

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION**

ALMONDNET, INC., and
INTENT IQ, LLC

Plaintiffs,

v.

ADOBE INC.,

Defendant.

Case No. 7:25-cv-00487-DC-DTG

JURY TRIAL DEMANDED

**DEFENDANT ADOBE INC.'S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT**

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE FAC FAILS TO STATE A PLAUSIBLE INFRINGEMENT CLAIM FOR ANY
ASSERTED PATENT 2

 A. The '146 Patent 2

 B. The '398 Patent 5

 C. The '878 Patent 7

III. DISMISSAL WITH PREJUDICE IS PROPER BECAUSE AMENDMENT WOULD BE
FUTILE..... 8

IV. CONCLUSION..... 9

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	1, 2, 5
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	1, 2, 5
<i>Bot M8 LLC v. Sony Corp. of Am.</i> , 4 F.4th 1342 (Fed. Cir. 2021)	4
<i>Bowmar Archery LLC v. VIP Veteran Innovative Prods. LLC</i> , No. 1:22-CV-00346-RP, 2023 WL 28438 (W.D. Tex. Jan. 3, 2023)	9
<i>Marucci Sports, L.L.C. v. Nat’l Collegiate Athletic Ass’n</i> , 751 F.3d 368 (5th Cir. 2014)	9

I. INTRODUCTION

Plaintiffs’ opposition only confirms that the FAC fails to state a plausible claim of patent infringement, and should be dismissed.

For each of the three asserted patents—U.S. Patent Nos. 8,959,146 (the “’146 Patent”), 8,677,398 (the “’398 Patent”), and 10,715,878 (the “’878 Patent”) (collectively, the “Asserted Patents”)—Plaintiffs do not meaningfully rebut that the FAC fails to plausibly allege infringement of multiple claim limitations, and improperly relies on third-party evidence with no substantiated connection to Adobe as well as Adobe’s privacy policy for its own website, rather than the operation of any accused Adobe product. In fact, Plaintiffs readily admit that their allegations rest upon “how,” allegedly, “the industry standard process for advertising bidding works.” Dkt. 32, at 9. But that only confirms the insufficiency of the FAC. It is apparent that Plaintiffs chose Adobe as a target first, and then tried to backfill their decision to file suit using third-party materials with no link to Adobe to sketch out allegations of patent infringement. The gatekeeping function of *Twombly* and *Iqbal* was articulated in part to prohibit this type of approach and weed out bare bones, conclusory complaints that are filed without stating a plausible claim, such as the FAC here. Adobe respectfully requests that the Court exercise its gatekeeping role and dismiss the FAC.

As discussed in more detail below, Plaintiffs’ opposition does nothing to cure the pleading deficiencies identified in Adobe’s motion to dismiss. *See generally* Dkt. 32 (Plaintiffs’ Opposition Brief). For the ’146 Patent, Plaintiffs double down on their claim chart’s conclusory attorney arguments (which are untethered from the operation of any Adobe products), and their reliance on unrelated third-party websites and Adobe’s privacy policy as alleged factual support for those conclusory attorney arguments. *Id.* at 3-7. Accordingly, the FAC’s allegations remain deficient.

For the ’398 and ’878 Patents (which are related), Plaintiffs’ opposition is similarly unavailing. Both patents plainly, on their face, relate to “delivering targeted *television*

advertisements,” as recited in the first line of the abstract for each patent. Dkt. 24-3 and 24-5, at Abstract. The title of the ’878 Patent is even “Targeted Television Advertisements Based On Online Behavior.” Dkt. 24-5, at Title. But as Adobe pointed out in its opening brief, neither claim chart includes a single factual allegation that connects the requirements of the claim steps to targeted television advertising. Dkt. 30, at 12-15. Plaintiffs’ response to this deficiency is revealing—they insist that these pleading deficiencies be ignored because they are supposedly issues for “claim construction.” Dkt. 32, at 10. Plaintiffs’ position is not credible, and reflects the type of gamesmanship in their pleading that *Twombly* and *Iqbal* were issued to prohibit.

As Adobe explained in its opening brief, Plaintiffs are now filing serial suits against Adobe in this District on various patents that purport to relate to targeted advertising. *See* Dkt. 30, at 4-5 (discussing the parallel suit No. 7:25-cv-00180-DC-DTG, also pending in this Court). Critically, for the ’398 and ’878 Patents in this FAC, Plaintiffs are accusing the same Adobe products and the same functionality within those products as they are accusing of infringing different patents in the parallel suit, which do not expressly relate to television advertising. The fact that Plaintiffs did not even bother to tailor their allegations for the ’398 and ’878 Patents to the subject matter for which those patents explicitly relate—“delivering targeted *television* advertisements”—and now argue in opposition to the motion to dismiss that they had no obligation to do so, further confirms that the FAC should be dismissed for failure to state a claim.

