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11
12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 SOUTHERN DIVISION

15 POLARIS POWERLED
TECHNOLOGIES, LLC
16
17 Plaintiff,
18 v.
19 VIZIO, INC.
20 Defendant.

Case No. 8:18-cv-01571-JVS-DFM
VIZIO, INC.’S MOTION TO DISMISS
Date: April 29, 2019
Time: 1:30 P.M.
Place: Courtroom 10C
Judge: James V. Selna

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1 **TO THE COURT AND ALL PARTIES AND THEIR RESPECTIVE**
2 **ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE that at the above time and place, Defendant VIZIO,
4 Inc. (“VIZIO”) will and hereby does move for an order dismissing Plaintiff Polaris
5 PowerLED Technologies, LLC’s (“Polaris” or “Plaintiff”) claims for induced
6 infringement and willful infringement.

7 This motion is based on this Notice of Motion, the Memorandum of Points
8 and Authorities attached hereto, the Declaration of Miles D. Freeman and
9 accompanying exhibits filed concurrently herewith, all materials incorporated or
10 relied upon in it, matters of which this Court may take judicial notice, and any and
11 all other materials the Court deems proper.

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DATED: April 1, 2019

Respectfully submitted,

By /s/ Richard W. Erwine
/s/ Richard W. Erwine

Attorney for Defendant VIZIO, Inc.

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1 **I. INTRODUCTION**

2 Pursuant to Federal Rule of Civil Procedure 12(b)(6), VIZIO respectfully
3 requests that the Court dismiss Polaris’s claims of induced infringement and willful
4 infringement in its Second Amended Complaint because Polaris has not alleged
5 facts sufficient to support those claims.

6 *First*, the Court should dismiss Polaris’s unfounded induced infringement
7 allegations. Liability for induced infringement requires more than mere knowledge
8 of a patent. *See Commil USA, LLC v. Cisco Systems, Inc.*, 135 S.Ct. 1920, 1926
9 (2015). Rather, the patentee must establish that the defendant knew that “the
10 induced acts constitute patent infringement.” *Id.* (citation omitted). Additionally, a
11 plaintiff must show that the defendant “possessed specific intent to encourage
12 another’s infringement and not merely that the defendant had knowledge of the acts
13 alleged to constitute inducement.” *Manville Sales Corp. v. Paramount Systems,*
14 *Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990). Polaris fails to allege facts showing the
15 requisite knowledge or intent to induce others to infringe.

16 As to knowledge, Polaris makes only one factual allegation beyond the filing
17 of its Complaint: that it sent a letter to VIZIO identifying the asserted patents four
18 months before it filed the initial Complaint. But Polaris’s letter did not even accuse
19 VIZIO of infringing the patents, let alone identify any features of VIZIO’s products
20 that might allegedly result in an infringing act. To the contrary, Polaris merely
21 stated that VIZIO’s products “*may* be using Polaris PowerLED’s technology
22 covered by these and other patents.” Polaris therefore did not request that VIZIO
23 respond to its allegations of infringement for any product (none were made), but
24 rather only that VIZIO “undertake a review” to determine whether any of its
25 products might infringe. Polaris did not provide any information whatsoever about
26 any allegedly infringing acts, which patent claims were allegedly infringed, or even
27 which allegedly infringing features or components VIZIO should have evaluated
28 pursuant to Polaris’s request. In short, the letter provided notice of the patents and

1 nothing more. Polaris does not plead any facts showing that VIZIO knew that any
2 of VIZIO’s products purportedly infringed Polaris’s patents.

3 Similarly, Polaris fails to plead any facts showing that VIZIO had specific
4 intent to induce others to infringe Polaris’s patents. Taking its factual allegations as
5 true, Polaris alleges, at most, that VIZIO (1) had knowledge of the patents-in-suit
6 and (2) has continued to sell accused products which contain allegedly infringing
7 components or features. Polaris does not allege any facts that would show that
8 VIZIO has engaged in “culpable conduct” with “specific intent and action to induce
9 infringement.” *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1364 (Fed.
10 Cir. 2003). Polaris’s induced infringement claims fail for this reason as well.

