

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DEERE & COMPANY,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 18-827 (GMS)
)	
AGCO CORPORATION,)	
)	
Defendant.)	
<hr/>		
DEERE & COMPANY,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 18-828 (GMS)
)	
PRECISION PLANTING LLC,)	
)	
Defendant.)	

OPENING BRIEF IN SUPPORT OF PRECISION PLANTING LLC AND AGCO CORPORATION’S MOTION TO DISMISS DEERE & COMPANY’S CLAIMS OF INDIRECT AND WILLFUL INFRINGEMENT AND ENHANCED DAMAGES

OF COUNSEL:

Michael J. Summersgill
Jordan L. Hirsch
Michaela P. Sewall
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

Mary (Mindy) V. Sooter
WILMER CUTLER PICKERING
HALE AND DORR LLP
1225 17th Street, Suite 2600
Denver, CO 80202
(720) 274-3135

MORRIS NICHOLS ARSHT & TUNNELL LLP
Jack B. Blumenfeld (#1014)
Jeremy A. Tigan (#5239)
Anthony D. Raucci (#5948)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@mnat.com
jtigan@mnat.com
araucci@mnat.com

Attorneys for Defendants AGCO Corporation and Precision Planting LLC

Grant K. Rowan
Heath A. Brooks
Michael Wolin
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

July 31, 2018

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. NATURE AND STAGE OF THE PROCEEDINGS	1
III. SUMMARY OF THE ARGUMENT	2
IV. STATEMENT OF FACTS	4
A. Deere’s Infringement Allegations.....	4
B. Deere’s Willfulness Allegations	5
C. Deere’s Inducement Allegations.....	7
D. Deere’s Contributory Infringement Allegations	8
V. ARGUMENT	9
A. Deere’s Willful Infringement Claims Should Be Dismissed.....	9
B. Deere’s Induced Infringement Claims Should Be Dismissed.....	13
C. Deere’s Contributory Infringement Claims Should Be Dismissed.....	17
VI. CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Federal Cases	
<i>Ansell Healthcare Prod. LLC v. Reckitt Benckiser LLC</i> , No. 15-915-RGA, 2018 WL 620968 (D. Del. Jan. 30, 2018).....	10, 11, 12
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	9
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2009).....	9
<i>In re Bill of Lading Transmission & Processing Sys. Patent Litig.</i> , 681 F.3d 1323 (Fed. Cir. 2012).....	14, 17, 18, 19
<i>CG Tech. Dev., LLC v. Big Fish Games, Inc.</i> , No. 16-587, 2016 WL 4521682 (D. Nev. Aug. 29, 2016).....	10
<i>Commil USA, LLC v. Cisco Sys., Inc.</i> , 135 S. Ct. 1920 (2015).....	16
<i>United States v. Deere</i> , No. 16-8515, D.I. 90 (N.D. Ill. Oct. 12, 2016).....	1
<i>Dorman Prod., Inc. v. Paccar, Inc.</i> , No. 13-6383, 2016 WL 4440322 (E.D. Pa. Aug. 23, 2016), <i>as amended</i> (Oct. 17, 2016).....	10
<i>DSU Med. Corp. v. JMS Co.</i> , 471 F.3d 1293 (Fed. Cir. 2006) (en banc).....	2, 13
<i>Finjan, Inc. v. Cisco Sys. Inc.</i> , No. 17-072, 2017 WL 2462423 (N.D. Cal. June 7, 2017).....	10
<i>Fowler v. UPMC Shadyside</i> , 578 F.3d 203 (3d Cir. 2009).....	9
<i>Greatbatch Ltd. v. AVX Corp.</i> , No. 13-723-LPS, 2016 WL 7217625 (D. Del. Dec. 13, 2016).....	9
<i>Halo Elecs., Inc. v. Pulse Elecs., Inc.</i> , 136 S. Ct. 1923 (2016).....	2, 9, 10
<i>IOEngine, LLC v. Imation, Corp.</i> , No. 14-1572, D.I. 199 (D. Del. 2017).....	11

M2M Sols. LLC v. Telit Commc’ns PLC,
 No. 14-1103-RGA, 2015 WL 4640400 (D. Del. Aug. 5, 2015)13, 15

Mallinckrodt, Inc. v. E-Z-Em Inc.,
 670 F. Supp. 2d 349 (D. Del. 2009).....13, 16, 20

Memory Integrity, LLC v. Intel Corp.,
 144 F. Supp. 3d 1185 (D. Or. 2015)16

Microsoft Corp. v. DataTern, Inc.,
 755 F.3d 899 (Fed. Cir. 2014).....13, 15

Neology, Inc. v. Kapsch Trafficcom IVHS, Inc.,
 No. 13-2052-LPS, 2014 WL 4675316 (D. Del. Sept. 19, 2014)17

Nexxon Ltd. v. Eaglepicher Techs., LLC,
 No. 15-955-RGA-MPT, 2016 WL 4045474 (D. Del. July 26, 2016).....19

Philips v. ASUSTeK Computer Inc.,
 No. 15-1125, 2016 WL 6246763 (D. Del. Oct. 25, 2016).....18

Plastic Omnium Advanced Innovation & Research v. Donghee Am., Inc.,
 No. 16-187-LPS, 2018 WL 2316637 (D. Del. May 22, 2018)10, 11

Pragmatus AV, LLC v. TangoMe, Inc.,
 No. 11-1092-LPS, 2013 WL 571798 (D. Del. Feb. 13, 2013).....18, 19

Pragmatus Telecom, LLC v. Ford Motor Co.,
 No. 12-092, 2012 WL 2700495 (D. Del. July 5, 2012)18

Princeton Digital Image Corp. v. Ubisoft Entm’t SA,
 No. CV 13-335-LPS-CJB, 2016 WL 6594076 (D. Del. Nov. 4, 2016).....9, 17

Slot Speaker Techs., Inc. v. Apple, Inc.,
 No. 13-1161, 2017 WL 4354999 (N.D. Cal. Sept. 29, 2017).....10

