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 13 STREETSPACE, INC.

14 UNITED STATES DISTRICT COURT
 15 SOUTHERN DISTRICT OF CALIFORNIA

16 STREETSPACE, INC., a Delaware
 17 corporation,

18 Plaintiff,

19 vs.

20 GOOGLE INC., a Delaware corporation;
 21 ADMOB, INC., a Delaware corporation;
 22 APPLE INC., a California corporation;
 23 QUATTRO WIRELESS, INC., a Delaware
 24 corporation; NOKIA CORPORATION, a
 25 foreign corporation; NOKIA INC., a
 26 Delaware corporation; NAVTEQ
 27 CORPORATION, a Delaware corporation;
 28 MILLENNIAL MEDIA, INC., a Delaware
 corporation; JUMPTAP, INC., a Delaware
 corporation; and DOES 1 through 20,
 inclusive,

Defendants.

CASE NO. 10-CV-1757-LAB-MDD

**STREETSPACE INC.'S
 MEMORANDUM IN OPPOSITION TO
 DEFENDANTS' SECOND RULE
 12(B)(6) MOTION TO DISMISS**

Date: May 9, 2011
 Time: 11:15 a.m.
 Judge: Hon. Larry A. Burns
 Ctrm: 9

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1 Plaintiff Streetspace, Inc. (“Streetspace”) respectfully submits the following memorandum
2 of points and authorities in opposition to Defendants’ Rule 12(b)(6) Motion to dismiss.
3 Defendants’ motion to dismiss should be denied. In fact, Defendants’ motion is so frivolous, it
4 can be denied summarily without oral argument.

5 **I. INTRODUCTION**

6 Eight months after they received Streetspace’s initial complaint, Defendants have still yet
7 to provide an answer. They now file their second Motion to Dismiss, raising a host of frivolous
8 arguments and factual misrepresentations, and further delaying discovery on the ultimate merits
9 of Streetspace’s constitutionally mandated and exclusive patent rights.

10 Defendants falsely state that Streetspace’s First Amended Complaint (FAC) “does not
11 name or otherwise specify a single [accused] product or service” for Millennial Media and
12 Jumtap, leaving them to “speculate as to what product or service is actually at issue in the suit.”
13 Yet, the FAC clearly identifies “Millennial Media’s MYDAS advertising platform and UMPIRE
14 ad serving technology,” which are the only two distinctly named services offered by Millennial
15 Media. D.E. 30, ¶ 35. Defendants also fail to inform this Court that no publicly available
16 information identifies what Jumtap’s infringing service is specifically called. Like Defendant
17 Millennial Media, Jumtap is in the business of one thing, and one thing only: providing
18 personalized advertisements to users of mobile devices. The argument, therefore, that Millennial
19 Media and Jumtap are left to “speculate” as to what is “actually at issue in the suit” is frivolous,
20 and wasteful of the parties’ and this Court’s time.

21 Moreover, Defendants completely misconstrue the law – “the pleading requirements set
22 forth in *Twombly* and *Iqbal* do **not** require a patentee to identify specific products or services by
23 name in the complaint.” *Atwater Partners of Texas LLC v. AT&T, Inc., et al.*, 2-10-cv-00175
24 (E.D.Tex March 18, 2011 Order) (Ward, J.) (interpreting *McZeal v. Sprint Nextel Corp.*, 501 F.3d
25 1354 (Fed.Cir.2007) (emphasis added)).¹ The FAC provides all Defendants, including Millennial

26 ¹ The Court in *Atwater* further noted that “Rule 11 cuts both ways, that is, it is also a violation of Rule 11 to file a
27 frivolous motion. *See* Fed. R. Civ. P. 11(b). This includes a frivolous Rule 12(b)(6) motion to dismiss for failure to
28 state a claim.” *Atwater Partners of Texas LLC* at 7; *see also Prompt Medical Sys., L.P. v. Allscriptsmisys Healthcare
Sol., Inc.*, No. 6:10-cv-71 (E.D.Tex. Feb. 11, 2011 Order) (Davis, J.) (“The Court strongly encourages the parties to

1 Media and Jumtap, with ample notice of Streetspace’s patent infringement allegations.

2 Incredibly, Defendants next argue that the claims against Millennial Media and Jumtap
3 should be dismissed with prejudice at the pleading stage because Streetspace “cannot identify any
4 specific service provided by [them] that includes a terminal.” However, Streetspace is not
5 required to recite the claim elements in its Complaint, let alone explain how they map to the
6 features of the accused service. Defendants will receive infringement contentions in due course
7 pursuant to this Court’s local patent rules. Defendants are seeking not a Rule 12(b)(6) dismissal,
8 but a summary judgment of non-infringement. A determination on the merits should not precede
9 an answer to a complaint.

