

Appeal No. 19-1210

**United States Court of Appeals
for the Federal Circuit**

DISTEFANO PATENT TRUST III

Plaintiff-Appellant,

v.

LINKEDIN CORPORATION

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in Case No. 17-1798-LPS-CJB, Judge Leonard P. Stark

**APPELLANT'S COMBINED PETITION FOR
REHEARING AND REHEARING EN BANC**

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December 12, 2019

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CERTIFICATE OF INTEREST

Counsel for the Appellant, DiStefano Patent Trust III, LLC certifies the following:

1. The full name of every party or amicus represented by me is:

DiStefano Patent Trust III, LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Meredith M. Addy, AddyHart P.C.

Scott Paul, Cuenot, Forsythe & Kim, LLC

Timothy Devlin, Devlin Law Firm LLC

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

LinkedIn Corporation v. DiStefano Patent Trust III, LLC,
IPR2019-00419 (P.T.A.B. institution denied).

Dated: December 12, 2019

By: /s/ Scott D. Paul
Scott D. Paul

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**STATEMENT OF COUNSEL PURSUANT TO
FEDERAL CIRCUIT RULE 35(b)**

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Court: *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91 (2011); *Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018); *Berkheimer v. HP Inc.*, 890 F.3d 1369 (Fed. Cir. 2018) (denial of *en banc*); *Aatrix Software, Inc. v. Green Shade Software, Inc.*, 882 F.3d 1121 (Fed. Cir. 2018).

Based on my professional judgment, I believe this appeal requires an answer to these closely related and precedent-setting questions of exceptional importance:

1. Whether the Federal Circuit's standard for evaluating a Complaint's factual allegations on a Rule 12(b)(6) motion to dismiss, requiring that the district court determine if the factual allegations are "plausible," is inconsistent with Supreme Court precedent requiring the "claim for relief"—as opposed to the factual

allegations—to be "plausible" and Third Circuit Precedent, which governs review of matters not unique to patent law.

2. Whether the Federal Circuit's consideration of a 35 U.S.C. § 101 affirmative defense in a Rule 12(b)(6) motion to dismiss is inconsistent with both Supreme Court precedent, *Iqbal* and *Twombly*, and also with Third Circuit precedent, which governs review of procedural matters and does not require responses to affirmative defenses to be pled in a complaint.

**POINTS OF LAW OR FACT OVERLOOKED OR
MISAPPREHENDED BY THE PANEL**

1. The district court decision on Rule 12(b)(6) specified that only the asserted patent claims 1, 4, 5, 8, and 10 were covered (Appx002), but the court's judgment invalidated "the patent." Appx017. DiStefano asks the Court to vacate the district court judgment at least to the extent that it encompasses more than the district court's opinion on the asserted patent claims.

2. Contrary to *Iqbal*, *Berkheimer* and *Aatrix*, the panel failed to give credit to factual allegations made in the pleadings, defeating LinkedIn's invalidity defense made in a Rule 12(b)(6) motion to dismiss.

DiStefano respectfully requests the panel decision be reheard.

ARGUMENTS IN SUPPORT OF REHEARING

I. The Court Should Amend its Decision to Only Cover the Asserted Patent Claims.

A. The District Court Order Covered the Asserted Patent Claims, but the District Court's Judgment Covered the Entire Patent

In the district court's September 28, 2018, decision on LinkedIn's Rule 12(b)(6) motion, the court correctly recognized that LinkedIn's Motion was directed only to the asserted patent claims: "The Court agrees with DiStefano that the unasserted claims are not part of this action and thus, the Court's analysis is limited to the asserted claims." Appx002, n.1 (internal citations omitted). However, in the court's October 17, 2019 judgment on the Motion, the court held that "judgment of invalidity of United States Patent No. 8,768,760 is hereby entered in favor of defendant LinkedIn Corporation" Appx017.

DiStefano raised this issue in its Reply Brief on page 6:

The parties here and at the district court focus on Claim 1, noting here that dependent claims 4, 5, 8, and 10 also are at issue. *See, e.g.*, Appx002; Appx156; Appx170. In the Final Judgment, however, the district court mistakenly invalidated the entire patent. Appx017.

