

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

UNITED SERVICES AUTOMOBILE
ASSOCIATION,

Plaintiff,

v.

PNC BANK, N.A.,

Defendant.

Civil Action No. 2:20-cv-00319-JRG

ORAL ARGUMENT REQUESTED

**DEFENDANT PNC BANK, N.A.'S MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM**

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INTRODUCTION

The Court should dismiss the First Amended Complaint (“FAC,” ECF No. 18) for failure to state a plausible claim. United Services Automobile Association (“USAA”) alleges that PNC Bank, N.A. (“PNC”) infringes four patents relating to mobile check deposit. But USAA fails to tie, as it must, PNC’s accused mobile banking products and services to the specific claims of any of these four patents.

First, the ’432 patent claims a system that includes both a “customer’s mobile device” and a “bank computer.” USAA alleges that PNC makes, sells, and uses this system, but USAA does not plausibly allege that PNC makes, sells, or uses mobile devices. Because USAA fails to allege facts showing that PNC itself combines all of the claim elements or controls the claimed system as a whole, the FAC does not overcome the divided infringement hurdle this patent raises, and the claim for infringement should be dismissed.

Second, the ’559 patent claims a computing device, intended to be a bank server, that receives a check image sent from a customer’s mobile device. Yet, USAA alleges that the accused computing device is the customer’s mobile device, rather than a bank server, meaning that infringement implausibly requires the customer’s device to receive check images from itself.

Third, the ’571 patent claims monitoring a check image “with respect to a monitoring criterion,” and capturing the image when it “passes the monitoring criterion.” The FAC parrots the claim language and displays screenshots. But it contains no factual allegations tying PNC’s accused system or the screenshots to the elements of the exemplary claim.

Fourth, the ’779 patent—like the ’432 patent—claims a system including a customer’s “mobile device.” USAA alleges that PNC makes, sells, and uses the claimed system, but fails to allege facts plausibly establishing that PNC makes, sells, or uses mobile devices.

Finally, because USAA fails to plausibly allege direct infringement, its indirect infringement claims also fail. In addition, USAA does not adequately plead PNC's intent to induce or contribute to any third-party infringement.

Thus, USAA fails to plead facts plausibly establishing any infringement by PNC.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Count 1 of the FAC should be dismissed because the FAC does not allege facts sufficient to make the claim of infringement of the '432 patent plausible on its face.
2. Whether Count 2 of the FAC should be dismissed because the FAC does not allege facts sufficient to make the claim of infringement of the '559 patent plausible on its face.
3. Whether Count 3 of the FAC should be dismissed because the FAC does not allege facts sufficient to make the claim of infringement of the '571 patent plausible on its face.
4. Whether Count 4 of the FAC should be dismissed because the FAC does not allege facts sufficient to make the claim of infringement of the '779 patent plausible on its face.

BACKGROUND

USAA's First Amended Complaint alleges direct, indirect, and willful infringement of U.S. Patent Nos. 10,482,432, 10,621,559, 8,977,571, and 8,699,779.¹ According to the FAC, PNC infringes each of these patents by providing its customers with applications that can be downloaded to a smartphone or tablet—specifically, the applications “PNC Mobile Deposit” and “PNC Deposit On-Site Mobile®”—along with “any other infringing instrumentalities that

¹ The '432 and '559 patents are both titled “Systems and Methods for Remote Deposit of Checks,” the '571 patent is titled “Systems and Methods for Alignment of Check During Mobile Deposit,” and the '779 patent is titled “Systems and Methods for Image Monitoring of Check During Mobile Deposit.”

include similar functionality,” that enable PNC customers to scan, upload, and deposit checks into their PNC accounts using their mobile devices. FAC ¶¶ 31-33.

Two of the asserted patents claim a system comprising a mobile device. Specifically, the ’432 patent claims a system comprising two components: (1) a “customer’s mobile device including a downloaded app”; and (2) a “bank computer.” ’432 patent at 14:23-48. Likewise, the ’779 patent requires a system comprising a “mobile device having a camera.” ’779 patent at 18:36-51. Although the systems claimed in these two patents require a “mobile device,” the FAC does not allege, as it must to state a claim for direct infringement, that PNC makes, uses, sells, offers, or imports any customers’ mobile devices. In addition, the system claimed in the ’432 patent also requires a “bank computer,” yet the FAC’s assertions of indirect infringement do not include any allegation that PNC’s customers make or use a bank computer.

