

No. 17-1645

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In the  
**Supreme Court of the United States**

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

*Petitioners,*

v.

ARCTIC CAT INC.,

*Respondent.*

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**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Federal Circuit**

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

In *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923, 1932 (2016), this Court held that the Federal Circuit had applied a standard for willful infringement that was “unduly rigid” in several respects—requiring objective willfulness in addition to subjective willfulness, and that both be proven by clear and convincing evidence. This Court rejected the requirement of proving objective willfulness and the heightened burden of proof requirement.

The question presented is whether *Halo*—without making any reference to, or engaging in any discussion of, the issue—also held that willfulness under 35 U.S.C. § 284 requires proof of knowing or intentional infringement and that district courts are barred from awarding enhanced damages when a jury finds the infringer acted “recklessly” with respect to a patent holder’s patent rights.

**CORPORATE DISCLOSURE STATEMENT**

Respondent is Arctic Cat Inc. Arctic Cat's parent company is Textron Inc., a publicly-held corporation. No other publicly-held company owns 10% or more of Respondent's stock.

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## INTRODUCTION

BRP's petition is predicated on the false premise that this Court's decision in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016), held that proof of reckless behavior is not enough to prove willful infringement. *Halo* did nothing of the sort. To the contrary, *Halo* cites the common-law recklessness standard approvingly in discussing what is sufficient to prove willful behavior, while holding only that the Federal Circuit erred by stacking *other* requirements on top. BRP's argument depends on reading snippets of *Halo* out of context and turning a blind eye to what the Court actually approved and rejected in that case. This Court did not reverse the Federal Circuit for imposing an "unduly rigid" test on certain aspects of the willfulness inquiry only to replace it with yet another heightened standard applicable only in patent cases.

BRP's petition then shifts from one erroneous premise to another when it argues that the Federal Circuit permits enhancement under 35 U.S.C. § 284 based on a showing of mere *negligence*. That argument too depends on plucking snippets out of context—focusing on the Federal Circuit's use of the phrase "should have known" in isolation, while ignoring that the phrase simply appears as part of the well-known standard for *recklessness*. Indeed, this Court's definition for recklessness uses those very words: a "person is reckless if he acts 'knowing or having reason to know of facts which would lead a reasonable man to realize' his actions are unreasonably risky." *Halo*, 136 S. Ct. at 1933 (emphasis omitted) (quoting *Safeco Ins. Co. of Am. v.*

*Burr*, 551 U.S. 47, 69 (2007)). There is simply no basis for this Court to take up questions that are not genuinely presented.

Regardless of the standard that BRP would apply, this case presents no occasion to consider the issue. In rendering its discretionary decision to enhance damages, the district court made its own independent factual findings that BRP had engaged in knowing and wanton behavior. The district court's opinion extensively catalogs that conduct. Whatever difference the standard for proving willfulness might make in some other case, it should make no difference here. That is reason enough to deny the petition.

## STATEMENT OF THE CASE

The relevant background is explained in the decision below. App. 1a-34a.

### A. Background

Arctic Cat's patents concern innovative, life-saving systems for steering personal watercraft. Personal watercraft, like jet skis, are propelled by discharging water out of a nozzle at the rear of the watercraft. App. 2a (citing C.A.J.A. 192 at 1:22-24). A rider controls the thrust through a throttle lever mounted on the steering handle. *Id.* To steer, a rider turns a steering handle, which causes the nozzle at the rear of the watercraft to rotate and discharge water toward the desired direction, causing the watercraft to turn. C.A.J.A. 192 at 1:25-37.

Because the ability to steer a personal watercraft away from an obstacle depends on water being discharged from the nozzle, an imperiled rider must maintain pressure on the throttle while turning the handle to ensure that water continues to be discharged from the nozzle. This action, however, is counter-intuitive to inexperienced riders, who instinctively release the throttle lever while turning the handle when attempting to avoid an obstacle. Releasing the throttle reduces steering control and may result in the rider colliding with the obstacle.

