No. 17-1645

IN THE

Supreme Court of the United States

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

Petitioners,

v.

ARCTIC CAT INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

SETH P. WAXMAN
CLAIRE H. CHUNG
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

WILLIAM F. LEE
Counsel of Record
LOUIS W. TOMPROS
JENNIFER J. JOHN
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
william.lee@wilmerhale.com

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This Court has recognized the importance of getting the standards of enhanced patent damages right, but the Federal Circuit's law—applied in this case—gets it wrong in a way that has profound consequences that will reverberate nationwide. In *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 136 S. Ct. 1923, 1932-1934 (2016), the Court instituted a simplified but principled standard that "subjective willfulness of a patent infringer, intentional or knowing," may demonstrate the egregious or "willful misconduct" permitting enhanced damages under 35 U.S.C. § 284, even without a showing of "objective[] reckless[ness]." The Federal Circuit has mistakenly construed *Halo*, and excised the objective prong of its two-part test in *In re Seagate*

Technology, LLC, 497 F.3d 1360 (Fed. Cir. 2007) (en banc), while leaving the subjective prong untouched so that it can be satisfied by mere negligence. *See* Pet. App. 32a (citing *WesternGeco L.L.C.* v. *ION Geophysical Corp.*, 837 F.3d 1358, 1362 (Fed. Cir. 2016), *rev'd on other grounds*, 138 S. Ct. 2129 (2018)). That error must be corrected by this Court, for all the reasons the Court recognized in *Halo*. 136 S. Ct. at 1931-1935.

Notably, Arctic Cat does not dispute the importance of the question presented. To the contrary, its argument that the standard for subjective willfulness is and should be "should have known" notwithstanding *Halo* only highlights the need for this Court's review. If Arctic Cat's response illustrates anything, it is that much confusion exists at the Federal Circuit and among district courts as to what *Halo* requires to show willfulness. The Court should grant review to resolve such dissonance once and for all.

I. *HALO* HELD THAT WILLFULNESS REQUIRES INTENTIONAL OR KNOWING CONDUCT

Arctic Cat argues (Opp. 10-15) that the Court should not take up this case because *Halo* did not institute a "new, heightened," or "'rigid'" standard for willfulness. Whether *Halo*'s standard is any of those things is more appropriate for the merits stage. But in any event, Arctic Cat misunderstands *Halo* and BRP's argument.

Arctic Cat's primary argument (Opp. 10-13)—echoing the Federal Circuit—is that *Halo* left intact the subjective willfulness prong of *Seagate*'s two-part test. *See* Pet. App. 32a ("'*Halo* did not disturb the subjective standard for the second prong of *Seagate*[.]'"). Arctic Cat claims (Opp. 12) that "if this Court had thought the Federal Circuit's subjective willfulness

standard were too lax, it presumably could have noted that concern specifically." But that is precisely what this Court did, in several ways.

Using the example of a "'wanton and malicious pirate,'" the Court held in *Halo* that, "in the context of such *deliberate wrongdoing*," "an independent showing of objective recklessness" is unnecessary. 136 S. Ct. at 1932 (emphasis added). The Court thus struck the objective prong of *Seagate because* subjective willfulness, defined as "intentional or knowing," captures those "characteristic[s] of a pirate" that § 284 seeks to punish. *Id.* at 1932-1933. The Court also emphasized the imperative for a carefully calibrated standard—requiring "intentional or knowing" conduct, but not objective recklessness—because otherwise § 284 would be inconsistent with "nearly two centuries of application and interpretation of the Patent Act" that enhanced damages are "not to be meted out in a typical infringement case, but are instead designed as a 'punitive' or 'vindictive' sanction for egregious infringement behavior." *Id.* at 1928-1930, 1932, 1935. The Court feared that without this carefully balanced standard, supposed willfulness under § 284 would "impede innovation as companies steer well clear of any possible interference with patent rights." *Id.* at 1935. Rather than "an isolated phrase" (Opp. 11), therefore, *Halo*'s "intentional or knowing" standard reflects the Court's considered judgment that while subjective willfulness may be sufficient on its own, a party's conduct must be intentional or knowing, not merely negligent, to justify punitive damages. 136 S. Ct. at 1933-1935.