The ’559 patent claims a “computing device” having two “processing circuitry” components. ’559 patent at 14:22-65. The “first processing circuitry” receives a digital check image transmitted using a mobile device. *Id.* at 14:29-34. The “second processing circuitry” then accepts the check image for deposit. *Id.* at 14:59-65. The FAC, however, implausibly alleges that customers’ mobile devices running “PNC Mobile Deposit” practice the claims of the ’559 patent, by both capturing and receiving the check image from the *same* mobile device that transmitted it. FAC ¶¶ 64-70.

Finally, the ’571 patent describes “monitoring” an image of a check seen through a camera, and automatically taking a picture of the check and sending the picture to a bank when the image “passes” a “monitoring criterion.” ’571 patent at 21:6-17. The FAC alleges that, when a customer uses PNC’s app to deposit a check remotely, the customer can “hold the phone over the check” and “it’ll automatically take photos of the check.” FAC ¶ 79. But the FAC does

not allege that the automatic photographing occurs once a “monitoring criterion” is passed, or where or how any PNC app employs any monitoring criterion.

LEGAL STANDARD

To survive a motion to dismiss, the FAC “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Whether the FAC plausibly states a claim for relief depends upon its “factual content,” not its “labels and conclusions,” nor any “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Id.*; see also *Ruby Sands LLC v. Am. Nat’l Bank*, 2016 WL 3542430, at *2-3 (E.D. Tex. June 28, 2016).

Thus, when a complaint for patent infringement does not allege “how” the accused product “meet[s] the text of the exemplary claim,” it does not “lay out sufficient factual allegations which might permit the Court to find that the *Iqbal/Twombly* standard is met” and therefore should be dismissed under Rule 12(b)(6). *Chapterhouse, LLC v. Shopify, Inc.*, 2018 WL 6981828, at *2 (E.D. Tex. Dec. 11, 2018). Likewise, when a complaint affirmatively alleges that the accused product “d[oes] not contain a key feature of the patent claim,” it does not plausibly allege infringement and dismissal is warranted. *Qwikcash, LLC v. Blackhawk Network Holdings, Inc.*, 2020 WL 6781566, at *3 (E.D. Tex. Nov. 17, 2020).

ARGUMENT

I. USAA Does Not Plausibly Allege Infringement of the '432 Patent (Count 1)

A. USAA does not plausibly allege direct infringement of the '432 patent

1. *USAA does not plausibly allege that PNC makes, uses, or sells a “customer’s mobile device”*

“[T]o state a claim for direct infringement, a plaintiff must explicitly plead facts to plausibly support the assertion that a defendant ‘without authority makes, uses, offers to sell, or sells any patented invention during the term of the patent.’” *Ruby Sands*, 2016 WL 3542430, at *2 (quoting 35 U.S.C. § 271(a)). Because the claimed system here includes a “customer’s mobile device,” ’432 patent at 14:23-48, and because USAA “makes no factual allegations that even remotely suggest that [PNC], a bank, makes, uses, offers to sell, or sells mobile devices,” *Ruby Sands*, 2016 WL 3542430, at *4, USAA’s claim for direct infringement against PNC must be dismissed.

The ’432 patent involves a single independent system claim. The claimed system includes both (1) “a customer’s mobile device” including a “downloaded app” that causes the mobile device to perform certain steps related to taking and sending a photo of a check, and (2) “a bank computer” programmed to update account balances. ’432 patent at 14:23-48. Because the system “includes elements in the possession of more than one actor”—a customer and the bank—it presents a divided infringement problem. *Centillion Data Sys., LLC v. Qwest Commc’ns Int’l, Inc.*, 631 F.3d 1279, 1283 (Fed. Cir. 2011).

Centillion is dispositive here. In *Centillion*, the claimed system also included both a “back-end” computer maintained by a service provider and a “front-end” personal computer maintained by the end user. *Id.* at 1281. The accused product involved a phone company’s servers and a software application provided by the phone company that ran on its customers’

personal computers. *Id.* The patentee accused the phone company of both “making” and “using” the system, and the Federal Circuit rejected both theories as a matter of law. *Id.* at 1286-88.