Arctic Cat succeeded where others failed in developing a solution for this “off-throttle” steering condition. With Arctic Cat’s invention, when a personal watercraft rider speeds toward an obstacle and, predictably, releases the throttle and turns the steering handle sharply, Arctic Cat’s controlled-thrust steering system engages, enabling the rider to steer safely away. App. 2a-3a. The chief of the U.S. Coast Guard’s Office of Boating Safety called Arctic Cat’s invention “one of the most impressive innovations [he had] seen all year,” which would “help [the Coast Guard] move forward in developing a realistic, achievable standard for a control and safety issue that [it] need[ed] to address.” App. 18a-19a.

In March 2000, at BRP’s request, Arctic Cat showed prototypes of its innovative system to several BRP employees, who concluded Arctic Cat’s invention “worked well.” App. 71a-72a. Arctic Cat offered BRP a license, but BRP declined. C.A.J.A. 1655-1656, 2618-2619.

In 2004, after trying other technologies, BRP began developing a system that automatically reapplied a personal watercraft's throttle without rider activation, as in Arctic Cat's patented system. App. 77a; C.A.J.A. 1428. BRP sold personal watercraft that infringed Arctic Cat's patents soon thereafter. C.A.J.A. 1429. By 2013, all of BRP's personal watercraft included Arctic Cat's patented technology. App. 77a.

BRP knew about Arctic Cat's patents within a month of their issuance. App. 72a-73a. In 2011, BRP was planning to sue Arctic Cat for infringement of patents relating to snowmobiles, and BRP anticipated a retaliatory infringement suit by Arctic Cat.

"To address its concerns about infringement, BRP tried to covertly buy [Arctic Cat's] patents 'rather than planning in good faith to design around them.'" App. 78a; *see also* App. 78a-79a ("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 infringement'"). When those surreptitious efforts did not pan out, "BRP resorted to hoping that Arctic Cat 'didn't care about these patents anymore' and, therefore, would let them expire." App. 79a.

BRP also "specifically sought opinions of counsel so that it could continue ignoring" Arctic Cat's patents, even though "its own experts had already concluded a likelihood of infringement." App. 68a; C.A.J.A. 54, 72. When BRP sought those opinions, it

had known about Arctic Cat's patents for eight years and had been infringing them for five. App. 67a-68a.

### B. District Court Proceedings

In October 2014, Arctic Cat sued BRP for willful infringement of its controlled-thrust steering patents.<sup>1</sup> The case was tried to a jury over 10 days in May and June 2016. At the close of trial, the court instructed the jury that “[w]illfulness 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.” C.A.J.A. 3037 (emphasis added). BRP did not object to this instruction.

The jury found that BRP infringed each asserted claim in Arctic Cat's patents and failed to prove those claims invalid. C.A.J.A. 91-95. The jury also found BRP infringed willfully. C.A.J.A. 94. The jury answered affirmatively the question on the verdict form of whether “Arctic Cat [had] proven by clear and convincing evidence that BRP infringed those claims of Arctic Cat's patents with *reckless*

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<sup>1</sup> Arctic Cat brought suit nearly three years after BRP sued Arctic Cat alleging infringement of BRP's patents relating to snowmobiles. C.A.J.A. 3501-3510; *Bombardier Recreational Prods., Inc. v. Arctic Cat, Inc.*, No. 11-cv-08897 (N.D. Ill.) and No. 12-cv-02706 (D. Minn.).

*disregard* of whether such claim was infringed or was invalid or unenforceable?” C.A.J.A. 94 (emphasis added). BRP did not object to the verdict form.

On June 13, 2016, after the jury had returned its verdict, this Court decided *Halo*. BRP filed post-trial motions in which it argued that, after *Halo*, “the jury has no role in determining willfulness” for purposes of enhancement of damages. App. 63a n.5; *see also* C.A.J.A. 3619-22. BRP also argued that “[e]ven if the jury retained any role in deciding willfulness post-*Halo* . . . the jury’s verdict in this case cannot stand because the jury was instructed to apply the *Seagate* standard that the Supreme Court has since overturned.” D.I.169 at 24 (citing *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc)). BRP did not argue that *Halo* permitted enhancement only for “intentional or knowing” infringement, as opposed to reckless infringement, or that the jury instructions were erroneous for that reason.