Stickle v. Heublein, Inc.,
 716 F.2d 1550 (Fed. Cir. 1983).....11

Straight Path IP Grp. Inc. v. Vonage Holdings Corp.,
 No. 14-502, 2014 WL 3345618 (D.N.J. July 7, 2014)16

Takeda Pharm. U.S.A., Inc. v. W.–Ward Pharm. Corp.,
 785 F.3d 625 (Fed. Cir. 2015).....15

Valmont Indus., Inc. v. Lindsay Corp.,
 No. CV 15-042-LPS-CJB, 2018 WL 503255 (D. Del. Jan. 22, 2018)11, 12

Varian Med. Sys., Inc. v. Elekta AB,
No. CV 15-871-LPS, 2016 WL 3748772 (D. Del. July 12, 2016)13

XPoint Techs., Inc. v. Microsoft Corp.,
730 F. Supp. 2d 349 (D. Del. 2010).....16, 20

Federal Statutes

35 U.S.C. § 271(c)3

35 U.S.C. § 284.....2, 5

I. INTRODUCTION

Defendant Precision Planting LLC (“Precision Planting”) develops industry-leading seed planting technology that improves the efficiency and profitability of farming. Plaintiff Deere & Company (“Deere”) tried to acquire Precision Planting in 2015, recognizing that Precision Planting’s farming equipment was “innovative” and would expand Deere’s capabilities in the agricultural market. *See Ex. A, United States v. Deere*, No. 16-8515, D.I. 90 at 2-3 (N.D. Ill. Oct. 12, 2016). When the Department of Justice opposed the acquisition and it failed, Precision Planting was instead purchased by Defendant AGCO Corporation (“AGCO”), the world’s leading manufacturer of farming equipment. Faced with the prospect of continued competition against Precision Planting products, Deere filed this action asserting thirteen patents against both Precision Planting and AGCO.

II. NATURE AND STAGE OF THE PROCEEDINGS

On June 1, 2018, Deere sued Precision Planting, asserting twelve patents, and separately sued AGCO, asserting the same twelve patents and substantially the same allegations. *See Deere & Co. v. Precision Planting LLC*, No. 18-828, D.I. 1 (D. Del.); *Deere & Co. v. AGCO Corp.*, No. 18-827, D.I. 1 (D. Del.) (together, “the Original Complaints”). On July 11, 2018, Deere filed amended complaints against both Precision Planting and AGCO. No. 18-828, D.I. 9 (“Precision Planting Am. Compl.”); No. 18-827, D.I. 9 (“AGCO Am. Compl.”) (together, “the Amended Complaints”). The Amended Complaints are identical to the Original Complaints, except that they add a thirteenth asserted patent (Count 13)—for which Deere alleges direct, indirect, and willful infringement and enhanced damages—and add claims of willfulness and enhanced damages for eight asserted patents (Counts 3-4 and 7-12). Deere now alleges direct, indirect, and willful infringement of all thirteen patents against Precision Planting and AGCO.

III. SUMMARY OF THE ARGUMENT

Deere alleges that Precision Planting and AGCO directly, indirectly (through induced and contributory infringement) and willfully infringe the thirteen asserted patents such that Deere is entitled to enhanced damages under 35 U.S.C. § 284. All of Deere’s claims are flawed but its claims of indirect and willful infringement—which are premised on an unsupported assertion of intentional infringement—are particularly deficient such that they fall well short of the pleading requirements and should be dismissed.

First, to sustain a claim of willful infringement and enhanced damages, a plaintiff must plead facts showing that the defendant intentionally infringed plaintiff’s patents and that defendant’s alleged infringement was egregious—such as “willful misconduct” that is “wanton,” “malicious,” “bad-faith,” “consciously wrongful,” “flagrant,” or “characteristic of a pirate.” *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016). Deere does not come close to meeting this exacting standard. Deere simply asserts without support that defendants acted “willfully and deliberately” and does not plead *any* facts indicating that either defendant engaged in the sort of culpable conduct that could support a finding of willfulness or enhanced damages.

Second, to state a claim of induced infringement, a plaintiff must allege facts showing, among other things, that the defendant knew of the asserted patents and the alleged infringement, and *specifically intended to induce infringement of those patents*. *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006) (en banc). Deere’s rote allegations again do not come close to meeting this high standard. Deere does not plead any facts showing that defendants specifically intended to infringe the asserted patents at any point in time. Instead, Deere merely cites—in the same copied-and-pasted paragraph for each of the thirteen patents—certain instructions that Precision Planting (not AGCO) provides its customers explaining how to use the accused products and concludes that this establishes specific intent to infringe. But merely

providing instructions to customers—something that all product companies must do in the ordinary course of their business—is not enough to show specific intent to infringe sufficient to sustain an inducement claim. At a minimum, Deere’s pre-suit inducement allegations fail because Deere has not pled that either defendant had pre-suit knowledge of eight of the asserted patents (Counts 3-4 and 7-12) or fair pre-suit notice of Deere’s infringement allegations as to the other five asserted patents (Counts 1-2, 5-6, and 13).

Third, to state a claim of contributory infringement, a plaintiff must allege facts showing that the defendant knew of the asserted patents, knew that the accused products have “no substantial non-infringing use,” and knew that its products were “especially made or especially adapted” to infringe the asserted patents. *See* 35 U.S.C. § 271(c). Deere’s allegations—which again consist of the same copied-and-pasted paragraph for all thirteen patents—again show none of these elements. Deere has failed to plead any facts showing that the accused products are not suitable for non-infringing use; in fact, Deere’s complaint shows the opposite—Deere alleges that Precision Planting’s products infringe when used together but concedes that the products can be used independently (and thus in a non-infringing manner). Moreover, at a minimum, Deere’s pre-suit contributory allegations fail because Deere has not pled that either defendant had pre-suit knowledge of eight of the asserted patents (Counts 3-4 and 7-12) or pre-suit notice of Deere’s infringement allegations (Counts 1-2, 5-6, and 13) such that they could have known the accused products were “especially made or especially adapted” for infringement.