11 **Second**, the Court should dismiss Polaris’s willful infringement allegations.
12 Polaris has not pled facts that show VIZIO’s behavior has been “willful, wanton,
13 malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—
14 characteristic of a pirate.” *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136
15 S.Ct. 1923, 1932 (2016). In fact, Polaris’s only allegation relating to willfulness is
16 that VIZIO received the letter from Polaris identifying the patents-in-suit four
17 months before Polaris filed suit. But courts in this district have found that receipt of
18 a pre-filing notice letter alone does not “suggest any type of egregious behavior that
19 could serve as a basis for a willful infringement allegation” and accordingly have
20 dismissed such allegations at the pleading stage. *See BlackBerry Ltd. v. Facebook,*
21 *Inc.*, No. 18-cv-2693, 2018 WL 4847053, at *16 (C.D. Cal. Aug. 21, 2018). That is
22 because “pre-suit knowledge alone is not sufficient to support a finding of willful
23 infringement” post-*Halo*. *Intellectual Ventures I LLC v. Symantec Corp.*, 234
24 F.Supp.3d 601, 611 (D. Del. 2017). Polaris is making an unwarranted, legally
25 baseless attempt to inject allegations of “egregious” conduct against VIZIO into this
26 case. The Court should dismiss Polaris’s willfulness claims as well.

27 **II. FACTUAL BACKGROUND**

28 **A. Polaris’s Original Complaint**

1 Polaris filed this case against VIZIO on September 4, 2018 alleging
2 infringement of U.S. Patent Nos. 7,239,087, 8,843,331, and 8,223,117 (collectively,
3 the “patents-in-suit”). Dkt. 1. Polaris’s September 4, 2018 Complaint alleged only
4 that VIZIO had directly infringed the patents-in-suit. *Id.* Polaris’s Complaint also
5 included a “barebones” allegation of willful infringement that “Defendant’s past and
6 continuing infringement has been deliberate and willful” because “[b]y at least as
7 early as May 2, 2018, VIZIO had actual knowledge or should have known of the
8 [patent-in-suit] and that its activities were infringing this patent.” *Id.* at ¶¶ 20, 32,
9 44. Polaris further alleged that after receiving actual knowledge of the patents,
10 “Defendant has continued to make, use, sell, offer for sale, and/or import infringing
11 products into the United States despite knowing that there was a high likelihood of
12 infringement.” *Id.* Polaris, however, offered no facts in support of its conclusory
13 allegation that VIZIO knew that “there was a high likelihood of infringement.”

14 On November 30, 2018, VIZIO timely filed its Answer to the September 4,
15 2018 Complaint. Dkt. 22. VIZIO’s Answer denied infringement of any claim of the
16 patents-in-suit and asserted several affirmative defenses including, *inter alia*, that
17 the patents-in-suit are not infringed, are invalid, and that Polaris lacks standing. *Id.*
18 The parties submitted their Joint Rule 26(f) Report on January 22, 2019 (Dkt. 29)
19 and appeared before the Court for a scheduling conference on January 28, 2019.

20 During the scheduling conference, counsel for Polaris stated that it intended
21 to file an amended complaint adding claims for both induced and contributory
22 infringement. Dkt. 34 at 9:2-6. VIZIO indicated that it did not object to Polaris
23 making that amendment provided that VIZIO was permitted to respond to the
24 amended complaint. VIZIO also noted that thus far Polaris had provided few details
25 about the bases for its infringement claims, and that VIZIO would expect additional
26 disclosures from Polaris in connection with any amendments.

27 **B. Polaris Adds Induced And Contributory Infringement Claims To**
28 **Its First Amended Complaint**

1 Polaris filed its First Amended Complaint on February 4, 2019. Dkt. 32.
2 Polaris’s First Amended Complaint did not provide additional details regarding the
3 bases for Polaris’s original infringement claim. *See* Ex. 3 (redline comparison of
4 Complaint against First Amended Complaint). Instead, Polaris simply added claims
5 for both induced infringement and contributory infringement for all three patents.
6 *Id.* at ¶¶ 12, 14, 24, 25, 35, 37. Polaris did not add any new factual allegations to
7 support these claims. Indeed, the only substantive addition to Polaris’s original
8 Complaint was the following sentence: “VIZIO also has indirectly infringed and
9 continues to indirectly infringe the [patent-in-suit] by inducing and contributing to
10 infringement by customers and third parties of the [patent-in-suit].” *Id.*

11 **C. Polaris Withdraws Its Contributory Infringement Claims, But**
12 **Continues Alleging Inducement And Willfulness In Its Second**
13 **Amended Complaint**

14 Mindful of the Court’s directive to avoid Rule 12 motions that could simply
15 be addressed by an amendment, VIZIO sent Polaris a letter on February 13, 2019
16 that identified to Polaris the deficiencies in the First Amended Complaint and
17 requested that Polaris provide an amendment to address those deficiencies. Ex. 4.
18 The parties met and conferred regarding VIZIO’s letter on February 18, 2019 and
19 Polaris agreed to provide VIZIO with a draft Second Amended Complaint that
20 Polaris represented would cure the deficiencies of the First Amended Complaint.¹
21 *See* Dkt. 37.

