

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

SCRIPT SECURITY SOLUTIONS L.L.C.,

Plaintiff,

v.

LOGITECH INC.,

Defendant.

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CASE NO. 2:16-cv-01400-JRG-RSP

JURY TRIAL DEMANDED

**DEFENDANT NETGEAR, INC.'S**  
**COMBINED RULE 12(b)(3) MOTION TO DISMISS FOR IMPROPER VENUE AND IN**  
**THE ALTERNATIVE RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO**  
**STATE A CLAIM**

**TABLE OF CONTENTS**

I.	INTRODUCTION TO COMPANY’S MOTION UNDER RULE 12(B)(3).....	1
II.	BACKGROUND .....	1
	A.    Procedural Background.....	1
	B.    Factual Background .....	2
III.	AUTHORITY .....	3
	A.    Venue in Patent Cases is Governed by 28 U.S.C. § 1400(b).....	3
	B.    The Burden Lies on a Plaintiff to Establish Proper Venue.....	5
IV.	ARGUMENT .....	5
	A.    Venue Is Improper in the Eastern District of Texas. ....	5
	B.    Transfer of Venue .....	9
V.	CONCLUSION AS TO IMPROPER VENUE.....	9
VI.	DEFENDANT’S MOTION TO DISMISS UNDER RULE 12(B)(6).....	9
VII.	STATEMENT OF THE ISSUES.....	12
VIII.	LEGAL STANDARD.....	12
IX.	ARGUMENT AS TO SCRIPT’S FAILURE TO STATE A CLAIM.....	13
	A.    Script Has Not Pleaded Sufficient Detail to Provide Notice of Its Direct Infringement Claims. ....	13
	B.    Script’s “Joint” Direct Infringement Claims Do Not State a Claim Upon Which Relief Can Be Granted and Do Not Comply with the Pleading Standard. ....	18
	C.    Script’s Indirect Infringement Amendments Fail to Add Any Detail to Script’s Claims.....	22
	CONCLUSION.....	23

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Akamai Techs., Inc. v. Limelight Networks, Inc.</i> , 797 F.3d 1020 (Fed. Cir. 2015).....	22
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	12, 13, 20
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) .....	12, 13, 15, 20
<i>In re Bill of Lading Transmission &amp; Processing Sys. Patent Litig.</i> , 681 F.3d 1323 (Fed. Cir. 2012).....	12, 22
<i>Centillion Data Sys. LLC v. Qwest Commc'ns Int'l Inc.</i> , 631 F.3d 1279 (Fed. Cir. 2011).....	19, 20
<i>In re Cordis Corp.</i> , 769 F.2d 733 (Fed. Cir. 1985).....	4, 6, 7, 8
<i>Hamilton v. United Parcel Service, Inc.</i> , 2012 WL 760714 (E.D. Tex. 2012).....	5
<i>Hole v. Texas A&amp;M Univ.</i> , 360 F. App'x. 571 (5th Cir. 2010) .....	13
<i>Johnston v. IVAC Corp.</i> , 681 F. Supp. 959 (D. Mass. 1987) .....	8
<i>Kinetic Instruments, Inc. v. Lares</i> , 802 F. Supp. 976 (S.D.N.Y. 1992).....	4
<i>L &amp; H Concepts LLC v. Schmidt</i> , 2007 WL 4165259 (E.D. Tex. 2007) .....	5
<i>LBS Innovations, LLC v. Nokia USA Inc.</i> , No. 2:15-CV-1972-JRG, 2016 WL 3407611 (E.D. Tex. June 21, 2016).....	21
<i>Lex Tex Ltd. v. Aileen, Inc.</i> , 326 F.Supp. 485 (S.D. Fla. 1971) .....	3
<i>Lyda v. CBS Corp.</i> , 838 F.3d 1331 (Fed. Cir. 2016).....	11, 18, 20, 22

<i>Magee v. Essex–Tec Corp.</i> , 704 F. Supp. 543 (D. Del. 1988).....	4
<i>Martinez v. Livingston</i> , No. 6:13-CV-802, 2014 WL 7877163 (E.D. Tex. Dec. 18, 2014) .....	13
<i>Michod v. Walker Magnetics Group, Inc.</i> , 115 F.R.D. 345 (N.D. Ill. 1987).....	4
<i>Raindance Techs. v. 10X Genomics, Inc.</i> , No. 15-152-RGA, 2016 WL 927143 (D. Del. Mar. 4, 2016) .....	13
<i>Rembrandt Patent Innovations LLC v. Apple Inc.</i> , No. C 14-05094 WHA, 2015 WL 8607390 (N.D. Cal. Dec. 13, 2015) .....	13
<i>Ruby Sands LLC v. Am. Nat’l Bank of Tex.</i> , Case No. 2:15-cv-1955-JRG, 2016 WL 3542430 (E.D. Tex. June 28, 2016) .....	12, 17, 18
<i>Ruby Sands LLC v. American National Bank of Texas</i> , No. 2:15-cv-1955-JRG (E.D. Tex. Jan. 29, 2016) .....	17, 18
<i>San Shoe Trading Corp. v. Converse, Inc.</i> , 649 F. Supp. 341 (S.D.N.Y. 1986).....	4
<i>Schnell v. Peter Eckrich and Sons, Inc.</i> , 365 U.S. 260 (1961).....	3, 9
<i>Script Security Solutions L.L.C. v. Amazon.com, Inc.</i> , No. 2:15-cv-1030-WCB, 2016 WL 3959804 (E.D. Tex. July, 22, 2016).....	15
<i>TC Heartland LLC v. Kraft Foods Group Brands LLC</i> , 581 U.S. ___, 2017 WL 2216934 (May 22, 2017) .....	1, 3, 5, 6
<i>University of Illinois Foundation v. Channel Master</i> , 382 F.2d 514 (7th Cir. 1967) .....	7, 8
<b>Statutes</b>	
28 U.S.C. § 1400(b) .....	1, 3, 4, 8
28 U.S.C. § 1406(a) .....	5, 9
<b>Other Authorities</b>	
Fed. R. Civ. P. 8.....	10, 11, 12
Fed. R. Civ. P. 8(a)(2).....	12
Fed. R. Civ. P. 12(b)(3).....	1