Arctic Cat's argument, like the Federal Circuit's standard, strips *Halo* of this central holding and all its reasoning. Not once does Arctic Cat mention the need for the willfulness standard to preserve the "careful

balance" between "the protection of patent rights and the interest in technological innovation." *Halo*, 136 S. Ct. at 1934-1935. Although Arctic Cat passingly mentions (Opp. 10) the longstanding law regarding enhanced patent damages, it does not address the substance of that law. Contrary to Arctic Cat's argument, *Halo*'s requirement of "intentional or knowing" conduct is not "new" or "heightened" (Opp. 10) in that broader context because it is "nearly two centuries" old. 136 S. Ct. at 1928-1930, 1932. The standard is only "heightened," as it should be, compared to the Federal Circuit's pre-*Halo negligence* standard. *See infra* Part II. Nor is *Halo*'s requirement somehow "'unduly rigid.'" Opp. 10. "'[I]n a system of laws discretion is rarely without limits'"; in *Halo*, the Court clearly drew the boundaries of a discretionary award of enhanced damages as punishing only "willful, wanton, malicious, bad faith, deliberate, consciously wrongful, [or] flagrant" behavior. 136 S. Ct. at 1931-1932.

Arctic Cat also argues (Opp. 11, 13-15) that *Halo* does not require "rewrit[ing]" *Seagate*'s subjective willfulness prong because *Halo* discussed a recklessness standard under *Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47 (2016), and in Arctic Cat's view, *Seagate*'s subjective willfulness prong requires recklessness, not negligence. But that ignores the words the Federal Circuit—and the applicable jury instructions—actually use. The subjective willfulness language endorsed by the Federal Circuit allows mere negligence to support willfulness. Pet. 11-13; *infra* Part II. More fundamentally, Arctic Cat continues to misapprehend *Halo* in contending that *Halo* supports recklessness under *Safeco* as the minimum culpability for willfulness, as opposed to "intentional or knowing" conduct. 136 S. Ct. at 1933. *Safeco* articulated a civil ob-

jective recklessness standard. 551 U.S. at 68-69 & n.18; *see infra* Part II. It would be odd for the Court to have struck the "objective recklessness" prong of *Seagate*, *Halo*, 136 S. Ct. at 1932-1933, while at the same time broadly approving precisely such recklessness as the standard for willfulness, *Safeco*, 551 U.S. at 68-69 & n.18. What *Halo* held instead is that the particular formulation of subjective willfulness in *Seagate* is not adequate and an "intentional or knowing" requirement is needed because enhanced damages are reserved for "egregious cases typified by willful misconduct" or "deliberate wrongdoing." 136 S. Ct. at 1932-1934.

Finally, to the extent Arctic Cat argues (Opp. 13-15) that civil objective recklessness may satisfy *Halo*'s "intentional or knowing" requirement, that is inconsistent with *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754, 766-770 (2011), for the reasons explained below and in BRP's petition (at 14-15). In any event, disputes over what "intentional or knowing" means are properly resolved at the merits stage.

II. THE FEDERAL CIRCUIT'S SUBJECTIVE WILLFULNESS STANDARD ALLOWS MERE NEGLIGENCE TO SUPPORT WILLFULNESS

However the Court construes *Halo*'s "intentional or knowing" requirement, it cannot be reduced to mere negligence. 136 S. Ct. at 1928-1935. Arctic Cat appears to concede this, but argues that the Federal Circuit's standard requires recklessness, not negligence. That is incorrect.

Arctic Cat starts (Opp. 15-16) with the district court's jury instruction, which stated that to prove BRP acted "recklessly," Arctic Cat must show that BRP "actually knew or should have known that its actions constituted an unjustifiably high risk of infringe-

ment of a valid and enforceable patent." C.A.J.A. 3037; Pet. App. 46a. According to Arctic Cat, that instruction describes recklessness because the phrase—"an unjustifiably high risk of infringement"—tracks the language of recklessness described in treatises and *Safeco*. But this Court and the Federal Circuit have recognized the "should have known" language as the standard for negligence. *See Global-Tech*, 563 U.S. at 770 (distinguishing recklessness, which requires "*know[ing]* … a substantial and unjustified risk," from negligence, which means the actor "*should have known* a similar risk but, in fact, did not" (emphasis added)); *Seagate*, 497 F.3d at 1371 ("the duty of care" announced in *Underwater Devices Inc.* v. *Morrison-Knudsen Co.*, 717 F.2d 1380 (Fed. Cir. 1983), that *Seagate* overruled is "more akin to negligence"); *Underwater Devices*, 717 F.2d at 1390 (applying a "knew or should have known" standard). Arctic Cat's bald assertion (Opp. 16) that a person who "should have known" a high risk is the same as a person who "recklessly disregard[s]" that risk has no basis in any applicable law.[1] *See Global-Tech*, 563 U.S. at 769-770; Pet. 12 n.2.