22 Polaris provided its draft Second Amended Complaint to VIZIO on March 4,
23 2019. In that draft, Polaris withdrew its contributory infringement claims, tacitly
24 acknowledging that it had no basis to add them to the First Amended Complaint.

25
26 ¹ VIZIO sent a second letter on February 27 in which it outlined additional
27 deficiencies in Polaris’s infringement allegations, including Polaris’s failure to
28 properly identify accused products and asked Polaris to address those deficiencies as
well in the Second Amended Complaint. Ex. 5.

1 But Polaris kept its induced infringement claims. The parties thereafter met and
2 conferred and discussed, particularly, the remaining issues with Polaris’s allegations
3 of knowledge and intent in the proposed Second Amended Complaint. VIZIO
4 followed up on the meet and confer with a letter outlining these issues. Ex. 6.
5 Polaris, however, chose not to further address these issues and filed its Second
6 Amended Complaint on March 11, 2019.

7 Consistent with its draft provided to VIZIO, Polaris withdrew its contributory
8 infringement allegations when it filed its Second Amended Complaint. But Polaris
9 continued to assert inducement and willful infringement. While Polaris added a
10 number of pages to the First Amended Complaint relating to inducement, those
11 pages consist almost entirely of a boilerplate recitation of the elements of induced
12 infringement for each patent along with screenshots of user manuals and webpages
13 allegedly showing VIZIO TVs on sale at various retailers. See SAC at ¶¶ 19, 57;
14 see also Ex. 7 (redline comparison of First Amended Complaint against Second
15 Amended Complaint). Based on those screenshots, Polaris made *pro forma*
16 allegations in the Second Amended Complaint that VIZIO has induced consumers,
17 retailers, and manufacturers to infringe the patents-in-suit, though Polaris provided
18 no factual allegations actually directed to showing VIZIO’s specific intent to induce
19 infringement. SAC at ¶ 61; see also SAC at ¶¶ 23 (‘087 patent) & 43 (‘331 patent).

20 Polaris also added a paragraph to the Second Amended Complaint for each of
21 the patents alleging that a May 2, 2018 letter put VIZIO on notice of the patents-in-
22 suit prior to the case being filed.² See Ex. 1. But Polaris’s letter did not accuse
23 VIZIO or anyone else of infringement. Nor did not it identify the specific television
24 models it now accuses of infringing its patents or identify any of the features or
25 components Polaris now includes in its Complaint and infringement contentions as

27 ² While Polaris refers to this letter as being dated May 2, 2018, the copy
28 received by VIZIO is actually dated May 10, 2018. See Ex. 1.

1 the bases for its infringement claims. *Id.* Rather, Polaris simply stated that VIZIO’s
2 products “*may* be using Polaris PowerLED’s technology covered by these and other
3 patents” and left it to VIZIO to “undertake a review” to determine if any of its
4 products might infringe. *Id.*

5 Finally, Polaris continued to include the same barebones accusation of willful
6 infringement stated in its initial Complaint.

7 **III. LEGAL STANDARD**

8 **A. Rule 12(b)(6)**

9 “To survive a motion to dismiss, a complaint must contain sufficient factual
10 matter, accepted as true, to state a claim for relief that is plausible on its face.”
11 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint must contain more than
12 “labels and conclusions, and a formulaic recitation of the elements of a cause of
13 action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Instead,
14 the plaintiff must plead “[f]actual allegations” that would “raise a right to relief
15 above the speculative level.” *Id.* “A claim has facial plausibility when the plaintiff
16 pleads factual content that allows the court to draw the reasonable inference that the
17 defendant is liable for the misconduct alleged.” *Ashcroft*, 556 U.S. at 678. Pleading
18 facts that are “merely consistent with a defendant’s liability [however] stops short of
19 the line between possibility and plausibility of entitlement to relief.” *Id.*

20 “Under the incorporation by reference doctrine, a court deciding a motion to
21 dismiss may consider documents ‘whose contents are alleged in a complaint and
22 whose authenticity no party questions, but which are not physically attached to the
23 [plaintiff’s] pleading.’” *In re Amylin Pharm., Inc. Sec. Litig.*, No. 01-cv-1455, 2003
24 WL 21500525, at *9 (S.D. Cal. May 1, 2003) (quoting *In re Silicon Graphics, Inc.*
25 *Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999)). Accordingly, the Court can consider
26 the actual contents of Polaris’s May 10, 2018 letter, which is cited in the Second
27 Amended Complaint, in determining the sufficiency of Polaris’s allegations.