Fed. R. Civ. P. 12(b)(6).....1, 9, 12, 23

Defendant NETGEAR, Inc. (“NETGEAR”) moves to dismiss Script Security Solutions, L.L.C.’s First Amended Complaint (Dkt. No. 58) (“Amended Complaint”) pursuant to Fed. R. Civ. P. 12(b)(3) for Improper Venue and Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

## **I. INTRODUCTION TO COMPANY’S MOTION UNDER RULE 12(B)(3)**

Venue is not proper in the Eastern District of Texas. Under the Supreme Court’s recent decision in *TC Heartland*, venue is only proper in patent cases in a company’s state of formation or “where the defendant has committed acts of [alleged] infringement *and* has a regular and established place of business.” 28 U.S.C. § 1400(b) (emphasis added). Script’s pleading, if taken as true, does not establish venue under this statute. Moreover, NETGEAR has no “permanent and continuous presence” sufficient to establish venue: NETGEAR has no offices in the district; NETGEAR does not complete sales in the district; and NETGEAR has no employees in the district whose work is directed towards the district. No court has found venue under similar circumstances, and thus, Script’s Amended Complaint should be dismissed.

## **II. BACKGROUND**

### **A. Procedural Background**

Script filed its Original Complaint on December 12, 2016 (No. 2:16-cv-1403, Dkt. No. 1) (“Original Complaint”). NETGEAR responded with its Motion to Dismiss for Failure to State a Claim. (2:16-cv-1403, Dkt. No. 19.) The Court had not ruled on NETGEAR’s motion prior to Script filing its Amended Complaint, and NETGEAR had not answered or asserted any counterclaims or affirmative defenses. On May 9, 2017, Script filed the Amended Complaint. On May 22, 2017, the Court dismissed the previous motion. (Dkt. No. 68 (“In light of Plaintiff’s Amended Complaint (Dkt. No. 58 in Lead Case No. 2:16-CV-01400), NETGEAR’s Motion to Dismiss is DENIED AS MOOT.”).)

In its Amended Complaint, Script pleads only general and unsupported allegations that venue is proper in this district:

Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400(b). Upon information and belief, Defendant has transacted business in this district and has committed, by itself or in concert with others, acts of patent infringement in this district.

Amended Complaint ¶ 4. Script further acknowledges that NETGEAR's state of incorporation is not located in this district. *Id.* ¶ 2 (“Defendant NETGEAR is a corporation organized under the laws of the state of Delaware.”). Indeed, Script has not pled any specific facts which support its allegations that venue is proper in this district.

## **B. Factual Background**

Script correctly stated that NETGEAR is incorporated in Delaware, and NETGEAR's main office is in San Jose, California. Ex. D, Dec. of Jennifer Khouri, ¶ 3. NETGEAR's business primarily consists of designing and selling consumer electronics. *Id.* ¶ 4. The vast majority of NETGEAR's business operations, including its management and over 300 of its approximately 400 employees in the United States, are located in San Jose, California. *Id.* ¶ 5. Approximately 60 of NETGEAR's remaining employees are based in Carlsbad, California. *Id.* ¶ 5. Smaller portions of NETGEAR's business are conducted in locations other than its San Jose and Carlsbad offices, and none of these NETGEAR locations are within the Eastern District of Texas. *Id.* ¶ 6. Some of NETGEAR's employees work remotely, from their homes, and NETGEAR does not direct or require any of these employees to live or work in the Eastern District of Texas. *Id.* ¶ 7.

NETGEAR's only direct contact with the Eastern District of Texas is a single employee who lives in the district. *Id.* ¶ 8. This employee works remotely from his home, and his role with NETGEAR does not require him to work in or from the Eastern District of Texas. *Id.* ¶ 7–8. His job does not involve sales or any other activity specifically directed towards the Eastern District of

Texas. *Id.* ¶ 8. In fact, this employee could work from anywhere in the country with no effect on his role or the NETGEAR’s business. *Id.*

NETGEAR’s products are primarily manufactured abroad and arrive in the United States at a port in California. *Id.* ¶ 10. These products are warehoused in California. *Id.* Primarily, NETGEAR sells its products directly to third-party retailers and/or distributors. *Id.* ¶ 11. These third parties decide when and where to ship the products to end users through their own stores and distribution channels. *Id.* ¶ 11. NETGEAR does not direct or control these third parties or their distribution and sales methods. *Id.*

### **III. AUTHORITY**

#### **A. Venue in Patent Cases is Governed by 28 U.S.C. § 1400(b).**

On May 22, 2017, the Supreme Court issued its decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 581 U.S. \_\_\_, 2017 WL 2216934 (May 22, 2017) (slip op.), expressly overruling the Federal Circuits holding in *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (1990). 2017 WL 2216934, at \*7. Under *VE Holding*, venue in patent cases against a corporate defendant was appropriate in any court with personal jurisdiction over the defendant. *VE Holding*, 917 F.2d at 1578. The Supreme Court’s rejection of this doctrine means venue in patent cases is governed solely by 28 U.S.C. § 1400(b), which establishes that “[a]ny civil action for patent infringement may be brought in the judicial district [i] where the defendant resides, or [ii] where the defendant has committed acts of [alleged] infringement *and* has a regular and established place of business.” “The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a ‘liberal’ construction.” *Schnell v. Peter Eckrich and Sons, Inc.*, 365 U.S. 260, 264 (1961); *see also Lex Tex Ltd. v. Aileen, Inc.*, 326 F.Supp. 485, 487 (S.D. Fla. 1971) (finding venue was not proper for a



corporation whose only activities in the state consisted of a sales representative who maintained a showroom in his own name and at his own expense and listed the corporation in the telephone directory without the corporation's consent).

