

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

VLSI TECHNOLOGY LLC, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 ) C.A. No. 18-966 (VAC) (CJB)  
 INTEL CORPORATION, )  
 )  
 Defendant. )

**INTEL CORPORATION'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO  
DISMISS CLAIMS FOR WILLFUL AND INDIRECT INFRINGEMENT  
UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

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## **I. NATURE AND STAGE OF THE PROCEEDINGS**

Plaintiff VLSI Technology LLC (“VLSI”) filed its Complaint on June 28, 2018, alleging infringement of five patents: U.S. Patent Nos. 6,212,633 (“’633 patent”); 7,246,027 (“’027 patent”); 7,247,552 (“’552 patent”); 7,523,331 (“’331 patent”); and 8,081,026 (“’026 patent”). (D.I. 1 (“Compl.”).) On August 6, 2018, Intel moved to transfer this action to the Northern District of California, where the parties are actively litigating another patent infringement suit filed over ten months ago by VLSI that substantially overlaps with this action. (D.I. 8.) Intel now moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss certain of VLSI’s claims for willful infringement and indirect infringement for failure to state a claim upon which relief can be granted. Intel’s motion should be granted for the following reasons.

## **II. SUMMARY OF ARGUMENT**

VLSI’s Complaint falls far short of meeting the pleading requirements under Federal Rule of Civil Procedure 8(a)(2) for claims of willful and indirect infringement. Rule 8(a)(2) requires that a complaint contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). To comply, a plaintiff is obligated to set forth factual matter which, if accepted as true, would “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining a claim is facially plausible only “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged”). VLSI has failed to meet these minimum pleading requirements. Its claims for willful infringement of the ’633, ’552, ’331, and ’026 patents (the “At-Issue Patents”) and pre-complaint indirect infringement of the ’633, ’331, and ’026 patents include insufficient factual allegations to permit a reasonable inference that VLSI is entitled to relief, and

in some instances, no factual allegations at all. VLSI's claims for willful infringement and pre-complaint indirect infringement should therefore be dismissed.<sup>1</sup>

Under 35 U.S.C. § 284, courts “may increase the damages [awarded in a patent infringement case] up to three times the amount found or assessed.” The Supreme Court has explained that enhanced damages under § 284 “should generally be reserved for egregious cases typified by willful misconduct,” *i.e.*, willful infringement, and “are not to be meted out in a typical infringement case, but are instead designed as a ‘punitive’ or ‘vindictive’ sanction for egregious infringement behavior.” *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932, 1934 (2016). To state a claim for willful infringement, a plaintiff must allege facts that plausibly show that the defendant (1) knew of the patent-in-suit, (2) infringed the patent-in-suit after acquiring that knowledge, and (3) in so infringing, knew or should have known that its conduct amounted to infringement of the patent-in-suit. *See Välinge Innovation AB v. Halstead New Eng. Corp.*, No. 16-1082-LPS-CJB, 2018 WL 2411218, at \*13 (D. Del. May 29, 2018).

VLSI's Complaint fails to meet these pleading requirements in two respects: first, with respect to allegations concerning Intel's pre-complaint knowledge of the At-Issue Patents; and second, with respect to the requirement that Intel knew or should have known its conduct amounted to infringement. In an attempt to plead that Intel had knowledge of the At-Issue Patents before the filing of VLSI's Complaint, VLSI points to the purported citation of three of the At-Issue Patents during the prosecution of Intel patents. But the mere mention of any third-party patent during the prosecution of a defendant's patent is not sufficient to support a claim that the defendant knew of that patent and can therefore be liable for willful infringement. VLSI also pleads that Intel was allegedly willfully blind to the At-Issue Patents solely by virtue of a

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<sup>1</sup> Although Intel does not presently move to dismiss VLSI's claims for willful or indirect infringement of the '027 patent, Intel denies that it has infringed the '027 patent willfully, indirectly, or otherwise.

supposed corporate policy (that VLSI neither quotes nor cites) forbidding employees from reading non-Intel patents. As discussed in detail below, VLSI’s factual allegations are insufficient to permit a reasonable inference that Intel had, or should be charged with, knowledge of the At-Issue Patents prior to the date on which VLSI filed its Complaint, such that it should be subjected to the type of “‘punitive’ or ‘vindictive’ sanction for egregious infringement behavior” that is described in *Halo*. In addition, VLSI’s Complaint ***includes no additional factual allegations*** to demonstrate that Intel purportedly knew or should have known its conduct amounted to infringement before the filing of the Complaint. Accordingly, VLSI’s claims for willful infringement of the At-Issue Patents should be dismissed.