Here, USAA similarly alleges in conclusory fashion that PNC “mak[es]” the accused system comprising both a back-end “bank computer” and a front-end “customer mobile device” that runs a mobile app. FAC ¶ 51; ’432 patent at 14:23-48. But USAA makes no factual allegations plausibly establishing that PNC “combine[s] all of the claim elements.” *Centillion*, 631 F.3d at 1288. On the contrary, as a matter of law under *Centillion* and the facts pled in the FAC, PNC cannot “make” the entire system because “[t]he customer, not [PNC], completes the system by providing the [mobile device] and installing the [downloaded app].” *Id.*; FAC ¶ 33 (alleging that PNC’s “customers . . . download its application for iPhone or Android devices and use the application and device”); *id.* ¶ 52 (accused system includes a customer’s “mobile device including PNC’s downloaded app, which PNC provides”); *see also Garrett v. TP-Link Rsch. Am. Corp.*, 2020 WL 5517202, at *3 (N.D. Cal. Sept. 14, 2020) (dismissing complaint for failing to allege that defendant made “mobile devices,” one element of the system). And there are no allegations plausibly establishing that PNC is vicariously liable for its customers’ actions: USAA does not allege facts showing that PNC’s customers “act as [PNC’s] agents” or that they are “contractually obligated by [PNC] to act.” *Centillion*, 631 F.3d at 1288.

Centillion likewise forecloses USAA’s conclusory allegation that PNC “us[es]” the claimed system and “controls the infringing system as a whole and obtains benefits from it.” FAC ¶ 51. To “use” a claimed system, 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. There are no allegations showing that PNC “puts into service” the mobile device element—nor can there be,

where, as here, “the entire system is not used until a customer loads software on its [mobile device]” to perform the relevant steps, and “[s]upplying the software for the customer to use is not the same as using the system.” *Centillion*, 631 F.3d at 1286, 1287; *see also* FAC ¶ 33 (alleging that PNC’s “customers . . . download its application for iPhone or Android devices and use the application and device”); *id.* ¶ 52 (accused system includes a “mobile device” with “PNC’s downloaded app, which PNC provides” to customers). “While [PNC] provides software and technical assistance, it is entirely the decision of the customer whether to install and operate this software on its [mobile device].” *Centillion*, 631 F.3d at 1287.

USAA’s conclusory allegations that PNC “sell[s], offer[s] to sell and/or import[s]” the system fail for the same reasons. FAC ¶ 51. Even “assum[ing] that a systems claim is infringed by the sale of the system,” to state a claim based on a “selling” theory of infringement, USAA must allege “all of the elements of the claim are present in the accused systems allegedly sold by [PNC].” *Omega Patents, LLC v. CalAmp Corp.*, 920 F.3d 1337, 1345 (Fed. Cir. 2019); *see also Garrett*, 2020 WL 5517202, at *3. Because there are no allegations that PNC makes the entire system, there are likewise no allegations establishing that PNC sells or offers to sell the complete system to its customers. On the contrary, it is the customers who “complete[] the system by providing the [mobile device] and installing the [downloaded app].” *Centillion*, 631 F.3d at 1288; *see also* FAC ¶ 33 (alleging that PNC’s “customers . . . download its application for iPhone or Android devices and use the application and device”). And the complaint is devoid of any facts showing PNC “importing” the system into the United States.

It does not matter that USAA has alleged that PNC makes and sells the *mobile app* that runs on the customer’s mobile device. That is not what the ’432 patent claims, or what *Centillion* requires. The claimed system here includes not merely an app, but “a customer’s

mobile device including a downloaded app.” ’432 patent at 14:23-27. It was insufficient in *Centillion* that the defendant phone company “provides the software” that runs on the user’s “personal computer processing means,” because to complete the system the customer had to supply the personal computer and install the software on it. *Centillion*, 631 F.3d at 1282, 1287-88. The same is true here. When “mobile devices” are “an element of the [asserted] patent claim,” then “in order to plead a direct infringement claim under a ‘make’ or ‘sell’ theory, [a patentee] must plead enough facts to show that [defendant] makes or sells mobile devices.” *Garrett*, 2020 WL 5517202, at *3. “An application to be installed on a mobile device is not the same thing as the ‘mobile device’ itself.” *Id.* Because “there are no allegations that [PNC] makes or sells a ‘mobile device’ to consumers,” direct infringement of the ’432 patent is not plausibly pled. *See id.*

In sum, USAA’s claim of direct infringement by PNC of the ’432 patent must be dismissed because USAA “makes no factual allegations that even remotely suggest that [PNC], a bank, makes, uses, offers to sell, or sells mobile devices.” *Ruby Sands*, 2016 WL 3542430, at *4.

2. *USAA does not plausibly allege that PNC’s customers make or use a “bank computer”*

Although USAA’s complaint focuses mostly on PNC, it also includes a conclusory allegation that “third parties” directly infringe the ’432 patent by “mak[ing] and/or us[ing] PNC Mobile Deposit in an infringing manner.” FAC ¶ 56; *see also id.* ¶ 51. The only “third parties” identified by USAA are PNC’s customers—the “end users.” *Id.* ¶ 56. But USAA includes no factual allegations plausibly establishing that PNC’s customers make or use the entire system—in particular, the “bank computer.” ’432 patent at 14:40-42.