28

1 **B. Induced Infringement**

2 35 U.S.C. § 271(b) provides patentees with a cause of action against anyone
3 who “actively induces infringement of a patent.” In order to make out a claim of
4 induced infringement, the patentee must allege facts to show that: “(1) a third party
5 directly infringed the asserted claims of the [patents-in-suit]; (2) [the defendant]
6 induced those infringing acts; and (3) [the defendant] knew the acts it induced
7 constituted infringement.” *Power Integrations, Inc. v. Fairchild Semiconductor*
8 *Int’l, Inc.*, 843 F.3d 1315, 1332 (Fed. Cir. 2016).

9 It is not enough, however, to simply allege that a defendant knew of the act of
10 alleged infringement; the patentee must also allege facts that would show that the
11 defendant acted with the intent to cause patent infringement. *Id.* Specifically,
12 “liability for induced infringement can only attach if the defendant knew of the
13 patent and knew as well that the induced acts constitute patent infringement.”
14 *Commil USA, LLC v. Cisco Systems, Inc.*, 135 S.Ct. 1920, 1926 (2015). Courts
15 routinely dismiss induced infringement claims when the patentee fails to plead facts
16 that would support a finding of knowledge or intent. That is because an allegation
17 that the defendant “has actively and consciously directed [other party’s] actions”
18 does not amount to a factual allegation that defendant “specifically intended to
19 encourage the infringement.” *Telebrands Corp. v. GMC Ware, Inc.*, No. 15-cv-
20 3121, 2016 WL 6237914, at *7 (C.D. Cal. Apr. 5, 2016). Put succinctly, alleging
21 facts that support finding “a defendant knew that another party was infringing” is
22 not the same as alleging facts that support finding a defendant “intended for that
23 other party to infringe.” *Uniloc USA, Inc. v. Logitech, Inc.*, No. 18-cv-1034, 2018
24 WL 6025597, at *2 (N.D. Cal. Nov. 17, 2018).

25 **C. Willful Infringement**

26 In order to make out a claim for willful infringement, a plaintiff must allege
27 facts showing that the defendant both knew of the patents-in-suit and engaged in
28 “willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, [or]

1 flagrant” conduct. *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S.Ct. 1923,
2 1932 (2016). Pleading knowledge of the patents-in-suit is not enough to allege
3 willfulness; there must be some allegation that the defendant has engaged in
4 “egregious” conduct that goes above and beyond a typical allegation of garden-
5 variety infringement. *See Blackberry Ltd. v. Facebook, Inc.*, 2018 WL 4847053, at
6 *16 (C.D. Cal. Aug. 21, 2018); *Finjan, Inc. v. Cisco Systems Inc.*, No. 17-cv-00072,
7 2017 WL 2462423, at *5 (N.D. Cal. June 7, 2017).

8 **IV. ARGUMENT**

9 **A. Polaris Has Failed To Plead Facts Sufficient To Support An** 10 **Induced Infringement Claim**

11 In order to plead a claim for induced infringement, a patentee must show
12 culpable conduct by the defendant, including that the defendant (1) “knew of the
13 patent and knew as well that the induced acts constitute patent infringement”
14 (*Commil*, 135 S.Ct. at 1926) and (2) “possessed [the] specific intent to encourage
15 another’s infringement” (*Manville Sales Corp. v. Paramount Systems, Inc.*, 917 F.2d
16 544, 553 (Fed. Cir. 1990). “[M]ere knowledge of possible infringement by others
17 does not amount to inducement; specific intent and action to induce infringement
18 must be proven.” *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1364 (Fed.
19 Cir. 2003). As set forth in greater detail below, Polaris has failed to plead facts that,
20 even if true, would meet the requirements for induced infringement.

21 **1. Polaris’s Allegations Regarding The May 10, 2018 Letter Are** 22 **Not Sufficient To Show Knowledge Of Any Act Constituted** 23 **Infringement**

24 The Second Amended Complaint contains only one allegation with respect to
25 VIZIO’s alleged knowledge prior to the filing of the Polaris’s Complaint.
26 Specifically, Polaris alleges that “VIZIO had knowledge of the [asserted patents]
27 since at least May 2, 2018 when... Polaris sent a letter” that identified the patent
28 numbers to VIZIO. SAC at ¶¶ 22, 42, 60. As set forth above, however, the May 10,

1 2018 letter did not identify any infringing television models or features or even
2 accuse VIZIO or any of VIZIO’s customers or retailers of infringement. *See* Ex. 1.

