

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

NEXSTEP, INC., )  
)  
Plaintiff, )  
)  
v. ) C.A. No. 19-1031 (RGA)  
)  
COMCAST CABLE COMMUNICATIONS, )  
LLC, )  
)  
Defendant. )

**COMCAST CABLE COMMUNICATIONS, LLC'S OPENING BRIEF IN SUPPORT  
OF ITS MOTION TO DISMISS NEXSTEP, INC.'S WILLFUL INFRINGEMENT,  
INDUCED INFRINGEMENT, VICARIOUS LIABILITY, AND JOINT  
INFRINGEMENT CLAIMS**

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## I. NATURE AND STAGE OF THE PROCEEDINGS

This is a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). Plaintiff NexStep, Inc. has sued Defendant Comcast Cable Communications, LLC for the purported direct infringement of nine patents (“the Asserted Patents”). In addition, NexStep has sued Comcast for purported willful infringement, induced infringement, vicarious liability, and joint infringement of the Asserted Patents. These latter claims, however, lack the factual allegations necessary to state a claim, and so Comcast moves to dismiss them here.

## II. SUMMARY OF ARGUMENT

NexStep fails to state a claim for willful infringement, induced infringement, vicarious liability, or joint infringement, and these claims should be dismissed.

*First*, NexStep alleges that Comcast is liable for willful infringement of each Asserted Patent—claims that require pre-suit knowledge of the Asserted Patents. NexStep fails, however, to allege that Comcast had *any* actual knowledge of the Asserted Patents before the lawsuit was filed. *Second*, NexStep alleges that Comcast is liable for induced infringement, which also requires pre-suit knowledge of the Asserted Patents. Again, however, these allegations fail because NexStep did not plead any pre-suit knowledge of the Asserted Patents by Comcast. *Third*, NexStep alleges that Comcast is vicariously liable for the acts of its customers. To prove vicarious liability, NexStep must show that Comcast required, through either a contractual or agency relationship, a third-party to directly infringe. But NexStep fails to make any allegations that any third-party allegedly combined products or components to practice the system, let alone any allegations showing the requisite legal relationship with and control of any third-party. *Finally*, NexStep alleges that Comcast and its customers jointly infringed some asserted method claims. These joint infringement allegations require that Comcast somehow directed or controlled its customers to perform some of the patented

steps under Comcast's instructions and for Comcast's benefit. But like the other claims, the joint infringement allegations are devoid of these necessary facts.

Because NexStep's claims for willful infringement, induced infringement, vicarious liability and joint infringement fail as a matter of law, they should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

### **III. STATEMENT OF FACTS**

#### **A. Background.**

Founded in 1964, Comcast is a leading technology company in the business of connecting consumers with entertainment and digital services. Among Comcast's product offerings are internet, video, home security, and telephone services. With thousands of engineers working throughout the United States, Comcast is dedicated to improving how people and businesses are entertained, informed, and connected.<sup>1</sup>

According to the Complaint, NexStep was founded by Dr. Robert Stepanian in 2004. *See* D.I. 1, ¶ 8. There is no allegation that Dr. Stepanian or NexStep ever commercialized the patented technology or licensed his patents, and there are no allegations that NexStep is anything other than a holding company for Dr. Stepanian's patents.

According to NexStep, the Asserted Patents are directed toward "systems and methods for controlling a variety [sic] devices such as TVs, set-top boxes, DVRs, VoIP (telephone) systems, and home devices (e.g., security cameras, electrical outlets, and thermostats) using a hand-held device." *Id.*, ¶ 19. The Complaint alleges that the claims are directly infringed through elaborate combinations of smartphone applications, remote control devices, set-top cable boxes, DVRs, Wi-Fi gateways, telephone systems, Bluetooth connections, touchpad interfaces, customer service centers, and cloud services. *Id.*, ¶¶ 24-44.

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<sup>1</sup> *See, e.g., Comcast Labs: Building Tomorrow's Technologies*, <https://corporate.comcast.com/news-information/news-feed/reimagining-the-future-of-technology-in-the-home>.

Coined in the Complaint as “Xfinity Services,” the accused combinations reach Comcast’s internet, cable television, video streaming, telephone, and security services, as well as its modems, gateways, routers, set-top boxes, remote controls, sensors, surveillance cameras, and smartphone applications. *Id.* The accused “Xfinity Services” even include third-party Apple and Android smartphones purchased by third-party customers. *Id.*

The Asserted Patents are U.S. Patent Nos. 7,444,130; 7,542,753; 7,697,669; 7,907,710; 8,280,009; 8,494,132; 8,885,802; 9,614,964; and 9,866,697. The first of these to issue was 7,444,130, which issued on October 28, 2008. The others issued between 2009 and 2018.