Arctic Cat's *Safeco* argument is also misplaced because *Safeco*'s discussion of recklessness was limited to civil objective recklessness. *Safeco* noted that the high risk explained above, "*objectively assessed*, … is the

[1] Additionally, the authorities that Arctic Cat invokes say the "'unreasonable risk'" in recklessness must be "'substantially greater than that which is necessary to make his conduct negligent.'" Opp. 16 (quoting *Restatement (Second) of Torts* § 500 at 587 (1963-1964)). Thus, the district court's "unjustifiably high risk of infringement" is not enough even under those standards absent a level-setting risk associated with negligence. In *Safeco*, this Court *declined* to "pinpoint the negligence/recklessness line." 551 U.S. at 69.

essence of recklessness at common law." 551 U.S. at 69 (emphasis added); *see also id.* at 68 (common law understands civil recklessness as "conduct violating an objective standard"). *Safeco* contrasted such objective recklessness with "criminal recklessness," which "requires subjective knowledge on the part of the offender." *Id.* at 68 n.18. *Halo*'s discussion of *Safeco* was similarly limited, refuting *Seagate*'s "objective recklessness" prong because allowing an infringer to escape willfulness based on a reasonable defense at trial "even if he did not act on the basis of the defense" was inconsistent with *Safeco*'s objective recklessness standard. 136 S. Ct. at 1932-1933. Arctic Cat's argument thus undermines the one holding of *Halo* that even Arctic Cat cannot dispute: objective recklessness is not required in a willfulness—much less subjective willfulness—determination. *Id.* at 1932-1933.

The Federal Circuit's standard (Opp. 16-19) fares no better. The Federal Circuit has held 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 show egregiousness. Pet. App. 32a (quoting *WesternGeco*, 837 F.3d at 1362). This "should have been known" standard carries with it all the same problems as the district court's jury instruction. Arctic Cat argues (Opp. 16-17) that the Federal Circuit's standard cannot describe negligence because the court admitted in *Seagate* that "a finding of negligence is not enough to show willfulness." 497 F.3d at 1371. The Federal Circuit did say so, but only to promulgate its two-part test, which drew on *Safeco* for its objective recklessness standard. *Id.* at 1370-1371 ("proof of willful infringement permitting enhanced damages requires at least a showing of objective reck-

lessness"). Without the objective prong, *Seagate*'s "should have been known" standard is indistinguishable from the negligence language it rejected. *Cf. Underwater Devices*, 717 F.2d at 1390.

What is left in Arctic Cat's defense of the lower courts' standard is the mere use of the word "reckless." But it hardly matters that the district court prefaced its instruction by saying the standard it articulates would prove BRP acted "recklessly." C.A.J.A. 3037; Pet. App. 46a. Using the word "recklessly" in the prefatory language does not somehow transform an instruction using the negligence standard into a recklessness instruction. And if both the district court and the Federal Circuit believe that their "should have known" or "should have been known" standard describes recklessness sufficient to show "intentional or knowing" conduct, *Halo*, 136 S. Ct. at 1933, that is all the more reason for the Court to grant review to clarify the profound and pervasive misunderstanding of *Halo* and the requisite egregiousness under § 284.

Similarly, the cases that Arctic Cat cites (Opp. 17-19) do not help it. Arctic Cat claims that the Federal Circuit (or district courts, for that matter) does not use the word "negligence" in describing its subjective willfulness standard. But courts need not say so. Their "should have known" standard spells out negligence, and that contradicts *Halo*, regardless of how the Federal Circuit or district courts understand *Seagate*'s subjective willfulness prong.

Moreover, as amici point out, the Federal Circuit's mistaken pairing of subjective willfulness with negligence—while confusingly also citing *Halo*'s "intentional or knowing" language, *WesternGeco*, 837 F.3d at 1362—has allowed some district courts to find willfulness

based effectively on negligence, and others seemingly to require higher culpability. *See* Intel Br. 11-12, 15-16; High Tech Inventors Alliance ("HTIA") Br. 19-21. In addition to the cases that amici explain, several of the cases BRP noted in its petition (at 3, 9 n.1) cited the Federal Circuit's "should have been" known standard *indiscriminately* with *Halo*'s "intentional or knowing" standard, its reference to "willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, [or] flagrant" behavior, or its recitation of *Safeco*'s civil objective recklessness language, 136 S. Ct. at 1932-1934. *See, e.g.*, *Apple Inc.* v. *Samsung Elecs. Co.*, 258 F. Supp. 3d 1013, 1027 (N.D. Cal. 2017); *Barry* v. *Medtronic, Inc.*, 230 F. Supp. 3d 630, 649 (E.D. Tex. 2017); *Masimo Corp.* v. *Philips Elecs. N. Am. Corp.*, 2016 WL 6542726, at *15-16 (D. Del. Oct. 31, 2016).