10 Defendants further argue that Streetspace fails to allege the knowledge requirement for
11 induced infringement. It is undisputed that Defendants received actual knowledge of the patent-
12 in-suit when they received Streetspace’s initial complaint. Yet, they contend that Streetspace
13 cannot state a claim for inducement because “knowledge of the patent *after* the filing of a
14 complaint is not sufficient for [such] pleading[.]” Again, Defendants are advancing another
15 frivolous argument – Streetspace is not alleging that Defendants gained notice of the ‘969 patent
16 after the filing of its first complaint, but concurrently therewith. Nonetheless, the law does not
17 prohibit a later pleading from referring to facts that occurred as a result of an earlier pleading.
18 Indeed, in a past dispute, Apple itself pled indirect infringement in precisely the same way as
19 Streetspace does here, and discovery may well reveal that one or more Defendants in fact had
20 knowledge of Streetspace’s patent long before filing of the complaint. Either way, Streetspace has
21 pled a viable claim for inducement of infringement.

22 In a final misplaced jab, Defendants argue without meaningful authority that “mere
23 presence” of the ‘969 Patent in the Google Patents database “is not sufficient to support a
24 reasonable inference that anyone at Google actually was aware of the existence of the ‘969
25 Patent.” But the law does not require the inference to be probable—only plausible, and
26 Streetspace’s inference easily meets the standard. Only discovery will reveal when Google and

27 try this case on the merits and not unnecessarily burden the Court with technical issues that lack practical
28 substance.”).

1 the other Defendants actually first became aware of the '969 patent. At any rate, the Complaint
2 additionally alleges that Google learned of the '969 Patent from Streetspace's initial complaint.
3 That is a sufficient allegation of Google's knowledge of the patent.

4 The arguments advanced by Defendants are not only frivolous; they are *knowingly*
5 frivolous and sanctionable. This Court already rejected many of these arguments once. Two
6 weeks later, however, Defendants decided to re-file many of those same arguments again.
7 Defendants' motion to dismiss is frivolous and should be denied.

8 **II. BACKGROUND**

9 On August 23, 2010, Streetspace filed its initial complaint, accusing each Defendant of
10 directly and indirectly infringing U.S. Patent No. 6,847,969 ("the '969 Patent"). D.E. 1. Eight
11 months later, no Defendant has answered. Instead of responding to Streetspace's complaint,
12 Defendants filed one motion after another to impede this action from proceeding.

13 Defendants filed their first motion to dismiss on January 18, 2011. D.E. 21. To address
14 Defendants' objections, Streetspace voluntarily amended its initial complaint on February 25.
15 D.E. 30. Shortly thereafter, Streetspace filed a response to the Court's Order to Show Cause
16 (D.E. 35), explaining why its proposed amendments should be allowed. D.E. 39.

17 Separately, on February 28, Streetspace filed an opposition to Defendant's pending motion
18 to dismiss. D.E. 32. At that time, Streetspace put Defendants on notice that *Twombly* and *Iqbal*
19 do not apply to the pleading requirements for direct patent infringement per the Federal Circuit's
20 ruling in *McZeal* and that Streetspace's indirect patent infringement allegations followed the
21 template used with success by Defendant Apple in another district court case. *Id.* Defendants
22 replied on March 7. D.E. 42. In their reply, Defendants argued that the Court should deny
23 Streetspace leave to amend because the proposed amendments would be "futile." D.E. 42, at 1, 5,
24 6. That same day, this Court granted Streetspace leave to amend and denied as moot Defendants'
25 first motion to dismiss. D.E. 43.

26 Still unsatisfied, on March 22, Defendants filed this (their second) Motion to Dismiss
27 directed against Streetspace's First Amended Complaint. D.E. 49. This new Motion repeats
28

1 many of the same arguments that had already been raised in their March 7 reply.

2 **III. LEGAL STANDARD**

3 Motions to dismiss are purely procedural questions to which the Federal Circuit applies
4 the law of the regional circuit. *Core Brace LLC v. Star Seismic LLC*, 566 F.3d 1069, 1072 (Fed.
5 Cir. 2009). In the Ninth Circuit, dismissal is “appropriate only where the complaint lacks a
6 cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v.*
7 *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In reviewing a motion to
8 dismiss, the court must assume the truth of all factual allegations and must construe all inferences
9 from them in the light most favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890,
10 895 (9th Cir. 2002). Indeed, motions to dismiss for failure to state a claim are viewed with
11 disfavor and are rarely granted. *See, e.g., Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th
12 Cir. 1986).

