC

OF COUNSEL:

Marc A. Fenster
Brian D. Ledahl
Reza Mirzaie
C. Jay Chung
RUSS, AUGUST & KABAT
12424 Wilshire Boulevard, 12th Floor
(310) 826-7474
Los Angeles, CA 90025-1031
mfenster@raklaw.com
bledahl@raklaw.com
rmirzaie@raklaw.com
jchung@raklaw.com

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

I. NATURE AND STAGE OF THE PROCEEDINGS

This case is at the pleading stage. Magistrate Judge Fallon issued a Report and Recommendation ("R&R"), granting in part and denying in part Defendants' motion to dismiss. (D.I. 48.) Realtime has objected to the R&R with respect to issues relating to 35 U.S.C. § 101. (D.I. 49.) The Court has yet to rule on the objection.

II. SUMMARY OF ARGUMENT

Realtime hereby moves this Court for leave to file a First Amended Complaint ("FAC," attached as Ex. 1). The FAC addresses the R&R, and provides detailed factual allegations regarding the patent eligibility of the asserted Fallon patents (the '535, '477, '907, and '046 patents) under 35 U.S.C. § 101. Leave to file the FAC should be granted. For instance, the Federal Circuit in *Aatrix Software, Inc. v. Green Shades Software, Inc.* held that it was reversible error to deny a proposed *second* amendment of the plaintiff's complaint. Instead, the court reversed and—in line with other Rule 12(b)(6) challenges based on defenses that had factual predicates—held that it was only appropriate to afford the plaintiff a third opportunity to submit a complaint that survives Rule 12(b)(6) challenges. 882 F.3d 1121, 1126-28 (Fed. Cir. 2018). Since then, the Federal Circuit has confirmed it "cannot adopt a result-oriented approach to end patent litigation at the Rule 12(b)(6) stage that would fail to accept as true the complaint's factual allegations and construe them in the light most favorable to the plaintiff, as settled law requires." *Berkheimer v. HP Inc.*, 890 F.3d 1369, 1372-73 (Fed. Cir. 2018) (per curiam).

Here, Realtime's FAC is anything but futile. To the contrary, it includes detailed, piece-by-piece factual allegations that are closely tied to—and, indeed, quote—the patents' intrinsic record. The FAC also quotes and is based on other relevant evidence—such as *later-filed* patents from technology companies like Western Digital and Altera, which demonstrate that after

Realtime's patents were first filed, various technologists *were still* struggling to solve the computer-specific problem of storing and/or transferring digital data more efficiently. The detailed allegations in the FAC squarely contradict each of the necessary premises and conclusions in the R&R, both under *Alice* Step 1 and Step 2, which were drawn without the benefit of the FAC. Accepting any of these well-supported and detailed allegations as true, the FAC confirms that any Rule 12(b)(6) challenge to Realtime's claims would fail under *Alice* Step 1 and Step 2. And beyond "futility," district courts in this Circuit have recognized only a handful of other legally cognizable reasons to deny an amendment—and none of them apply to this case.

While the FAC shows that Realtime's asserted Fallon patent claims cannot be judged to be patent-ineligible under *Alice*—at least not at the pleading stage—Realtime *is not* asking this Court to immediately change the conclusions in the R&R. Instead, it is only asking for an opportunity to file the FAC and have this Court decide any follow-on challenge to that FAC, with a more develop factual record. Under Federal Circuit law, this would be the correct result. And respectfully, it would be error not to. *See Aatrix Software*, 882 F.3d at 1126-28.

For these and other reasons, respectfully, this Court should grant leave to First Amended Complaint.[1]

III. STATEMENT OF FACTS

[1] The FAC also substitutes Count II's allegations from allegations of infringement of U.S. Patent No. 8,634,462 ("the '462 patent") to that of U.S. Patent No. RE46,777 ("the '777 patent"). The '777 patent is a reissue of the '462 patent. *See* 35 U.S.C. § 252 ("The surrender of the original patent shall take effect upon the issue of the reissued patent, and every reissued patent shall have the same effect and operation in law, on the trial of actions for causes thereafter arising, as if the same had been originally granted in such amended form, but in so far as the claims of the original and reissued patents are substantially identical, such surrender ***shall not affect any action then pending nor abate any cause of action then existing***, and the reissued patent, to the extent that its claims are substantially identical with the original patent, shall constitute a continuation thereof and ***have effect continuously from the date of the original patent***.") (emphasis added).

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.