As to “making,” USAA does not and cannot plead that PNC’s customers “combine all of the claim elements.” *Centillion*, 631 F.3d at 1288. There are no factual allegations showing that PNC’s customers provide the essential element of a “bank computer programmed to update a balance of an account,” ’432 patent at 14:40-42, which is entirely implausible.

As to “using,” USAA does not include even conclusory allegations—let alone factual ones—plausibly showing that USAA’s customers “put the invention into service, *i.e.*, control the system as a whole and obtain benefit from it.” *Centillion*, 631 F.3d at 1284. Use requires not only that customers “use each and every element of a claimed system,” *id.*, but also that they “control . . . the ability to place the system as a whole into service,” *id.*, and “obtain[] ‘benefit’ from each and every element of the claimed system.” *Intellectual Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1329 (Fed. Cir. 2017). Here, however, USAA has alleged that “PNC controls the infringing system as a whole and obtains benefits from it.” FAC ¶ 51 (emphasis added); *see also id.* ¶ 52 (PNC provides its app to customers “to control check deposit”); *id.* ¶ 56 (PNC “controls . . . its end users”). USAA has not pled that PNC’s *customers* actually control the accused system as a whole. That would be inconsistent with what USAA has pled. Nor has USAA alleged facts showing that customers, as opposed to PNC (*see id.* ¶ 26), benefit from each element of the system. This is fatal to the complaint. *See Grecia v. McDonald’s Corp.*, 724 F. App’x 942 (Fed. Cir. 2018) (affirming dismissal of complaint that failed to allege facts plausibly showing how accused direct infringer benefitted from each and every element of the claimed system).

B. USAA does not plausibly allege indirect infringement of the ’432 patent

The Court should also dismiss USAA’s conclusory allegations that PNC has induced infringement of and contributorily infringed the ’432 patent under 35 U.S.C. § 271(b) and (c), respectively. *See* FAC ¶¶ 56-57.

First, the induced and contributory infringement allegations should be dismissed in their entirety because USAA does not plausibly allege any acts of direct infringement. Induced infringement and contributory infringement are types of indirect infringement that “require[] an act of direct infringement as a predicate, and thus, there cannot be indirect infringement without direct infringement.” *Regents of the Univ. of Mich. v. Leica Microsystems Inc.*, 2020 WL 2084891, at *4 (N.D. Cal. Apr. 30, 2020) (citing *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915, 920-26 (2014)). The only alleged predicate acts of direct infringement of the ’432 patent, however, are the same uses of PNC Mobile Deposit described in USAA’s allegations of direct infringement by PNC. FAC ¶¶ 56-57. As shown above, those allegations of PNC’s direct infringement are insufficient to state a claim. Because the allegations of indirect infringement are entirely dependent upon and derivative of those implausible allegations of direct infringement, the allegations of indirect infringement are implausible as well.

Second, insofar as USAA alleges indirect infringement by PNC before this case began, the claims should be dismissed for the additional reason that USAA does not allege any facts plausibly showing that PNC knew of the ’432 patent. “Proving either type of alleged indirect infringement, induced or contributory, requires a showing that the defendant had knowledge of the patent.” *Chan v. AT&T Mobility LLC*, 2012 WL 13019050, at *4 (W.D. Wash. July 18, 2012); *see AMG Prods., Inc. v. Dirt Cheap, LLC*, 2019 WL 2484260, at *3 (E.D. Tex. Mar. 12, 2019) (“[l]iability for induced infringement can only attach if the defendant knew of the patent”). Thus, when a complaint does not plausibly allege that the defendant knew of the asserted patent before the complaint was served, claims of pre-suit indirect infringement should be dismissed. *See, e.g., Realtime Data LLC v. EchoStar Corp.*, 2017 WL 4693512, at *6 (E.D. Tex. July 19, 2017) (dismissing pre-suit indirect infringement claims because plaintiff “has not provided any

factual basis” for assertions that defendant “had pre-suit knowledge of the asserted patents”), *adopted*, 2017 WL 3599537 (E.D. Tex. Aug. 21, 2017).

