



valid patent, and (2) either that the defendant subjectively knew of the risk of infringement or that the risk of infringement was so obvious, the defendant should have known the risk. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (en banc); *see also Bard Peripheral Vascular, Inc. v. W.L. Gore & Assoc., Inc.*, 682 F.3d 1003 (Fed. Cir. 2012). A finding of willfulness “**must necessarily be grounded exclusively in the accused infringer’s pre-filing conduct.**” *Seagate*, 497 F.3d at 1371 (emphasis added). Therefore, “when a complaint is filed, a patentee must have a good faith basis for alleging willful infringement.” *Id.* at 1374.<sup>1</sup>

Applying *Seagate*, this Court has consistently held that without sufficient allegations of pre-suit notice, the filing of an infringement suit alone is insufficient to give rise to a plausible willful infringement claim. *InMotion Imagery Tech. v. Brain Damage Films*, No. 2:11-cv-414-JRG, 2012 U.S. Dist. LEXIS 112630, \*8 (E.D. Tex. Aug. 10, 2012) (granting motion to dismiss willful infringement claim where plaintiff merely alleged that the defendant had actual notice of the patent-in-suit “at least as of the time of the filing of this lawsuit”); *Achates Reference Pub., Inc. v. Symantec Corp.*, No. 2:11-cv-294-JRG-RSP, 2013 U.S. Dist. LEXIS 27143, \*12 (E.D. Tex. Jan. 2013), *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 26160 (E.D. Tex. Feb. 26, 2013) (dismissing willful infringement claim as patentee’s barebones assertion that the accused infringer willfully committed infringing acts was not sufficient); *Blue Spike, LLC v. Texas Instruments, Inc.*, 6:12-cv-499-MHS, Dkt. No. 1006 (E.D. Tex. Sept. 27, 2013) (holding

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<sup>1</sup> To survive a motion to dismiss under Rule 12(b)(6), a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draft the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The plaintiff must set forth enough in the complaint to “nudge[] [his] claims across the line for conceivable to plausible,” *Twombly*, 550 U.S. at 570, and if the “complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). To avoid dismissal for failure to state a claim, a plaintiff “must plead specific facts, not mere conclusory allegations.” *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1994) (citation omitted).

that”[a]bsent additional allegations, the filing of an infringement suit alone is insufficient to give rise to a post-filing willful infringement claim”).<sup>2</sup>

Solocron alleges that “AT&T has willfully infringed ... the [asserted patents] ... despite being on notice that its actions constitute infringement at least as of the date of service of Solocron’s original Complaint.” *See* Dkt. No. 20 (Amended Compl.) at ¶¶ 119, 127, 135, 143, 151, 159, 167. Notably, however, the Complaint does not allege any facts indicating that AT&T had knowledge of the asserted patents *prior to* the filing of the Complaint. As shown in each of the cases above, this is plainly insufficient. Accordingly, AT&T respectfully requests that the Court dismiss Solocron’s willful infringement claims with regard to each of the asserted patents.

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<sup>2</sup> Courts in other districts have arrived at the same result. *See, e.g., Netgear Inc. v. Ruckus Wireless Inc.*, No. 10-999-SLR, 2013 U.S. Dist. LEXIS 35686, \*4-5 (D. Del. Mar. 14, 2013) (dismissing willful infringement claim since the patentee could not plead any pre-suit knowledge of the patent by the accused infringer); *Pacing Tech, LLC v. Garmin Intern., Inc.*, No. 12-cv-1067 BEN (WMC), 2013 U.S. Dist. LEXIS 15728, \*11-12 (S.D. Cal. Feb. 5, 2013) (dismissing willful infringement claim because patentee failed to plead adequate facts to show pre-suit knowledge of the patent and had not moved for a preliminary injunction to stop any post suit conduct); *Radware, Ltd. v. A10 Networks, Inc.*, No. C-13-02021-RMW, 2013 U.S. Dist. LEXIS 136942, \*22 (N.D. Cal. Sept. 24, 2013) (granting motion to dismiss willful infringement claim where patentee failed to plead facts showing pre-suit knowledge of the patent).

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### **CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) on February 28, 2014. As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Nicholas Mathews

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