The Federal Circuit has characterized the corporate venue framework of § 1400(b) developed before the Circuit was formed as the “permanent and continuous presence” inquiry. *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985). As district courts have interpreted, an accused infringer defendant must be “regularly engaged in carrying on a substantial part of its ordinary business on a permanent basis in a physical location . . . over which it exercises some measure of control.” *San Shoe Trading Corp. v. Converse, Inc.*, 649 F. Supp. 341, 345 (S.D.N.Y. 1986) (quoting *Mastantuono v. Jacobsen Manufacturing Co.*, 184 F. Supp. 178, 180 (S.D.N.Y. 1960)); *see also Magee v. Essex-Tec Corp.*, 704 F. Supp. 543, 545 (D. Del. 1988) (“A regular and established place of business has been described as a place where a party is engaged in carrying on in a continuous manner a substantial part of its ordinary business.”) (citation omitted); *Michod v. Walker Magnetics Group, Inc.*, 115 F.R.D. 345, 347 (N.D. Ill. 1987) (alleged infringer “has a regular and established place of business in a judicial district only if it actually has a place of business there; activities such as the maintenance of independent sales agents, visits by company representatives, and the solicitation of orders are not enough”); *Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976, 987 (S.D.N.Y. 1992) (“regular and established place of business” exists only if defendant is “regularly engaged in carrying on a substantial part of its ordinary business on a permanent basis in a physical location within the district over which it exercises some measure of control”).

After the Federal Circuit's 1990 *VE Holdings* decision, more recent cases analyzing patent venue under the second part of § 1400(b) have done so only in the context of individuals or sole

proprietorships. These cases have not ventured far from the pre-*VE Holdings* decisions. See *HomeBingo*, 428 F. Supp. 2d 1232; *Roblor Mktg. Grp., Inc. v. GPS Indus., Inc.*, 645 F. Supp. 2d 1130 (S.D. Fla. 2009) (noting that “[t]he standard ‘regular and established place of business,’ is quite narrow: it involves more ‘than doing business’”) (citing *Hsin Ten Enter. USA, Inc. v. Clark Enterprises*, 138 F. Supp. 2d 499, 461 (S.D.N.Y. 2000)).

#### **B. The Burden Lies on a Plaintiff to Establish Proper Venue**

Once a defendant raises a 12(b)(3) motion to dismiss for improper venue, the burden of sustaining venue lies with the plaintiff. *L & H Concepts LLC v. Schmidt*, 2007 WL 4165259, at \*1 (E.D. Tex. 2007) (citing *Laserdynamics Inc. v. Acer Am. Corp.*, 209 F.R.D. 388, 390 (S.D. Tex. 2002)). “Whenever an action could not have been properly brought in a district and no reason appears why it would be more in [the] interest of justice for [the] court to transfer [the] case than to dismiss it, it should be dismissed pursuant to 28 U.S.C. § 1406(a).” *Hamilton v. United Parcel Service, Inc.*, 2012 WL 760714, at \*2 (E.D. Tex. 2012).

### **IV. ARGUMENT**

*TC Heartland* completely reshaped the venue analysis in patent cases by holding that venue is not proper where corporate defendants are subject to personal jurisdiction, but rather only where a defendant is incorporated or “where the defendant has committed acts of [alleged] infringement *and* has a regular and established place of business.” 2017 WL 2216934, at \*3 (emphasis added). As Script failed to allege any specific facts that could support proper venue under this change in law, the defense of improper venue became available to NETGEAR when the *TC Heartland* decision was handed down on May 22, 2017.

#### **A. Venue Is Improper in the Eastern District of Texas.**

Script has not carried its burden to show that venue is proper in this district. Script’s pleading concedes that NETGEAR is neither incorporated nor has its headquarters anywhere in

Texas. Script has similarly failed to plead any facts attempting to demonstrate that NETGEAR has a regular or established place of business in this district. Thus, under *TC Heartland*, Script's Complaint fails to establish that venue is proper in the Eastern District of Texas and should be dismissed. 2017 WL 2216934, at \*3.

Moreover, the certified facts established above confirm that, under the “permanent and continuous presence” framework, it would be impossible for Script to amend its pleading to allege that venue is proper. The Federal Circuit's *Cordis* decision provides guidance on the limits of patent venue. In *Cordis*, a Florida company was sued for patent infringement in the District of Minnesota. *Id.* at 735. The defendant employed two sales representatives in the district to market pacemakers to customers in the district. *Id.* Each was paid a salary plus commission and was supplied with a company car. *Id.* The defendant company did not have a bank account, nor did it own or lease any real property in the district. *Id.* The sales representatives maintained offices in their homes in the district, and together they kept around \$90,000 worth of the defendant's products on hand. *Id.* Hospitals or physicians (i.e., customers) could obtain the accused pacemakers either through an out of state office via the in-district sales representatives, or directly from the in-district sales representatives out of their locally-stored inventory. *Id.* The two sales representatives also acted as technical consultants to customers in the district through their presence in operating rooms during a significant number of surgical implantations of the devices in the district. *Id.* During the operations, they provided technical product information to the physicians. *Id.* They also provided post-implantation consultation and gave presentations to medical personnel in the district regarding technological developments. *Id.*

