

# **APPENDICES**

**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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2017-1475

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ARCTIC CAT INC.,  
*Plaintiff-Appellee,*  
*v.*

BOMBARDIER RECREATIONAL  
PRODUCTS INC., BRP U.S. INC.,  
*Defendants-Appellants.*

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Appeal from the United States District Court for  
the Southern District of Florida in No. 0:14-cv-62369-  
BB, Judge Beth Bloom.

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Decided: December 7, 2017  
[876 F.3d 1350]

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JOHN A. DRAGSETH, Fish & Richardson P.C., Minneapolis, MN, argued for plaintiff-appellee. Also represented by NICHOLAS STEPHAN BOEBEL, Populus Law LLC, Minneapolis, MN; NIALl ANDREW MACLEOD, AARON MYERS, DIANE PETERSON, Kutak Rock LLP, Minneapolis, MN.

WILLIAM F. LEE, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, MA, argued for defendants-appellants. Also represented by JENNIFER JASMINE JOHN, MICHELLE LISZT SANDALS, LOUIS W. TOMPROS.

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Before MOORE, PLAGER, and STOLL, *Circuit Judges*.

MOORE, *Circuit Judge*.

Bombardier Recreational Products Inc. and BRP U.S. Inc. (collectively, “BRP”) appeal from the United States District Court for the Southern District of Florida’s denial of judgment as a matter of law that the asserted claims of U.S. Patent Nos. 6,568,969 (“’969 patent”) and 6,793,545 (“’545 patent”) would have been obvious, that Arctic Cat Inc. (“Arctic Cat”) failed to mark patented products, that the jury’s royalty award was based on improper expert testimony, and that BRP did not willfully infringe the asserted claims. BRP also appeals the district court’s decision to treble damages and its award of an ongoing royalty to Arctic Cat. We affirm the district court’s denial of judgment as a matter of law as to obviousness, the jury’s royalty rate, and willfulness. We affirm the district court’s decision to treble damages and award an ongoing royalty to Arctic Cat. We vacate the court’s denial of judgment as a matter of law as to marking and remand for further consideration limited to that issue.

#### BACKGROUND

The ’969 and ’545 patents disclose a thrust steering system for personal watercraft (“PWC”) propelled by jet stream. This type of watercraft is propelled by discharging water out of a discharge nozzle at the rear of the watercraft. *E.g.*, ’545 patent at 1:22–24. The rider controls the thrust of water out of the discharge nozzle by pressing a lever mounted on the steering handle. *Id.* at 1:38–40. A sufficient amount of thrust out of the steering nozzle is required for these watercraft to steer properly because decreasing the thrust of the water out

of the discharge nozzle decreases the steering capability of the watercraft. *Id.* at 1:34–36, 1:51–55.

Because steering capabilities are affected by the amount of thrust applied, the patents explain that, to avoid obstacles at high speed, riders should apply constant pressure on the throttle lever while simultaneously turning the steering handle away from the obstacle. *Id.* at 1:59–61. This is counter-intuitive to inexperienced riders who often slow down to turn out of the way. *Id.* at 1:55–65. In these situations a rider may not be able to avoid the obstacle because steering capability has been decreased. *Id.* at 1:65–67. The patents seek to overcome this issue by automatically providing thrust when riders turn the steering system. *Id.* at 2:11–27. Claim 15 of the '545 patent is representative:

A watercraft including:

a steering mechanism;

a steering nozzle;

a thrust mechanism;

a lever adapted to allow an operator to manually control thrust of said thrust mechanism, said lever mounted on said steering mechanism and biased toward an idle position; and

***a controlled thrust steering system*** for controlling thrust of said thrust mechanism independently of the operator;

wherein said controlled thrust steering system activates said thrust mechanism ***to provide a steerable thrust*** after said lever is positioned other than to provide a

steerable thrust and after the steering mechanism is positioned for turning said watercraft.

Arctic Cat sued BRP for infringement of claims 13, 15, 17, 19, 25, and 30 of the '545 patent and claims 15–17, and 19 of the '969 patent, accusing the off-throttle thrust reapplication system in several of BRP's Sea-Doo PWC. BRP refers to its proprietary off-throttle thrust reapplication system as Off-Throttle Assisted Steering ("OTAS"). Before trial, BRP unsuccessfully moved for summary judgment on several issues, including that Arctic Cat's sole licensee Honda failed to mark its products with the licensed patent numbers.

At trial, the jury found both patents not invalid, awarded a royalty consistent with Arctic Cat's model (\$102.54 per unit) to begin on October 16, 2008, and found by clear and convincing evidence that BRP willfully infringed the asserted claims. Based on the willfulness verdict, the district court trebled damages, a decision it further explained in a subsequent order.

After post-trial briefing, the district court denied BRP's renewed motion for judgment as a matter of law on all issues. It granted Arctic Cat's motion for an ongoing royalty, awarding \$205.08 per unit. BRP appeals the district court's denial of judgment as a matter of law on validity, marking, damages, and willfulness, as well as its grant of an ongoing royalty and decision to treble damages. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

#### DISCUSSION

In appeals of patent cases, we apply the law of the regional circuit "to which district court appeals normally lie, unless the issue pertains to or is unique to patent law." *AbbVie Deutschland GmbH & Co., KG v.*

*Janssen Biotech, Inc.*, 759 F.3d 1285, 1295 (Fed. Cir. 2014) (internal quotation marks omitted). We review rulings on motions for judgment as a matter of law under the law of the regional circuit. *Id.* The Eleventh Circuit reviews the denial of judgment as a matter of law de novo, viewing the evidence in the light most favorable to the non-moving party. *Howard v. Walgreen Co.*, 605 F.3d 1239, 1242 (11th Cir. 2010). “The motion should be granted only when the plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action.” *Id.* (internal quotation marks omitted).

## I. OBVIOUSNESS

Obviousness is a question of law based on underlying facts. *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1326 (Fed. Cir. 2016). In *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 419 (2007), the Supreme Court cautioned that the obviousness analysis should not be reduced to “rigid and mandatory formulas.” In *Graham v. John Deere Co.*, the Supreme Court set the framework for the obviousness inquiry under 35 U.S.C. § 103:

Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.

383 U.S. 1, 17–18 (1966). The *Graham* factors—(1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the art; and (4) objective considerations of nonobviousness—are questions of fact reviewed for substantial evidence. See *Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1047–48 (Fed. Cir. 2016) (en banc); *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 676 F.3d 1063, 1068 (Fed. Cir. 2012). “When reviewing a denial of judgment as a matter of law of obviousness, where there is a black box jury verdict, as is the case here, we presume the jury resolved underlying factual disputes in favor of the verdict winner and leave those presumed findings undisturbed if supported by substantial evidence.” *WBIP*, 829 F.3d at 1326. We examine the legal conclusion de novo in light of those facts. *Id.*

“A determination of whether a patent claim is invalid as obvious under § 103 requires consideration of all four *Graham* factors, and it is error to reach a conclusion of obviousness until all of those factors are considered.” *Apple*, 839 F.3d at 1048. This includes objective indicia of nonobviousness, which must be considered in every case where present. See, e.g., *id.* at 1048 & n.13; *Millennium Pharm., Inc. v. Sandoz Inc.*, 862 F.3d 1356, 1368–69 (Fed. Cir. 2017); *Merck & Cie v. Gnosis S.p.A.*, 808 F.3d 829, 837 (Fed. Cir. 2015); *Bristol-Myers Squibb Co. v. Teva Pharm. USA, Inc.*, 752 F.3d 967, 977 (Fed. Cir. 2014); *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling USA, Inc.*, 699 F.3d 1340, 1349 (Fed. Cir. 2012). “This requirement is in recognition of the fact that each of the *Graham* factors helps inform the ultimate obviousness determination.” *Apple*, 839 F.3d at 1048. Objective indicia of nonobviousness are considered collectively with the

other *Graham* factors because they “serve to ‘guard against slipping into use of hindsight,’ and to resist the temptation to read into the prior art the teachings of the invention in issue.” *Graham*, 383 U.S. at 36 (citation omitted); *see also KSR*, 550 U.S. at 415 (inviting court “to look at any secondary considerations that would prove instructive”); *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538–39 (Fed. Cir. 1983) (noting that evidence of these factors must be considered with all the evidence and “not just when the decisionmaker remains in doubt after reviewing the art”).

Also a fact question is whether one of ordinary skill in the art had a motivation to combine the prior art to achieve the claimed combination. *Apple*, 839 F.3d at 1047–48, 1051; *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1237–39 (Fed. Cir. 2010). “In *KSR*, the Supreme Court criticized a rigid approach to determining obviousness based on the disclosures of individual prior-art references, with little recourse to the knowledge, creativity, and common sense that an ordinarily skilled artisan would have brought to bear when considering combinations or modifications.” *Randall Mfg. v. Rea*, 733 F.3d 1355, 1362 (Fed. Cir. 2013). Therefore, a motivation to combine can be found explicitly or implicitly in the prior art references themselves, in market forces, in design incentives, or in “any need or problem known in the field of endeavor at the time of invention and addressed by the patent.” *KSR*, 550 U.S. at 420–21; *accord Plantronics, Inc. v. Aliph, Inc.*, 724 F.3d 1343, 1354 (Fed. Cir. 2013) (“[M]otivation to combine may be found explicitly or implicitly in market forces; design incentives; the ‘interrelated teachings of multiple patents’; ‘any need or problem known in the field of endeavor at the time of invention and addressed by the patent’; and the background knowledge, creativity, and



common sense of the person of ordinary skill.” (quoting *Perfect Web Techs., Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1328–29 (Fed. Cir. 2009))). “The court should consider a range of real-world facts to determine ‘whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue.’” *Intercontinental Great Brands LLC v. Kellogg N. Am. Co.*, 869 F.3d 1336, 1344 (Fed. Cir. 2017) (quoting *KSR*, 550 U.S. at 418). Motivation to combine is a factual determination as to whether there is a known reason a skilled artisan would have been motivated to combine elements to arrive at a claimed combination. This is not the ultimate legal determination of whether the claimed combination would have been obvious to the ordinary artisan—meaning that it is possible that a reason or motivation may exist, but nonetheless the ordinary artisan would not have found the combination obvious.

When a challenger shows that a “motivation” existed for a relevant skilled artisan to combine prior art in the way claimed in the patent at issue, such a showing commonly supports and leads readily to the further, ultimate determination that such an artisan, using ordinary creativity, would actually have found the claimed invention obvious. But the latter conclusion does not follow automatically from the former finding, and additional evidence may prevent drawing it. ... Even with a motivation proved, the record may reveal reasons that, after all, the court should not conclude that the combination would have been obvious ... .

*Intercontinental Great Brands*, 869 F.3d at 1346–47.

Determining whether a claimed combination would have been obvious to a skilled artisan requires consideration of all the facts, no one of which is dispositive. The prior art, skill, and knowledge of the ordinarily skilled artisan may present a motivation or reason to combine. The prior art, skill, and knowledge of an ordinary artisan may also provide reasons not to combine which would likewise be a question of fact. For example, a reference may be found to teach away from a claimed combination, also a question of fact. *Allergan, Inc. v. Sandoz Inc.*, 796 F.3d 1293, 1305 (Fed. Cir. 2015). Prior art teaches away when “a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.” *Id.* (citing *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994)). In fact, the prior art could contain one reference suggesting a combination and others critiquing or otherwise discouraging the same. Even a single reference can include both types of statements, and we have held that it is error to fail to consider the entirety of the art. *See, e.g., W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1550 (Fed. Cir. 1983) (holding the district court erred by “considering the references in less than their entireties, i.e., in disregarding disclosures in the references that diverge from and teach away from the invention at hand”).

“The degree of teaching away will of course depend on the particular facts; in general, a reference will teach away if it suggests that the line of development flowing from the reference’s disclosure is unlikely to be productive of the result sought by the applicant.” *Gurley*, 27 F.3d at 553. As our precedent reflects, prior art need not explicitly “teach away” to be relevant to

the obviousness determination. Implicit in our discussion of the “degree” of teaching away is an understanding that some references may discourage more than others. *Id.*; see also *Meiresonne v. Google, Inc.*, 849 F.3d 1379, 1382 (Fed. Cir. 2017) (“A reference that ‘merely expresses a general preference for an alternative invention but does not criticize, discredit, or otherwise discourage investigation into’ the claimed invention does not teach away.” (quoting *Galderma Labs., L.P. v. Tolmar, Inc.*, 737 F.3d 731, 738 (Fed. Cir. 2013))); *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1327 (Fed. Cir. 2009) (affirming district court’s finding of teaching away where the reference “expresse[d] concern for failure”); *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546 (Fed. Cir. 1998) (reversing a judgment of invalidity in part because references “cautioned against compressing the layers in a multilayer insulator”). Indeed, the Supreme Court has long held that “known disadvantages in old devices which would naturally *discourage* the search for new inventions may be taken into account in determining obviousness.” *United States v. Adams*, 383 U.S. 39, 52 (1966) (emphasis added).

Such understandings about reasons to combine or countervailing reasons not to combine could come from the knowledge, skill, and creativity of the ordinarily skilled artisan. *KSR*, 550 U.S. at 418. We have held that where a party argues a skilled artisan would have been motivated to combine references, it must show the artisan “would have had a reasonable expectation of success from doing so.” *Cyclobenzaprine*, 676 F.3d at 1068–69. Thus, if an ordinarily skilled artisan would not believe that a particular combination would have a reasonable expectation of “anticipated success,” the combination may not be obvious. See *KSR*, 550 U.S. at

421. Whether a reasonable expectation of success exists is yet another fact question. *PAR Pharm., Inc. v. TWI Pharm., Inc.*, 773 F.3d 1186, 1196 (Fed. Cir. 2014). Thus, whether there exist reasons a skilled artisan would combine or reasons a skilled artisan would not combine are entirely factual determinations to which deference must be given. Once all relevant facts are found, the ultimate legal determination involves the weighing of the fact findings to conclude whether the claimed combination would have been obvious to an ordinary artisan.

The jury, in this case, determined that BRP failed to prove by clear and convincing evidence that the claims at issue would have been obvious to a skilled artisan. BRP moved for judgment as a matter of law on obviousness, which the district court denied. On appeal, BRP argues that the district court erred in refusing to grant it judgment as a matter of law that the asserted claims would have been obvious in light of the off-throttle thrust reapplication system in its 1997 Sea-Doo Challenger 1800 Jet Boat (“Challenger”) and an existing PWC such as the 1998 Sea-Doo GTX RFI (“GTX”). There is no serious dispute that the Challenger system and a PWC like the GTX disclose all elements of most of the asserted claims.<sup>1</sup>

BRP argues a reasonable jury could only have concluded an ordinarily skilled artisan would have been motivated to combine Challenger and a PWC, and that objective indicia of nonobviousness confirm the assert-

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<sup>1</sup> BRP argues the only claims not disclosed in the Challenger-PWC combination are dependent claims 25 of the ’545 patent and 17 of the ’969 patent, but notes those claims are disclosed by adding another patent to the Challenger-PWC combination. Appellant’s Br. 23–24.

ed claims would have been obvious. BRP disputes whether substantial evidence exists for particular jury fact findings and the ultimate legal determination of obviousness.

