

THE NEW DEVELOPMENT OF THE KNOWLEDGE REQUIREMENT OF INDUCED INFRINGEMENT UNDER THE AMERICAN PATENT LAW

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ABSTRACT

The United States has the most pro-inventor patent system which provides a full range of remedies for patentees facing infringement. 35 U.S.C. § 271(b) provides, “Whoever actively induces infringement of a patent shall be liable as an infringer.” So, a person accused of active inducement does not infringe the claimed invention directly. Instead, another person directly exploits the claimed invention. In 2011, the Supreme Court in *Global-Tech Appliances, Inc. v. SEB S.A.* interpreted the knowledge requirement of § 271(b) to mandate that the plaintiff has to prove that an inducer knew the patent-in-suit and the patent infringement. The Supreme Court clarified that there is no negligent or reckless inducer. However, what was not clear is whether the “should have known” standard has been abrogated because the Supreme Court did not express that. After the Federal Circuit’s *Commil USA, LLC v. Cisco Sys., Inc.* in 2013, the “should have known” standard was finally removed from the knowledge requirement. After *Global-Tech*, there were several district court decisions applying *Global-Tech*. This article analyzed several early district court decisions and found no effect on the traditional practice of finding inducement.

Keywords: American patent law, inducement, *Global-Tech*, indirect infringement, patent infringement

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I. Introduction

The United States has the most pro-inventor patent system which provides a full range of remedies for patentees facing infringement. The system was designed to encourage innovations and to keep the economy growing.¹ To encourage disclosure of an invention, the patent law grants to the inventor an exclusive right to prevent others from unlawfully exploiting her invention.² This exclusive right is vested in the statutes defining liabilities of unlawful exploitation of a claimed invention.

35 U.S.C. § 271 defines various forms of infringement.³ One form is active inducement.⁴ § 271(b) provides, “Whoever actively induces infringement of a patent shall be liable as an infringer.” So, a person accused of active inducement does not infringe the claimed invention directly. Instead, another person directly exploits the claimed invention.

When § 271(b) was codified in 1952, Congress intended to make liable contributory infringement of a patent developed by the case law.⁵ Instead of creating a single provision to cover all infringing acts under the case law of contributory infringement, Congress provided two categories of contributory infringement.⁶ One was in § 271(b), and the other was in § 271(c). § 271(c) states, “Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.” § 271(c) was intended to cover a specific act of contributory infringement, while § 271(b) was intended to cover a broad sense of contributory infringement.⁷

¹ See Ping-Hsun Chen, *Should We Have Federal Circuit Law for Reviewing JMOL Motions Arising from Patent Law Cases?*, 1 NTUT J. OF INTELL. PROP. L. & MGMT. 1, 1 (2012).

² See F. Scott Kieff, *The Case for Registering Patents and the Law and Economics of Present Patent-Obtaining Rules*, 45 B.C. L. REV. 55, 61-62 (2003).

³ About the history of section 271, please see Tom Arnold & Louis Riley, *Contributory Infringement and Patent Misuse: The Enactment of § 271 and its Subsequent Amendments*, 76 J. PAT. & TRADEMARK OFF. SOC’Y 357 (1994).

⁴ See Timothy R. Holbrook, *The Intent Element of Induced Infringement*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 399, 399 (2006).

⁵ See *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 485-86 (1964).

⁶ See *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1468-69 (Fed. Cir. 1990).

⁷ See *Power Lift, Inc. v. Lang Tools, Inc.*, 774 F.2d 478, 481 (Fed. Cir. 1985) (“The purpose of section 271 was to ‘codify in statutory form principles of contributory

In 1988, the Federal Circuit first interpreted § 271(b) to require that a person infringes a patent “by actively and knowingly aiding and abetting another’s direct infringement.”⁸ The Federal Circuit particularly clarified “knowing” as an element because “the case law and legislative history uniformly assert such a requirement.”⁹ The “knowing”/“knowledge” requirement requires “proof of a specific, knowing intent to induce infringement.”¹⁰ But, the Federal Circuit did not require “direct evidence,” and confirmed that “circumstantial evidence may suffice.”¹¹

The “knowledge” requirement had been ambiguous back then because of two conflicting opinions of the Federal Circuit in 1990.¹² In *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, the Federal Circuit held that “proof of actual intent to cause the acts which constitute the infringement is a necessary prerequisite to finding active inducement.”¹³ That is, causing infringement specifically is not required. Contrarily, in *Manville Sales Corp. v. Paramount Sys., Inc.*, the Federal Circuit held, “The plaintiff has the burden of showing that the alleged infringer’s actions induced infringing acts and that he knew or should have known his actions would induce actual infringements.”¹⁴ That is, knowledge of direct infringement is specifically required.

Hewlett-Packard Co. and *Manville Sales Corp.* provide two different standards. Prof. Lemley comments that the *Hewlett-Packard Co.* court is “a fairly lower standard of intent since most people do intend the natural consequences of their acts.”¹⁵ On the other hand, he mentions that for the *Manville Sales Corp.* court, “it is the knowledge of the legal consequence – infringement – that matters.”¹⁶ He also observes that the Federal Circuit and district courts applied either of these two standards and the Federal Circuit failed to reconcile the standards.¹⁷

infringement and at the same time eliminate ... doubt and confusion. Paragraph (b) recites in broad terms that one who aids and abets an infringement is likewise an infringer.” (citing a Congressional report)).

⁸ *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See Mark A. Lemley, *Inducing Patent Infringement*, 39 U.C. DAVIS L. REV. 225, 238 (2005).

¹³ *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990).

¹⁴ *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990).

¹⁵ Lemley, *supra* note 12, at 239.

¹⁶ *Id.* at 240.

¹⁷ See *id.* at 240-41.

In 2006, the Federal Circuit resolved the conflicting case law through *DSU Med. Corp. v. JMS Co.*¹⁸ that is an en banc decision on the issue of inducement.¹⁹ The Federal Circuit chose the *Manville Sales Corp.* court as an ultimate standard for inducement.²⁰ It further held, “The requirement that the alleged infringer knew or should have known his actions would induce actual infringement necessarily includes the requirement that he or she knew of the patent.”²¹

Although the standard for determining inducement is definite, the application of the standard is still confusing because a court looks to circumstantial evidence. A plaintiff may prove that the defendant actually knew the induced act was infringement. Or, a plaintiff may prove that the defendant should have known the induced act was infringement. All factual findings are based on circumstantial evidence. In 2010, the Federal Circuit took a bold step to loosen the standard of knowledge to find inducement with the evidence on hands.²² The Federal Circuit created a “deliberate indifference” standard.²³

In 2011, *Global-Tech Appliances, Inc. v. SEB S.A.*²⁴ is the Supreme Court’s first case related to the interpretation of 35 U.S.C. § 271(b). The decision responded to the Federal Circuit’s “deliberate indifference” standard. The Supreme Court clarified that § 271(b) requires the plaintiff to prove that the accused infringer not only knows the patent-in-suit but also has a specific intent to cause others to infringe the patent.²⁵ The Supreme Court also overruled the “deliberate indifference” standard.²⁶ While “actual knowledge” of both the patent and direct infringement is required for proving inducement, the Supreme Court introduced the willful-blindness standard as an alternative of proving “actual knowledge.”²⁷ The standard has two prongs.²⁸ First, “the

¹⁸ *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293 (Fed. Cir. 2006).

¹⁹ See David W. Roadcap, *Global-Tech Appliances, Inc. v. SEB S.A. and the Creation of a Flexible Blindness Standard for Induced Patent Infringement*, 13 N.C. J.L. & TECH. ON. 117, 122 (2011).

²⁰ See *DSU Med. Corp.*, 471 F.3d at 1304.

²¹ *Id.*

²² See *SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d 1360, 1376-78 (Fed. Cir. 2010).

²³ See Andrew Ward, *Inducing Infringement: Specific Intent and Damages Calculation*, 94 J. PAT. & TRADEMARK OFF. SOC’Y 1, 13-14 (2012).

²⁴ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011).

²⁵ See Daniel Eric Gorman, Note, *Global-Tech Appliances, Inc. v. SEB S.A.: Invoking the Doctrine of Willful Blindness to Bring those Who Lack Knowledge of Induced Infringement within § 271(b)’s Prohibition*, 14 TUL. J. TECH. & INTELL. PROP. 397, 402 (2011).

²⁶ See Ward, *supra* note 23, at 20.

²⁷ See Jason A. Rantanen, *An Objective View of Fault in Patent Infringement*, 60 AM. U. L. REV. 1575, 1615-16 (2011).

defendant must subjectively believe that there is a high probability that a fact exists.”²⁹ Second, “the defendant must take deliberate actions to avoid learning of that fact.”³⁰

The *Global-Tech* decision is a new beginning of inducement. Because this new legal standard is invented, it is necessary to observe how district courts apply the willful-blindness standard. This paper has two parts. Part II discusses the *Global-Tech* decision and background knowledge thereof, including key facts and lower courts’ opinions. Additionally, one recent Federal Circuit case that responded to the *Global-Tech* decision is discussed. Part III provides a survey of early thirty five district court decisions citing the *Global-Tech* decision and analyzes how district courts applied the willful-blindness standard or understood the *Global-Tech* decision. The district courts’ interpretations of the standard are reviewed. The opinions are analyzed in terms of different types of motion under the Federal Rules of Civil Procedure (“FRCP”), for example, Rule 12(b)(6) motions, Rule 56 motions, and motions for judgment as a matter of law (“JMOL”).

II. Global-Tech Appliances, Inc. v. SEB S.A.

A. Procedural History

The plaintiff in *Global-Tech* was the owner of a U.S. Patent No. 4,995,312 that claims an electrical deep fryer.³¹ The plaintiff also made deep fryers and sold them through its distributor.³²

The defendants were Montgomery Ward & Co., Inc., Global-Tech Appliances, Inc., and Pentalpha Enterprises Ltd.³³ Pentalpha Enterprises Ltd. was responsible for designing and selling the accused product, while Global-Tech Appliances, Inc. was a mother company of Pentalpha Enterprises Ltd.³⁴ Pentalpha Enterprises Ltd. sold the accused product to Montgomery Ward & Co., Inc. that owned a lot of retailer stores in the States.³⁵ Then, Montgomery Ward & Co., Inc. began to sell to customers the accused product.³⁶

In August 1999, the plaintiff filed a law suit against those three defendants at the United States District Court for the Southern District of

²⁸ See Ward, *supra* note 23, at 20.

²⁹ Rantanen, *supra* note 27, at 1603 (citing the *Global-Tech* decision).