Here, this litigation could not have established PNC’s knowledge of the ’432 patent before the original complaint (ECF No. 1) (hereinafter “Complaint”) was served, and USAA’s factual allegations in the Complaint or the FAC do not plausibly establish that PNC knew of the ’432 patent earlier. USAA does not allege that it affirmatively put PNC on notice of the patent by letter or otherwise. The only allegations that purport to address pre-suit knowledge are USAA’s assertions that the patents-in-suit “are publicly known and have been widely publicized in the banking industry, including in major publications read by PNC employees and specifically referring to PNC”; that PNC previously sued Wells Fargo for infringing family members of the ’432 patent (but not the ’432 patent itself); and that PNC is aware of USAA’s “Deposit@Mobile” software that allegedly practices the ’432 patent. FAC ¶¶ 35-39.

Alternatively, USAA alleges that even if PNC did not know of the patents, it was “willfully blind by deliberately avoiding investigating” USAA’s patents or mobile deposit software. *Id.* ¶ 43.

None of these allegations are sufficient to show that PNC knew of—or was willfully blind to—the ’432 patent. News articles and other published materials about USAA’s patents generally, which the Complaint and FAC do not attach or even identify by title, do not plausibly suggest that PNC knew of the ’432 patent specifically. *See Finjan, Inc. v. Juniper Networks, Inc.*, 2018 WL 905909, at *4 (N.D. Cal. Feb. 14, 2018) (“allegations that [defendant] knew about [plaintiff’s] patent portfolio and an ‘exemplary,’ non-asserted patent” do not show the requisite knowledge). Publicity about USAA’s litigation involving patents that are not asserted here, and involving Wells Fargo’s accused products that are not accused here, is likewise inadequate because “knowledge of another patent within the same family as an asserted patent” does not

show “knowledge of the asserted patent.” *Intellectual Ventures II LLC v. Sprint Spectrum, L.P.*, 2019 WL 1987172, at *2 (E.D. Tex. Apr. 12, 2019), *adopted*, 2019 WL 1979866 (E.D. Tex. May 3, 2019). Similarly, allegations that PNC “w[as] aware” of USAA’s patented product do not support an inference that PNC ever used USAA’s product—and, even if PNC did, the FAC does not address “whether [the product] was marked” as covered by the ’432 patent “at the time” PNC supposedly used it. *See Rehrig Pac. Co. v. Polymer Lights (Israel), Ltd.*, 2019 WL 8161141, at *4 (C.D. Cal. Aug. 30, 2019) (granting motion to dismiss for failure to plausibly allege pre-suit knowledge of the patent).

Finally, PNC’s alleged failure to investigate USAA’s patents does not plausibly show willful blindness. PNC could not have been willfully blind to the ’432 patent unless it “subjectively believe[d] that there [was] a high probability” it infringed that patent, which the FAC does not allege. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011). Even an allegation that PNC had a policy of instructing employees generally to ignore patents is not sufficient. “[M]ore must be alleged to show a policy of ignoring patents caused an alleged infringer’s actions to ‘surpass recklessness and negligence’ and rise to the level of ‘willful blindness.’” *Nonend Inventions, N.V. v. Apple, Inc.*, 2016 WL 1253740, at *3 (E.D. Tex. Mar. 11, 2016), *adopted*, 2016 WL 1244973 (E.D. Tex. Mar. 30, 2016).

II. USAA Does Not Plausibly Allege Infringement of the ’559 Patent (Count 2)

A. USAA does not plausibly allege direct infringement of the ’559 patent

1. *USAA does not plausibly allege direct infringement of the ’559 patent, which relates to a bank server, because USAA incorrectly focuses on the customer’s mobile device*

To survive a motion to dismiss, USAA must “plausibly allege that the accused products meet ‘each and every element of at least one claim’ of the asserted patent.” *Qwikcash*, 2020 WL 6781566, at *3. Where “the claim language and alleged features of the accused products [a]re

sufficiently incongruous as to make the complaint implausible on its face”—for example because “the infringement allegations in [the] Complaint cannot be reconciled with the plain text of [the patent]”—the complaint must be dismissed. *Id.* at *2-3. Here, USAA’s FAC alleges that customer mobile devices running PNC’s mobile app constitute the claimed device or perform the claimed method. FAC ¶¶ 64-70. That “reading, however, is irreconcilable with the structure and text of [the asserted claims], which unmistakably provide” that the claimed device performing the claimed method must be something *other* than the customer mobile device. *Qwikcash*, 2020 WL 6781566, at *5.