Reply Brief at 6, n.3. "The scope of any judgment should conform to the issues that were actually litigated." *Alcon Res. Ltd. v. Barr Labs., Inc.*, 745 F.3d 1180, 1193 (Fed. Cir. 2014); *see also Uniloc USA, Inc. v. ADP, LLC*, 279 F. Supp. 3d 736, 741 (E.D. Tex. 2017) (declining to consider invalidity of unasserted claims).

B. Amendment of the Court's Decision to be Limited to the Asserted Patent Claims Resolves this Issue

The district court's overly broad Judgment would have been a harmless error had there been a merits decision on appeal because the Court would have addressed the asserted claims, regardless of the ultimate determination. In fact, counsel was asked at oral argument if Claim 1 was considered representative of the asserted claims, and she replied that it was. Therefore, any written decision would have addressed the asserted claims, whereas the Rule 36 affirmance does not.

At the least, DiStefano requests that the Court revise its decision to reflect that it covers the decision of the district court only with respect to the asserted claims 1, 4, 5, 8, and 10.

II. The District Court's Admission that DiStefano's Complaint Contained Factual Assertions Prohibited Rule 12(b)(6) Dismissal

A. Standard of Review

The Federal Circuit reviews "a district court's dismissal for failure to state a claim under the law of the regional circuit." *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n*, 776 F.3d 1343, 1345 (Fed. Cir. 2014); *see also Berkheimer v. HP Inc.*, 881 F.3d 1360, 1364 (Fed. Cir. 2018), *petition for cert. filed* No. 18-415 (U.S. Sept. 28, 2018) ("we apply the law of the regional circuit, ... to issues not unique to patent law."). Here, the Third Circuit reviews a grant of a Rule 12(b)(6) motion to dismiss *de novo*. *See e.g., Schmidt v. Skolas*, 770 F.3d 241, 248 (3d Cir. 2014). No specialized patent laws govern the procedural evaluation of a motion to dismiss for failure to state a claim. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 964 (2017) ("[p]atent law is governed by the same common-law principles, methods of statutory interpretation, and procedural rules as other areas of civil litigation").

B. Factual Allegations of Inventiveness Defeat a Rule 12(b)(6) Motion to Dismiss

"[W]hether a claim recites patent eligible subject matter is a question of law which may contain underlying facts." *Berkheimer*, 881 F.3d at 1368. These factual allegations, taken as true, prevent resolving the eligibility question as a matter of law. *See Aatrix Software, Inc. v. Green Shade Software, Inc.*, 882 F.3d 1121, 1125 (Fed. Cir. 2018); *CellSpin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306, 1320 (Fed. Cir. 2019) ("accepting those allegations as true, we cannot say that the asserted claims are ineligible under § 101 as a matter of law"). On a motion to dismiss, all factual allegations—including whether a claim element or combination of elements is well-understood, routine and conventional—must be resolved in the plaintiff's favor. *Aatrix*, 882 F.3d at 1127-28; *see also Berkheimer*, 881 F.3d at 1368.

The district court admitted that "DiStefano contends a factual dispute exists regarding whether the ordered combination of steps is routine and conventional." Appx014. While the court recognized that DiStefano factually alleged the claimed invention improved a technical process, the court disagreed that the invention

"improve[ed] any technical problem in the prior art." Appx011, Appx014. Thus, the court erred by failing to resolve DiStefano's factual allegations in DiStefano's favor.

Once the district court recognized that DiStefano made factual allegations that the claimed invention was directed to an improvement over prior art technologies and was not a conventional ordered combination of elements, *a factual dispute existed between DiStefano and LinkedIn*, requiring LinkedIn's motion be denied. Consequently, based upon *Berkheimer*, *Aatrix*, and *CellSpin*, the court's decision to invalidate the '760 patent under 35 U.S.C. § 101 should be vacated and remanded.