The district court denied BRP’s post-trial challenges to the jury’s verdict of willful infringement. The court explained that “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,” which only could have “benefited BRP” anyway. App. 47a; *see also* App. 85a. The district court enhanced damages, concluding “BRP is the wanton infringer that the Supreme Court sought to punish through its

relaxation of the standard governing willfulness and enhancement of damages” in *Halo*. App. 80a-81a.

### C. Federal Circuit Proceedings

BRP appealed, challenging, among other things, the willful-infringement judgment and the jury instructions on willfulness. App. 31a-33a. The Federal Circuit unanimously agreed with Arctic Cat on each point.

The Federal Circuit rejected BRP’s challenge to the jury instructions in light of its post-*Halo* decision in *WesternGeco L.L.C. v. ION Geophysical Corp.*, 837 F.3d 1358, 1362 (Fed. Cir. 2016).<sup>2</sup> App. 32a-33a. In *WesternGeco*, the Federal Circuit ruled that “*Halo* did not disturb the substantive standard for the second prong of *Seagate*,” but instead “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—can support an award of enhanced damages.” App. 32a (internal citations and quotations omitted). It thus rejected BRP’s challenge to the jury instructions. App. 32a-33a.

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<sup>2</sup> *WesternGeco* issued after this Court granted a writ of certiorari, vacated, and remanded in light of *Halo*. *WesternGeco L.L.C. v. ION Geophysical Corp.*, 136 S. Ct. 2486 (2016). The Court’s decision in *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018), ruled on an unrelated issue in the same case.

The Federal Circuit also determined that substantial evidence supported the willful-infringement findings, including evidence 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.” App. 32a. The Federal Circuit refused to second-guess the jury’s judgment on that front and concluded that the district court did not abuse its discretion by trebling damages. App. 32a-33a.<sup>3</sup>

BRP filed a rehearing petition in which it argued the jury instruction applying *Seagate’s* subjective willfulness standard conflicts with *Halo*. The Federal Circuit unanimously denied BRP’s rehearing petition without comment. App. 35a-36a. BRP now petitions for this Court’s review.

### **REASONS FOR DENYING THE WRIT**

The petition does not warrant this Court’s review for three independent reasons:

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<sup>3</sup> The Federal Circuit vacated the portion of the district court’s judgment awarding damages for BRP’s pre-suit infringement because it concluded the district court erred in placing the burden on BRP to prove an Arctic Cat licensee should have marked its products with Arctic Cat’s patent numbers under 35 U.S.C. § 287. App. 20a-28a, 33a. The Federal Circuit remanded on the marking issue. Trial on that issue is scheduled for August 20, 2018.



*First*, the Court in *Halo* did not announce that only “intentional or knowing” conduct—and not recklessness—can support a showing of willful infringement, as BRP contends. To the contrary, *Halo* expressly recognizes that proof of recklessness is enough to satisfy a subjective willfulness standard, finding only that the Federal Circuit had improperly stacked an *objective* standard and a *clear-and-convincing evidence* requirement on top of it. That is plain from the Court’s opinion, which dissects and specifically discards these additional requirements from *Seagate*, but gives the Federal Circuit no instruction to deviate from its existing standard for subjective willfulness.

That result is also unsurprising. For decades, this Court has recognized that recklessness can show willfulness in the civil context. And in *Halo*, the Court specifically relied on the standard for recklessness it articulated in *Safeco*—a standard nearly identical to the jury instructions in this case and the subjective prong of *Seagate*.

