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12
13 **UNITED STATES DISTRICT COURT**

14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 FLUIDIGM CORPORATION, a Delaware
corporation,

16 Plaintiff,

17 v.

18 BIOMERIEUX SA, a French corporation,

19 Defendant.
20

CASE NO. 5:19-CV-02716-LHK

DEFENDANT'S MOTION TO DISMISS

Complaint Filed Date: May 17, 2019

Judge: Honorable Lucy H. Koh
Hearing Date: December 5, 2019
Time: 1:30 PM
Courtroom: 8

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
III. ARGUMENT.....	2
A. bioMérieux SA Is an Improper Defendant and Should Be Dismissed	3
1. Fluidigm improperly sued a foreign parent for the alleged acts of its domestic subsidiary.....	3
2. There is no personal jurisdiction over bioMérieux SA.....	5
B. Fluidigm’s Direct Infringement Claim Should Be Dismissed.....	7
C. Fluidigm’s Indirect Infringement Claim Should Be Dismissed	8
IV. CONCLUSION	9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Home Assurance Co. v. Tutor-Saliba Corp.,
No. 15-00303 SC, 2015 WL 2228062 (N.D. Cal. May 12, 2015).....5

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....3

Avocet Sport Tech., Inc. v. Garmin Int’l, Inc.,
No. C 11-04049, 2012 WL 2343163 (N.D. Cal. June 5, 2012)9

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....3

In re Bill of Lading Transmission & Processing Sys. Patent Litig.,
681 F.3d 1323 (Fed. Cir. 2012).....9

Bowoto v. Chevron Texaco Corp.,
312 F. Supp. 2d 1229 (N.D. Cal. 2004)3, 4

C.R. Bard, Inc. v. Guidant Corp.,
997 F. Supp. 556 (D. Del. 1998).....4, 6, 7

Celgard, LLC v. SK Innovation Co.,
792 F.3d 1373 (Fed. Cir. 2015).....5

Colida v. LG Elecs., Inc.,
77 F. App’x 523 (Fed. Cir. 2003)5, 6

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003).....4

Elec. Scripting Prod., Inc. v. HTC Am. Inc.,
No. 17-CV-05806-RS, 2018 WL 1367324 (N.D. Cal. Mar. 16, 2018)8

Gevo, Inc. v. Butamax(TM) Advanced Biofuels LLC,
No. CV 12-1724-SLR, 2013 WL 3381258 (D. Del. July 8, 2013).....7

In re Gilead Scis. Sec. Litig.,
536 F.3d 1049 (9th Cir. 2008)2

Grobler v. Sony Computer Entm’t Am. LLC,
No. 5:12-CV-01526-LHK, 2013 WL 308937 (N.D. Cal. Jan. 25, 2013)8

Implicit, LLC v. NetScout Sys., Inc.,
No. 2:18-CV-00053-JRG, 2019 WL 127115 (E.D. Tex. Jan. 8, 2019)4

TABLE OF AUTHORITIES (CONT'D)