ARGUMENTS IN SUPPORT OF REHEARING EN BANC

I. Federal Circuit's Approach Contradicts Supreme Court and Third Circuit Precedent, Which Requires All Factual Allegations be Accepted as True

A. Federal Circuit's Application of a Plausibility Standard to Factual Allegations Lacks Precedent

The Federal Circuit employs a *plausibility* standard for evaluating a complaint's factual allegations. *See, e.g., Aatrix*, 882 F.3d at 1125. This plausible factual allegation standard set forth in *Aatrix* stems from *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839

F.3d 1089, 1097 (Fed. Cir. 2016): "plausible factual allegations may preclude dismissing a case under § 101." However, *FairWarning* relies upon *BASCOM*, which does not refer to plausible factual allegations. Rather, *BASCOM* noted that "nothing on this record ... refutes those allegations as a matter of law or justifies dismissal under Rule 12(b)(6)." *BASCOM Global Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1352 (Fed. Cir. 2016). Therefore, the Federal Circuit's plausibility standard for evaluating a complaint's factual allegations, first announced in *FairWarning*, lacks precedent.

B. Supreme Court's Plausibility Standard Applies to the Claim for Relief – not to Factual Allegations

While the Supreme Court also applies a plausibility standard in evaluating a motion to dismiss, the Supreme Court's plausibility standard goes to the plausibility of the *claim for relief – not the factual allegations*. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The standard set forth by the Supreme Court is that "only a complaint that states a *plausible claim for relief* survives a motion to dismiss." *Iqbal*, 556 U.S. at 678 (emphasis

added). Therefore, plausibility goes to the claim – not the factual allegation.

C. Supreme Court and Third Circuit Precedent Assume all Factual Allegations to be True in a Rule 12(b)(6) Motion to Dismiss

The Third Circuit requires that allegations of historical fact are "assumed to be true even if 'unrealistic or nonsensical,' 'chimerical,' or 'extravagantly fanciful.'" *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 789 (3d Cir. 2016) (citing *Iqbal*, 556 U.S. at 681). The Third Circuit interpreted both *Twombly* and *Iqbal* as "expressly declin[ing] to exclude even *outlandish allegations* from a presumption of truth except to the extent they resembled [legal conclusions]." *Id.* (emphasis added). Even the district court itself cited Third Circuit law that "'assum[es] the allegations in the complaint are true (even if doubtful in fact).'" *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). It just failed to apply it. Once assumed true, the court is to construe the factual allegations "in the light most favorable to the plaintiff, and then draw all reasonable inferences from them." *Connelly* at 790.

The Federal Circuit's reliance upon a standard requiring evaluation of the *plausibility* of the factual allegations departs from Supreme Court precedent. Even judicial disbelief as to the plausibility of factual allegations is not sufficient to dismiss a complaint under Rule 12(b)(6). *Twombly*, 550 U.S. at 556 ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable"). "Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U. S. 319, 327 (1989).

D. The District Court's Disbelief of DiStefano's Factual Allegations is Irrelevant

1. District Court's Reasoning

The district court did not assume the factual allegations in the complaint to be true, nor did it construe these factual allegations in the light most favorable to DiStefano. Rather, the district court disagreed with DiStefano's factual assertions for two reasons. First, the court relied upon purported "concessions during oral argument" regarding "conventional elements ... and that the claimed method is simply an automation of already-established

steps." Appx014. Second, the district court pointed out DiStefano's alleged "failure to identify any reason to find the ordered combination non-routine." *Id.*

Neither the district court's disagreement with DiStefano nor DiStefano's purported failure to identify a reason why the ordered combination was non-routine justify granting a Rule 12(b)(6) motion to dismiss because the patent challenger, not the patentee, bears the burden of proof. "[T]he *patent challenger* bears the burden of demonstrating that the claims lack patent eligibility, 35 U.S.C. § 282(a)." *Berkheimer v. HP Inc.*, 890 F.3d 1369, 1371 (Fed. Cir. 2018) (denial of en banc) (requiring evidence supporting a finding that additional elements were well understood, routine, and conventional and noting that reliance on the specification alone may be appropriate where, as in *Mayo*, the specification *admits* as much). Here, LinkedIn presented no such evidence that the combination was routine. *i4i Ltd. P'ship*, 564 U.S. at 95 (holding that 35 U.S.C. § 282 requires that the patent challenger bear the burden of proving invalidity by clear and convincing evidence).