**B. NexStep’s allegations.**

Within each direct infringement count, NexStep alleges that Comcast’s alleged infringement has been willful, yet NexStep fails to allege that Comcast had pre-suit knowledge of any of the Asserted Patents.<sup>2</sup> Each willfulness paragraph is essentially identical boilerplate, referring back to an introductory section in the Complaint: “NexStep’s Notice of Infringement to Defendant.” *See id.*, ¶¶ 20-23, 62, 85, 111, 134, 159, 179, 201, 236, 262. In this “Notice” section, however, NexStep fails to allege that it ever disclosed to Comcast any of the nine patents asserted in this lawsuit. *See id.*, ¶¶ 20-23. Nor does NexStep allege that it ever notified Comcast of its alleged infringement, or that Comcast learned of the patents in any other way. *See id.* Instead, NexStep summarizes Dr. Stepanian’s failed attempt to market some *technology*—not these patents—to Comcast *before* any of the Asserted Patents issued in 2008. *Id.*<sup>3</sup> NexStep also alleges that Dr. Stepanian sent Comcast written materials about his technology, but the written materials

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<sup>2</sup> NexStep alleges willfulness within each direct infringement count at D.I. 1, ¶¶ 62, 85, 111, 134, 159, 179, 201, 236, 262.

<sup>3</sup> NexStep’s vague assertion that “Dr. Stepanian disclosed that his technology was covered by issued and pending patent applications” (D.I. 1, ¶ 22) is at best incomplete, given that none of the asserted patents had issued at the time of the alleged discussions.

he allegedly provided are not attached to the Complaint. *Id.* The Complaint further fails to specify any patents or technology allegedly copied by Comcast from the alleged written materials. *Id.*

NexStep also brings induced infringement claims for each Asserted Patent under 35 U.S.C. Sec. 271(b).<sup>4</sup> Within each Count, NexStep again relies on boilerplate language, alleging that Comcast induced its customers to infringe the asserted patents. *See* D.I. 1, *e.g.*, Count II, ¶¶ 64-67; Count IV, ¶ 87-90; etc. As to the necessary elements of knowledge of the patents and the specific intent to induce infringement, NexStep again simply refers back to the “Notice” section summarized above, which fails to allege any pre-suit knowledge by Comcast of the Asserted Patents. *Id.*, ¶ 64-67. Moreover, the Complaint is devoid of any factual allegations that Comcast knew that its customers allegedly infringed or had the requisite intent to induce their infringement. *Id.*

Finally, NexStep appears to assert vicarious liability claims (for the asserted system claims) and joint infringement claims (for the asserted method claims). *See, e.g., id.*, ¶ 53; *see also id.*, ¶ 146. NexStep relies on nothing but a boilerplate allegation that Comcast is liable for its customers’ alleged infringement because Comcast “control[s] the entire system and deriv[es] a benefit from the use of every element of the entire system,” even for claims where the Complaint acknowledges that Comcast does not make or sell the hardware and software required to infringe the claims. *Id.*, ¶ 53. NexStep likewise simply alleges that Comcast’s customers’ “beneficial use of the [] Accused Products is conditioned on combining the components in an infringing manner.” *Id.* For the method claims, NexStep adds the conclusory allegation that Comcast infringes because its customers’ “beneficial use of the [] Accused Products is conditioned on combining the components and performing one

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<sup>4</sup> *See* D.I. 1, Counts II, IV, VI, XIII, X, XII, XIV, XVI & XVIII.



or more steps of the methods in an infringing manner as established by Defendant.” *Id.*, ¶ 146.

None of the vicarious liability or joint infringement allegations, however, state any facts suggesting how Comcast supposedly directs, controls, or conditions its customers’ use of the accused products on infringing the asserted patents. The only reference to any legal relationship between Comcast and its customers relies on the “Comcast Subscriber Agreement.” *Id.*, ¶¶ 26-27. But the Subscriber Agreement contradicts NexStep’s claims. It states that a customer may “choose” whether or not to use his or her personal “Customer Equipment” (such as a smartphone) “in connection with the Service[s].” *Id.*, ¶ 27. And if the customer chooses to use his or her personal equipment with Xfinity Services, the customer agrees to allow Comcast to “insert CableCARDS and other hardware in the Customer Equipment, send software and/or ‘downloads’ to the Customer Equipment and install, configure, maintain, inspect and upgrade the Customer Equipment.” *Id.* Nowhere does the Subscriber Agreement require Comcast’s customers to make or use any allegedly infringing system or to perform steps required by the asserted method claims.<sup>5</sup>