The ’559 patent includes two independent claims, a device claim and a method claim. Independent claim 1 claims “[a] computing device” comprising a “first processing circuitry” that performs a series of specified “first operations”; and a “second processing circuitry” that performs a “second operation[.]” ’559 patent at 14:22-65. Independent claim 10 very similarly claims a “method for controlling a computing device” comprising a “first processing circuitry” that performs the same series of “first operations”; and a “second processing circuitry” that performs the same “second operation[.]” *Id.* at 15:38-16:18. In both cases, among the series of operations performed by the “first processing circuitry” is the following step: “receiv[ing] a digital image depicting at least portions of [a] check submitted by a user for the remote deposit of the check, the digital image transmitted using a mobile device”

Because the “first processing circuitry” *receives* a digital image *from* the user’s mobile device, the first processing circuitry must be something distinct from the user’s “mobile device,” which *sends* the image. And because that same “first processing circuitry” must carry out ten other enumerated operations, *id.*, those operations must also be carried out on a device other than the user’s mobile device. As the specification explains, that something else is “a server or other

electronics operated by a financial institution.” *Id.* at 9:20-21; *see also id.* at 12:25, 12:38. The bank server, not the user’s mobile device, carries out the various operations that claims 1 and 13 specify for the first and second processing circuitries, such as receiving check images and performing optical character recognition. *See id.* at 9:17-13:7.

To the extent USAA’s FAC identifies any facts in alleging infringement, it points to the user’s mobile device running PNC’s mobile app. For the step of receiving a digital image of a check transmitted from a mobile device, for example, USAA points to website marketing materials depicting an Apple iPhone and iPad and Android phone running the PNC mobile app, as well as pictures of the PNC mobile app running on an iPhone. FAC ¶ 64. For the steps of applying optical character recognition, determining a deposit amount, and comparing the determined amount against a customer-entered amount—all of which must be executed on the first processing circuitry (’559 patent at 14:22-65)—USAA points to an error message displayed on the “PNC Mobile Deposit application.” FAC ¶ 66. For the step of optically reading a MICR line, which must likewise be executed on the first processing circuitry, USAA similarly points to messages displayed on the mobile app, using a picture of the app running on an iPhone. *Id.* ¶ 67. And for the step of determining that the digital image is suitable and sufficient to forward with the deposit, USAA points to the mobile app providing a confirmation message of a successful deposit. *Id.* ¶ 69; *see also id.* ¶ 55. None of these allegations involving the customer’s mobile device can demonstrate the “first processing circuitry” required by the ’559 patent because, as shown above, the claimed first processing circuitry must be something *other* than the mobile device.

USAA’s attempt to conflate steps carried out on the customer’s mobile device with those on the bank’s server demonstrates that USAA is impermissibly asserting two inconsistent

patents. The '432 patent requires that the “customer mobile device” perform the step of “confirming that the mobile check deposit can go forward after optical character recognition is performed on the check in the photo.” '432 patent at 14:24-47. The '559 patent, meanwhile, requires that a “first processing circuitry”—something *other* than the customer mobile device—performs the steps of “determin[ing] the digital image [of the check] is ... sufficient to go forward with the deposit” and “apply[ing] optical character recognition to the digital image.” '559 patent at 14:24-58. In trying to allege that PNC infringes both patents, USAA has tried to be consistent by pointing to the mobile device as satisfying all these limitations. But that squarely contradicts the language and structure of the '559 patent, which makes clear that the “first processing circuitry” performing these steps cannot be the mobile device.

2. *USAA does not plausibly allege direct infringement of the '559 patent because USAA fails to allege how the accused product is tied to the asserted patent's claims*

Besides the incongruity between the text of the '559 patent and the FAC's allegations, there are a number of claim elements for which USAA alleges no facts at all other than a bare and conclusory recitation that the limitation is present somewhere in PNC's products. For example, the FAC asserts that “PNC Mobile Deposit detects an image format of the digital image, determines that it is stored in a first image format, and converts that image, wherein an image quality of the first image format is greater than an image quality of the second format”—with no particular functionality, device, feature, or example identified. FAC ¶ 65. This is just a recitation of language from claim 1 of the '559 patent and an assertion that it is present somewhere in “PNC Mobile Deposit,” which USAA vaguely and tautologically defines to include “PNC's mobile remote deposit capture systems, including but not limited to *PNC Mobile Deposit* and *PNC Deposit On-Site Mobile®* . . . along with any other infringing instrumentalities

that include similar functionality.” *Id.* ¶ 31. It is entirely unclear from this allegation how specifically PNC is alleged to practice this limitation of the asserted claim.