13 Under Federal Rule of Civil Procedure 8(a)(2), the plaintiff is only required to set forth a
14 “short and plain statement of the claim showing that the pleader is entitled to relief.” *Bell*
15 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Rules do not require an elaborate
16 recitation of every fact a plaintiff may ultimately rely upon at trial, but only a statement sufficient
17 to give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it
18 rests. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). While it is clear that the complaint must allege
19 enough facts to state a claim that is “plausible on its face,” *Ashcroft v. Iqbal*, 129 S.Ct. 1937,
20 1940, 1949 (2009), the “plausibility” standard is not akin to a probability requirement. *Twombly*,
21 550 U.S. at 545. It simply requires enough facts to “raise a reasonable expectation that discovery
22 will reveal evidence” that a defendant has acted unlawfully. *Id.*

23 In the context of patent litigation, this requirement merely ensures that an accused
24 infringer has sufficient knowledge of the facts alleged to enable it to answer the complaint and
25 defend itself. *Phonometrics v. Hospitality Franchise Systems, Inc.*, 203 F.3d 790, 794 (Fed. Cir.
26 2000). In particular, a claim of direct patent infringement alleged in conformity with Form 18
27 appended to Rule 84 must survive a motion to dismiss for failure to state claim. *McZeal v. Sprint*
28

1 *Nextel Corp.*, 501 F.3d 1354, 1356-58 (Fed. Cir. 2007); *see also Elan Microelectronics Corp. v.*
2 *Apple, Inc.*, 2009 WL 2972374, at *2 (N.D. Cal. 2009). Not much is required to satisfy the
3 pleading standards for patent infringement under Federal Circuit case law and Federal Rule of
4 Civil Procedure Form 18. *Atwater Partners of Texas LLC v. AT&T, Inc., et al.*, 2-10-cv-00175
5 (E.D.Tex. March 18, 2011 Order) (Ward, J.).

6 **IV. ARGUMENT**

7 **A. Streetspace Properly States Its Claims for Direct Infringement**

8 Defendants first argue that Streetspace’s allegations of direct infringement should be
9 dismissed “because they do not identify any allegedly infringing products or services.” D.E. 49 at
10 5. According to Defendants, Streetspace must “name” the specific products and services accused
11 of infringing the ’969 Patent. D.E. 49 at 3. This is not the law.

12 **1. There Is No Categorical Rule That an Allegation for Direct Patent
13 Infringement Must Name the Accused Product or Service**

14 Contrary to Defendants’ contention, there is no categorical rule that a plaintiff must name
15 the specific product or service accused of direct patent infringement. Rather, “[d]etermining
16 whether the complaint states a plausible claim for relief will . . . be a context-specific task that
17 requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129
18 S.Ct. at 1940. Even conclusory allegations of direct patent infringement are sufficient to survive a
19 motion to dismiss. *See McZeal v. Sprint Nextel Corp.*, 501 F.3d at 1357. Streetspace has gone
20 way beyond conclusory allegations. The pleading requirements in *Twombly* and *Iqbal* do not
21 require a patentee to identify specific products or services by name in the complaint. *Atwater
22 Partners of Texas LLC v. AT&T, Inc., et al.* at 3 (internal citations omitted). Streetspace has
23 identified specific products or services in its FAC.

24 In *Xpoint Technologies v. Microsoft* (a case cited in Defendants’ own Motion), the court
25 openly declared: “As this court has previously held, it is not necessary to identify specific
26 products, *i.e.* model names, but plaintiffs pleadings must mimic Form 18 and identify a general
27 category of products.” *Xpoint Technologies v. Microsoft*, 2010 WL 3187025, at *3 (D. Del.
28 2010). This view is confirmed by the Patent Case Management Judicial Guide, which at least one

1 California federal court has found persuasive (*see RPost Holdings, Inc. v. Trustifi Corp.*, 2010
2 WL 2079743, at *1 fn.1 (C.D. Cal. 2010)):

3 Infringement complaints are usually sparse and conclusory. Typically, a
4 patent holder will merely allege that a defendant is directly or indirectly infringing
5 a patent. The asserted patents must be identified, and are often attached to the
6 complaint. . . . The complaint should also provide a statement of ownership of the
7 asserted patent, identify the accused infringer(s), provide a brief statement of
8 alleged infringing acts, and (if applicable) a statement regarding the patent owner’s
9 marking of product with the patent number under § 287.