#### **IV. ARGUMENT**

##### **A. NexStep’s willfulness claims should be dismissed because the Complaint lacks any allegation that Comcast knowingly infringed the asserted patents.**

The Court should dismiss all willful infringement claims because NexStep fails to allege that Comcast had any pre-suit knowledge of the Asserted Patents, let alone knowingly infringed them.<sup>6</sup> To state a claim for willful infringement, NexStep must allege facts that plausibly show that Comcast (1) knew of the Asserted Patents; (2) infringed the Asserted

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<sup>5</sup> Xfinity Home and Xfinity Mobile Services are specifically excluded from the terms of the Subscriber Agreement.

<sup>6</sup> D.I. 1, Count I, ¶ 62; Count III, ¶ 85; Count V, ¶ 111; Count VII, ¶ 134; Count IX, ¶ 159; Count, XI, ¶ 179; Count, XIII ¶ 201; Count, XV ¶ 236; and Count, XVII ¶ 262.

Patents after acquiring that knowledge; and (3) knew (or should have known) that its conduct amounted to the infringement. *See, e.g., Välinge Innovation AB v. Halstead New Eng. Corp.*, No. 16-1082-LPS-CJB, 2018 WL 2411218, at \*13 (D. Del. May 29, 2018) (dismissing willfulness claims for failing to allege pre-suit knowledge of the asserted patents).

The Complaint fails to allege that Comcast had any prior knowledge whatsoever of any Asserted Patent. This is fatal to NexStep’s willfulness claims. The closest that NexStep comes to meeting its requirement is alleging that Dr. Stepanian pitched some technology to Comcast—allegedly with some undefined intellectual property—during licensing discussions in 2007 *before any of the Asserted Patents issued*. D.I. 1, ¶¶ 20-23. NexStep alleges that Comcast declined to pursue a commercial relationship with Dr. Stepanian and the discussions broke down shortly thereafter. *Id.* There is no allegation that Dr. Stepanian provided Comcast with copies of the Asserted Patents or even informed Comcast of the Asserted Patents by name or number. *Id.*, ¶¶ 20-23. Indeed, it would have been impossible for NexStep to have provided Comcast with knowledge of the Asserted Patents until the first one issued in October 2008—more than one year after Dr. Stepanian’s alleged discussions with Comcast. *Robocast, Inc. v. Microsoft Corp.*, 21 F. Supp. 3d 320, 334 (D. Del. 2014) (“To willfully infringe a patent, the patent must exist, and one must have knowledge of it. A ‘patent pending’ notice gives one no knowledge whatsoever...Filing an application is no guarantee any patent will issue[.]”) (quoting *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985); *Evolved Wireless, LLC v. Samsung Elecs. Co.*, No. 15-545-SLR-SRF, 2016 WL 1019667, at \*4 (D. Del. Mar. 15, 2016), report and recommendation adopted, No. 15-545-SLR-SRF, 2016 WL 1381765 (D. Del. Apr. 6, 2016) (“[A] general allegation about ‘discussions’ or ‘a presentation’ is insufficient to withstand a motion to dismiss [a willfulness claim]”) (citing *Intellectual Ventures I LLC v. Toshiba Corp.*, 66 F. Supp. 3d 495,

499 (D. Del. 2014). Moreover, NexStep does not allege that Dr. Stepanian even disclosed any patent *application* relating to one of the Asserted Patents.<sup>7</sup>

Given that allegations of willful infringement require *specific knowledge* of the Asserted Patents, and that NexStep makes only generic allegations that provided Comcast with knowledge of some undefined NexStep intellectual property, there is not sufficient factual support for the willfulness claims to survive a motion to dismiss. *See Robocast*, 21 F. Supp. 3d at 334; *Evolved Wireless*, 2016 WL 1019667 at \*3; *see, e.g., Bayer Healthcare LLC v. Baxalta Inc., et. al.*, No. 16-1122-RGA, D.I. 27 (D. Del. Aug. 10, 2017) (order granting motion to dismiss induced, contributory, and willful infringement claims).