		<u>Page(s)</u>
1	<i>IpVenture, Inc. v. Cellco P'ship,</i>	
2	No. C 10-04755 JSW, 2011 WL 207978 (N.D. Cal. Jan. 21, 2011).....	9
3	<i>Kellman v. Whole Foods Mkt., Inc.,</i>	
4	313 F. Supp. 3d 1031 (N.D. Cal. 2018)	6
5	<i>Nalco Co. v. Chem-Moc, LLC,</i>	
6	883 F.3d 1337 (Fed. Cir. 2018).....	8
7	<i>Nicolosi Distrib., Inc. v. FinishMaster, Inc.,</i>	
8	No. 18-CV-03587-BLF, 2019 WL 1560460 (N.D. Cal. Apr. 10, 2019)	6
9	<i>Pantoja v. Countrywide Home Loans, Inc.,</i>	
10	640 F. Supp. 2d 1177 (N.D. Cal. 2009)	3, 4
11	<i>Pearson v. Component Tech. Corp.,</i>	
12	247 F.3d 471 (3d Cir. 2001).....	4
13	<i>Reese v. BP Exploration (Alaska) Inc.,</i>	
14	643 F.3d 681 (9th Cir. 2011)	2
15	<i>SIPCO, LLC v. Streetline, Inc.,</i>	
16	No. CV 16-830-RGA, 2018 WL 762335 (D. Del. Feb. 7, 2018)	5, 8
17	<i>Sonora Diamond Corp. v. Superior Court,</i>	
18	83 Cal. App. 4th 523 (2000)	4
19	<i>Sound N Light Animatronics Co., LTD v. Cloud b, Inc.,</i>	
20	No. CV16-05271-GHK(JPRx), 2016 WL 7635950 (C.D. Cal. Nov. 10, 2016).....	5, 7
21	<i>Uniloc USA, Inc. v. Logitech, Inc.,</i>	
22	No. 18-CV-01304-LHK, 2018 WL 6025597 (N.D. Cal. Nov. 17, 2018).....	9
23	<i>United States v. Bestfoods,</i>	
24	524 U.S. 51 (1998).....	3
25	<i>whiteCryption Corp. v. Arxan Techs., Inc.,</i>	
26	No. 15-cv-00754-WHO, 2016 WL 3275944 (N.D. Cal. Jun. 15, 2016).....	3, 4
27	<i>Williby v. Hearst Corp.,</i>	
28	2017 WL 121003 (N.D. Cal. Mar. 31, 2017).....	4, 5
	Rules	
	Fed. R. Civ. P. 12(b)(2).....	1
	Fed. R. Civ. P. 12(b)(3).....	1
	Fed. R. Civ. P. 12(b)(6).....	1, 2, 4

1 **I. INTRODUCTION**

2 Fluidigm’s Complaint suffers from several fatal deficiencies and should be dismissed pursuant to
3 Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), and 12(b)(6).

4 Most fundamentally, to the extent that Fluidigm has any viable patent infringement claim at all, it
5 has sued the wrong party. The Court need only look to the exhibits attached to Fluidigm’s Complaint to
6 see that the accused product is manufactured and sold in the United States by *BioFire Diagnostics, LLC*,
7 not the named defendant, bioMérieux SA. bioMérieux SA is a French company that has several
8 subsidiaries domiciled in the United States. bioMérieux SA is not licensed to, and does not, participate in
9 any activities in the United States that could form the basis for an infringement allegation. While BioFire
10 Diagnostics may be a wholly-owned subsidiary of bioMérieux SA, and bioMérieux SA may tout the
11 accomplishments of its subsidiaries in press releases, this does not establish a basis for liability. In the
12 absence of allegations that would justify piercing the corporate veil, or otherwise make bioMérieux SA
13 legally responsible for the actions of its subsidiary relating to the accused product, the Complaint against
14 bioMérieux SA must be dismissed.

15 Fluidigm’s Complaint also fails to establish personal jurisdiction over the named defendant, or that
16 this is a proper venue for this action. Fluidigm’s minimal allegations connecting the named defendant to
17 the accused product, and the alleged contacts with California or even the United States, are insufficient to
18 satisfy the requirements for personal jurisdiction under governing precedent. bioMérieux SA does not
19 import, make, use, offer to sell, or sell the accused devices in the United States, let alone this judicial
20 district. bioMérieux SA also does not engage in continuous and systematic contacts with California to be
21 subject to general jurisdiction here.

22 Beyond these fundamental flaws, Fluidigm’s Complaint also should be dismissed because each of
23 the specific bases of alleged infringement fail even the low bar set at the pleadings stage. For direct
24 infringement, not only does Fluidigm fail to allege facts of any actual use by bioMérieux SA of the claimed
25 method in the United States, its only allegations are “upon information and belief” that bioMérieux SA
26 infringes “either directly *or through subsidiaries*” (Compl. ¶ 29). Fluidigm’s conclusory supposition is
27 wrong about bioMérieux SA’s actual activities, and Fluidigm pleads nothing that could establish
28 bioMérieux SA’s liability for the acts of its subsidiaries. Similarly, Fluidigm’s conclusory allegations

1 regarding indirect infringement fail to plead facts that establish the requisite knowledge of the patent-in-
2 suit or specific intent to infringe. The failure to plead such facts is not surprising, given that bioMérieux
3 SA does not conduct any operations in the United States, in particular with respect to BioFire Diagnostics’
4 FilmArray products.