10 Under the notice pleading requirement of Rule 8(a), the patent holder is not
11 required to do more. Therefore, a defendant will not know which claims of the
12 patents are being asserted against it and sometimes will not even know which of its
13 products or processes are accused of infringing. As discussed above, some courts
14 require disclosure of this information early in the case. See, e.g., N.D. Cal. Patent
15 Local Rule 3-1 (requiring early disclosure of asserted claims and accused
16 products).

17 Menell *et al.*, Patent Case Management Judicial Guide § 2.2.3.1 (Federal Judicial Center 2009).

18 Indeed, this District has adopted its own “patent local rules,” which require disclosure of the
19 accused products only *after* the first case management conference. Patent L. R. 3.1(b). Even
20 then, identification “by name” need be made only to the extent “possible.” *Id.*

21 The cases cited by Defendants are all distinguishable. In *Gen-Probe v. Amoco*, the
22 complaint’s patent infringement claims were criticized for a number of other shortcomings. *Gen-*
23 *Probe v. Amoco*, 926 F.Supp. 948, 960-962 (S.D. Cal. 1996). Most glaringly, the claims were
24 stated “in a confusingly conclusory manner, accusing each of five defendants of three very
25 different causes of action on two different patents, all in one conclusory sentence[.]” *Id.* at 960.
26 The court found the complaint “unclear [as to] which of the five [defendants] is accused of which
27 type of infringement[: direct, inducement, or contributory.]” *Id.* “Even were there no other
28 deficiencies, this confusion of which claims apply to which defendants [required] that the
complaint be dismissed[.]” *Id.* at 961. *Gen-Probe* was distinguished by a later case on precisely
this ground. See *Bender v. Broadcom Corp.*, 2009 WL 3571286, at *4 fn.4 (N.D. Cal. 2009).
Gen-Probe is not applicable here.

 In *HP v. Intergraph*, the plaintiff accused Intergraph of making and selling “infringing
software and hardware products[.]” *HP v. Intergraph*, 2003 U.S. Dist. LEXIS 26092, at *5-6

1 (N.D. Cal. 2003). The defendant, however, “produces some 150 technology platforms which are
2 implemented in over 4000 end-user application products.” *Id.* at *6. Given the large number of
3 products, the court found that the complaint failed to provide the defendant “fair notice” of what
4 is being accused. *Id.* at *6-7; *see also Bender v. LG Electronics*, 2010 WL 889541 (N.D. Cal
5 2010)(infringement allegations implicated thousands—if not millions—of defendant’s circuits);
6 *Realtime Data v. Morgan Stanley*, 721 F.Supp.2d 538, 541 (E.D. Tex. 2010) (infringement
7 allegations implicated numerous IT services provided by defendant). *HP* was later limited to its
8 facts in *Resonance Technology*, which held that where the number of products is limited, a
9 description that “narrowly identified the infringing products” is sufficient. *Resonance*
10 *Technology v. Koninklijke Philips Electronics*, 2008 WL 4330288, at *2 (C.D. Cal. 2008).
11 Millennial Media and Jumptap provide just one service – mobile advertising.

12 These cases are distinguishable from the present case. Streetspace’s Complaint is not
13 unclear as to which Defendant is accused of which type of infringement. *See, e.g.*, D.E. 30, ¶¶
14 176, 180. Nor does the Complaint impose on Defendants the heavy burden of scouring thorough
15 millions of circuits. In contrast to the defendants in the cited cases, Millennial Media and
16 Jumptap do not sell multiple products and services. In fact, each company provides just one
17 service: access to their respective mobile advertising networks. *Id.*, ¶¶ 35, 37.

18 It is remarkable and sanctionable that Millennial Media and the other Defendants argue
19 that the FAC “does not name or otherwise specify a single [accused] product or service” for
20 Millennial Media because in ¶ 35 of the FAC, “Millennial Media’s MYDAS advertising platform
21 and UMPIRE ad serving technology” are expressly identified. MYDAS and UMPIRE are the
22 only two distinctly named products or services offered by Millennial Media, according to its
23 website. The allegations set forth in ¶ 35 of the FAC are incorporated by reference into Count
24 Eight – Patent Infringement against Millennial Media. *See id.*, ¶ 174. Even if the law required a
25 patentee to name specific products and services in its infringement allegations, which it does not,
26 a reasonable attorney would not advance Millennial Media’s argument after reading the FAC.²

27 ² Millennial Media’s counsel advancing this argument is the same counsel that is subject to a pending motion to
28 disqualify. *See* D.E. 29.