BRP argues that “*KSR* compels a finding of obviousness.” Appellant’s Br. 21. It argues that a conclusion of obviousness must be reached because there was “a design need or market pressure to solve a problem” and the combination is one of “a finite number of identified, predictable solutions.” *Id.* at 24 (quoting *KSR*, 550 U.S. at 421).

In order to show a skilled artisan would have been motivated to modify a PWC with Challenger’s off-throttle thrust reapplication system, BRP principally relies on two prior art reports written by the Society of Automotive Engineers (“SAE”) that studied “personal watercraft as test vehicles in order to evaluate and test emerging off throttle steering concepts and devices.” J.A. 7530. Specifically, the SAE Interim and Draft Final Reports suggested using the Challenger system in a PWC to address the off-throttle steering problem. The Draft Final Report concluded if the Challenger system were applied to PWCs, “performance characteristics would remain unchanged when operated properly, but when off-throttle steering and panic was sensed, then some additional steering torque would automatically be restored.” J.A. 7577. BRP also cites additional references that it argues provided PWC manufacturers with overwhelming pressure to implement solutions to off-throttle steering so that riders could safely avoid obstacles. For example, the National Transportation Safety Board recommended PWC manufacturers “consider ... off-throttle steering” “to improve operator control and to help prevent personal injuries.” J.A. 7944. The National Association of State

Boating Law Administrators similarly pressured the PWC industry to address the “disproportionate number of accidents” attributed to “‘off-throttle’ steering loss” in PWCs. J.A. 9536. BRP also argues its own patent application, Canadian Patent Appl. 2,207,938 (“Rheault ’938”), and patent, U.S. Patent No. 6,336,833 (“Rheault ’833”), disclose a throttle reapplication system and suggest its use in a PWC.

BRP argues a skilled artisan would have selected the Challenger system because it was one of a finite number of identified, predictable solutions to the problem of off-throttle steering in PWCs. *See KSR*, 550 U.S. at 421. The SAE Interim and Draft Final Reports identified the Challenger’s throttle reapplication as one of four solutions to the problem of off-throttle steering, along with rudders, flaps, and scoops. The National Association of State Boating Law Administrators also explained that jet boats and PWCs are similar and off-throttle directional control is a problem for both. Rheault ’833 disclosed that its steer-responsive throttle “is applicable to single-engine personal watercraft,” and Rheault ’938 states the Challenger jet boat’s thrust steering “is applicable to all types of watercraft vehicles, including personal watercraft vehicles.” J.A. 8942 at Abstract; J.A. 8920 at 8:15–17. For these reasons, BRP argues a reasonable jury could only have found a skilled artisan would have been motivated to modify a PWC with Challenger’s off-throttle thrust reapplication system, which would have combined known elements to improve the system in the same way and yield expected results.

We presume the jury found that an ordinarily skilled artisan would not have been motivated to combine the Challenger system with a PWC given its determination that the asserted claims are not invalid as

obvious. If such a fact finding is supported by substantial evidence, we may not reverse it. In briefing and oral argument, BRP devoted much of its argument to re-litigating its case and its evidence rather than addressing the evidence that could have supported the jury's finding of no motivation to combine. We do not reweigh the evidence and reach our own factual determination regarding motivation. The question for us on appeal is only whether substantial evidence supports the jury's presumed finding. *See, e.g., Apple*, 839 F.3d at 1052 ("Our job is not to review whether Samsung's losing position was also supported by substantial evidence or to weigh the relative strength of Samsung's evidence against Apple's evidence. We are limited to determining whether there was substantial evidence for the jury's findings, on the entirety of the record."). We conclude that it does.

A reasonable jury could have found that a skilled artisan would not have been motivated to combine Challenger and a PWC. The SAE reports identified the combination of the Challenger system with a PWC to address the off-throttle steering problem, tested the Challenger for that purpose, and noted potential benefits of the combination. *E.g.*, J.A. 7577. But the reports did not stop there. The Draft Final Report also stated that "additional new hazards can be envisioned with such a steering system," including collisions "when inadvertent activation of restored thrust might occur close to other boats, swimmers or fixed objects." *Id.* It explained that because these hazards do not currently exist, "it is difficult to predict the frequency with which such events may occur." *Id.* Kevin Breen, an author of the SAE reports and BRP's expert at trial, testified that automatic throttle reapplication without "smart" engine controls could be dangerous. J.A. 2361–62. The

Draft Final Report likewise identified potential problems with proposed “smart” engine controls, which “would only become activated when needed and would not otherwise effect [sic] handling.” J.A. 7577. The report noted some “obvious” problems with this technology, such as the system performing in a manner contrary to the operator’s intentions and the need for the system to account for several variables “to be beneficial.” *Id.* As to the thought process behind “smart” engine controls, Mr. Breen testified that throttle reapplication “would be useful only if they were smart or on demand, as opposed to they just happened.” J.A. 2231–32. The claimed invention, in contrast, “just happen[s]” when the rider turns the steering mechanism. *Id.*; *see, e.g.*, ’545 patent at claim 1.

This evidence may not rise to the level of teaching away. Nonetheless, in light of this record, the jury’s determination that there was no motivation to make this particular combination is supported by substantial evidence. Evidence suggesting reasons to combine cannot be viewed in a vacuum apart from evidence suggesting reasons not to combine. In this case, the same reference suggests a reason to combine, but also suggests reasons that a skilled artisan would be discouraged from pursuing such a combination. Under such circumstances, the jury’s fact finding regarding motivation is supported by substantial evidence. Coupled with testimony confirming the potential problems of automatic throttle reapplication and suggesting an alternative approach might reduce those same problems, J.A. 2230–32, a jury could find a skilled artisan would not have been motivated to combine the Challenger system with a PWC to arrive at the claimed combination.



BRP argues that the SAE reports demonstrate market pressure to solve a problem and a finite number of predictable solutions; in fact, BRP argues there were only four articulated solutions. Appellant's Br. 9. In *KSR*, the Supreme Court explained when there is "market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp." 550 U.S. at 421. While the SAE reports identified the Challenger system, rudders, flaps, and scoops as potential solutions to the problem of off-throttle steering in PWCs, a reasonable jury could have determined that more than four solutions existed. At trial, Arctic Cat's expert and named inventor Fred Bernier testified there were "various fins" and "a variety of things tried over a course of a number of years," including modifying where the appendages attached to the PWC. J.A. 1219–21. BRP's expert Richard Simard also testified BRP built seventeen prototypes incorporating various approaches over the course of five years. J.A. 1951–57. An internal BRP "brainstorming" session identified thirtytwo possible designs directed to off-throttle steering. J.A. 9454. And there is evidence that other potential solutions to the off-throttle steering problem existed but were not fully disclosed for confidentiality and other concerns. *See, e.g.*, J.A. 7532 (noting that some ideas offered in response to SAE's inquiry "have typically either not conveyed sufficient information or have patent, propriety, or litigation concerns").

A reasonable jury also could have found that modifying a PWC with the Challenger system would not have been a predictable solution yielding expected results. Mr. Bernier testified "[i]t was quite a—quite a surprise, actually" when his team realized the technol-

ogy worked on a prototype PWC. J.A. 1232. So did Mr. Simard, who testified “[w]e were surprised” that Proto-14, BRP’s prototype incorporating the Challenger system with a PWC, was “pretty good in forward speed.” J.A. 1960. He also admitted “what works on a jet boat may not work on a personal watercraft.” *Id.* And although Arctic Cat’s expert Dr. Bernard Cuzzillo testified the Challenger system reapplies some throttle when steering, he also testified he did not know whether the Challenger system was “adequate to qualify as a steerable thrust” and that it would “not necessarily” comprise a “controlled-thrust steering system.” J.A. 2876–78. This testimony along with the SAE reports’ own cautions about potential hazards of the combination provide substantial evidence upon which a jury could conclude that a skilled artisan would not have “anticipated success” with the claimed combination.

### **A. Objective Considerations**

At trial, Arctic Cat argued the claimed invention received industry praise and satisfied a long-felt need. We presume the jury found in favor of Arctic Cat as to each of these objective considerations. We will not reverse these presumed findings if supported by substantial evidence.

#### **1. Industry Praise**

“Evidence that the industry praised a claimed invention or a product that embodies the patent claims weighs against an assertion that the same claimed invention would have been obvious.” *Apple*, 839 F.3d at 1053; accord *Institut Pasteur & Universite Pierre Et Marie Curie v. Focarino*, 738 F.3d 1337, 1347 (Fed. Cir. 2013) (“[I]ndustry praise ... provides probative and cogent evidence that one of ordinary skill in the art would

not have reasonably expected [the claimed invention].”).

At trial, Arctic Cat introduced a press release it issued after Captain Michael Holmes, chief of the U.S. Coast Guard Office of Boating Safety, rode and evaluated an Arctic Cat prototype incorporating the claimed invention. J.A. 9537. After his test ride, Captain Holmes stated: “I like it. It’s one of the most impressive innovations I’ve seen all year.” J.A. 9537. He continued, “What I saw today will help us move forward in developing a realistic, achievable standard for a control and safety issue that we need to address. I’m particularly encouraged that this amount of quick-turn control can be achieved without some of the negative handling or safety ramifications that seem to accompany fins or rudders.” J.A. 9537. And Mr. Bernier testified others at the prototype demonstration “were very impressed with the system and how it worked” and said “it was the first time they had seen something that had a viable chance of resolving the off-throttle steering issues.” J.A. 1237.

BRP argues that substantial evidence does not support the jury’s presumed factual finding that the claimed invention received industry praise because “praise from a Coast Guard official in Arctic Cat’s own press release” is a “hearsay statement [that] cannot overcome persuasive evidence that the claimed technology described the same approach as BRP’s system.” Appellant’s Br. 35–36 (citing J.A. 7828; J.A. 7871; *In re Cree, Inc.*, 818 F.3d 694, 702 (Fed. Cir. 2016)). We disagree for at least two reasons. First, Arctic Cat contends—and BRP does not contest—that BRP failed to object to this evidence as hearsay at trial, so the jury was entitled to credit the statement. Appellee’s Br. 12. Second, that Captain Holmes’ statements appear in

Arctic Cat's press release goes to evidentiary weight. Captain Holmes' statements and Mr. Bernier's testimony constitute substantial evidence to support the jury's presumed factual finding that the claimed invention received praise from the industry. This evidence of industry recognition of the significance and value of the claimed invention weighs in favor of nonobviousness.

## 2. Long-Felt Need

"Evidence of a long felt but unresolved need tends to show non-obviousness because it is reasonable to infer that the need would have not persisted had the solution been obvious." *WBIP*, 829 F.3d at 1332; *see also Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2004) ("Absent a showing of long-felt need or the failure of others, the mere passage of time without the claimed invention is not evidence of nonobviousness.").

BRP does not dispute there was a long-felt need in the area of off-throttle steering and PWC rider safety. Rather, it argues Arctic Cat's invention did not satisfy this long-felt need because the Challenger system already solved off-throttle steering. Substantial evidence supports the jury's presumed finding that the claimed invention solved the problem of off-throttle steering. The SAE Draft Final Report noted "an effort has been ongoing to develop this [off-throttle steering] technology for more than three decades with little commercially viable success." J.A. 7575. The report summarized test results of the *Challenger* system for its off-throttle steering capabilities and offered potential pros and cons of its use in a PWC; it did not summarize test results of a Challenger-PWC combination. And Mr. Breen conceded at trial that despite a number

of people working to address the offthrottle steering problem, there “was not a publicly available personal watercraft with throttle reapplication” before Arctic Cat’s invention. Appellee’s Br. 41 (citing J.A. 2337). This is substantial evidence to support the jury’s fact finding about long-felt need. This long-felt need weighs in favor of the nonobviousness of the claimed invention.

### **B. Legal Conclusion**

We consider whether the claimed invention would have been obvious *de novo*, in light of the jury’s underlying factual findings. *WBIP*, 829 F.3d at 1326. The evidence suggesting a motivation to combine is tempered by the evidence suggesting the Challenger-PWC combination could have serious problems, that “smart” engine controls might better address those problems, that the combination was not one of only four possible solutions, and that the combination did not yield expected results. We cannot under these circumstances reverse any of the jury’s presumed fact findings regarding motivation to combine or expectations of success. In light of these fact findings along with the objective indicia of nonobviousness, which also weigh in favor of nonobviousness, we see no error in the conclusion that BRP failed to prove that the asserted claims would have been obvious by clear and convincing evidence.

## **II. MARKING**

Pursuant to 35 U.S.C. § 287(a), a patentee who makes or sells a patented article must mark his articles or notify infringers of his patent in order to recover damages. *See Dunlap v. Schofield*, 152 U.S. 244, 248 (1894). Section 287(a) provides:

Patentees, and persons making, offering for sale, or selling within the United States any patented article for or under them, or importing any patented article into the United States, may give notice to the public that the same is patented, either by fixing thereon the word “patent” or the abbreviation “pat.”, together with the number of the patent ... . In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice.

The patentee bears the burden of pleading and proving he complied with § 287(a)’s marking requirement. *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1111 (Fed. Cir. 1996); *see also Dunlap*, 152 U.S. at 248 (“[T]he duty of alleging and the burden of proving either [actual or constructive notice] is upon the [patentee].”). Whether a patentee’s articles have been marked “is a matter peculiarly within his own knowledge ... .” *Dunlap*, 152 U.S. at 248. If a patentee who makes, sells, offers for sale, or imports his patented articles has not “given notice of his right” by marking his articles pursuant to the marking statute, he is not entitled to damages before the date of actual notice. *Id.*; *see also* 35 U.S.C. § 287 (noting the patentee’s “failure so to mark” limits his damages to those incurred after actual notice). Section 287 is thus a limitation on damages, and not an affirmative defense. *Motorola, Inc. v. United States*, 729 F.2d 765, 770 (Fed. Cir. 1984). Compliance with § 287 is a question of fact. *Maxwell*, 86 F.3d at 1111.

A patentee's licensees must also comply with § 287, because the statute extends to "persons making or selling any patented article for or under [the patentee]." *Id.* (quoting § 287(a)). Recognizing that it may be difficult for a patentee to ensure his licensees' compliance with the marking provisions, we have held that where third parties are involved, courts may consider "whether the patentee made reasonable efforts to ensure compliance with the marking requirements." *Id.* at 1111–12. This "rule of reason" inquiry is "consistent with the purpose of the constructive notice provision—to encourage patentees to mark their products in order to provide notice to the public of the existence of the patent and to prevent innocent infringement." *Id.* at 1112.

We have explained that the marking statute serves three related purposes: (1) helping to avoid innocent infringement; (2) encouraging patentees to give public notice that the article is patented; and (3) aiding the public to identify whether an article is patented. *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1443 (Fed. Cir. 1998) (collecting authorities). Although patent infringement is a strict liability tort, a patentee who sells or permits the sale of unmarked, patented articles misleads others into believing they are free to make and sell an article actually covered by patent. Marking helps reduce innocent infringement by notifying the public that the article is patented. *See Motorola*, 729 F.2d at 772.