The Complaint also fails to allege that Comcast ever knew or should have known that the accused “Xfinity Services” infringed the Asserted Patents. Without alleging that Comcast knew of the Asserted Patents, NexStep certainly cannot claim that Comcast knew (or should have known) that it infringed them. *See Evonik Degussa GmbH v. Materia, Inc.*, 305 F. Supp. 3d 563, 577 (D. Del. 2018) (“Willfulness necessarily involves knowledge of the patent and of infringement.”) (emphasis in original). Moreover, NexStep alleges that the accused products only came to market in 2010 at the earliest, and so it would have been impossible to make any infringement accusation in 2007. *See, e.g.*, D.I. 1, ¶ 62. NexStep also fails to allege that it ever communicated with Comcast about any intellectual property in the nearly 12 years following the alleged 2007 discussions, let alone accused Comcast of infringement. Rather, the allegations show that NexStep sat on its earliest patent for 12 years without giving Comcast any reason to believe it would be sued for patent infringement. It is simply not plausible that Comcast willfully infringed the claims after NexStep sat in silence for more than a decade. With no facts alleging that Comcast knew (or should have known)

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<sup>7</sup> Although NexStep alleges that Dr. Stepanian sent written correspondence to Comcast regarding its intellectual property, it is not attached to the Complaint. *Id.*, ¶¶ 21-23.

that it infringed the Asserted Patents, the willfulness claims should be dismissed. *See Scripps Research Inst. v. Illumina, Inc.*, No. 16-CV-661 JLS (BGS), 2016 WL 6834024, at \*7 (S.D. Cal. Nov. 21, 2016).

**B. NexStep’s induced infringement claims should be dismissed because the Complaint fails to show knowledge of the patent and intent to induce infringement.**

Suffering from a similar defect as the willfulness claims, all of NexStep’s induced infringement claims should be dismissed because NexStep fails to allege that Comcast had pre-suit knowledge of any Asserted Patent.<sup>8</sup> To state a claim for induced infringement, NexStep is required to plead facts showing that Comcast: (i) knew of the Asserted Patents; (ii) knowingly induced a third-party to infringe them;<sup>9</sup> (iii) acted with the specific intent to induce a third-party to infringe them; and (iv) as a result of the supposed inducement, the third-party directly infringed the Asserted Patents. *See DSU Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (en banc).

As detailed above, NexStep fails to allege that Comcast had pre-suit knowledge of any Asserted Patent. All nine induced infringement claims are drafted as essentially identical boilerplate. *See, e.g.*, D.I. 1, Count II, ¶¶ 64-67. The allegations generically conclude that Comcast induced “customers and developers” to use the accused products in an infringing manner. *Id.* But none offers factual allegations about Comcast learning of the Asserted Patents, let alone how Comcast intentionally induced customers or developers to infringe them. *Id.* Rather, the allegations refer back to the “Notice” section regarding the alleged 2007 discussions between Comcast and Dr. Stepanian. But (as explained above) the “Notice” section fails to allege that NexStep ever disclosed the Asserted Patents to Comcast. *Id.*,

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<sup>8</sup> The induced infringement claims are Counts II, IV, VI, VIII, X, XII, XIV, XVI, XVIII.

<sup>9</sup> Unlike willfulness, induced infringement requires actual knowledge of the infringing activity; allegations of willful blindness will not do. *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012).

¶¶ 20-23. The “Notice” section also fails to allege that Comcast knew that customers (or developers) were allegedly infringing the patents, let alone encouraged such alleged infringement. *Id.*

Induced infringement is not a strict liability cause of action. Without allegations that Comcast knew of the Asserted Patents, Comcast cannot be accused of inducing anyone to infringe them. *See, e.g., DSU Med. Corp.*, 471 F.3d at 1306 (“[T]he intent requirement for inducement requires more than just intent to cause the acts that produce direct infringement.... [I]nducement requires evidence of culpable conduct, directed to encouraging another’s infringement[.]”). For these reasons, the induced infringement claims fail as a matter of law.

**C. NexStep’s vicarious liability claim should be dismissed because the Complaint fails to allege facts that Comcast required any third-party to combine the accused systems.**

NexStep alleges that Comcast is vicariously liable for its customers’ infringement of the asserted system claims because Comcast allegedly directs or controls its customers to combine third-party equipment with Comcast’s equipment to make a complete accused system.<sup>10</sup> The Complaint, however, lacks any factual allegation that Comcast has legally required customers to make any accused system. To the contrary, NexStep *admits* that Comcast’s customers may *choose* whether or not to integrate their own equipment with Comcast products. As a result, NexStep’s vicarious liability claim must fail.