1 In addition, there is no publicly available information from which Streetspace can discern
2 the specific name of Jumtapt’s accused products and services. Like many other single-service
3 Internet companies, Jumtapt does not appear to publicize and market a separate or distinct name
4 for its service. Rather, the service is simply associated with the company name – “the Jumtapt
5 mobile ad network.” Streetspace’s FAC does adequately identify the accused service by
6 identifying the service provider (Jumtapt), and Defendants’ attempt to analogize this case to the
7 various cases they present is misleading.

8 **2. The Amended Complaint Conforms with Form 18 of the Federal Rules
9 of Civil Procedure**

10 As mentioned above, *Twombly* and *Iqbal* do not raise the standard for pleading **direct**
11 patent infringement above what is currently required by the Federal Rules of Civil Procedure. In
12 particular, the Rules include Form 18, which “provides an example of alleging direct patent
13 infringement[.]” *Elan*, 2009 WL 2972374, at *2. “Under Rule 84 of the Federal Rules of Civil
14 Procedure[,] a court must accept as sufficient any pleading in conformance with the form[.]” *Id.*
15 The sufficiency of Form 18 is acknowledged even in cases cited by Defendants: “The Supreme
16 Court’s decisions in *Twombly* and *Iqbal* have not affected the adequacy of complying with Form
17 18. To hold otherwise would render Rule 84 and Form 18 invalid, which cannot be done by
18 judicial action.” *Realtime Data*, 721 F.Supp.2d at 542.

19 Form 18 does not require the identification of any specific accused product or service.

20 General types of products such as “electric motors” will do:

21 2. On date, United States Letters Patent No. _____ were
22 issued to the plaintiff for an invention in an electric motor. The plaintiff
23 owned the patent throughout the period of the defendant’s infringing acts
24 and still owns the patent.

25 3. The defendant has infringed and is still infringing the Letters Patent by
26 making, selling, and using electric motors that embody the patented
27 invention, and the defendant will continue to do so unless enjoined by this
28 court.

29 Fed. R. Civ. P. Form 18 (2007), ¶¶ 2, 3; *see also Advanced Analogic Technologies v. Kinetic*
30 *Technologies*, 2009 WL 1974602, at *1 (N.D. Cal. 2009) (“To the extent [the defendant] seeks a
31 more definite statement providing further details as to the infringing products,” the court ruled,
32 “the motion will be denied, for the reason the material sought[] is obtainable through

1 discovery.”); *Resonance Technology*, 2008 WL 4330288, at *2 (“Like the example in Form 18, in
2 this case Plaintiff’s [complaint] alleges a specific ‘type’ of product that allegedly infringes upon
3 the patents at issue[.] . . . [It] is not so vague or ambiguous that Defendants cannot reasonably be
4 required to respond.”)

5 Streetspace’s allegation of infringing products and services easily passes the test. As an
6 initial matter, contrary to Defendants’ assertions, the FAC does identify Millennial Media’s
7 infringing system by name. *See* D.E. 30, ¶ 35. With respect to Jumtap, the Complaint alleges
8 that Jumtap is infringing “by making, using, selling . . . a method and/or system for providing
9 personalized information and/or targeted online advertising services based on location,
10 consumers’ profiles and/or usage history.” *Id.* at ¶ 189. This sentence plainly notifies Jumtap
11 that its online advertising service (and the system for delivering that service) is believed to be
12 infringing. The Complaint then devotes several more paragraphs to allege additional details
13 about the accused system and service. *See, e.g., id.* at ¶¶ 191 (referring to Jumtap’s “mobile
14 advertising network”), 193 (databases to track consumer data), 194 (software to target ads).
15 These allegations narrowly identify the type of service being accused. They go way beyond what
16 is required by Form 18 (reciting only “electric motors”), and are not “so vague or ambiguous” as
17 to preclude Jumtap from responding to the charge.

18 Ironically, despite their repeated complaints that Streetspace’s allegations are “far too
19 vague,” Millennial Media and Jumtap were able to glean enough from the Complaint to
20 formulate a non-infringement argument. *See* D.E. 49 at 6 (arguing that they do not infringe
21 because neither company provides a “terminal” as part of its service). So confident are they of
22 their non-infringement that Millennial Media and Jumtap urge this Court to dismiss the claims
23 against them “with prejudice”—before having even received “fair notice” of what Streetspace is
24 actually accusing. *Id.* The reality is, Millennial Media and Jumtap received fair notice of their
25 accused system and service the day they received the initial complaint. Instead of continuing to
26 quibble over the words of this Complaint, they should try responding to it.

