

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FT. MYERS DIVISION**

WHEREVERTV, INC.,

Plaintiff,

vs.

CASE NO. 2:18-CV-529-UA-CM

COMCAST CORPORATION, COMCAST  
CABLE COMMUNICATIONS, LLC,  
COMCAST CABLE COMMUNICATIONS  
MANAGEMENT, LLC, AND COMCAST  
BUSINESS COMMUNICATIONS, LLC,

Defendants.

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**DEFENDANTS' MOTION TO DISMISS ALL OF WHEREVERTV'S  
CLAIMS UNDER FED. R. CIV. P. 12(B)(6) AND TO DISMISS DEFENDANT  
COMCAST CORPORATION FOR LACK OF PERSONAL JURISDICTION AND  
IMPROPER VENUE, AND INCORPORATED MEMORANDUM OF LAW**

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## **I. INTRODUCTION**

WhereverTV's complaint fails to plausibly allege Comcast infringement.<sup>1</sup> As for direct infringement, the complaint wholly ignores one limitation of the asserted claims. For this reason alone, the complaint should be dismissed in its entirety under the plausibility-pleading standard of *Iqbal* and *Twombly*. And for other claim limitations, the complaint parrots claim language but provides no factual support for the charge of infringement, again failing the plausibility standard.

As for indirect infringement, the pleadings should be dismissed because there is no plausible direct-infringement allegation, a prerequisite for indirect infringement. Additionally, the complaint fails to plead that Comcast had pre-suit knowledge of the patent, another prerequisite. And as for the many further statutory elements of indirect infringement, the complaint either is silent or parrots the statutory elements without providing factual allegations at all, let alone facts that, if taken as true, would establish plausibility.

Finally, while the complaint mentions 35 U.S.C. § 271(g) – a statutory provision creating liability when a product is made through infringement of a claimed process – it nowhere provides any discussion of the statutory elements, let alone pleads any facts regarding them.

For the reasons provided, this Court should dismiss WhereverTV's complaint in its entirety for failing to state a claim upon which relief can be granted under Rule 12(b)(6).

The Court should further dismiss this action as to Comcast Corporation for lack of personal jurisdiction and because venue is improper.

## **II. LAW**

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” To survive

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<sup>1</sup> “Comcast” means all of the named defendants collectively and individually.

a motion under Federal Rule of Civil Procedure 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” must be disregarded. *Id.* “Factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

In deciding a motion to dismiss under Rule 12(b)(6), “the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff.” *Every Penny Counts, Inc., v. Bank of America Corp.*, No. 2:07-cv-42-FtM-29SPC, 2007 WL 4247790, at \*1 (M.D. Fla. Nov. 30, 2007) (Steele, J.) (citing *Erickson v. Pardus*, 127 S.Ct. 2197 (2007) & *Cristopher v. Harbury*, 536 U.S. 403, 406 (2002)). A complaint must show an entitlement to relief and provide “notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Id.* (internal quotations omitted). “Plaintiff must plead enough facts to state a plausible basis for the claim.” *Id.* (citing *Twombly*, 550 U.S. at 555).

With its 2009 *Iqbal* ruling, the Supreme Court put to rest any question that the stringent “plausibility” pleading standard announced in its 2007 *Twombly* decision applied to federal civil cases outside of *Twombly*’s antitrust context. *Twombly*, 550 U.S. at 570 (requiring plaintiffs to state a claim for relief that is plausible on its face); *Iqbal*, 556 U.S. at 684 (stating that *Twombly* “was based on our interpretation and application of Rule 8” and that it “expounded the pleading standard for ‘all civil actions’ . . .”). After *Iqbal*, United States district courts differed on

whether the “plausibility” standard applied in patent cases or, instead, the less-stringent pleading requirements of Form 18 of the Federal Rules of Civil Procedure. *See, e.g., Gradient Enterprises, Inc. v. Skype Techs. S.A.*, 848 F. Supp. 2d 404, 407-08 (W.D.N.Y. 2012) (compiling cases). The United States Court of Appeals for the Federal Circuit concluded that, with respect to pleading direct infringement of a patent, Form 18 trumped *Twombly* and *Iqbal* and was sufficient even if, for example, the allegation did not “plead facts establishing that each element of an asserted claim is met.” *In re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d 1323, 1334-35 (Fed. Cir. 2012) (citing *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007)). As for indirect infringement (*e.g.*, contributory infringement and inducement), the Federal Circuit applied the Supreme Court’s plausibility standard. *Id.* at 1336-40.

Despite the Federal Circuit’s analysis, district courts – applying regional circuit law to this non-patent and purely procedural issue – continued to require plausibility in pleadings for direct infringement notwithstanding Form 18. *See, e.g., Macronix Int’l Co. v. Spansion Inc.*, 4 F. Supp. 3d 797, 803-04 (E.D. Va. 2014); *C&F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1306 (Fed. Cir. 2000) (“The question of whether a Rule 12(b)(6) motion was properly granted is a purely procedural question not pertaining to patent law, to which this court applies the rule of the regional . . . circuit.”). In requiring plausible pleadings, one court observed:

Indeed, it is high time that counsel in patent cases do all of that work before filing a complaint. That, of course, will serve to winnow out weak (or even baseless) claims and will protect defendants from the need to prepare defenses for the many claims that inevitably fall by the way side in patent cases.

*Macronix Int’l*, 4 F. Supp. 3d at 803.