II. THE FAC FAILS TO STATE A PLAUSIBLE INFRINGEMENT CLAIM FOR ANY ASSERTED PATENT

Plaintiffs failed to rebut Adobe’s challenge under Fed. R. Civ. P. 12(b)(6)—the FAC should be dismissed because it does not plausibly allege that Adobe performs all steps of any claim of the Asserted Patents. Dkt. 32, at 3-13.

A. The ’146 Patent

As an initial matter, Plaintiffs do not dispute what must be shown in order to make out a plausible allegation of infringement for Claim 1 (the only asserted claim). For step 1(a), the FAC must plausibly allege that Adobe “directs” a “*third-party server computer* controlling advertising space on a second media property” to take action to “display” an advertisement, where Adobe is distinct from the “second media property.” Dkt. 24-1. And for step 1(b), the FAC must plausibly allege that Adobe “directs” some type of indicator about “profile attributes,” which was received by Adobe as a result of a visitor visiting a “first media property,” which is also distinct from Adobe. *Id.* Plaintiffs do not rebut that the FAC fails to plausibly allege infringement of either step.

For step 1(a), Plaintiffs argue that the FAC does in fact “identify a ‘third-party server computer,’ a ‘first media property’ ... ‘second media property,’ and an[] ‘advertisement’ displayed to a visitor.” Dkt. 32, at 3. But as support for that argument, the rest of the paragraph in Plaintiffs’ response only quotes from the *attorney arguments* on page two of the claim chart for the ’146 Patent—i.e., it neither cites nor recites any facts. *Id.* at 3-4 (citing Dkt. 24-2, at 2: “For example...may be displayed.”). Next, Plaintiffs attempt to connect several pieces of the excerpted website materials to the claim requirements. One of them relates to the claim requirement that Adobe must transmit an “indicia of a condition” to some third party—but here, Plaintiffs argue the requirement is met by “bid values,” for which the claim chart only cites an excerpt from a third-party “github.com” website, with no explanation of why the excerpt is relevant or connected to Adobe. Dkt. 32, at 4-5.

The second website excerpt relates to the claim requirement that Adobe must “direct” a “third-party server computer” to “display” an ad. *Id.* at 5 (citing general descriptions of Adobe’s DSP). But here, what Plaintiffs cite is insufficient on its face, because in this Adobe website excerpt both the “supply side platform” and the “exchange” that Plaintiffs argue delivers the ad *are third parties, not Adobe*. For Adobe itself to infringe, step 1(a) would require Adobe to direct

the step's action, but Plaintiffs admit that their allegation relies on third parties selecting an advertisement and delivering it. That is the opposite of Adobe directing the display of an ad, and therefore cannot state a plausible claim. *See Bot M8 LLC v. Sony Corp. of Am.*, 4 F.4th 1342, 1354-55 (Fed. Cir. 2021) (affirming dismissal of complaint where the plaintiff pled facts showing that the defendant's product operated differently than what the asserted claim required).

Turning to step 1(b), Plaintiffs again simply repeat the conclusory attorney argument from the claim chart, without showing any plausible factual support that connects those allegations to the claim requirements. Dkt. 32, at 6-7 (citing Dkt. 24-2 at 31-32: "For example . . . ad server or SSP"). Nor did Plaintiffs rebut the impropriety of relying on Adobe's privacy policy for its own website. On that point, Plaintiffs fully admit that for the claim requirement of "profile attributes" that would need to be received by Adobe as a result of a visitor visiting a "first media property," the claim chart *only* cites material from the *privacy policy* for Adobe's own website. *Id.* at 6-7 (pointing to the collection of data from "Adobe's own 'apps and websites,'" and that Adobe "may learn your likely interest when you use our apps and websites"). Such allegations cannot possibly state a plausible infringement claim, for at least two reasons. First, Claim 1 requires displaying advertisements in ad space controlled by a "third-party computer server" for "a second media property." Dkt. 24-1. But Adobe's use of data for its own website cannot plausibly have anything to do with the website of a third-party "second media property." Second, Plaintiffs effectively admit that they alleged no facts for step 1(b) that connect the claim requirements to any Adobe *product*, where at the beginning of the claim chart, Plaintiffs generally allege that Adobe's DSP (and more) is what supposedly infringes. Dkt. 24-2, at 1. This is fatal to the FAC, because there is no connection between actions that Adobe may take for its own website, and the operation of the accused Adobe DSP product, and Plaintiffs do not allege otherwise.