VLSI’s claims with respect to pre-complaint indirect infringement of the ’633, ’331, and ’026 patents fail for similar reasons. To state a claim for either induced infringement or contributory infringement, a plaintiff must allege facts that plausibly show that the defendant had knowledge of the patent and knowledge that the patent was infringed. *See, e.g., Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926 (2015) (“Like induced infringement, contributory infringement requires knowledge of the patent in suit and knowledge of patent infringement.”); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766, 769 (2011) (noting that either actual knowledge<sup>2</sup> or willful blindness—which is a higher standard than negligence or recklessness—is required for indirect infringement). VLSI’s factual allegations regarding Intel’s alleged pre-complaint actual knowledge of or willful blindness to the ’633, ’331, and ’026 patents are insufficient, and VLSI’s failure to include any additional factual allegations that Intel purportedly knew of the alleged infringement is fatal to its claims of pre-complaint indirect infringement. Thus, these claims should also be dismissed.

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<sup>2</sup> “Actual knowledge” is used to distinguish situations in which a party actually had awareness of a patent from those in which a party was merely willfully blind to a patent, and is therefore charged with, its knowledge.



### III. STATEMENT OF FACTS

#### A. VLSI's Claims That Intel Willfully And Indirectly Infringed The '633, '331, And '026 Patents Are Not Supported By Factual Allegations

VLSI's Complaint includes claims for willful and indirect infringement of the '633, '331, and '026 patents, but fails to include sufficient factual allegations to support those claims. VLSI's Complaint asserts that Intel directly and indirectly infringes each of these patents. (Compl. ¶¶ 15, 32-33, 97, 114-115, 128, 143-144.) VLSI also includes virtually identical allegations that Intel had pre-complaint knowledge of, or was willfully blind to, these patents:

Intel has long had knowledge of the ['633, '331, or '026 patent]. For example, the ['633, '331, or '026 patent] has been cited in [specified Intel patent prosecutions]. To the extent Intel claims it did not have broader actual knowledge of the ['633, '331, or '026 patent], Intel has been willfully blind to [the '633, '331, or '026 patent's] existence based on, for example, its publicly-known corporate policy forbidding its employees from reading patents held by outside companies or individuals.

(*Id.* ¶¶ 31, 113, 142.) Relying on these allegations of knowledge or willful blindness, VLSI uses identical, boilerplate language to allege that Intel willfully infringes each of these patents:

VLSI is informed and believes, and thereon alleges, that the infringement of the ['633, '331, or '026 patent] by Intel has been and continues to be willful. As noted above, Intel has long had knowledge of the ['633, '331, or '026 patent]. Intel has deliberately continued to infringe in a wanton, malicious, and egregious manner, with reckless disregard for VLSI's patent rights. Thus, Intel's infringing actions have been and continue to be consciously wrongful.

(*Id.* ¶¶ 37, 119, 148.)<sup>3</sup>

VLSI similarly includes identical language to allege that Intel induces and contributes to infringement of the '633, '331, and '026 patents, but no factual allegations to support that Intel knew its actions were inducing or contributing to another's direct infringement:

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<sup>3</sup> Notably, the application that resulted in the '633 patent was filed on June 26, 1998. Declaration of Amanda L. Major ("Major Decl.") ¶ 24 & Ex. 20.) The '633 patent thus expired on June 26, 2018—two days before VLSI filed its Complaint. (*Id.*; see Compl. (dated June 28, 2018).) 35 U.S.C. § 154(a)(2) (providing that a patent grant "shall be for a term . . . ending 20 years from the date on which the application for the patent was filed in the United States"). VLSI's allegation that Intel's actions with respect to the '633 patent "continue to be consciously wrongful" thus is not facially plausible.

VLSI is informed and believes, and thereon alleges, that Intel actively, knowingly, and intentionally has induced infringement of the ['633, '331, or '026 patent] by, for example, controlling the design and manufacture of, offering for sale, selling, supplying, and otherwise providing instruction and guidance regarding the above-described products with the knowledge and specific intent to encourage and facilitate infringing uses of such products by its customers both inside and outside the United States (as used in this pleading, “customers” refers to both direct and indirect customers, including entities that distribute and resell the accused products, alone or as part of a system, and end users of such products and systems). For example, Intel publicly provides documentation, including datasheets available through Intel’s publicly accessible ARK service and software developer’s manuals, instructing customers on uses of Intel’s products that infringe the methods of the ['633, '331, or '026 patent]. *See, e.g.*, <http://ark.intel.com>. On information and belief, Intel’s customers directly infringe the ['633, '331, or '026 patent] by, for example, making, using, offering to sell, and selling within the United States, and importing into the United States, without authority or license, products containing the above-described Intel products.

(*Id.* ¶¶ 32, 114, 143.)

VLSI is informed and believes, and thereon alleges, that Intel has contributed to the infringement by its customers of the ['633, '331, or '026 patent] by, without authority, importing, selling and offering to sell within the United States materials and apparatuses for practicing the claimed invention of the ['633, '331, or '026 patent] both inside and outside the United States. For example, the above-described products constitute a material part of the inventions of the ['633, '331, or '026 patent] and are not staple articles or commodities of commerce suitable for substantial noninfringing use. On information and belief, Intel knows that the above-described products constitute a material part of the inventions of the ['633, '331, or '026 patent] and are not staple articles or commodities of commerce suitable for substantial noninfringing use. On information and belief, Intel’s customers directly infringe the ['633, '331, or '026 patent] by, for example, making, using, offering to sell, and selling within the United States, and importing into the United States, without authority or license, products containing the above-described Intel products.