³⁰ *Id.* (citing the *Global-Tech* decision).

³¹ See *SEB S.A. v. Montgomery Ward & Co., Inc.*, 77 F. Supp. 2d 399, 400 (S.D.N.Y. 1999).

³² See *id.*

³³ See *id.*

³⁴ See *SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d 1360, 1366 (Fed. Cir. 2010).

³⁵ See *SEB S.A.*, 77 F. Supp. 2d at 400.

³⁶ See *id.*

New York and asserted patent infringement.³⁷ On September 10, 1999, the plaintiff moved for preliminary injunction.³⁸ On November 15, 1999, the district court issued “a preliminary injunction against defendants’ continued sale of the fryer.”³⁹ The defendants then appealed to the Federal Circuit which affirmed the preliminary injunction on November 6, 2000.⁴⁰

During the term of the preliminary injunction, the accused product was modified,⁴¹ so the plaintiff moved for a supplemental preliminary injunction on August 3, 2000 to include the modified fryers as part of the original injunction.⁴² Agreeing with the plaintiff, the district court later issued a new injunction on March 20, 2001.⁴³

Long after the discovery was closed on October 30, 2001, the district court did not begin the trial until April 17, 2006.⁴⁴ After the jury heard all evidence, the defendants (not including Montgomery Ward & Co., Inc.) moved for judgment as a matter of law on inducement.⁴⁵ But, the district court denied the motion and let the jury try the case.⁴⁶ With respect to the issue of inducement, the jury found the inducement by the defendants.⁴⁷

Among other motions, the defendants filed a post-trial motion for judgment as a matter of law on inducement.⁴⁸ But, the district court again denied the motion.⁴⁹ Then, the defendants appealed to the Federal Circuit which, among other things, reviewed the issue of inducement and affirmed the district court’s ruling as well as jury’s finding.⁵⁰

The defendants later filed a petition to the Supreme Court which granted the petition for writ of certiorari on October 12, 2010.⁵¹ The issue was specifically about inducement, and the defendants challenged the legal standard of inducement adopted by the Federal Circuit.⁵² Unfortunately to

³⁷ See *SEB S.A. v. Montgomery Ward & Co., Inc.*, 137 F. Supp. 2d 285, 286 (S.D.N.Y. 2001).

³⁸ See *SEB S.A.*, 594 F.3d at 1367.

³⁹ See *SEB S.A.*, 137 F. Supp. 2d at 286.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.* at 287.

⁴³ See *id.* at 285.

⁴⁴ See *SEB S.A.*, 594 F.3d at 1367.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *SEB S.A. v. Montgomery Ward & Co., Inc.*, 2007 WL 3165783, at *13 (S.D.N.Y. 2007).

⁴⁹ See *id.* at *4.

⁵⁰ See *SEB S.A.*, 594 F.3d at 1374, 1378.

⁵¹ See *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 458, 458 (2010).

⁵² See *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2063, 2065 (2011).

the defendants, while the Supreme Court did not agree with the Federal Circuit's legal standard,⁵³ it eventually held the Federal Circuit's ruling because under a new standard developed by the Supreme Court, the circumstantial evidence supported the finding of inducement.⁵⁴

B. Inducement Issue

The key facts surrounding the inducement issue were about the product development of the accused products. Pentalpha Enterprises Ltd. designed the accused fryer in Hong Kong, China.⁵⁵ The design idea was not original, because Pentalpha Enterprises Ltd. simply copied the plaintiff's fryer sold in Hong Kong.⁵⁶ In 1997, Global-Tech Appliances, Inc. sold the accused products to Sunbeam Products, Inc. in the States.⁵⁷ Under the request of Sunbeam Products, Inc., Global-Tech Appliances, Inc. hired an American attorney to do a right-to-use study that was based on the analysis of twenty six patents and concluded that the accused product was not read on any claims of those patents.⁵⁸ But, Global-Tech Appliances, Inc. had never told the attorney that the accused product copied the plaintiff's fryer.⁵⁹

When the district court heard the defendants' motion for judgment as a matter of law on inducement, the defendants specifically argued that it was insufficient to show the knowledge of the patent-in-suit by using the piece of evidence to show that the attorney was set up to avoid knowing the accused fryer simply copied the plaintiff's fryer.⁶⁰ But, the district court disagreed by stating that "the jury was free to consider whether key information was not disclosed to Levy in his patent search and whether that information would have allowed defendants to discover the patent."⁶¹ The district court further recognized that the evidence of "copying" "was sufficient to establish "specific intent and action to induce infringement."⁶² Thus, the jury's finding was upheld.

C. Analysis of the Federal Circuit Decision

⁵³ See *id.* at 2067, 2065.

⁵⁴ See *id.* at 2068-72.

⁵⁵ See *SEB S.A.*, 594 F.3d at 1366.

⁵⁶ See *id.*

⁵⁷ See *id.* I assumed that the mother company was responsible for selling products.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *SEB S.A.*, 2007 WL 3165783, at *4.

⁶¹ See *id.* at *4.

⁶² See *id.*

The debate of the inducement issue focused on the jury's finding related to inducement.⁶³ The key issue was whether all relevant evidence considered by the jury sufficiently supported a finding of knowledge of the patent-in-suit.⁶⁴ To resolve the issue, the Federal Circuit first elaborated the requirement of knowledge of a patent-in-suit.

The Federal Circuit case law requires that to constitute inducement, "the plaintiff must show that the alleged infringer knew or should have known that his actions would induce actual infringements."⁶⁵ This requirement "necessarily includes the requirement that he or she knew of the patent."⁶⁶ However, when the Federal Circuit dealt with the defendants' appeal, what was not defined was "the metes and bounds of the knowledge-of-the-patent requirement."⁶⁷ Although the defendants challenged the "should have known" standard, the Federal Circuit developed an even more loose standard for determining actual knowledge of a patent-in-suit.⁶⁸ It is a "deliberate indifference" standard which was later abrogated by the Supreme Court.

While again recognizing that "inducement requires a showing of 'specific intent to encourage another's infringement,'"⁶⁹ the Federal Circuit stated that "'specific intent' in the civil context is not so narrow as to allow an accused wrongdoer to actively disregard a known risk that an element of the offense exists."⁷⁰ This statement indicated the Federal Circuit's awareness of the fact of this case. Because the defendants intentionally hid the key information from their attorney when the attorney was doing a right-to-use study, the Federal Circuit seemed to condemn such behavior by developing a new standard for inducement in such case.

To support the "deliberate indifference" standard, the Federal Circuit cited sister Circuits' cases and stated the "the standard of deliberate indifference of a known risk is not different from actual knowledge, but is a form of actual knowledge."⁷¹ The Federal Circuit also gave an evidential definition of the "deliberate indifference" standard. First, the Federal Circuit distinguished the "should have known" standard and "deliberate indifference" standard by stating that the former standard "implies a solely objective test" and that the latter standard "may require a subjective

⁶³ See *SEB S.A.*, 594 F.3d at 1373.

⁶⁴ See *id.*

⁶⁵ See *id.* at 1376.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.* at 1376-77.

⁶⁹ See *id.* at 1376.

⁷⁰ See *id.*

⁷¹ See *SEB S.A.*, 594 F.3d at 1377 (quoting *United States v. Carani*, 492 F.3d 867, 873 (7th Cir. 2007); *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 84 n.14 (2d Cir. 2005)).

determination that the defendant knew of and disregarded the overt risk that an element of the offense existed.”⁷² Second, the Federal Circuit recognized that “an accused infringer may defeat a showing of subjective deliberate indifference to the existence of a patent where it shows that it was genuinely ‘unaware even of an obvious risk.’”⁷³

After defining the “deliberate indifference” standard as an ultimate standard for the present case, the Federal Circuit explained why “[t]he record contains adequate evidence to support a conclusion that [the defendants] deliberately disregarded a known risk that [the plaintiff] had a protective patent.”⁷⁴ The Federal Circuit quoted several pieces of evidence heard by the jury to support its conclusion. For instance, “[the defendant] purchased an [plaintiff-made] deep fryer in Hong Kong and copied all but the cosmetics.”⁷⁵ “[The defendant] hired an attorney to conduct a right-to-use study, but did not tell him that it had based its product on [the plaintiff’s] product.”⁷⁶ There were other facts that caused “[the] failure to inform [the defendants’] counsel of copying [to] be highly suggestive of deliberate indifference.”⁷⁷ First, the president of one defendant was well familiar with the American patent system and was one listed inventor of several U.S. patents.⁷⁸ In addition, the defendants had a prior business relationship with the plaintiff regarding the defendants’ patented steamer.⁷⁹

The Federal Circuit also considered whether “proof of knowledge through a showing of deliberate indifference [was] defeated where an accused infringer establishes that he actually believed that a patent covering the accused product did not exist,”⁸⁰ and concluded it was not.⁸¹ For example, while the plaintiff’s fryer copied was not marked with a U.S. patent number, the defendants did not “argue that it relied on the lack of a mark to come to a belief that the deep fryer was not patented.”⁸² The Federal Circuit even required the defendants to explain “why one would expect an [plaintiff’s] deep fryer purchased in Hong Kong to have U.S. patent markings.”⁸³

⁷² See *id.* at 1376.

⁷³ See *id.* at 1376-77.

⁷⁴ See *id.* at 1377.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.* at 1378.

⁸¹ See *id.*

⁸² See *id.*

⁸³ See *id.*

While the defendants' behavior surrounding the accused fryer constituted inducement under the "deliberate indifference" standard, the Federal Circuit further cautioned that "[its] opinion does not purport to establish the outer limits of the type of knowledge needed for inducement."⁸⁴ Under a dictum made in this case, "a patentee may perhaps only need to show, ... , constructive knowledge with persuasive evidence of disregard for clear patent markings."⁸⁵

In conclusion, the Federal Circuit created the new "deliberate indifference" standard while not limiting its knowledge theories for future development.

D. Analysis of the Supreme Court Decision

1. Rejection of the "Deliberate Indifference" Standard

The Supreme Court in *Global-Tech* expressly rejected the "deliberate indifference" standard and, contrary to the Federal Circuit, established a boundary of the knowledge requirement for inducement. To set aside the "deliberate indifference" standard, the Supreme Court specified the knowledge requirement of inducement under section 271(b).

