

No. 17-

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IN THE  
**Supreme Court of the United States**

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BOMBARDIER RECREATIONAL PRODUCTS INC.,  
BRP U.S. Inc.,  
*Petitioners,*

*v.*

ARCTIC CAT INC.,  
*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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SETH P. WAXMAN	WILLIAM F. LEE
WILMER CUTLER PICKERING	<i>Counsel of Record</i>
HALE AND DORR LLP	LOUIS W. TOMPROS
1875 Pennsylvania Ave. NW	JENNIFER J. JOHN
Washington, DC 20006	WILMER CUTLER PICKERING
(202) 663-6000	HALE AND DORR LLP
	60 State Street
	Boston, MA 02109
	(617) 526-6000
	<a href="mailto:william.lee@wilmerhale.com">william.lee@wilmerhale.com</a>

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## QUESTION PRESENTED

In *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016), this Court abrogated the two-part test for enhanced patent damages established by the Federal Circuit in *In re Seagate Technology, LLC*, 497 F. 3d 1360, and held that the “[t]he subjective willfulness of a patent infringer, intentional or knowing, may warrant enhanced damages, without regard to whether his infringement was objectively reckless.”

The Federal Circuit subsequently held that “*Halo* did not disturb the substantive standard for the second prong of *Seagate*, subjective willfulness” and therefore for “subjective willfulness alone” to support enhanced damages, the risk of infringement must merely be “either known or so obvious that it should have been known to the accused infringer.”

The question presented is:

Does a finding of willful infringement based on *Seagate*’s “should have been known” negligence standard violate the requirement that subjective willfulness be “intentional or knowing”?

## **RULE 29.6 DISCLOSURE**

BRP US Inc. is a wholly-owned subsidiary of Bombardier Recreational Products Inc. Bombardier Recreational Productions Inc. is a wholly-owned subsidiary of BRP Inc. To Petitioners' knowledge, no other publicly held corporation owns 10% or more of stock in BRP US Inc. or Bombardier Recreational Products Inc.

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Petitioners Bombardier Recreational Products Inc., and BRP U.S. Inc, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App. 1a-34a) is reported at 876 F.3d 1350. The order denying rehearing en banc (App. 35a-36a) is unreported. The opinions of the district court (App. 37a-81a) are available at 2016 WL 4267375 and 198 F.Supp.3d 1343, and unreported (App. 83a-86a).

## JURISDICTION

The court of appeals entered judgment on December 12, 2017. App. 1a. The court denied petitioners' timely request for rehearing on March 9, 2018. App. 35a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

The relevant provisions of the Patent Act are reproduced at App. 87a.

## INTRODUCTION

In *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016), this Court abrogated the Federal Circuit's two-part test for enhanced patent damages established in *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007). Concluding that the *Seagate* standard was inconsistent with 35 U.S.C. § 284, this Court held "[t]he subjective willfulness of a patent infringer, *intentional or knowing* may warrant enhanced damages, without regard to whether his infringement was objectively reckless." *Halo*, 136 S. Ct. at 1933 (emphasis added).

Notwithstanding this Court's statement in *Halo* that willfulness requires "intentional or knowing" conduct, the Federal Circuit held that "*Halo* did not disturb the substantive standard for the second prong of *Seagate*, subjective willfulness" and therefore "subjective willfulness alone" supports enhanced damages based on a "known" or "should have been known" standard. *WesternGeco L.L.C. v. ION Geophysical Corp.*, 837 F.3d 1358, 1362 (Fed Cir. 2016). Indeed, the Federal Circuit has consistently affirmed willfulness determinations based solely on the pre-*Halo* "knew or

should have known” negligence standard articulated in *Seagate*. The Federal Circuit, however, has not explained how permitting punitive enhanced damages based on a finding of negligence—“knew or should have known”—is consistent with this Court’s articulation of the subjective willfulness standard. *Halo*, 136 S. Ct. at 1933.