(*Id.* ¶¶ 33, 115, 144.)

**B. VLSI’s Claim That Intel Willfully Infringed The ’552 Patent Is Not Supported By Factual Allegations**

VLSI’s Complaint asserts that Intel has directly infringed the ’552 patent. (Compl. ¶ 68.)

Apparently unable to locate an Intel patent citing the ’552 patent, VLSI does not even attempt to

allege that Intel had actual knowledge of the '552 patent before the filing of VLSI's Complaint.

Instead, VLSI alleges:

Intel has had knowledge of the '552 Patent at least since the filing of this complaint, and if it did not have actual knowledge prior to that time, it was willfully blind to the existence of the '552 Patent based on, for example, its publicly-known corporate policy forbidding its employees from reading patents held by outside companies or individuals.

(*Id.* ¶ 84.) VLSI goes on to assert that it “is informed and believes, and thereon alleges, that Intel’s infringement of the '552 Patent has been and continues to be willful.” (*Id.* ¶ 88.) VLSI does not allege that Intel has indirectly infringed that '552 patent.

#### IV. ARGUMENT

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).<sup>4</sup> To state a facially plausible claim for willful infringement, a plaintiff must allege facts regarding two types of knowledge: First, the plaintiff must allege facts that, if accepted as true, demonstrate that the defendant knew of the patents-in-suit. *Välinge Innovation*, 2018 WL 2411218, at \*13. Second, the plaintiff must allege facts that, if accepted as true, demonstrate that the defendant knew or should have known that its conduct amounted to infringement of those patents-in-suit. *Id.* For claims of pre-complaint indirect infringement, a plaintiff is required to allege facts regarding these same two types of knowledge. *Commil USA*, 135 S. Ct. at 1926 (stating that induced and contributory infringement require both “knowledge of the patent in suit” and “knowledge of patent infringement”). Unlike in the context of willful

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<sup>4</sup> In the Third Circuit, when considering a motion to dismiss brought under Rule 12(b)(6), courts apply a two-part analysis to determine whether a complaint sufficiently alleges facts to satisfy Rule 8(a)(2)'s pleading requirement. First, courts must separate the factual and legal elements of a claim, accepting the complaint's well-pleaded facts as true, but disregarding any legal conclusions. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009); *Välinge Innovation*, 2018 WL 2411218, at \*2. Second, courts must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. *See Fowler*, 578 F.3d at 211; *Välinge Innovation*, 2018 WL 2411218, at \*2.

infringement, however, it is not sufficient to show that a defendant “should have known” of the infringement. *Global-Tech*, 563 U.S. at 769. VLSI has failed to adequately plead either type of knowledge. Accordingly, VLSI’s claims for willful infringement of the At-Issue Patents and for pre-complaint indirect infringement of the ’633, ’331, and ’026 patents do not satisfy Rule 8(a)(2) and should be dismissed.

**A. VLSI’s Claims For Willful Infringement Of The At-Issue Patents Should Be Dismissed**

**1. VLSI Has Not Sufficiently Pleaded That Intel Knew Of The At-Issue Patents Prior To VLSI’s Complaint**

To move forward on its claim that Intel willfully infringed the At-Issue Patents prior to June 28, 2018—the date on which VLSI filed its Complaint—VLSI must allege facts that plausibly demonstrate that Intel had knowledge of those patents before that date. *See Fowler*, 578 F.3d at 210-11. VLSI’s allegations, however, are insufficient to permit a reasonable inference that Intel knew of (or was willfully blind to) the At-Issue Patents.

**(a) VLSI Has Not Sufficiently Pleaded Pre-Complaint Actual Knowledge Of The At-Issue Patents**

The only factual allegations that VLSI includes in its Complaint in support of Intel’s purported actual knowledge of the ’633, ’331, and ’026 patents before the Complaint was filed are that each of those three patents “has been cited” in a handful of Intel patent prosecutions. (VLSI fails to make even that allegation in the context of the ’552 patent.) However, “[a]t the motion to dismiss stage, allegations that a defendant cited or referenced a patent during prosecution are generally not sufficient, alone, to support an inference of pre-suit knowledge of that patent.” *See, e.g., Princeton Digital Image Corp. v. Ubisoft Entm’t SA*, No. 13-335-LPS-CJB, 2017 WL 6337188, at \*1 (D. Del. Dec. 12, 2017), *adopting* No. 13-335-LPS-CJB, 2016 WL 6594076 (D. Del. Nov. 4, 2016). That an allegation of a mere mention of a third-party patent during prosecution of a defendant’s patent is insufficient to permit a reasonable inference

that the defendant knew of the third-party's patent makes sense given that many patentees prosecute large portfolios of patents, and prosecution of each may involve citation of dozens or hundreds of third-party patents. Here, where VLSI has alleged no additional facts to support why the mention of these particular patents during prosecution of particular Intel patents (or, as explained below, circumstances that fall short of even that) should give rise to a reasonable inference that Intel knew of the patents, VLSI's allegations do not make it plausible that Intel had pre-complaint knowledge of the patents.