Based on three reasons, the Supreme Court held that "induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement."⁸⁶

First, from the language of section 271(b), the Supreme Court explained "actively induces" and concluded that "the inducement must involve the taking of affirmative steps to bring about the desired result."⁸⁷ But, section 271(b), as the Supreme Court was confused, might be read to "require merely that the inducer lead another to engage in conduct that happens to amount to [direct] infringement,"⁸⁸ or to "mean that the inducer must persuade another to engage in conduct that the inducer knows is [direct] infringement."⁸⁹

To resolve such ambiguity, the Supreme Court then looked to the case law before the indirect infringement clauses were codified, because the legislative history showed that sections 271(b) and (c) were intended to codify the case law of contributory patent infringement.⁹⁰ However, the Supreme Court found that there were two conflicting ways of how courts

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See Global-Tech Appliances, Inc.*, 131 S. Ct. at 2068.

⁸⁷ *See id.* at 2065.

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.* at 2065-66.

viewed contributory patent infringement.⁹¹ The pre-codification case law did not help. So, the Supreme Court relied on its recent precedent, which relates to contributory copyright infringement.⁹² Citing its 2005 decision, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,⁹³ the Supreme Court stated again that “[t]he inducement rule ... premises liability on purposeful, culpable expression and conduct.”⁹⁴

Last, because of no clue from the pre-codification case law, the Supreme Court relied on its precedent of interpreting § 271(c) to resolve the issue. In 1964, the Supreme Court in *Aro Mfg. Co. v. Convertible Top Replacement Co.* (“*Aro II*”)⁹⁵ interpreted § 271(c),⁹⁶ and concluded that “a violator of § 271(c) must know ‘that the combination for which his component was especially designed was both patented and infringing.’”⁹⁷ That is, “§ 271(c) requires knowledge of the existence of the patent that is infringed.”⁹⁸ Here, for some reasons, the Supreme Court held that the *Aro II* decision “compels this same knowledge for liability under § 271(b).”⁹⁹ First, the inducement under section 271(b) was considered part of contributory patent infringement prior to the codification.¹⁰⁰ Second, the phrase “knowing [a component] to be especially made or especially adapted for use in an infringement” in section 271(c) also could be read in two ways: “[(1)] a violator must know that the component is “especially adapted for use” in a product that happens to infringe a patent[; or (2)] the phrase may be read to require, in addition, knowledge of the patent's existence.”¹⁰¹ Third, the Supreme Court felt “strange to hold that knowledge of the relevant patent is needed under § 271(c) but not under § 271(b).”¹⁰²

It should be noted that the Supreme Court referred the “deliberate indifference” standard to “deliberate indifference to a known risk that a

⁹¹ See *id.* at 2066.

⁹² See *id.* at 2066-67 (interpreting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)).

⁹³ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁹⁴ See *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2067 (citing *Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at 937).

⁹⁵ *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964).

⁹⁶ See *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2067

⁹⁷ See *id.*

⁹⁸ See *id.* at 2068.

⁹⁹ See *id.* at 2067.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *id.* at 2068.

patent exists.”¹⁰³ While the Supreme Court used “known risk,” the Federal Circuit actually emphasized “overt risk” or “obvious risk.”¹⁰⁴

2. Creation of a “Willful-blindness” Standard

Although the newly-born “deliberate indifference” standard was overruled, the Supreme Court did not mean to free the defendants because it then created a new “willful-blindness” standard to hold that the behavior of the defendants constituted inducement under § 271(b).¹⁰⁵ The doctrine of willful blindness is a concept of criminal law.¹⁰⁶ The doctrine is applied to prevent “defendants [from] escap[ing] the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances.”¹⁰⁷

The doctrine of willful blindness was adopted because “defendants who behave in this manner are just as culpable as those who have actual knowledge.”¹⁰⁸ The Supreme Court considered “willful blindness” as a substitute for “actual knowledge.”¹⁰⁹

Based on Circuit Courts’ case laws, the Supreme Court held the willful-blindness standard had “two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.”¹¹⁰ Alternatively, the Supreme Court held 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.”¹¹¹

To distinguish the “willful-blindness” standard from the “deliberate indifference” standard, the Supreme Court first stated that “[the two basic] requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence.”¹¹² The Supreme Court characterized “a reckless defendant [as] one who merely knows of a substantial and unjustified risk of such wrongdoing”¹¹³ and “a negligent defendant [as] one

¹⁰³ *See id.*

¹⁰⁴ *See SEB S.A.*, 594 F.3d at 1376-77.

¹⁰⁵ *See Global-Tech Appliances, Inc.*, 131 S. Ct. at 2068.

¹⁰⁶ *See id.*

¹⁰⁷ *See id.* at 2068-69.

¹⁰⁸ *See id.* at 2069.

¹⁰⁹ *See id.*

¹¹⁰ *See id.* at 2070.

¹¹¹ *See id.* at 2070-71.

¹¹² *See id.* at 2070.

¹¹³ *See id.* at 2071.

who should have known of a similar risk but, in fact, did not.”¹¹⁴ Thus, the proposition suggests that neither a reckless defendant nor negligent defendant can be held liable for inducement.

The Supreme Court also criticized the “deliberate indifference” standard in two ways.¹¹⁵ “First, [the Federal Circuit’s standard] permits a finding of knowledge when there is merely a ‘known risk’ that the induced acts are infringing. Second, in demanding only ‘deliberate indifference’ to that risk, the Federal Circuit’s test does not require active efforts by an inducer to avoid knowing about the infringing nature of the activities.”¹¹⁶

But, the question remains whether the Supreme Court has abrogated the “should have known” standard. First, whether the “should have known” standard is equivalent to the Supreme Court’s “negligent defendant” is questionable. Second, “surpass” was used as a verb in comparing willful blindness with recklessness and negligence, while the Supreme Court did not expressly hold that the “negligence” standard is not applicable. So, the proposition that the “willful-blindness” standard is a better test seems not to mean that the “should have known” standard is inappropriate.

3. Application of the “Willful-blindness” Standard

Although the defendants won on the issue of an applicable standard, the Supreme Court still held that “[t]he jury could have easily found that before April 1998 [the defendants] willfully blinded itself to the infringing nature of the sales it encouraged [a third party] to make.”¹¹⁷ Several pieces of evidence were relied on. First, the Supreme Court found that the plaintiff’s fryer was an innovation and that sales of the fryer were expected to be growing for some time.¹¹⁸ When the defendants developed the accused fryer for their American customer, they did a market research and collected as much information as possible.¹¹⁹ The defendants believed that the advanced technology embodied in the plaintiff’s fryer was valuable to the U.S. market, because they decided to copy such advanced technology.¹²⁰ The defendants intended to copy the plaintiff’s fryer sold in Hong Kong.¹²¹ The defendants knew their deep fryer was developed for the U.S. market.¹²² The top

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See id.*

manager of the defendants was an inventor of many U.S. patents.¹²³ Last, the top manager decided not to tell their attorney that their deep fryer was a copy of the plaintiff's product when the attorney was producing a right-to-use report.¹²⁴

The Supreme Court particularly questioned the motive of the top manager to hide the information that they copied the plaintiff's deep fryer. The Supreme Court stated that "we cannot fathom what motive [the top manager] could have had for withholding this information other than to manufacture a claim of plausible deniability in the event that his company was later accused of patent infringement."¹²⁵

Based on the evidence surrounding the making of the right-to-use study, the Supreme Court held that it "was more than sufficient for a jury to find that [the defendants] subjectively believed there was a high probability that [the plaintiff's fryer was patented, that [the defendants] took deliberate steps to avoid knowing that fact, and that it therefore willfully blinded itself to the infringing nature of [a third party's] sales."¹²⁶

It should be noted that the Supreme Court actually asked the defendants to provide some rebuttals, so the inference could be withdrawn. For instance, the defendants might answer "whether the attorney would have fared better had he known of [the plaintiff's] design."¹²⁷ That is, the defendants might have had a chance to provide a theory of why the attorney does not need to know that they copied the plaintiff's fryer. But, the defendants did not respond.¹²⁸

E. Federal Circuit's Response

While excluding a negligent defendant from inducement actions, the Supreme Court in *Global-Tech* did not explicitly overrule the "should have known" standard that has been adopted by the Federal Circuit. After *Global-Tech*, the Federal Circuit was occasionally confronted with inducement, but until 2013 it did not address the legality of the "should have known" standard.¹²⁹

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *See id.* at 2072.

¹²⁷ *See id.* at 2071.

¹²⁸ *See id.* at 2071.

¹²⁹ *See e.g.*, *Meril Ltd. v. Cipla Ltd.*, 681 F.3d 1283 (Fed. Cir. 2012); *In re Bill of Lading Transmission and Processing System Patent Litigation*, 681 F.3d 1323 (Fed. Cir. 2012); *SynQor, Inc. v. Artesyn Techs., Inc.*, 709 F.3d 1365 (Fed. Cir. 2013); *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301 (Fed. Cir. 2012); *Smith & Nephew, Inc. v. Arthrex, Inc.*, 502 F. App'x 945 (Fed. Cir. 2013).

In 2013, the Federal Circuit in *Commil USA, LLC v. Cisco Sys., Inc.*¹³⁰ confirmed that the “should have known” standard has been abrogated by the Supreme Court. In *Commil USA, LLC*, the appeal related to a jury instruction that told the jury to find inducement if the defendant “actually intended to cause the acts that constitute direct infringement and that Cisco knew or should have known that its actions would induce actual infringement.”¹³¹ The Federal Circuit found this jury instruction was legally erroneous because a defendant that negligently induces the direct infringement may still be found liable under § 271(b).¹³²

Drawing from *Global-Tech*, the Federal Circuit clarified the “knowledge” requirement in two aspects. First, showing either “actual knowledge or willful blindness” may prove the inducer’s knowledge of the patent-in-suit.¹³³ Second, § 271(b) requires a finding of two types of knowledge: knowledge of the patent-in-suit and knowledge of direct infringement.¹³⁴

The Federal Circuit also provided an evidentiary aspect of how to determine an inducer’s knowledge. First, the level of supporting facts of “willful blindness” prevents a finding of knowledge based on either recklessness or negligence.¹³⁵ Thus, circumstantial evidence supporting a finding of knowledge based on recklessness or negligence cannot lead to a finding of knowledge based on “willful blindness.” Second, the “should have known” standard may accuse a finding of inducement based on an inducer’s recklessness or negligence.¹³⁶ Thus, a jury instruction reciting the “should have known” standard is erroneous.

Third, evidence of an inducer’s good-faith belief of invalidity of the patent-in-suit must be heard by fact-finders.¹³⁷ The Federal Circuit provided this proposition in response to the district court’s exclusion of the defendant’s evidence of a good-faith belief of invalidity, where the same district court recognized the Federal Circuit case law allowing evidence of a good-faith belief of non-infringement that may negate the prerequisite intent

¹³⁰ *Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361 (Fed. Cir. 2013).

