UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

AORTIC INNOVATIONS, LLC, Plaintiff, v. EDWARDS LIFESCIENCES CORPORATION; EDWARDS LIFESCIENCES LLC; EDWARDS LIFESCIENCES (U.S.) INC., Defendants.	)	Case No. 1:23-cv-00158-JPM JURY TRAL DEMANDED

ORDER DENYING DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS AND GRANTING DEFENDANTS' MOTION FOR MORE DEFINITE STATEMENT

Before the Court is Defendants Edwards Lifesciences Corporation, Edwards Lifesciences LLC, and Edwards Lifesciences (U.S.) Inc.'s (collectively, "Edwards") Motion to Dismiss for Failure to State a Claim, Motion for More Definite Statement, and Motion to Strike with supporting Brief, filed on May 15, 2023. (ECF Nos. 23-4.) For the following reasons, the Court **DENIES** Defendants' Motion to Dismiss and **GRANTS** Defendants' Motion for More Definite Statement. Defendants' Motion to Strike is rendered **MOOT**.

I. BACKGROUND

A. Factual Background

Plaintiff Aortic Innovations, LLC ("Aortic" or "AI") is incorporated in Florida, with a principal place of business in Hillsboro Beach, Florida. (ECF No. 13 ¶ 7.) Edwards is incorporated in Delaware, with a principal place of business in Irvine, California. (Id. ¶¶ 8–10.) Edwards sells the SAPIEN 3 Ultra TAVR (transcatheter aortic valve replacement), which Aortic alleges infringes one or more claims of the following of its patents: U.S. Patent No. 11,337,834 (the "'834 Patent"),

U.S. Patent No. 11,389,310 (the "'310 Patent"), U.S. Patent No. 11,491,033 (the "'033 Patent"), U.S. Patent No. 11,497,634 (the "'634 Patent"), and U.S. Patent No. 11,523,918 (the "'918 Patent") (collectively, "Asserted Patents"). (Id. ¶¶ 1–5.)

The patents are directed to an improvement in TAVR devices. The Complaint provides a general summary of TAVR:

> TAVR is a procedure where a replacement aortic heart valve is delivered by a catheter that is passed through an artery of a patient. Prior to TAVR, patients undergoing heart valve replacement would have their chest incised in an open heart procedure called Surgical Aortic Valve Repair ("SAVR"). SAVR often led to increased complications and was not deemed suitable for high risk patients who were often determined to be inoperable. The first TAVR device was approved in the United States by the Food and Drug Administration in 2011. Since that time, TAVR has become the leading choice for aortic valve replacement compared to the SAVR approach, with the number of TAVR procedures exceeding the number of SAVR procedures for the first time in 2019.

(Id. ¶ 3.) The claims of the Asserted Patents and the accused product are improvements on the original TAVR devices.

B. Procedural and Patent Background

This is the second district court action between these Parties regarding infringement of patents relating to improvements of the original TAVR devices. The history of litigation between the two parties is critical to the arguments in the instant Motions. As such, the Court briefly summarizes the procedural background from both proceedings and outlines the key dates and relationships between Aortic's patents asserted in each case.

1. The First Litigation and the Origin of the Dispute

Aortic filed the Complaint in the original action ("Aortic I") on September 28, 2021, accusing Edwards of infringing U.S. Patents No. 10,881,538 (the "'538 Patent"), 10,966,846 (the "'846 Patent"), 10,987,236 (the "'236 Patent"), and 11,129,735 (the "'735 Patent"). See Aortic Innovations LLC v. Edwards Lifesciences Corp., 1-21-cv-01377-JPM, Complaint for Patent

Infringement, ECF No. 1 (D. Del. Sept. 28, 2021). The Dispute, however, began prior to that. In July 2021, Dr. Ali Shahriari, Aortic's CEO, "suggested that Edwards' SAPIEN 3 Ultra valve practiced 'one or more claims' of Several [Aortic] patents." (ECF No. 24 at PageID 5395.) Edwards then determined that the Accused Products "do[] not practice any of the patents raised by Dr. Shahriari or, to the extent [Aortic's] patents could conceivably stretch to cover the SAPIEN 3 Ultra valve, the patents would be invalid in view of Edwards' own work conducted years before [Aortic] filed any patent applications." (Id.) Edwards proceeded to file an *Inter Partes* Review ("IPR") at the United States Patent and Trademark Office ("USPTO") in September 2021 to challenge the validity of Aortic's Patents. (ECF No. 13 ¶108.) Within the same month, Aortic filed the Complaint in Aortic I.