3 Polaris’s Second Amended Complaint states that its “letter advised VIZIO
4 that it is marketing and selling televisions *using this patented technology*, including
5 identifying VIZIO’s televisions by series number, *e.g.*, E-series, M-series, and P-
6 series VIZIO televisions.” *See* SAC at ¶¶ 22, 42, 60. That is not correct. VIZIO
7 has attached the letter as Exhibit 1 and the Court may take judicial notice of its
8 contents under the incorporation-by-reference doctrine. *See* Section III.A. Polaris’s
9 letter avoided making any accusation of infringement and certainly did not identify
10 any allegedly infringing features or models. Rather, the letter stated that VIZIO’s
11 televisions “may be using Polaris PowerLED’s technology covered by these and
12 other patents.” Ex. 1. Polaris therefore requested not that VIZIO respond to its
13 allegations of infringement (none were made in the letter), but that VIZIO analyze
14 all of its products and provide a “written assurance that VIZIO’s products do not
15 infringe these patents, with a complete non-infringement analysis.” *Id.*

16 It is not—and cannot be—the law that such a letter is sufficient to support an
17 allegation of induced infringement.³ Induced infringement requires not just that the
18 defendant knew of the asserted patents but that the defendant “knew as well that the
19 induced acts constitute patent infringement.” *Commil*, 135 S.Ct. at 1926. Polaris’s
20 letter did not identify any acts of infringement, let alone identify which VIZIO
21 models might infringe and which might not.

22 Courts have thus regularly found similar allegations insufficient to support
23 knowledge of infringement for an inducement claim. For instance, in
24

25 ³ Polaris also mentions the filing of this lawsuit as providing “further
26 knowledge” (*see* SAC at ¶¶ 22, 42, 60) but that fails for the same reason: though
27 Polaris included a direct infringement allegation in its original Complaint, Polaris
28 did not identify accused models, and particularly did not identify alleged acts of
infringement by customers or retailers that Polaris now seeks to add.

1 *LaserDynamics USA, LLC v. Cinram Group, Inc.*, No. 15-cv-1629, 2015 WL
2 6657258 (S.D.N.Y. Oct. 30, 2015), LaserDynamics alleged induced infringement
3 based on a notice letter identifying the patents sent prior to the filing of the
4 complaint. *Id.*, at *6. As is the case here, however, LaserDynamic’s letter made no
5 specific charge of infringement for any product and did not provide the bases for
6 any infringement claim. *Id.* Presented with such facts, the *LaserDynamics* court
7 dismissed the induced infringement claim because the letter alone could not show
8 that the defendant had knowledge of “a plausibly high risk of infringement.” *Id.*

9 Similarly, in *Bonutti Skeletal Innovations LLC v. Smith & Nephew, Inc.*, No.
10 12-cv-111, 2013 WL 6058472 (D. Del. Nov. 18, 2013), Bonutti had informed Smith
11 of its patents prior to filing suit and, on this basis, alleged induced infringement. *Id.*,
12 at *1 n.5. But the *Bonutti* court similarly found that “[a]llegations that Smith knew
13 of Bonutti’s patents and of its customers’ use of Smith’s products do not suffice to
14 establish that Smith also knew that its customer’s use of Smith’s own products
15 would amount to infringement of Bonutti’s patents.” *Id.* The Court thus found
16 “Bonutti’s allegations are deficient... regarding whether Smith knowingly induced
17 infringement of the patents.” *Id.* (further finding “these allegations do not establish
18 that Smith intended that its customers infringe Bonutt’s patents by using Smith’s
19 products”).

20 Here, similar to the plaintiffs in *LaserDynamics* and *Bonutti*, Polaris alleges
21 knowledge of the patents based on a notice letter, but fails to make any factual
22 allegation that VIZIO had knowledge of any alleged infringement. Polaris’s letter,
23 while mentioning the patents-in-suit, did not provide any information whatsoever
24 about any allegedly infringing acts, which claims were allegedly infringed, or even
25 which allegedly infringing features or components VIZIO should have evaluated
26 pursuant to Polaris’s request. Under the standards set forth by the Supreme Court in
27 *Commil*, Polaris’s allegations about the letter are insufficient to support a claim of
28 induced infringement because “liability for induced infringement can only attach if

1 the defendant knew of the patent and knew as well that the induced acts constitute
2 patent infringement.” *Commil*, 135 S.Ct. at 1926. The Court should dismiss
3 Polaris’s induced infringement claims on this ground alone.