1 **3. Now Is Not the Time for an Element-by-Element Infringement**
2 **Analysis**

3 With regard to Defendants’ argument that Millennial Media and Jumptap do not infringe
4 because they provide no “terminal,” Streetspace disagrees. Regardless, now is not the time to
5 engage in this sort of debate. Even if Defendants’ argument were correct—which it is not—a
6 Rule 12(b)(6) motion is not the proper vehicle to construe a patent or argue non-infringement.
7 The question before this Court is simply whether Streetspace has stated a plausible claim. Indeed,
8 the law does not even require the plaintiff to allege the claim elements of the asserted patent.
9 *Phonometrics*, 203 F.3d at 794. “[I]t is in the discovery phase of litigation, not pleading, that the
10 parties are required to conscientiously develop facts that support the various theories of
11 infringement, or non-infringement as the case may be.” *Tune Hunter, Inc. v. Samsung*
12 *Telecommunications Am., LLC*, 2010 WL 1409245, *4 (E.D. Tex. 2010). For the reasons stated
13 above, Streetspace properly states its claims of direct infringement against Millennial Media and
Jumptap. These claims should not be dismissed, let alone dismissed with prejudice.

14 **B. Streetspace Properly States Its Claims for Indirect Infringement**

15 Defendants next argue that Streetspace’s allegation of their knowledge of the patent-in-
16 suit is improper because “as a matter of law[,] knowledge *after* filing of the present action is *not*
17 sufficient for pleading the requisite knowledge for indirect infringement.” See D.E. 49 at 8
18 (citing *Xpoint Techs., Inc. v. Microsoft Corp.*, 2010 WL 3187025, at *6 (D. Del. 2010) and
19 *Mallinckrodt Inc. v. E-Z-Em, Inc.*, 670 F.Supp.2d 349, 354, n.1 (D. Del., Nov. 20, 2009)).
20 According to them, unless they knew of the ’969 Patent before the filing of the initial complaint,
21 Streetspace cannot state a claim of indirect infringement.³ See D.E. 49 at 9 (“Either Streetspace
22 can plead . . . the requisite knowledge of the ’969 Patent at the time it filed the original
23 Complaint, or it cannot.”). This contention is also incorrect. Streetspace is alleging the
24 Defendants gained knowledge of the ’969 patent at least as early as the filing date of the initial
25 complaint – not after the filing date.

26 _____
27 ³ If this contention was correct, then every patentee would have to put an accused infringer on notice of the
28 applicable patent and/or infringement prior to filing a complaint – thereby risking the filing of a declaratory judgment
initiated by the accused infringer – which is not the current state of the law.

1 **1. *Xpoint* and *Mallinckrodt* Do Not Prohibit an Indirect Infringement**
2 **Claim from Alleging the Accused’s Knowledge of the Patent-in-Suit**
3 **Based on His Receipt of the Initial Complaint**

4 The two decisions cited by Defendants—*Xpoint* and *Mallinckrodt*—are gross outliers that
5 have not been followed by any court outside of Delaware. In fact, they are *not* even the law in the
6 Second Circuit. *See, e.g., Automated Transactions, LLC v. First Niagra Fin. Group, Inc.*, 2010
7 U.S. Dist. LEXIS 141275, at *15-16 (W.D.N.Y. 2010) (“[I]n this Circuit at least, pre-filing
8 knowledge of the patents is **not** essential to a claim of induced infringement.” (emphasis added)).

9 Additionally, in both of those cases, the complaint did not actually rely on its filing date as
10 a basis for knowledge of the patent. In both cases, the plaintiff did not allege the origin of the
11 defendant’s knowledge until during later argument. *See Xpoint*, 2010 WL 3187025 at *6,
12 *Mallinckrodt*, 670 F. Supp. 2d at 354, n.1. At most, these decisions merely hold that this sort of
13 allegation cannot be raised for the first time *in later argument*. They do not support the result that
14 Defendants urge here—that Streetspace be barred from alleging *in its Complaint* this action’s
15 commencement date as the date of actual knowledge of the patent.

16 The facts of this case are different from *Xpoint* and *Mallinckrodt*. Here, the pleading at
17 issue is an *amended* complaint, filed after the initial complaint. Here, the FAC states that
18 Defendants gained actual knowledge of the ’969 Patent upon receiving the initial complaint. *See,*
19 *e.g., D.E. 30, ¶ 90.* And here, the FAC states that Defendants continued their inducing conduct
20 after receiving the initial complaint. *See, e.g., id.* at ¶¶ 71-73. These allegations clearly specify
21 that Defendants engaged in inducing conduct with the requisite knowledge of the patent-in-suit.