2. The Second (Instant) Litigation

On February 13, 2023, Aortic filed, but did not serve, the original Complaint (ECF No. 1) in the instant action ("Aortic II"), alleging direct infringement of the '834 and '310 Patents. On February 15, 2023, Aortic's counsel emailed Edwards' counsel to inform them of the February 13, 2023 Complaint, and stated that Aortic's SAPIEN 3 Ultra valve practices one or more claims of the '033, '634, and '918 Patents. (ECF No. 13 at Ex. 75.) On March 20, 2023, Aortic filed the First Amended Complaint ("FAC") alleging direct, induced, contributory, and willful infringement of the Asserted Patents. (See ECF No. 5.) On April 10, 2023, Aortic filed the Second Amended Complaint ("SAC"), again alleging direct, induced, contributory, and willful infringement of the Asserted Patents. (See ECF No. 13.)

3.Patent Relationships and Timelines

As shown in the table below, all of the Asserted Patents from Aortic II were published and granted before Aortic filed the instant action. The '834, '033, '634, and '918 Patents are all

continuations of the '846 Patent asserted in Aortic I. (See ECF No. 13-1 Ex. 1-2; ECF No. 13-5 Ex. 71-3.)

U.S. Patent No.	Grant Date	Publication Date
10,881,538 (Aortic I)	01/05/2021	01/07/2021
10,966,846 (Aortic I)	04/06/2021	03/04/2021
10,987,236 (Aortic I)	04/27/2021	04/15/2021
11,129,735 (Aortic I)	09/28/2021	06/03/2021
11,337,834 (Aortic II)	05/24/2022	09/09/2021
11,389,310 (Aortic II)	07/19/2022	11/12/2020
11,491,033 (Aortic II)	11/08/2022	08/04/2022
11,497,634 (Aortic II)	11/15/2922	12/30/2021
11,523,918 (Aortic II)	12/13/2022	7/15/2021

(Id.; Aortic I, ECF No. 1-1 Ex. 1-4.)

II. LEGAL STANDARD

When reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept the complaint's factual allegations as true. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007). "Though 'detailed factual allegations' are not required, a complaint must do more than simply provide 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" Davis v. Abington Mem'l Hosp., 765 F.3d 236, 241 (3d Cir. 2014) (quoting Twombly, 550 U.S. at 555). A complainant must plead facts sufficient to show that a claim has "substantive plausibility." Id. at 247. That plausibility must be found on the face of the complaint. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

III. ANALYSIS

The instant Motions seek dismissal of willful and induced infringement claims as well as a more definite statement of the 35 U.S.C. § 287 claim. Edwards asks the court to find that: (1) willful infringement claims should be dismissed as to all Asserted Patents; (2) willful infringement claims for the '834 and '310 Patents should be dismissed; (3) indirect infringement claims for the '834 and '310 Patents should be dismissed; and (4) Aortic should provide a more definite statement regarding 35 U.S.C. § 287 allegations, or, in the alternative, the Court should strike those allegations from the SAC. The Court addresses each of these arguments in separate sections below. Before proceeding, however, it is important to outline the relevant legal standard for willful and induced infringement at the motion to dismiss stage.