4 **2. Polaris’s Allegations Fail To Show VIZIO Acted With Specific**
5 **Intent To Induce Infringement Of The Patents-In-Suit**

6 In addition to its failure to plead that VIZIO had knowledge of the alleged
7 infringement, Polaris also fails to plead any facts that support its allegation that
8 VIZIO specifically intended to induce infringement of the patents-in-suit. Again, it
9 is well established that “mere knowledge of possible infringement by others does
10 not amount to inducement; specific intent and action to induce infringement must be
11 proven.” *Warner-Lambert Co.*, 316 F.3d at 1364.

12 Specifically, Polaris alleges that VIZIO “has had specific intent to induce...
13 third parties to infringe the [patents-in-suit] when it explicitly directs or directed
14 them to take actions that would constitute direct infringement of [the patents-in-
15 suit],” including “directing and instructing [customers and third parties] to use the
16 Accused Products” and “directing and instructing” the retailers to infringe “as
17 evidenced by VIZIO’s sales collateral and marketing materials.” SAC at ¶¶ 18-23
18 (‘087 patent); *see also* SAC at ¶¶ 37-43 (‘331 patent) & ¶¶ 56-61 (‘117 patent).
19 Polaris relies on screenshots of user manuals with explanations of a variety of
20 features, various specification pages setting out available features, and certain
21 retailer webpages, alleging that they show that “VIZIO’s conduct has included
22 describing features and directing and instructing customers to commit acts that
23 constitute infringement.” *Id.*

24 But Polaris makes no attempt to tie VIZIO’s alleged knowledge of the patents
25 and alleged knowledge of infringement to the acts of “directing and instructing” that
26 Polaris alleges VIZIO performed. Indeed, such an allegation would make little
27 sense as, for example, the user manuals relied on by Polaris are dated as being
28 created in 2017 and 2018—*before* Polaris alleges that VIZIO had knowledge of the

1 patents and the purported infringement—and there is no allegation that VIZIO did
2 anything other than continue to supply televisions and user manuals to customers
3 and retailers after Polaris alleges it provided VIZIO with knowledge of the patents
4 and purported infringing acts. Thus, Polaris fails to plead any facts that would
5 support the inference that VIZIO specific intended to “knowingly induce[]
6 infringement.” *DSU Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1306 (Fed. Cir.
7 2006).

8 This is not merely formalism: requiring more than Polaris’s generic
9 allegations of independent third party acts, instructions or sales materials, and
10 VIZIO’s alleged knowledge of the patents is important in the context of induced
11 infringement because, unlike direct infringement, an inducement claim is intended
12 only for situations where a defendant acted culpably and “possessed specific intent
13 to encourage another’s infringement and not merely that the defendant had
14 knowledge of the acts alleged to constitute inducement.” *Manville*, 917 F.2d at 553.
15 “[M]ere knowledge of possible infringement will not suffice.” *Vita-Mix Corp. v.*
16 *Basic Holding, Inc.*, 581 F.3d 1317, 1328 (Fed. Cir. 2009). Thus, faced with similar
17 allegations, both the Federal Circuit and district courts have found that dismissal is
18 the proper remedy.

19 For example, in *Superior Indus., LLC v. Thor Glob. Enterprises Ltd.*, 700
20 F.3d 1287 (Fed Cir. 2012), the Federal Circuit found the plaintiff’s citation to “press
21 releases” and offers to sell allegedly infringing technology made after “receiving
22 notice of its alleged infringement” fell “far short of pleading facts necessary to state
23 a plausible claim for” induced infringement. *Id.* at 1295-96; *see also Addiction &*
24 *Detoxification Institute L.L.C. v. Carpenter*, 620 Fed. Appx. 934, 938 (Fed. Cir.
25 2015) (affirming dismissal of induced infringement claims—and subsequent denial
26 of a motion to amend—where the plaintiff alleged that the defendant “instruct[ed]
27 others” to perform the claimed method, but the complaint “did not include any facts
28

1 that would allow a court to reasonably infer that Defendants had the specific intent
2 to induce infringement....”).