The district court concluded that these facts supported a “regular and established place of business.” *Id.* at 734. On mandamus, the Federal Circuit found that under the “permanent and

continuous presence” inquiry, defendant “ha[d] not demonstrated that the district court’s conclusion on this point constitutes an abuse of discretion, such that it warrants the extraordinary remedy of mandamus.” *Id.* at 736. The Federal Circuit took care to note that “mandamus is ‘strong medicine’ to be reserved for the most serious and critical ills, and if a rational and substantial legal argument can be made in support of the rule in question, the case is not appropriate for mandamus, even though on normal appeal, a court might find reversible error.” *Cordis*, 769 F.2d at 737. “The record indicate[d] that a rational and substantial legal argument may be made in support of the court’s order denying Cordis’ motion to dismiss for lack of proper venue” *Id.* Accordingly, Cordis did not demonstrate that the district court’s conclusion was “an abuse of discretion, such that it warrant[ed] the extraordinary remedy of mandamus.” *Id.* Thus, *Cordis* represents the outer boundary of “a regular and established place of business.”

In its opinion, the Federal Circuit distinguished the facts in *Cordis* from those of a seminal venue case: *University of Illinois Foundation v. Channel Master*, 382 F.2d 514, 516 (7th Cir. 1967). In *Channel Master*, the Court of Appeals for the Seventh Circuit upheld a dismissal for lack of proper venue of a patent infringement suit against a New York manufacturer of television antennas. *Id.* at 515. The facts demonstrated that the manufacturer’s sole employee in the district worked from his home in Illinois promoting sales of his employer’s products. *Id.* at 515. All orders from customers were accepted in the New York home office, all shipments were made from the home office to customers and all payments by customers were made to that office. *Id.* at 516. Unlike Cordis’ representatives who maintained a stock of accused products within the district, the sales representative in *Channel Master* kept no stock or samples of the products. *Id.* Additionally, while there was evidence that the sales representative conducted seminars with distributors in the district, there was no evidence to demonstrate that these activities were concerned the specific

product accused of infringing. *Id.* On these facts, the Seventh Circuit concluded that venue under § 1400(b) was not proper. *Id.* at 517.

*Channel Master* and its progeny establish, and *Cordis* supports, that even where a defendant establishes an office of some type in a district, venue is proper therein only if a sales representative is authorized to actually consummate, in the district, the sales they have solicited there. *See Johnston v. IVAC Corp.*, 681 F. Supp. 959, 962 (D. Mass. 1987) (“[V]enue is proper only if the defendant maintains, controls, and pays for a permanent physical location from which sales are made within the district.”) (citing *Warner–Lambert Co. v. C.B. Fleet Co.*, 583 F. Supp. 519, 524 (D.N.J. 1984)).

The facts of the present case are less suggestive of proper venue than either *Channel Master* or *Cordis*. NETGEAR has no physical facilities in the district, and NETGEAR’s single, non-sales, employee living in the district is not located in the district at the company’s direction or for any purpose related to his employment. NETGEAR does not store any saleable inventory in the district and does not complete any sales in the district. NETGEAR’s products’ contacts with the district, to the extent any exist, are not controlled at all by NETGEAR, and NETGEAR does not target its website to any district in particular, let alone this district. Moreover, NETGEAR’s contacts, if any, are not permanent. For any products that may have been shipped to the Eastern District, NETGEAR, like the defendant in *Channel Master*, completes the orders it receives in its home territory and ships products via third parties. Thus, the NETGEAR does not have “a regular and established place of business” and is not “regularly engaged in carrying on a substantial part of its ordinary business on a permanent basis in a physical location . . . over which it exercises some measure of control.”

“The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a ‘liberal’ construction.” Schnell, 365 U.S. at 264. The facts in this case are clear that venue is not proper in the Eastern District of Texas.

#### **B. Transfer of Venue**

Dismissal is the proper remedy to Script’s deficient pleading. However, in the alternative, NETGEAR requests that the Court transfer this case to the Northern District of California. Venue is proper in the Northern district as to NETGEAR—as it has a “regular and established places of business” in that district. Thus, if it finds that it would be in the interest of justice, the Court could transfer this case against NETGEAR to the Northern District of California pursuant to 28 U.S.C. § 1406(a).

#### **V. CONCLUSION AS TO IMPROPER VENUE**

For the foregoing reasons, NETGEAR respectfully requests that the Court dismiss this case for improper venue. In the alternative, NETGEAR requests the case be transferred to the Northern District of California pursuant to 28 U.S.C. § 1406(a).

#### **VI. DEFENDANT’S MOTION TO DISMISS UNDER RULE 12(B)(6)**

Pursuant to Fed. R. Civ. P. 12(b)(6), NETGEAR Plaintiff’s Amended Complaint for failure to state a valid claim.

In its Amended Complaint, Script alleges direct infringement, including “joint” direct infringement of claim 1 of both U.S. Patent Nos. 6,542,078 (“the ’078 Patent”) and 6,828,909 (“the ’909 Patent”) (collectively, “the Asserted Patents”), both entitled “Portable Motion Detector and Alarm System and Method.” In the Amended Complaint, Script also included boilerplate allegations of indirect infringement, both contributory and induced. Script’s allegations as to both

Asserted Patents fail to comply with the requirements of Fed. R. Civ. P. 8 (“Rule 8”), therefore fail to properly state a claim, and should be dismissed.