"[I]n order to sufficiently plead willful infringement, a plaintiff must allege facts plausibly showing that as of the time of the claim's filing, the accused infringer: (1) knew of the patent-in-suit; (2) after acquiring that knowledge, it infringed the patent; and (3) in doing so, it knew, or should have known, that its conduct amounted to infringement of the patent." See Välinge Innovation AB v. Halstead New England Corp., No. 16-1082-LPS-CJB, 2018 WL 2411218, *12-*13 (D. Del. May 29, 2018); see also Bayer Healthcare LLC v. Baxalta Inc., 989 F.3d 964, 988 (Fed. Cir. 2021) ("Knowledge of the asserted patent and evidence of infringement is necessary, but not sufficient, for a finding of willfulness."). District courts across the nation, including in this District, have been split regarding whether reliance solely on post-suit knowledge allows for a finding of willful infringement. See Välinge Innovation, 2018 WL 2411218 at *10 (summarizing the split between the district courts). As previously outlined in Välinge Innovation, this Court agrees that, based on Federal Circuit's decision in Mentor Graphics Corp. v. EVE–USA, Inc., 851 F.3d 1275 (Fed. Cir. 2017), "[i]n order to survive a motion to dismiss … the allegations regarding

willful infringement must simply render it plausible that this type of conduct has occurred as of the date of the filing of the claim." Välinge Innovation, 2018 WL 2411218 at *12. In other words, post-suit knowledge alone is insufficient to sustain a claim for willfulness even at the motion to dismiss stage. In order to make a showing of willfulness at this stage in the proceedings, plaintiffs must plead some factual allegations "that plausibly demonstrate that the accused infringer not only knew of the patent-in-suit, but also knew or should have known that what it was doing (and what it continued to do) amounted to infringement of that patent." Id. at *13.

Similarly, "[L]iability for inducing infringement attaches only if the defendant knew of the patent and that 'the induced acts constitute patent infringement.'" Commil USA, LLC v. Cisco Sys., Inc., 575 U.S. 632, 639 (2015) (quoting Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766 (2011)). More specifically, to state a claim of induced infringement, a complaint must plausibly allege that (1) a third party directly infringed the asserted claims; (2) the defendant induced those infringing acts; and (3) the defendant knew the acts it induced constituted infringement. See Id. at 641-42.

A. Dismissal of Willful Infringement Claims for All Five Asserted Patents

Edwards argues that Aortic's "willful infringement claims for all five Asserted Patents should be treated as post-suit willfulness claims and should be dismissed because [Aortic] cannot plausibly plead that Edwards willfully infringed any Asserted Patent under the circumstances in this case." (ECF No. 24 at PageID 5398.) Edwards asserts that Aortic II is simply a continuation of Aortic I because all of the Asserted Patents are "continuations of the patents asserted in [Aortic I], meaning that they share substantively identical drawings and specifications." (Id. at PageID 5401.) Edwards further asserts that because Aortic II is a continuation of Aortic I, it presents "the same 'black box' privilege and proof issues recognized in [Wrinkl, Inc. v. Facebook, Inc., No. 20-cv-1345-RGA, 2021 WL 4477022, at *7 (D. Del. Sept. 30, 2021).]" (Id.) Edwards argues that it

was acting on the advice of litigation counsel when Edwards became aware of the Asserted Patents and thus "allegations of willful infringement 'are not plausible' in such circumstances." (Id.)

In response, Aortic argues that "Edwards' request to dismiss Aortic's willful infringement claims as to all five Asserted Patents based on 'privilege and proof' issues'…should be denied as unfounded, hypothetical, and unsupported." (ECF No. 33 at PageID 5460.) Aortic argues that its willfulness allegations "are supported in part by Edwards' conduct and course of dealing with Aortic *before* the Aortic I suit was even filed …[and] Edwards' *public* filings attaching and discussing the Asserted Patents[.]" (Id.) Aortic argues that the black box issues discussed in Wrinkl are not applicable in this case, because "Edwards' public briefing and IPR filings are not subject to privilege[,]" and thus "'privilege and proof issues' are not a legitimate concern for Edwards' public filings either." (Id. at PageID 5469.)