Similarly, the FAC contains a bare allegation that “PNC Mobile Deposit includes second processing circuitry and a second memory having stored thereon executable instructions that, when executed by the second processing circuitry, cause the second processing circuitry to perform second operations, including accepting the digital image for check deposit in place of the check depicted in the digital image.” *Id.* ¶ 70. USAA gives no indication as to what constitutes the “second processing circuitry and second memory” that performs this operation, or how it is distinct from the “first processing circuitry” and “first memory” that is alleged to perform all the other operations. Indeed, as discussed above, USAA appears to allege that the “first processing circuitry” is the customer’s mobile device. But USAA also points to the mobile device in connection with the “second processing circuitry,” citing as support for this limitation the allegation that the mobile app “provides a confirmation of successful deposit and instructs users to retain the original check.” *Id.* PNC alleges no facts plausibly showing that a “second processing circuitry” distinct from the first performs the operation of accepting the check image, or that a mobile device has two separate processing circuitries for processing the check image and accepting the check image.

This failure to “identify” each element in the accused products and “show[] that the Accused Products contain” each element is fatal. *Metricolor LLC v. L’Oreal S.A.*, 791 F. App’x 183, 188 (Fed. Cir. 2019). In *Artrip v. Ball Corp.*, 735 F. App’x 708 (Fed. Cir. 2018), the court held that a plaintiff plausibly pleads direct infringement “by specifically identifying the infringing products and alleging those specific products included each element of the patented claims.” *Id.* at 714 (citing *Disc Disease Sols. Inc. v. VGH Sols., Inc.*, 888 F.3d 1256 (Fed. Cir.

2018)). The court affirmed dismissal of a complaint that did not “identify, for example, by photograph or name, any of the particular machines that allegedly infringe other than by broad functional language.” *Id.* at 715. So, too, here. The recitation of the asserted claim elements coupled with the assertion that “PNC Mobile Deposit” includes each element does not specifically identify the infringing products so as to put PNC on notice of what it must defend. “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

B. USAA does not plausibly allege indirect infringement of the ’559 patent

The Court should likewise dismiss USAA’s induced and contributory infringement allegations for the ’559 patent. *See* FAC ¶¶ 71-72. Those allegations are in substance the same as the induced and contributory infringement allegations for the ’432 patent, and they fail for the same reasons. As with the ’432 patent, USAA does not plausibly allege any predicate acts of direct infringement. Also as with the ’432 patent, USAA does not plausibly allege PNC’s knowledge of the ’559 patent before this case began because USAA does not allege that PNC personnel read any news articles or other publications about the ’559 patent specifically; the prior Wells Fargo litigation did not involve the ’559 patent or any of PNC’s accused products; and USAA does not allege that PNC ever used USAA’s product at a time when it was marked as covered by the ’559 patent. *See id.* ¶¶ 35-42. Likewise, the FAC does not plausibly allege willful blindness, *id.* ¶ 43, because it does not allege any facts supporting a plausible inference that PNC “subjectively believe[d] that there [was] a high probability” it infringed that the ’559 patent. *See Global-Tech*, 563 U.S. at 769.

III. USAA Does Not Plausibly Allege Infringement of the '571 Patent (Count 3)

A. USAA does not plausibly allege direct infringement of the '571 patent

USAA's allegations of direct infringement of the '571 patent are conclusory and fail to state a claim for relief that is plausible on its face. They consist of only two paragraphs that do little more than repeat language from claim 1 of the '571 patent and show screen-shots relating to the accused product. FAC ¶¶ 79-80. As the Court has recognized, screen-shots relating to the accused product "may be useful in laying out a plausible allegation of patent infringement," but by themselves they do not "constitute the requisite factual allegations." *Chapterhouse*, 2018 WL 6981828, at *2. To survive a motion to dismiss, the patentee "must further allege how the screenshots meet the text of the exemplary claim in order to lay out sufficient factual allegations which might permit the Court to find that the *Iqbal/Twombly* standard is met." *Id.* USAA fails to do so.

Claim 1, the independent claim whose language the FAC parrots, is directed to computer-readable instructions that cause a processor to "monitor an image of [a] check . . . with respect to a monitoring criterion" and "capture the image of the check with the camera when the image of the check passes the monitoring criterion." '571 patent at 21:6-14. The FAC contains no factual allegations, however, about any "monitoring criterion" that PNC supposedly uses. It alleges merely that "PNC Mobile Deposit . . . monitor[s] an image of the check . . . with respect to a monitoring criterion," and shows screen-shots stating that the users "hold[s] the phone over the check" and the app "automatically take[s] photos of the check for you." FAC ¶ 79. These allegations do not identify any criteria that must be passed before the mobile device's camera takes a picture of the check. With no allegations about "how the screenshots meet the text of the exemplary claim," as the Court held were necessary in *Chapterhouse*, the Compliant does not provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," and

therefore does not cross the line from a claim that is a sheer possibility to one that plausibly shows an entitlement to relief. *Iqbal*, 556 U.S. at 678.