For example, claims 1 and 11 of the ’078 Patent both claim “[a] system for detecting the movement of an object” that explicitly comprises “*an object whose movement is to be detected.*” Rather than fulfill its obligations under Rule 8 for its allegations involving the ’078 Patent, Script simply alleged that “[t]he accused products include an object whose movement is to be detected.” Amended Complaint ¶ 10. Script used this boilerplate “the accused products include” language for every identified element of the identified claims of *both* Asserted Patents. This language fails to allege how the “accused”<sup>1</sup> products infringe the claims. Instead, Script asserts conclusory allegations as to the parroted elements of the asserted claims—barebones pleading that does not comply with Rule 8.

Even if Script were allowed to amend its pleading as to the ’078 Patent, such an amendment would be futile, as Script cannot support its infringement claims. To the extent the “accused products” are any of those listed at <http://www.arlo.com/en-us/> or <http://www.vuezone.com/use-ideas/wireless-home-video-security>, the “accused products” do not include, for example, any “object whose movement is to be detected.” Instead, it would appear any such “object” would have to be, at best, provided by someone other than NETGEAR, an allegation not included in Script’s Pleading.

Similarly, asserted claim 1 of the ’909 Patent requires each of (a) “a motion sensor adapted to . . . provide an indication of said movement including a unique identifier”; (b) “a transmitter

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<sup>1</sup> Script’s Complaint fails to sufficiently identify which specific products are the “accused products.” Complaint ¶¶ 8, 19 (identifying only “Arlo Home Security Systems identified at <http://www.arlo.com/en-us/> and the VueZone wireless home video system identified at <http://www.vuezone.com/use-ideas/wireless-home-video-security>”).

associated with said sensor and adapted to wirelessly transmit a predetermined signal containing said indication”; *and* (c) a “receiver . . . adapted to receive said predetermined signal, to process said unique identifier for local or remote conversion to associated object identification information that identifies said object, and to visually or audibly output said identification information.” The remaining independent claims of the ’909 Patent include the same or similar elements. Again, the “accused products,” to the extent they are any of those listed at <http://www.arlo.com/en-us/> or <http://www.vuezone.com/use-ideas/wireless-home-video-security>, do not include, for example, any “receiver . . . to process said unique identifier . . . and to visually or audibly output said object identification information.”

Script’s Amended Complaint as to the ’909 Patent fails to specify with the level of detail required by Rule 8 what Script possibly could contend NETGEAR provides in “accused products” that could be such a “local receiver,” and it does not appear Script can assert in any amended complaint a claim of direct infringement of Claim 1 of the ’909 Patent against NETGEAR.

Script’s alleged “joint infringement” allegations assert, without providing the level of detail required by Rule 8, that NETGEAR creates a “joint enterprise” with “customers” or “service providers.” *See Lyda v. CBS Corp.*, 838 F.3d 1331, 1340 (Fed. Cir. 2016) (noting that mere allegations of “control” are insufficient for claims of joint infringement without factual support). Script relies on unidentified “contracts” and “instructions” to support this contention. Like its direct infringement claims, these conclusory statements are insufficient. Compounding this problem, “joint infringement” does not apply to system claims (the only type of claims identified in the Amended Complaint), and Script therefore did not state a claim upon which relief may be granted. *See id.* at 1339 (“Our cases have applied joint infringement to method claims and not system claims.”).



Finally, Script's indirect infringement allegations fail to add any detail necessary to overcome the deficiencies found in the rest of the Amended Complaint. Assertions of indirect infringement must be supported by direct infringement allegations that comply with Rule 8. *See In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1333 (Fed. Cir. 2012). But, Script has failed to "to give the defendant[s] fair notice" of any direct infringement or identify an alleged direct infringer. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007).

Script's pleading reflects that it did not conduct a reasonable and sufficient pre-suit investigation into its claims. Script also must recognize the futility of its claims, which are insufficient, implausible, and should be dismissed.

## **VII. STATEMENT OF THE ISSUES**

The issue to be decided is whether the direct infringement, joint direct infringement, and indirect infringement claims set forth in the Amended Complaint fail to state a claim upon which relief may be granted, and therefore should be dismissed under Fed. R. Civ. P. 12(b)(6).

## **VIII. LEGAL STANDARD**

Pursuant to Rule 8, a complaint must include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Importantly, the Supreme Court recently abrogated the Appendix of Forms, including the former Form 18, confirming that patent plaintiffs can no longer seek to avoid the *Iqbal* and *Twombly* standards by relying on the former, highly generalized form infringement complaint (Form 18). *See* Fed. R. Civ. P. App'x of Forms (noting that forms, including Form 18, were abrogated effective Dec. 1, 2015); *see also Ruby Sands LLC v. Am. Nat'l Bank of Tex.*, Case No. 2:15-cv-1955-JRG, 2016 WL 3542430, at

\*4 (E.D. Tex. June 28, 2016) (granting a motion to dismiss for failure to state a claim under the *Twombly* and *Iqbal* standards).<sup>2</sup>

Under *Twombly*, a plaintiff must provide the grounds of his entitlement to relief, and must allege specific facts in support of each such claim, sufficient to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555. Indeed, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And, while well-pleaded facts are generally taken as true, the Court “need not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.” *Martinez v. Livingston*, No. 6:13-CV-802, 2014 WL 7877163, at \*2 (E.D. Tex. Dec. 18, 2014) (citing *Plotkin v. IP Axxess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005)). “[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 ‘shown’—that the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679; *Hole v. Texas A&M Univ.*, 360 F. App’x. 571, 573 (5th Cir. 2010).