22 Streetspace acknowledges that it currently lacks absolute knowledge as to Defendants’
23 awareness of the ’969 Patent before this lawsuit began. But rather than arguing about whether it
24 can or cannot plead Defendants’ pre-filing knowledge of the ’969 Patent, Streetspace simply
25 states the indisputable fact that Defendants have known of the patent since at least as early as the
26 filing of the first complaint, i.e., August 23, 2010. *See, e.g., D.E. 30, ¶ 109.* A plaintiff is not
27 precluded from stating such facts to support a claim of post-filing indirect infringement. *See, e.g.,*
28 *Minkus Electronic Display Systems v. Micron Systems*, 2011 U.S. Dist. LEXIS 26827 (D. Del.

1 Mar. 16, 2011)(The court granted defendant’s motion to dismiss, but only to the extent that
2 Minkus’ claim for indirect infringement sought pre-filing damages. As to the defendant’s *post-*
3 *filing* activities, plaintiff’s indirect infringement claim actually survived.). Defendants’ reliance
4 on *Xpoint* and *Mallinckrodt* is thus misplaced.

5 **2. If Streetspace Is Prevented from Stating Its Claims for Indirect**
6 **Infringement, Defendants Will Effectively Escape Liability for Their**
7 **Actionable Post-Filing Conduct**

8 Defendants’ view of the law makes no sense. If they were correct, then no defendant will
9 be held liable for indirect infringement where the defendant first learns of the infringed patent
10 from the initial complaint—because no plaintiff will be able to state a claim in such a situation.
11 But that is simply not the case. It is well settled that liability for indirect infringement may be
12 triggered upon a filing of a complaint for patent infringement. *See, e.g., Broadcom v. Qualcomm,*
13 *2007 U.S. Dist. LEXIS 62764, *15 (C.D. Cal. 2007)* (“Given Qualcomm’s knowledge of
14 Broadcom’s contentions at least as of the date of the filing of the complaint in May 2005, the
15 contention that Qualcomm lacked the required specific intent [for inducement] rings hollow.”),
16 vacated on other grounds, *Broadcom Corp. v. Qualcomm, Inc., 2007 U.S. Dist. LEXIS 86627*
17 *(C.D. Cal. 2007); Monolithic Power Systems v. O2 Micro International, 476 F.Supp.2d 1143,*
18 *1158 (N.D. Cal. 2007)* (Denied in part a defendant’s motion for summary judgment because “it
19 has known, since it was served,” that “the combination for which its components were especially
20 made is allegedly both patented and infringing.”); *Cybiotronics, Ltd. v. Golden Source*
21 *Electronics, Ltd., 2001 U.S. Dist. LEXIS 6191, at *22-23 (C.D. Cal. 2001)* (It was “undisputed
22 that [the defendant] was first served with the Complaint[] on February 22, 2000[,] this date
23 represent[ed] the first date that actual knowledge [of the patent-in-suit] may be imputed.”). In
24 general, the law allows a plaintiff to prove a defendant’s knowledge of the patent-in-suit based on
25 his receipt of the initial complaint. *See 35 U.S.C. 287(a)* (“Filing of an action for infringement
26 shall constitute[] notice [of the patent’s existence].”). A defendant can be held liable for indirect
27 infringement because of knowledge of a patent first gained from a complaint for patent
28 infringement. And if the plaintiff can recover for such a claim, then surely he must be able to

1 *plead* it.

2 Indeed, Apple pled indirect infringement in precisely this fashion in *Elan*
3 *Microelectronics v. Apple*, alleging that Elan “has had actual knowledge of the ’218 patent since
4 at least July 1, 2009[, the date it was first served with Apple’s counterclaims].”⁴ Coddington
5 Decl., ¶¶ 2, 3, and Exh. A at ¶ 58. The allegation appeared in Apple’s second amended answer,
6 filed in response to a court order dismissing Apple’s original counterclaims of indirect
7 infringement. *See Elan*, 2009 WL 2972374 at *2. Neither the court nor Elan challenged Apple’s
8 new counterclaims.