But the debate between Form 18 or plausibility has been put to rest with the December 2015 abrogation of Rule 84 of the Federal Rules of Civil Procedure. With that abrogation, Form

18 met its demise, and the Supreme Court’s plausibility standard undisputedly applies to all pleadings for direct and indirect patent infringement. While it does not appear that courts in this district have specifically addressed the pleading standard in patent cases since the abrogation of Rule 84, other courts in the Eleventh Circuit have, and all appear to agree that pleadings for direct and indirect infringement must meet the heightened plausibility requirement of *Iqbal & Twombly*. See, e.g., *Glob. Tech Led, LLC v. Every Watt Matters, LLC*, No. 15-cv-61933, 2016 WL 6682015, at \*2 & \*4 (S.D. Fla. May 19, 2016) (“Although nothing about *Twombly* and *Iqbal* necessarily ‘suggests that a patent infringement complaint that largely tracks the language of the claims to allege infringement is insufficient per se,’ Form 18’s abrogation has clearly changed the pleading standard required for claims of direct infringement.”) (quoting *Avago Techs. Gen. IP (Sing) PTE Ltd.*, 2016 U.S. Dist. LEXIS 55655, at \*13 (N.D. Cal. Apr. 25, 2016)); see also *Raptor, LLC v. Odebrecht Construction, Inc.*, 2017 WL 3503399, at \*3 (S.D. Fla. June 22, 2017) (Altonaga, J.) (“[A]n allegation of direct patent infringement is insufficient under *Twombly* and *Iqbal* if it simply recit[es] some of the elements of a representative claim and then describ[es] generally how an accused product operates, without specifically tying the operation to any asserted claim or addressing all of the claim requirements.”) (quoting *Glob. Tech Led*, 2016 WL 6682015, at \*2) (internal quotations omitted).

### **III. FACTUAL BACKGROUND**

#### **A. The complaint**

Comcast Corporation is a media and technology company with two primary businesses, Comcast Cable and NBCUniversal. Its Cable Communications business segment provides video and high-speed Internet, among other products, to residential customers under the Xfinity brand, and also provides these services to business customers. All of the Comcast defendants are headquartered in Philadelphia, PA.

WhereverTV's complaint accuses the Comcast entities generally of direct and indirect infringement of U.S. patent no. 8,656,431 ("the 431 patent"). Dkt. 1 ¶¶ 50 & 60. As for direct infringement, WhereverTV alleges that Comcast infringes all 45 claims of the patent but it focuses infringement allegations on only claim 1 as supposedly "exemplary." *Id.* ¶ 50. In doing so, the complaint fails to even mention some limitations of claim 1, including that the recited "server" be "distinct from at least one of the one or more MSOs and one or more non-MSOs." *Id.* at Ex. 1, col. 16, lines 49-50. For other limitations, the complaint parrots claim language but alleges no fact to support its bald charge that Comcast's accused "Xfinity X1 Platform" meets the limitations.

The complaint further alleges, without citing a single supporting fact and without divulging relevance, that the various named Comcast defendants all somehow "exercise control and direction over one another, thus, making each of them vicariously liable for each other's infringement." *Id.* ¶ 59.

As for indirect infringement, the complaint accuses Comcast of both inducement and contributory infringement under 35 U.S.C. § 271(b) and (c) but fails to mention necessary elements to satisfy the plausibility requirement, let alone allege facts that, if taken as true, would satisfy the elements. *Id.* ¶ 60.

Finally, in head-scratching fashion, the complaint accuses Comcast of infringement under 35 U.S.C. § 271(g), a statutory provision establishing liability for importing into the United States or selling in the United States a product that has been made through a process claimed in a United States patent. *Id.* The complaint identifies no Comcast product made through any claimed process in the 431 patent. Moreover, "exemplary" claim 1, the only claim actually discussed in the complaint, is not even a process claim; instead, it claims a device. *Id.* at Ex. 1,



col. 16, line 32 (“A content manager device. . .”).

**B. September 5, 2018, conference between the parties**

Because the complaint falls well short of the plausibility requirement, at the request of Comcast, on September 5, 2018, counsel for the parties conferred on the telephone. Counsel for Comcast described many deficiencies in the complaint – including those raised in this motion – and in the infringement allegations overall, and requested that WhereverTV withdraw the complaint. Counsel for Comcast memorialized the call by letter dated September 11, 2018. *See* Ex. 1. WhereverTV did not respond to the letter nor address the deficiencies that Comcast identified during the phone conversation.

**IV. THE COURT SHOULD DISMISS THE COMPLAINT IN ITS ENTIRETY BECAUSE IT FAILS TO PLAUSIBLY ALLEGE DIRECT INFRINGEMENT UNDER 35 U.S.C. § 271(a), INDIRECT INFRINGEMENT UNDER 35 U.S.C. § 271(b) OR (c), AND INFRINGEMENT UNDER 35 U.S.C. 271(g).**

**A. WhereverTV’s direct infringement claims should be dismissed because the complaint fails to allege factual support for all claim limitations.**

**1. WhereverTV failed to plausibly allege direct infringement because the complaint does not even address certain claim limitations, including the recited “server” being “distinct from” the alleged “MSO.”**

The complaint specifically mentions only claim 1 of the patent as a supposed exemplar of Comcast’s infringement. Dkt. 1 ¶ 50. Claim 1 is directed to a “content manager device,” and the complaint alleges that Comcast’s “Xfinity X1 Platform” corresponds to the claimed device. *Id.* ¶ 50 & Ex. 1, col. 16, line 32. Claim 1 requires that the content manager device comprises:

*a server . . . containing descriptive program data about video content available from one or more multiple cable system operators (MSOs) and one or more non-MSOs;*

\* \* \*

*wherein the server is distinct from at least one of the one or more MSOs and one or more non-MSOs . . . .*

*Id.*, Ex. 1 at col. 16, lines 33-36 & 49-50 (emphasis added).