## **IX. ARGUMENT AS TO SCRIPT’S FAILURE TO STATE A CLAIM**

### **A. Script Has Not Pleaded Sufficient Detail to Provide Notice of Its Direct Infringement Claims.**

Script failed to meet the minimum pleading standards required by *Twombly* and *Iqbal*. For example, independent claims 1 and 11 of the ’078 Patent require a “system” explicitly comprising

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<sup>2</sup> See also *Raindance Techs. v. 10X Genomics, Inc.*, No. 15-152-RGA, 2016 WL 927143, at \*2 (D. Del. Mar. 4, 2016) (noting that Form 18 has been abrogated and applying the *Twombly* and *Iqbal* standards); *Rembrandt Patent Innovations LLC v. Apple Inc.*, No. C 14-05094 WHA, 2015 WL 8607390, at \*2 (N.D. Cal. Dec. 13, 2015) (finding that *Twombly* sets forth the controlling pleading standard after the abrogation of Rule 84, which included Form 18).

“an object whose movement is to be detected.” But, Script does not identify how any “accused products” meet this element.

The Amended Complaint only specifically accuses NETGEAR of infringing claim 1 of the '078 Patent, which claims:

A system for detecting the movement of an object and providing information relative to said movement to a remote location comprising

***an object whose movement is to be detected,***

a detector adapted to detect movement of said object and provide an indication of said movement,

a first transmitter associated with said detector and adapted to wirelessly transmit a predetermined signal in response to said indication,

an information gathering device adapted to receive said predetermined signal, to gather information relating to said movement, and to transmit said information and

a remote notification device adapted to receive said information from said information gathering device, to establish data communication with a remote host and to provide said information to said remote host.

Script’s complaint, however, fails to identify any such “object” or describe how any product of NETGEAR meets this limitation. Indeed, as shown below, Script fails to identify with any specificity what products are accused, or how any “accused products” meet any individual elements of any identified claim. Script’s Amended Complaint only comprises general assertions that “the accused products include” the parroted claim elements:

The accused products include ***an object whose movement is to be detected.***

The accused products include ***a detector adapted to detect movement of said object and provide an indication of said movement.***

The accused products include ***a first transmitter associated with said detector and adapted to wirelessly transmit a predetermined signal in response to said indication.***

The accused products include ***an information gathering device adapted to receive said predetermined signal, to gather information relating to said movement and to transmit said information.***

The accused products include *a remote notification device adapted to receive said information from said information gathering device, to establish data communication with a remote host, and to provide said information to said remote host.*

Amended Complaint ¶¶ 10–14, with emphasis added to show parroted claim language. At no point does Script identify what it believes the claimed “object” is, or how “accused products” allegedly meet any other claim elements. These inadequate pleadings do not provide to NETGEAR sufficient notice of how Script contends any of the elements of a claim asserted against NETGEAR are met. Indeed, Script only provides a conclusory pleading that formulaically parrots the elements of an asserted claim. *See Twombly*, 550 U.S. at 555.

Even if Script were allowed to amend its pleading, Script would have no good faith basis to allege that “accused products” include, for example, the claimed “object.” Independent claims 1 and 11 of the ’078 Patent both claim a “system for detecting the movement of an object” that explicitly includes “an object whose motion is detected.” Though Script’s pleading does not provide any indication of what it contends the claimed “object” is, the claims show that “accused products,” to the extent they are any of those listed at <http://www.arlo.com/en-us/> or <http://www.vuezone.com/use-ideas/wireless-home-video-security>, do not include anything that could meet this limitation. The ’078 Patent describes the claimed “object” as a door or window. *See, e.g.*, ’078 Patent at 4:47–49 (“Each movement detecting and signal transmitting means 20 is coupled to one object, such as a door 24, or window 25, whose movement is to be detected.”). Moreover, this Court previously construed the term “object” in the ’078 Patent as a “moveable object, such as a door, a window, or a baby gate.” Claim Construction Memorandum Opinion and Order at 5–6, *Script Security Solutions L.L.C. v. Amazon.com, Inc.*, No. 2:15-cv-1030-WCB, 2016 WL 3959804 at \*3 (E.D. Tex. July, 22, 2016). NETGEAR does not provide doors, windows, baby gates, or any other movable and detectable “objects.” For example, the products pictured at

<http://www.arlo.com/en-us/> and <http://www.vuezone.com/use-ideas/wireless-home-video-security> are internet-connected devices. See Exs. A, B. Thus, “accused products” are not the “object” whose movement is detected—there must be some other “object.” And Script has not, and cannot, assert that NETGEAR sells doors or windows. At best, any such “object” would have to be provided by a third party.

Script’s pleadings as to the ’909 Patent are equally deficient, for example regarding the “receiver . . . adapted to receive said predetermined signal . . . to process [forward]<sup>3</sup> said unique identifier for . . . conversion to associated object identification information that identifies said object, and to visually or audibly output said object identification information” elements.. The only claim of the ’909 Patent identified in the Amended Complaint, claim 1, is as follows:

A portable security alarm system for detecting the movement of an object and providing information relative to said movement, said system comprising

a motion sensor adapted to detect movement of an object and provide an indication of said movement including a unique identifier associated with said sensor,

a transmitter associated with said sensor and adapted to wirelessly transmit a predetermined signal containing said indication, and

a local *receiver* at or near the site of the object ***adapted to receive said predetermined signal, to process said unique identifier for local or remote conversion to associated object identification information that identifies said object, and to visually or audibly output said object identification information.***

As with Script’s allegations involving the ’078 Patent, the Amended Complaint fails to identify ***any*** element claimed in the ’909 Patent in non-conclusory terms. For example, the Amended Complaint provides the following bare-bones allegation merely parroting the claim language regarding the “receiver” element of claim 1:

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<sup>3</sup> Rather than the “to process” language of independent claims 1, 15, 19, 24, 25, and 30, the remaining independent claims (26 and 29) of the ’909 Patent, which were not identified in Script’s Complaint, use “to forward” language for the required functionality of the claimed “receiver.” Script did not mention this element in its complaint.