The pleading rules are designed to ensure that a plaintiff has some basis for its allegations and to put a defendant on reasonable notice of those allegations. Deere’s boilerplate allegations do neither. Accordingly, defendants request that Deere’s claims of willful infringement and enhanced damages, induced infringement, and contributory infringement be dismissed.

IV. STATEMENT OF FACTS

A. Deere's Infringement Allegations

Precision Planting: Deere does not allege that any single Precision Planting product infringes. Instead, Deere alleges that two of Precision Planting's products—its “vSet Products” (seed meters) and its SpeedTube product (seed delivery system)—infringe the asserted patents when combined. (AGCO Am. Compl. ¶ 89; Prec. Planting Am. Compl. ¶ 87.) According to Deere's complaints, the vSet Products and SpeedTube Product are Precision Planting products that are installed on planters. (AGCO Am. Compl. ¶¶ 68-96; Prec. Planting Am. Compl. ¶¶ 64-85.) Planters—which are used to sow seed—are pulled behind tractors and often include dozens of “row units” for placing the seed in parallel furrows in the soil. (Am. Compl. ¶¶ 35-36.) “[R]ow units commonly include conventional components—such as seed meters and seed tubes.” (Am. Compl. ¶ 36.) A seed meter, such as a vSet Product, receives seed from a hopper and feeds seeds to a seed delivery system, such as SpeedTube, which delivers the seed from the seed meter to an open furrow in the ground. (AGCO Am. Compl. ¶¶ 75-79; Prec. Planting Am. Compl. ¶¶ 73-77.) Deere alleges (on information and belief) that the “vSet Products are specifically configured to work in combination with Precision Planting's SpeedTube product” (AGCO Am. Compl. ¶ 88; Prec. Planting Am. Compl. ¶ 86), but includes exhibits showing that the vSet Products may instead be used with other seed delivery systems. (*See* AGCO Am. Compl. Ex. 19 at 1 (“The vSet 2 meter is compatible with both SpeedTube and conventional seed tube delivery. . . . vSet 2 will be available for seed tube delivery on John Deere Max Emerge 5 and White 8000/9000 mini-hopper row units.”); Prec. Planting Am. Compl. Ex. 18 at 1 (same); *see also id.* ¶¶ 63-64.)

AGCO: According to the Amended Complaints, “AGCO acquired assets and assumed liabilities relating to the equipment business of Precision Planting” on or about September 1,

2017, and Precision Planting thereafter “engaged in the infringing activities . . . under the direction and control of AGCO.”¹ (AGCO Am. Compl. ¶ 17; *see also* Prec. Planting Am. Compl. ¶ 17.) Deere accuses AGCO of infringing via the same combination of Precision Planting products (vSet Products combined with SpeedTube). (AGCO Am. Compl. ¶ 89.) In the background section of its complaint against AGCO, Deere further alleges that the vSet Products and/or SpeedTube combined with AGCO’s “White Planter Products” infringe the asserted patents. (AGCO Am. Compl. ¶ 97.) However, Deere does not explain how this combination allegedly infringes—it charts only the Precision Planting’s vSet/SpeedTube combination.

Deere claims that defendants directly infringe Deere’s patents by selling allegedly infringing products to “Downstream Parties,” *i.e.*, “end users, customers, dealers, distributors, and/or resellers.” (AGCO Am. Compl. ¶¶ 17, 69, 77, 89, 97, 105-109; Prec. Planting Am. Compl. ¶¶ 17, 87, 92-95.) In addition, Deere alleges that Precision Planting and AGCO induce infringement of, contributorily infringe, and willfully infringe the asserted patents such that Deere is entitled to enhanced damages under 35 U.S.C. § 284.

B. Deere’s Willfulness Allegations

For all asserted patents, Deere alleges that defendants’ alleged infringement was willful and warrants enhanced damages.

For four asserted patents (Counts 1, 2, 5, 6), Deere alleges willfulness and enhanced damages against both parties on the basis of a letter that it alleges it sent to Precision Planting (not AGCO) in August 2017:

On information and belief, as set forth above, Defendant has directly and indirectly infringed the [’663, ’199, ’998, ’955 patents] willfully and deliberately. On August 11, 2017, Deere sent a letter *to Precision Planting* identifying the [’663, ’199, ’998,

¹ In purported support of its “direction and control” allegation, Deere alleges only that “[a]s of the acquisition date, the results of the operations of Precision Planting have been included in AGCO’s Condensed Consolidated Financial Statements.” AGCO Am. Compl. ¶ 21.

'955 patents] and explaining that *Precision Planting's* products infringe multiple claims of the ['663, '199, '998, '955 patents]. As such, *Precision Planting* has had knowledge of the ['663, '199, '998, '955 patents] since no later than on or about August 11, 2017, and on information and belief, [AGCO] was informed of the existence of the August 11, 2017 letter and knew or should have known no later than on or about that same date that there was an objectively high likelihood that its actions constituted infringement of one or more claims of the ['663, '199, '998, '955 patents].

As a result of Defendant's deliberate and willful infringement, Deere is entitled to enhanced damages under 35 U.S.C. § 284.

(AGCO Am. Compl. ¶¶ 129-30, 149-50, 215-16, 236-37 (emphases added); *see also* Prec.

Planting Am. Compl. ¶¶ 115-16, 135-36, 201-02, 222-23.) Deere did not attach the August 2017 notice letter to the Original or Amended Complaints.

For the thirteenth patent added in the Amended Complaints (Count 13), Deere alleges willfulness and enhanced damages based on a communication from Deere to "Defendants' counsel" on June 27, 2018—two weeks before Deere added that patent to the case:

On information and belief, as set forth above, Defendant has directly and indirectly infringed the '173 Patent willfully and deliberately. On June 27, 2018, Deere informed Defendants' counsel of the issuance of the '173 Patent and that claims of the '173 Patent are infringed by the Accused Infringing Products. As such, Defendant has had knowledge Precision of the '173 Patent since at least no later than June 27, 2018, and knew or should have known that there was an objectively high likelihood that its actions constituted infringement of one or more claims of the '173 Patent.