The parties dispute whether Arctic Cat's licensee's failure to mark certain products limits Arctic Cat's damages. In February 2002, Arctic Cat entered into a fully paid-up license agreement with Honda in which Honda paid \$315,000 for licenses to two earlier-issued Arctic Cat patents and any later patents "that patently

cover Arctic Cat’s Controlled Thrust Steering methods, systems and developments.” J.A. 3540 ¶ EE; J.A. 7830–31 §§ 1.01, 3.01. The agreement includes the patents-in-suit. J.A. 3540 ¶ EE. The agreement specifically states Honda “shall have no obligation or requirement to mark” its licensed products. J.A. 7833 § 6.01. Honda sold PWCs in the United States through 2009 and Arctic Cat made no effort to ensure Honda marked those PWCs. J.A. 3540–41 ¶¶ II, JJ. At trial, the jury found damages began on October 16, 2008, before BRP received actual notice of infringement. J.A. 94.

There is no dispute that the patentee bears the burden of pleading and proving he complied with § 287(a). *Maxwell*, 86 F.3d at 1111. There is no dispute that Arctic Cat did not require Honda to mark; in fact, it expressly authorized Honda to sell licensed products without marking. And it is likewise undisputed that Honda did not mark any of its PWCs with the patent numbers at issue. Thus, if Honda sold PWC products covered by the patents at issue, Arctic Cat has failed to satisfy the marking requirements. The only dispute between the parties is whether any of the Honda PWCs was covered by the patent claims at issue. BRP explains the issue on appeal: “The only area of dispute between the parties was whether the PWCs that Honda sold were patented articles that were required to be marked. Which party bears the burden on this issue is a question of first impression for this Court and has split district courts.” Appellant’s Br. 37.

On summary judgment, the district court in this case held that the burden of proving compliance with marking is placed on the defendant and that “the burden of production does not shift to the plaintiff to show compliance with a marking statute.” J.A. 58–59. And



again in the denial of judgment as a matter of law, the district court repeated its belief that “BRP bears the burden of proving the defen[se] of marking.” J.A. 75. This was a legal error. The burden of proving compliance with marking is and at all times remains on the patentee. As in this case where BRP identified fourteen unmarked Honda PWCs, which it argued fell within the patent claims, it was the patentee’s burden to establish compliance with the marking statute—that these products did not fall within the patent claims.

There is a split among the district courts regarding which party must initially identify the products which it believes the patentee failed to mark. Some courts require the alleged infringer to initially identify products it believes practice the asserted patents. *See, e.g., Fortinet, Inc. v. Sophos, Inc.*, No. 13-CV-05831-EMC, 2015 WL 5971585, at \*4–5 (N.D. Cal. Oct. 14, 2015). These courts reason that “[a]bsent guidance from the other side as to which specific products are alleged to have been sold in contravention of the marking requirement, a patentee ... is left to guess exactly what it must prove up to establish compliance with the marking statute.” *Sealant Sys. Int’l, Inc. v. TEK Glob. S.R.L.*, No. 5:11-CV-00774-PSG, 2014 WL 1008183, at \*31 (N.D. Cal. Mar. 7, 2014), *rev’d in part on other grounds*, 616 F. App’x 987 (Fed. Cir. 2015) (placing the initial burden on the alleged infringer to put the patentee “on notice” of unmarked products and finding it failed to meet its burden because of conflicting expert testimony and failure to produce admissible evidence showing a patented product was sold); *Fortinet*, 2015 WL 5971585, at \*5 (adopting a “burden of production on [the alleged infringer] to identify the [unmarked products] it believes practice the inventions claimed” and granting partial summary judgment in favor of the

alleged infringer where its expert report was “not too conclusory”); *Unwired Planet, LLC v. Apple Inc.*, No. 13-CV04134-VC, 2017 WL 1175379, at \*5 (N.D. Cal. Feb. 14, 2017) (holding “[a]t most, the infringer bears some initial burden of plausibly identifying products subject to the marking requirement” and granting summary judgment in favor of the alleged infringer where it submitted a declaration and attached exhibits identifying particular products). This district court agreed with that approach, concluding that if the defendant did not at least have the burden of identifying unmarked products it believed fell within the claims, “a defendant’s general allegations could easily instigate a fishing expedition for the patentee.” J.A. 59.

Other courts have required the patentee prove that none of its unmarked goods practice the asserted claims. *See, e.g., Adrea, LLC v. Barnes & Noble, Inc.*, No. 13-CV- 4137 JSR, 2015 WL 4610465, at \*1–2 (S.D.N.Y. July 24, 2015). Courts adopting this approach reason the patentee is in a better position to know whether his goods practice the patents-in-suit. *Id.* at \*2 (citing *Dunlap*, 152 U.S. at 248); *see also, e.g., DR Sys., Inc. v. Eastman Kodak Co.*, No. 08-CV-0669H(BLM), 2009 WL 2632685, at \*4 (S.D. Cal. Aug. 24, 2009) (“Just as a patentee’s compliance with the marking statute is a matter particularly within its knowledge, so are the details of its own product line.”); *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC*, No. 1:09-CV-1685, 2013 WL 1821593, at \*3 (M.D. Pa. Apr. 30, 2013).

We hold an alleged infringer who challenges the patentee’s compliance with § 287 bears an initial burden of production to articulate the products it believes are unmarked “patented articles” subject to § 287. To be clear, this is a low bar. The alleged infringer need

only put the patentee on notice that he or his authorized licensees sold specific unmarked products which the alleged infringer believes practice the patent. The alleged infringer's burden is a burden of production, not one of persuasion or proof. Without some notice of what market products BRP believes required marking, Arctic Cat's universe of products for which it would have to establish compliance would be unbounded. *See Fortinet*, 2015 WL 5971585, at \*5 ("Without some notice of what marketed products may practice the invention, AMI's universe of products for which it would have to establish compliance with, or inapplicability of, the marking statute would be unbounded." (quoting *Sealant*, 2014 WL 1008183, at \*31)). Permitting infringers to allege failure to mark without identifying any products could lead to a large scale fishing expedition and gamesmanship. Once the alleged infringer meets its burden of production, however, the patentee bears the burden to prove the products identified do not practice the patented invention.

We do not here determine the minimum showing needed to meet the initial burden of production, but we hold in this case it was satisfied by BRP. At trial BRP introduced the licensing agreement between Honda and Arctic Cat showing Honda's license to practice "Arctic Cat patents that patently cover Arctic Cat's Controlled Thrust Steering methods, systems and developments." J.A. 7830 § 1.01. BRP identified fourteen Honda PWCs from three versions of its Aquatrax series sold between 2002 and 2009. J.A. 3540–41 ¶ II. BRP's expert testified that he "review[ed] information regarding those models" and believed if BRP's OTAS system practiced the patents, so did Honda's throttle reapplication system in the Aquatrax PWCs. J.A.

2447–49; J.A. 2482. This was sufficient to satisfy BRP’s initial burden of production.

At summary judgment, the district court found BRP identified Honda PWCs and “presented an array of evidence” alleging they practice the asserted patents, but concluded BRP failed to meet its burden because it did not conduct a claim analysis of the products. J.A. 59–61. It later denied BRP’s motion for judgment as a matter of law because BRP “failed as a matter of law to meet its burden in *proving* that Honda sold patented articles.” J.A. 75 (emphasis added). The district court erred when it placed this burden on the alleged infringer. BRP shouldered only a burden of production to identify unmarked products that it alleges should have been marked. It was Arctic Cat’s burden to prove those products—once identified—do not practice the patent-at-issue. The alleged infringer need not produce claim charts to meet its initial burden of identifying products. It is the patentee who bears the burden of proving that it satisfied the marking requirements and thus the patentee who would have to prove that the unmarked products identified by the infringer do not fall within the patent claims. The district court erred in placing this burden upon BRP and thus we vacate and remand on marking.

Because the district court adopted this legal approach at the summary judgment stage, it made clear to the parties that it would be BRP’s burden to prove that the unmarked products fell within the patent claims. Arctic Cat, therefore, did not have a fair opportunity to develop its case regarding the Honda PWCs at trial. Because Arctic Cat was not on notice regarding its burden, and in fact labored under the assumption that BRP had the burden of proof, reversal would be improper. We thus vacate the district court’s judg-

ment as to marking and remand so that Arctic Cat has an opportunity to proffer evidence related to the identified Honda PWCs.<sup>2</sup> Because we conclude BRP has met its initial burden of production, Arctic Cat must now establish the Honda PWCs do not practice the asserted patents to recover damages under the constructive notice provisions of § 287.

### III. DAMAGES

BRP appeals the district court's denial of judgment as a matter of law that the jury's royalty award of \$102.54 per infringing unit should be vacated based on inadmissible expert testimony. Prior to trial, the district court denied BRP's *Daubert* motion to exclude this testimony of Arctic Cat's expert, Walter Bratic, regarding the calculation of a reasonable royalty rate. J.A. 24–28. BRP also appeals the district court's grant of an ongoing royalty of \$205.08 per infringing unit. J.A. 137–44.

#### A. Reasonable Royalty Rate

The Eleventh Circuit reviews *Daubert* decisions for abuse of discretion. *Quiet Tech. DC-8, Inc. v. Hurrel-Dubois UK Ltd.*, 326 F.3d 1333, 1339–40 (11th Cir. 2003). “We review the jury’s determination of the amount of damages, an issue of fact, for substantial evidence.” *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1310 (Fed. Cir. 2009).

BRP raises the same arguments to exclude the testimony of Mr. Bratic rejected by the district court. BRP argues Mr. Bratic erroneously used BRP's later-

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<sup>2</sup> We leave it to the district court to determine if additional discovery on this issue is appropriate in light of our ruling.

developed “Intelligent Brake and Reverse” (“iBR”) system as a value benchmark for BRP’s allegedly infringing and earlier-developed OTAS system. It argues that Mr. Bratic failed to establish that iBR is sufficiently comparable to the technology and value of OTAS, and thus his benchmark cannot serve as the basis for the jury’s royalty award. The district court found that Mr. Bratic properly relied on the opinion of another Arctic Cat expert, Dr. Cuzzillo, who opined that OTAS and iBR are of comparable technological and safety value. J.A. 24–26. The district court noted that Dr. Cuzzillo’s opinion was not vague or conclusory but based on “his own investigation of the OTAS and iBR brake technologies, how they work, and the benefits provided as well as discussions with [another expert and review of his report].” J.A. 25–26. To the extent BRP found the comparison problematic, the district court suggested “that is a line of attack more appropriately addressed through cross-examination.” J.A. 26. BRP was given this chance at trial. *E.g.*, J.A. 1738–43.

We agree with the district court’s analysis and conclude it did not abuse its discretion in admitting Mr. Bratic’s damages testimony. *Cf. Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1316–20 (Fed. Cir. 2014) (factually attacking the accuracy of a benchmark goes to evidentiary weight, not admissibility), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) (en banc). Because BRP does not argue the royalty rate is not otherwise supported by substantial evidence,<sup>3</sup> we affirm the district

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<sup>3</sup> BRP states in a footnote that even if this testimony were admissible, it is irrelevant and thus Arctic Cat failed to provide sufficient evidence to support the jury’s award. Appellant’s Br. 46 n.3. This single sentence, devoid of any analysis, is insufficient

court’s denial of judgment as a matter of law as to the jury’s reasonable royalty rate.

### **B. Ongoing Royalty Rate**

We review for abuse of discretion a district court’s grant of an ongoing royalty. *Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 35 (Fed. Cir. 2012). Ongoing royalties may be based on a post-judgment hypothetical negotiation using the *Georgia-Pacific* factors. *Fresenius USA, Inc. v. Baxter Int’l, Inc.*, 582 F.3d 1288, 1303 (Fed. Cir. 2009) (citing *Georgia-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970)).

The district court did not abuse its discretion in awarding an ongoing royalty rate. The district court weighed the relevant *Georgia-Pacific* factors and determined that Arctic Cat is entitled to an ongoing royalty amount higher than the jury rate. J.A. 137–42. While BRP argues the rate impermissibly covers its profits, we have affirmed rates at or near the infringer’s alleged profit margin. *See, e.g., Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1338–39 (Fed. Cir. 2004) (affirming district court’s grant of a reasonable royalty the defendant argued covered its profits); *Bos. Sci. Corp. v. Cordis Corp.*, 497 F. App’x 69 (Fed. Cir. 2013) (same for ongoing royalties); *cf. Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1346 (Fed. Cir. 2013) (vacating and remanding a royalty award where the district court “clearly erred by limiting the ongoing royalty rate based on [the defendant’s] profit margins”). And we have explained that

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for BRP to meet its burden on appeal, and we nevertheless conclude Mr. Bratic’s testimony constitutes substantial evidence supporting the jury’s reasonable royalty award.

“[o]nce a judgment of validity and infringement has been entered ... the calculus is markedly different because different economic factors are involved.” *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1362 (Fed. Cir. 2008); *see also Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1317 (Fed. Cir. 2007) (Rader, J., concurring) (“[P]re-suit and post-judgment acts of infringement are distinct, and may warrant different royalty rates given the change in the parties’ legal relationship and other factors.”). We see no abuse of discretion in the district court’s analysis and affirm its order awarding an ongoing royalty.

#### IV. WILLFULNESS & ENHANCED DAMAGES

We review enhanced damages under 35 U.S.C. § 284 for abuse of discretion. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934 (2016). A party seeking enhanced damages under § 284 bears the burden of proof by a preponderance of the evidence. *Id.* (citing *Octane Fitness, LLC v. ICON Health & Fitness Inc.*, 134 S. Ct. 1749, 1758 (2014)). The Eleventh Circuit reviews de novo previously raised objections to jury instructions and gives district courts wide discretion in wording so long as the instructions accurately state the law. *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 802 (11th Cir. 2015).

BRP appeals the district court’s denial of judgment as a matter of law that it did not willfully infringe the asserted patents because the jury’s willfulness finding is not supported by substantial evidence and the district court erred in instructing the jury. It also argues the district court abused its discretion by trebling damages.

The jury’s willfulness finding is supported by substantial evidence. In denying BRP’s motion for judg-



ment as a matter of law on willfulness, the district court found substantial evidence demonstrated that BRP knew about the patents before they issued, conducted only a cursory analysis of the patents, waited years before seeking advice of qualified and competent counsel, and unsuccessfully tried to buy the asserted patents through a third party. J.A. 70–72. The district court denied BRP’s renewed motion for judgment as a matter of law on willfulness, stating it “will not second-guess the jury or substitute [the court’s] judgment for its judgment” where the verdict is supported by substantial evidence. J.A. 124. Neither will we.

We reject BRP’s argument that the district court’s jury instruction was erroneous. The district court instructed the jury that as to willful infringement, “Arctic Cat must prove by clear and convincing evidence that BRP actually knew *or should have known* that its actions constituted an unjustifiably high risk of infringement of a valid and enforceable patent.” J.A. 3037 (emphasis added). BRP argues this “should have known” standard contradicts *Halo*. Appellant’s Br. 61 (citing *Halo*, 136 S. Ct. at 1933). But this Court addressed this issue and concluded:

*Halo* did not disturb the substantive standard for the second prong of *Seagate*, subjective willfulness. Rather, *Halo* emphasized that subjective willfulness alone—i.e., proof that the defendant acted despite a risk of infringement that was “either known or so obvious that it should have been known to the accused infringer,” *Halo*, 136 S. Ct. at 1930 (quoting *Seagate*, 497 F.3d at 1371)—can support an award of enhanced damages.