Aortic further argues that "Edwards cites no authority holding that willful infringement cannot be alleged in a second related infringement action due to 'privilege and proof issues' arising from the filing of a first action." (Id.) Aortic argues that at minimum Edwards' actions[1] show they were willfully blind to the infringement of Aortic's patents. (Id.) Finally, Aortic argues that "some of Aortic's willfulness allegations are based on Edwards' course of conduct and behavior toward Aortic and Dr. Shahriari prior to the filing of the Aortic I suit." (Id. at PageID 5470.)

In reply, Edwards argues that Aortic's willful infringement claims present black box privilege and proof issues because Aortic II is an extension of Aortic I, and as such, the Court "should treat [Aortic's] willfulness allegations as post-suit willfulness." (ECF No. 34 at PageID 5485.) Edwards argues that the instant case is an extension of Aortic I because: (1) Asserted

[1] Aortic alleges that while facing infringement claims of Aortic's patents, Edwards continued to "sell the original accused product, release a second accused product, and work on a third similar product." (ECF No. 33 at PageID 5469.)

Patents are in the same family; (2) Asserted Patents share the same specification; (3) Litigation counsel are the same; and (4) Accused Products are the same. (Id.) Edwards further argues that in Brandywine Commc'ns Techs., LLC v. T-Mobile USA, Inc., 904 F. Supp. 2d 1260 (M.D. Fla. 2012), the district court in Florida "dismissed induced and willful infringement allegations in a second suit that were based on a complaint in the first suit and letters sent during the first suit." (Id. at PageID 5485.)

Edwards also argues that Aortic's February 15 email does not eliminate the privilege and proof issues since it presents the same post-suit considerations discussed in Wrinkl. (Id. at PageID 5486.) Edwards argues that Aortic "ignores that willfulness must be based on prelitigation conduct." (Id.) Edwards also asserts (without support) that Edwards' public filings cited by Aortic do not eliminate the privilege and proof issues, because those filings were prepared by litigation counsel. (Id. at PageID 5487.) Edwards argues that Aortic's reliance on the public filings falls short, because it can only show that "Edwards had knowledge merely of four of the five asserted patents." (Id. at PageID5488.) Edwards asserts that the "SAC contains no allegation that Edwards intended to infringe all five asserted patents," and that willful blindness is not enough to meet the standards for willfulness. (Id.)

Edwards' argument regarding willfulness for all five Asserted Patents is premised on the contention that Aortic II should be treated as a continuation of Aortic I. Edwards cites two cases ostensibly in support: the Wrinkl case and the Brandywine case. (ECF No. 34 at PageID 5485-6.) Wrinkl does not address or support two separate litigations being viewed as one. See generally Wrinkl, 2021 WL 4477022. Putting aside that Wrinkl is not reported and is not binding on this Court, the Wrinkl Court's discussion of the black box problem relates to post-suit knowledge after filing of the complaint in the same action (not two separate actions). See Id. at *7 ("It is possible

that a defendant could engage in such bad behavior even though it did not know of the patent until suit was filed. But in the usual case, willfulness based on post-suit knowledge is a black box.").

Brandywine, although technically dealing with two separate cases, similarly fails to address the circumstances at issue here. See generally Brandywine, 904 F. Supp. 2d 1260. In Brandywine, the second case resulted from a court-ordered severance from the original case. As such, both cases raised the same causes of action for the exact same patents. Id. at 1262-4, 1269. That is not the case here. Here the two litigations deal with separate counts of infringement for different patents.

The premise that two separate litigations could be continuations of each other because they involve patents that are continuations of each other, or because litigation counsel and accused products are the same, has no merit. Such a ruling would lead to absurd results, preventing plaintiffs from adequately protecting their property rights and failing to deter wrongful actors from willful infringement, simply because an earlier patent in the same family was previously litigated. Edwards fails to provide the Court with a measurable means of determining when such a chain tying separate litigations together could be broken. Would a continuation filed four, five, or six patents apart be enough? There is insufficient reason to treat these litigations as one and thus require pre-suit knowledge to precede the filing of the complaint in Aortic I.