Numerous post-*Halo* decisions have followed the Federal Circuit’s erroneous standard to find that an infringer is liable for willful infringement and enhanced damages merely because the infringer “*should have known* that its actions constituted an unjustifiably high risk of infringement.” See, e.g., *Barry v. Medtronic, Inc.*, 230 F. Supp. 3d 630, 649 (E.D. Tex. 2017) (citing *WesternGeco* on willfulness as interpreting *Halo*); *Capbran Holdings, LLC v. Firemall LLC*, 2017 WL 4769434, at \*6 (C.D. Cal. Aug. 23, 2017) (reciting the *Seagate* standard for subjective willfulness of “should have been known to the accused infringer”); *Sprint Commc’ns Co. v. Time Warner Cable, Inc.*, 2017 WL 978107, at \*12 (D. Kan. Mar. 14, 2017) (citing Federal Circuit’s declaration that *Halo* “did not disturb the substantive standard for the second prong of the *Seagate* test”); see also, e.g., *Exergen Corp. v. Kaz USA, Inc.*, 2018 WL 1193529, at \*9 (Fed. Cir. Mar. 8, 2018) (citing *WesternGeco* in assessment of willfulness); *WCM Indus., Inc. v. IPS Corp.*, 2018 WL 707803, at \*7 (Fed. Cir. Feb. 5, 2018) (same); *Alfred E. Mann Found. for Sci. Research v. Cochlear Corp.*, 841 F.3d 1334, 1346 (Fed. Cir. 2016) (same).

Because the Federal Circuit has nationwide jurisdiction in patent cases and so many courts have relied and continue to rely on its erroneous standard in weighing alleged infringers’ willfulness, it is imperative that this Court clarify explicitly that negligence is insuffi-

cient to support a finding of willful infringement. This Court already established when it granted *Halo* that the standard for awarding enhanced patent damages is a question of national importance. The Federal Circuit’s systematic misinterpretation of *Halo* upends that standard no less profoundly than *Seagate*.

The Court should grant certiorari to overturn the Federal Circuit’s willfulness standard as inconsistent with *Halo*, and to make clear that negligence is insufficient to support a finding of willful infringement.

## STATEMENT

### A. Factual Background

Petitioners Bombardier Recreational Products, Inc. and BRP U.S., Inc. (collectively “BRP”) are a global manufacturer of recreational vehicles, including personal watercraft and jet boats, and a leading innovator in recreational vehicle development and safety. At the time of the underlying case, Petitioners used “off throttle assisted steering” technology in some of their jet-pump propelled watercraft. C.A.J.A. 3538-3540, 9507-9513. Jet-pumped propelled watercraft are propelled by pumping water out of a nozzle at the back of the watercraft. C.A.J.A. 8845, 2173-2174, 2192. The direction that the nozzle is pointing determines the direction of the watercraft. C.A.J.A. 8845-8846. When a driver attempts to turn a jet-pumped propelled watercraft without applying the throttle, the watercraft loses thrust and directional control in what is known as the “off-throttle directional control” problem. C.A.J.A. 8845-8846, 9536.

Well before the priority date of the patents that Respondent, Arctic Cat, asserted in this case, BRP developed and patented its own jet boat throttle reappli-

cation system that solved the off-throttle directional control problem. C.A.J.A. 8800. When the driver was not applying the throttle but turned nearly all the way, the engine automatically provided thrust to increase directional control. C.A.J.A. 8849, 2228, 2258, 1444-1445. BRP incorporated this solution into its 1997 Sea-Doo Challenger 1800 Jet Boat (the “Challenger”). C.A.J.A. 8849, 1828.

Respondent Arctic Cat is a recreational vehicle manufacturer that obtained patents involving the combination of throttle reapplication technology and personal watercraft, notwithstanding the obviousness of combining BRP’s existing throttle reapplication system for jet boats with existing personal watercraft designs. BRP evaluated those patents’ claims, concluded that they were invalid as obvious, and began selling personal watercraft with throttle reapplication in 2004. C.A.J.A. 2021-2022, 2023-2025. Arctic Cat never commercialized its patented system and left the personal watercraft industry in 1999. C.A.J.A. 1302, 7871.