3 Similarly, in *Uniloc USA, Inc. v. Logitech, Inc.*, No. 18-cv-01304, 2018 WL
4 6025597 (N.D. Cal. Nov. 17, 2018), Uniloc alleged that “Logitech intentionally
5 instruct[ed] its customers to use the Accused Infringing Products in a manner that
6 infringes through training videos, demonstrations, brochures, installation and user
7 guides, and other instructional and marketing materials.” *Id.* at *2. But the court
8 found that “using broad categories of materials, coupled with a list of... generic
9 websites, do[es] not amount to factual content supporting any reasonable inference
10 that [Logitech] possessed... specific intent to encourage another’s infringement. *Id.*
11 (citing *Uniloc USA, Inc. v. Apple Inc.*, No. 18-cv-359, 2018 WL 2047553 (N.D. Cal.
12 May 2, 2018)). As here, “Uniloc only generically allege[d] that Logitech, with the
13 intent to have its customers infringe, provided its customers with instructions to do
14 so...” and thus the court found that “[t]his is simply not enough to allege induced
15 infringement.” *Id.*, at *3.

16 Likewise, in *Straight Path IP Group, Inc. v. Vonage Holdings Corp.*, No. 14-
17 cv-502, 2014 WL 3345618 (D.N.J. July 7, 2014), the plaintiff “set forth numerous
18 facts that show[ed] that Defendants were aware of the Asserted Patents...” and “also
19 alleged that Defendants induced their customers to infringe the Asserted Patents by
20 instructing them how to use the Accused Products.” But the court found that “while
21 these allegations may be sufficient to establish elements one and three of induced
22 infringement, Plaintiff has not shown that Defendants *specifically intended* for the
23 induced acts to infringe the Asserted Patents, and thus Plaintiff has failed to
24 establish element two.” *Id.* at *2; *see also Telebrands Corporation v. GMC Ware,*
25 *Inc.*, No. 15-cv-3121-SJO, 2016 WL 6237914, at *7 (C.D. Cal. Apr. 5, 2016)
26 (finding mere allegation that the defendant “has actively and consciously directed
27 [other party’s] actions” failed to state a claim for induced infringement because
28

1 there was no factual allegation that defendant “specifically intended to encourage
2 the infringement.”).

3 Nor does the existence of a pre-suit notice letter save Polaris’s claims here, as
4 other courts have recognized. For example, in *Pragmatus AV, LLC v. Tangome,*
5 *Inc.*, No. 11-cv-1092, 2013 WL 571798, at *12 (D. Del. Feb. 13, 2013), Pragmatus
6 relied on a notice letter sent to Tango as support for its inducement allegations. But
7 the court held that “the bare fact that Tango continued to make [] video conference
8 services and products available to its users after Plaintiff provided [defendant]
9 with... written ‘notice’ of infringement” was insufficient to support a claim for
10 infringement because it “provides the Court with no basis to infer that Defendant,
11 after receiving the notice, could have specifically intended for its users to continue
12 infringing the patents.” The court specifically found that “[t]he law requires more.”
13 *Id.* The same is true here. The fact that Polaris identified the patent numbers in a
14 letter to VIZIO says nothing about *VIZIO’s* intent. Indeed, Polaris’s pre-suit letter
15 failed to even make a formal charge of infringement, identify what specific products
16 might be infringing, or identify what features or components VIZIO should
17 evaluate. There is no basis to infer any intent on VIZIO’s part based on the May 10,
18 2018 letter.

19 Accordingly, Polaris had made no allegations that, even if taken as true, could
20 support a finding that VIZIO specifically intended to induce its third party end users
21 or retailers to infringe the patents-in-suit. The Court should dismiss Polaris’s
22 induced infringement claims.

23 **B. The Second Amended Complaint Fails To Plead Facts Sufficient**
24 **To Support Its Willful Infringement Claim Because There Is No**
25 **Factual Allegation Of Any “Egregious” Conduct**

26 The Court should also dismiss Polaris’s willful infringement claim. Polaris’s
27 Second Amended Complaint fails to set forth any facts that, even when taken as
28 true, support the conclusion that VIZIO has acted in a “willful, wanton, malicious,

1 bad-faith, deliberate, consciously wrongful, [or] flagrant” manner. *Halo*
2 *Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S.Ct. 1923, 1932 (2016).