5 For these reasons, and as more fully explained herein, bioMérieux SA respectfully requests that
6 Fluidigm’s Complaint be dismissed.

7 **II. BACKGROUND**

8 For more than ten years, BioFire Diagnostics, LLC (“BioFire Diagnostics”) designed and
9 developed the FilmArray System, a unique CE-marked and FDA-approved multiplex PCR system that
10 integrates all molecular diagnostics steps—sample preparation, amplification, detection and analysis—
11 into one system. FilmArray created a new standard in the market with its essential combination of speed,
12 accuracy, ease-of-use and comprehensiveness in one single assay. BioFire Diagnostics manufactures the
13 FilmArray products in Salt Lake City, Utah, and has sold various FilmArray products in the United States
14 since at least 2011. Declaration at ¶¶ 6, 11.

15 Named Defendant bioMérieux SA is headquartered in Marcy-I’Etoile, France. Declaration at ¶ 4.
16 bioMérieux SA, via its US-based subsidiary bioMérieux Inc., acquired BioFire Diagnostics as a wholly-
17 owned subsidiary in 2014. Declaration at ¶¶ 5-6. bioMérieux SA does not make, use, offer to sell, or sell
18 within the United States the accused FilmArray System or associated products. Declaration at ¶ 9.
19 bioMérieux SA is a separate legal entity from BioFire Diagnostics, and does not exert any special control
20 over BioFire Diagnostics’ business activities. Declaration at ¶¶ 7, 8, 12. BioFire Diagnostics has a
21 separate management and board of directors, and maintains separate accounting and other functions.
22 Declaration at ¶ 8.

23 **III. ARGUMENT**

24 When determining whether a claim has been stated under Federal Rule of Civil Procedure
25 12(b)(6), the Court accepts as true all well-pled factual allegations and construes them in the light most
26 favorable to the plaintiff. *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011).
27 However, the Court need not accept as true “allegations that are merely conclusory, unwarranted
28 deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th

1 Cir. 2008). While a complaint need not contain detailed factual allegations, it “must contain sufficient
2 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
3 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

4 **A. bioMérieux SA Is an Improper Defendant and Should Be Dismissed**

5 **1. Fluidigm improperly sued a foreign parent for the alleged acts of its domestic**
6 **subsidiary**

7 Fluidigm’s Complaint must be dismissed because, despite its conclusory pleadings to the contrary,
8 bioMérieux SA does not do anything in this country that could possibly form the basis for an infringement
9 claim. bioMérieux SA does not import, make, use, offer to sell, or sell the accused devices in the United
10 States. Declaration at ¶ 9. Not surprisingly, Fluidigm’s Complaint pleads no facts that plausibly connect
11 the named defendant, bioMérieux SA, to any enumerated act of infringement. Indeed, to the extent that
12 bioMérieux SA has interactions at all with this country, it is through its wholly-owned subsidiaries.
13 BioFire Diagnostics, LLC is the manufacturer and seller of the accused products in the United States.

14 Beyond the failure to plead any infringing acts by bioMérieux SA itself, Fluidigm fails to plead
15 facts that might justify piercing the corporate veil, or otherwise render bioMérieux SA legally responsible,
16 for the acts of its subsidiary. It is a well settled “principle of corporate law deeply ingrained in our
17 economic and legal system that a parent corporation . . . is not liable for the acts of its subsidiaries.” *United*
18 *States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotation omitted); *see Pantoja v. Countrywide Home*
19 *Loans, Inc.*, 640 F. Supp. 2d 1177, 1192 (N.D. Cal. 2009) (“It is the general rule that a parent corporation
20 and its subsidiary will be treated as separate legal entities.”). “Only in unusual circumstances will the law
21 permit a parent corporation to be held either directly or indirectly liable for the acts of its subsidiary.”
22 *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1234 (N.D. Cal. 2004); *see also whiteCryption*
23 *Corp. v. Arxan Techs., Inc.*, No. 15-cv-00754-WHO, 2016 WL 3275944, at *8 (N.D. Cal. Jun. 15, 2016).
24 No such circumstances exist in this case.