Given that Court will not treat Aortic II as a continuation of Aortic I, pre-suit knowledge would constitute knowledge that took place prior to the filing of the original Complaint in the instant action (February 13, 2023). When considering a motion to dismiss, the Court must accept all of the complaint's well-pleaded facts as true." Fowler v. UPMC Shadyside, 578 F.3d 203, 210–11 (3d Cir. 2009). Here, the SAC clearly outlines Edwards' public filings and statements regarding the Asserted Patents, thus showing Edwards knew of these Patents before the filing of the original

Complaint in the instant action. (ECF No. 13 ¶¶ 111-3). Edwards argues that even if Aortic can show pre-suit knowledge, they could not show that Edwards knew or should have known that they were infringing the Asserted Patents. (ECF no. 34 at PageID5488.) This assertion is not well taken given that in the same Motion Edwards argues that the Patents in Aortic I and the instant case are so similar as to transform two separate actions into a singular case. (See e.g., ECF No. 24 at PageID 5401.) Even treating this argument as made in the alternative and taking well pleaded facts regarding Edwards' own statements and filings as true, the Court finds that these facts show that Edwards knew or should have known that the SAPIEN 3 Ultra valve potentially infringes the Asserted Patents.

Furthermore, the fact that Aortic I and the instant case are separate litigations also moots the arguments Edwards' presented regarding black box privilege and proof issues. A defendant is not able to hide behind its lawyers' public filings and statements and claim ignorance when convenient. As Aortic noted, Edwards' public briefing and IPR filings are not subject to privilege. (ECF No. 33 at PageID 5469.) Edwards also argues that Aortic's reliance on the public filings falls short because it can only show that "Edwards had knowledge merely of four of the five asserted patents." (Id. at PageID 5488.) Aortic, however, has pled in the SAC that "since at least the time of Dr. Shahriari's July 19, 2021 email and the filing of Aortic's complaint in September 28, 2021, Edwards has investigated Aortic's patents and patent applications at least in connection with the numerous IPR's filed to date by Edwards on Aortic's patents," and as such should have been aware of all five Asserted Patents. (ECF No. 13 at ¶¶ 111-3.)

Based on the above, the Court finds that Aortic has sufficiently pled requisite pre-suit knowledge of the Asserted Patents. The Court, therefore, **DENIES** Edwards' Motion to Dismiss willful infringement contentions for all five Asserted Patents.

B. Dismissal of Willful Infringement Claims for the '834 and '310 Patents

Edwards argues that Aortic's "willful infringement claims for the '834 and '310 [P]atents should be dismissed because [Aortic] fails to allege facts supporting a plausible inference that Edwards had the requisite pre-suit knowledge of the '834 and '310 [P]atents required for willful infringement." (ECF No. 24 at PageID 5398.) Edwards argues that Aortic cannot establish that Edwards had the requisite knowledge of the '834 and '310 Patent before the February 13, 2023 filing of the original complaint in Aortic II because: (1) Aortic cannot rely on its February 15 email as it was sent two days after the original complaint was filed in Aortic II; and (2) Aortic "cannot rely on Edwards attachment of the '834 and '310 [P]atents as exhibits to Edwards' responsive claim construction brief [in Aortic I]" because at most those attachments show that Edwards knew these patents existed, but not that they knew or should have known that they were infringing them. (Id. at PageID 5402-3.) As such Edwards argues that Aortic must rely "on post-suit knowledge in the form of [Aortic's] original Complaint and an email sent two days ***after*** [Aortic] filed its original Complaint." (Id. at PageID 5402.)

Edwards argues that Aortic also fails to demonstrate post-suit knowledge, equating the situation to the Aortic's willful infringement claims for the '735 Patent in Aortic I, which this Court dismissed due to lack of pre-suit knowledge. (Id. at PageID 5404-5); see Aortic I, ECF No. 25. Edwards argues that the Court should adopt the logic in ZapFraud Inc. v. Barracuda Networks, Inc., which explained that the "purpose of enhanced damages is to punish and deter bad actors from egregious conduct, not to provide a financial incentive for opportunistic plaintiffs to spring suits for patent infringement on innocent actors who have no knowledge of the existence of the asserted patents." 528 F. Supp. 3d 247 (D. Del. 2021).