To support a vicarious liability theory, NexStep must allege that third-parties acted as Comcast’s agent or were otherwise contractually directed by Comcast to combine the accused system in an infringing manner. *Centillion Data Sys., LLC v. Qwest Commc’ns Int’l, Inc.*,

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<sup>10</sup> This ground for dismissal applies only to the Asserted Patents with system claims. *See* Count I, ¶ 53; Count III, ¶ 74; Count V, ¶ 98; Count VII, ¶ 123; Count XI, ¶ 171; Count XIII, ¶ 191. For method claims, vicarious liability is commonly referred to as “joint infringement” or “divided infringement” and is governed by a different legal standard, as analyzed in Section IV.D below.

631 F.3d 1279, 1287 (Fed. Cir. 2011).<sup>11</sup> By contrast, an allegation that Comcast supplied a component to a third-party (such as a customer), and the third-party was free to choose whether or not to integrate the component into the accused system, cannot state a vicarious liability claim. See *Acceleration Bay LLC v. Activision Blizzard, Inc.*, 324 F. Supp. 3d 470, 482 (D. Del. 2018) (holding that defendant was not vicariously liable for the actions of its customers as a matter of law where “the customer [] can choose whether to install and operate [defendant’s] software”); *Joao Control & Monitoring Sys. of California, LLC v. Sling Media, Inc.*, No. C-11-6277 EMC, 2012 WL 3249510, at \*7 (N.D. Cal. Aug. 7, 2012) (vicarious liability theory failed to state a claim where customers were not “contractually obligated to use the [defendant’s] software”).

Here, NexStep’s theory of vicarious liability lacks any factual support or legal justification. NexStep simply makes the conclusory assertion that Comcast is “vicariously liable” for the “manufacture and use of the patented system” where the “Accused Products include hardware or software owned by third parties.” D.I. 1, ¶ 53. The Complaint asserts without support that Comcast supposedly “control[s] the entire system and deriv[es] a benefit from the use of every element of the entire system.” *Id.* NexStep also concludes that Comcast is liable where “third parties (e.g., customers) ... use their own equipment to form the [] Accused Products ... because third parties’ beneficial use of the [] Accused Products is conditioned on combining the components in an infringing manner.” *Id.* But these allegations fail to identify the “hardware or software owned by third parties” that is purportedly combined by customers, and therefore fails to identify the combinations of hardware and/or software that it accuses. Without this core allegation going to the accused component combined by the customer, NexStep fails to put Comcast on notice of the

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<sup>11</sup> This law of vicarious liability is a limited exception to the rule that a defendant may only directly infringe a system claim if it uses, makes, or sells the entire claimed system under 35 U.S.C. Sec. 271(a).

vicarious liability claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that “threadbare recitals” of the legal standard do not suffice to state a claim.).

Aside from the failure to identify the accused combination, NexStep also fails to identify how Comcast has allegedly “conditioned” the beneficial use of the Accused Products on “combining the components in an infringing manner.” In fact, NexStep’s citation to the Comcast Subscriber agreement ***expressly contradicts*** NexStep’s theory that Comcast legally requires customers to combine customer equipment with Comcast Services. D.I. 1, ¶¶ 26-27. The Subscriber Agreement states that it governs “software, hardware, or services that ***you choose*** to use in connection with the Service(s) that is not provided or leased by us or our agent.” *Id.*, ¶ 27 (emphasis added). In other words, it is the ***customer’s choice*** whether to combine his or her equipment (such as a smartphone) with Xfinity products, services, and applications.

NexStep’s vicarious liability theory closely resembles the theory rejected by this Court in *Acceleration Bay*, 324 F. Supp. 3d at 482. There, this Court held that a plaintiff could not go forward with a vicarious liability claim as a matter of law because the software necessary to complete the accused system was ***optionally*** used by customers on the product supplied by the defendant. *Id.* Likewise, another district court in *Joao Control* granted a motion to dismiss a vicarious liability claim where the alleged contractual relationship did not obligate customers to do anything under the defendant’s control, nor did it mandate any action by customers on behalf of the defendant. 2012 WL 3249510, at \*7. Mere “arms-length cooperation” does not give rise to vicarious liability. *Id.* at \*8. Given NexStep’s failure to allege facts showing that Comcast legally required customers to complete the accused system, NexStep fails to state a vicarious liability claim.