**(1) VLSI Has Failed To Adequately Plead Pre-Complaint Actual Knowledge Of The '633 Patent**

VLSI's allegation that "the '633 Patent has been cited in multiple Intel patent prosecutions, including during the prosecution of its U.S. Patent Nos. 7,215,781; 9,507,962; 9,507,963; 9,547,779; and 9,619,672" is insufficient to make pre-complaint knowledge of the '633 patent by Intel plausible. (Compl. ¶ 31.) The '633 patent is one of 234 patents or patent applications cited in U.S. Patent No. 7,215,781's prosecution history, and one of 86 to 88 patents or patent applications cited in the prosecution histories for each of the other four Intel patents VLSI cites, all of which are in the same patent family. (Major Decl. ¶¶ 3-8 & Exs. 1-5.)<sup>5</sup> This District has previously held the mention of a plaintiff's patent during prosecution of one of defendant's patents to be inadequate for inferring pre-complaint knowledge of the asserted patent. *See, e.g., Princeton Digital Image*, 2017 WL 6337188, at \*1; *Spherix Inc. v. Juniper Networks, Inc.*, No. 14-578-SLR, 2015 WL 1517508, at \*3 (D. Del. Mar. 31, 2015) (finding no knowledge of plaintiff's patent despite citation to that patent by examiner and defendant during

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<sup>5</sup> As the Third Circuit has recognized in affirming a dismissal under Rule 12(b)(6), courts must "draw on the allegations of the complaint in a realistic, rather than slavish, manner," and "are not required to accept as true unsupported conclusions and unwarranted inferences." *Kundrat v. Thomas*, 407 F. App'x 625, 627 (3d Cir. 2011) (internal quotation marks and alterations omitted). It is thus permissible for the Court to consider the additional circumstances of the alleged citation of the At-Issue Patents during prosecution of Intel patents in assessing whether VLSI has sufficiently alleged that Intel had actual knowledge of the At-Issue Patents.

prosecution of two patents); *Chalumeau Power Sys. LLC v. Alcatel-Lucent*, No. 11-1175-RGA, 2012 WL 6968938, at \*1 (D. Del. July 18, 2012) (“The Amended Complaint states that twice in 2003, and once in 2004, in relation to three patent applications . . . , a patent examiner asserted that the [asserted] patent was prior art. . . . Those are factual assertions. They do not, however, in my judgment, make actual knowledge of the [asserted] patent’s existence by the . . . defendants plausible.”). Here too, VLSI’s factual allegation is insufficient to make it plausible that Intel had actual knowledge of the ’633 patent before the filing of VLSI’s Complaint.

**(2) VLSI Has Failed To Adequately Plead Pre-Complaint Actual Knowledge Of The ’331 Patent**

VLSI’s factual allegation relating to Intel’s supposed pre-complaint actual knowledge of the ’331 patent is similarly insufficient. VLSI asserts that Intel had actual knowledge of the ’331 patent because, supposedly, “the ’331 Patent has been cited in Intel patent prosecutions, including during the prosecution of its U.S. Patent No. 7,523,327.” (Compl. ¶ 113.) Even if that allegation were accurate, it would be insufficient to plausibly allege that Intel had pre-complaint knowledge of the ’331 patent. *See Princeton Digital Image*, 2017 WL 6337188, at \*1. But the ’331 patent is not, in fact, identified as a reference that was cited during prosecution of U.S. Patent No. 7,523,327. (Major Decl. ¶ 17 & Ex. 6.) Rather, a Chinese counterpart to the ’331 patent, CN1853151, was cited during prosecution of a Chinese counterpart to Intel’s U.S. Patent No. 7,523,327, CN101137967. (*Id.* ¶¶ 9-17 & Exs. 6-11.)

In *Princeton Digital Image Corp. v. Ubisoft Entertainment SA*, this Court rejected the notion that a plaintiff can plausibly allege actual knowledge of a patent through “degrees of separation.” No. 13-335-LPS-CJB, 2016 WL 6594076, at \*6-7 (D. Del. Nov. 4, 2016), *report and recommendation adopted*, No. 13-335-LPS-CJB, 2017 WL 6337188 (D. Del. Dec. 12, 2017). Here, VLSI appears to allege that citation of a third-party Chinese patent during

prosecution of one of Intel's Chinese patents gave Intel actual knowledge of not only that third-party Chinese patent, *but also its counterparts*—including the '331 patent itself. Under this rationale, a party would have actual knowledge of all U.S. patents ever mentioned during the course of patent prosecution *and* all U.S. patents that correspond to any foreign patent mentioned during patent prosecution. VLSI's allegation simply requires too far a stretch to provide a basis for a reasonable inference that Intel knew of the '331 patent before VLSI filed its Complaint.