As a result of Defendant's deliberate and willful infringement, Deere is entitled to enhanced damages under 35 U.S.C. § 284.

(AGCO Am. Compl. ¶¶ 380-81; Prec. Planting Am. Compl. ¶¶ 366-67.) Deere did not attach the June 2018 communication to the Amended Complaints.

For the remaining eight asserted patents (Counts 3-4, 7-12), Deere alleges willfulness and enhanced damages solely based on Deere's filing of the original complaints:

On information and belief, as set forth above, Defendant has directly and indirectly infringed the [asserted patent] willfully and deliberately. On June 1, 2018, Deere filed a complaint in the above-captioned case alleging that the Accused Infringing

Products infringe claims of the [asserted patent]. As such, Defendant has had knowledge of the [asserted patent] since at least no later than June 1, 2018, and knew or should have known that there was an objectively high likelihood that its actions constituted infringement of one or more claims of the [asserted patent].

As a result of Defendant's deliberate and willful infringement, Deere is entitled to enhanced damages under 35 U.S.C. § 284.

(AGCO Am. Compl. ¶¶ 172-73, 194-95, 255-56, 274-75, 294-95, 313-14, 336-37, 358-59; Prec. Planting Am. Compl. ¶¶ 158-59, 180-81, 241-42, 260-61, 280-81, 299-300, 322-23, 344-345.)

Deere does not explain how or why the contents of the alleged pre-suit communications or the filing of the Original Complaints establish that defendants "knew or should have known" of "an objectively high likelihood" of infringement after receiving them.

C. Deere's Inducement Allegations

Deere's inducement allegations consist of the same copied-and-pasted paragraph against each defendant for each of the thirteen asserted patents:

On information and belief, Defendant has been, and is still, knowingly and intentionally inducing infringement, literally and/or under the doctrine of equivalents, of one or more claims of the [asserted patent], including at least [the asserted claim], by actively encouraging the Downstream Parties to make, use, offer for sale, sell and/or import the Accused Infringing Products in or into the United States, without authority. For example, on information and belief, Defendant has actively and knowingly encouraged and facilitated, and continues to actively and knowingly encourage and facilitate, the Downstream Parties to directly infringe the [asserted patent] by marketing and selling the Accused Infringing Products and instructing the Downstream Parties to combine the vSet Products with the SpeedTube product and make, use, sell, offer to sell, and/or import those products together. Thus, Defendant is liable as an active inducer of infringement in violation of 35 U.S.C. § 271(b).

(AGCO Am. Compl. ¶¶ 125, 145, 168, 190, 211, 232, 251, 270, 290, 309, 332, 354, 376; Prec. Planting Am. Compl. ¶¶ 111, 131, 154, 176, 197, 218, 237, 256, 276, 295, 318, 340, 362.) The alleged "instructions" that Deere relies on consist of a single Precision Planting installation manual dated October 2016 which instructs how to install SpeedTube in a row unit of a planter.

(AGCO Am. Compl. ¶¶ 91-93, Ex. 22; Prec. Planting Am. Compl. ¶¶ 89-91, Ex. 21.) One step

in the manual is titled “vSet 2 Meter and SpeedTube Interface” and instructs how to align SpeedTube with a vSet 2 Meter when both are present in the row unit. (AGCO Am. Compl.

¶ 93, Ex. 22 at 7; Prec. Planting Am. Compl. ¶ 91, Ex. 21 at 7.)

Deere alleges no facts that, if true, plausibly show that defendants specifically intended to induce anyone to infringe any of the asserted patents. What is more, Deere does not allege any facts showing that either defendant had pre-suit knowledge of eight asserted patents (Counts 3-4, 7-12) or how they were allegedly inducing anyone else to infringe any of the patents.

D. Deere’s Contributory Infringement Allegations

Deere’s contributory infringement allegations also consist of a single copied-and-pasted paragraph for each defendant on each of the thirteen asserted patents:

On information and belief, Defendant has been, and is still, knowingly and intentionally contributorily infringing, literally and/or under the doctrine of equivalents, one or more claims of the [asserted patent], including at least [the asserted claim], by making, using, selling, offering to sell and/or importing the Accused Infringing Products and/or one or more components of the Accused Infringing Products in or into the United States, without authority. On information and belief, Defendant did possess, and still possesses, knowledge and awareness that the Accused Infringing Products are especially made or adapted for use in an infringement of the [asserted patent], that the Accused Infringing Products include a material component for use in practicing the ’663 Patent, and that the Accused Infringing Products are not a staple article or commodity of commerce suitable for substantial non-infringing use. Thus, Defendant is liable for its infringement of the [asserted patent] in violation of 35 U.S.C. § 271(c).

(AGCO Am. Compl. ¶¶ 126, 146, 169, 191, 212, 233, 252, 271, 291, 310, 333, 355, 377; Prec. Planting Am. Compl. ¶¶ 112, 132, 155, 177, 198, 219, 238, 257, 277, 296, 319, 341, 363.)

Deere alleges no facts that could show that the accused products are incapable of substantial non-infringing uses. And again, Deere does not allege facts showing that either defendant had pre-suit knowledge of eight asserted patents or pre-suit notice of how it was allegedly contributing to anyone else’s infringement of any of the patents.

V. ARGUMENT

To state a claim, a plaintiff must allege and provide factual support for each element of the claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” (internal quotation omitted)). Merely reciting the elements of a claim and providing “conclusory statements” without factual support is insufficient. *See id.* at 678; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2009).

“[W]hen presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, the court separates the “factual and legal elements of a claim,” accepting as true the well-pleaded facts but disregarding legal conclusions. *Id.* at 210-211. Second, the court “determine[s] whether the facts alleged in the complaint are sufficient to show that the plaintiff has a ‘plausible claim for relief.’” *Id.* at 211 (quoting *Iqbal*, 556 U.S. at 679). “[A] complaint must do more than allege the plaintiff’s entitlement to relief. A complaint has to ‘show’ such an entitlement with its facts.” *Id.*

Deere’s allegations of willful, induced, and contributory infringement do not meet this pleading standard and should be dismissed.