The complaint alleges that Comcast's Xfinity X1 Platform includes the recited server. *Id.* ¶ 54. And the complaint alleges that Comcast is an "MSO" according to the claim, while Netflix and YouTube are each a recited "non-MSO." *Id.* The complaint states, "the Xfinity X1 Platform includes a server on a network that contains descriptive programming data about video content available from one or more non-MSOs, including, for example Netflix and YouTube, and one or more MSO's, for example, Comcast." *Id.* But the complaint ignores the requirement of the claim shown above that the recited "server" be "distinct" from both the "MSO" and the "non-MSO." *Id.*, Ex. 1, col. 16, lines 49-50 ("wherein the server is distinct from at least one of the one or more MSOs and one or more non-MSOs. . . .").

To infringe claim 1 of the patent, the "server" that is part of the "content manager device" must be "distinct from" the MSO and non-MSO. But WhereverTV's complaint completely ignores this requirement in its pleading, never mentioning it, let alone providing any factual support for it. For this reason alone, the direct-infringement claims under 35 U.S.C. § 271(a) should be dismissed. *See Raptor*, 2017 WL 3503399, at \* 4 ("without providing an **element-by-element analysis** of how the photographs [of the accused device and methods] depict infringement of all limitations of any Claim, [the complaint] does not give Defendants' 'fair notice' of the 'grounds upon which' Plaintiffs' claim for direct infringement rests. *Twombly*, 550 U.S. at 555. Accordingly, the Complaint fails to state a claim for direct infringement and is dismissed.") (emphasis added); *Glob. Tech Led*, 2016 WL 6682015, at \*2 ("[A]n allegation of direct patent infringement is insufficient under *Twombly* and *Iqbal* if it simply recite[s] some of the elements of a representative claim and then describ[es] generally how an accused product operates, without specifically . . . addressing **all** of the claim requirements.") (emphasis added)

(internal quotations omitted); *Tai v. Minka Lighting, Inc.*, No. CV-16-02810-PHX-DLR, 2017 WL 568519, at \*2 (D. Ariz. Feb. 13, 2017) (“[T]o meet the pleading requirements of *Twombly* and *Iqbal* and avoid dismissal, the complaint must plausibly allege that the accused product practices *each of the limitations found in at least one asserted claim*. . . . This is because the failure to meet a single limitation is sufficient to negate infringement of a claim.”) (internal quotation & citation omitted) (emphasis added); *Wright’s Well Control Servs., LLC v. Oceaneering Int’l, Inc.*, Civ. No. 15-1720, 2017 WL 568781, at \*5 (E.D. La. Feb. 13, 2017) (“There is simply *no infringement unless every limitation set forth in a patent claim is found* in an accused product, exactly. . . . Unless plaintiffs allege that every element or limitation of a least one claim is found in an accused product, it will always be plausible that the accused product merely resembles or shares similarities with, but does not infringe, their claim. . . . Therefore, the Court finds that *Twombly and Iqbal require* plaintiffs to allege facts showing that an accused product contains each and *every limitation or element of at least one patented claim*.”) (internal quotations omitted) (emphasis added).

Moreover, while the complaint alleges that Comcast is the supposed “MSO” of the claims and the claim limitation requires that the recited server be “distinct” from the MSO (*i.e.*, Comcast), the complaint actually alleges that the offending server is a Comcast server that is part of the accused Comcast “Xfinity X1 Platform.” Therefore, not only does the complaint fail to allege any fact demonstrating a server that forms part of an infringing device is “distinct” from both the MSO and non-MSO, it actually implies that the server in the supposed infringing device is part of Comcast, the supposed MSO of the claims. For this reason as well, WhereverTV’s direct infringement claims should be dismissed.

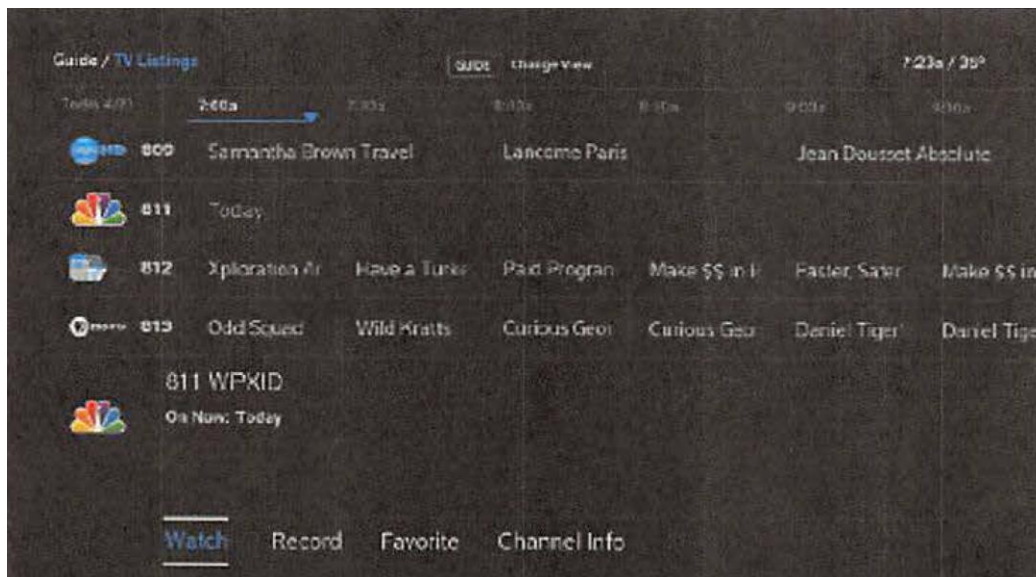
**2. WhereverTV fails to plausibly allege direct infringement because the complaint fails to plead any fact demonstrating that the accused**