**D. NexStep’s joint infringement claims should be dismissed because the Complaint lacks factual allegations that Comcast exercised direction or control over customers who allegedly practiced the claimed methods.**

Finally, the joint infringement theories should be dismissed because NexStep fails to identify any steps allegedly performed by any third-party to complete the claimed methods, or allege facts suggesting that Comcast exercised direction or control over the purported steps.<sup>12</sup> To support joint infringement claims, NexStep is required to allege facts suggesting that Comcast asserted “direction or control” over its customers, who jointly performed the claimed methods with Comcast.<sup>13</sup> *Lyda v. CBS Corp.*, 838 F.3d 1331, 1339 (Fed. Cir. 2016). This requires pleading facts that (1) the benefits of a particular service or product can be obtained only if the customer complies with instructions given by Comcast, and (2) the instructions direct the customer to perform acts that constitute recited steps in the asserted method claims. *See Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015); *see also Travel Sentry v. Trapp*, 877 F.3d 1370 (Fed. Cir. 2017). A “bare assertion,” that Comcast “directs or controls” its customers “is insufficient to sustain a theory of joint infringement.” *Progme Corp. v. Comcast Cable Commc’ns LLC*, No. CV 17-1488, 2017 WL 5070723, at \*11 (E.D. Pa. Nov. 3, 2017) (citing *Lyda*, 838 F.3d at 1340.)

But all that NexStep alleges here is an inadequate “bare assertion.” In particular, NexStep makes boilerplate assertions that Comcast and its customers jointly infringe the method claims. *See, e.g.*, D.I. 1, ¶ 146. Without support, NexStep concludes that the customers’ “beneficial use” of the accused products “is conditioned on combining the components and performing one or more steps of the methods in an infringing manner as

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<sup>12</sup> The joint infringement allegations are found at Count IX, ¶ 145; Count XV, ¶ 214; and Count XVII, ¶ 248. Joint infringement of a method claim is governed by the *Akamai* standard, which differs from the *Centillion* standard used for vicarious liability of system claims.

<sup>13</sup> Although a plaintiff may also claim joint infringement by alleging a “joint enterprise,” NexStep makes no “joint enterprise” allegations.



established by [Comcast].” *See, e.g.*, D.I. 1, ¶ 145. But there is no indication of what steps Comcast required its customers to perform, or how Comcast conditions a customer benefit on performing the method steps. *See id.* These “threadbare recitals” of joint infringement elements do not suffice to state a claim. *Iqbal*, 556 U.S. at 678.

For example, NexStep alleges that the claimed method of the ’697 patent is directly infringed by Comcast through using a free software application—the Xfinity “My Account App”—on a smartphone (the alleged “handheld concierge device”). *Id.*, ¶ 247. The My Account App allegedly is capable of initiating a session with Comcast’s on-line or live support. *Id.*, ¶¶ 251-254. There is, however, no factual allegation that Comcast **requires** its customers to download, let alone use this free software application or any of its features, on a smartphone. Nor is there an allegation that Comcast **conditions** a customer benefit on performing any My Account App function. The Subscriber Agreement itself shows that Comcast does not condition any benefit on a customer using “Customer Equipment” to practice the claimed methods; it is rather the customer’s **choice** whether to use “Customer Equipment” (such as a smartphone) with the Xfinity Services. *Id.*, ¶¶ 26-27.<sup>14</sup>

Courts often dismiss joint infringement claims that fail to allege facts supporting “direction or co” at the pleading stage. *See, e.g., Lyda*, 838 F.3d at 1340; *Progme Corp.*, 2017 WL 5070723 at \*10 (granting Comcast’s motion to dismiss joint infringement claims); *Sonrai Sys., LLC v. AMCS Grp. Inc.*, No. 16 C 9404, 2017 WL 4281122, at \*6 (N.D. Ill. Sept. 27, 2017) (“[T]he fact that [Defendant] provided the technology to [its customer] has no bearing over whether [Defendant] in fact exercised control over [customer’s] use of the technology to infringe.”). NexStep has failed to allege that Comcast directs or controls its

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<sup>14</sup> In fact, Xfinity Home is specifically excluded from the terms of the Subscriber Agreement, which is an independent reason that all vicarious liability and joint infringement claims against Xfinity Home should be dismissed. *See* D.I. 1, ¶¶ 35-36.

customers to practice the claimed methods, and so the joint infringement claim should be dismissed.

## V. CONCLUSION

For all of the above reasons, the willfulness, induced infringement, vicarious liability, and joint infringement claims should be dismissed.

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July 25, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on July 25, 2019, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on July 25, 2019, upon the following in the manner indicated:

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