*Second*, the petition and the “question presented” are also premised on the notion that the Federal Circuit has been applying a “negligence standard” for determining subjective willfulness after this Court’s decision in *Halo*. Not so. *Seagate* expressly rejected a negligence standard for willful infringement, instead requiring proof that the defendant acted despite a risk of infringement that “was either known or so obvious that it should have been known.” That is the common-law understanding of recklessness, which this Court applied in *Safeco*. After *Halo*, the Federal Circuit has continued to

require at least a showing of subjective recklessness to sustain a finding of willful infringement—no more (as *Halo* held), and no less.

*Third*, this Court’s discretionary review is not warranted for the basic reason that the district court did not assess enhanced damages against BRP for negligence, or even based just on the jury’s finding (by clear and convincing evidence) of recklessness; rather, the district court also independently found BRP’s infringement of Arctic Cat’s patents to be knowing and “BRP [to be] the wanton infringer” that *Halo* recognized was deserving of punishment. BRP makes no showing that the heightened standard it seeks would actually make any difference to the outcome in this case, and that is further reason to deny review.

**I. The Petition Erroneously Assumes *Halo* Heightened The Standard For Proving Subjective Willfulness**

BRP’s petition is premised on the notion that this Court in *Halo* articulated a new, heightened standard for proving subjective willfulness, while simultaneously reversing the Federal Circuit for having imposed an “unduly rigid” test for willfulness overall. But *Halo* did no such thing. In *Halo*, this Court started by “eschew[ing] any rigid formula for awarding enhanced damages under § 284,” and instead held that enhancement was a matter of district court “discretion,” guided by nearly two centuries of applying the Patent Act and common law principles to such decisions. 136 S. Ct. at 1934. It did not replace one “unduly rigid” test with another.

In support of its position, BRP points to an isolated phrase in the *Halo* opinion where the Court observed that “[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 1933; *see* Pet. at 8-9. According to BRP, this language announced a new, elevated standard for proving willfulness for purposes of enhancing damages in patent cases and rejected “the *Seagate* test for subjective willful infringement,” *see* Pet. at 7, i.e., the understanding that willfulness includes not only intentional or knowing conduct, but reckless conduct as well.

This is an obvious misreading of *Halo*. To start, *Halo* never portends to modify—let alone dispense with—the “*Seagate* test for subjective willful infringement.” *Id.* Even reading the isolated sentence BRP quotes in the context of the paragraph containing it shows that its point was not to redefine willfulness. Instead, that sentence’s purpose is to make clear that subjective willfulness *alone* is enough for enhanced damages, and that the Federal Circuit was wrong to require that an infringer’s behavior also be “objectively reckless.” In the same paragraph, the Court explained that “culpability is generally measured against the knowledge of the actor at the time of the challenged conduct,” and cited its own application of the recklessness standard in *Safeco* as a supporting example. The Court quoted *Safeco* as “stat[ing] that a person is reckless if he acts ‘*knowing or having reason to know* of facts which would lead a reasonable man to realize’ his actions are unreasonably risky.” *Halo*, 136 S. Ct. at 1933

(emphasis added) (quoting *Safeco*, 551 U.S. at 69). The Court holds this up as an example of the “culpable behavior” that § 284 “allows district courts to punish.” *Id.*

The Court further explained that the district court’s awarding of damages under § 284 is like the district court’s awarding of attorney’s fees for an exceptional case under § 285—neither requires satisfying an “objective” test. *Id.* at 1932-33 (citing *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014)). Indeed, if this Court had thought the Federal Circuit’s subjective willfulness standard were too lax, it presumably could have noted that concern specifically and instructed the district court to alter the standard on remand. But even BRP does not claim that the Court did anything like that.

That *Halo* did not fault *Seagate*’s test for subjective willful infringement was no oversight. In fact, *Halo* notably took issue with almost every other part of the Federal Circuit’s willfulness test *except* for *Seagate*’s subjective willfulness standard. The Court identified three problems with the Federal Circuit’s treatment of willfulness under § 284: (1) it required a finding of *objective* recklessness, (2) it required satisfying a clear-and-convincing-evidence standard, and (3) it applied a tripartite framework for appellate review that was inconsistent with the fact that the decision to enhance damages under § 284 is within the district court’s discretion. *Id.* at 1932-34.