3 Polaris makes a single allegation of willful infringement in the Second
4 Amended Complaint: VIZIO “[a]fter receiving actual knowledge of the [patent-in-
5 suit].... continued to make, use, sell, offer for sale, and/or import infringing
6 products into the United States despite knowing that there was a high likelihood of
7 infringement.” SAC at ¶¶ 27, 46, 64. Polaris includes only the May 10, 2018 letter
8 as the basis for its claim that VIZIO “receiv[ed] actual knowledge.” But as set forth
9 above, that letter contained no allegation that VIZIO was infringing or knew of any
10 alleged infringement, made no reference to what claims of the patents-in-suit were
11 allegedly infringed, and included no analysis or identification of VIZIO products or
12 features that Polaris might have accused of infringement.

13 Moreover, it is well-established in this district that knowledge of the patents-
14 in-suit alone is not sufficient to establish a claim for willful infringement because
15 mere knowledge does not show “egregious” conduct. For example, in *BlackBerry*
16 *Limited v. Facebook, Inc.*, No. 18-cv-1844, 2018 WL 4847053 (C.D. Cal. Aug. 21,
17 2018), the plaintiff alleged willful infringement based on a notice letter that was sent
18 a few months before the complaint was filed. *Id.* at *16. But the *BlackBerry* court
19 rejected the argument that this notice letter alone could support a willfulness claim
20 because this fact by itself did not “suggest any type of egregious behavior that could
21 serve as a basis for a willful infringement allegation.” *Id.* (citing *Halo*, 136 S.Ct. at
22 1932); *see also Finjan, Inc. v. Cisco Systems Inc.*, No. 17-cv-00072, 2017 WL
23 2462423, at *5 (N.D. Cal. June 7, 2017) (“[E]ven if Finjan had adequately alleged
24 that Cisco had pre-suit knowledge of the Asserted Patents, dismissal would also be
25 warranted because the FAC does not contain sufficient factual allegations to make it
26 plausible that Cisco engaged in ‘egregious’ conduct that would warrant enhanced
27 damages under *Halo*.”).

28

1 Like the plaintiff in *BlackBerry*, Polaris does not allege any facts that support
2 a claim of willful infringement under the *Halo* standard. The Supreme Court
3 instructed in *Halo* that “[a]wards of enhanced damages [based on willfulness] under
4 the Patent Act over the past 180 years establish that they are not to be meted out in a
5 typical infringement case, but are instead designed as a ‘punitive’ or ‘vindictive’
6 sanction for egregious infringement behavior.” *Halo*, 136 S.Ct. at 1932. Indeed, the
7 *Halo* Court expressly held that Section 284 enhanced damages for willful
8 infringement should not be awarded for “garden-variety cases.” 136 S.Ct. at 1935.
9 And following the Supreme Court’s lead, courts have repeatedly recognized that a
10 willfulness charge should not be a routine part of every case, but should instead
11 require an allegation of specific egregious conduct. “[P]re-suit knowledge alone is
12 not sufficient to support a finding of willful infringement . . . [the plaintiff must]
13 identif[y]... evidence of behavior beyond typical infringement.” *Intellectual*
14 *Ventures I LLC v. Symantec Corp.*, 234 F. Supp. 3d 601, 611–12 (D. Del. 2017),
15 *aff’d*, 725 F. App’x 976 (Fed. Cir. 2018).

16 In the Second Amended Complaint, Polaris makes allegations that, at best,
17 would show “typical” “garden-variety” infringement if true (they are not). Polaris’s
18 primary allegation is that Polaris sent a letter to VIZIO identifying the patents-in-
19 suit and that prior to the filing of the Complaint, VIZIO “has continued to make,
20 use, sell, offer for sale, and/or import infringing products into the United States
21 despite knowing that there was a high likelihood of infringement.” This allegation
22 does not support a finding that VIZIO has behaved in a “willful, wanton, malicious,
23 bad-faith, deliberate, consciously wrongful, [or] flagrant” manner as a matter of law
24 or fact. Moreover, Polaris provided no factual support for the conclusory allegation
25 that VIZIO knew there was a high likelihood of purported infringement. *Twombly*,
26 550 U.S. at 555 (“labels and conclusions, and a formulaic recitation of the elements
27 of a cause of action will not do.”). Thus the Court should dismiss Polaris’s
28

1 willfulness claims and deny Polaris’s attempt to tar VIZIO with legally and factually
2 unjustified claims of egregious misconduct.

3 **V. CONCLUSION**

4 For the reasons set forth above, Polaris’s claims for induced infringement and
5 willful infringement should be dismissed pursuant to Federal Rule of Civil
6 Procedure 12(b)(6).

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8 DATED: April 1, 2019

Respectfully submitted,

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By /s/ Richard W. Erwine

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/s/ Richard W. Erwine

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Attorney for Defendant VIZIO, Inc.

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