A. Deere’s Willful Infringement Claims Should Be Dismissed

A claim for willful infringement and enhanced damages must be supported by facts showing that the defendant knew of plaintiff’s patents and deliberately infringed the patents, and that defendant’s alleged infringement was egregious—such as “willful misconduct” that is “wanton,” “malicious,” “bad faith,” “consciously wrongful,” “flagrant,” or “*characteristic of a pirate*.” *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016) (emphasis added); *see also Princeton Digital Image Corp. v. Ubisoft Entm’t SA*, No. CV 13-335-LPS-CJB, 2016

WL 6594076, at *11 (D. Del. Nov. 4, 2016) (dismissing complaint that failed to “sufficiently articulate how [defendant’s] actions during a short, three-month [post-complaint] period of time amount to an ‘egregious’ case of infringement of the patent”); *Greatbatch Ltd. v. AVX Corp.*, No. 13-723-LPS, 2016 WL 7217625, at *3 (D. Del. Dec. 13, 2016) (granting summary judgment of no willfulness where patentee did not identify evidence that infringement “was ‘egregious,’ ‘deliberate,’ atypical, or otherwise characteristic of the type of infringement that could support a finding of willful infringement”); *Ansell Healthcare Prod. LLC v. Reckitt Benckiser LLC*, No. 15-915-RGA, 2018 WL 620968, at *8 (D. Del. Jan. 30, 2018) (same); *CG Tech. Dev., LLC v. Big Fish Games, Inc.*, No. 16-587, 2016 WL 4521682, at *14 (D. Nev. Aug. 29, 2016) (dismissing willfulness claim where plaintiff did not allege “facts suggesting that Defendant’s conduct is ‘egregious ... beyond typical infringement’”); *Dorman Prod., Inc. v. Paccar, Inc.*, No. 13-6383, 2016 WL 4440322, at *9 (E.D. Pa. Aug. 23, 2016), *as amended* (Oct. 17, 2016) (“*Halo* requires more than simple awareness of the patent and awareness of infringement.”).

At a minimum, the complaint must plausibly show that a defendant acted with subjective bad faith at the time of the allegedly infringing conduct. *Halo*, 136 S. Ct. at 1933; *Finjan, Inc. v. Cisco Sys. Inc.*, No. 17-072, 2017 WL 2462423, at *5 (N.D. Cal. June 7, 2017) (dismissing willfulness claim where complaint contained “no specific factual allegations about [defendant’s] subjective intent, or any other aspects of [defendant’s] behavior that would suggest its behavior was ‘egregious’”); *Slot Speaker Techs., Inc. v. Apple, Inc.*, No. 13-1161, 2017 WL 4354999, at *2 (N.D. Cal. Sept. 29, 2017) (dismissing willfulness claims where plaintiff did not plead facts to “render a claim of willfulness plausible, and not merely possible”). “Subjective willfulness is found when ‘the risk of infringement was either known or so obvious that it should have been known to the accused infringer.’” *Ansell Healthcare*, 2018 WL 620968, at *6 (quoting *Halo*,

136 S. Ct. at 1930)); *see also Plastic Omnium Advanced Innovation & Research v. Donghee Am., Inc.*, No. 16-187-LPS, 2018 WL 2316637, at *10 (D. Del. May 22, 2018) (same).

Willfulness claims should be dismissed in their entirety: Deere fails to plead any facts that could support an inference that defendants engaged in the sort of culpable conduct that could support a finding of willfulness or enhanced damages. All Deere cites to are letters they allegedly sent asserting infringement, and the filing of the Original Complaints. Deere nowhere alleges—much less provides supporting facts that could show—that either defendant, at any point in time either before or after the suits were filed, deliberately copied the asserted patents, attempted to conceal its allegedly infringing behavior, or engaged in any other conduct outside the standards of commerce in the agricultural industry. Without providing any allegations or facts showing that defendants engaged in any culpable conduct, Deere’s willfulness and enhanced damages claims fail as a matter of law. *See Ex. B, IOEngine, LLC v. Imation, Corp.*, No. 14-1572, D.I. 199 at 29-30 (D. Del. 2017) (instructing jury that whether defendant acted egregiously enough to support willfulness finding requires consideration of whether defendant had reasonable belief in noninfringement or invalidity, intentionally copied the patent or tried to cover up infringement, or acted in accordance with the standards of commerce for its industry); *Valmont Indus., Inc. v. Lindsay Corp.*, No. CV 15-042-LPS-CJB, 2018 WL 503255, at *4 (D. Del. Jan. 22, 2018) (granting motion to dismiss willfulness claim where plaintiff did not plead facts that defendant acted willfully or egregiously since the filing of the original complaint); *Ansell Healthcare*, 2018 WL 620968, at *7 (granting summary judgment of no willfulness or enhanced damages where “[plaintiff] does not point to any ‘egregious’ post-complaint ‘infringement behavior.’”); *Plastic Omnium*, 2018 WL 2316637, at *10–11 (same); *see also Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1565 (Fed. Cir. 1983) (“[M]ore is necessary to

support a finding of ‘willfulness’ than that the infringing acts were not inadvertent. The court must determine that the infringer acted in disregard of the patent, that is, that the infringer had no reasonable basis for believing it had a right to do the acts.”).