“The principal problem” with *Seagate*’s test was its requirement of “a finding of objective recklessness

in every case before district courts may award enhanced damages.” *Id.* at 1932. This meant that an infringer who never acted in reliance on a non-infringement defense—or was even aware such a defense existed—could nonetheless escape enhanced damages solely based on his attorney’s ingenuity in crafting such a defense later. *Id.* The Court concluded that the *Seagate* test was “unduly rigid” and could “have the effect of insulating some of the worst patent infringers from any liability for enhanced damages.” *Id.* Likewise, the Court found that the “*Seagate* test is also inconsistent with § 284 because it requires clear and convincing evidence to prove recklessness.” *Id.* at 1934 (emphasis added). The Court did not criticize application of a recklessness standard for proving willfulness—it acknowledged it, criticizing only the application of a heightened burden of proof.

In short, nothing in *Halo* even discusses—let alone purports to reject—*Seagate*’s standard for subjective willfulness or admonishes the Federal Circuit to rewrite that standard so that enhanced damages could be awarded only for “intentional or knowing” infringement. Instead, *Halo* acknowledged that “[t]he *Seagate* test reflects, in many respects, a sound recognition that enhanced damages are generally appropriate under § 284 only in egregious cases.” *Id.* at 1932.

*Halo*’s lack of criticism for *Seagate*’s subjective willfulness standard is hardly surprising. *Seagate* held that proof of willful infringement requires at least a showing of recklessness. 497 F.3d at 1370-71. And, for more than 30 years, this Court has

understood that proof of reckless behavior suffices to show willfulness. After all, in “common law usage,” “actions in ‘reckless disregard’ of the law” were treated “as ‘willful’ violations.” *Safeco*, 551 U.S. at 57. For at least that reason, the Court has confirmed that “either knew or showed reckless disregard” for legal prohibitions “is an acceptable way to articulate a definition of ‘willful.’” *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128-29 (1985); see *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (“The standard of willfulness that was adopted in *Thurston*,” “either knew or showed reckless disregard” for legal prohibitions, “is surely a fair reading of the plain language of the [Fair Labor Standards] Act”). As a leading treatise aptly put it, “[a]lthough efforts have been made to distinguish” the terms “willful,” “wanton,” and “reckless,” “such distinctions have consistently been ignored, and the three terms have been treated as meaning the same thing, or at least as coming out at the same legal exit.” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 34 at 212 (5th ed. 1984).

Indeed, interpreting *Halo* as creating a special, heightened standard for willful patent infringement would be inconsistent with the Court’s rejection of patent-specific variations on general civil law principles—including in *Halo* itself. See, e.g., *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 964 (2017) (no “different patent-law-specific rule” governing relationship between laches and statutes of limitations); *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836-38 (2015) (Fed. R. Civ. P. 52(a)(6) has no patent-

law “exception”); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393-94 (2006) (no rule for injunctions “unique to patent disputes”).

This Court did not trade one patent-unique heightened standard for another in *Halo*, and there is no reason for this Court to take up a petition predicated on a contrived reading of that decision.

## **II. A Premise Of The Petition—That The Federal Circuit Applies A Negligence Standard—Is Simply False**

BRP is equally wrong in declaring that the Federal Circuit allows a finding of willfulness to be based on merely negligent conduct. BRP once again spins its argument from a handful of words: here, the portion of the jury instruction stating that “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.” Pet. at 6. According to BRP and its amici, the words “should have known” show that the Federal Circuit condones awarding enhanced damages for nothing more than negligent infringement. Pet. at 11; Brief of Intel at 2; Brief of High Tech Inventors Alliance (HTIA) at 1.

