IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VLSI TECHNOLOGY LLC,

      Plaintiff,

      v.

INTEL CORPORATION,

      Defendant.

Civil Action No. 18-0966-CFC

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Brian E. Farnan, Michael J. Farnan, FARNAN LLP, Wilmington, Delaware;
Morgan Chu, Benjamin Hattenbach, Amy Proctor, Dominik Slusarczyk, Charlotte
J. Wen, IRELL & MANELLA LLP, Boston, Massachusetts; Christopher
Abernethy, Iian Jablon, Adina Stohl, Brian Weissenberg, IRELL & MANELLA
LLP, Los Angeles, California; Ben Yorks, IRELL & MANELLA LLP, Newport
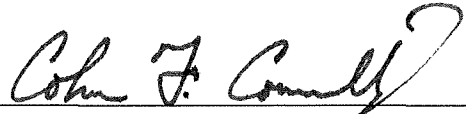Beach, California

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MEMORANDUM OPINION

June 26, 2020
Wilmington, Delaware

Colm F. Connolly
_____
COLM F. CONNOLLY
UNITED STATES DISTRICT JUDGE

Pending before me is VLSI Technology LLC's motion to amend its

Complaint. D.I. 257. By its motion, VLSI seeks to add claims for indirect

infringement and for enhanced damages based on willful infringement of U.S.

Patent Nos. 6,212,633 (the #633 patent) and 7,523,331 (the #331 patent).[1]

Defendant Intel Corporation opposes the motion insofar as the claims VLSI seeks

to add are for pre-suit infringement. D.I. 275 at 1, 4.[2]

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[1] VLSI also seeks in its motion to add claims for indirect infringement and for enhanced damages based on willful infringement of U.S. Patent Nos. 7,247,552 (the #552 patent) and 8,081,026 (the #026 patent). D.I. 257 at 1. The case, however, has been stayed with respect to those patents; and the parties have agreed that "VLSI's requests [in the present motion to amend] to add allegations regarding the [#]026 and [#]552 patents need not be decided at this time." D.I. 617 at 3.

[2] Intel also objected to VLSI's motion to the extent VLSI sought to add claims for enhanced damages based on post-suit willful infringement of the #633 patent, which expired before VLSI filed this suit. D.I. 275 at 18. In its reply brief, however, VLSI "clarif[ied] that it is not alleging post-filing willful infringement" of that patent. D.I. 286 at 2 n.1. For reasons not clear from the record, Intel has not objected to VLSI's remaining claims for post-suit indirect infringement and enhanced damages based on post-suit willful infringement. _See VLSI Tech. LLC v. Intel Corp._, 2019 WL 1349468, at *2 (D. Del. Mar. 26, 2019) (holding that "the complaint itself cannot serve as the basis for a defendant's actionable knowledge" for a willful infringement claim because "[t]he purpose of a complaint is not to create a claim but rather to obtain relief for an existing claim"); _Kaufman v. Microsoft Corp._, 2020 WL 364136, at *4 (S.D.N.Y. Jan. 22, 2020) (holding that "Plaintiff's theory [of post-suit knowledge of asserted patents] is without merit" and "not the law in this district").

I.   BACKGROUND

VLSI's Complaint originally included claims for indirect infringement of the #633 and #331 patents and enhanced damages based on willful infringement of those patents. D.I. 1 ¶¶ 32–33, 37, 114–15, 119. Intel, however, moved to dismiss those claims, D.I. 17, and I granted Intel's motion because the Complaint failed to state a plausible claim that Intel knew of or was willfully blind to Intel's infringement of the two patents, D.I. 110 at 5.

In support of its attempt to reintroduce these claims to the case, VLSI seeks to add to the Complaint allegations that Intel "regularly monitors its competitors' activities, which are often in the same field and involve similar products"; that "Intel has acknowledged that competitors may have patents covering similar products"; that the prior assignee of the #633 and #331 patents, NXP, is Intel's competitor and Intel monitors NXP's activities; and that Intel previously engaged NXP to purchase "other NXP patents." *Id.*, Ex. A ¶¶ 32, 123.

VLSI also seeks to add more detailed allegations regarding Intel's "publicly-known corporate policy forbidding its employees from reading patents held by outside companies or individuals." *Id.*, Ex. A ¶¶ 33, 124. VLSI's proposed amended complaint states that Intel employees "have admitted that this policy's purpose is to avoid possible triple damages for willful infringement." *Id.*, Ex. A ¶ 33 (internal quotation marks omitted). And the proposed amended complaint

alleges that "[b]ecause a patentee cannot recover triple damages for an infringer's mere knowledge of a patent, Intel's policy necessarily include[s] avoiding review of known patents to avoid learning of infringement." *Id.*, Ex. A ¶ 33.

VLSI argues that "[w]ith these new allegations, VLSI's proposed complaint states a claim that is more than plausible for enhanced damages based on Intel's willfulness, and for pre-filing indirect infringement." *Id.* at 2.

II.   LEGAL STANDARDS

A.   Motion to Amend

"If the complaint, as amended, would not survive a motion to dismiss, leave to amend may be denied as futile." *Delaware Display Grp. LLC v. Lenovo Grp. Ltd., Lenovo Holding Co.*, 2016 WL 720977, at *7 (D. Del. Feb. 23, 2016) (citation omitted). To survive a motion to dismiss, a complaint must set forth enough facts, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Deciding whether a claim is plausible is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679 (citation omitted). Detailed factual allegations are not required, but the complaint must include more than mere

"labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555 (citation omitted).

B.   Indirect Infringement

Indirect infringement "requires knowledge of the patent in suit and knowledge of patent infringement." *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926 (2015). A patentee can establish knowledge of patent infringement by showing that the defendant was willfully blind—i.e., by showing that the defendant (1) subjectively believed that there was a high probability that the induced acts constituted infringement and (2) took deliberate actions to avoid learning of that fact. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

C.   Enhanced Damages Based on Willful Infringement

Section 284 of the Patent Act "gives district courts the discretion to award enhanced damages against those guilty of patent infringement." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1935 (2016). The statute provides that "the court may increase the damages up to three times the amount found or assessed." 35 U.S.C. § 284. Although the Court in *Halo* intentionally "eschew[ed] any rigid formula for awarding enhanced damages under § 284," 136 S. Ct. at 1934, the Court held that the legal principles "developed over nearly two centuries of application and interpretation of the Patent Act . . . channel the exercise of [the

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