B. USAA does not plausibly allege indirect infringement of the '571 patent

The Court also should dismiss USAA's induced and contributory infringement allegations for the '571 patent. *See* FAC ¶¶ 82-83. Those allegations are in substance the same as the induced and contributory infringement allegations for the '432 and '559 patents, and they fail for the same reasons, namely, that USAA does not plausibly allege any predicate acts of direct infringement, PNC's knowledge of the '571 patent before this case began, or willful blindness.

The only potential distinction between the indirect infringement allegations for the '571 patent and the indirect infringement allegations for the '432 and '559 patents is that, unlike the '432 and '559 patents, the '571 patent was the subject of litigation between USAA and Wells Fargo. *See id.* ¶¶ 20, 36, 37. But that is a distinction without a difference because the accused PNC product was not at issue in the prior Wells Fargo litigation, PNC was not involved in that litigation, and a determination about Wells Fargo's infringement has no bearing on PNC's alleged belief about a risk of infringement by PNC's own products.

IV. USAA Does Not Plausibly Allege Infringement of the '779 Patent (Count 4)

A. USAA does not plausibly allege direct infringement of the '779 patent

USAA's allegations of direct infringement of the '779 patent are implausible for substantially the same reasons that its allegations of direct infringement of the '432 patent are implausible. Like the '432 patent, claim 1 of the '779 patent—the claim to which the FAC appears to refer—claims a “system” comprising a “mobile device having a camera.” '779 patent at 18:36-37; *see* FAC ¶ 89 (alleging that “PNC Mobile Deposit is a system for depositing checks, comprising a mobile device with a camera”). Stating a claim for direct infringement requires

USAA to allege facts supporting an inference that PNC makes, uses, offers to sell, or sells the patented invention, 35 U.S.C. § 271(a), but the FAC contains no factual allegations that PNC makes, uses, offers to sell, or sells mobile devices. *See Ruby Sands*, 2016 WL 3542430, at *4.

USAA has not plausibly alleged that PNC makes the claimed system because, as the FAC admits, “[t]he customer,” not PNC, “completes the system” by providing the mobile device and installing the downloaded app. *Centillion*, 631 F.3d at 1288; FAC ¶ 33 (alleging that PNC’s “customers . . . download its application for iPhone or Android devices and use the application and device”); *id.* ¶ 52 (accused system includes a customer’s “mobile device including PNC’s downloaded app, which PNC provides”).

Nor has USAA alleged facts plausibly showing that PNC uses the claimed system, or controls the claimed system as a whole. Thus, *Centillion* likewise forecloses USAA’s conclusory allegation that PNC “us[es]” the claimed system and “controls the infringing system as a whole and obtains benefits from it.” FAC ¶ 51. There are no allegations showing that PNC “puts into service” the mobile device element—nor can there be, where, as here, “the entire system is not used until a customer loads software” on the mobile device to perform the relevant steps, and “[s]upplying the software for the customer to use is not the same as using the system.” *See Centillion*, 631 F.3d at 1286, 1287.

Likewise, the allegations that PNC “sell[s], offer[s] to sell and/or import[s]” the system are implausible. *See* FAC ¶ 51. To state a claim based on a “selling” theory of direct infringement, USAA must allege “all of the elements of the claim are present in the accused systems allegedly sold” by PNC. *Omega Patents*, 920 F.3d at 1345. USAA does not and cannot allege that PNC—a bank, not a seller of mobile devices—sells or offers to sell the complete system to its customers. On the contrary, the customers who “complete[] the system by

providing” the mobile device and installing the downloaded app. *See Centillion*, 631 F.3d at 1288; *see also* FAC ¶ 33 (alleging that PNC’s “customers . . . download its application for iPhone or Android devices and use the application and device”). The FAC is similarly devoid of any facts showing PNC “importing” the claimed system into the United States.

B. USAA does not plausibly allege indirect infringement of the ’779 patent

The Court also should dismiss USAA’s induced and contributory infringement allegations for the ’779 patent, FAC ¶¶ 82-83, because they are in substance the same as the induced and contributory infringement allegations for the ’571 patent and implausible for the same reasons.

CONCLUSION

For the reasons stated above, the Court should dismiss the FAC in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically and served on all counsel of record by the Court's CM/ECF system on December 18, 2020.

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