¹³¹ *Id.* at 1366 (citing the jury instruction).

¹³² *See id.* at 1367.

¹³³ *See id.* at 1366.

¹³⁴ *See id.* at 1367 (“A finding of inducement requires both knowledge of the existence of the patent and ‘knowledge that the induced acts constitute patent infringement.’”).

¹³⁵ *See id.* at 1366 (“The [Supreme] Court acknowledged that the facts that must be adduced to find willful blindness prevent such a finding on facts that support only recklessness or negligence.”).

¹³⁶ *See id.* (“[T]he present jury instruction plainly recites a negligence standard, which taken literally, would allow the jury to find the defendant liable based on mere negligence where knowledge is required.”).

¹³⁷ *See id.* at 1369.

required for finding inducement.¹³⁸ The proposition is based on a notion that “[i]t is axiomatic that one cannot infringe an invalid patent.”¹³⁹ Therefore, it is possible that “one could be aware of a patent and induce another to perform the steps of the patent claim, but have a good-faith belief that the patent is not valid.”¹⁴⁰ In addition, the importance of evidence of good-faith belief of invalidity is that it may “negate [a finding] of the specific intent to encourage another’s infringement.”¹⁴¹ However, while holding that “evidence of an accused inducer’s good-faith belief of invalidity may negate the requisite intent for induced infringement,”¹⁴² the Federal Circuit cautioned that “[t]his is, of course, not to say that such evidence precludes a finding of induced infringement.”¹⁴³

Therefore, after *Commil USA, LLC*, the “should have known” standard is no longer a good law. The scope of the “knowledge” requirement is more definite.

III. Early District Court Response

A. Overview

Since *Global-Tech*, there have been several district court decisions citing *Global-Tech*.¹⁴⁴ Among the cases issued by May 22, 2012, *Mikkelsen Graphic Eng’g Inc. v. Zund Am., Inc.*,¹⁴⁵ *ePlus, Inc. v. Lawson Software, Inc.*¹⁴⁶ (hereinafter, “*ePlus I*”), and *ePlus Inc. v. Lawson Software, Inc.*¹⁴⁷ (hereinafter, “*ePlus II*”), *Vasudevan Software, Inc. v. TIBCO Software Inc.*,¹⁴⁸ *Ill. Tool Works, Inc. v. MOC Prods. Co.*,¹⁴⁹ *Weiland Sliding Doors and Windows, Inc. v. Panda Windows and Doors, LLC*,¹⁵⁰ *Trading Techs.*

¹³⁸ *See id.* at 1367.

¹³⁹ *Id.* at 1368.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 1368-69.

¹⁴⁴ The search date was done on Oct. 9, 2013. The database was Westlaw’s KeyCite.

¹⁴⁵ *Mikkelsen Graphic Eng’g Inc. v. Zund Am., Inc.*, 2011 WL 6122377 (E.D. Wis. Dec. 08, 2011).

¹⁴⁶ *ePlus, Inc. v. Lawson Software, Inc.*, 2011 WL 3584313 (E.D. Va. Aug. 12, 2011) (hereinafter, *ePlus I*).

¹⁴⁷ *ePlus Inc. v. Lawson Software, Inc.*, 2011 WL 4704212 (E.D. Va. Oct. 04, 2011) (hereinafter, *ePlus II*).

¹⁴⁸ *Vasudevan Software, Inc. v. TIBCO Software Inc.*, 2012 WL 1831543 (N.D. Cal. May 18, 2012).

¹⁴⁹ *Ill. Tool Works, Inc. v. MOC Prods. Co.*, 2012 WL 727828 (S.D. Cal. Mar. 06, 2012).

¹⁵⁰ *Weiland Sliding Doors and Windows, Inc. v. Panda Windows and Doors, LLC*, 2012 WL 202664 (S.D. Cal. Jan. 23, 2012).

Int'l, Inc. v. BCG Partners, Inc.,¹⁵¹ *Minemyer v. R-Boc Representatives, Inc.*,¹⁵² and *Walker Digital, LLC v. Facebook, Inc.*¹⁵³ are decisions that interpret the *Global-Tech* decision. This section is intended to explore these decisions to see how they viewed the *Global-Tech* decision.

1. Does the *Global-Tech* Decision Change the Elements of Inducement?

Some commentators stated that the *Global-Tech* decision changed the rules of inducement under section 271(b).¹⁵⁴ This observation from the *Global-Tech* decision may not be a case.

In *Mikkelsen Graphic Eng'g Inc.*, the district court stated that the *Global-Tech* decision “does not change the state-of-mind element for inducement.”¹⁵⁵ In *Vasudevan Software, Inc.*, to state a proposition where “[u]nder *Global-Tech*, to state a claim for inducement, the patentee must show that the alleged infringer had ‘knowledge of the existence of the patent that is infringed,’” the district court cited not only the *Global-Tech* decision but also one Federal Circuit’s en banc case, *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1304 (Fed. Cir.2006), and quoted: “the requirement that the alleged infringer knew or should have known his actions would induce actual infringement necessarily includes the requirement that he or she knew of the patent.”¹⁵⁶ This shows that the district court linked the *Global-Tech* decision to the existing Federal Circuit case law, indicating that the *Global-Tech* decision just affirms the existing case law.

In *Minemyer*, the district court stated that the Supreme Court “clarified the existing case law.”¹⁵⁷ While “clarified” was used, the district court still stated, “The Supreme Court’s holding confirmed long-established Federal Circuit law on inducement.”¹⁵⁸

Maybe the knowledge requirement is refined by the *Global-Tech* decision. In *Trading Techs. Int'l, Inc.*, the district court confirmed that the *Global-Tech* decision required a plaintiff to prove that “the alleged infringer

¹⁵¹ *Trading Techs. Int'l, Inc. v. BCG Partners, Inc.*, 2011 WL 3946581 (N.D. Ill. Sept. 02, 2011).

¹⁵² *Minemyer v. R-Boc Representatives, Inc.*, 2012 WL 527857 (N.D. Ill. Feb. 15, 2012).

¹⁵³ *Walker Digital, LLC v. Facebook, Inc.*, ___ F. Supp. 2d ___, 2012 WL 1129370 (D. Del. Apr. 04, 2012).

¹⁵⁴ See Yuan-Chen Chiang, “Willful Blindness” for Induced Infringement—Impacts of the U.S. Supreme Court’s *Global-Tech* Case on Taiwanese Companies, 1 NTUT J. OF INTELL. PROP. L. & MGMT. 114, 119 (2012) (“Now the standard is much stricter, and thus it’s harder for a plaintiff to prove induced infringement.”).

¹⁵⁵ *Mikkelsen Graphic Eng'g Inc.*, 2011 WL 6122377, at *7.

¹⁵⁶ See *Vasudevan Software, Inc.*, 2012 WL 1831543, at *6.

¹⁵⁷ *Minemyer*, 2012 WL 527857, at *1 (emphasis added).

¹⁵⁸ *Id.*

must have knowledge of the patent at issue (or at least ‘willful blindness’ to the patent) and knowledge that the infringer’s product infringed on that patent.”¹⁵⁹ In *Walker Digital, LLC*, the district court cited the Global-Tech decision and stated that “[the plaintiff] must allege that [the defendants] had knowledge not only of the patent, but of the allegedly infringing nature of the asserted conduct under § 271(b).”¹⁶⁰ That is, there are two forms of knowledge. One is that a defendant has to know the patent-in-suit. The other is that a defendant has to know the existence of direct infringement.

2. What is the Willful-blindness Standard?

Two requirements of the Willful-blindness standard were defined by the Global-Tech decision. The district courts treat the two requirements as two elements for proving that a defendant willfully blinded himself from knowing the patent-in-suit.

Some opinions misunderstood the Supreme Court’s ruling. In *Illinois Tool Works, Inc.* and *Weiland Sliding Doors and Windows, Inc.*, the district court distinguished the willful-blindness standard from actual knowledge by stating, “The [Supreme] Court further held that under this standard actual knowledge is not required, but that the doctrine of willful blindness applies to inducement of infringement claims.”¹⁶¹ However, the exact propositions made by the Supreme Court are, “The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge,”¹⁶² and “It is also said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.”¹⁶³ The Supreme Court has never rejected that actual knowledge is not required but that the willful-blindness standard is an alternative for proving actual knowledge in the context of inducement.

3. Is There Any Alternative to the “Willful-blindness” Standard?

In *ePlus I*, the district court equaled “deliberately disregard” to “willfully blind.”¹⁶⁴ The defendant challenged the jury instruction read as “[k]nowledge of the patent may be established by a finding that Lawson had actual knowledge of the patent or that Lawson deliberately disregarded a

¹⁵⁹ *Trading Techs. Int’l, Inc.*, 2011 WL 3946581, at *3.

¹⁶⁰ *Walker Digital, LLC*, 2012 WL 1129370, at *5.

¹⁶¹ See, e.g., *Weiland Sliding Doors and Windows, Inc.*, 2012 WL 202664, at *4; *Ill. Tool Works, Inc.*, 2012 WL 727828, at *7.

¹⁶² *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2069.

¹⁶³ *Id.*

¹⁶⁴ See *ePlus I*, 2011 WL 3584313, at *4-*5.

known risk that ePlus had a protective patent.”¹⁶⁵ The defendant asserted that the jury instruction adopted “a flawed, pre-*[Global-Tech]* standard for intent.”¹⁶⁶ But, the district court held, “This instruction comports with the Supreme Court’s discussion of willful blindness in *[Global-Tech]*.”¹⁶⁷ The holding was based on the fact that the difference between “deliberate indifference” and “deliberately disregard” was explained to the jury by the district court.¹⁶⁸

In *ePlus II*, which followed *ePlus I*, the defendant again attacked the language “deliberately disregarded a known risk that ePlus had a protective patent” in the jury instruction.¹⁶⁹ In responding to that attack, the district court explained why “this language does not depart from the ‘willful blindness’ standard set out in *Global-Tech*.”¹⁷⁰ By citing one quotation in footnote nine of the *Global-Tech* decision, the district court held, “‘Deliberate disregard of a known risk’ implies that the Defendant ‘knew that criminal activity was particularly likely’ (the risk), and ‘intentionally failed to investigate’ (deliberate disregard).”¹⁷¹ In addition, the distinction between “deliberate indifference” and “deliberately disregard” was made again. The district court stated, “Whereas disregard implies ‘deliberate actions to avoid confirming a high probability of wrongdoing,’ indifference does not.”¹⁷² That is, in the district court’s view, “deliberately disregard” requires a defendant to take an action to not knowing the existence of a patent-in-suit or patent infringement. Therefore, the “willful-blindness” standard can be operated in a form of “deliberately disregard.”