**Comcast device provides an “interactive program guide (IPG) listing at least one channel of video content” from an MSO and a non-MSO.**

Claim 1 further requires “an interactive program guide application” that “provides user – configurable interactive program guide (IPG) listing at least one channel of video content available from each of the one or more MSOs and each of the one or more non-MSOs. . . .” Dkt. 1 at Ex. 1, col. 16, lines 39-43. The complaint repeats this language. *Id.* ¶ 56 (“Comcast’s Xfinity XI Platform further comprises a user-configurable electronic interactive programming guide that provides a listing of video content from at least one MSO and at least one non-MSO, and each of the channels is selectable for receiving streaming video programming from its respective MSO (e.g., Comcast distributed video content) or non-MSO video content (e.g., Netflix, YouTube, etc.) over the network.”). But the complaint alleges no fact, let alone a plausible one, showing that the accused device meets the claim limitation. *Raptor*, 2017 WL 3503399, at \*3 (“[A]n allegation of direct patent infringement is insufficient under *Twombly* and *Iqbal* if it simply recit[es] some of the elements of a representative claim and then describ[es] generally how an accused product operates, without specifically . . . addressing all of the claim requirements.”) (quoting *Glob. Tech Led*, 2016 WL 6682015, at \*2) (internal quotations omitted); *Macronix Int’l*, 4 F. Supp. 3d at 804 (“[T]he [first amended complaint] simply alleges that each element of a cited claim is infringed and then parroted the claim language for each element. That simply does not satisfy the notice and showing requirements of Rule 8(a) as interpreted by *Twombly* and *Iqbal*.”); *L.M. Sessler Excavating & Wrecking, Inc. v. Bette & Cring, LLC*, No. 16-CV-06534-FPG, 2017 WL 4652709, at \*4 (W.D.N.Y. Oct. 17, 2017) (finding the plausibility standard not met where pleading only parroted the patent claim and provided no factual allegation).

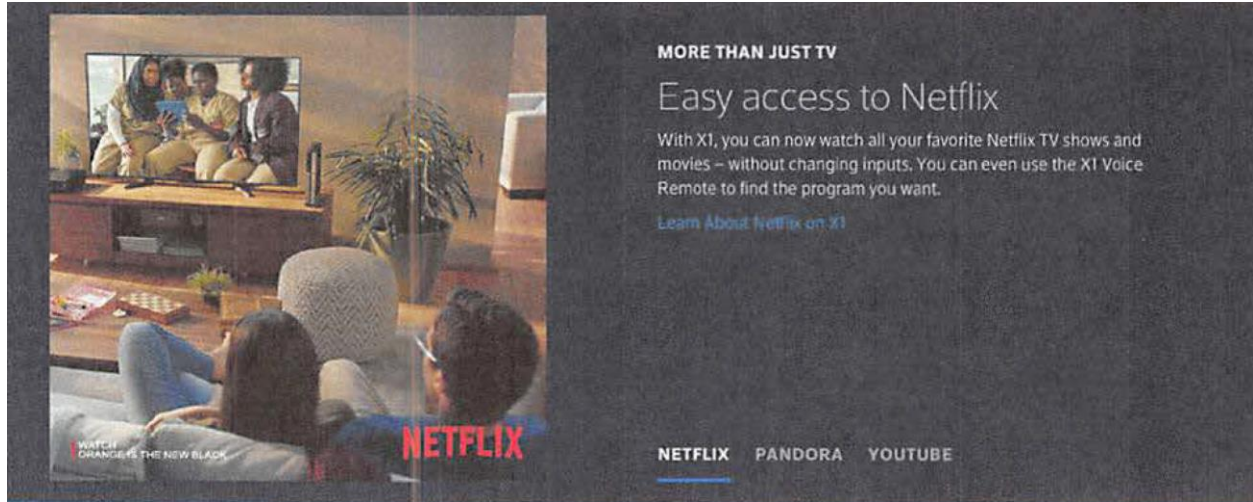
To the contrary, this bald allegation of infringement is belied by every screen shot

provided in the complaint, each of which shows no listing of both MSO (here, alleged to be Comcast) and non-MSO (here, alleged to be Netflix or YouTube) channels. For example, the following two screen shots shown in the complaint show only Comcast-provided channels listed in the Comcast guide:



And the following complaint screen shots show Netflix (supposed “non-MSO” programming) but not in any program guide, let alone a guide that also includes any alleged

“MSO,” as required in claim 1:



Because the complaint fails to allege any plausible fact supporting infringement of this claim requirement, all of WhereverTV’s direct infringement allegations should be dismissed.

- 3. WhereverTV fails to plausibly allege any fact demonstrating that the accused Comcast device provides an interactive program guide application that allows for the interactive program guide “to be configured by a user with respect to adding or deleting channels.”**

Claim 1 further requires that the “content manager device” include “an interactive

program guide application” that “allows for the [interactive program guide] IPG to be configured by a user with respect to adding or deleting channels from any of the one or more MSOs or the one or more non-MSOs.” Dkt. 1, Ex. 1 at col. 16, lines 51-54. The complaint parrots this language. *Id.* ¶ 57 (“Comcast’s XI electronic interactive programming guide is also configurable by users. Without limitation, users can configure the programming guide by adding and deleting channels, among other configuration changes.”). But the complaint provides no factual support, plausible or otherwise, demonstrating any such ability by a user to add or delete channels. Instead, the complaint is silent as to this limitation. For this additional reason, all pleadings related to direct infringement under 35 U.S.C. § 271(a) should be dismissed. *Raptor*, 2017 WL 3503399, at \*3; *Macronix Int’l*, 4 F. Supp. 3d at 803-04; *L.M. Sessler Excavating & Wrecking, Inc.*, 2017 WL 465709, at \*4.<sup>2</sup>

**B. WhereverTV’s indirect infringement charges should be dismissed because the complaint fails to plausibly allege direct infringement, a prerequisite for**

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<sup>2</sup> The complaint also states, “[e]ach of the different Defendants have also jointly and collectively combined their actions in a manner that collectively constitute infringement of the ‘431 Patent, and, they exercise control and direction over one another, thus, making each of them vicariously liable for each other’s infringement.” Dkt. 1 ¶ 59. Such allegations appear – though it is by no means clear – to implicate a “joint infringement” theory. *Lyda v. CBS Corp.*, 838 F.3d 1331, 1339 (Fed. Cir. 2016). Joint infringement occurs only if “the acts of one are attributable to the other such that a single entity is responsible for the infringement.” *Eli Lilly & Co. v. Teva Parenteral Medicines, Inc.*, 845 F.3d 1357, 1364 (Fed. Cir. 2017) (internal quotation omitted). An entity may be held responsible for others’ actions under a joint infringement theory in either of two circumstances: “(1) where that entity directs or controls others’ performance, and (2) where the actors form a joint enterprise.” *Travel Sentry, Inc. v. Tropp*, 877 F.3d 1370, 1378 (Fed. Cir. 2017) (internal quotation omitted). But other than its conclusory statement mentioned above, WhereverTV’s complaint is devoid of any factual allegations supporting a joint infringement theory. Among other things, it fails to allege any facts demonstrating that some Comcast entity directs or controls other Comcast entities, or explain what specific acts such a Comcast entity allegedly directs and controls. *See Brandywine Commc’ns Techs., LLC v. Casio Computer Co.*, 912 F. Supp. 2d 1338, 1350 (M.D. Fla. 2012) (dismissing joint infringement claim where complaint “simply stated, without any factual support, that the relationship between [alleged joint infringers] is one in which [one joint infringer] exerts control and direction over the entire process such that every step is attributable to [it]”); *Lyda*, 838 F.3d at 1340 (“[T]he Amended Complaint alleges conclusively and without factual support that CBS directed or controlled the independent contractors who then directed or controlled the unnamed third parties.”); *EON Corp. IP Holdings LLC v. FLO TV Inc.*, 802 F. Supp. 2d 527, 535 (D. Del. 2011) (dismissing claim because “plaintiff’s complaint does not provide specific facts explaining any alleged relationships among defendants”). Because WhereverTV failed to include those factual allegations, it did not state a proper claim for joint infringement, if that is what it intended.

**indirect infringement, and further ignores elements required for indirect infringement and fails to allege facts plausibly supporting the charges.**

The complaint alleges that Comcast indirectly infringed the patent through inducement and contributory infringement. Dkt. 1 ¶ 60. But there can be no plausible allegation of indirect infringement without a plausible allegation of direct infringement, and therefore, the indirect infringement charges should be dismissed for the reasons provided above regarding direct infringement. *See Tai*, 2017 WL 568519, at \*3 (“To the extent the infringement claim is based on alleged inducement of others or contributory infringement . . . the claim fails as a matter of law because Plaintiff has not stated a plausible claim for direct infringement. *See MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1378 (Fed. Cir. 2005) (direct infringement is an element of an inducement claim. . . .); *Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321, 1326 (Fed. Cir. 2010) (same with respect to a claim for contributory infringement).”).

Furthermore, as to the allegation of indirect infringement under 35 U.S.C. § 271(b) (inducement), the complaint fails to plead facts sufficient to establish the other elements of inducement. Proof of inducement requires (1) actual knowledge of the patents-in-suit by the defendant; (2) knowledge that the direct infringer’s actions constituted infringement; and (3) specific intent to cause the infringement. *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926, 1928 (2015); *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1303, 1305-06 (Fed. Cir. 2006); *Brandywine Commc’ns Techs.*, 912 F. Supp. 2d at 1345; *In re Bill of Lading*, 681 F.3d at 1339 (explaining that, to survive a motion to dismiss, the complaint “must contain facts plausibly showing that [the defendant] specifically intended [a third party] to infringe . . . and knew that the [third party’s] acts constituted infringement”).

Here, WhereverTV failed to plead these elements of inducement. Dkt. 1 ¶¶ 60, 61. For instance, it failed to allege facts showing that Comcast had the requisite pre-suit knowledge of



the asserted patent. Although WhereverTV alleges that Comcast had knowledge of the patent “since at least the date of service of th[e] Complaint,” that allegation is inadequate. In this District, courts have held that “[a] claim of induced infringement requires showing *pre-suit* knowledge of the patent.” *Brandywine Commc’ns Techs.*, 912 F. Supp. 2d at 1345 (emphasis added). WhereverTV did not allege, let alone plead any facts, demonstrating such pre-suit knowledge of the asserted patent.

WhereverTV also failed to plead facts plausibly showing that Comcast had knowledge of any third-party infringement and specific intent to cause the infringement. To survive a motion to dismiss, the complaint “must contain facts plausibly showing that [the defendant] specifically intended [a third party] to infringe . . . and knew that the [third party’s] acts constituted infringement.” *In re Bill of Lading*, 681 F.3d at 1339. Here, other than generically claiming infringement, WhereverTV’s complaint includes no facts demonstrating that Comcast knew that anyone was infringing.

Nor does WhereverTV allege any facts showing specific intent for anyone else to infringe. Instead, it merely alleges, without any detail, that Comcast provided advertisements and instructional material to its customers. Dkt. 1 ¶ 60. There are no allegations, for example, that the advertisements and other materials direct anyone to use the specific accused functionalities, and there is no explanation as to how any instructions direct anyone to use the accused products and services in an infringing way. WhereverTV’s pleadings regarding specific intent are therefore insufficient. *See Bonutti Skeletal Innovations LLC v. Arthrex, Inc.*, No. 6:12-cv-1380-Orl-22TBS, 2013 WL 12149301, at \*4 (M.D. Fla. Mar. 29, 2013) (“Merely including instructions and conducting training sessions, standing alone, are innocuous activities that do not suggest a specific intent to encourage another’s infringement”) (internal quotation omitted);

*MONEC Holding AG v. Motorola Mobility, Inc.*, 897 F. Supp. 2d 225, 234 (D. Del. 2012)

(“Allegations of the marketing activities . . . do not, on their own, demonstrate that Defendants knew such activities were infringing or that Defendants possessed the specific intent to encourage another’s infringement.”).

As for allegations of indirect infringement under 35 U.S.C. § 271(c) (contributory infringement), the complaint nowhere mentions the elements of the statute let alone pleads any fact that could lead to a plausible assertion of contributory infringement. In addition to demonstrating direct infringement by another, contributory infringement requires a showing that: (1) the defendant had pre-suit knowledge of the asserted patent; (2) a component provided by the accused contributory infringer have no substantial non-infringing uses; (3) the component be a material part of the invention; and (4) the accused contributory infringer knew that “the combination for which [its] component was especially designed was both patented and infringing. *Glob. Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 763-64 (2011) (internal quotation marks omitted); *see also Commil*, 135 S. Ct. at 1926 (“[C]ontributory infringement requires knowledge of the patent in suit and knowledge of patent infringement.”); *In re Bill of Lading*, 681 F.3d at 1337 (“[P]laintiff must, among other things, plead facts that allow an inference that the components sold or offered for sale have no substantial non-infringing uses.”).

Here, WhereverTV’s complaint nowhere even mentions these statutory requirements let alone plead facts plausibly showing that they are met. Dkt. 1 ¶¶ 60 & 61. For example, other than including an irrelevant allegation of post-complaint knowledge, the complaint does not include any facts demonstrating that Comcast knew of the asserted patent before the complaint was filed. *Brandywine Commc’ns Techs.*, 912 F. Supp. 2d at 1347-49 (dismissing contributory infringement claim because complaint failed to include facts demonstrating pre-suit knowledge

of asserted patent). Nor does the complaint identify any “component” of an invention, let alone allege that such component was not suitable for any substantial noninfringing use. *See In re Bill of Lading*, 681 F.3d at 1337.

For each of these reasons, all of WhereverTV’s indirect infringement claims should be dismissed for failure to state a claim.

**C. WhereverTV’s infringement charge under 35 U.S.C. § 271(g) should be dismissed because the complaint fails to mention any element of this statutory provision or allege any fact plausibly supporting the elements of infringement of a product-by-claimed-process claim.**

The complaint alleges Comcast infringement under 35 U.S.C. § 271(g). Dkt. 1 ¶ 60.

This statutory section provides:

(g) Whoever without authority imports into the United States or offers to sell, sells, or uses within the United States a product which is made by a process patented in the United States shall be liable as an infringer, if the importation, offer to sell, sale, or use of the product occurs during the term of such process patent. In an action for infringement of a process patent, no remedy may be granted for infringement on account of the noncommercial use or retail sale of a product unless there is no adequate remedy under this title for infringement on account of the importation or other use, offer to sell, or sale of that product. A product which is made by a patented process will, for purposes of this title, not be considered to be so made after—

(1) it is materially changed by subsequent processes; or

(2) it becomes a trivial and nonessential component of another product.

35 U.S.C. § 271(g).

Aside from mentioning this statutory provision in the complaint, WhereverTV’s pleadings nowhere address any of its statutory requirements, let alone plead a single fact that could support the infringement allegation. To the contrary, the complaint does not even specify infringement of any process claim (“exemplary claim 1” is directed to a device) nor contain a single fact demonstrating that an accused product was somehow made through a claimed process.

**V. THE COURT SHOULD FURTHER DISMISS THE COMPLAINT AS TO COMCAST CORPORATION FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE.**

Comcast further moves this Court for an order dismissing this action as to Comcast Corporation for lack of personal jurisdiction and improper venue. *See* Fed. R. Civ. P. 12(b)(2) & (3); 28 U.S.C. §§ 1400(b) & 1406(a).<sup>3</sup>

**A. Law**

Federal Circuit law governs whether personal jurisdiction extends over an accused out-of-state infringer. *See Rates Tech. Inc. v. Nortel Networks Corp.*, 399 F.3d 1302, 1307 (Fed. Cir. 2005); *Alpha Tech. U.S.A. Corp. v. N. Dairy Equip., Ltd.*, No. 6:17-cv-1000-Orl-31DCI, 2018 WL 501598, at \*4 (M.D. Fla. Jan. 22, 2018). The plaintiff bears the burden of establishing personal jurisdiction. *See Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico*, 563 F.3d 1285, 1294 (Fed. Cir. 2009). To make that showing, the plaintiff must establish either “general” or “specific” jurisdiction over the defendant. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984); *Carmouche v. Tamborlee Mgmt., Inc.*, 789 F.3d 1201, 1204 (11th Cir. 2015) (quoting *Int’l Shoe Co. v. State of Wash.*, 326 U.S. 310, 317 (1945) (“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations, without offending due process ‘when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”)).