2. Purported "multiple concessions during oral argument" Were Not Determinative of Section 101

Entirely absent from the district court's citations to the oral arguments is the identification of: (i) an admission that any of the individual steps of the claimed invention were conventional, and (ii) an admission that the ordered combination of elements were well-understood, routine, and conventional. To the contrary, DiStefano repeatedly argued during oral argument that the ordered combination of limitations was not routine and conventional. Appx236-237, Appx240-241 ("there is no argument here, and I haven't heard it, that this ordered combination of elements is something that is conventional"), Appx248-249.

In total, DiStefano conceded that certain individual elements recited in the claims were conventional. Appx227, Appx240. DiStefano also conceded that the claimed invention was directed to achieving a "same result" as that achieved in the prior art – albeit in a unconventional manner. Appx241, Appx248. DiStefano, however, did not concede that any of the individual steps of the claimed invention were conventional or that the ordered combination of elements were well-understood, routine, and

conventional. Consequently, nothing from DiStefano's concessions contradicted or made implausible the factual allegations made within the complaint.

The district court also misrepresented the extent of the concessions made by DiStefano during oral argument. First, *at no point* in DiStefano's patent, complaint, filings, or oral arguments did DiStefano concede that "the claimed method is simply an automation of already-established steps." Such allegations were made *solely* by LinkedIn. Appx208-209, Appx218-220, Appx250-253, Appx256. The district court confused LinkedIn's attorney arguments with concessions made by DiStefano.

Although DiStefano conceded that individual components recited in the claims were known. Appx227 ("the patent itself indicates that web pages were known. Links were known. Reciprocal linking was known. All of this background technology is conceded as prior art in the patent"), these concessions were not directed to the claimed steps or the ordered combination of elements. Moreover, an admission that individual elements are known is not dispositive under 35 U.S.C. § 101 since "[m]odern

inventions very often consist merely of a new combination of old elements or devices." *DDR Holdings, LLC v. Hotels.Com, L.P.*, 773 F.3d 1245, 1258 n.5 (Fed. Cir. 2014) (citing *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418-19 (2007)); *BASCOM*, 827 F.3d at 1349 (finding inventive concept in ordered combination of old elements).

The court also determined that DiStefano admitted that "prior art processes accomplish the same result." Appx014. Yet, the court ignored DiStefano's clarification that "[t]he result is not something that is being claimed herein," Appx248, and "this claim describes a very specific limited process that achieves that ... known result, but *does it in a new and different way, in a way that was totally unconventional.*" Appx241 (emphasis added). Thus, contrary to admitting claiming solely a result, DiStefano argued that the claimed invention covered an unconventional method of achieving the result, indicative of patent eligible subject matter. *See Electric Power Group, LLC v. Alstom, SA*, 830 F.3d 1350, 1356 (Fed. Cir. 2016) (describing the Supreme Court's framework as distinguishing between claims to "desired results" and claims to "particular ways of achieving (performing) them.")

3. Contrary to the District Court, it was Not DiStefano's Burden to "identify any reason to find the ordered combination non-routine"

The court criticized DiStefano for "fail[ing] to identify any reason to find the ordered combination non-routine." Appx014. However, a plaintiff is not required to provide, in a complaint, a reason why an ordered combination of elements is non-routine. The "reason" involves matters of historical fact – including a discussion of the prior art, yet "[s]pecific facts are not necessary [in a complaint]." *See Disc Disease Solutions Inc. v. VGH Solutions, Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).

This point aside, paragraph 10 of the complaint, for example, made the specific factual allegation that the claimed invention "allow[s] parties to establish reciprocal linking arrangements between multiple web pages using only a single web page implementation system, as opposed to prior art processes that required multiple systems to accomplish the same result." Appx072. The court, therefore, erred by not accepting these factual allegations as true, thus defeating LinkedIn's motion to dismiss.

See CellSpin Soft, 927 F.3d at 1320 (holding district court erred by not accepting as true factual allegations as to why claimed invention was not conventional).