B. Rule 12(b)(6) Motion Cases

1. Rule 12(b)(6) Motions

A Rule 12(b)(6) motion is a procedural tool for defendants to request the court to dismiss the complaint. In determining whether a Rule 12(b)(6) should be granted, many district courts have recognized two recent Supreme Court cases *Ashcroft v. Iqbal*¹⁷³ and *Bell Atlantic Corp. v. Twombly*¹⁷⁴ as a

¹⁶⁵ *See id.* at *5.

¹⁶⁶ *See id.* at *4.

¹⁶⁷ *See id.* at *5.

¹⁶⁸ *See id.*

¹⁶⁹ *See ePlus II*, 2011 WL 4704212, at *3.

¹⁷⁰ *See id.*

¹⁷¹ *See id.* In footnote nine of the *Global-Tech* decision, the quoted proposition is: “Ignorance is deliberate if the defendant was presented with facts that put her on notice that criminal activity was particularly likely and yet she intentionally failed to investigate those facts,” from *United States v. Florez*, 368 F.3d 1042, 1044 (8th Cir. 2004).

¹⁷² *See ePlus II*, 2011 WL 4704212, at *3.

¹⁷³ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹⁷⁴ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

legal standard. The *Ashcroft* Court reaffirmed the standard of reviewing Rule 12(b)(6) motions ruled in *Bell Atlantic Corp.*¹⁷⁵

To survive a Rule 12(b)(6) motion, a complaint must state factual allegations sufficient to “allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”¹⁷⁶ Reciting “the elements of a cause of action, supported by mere conclusory statements, do not suffice.”¹⁷⁷ To determine whether to deny a motion to dismiss, the court must conduct “a context-specific task [to] draw on its judicial experience and common sense.”¹⁷⁸ If factual allegations are well pleaded, the court “should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”¹⁷⁹

In the context of inducement, the ultimate question is “whether [the plaintiff] has plead sufficient facts ... for the [c]ourt to infer that the defendant[] had knowledge of [the patent at issue] and that [the defendant’s] products infringed on [the patent].”¹⁸⁰

2. Plaintiff-won Cases

a. Trading Techs. Int’l, Inc. v. BCG Partners, Inc.

In *Trading Techs. Int’l, Inc.*, the district court denied the defendant’s motion to dismiss. The district court inferred the defendant’s knowledge of the patent-in-suit because of several main reasons.¹⁸¹ First, the defendants were in the business related the patent-in-suit.¹⁸² The plaintiff marked its products with the patent number.¹⁸³ The defendants were aware of the patent-in-suit through several law suits while continuing to sell the infringing products to the customers.¹⁸⁴ In addition, the district court considered other alleged facts, such as “press coverage, previously filed litigation, consent judgments entered in companion cases and complaints filed against other defendants in this consolidated proceeding.”¹⁸⁵

The factual allegations related to knowledge of the patent-in-suit were presented as a competition game between the plaintiff and defendant. As the district court highlighted, because the defendant is a competitor with the

¹⁷⁵ See *Ashcroft*, 556 U.S. at 677-79.

¹⁷⁶ *Id.* at 678.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 679.

¹⁷⁹ *Id.*

¹⁸⁰ *Trading Techs. Int’l, Inc.*, 2011 WL 3946581, at *3.

¹⁸¹ See *id.* at *4.

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ *Id.*

plaintiff, the defendant “would be keeping an eye on patents issued to [the defendant] and other competitors.”¹⁸⁶ However, the district court in footnote 5 clarified that it did not require knowledge to be found “solely by pleading that the competitor would be monitoring the plaintiff’s patent filings and any patents issued to it.”¹⁸⁷ Nonetheless, the fact that the parties are in the same industry “makes knowledge of the patent at issue *more* plausible.”¹⁸⁸

With respect to the defendant’s knowledge of direct infringement or specific intent to cause direct infringement, the district court relied on the factual allegations where “the defendants sold their products to customers knowing that they had no other use than one that infringed on [patents at issue] and showed them how to infringe on those patents with their websites and instructions.”¹⁸⁹ Therefore, “non-infringing use” might be a factor of knowledge of direct infringement.

b. Weiland Sliding Doors and Windows, Inc. v. Panda Windows and Doors, LLC

In *Weiland Sliding Doors and Windows, Inc.*, the district court found sufficient pleadings of inducement.¹⁹⁰ Regarding the defendant’s knowledge of the patent, the district court depended on two factual allegations. First, the plaintiff marked their products “with appropriate patent markings.”¹⁹¹ Second, the plaintiff had sent a patent licensing opportunity letter that encloses a copy of the patent at dispute.¹⁹²

Regarding the defendant’s knowledge of direct infringement, the district court pointed out the following allegations. First, the defendant possessed the patent and the plaintiff’s product.¹⁹³ The defendant’s product was identical to the plaintiff’s, so any non-infringing use was impossible.¹⁹⁴ The defendant had expressed his intent to copy the patented product.¹⁹⁵ The defendant had never sought a counsel opinion of non-infringement.¹⁹⁶ The on-line brochure, which advertises the allegedly infringing products and provides instructions of installation, was disseminated by the defendant.¹⁹⁷

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *4 n.5.

¹⁸⁸ *Id.* (emphasis in original).

¹⁸⁹ *Id.* at *4.

¹⁹⁰ *See Weiland Sliding Doors and Windows, Inc.*, 2012 WL 202664, at *6.

¹⁹¹ *See id.* at *4.

¹⁹² *See id.*

¹⁹³ *See id.* at *5.

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

¹⁹⁶ *See id.*

¹⁹⁷ *See id.*

Particularly, regarding the factual allegation that the defendant had failed to obtain a counsel opinion about infringement analysis after receiving a copy of the patent, the district court clarified that the patent licensing opportunity letter actually did not “alert [the defendant] to the potentiality of infringement,”¹⁹⁸ because the letter only expressed an offer for licensing the patent.¹⁹⁹ So, the district court refused to infer the intent to cause direct infringement from such allegation alone.²⁰⁰

c. Apeldyn Corp. v. Sony Corp. (“Apeldyn I”)

In *Apeldyn Corp. v. Sony Corp.*, the district court dismissed the defendant’s motion,²⁰¹ while it did not expressly speak about knowledge of direct infringement. This Rule 12(b)(6) motion was filed by Sony, which and Samsung co-owned a company manufacturing infringing products.²⁰² The district court found the defendant’s knowledge of the patent at issue because of several factual allegations.²⁰³ First, the defendant’s in-house legal department routinely reviewed competitors’ patents.²⁰⁴ A notice letter sent to Samsung mentioned that their products might infringe the patent at issue.²⁰⁵ For the same patent, the plaintiff had filed a law suit against the defendant.²⁰⁶

d. Walker Digital, LLC v. Facebook, Inc.

In *Walker Digital, LLC*, the multiple defendants were in the e-commerce business.²⁰⁷ Two defendants, Amazon, Inc. and Zappos.com, Inc., filed a motion to dismiss.²⁰⁸ The district court denied both motions.²⁰⁹ Like the *Apeldyn* court, the district court here did not specifically mention knowledge of direct infringement. With respect to knowledge of the patents-in-suit, the district court’s holding was based on the factual allegation that the plaintiff’s representatives had interacted with the defendants for infringement issues

¹⁹⁸ *Id.*

¹⁹⁹ *See id.*

²⁰⁰ *See id.*

²⁰¹ *See Apeldyn Corp. v. Sony Corp.*, ___ F. Supp. 2d ___, 2012 WL 1129371, at *1 (D. Del. Apr. 4, 2012) (hereinafter, “*Apeldyn I*”).

²⁰² *See id.* at *2.

²⁰³ *See id.* at *4.

²⁰⁴ *See id.*

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ *See Walker Digital, LLC*, 2012 WL 1129370, at *1.

²⁰⁸ *See id.*

²⁰⁹ *See id.*

related to the patents-in-suit.²¹⁰ Those interactions led to the inference of the defendants' knowledge.²¹¹

e. CyberFone Sys. LLC v. Cellco P'ship

In *CyberFone Sys., LLC v. Cellco P'ship*, the district court dismissed the defendant's Rule 12(b)(6) motion.²¹² The main dispute rested on the defendant's knowledge of the patent at issue. The district court based its holding on the factual allegation that at least the defendant began to know the patent at issue when the original complaint was filed.²¹³

3. Defendant-won Cases

a. Nazomi Commc'ns, Inc. v. Nokia Corp.

In *Nazomi Commc'ns, Inc. v. Nokia Corp.*, the district court granted the defendant's motion to dismiss, while it also allowed the plaintiff to amend the complaint.²¹⁴ The district court held that the plaintiff did not specify particular facts related to inducement and that the plaintiff only made conclusory statements.²¹⁵

b. Aguirre v. Powerchute Sports, LLC

In *Aguirre v. Powerchute Sports, LLC*, the district court dismissed the plaintiff's indirect infringement claims because the allegations did not touch the knowledge requirement of inducement.²¹⁶ In fact, the plaintiff had amended the complaint twice but had never specified the defendant's knowledge of either the patent in suit or direct infringement.²¹⁷ Nonetheless, the district court here still allowed the plaintiff to amend the complaint.²¹⁸

c. McRee v. Goldman (McRee I)

In *McRee v. Goldman* (hereinafter, "*McRee I*"), the defendant who filed a motion to dismiss was a chairman of an association that allegedly directly

²¹⁰ See *id.* at *4-*5.

²¹¹ See *id.* at *5.

²¹² See *CyberFone Sys., LLC v. Cellco P'ship*, 2012 WL 1509504, at *3 (D. Del. Apr. 30, 2012).

²¹³ See *id.*

²¹⁴ See *Nazomi Commc'ns, Inc. v. Nokia Corp.*, 2011 WL 2837401, at *1 (N.D. Cal. July 14, 2011).

²¹⁵ See *id.* at *3.

²¹⁶ See *Aguirre v. Powerchute Sports, LLC*, 2011 WL 3359554, at *5 (W.D. Tex. Aug. 04, 2011).

²¹⁷ See, e.g., Complaint for Patent Infringement, *Aguirre v. Powerchute Sports, LLC*, 2010 WL 3430669 (W.D. Tex. Aug. 23, 2010); First Amended Complaint for Patent Infringement, *Aguirre v. Powerchute Sports, LLC*, 2010 WL 4951253 (W.D. Tex. Sept. 17, 2010).