In response, Aortic argues that "Aortic's allegations and evidence demonstrate that Edwards had knowledge of the '834 and '310 Patents months before the Aortic II Original

Complaint was filed when Edwards discussed and attached copies of the '834 and '310 Patents in briefing filed in the Aortic I matter." (ECF No. 33 at PageID 5461.) Aortic further argues that Edwards' public statements[2] indicate that Edwards was not only aware of the two patents but also knew or should have known of the ongoing infringement. (Id.) Aortic argues that "Edwards' knowledge of infringement can be reasonably inferred from Edwards' claim that Aortic was 'crafting patent claims,'… 'that read on Edwards' devices.'" (Id. at PageID 5472.) Finally, Aortic argues that the case law cited by Edwards' "does not support dismissing Aortic's willful infringement claims" as to the two patents at issue, because "the allegations and evidence in Aortic's SAC reflect that Edwards had direct knowledge of [both patents] months before the Original Complaint was filed." (Id. at PageID 5473.)

Regarding post-suit knowledge, Aortic argues that Edwards had requisite post-suit knowledge of the two patents because (1) Aortic sent notice correspondence to Edwards informing them of the infringement, independent of the filed Complaint; and (2) "as Edwards admits, under split authority in this district it is permissible to rely on the filing of a complaint for post-suit willful infringement." (Id. at PageID 5462, 5474.) Aortic also argues that because it plausibly establishes pre-suit knowledge, it also plausibly pled post-suit knowledge. (Id. at PageID 5473-4.)

In reply, Edwards argues that Aortic's willfulness allegations for the '834 and '310 Patents are insufficient because (1) they fail to allege knowledge of infringement; and (2) the post-suit knowledge cannot save Aortic's deficient willfulness claims for these two patents. (ECF No. 34 at PageID 5489-91.) Edwards argues that the "inner frame" citation cannot show knowledge of infringement as Edwards discussed it "merely as an example to show that [Aortic] is adjusting its

[2] Aortic refers to the following public statements made by Edwards: (1) "Aortic continues to obtain *patents* without an 'inner frame' limitation after Edwards' identified that limitation as missing from its Sapien 3 Ultra valve[;]" (2) "Aortic has repeatedly argued to the Patent Office that SAPIEN 3 Ultra 'appears to be covered by the claimed invention." (ECF No. 33 at PageID 5471.)

patent prosecution strategy based on flaws exposed in the litigation with Edwards." (Id. at PageID 5489.) Edwards argues that the statement regarding SAPIEN 3 Ultra valve appearing to be covered by claimed invention "does not clearly reference the '834 or '310 [P]atents." (Id.) Edwards further contends that it only cited the two patents in its filings in Aortic I "in a footnote to illustrate that '[Aortic] knows how to claim an apparatus with only a frame and covering.'" (Id. at PageID 5490.) Finally, Edwards argues that "Edwards could not have been aware of 'Aortic's contention that the SAPIEN 3 Ultra read on [the '834 and '310] patents' because [Aortic] never made the contention prior to this action." (Id.)

In regard to post-suit knowledge, Edwards argues that courts in Delaware have found issues with willful infringement claim based on post-suit knowledge. (Id. at PageID 4592 (citing Pact XPP Schweiz AG v. Intel Corp., 2023 WL 2631503, at *5 (D. Del. Mar. 24, 2023), reconsideration denied, 2023 WL 3934058 (D. Del. June 9, 2023); ZapFraud, 528 F. Supp. 3d at 251-52.) Edwards argues that Aortic "provides no explanation as to why the reasoning of Pact and ZapFraud is incorrect, nor why this Court, which has already dismissed willful infringement claims for lack of pre-suit knowledge in Aortic I, should hold differently here." (Id.) Finally, Edwards argues that Aortic fails to provide any basis for why the February 15 email should be treated as independent basis for post-suit knowledge. (Id.)