25 Fluidigm has failed to plead allegations that might justify piercing the corporate veil between
26 BioFire Diagnostics and bioMérieux SA, or support finding they are alter egos. Fluidigm does not even
27 evoke the magic words of “piercing the corporate veil” or “alter ego” in its Complaint, let alone plead
28 facts sufficient to make these legal theories plausible. The closest Fluidigm comes is when it pleads that

1 “Defendant has itself, through its agents, committed acts of direct infringement. . . .” (Compl. ¶ 8). But
2 allegations like these that amount “to no more than a legal conclusion” “fail[] to state a plausible claim
3 for relief.” *See Implicit, LLC v. NetScout Sys., Inc.*, No. 2:18-CV-00053-JRG, 2019 WL 127115, at *2
4 (E.D. Tex. Jan. 8, 2019) (dismissing claims under Rule 12(b)(6) where accused infringer did not make or
5 sell an accused product, a related corporate entity did).

6 Fluidigm does not even allege that bioMérieux SA is liable under the doctrines of alter ego or
7 single business enterprise—nor could it. In California, two conditions must be met before the alter ego
8 doctrine will be invoked: 1) “there must be such a unity of interest and ownership between the corporation
9 and its equitable owner that the separate personalities of the corporation and the shareholder do not in
10 reality exist” and 2) “there must be an inequitable result if the acts in question are treated as those of the
11 corporation alone.” *Sonora Diamond Corp. v. Superior Court*, 83 Cal. App. 4th 523, 538 (2000). The
12 corporate veil is only pierced in the “rare exception” “when the corporate form is used to perpetrate a
13 fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose.” *Id.*; *Dole Food*
14 *Co. v. Patrickson*, 538 U.S. 468, 475 (2003). Fluidigm fails to plead any facts that could possibly warrant
15 this “extreme remedy.” *Id.*

16 Fluidigm also fails to plead allegations that might make bioMérieux SA vicariously liable for
17 BioFire Diagnostics’ actions, such that BioFire Diagnostics acted as an agent of its parent. *Bowoto*, 312
18 F. Supp. 2d at 1234. “An agency relationship only arises when ‘the parent so controls the subsidiary as
19 to cause the subsidiary to [] become merely the instrumentality of the parent.’” *Williby v. Hearst Corp.*,
20 2017 WL 121003, at *4 (N.D. Cal. Mar. 31, 2017) (*quoting Pantoja*, 640 F. Supp. 2d at 1192);
21 *whiteCryption Corp.*, 2016 WL 3275944, at *8. “Mere ownership of a subsidiary does not justify the
22 imposition of liability on the parent.” *Id.* (*quoting Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484
23 (3d Cir. 2001)).

24 Under the agency theory “only the precise conduct shown to be instigated by the parent is attributed
25 to the parent.” *C.R. Bard, Inc. v. Guidant Corp.*, 997 F. Supp. 556, 560 (D. Del. 1998). To establish
26 actual agency, Fluidigm must show: (1) a manifestation by the principal that the agent shall act for the
27 principal; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties
28 that the principal is in control of the undertaking. *Bowoto*, 312 F. Supp. 2d at 1239. Fluidigm has failed

1 to make such a showing here. Fluidigm alleges no facts that suggest bioMérieux SA “authorized or
2 otherwise manifested the intent” for BioFire Diagnostics to act on its behalf. *Williby*, 2017 WL 121003
3 at *4.

4 Fluidigm has not alleged that bioMérieux SA controls, and bioMérieux SA does not in fact control,
5 BioFire Diagnostics’ day-to-day activities relating to the accused devices. Declaration at ¶ 12.
6 bioMérieux SA does not manufacture or produce the accused devices. *Id.* Failure to plead otherwise
7 (because no facts exist to do so) requires dismissal of the Complaint.