The accused products include *a local receiver at or near the site of the object adapted to receive said predetermined signal, to process said unique identifier for local or remote conversion to associated object identification information that identifies said object, and to visually or audibly output said object identification information.*

Amended Complaint ¶ 24, emphasis added to show parroted claim language. These allegations are as insufficient as those involving the '078 Patent.

Further, the case should be dismissed as to the '909 Patent, because Script has no good faith basis to represent that “accused products,” to the extent they are any of those listed at <http://www.arlo.com/en-us/> or <http://www.vuezone.com/use-ideas/wireless-home-video-security>, include, for example, the claimed “receiver . . . to visually or audibly output said object identification information.” As with the claimed “object” of the '078 Patent, the “accused products” have no “receiver” “visually or audibly output[ting]” identification information. But Script did not include such an allegation in its pleading. By way of further example, Script also has no good faith basis to assert that the accused products include “object identification information.” Not only has Script not identified anything showing this element, but also nothing on the website Script points to reflects the ability to “identif[y] said object.” Once again, Script insufficiently asserted its claims of direct infringement, and therefore its claims involving the '909 Patent should be dismissed.

This Court has dismissed the complaint of a patentee, like Script, who provided deficient pleadings like Script's. In *Ruby Sands LLC v. American National Bank of Texas*, the Court dismissed a patent case with prejudice because “the Amended Complaint plainly fails to state a claim for relief that is plausible on its face.” No. 2:15-cv-1955-JRG, 2016 WL 3542430, at \*4 (E.D. Tex June 28, 2016) (Slip Op.). Ruby Sands identified patent claims with several distinct parts. *Id.* at \*1–2. Ruby Sands' complaint merely identified a product of defendant and referenced a website in support of its allegations. *See* Ex. C ¶¶ 12-17, Plaintiff's First Amended Complaint,

Dkt. No. 7, *Ruby Sands LLC v. American National Bank of Texas*, No. 2:15-cv-1955-JRG (E.D. Tex. Jan. 29, 2016). But, this Court found Ruby Sands' pleading failed to create a plausible claim for relief because nothing therein, including the identified website, could plausibly support the allegations. *Ruby Sands*, 2016 WL 3542430 at \*4-5. Ruby Sands' claims required an "image transfer device," which it alleged was met by a cell phone. *Id.* at \*3 "However, assuming all facts pleaded in the Amended Complaint are true, Ruby Sands [made] no factual allegations that even remotely suggest that [defendant], a bank, makes, uses, offers to sell, or sells mobile devices." *Ruby Sands*, 2016 WL 3542430, at \*4.

Script's Amended Complaint suffers even more deficiencies than Ruby Sands'. The claims identified in Script's Amended Complaint require multiple parts of a system, including one or more of an "object" whose movement is detected, and an "information gathering device"/"receiver" for, among other required functions, receiving signals from a wireless "transmitter" and providing "object identification information that identifies said object." Yet neither Script's Amended Complaint, nor the web page it relies on, make any factual allegations that suggest that NETGEAR, makes, uses, offers to sell, or sells such an "object," "information gathering device," or "receiver" as claimed, and (unlike Ruby Sands' complaint that identified a mobile device as corresponding to the claim element) Script's Amended Complaint does not even identify what, if anything, Script even contends meets such limitations. *See Id.*

**B. Script's "Joint" Direct Infringement Claims Do Not State a Claim Upon Which Relief Can Be Granted and Do Not Comply with the Pleading Standard.**

In an apparent attempt to avoid outright dismissal for the above issues, Script asserts conclusory claims of "joint" direct infringement at the end of its pleading. However, "[the Federal Circuit's] cases have applied joint infringement to method claims *and not system claims.*" *Lyda*, 838 F.3d at 1339 (citing *Centillion Data Sys. LLC v. Qwest Commc'ns Int'l Inc.*, 631 F.3d 1279,

1284 (Fed. Cir. 2011)) (emphasis added). Instead, “to ‘use’ a system for purposes of infringement, a party must put the invention into service, *i.e.*, control the system **as a whole** and obtain benefit from it.” *Centillion*, 631 F.3d at 1284 (emphasis added).

The Asserted Patents, with the exception of claim 29 of the '909 Patent, comprise only system claims—a “system for detecting” and a “portable security alarm system.”<sup>4</sup> Under Federal Circuit law, only a single alleged direct infringer making “use” of an accused product, not a “joint enterprise” as incorrectly asserted by Script, could infringe such system claims. *See Id.* To the extent Script alleges NETGEAR “uses” “accused products,” these allegations fail to state a claim upon which relief may be granted. For example, *Centillion*, like Script, asserted a patent claiming a multi-component system:

Claim 1 is illustrative and, at a high level, requires “a system for presenting information ... to a user ... comprising:”

- 1) storage means for storing transaction records,
- 2) data processing means for generating summary reports as specified by a user from the transaction records,
- 3) transferring means for transferring the transaction records and summary reports to a user, and
- 4) personal computer data processing means adapted to perform additional processing on the transaction records.

*Id.* at 1281. In *Centillion*, the defendant was alleged to profit from software meeting claimed “processing” and “transferring” elements where its customers subscribed to the accused instrumentality, which included installation of the software on a customer’s computer and back-end processing by defendant. *Id.* at 1281-82. But even these actions were found insufficient to constitute defendant’s “use” of the claimed system. *Id.* at 1286. The Federal Circuit noted “[w]hile [the defendant] may make the back-end processing elements, it never ‘uses’ the entire claimed

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<sup>4</sup> Claim 29 of the '909 Patent is a method claim, but includes numerous claimed requirements not found in any of the other independent claims of the '909 Patent. Script did not identify claim 29 of the '909 Patent or make any attempt to plead its unique requirements in its Amended Complaint, even using the bare-bones, parroted claim language it included for the identified system claims.



system because it never puts into service the personal computer data processing means. Supplying the software for the customer to use is not the same as using the system.” *Id.* In contrast, it was defendant’s customers who “used” the accused instrumentality by controlling its operation: “The customer controls the system by creating a query and transmitting it to Qwest’s back-end. The customer controls the system on a one request/one response basis.” *Id.* at 1285.