Arctic Cat's attempt (Opp. 21-22) to downplay *Global-Tech* in a single paragraph is equally unpersuasive. The only basis on which Arctic Cat seeks to distinguish *Global-Tech* is that that case was about induced infringement. But induced infringement in patent law is more analogous than the common-law recklessness cases that Arctic Cat invokes (Opp. 20-21) (which are irrelevant for Arctic Cat's purposes anyway because the Federal Circuit requires negligence, not recklessness).[2] In *Global-Tech*, the Court borrowed the doctrine of willful blindness from criminal law to craft a (minimum) knowledge standard for induced infringement, noting that there is "no reason why the doctrine should not apply in civil lawsuits." 563 U.S. at 766-768. The same is true for enhanced or "'punitive'" damages,

[2] BRP's citation to common-law recklessness cases was intended to show that the Federal Circuit's *negligence* standard is inadequate under those cases. Pet. 15-18.

Halo, 136 S. Ct. at 1929, 1930, which this Court has described as "'quasi-criminal,'" *Cooper Industries, Inc.* v. *Leatherman Tool Group Inc.*, 532 U.S. 424, 432 (2001). And as the Court explained in detail in *Halo*, 136 S. Ct. at 1928-1930, 1932, punitive damages are intrusive, no less so than induced infringement liability, *see* Opp. 22.

III. THE DISTRICT COURT'S DISCRETION IN ENHANCING DAMAGES IS NO REASON TO DENY REVIEW

Arctic Cat's argument highlights the need for this Court's review because the Federal Circuit's standard would be contrary to *Halo* and its reasoning if even *one* of Arctic Cat's main contentions is incorrect. If *Halo* requires "intentional or knowing" conduct, 136 S. Ct. at 1933, then the Federal Circuit's standard would be inadequate, even if it required recklessness (it does not), because *Global-Tech* held that knowledge cannot be satisfied by recklessness, 563 U.S. at 769-770. If *Halo* required civil objective recklessness per *Safeco* (it does not), but the Federal Circuit requires only negligence, then the Court still needs to correct the Federal Circuit's error to restore consistency with *Global-Tech* and "nearly two centuries" of patent law requiring higher culpability for enhanced damages, *Halo*, 136 S. Ct. at 1928-1935. Even if Arctic Cat were right on *both* its main contentions (it is not), this Court's review is warranted because there would still be inconsistency in patent law's recklessness standard between the Federal Circuit's subjective willfulness formulation for enhanced damages and *Global-Tech*'s definition of recklessness in the context of induced infringement.

Arctic Cat seeks to avoid review by claiming (Opp. 22-25) that the district court properly exercised its discretion in awarding enhanced damages. As explained above, however, *Halo* made clear that district courts'

discretion to grant enhanced damages must be guided by "'sound legal principles' developed over nearly two centuries" and that punitive damages must "generally be reserved for egregious cases typified by willful misconduct." 136 S. Ct. at 1932, 1934-1935. The district court's jury instruction failed to follow that guidance by requiring only negligence. Arctic Cat's citation (Opp. 23) to the jury verdict form, which did not have the negligence language, does not excuse the erroneous jury instruction for the reasons explained in BRP's petition. Pet. 18-20.

While Arctic Cat claims (Opp. 23) that the district court "undertook its own independent review" of the evidence and found that BRP "knowingly infringed," many of the district court's statements that Arctic Cat cites come from the district court's analysis of the nine factors set forth in *Read Corp.* v. *Portec Inc.*, 970 F.2d 816, 826-827 (Fed. Cir. 1992). *See* Pet. App. 71a-80a. That analysis occurs only after "the jury's finding of willful infringement is sustained," *WesternGeco*, 837 F.3d at 1364, and here the district court's erroneous instruction and the Federal Circuit's flawed standard at least question the validity of the jury's finding. Additionally, *Read*'s nine factors, which far predate *Halo*, have limited relevance to determining "intentional or knowing" conduct. As amicus Intel points out, the majority of *Read*'s factors do not suggest egregiousness at all unless accompanied by the necessary culpable state of mind. Intel Br. 13-16. The district court's various announcements regarding BRP's knowledge based on such analysis are thus dubious, because they are necessarily dependent on the jury's willfulness determination, which was itself based on an incorrect instruction that included the negligence standard.

Moreover, whatever factual uncertainty exists can be resolved on remand. It certainly does not outweigh the need for review, when the Federal Circuit perpetuates a serious legal error defying "nearly two centuries" of enhanced damages law and disrupting the "careful balance" between patent protection and innovation that this Court established in *Halo*. 136 S. Ct. at 1934-1935; *see also* Intel Br. 16-22; HTIA Br. 16-22.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
CLAIRE H. CHUNG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

WILLIAM F. LEE
Counsel of Record
LOUIS W. TOMPROS
JENNIFER J. JOHN
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
william.lee@wilmerhale.com

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