9 Like Apple’s allegation in *Elan*, Streetspace’s allegation here is proper. It does not, as
10 Defendants suggest, “fabricate” a claim of indirect infringement where there is none. *See* D.E. 49
11 at 8. On the contrary, it is the Defendants who are attempting to fabricate a defense. If
12 Streetspace is prevented from making its allegation here because of the way Defendants found out
13 about the patent, the same reasoning would also prevent Streetspace from stating its claims in any
14 subsequent pleading. *Id.* at 9 (arguing that any further amendment “would be futile”). In effect,
15 Defendants would escape liability for their post-filing indirect infringement.

16 The law of pleadings is designed to provide adequate notice to the accused; it does not
17 absolve him from punishment where real liability exists. Streetspace’s allegations are simple.
18 Defendants gained actual knowledge of the ’969 Patent upon receiving the initial complaint. *See*,
19 *e.g.*, D.E. 30, ¶ 90. Defendants continued their inducing conduct after receiving the initial
20 complaint. *See, e.g., id.* ¶¶ 71-73. If true, these allegations establish Defendants’ liability for
21 inducement. *See Broadcom*, 2007 U.S. Dist. LEXIS 86627, at *15, *Monolithic Power Sys.*, 476
22 F.Supp.2d at 1158, *Cybiotronics*, 2001 U.S. Dist. LEXIS 6191, at *22-23. Streetspace must be
23 allowed to state its claims.

24 **3. Streetspace’s Factual Allegation Concerning Google’s Patent Database**
25 **Creates a Reasonable Inference of Google’s Knowledge of the Patent-**
in-Suit

26 Defendants next take issue with Streetspace’s factual allegations supporting Google’s

27 ⁴ Remarkably, Defendants (including Apple) advance an argument that apparently does not apply to Apple in other
28 indirect patent infringement cases.

1 knowledge of the patent-in-suit, arguing that “the mere presence of the ’969 Patent within the
2 comprehensive Google Patents database is not sufficient to support a reasonable inference that
3 anyone at Google actually was aware of the existence of the ’969 Patent.” D.E. 49 at 8.

4 However, Defendants cite no meaningful authority to support their argument.

5 Defendants’ argument only recites platitudes. *Id.* at 8-9 (quoting *Twombly*, 550 U.S. 544
6 and *Hackford v. Babbitt*, 14 F.3d 1457 (10th Cir. 1994)). *Twombly* and *Hackford* are not patent
7 infringement cases. The *Hackford* opinion briefly touches on the pleading requirements for
8 standing, but does not discuss it in any detail. *See Hackford*, 14 F.3d at 1464 (“Issue on
9 Appeal”), 1465.

10 *Twombly* dealt with the pleading of an antitrust claim. Specifically, the issue was whether
11 a factual allegation of “parallel conduct” between market participants was enough to suggest an
12 “illegal agreement.” *Twombly*, 550 U.S. at 545. In its analysis, the Supreme Court stated that
13 “[f]actual allegations must be enough to raise a right to relief above the speculative level on the
14 assumption that all of the complaint’s allegations are true.” *Id.* However, it then added: “Asking
15 for plausible grounds does not impose a probability requirement at the pleading stage; it simply
16 calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of
17 illegal agreement.” *Id.*

18 Streetspace’s allegations of Google’s knowledge of the ’969 Patent easily meets the
19 *Twombly* standard. The Complaint states that Google maintains a text-searchable database
20 containing the ’969 Patent. D.E. 30, ¶ 72. It is easy to see why, based on this fact alone,
21 Streetspace would have a reasonable expectation that discovery will reveal additional evidence of
22 Google’s actual knowledge of the patent. Google not only provides access to patents, it also
23 processes them and collects metadata about them. *See id.* Such metadata represents Google
24 knowledge, which may or may not be available to the public. Google’s knowledge becomes even
25 more plausible when one considers that the ’969 Patent deals with, among other things, online
26 advertising—something that is part of Google’s core business. *Id.*, ¶¶ 6, 15. Indeed, it is difficult
27 to understand how a company could spend the effort to acquire, process, and store in its database
28

1 a document related to its business—and yet remain totally ignorant of its existence. Streetspace’s
2 inference is reasonable and plausible, and amounts to more than mere speculation.

3 In any event, as discussed above, Streetspace properly alleges Google’s knowledge of the
4 ’969 Patent because it already states that Google learned of the patent when it received
5 Streetspace’s initial complaint. *See id.*, ¶ 72. That short and plain statement of fact is sufficient,
6 and the law demands no more. *See* Fed. R. Civ. P. 8(a)(2).

7 **V. CONCLUSION**

8 For the foregoing reasons, Defendants’ Motion to Dismiss should be denied entirely.

9 Respectfully submitted,

10 Dated: April 25, 2011

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11
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