²¹⁸ See *Aguirre*, 2011 WL 3359554, at *5.

infringed the patent in suit.²¹⁹ The district court granted the motion because of two main reasons. First, while recognizing the plaintiff's allegation that the defendant had been notified of the infringement issue, the district court did not infer the defendant's knowledge of either the patent or the infringement made by the association.²²⁰ Second, no allegation related to how the defendant induced his association to infringe the patent.²²¹ The plaintiff only asserted that the defendant took a photograph of himself with the alleged infringing product.²²²

d. Wright Mfg. Inc. v. Toro Co.

In *Wright Mfg. Inc. v. Toro Co.*, the district court granted the defendant's motion to dismiss because the complaint only included conclusory allegations.²²³ The district court quoted one allegation that "Toro has known of [been aware of] [the patent] since at least 2008"²²⁴ and concluded that "[m]ore is required."²²⁵

e. McRee v. Goldman (McRee II)

In *McRee v. Goldman* (hereinafter, "*McRee II*"), among other things, the district court granted to the same defendant in *McRee I* his motion to dismiss.²²⁶ And, the district court allowed the plaintiff to amend the complaint again.²²⁷ The *McRee II* decision was the following decision of the *McRee I* decision.²²⁸ In *McRee II*, the defendant attacked the plaintiff's first amended complaint.²²⁹ The district court agreed with the defendant because the plaintiff "fail[ed] to show the concurrence of knowledge and action necessary to establish [the defendant's] liability under § 271(b) for induced infringement."²³⁰ The holding in *McRee II* is similar to that in *McRee I*. The plaintiff still could not make sufficient factual allegations.

The plaintiff alleged some facts. First, the defendant had seen a model of the infringing product before the defendant donated money to an association that was authorized by a local government to construct the infringing

²¹⁹ See *McRee v. Goldman*, 2011 WL 4831199, at*4 (N.D. Cal. Oct. 12, 2011).

²²⁰ See *McRee I*, 2011 WL 4831199, at*5.

²²¹ See *id.*

²²² See *id.*

²²³ See *Wright Mfg. Inc. v. Toro Co.*, 2011 WL 6211172, at *3 (D. Md. Dec. 13, 2011).

²²⁴ See *id.* (modification in original).

²²⁵ See *id.*

²²⁶ See *McRee v. Goldman*, 2012 WL 929825, at *1 (N.D. Cal. Mar. 19, 2012) (hereinafter, "*McRee II*").

²²⁷ See *id.* at *5.

²²⁸ See *id.* at *3.

²²⁹ See *id.*

²³⁰ *Id.* at *5.

product.²³¹ Second, the local government's head had a meeting with the plaintiff before the construction of the infringing product began.²³² In the meeting, the plaintiff disclosed to the local government's head his patent application that later became the patent in suit.²³³

However, from these factual allegations, the district court could not "draw a plausible inference that [the defendant] knew of or was willfully blind to the existence of the [patent in suit] at the time of his charitable donation, nor that he knew his funds would be used to infringe the [patent in suit]."²³⁴ Specifically, the district court gave an instructive comment that "[the plaintiff] fail[ed] to allege how or when this information was conveyed to [the defendant] in advance of his charitable donation to the [construction project]."²³⁵

f. Vasudevan Software, Inc. v. TIBCO Software Inc.

In *Vasudevan Software, Inc. v. TIBCO Software Inc.*, the district court granted the defendant's motion to dismiss but left the plaintiff to amend the complaint.²³⁶ The plaintiff here applied the willful-blindness standard to willful infringement and inducement, both require a defendant's knowledge of the patent-in-suit and direct infringement.²³⁷ The defendant tried to establish the defendant's willful blindness instead of approving actual knowledge.²³⁸ However, the district court concluded that the plaintiff only made conclusory allegations.²³⁹ The district court specifically criticized that the plaintiff had not pointed out "any affirmative actions taken by the defendant to avoid gaining actual knowledge of the [patent-in-suit]."²⁴⁰

C. Rule 56 Motion Cases

1. Rule 56 Motions

A Rule 56 motion is also known as "a motion for summary judgment." A Rule 56 motion is granted, "when, drawing all justifiable inferences in the non-movant's favor, there exists no genuine issue of material fact and the

²³¹ *See id.*

²³² *See id.*

²³³ *See id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *See Vasudevan Software, Inc. v. TIBCO Software Inc.*, 2012 WL 1831543, at *1 (N.D. Cal. May 18, 2012).

²³⁷ *See id.* at *5.

²³⁸ *See id.* at *5-*6.

²³⁹ *See id.* at *6.

²⁴⁰ *Id.*

movant is entitled to judgment as a matter of law.”²⁴¹ To determine whether “a dispute about a material fact is genuine,”²⁴² a court looks to “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”²⁴³

2. Plaintiff-won Cases

a. *DataQuill Ltd. v. High Tech Computer Corp.*

In *DataQuill Ltd. v. High Tech Computer Corp.*, the defendant (HTC) moved for summary judgment of no indirect infringement, but the district court denied the motion.²⁴⁴ Among other things, HTC argued that the plaintiff had not presented sufficient evidence to support the “specific intent” requirement.²⁴⁵

The suit was filed on March 24, 2008.²⁴⁶ Two patents were alleged to be infringed.²⁴⁷ Prior to the suit, both patents were subject to the reexamination proceeding.²⁴⁸ On April 1, 2008, two non-final office actions were issued to reject all claims of those two patents.²⁴⁹ On May 14, 2009, the district court stayed the action.²⁵⁰ On October 27, 2009, one reexamination certificate was issued to one patent.²⁵¹ On April 13, 2010, one reexamination certificate was issued to the other patent.²⁵² Then, the district court lifted the stay because of the positive outcome.²⁵³

To prove the inducement, the plaintiff presented several pieces of evidence. First, before the suit was filed, the plaintiff had sent a letter to notify HTC of the patents-in-suit.²⁵⁴ Second, the plaintiff had filed a law suit against HTC.²⁵⁵ Third, both patents-in-suit survived the reexamination.²⁵⁶ Fourth, the plaintiff had produced an expert opinion explaining the

²⁴¹ *Toshiba Corp. v. Imation Corp.*, 681 F.3d 1358, 1361 (Fed. Cir. 2012).

²⁴² *Id.*

²⁴³ *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

²⁴⁴ *See DataQuill Ltd. v. High Tech Computer Corp.*, 2011 WL 6013022, at *2 (S.D. Cal. Dec. 01, 2011).

²⁴⁵ *See id.* at *8.

²⁴⁶ *See id.* at *1.

²⁴⁷ *See id.*

²⁴⁸ *See id.*

²⁴⁹ *See id.*

²⁵⁰ *See id.*

²⁵¹ *See id.*

²⁵² *See id.*

²⁵³ *See id.*

²⁵⁴ *See id.* at *9.

²⁵⁵ *See id.*

²⁵⁶ *See id.*

infringement made by the accused products.²⁵⁷ Fifth, the plaintiff had presented HTC's "marketing materials and user guides related to the accused products."²⁵⁸ With these facts, the district court held that a reasonable jury will reach a conclusion of inducement.²⁵⁹

HTC provided two arguments that were, however, rejected by the district court. First, HTC argued that the plaintiff only showed "evidence related to the issue of whether HTC had knowledge of the allegedly induced acts."²⁶⁰ The district court disagreed and held that HTC "had knowledge of [the plaintiff's] contention that HTC was infringing these patents because [the plaintiff] had already filed the present lawsuit against HTC."²⁶¹ The second argument was that HTC "did not have the specific intent" either because all claims of the patents-in-suit were rejected in the non-office actions during the reexamination proceeding²⁶² or because HTC had "asserted substantial defenses to [the plaintiff's] claims through [the] litigation."²⁶³ The district court, however, responded that these assertions "at best show[ed] that there is a triable issue of fact as to whether HTC is liable for induced infringement."²⁶⁴ Specifically, the district court held that "no case law stand[ed] for the proposition that inducement can be foreclosed as a matter of law by rejections in a non-final office action or by the assertion of substantial defenses during litigation of the patents-in-suit."²⁶⁵

b. Mformation Techs., Inc. v. Research in Motion Ltd.

In *Mformation Techs., Inc. v. Research in Motion Ltd.*, the district court denied the defendant's motion for summary judgment regarding inducement.²⁶⁶ The defendant argued that the plaintiff did not establish the knowledge requirement and the "specific intent" requirement.²⁶⁷ Regarding the knowledge requirement, the district court held that there was a triable issue of whether the defendant knew the patent-in-suit.²⁶⁸ This was because the plaintiff had shown that some employees of the defendant had knowledge of the patent-in-suit during "a series of disclosures made while [the plaintiff]

²⁵⁷ *See id.*

²⁵⁸ *Id.*

²⁵⁹ *See id.*

²⁶⁰ *Id.* at *10.

²⁶¹ *Id.*

²⁶² *See id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *See Mformation Techs., Inc. v. Research in Motion Ltd.*, 830 F. Supp. 2d 815, 2011 WL 6357804, at *20 (N.D. Cal. Dec. 19, 2011).

²⁶⁷ *See id.*

²⁶⁸ *See id.*

was pursuing a potential partnership and license [sic] agreement with [the defendant]”²⁶⁹ and that one employee of the defendant “was present at a working group meeting”²⁷⁰ where the application for the patent-in-suit was disclosed.²⁷¹

Regarding the “specific intent” requirement, the district court reached the same conclusion.²⁷² In addition to the evidence regarding the defendant’s knowledge of the patent-in-suit, the record also showed that the defendant intended to induce third parties’ infringement.²⁷³ This was because the plaintiff had produced technical documents containing the instructions that teach consumers the infringing acts.²⁷⁴

3. Defendant-won Cases

a. *Apeldyn Corp. v. AU Optronics Corp. (“Apeldyn IP”)*

In *Apeldyn Corp. v. AU Optronics Corp.* (hereinafter, “*Apeldyn IP*”), two Taiwanese defendants filed a motion for summary judgment of no inducement.²⁷⁵ One defendant won the motion because of no direct infringement.²⁷⁶ The other defendant, AU Optronics Corp. (hereinafter, “AUO”), also moved for summary judgment of no inducement and won on the issues other than direct infringement.²⁷⁷

AUO focused on the fact that it did not know the patent-in-suit until the law suit was filed.²⁷⁸ The plaintiff provided two theories to overcome AUO’s assertion, but the district court did not agree.²⁷⁹ The first theory was the “transitive knowledge” theory.²⁸⁰ The plaintiff produced evidence showing that a third party company licensed its intellectual property to AUO, that such third party company owned a patent that cites two other patents, and that both cited patents list the patent-in-suit.²⁸¹ With these facts, the plaintiff claimed the existence of AUO’s knowledge of the patent-in-suit. However, the district court held it was not, because the case law provided “no example of a finding of constructive knowledge based on the listing of a patent on the

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *See id.*

²⁷² *See id.*

²⁷³ *See id.*

²⁷⁴ *See id.*

²⁷⁵ *See Apeldyn Corp. v. AU Optronics Corp.*, 831 F. Supp. 2d 817, 820, 830-31 (D. Del. 2011) (hereinafter, “*Apeldyn IP*”).