At least pre-suit willfulness should be dismissed: At the very least, the Court should dismiss Deere’s allegations of pre-suit willfulness as to Counts 1-2, 5-6 and 13.² First, Deere bases its pre-suit notice allegation for these five asserted patents on two letters that it alleges it sent in August 2017 and June 2018. But Deere does not attach either letter to its complaints, nor does it describe either communication or how the communications showed defendants that they allegedly infringed, much less egregiously infringed. This does not provide the sort of notice of infringement that is necessary to state a claim for willfulness or enhanced damages. *See Valmont Indus.*, 2018 WL 503255, at *4 (dismissing willfulness claim where original complaint alleged to give notice of infringement was “bereft of factual allegations as to how Defendant’s products infringe” and did not “show how Defendant has, from the date of that Complaint, known or should have known that its actions constituted and continue to constitute infringement, let alone egregious infringement” (internal quotations and alterations omitted)). Indeed, if a mere allegation of infringement were sufficient to sustain an allegation of *willful* infringement and enhanced damages, there could be a viable claim of willful infringement and enhanced damages in every patent case. That is not the law. *See Ansell Healthcare*, 2018 WL 620968, at *8 (granting summary judgment of no willfulness or enhanced damages where “[plaintiff] does not allege that [defendant] engaged in any sort of ‘egregious’ behavior while knowing or being willfully blind to the patents-in-suit”).

Second, Deere’s allegations of pre-suit willfulness against AGCO for Counts 1-2 and 5-6 fail for an additional reason. Deere bases its willfulness allegations for these counts on an

² Deere does not allege pre-suit willfulness for Counts 3-4 or 7-12.

August 2017 letter that it contends it sent to *Precision Planting*. Deere never alleges that it sent this letter to AGCO and fails to allege any facts plausibly suggesting that *Precision Planting's* alleged knowledge of the patents from the August 2017 letter should be imputed to *AGCO*.

Deere asserts only that “on information and belief, [AGCO] was informed of the existence of the August 11, 2017 letter” (AGCO Am. Compl. ¶ 129), but offers no facts in support of this conclusory allegation. This is insufficient to state a willfulness claim *against AGCO* with respect to these four patents (Counts 1-2, 5-6). See *Varian Med. Sys., Inc. v. Elekta AB*, No. CV 15-871-LPS, 2016 WL 3748772, at *5 (D. Del. July 12, 2016) (“Plaintiff needs to set out more than just the bare fact of the parent/subsidiary relationship in order to make out a plausible claim that the [related companies] had the requisite knowledge of the patent-in-suit . . .”); *M2M Sols. LLC v. Telit Commc’ns PLC*, No. 14-1103-RGA, 2015 WL 4640400, at *4 (D. Del. Aug. 5, 2015) (assertion of knowledge of parent corporation “based on no factual allegations cannot pass muster under the plausibility standards”).

B. Deere’s Induced Infringement Claims Should Be Dismissed

To state a claim for induced infringement, Deere was required to plead facts showing that defendants: (i) knew of the asserted patents; (ii) knowingly induced a third party to infringe them; (iii) had *specific intent to induce a third-party to infringe* them; and (iv) as a result of the supposed inducement, the third party directly infringed the patents. See *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (en banc); *Mallinckrodt, Inc. v. E-Z-Em Inc.*, 670 F. Supp. 2d 349, 354 (D. Del. 2009) (dismissing inducement claim where complaint failed to “sufficiently allege the requisite intent and knowledge needed to state a claim for inducing infringement”). The Federal Circuit has made clear that the “specific intent” requirement of an inducement claim requires not only knowledge of the asserted patent and intent to cause the acts that allegedly produced infringement, but also that the defendant had *an affirmative intent to*

cause infringement. See *Microsoft Corp. v. DataTern, Inc.*, 755 F.3d 899, 904 (Fed. Cir. 2014) (“To prove inducement of infringement . . . the patentee must show that the accused inducer took an affirmative act to encourage infringement with the knowledge that the induced acts constitute patent infringement.”); *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012) (holding that a well-pled “complaint[] must contain facts plausibly showing that [defendants] specifically intended their customers to infringe [the asserted] patent and knew that the customer’s acts constituted infringement”).

Inducement allegations should be dismissed in their entirety: Deere’s inducement allegations should be dismissed in their entirety because Deere fails to allege facts showing that defendants possessed the requisite specific intent. Instead, despite the seriousness of its allegations, Deere relies on the same boilerplate language *for all 13 asserted patents* for *both Precision Planting and AGCO* that largely regurgitates the elements of an inducement claim.

These copied-and-pasted paragraphs do not plausibly show that defendants specifically intended to induce infringement of the asserted patents. Deere’s infringement allegations require that two of Precision Planting’s products—the vSet 2 Meter and the SpeedTube—be combined with one another. The instructions that Deere relies on to allege that Precision Planting induces its customers to combine its products and allegedly infringe Deere’s patents consist of a single Precision Planting installation manual dated October 2016 which was published on Precision Planting’s website and instructs on how to install SpeedTube in a planter. One step is titled “vSet 2 Meter and SpeedTube Interface” and instructs how to align SpeedTube with a vSet 2 Meter when both are present in the row unit. AGCO Am. Compl. ¶¶ 92-93, Ex. 22.

These “instructions” do not establish a specific intent to induce infringement. As for AGCO, Deere’s allegations—based solely on a *Precision Planting* instruction manual on

Precision Planting's website—plainly fail to state a claim for intent. While Deere alleges that “on information and belief, [AGCO] *and/or* Precision Planting instruct customers to combine the vSet Products with the SpeedTube product,” *id.* ¶ 91 (emphasis added), this allegation suffers from two defects. First, it is without factual support—indeed, the use of “and/or” suggests AGCO might *not* instruct. Second, this allegation impermissibly “fus[es] ... two Defendants as one.” *M2M Sols. LLC*, 2015 WL 4640400, at *4. “With regard to inducement claims, this Court has held that ... the plaintiff has to identify ‘which particular Defendant ... [is] said to have disseminated the training or instructional materials at issue.’” *Id.* (internal quotation omitted). Where a complaint fails to do so, it “has not pled a plausible inducement claim.” *Id.* All of Deere’s inducement claims against AGCO should therefore be dismissed.