II. The Federal Circuit's Determination of a Section 101 Affirmative Defense in a Rule 12(b)(6) Motion to Dismiss is Irreconcilable with Both *Iqbal/Twombly* and Third Circuit precedent

A. Federal Circuit has Improperly Created Specialized Rules for Patent Law

The Federal Circuit admits that "we are not free to create specialized rules for patent law that contradict well-established, general legal principles." *Berkheimer*, 890 F.3d at 1371 (citing *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S.Ct. 831, 840 (2015)). Yet, the Federal Circuit has done just that by repeatedly holding that it is proper to consider a patent invalidity defense under Rule 12(b)(6). *See, e.g., Berkheimer*, 881 F.3d at 1368 ("Nothing in this decision should be viewed as casting doubt on the propriety' of our previous cases resolving patent eligibility on motions to dismiss"). *Aatrix*, 882 F.3d at 1125.

B. Affirmative Defenses Need Not be Addressed in a Complaint to Overcome a Motion to Dismiss

In contradiction to the Federal Circuit's approach, Third Circuit precedent requires that "[u]nder Federal Rule of Civil Procedure 8, a complaint need not anticipate or overcome affirmative defenses." *Schmidt*, 770 F.3d at 248, (citing *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 277 (3d Cir. 2004) ("an affirmative defense may not be used to dismiss a plaintiff's complaint under Rule 12(b)(6)"). Consequently, "[a] complaint does not fail to state a claim simply because it omits facts that would defeat a ... defense." *Schmidt*, 770 F.3d at 248.

Rather, Rule 8(a)(2)'s pleading requirement 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.'" *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). As also explained in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002), "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome." (quoting *Conley*, 355 U.S. at 48).

The Federal Circuit takes an opposite approach to the Supreme Court by imposing a heightened pleading standards for claims of patent infringement. Specifically, the Federal Circuit requires that the pleading both: (i) anticipate an affirmative defense under § 101, and (ii) make factual allegations, not directed to the claim of patent infringement, to address the affirmative defense; otherwise, an asserted patent can be invalidated. *See, e.g., Secured Mail Sols. LLC v. Universal Wilde, Inc.*, 873 F.3d 905, 913 (Fed. Cir. 2017). The Supreme Court, however, has repeatedly declined to judicially impose heightened pleading standards on plaintiffs. *See Swierkiewicz*, 534 U.S. at 515; *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (declining to impose a heightened pleading requirement in civil rights claims regarding liability on a municipality).

C. The Federal Circuit’s Approach Cannot Be Reconciled With Third Circuit Precedent Requiring a Complaint to Only be Dismissed Under Rule 12(b)(6) for Failure to State a Plausible Claim

Post-*Alice*, the first reported Federal Circuit decision involving a Rule 12(b)(6) motion to dismiss under § 101 was

Ultramercial, LLC v. Hulu, LLC. 772 F.3d 709, 713 (Fed. Cir. 2011). The *Ultramercial* majority opinion skipped over the propriety of addressing an affirmative defense under 12(b)(6). However, the *Ultramercial* concurrence attempted to reconcile the decision with *Twombly* by asserting that patent eligibility is a type of "basic deficiency" that should be addressed "at the outset of litigation." *Id.* at 719 (Mayer, J, concurring). This same rationale was presented by Judge Mayer in another concurrence. *OIP Techs., Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1364 (Fed. Cir. 2015).

This attempted reconciliation fails for two reasons. First, under 35 U.S.C. § 282(a), "[a] patent shall be presumed valid," and invalidity must be proved by clear and convincing evidence. *i4i Ltd. P'ship*, 564 U.S. at 95. Thus, under statutory law, a presumption exists that there is *no* "basic deficiency" in an issued patent as to patent eligibility that can be overcome solely by judicial fiat. *See CellSpin*, 927 F.3d at 1319 (issued patents are presumed patent eligible). Rather, a patent can only be rendered invalid by clear and convincing evidence. *i4i Ltd. P'ship*, 564 U.S. at 95. Moreover, *assuming arguendo* that LinkedIn presented evidence to support its

invalidity allegation, DiStefano should have been provided an opportunity to "present contrary evidence and argument." *See Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356, 1364 (Fed. Cir. 2018). However, Rule 8 does not contemplate presentation of rebuttal evidence in a complaint to an anticipated affirmative defense. *See, e.g., Schmidt*, 770 F.3d at 248.