*WesternGeco L.L.C. v. ION Geophysical Corp.*, 837 F.3d 1358, 1362 (Fed. Cir. 2016). Thus, the court did not err in instructing the jury as BRP argues.

Finally, the district court did not abuse its discretion by trebling damages. While the district court initially trebled damages without much explanation, J.A. 97–98, it explained its decision in a subsequent thorough and well-reasoned opinion. *See* J.A. 99–116 (applying the factors outlined in *Read Corp. v. Portec, Inc.*, 970 F.2d 816 (Fed. Cir. 1992)). Although the district court did not allow the parties to brief the issue, we will not adopt a blanket rule that a district court abuses its discretion by deciding an issue without receiving briefing from the parties. That is especially true where, as here, BRP attacks the district court’s procedure but does not explain how additional briefing would have changed the outcome. In short, BRP has not shown that the district court’s failure to allow briefing amounts to an abuse of discretion. We affirm the district court’s denial of judgment as a matter of law on willfulness and its order trebling damages.

### CONCLUSION

For the foregoing reasons, we affirm the district court’s denial of judgment as a matter of law that the asserted claims would have been obvious, that the jury-awarded royalty rate should be vacated, and that BRP did not willfully infringe the asserted claims. We also affirm the district court’s orders granting an ongoing royalty and trebling damages. We vacate the district court’s denial of judgment as a matter of law as to marking and remand for a new trial on this issue.

**AFFIRMED IN PART, VACATED IN PART, AND  
REMANDED**

**COSTS**

34a

No costs.

35a

**APPENDIX B**

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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2017-1475

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ARCTIC CAT INC.,  
*Plaintiff-Appellee,*  
*v.*

BOMBARDIER RECREATIONAL  
PRODUCTS INC., BRP U.S. INC.,  
*Defendants-Appellants.*

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Appeal from the United States District Court  
for the Southern District of Florida in  
No. 0:14-cv-62369-BB, Judge Beth Bloom.

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**ON PETITION FOR REHEARING EN BANC**

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Before PROST, *Chief Judge*, NEWMAN, PLAGER\*,  
LOURIE, DYK, MOORE, O'MALLEY, REYNA,  
WALLACH, TARANTO, CHEN,  
HUGHES, and STOLL, *Circuit Judges*.

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\* Circuit Judge Plager participated only in the decision on the petition for panel rehearing.

PER CURIAM.

**ORDER**

Appellants Bombardier Recreational Products Inc. and BRP U.S. Inc. filed a petition for rehearing en banc. A response was invited by the court and filed by appellee Arctic Cat Inc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on March 19, 2018.

FOR THE COURT

March 9, 2018  
Date

/s/ Peter R. Marksteiner  
Peter R. Marksteiner  
Clerk of Court

**APPENDIX C**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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Case No. 14-cv-62369-BLOOM/Valle

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ARCTIC CAT INC.,

*Plaintiff,*

*v.*

BOMBARDIER RECREATIONAL  
PRODUCTS, INC., AND BRP U.S. INC.,

*Defendants.*

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**ORDER**

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**THIS CAUSE** is before the Court upon two Motions: (1) Defendants Bombardier Recreation Products, Inc. and BRP U.S. Inc.’s (hereinafter, referred to together as “BRP” or “Defendant”) Renewed Motion for Judgment as a Matter of Law (or “JMOL”) or for a New Trial, ECF No. [169] (the “Defendant’s Motion”); and (2) Plaintiff Arctic Cat Inc.’s (“Plaintiff” or “Arctic Cat”) Motion for (A) Accounting of Supplemental Damages, (B) Post-Judgment Ongoing Royalty, and (C) Periodic Accounting through Expiration of the ‘545 Patent (defined below), ECF No. [160] (the “Plaintiff’s Motion”). The Court entered Final Judgment in the above-styled case on June 13, 2016, ECF No. [157] (the “Judgment”), and denied BRP’s Motion to Vacate the Judgment on July 27, 2016, ECF No. [200] (“Order Denying Motion to Vacate”). The Court has reviewed the Motions, all supporting and opposing submissions

and exhibits, the record, and the applicable law, and is otherwise fully advised. For the reasons set forth below, Defendant's Motion is denied, and Plaintiff's Motion is granted in part and denied in part.

## **I. BACKGROUND**

Following a ten-day jury trial, a verdict issued in the above-styled case, finding BRP liable to Plaintiff Arctic Cat Inc. ("Plaintiff" or "Arctic Cat") for willful infringement through the sale of certain models of personal watercraft under the name, Sea-Doo, which incorporated an off-throttle assisted steering technology (the "Infringing PWCs"). See ECF No. [153] (Jury "Verdict," dated June 1, 2016). Therein, the jury concluded that BRP infringed ten claims in Arctic Cat's Patents, United States Patent Numbers 6,793,545 ("the '545 Patent"), and 6,568,969 ("the '969 Patent"). See *id.* at 1-2. The jury further held that BRP failed to prove its invalidity defenses of anticipation, obviousness, and enablement. *Id.* at 2-3. As to damages, the jury identified October 16, 2008, as the proper starting date, and \$102.54 as the reasonable royalty per unit sold to which Arctic Act is entitled. The parties stipulated to the number of units sold since October 16, 2008, to wit, 151,790. See ECF No. [149] (trial minutes, May 31, 2016).

Moreover, the jury found, by clear and convincing evidence, that BRP infringed the above-listed claims "with reckless disregard of whether such claim was infringed or was invalid or unenforceable." Verdict at 4. The issue of subjective willfulness reached the jury after the Court found objective willfulness by clear and convincing evidence, pursuant to the two-part *Seagate* test, in its Order Denying JMOL, ECF No. [148] ("Order Denying JMOL") (citing *In re Seagate Tech., LLC*,

497 F.3d 1360, 1371 (Fed. Cir. 2007)).<sup>1</sup> Coincidentally, the Supreme Court issued a ruling shortly after the conclusion of trial that, *inter alia*, discarded the *Seagate* test for willfulness as inconsistent with Section 284 of the Patent Act. *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1926 (2016) (citing 35 U.S.C. § 284). *Halo* held that “an independent showing of objective recklessness should [*not*] be a prerequisite to enhanced damages” and that a determination as to enhancement should be governed by the preponderance of the evidence standard that “has always” governed all other aspects of patent-infringement litigation. 136 S. Ct. at 1926-27. This decision, importantly, did not impact the validity of the Judgment in this case because, as the Court explained, “where both objective willfulness and subjective willfulness were found by clear and convincing evidence, a more lenient inquiry as to subjective willfulness, without the additional hurdle imposed by the objective willfulness inquiry, and by the lesser preponderance of the evidence standard, would reach the same result.” Judgment at 3. Furthermore, *Halo* only reaffirmed the subjective willfulness inquiry that was submitted to the jury in this case. 136 S. Ct. at 1933 (“The subjective willfulness of a patent infringer, intentional or knowing, may warrant

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<sup>1</sup> Under the first, objective prong of this test, a patent owner must “show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.” *Seagate*, 497 F.3d at 1371. Under the second, subjective prong, the patentee must demonstrate, also by clear and convincing evidence, that the risk of infringement “was either known or so obvious that it should have been known to the accused infringer.” Of course, any consideration of the *Seagate* test was limited to the Court’s Order Denying JMOL, and oral argument on the same – and did not affect any other aspect of the trial.



enhanced damages, without regard to whether his infringement was objectively reckless.”).

Pursuant to the applicable law, including the issuance of *Halo*, and after due consideration of the totality of the circumstances, the Court held that the Verdict entitled Arctic Cat to the trebling of damages and, thus, directed BRP to return \$46,693,639.80, along with any applicable interest, to the Plaintiff. *See generally* Judgment. Post-Judgment, the Defendant renews its Motion for JMOL or, alternatively, requests a new trial, under Rules 50(b) and 59, respectively, of the Federal Rules of Civil Procedure. At the same time, Plaintiff seeks imposition of supplemental damages, a post-judgment ongoing royalty, and periodic accounting through expiration of the ‘545 Patent. The Court now endeavors to resolve the parties’ two competing requests.

## II. LEGAL STANDARD

### A. Rule 50

“Under Rule 50, a party’s motion for judgment as a matter of law can be granted at the close of evidence or, if timely renewed, after the jury has returned its verdict, as long as there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party.” *Chaney v. City of Orlando, Fla.*, 483 F.3d 1221, 1227 (11th Cir. 2007) (internal quotations omitted; alterations adopted) (citing Fed. R. Civ. P. 50). The standard by which the motion is reviewed is the same regardless of whether the motion is brought pursuant to Rule 50(a) or 50(b). *Id.* (citing *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1192 (11th Cir. 2004); *Arthur Pew Constr. Co. v. Lipscomb*, 965 F.2d 1559, 1563 (11th Cir. 1992); 9A Charles Alan

Wright & Arthur R. Miller, Federal Practice and Procedure § 2537 (2d ed. 1995)). Where a post-verdict motion for JMOL “pertains uniquely to patent law,” it is reviewed under Federal Circuit law as opposed to the law of the regional circuit, *Junker v. Eddings*, 396 F.3d 1359, 1363 (Fed. Cir. 2005); on the other hand, evidentiary rulings and denials of motions for JMOL are reviewed under the law of the regional circuit. See *Retractable Tech., Inc. v. Becton, Dickinson and Co.*, 653 F.3d 1296, 1302 (Fed. Cir. 2011) (“In reviewing evidentiary rulings and denials of motions for JMOL, we apply the law of the regional circuit.”); *Liquid Dynamics Corp. v. Vaughan Co.*, 449 F.3d 1209, 1218 (Fed. Cir. 2006) (applying regional circuit law when reviewing a *Daubert* ruling).

To succeed under Rule 50(b), the movant has the burden to prove that there is indeed only “one reasonable conclusion as to the verdict.” *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001). In other words, “the facts and inferences [of a case must] point so overwhelmingly in favor of the movant that reasonable people could not arrive at a contrary verdict.” *Millette v. DEK Techs., Inc.*, -- F. Supp. 2d --, 2011 WL 5331708, at \*2 (S.D. Fla. Nov. 7, 2011). When reviewing a motion under Rule 50, the Court is obligated to review the evidence in the light most favorable to the non-moving party. See *Hanes v. Greyhound Lines, Inc.*, 316 F. App’x 841, 842 (11th Cir. 2008) (citing *Daniel v. City of Tampa*, 38 F.3d 546, 549 (11th Cir. 1994)); *Sherrod v. Palm Beach Cnty. Sch. Dist.*, 424 F. Supp. 2d 1341, 1344 (S.D. Fla. 2006) (“[The Court] must view the evidence in a light most favorable to the plaintiff, and must not weigh the evidence nor assess witness credibility.”) (citing *Reeves v. Sander-son Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000)).

**B. Rule 59**

“A post-judgment motion may be treated as made pursuant to either Fed. R. Civ. P. 59 or 60 – regardless of how the motion is styled by the movant – depending on the type of relief sought.” *Mays v. U.S. Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997). A party cannot, however, use a post-judgment motion “to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.” *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005) (citing *Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998)).

Among other relief, a court may grant a new jury trial under Rule 59 “for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a). For instance, a party may assert that “the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving.” *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). Thus, a motion for new trial should be granted “when the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.” *Brown v. Sheriff of Orange Cnty., Fla.*, 604 F. App’x 915 (11th Cir. 2015) (per curiam) (quoting *Lipphardt*, 267 F.3d at 1186); see *Tucker v. Hous. Auth. of Birmingham Dist.*, 229 F. App’x 820, 826 (11th Cir. 2007) (“[N]ew trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great – not merely the greater – weight of the evidence.”); *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1320 n.3 (11th Cir. 1999) (holding that, because a “less stringent standard applies to a motion for

a new trial than to a motion for a judgment as a matter of law,” the failure to meet the Rule 59 standard is fatal to the Rule 50(b) standard) (citation omitted).

Additionally, a motion for a new jury trial “may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.” *Montgomery Ward*, 311 U.S. at 251. Jury instructions merit a new trial where the instructions give the jury “a misleading impression or inadequate understanding of the law and the issues to be resolved.” *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1081 (11th Cir. 2003) (quoting *Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563, 1571 (11th Cir. 1989)); see *U.S. S.E.C. v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 804 (11th Cir. 2015) (instructing that reversal on instructions only occurs where there is “substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations”) (quoting *McCormick v. Aderholt*, 293 F.3d 1254, 1260 (11th Cir. 2002)).

“[G]ranteeing motions for new trial touches on the trial court’s traditional equity power to prevent injustice and the trial judge’s duty to guard the integrity and fairness of the proceedings before [her].” *Sherrod v. Palm Beach Cnty. Sch. Dist.*, 237 F. App’x 423, 424 (11th Cir. 2007) (quoting *Christopher v. Florida*, 449 F.3d 1360, 1366 n.4 (11th Cir. 2006)). Ultimately, “motions for a new trial are committed to the discretion of the trial court.” *Montgomery v. Noga*, 168 F.3d 1282, 1295 (11th Cir. 1999); *Steger*, 318 F.3d at 1081 (citing *Deas v. PACCAR, Inc.*, 775 F.2d 1498, 1503 (11th Cir. 1985)) (“A district court is permitted wide discretion in considering a motion for new trial based on an erroneous jury instruction.”).

### III. DISCUSSION

#### A. Defendant's Motion

At the close of Arctic Cat's case-in-chief and prior to the Court's submission of this matter to the jury, BRP moved for JMOL under Rule 50(a). Renewing arguments from its summary judgment motion, the Defendant argued that Arctic Cat failed to present legally sufficient evidence from which a reasonable jury could find infringement, willfulness, damages, and marking.<sup>2</sup> Furthermore, the Defendant submitted that it had presented sufficient evidence on its obviousness invalidity defense to warrant JMOL in its favor. Citing many of the same reasons for its denial of summary judgment, the Court denied BRP's Rule 50(a) motion. *See* ECF No. [148].

This is now the third time, albeit now through the lenses of Rules 50(b) and 59, that the Court has reviewed BRP's repackaged arguments, sub-arguments, and support as to obviousness, infringement, willfulness, damages, and marking, with no material change in the evidence or the law.<sup>3</sup> Fed. R. Civ. P. 50(b), 59. And, for the third time, BRP's arguments fail. *See, e.g., Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002) (citing *Abel v. Dubberly*, 210 F.3d 1334 (11th Cir. 2000)) ("Where there is no change in the evidence, the same evidentiary dispute that got the plaintiff past a

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<sup>2</sup> BRP contended then, and continues to argue now, that Arctic Cat bears the burden on marking pursuant to 35 U.S.C. § 287(a).

<sup>3</sup> Of course, no material change in the law other than the issuance of *Halo*, which changed the appropriate standard for willfulness as discussed *infra* and in the Court's Order Denying Motion to Vacate.

summary judgment motion asserting [a particular argument] will usually get that plaintiff past a Rule 50(a) motion asserting the [same argument], although the district court is free to change its mind.”).