²⁷⁶ *See id.* at 830-31.

²⁷⁷ *See id.* at 830-31

²⁷⁸ *See id.* at 831

²⁷⁹ *See id.* at 832.

²⁸⁰ *See id.* at 831.

²⁸¹ *See id.*

face of another patent, twice removed.”²⁸² The district court further stated, “There is simply no indication that constructive notice is meant to embrace the hundreds, if not thousands, of listed patents that would be generated in many cases by such an extrapolation.”²⁸³

The second theory was based on the willful-blindness standard.²⁸⁴ The plaintiff provided evidence showing that AUO was a large company with a lot of patents, that AUO had a big intellectual property group that is capable of monitoring patents, and that AUO’s intellectual property group did not collect competitors’ patents unless they were requested by AUO’s internal lawyers to do so.²⁸⁵ Based on these facts, the plaintiff asserted that AUO willfully blinded itself from knowing the direct infringing acts.²⁸⁶ However, the district court disagreed because these facts only showed that AUO was reckless or negligent.²⁸⁷

b. Ill. Tool Works, Inc. v. MOC Prods. Co.

In *Ill. Tool Works, Inc.*, the district court denied the plaintiff’s motion for summary judgment for inducement.²⁸⁸ The plaintiff made two arguments both of which were rejected by the district court.²⁸⁹

The plaintiff and defendant were competitors in a niche industry of products for cleaning automotive parts.²⁹⁰ The plaintiff had one former employee who was one inventor of the patent-in-suit.²⁹¹ This former employee was later hired by the defendant to develop the accused product.²⁹² So, both parties did not dispute about the knowledge of the patent-in-suit. The focus was the knowledge of induced direct infringement.²⁹³

The first argument was based on the defendant’s admitted fact that the accused product has a technical feature claimed in the patent-in-suit. Two theories were asserted. The plaintiff’s first theory was that because the defendant knew that the accused product had a patented technical feature, the defendant also knew the accused product infringed the patent-in-suit.²⁹⁴ The

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *See id.*

²⁸⁵ *See id.*

²⁸⁶ *See id.*

²⁸⁷ *See id.*

²⁸⁸ *See Ill. Tool Works, Inc.*, 2012 WL 727828, at *1.

²⁸⁹ *See id.* at *7-*9.

²⁹⁰ *See id.* at *1.

²⁹¹ *See id.* at *2.

²⁹² *See id.*

²⁹³ *See id.* at *7.

²⁹⁴ *See id.* at *8.

plaintiff's second theory was based on the willful-blindness standard.²⁹⁵ The plaintiff asserted that the defendant took a deliberate action to avoid knowing the direct infringement.²⁹⁶ First, the plaintiff's former employee was one inventor of the patent-in-suit and was responsible for developing the infringing product.²⁹⁷ If the defendant had avoided the infringement, it should have done the test for the infringing product.²⁹⁸

Contrarily, the defendant argued that the plaintiff had known the sales of the accused product but had not informed the defendant of the infringement.²⁹⁹ So, the defendant asserted that it "did not know and had no reason to suspect that use of its product infringed [the patent-in-suit]."³⁰⁰

While confirming that the knowledge requirement focuses on the defendant's mind not the plaintiff's inaction, the district court did weigh the plaintiff's inaction, because of "viewing the evidence in the light most favorable to [the defendant]."³⁰¹ The reasoning was that if the plaintiff had informed the defendant of the infringement of the patent-in-suit, the fact would suggest that the defendant subjectively believed a high probability of the infringement done by its product.³⁰² But, actually, the plaintiff had not done so.³⁰³ On the other hand, when the defendant received the allegations of the infringement, it "redesigned its product and sought clearance from [the plaintiff's] attorney that its redesign was not infringing."³⁰⁴ Thus, the district court held that "once [the defendant] knew of a high probability of infringement, it took deliberate action to avoid infringing, not to avoid discovering whether it was infringing."³⁰⁵

The second argument was based on the defendant's litigation strategy. The plaintiff asserted the non-infringement argument made for the inducement issue was not presented by the defendant for the issue of direct infringement.³⁰⁶ When developing the infringing products, the plaintiff's former employee based his belief of non-infringement on the fact that the infringing product uses a particular nozzle that is allegedly not within the scope of the patent-in-suit.³⁰⁷ However, when arguing the direct

²⁹⁵ *See id.*

²⁹⁶ *See id.*

²⁹⁷ *See id.*

²⁹⁸ *See id.*

²⁹⁹ *See id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *See id.*

³⁰³ *See id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *See id.* at *9.

³⁰⁷ *See id.*

infringement issues, the defendant did not raise the nozzle issue to support the assertion of non-infringement.³⁰⁸ Based on this litigation record, the plaintiff asserted that the defendant had known the direct infringement.³⁰⁹

The second argument was also rejected. The district court held that the defendant had “carried its burden to establish a genuine issue as to whether it had knowledge that the acts it induced were infringing.”³¹⁰ The district court also declined to “infer such knowledge from [the defendant’s] litigation strategy.”³¹¹

c. **Mikkelsen Graphic Eng’g Inc. v. Zund Am., Inc.**

In *Mikkelsen Graphic Eng’g Inc.*, the district court was requested by the plaintiff to reconsider a summary judgment decision of finding that the defendant was not liable for inducement.³¹² The request was made because the summary judgment of no inducement was followed by the Supreme Court’s *Global-Tech* decision.³¹³ The district court did not change its decision because it held that the *Global-Tech* decision did not change the existing elements of inducement.³¹⁴

The summary judgment was in favor of the defendant because the language of the patent-in-suit was reasonably disputed. The district court held that “[t]he most that [the defendant] could have intended was to induce [others] to commit acts that would constitute patent infringement if the patent was, at some point in the future, construed in a particular way.”³¹⁵

D. **JMOL Motion Cases**

1. **JMOL Motions**

A motion for judgment as a matter of law is to request a court to decide factual disputes even though one party has demanded for jury trial. In determining a JMOL motion, as the Supreme Court held in *Reeves v. Sanderson Plumbing Prods., Inc.*, “the court should review all of the evidence in the record.”³¹⁶ The standard requires the court to “draw all reasonable inferences in favor of the nonmoving party [without making] credibility determinations or weigh the evidence.”³¹⁷ The court “must

³⁰⁸ *See id.*

³⁰⁹ *See id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *See Mikkelsen Graphic Eng’g Inc.*, 2011 WL 6122377, at *1.

³¹³ *See id.*

³¹⁴ *See id.*

³¹⁵ *Id.* at *7.

³¹⁶ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

³¹⁷ *Id.*

disregard all evidence favorable to the moving party that the jury is not required to believe.”³¹⁸ The ultimate rule is that “the court should give credence to the evidence favoring the nonmovant as well as that ‘evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.’”³¹⁹

A JMOL motion can be filed after the jury hears all evidence and before the jury returns its verdict.³²⁰ This is a Rule 50(a) motion.³²¹ A JMOL motion can also be filed after the jury returns its verdict if the movant filed a JMOL motion under Rule 50(a).³²² A post-trial JMOL motion is also called a Rule 50(b) motion.³²³ In addition to asking the court to reverse the jury verdict, a movant might request a new trial, but that will be a motion based on different rules.

2. Pre-trial JMOL Case-Minemyer v. R-Boc Representatives, Inc.

In *Minemyer*, three groups of the defendants filed a JMOL motion of no inducement.³²⁴ The district court granted all three JMOL motions.³²⁵

3. Post-trial JMOL Cases

a. ePlus, Inc. v. Lawson Software, Inc. (*ePlus I*)

In *ePlus I*, the district court denied the defendant’s renewed motion for JMOL and renewed motion for new trial.³²⁶ The defendant asserted that under the *Global-Tech* decision the jury should have not found that he had actual knowledge of the patent-in-suit before the law suit was filed.³²⁷ But, the district court disagreed because several pieces of evidence had been considered by the jury.³²⁸ First, the patents-in-suit “were marked.”³²⁹ The patents “were publicized within the industry.”³³⁰ Last, the plaintiff was known to the defendant as a competitor, though, less threatening.³³¹

³¹⁸ *Id.* at 151.

³¹⁹ *Id.*

³²⁰ *See* Chen, *supra* note 1, at 3.

³²¹ *See id.*

³²² *See id.*

³²³ *See id.*

³²⁴ *See Minemyer*, 2012 WL 527857, at *1.

³²⁵ *See id.* at *8.

³²⁶ *See ePlus I*, 2011 WL 3584313, at *1.

³²⁷ *See id.* at *4.

³²⁸ *See id.* at *1.

³²⁹ *See id.*

³³⁰ *See id.*

³³¹ *See id.*

b. Versata Software Inc. v. SAP Am., Inc.

In *Versata Software Inc. v. SAP Am., Inc.*, the district court denied the defendants' motion for JMOL and new trial regarding inducement.³³² The litigation here covered two separate jury trials of the same parties and the same patents.³³³ There were two sets of infringing products.³³⁴ The first trial related to the original infringing product, while the second trial related to the modified infringing product.³³⁵ Both trials found inducement.³³⁶ But, the defendants' motion was only for the second trial.³³⁷

While the defendants based their arguments on the *Global-Tech* decision, the district court, however, held that no different result would be made.³³⁸ Three pieces of evidence were sufficient for the second jury's findings that the defendants knew the patent-in-suit and infringement.³³⁹ First, the defendants "had long known of the [patent-in-suit] and the infringement issues related thereto."³⁴⁰ Second, the defendants "had already been found liable for infringement when [they] made the [modified infringing product]."³⁴¹ Third, the plaintiff presented to the second jury that the modified infringing product did not remove or change [the technical feature at dispute] which is shown in the original infringing product.³⁴²

E. Observations and Comments

1. Application of the Willful-blindness Standard

After *Global-Tech*, few district court decisions applied the will-blindness standard. Based on the discussion above, two observations of the willful-blindness standard can be drawn. First, there is no affirmative duty to discover the patent-in-suit. The *Apeldyn II* court applied the standard and ruled in favor of the defendant. There, the plaintiff claimed that the defendant AUO willfully blinded itself from knowing the patent by push the court to impose a duty to discover the patent on AUO. AUO was a company with a large patent department that monitors patents or do patent prosecution. The plaintiff's assertion implied that because AUO had a large patent team,

³³² See *Versata Software Inc. v. SAP Am., Inc.*, 2011 WL 4017952, at *1 (E.D. Tex. Sept. 9, 2011).