8 Fluidigm relies heavily on bioMérieux SA’s praise of BioFire Diagnostics’ accomplishments in
9 press releases and articles (*see, e.g.*, Compl. at Ex. 2, 3), but this does not create any legal liability for
10 BioFire Diagnostics’ activities. Merely touting a subsidiary’s products on a website is “insufficient to
11 allow the Court to draw a ‘reasonable inference’ that [the parent company] is liable for offering to sell or
12 selling the patented inventions.” *SIPCO, LLC v. Streetline, Inc.*, No. CV 16-830-RGA, 2018 WL 762335,
13 at *1 (D. Del. Feb. 7, 2018) (dismissing claims against foreign parent that, like here, had acquired and was
14 now the owner of the manufacturer and seller of the accused product); *see also Sound N Light*
15 *Animatronics Co., LTD v. Cloud b, Inc.*, No. CV16-05271-GHK(JPRx), 2016 WL 7635950, at *4-*5 (C.D.
16 Cal. Nov. 10, 2016) (dismissing patent infringement claim against foreign defendant despite allegation
17 that website offered products for sale to U.S. residents, finding insufficient facts pled to make claim
18 plausible).

19 **2. There is no personal jurisdiction over bioMérieux SA**

20 Fluidigm’s conclusory allegations also fail to establish personal jurisdiction over the named
21 defendant bioMérieux SA. Fluidigm alleges in conclusory fashion that personal jurisdiction is proper over
22 bioMérieux SA because “it” has directed infringing activities to California. (Compl ¶ 5, 7-9). But, as
23 discussed above, Fluidigm’s Complaint relies primarily on the activities of corporate entities other than
24 bioMérieux SA to make this argument, and a more rigorous review of the Complaint and attached Exhibits
25 confirms the failure to plead facts establishing personal jurisdiction over bioMérieux SA.¹

27 ¹ Federal law applies to the Court’s analysis of personal jurisdiction in patent cases. *Celgard, LLC v.*
28 *SK Innovation Co.*, 792 F.3d 1373, 1377 (Fed. Cir. 2015); *Colida v. LG Elecs., Inc.*, 77 F. App’x 523
(Fed. Cir. 2003). Because there is no personal jurisdiction over bioMérieux SA, venue is not proper

1 There is in fact no basis for personal jurisdiction over bioMérieux SA in this Court for this case.
2 bioMérieux SA does not import or make the accused products—they are made in the United States by
3 BioFire Diagnostics. Declaration at ¶¶ 9, 11; *see also* Compl. Exs. 7, 11, 13. And bioMérieux SA does
4 not use such devices in the United States; it does not even have a corporate presence in the United States.
5 Declaration at ¶ 5. Finally, bioMérieux SA cannot induce or contribute to infringement because it makes
6 no sales and has no customers relating to FilmArray in the United States. Declaration at ¶¶ 9-10; *see*
7 *Colida v. LG Elecs., Inc.*, 77 F. App'x 523 (Fed. Cir. 2003) (affirming dismissal of claims against a foreign
8 parent due to lack of personal jurisdiction in patent infringement suit, even though manufacturer had
9 subsidiary in New Jersey, where manufacturer conducted no business, did not solicit customers, did not
10 maintain any offices, and did not have any employees in New Jersey).

11 Further, bioMérieux SA's "role as a parent corporation is insufficient without allegations or
12 evidence that" it has "pervasive control" over BioFire Diagnostics, which Fluidigm fails to plead. *Nicolosi*
13 *Distrib., Inc. v. FinishMaster, Inc.*, No. 18-CV-03587-BLF, 2019 WL 1560460, at *9 (N.D. Cal. Apr. 10,
14 2019). "[T]o establish personal jurisdiction on an agency theory, the plaintiffs must show that the parent
15 company had 'the right to substantially control its subsidiary's activities.'" *Kellman v. Whole Foods Mkt.,*
16 *Inc.*, 313 F. Supp. 3d 1031, 1048 (N.D. Cal. 2018) (internal quotation omitted). bioMérieux SA exerts no
17 such control over BioFire Diagnostics. As previously discussed, BioFire Diagnostics does not act as
18 bioMérieux SA's agent for the development and sales of the accused products.

19 The case of *C.R. Bard, Inc. v. Guidant Corp.*, 997 F. Supp. 556, 561 (D. Del. 1998), is further
20 instructive. Except for the party names, the facts are on point here:

21 [T]his is not a case where [bioMérieux SA] is manufacturing a product and then using an
22 independent distributor or sales agent It does not engage in any production activities.
23 [BioFire Diagnostics] makes its own decisions about day-to-day activities. [BioFire
24 Diagnostics] designed, manufactured, marketed and distributed the [products] at issue.
25 [BioFire Diagnostics] used [bioMérieux SA's] name on its cartons and in its brochures.
26 [bioMérieux SA] is at most responsible for adopting the company policy of encouraging
its subsidiaries to use its name when marketing their products. [BioFire Diagnostics']
promotional materials make it clear that they come from [BioFire Diagnostics] and not
from [bioMérieux SA]. [BioFire Diagnostics] prominently displays its own name, its logo,
and its address on each of these items.