**(3) VLSI Has Failed To Adequately Plead Pre-Complaint Actual Knowledge Of The '026 Patent**

For Intel's pre-complaint knowledge of the '026 patent, VLSI relies on a similar factual allegation that fails to make such knowledge plausible. VLSI alleges that “the '026 Patent has been cited in Intel patent prosecutions, including during the prosecution of its U.S. Patent No. 8,810,304.” (Compl. ¶ 142.) Even if that were an accurate statement, that allegation would not be sufficient to plausibly allege that Intel had pre-complaint knowledge of the '026 patent. *See Princeton Digital Image*, 2017 WL 6337188, at \*1. In any event, the '026 patent was not cited during prosecution of U.S. Patent No. 8,810,304; instead, Intel cited to the published patent application that resulted in the '026 patent—U.S. Patent Application No. 2011/0291740—and the only mention of the '026 patent in the file history for U.S. Patent No. 8,810,304 is in a PCT search report that identified the '026 patent as a family member of U.S. Patent Application No. 2011/0291740. (Major Decl. ¶¶ 18-23 & Exs. 12-19.) Notably, Intel cited the application *after* the '026 patent had issued, further suggesting that Intel was, in fact, unaware of the existence of the '026 patent. (*Id.*)

“[A]n infringer's knowledge of the patent application cannot, standing alone, constitute knowledge of the resulting, or issued, patent-in-suit.” *Adidas Am., Inc. v. Skechers USA, Inc.*, No. 3:16-cv-1400-SI, 2017 WL 2543811, at \*3 (D. Or. June 12, 2017). “Filing an application is

no guarantee any patent will issue . . . [and] the scope of claims in patents that do issue . . . is something totally unforeseeable.” *Bayer Healthcare, LLC v. Baxalta Inc.*, No. 16-1122-RGA, 2017 U.S. Dist. LEXIS 126904, at \*3 (D. Del. Aug. 10, 2017) (quoting *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985)); *see also, e.g., Software Research, Inc. v. Dynatrace LLC*, No. 18-cv-00232-EMC, 2018 WL 3241043, at \*13 (N.D. Cal. July 3, 2018) (same). Thus, the only factual allegation VLSI provides as a basis for Intel’s supposed pre-complaint knowledge of the ’026 patent is insufficient to permit a reasonable inference of such knowledge.

**(4) VLSI Has Failed To Adequately Plead Pre-Complaint Actual Knowledge Of The ’552 Patent**

VLSI’s Complaint includes *no* express allegations concerning Intel’s supposed pre-complaint actual knowledge of the ’552 patent. (Compl. ¶ 84 (“Intel has had knowledge of the ’552 patent at least since the filing of this complaint[.]”).)

**(b) VLSI’s Allegations That Intel Willfully Blinded Itself To The Existence Of The At-Issue Patents Are Insufficient**

Perhaps aware of the insufficiency of its actual knowledge allegations, VLSI also asserts that Intel was “willfully blind” to those patents. Even if taken as true, however, VLSI’s assertions do not support its claims of willful infringement of the At-Issue Patents.

As an initial matter, courts, including this District, have expressed doubt as to whether the doctrine of “willful blindness”—which ordinarily arises in the indirect infringement context—can be applied to satisfy the requirement that a defendant have knowledge of an asserted patent in the willful infringement context. *See Adidas Am.*, 2017 WL 2543811, at \*5 (“It is unclear, however, that the doctrine of willful blindness as articulated in *Global-Tech*, an induced infringement case, applies in the direct infringement analysis context.”); *see also, e.g., Kyowa Hakka Bio, Co. v. Ajinomoto Co.*, No. 17-313, 2018 WL 834583, at \*10 (D. Del. Feb. 12,



2018) (citing *Global-Tech*, 563 U.S. at 766, 769); *Nonend Inventions, N.V. v. Apple Inc.*, No. 2:15-cv-466-JRG-RSP, 2016 WL 1253740, at \*2-3 (E.D. Tex. Mar. 11, 2016) (“The Court does not address if ‘willful blindness’ can serve as a substitute for actual knowledge in an allegation of willful infringement.”), *report and recommendation adopted*, No. 2:15-cv-466-JRG-RSP, 2016 WL 1244973 (E.D. Tex. Mar. 30, 2016).

But even if willful blindness could, in theory, satisfy VLSI’s obligation to allege that Intel knew of the patents in the context of a willful infringement analysis, VLSI’s allegations in its Complaint are still insufficient. “[A] willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.” *Kyowa Hakka Bio*, 2018 WL 834583, at \*10 (quoting *Global-Tech*, 563 U.S. at 766). In contrast, VLSI (without citing to any support) has alleged that Intel supposedly has a “publicly-known corporate policy forbidding its employees from reading patents held by outside companies or individuals.” (Compl. ¶¶ 31, 84, 113, 142.) VLSI’s Complaint includes no factual allegations that Intel was particularly concerned about the existence of the At-Issue Patents when it developed its alleged policy. VLSI’s argument is essentially that such a policy would make Intel willfully blind as to *any patent in existence*, such that any allegation of infringement could automatically be alleged to be willful. VLSI’s argument contradicts the Supreme Court’s admonition that courts should “exercise . . . discretion, limiting the award of enhanced damages to egregious cases of misconduct beyond typical infringement.” *Halo*, 136 S. Ct. at 1935. VLSI’s allegation thus falls far short of suggesting that Intel subjectively believed that there was a high probability that any of the At-Issue Patents existed and took deliberate actions to avoid learning of it. *Ansell Healthcare Prods. LLC v. Reckitt Benckiser LLC*, No. 15-915-RGA, 2018 WL 620968, at \*6 (D. Del. Jan.