In this case, someone other than NETGEAR “uses” “accused products,” controlling them and obtaining benefits therefrom. Additionally, if anyone, it is the third party controlling “accused products” and obtaining benefits therefrom who could provide the claimed “object whose movement is to be detected” by “accused products,” and connect “accused products” to some other device. The steps needed to “put the [alleged] invention into service” would need to be performed by someone other than NETGEAR. Thus, a third party, who has not to date been sufficiently identified by Script in its Amended Complaint, would be the alleged “users” for purposes of finding any liability for direct infringement, regardless of NETGEAR’s alleged operation of any back-end systems, and Script’s insufficient allegations of “use” are, at best, improperly pleaded allegations of indirect infringement. *See Centillion*, 631 F.3d at 1286.

To the extent Script instead relies on its “Joint Infringement” theory of use, joint infringement does not apply to system claims. *Lyda*, 838 F.3d at 1339. Further, even if joint infringement were an acceptable infringement theory under Federal Circuit law for system claims, the sufficiency of any allegations of joint infringement in a complaint are also measured by the *Iqbal* and *Twombly* standard. *Lyda*, 838 F.3d at 1339. To survive a Rule 12(b)(6) motion, Script must “plausibly allege that Defendant[] exercise[d] the requisite ‘direction or control’ over the performance of the claim steps, such that performance of every step is attributable to Defendant[.]” *Id.* 1340. A bare assertion that NETGEAR controls other entities, without any factual allegations

relating to *how* NETGEAR exercises such control, cannot form the basis of a reasonable inference that *each* element of any claim is attributable to NETGEAR. *See id.* (holding that alleging direction or control “conclusively and without factual support” failed “to plausibly plead sufficient facts to ground a joint infringement claim”).

As in *LBS Innovations*, Script “has failed to plausibly set forth a joint enterprise theory of divided infringement because (1) the Complaint does not establish the plausibility of an enterprise in which the members share an equal right of control and (2) the Complaint fails to include any facts in its pleading suggesting a community of pecuniary interest.” *See LBS Innovations, LLC v. Nokia USA Inc.*, No. 2:15-CV-1972-JRG, 2016 WL 3407611, at \*3 (E.D. Tex. June 21, 2016). Script’s Amended Complaint merely posits that unidentified “contracts” create a “joint enterprise” between NETGEAR and its “customers:”

Defendant forms a joint enterprise with its customers by entering into a contract with the customer, instructing the customer on how to install the accused products, instructing customers on how to use the accused products, and conditioning receipt of monitoring services upon various activities by the customer.”

Amended Complaint ¶ 27. Script asserts similar theories as to unnamed and unidentified “interactive service providers:”

Defendant forms a joint enterprise with the interactive service providers by entering into a contract with the interactive service providers and instructing the interactive service providers regarding the various services provided to Defendant’s customers.

*Id.* at ¶ 28. But, Script provides insufficient factual allegations to support these assertions.

As the Federal Circuit notes, a joint enterprise requires proof of four elements:

- (1) an agreement, express or implied, among the members of the group;
- (2) a common purpose to be carried out by the group;
- (3) a community of pecuniary interest in that purpose, among the members; and
- (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

*Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1023 (Fed. Cir. 2015) (finding that the actions of a joint enterprise could be attributed to a single entity only in the context of method claims). But, apart from asserting the existence of some contract, Script has not made any factual allegations that could support the finding of a “joint enterprise”: Script has not alleged that there is a common purpose, a community of pecuniary interest, or an equal right to voice in the direction of the alleged joint enterprise. *See Lyda*, 838 F.3d at 1340 (holding that a complaint is insufficient when it “alleges conclusively and without factual support that [defendant] directed or controlled the independent contractors who then directed or controlled the unnamed third parties”).

Indeed, Script does not reveal what language in which alleged “contracts” with which alleged “customers” support its alleged “joint infringement” theories. Script also did not identify what “instructions” allegedly given to the alleged “customers” contribute to the alleged “joint infringement.” These are unsupported conclusory assertions, and “[t]here are thus no allegations in the Amended Complaint that can form the basis of a reasonable inference that each claim step was performed by or should be attributed to Defendant[.]” *Id.*

**C. Script’s Indirect Infringement Amendments Fail to Add Any Detail to Script’s Claims.**

Paragraphs 30–36 add only boilerplate contributory and induced infringement allegations. However, “[i]t is axiomatic that [t]here can be no inducement or contributory infringement without an underlying act of direct infringement.” *In re Bill of Lading*, 681 F.3d at 1333 (internal quotation omitted). As explained above, Script’s pleading has failed to establish any underlying act of direct infringement, and Script’s pleading as to alleged indirect infringement fails to remedy its deficient pleading as to direct infringement. Thus, Script cannot rely on its indirect infringement allegations to rescue its complaint.

## **CONCLUSION**

For the foregoing reasons, pursuant to Fed. R. Civ. P. 12(b)(6), NETGEAR also respectfully requests that the Court dismiss all of Script's claims against NETGEAR for failure to state any valid claim.

Dated: June 7, 2017

Respectfully submitted,

FISH & RICHARDSON P.C.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on June 7, 2017, 2016, on all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3).

*/s/ William B. Collier, Jr.*

William B. Collier, Jr.

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