Finally, Plaintiffs' attempt at defending the FAC's reliance on third-party materials is

unavailing. Dkt. 32, at 8-9. It is *Plaintiffs* who bear the burden of pleading alleged facts that plausibly support their patent infringement claims. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Yet in their opposition, Plaintiffs improperly attempt to shift that burden by arguing that *Adobe* has to “explain why the practices described” in the untethered third-party materials cited throughout the claim charts “would not apply to Adobe’s systems.” Dkt. 32, at 9 (emphasis added). That is plainly incorrect. This argument could apply to any non-Adobe document Plaintiffs chose to cite, even the phonebook, and would turn the applicable burden on its head. *See, e.g.*, Dkt. 30, at 11 (listing materials cited by Plaintiffs from “github.com,” “adalytics.io,” “smartadserver.com,” and “zorbis.com”).

Plaintiffs argue that they “are entitled to rely on such materials,” but they cite no authority for that proposition. Dkt. 32, at 9. Plaintiffs cannot dispute that they have the burden to plead plausible factual allegations, and the FAC makes no attempt to connect any Adobe product to the arbitrary third-party materials Plaintiffs have without explanation chosen to cite. Plaintiffs suggest that they should be allowed to get away with this, because they would not be able to sketch out a complaint without those materials. But that gets the pleading standard exactly backwards—the solution to not having sufficient facts to file a complaint is to find more facts, or refrain from filing a complaint. What Rule 12(b)(6) and *Twombly/Iqbal* do not countenance is filing a deficient complaint and then asking the Court to disregard the Supreme Court’s requirements for stating a plausible claim.

B. The ’398 Patent

Plaintiffs’ attempt to transform the deficiencies in the FAC into a supposed “claim construction dispute” should not be credited. Dkt. 32, at 10. It cannot be seriously disputed that the ’398 Patent explicitly relates to “targeted *television* advertisements”—that is how both the first line of the Abstract and the first line of the Summary of the Invention describe the patent. Dkt.

24-3 at Abstract, 7:66-8:16. A search of the specification further reveals that it uses the word “television” *over one hundred twenty times*. Yet Plaintiffs incredibly argue that the subject matter of the ’398 Patent should be ignored at the pleading stage. Dkt. 32, at 10. The reason for this is clear—Plaintiffs do not dispute that the FAC fails to allege a single fact connecting any Adobe product to “targeted television advertisements,” which is the subject matter of Claim 13. *See* Dkt. 24-4 (no allegations relating to “targeted television advertisements”).¹ For that reason, Plaintiffs failed to rebut the FAC’s failure to plausibly allege that any Adobe product directs a targeted television advertisement for a “second device,” as required by step 13(a). Dkt. 30, at 12-13.

Plaintiffs’ arguments are particularly unavailing because instead of pleading any allegations relating to television advertisements, they made up two different “actions” (which do not appear in the claims) that can supposedly satisfy the claims: “direction of a targeted advertisement or an attribution event.” Dkt. 24-4, at 1 (alleging that Adobe performs the “action” recited in Claim 13(a) via one of these two items). For the first alleged “action,” Plaintiffs’ tactic is obvious, as they simply omitted “television” from “direction of a targeted [television] advertisement.” But nowhere in their opposition do Plaintiffs explain how the ’398 Patent allegedly relates to *non*-television advertisements, and Plaintiffs should not be permitted to broaden (and completely change) the subject matter of the patent for purposes of satisfying the pleading requirements, while at the same time accusing *Adobe* of making premature claim construction arguments. For the second alleged “action,” Adobe still has no idea what an “attribution event” is. As noted in its motion, the ’398 Patent does not use that phrase, and the

¹ Plaintiffs later make the offhand argument that even if the claimed invention does relate to “targeted television advertisements,” the FAC includes plausible allegations via one quote from Adobe website material referring to “send[ing] personalized messages to targeted devices....you need to reach those people on *all of their devices*.” Dkt. 32, at 11 (citing Dkt. 24-4, at 4). But there is no indication that this excerpt relates to delivering *ads* of any kind, let alone television ads.