That is not true. First, BRP and its amici focus on the words “should have known” in isolation while simply ignoring the rest of the jury instruction. As the sentence as a whole makes clear, to find BRP’s infringement to be willful, the jury had to find BRP should have known “that its actions constituted an unjustifiably high risk of infringement of a valid and enforceable patent.” That does not describe

negligent behavior—it describes recklessness. To say that an infringer should have known of an unjustifiably high risk of infringement is just another way of saying that the infringer recklessly disregarded that risk. A party that pursues a predetermined action while ignoring warning signs in plain view epitomizes a reckless actor.

Leading treatises and this Court's cases make that clear. An "actor's conduct is in reckless disregard of the safety of another if he does an act . . . knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." Restatement (Second) of Torts § 500 at 587 (1963-1964); *see* Prosser and Keeton, Torts § 34 at 213 (recklessness requires "a known or obvious risk that was so great as to make it highly probable that harm would follow"); *Safeco*, 551 U.S. at 69.

A second problem with BRP's argument is that the Federal Circuit has stated explicitly that a finding of negligence is not enough to show willfulness. In *Seagate*, the en banc Federal Circuit expressly overruled a Federal Circuit precedent that allowed a willfulness verdict based on negligence, and held instead that proof of willful infringement requires at least a showing of recklessness. 497 F.3d at 1370-71. In determining that the threshold for willful infringement should be recklessness, the Federal Circuit drew on this Court's decision in *Safeco*, which observed "that the 'standard civil



usage’ of ‘willful’ includes reckless behavior” and that common law “‘treated actions in ‘reckless disregard’ of the law as ‘willful’ violations.” *Id.* at 1371 (quoting *Safeco*, 551 U.S. at 57).<sup>4</sup>

Consistent with general standards for willfulness, the Federal Circuit since *Halo* has continued to require at least recklessness to support a willful-infringement finding: “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.’” *WesternGeco*, 837 F.3d at 1362 (quoting *Halo*, 136 S. Ct. at 1930); *see* App. 32a-33a. Indeed, BRP fails to identify a single post-*Seagate* case in which the Federal Circuit or a district court has allowed or awarded enhanced damages for merely negligent conduct. BRP cites 21 Federal Circuit and district court decisions that have cited *WesternGeco*. Pet. at 3, 9 n.1. But four of those decisions do not resolve any willful-infringement

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<sup>4</sup> The Federal Circuit in *Seagate* also defined “recklessness” consistent with this Court’s opinions. *Seagate* repeated this Court’s explanation that “the civil law generally calls a person reckless who acts . . . in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.” 497 F.3d at 1371 (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). Even one of BRP’s amici admits that “Bombardier’s jury instruction does . . . track the definition of ‘civil recklessness’ as formulated by other decisions of this Court.” Brief of HTIA at 11 n.3 (citing *Farmer* and *Safeco*).

claims.<sup>5</sup> Another seven *declined* to award enhanced damages.<sup>6</sup> Only eight refer to the “so obvious that it should have been known” standard for willful infringement reiterated in *WesternGeco*.<sup>7</sup> And *not*

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<sup>5</sup> *Rembrandt Wireless Techs., LP v. Samsung Elecs. Co.*, 853 F.3d 1370 (Fed. Cir. 2017); *Romag Fasteners, Inc. v. Fossil, Inc.*, 686 F. App’x 889 (Fed. Cir. 2017); *Vecco Instruments, Inc. v. SGL Carbon, LLC*, 2017 WL 5054711 (E.D.N.Y. 2017); *Abt Sys., LLC v. Emerson Elec. Co.*, 2016 WL 5470198 (E.D. Mo. 2016).

<sup>6</sup> *Exergen Corp. v. Kaz USA, Inc.*, 725 F. App’x 959 (Fed. Cir. 2018); *Adrea, LLC v. Barnes & Noble, Inc.*, 227 F. Supp. 3d 303 (S.D.N.Y. 2017); *Idenix Pharms. LLC v. Gilead Scis., Inc.*, 271 F. Supp. 3d 694 (D. Del. 2017) (denying enhanced damages even though jury found willfulness); *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 2017 WL 130236 (N.D. Cal. 2017) (same); *Convolve, Inc. v. Dell Inc.*, 2017 WL 2463398 (E.D. Tex. 2017) (same); *Sprint Commc’ns Co. v. Time Warner Cable, Inc.*, 2017 WL 978107 (D. Kan. 2017) (same); *WCM Indus., Inc. v. IPS Corp.*, 721 F. App’x 959 (Fed. Cir. 2018) (vacating award of enhanced damages and remanding even though jury found willfulness).