27
28 in this District either. *Am. Home Assurance Co. v. Tutor-Saliba Corp.*, No. 15-00303 SC, 2015 WL
2228062, at *1 (N.D. Cal. May 12, 2015).

1 *Id.* (finding no agency relationship and granting motion to dismiss foreign parent for lack of personal
2 jurisdiction). Fluidigm has similarly failed to allege facts to establish personal jurisdiction over
3 bioMérieux SA, and dismissal is warranted on this basis as well.

4 **B. Fluidigm’s Direct Infringement Claim Should Be Dismissed**

5 Fluidigm’s bald allegations of direct infringement are also insufficient to state a claim. The
6 Complaint alleges “[u]pon information and belief, Defendant has used, either directly *or through*
7 *subsidiaries*, the Infringing Instrumentalities to practice the method of, *inter alia*, Claim 1 of the ’934
8 patent in the United States, as described above.” (Compl ¶ 29) (emphasis added). Fluidigm’s equivocal
9 assertion of infringement—“on information and belief”—“is not buttressed by any specific facts and is
10 even further diluted by” its acknowledgment that the only acts of infringement may be performed by
11 subsidiaries. *Gevo, Inc. v. Butamax(TM) Advanced Biofuels LLC*, No. CV 12-1724-SLR, 2013 WL
12 3381258, at *3 (D. Del. July 8, 2013) (dismissing “equivocal assertion” of infringement against defendant
13 “and/or” subsidiaries). Given the absence of any specific allegations and the acknowledgment (via
14 pleading in the alternative with “or”) that any actions might only be “through subsidiaries”, direct
15 infringement *by bioMérieux SA* has not been sufficiently pled. *Id.*

16 To put the point another way, Fluidigm has not sufficiently pled any act of infringement that
17 plausibly could be attributed to bioMérieux SA. *Gevo* at *3. As previously discussed, in the absence of
18 pleaded facts to the contrary, “the court is not obligated to accept as true the proposition that [the parent]
19 controls the activities of its subsidiary defendants or the activities of any business ventures owned by the
20 subsidiaries.” *Id.* It is indisputable that bioMérieux SA does not manufacture or sell the accused products
21 in the United States, and Fluidigm’s allegations do not sufficiently tie bioMérieux SA to any alleged act
22 of infringement.

23 Insofar as Fluidigm references a bioMérieux SA press release touting the FilmArray products—
24 which in fact makes clear that the FilmArray comes from “bioMérieux’s molecular biology affiliate,
25 BioFire Diagnostics”—this by itself does not establish a basis for a claim against bioMérieux SA either.
26 (Compl. Ex. 2.) Fluidigm does not allege that bioMérieux SA’s press releases are offers for sale or that it
27 could even accept orders for the accused products. Even if it did, there is no evidence that bioMérieux
28 SA “advertised or actually sold any of the infringing products in the United States” and a press release

1 alone “does not make the type of allegations that would render this claim plausible.” *Sound N Light*
2 *Animatronics Co., LTD v. Cloud b, Inc.*, 2016 WL 7635950, at *4-5 (dismissing patent infringement claim
3 against foreign defendant despite allegation that website offered products for sale to U.S. residents, finding
4 insufficient facts pled to make claim plausible); *SIPCO, LLC v. Streetline, Inc.*, No. CV 16-830-RGA,
5 2018 WL 762335, at *1 (D. Del. Feb. 7, 2018) (granting motion to dismiss foreign-based parent despite
6 allegations that website offered accused product for sale).

7 Fluidigm has failed to plead facts to make a claim of direct infringement against bioMérieux SA
8 plausible, and thus these claims should be dismissed.