As to Precision Planting, the installation manual is also insufficient to state a claim for inducement. Merely alleging that a defendant instructs its customers how to use the accused products, without more, does not show specific intent to infringe a patent. *See Takeda Pharm. U.S.A., Inc. v. W.–Ward Pharm. Corp.*, 785 F.3d 625, 631 (Fed. Cir. 2015) (instructions that merely describe an “infringing mode” do not show intent to induce). There is good reason for this: virtually all product companies provide instructions to their customers. If offering technical support were sufficient to show specific intent to induce infringement, the specific intent requirement would be vitiated and indirect infringement would be reduced to a strict liability offense (which it is not). *See DataTern*, 755 F.3d at 904 (“To prove inducement of infringement, unlike direct infringement, the patentee must show that the accused inducer took an affirmative act to encourage infringement with the knowledge that the induced acts constitute patent infringement.”).

Here, the instructions that Deere cites show at most that both a vSet 2 Meter and a

SpeedTube can be installed on a planter row unit. (AGCO Am. Compl. ¶¶ 92-93 (citing Ex. 22).) Precision Planting is, at most, merely informing customers how to align these products once the customer has already decided to install them together on a row unit. The instructions contain nothing suggesting that Precision Planting specifically intended its customers to infringe the asserted patents. *See Memory Integrity, LLC v. Intel Corp.*, 144 F. Supp. 3d 1185, 1196-98 (D. Or. 2015) (reference to defendant’s product instructions not sufficient to show specific intent to infringe); *Straight Path IP Grp. Inc. v. Vonage Holdings Corp.*, No. 14-502, 2014 WL 3345618, at *2 (D.N.J. July 7, 2014) (allegations that defendants instructed customers how to use accused products insufficient to establish that “Defendants specifically intended for the induced acts to infringe”). Deere’s allegations of induced infringement against Precision Planting should therefore also be dismissed.

At least pre-suit inducement should be dismissed: At a minimum, Deere’s pre-suit inducement allegations should be dismissed. For the eight asserted patents in Counts 3-4 and 7-12, Deere fails to plead any allegation showing that defendants knew of these patents at any point prior to the filing of this case. This, by itself, is fatal to its inducement claim with respect to those eight patents. *See Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926 (2015) (“[L]iability for inducing infringement attaches only if the defendant knew of the patent and the induced acts constitute patent infringement.” (internal citation and quotation omitted)); *XPoint Techs., Inc. v. Microsoft Corp.*, 730 F. Supp. 2d 349, 356-57 (D. Del. 2010) (dismissing inducement claim where allegation of “knowledge after filing of the present action is not sufficient for pleading the requisite knowledge for indirect infringement”); *Mallinckrodt*, 670 F. Supp. 2d at 354 (dismissing inducement claim where complaint “[did] not specifically allege that Defendants had knowledge of the [asserted patent] at the time they were committing the

allegedly infringing activities” or “contain sufficient facts” to infer such knowledge).

Deere’s pre-suit inducement allegations for the remaining five patents (Counts 1-2, 5-6, and 13) also fail. First, as explained above, Deere appears to base its allegations of pre-suit knowledge on the August 2017 letter and June 2018 communication that it alleges it sent to Precision Planting or defendants’ counsel. Deere fails to attach the pre-suit communications to its complaints or describe how they allegedly provided sufficient notice of infringement to either defendant. With no allegation that the communications explained *how* Precision Planting’s products allegedly infringe the patents, or *how* Precision Planting’s customers’ use of those products constitute infringement, Deere has not shown that Precision Planting or AGCO knew of the patents *and* of its alleged infringement. *See Princeton Digital*, 2016 WL 6594076, at *10 (dismissing post-suit inducement allegation where original complaint “did not provide many details as to how [defendant] was said to infringe” and did not allege indirect infringement at all); *Neology, Inc. v. Kapsch Trafficcom IVHS, Inc.*, No. 13-2052-LPS, 2014 WL 4675316, at *5 (D. Del. Sept. 19, 2014) (same, where neither complaint nor amended complaint “sets out factual allegations regarding how these products are said to infringe the Asserted Patents when utilized by the respective alleged direct infringers”).

Second, for the four asserted patents in Counts 1-2 and 5-6, Deere alleges, in the context of its willfulness allegations, that *Precision Planting* had pre-suit knowledge of the asserted patents based on the August 2017 letter. However, as explained above, Deere does not show that Precision Planting’s alleged knowledge should be imputed to *AGCO*, and thus these claims should be dismissed as to *AGCO*.

C. Deere’s Contributory Infringement Claims Should Be Dismissed

“Contributory infringement occurs if a party sells or offers to sell, a material or apparatus for use in practicing a patented process, and that ‘material or apparatus’ is material to practicing

the invention, has no substantial non-infringing uses, and is known by the party ‘to be especially made or especially adapted for use in an infringement of such patent.’” *In re Bill of Lading*, 681 F.3d at 1337 (quoting 35 U.S.C. § 271(c)). Thus, “[t]o state a claim for contributory infringement . . . a plaintiff must, among other things, plead facts that allow an inference that the components sold or offered for sale have no substantial non-infringing uses.” *Id.* “[A] substantial non-infringing use is any use that is not unusual, far-fetched, illusory, impractical, occasional, aberrant, or experimental.” *Id.* (internal quotation omitted). Moreover, a plaintiff must plead facts to show that the defendant knew that the product it offered was “especially made or especially adapted” for infringement. *See Pragmatus AV, LLC v. TangoMe, Inc.*, No. 11-1092-LPS, 2013 WL 571798, at *13 (D. Del. Feb. 13, 2013).

Contributory infringement allegations should be dismissed in their entirety: Deere’s contributory infringement allegations should be dismissed in their entirety because Deere has failed to plead facts showing that the accused vSet and SpeedTube Products are not suitable for non-infringing use. Rote recitation of the claim elements with no factual support is deficient as a matter of law. *See Philips v. ASUSTeK Computer Inc.*, No. 15-1125, 2016 WL 6246763, at *4 (D. Del. Oct. 25, 2016) (dismissing contributory infringement claims where “no facts support[ed] the inference that the Accused Functionalities have no substantial non-infringing use” beyond plaintiff’s conclusory assertions); *Pragmatus Telecom, LLC v. Ford Motor Co.*, No. 12-092, 2012 WL 2700495, at *1 (D. Del. July 5, 2012) (same).