30, 2018) (citing *Global-Tech*, 563 U.S. at 769). “[A] defendant’s willful blindness to all of the patents in an *entire field* might not necessarily demonstrate culpability tantamount to the culpability demonstrated by a defendant’s knowledge of a *particular patent* covering the product being sold, as is required for willful infringement.” *Id.* at \*6 (emphasis added); *see also, e.g., Nonend Inventions*, 2016 WL 1253740, at \*2-3 (“[T]he Court finds Motorola’s policy of asking its employees to ignore patents and patent applications does not per-se constitute ‘willful blindness.’ The Court finds that more must be alleged to show a policy of ignoring patents caused an infringer’s actions to surpass recklessness and negligence and rise to the level of willful blindness.” (internal quotation marks omitted)).

**2. VLSI Has Not Sufficiently Pleaded That Intel Knew Or Should Have Known That Its Conduct Amounted To Infringement Of The Patents**

As demonstrated above, VLSI has failed to sufficiently allege that Intel had either actual knowledge of the At-Issue Patents or willfully blinded itself to the existence of those patents. Separately, however, VLSI’s Complaint is entirely devoid of any factual allegations that, even if taken as true, would show that Intel knew or should have known that its conduct amounted to infringement of the At-Issue Patents.

To adequately plead a claim for willful infringement, a plaintiff must—in addition to including factual allegations that the defendant had knowledge of a patent—include factual allegations that the defendant knew that its actions *constituted infringement* of that patent. *See, e.g., Välinge Innovation*, 2018 WL 2411218, at \*13; *Valmont Indus., Inc. v. Lindsay Corp.*, No. 15-042-LPS-CJB, 2018 WL 503255, at \*3-4 (D. Del. Jan. 22, 2018). More specifically:

[A] plaintiff alleging that it is plausible that a defendant had knowledge of its infringement as of a particular date must do more than simply allege facts rendering it plausible that as of that date: (1) a defendant knew of the patent claims and (2) happened to infringe at least one of them. There also has to be some facts alleged that show why it is plausible that, as of that date, the defendant knew that it infringed.

*Valmont Indus.*, 2018 WL 503255, at \*4 n.8; *see also Välinge Innovation*, 2018 WL 2411218, at \*13 (“[T]here must be some other factual allegations that go to the accused infringer’s subjective intent to infringe—*i.e.*, that plausibly demonstrate that the accused infringer not only knew of the patent-in-suit, but also knew or should have known that what it was doing (and what it continued to do) amounted to infringement of that patent.”); *id.* (citing *Bio-Rad Labs. Inc. v. Thermo Fisher Sci. Inc.*, 267 F. Supp. 3d 499 (D. Del. 2017), as an example of a District of Delaware decision finding willfulness allegations plausible where the complaint alleged that the plaintiff gave the defendant notice of infringement, proposed licensing terms, and sent a reminder letter to the defendant, that the defendant or an affiliate then directed the filing of an opposition to the European counterpart of the asserted patent, and that the defendant continued to sell the accused products).

VLSI’s Complaint fails to allege *any* facts from which one could plausibly infer that Intel knew or should have known that its conduct amounted to infringement of the At-Issue Patents. The Court should therefore dismiss VLSI’s willful infringement allegations as to those patents.

### **3. VLSI’s Willful Infringement Claims Should Be Dismissed In Their Entirety**

VLSI’s failure to adequately plead that Intel knew of the At-Issue Patents before the filing of the Complaint or knew or should have known that its actions constituted infringement of those patents requires dismissal of VLSI’s claims for willful infringement of the At-Issue Patents in their entirety. Decisions in this District have held that, “to state a claim of willful infringement, the patentee must allege facts in its pleading plausibly demonstrating that the accused infringer had committed subjective willful infringement *as of the date of the filing of the willful infringement claim.*” *Välinge Innovation*, 2018 WL 2411218, at \*12 (emphasis added); *see also, e.g., Adidas Am.*, 2017 WL 2543811, at \*4 (“A patentee . . . must have a good

faith basis for alleging willful infringement at the time when the complaint is filed.”).<sup>6</sup> VLSI’s willful infringement claims thus should be dismissed in their entirety. Indeed, that result is in line with *Halo*’s caution that enhanced damages under § 284 should be used only as a “‘punitive’ or ‘vindictive’ sanction for egregious infringement behavior.” 136 S. Ct. at 1932. Since VLSI has not plausibly alleged that Intel had knowledge of the At-Issue Patents or its alleged infringement thereof at the time that VLSI filed its Complaint, VLSI cannot be said to have adequately stated a claim that gives rise to such a severe sanction *in the same Complaint*. See *Välinge Innovation*, 2018 WL 2411218, at \*11 n.15.

At the very least, the Court should dismiss VLSI’s claims for pre-complaint willful infringement of the ’552, ’331, and ’026 patents. The Court should dismiss VLSI’s claim of willful infringement of the ’633 patent in its entirety in any event, as the ’633 patent expired two days *prior to* VLSI filing its Complaint. Intel thus cannot have infringed the ’633 patent, willfully or otherwise, after VLSI filed its Complaint. See, e.g., *Korsinsky v. Microsoft Corp.*, No. 04CV2695 (SLT)(LB), 2005 WL 1123769, at \*2 (E.D.N.Y. Mar. 31, 2005) (“[O]ne cannot infringe an expired patent.”), *aff’d*, 198 F. App’x 931 (Fed. Cir. 2006).

**B. VLSI’s Claims For Indirect Infringement Of The ’633, ’331, And ’026 Patents Should Be Dismissed**

For reasons similar to those described above with respect to willful infringement, the Court should dismiss VLSI’s claims for pre-complaint induced and contributory infringement. To move forward on its claims against Intel for induced and contributory infringement of the ’633, ’331, and ’026 patents prior to the June 28, 2018 filing of the Complaint, VLSI must plausibly allege that Intel knew of those patents before that date and that the conduct it

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<sup>6</sup> *But see Välinge Innovation*, 2018 WL 2411218, at \*9 (“Courts are split . . . on whether post-suit knowledge of a patent can alone suffice to make out a claim of willful infringement.” (footnote omitted)); cf. *Zimmer Surgical, Inc. v. Stryker Corp.*, No. CV 16-679-RGA-MPT, 2017 WL 3736750, at \*2 (D. Del. Aug. 30, 2017) (“[A]llegations of post-filing conduct can support a finding of willfulness.”).

supposedly induced and contributed to constituted infringement of those patents before that date. *See Chalumeau Power Sys.*, 2012 WL 6968938, at \*1 (“Both induced infringement and contributory infringement require the defendant to know of the patent, and to know that the defendant’s actions are either inducing or contributing to another’s infringement.”); *see also MONEC Holding AG v. Motorola Mobility, Inc.*, 897 F. Supp. 2d 225, 229 (D. Del. 2012) (“To prevail on a claim for indirect infringement, . . . [t]he knowledge requirement[s] must be met by a showing of either actual knowledge or willful blindness.”). VLSI has failed to adequately plead Intel’s pre-complaint knowledge of the ’633, ’331, and ’026 patents, and has failed to adequately plead that Intel had pre-complaint knowledge that it induced or contributed to infringement of those patents. VLSI’s pre-complaint indirect infringement claims should therefore be dismissed for these two separate and independent reasons.

**1. VLSI Has Not Sufficiently Pleaded That Intel Knew Of, Or Was Willfully Blind To, The ’633, ’331, And ’026 Patents**

VLSI has failed to plead sufficient facts regarding Intel’s supposed pre-complaint actual knowledge of, or willful blindness to, the ’633, ’331, and ’026 patents. Just as VLSI’s allegations regarding the citation of these patents during prosecution of certain Intel patents are insufficient for willfulness purposes (*see supra* Section IV.A.1.(a).(1)-(3)), they are also insufficient for purposes of induced and contributory infringement. *See, e.g., Princeton Digital Image*, 2016 WL 6594076, at \*6-9, \*11 (assessing the plaintiff’s pleading of factual allegations concerning knowledge of the asserted patent in the same way for purposes of induced, contributory, and willful infringement claims); *Chalumeau Power Sys.*, 2012 WL 6968938, at \*1-2 (analyzing pre-complaint knowledge of the patent-in-suit for induced, contributory, and willful infringement in the same way). Likewise, VLSI’s allegation that a supposed Intel policy prohibits Intel employees from reviewing non-Intel patents is insufficient to permit a reasonable

inference that Intel was aware of a high likelihood of the existence of the '633, '331, or '026 patent and took steps to avoid learning of it. *See supra* Section VI.A.1.(b); *see also, e.g., Ansell Healthcare Prods.*, 2018 WL 620968, at \*6-7 (reasoning that willful blindness to all patents in an entire field does not demonstrate the same level of culpability as willful blindness to a particular patent); *Princeton Digital Image*, 2016 WL 6594076, at \*8-9, \*11; *Chalumeau Power Sys.*, 2012 WL 6968938, at \*1-2.