As set out in detail in Section III.A above, the Court finds that Plaintiff sufficiently pled pre-suit knowledge regarding all five Asserted Patents, including the '834 and '310 Patents at issue here. See supra Section III.A. Edwards' arguments regarding reasons for its public statements and attachment of these two Patents to public filings do not change the Court's findings given that,

at the Motion to Dismiss phase, Courts must accept the complaint's factual allegations as true and construe them in favor of the non-moving party. See Twombly, 550 U.S. at 555–56 (2007).

Edwards' argument that Aortic did not contend that the SAPIEN 3 Ultra valve infringes the '834 and '310 Patents prior to the filing of this action also fails. Aortic was not required to contend infringement prior to filing to show that Edwards knew or should have known of the infringement. Ravgen, Inc. v. Ariosa Diagnostics, Inc., No. CV 20-1646-RGA-JLH, 2021 WL 3526178, at *3 (D. Del. Aug. 11, 2021) ("knowledge of infringement can be 'based on surrounding circumstances[.]'") (citing 3Shape A/S v. Align Tech., Inc., No. 18-886-LPS, 2019 WL 1416466, at *2 (D. Del. Mar. 29, 2019) (quoting In re Bill of Lading Transmission & Processing Sys. Pat. Litig., 681 F.3d 1323, 1340 (Fed. Cir. 2012))). Aortic lists several statements and public filings in the SAC, which when interpreted in light most favorable to the non-moving party, allow the Court to infer pre-suit knowledge of infringement from the surrounding circumstances. (See ECF No. 13 ¶¶ 111-3)

Because the Court finds that the standard for pre-suit knowledge has been met, it is not necessary to address any of the arguments presented regarding post-suit knowledge. For the foregoing reasons, the Court **DENIES** Edwards' Motion to Dismiss willful infringement contentions for the '834 and '310 Patents.

C. Dismissal of Indirect Infringement Claims for the '834 and '310 Patents

Edwards argues that Aortic's "indirect infringement claims for the '834 and '310 [P]atents should be dismissed because [Aortic] fails to allege facts supporting a plausible inference that Edwards had pre-suit knowledge of the '834 and '310 [P]atents, or that Edwards possessed the specific intent required for indirect patent infringement." (ECF No. 24 at PageID 5398.) As such, Edwards asserts that Aortic must rely on post-suit knowledge "from the filing of the AI's original Complaint and the post-suit February 15, 2023 email." (Id. at PageID 5405.) Edwards argues that

Delaware courts have held that the complaint "cannot be the source of knowledge required to sustain claims of induced infringement." (Id. (citing ZapFraud, 528 F. Supp. 3d at 250).) In a footnote, however, Edwards notes that Delaware courts "are divided regarding whether a complaint can serve as the source of knowledge for post-suit indirect infringement claims." (Id. at PageID 5406 n. 2.)

In response, Aortic argues that its "has sufficiently and plausibly pled both pre- and post-suit knowledge of the patents and Edwards' infringement as discussed in connection with Edwards' requests to dismiss Aortic's willful infringement allegations." (ECF No. 33 at PageID 5462.) Aortic argues that "as Edwards acknowledges, under some Delaware authority […] a plaintiff may amend its complaint to alleged knowledge since the filing of the original complaint for indirect infringement claims," and Aortic did so by filing the FAC and the SAC. (Id. at PageID 5476.)

In reply, Edwards argues that in the willfulness discussion in its brief it demonstrated that Aortic's allegations fail to show "Edwards' pre-suit knowledge of the alleged infringement" of the two patents. (ECF No. 34 at PageID 5493.) Edwards also argues that the court in Zapfraud "explained that a plaintiff cannot 'prove an element of a legal claim with evidence that the plaintiff filed the claim.'" (Id. (citing Mot. at 13-14 (citing ZapFraud, 528 F. Supp. at 247)).) Edwards argues that the case law cited by Aortic in its Response fails to "provide any reasoning." (Id.)