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<sup>3</sup> In an effort to avoid bringing this motion, Comcast alerted WhereverTV to the lack of personal jurisdiction and improper venue on September 5, 2018, and requested that WhereverTV dismiss certain Comcast defendants. Comcast agreed, if the certain defendants were dismissed, that Comcast would not argue that such dismissal impairs WhereverTV’s ability to pursue or obtain discovery on any of the claims for relief alleged in the complaint from any dismissed Comcast entity. Ex. 2 at 4. Despite two follow-up requests for attention to this matter, WhereverTV did not respond to Comcast’s proposal until September 17, 2018, the day before the due date for this motion. In that response, WhereverTV simply stated that it had not “made a final decision regarding whether to dismiss the entities” Comcast requested to be dismissed. *Id.* at 1-2.

A federal court sitting in Florida applies a two-prong test to determine whether personal jurisdiction exists over an out-of-state defendant corporation. First, a court determines whether jurisdiction exists under Florida's long-arm statute, Florida Statute § 48.193. Interpretation of the long-arm statute is grounded in the rulings of the Florida Supreme Court and Florida intermediate appellate courts, and the long-arm statute is to be strictly construed. *Canadian Steel, Inc. v. HFP Capital Markets, LLC*, No. 11-23650-CIV, 2012 WL 2326119 (S.D. Fla. June 19, 2012); *Sculptchair, Inc. v Century Arts, Ltd.*, 94 F.3d 623, 626-627 (11th Cir. 1996). Second, the court determines whether there are sufficient "minimum contacts" within the forum to comply with federal-constitutional due process such that the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." *Canadian Steel*, 2012 WL 2326119, at \*3; *Future Tech. Today, Inc. v OSF Healthcare Sys.*, 218 F.3d 1247, 1249 (11th Cir. 2000). Under this analysis, the court's initial inquiry is whether the plaintiff has pled a prima facie case for personal jurisdiction. *Canadian Steel*, 2012 WL 2326119, at \*3. "Plaintiff's burden in alleging jurisdiction is to plead sufficient material facts to establish the basis for exercise of such jurisdiction." *Id.*; *Future Tech.*, 218 F.3d at 1249.

As for the minimum-contacts analysis, this Court applies the Federal Circuit's "three-prong minimum contacts test" for patent-infringement cases: (1) whether the defendant "purposefully directed its activities at residents of the forum"; (2) whether the cause of action arises out of or relates to those activities; and (3) whether its assertion of personal jurisdiction would be "reasonable and fair." See *Alpha Tech.*, 2018 WL 501598, at \*4 (citing *3D Sys., Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1378 (Fed. Cir. 1998)). "The first two factors correspond with the minimum contacts prong of the *International Shoe* analysis, and the third factor with the fair play and substantial justice prong of the analysis." *Inamed Corp. v. Kuzmak*, 249 F.3d 1356,

1360 (Fed. Cir. 2001) (internal quotations omitted). Only after the plaintiff has met its burden as to the first two prongs, must the Court determine whether the exercise would be reasonable and fair. *See id.* at 1363. In doing so, the Court must consider: “(1) the burden on the defendant, (2) the interests of the forum state, (3) the plaintiff’s interest in obtaining relief, (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several States in furthering fundamental substantive social policies.” *Id.*

As for venue, a domestic corporation can only be sued in its state of incorporation or a district where it has both committed acts of infringement and has a regular and established place of business. *See TC Heartland LLC v. Kraft Food Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017); 28 U.S.C. § 1400(b).

**B. The Court should dismiss Comcast Corporation for lack of personal jurisdiction.**

The Court should dismiss Comcast Corporation for lack of personal jurisdiction. As for general personal jurisdiction, it does not appear that the complaint alleges that Comcast Corporation is subject to general personal jurisdiction. Dkt. 1 ¶ 11. In any event, Comcast Corporation is not subject to general jurisdiction in this Court. First, Comcast Corporation is not incorporated in Florida and does not consent to jurisdiction in Florida. Second, Comcast Corporation has not engaged “in substantial and not isolated activity within this state.” *See* Florida Statute § 48.193(2); *Helicopteros*, 466 U.S. at 414-16. To the contrary, Comcast Corporation is a holding company, not an operating company. It provides, markets, and sells no product or service to, nor directs any of its activities toward, customers at all, let alone residents of Florida. Comcast Corporation is not registered to do business within Florida, has no registered agent for the service of process in Florida, and therefore is unqualified to do business in Florida. Comcast Corporation maintained the formalities of separate corporate existence,

including the keeping of separate books, records, and accounts. Comcast Corporation does not have day-to-day control over its subsidiaries, including any that may provide services in Florida. Any subsidiaries that may provide services in Florida would not be Comcast Corporation's agents, and neither Comcast Corporation nor its subsidiaries operate as a single enterprise with respect to any acts performed in Florida.