The Defendant has not carried its burden in showing that there is “only one reasonable conclusion” – of no liability – as to the Verdict in this case. *See Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. All Am. Freight, Inc.*, No. 14-CV-62262, 2016 WL 3787638, at \*4 (S.D. Fla. July 6, 2016) (finding that defendant failed to meet standard for renewed JMOL). Ultimately, and as this Court has already concluded, the Verdict is consistent with both the manifest weight of the evidence and the applicable law. *See* ECF Nos. [119], [148], [200] (Order Denying Summary Judgment, Order Denying JMOL, Order Denying Motion to Vacate, respectively); Fed. R. Civ. P. 50(b), 59. Indeed, the Court “will not second-guess the jury or substitute [the Court’s] judgment for its judgment[, as BRP essentially requests, because the V]erdict is supported by sufficient evidence.” *Lipphardt*, 267 F.3d at 1186 (quoting *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582 (11th Cir.), *cert. denied*, 531 U.S. 1076 (2000)); *see, e.g., Bozeman v. Pollock*, -- F. Supp. 3d --, 2015 WL 5016510, at \*11 (S.D. Fla. Aug. 25, 2015) (“Although Defendants would have the jury believe that the situation [plaintiff] found herself in had no effect on her mental state, the jury was free to draw a different conclusion based on the evidence presented.”).

In fact, in the entirety of its forty-five page Motion, BRP raises only two fresh considerations, related to jury instructions on willfulness and marking. *See generally* Motion. The Court now addresses each claim in turn.

First, in line with the Defendant's arguments in its Motion to Vacate, ECF No. [158], BRP argues that the Verdict cannot stand, because the jury was instructed pursuant to the now-overruled *Seagate* standard. However, as addressed above as well as in painstaking detail in the Court's Order Denying Motion to Vacate, the instruction provided to the jury on willful infringement pertained only to *subjective* willfulness, reading as follows:

In this case, Arctic Cat argues both that BRP infringed and further that BRP infringed willfully. If you have decided that BRP has infringed, you must go on and address the additional issue of whether or not the infringement was willful. Willfulness requires you to determine by clear and convincing evidence that BRP acted recklessly. To prove that BRP acted recklessly, Arctic Cat must prove by clear and convincing evidence that BRP actually knew or should have known that its actions constituted an unjustifiably high risk of infringement of a valid and enforceable patent.

To determine whether BRP had this state of mind, consider all the facts which may include but are not limited to whether or not BRP acted in accordance with the standards of commerce for its industry, whether or not BRP intentionally copied a product of Arctic Cat that is covered by the '545 patent or the '969 patent, whether or not there is a reasonable basis to believe that BRP did not infringe or had a reasonable defense to infringement, whether or not BRP made a good-faith effort to avoid infringing the '545 patent and the '969 patent. For example, whether BRP attempted to design around the '545 patent and the '969 patent; whether or not BRP tried to cover up its infringement.

And BRP argues it did not act recklessly because it relied on a legal opinion that advised BRP either, one, that the product did not infringe the '545 patent or the '969 patent or, two, that the '545 patent and/or the '969 patent was invalid. You must evaluate whether the opinion was of a quality that reliance on its conclusions was reasonable.

ECF No. [182-10] (June 1, 2016, Trial Transcript) at 44:16-45:18 (jury instruction); *Halo*, 136 S. Ct. at 1933 (“The subjective willfulness of a patent infringer, intentional or knowing, may warrant enhanced damages, without regard to whether his infringement was objectively reckless.”).

BRP does not and cannot explain how *Halo* impacts the instruction given to the jury on willful infringement or why, under *Halo*, anything in the instruction is incorrect – other than, of course, the clear and convincing standard. However, this standard could have only benefited BRP in that the jury members were directed to hold the evidence introduced at trial to a more scrutinizing standard than is now applicable to willfulness, to wit, the preponderance of the evidence standard. Indeed, the absence of any meaningful argument to this effect is telling. *See generally* Motion; ECF No. [194] (BRP Reply). The Defendant cannot escape the fact that the jury found subjective willfulness, even using a clear and convincing evidentiary standard. *See* Judgment at 2-3; Order Denying Motion to Vacate. Therefore, it is clear that the willfulness instruction did not in any way provide “a misleading impression or inadequate understanding of the law and the issues to be resolved.” *Steger*, 318 F.3d at 1081. No relief – whether in the form of vacatur, JMOL, or a new trial – is warranted under these facts.



Second, the Defendant claims that the Court's marking instruction was erroneous. *See* Motion at 44-45. The jury instruction entitled, "Date Damages Begin," states, in relevant part:

Arctic Cat must prove that it is more likely than not that BRP actually was notified of the claim for patent infringement as of the date alleged by Arctic Cat. . . . If you find that Arctic Cat and its licensees did mark substantially all of their products with the patent number, then October 16, 2008 is the date for the start of damages calculations. If, however, you find that Arctic Cat and its licensees did not mark substantially all of those products with the patent number, then Arctic Cat did not provide notice in this way. . . .

ECF No. [151] (Jury Instructions) at 31-32.

The parties developed and stipulated to this marking instruction. BRP initially proposed an additional concluding sentence to this paragraph imposing the burden of showing no patented article on Arctic Cat. *See* ECF Nos. [106], [78]. But, the Defendant dropped this request in a subsequent Joint Proposed Jury Instruction. *See* ECF No. [146] (Joint Proposed Jury Instructions) at 76. BRP made no objection to the omission of this sentence during the Court's charging conference. *See* ECF No. [182-10] (June 1, 2016, Trial Transcript) at 14:6-19:14 (objections to Court's draft jury instructions). Likewise, BRP made no objection to the Court's inclusion of the question as to whether Honda manufactured and sold a "patented article" on the jury verdict form – and, in fact, argued for its inclusion. *See id.* at 8:14-9:21, 6:23-14:5 (generally discussing § 287 marking language on Court's draft verdict form). The Defendant, therefore, waived any argument that

the jury was not properly instructed on the requirements of 35 U.S.C. § 287(a)). *Id.* at 19:13-14 (Ms. Rodman: “Your Honor, we don’t see anything else on our end.”); *see Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1394 (11th Cir. 1997) (“Failure to object to the instructions on these grounds before the jury retired constituted a waiver.”). Furthermore, notwithstanding this waiver, the Court notes that, contrary to Defendants’ argument, the jury was properly instructed as to burden in establishing marking and notice under 35 U.S.C. § 287(a). *See* Order Denying Summary Judgment at 59<sup>4</sup> (adopting “the better view” that the burden of production does not shift to a plaintiff to show compliance with a marking statute) (quoting *Sealant Sys. Int’l, Inc. v. TEK Glob. S.R.L.*, No. 5:11-CV-00774-PSG, 2014 WL 1008183, at \*30 (N.D. Cal. Mar. 7, 2014), *rev’d in part on other grounds*, *Sealant Sys. Int’l, Inc. v. TEK Glob. S.R.L.*, 616 F. App’x 987 (Fed. Cir. 2015) (citing *Oracle Am., Inc. v. Google Inc.*, Case No. 3:10-cv-03561-WHA, 2011 WL 5576228, at \*2 (N.D. Cal. Nov. 15, 2011))).

BRP makes no other argument that has yet to be addressed after the full presentation of evidence in this case. *See, e.g., Michael Linet*, 408 F.3d at 763 (noting that a Rule 59 motion cannot be used to “relitigate old matters”); *American Home Assur. Co. v. Glenn Estess & Associates, Inc.*, 763 F.2d 1237, 1239 (11th Cir. 1985) (explaining that Rule 59(e) motions do not afford an unsuccessful litigant “two bites at the apple”); *Amegy Bank Nat. Ass’n v. DB Private Wealth Mortgage, Ltd.*,

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<sup>4</sup> “Indeed, otherwise, a defendant’s general allegations could easily instigate a fishing expedition for the patentee in order to stave off pursuit of damages for infringement. This theory also comports with the general allocation of burden to proof for defenses at common law.” *Id.*

No. 2:12-CV-243-FTM-38CM, 2014 WL 1876208, at \*2 (M.D. Fla. May 9, 2014), *aff'd sub nom.*, *Amegy Bank Nat. Ass'n v. Deutsche Bank Alex. Brown*, 619 F. App'x 923 (11th Cir. 2015) ("The jury has reasonably made a determination based on the evidence and thus the Court will not substitute the jury's judgment. Pursuant to Rule 50(b), this motion is due to be denied."). Particularly when viewed in the light most favorable to Arctic Cat, as the non-moving party, the Verdict and Judgment are supported by overwhelming evidence as presented at trial and filed on the record during the duration of this action. *See, e.g., Lipphardt*, 267 F.3d at 1186. BRP, therefore, is not entitled to judgment as a matter of law or to a new trial.

### **B. Plaintiff's Motion**

Plaintiff's post-judgment Motion argues that sections 283 and 284 of the Patent Act entitle Arctic Cat, as the prevailing party, to (A) an award of supplemental damages for BRP's sales of the Infringing PWCs from April 30, 2016, through June 14, 2016 (the date of Judgment), at an enhanced rate; (B) entry of an ongoing royalty for BRP sales of the Infringing PWCs from the date of Final Judgment through expiration of the '545 Patent; and (C) periodic accountings of sales of such PWCs through expiration of the '545 patent. *See* 35 U.S.C. §§ 283, 284. BRP opposes all relief sought by the Plaintiff. *See* ECF No. [175] ("BRP Response"). Importantly, however, BRP does not contest that it is continuing to infringe the '545 Patent through sales of the Infringing PWCs through the date of judgment, and onwards.

### 1. Supplemental Damages

District courts “have discretion to award damages for periods of infringement not considered by the jury.” *Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 38 (Fed. Cir. 2012); *see* 35 U.S.C. § 284 (“[W]hen the damages are not found by a jury, the court shall assess them.”). Here, the jury found a per unit reasonable royalty rate of \$102.54 for BRP’s past infringement. *See* Verdict. During trial, both parties’ damages experts agreed that BRP sold 151,790 Infringing PWCs between October 16, 2008<sup>5</sup> and April 30, 2016, the date of the most current sales data disclosed by BRP. *See* ECF No. [161-1] (May 18, 2016, Trial Transcript) at 136:16-137:1 (Arctic Cat damages expert); ECF No. [161-2] (May 31, 2016, Trial Transcript) at 27:1-4 (BRP damages expert). The jury further found that BRP’s past infringement was willful, which ultimately persuaded the Court, after careful consideration of the totality of the circumstances, to treble the damages awarded by the jury, as provided by § 284. As this enhancement amounted to an effective royalty rate of \$307.62 per unit, the Court assessed the total disclosed enhanced damages at \$46,693,639.80, representing the product of 307.62 and 151,790. *See* Final Judgment.

Arctic Cat, therefore, is also entitled to supplemental damages based on undisclosed infringing sales of the Infringing PWCs occurring after April 30, 2016, through the date of final judgment, June 14, 2016. *See Carnegie Mellon Univ. v. Marvell Tech. Group, Ltd.*, No. 09-cv-290, 2014 WL 13220154, at \*4 (W.D. Pa. March 31, 2014), *rev’d on other grounds*, 807 F.3d 1283 (Fed. Cir. 2015) (“[A] prevailing patentee is due the

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<sup>5</sup> This date accounted for the 6-year time limitation imposed by 35 U.S.C. § 286.

damages for uncalculated pre-verdict sales through the date of the entry of judgment. The Court finds that supplemental damages are properly awarded . . . because the jury did not have the opportunity to assess them due to a lack of financial information regarding [the defendant's] ongoing sales of Accused [products] at the time of trial.”) (citation omitted). Specifically, Arctic Cat submits that the royalty for BRP sales of Infringing PWCs from April 30, 2016, through June 14, 2016, should be assessed at the implied royalty rate of \$307.62, resulting from BRP’s willful infringement – and the Court agrees. Such pre-judgment sales of BRP’s Infringing PWCs are willful infringements, as determined by the jury, and, thus, are appropriately included in Arctic Cat’s Verdict. As set forth in the Declaration of Walter Bratic, the estimated number of units from April 30, 2016, through the date of judgment is 4,848 infringing units. *See* ECF No. [162] (Bratic Declaration or “Bratic Decl.”) ¶ 5; ECF No. [162-3] (calculations). Assessed at the royalty rate effectively employed by the Final Judgment, Arctic Cat is awarded supplemental damages for the period between May 1, 2016, and June 14, 2016, in the amount of \$1,491,385. *See* Bratic Decl. ¶ 6. The Plaintiff next seeks prospective relief for alleged ongoing infringement post-Judgment.

## **2. Ongoing Royalty**

Arctic Cat submits – and BRP does not contest – that the Defendant is continuing to manufacture and sell its Infringing PWCs. *See* ECF No. [161-4] (May 17, 2016, Trial Transcript) at 198:15-22; *see also* ECF No. [161-3] (BRP Reports Fiscal Year 2017 First-Quarter Results, June 9, 2016). Indeed, the Plaintiff set forth a prayer for ongoing injunctive relief in its

First Amended Complaint to account for this very possibility. ECF No. [36] (requesting that the Court “enter orders preliminarily and permanently enjoining BRP and its officers, agents, directors, servants, employees, attorneys, representatives, parents, subsidiaries, affiliates, and all of those in active concert, privity or participation with them and their successors and assigns, from infringing the ‘545 patent”). BRP appears to oppose any such relief, although it is unclear on what grounds. *See* BRP Response at 2 (“Even where a permanent injunction is not appropriate, a court need not award an ongoing royalty. However, if the Court awards an ongoing royalty in this case, it should be no more than the reasonable royalty that the jury awarded Arctic Cat – \$102.54 per unit.”)

District courts “may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.” 35 U.S.C. § 283. However, in lieu of an injunction prohibiting BRP from using the life-saving innovations of the ‘545 patent, Arctic Cat seeks an ongoing royalty rate for BRP’s sales of all Infringing PWCs from June 15, 2016, through expiration of the ‘545 patent. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1332-33 (Fed. Cir. 2015) (en banc), *cert. granted*, 136 S. Ct. 1824 (May 2, 2016) (“[A]bsent egregious circumstances, when injunctive relief is inappropriate, the patentee remains entitled to an ongoing royalty.”). This is one of “several types of relief for ongoing infringement that a court can consider.” *Whitserve*, 694 F.3d at 38 (“(1) [I]t can grant an injunction; (2) it can order the parties to attempt to negotiate terms for future use of the invention; (3) it can grant an ongoing royalty; or (4) it can exercise its discretion to conclude

that no forward-looking relief is appropriate in the circumstances.”); *see Telcordia Techs., Inc. v. Cisco Sys., Inc.*, 612 F.3d 1365, 1379 (Fed. Cir. 2010) (“If the district court determines that a permanent injunction is not warranted, the district court may, and is encouraged, to allow the parties to negotiate a license.”)); *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1315 n.16 (Fed. Cir. 2007) (finding that an ongoing royalty is a form of equitable relief authorized under § 283).