In fact, the Amended Complaints show that the accused products are suitable for non-infringing uses. For example, in Count 1, Deere alleges that features of the vSet Products, when combined with the SpeedTube Product, practice all the claims of the ’663 patent. AGCO Am. Compl. ¶¶ 114-121. But using the vSet Products with the SpeedTube product is *optional*, as

demonstrated by the exhibits attached to the complaint, which explain that vSet Products may be used with SpeedTube *or* with “conventional seed tube delivery.”³ (*Id.* at Ex. 19 at 1 (“The vSet 2 meter is compatible with both SpeedTube *and conventional seed tube delivery.*” (emphasis added)); *see also* Prec. Planting Am. Compl. ¶¶ 63-65.) The fact that the vSet Products are used without SpeedTube demonstrates that there are substantial non-infringing uses. *See In re Bill of Lading*, 681 F.3d at 1338 (“Where the product is equally capable of, and interchangeably capable of, both infringing and substantial non-infringing uses, a claim for contributory infringement does not lie.”); *Nexeon Ltd. v. Eaglepicher Techs., LLC*, No. 15-955-RGA-MPT, 2016 WL 4045474, at *7 (D. Del. July 26, 2016), *adopted*, No. 15-955-RGA, 2016 WL 6093471 (D. Del. Oct. 18, 2016) (dismissing contributory infringement claim where plaintiff did not plead facts showing “lack of substantial non-infringing uses”); *Pragmatus*, 2013 WL 571798, at *13 (“The mere allegation that [plaintiff’s] video conference services and products may be used to infringe is not sufficient to allow a reasonable inference that, *inter alia*, these services and products have no substantial noninfringing uses.”). Indeed, because these non-infringing uses are described in the complaint itself, Deere “supplies the very facts which defeat its claims of contributory infringement.” *In re Bill of Lading*, 681 F.3d at 1338 (dismissing contributory infringement claim where “materials regarding [defendants’] products ... attached to the amended complaints, contain ... descriptions of non-infringing uses to which the accused products can be put”).

At least pre-suit contributory infringement should be dismissed: As noted above, Deere does not allege facts showing that defendants had pre-suit knowledge of eight asserted patents

³ Similarly, Deere alleges that when the vSet Products or SpeedTube Product is installed on or combined with AGCO’s “White Planter Products,” the combination infringes Deere’s patents. (AGCO Am. Compl. ¶ 97.) But again, exhibits to the complaint show that using the vSet Products with AGCO’s White Planter Products is optional—the products may be used with other non-infringing products, including Deere’s row units and others. (*Id.* at Ex. 19 (stating that “vSet 2 will be available for seed tube delivery *on John Deere Max Emerge 5 and White 8000/9000 mini-hopper row units,*” and “vSet 2 will also be compatible with SpeedTube delivery. 2015 compatibility includes *John Deere XP row units with mini hoppers (CCS) and Kinze 3000 row units with mini hoppers (ASD).*” (emphases added).)

(Counts 3-4 and 7-12) or pre-suit notice of Deere's infringement allegations for the other five asserted patents (Counts 1-2, 5-6, and 13). Defendants can hardly be alleged to have known that their components were "especially made or adapted for infringement" where they did not know of the patents or have notice of alleged infringement. At a minimum, Deere's pre-suit contributory infringement claims should be dismissed. *XPoint*, 730 F. Supp. 2d at 356 ("[A]n allegation of contributory infringement must . . . plead requisite knowledge of the patent-in-suit at the time of infringement."); *Mallinckrodt*, 670 F. Supp. 2d at 354-55 (dismissing contributory infringement claim where complaint did not "sufficiently plead that Defendants had knowledge of the [asserted patent]" because "[l]iability for contributory infringement requires a showing that the alleged contributory infringer knew that the combination for which his component was especially designed was both patented and infringing" (internal quotation omitted)).

VI. CONCLUSION

Deere makes the serious allegations that Precision Planting and AGCO intentionally infringed the Deere patents, but it pleads no facts that could plausibly support this assertion. Defendants therefore respectfully request that Deere's claims for willful infringement, induced infringement, and contributory infringement be dismissed.

MORRIS NICHOLS ARSHT & TUNNELL LLP

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)

Jeremy A. Tigan (#5239)

Anthony D. Raucci (#5948)

1201 North Market Street

P.O. Box 1347

Wilmington, DE 19899

(302) 658-9200

jblumenfeld@mnat.com

jtigan@mnat.com

araucci@mnat.com

Attorneys for Defendants AGCO

Corporation and Precision Planting LLC

OF COUNSEL:

Michael J. Summersgill

Jordan L. Hirsch

Michaela P. Sewall

WILMER CUTLER PICKERING

HALE AND DORR LLP

60 State Street

Boston, MA 02109

Mary (Mindy) V. Sooter

WILMER CUTLER PICKERING

HALE AND DORR LLP

1225 17th Street, Suite 2600

Denver, CO 80202

(720) 274-3135

Grant K. Rowan

Heath A. Brooks

Michael Wolin

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Ave., NW

Washington, DC 20006

(202) 663-6000

July 31, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on July 31, 2018, upon the following in the manner indicated:

Adam W. Poff, Esquire
Pilar G. Kraman, Esquire
YOUNG CONAWAY STARGATT & TAYLOR LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
Attorneys for Plaintiff

VIA ELECTRONIC MAIL

Richard L. Rainey, Esquire
Kevin B. Collins, Esquire
Jay I. Alexander, Esquire
Nicholas L. Evoy, Esquire
Daniel E. Valencia, Esquire
R. Jason Fowler, Esquire
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
Attorneys for Plaintiff

VIA ELECTRONIC MAIL

/s/ Jack B. Blumenfeld

Jack B. Blumenfeld (#1014)