³³³ See *id.*

³³⁴ See *id.*

³³⁵ See *id.*

³³⁶ See *id.*

³³⁷ See *id.* at *4.

³³⁸ See *id.*

³³⁹ See *id.*

³⁴⁰ See *id.*

³⁴¹ See *id.*

³⁴² See *id.*

it should have been taking an affirmative action to find out the patent-in-suit instead of waiting for a request of an in-house counsel to perform a search. But, the district court rejected such implication.

The factual difference between *Apeldyn II* and *Global-Tech* is that AUO did not copy the plaintiff's product while the *Global-Tech* defendant did intentionally. Thus, the factor of no affirmative duty to discover the patent-in-suit might be weakened under other circumstances related to the defendant's culpable intent.

The second observation is that a defendant has to do something to avoid infringement. A defendant might design around the patent-in-suit. In *Illinois Tool Works, Inc.*, the defendant hired a name inventor of the patent-in-suit to develop the accused product. The district court there held that this fact alone cannot lead to a conclusion of knowledge of infringement. On one hand, the name inventor might be hired to avoid patent infringement. On the other hand, the defendant redesigned the product after receiving the notification of infringement. The redesign action was considered by the district court there as an affirmative action to avoid infringement. Therefore, to avoid being held willfully blind from knowing infringement, a defendant has to conduct design-around to establish a positive piece of evidence for inducement.

A defendant might acquire a credible assurance of non-infringement. The *Minemyer* court weighed the fact that, after knowing the patent marking, the defendant looked to the device supplier to check the patent issue and, therefore, received the supplier's assurance of no patent issue. Besides, such assurance was based on an attorney's analysis. Thus, a credible guaranty of no infringement might be a positive factor for a defendant when courts apply the willful-blindness standard.

2. Knowledge Requirements under the Existing Standard

The *Global-Tech* decision reaffirmed the existing case law that requires knowledge of both the patent-in-suit and direct infringement. The first knowledge requirement is knowledge of the patent-in-suit. Marking a patent number on plaintiff's products helps meet the requirement. It works well particularly when the plaintiff and defendant are in the same industry. The examples are *Trading Techs. Int'l, Inc.*, *Weiland Sliding Doors and Windows, Inc.*, and *ePlus I*. Second, notifying a defendant of the patent-in-suit is another way to meet the requirement. This way is more direct. A plaintiff could initiate litigation about the patent-in-suit. The examples are *Trading Techs. Int'l, Inc., Inc.*, *Apeldyn I*, *Walker Digital, LLC*, *CyberFone Systems, LLC*, and *DataQuill Ltd*. In addition, a plaintiff could negotiate a licensing about the patent-in-suit. The examples are *Weiland Sliding Doors and Windows* and *Mformation Techs., Inc.*

The second knowledge requirement is knowledge of direct infringement. A plaintiff could file a law suit to make the defendant know direct infringement. The examples are *DataQuill Ltd.* and *Versata Software Inc.* A plaintiff could send a letter describing infringement, which is more direct to meet the requirement. *ePlus I.* is one example. Contrarily, a letter merely offering a licensing of the patent-in-suit is not enough. This rule is implied in *Weiland Sliding Doors and Windows, Inc.* In addition, a defendant's copying patented products with knowledge of the patent-in-suit might help prove knowledge of direct infringement. The example is *Weiland Sliding Doors and Windows, Inc.* However, evidence of knowledge of direct infringement could be rebutted. For example, a patent-in-suit has ambiguous claims. *Mikkelsen Graphic Eng'g Inc.* is one example.

3. Effects of Review Standards

Courts apply different review standards to different motions. It is expectable that the same factual scenario might reach different results in different motions. In Rule 12(b)(6) motions, courts primarily look at a plaintiff's pleadings. Plaintiffs have more leeway to present factual allegations about inducement. For example, the plaintiff in *Apeldyn I* successfully made a case of inducement by alleging that the knowledge of direct infringement was acquired by the defendant through its joint-vendor partner.

On the other hand, in non-Rule 12(b)(6) motions, courts adjudicate a dispute in favor of the non-movant. So, either plaintiffs or defendants could win motion judgment. The above-mentioned Rule 56 motion cases all resulted in letting disputes be tried by jury. That means at most one party had made a triable issue through evidence of inducement. In addition, the JMOL motions showed that the proof that the defendant was informed of the patent-in-suit and infringement resulted in a judgment favorable to the plaintiff.

IV. Conclusion and Future Study

The *Global-Tech* decision clarified the "knowledge" requirement under § 271(b). The Supreme Court required a plaintiff to prove the defendant's knowledge of both the patent-in-suit and direct infringement. To resolve the dispute in *Global-Tech*, the Supreme Court further created a new standard of knowledge as an alternative to prove actual knowledge. It is the willful-blindness standard which is a two-step test: (1) "the defendant must subjectively believe that there is a high probability that a fact exists;" (2) "the defendant must take deliberate actions to avoid learning of that fact."

According to early district court cases, the willful-blindness standard was applied to forming a ground of a decision. But, a few cases applied the standard to determine knowledge. Based on the cases reviewed by this study,

before more cases come out, the application of the willful-blindness standard cannot be predictable. However, some implications could be drawn from those cases. First, there is no affirmative duty to discover the patent-in-suit. It is better for a defendant has to do something to avoid infringement. A defendant might design around the patent-in-suit or acquire a credible assurance of non-infringement.

The dispute about the “knowledge” requirement was finally settled by the Supreme Court. However, a new dispute arose in 2012 because the Federal Circuit in *Akamai Techs., Inc. v. Limelight Networks, Inc.*³⁴³ clarified the requirement of “direct infringement” with respect to method claims. Whether the new definition of the “direct infringement” requirement affects the determination of “knowledge” is worth being watched or studied in the future.

Finally, the evolution of the “knowledge” requirement after *Global-Tech* is on-going at the district court level. The Appendix of this paper lists several updated case names and categorizes those cases into four types: (1) Rule 12(b)(6); (2) Rule 56; (3) Rule 50 & New Trial; (4) Other motions.

Appendix

(1) Rule 12(b)(6)

- MONEC Holding AG v. Motorola Mobility, Inc., 897 F. Supp. 2d 225 (D. Del. 2012).
- Brandywine Commc’ns Techs., LLC v. Casio Computer Co., 912 F. Supp. 2d 1338 (M.D. Fla. 2012).
- Brandywine Commc’ns Techs., LLC v. T-Mobile USA, Inc., 904 F. Supp. 2d 1260 (M.D. Fla. 2012).
- Pacing Techs., LLC v. Garmin Int’l, Inc., 2013 WL 444642 (S.D. Cal. Feb. 5, 2013).
- Versata Software, Inc. v. Callidus Software Inc., 2013 WL 2111672 (D. Del. May 16, 2013).
- Fairchild Semiconductor Corp. v. Power Integrations, Inc., 2013 WL 1309413 (D. Del. Mar. 29, 2013).
- E.I. Du Pont de Nemours and Co. v. Heraeus Holding GmbH, 2012 WL 4511258 (D. Del. Sept. 28, 2012).
- Allergan, Inc. v. Watson Labs., Inc.-Fla., 869 F. Supp. 2d 456 (D. Del. 2012).
- Gharb v. Mitsubishi Elec. Automation, Inc., 2012 WL 1986435 (N.D. Ill. June 4, 2012).
- Cronos Techs., LLC v. Camping World Inc., 2013 WL 3936899 (W.D. Ky. July 30, 2013).

³⁴³ *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301 (Fed. Cir. 2012).

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Nat'l Inst. for Strategic Tech. Acquisition and Commercialization v. Nissan of N. Am., 2012 WL 3600289 (E.D. Mich. Aug. 21, 2012).

Prism Techs., LLC v. McAfee, Inc., 2012 WL 5385210 (D. Neb. Nov. 1, 2012).

Silver State Intellectual Techs., Inc. v. FourSquare Labs, Inc., 2013 WL 5437363 (D. Nev. Sept. 26, 2013).

Rembrandt Social Media, LP v. Facebook, Inc., 2013 WL 2950342 (E.D. Va. June 12, 2013).

Radware, Ltd. v. A10 Networks, Inc., 2013 WL 5373305 (N.D. Cal. Sept. 24, 2013).

U.S. Ethernet Innovations, LLC v. Netgear, Inc., 2013 WL 4112601 (N.D. Cal. Aug. 12, 2013).

CreAgri, Inc. v. Pinnaclife Inc., 2013 WL 3958379 (N.D. Cal. Jul. 29, 2013).

Seoul Laser Dieboard Sys. Co. v. Serviform, S.r.l., 2013 WL 3761535 (S.D. Cal. Jul. 16, 2013).

Emblaze Ltd. v. Apple Inc., 2012 WL 5940782 (N.D. Cal. Nov. 27, 2012).

Infineon Techs. AG v. Volterra Semiconductor Corp., 2012 WL 3939353 (N.D. Cal. Sept. 10, 2012).

McRee v. Goldman, 2012 WL 3745190 (N.D. Cal. Aug. 28, 2012).

Proxyconn Inc. v. Microsoft Corp., 2012 WL 1835680 (C.D. Cal. May 16, 2012).

Guzik Technical Enters., Inc. v. W. Digital Corp., 2012 WL 1669355 (N.D. Cal. May 11, 2012).

Wistron Corp. v. Phillip M. Adams & Assocs., LLC, 2011 WL 4079231 (N.D. Cal. Sept. 12, 2011).

Potter Voice Techs. LLC v. Apple, Inc., 2013 WL 1325040 (D. Colo. Mar. 29, 2013).

E.I. Du Pont De Nemours & Co. v. Heraeus Precious Metals N. Am. Conshohocken LLC, 2013 WL 4047648 (D. Del. Aug. 8, 2013).

Telecomm Innovations, LLC v. Ricoh Co., 2013 WL 4017096 (D. Del. Aug. 6, 2013).

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