<sup>7</sup> *WCM Indus.*, 721 F. App’x at 969; *Barry v. Medtronic, Inc.*, 230 F. Supp. 3d 630, 649 (E.D. Tex. 2017); *Capbran Holdings, LLC v. Firemall LLC*, 2017 WL 4769434, at \*6 (C.D. Cal. 2017); *Sprint*, 2017 WL 978107, at \*12; *Apple Inc. v. Samsung Elecs. Co.*, 258 F. Supp. 3d 1013, 1023 (N.D. Cal. 2017); *Power Integrations*, 2017 WL 130236, at \*2-3;

*one* of the decisions BRP cites finds a defendant’s “negligence” sufficient to show willful infringement. Pet. at 3. In short, the Federal Circuit, and district court’s following it, properly recognize that a showing of recklessness—but *not* a showing of mere negligence—may demonstrate willfulness.

The jury in this case was instructed in accordance with these principles. The jury instructions used the common law definition for recklessness. *Compare* C.A.J.A. 3037 (jury instructions) (“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”) (emphasis added), *with Safeco*, 551 U.S. at 68 (civil “recklessness” encompasses “action entailing ‘an *unjustifiably high risk of harm* that is . . . so obvious that it *should have been known*”) (emphasis added). And the jury verdict form further confirmed for the jury that they had to find BRP acted recklessly to find BRP infringed willfully. C.A.J.A. 94 (requiring the jury to find whether “Arctic Cat [has] proven by clear and convincing evidence that BRP infringed those claims of Arctic Cat’s patents with *reckless disregard* of whether such claim was infringed or was invalid or unenforceable”) (emphasis added).

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*SRI Int’l, Inc. v. Cisco Sys., Inc.*, 254 F. Supp. 3d 680, 716-17 (D. Del. 2017); *Masimo Corp. v. Philips Elecs. N. Am. Corp.*, 2016 WL 6542726, at \*15-16 (D. Del. 2016).

Once the Federal Circuit's standard for willfulness is properly understood, BRP's extended argument about the standards for awarding punitive damages falls of its own weight. As even the cases cited by BRP show, Pet. at 16-18, both federal and state courts have routinely awarded punitive damages based upon a finding of reckless behavior. *See White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 805 (6th Cir. 2004) (en banc) ("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*." (emphasis added); *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1302-03 (9th Cir. 1998), *opinion amended on denial of reh'g*, 156 F.3d 988 (9th Cir. 1998) ("[I]ntentional 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,' . . ., or a comparably reprehensible intent.") (emphasis added and citation omitted); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1055 (10th Cir. 2016) ("The Wyoming Supreme Court defines willful and wanton misconduct as 'the intentional doing, or failing to do, an act *in reckless*

*disregard* of the consequences and under circumstances and conditions that a reasonable person would know that such conduct would, in a high degree of probability, result in harm to another.”) (emphasis added); *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.”) (emphasis added); *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 federally protected rights of an aggrieved individual.’ 42 U.S.C. § 1981a(b)(1).”) (emphasis added). That makes sense and aligns with this Court’s declaration that common-law punitive damages may be awarded for “willful, wanton, and reckless indifference for the rights of others.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493 (2008) (citations omitted).