Setting an appropriate ongoing royalty rate, “of course, is a matter committed to the sound discretion of the district court.” *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1364 n.2 (Fed. Cir. 2008); *see Paice*, 504 F.3d at 1315. A district court must, nonetheless, take care to provide a “concise but clear explanation of its reasons” supporting the rate set. *Amado*, 517 F.3d at 1362 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)); *Paice*, 504 F.3d at 1315 (same). Ongoing royalties are determined based on the assumption that the parties engage in a post-verdict negotiation, with the jury’s damages award as a starting point:

Because the Court is using the jury’s determination of a . . . royalty rate . . . as a starting point, the Court focuses on any new evidence that was not before the jury and additionally any changed circumstances (other than willfulness) between a hypothetical negotiation that occurred [when infringement began] (which the jury determined) and a hypothetical negotiation that would occur . . . after the judgment (which this Court is determining).

*Mondis Tech. Ltd. v. Chimei InnoLux Corp.*, 822 F. Supp. 2d 639, 647 (E.D. Tex. 2011), *aff’d sub nom. Mondis Tech. Ltd. v. Innolux Corp.*, 530 F. App’x 959

(Fed. Cir. 2013);<sup>6</sup> see *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 582 F.3d 1288, 1303 (Fed. Cir. 2009) (instructing district court on remand to determine royalty that would result from a post-verdict hypothetical negotiation between the parties); *Apple, Inc. v. Samsung Elecs. Co.*, No. 12-CV-00630-LHK, 2014 WL 6687122, at \*4 (N.D. Cal. Nov. 25, 2014) (“Courts have used the *Georgia-Pacific* factors to evaluate a post-verdict hypothetical negotiation for ongoing royalties.”). In this case, the Verdict’s reasonable royalty rate for past damages, that is, \$102.54 per infringing unit, shall set the floor for negotiations. See *Mondis*, 822 F. Supp. 2d at 647, n.8; *Telcordia*, 612 F.3d at 1377 (“[T]his court gives ‘broad deference to the conclusions reached by the finder of fact.’”) (quoting *Monsanto Co. v. McFarling*, 488 F.3d 973, 981 (Fed. Cir. 2007)).

Rather than evaluate a post-verdict hypothetical negotiation, however, the Court finds that the best course is to require that the parties engage in an actual one. See *Paice*, 504 F.3d at 1315 (“[T]he district court may wish to allow the parties to negotiate a license amongst themselves regarding future use of a patented invention before imposing an ongoing royalty.”). Following this guidance, the Court will order the parties to attend mediation in order to negotiate the terms of a license, within the framework of the *Georgia-Pacific* factors,<sup>7</sup> as to post-judgment infringement of the ‘545

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<sup>6</sup> See *Paice*, 504 F.3d at 1316 (“[T]he fact that monetary relief is at issue in this case does not, standing alone, warrant a jury trial.”)

<sup>7</sup> *Georgia-Pacific* factors: “1. The royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty. 2. The rates paid by the licensee for the use of other patents comparable to the patent in suit. 3. The nature and scope of the license, as exclusive or non-exclusive;



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or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold. 4. The licensor's established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly. 5. The commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter. 6. The effect of selling the patented specialty in promoting sales of other products of the licensee; that existing value of the invention to the licensor as a generator of sales of his non-patented items; and the extent of such derivative or convoyed sales. 7. The duration of the patent and the term of the license. 8. The established profitability of the product made under the patent; its commercial success; and its current popularity. 9. The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results. 10. The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention. 11. The extent to which the infringer has made use of the invention; and any evidence probative of the value of that use. 12. The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions. 13. The portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer. 14. The opinion testimony of qualified experts. 15. The amount that a licensor (such as the patentee) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee – who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention – would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license.” *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

Patent. At this stage, all additional relief requested by Arctic Cat, including the imposition of a periodic accounting, must be denied, pending the outcome of the parties' licensing discussions.

#### IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. BRP's Renewed Motion for Judgment as a Matter of Law or for a New Trial, **ECF No. [169]**, is **DENIED**.
2. Arctic Cat's Motion for Supplemental Damages, Ongoing Royalty, and Periodic Accounting, **ECF No. [160]**, is **GRANTED IN PART AND DENIED IN PART** consistent with this opinion.
3. The parties shall attempt to **NEGOTIATE** terms for future use of the Infringing PWCs. Towards that end, they are directed to select a mediator and schedule a date, time, and place for mediation **no later than September 2, 2016**. The parties shall submit a mediation report indicating the results of the mediation within **seven days** of the scheduled mediation.
4. **No later than November 14, 2016**, the parties shall file a joint report indicating the negotiated terms of any licensing agreement reached.

**DONE AND ORDERED** in Miami, Florida, this 12th day of August, 2016.

[Signature] \_\_\_\_\_

**BETH BLOOM**

**UNITED STATES DISTRICT  
JUDGE**

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Copies to: Counsel of Record

**APPENDIX D**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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Case No. 14-cv-62369-BLOOM/Valle

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ARCTIC CAT INC.,

*Plaintiff,*

*v.*

BOMBARDIER RECREATIONAL  
PRODUCTS, INC., AND BRP U.S. INC.,

*Defendants.*

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**ORDER**

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**THIS CAUSE** is before the Court upon the Motion of Defendants Bombardier Recreation Products, Inc. and BRP U.S. Inc. (hereinafter, referred to together as “BRP” or “Defendant”) for an Order (A) Vacating the Portion of the June 14, 2016, Final Judgment Enhancing Damages, ECF No. [157] (“Judgment”), and (B) Setting Briefing Schedule for Consideration of Motion by Plaintiff for Enhanced Damages. ECF No. [158] (the “Motion”). The Court has reviewed the Motion, all supporting and opposing submissions and exhibits,<sup>1</sup>

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<sup>1</sup> The Court has considered, *inter alia*, argument as to enhanced damages contained within briefing on other pending post-trial motions, as requested by the parties. *See, e.g.*, ECF No. [172] (“Reply”) at 8.

and the applicable law, and is otherwise fully advised. For the reasons set forth below, the Motion is denied.

## **I. BACKGROUND**

Following a jury trial, a verdict issued in the above-styled case finding BRP liable to Plaintiff Arctic Cat Inc. (“Plaintiff” or “Arctic Cat”) for willful infringement through the sale of certain models of personal watercraft (or “PWCs”) under the name, SeaDoo, which incorporated an off-throttle assisted steering technology. *See* ECF No. [153] (Jury “Verdict,” dated June 1, 2016). Therein, the jury found by a preponderance of the evidence that BRP infringed ten claims in Arctic Cat’s Patents, United States Patent Numbers 6,793,545 (“the ‘545 Patent”) and 6,568,969 (“the ‘969 Patent”), including claims 13, 15, 17, 19, 25, and 30 of the ‘545 Patent as well as claims 15, 16, 17, and 19 of the ‘969 Patent. *See id.* at 1-2. The jury further held that BRP failed to prove its invalidity defenses of anticipation, obviousness, and enablement. *Id.* at 2-3. As to damages, the jury identified October 16, 2008, as the proper starting date, and \$102.54 as the reasonable royalty per unit sold to which Arctic Act is entitled. The parties stipulated to the number of units sold since October 16, 2008, to wit, 151,790. *See* ECF No. [149] (trial minutes, May 31, 2016).

Moreover, the jury found, by clear and convincing evidence, that BRP infringed the above-listed claims “with reckless disregard of whether such claim was infringed or was invalid or unenforceable,” entitling Arctic Cat to treble damages. Verdict at 4. The issue of subjective willfulness reached the jury after the Court found objective willfulness by clear and convincing evidence, pursuant to the two-part *Seagate* test, in its Order Denying Judgment as a Matter of Law, ECF No.

[148] (“Order Denying JMOL”) (citing *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007)). Under the first, objective prong of this test, a patent owner must “show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.” *Seagate*, 497 F.3d at 1371. Under the second, subjective prong, the patentee must demonstrate, also by clear and convincing evidence, that the risk of infringement “was either known or so obvious that it should have been known to the accused infringer.” *Id.*<sup>2</sup>

Coincidentally, the Supreme Court issued a ruling shortly after the conclusion of trial that, *inter alia*, discarded the *Seagate* test for willfulness as inconsistent with Section 284 of the Patent Act. See *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1923 (2016) (citing 35 U.S.C. § 284). *Halo* held that “an independent showing of objective recklessness should [*not*] be a prerequisite to enhanced damages” and that a determination as to enhancement should be governed by a preponderance of the evidence standard. 136 S. Ct. at 1925. Moreover, it concluded that enhancement of damages should be governed by a preponderance of the evidence standard that “has always” governed all other aspects of patent-infringement litigation. *Id.* This decision, importantly, did not impact the validity of the Judgment because, as the Court explained, “where both objective willfulness and subjective willfulness were found by clear and convincing evidence, a more lenient inquiry as to subjective willfulness, without the additional hurdle imposed by the objective willfulness

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<sup>2</sup> Any consideration of the *Seagate* test was limited to the Court’s Order Denying JMOL, and oral argument on the same—and did not affect any other aspect of the trial in this case.

inquiry, and by the lesser preponderance of the evidence standard, would reach the same result.” Judgment at 3. Pursuant to the applicable law, including the issuance of *Halo*, the Court held that the Verdict entitled Arctic Cat to the trebling of damages and, thus, directed judgment against BRP and in favor of the Plaintiff for \$46,693,639.80, and any applicable interest.

BRP identifies no procedural basis for its Motion under the Federal Rules of Civil Procedure, which would inform the Court’s standard of review. Regardless, it asks the Court to vacate the instant Judgment, suggesting that the enhancement of damages under 35 U.S.C. § 284 was improper. Accordingly, the Court takes this opportunity to examine the relevant law, including the Supreme Court’s recent decision in *Halo*, entered on the same day as the Court’s Judgment<sup>3</sup>—and, thus, to ensure that the Court’s decision in which it trebled damages comports with the Supreme Court’s new guidance.

## II. AUTHORITY

Section 284 of the Patent Act provides that, in a case of infringement, courts “may increase the damages up to three times the amount found or assessed.” 35 U.S.C. § 284. In 2007, the Federal Circuit adopted the two-part *Seagate* test for determining when a district court may increase damages pursuant to § 284.<sup>4</sup> But,

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<sup>3</sup> The Court’s Final Judgment was entered on June 13, 2016, and issued on the case docket on June 14, 2016.

<sup>4</sup> Before *Seagate*, determining whether to award enhanced damages was a two-step process in which a jury’s finding of willfulness satisfied the first step. See *Transclean Corp. v. Bridge-wood Services, Inc.*, 290 F.3d 1364, 1377 (Fed. Cir. 2002). “For the

as noted, the Supreme Court rejected the *Seagate* test in *Halo* as “unduly rigid” and held that, instead, “district courts [should] exercise their discretion” as provided in § 284 to determine whether to award enhanced damages. 136 S. Ct. at 1933-34 (“Section 284 permits district courts to exercise their discretion in a manner free from the inelastic constraints of the *Seagate* test.”). Accordingly, “[t]he subjective willfulness of a patent infringer, intentional or knowing, may warrant enhanced damages, without regard to whether his infringement was objectively reckless.” *Id.* at \*8; see *SOCIEDAD ESPANOLA DE ELECTROMEDICINA Y CALIDAD, S.A., v. BLUE RIDGE X-RAY CO., INC., DRGERM USA, INC., & DRGEM CORP.*, No. 1:10-CV-00159-MR, 2016 WL 3661784, at \*2 (W.D.N.C. July 8, 2016) (“Thus, in *Halo*, the Supreme Court [] overruled the objective prong of *Seagate*, leaving the issue of willfulness as solely a factual issue which can readily be addressed by a jury.”).<sup>5</sup> Additionally, as explained in the Final Judgment, *Halo* “disavowed the burden of proof prescribed by *Seagate* and opted for the lesser preponderance of the evidence standard for a patentee to prove an alleged infringer’s recklessness.” *PPC Broadband, Inc. v. Corning Optical Commc’ns RF, LLC*, -- F. Supp. 3d --, 2016 WL 3365437, at \*5 (N.D.N.Y. June 16, 2016) (citing *id.* at \*9).

Enhanced damages “are not to be meted out in a typical infringement case, but are instead designed as a

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second step, the Court exercise[d] its discretion whether to increase damages.” *Itron, Inc. v. Benghiat*, No. CIV.99-501(JRT/FLN), 2003 WL 21402608, at \*7 (D. Minn. June 16, 2003).

<sup>5</sup> Defendant incorrectly argues that *Halo* holds “that the jury has no role in determining willfulness.” Reply at 3.



‘punitive’ or ‘vindictive’ sanction for egregious behavior. The sort of conduct warranting enhanced damages has been variously described in our cases as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate.” *Halo*, 136 S. Ct. at 1932.<sup>6</sup> “[A]lthough there is ‘no precise rule or formula’ for awarding damages under § 284, a district court’s ‘discretion should be exercised in light of the considerations’ underlying the grant of that discretion.” *Halo*, 136 S. Ct. at 1932 (citations omitted). That is, “[a]s with any exercise of discretion, courts should ... take into account the particular circumstances of each case in deciding whether to award damages, and in what amount ... [and] ‘be guided by [the] sound legal principles’ developed over nearly two centuries of application and interpretation of the Patent Act.” *Halo*, 136 S. Ct. at 1933, 1935 (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005)).<sup>7</sup>

### III. DISCUSSION

The narrow question before the Court is whether the trebling of damages was proper. Contrary to Defendant’s argument that “the Court indicated a perceived requirement to automatically treble the damag-

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<sup>6</sup> Although it is true that, 180 years ago, “Congress did away with automatic trebling of damages,” BRP fails to acknowledge that this was for simple infringement, without regard to willful infringement. As *Halo* recounted, the Supreme Court “explained [in 1854] that the change was prompted by the ‘injustice’ of subjecting a ‘defendant who acted in ignorance or good faith’ to the same treatment as the ‘wanton and malicious pirate.’” *Halo* at \*3 (citing *Seymour v. McCormick*, 16 How. 480, 488 (1854)).

<sup>7</sup> *Halo* also establishes that the Federal Circuit will review enhanced damages awards for abuse of discretion. *Id.* at \*10.

es in its Final Judgment,” treble damages were awarded after comprehensive—perhaps, painstakingly so—consideration of the particular circumstances of this case in the resolution of multiple *Daubert* motions, a summary judgment motion, involving nearly three hours of oral argument, a motion for judgment as a matter of law, and a ten-day trial, after which the jury found willful infringement. Indeed, the Court has now reviewed the full factual record in this case, and evaluated arguments from both parties, on at least three separate occasions. The evidence established that BRP’s conduct was so unreasonable as to warrant a finding of “objective recklessness” under *Seagate*—a legal standard that *Halo* rejected for the very reason that it made it too difficult for patent holders to find redress for acts of intentional infringement, and overly constrained district courts from exercising their discretion to punish willful patent infringers under 35 U.S.C. § 284. *See Halo*, 136 S. Ct. at 1933 (“The *Seagate* test aggravates the problem by making dispositive the ability of the infringer to muster a reasonable (even though unsuccessful) defense at the infringement trial. The existence of such a defense insulates the infringer from enhanced damages, even if he did not act on the basis of the defense.”); ECF No. [148] (Order Denying Judgment as a Matter of Law, or “Order Denying JMOL”).

As a result, the argument that BRP has not had a chance to weigh in on the instant issue rings hollow. Furthermore, the enhancement of damages, which followed and specifically accounted for the decision in *Halo*, was neither automatic nor unprompted. *See* Judgment at 2 (citing 35 U.S.C. § 284 (“[C]ourts ‘*may increase the damages up to three times the amount found or assessed.*’”) (emphasis added)). Indeed, the Court is aware of no authority in connection with either 35

U.S.C. § 284 or the Federal Rules of Civil Procedure that requires that the Court consider post-trial briefing before awarding enhanced damages,<sup>8</sup> and BRP has cited no authority requiring as much. Once willful infringement is found, the question of enhancement is firmly committed to the sound discretion of the district court. *See Halo*, 136 S. Ct. at 1931 (quoting *Martin*, 546 U.S. at 136) (“That language [in § 284] contains no explicit limit or condition, and we have emphasized that the word ‘may’ clearly connotes discretion.”) (internal quotation marks omitted); *see also Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1570 (Fed. Cir. 1996) (explaining that, once the fact-finder determines that an infringer is “guilty of conduct upon which increased damages may be based[,] ... the court then determines, exercising its sound discretion, whether, and to what extent, to increase the damages award given the totality of the circumstances”). Where, as here, the Court carefully considered the record evidence and details its reasons for enhancement, its determination regarding enhancement is appropriate. *See Order Denying JMOL.*

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<sup>8</sup> Similarly, BRP’s briefing suggests that Arctic Cat was required to overcome an additional hurdle—above willfulness—in order to carry its burden in demonstrating that enhancement of damages was warranted. ECF No. [175] (BRP Response) (“As the Supreme Court noted in *Halo*, enhanced damages are reserved for conduct that is ‘willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate.’ Arctic Cat has not made that showing here.”) (citing *Halo*). This simply is a misstatement of the law, as discussed *infra*. Instead, *Halo* carefully distinguished between a “defendant who acted in ignorance or good faith”—*i.e.*, not willful—and a “wanton and malicious pirate”—*i.e.*, willful. This is not to say that willfulness requires the automatic trebling of damages, but only to emphasize Defendant’s faulty framing of the same.

Specifically, the Court made the following factual findings and conclusions of law in its Order Denying JMOL:

Here, testimony has been presented conclusively demonstrating that BRP's agent, Mr. Goudrault of BRP's IP Department, knew about the subject patents before they issued. *See State Industries, Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985) ("To willfully infringe a patent, the patent must exist and one must have knowledge of it."). Mr. Daujenais and Mr. Goudrault confirmed that fact. Indeed, Mr. Goudrault stated at trial that he made a note in his file to reexamine the patent after its issuance. *See id.* Furthermore, Mr. Goudrault[s] only analysis of the patent—on which BRP exclusively relied—consisted of one conclusory sentence on a page of handwritten notes. The witness, himself, testified that he would not provide such an opinion to one of his clients today. Even if a larger file existed that has gone missing in the years since he conducted his analysis, importantly, Mr. Goudrault is not an attorney. Thus, whatever the quality of his work, BRP cannot legally rely on him to establish the advice of counsel defense. So, despite specifically noting the relevance of Arctic Cat's patent application, BRP chose not to seek advice of qualified and competent counsel until much later, after unsuccessfully attempting to purchase Arctic Cat's patents through a third party. In *Creative*, the defendant sought advice of counsel before it engaged in potentially infringing activities. Here, by contrast, by the time that BRP got around to

getting any sort of opinion from Mr. Marcus, BRP had known about the patents already for eight years. Testimony has established that BRP had been selling potentially infringing products across their entire product line for at least a half a decade. ...

[C]ases that have found no willfulness despite no advice of counsel have involved much stronger facts than those present in this action, such as where the [Court] finds weak evidence of infringement altogether. ...

[I]n contrast [to *Eastman Kodak*], BRP attempted to purchase the Arctic Cat patents, rather than planning in good faith to design around them. When those efforts were unsuccessful, BRP recommenced production of the very models for which they had expressed concern regarding potential infringement—and then sought advice of counsel as to non-infringement years after learning about the patents. It was objectively reckless for BRP to rely on an infringement defense where its own experts had already concluded a likelihood of infringement.

BRP's last contention is its invalidity defense. However, this defense depends upon prior art that was squarely before the Patent and Trademark Office when the Office decided to issue the '545 and '969 Patents. Although perhaps not dispositive, the Court cannot find that it was objectively reasonable for BRP to rely on obviousness as a theory of invalidity where the USPTO specifically drew the opposite conclusion—finding that the patent claims

were not so obvious as to preclude the issuance of the patents. In light of the foregoing, the Court holds that BRP acted despite an objectively high risk of infringement.

*Id.* at 10 (citing *Creative Compounds, LLC v. Starmark Laboratories, Inc.*, No. 07-22814-CIV, 2010 WL 2757196, \*5 (S.D. Fla. 2010)); *Eastman Kodak Co. v. Agfa-Gevaert N.V.*, 560 F. Supp. 2d 227, 301-05 (W.D.N.Y. 2008), *judgment entered*, 2008 WL 5115252 (W.D.N.Y. 2008) *and aff'd*, 351 F. App'x 441 (Fed. Cir. 2009)).<sup>9</sup>

It was specifically pursuant to this analysis, as well as the Jury Verdict finding willful infringement and the guidance provided by *Halo* as to willfulness and enhancement of damages, that the Final Judgment was

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<sup>9</sup> In a concurrence to the majority opinion, Justice Breyer, joined by Justice Kennedy and Justice Alito, wrote separately to express “limits” imposed by section 284 “that help produce uniformity in its application and maintain its consistency with the basic objectives of patent law.” *Id.* at 1936 (citing U.S. Const., Art. I, § 8, cl. 8). Therein, he counsels against a bright line rule in which failure of an infringer to obtain advice of counsel is used as proof of willful infringement. *Id.* Explaining this reasoning, the concurrence posits that legal costs “can prevent an innovator from getting a small business up and running. At the same time, an owner of a small firm, or a scientist, engineer, or technician working there, might, without being ‘wanton’ or ‘reckless’ reasonably determine that its product does not infringe a particular patent, or that the patent is probably invalid.” *Id.* (citing *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. —, —, 133 S. Ct. 2107, 2117 (2013)). Needless to say, this analysis does not come into play here, as the fact that Mr. Goudrault is not an attorney is only one of many problems with BRP’s proffered defenses—and, certainly, a large market leader like BRP cannot rely on this concurrence to claim in good faith that legal costs imposed too great a burden in this instance.

entered. The Court ultimately decided that any further briefing, where the evidence was so clear and overwhelming, would only serve to delay resolution of this case—which had already been pending for nearly twenty-one months. *See* Fed. R. Civ. P. 58(b)(2) (“[T]he court must promptly approve [and enter] the judgment.”).

An enhancement of damages often follows a finding of willful infringement. In fact, the Federal Circuit has instructed that, upon such a finding, “courts should provide reasons for *not* increasing a damages award” under § 284. *Jurgens*, 80 F.3d at 1572 (holding that, in light of the jury’s findings of willful infringement, trial court abused its discretion in refusing to enhance damages without an explanation of any proper mitigating factors) (emphasis added); *see also Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 37 (Fed. Cir. 2012) (“[T]rial court abused its discretion in denying the motion for enhanced damages without independent justification.”); *Carnegie Mellon Univ. v. Marvell Tech. Group, Ltd.*, -- F. Supp. 3d --, 2014 WL 1320154, at \*9 (W.D. Pa. Mar. 31, 2014) (“To be clear, a finding of willful infringement does not necessitate the imposition of enhanced damages; however, after such a finding is made, the Court must explain its reasons for declining to award enhanced damages.”), *rev’d on other grounds*, 807 F. 3d 1283 (Fed. Cir. 2015). BRP’s own cited authorities establish as much. For example, in *Modine Mfg. Co. v. Allen Group, Inc.*, 917 F.2d 538 (Fed. Cir. 1990), the Federal Circuit affirmed a district court opinion for no enhancement of damages, because “[it] demonstrated that [the court] carefully considered the finding of willful infringement in light of the deterrent function of enhanced damages in reaching [its] determination that enhanced damages were not appropriate

to this particular case.” *Id.* at 543 (finding that plaintiff “utterly failed to demonstrate that this determination was an abuse of discretion”). And, importantly, there, unlike here, the court found that “willfulness was sufficiently close on the evidence.” *Id.*

Although not mentioned in *Halo*, the Federal Circuit provided a list of nonexclusive factors to assist in this discretionary determination in *Read Corp. v. Portec Inc.*, 970 F.2d 816 (Fed. Cir. 1992)—ultimately, however, the decision hinges on “the egregiousness of the defendant’s conduct based on all the facts and circumstances.” *Id.* at 826-27 (including: (1) whether the infringer deliberately copied the ideas or design of another; (2) whether the infringer, when he knew of the other’s patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed; (3) the infringer’s behavior as a party to the litigation; (4) the defendant’s size and financial condition; (5) closeness of the case; (6) duration of defendant’s misconduct; (7) remedial action by the defendant; (8) defendant’s motivation for harm; and (9) whether defendant attempted to conceal its misconduct). Nonetheless, examination of the *Read* factors—particularly, factors 1, 2, 4, 5, 6, 7, and 9—strongly supports enhancement of damages in this case.

The first *Read* factor, whether the infringer deliberately copied the ideas or design of another, weighs in favor of enhancement. *See Read*, 970 F.2d at 827, n. 7 (instructing that, in this context, “‘ideas’ and ‘design’ would encompass, for example, copying the commercial embodiment, not merely the elements of a patent claim”). At trial, it was established that BRP’s Fernando Garcia attended a demonstration of Arctic Cat’s off-throttle steering technology in Lake Hamilton,



Florida, in March 2000, where he was able to test Arctic Cat's actual prototype. BRP's Director of Engineering, Renald Plante, testified that Garcia thought that the prototype "worked well, but on my side, you know, we—or rather, I compared the system that we were developing, the OPAS system that we were developing, to the Arctic Cat system and we decided to keep our OPAS [off-power] system and just stop the negotiations with Arctic Cat." ECF No. [182-1] (May 17, 2016, Trial Transcript) at 189:9-190:15. This meeting was approximately four years before BRP began infringing the Arctic Cat patents in 2004—after, evidence has shown, BRP abandoned its own prototype attempting to combine BRP's jet boat technology with a PWC. See ECF No. [182-9] (May 31, 2015, Trial Transcript) at 187:23-188:7 ("So Proto-14, as you've heard testified about, was basically an application of the jet boat to—technology to a PWC. And it was tried and it basically reached a dead end and they went a different way."). "That [BRP] developed a very similar system under these circumstances is strong evidence of copying and favors enhancing damages." *Georgetown Rail Equip. Co. v. Holland L.P.*, No. 6:13-CV-366, 2016 WL 3346084, at \*17 (E.D. Tex. June 16, 2016).

As to *Read* factor 2, BRP continues to argue that, as soon as it became aware of Arctic Cat's prototype and patent application, it developed a good-faith belief that the patents were invalid based upon BRP's jet boat prior art. However, the trial testimony established exactly the opposite—that is, that BRP failed to properly investigate the scope of the patents and form a good-faith belief that the patents were invalid and/or not infringed. See Order Denying JMOL at 5-10; Jury Verdict; see also ECF No. [171] ("Boebel Decl." with Exs. 1-12 attached thereto), Ex. 4 (May 18, 2016, Trial

Transcript) at 46:6-17 (J. Daunais) (testifying that Defendants knew of the '545 and '969 patents each within about a month after they issued), at 47:5-12, 97:4-9, 102:15-17 (BRP retained lawyer R. Laurie to try to buy the '545 and '969 patents anonymously "just hoping that [Arctic Cat] didn't care about the patents anymore"), Ex. 5 (May 23, 2016, Trial Transcript) at 45:15-46:9 (D. Goudreault was a patent agent who "investigated" the patents acknowledging that, by law, he is not permitted to give an opinion on patent infringement or validity), at 53:8-54:21, 59:4-21, 67:20-68:9 (acknowledging that the art on which BRP relied was cited on the face of the '969 and '545 patents, and that this meant that the examiner considered that art and concluded that the patents-in-suit were new and different from anything disclosed therein), Ex. 6 (BRP Trial Ex. 74) at BRP133512 & 514 (reflecting brief analysis of '545 and '969 patents); Exs. 7, 8 (BRP Trial Exs. 55, 56) (legal opinion letters not obtained until seven years and eleven years after first infringement, respectively). Indeed, it is disingenuous at best for BRP to claim that it subscribed to the good-faith belief that the patents were invalid where, despite "kn[owing] of both patents within a month or so of their issuance," ECF No. [161-1] (May 18, 2016, Trial Transcript) at 46:9-17, no BRP employee even took the time to review the 31 claims in the issued '545 patent. Boebel Decl., Ex. 5 at 52:24-53:7, 63:3-64:11 (BRP patent agent Goudreault admitting that he reviewed the five claims of the published application for the '545 patent, but not the 31 claims that ultimately issued). Moreover, BRP's notes on the parties' Hamilton meeting, introduced at trial, reflect that Garcia did not assert that any patents were invalid, but instead "asked about our patent and how it would differ from [BRP's] jetboat system." ECF No.

[182-15] at AC00008617. Arctic Cat “said [that the] Patent Office would decide.” *Id.* And the Patent Office did decide—when it issued the claims of the ’969 and ’545 patents with undisputed knowledge of the much-discussed Rheault patent (one of the patents on BRP’s jet boat technology), which was cited on the face of the ’545 and ’969 patents. *See, e.g.*, ECF No. [119] (Order Denying Summary Judgment) at 34.

Similarly far-fetched is Arctic Cat’s argument, under *Read* factor 3, that BRP’s behavior in announcing its intention to appeal the Verdict was unprofessional. BRP certainly did not engage in litigation misconduct, that is, “bringing vexatious or unjustified suits, discovery abuses, failure to obey orders of the court, ... acts that unnecessarily prolong litigation,” or violations of court orders by counsel. *i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 859 (Fed Cir. 2010). In fact, the Court complimented the conduct of the parties’ respective attorneys throughout the case. *See, e.g.*, Reply at 8 (citing June 1, 2016, Trial Transcript) at 169:21-25 (referring to counsel as “extremely talented and superb trial attorneys”). Accordingly, this factor weighs in favor of no enhancement. *See On Demand Mach. Corp. v. Ingram Indus., Inc.*, No. 4:01CV1668MLM, at \*17 (E.D. Mo. July 23, 2004) (finding that factor 3 weighed against enhancement where each side conducted themselves with civility before and during trial).

On the other hand, BRP’s size and financial condition—*Read* factor 4—support the Court’s decision to treble damages. The Defendant is a market leader in personal watercraft and continues to grow. *See, e.g.*, Boebel Decl., Ex. 9 (May 25, 2016, Trial Transcript) at 149:20-22 (stating that BRP is the market leader “[f]or sure”), Ex. 10 (BRP 2016 Annual Review) at 10-11. Its personal watercraft division, Sea-Doo, ended the 2015

season setting a new market share record and appears to be gaining momentum. *See* Boebel Decl., Ex. 10 at 10. BRP boasts that the Sea-Doo Spark—the very PWC that the jury found to infringe Arctic Cat’s patents—“is a prime example [of BRP’s growth strategy] as we can directly tie the industry’s 26% growth worldwide to its introduction in 2013.” *Id.* at 11. In North America, retail sales of the Spark units increased by 40% in fiscal year 2016, while the industry itself increased by only 10%. *Id.* (“What’s more, this increase did not come at the expense of our other ‘traditional’ PWC models.”). Additionally, BRP’s global sales for its “Seasonal Products” division alone was up 6.1% over the previous year at over \$1.3 billion. *Id.*

According to BRP’s 2016 Annual Review, in fiscal year 2016, the Defendant’s sales reached the \$3.8 billion mark. *Id.* at 2. For the three-month period ending April 30, 2016, BRP revenues increased by \$31.8 million, or 3.5%, to \$929.9 million. Boebel Decl., Ex. 1 (Press Release: BRP Reports Fiscal Year 2017—First-Quarter Results, June 9, 2016) at 2. Revenues of Seasonal Products for that same three-month period increased by \$15.6 million, or 5.8%. *Id.* at 3. BRP reported that “[t]he increase resulted primarily from a higher volume and a favourable mix of PWC sold and from a favourable foreign exchange rate variation of \$12 million.” *Id.* While gross profit margins decreased in this period, the decrease attributed was primarily due to higher sales programs in snowmobiles and unfavourable foreign exchange variation, partially offset by favourable product mix in PWC[.]” *Id.* at 4 (emphasis added). According to BRP President and CEO, Jose Boisjoli, BRP “significantly outpaced the industry” and is “currently in an excellent position[.]” *Id.* at 2.

Though Arctic Cat is not a small mom-and-pop shop by any stretch,<sup>10</sup> it is a fraction of BRP's size and the smallest company in the markets where the two compete. *See* Boebel Decl., Ex. 11 (May 17, 2016, Trial Transcript) at 91:12-24 (M. Okerlund) ("Of the companies that I've mentioned, Arctic Cat is by far the smallest company. By comparison, Polaris, which is also a Minnesota-based company, is I think about a five billion dollar company. BRP is a billion, multi-billion dollar company. Arctic Cat's a small fraction of their size."); Reply at 10. Where, as here, BRP is a multi-billion dollar enterprise and the market leader—due in significant part to sales of products found to willfully infringe Arctic Cat's patents—enhancement of damages is particularly warranted. *See St. Regis Paper Co. v. Winchester Carton Corp.*, 410 F. Supp. 1304, 1309 (D. Mass. 1976) (awarding "double damages," with the caveat that, "[i]f defendant were the giant and plaintiff the small independent, I would make it treble"); *Lightwave Technologies, Inc. v. Corning Glass Works*, 19 U.S. P.Q. 2d 1838, 1848-49 (S.D.N.Y. 1991) (increasing damages based on infringer's culpability and appropriate compensation to patentee, but awarding double damages because infringer could not afford treble).

Moreover, pursuant to *Read* factor 5, this case was not a close one. As noted in analysis of *Read* factor 2, the trial testimony established that BRP failed to properly investigate the scope of the patents and form a good-faith belief that the patents were invalid and/or

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<sup>10</sup> Arctic Cat is a publicly-traded company with total net sales in 2015 of over \$698 million. *See* Arctic Cat Inc. Form 10-K, Securities & Exchange Commission (May 27, 2016), at 16, available at: <http://phx.corporate-ir.net/phoenix.zhtml?c=97941&p=irol-reportsannual>.

not infringed. Pursuant to these facts, the case was not close—as demonstrated by the fact that the Court and jury found clear and convincing evidence of willful infringement under the stringent objective/subjective test of *Seagate*. Accordingly, this factor provides more support for enhancement of damages. *Cf. Crucible, Inc. v. Stora Kopparbergs Bergslags AB*, 701 F. Supp. 1157, 1164 (W.D. Pa. 1988) (“[B]ecause the court still considers the [willfulness] question to be a close one ... double, and not treble damages are appropriate.”).

The duration of BRP’s misconduct, that is, *Read* factor 6, also supports the enhancement of the jury’s damages award. BRP began infringing the Arctic Cat patents in 2004. After discontinuing the original infringing product line—the 3D personal watercraft—BRP launched an all-new product platform using the infringing technology in 2009. BRP included the infringing OTAS system in its PWC in 2009 and expanded that use over the next four years, such that all BRP PWCs sold since 2013 include the technology that the jury in this case found to willfully infringe Arctic Cat’s patents. To be sure, as BRP argues, if Arctic Cat had brought this suit earlier, then the period of infringement would have been shorter. *See* Reply at 9. However, this repurposed laches argument invoked by BRP is a red herring. Any delay by Arctic Cat—and the Court has already determined on two occasions that the delay in this case is insufficient to support a laches defense—was not the cause of BRP’s infringement. BRP is responsible for its own actions.

BRP has never engaged in remedial action either, going to *Read* factor 7, such as approaching Arctic Cat about a license or attempting in good faith to design around Arctic Cat’s patents. As this Court found, “by

the time that BRP got around to getting any sort of opinion from Mr. Marcus, BRP had known about the patents already for eight years. Testimony has established that BRP had been selling potentially infringing products across their entire product line for at least a half a decade.” Order Denying JMOL at 9. To address its concerns about infringement, BRP tried to covertly buy the patents “rather than planning in good faith to design around them.” *Id.* at 10. BRP likewise did not voluntarily cease making or selling the infringing products at any point or take steps to implement a non-infringing alternative. *Cf. Intra Corp. v. Hamar Laser Instruments, Inc.*, 662 F. Supp. 1420, 1439 (E.D. Mich. 1987) (damages only doubled because defendant “voluntarily ceased manufacture and sale of infringing systems during the pendency of this litigation”), *aff’d without opinion*, 862 F.2d 320 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1021 (1989).

The Defendant’s motivation for harm, pursuant to *Read* factor 8, is neutral in this analysis as the evidence is inconclusive. Although BRP’s conduct was egregious in numerous respects, Arctic Cat has failed to show that BRP’s infringement was motivated by a desire to harm Arctic Cat, at least beyond the Defendant’s secretive attempt to purchase Arctic Cat’s patents. As a result, factor 8 does not weigh significantly in either direction and, thus, does not impact the instant determination.

BRP’s attempt to conceal its misconduct, however, does support enhancement of damages pursuant to *Read* factor 9. At trial, evidence was adduced that BRP hired “a guy named Ron Laurie” in 2011 to try to buy the patents from Arctic Cat, because the Defendant was “worried that after reviewing the patents Arctic Cat would file a lawsuit against BRP for infringe-

ment.” ECF No. [161-1] (May 18, 2016, Trial Transcript) at 47:5-18, 97:10-14. The Defendant offered \$40,000 initially, which amount was “subsequently raised that to \$60,000. And it didn’t work.” *Id.* at 102:13-14. So, instead, BRP resorted to hoping that Arctic Cat “didn’t care about these patents anymore” and, therefore, would let them expire. *Id.* at 102:8-10, 15-17 (“A. Well, also we were thinking that they could even let them all go expire. But it was not happening yet. So that’s why we wanted to get a shot at buying them. ... Q. So is it fair to say you were just hoping they didn’t care about these patents anymore? A. That’s what we were hoping.”). In contrast, the jury was introduced at trial to a third-party company in the PWC industry, Honda, which addressed the same conundrum in an entirely different manner. Rather than attempt any sleight of hand, Honda entered into a licensing agreement with Arctic Cat when it feared that its products might infringe the Plaintiff’s patents. Particularly in light of this comparison, BRP’s behavior strongly suggests a lack of transparency and good faith that weighs in favor of enhanced damages.

Ultimately, *Read* factors 1, 2, 4, 5, 6, 7, and 9 compellingly support the Court’s decision to treble damages.<sup>11</sup> Though *Read* factor 3 cuts the other way, an ar-

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<sup>11</sup> Arctic Cat urges the Court to consider in its analysis under the *Read* factors the alleged fact that BRP continues to infringe the subject patents. See ECF No. [170] (Response) at 13 (“In 2014, after this suit was filed, BRP continued to infringe; in fact, it expanded its infringing use with the new Spark line of products. And even now—after the jury verdict—BRP continues to trample on Arctic Cat’s patent rights.”). However, this is the first time that the Court has heard such allegations—after the conclusion of trial, when the case has been pending for almost twenty-one months. Before trial, the parties expressly stipulated



gument that no enhancement is warranted based on factor 3 alone—particularly, as it concerns conduct during the litigation, rather than during the period of underlying infringement—is entirely unconvincing. In this case, “the egregiousness of the defendant’s conduct based on all the facts and circumstances” overwhelmingly supports enhancement of damages. *Read*, 970 F.2d at 826-27. “The evidence at trial revealed a degree of dismissiveness of [Plaintiff’s] patent rights and disrespect of the value the law places on protection of intellectual property that was exceptional. Enhanced damages are merited to punish this conduct and deter similar behavior, and to promote appropriate regard for patent rights.” *Applera Corp. v. MJ Research Inc.*, 372 F. Supp. 2d 233, 247 (D. Conn. 2005).

#### IV. CONCLUSION

Trial in this case has established by clear and convincing evidence—a higher standard than is now applicable to a willfulness inquiry under *Halo*—that BRP willfully infringed Arctic Cat’s patented off-throttle steering technology in contravention of the United States Patent Act. It did so with full knowledge of Arctic Cat’s patent rights, without so much as approaching Arctic Cat about a license, as is demonstrated by, *inter alia*, its hiring of an agent to surreptitiously buy Arctic Cat’s patents without disclosing BRP as the intended buyer. Suffice it to say, BRP is the wanton infringer that the Supreme Court sought to punish through its relaxation of the standard governing will-

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to the number of infringing products at issue in this case since October 16, 2008. See ECF No. [149] (trial minutes, May 31, 2016). Accordingly, Arctic Cat’s belated attempt to abandon this stipulation, on which the Court and the parties relied, is not well-taken.

fulness and enhancement of damages. *Halo*, 136 S. Ct. at 1933-34 (“Section 284 permits district courts to exercise their discretion in a manner free from the inelastic constraints of the *Seagate* test. Consistent with nearly two centuries of enhanced damages under patent law, however, such punishment should generally be reserved for egregious cases typified by willful misconduct.”). It is therefore **ORDERED AND ADJUDGED** that Defendant’s Motion, **ECF No. [158]**, is **DENIED**. The Court will address the parties’ other post-trial motions by separate order.

**DONE AND ORDERED** in Miami, Florida, this 27th day of July, 2016.

[Signature] \_\_\_\_\_  
**BETH BLOOM**  
**UNITED STATES DISTRICT**  
**JUDGE**

Copies to: Counsel of Record



**APPENDIX E**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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Case No. 14-cv-62369-BLOOM/Valle

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ARCTIC CAT INC.,

*Plaintiff,*

*v.*

BOMBARDIER RECREATIONAL  
PRODUCTS, INC., AND BRP U.S. INC.,

*Defendants.*

**FINAL JUDGMENT**

**THIS CAUSE** is before the Court upon the jury verdict issued in the above-styled case, finding Defendants Bombardier Recreation Products, Inc. and BRP U.S. Inc. (hereinafter, referred to together as “BRP” or “Defendant”) liable to Plaintiff Arctic Cat Inc. (“Plaintiff” or “Arctic Cat”) for willful infringement, through the sale of certain models of personal watercraft, under the name Sea-Doo, which incorporated an off-throttle assisted steering technology. *See* ECF No. [153] (“Verdict,” dated June 1, 2016). Therein, the jury found by a preponderance of the evidence that BRP infringed ten claims in Arctic Cat’s Patents, United States Patent Numbers 6,793,545 (“the ‘545 Patent”) and 6,568,969 (“the ‘969 Patent,” together with the ‘545 Patent, the “Patents”), including Claims 13, 15, 17, 19, 25, and 30 of the ‘545 Patent as well as Claims 15, 16, 17, and 19 of the ‘969 Patent. *See id.* at 1-2. The jury further held that BRP failed to prove its invalidity

defenses of anticipation, obviousness, and enablement. *Id.* at 2-3. As to damages, the jury found that October 16, 2008, is the proper starting date, and \$102.54 is the reasonable royalty per unit sold to which Arctic Act is entitled. The parties stipulated to the number of units sold since October 16, 2008, to wit, 151,790. *See* ECF No. [149] (trial minutes, May 31, 2016).

Moreover, the jury found, by clear and convincing evidence, that BRP infringed the above-listed claims “with reckless disregard of whether such claim was infringed or was invalid or unenforceable,” entitling Arctic Cat to treble damages. Verdict at 4. The issue of subjective willfulness reached the jury after the Court found objective willfulness by clear and convincing evidence, pursuant to the two-part *Seagate* test, in the Court’s Order denying Judgment as a Matter of Law, ECF No. [148] (“Order”). *See In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007)). Under the first, objective prong of this test, a patent owner must “show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent.” *Seagate*, 497 F.3d at 1371. Under the second, subjective prong, the patentee must demonstrate, also by clear and convincing evidence, that the risk of infringement “was either known or so obvious that it should have been known to the accused infringer.” *Id.* Any consideration of the *Seagate* test was limited to the Court’s Order denying judgment as a matter of law, and oral argument on the same—and did not affect any other aspect of the trial in this case. Coincidentally, the Supreme Court issued a ruling today that, *inter alia*, discards the *Seagate* test for willfulness as inconsistent with Section 284 of the Patent Act. *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, No. 14-1513, 2016 WL

3221515, at \*1 (U.S. June 13, 2016) (citing 35 U.S.C. § 284 (courts “may increase the damages up to three times the amount found or assessed”)). *Halo* finds that “an independent showing of objective recklessness should [*not*] be a prerequisite to enhanced damages.” 2016 WL 3221515, at \*1. Moreover, the Supreme Court instructed that “[e]nhanced damages are no exception” to the preponderance of the evidence standard that “has always” governed all other aspects of patent infringement litigation. *Id.* This decision, importantly, does not impact the validity of the instant judgment. Certainly, where both objective willfulness and subjective willfulness were found by clear and convincing evidence, a more lenient inquiry as to subjective willfulness, without the additional hurdle imposed by the objective willfulness analysis, and by the lesser preponderance of the evidence standard, would reach the same result.

For all of these reasons, pursuant to Federal Rule of Civil Procedure 58, it is **ORDERED AND ADJUDGED** as follows:

5. Judgment is entered **in favor of Plaintiff** and against Defendants upon the Verdict referenced herein.
6. Defendants are directed to return compensatory damages of **\$46,693,639.80** to the Plaintiff, along with any applicable interest, as a result of the trebling of the amount due for 151,790 units at a reasonable royalty rate of \$102.54 per unit.
7. The Court reserves jurisdiction to enter an award of attorneys’ fees and costs pursuant to Southern District of Florida Local Rule 7.3.
8. The Clerk is directed to **CLOSE** this case.

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**DONE AND ORDERED** in Miami, Florida, this 13th  
day of June, 2016.

[Signature] \_\_\_\_\_

**BETH BLOOM**  
**UNITED STATES DISTRICT**  
**JUDGE**

Copies to: Counsel of Record

**APPENDIX F**

**RELEVANT STATUTORY PROVISIONS**

**35 U.S.C. § 284**

**§ 284. Damages**

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. Increased damages under this paragraph shall not apply to provisional rights under section 154(d).

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.

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