**2. VLSI Has Not Sufficiently Pleaded That Intel Knew Of, Or Was Willfully Blind To, Infringement Of The '633, '331, and '026 Patents**

VLSI's indirect infringement claims with respect to the '633, '331, and '026 patents should also be dismissed because VLSI's Complaint is devoid of factual allegations that, even if accepted as true, would permit a reasonable inference that Intel knew, or was willfully blind to the fact that, the acts at issue constituted patent infringement. *See, e.g., Commil USA*, 135 S. Ct. at 1926 ("Like induced infringement, contributory infringement requires knowledge of the patent in suit *and knowledge of patent infringement.*" (emphasis added)); *Princeton Digital Image*, 2016 WL 6594076, at \*4 ("Claims for both induced infringement and contributory infringement require, *inter alia*, 'knowledge of the existence of the patent that is [allegedly] infringed' as well as 'knowledge that the acts [at issue] constitute patent infringement.'" (quoting *Global-Tech*, 563 U.S. at 765-66)).

VLSI's Complaint asserts, in conclusory fashion, that Intel "actively, *knowingly*, and intentionally has induced infringement" of the '633, '331, and '026 patents, and that Intel acted "with the *knowledge* and specific intent to encourage and facilitate infringing uses of" products described in its Complaint. (Compl. ¶¶ 32, 114, 143 (emphasis added).) VLSI does not include any facts that support its assertions regarding Intel's knowledge. Similarly, for its contributory infringement claims for the '633, '331, and '026 patents, VLSI's Complaint asserts that "Intel

knows that the above-described products constitute a material part of the inventions of the [patents] and are not staple articles or commodities of commerce suitable for substantial noninfringing use.” (*Id.* ¶¶ 33, 115, 144.) But VLSI’s Complaint contains no additional factual allegations to support its conclusory assertion that Intel knew of the alleged infringement.

Decisions from this District have found similar allegations inadequate at the pleading stage. For example, a complaint stating that “[Defendant] actively, knowingly, and intentionally induced, and continues to actively, knowing, and intentionally induce, infringement of the [patent-in-suit],” and acted “with knowledge that its game developers will use the methods claimed in the [patent-in-suit]” and “with the knowledge and the specific intent to encourage and facilitate those infringing uses of the aforementioned software processes,” was insufficient to plead knowledge of infringement for inducement purposes. *McRo, Inc. v. Rockstar Games, Inc.*, Nos. 12-1513, -1517, -1519, 2014 WL 1051527, at \*4-6 (D. Del. Mar. 17, 2014) (agreeing that the complaint was “entirely silent on knowledge of infringement before this suit” and dismissing induced infringement claims), *report and recommendation adopted*, Nos. 12-1513, -1517, -1519, 2014 WL 1677366 (D. Del. Apr. 24, 2014); *see also Neology, Inc. v. Kapsch Trafficcom IVHS, Inc.*, No. 13-2052-LPS, 2014 WL 4675316, at \*3-4, \*7 (D. Del. Sept. 19, 2014) (dismissing indirect infringement claims despite defendants’ pre-complaint knowledge of and communications with the plaintiff about the asserted patents, because the complaint did not “contain any specific facts articulating how or why [the defendant] would have or should have understood that the [accused technology] discussed in those communications included the types of . . . products that are accused of infringement here” and “Plaintiff did not adequately allege Defendants’ knowledge of how the Accused Products are used by their customers to infringe the patents-in-suit”); *HSM Portfolio LLC v. Fujitsu Ltd.*, No. 11-770-RGA, 2012 WL 2580547, at \*1

(D. Del. July 3, 2012) (“To the extent the allegations can be read to allege that the defendant knew that the acts it induced or contributed to constituted patent infringement, *they are wholly unsupported by any factual allegations.*” (emphasis added) (citation omitted)). Accordingly, VLSI’s indirect infringement claims as to the ’633, ’331, and ’026 patents fail to satisfy the pleading requirements of Rule 8(a)(2).

**3. VLSI’s Pleading Deficiencies Warrant Dismissal Of VLSI’s Indirect Infringement Claims**

Given the deficiencies in VLSI’s Complaint with respect to Intel’s alleged pre-complaint knowledge of the ’633, ’331, and ’026 patents, as well as VLSI’s failure to plead factual allegations that would permit a reasonable inference that Intel knew of or was willfully blind to infringement of these patents, VLSI’s pre-complaint claims for induced and contributory infringement should be dismissed. With respect to the ’633 patent, which expired before VLSI filed its Complaint, such dismissal should result in VLSI’s indirect infringement claims being dismissed altogether. *See supra* Section IV.A.3.

**V. CONCLUSION**

Based on the foregoing, Intel requests that the Court dismiss:

- VLSI’s claim for willful infringement of the ’633 patent in its entirety;
- VLSI’s claims for willful infringement of the ’552, ’331, and ’026 patents in their entirety or, at a minimum, VLSI’s claims for pre-complaint willful infringement of those patents;
- VLSI’s claim for induced infringement of the ’633 patent in its entirety;
- VLSI’s claim for contributory infringement of the ’633 patent in its entirety;
- VLSI’s claims for pre-complaint induced infringement of the ’331 and ’026 patents; and
- VLSI’s claims for pre-complaint contributory infringement of the ’331 and ’026 patents.



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**CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 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 August 20, 2018, upon the following in the manner indicated:

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