As to all of the foregoing facts, the complaint does not plead otherwise. Instead, the complaint lumps all of the Comcast defendants together and generically alleges jurisdiction as to all of them with no factual assertion supporting general jurisdiction as to Comcast Corporation. *Id.* Indeed, at least one court has held that general jurisdiction is not proper over Comcast Corporation because it is a "holding company that does not do any business in [the forum state]." *See Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 34 (June 18, 2013). Therefore, this Court should not exercise general jurisdiction over Comcast Corporation based on activity of its subsidiary at all, let alone based on a complaint that identifies no subsidiary or activity. *See Garrido*, 2013 IL App (1st) 120466, ¶ 35 (refusing to assert general jurisdiction over Comcast Corporation based solely on activity of a subsidiary in the forum).

As to specific jurisdiction, Comcast Corporation has insufficient contacts with Florida to be subject to suit in this judicial district for its purported infringement of the asserted patent. First, Comcast Corporation has not "purposefully directed [its] activities at the residents of" Florida, because as explained, Comcast Corporation does not have any consumer-facing activities. Specifically with reference to the allegations in the complaint, Comcast Corporation neither "provides products and services under the brand name 'Xfinity,' . . . to customers . . . in this judicial district," nor "develops the [allegedly] infringing Xfinity services and equipment and provides the [allegedly] infringing interactive programming guide, set-top boxes, television

systems, software apps, Wi-Fi services, and related components to customers in this judicial district.” *See* Dkt. 1 ¶ 3. Comcast Corporation has not engaged, and does not engage, in any of the allegedly infringing acts anywhere, let alone within Florida. It does not make, use, offer to sell, or sell any product or service; or perform any other act that could possibly be considered infringement of the asserted patent, in Florida. The complaint does not allege otherwise.

Therefore, Comcast Corporation has not “purposefully directed [any] activit[y] at residents of” Florida from which the cause of action purportedly described in the complaint “arises out of or [is] relate[d] to.” For this reason, the exercise of specific personal jurisdiction under due process would not be either reasonable or fair. *See Alpha Tech.*, 2018 WL 501598, at \*4 (citing *3D Sys.*, 160 F.3d at 1378). As to Florida’s long-arm statute for specific jurisdiction, as explained above, Comcast Corporation has performed no alleged activity in Florida, let alone activity related to the purported patent infringement. Therefore, even under the Florida long-arm statute, Comcast Corporation is not subject to specific personal jurisdiction.

**C. The Court should dismiss Comcast Corporation for improper venue.**

In addition to dismissing this action for lack of personal jurisdiction, the Court should also dismiss this action as to Comcast Corporation for improper venue. *See* Fed. R. Civ. P. 12(b)(3) & 28 U.S.C. §§ 1400(b), 1406(a). A domestic corporation can only be sued in its state of incorporation or a district where it has both committed acts of infringement and has a regular and established place of business. *See TC Heartland*, 137 S. Ct. at 1517; 28 U.S.C. § 1400(b) (Venue for an action for patent infringement is proper “where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.”). This action should be dismissed for improper venue first because Comcast Corporation is not incorporated, and thus does not reside, in Florida. *See TC Heartland*, 137 S. Ct. at 1517 (stating that “a domestic corporation ‘resides’ only in its State of incorporation for



purposes of the patent venue statute”). Second, as explained above, Comcast Corporation has committed no act in this District, let alone an act constituting the alleged patent infringement. Finally, Comcast Corporation maintains its principal place of business in Philadelphia, Pennsylvania. Thus, it does not have a “regular and established place of business” in this judicial district. For these reasons, venue is improper in the Middle District of Florida.

## **VI. CONCLUSION**

The Court should dismiss WhereverTV’s direct and indirect infringement claims, as well as its claim of infringement under 35 U.S.C. § 271(g). That is, the Court should dismiss this complaint in its entirety for failing to plausibly plead infringement under Rule 12(b)(6). WhereverTV’s allegations lack the requisite facts necessary to show that its claims are plausible on their face, fail to put Comcast on notice of any alleged patent infringement, and are therefore insufficient under Supreme Court precedent. The Court should further dismiss Comcast Corporation under Rule 12(b)(2) for lack of personal jurisdiction and under Rule 12(b)(3) for improper venue.

Respectfully submitted this 18<sup>th</sup> day of September, 2018.

*s/Michael S. Vitale*

Michael S. Vitale

Florida Bar No. 17136

**BAKER & HOSTETLER LLP**

SunTrust Center

Suite 2300

200 South Orange Avenue

Orlando, FL 32801-3432

[mvitale@bakerlaw.com](mailto:mvitale@bakerlaw.com)

Telephone: 407-649-4000

Facsimile: 407-841-0168

Of Counsel:

Daniel J. Goettle  
dgoettle@bakerlaw.com  
Jeffrey W. Lesovitz  
jlesovitz@bakerlaw.com  
Stephanie M. Papastephanou  
[spapastephanou@bakerlaw.com](mailto:spapastephanou@bakerlaw.com)  
**BAKER & HOSTETLER LLP**  
2929 Arch Street  
Cira Centre, 12th Floor  
Philadelphia, PA 19104-2891  
Telephone: 215.568.3100  
Facsimile: 215.568.3439

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 18, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to:

Robert N. Harrison  
Robert N Harrison, PA  
304 West Venice Avenue, Suite 201  
Venice, FL 34285  
robert@harrisonlawoffice.com  
(941) 485-8551 (telephone)  
(941) 584-8376 (facsimile)

Adam Sanderson (pending special admission)  
REESE MARKETOS LLP  
750 N. St. Paul, St. Ste. 610  
Dallas, Texas 75201  
(214) 382-9810 (telephone)  
(214) 501-0731 (facsimile)  
adam.sanderson@rgmfirm.com

COUNSEL FOR PLAINTIFF

*s/Michael S. Vitale*  
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Michael S. Vitale