9 **C. Fluidigm’s Indirect Infringement Claim Should Be Dismissed**

10 Fluidigm also fails to plead sufficient facts to support its claim of indirect infringement. “For an
11 allegation of induced infringement to survive a motion to dismiss, a complaint must plead facts plausibly
12 showing that the accused infringer specifically intended [another party] to infringe [the patent] and knew
13 that the [other party]’s acts constituted infringement.” *Nalco Co. v. Chem-Moc, LLC*, 883 F.3d 1337, 1355
14 (Fed. Cir. 2018) (internal quotation omitted). Here, Fluidigm’s barebones pleadings fail to meet this
15 standard and should be dismissed for this reason as well.

16 Fluidigm first fails to plead any facts to establish bioMérieux SA’s knowledge of the asserted
17 patent. It asserts, on “information and belief”, that bioMérieux SA had knowledge of the asserted patent
18 based on its ongoing business operations. (Compl ¶ 30.) But such conclusory allegations are without
19 factual basis, and in any event insufficient to survive a motion to dismiss. As previously discussed,
20 bioMérieux SA does not manufacture or sell the accused products in the United States and has no
21 customers for the accused products. But even if it did, the lack of factual allegations regarding knowledge
22 of the patent is “fatal” to Fluidigm’s induced and contributory infringement claims. *See Elec. Scripting*
23 *Prod., Inc. v. HTC Am. Inc.*, No. 17-CV-05806-RS, 2018 WL 1367324, at *6 (N.D. Cal. Mar. 16, 2018)
24 (“Here, ESPI provides nothing more than its conclusory statement that ‘Plaintiff’s Patents were well
25 known to defendants at all times relevant hereto, plaintiff having given each defendant written notice of
26 the Patents.’ [] ESPI provides no information as to what the written notice entailed or when it was
27 delivered to, or received by, HTC such that HTC’s knowledge could reasonably be inferred. . . . ESPI’s
28 failure to allege pre-suit knowledge is fatal to its willful and induced infringement claim.”); *see also*

1 *Grobler v. Sony Computer Entm't Am. LLC*, No. 5:12-CV-01526-LHK, 2013 WL 308937, at *1 (N.D.
2 Cal. Jan. 25, 2013) (granting motion to dismiss induced infringement claim due to failure to plead
3 knowledge of direct infringement); *IpVenture, Inc. v. Cellco P'ship*, No. C 10-04755 JSW, 2011 WL
4 207978, at *1 (N.D. Cal. Jan. 21, 2011) (same).

5 Fluidigm also fails to plead sufficient facts relating to specific intent. It merely alleges that “in
6 addition to providing the Infringing Instrumentalities, Defendant induces infringement by its customers
7 by offering training regarding, providing installation services to facilitate, and providing ongoing support
8 regarding the use of the Infringing Instrumentalities in a manner that infringes at least Claim 1 of the '934
9 patent. Defendant likewise advertises the use of the Infringing Instrumentalities in an infringing manner.”

10 But Fluidigm’s “allegations lack ‘*facts plausibly showing* that [the accused infringer] specifically
11 intended their customers to infringe.”” *Uniloc USA, Inc. v. Logitech, Inc.*, No. 18-CV-01304-LHK, 2018
12 WL 6025597, at *2 (N.D. Cal. Nov. 17, 2018) (dismissing indirect infringement claims because complaint
13 failed to plead facts that accused infringer specifically intended its customers to infringe) (citing *In re Bill*
14 *of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012)) (emphasis
15 in original). Fluidigm “pleads no facts, only conclusory statements,” in relation to bioMérieux SA’s intent
16 for its customers to infringe. *Id.* And giving customers “specific instructions or training” is insufficient
17 to allege indirect infringement. *Avocet Sport Tech., Inc. v. Garmin Int’l, Inc.*, No. C 11-04049, 2012 WL
18 2343163, at *4 (N.D. Cal. June 5, 2012).

19 Fluidigm’s failure to plead sufficient facts to allege knowledge of the asserted patent and specific
20 intent for others to infringe requires dismissal of the indirect infringement claims of the Complaint.

21 **IV. CONCLUSION**

22 For the reasons stated herein, Defendant respectfully request that the Court dismiss all claims
23 because Plaintiff wrongfully named bioMérieux SA and failed to plead the basic facts required for its
24 claims.

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Respectfully submitted,
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