Finally, BRP and its amici attempt to manufacture a basis for review by creating an illusory conflict between the Federal Circuit’s recklessness standard for willful infringement and this Court’s explanation of the knowledge requirement for finding induced infringement under 35 U.S.C. § 271(b). Pet. at 14-15; Brief of HTIA at 11; Brief of Intel at 10-11. No conflict exists. In

*Global-Tech Appliances, Inc. v. SEB S.A.*, the Court inferred from the statute’s text that at least some intent is required to show liability for induced infringement and then held, based on earlier decisions concerning contributory infringement, that “induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement” and that recklessness was not sufficient. 563 U.S. 754, 765-770 (2011). It is unsurprising that induced infringement requires heightened knowledge, because the inducer is being held responsible for direct infringement by another. *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S. Ct. 2111, 2117 (2014). But whereas § 271(b) defines the requirements for liability for induced infringement, § 284 is a punitive damages statute. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 648 n.11 (1999); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 508 (1964); see *WesternGeco*, 138 S. Ct. at 2138 (distinguishing a “substantive element of a cause of action” from “damages—a separate legal concept”). And, as explained above, this Court and others have long recognized that recklessness can warrant punitive damages.

### **III. The District Court’s Discretionary Decision To Enhance Damages For BRP’s Wanton Infringement Does Not Warrant Review**

The fact that the Federal Circuit’s standard for finding willfulness is fully consistent with the standard recognized by this Court is reason enough to deny the petition. But the case would hardly be a

good vehicle for addressing the standard for willfulness in any event. The evidence here plainly showed that BRP knowingly infringed Arctic Cat's patents. Thus, BRP flunks even the (erroneous) test that it wants the Court to adopt.

The record in this case leaves little doubt on this score. Considering all the evidence, the jury found by clear and convincing evidence (the requirement before *Halo*) that BRP infringed willfully—that is, that “Arctic Cat [had] proven *by clear and convincing evidence* that BRP infringed those claims of Arctic Cat's patents with reckless disregard of whether such claim was infringed or was invalid or unenforceable.” C.A.J.A. 94 (emphasis added).

Then, as well as reviewing the jury's willfulness finding, the district court undertook its own independent review of the same evidence and made its own factual findings, which showed that BRP at least knowingly infringed—establishing willfulness even under BRP's proposed standard. The district court found that BRP knew of Arctic Cat's inventions even before the patents had issued. App. 71a-72a. BRP followed the progress of Arctic Cat's patents through the Patent Office, and knew of their issuance within a month of the Office granting them. App. 72a-73a. And when BRP began developing its infringing system in 2004, it initially “chose not to seek advice of qualified and competent counsel,” but rather tasked an inexperienced patent agent to investigate; that agent's “only analysis of the patent—on which BRP exclusively relied—consisted of one conclusory sentence on a page of handwritten notes.” App. 67a; C.A.J.A. 2055-2056.

BRP began selling its infringing products soon thereafter, and by 2013 all of its products included Arctic Cat's patented technology. App. 77a. Along the way, BRP "attempt[ed] to conceal its misconduct" by hiring someone to covertly buy Arctic Cat's patents. App. 78a-79a. And—eight years after learning of Arctic Cat's patents and five years after beginning to infringe—BRP "specifically sought opinions of counsel so that it could continue ignoring" Arctic Cat's patents, even though "its own experts had already concluded a likelihood of infringement." App. 67a-68a; C.A.J.A. 54, 72. This is the kind of behavior the Court in *Halo* said *should* deserve "comeuppance." 136 S. Ct. at 1933.

Based on its independent review of the record, the district court found that the trial showed "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"—and "did so with full knowledge of Arctic Cat's patent rights." App. 80a.

These facts led the district court to conclude that "[t]he evidence at trial revealed a degree of dismissiveness of [Arctic Cat's] patent rights and disrespect of the value the law places on protection of intellectual property that was exceptional." *Id.* As the district court put it, "[s]uffice it to say, BRP is the wanton infringer that the Supreme Court sought to punish." App. 80a-81a.

Against that backdrop, BRP cannot show that the heightened standard it seeks for subjective willfulness would make any difference, or that the



district court ultimately abused its discretion in enhancing damages on these facts. There is no reason for this Court to grant review of this case.

**CONCLUSION**

For the foregoing reasons, BRP's petition should be denied.

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