FAC neither explains nor defines it. Dkt. 30, at 7, n.2. Plaintiffs’ opposition, which is entirely silent on the meaning of “attribution event,” does nothing to remedy this deficiency either. Plaintiffs’ failure to plausibly allege that any Adobe product performs any claim steps related to “targeted television advertisements,” in accordance with Claim 13, is fatal to the FAC.

Finally, for largely the same reasons discussed above for the ’146 Patent, Plaintiffs failed to rebut the impropriety of relying on arbitrary third-party materials and Adobe’s privacy policy. For the third-party materials (*see* Dkt. 30, at 13 (citing quotes from “prnewswire.com,” “adalytics.io,” “iabtechlab.com,” “smartadserver.com,” and “tapad.com”)), Plaintiffs again improperly attempt to shift the burden onto Adobe. Dkt. 32, at 12. Plaintiffs make no effort in their opposition to substantiate any connection between the third-party materials and the operation of any Adobe product, plainly demonstrating why reliance on those materials cannot support allegations to state a plausible claim. And for Adobe’s privacy policy, Plaintiffs again make no attempt to explain how Adobe’s actions on its own website could relate to the Adobe products accused of infringement, which include Adobe Experience Platform and Adobe Audience Manager. Dkt. 24-4, at 1. This is also fatal to the FAC, because there is no connection between Adobe’s own website and the operation of these accused products, and Plaintiffs do not allege otherwise.

C. The ’878 Patent

Because the ’878 Patent is related to the ’398 Patent, and claims similar subject matter, Plaintiffs’ opposition fails to rebut the FAC’s deficiencies for the same reasons.

First, Plaintiffs again improperly attempt to transform the deficiencies in the FAC into a supposed “claim construction dispute.” Dkt. 32, at 12. That is wrong, because it also cannot be disputed that the ’878 Patent relates to “targeted *television* advertisements”—as described in both the first line of its Abstract and the first line of the Summary of the Invention. Dkt. 24-5 at

Abstract, 8:13-30. Plaintiffs do not dispute that the FAC fails to allege a single fact connecting any Adobe product to “targeted television advertisements,” which is the subject matter of Claim 1. *See* Dkt. 24-6 (claim chart with no allegations relating to “targeted television advertisements”). Thus, Plaintiffs have failed to rebut the FAC’s failure to plausibly allege that any Adobe product directs a targeted television advertisement “with respect to a second of the associated Internet-accessing electronic devices,” as required by step 1(d). Dkt. 30, at 14-15.

Finally, Plaintiffs again fail to rebut the impropriety of relying on Adobe’s privacy policy, and again improperly attempt to shift the burden onto Adobe. Dkt. 32, at 12. But here Plaintiffs also make no attempt to explain how Adobe’s actions on its own website could relate to the Adobe products accused of infringement. Dkt. 24-6, at 1. This is also fatal to the FAC, because there is no connection between the two, and Plaintiffs do not allege otherwise.

III. DISMISSAL WITH PREJUDICE IS PROPER BECAUSE AMENDMENT WOULD BE FUTILE

Leave to amend the FAC should not be granted. As discussed in Adobe’s opening brief, AlmondNet already attempted to add infringement claims for two patents that are related to the ’146 Patent in the parallel suit, yet the allegations in this FAC have the same deficiencies. *See* Case No. 7:25-cv-00180-DC-DTG (W.D. Tex.), Dkt. Nos. 38 and 44 (Adobe’s opening and reply briefs in support of its motion to dismiss). That the FAC here still improperly relies on arbitrary third-party materials and Adobe’s privacy policy—despite Plaintiffs having now had multiple opportunities to substantiate any alleged connection to an accused Adobe product—demonstrates that Plaintiffs have no factual allegations to plead that could survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Thus, any further amendment to the FAC would be futile.

The same is true for the ’398 and ’878 Patents. Plaintiffs have already had additional time to add plausible factual allegations to the FAC, but have failed to do so and instead have doubled-

down on their reliance on third-party materials and Adobe's privacy policy. Another bite at the apple cannot remedy such fundamental deficiencies. Accordingly, any further amendment to the FAC would be futile. *See, e.g., Bowmar Archery LLC v. VIP Veteran Innovative Prods. LLC*, No. 1:22-CV-00346-RP, 2023 WL 28438, at *4 (W.D. Tex. Jan. 3, 2023); *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014).

IV. CONCLUSION

For the foregoing reasons, dismissing the FAC with prejudice for failure to state a claim is warranted.

Dated: May 4, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2026, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record who are deemed to have consented to electronic service.

/s/ Shaun W. Hassett

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