Arctic Cat brought suit in 2014, alleging, among other claims, that BRP willfully infringed two of its patents related to a steering system for personal watercraft. C.A.J.A. 3501-3510.

## **B. District Court Proceedings**

At trial in the United States District Court for the Southern District of Florida, a jury found that Petitioners infringed two of Respondent’s patents. The district court denied BRP’s Motion for Judgment as a Matter of Law, finding that substantial evidence demonstrated that BRP knew about the patents before they issued, conducted only a cursory analysis of the patents, waited too long before seeking advice of counsel, and at one point attempted to purchase the patents. C.A.J.A. 70-

72; App. 31a-33a. Trial was completed before this Court's decision in *Halo*, and the jury was instructed using a negligence standard for willful infringement articulated in the Federal Circuit's *Seagate* decision:

Arctic Cat must prove... that BRP actually knew *or should have known* that its actions constituted an unjustifiably high risk of infringement of a valid and enforceable patent.

C.A.J.A. 3037 (emphasis added). Applying that instruction, the jury found that BRP willfully infringed the asserted patent claims. C.A.J.A. 91-95. The jury awarded Arctic Cat \$15,564,546.60 in damages. C.A.J.A. 91-95, 98.

Shortly after trial, this Court decided *Halo*. *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016). On the same day and prior to any briefing, the district court *sua sponte* entered a three-page order trebling damages to \$46,693,639.80, holding that the jury's willfulness finding "entitl[ed] Arctic Cat to treble damages." C.A.J.A. 97-98; App. 84a. In its motions to reconsider and vacate that enhancement order, BRP argued that *Halo* changed the standard for enhancing damages. C.A.J.A. 3566-3572, 3617-3628. The district court denied BRP's motion to vacate its enhancement order. C.A.J.A. 99-116; App. 59a-81a. The district court also denied BRP's motion for judgment as a matter of law and motion for a new trial on multiple issues, including willfulness. C.A.J.A. 119, 124-126; App. 37a-58a. As recognized by the Federal Circuit, the district did not allow briefing on the amount of enhanced damages. App. 33a.



### C. The Federal Circuit’s Decision

BRP appealed, challenging (among other things) the negligence standard that the district court applied for willful infringement. On December 7, 2017, a panel of the United States Court of Appeals for the Federal Circuit “reject[ed] BRP’s argument that the district court’s jury instruction was erroneous.” App. 32a. That panel was bound by—and based its decision solely on—*WesternGeco L.L.C. v. ION Geophysical Corp.*, 837 F.3d 1358, 1362 (Fed. Cir. 2016). App. 32a-33a. In that case, the Federal Circuit had held that “*Halo* did not disturb the substantive standard for the second prong of *Seagate*, subjective willfulness.” The panel in the instant case applied *WesternGeco* to conclude that a “should have known” jury instruction is permissible, notwithstanding *Halo*’s requirement that subjective willfulness be “intentional or knowing.” *Id.*

BRP petitioned the Court of Appeals for the Federal Circuit for rehearing *en banc*, asking the *en banc* court to overrule *WesternGeco* and hold that negligence—“knew or should have known”—is insufficient to sustain a judgment of willful infringement post-*Halo*. On March 9, 2018, the Federal Circuit denied the petition.

### REASONS FOR GRANTING THE PETITION

#### I. THE COURT SHOULD GRANT REVIEW TO REVERSE THE FEDERAL CIRCUIT’S HOLDING THAT *HALO* “DID NOT DISTURB” THE SUBJECTIVE PRONG OF THE *SEAGATE* FRAMEWORK FOR ASSESSING WILLFULNESS

The Federal Circuit erroneously held that *Halo* did not affect the test for subjective willful infringement. This Court should grant this petition to make clear that *Halo* did, in fact, render obsolete the *Seagate* test for subjective willful infringement.

### A. *Halo* Abrogated *Seagate*.

Under 35 U.S.C. § 284, a district court “may increase the damages up to three times the amount found or assessed.” In *Seagate*, the Court of Appeals for the Federal Circuit established a two-part test for determining when a district court may enhance damages under § 284. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007). Under that standard, first, “a patentee 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.” *Id.* Second, “the patentee must also demonstrate that this objectively-defined risk (determined by the record developed in the infringement proceeding) was either known or so obvious that it should have been known to the accused infringer.” *Id.*

In *Halo*, this Court expressly abrogated the framework established in *Seagate*, holding that the *Seagate* test is inconsistent with § 284. *Halo*, 136 S. Ct. at 1928 (“The question before us is whether [the *Seagate*] test is consistent with § 284. We hold that it is not.”). Specifically, this Court concluded that the *Seagate* test “is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts” because it “requires a finding of objective recklessness in every case.” *Id.* at 1932. The Court also rejected the subjective prong of *Seagate*, holding instead that “[t]he subjective willfulness of a patent infringer, *intentional or knowing*, may warrant enhanced damages.” *Id.* at 1932-1933 (emphasis added).

Notwithstanding this Court’s express statement that subjective willfulness must be “intentional or knowing”, 136 S. Ct. at 1932 the Federal Circuit held shortly after *Halo* that “*Halo* did not disturb the sub-

stantive standard for the second prong of *Seagate*, subjective willfulness.” *WesternGeco L.L.C. v. ION Geophysical Corp.*, 837 F.3d 1358, 1362 (Fed. Cir. 2016); see also *Arctic Cat Inc. v. Bombardier Recreational Prod. Inc.*, 876 F.3d 1350, 1371 (Fed. Cir. 2017) (quoting *WesternGeco*, 837 F.3d at 1362). In leaving the subjective prong of the *Seagate* test unchanged, the Federal Circuit failed to follow this Court’s guidance or explain how *Halo*’s requirement that subjective willfulness be “intentional or knowing” conduct is anything *other* than a change to “the substantive standard for the second prong of *Seagate*, subjective willfulness”—which, until then, allowed for a finding of willfulness based solely on negligent conduct. See *WesternGeco*, 837 F.3d at 1362; *Arctic Cat*, 876 F.3d at 1371.

As evidenced by the Federal Circuit’s direct contradiction of *Halo* on the issue of subjective willfulness, and the scores of cases that have cited *WesternGeco* in the aftermath of *Halo*<sup>1</sup>, it is vital that this Court clarify

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<sup>1</sup> See *Apple Inc. v. Samsung Elecs. Co.*, 258 F. Supp. 3d 1013 (N.D. Cal. 2017); *Veeco Instruments Inc. v. SGL Carbon, LLC*, 2017 WL 5054711 (E.D.N.Y. Nov. 2, 2017); *Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.*, 2017 WL 1716788 (E.D. Tex. Apr. 27, 2017); *WCM Indus., Inc. v. IPS Corp.*, 2018 WL 707803 (Fed. Cir. Feb. 5, 2018); *Romag Fasteners, Inc. v. Fossil, Inc.*, 686 F. App’x 889 (Fed. Cir. 2017); *Rembrandt Wireless Techs., LP v. Samsung Elecs. Co.*, 853 F.3d 1370 (Fed. Cir. 2017); *Alfred E. Mann Found. for Sci. Research v. Cochlear Corp.*, 841 F.3d 1334 (Fed. Cir. 2016); *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 2017 WL 130236 (N.D. Cal. Jan. 13, 2017); *Idenix Pharm. LLC v. Gilead Scis., Inc.*, 271 F. Supp. 3d 694 (D. Del. 2017); *SRI Int’l, Inc. v. Cisco Sys., Inc.*, 254 F. Supp. 3d 680 (D. Del. 2017); *Masimo Corp. v. Philips Elecs. N. Am. Corp.*, 2016 WL 6542726 (D. Del. Oct. 31, 2016); *Abt Sys., LLC v. Emerson Elec. Co.*, 2016 WL 5470198 (E.D. Mo. Sept. 29, 2016); *Adrea, LLC v. Barnes & Noble, Inc.*, 227 F. Supp. 3d 303 (S.D.N.Y. 2017); *Ericsson Inc. v. TCL Commc’n Tech. Holdings,*

that its ruling in *Halo* did, in fact, abrogate the subjective prong of the *Seagate* standard. Granting this petition will allow this Court to resolve the contradictions between *Halo* and the *WesternGeco* line of cases that continue to apply *Seagate*.

**II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT A FINDING OF NEGLIGENCE CANNOT SUSTAIN A JUDGMENT OF WILLFUL INFRINGEMENT**

The Federal Circuit’s decision to continue applying the subjective prong of the *Seagate* test despite this Court’s general abrogation of *Seagate* would be bad enough on its own, but the particular nature of the standard being applied makes the problem even worse. The willfulness standard that the district court applied—and that the Federal Circuit affirmed—allows enhanced damages to be awarded based on a negligence standard. It therefore opens the door for a punishment reserved for “wanton” or “deliberate” conduct to be “meted out in a typical infringement case,” contrary to this Court’s guidance. *Halo*, 136 S. Ct. at 1932. It also creates a contradiction between the law of willful infringement and the intent required to prove induced infringement. And, more generally, it creates a split between the Federal Circuit and other courts applying general principles that do not allow punitive damages to be awarded for mere negligence.

In short, the Federal Circuit’s response to *Halo* has swung the pendulum too far in the other direction. The

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*Ltd.*, 2017 WL 5137401 (E.D. Tex. Nov. 4, 2017); *Elbit Sys. Land & C4I Ltd. v. Hughes Network Sys., LLC*, 2017 WL 2651618 (E.D. Tex. June 20, 2017); *Convolve, Inc. v. Dell Inc.*, 2017 WL 2463398 (E.D. Tex. June 7, 2017); *Erfindergemeinschaft UroPep GbR v. Eli Lilly & Co.*, 240 F. Supp. 3d 605 (E.D. Tex. 2017).

Federal Circuit has replaced a rigid two-part standard that made it difficult to award enhanced damages with a patent-specific negligence test that makes it far easier than this Court contemplated—or general principles would allow—to award punitive damages. That change now controls all patent cases nationwide and urgently requires the attention of this Court.

**A. The “Knew Or Should Have Known” Standard That The District Court Applied In This Case Was Contrary To *Halo*.**

The “knew or should have known” standard applied in this case—including as part of the jury instruction on willfulness—expressly contradicted *Halo*’s requirement that an alleged infringer’s subjective willfulness be “intentional or knowing” and improperly permits enhanced damages based on mere negligence.

This Court’s criticism of *Seagate*’s rigidity in invariably requiring a showing of objective recklessness did not open the door to enhanced damages in routine cases. This Court explained that “awards of enhanced damages... are... designed as a ‘punitive’ or ‘vindicative’ sanction for egregious infringement behavior.” *Halo*, 136 S. Ct. at 1932. Further, the Court ruled that “[t]he 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.” *Id.* (describing a willful infringer as “the ‘wanton and malicious pirate’ who intentionally infringes another’s patent—with no doubts about its validity or any notion of a defense—for no purpose other than to steal the patentee’s business”).

The Court reasoned, “[i]n the context of such *deliberate wrongdoing*,...it is not clear why an independent showing of objective recklessness ... should be a prerequisite to enhanced damages.” The Court thus noted that “[t]he subjective willfulness of a patent infringer, *intentional or knowing*, may warrant enhanced damages.” *Halo*, 136 S. Ct. at 1932-1933 (emphasis added).

This focus on an alternative path to enhanced damages based on “deliberate” or “consciously wrongful” acts was not an invitation to apply the second prong of the *Seagate* standard on its own and thereby award enhanced damages under a “should have known” test. “Should have known” is the standard for negligence.<sup>2</sup>

Rather, the Court contemplated that enhanced damages based on subjective willfulness would require intent or knowledge far beyond mere negligence. See *Halo*, 136 S. Ct. at 1932-1933; *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (“The word ‘willful’ is

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<sup>2</sup> See *Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361, 1366 (Fed. Cir. 2013) (Jury instruction reciting the “knew or should have known” standard was erroneous because it “plainly recit[ed] a negligence standard, which taken literally would allow the jury to find the defendant liable based on mere negligence where knowledge is required.”), *vacated on other grounds*, 135 S. Ct. 1920 (2015); cf. *In re Bose Corp.*, 580 F.3d 1240, 1244 (Fed. Cir. 2009) (“Knowing conduct thus stands in contrast to negligent conduct, which typically requires only that the defendant knew or *should have known* each of the facts that made his act or omission unlawful . . . .” (quoting *Illeto v. Glock, Inc.*, 565 F.3d 1126, 1155 (9th Cir. 2009)); *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1290 (Fed. Cir. 2011) (“To prevail on a claim of inequitable conduct, the accused infringer must prove that the patentee acted with the specific intent to deceive the PTO. . . . A finding that the misrepresentation or omission amounts to gross negligence or negligence under a ‘should have known’ standard does not satisfy this intent requirement.”).

widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent.”).

By failing to heed this clear command, the Federal Circuit has scrambled the law of enhanced damages. It has borrowed some elements from *Halo* while maintaining one element of the old *Seagate* standard, in a manner that makes it unusually easy to get punitive damages in patent cases. The consequences for the conduct of patent litigation and for society more broadly are troubling. This Court has recognized that “the public... has a paramount interest in seeing that patent monopolies are kept within their legitimate scope.” *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 851-852 (2014) (internal quotation marks omitted). But many companies and individuals that might have stood their ground and raised good faith challenges to the validity or scope of patents will have little choice but to yield in the face of the overwhelming pressure created by the possibility of treble damages awarded under a negligence standard.

This Court should not allow its *Halo* decision to be so profoundly misinterpreted. The Federal Circuit has nationwide jurisdiction over patent cases, and unless and until this Court clarifies that mere negligence is insufficient to award enhanced damages, every court in the country will be bound to apply the Federal Circuit’s unduly permissive standard.

**B. The Jury Instruction In This Case Violated This Court’s Jurisprudence On The Knowledge Requirement For A Finding Of Induced Infringement Under § 271(b).**

The Federal Circuit’s “should have known” standard for willfulness also creates a contradiction between the law of willful infringement (where this Court has held that the action must be “intentional or knowing” but the Federal Circuit allows for a “should have known” standard) and the law of induced infringement under § 271(b) (where this Court has held that the action must be “willfully blind” and “should have known” is insufficient). Notably, in *Global-Tech*, this Court held that “induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). In unequivocally rejecting alternative recklessness and negligence standards (the latter of which encompasses the *Seagate* subjective willfulness standard of “should have known”), this Court held that “deliberate indifference” is not sufficient. This Court held that willful blindness, at the very least, is needed to meet the knowledge requirement under Section 271(b). *Id.* *Global-Tech* explained that “a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.... By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing ..., and a negligent defendant is one who should have known of a similar risk but, in fact, did not.” *Id.* at 769-770.

Consistent with this Court’s holding in *Global-Tech*, and of special relevance to Petitioners’ case, the Federal Circuit has held that an induced infringement



jury instruction reciting the “knew or should have known” standard was erroneous because it “plainly recit[ed] a negligence standard, which taken literally would allow the jury to find the defendant liable based on mere negligence where knowledge is required .... Therefore, to the extent [Federal Circuit] prior case law allowed the finding of induced infringement based on recklessness or negligence, such case law is inconsistent with *Global-Tech* and no longer good law. It is, therefore, clear that the jury instruction in this case was erroneous as a matter of law.” *Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361, 1366 (Fed. Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1920 (2015). The precedent outlined by *Commil*, in conjunction with *Global-Tech*’s stipulation of the knowledge requirement for induced infringement, underscores the error at work in the jury instruction in this case. This precedent suggests the dubiousness of allowing willfulness to be found whenever a defendant merely “should have ... known” about the risk of infringement. *WesternGeco*, 837 F.3d at 1362.

**C. Awarding Punitive Damages Based On A Mere Negligence Standard Diverges From The Elevated Standards Guiding Punitive Damages That Are The Established Norm Across Many Areas Of Law.**

The application of a “should have known” negligence standard to award punitive damages puts the Federal Circuit out of step with the general principles applied by other courts. Heightened standards of culpability are widely used to ensure that punitive damages are “awarded only in the most egregious cases.” *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 806 (6th Cir. 2004) (en banc), *aff’d*, 548 U.S. 53

(2006). Upholding *Halo*'s standard—that only “intentional or knowing” infringement can justify enhanced damages—is necessary to keep the law of patent infringement in line with the use of heightened standards for punitive damages, and to ensure that punitive damage awards are not awarded indiscriminately in cases of mere negligence.

Statutory schemes involving punitive damages almost universally limit punitive damage awards to the most egregious conduct. That limit is generally imposed via heightened standards of culpability, ones categorically distinguishable from mere negligence. Accordingly, punitive damages jurisprudence, across many areas of law, hews consistently to sanctioning conduct that is reckless, wanton, malicious, or reflects intentional indifference.

Appellate courts have made clear that punitive damage awards are limited by heightened standards of culpability that transcend a mere negligence standard. *See, e.g., White*, 364 F.3d at 805 (“According to Title VII, [a] complaining party may recover punitive damages under this section against a respondent ... if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with *malice or with reckless indifference* to the federally protected rights of an aggrieved individual. 42 U.S.C. § 1981a(b)(1).” (emphasis added)); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 100 (4th Cir. 1991) (“The law of South Carolina permits a jury to award punitive damages to punish, deter, and vindicate the rights of the plaintiff *whenever the conduct of the defendant is willful, wanton or reckless. The plaintiff must prove by clear and convincing evidence that the conduct included a ‘consciousness of wrongdoing’ at the time of the conduct.*” (citation omitted) (emphasis

added)); *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1302-1302 (9th Cir. 1998), *opinion amended on denial of reh'g*, 156 F.3d 988 (9th Cir. 1998) (“Under the heightened standard adopted in these cases, intentional acts of discrimination giving rise to section 1981 liability do not warrant punitive damages unless they evince ‘malice or reckless or callous indifference of an egregious character,’ *Beauford v. Sisters of Mercy-Province*, 816 F.2d 1104, 1109 (6th Cir. 1987), or a comparably reprehensible intent. This standard reflects the view that ‘[s]omething more than mere commission of a tort is always required for punitive damages.’ Keeton et al., *The Law of Torts* 9 (5th ed. 1984).”); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1055 (10th Cir. 2016) (In applying Wyoming law, “[p]unitive damages are only appropriate for ‘circumstances involving outrageous conduct, such as intentional torts, torts involving malice and torts involving willful and wanton misconduct.’”); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir. 1990) (“The jury was instructed that punitive damages may be awarded if the defendant’s conduct was determined to be ‘wanton and reckless,’ which was further explained as ‘done in such a manner and under such circumstances as to show heedlessness of or utter disregard of the effect upon the rights and safety of others....’ This instruction was in substantial conformity with New York practice.”); *Keenan v. City of Philadelphia*, 983 F.2d 459, 469-470 (3d Cir. 1992) (“Punitive damages in § 1983 cases are available where the defendants have acted with a ‘reckless or callous disregard of, or indifference to, the rights and safety of others.’”); *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224, 235 (2d Cir. 2000) (“Under federal law, an employer may be subject to an award of punitive damages for violating the ADA if it has acted with ‘malice or with reckless indifference to the federal-

ly protected rights of an aggrieved individual. 42 U.S.C. § 1981a(b)(1).”).

Halo’s “intentional or knowing” standard succeeds in anchoring punitive damages in a heightened standard of culpability, in line with the widespread limitation of punitive damage awards to only the most egregious offenders. By deviating from *Halo*, the jury instruction in this case permitted a punitive damage award in the absence of any such heightened standard of culpability. Such results risk compromising the legitimate purposes, and rigorous limits, of punitive damage awards in the patent infringement context. This Court should clarify that *Seagate*’s negligence standard, running counter to *Halo*, cannot serve as a sufficient basis for punitive damage awards.

**D. The Verdict Form Ultimately Given To The Jury Is Irrelevant As It Could Not Undo The Erroneous Jury Instruction.**

In its response to Petitioners’ petition for a rehearing *en banc* before the United States Court of Appeals for the Federal Circuit, Respondent sought to downplay the significance of the jury instruction at issue, arguing that the ultimate verdict form “that went into the jury room, and which was before the jury when it made its decision,” did not feature the disputed language of the jury instruction. *Arctic Cat Inc. v. Bombardier Recreational Products Inc., et. al.*, No. 2017-1475, Dkt. 45 (Feb. 20, 2018) at 9. Rather, the final verdict form, Respondent points out, instructed the jury to find in the affirmative only if Arctic Cat offered “clear and convincing evidence” of “reckless disregard.” C.A.J.A. 94.

This line of argument is unavailing. A verdict form cannot serve to undo the effect of an erroneous jury in-

struction, which wrongly shaped the jury’s approach to assessing willfulness. In assessing grounds for legal error, courts examine jury instructions in addition to verdict forms, rather than merely assessing verdict forms to the detriment of the accompanying jury instructions. *See, e.g., People v. LePage*, 397 P.3d 1074, 1078 (Colo. App. 2011) (“An appellate court reviews the jury instructions, the jury verdict forms, and the evidence, and determines from the record whether there is competent evidence from which the jury logically could have reached its verdicts.”). At best, verdict forms are typically “considered part of the jury instruction” such that they are evaluated based on “the combined effect [of the two] on the jury.” *United States v. Fairley*, 880 F.3d 198, 208 (5th Cir. 2018) (citing *Jones v. United States*, 527 U.S. 373, 393 (1999) (“[A]lthough the verdict forms standing alone could have [confused the jury], any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction.”)). This combined analysis can involve an assessment of how well the jury instructions and verdict forms in a case aligned. *See, e.g., Great Lakes Transp. Holding, LLC v. Yellow Cab Serv. Corp.*, 2013 WL 5799951, at \*7 (E.D. Mich. Oct. 29, 2013) (citing the district court’s statement that “[o]bviously the final verdict form must be reflective of the instructions to the jury on the law of the case.”). Thus, a faulty jury instruction cannot be excused merely because a subsequent verdict form avoided the error in question. And pointedly, the district court judge in the instant case denied Judgment as a Matter of Law on the precise basis Petitioners articulate: that the jury instruction included erroneous “should have known” language. C.A.J.A. 124-134; App. 44a-50a. The district court’s jury instruction, along with the finding of willful infringement and trebled damages that it laid the basis

for, constituted legal error. Respondent's emphasis on the language of the final verdict form, and its conclusory assertions about the egregiousness of Petitioners' actions outside of the applicable framework of *Halo's* "intentional or knowing" standard, amounts to nothing more than an effort at misdirection.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN	WILLIAM F. LEE
WILMER CUTLER PICKERING	<i>Counsel of Record</i>
HALE AND DORR LLP	LOUIS W. TOMPROS
1875 Pennsylvania Ave. NW	JENNIFER J. JOHN
Washington, DC 20006	WILMER CUTLER PICKERING
(202) 663-6000	HALE AND DORR LLP
	60 State Street
	Boston, MA 02109
	(617) 526-6000
	<a href="mailto:william.lee@wilmerhale.com">william.lee@wilmerhale.com</a>

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