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REPORT AND RECOMMENDATION: The Court, having reviewed Defendant's motion to dismiss ("Motion"), (D.I. [21]), and the briefing related thereto, (D.I. [22]; D.I. [27]; D.I. [28]), and having considered the relevant legal standards regarding review of a motion filed pursuant to Fed. R. Civ. P. 12(b)(6), *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009), hereby RECOMMENDS as follows: (1) To the extent the Motion requests that the Court dismiss Plaintiff's "claims for pre-suit willful infringement because the [operative First Amended Complaint, or 'FAC'] does not plausibly allege that [Defendant] knew of the two asserted patents" (the 515 and the 892 patents, which both issued in 2012) prior to the filing of the original Complaint in May 2024, (D.I. [22] at 3; *id.* at 5; *see also* D.I. [19] at paras. 79, 81), the Court recommends that it be DENIED. The FAC sufficiently pleads pre-suit knowledge due to the effect of its *combined* allegations. These include the following: (a) Plaintiff and Defendant are sophisticated, direct competitors who each manufacture railcars.; (b) The parties were adversaries in a number of prior patent litigation matters involving other patents (i.e., in cases filed in 2011 and 2015, as well as in prior IPR proceedings).; (c) Defendant (via its attorneys, whom it is surely plausible that Defendant's employees conferred with as to these matters at the relevant times), *see LiTL LLC v. Dell Techs. Inc.*, Civil Action No. 23-121-RGA, 2023 WL 7922176, at *2 (D. Del. Nov. 16, 2023), cited the 515 patent—which has the same specification as the 892 patent, is a divisional of the 892 patent and facially references the 892 patent—during prosecution of one of its own patent applications in 2018, and cited to or incorporated by reference the 515 patent (along with other patents associated with the first-named inventor of the asserted patents) in 2014 and 2016 during prosecution of its own patent applications.; and (d) Plaintiff marked its patent-embodying products with a prominent "U.S. AND OTHER PATENTS PENDING" notification, and when Defendant (who was about to compete with Plaintiff again as to a potential contract with a third party) inspected Plaintiff's embodying products in July 2024, its employees saw that marking. (D.I. [19] at paras. 17, 20, 29, 33-55, 57-59, 61-68, 70) That is plenty of circumstantial evidence to support the plausible claim that Defendant—i.e., a party that had every reason to be highly attuned to the ins and outs of the intellectual property portfolio of its fierce competitor, one with whom it frequently litigates in the patent space—knew of the asserted patents and their content prior to suit. *See Aerin Med. Inc. v. Neurent Med. Inc.*, Civil Action No. 23-756-JLH, D.I. 74 (D. Del. June 5, 2024); *CommScope Techs. LLC v. AFL Telecomms. LLC*, Civil Action No. 21-377-JLH, D.I. 48 (D. Del. June 5, 2024); *10x Genomics, Inc. v. Celsee, Inc.*, Civil Action No. 19-862-CFC-SRF, 2019 WL 5595666, at *8 (D. Del. Oct. 30, 2019), *report and recommendation adopted*, 2019 WL 6037558 (D. Del. Nov. 14, 2019); *Elm 3DS Innovations, LLC v. Samsung Elecs. Co.*, Civil Action No. 14-1430-LPS-CJB, 2015 WL 5725768, at *2-3 (D. Del. Sept. 29, 2015), *report and recommendation adopted*, 2016 WL 1274812 (D. Del. Mar. 31, 2016).; (2) To the extent that the Motion requests that the Court dismiss Plaintiff's claims for "post-suit" willful infringement after the date of filing of the original Complaint, the Court recommends that no action be taken on this assertion, since a claim of willful infringement has already plausibly been set out, and there is no need at this time for the District Court to get into the weeds and determine exactly what date willful infringement ceased for purposes of the claim.; (3) To the extent that the Motion requests that the Court dismiss Plaintiff's claims for induced infringement, the Court also recommends that it be DENIED, as Defendant's argument as to inducement rises and falls with its willful infringement-related knowledge arguments. (D.I. [22] at 10) Since Plaintiff has sufficiently pleaded knowledge for purposes of setting out a viable willful infringement claim, it has done the same as to a viable induced infringement claim.; and (4) This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b)(2). The failure of a party to object to legal conclusions may result in the loss of the right to de novo review in the district court. *See Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006); *Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir. 1987). The parties are directed to the Court's Standing Order for Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the District Court's website, located at http://www.ded.uscourts.gov. Ordered by Judge Christopher J. Burke on 01/21/2025. (smg)

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