Second, the "basic deficiency" in *Twombly* refers to whether the pleadings contain sufficient factual allegations to establish that the plaintiff is "entitled to relief." *Twombly*, 550 U.S. at 557-558. Giving a "defendant fair notice of what the ... claim is and the grounds upon which it rests," *id.* at 555, is not the same as the Federal Circuit crafting a merits decision based on an invalidity defense. According to the Supreme Court, a Rule 12(b)(6) motion should be granted only if the pleader is unable to articulate "only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *accord Ashcroft*, 556 U.S. at 678 (holding that a claim has "facial plausibility" when the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

Since a patent is presumed valid, this plausibility standard is met by factual allegations that infringing product or method meets all of the claimed elements. *See Disc Disease Solutions*, 888 F.3d at 1260 (citing *Iqbal* and *Twombly*).

D. LinkedIn Identified No Deficiency in DiStefano's Complaint

In none of its filings, before either the district court or the Federal Circuit, did LinkedIn allege that DiStefano's complaint failed to provide fair notice of the patent infringement claim and grounds upon which it rests. Moreover, the court did not hold that DiStefano's complaint failed to comply with the requirements of Rule 8 or failed to state a claim to relief that is plausible on its face. These are necessary conditions to dismiss a complaint under Rule 12(b)(6), and the absence of which necessitates that the court's ruling granting LinkedIn's motion to dismiss be vacated. *See, e.g., Schmidt*, 770 F.3d at 248.

An example of the proper approach to handling a Rule 12(b)(6) motion to dismiss was made in *Disc Disease Solutions*, in which the Federal Circuit noted that the "complaint specifically identified the ... accused products ... and alleged that the accused products meet

'each and every element of at least one claim of the [asserted] Patent.'" *Id.* The Federal Circuit, therefore, held that "district court ... erred in dismissing [the] complaint for failure to state a claim." *Id.* Using this proper approach to evaluate a Rule 12(b)(6) motion to dismiss, the decision of the district court to dismiss DiStefano's complaint should be vacated.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

DISTEFANO PATENT TRUST III, LLC,
Plaintiff-Appellant

v.

LINKEDIN CORPORATION,
Defendant-Appellee

2019-1210

Appeal from the United States District Court for the District of Delaware in No. 1:17-cv-01798-LPS-CJB, Chief Judge Leonard P. Stark.

JUDGMENT

MEREDITH MARTIN ADDY, AddyHart P.C., Atlanta, GA, argued for plaintiff-appellant. Also represented by SCOTT D. PAUL, Cuenot, Forsythe & Kim, LLC, Wellington, FL.

ROBERT TODD CRUZEN, Klarquist Sparkman, LLP, Portland, OR, argued for defendant-appellee. Also represented by SARAH ELISABETH JELSEMA, ANDREW M. MASON, TODD M. SIEGEL.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (PROST, *Chief Judge*, DYK and
WALLACH, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

November 12, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

PROOF OF SERVICE

I certify that today, December 12, 2019, I electronically filed the foregoing APPELLANT'S COMBINED PETITION FOR REHEARING AND REHEARING EN BANC with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit cuing the appellate CM/ECF system. Counsel of record for all parties will be served by the appellate CM/ECF system.

Dated: December 12, 2019

By: /s/ Meredith M. Addy
Meredith M. Addy

CERTIFICATE OF COMPLAINE

This brief complies with thee typeface requirements of Federal Rule of Appellate Procedures 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief was printed using 14 point Century Schoolbook font.

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A). It contains 3891 words, excluding the parts of the brief exempted from the Federal Circuit Rule 32(b) and Federal Rule of Appellate Procedure 32(f). This certificate was prepared in reliance on the word count of the word-processing system (Microsoft® Word for Mac, version 16.31) used to prepare the brief.

Dated: December 12, 2019

By: /s/ Meredith M. Addy
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