To state a claim of induced infringement, a complaint must plausibly allege that (1) a third party directly infringed the asserted claims; (2) the defendant induced those infringing acts; and (3) the defendant knew the acts it induced constituted infringement. Commil USA, 575 U.S. at 641-2. As set out in detail in Section III.A above, the Court finds that Plaintiff sufficiently pled pre-suit knowledge regarding all five Asserted Patents, including the '834 and '310 Patents at issue

here. See supra Section III.A. Thus, it has been established that Aortic met element three of the standard for stating a claim of induced infringement. Id. The SAC also sufficiently pleads elements one and two as it provides that Edwards induces infringement by others, such as "Edward[s'] affiliated hospitals, doctors, medical professionals, distributors, customers, and end users[,]" by performing "affirmative acts of manufacturing, selling, distributing, and/or otherwise making available the Accused Products, and providing instructions for use, documentation, online technical support and videos, marketing, product manuals, advertisements, and other information to customers and end users[.]" (ECF No. 13 ¶¶ 134, 153.)

Because the Court finds that pre-suit knowledge has been met, it is not necessary to address the arguments presented regarding post-suit knowledge. The Court therefore **DENIES** Edwards' Motion to Dismiss indirect infringement contentions for the '834 and '310 Patents.

D. More Definite Statement Regarding 35 U.S.C. § 287

Edwards argues that Aortic's "allegations regarding 35 U.S.C. § 287 are so conclusory, vague, and ambiguous that Edwards cannot reasonably prepare a response." (ECF No. 24 at PageID 5398.) Edwards alternatively asks the Court to strike these allegations from the SAC. (Id.) Edwards argues that "[e]ven though [Aortic] bears the burden on pleading compliance with section 287, the totality of [Aortic's] allegations regarding section 287 are provided in a single, conclusory sentence." (Id. at PageID 5406.)

In response, Aortic argues that "Aortic's SAC is sufficiently definite to enable Edwards to answer it." (ECF No. 33 at PageID 5462.) Aortic argues that because Edwards "knows and has known that Aortic does not make or sell a TAVR product, or authorize any third-party to do the same[,]" Aortic is under no obligation to mark any products pursuant to 35 U.S.C. § 287. Aortic

thus argues that "there exists no product which Aortic is obligated to mark under 35 U.S.C. § 287." (Id. at PageID 5477.)

In reply, Edwards argues that Aortic 35 U.S.C. § 287 "addresses remedies generally, including numerous legal requirements other than patent marking[,]" and thus the SAC "fails to explain which of the many § 287 requirements are applicable or how they are allegedly satisfied." (ECF no 24 at PageID 5493.)

35 U.S.C. § 287 sets out limitations on remedies in patent infringement cases. See 35 U.S.C. § 287. The only mention in the SAC of § 287, states: "[t]o the extent applicable, the requirements of 35 U.S.C. § 287 have been met with respect to the Patents-in-Suit." (ECF No. 13 at ¶ 90.) Aortic thus fails to provide details regarding § 287 or how it would be applicable in this case. The Court therefore finds that the single sentence is indeed "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Schaedler v. Reading Eagle Publ'n, Inc., 370 F.2d 795, 797 (3d Cir. 1967).

For the foregoing reasons, the Court **GRANTS** Edwards' Motion for More Definite Statement. Aortic is allowed thirty (30) days (excluding two (2) holidays), that is, no later than January 8, 2024, to file an amended complaint.[3] Because the Court has granted Edward's Motion for More Definite Statement, its Motion to Strike is found **MOOT**.

IV. CONCLUSION

For the reasons discussed above, the Court **DENIES** Edwards's Motion to Dismiss and **GRANTS** Edward's Motion for More Definite Statement. Edwards' Motion to Strike is determined to be **MOOT**. The Second Amended Complaint having been determined to be insufficient as discussed above, Aortic is allowed thirty (30) days (excluding holidays) from the

[3] See ECF No. 33 at PageID 5477 ("Aortic respectfully requests that the Court . . . permit Aortic to file an amended complaint" if Defendants' Motion for a More Definite Statement is granted).

date of entry of this order to file an amended complaint to provide a more definite statement regarding facts supporting compliance with the § 287 requirement in this case.

IT IS SO ORDERED, this 8th day of December, 2023.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE