No. 2023-102

IN THE

United States Court of Appeals

FOR THE FEDERAL CIRCUIT

IN RE: STINGRAY IP SOLUTIONS LLC,

Petitioner.

On Petition for Writ of Mandamus to
the United States District Court for the Eastern District of Texas,
Nos. 2:21-cv-00045-JRG and 2:21-cv-00046-JRG
Chief Judge J. Rodney Gilstrap

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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Respondents all but concede that, under the proper standard, mandamus review is appropriate here. "[T]he Supreme Court and this [C]ourt have confirmed that mandamus relief may be appropriate in certain circumstances to decide 'basic' and 'undecided' questions," as well as " 'to further supervisory or instructional goals where issues are unsettled and important.' " *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1011 (Fed. Cir. 2018) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964), and *In re Queen's Univ. at Kingston*, 820 F.3d 1287, 1291 (Fed. Cir. 2016); citing *In re Micron Technology, Inc.*, 875 F.3d 1091, 1095-96 (Fed. Cir. 2017), *In re Cray, Inc.*, 871 F.3d 1355, 1358-59 (Fed. Cir. 2017), and *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1313 (Fed. Cir. 2011)). The petition urged review on exactly that basis, *see* Petition 1-3, 13-16, 22-23, citing half a dozen cases where this Court granted mandamus review of § 1406 transfer decisions to resolve unsettled legal issues, *see* Petition 14-15.

Rather than address that standard, respondents ignore it. They never mention this Court's precedents holding that mandamus is appropriate to resolve unsettled, important questions that have divided district courts. And far from rebutting Stingray's showing that the standard is met here, respondents confirm that it is satisfied. Respondents admit there are "myriad competing views—at both the district court and appellate levels—regarding the proper application of a defendant's consent under Rule 4(k)(2)." Opp. 3, 19. And they concede that those conflicting views

stem largely from district courts' "disparate" interpretations of "this Court's precedents." Opp. 3. It could not be clearer that "mandamus is a proper vehicle" for this Court to bring clarity to "the fundamental legal issues presented in this case and many others." *In re Micron*, 875 F.3d at 1096.

Respondents nonetheless invoke the "clear and indisputable" standard for mandamus, saying it is not met because district courts have decided the Rule 4(k)(2) issue here "in disparate ways." Opp. 19-20. But they cannot escape the alternative standard this Court has repeatedly invoked—that mandamus is proper to resolve "unsettled, recurring legal issues" that have produced "disparate results." *In re Micron*, 875 F.3d at 1095.

Respondents' opposition brief is otherwise an exercise in revisionism. Their insistence that these cases somehow do not present the question at issue rests on an effort to rewrite the decision below. The district court declared Rule 4(k)(2) inapplicable based ***solely*** on respondents' post-suit consent to " 'submit to jurisdiction' in" California. Appx15 (quoting Appx176). It ***never*** found personal jurisdiction would otherwise be proper in California.

Respondents also attempt to rewrite their own submissions below, which never argued (much less proved) that ***non-party TP-Link USA's*** contacts with California established personal jurisdiction in California over ***respondents TP-Link China and Hong Kong***. To the contrary, respondents repeatedly insisted that TP-

Link USA's contacts ***could not be imputed to respondents*** for personal-jurisdiction purposes. The district court never held otherwise. Respondents cannot evade review of the district court's decision by imagining rulings that court never made.

I. MANDAMUS IS WARRANTED TO RESOLVE THE CONCEDED CONFLICT OVER WHETHER FOREIGN DEFENDANTS CAN DEFEAT PERSONAL JURISDICTION UNDER RULE 4(k)(2) BY CONSENTING TO SUIT IN ANOTHER FORUM

As this Court and the Supreme Court have recognized, "mandamus can be an appropriate means for the appellate court to correct a district court's answers to 'basic, undecided' legal questions." *In re Micron*, 875 F.3d at 1095 (quoting *Schlagenhauf*, 379 U.S. at 110). Mandamus is particularly appropriate to resolve questions that are "important to 'proper judicial administration' " and have generated "considerable litigation producing disparate results." *Id.* (quoting *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957)).

The issue here—whether foreign defendants can defeat personal jurisdiction under Rule 4(k)(2) and obtain transfer simply by consenting to jurisdiction in their preferred forum—is exactly the kind of "basic, unsettled, recurring legal issue[ ]" that this Court regularly addresses through mandamus. *In re Micron*, 875 F.3d at 1095; *see* Petition 16-23. Rather than deny that fact, respondents ***concede*** that "disparate" interpretations of this Court's precedents have led to "myriad competing views" on this recurring and fundamental issue. Opp. 3, 19. Thus, while respondents overlook this Court's cases holding that "mandamus is a proper vehicle" to resolve

"widespread disparities in rulings" on "unsettled" legal issues "important to proper judicial administration," *In re Micron*, 875 F.3d at 1095-96, they admit that standard is met.

Respondents insist that mandamus is unavailable because the correct answer supposedly is not "'clear and indisputable,'" and because the issue theoretically could be addressed on appeal after final judgment. Opp. 1-3, 17-20. But the "clear and indisputable right" standard respondents invoke is only one of multiple articulations of the mandamus standard. "The Supreme Court has confirmed that the requirements for mandamus are [also] satisfied when the district court's decision involves 'basic' and 'undecided' legal questions." *In re Google LLC*, 949 F.3d 1338, 1341 (Fed. Cir. 2020) (quoting *Schlagenhauf*, 379 U.S. at 110). "In such situations, a district court's order may constitute a 'clear abuse of discretion' for which mandamus relief is the only adequate relief." *Id.* This Court thus has held that "'basic' and 'undecided' issues relating to proper judicial administration" present "sufficiently exceptional circumstances as to be amenable to resolution via mandamus." *In re ZTE*, 890 F.3d at 1011. Respondents' own authority (cited Opp. 22) recognizes that "mandamus may be appropriate 'to further supervisory or instructional goals where issues are unsettled and important.'" *In re BigCommerce, Inc.*, 890 F.3d 978, 981 (Fed. Cir. 2018).

Whether that standard is viewed as an application of the "clear and indisputable" standard, *see In re Google*, 949 F.3d at 1341, or an alternative, *see In re Cray*, 871 F.3d at 1358-59, this Court has invoked that standard numerous times to clarify unsettled and recurring questions. Petition 14-15 (collecting cases). In doing so, it has never demanded that the ***answer*** to an unsettled question be "clear and indisputable." Such a requirement would make no sense when the whole point of review is to ***provide*** clarity and ***resolve*** disputes. Respondents' contention that the "myriad competing views" on the issue here somehow foreclose mandamus review, Opp. 19, is thus backward. Those conflicting views are precisely why mandamus review is warranted.

While the answer to the legal issue here need not be "clear and indisputable," it comes about as close to that mark as any "unsettled and important" issue could. In *Merial*, this Court declared that "a defendant cannot defeat Rule 4(k)(2)" by "consent[ing] to suit" in another forum, but instead must identify "a forum where jurisdiction would have been proper at the time of filing, ***regardless of consent***." *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1294 (Fed. Cir. 2012) (emphasis added). As the petition explained—and respondents nowhere dispute—that conclusion follows directly from this Court's precedent and Supreme Court precedent. Petition 24-26 (discussing *Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403, 1415 (Fed. Cir. 2009), and *Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960)). It interprets Rule

4(k)(2) harmoniously with related transfer statutes. Petition 26. And it avoids obvious incentives for gamesmanship. Petition 26-28. Respondents' failure to offer any contrary argument speaks volumes.

The other errors identified in the petition are likewise clear and effectively undisputed. Petition 30-31. Transferring cases to another district under § 1406 based on a defendant's consent to suit in that district, *see* Appx16-17, directly contravenes § 1406's plain text, which allows transfer only to a district where the suit "***could have*** been brought." 28 U.S.C. § 1406(a) (emphasis added). And it contravenes Supreme Court precedent holding that whether a suit could have been brought in a transferee district must be determined " 'independently of the defendant's wishes' " or " 'consent.' " *Hoffman*, 363 U.S. at 344. Insofar as the district court thought "Fifth Circuit" law governs, Appx17, that contravenes this Court's precedent that "personal jurisdiction issues in patent infringement cases are reviewed under Federal Circuit law, not regional circuit law," *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico*, 563 F.3d 1285, 1293 (Fed. Cir. 2009). Respondents offer no contrary argument on any of those points.

Respondents' contention that review must wait until after final judgment, Opp. 17-18, likewise disregards precedent. While mandamus is "[o]rdinarily" not available for § 1406 transfer decisions, this Court has held that mandamus review of such decisions ***is*** appropriate "where doing so is important to 'proper judicial admin-

istration,' " including where " 'a significant number of district court decisions' " have " 'adopt[ed] conflicting views on the basic legal issues presented.' " *In re Volkswagen Group of America, Inc.*, 28 F.4th 1203, 1207 (Fed. Cir. 2022); *see* Petition 15. That is concededly the case here: Respondents admit that "myriad competing views on the effect of a defendant's consent under Rule 4(k)(2)" have produced dozens of "disparate" district-court decisions. Opp. 3, 19. The issue has created both "inter-district" and "intra-district" conflicts. *In re Volkswagen*, 28 F.4th at 1207 n.2; *see* Petition 16-22. Respondents contest none of that.

Mandamus is especially appropriate where "experience has shown" that the issue is "unlikely" to be presented through the "regular appellate process." *In re Google*, 949 F.3d at 1342. That is the case here, as the myriad district-court decisions and paucity of circuit precedent make clear. Such issues are unlikely to reach this Court after final judgment because prevailing at that point would mean starting over in the original district, after the parties have already incurred "substantial expense" litigating elsewhere based on "an erroneous district court decision." *Id.* at 1342-43. That fact, along with "the disagreement among district courts on [a] recurring issue," readily presents "exceptional circumstances warranting immediate review." *In re Volkswagen*, 28 F.4th at 1207.

II. RESPONDENTS' EFFORTS TO EVADE MANDAMUS REVIEW ARE UNAVAILING

Having conceded that the Rule 4(k)(2) question here is a "basic, unsettled, recurring" issue on which district courts are "deeply split," *In re Micron*, 875 F.3d at 1095—and unwilling to defend giving defendants *carte blanche* to evade Rule 4(k)(2) by naming their own preferred forum—respondents try to evade review by reimagining the proceedings below. They reimagine the district court's decision, contradict their own prior submissions, and misapprehend the parties' respective burdens. Those efforts are unavailing.

A. Respondents Improperly Attempt To Rewrite the District Court's Decision and Their Own Submissions Below

1. Respondents urge that these cases do not implicate whether foreign defendants can defeat Rule 4(k)(2) by consenting to suit a different forum because—they now say—personal jurisdiction existed in California based on respondents' contacts there, without regard to consent. Opp. 11-15. But the district court ***never*** found there would be personal jurisdiction in California based on respondents' contacts there. It relied exclusively on respondents' ***consent*** to suit in California, invoking their litigation-inspired assertions that they would "'submit to jurisdiction in the CDCA'" and "'are amenable to suit in the CDCA.'" Appx17 (citing Appx176). The district court did so based on its view that defendants can avoid Rule 4(k)(2) simply by "'conced[ing] to jurisdiction in another state.'" Appx17. Respondents cite ***nothing*** in the district court's opinion addressing whether (much less

holding that) their contacts with California established personal jurisdiction there. The decision below rests squarely on whether consent can defeat Rule 4(k)(2)—an issue that has concededly divided "myriad" district courts. Opp. 3, 19.

The district court never found that respondents' contacts with California established personal jurisdiction there, because ***respondents never asked it to***. Under Rule 4(k)(2), it is "the defendant's burden" to show that another State would have jurisdiction "regardless of consent." *Merial*, 681 F.3d at 1294; *see Touchcom*, 574 F.3d at 1415. Respondents made no effort to carry that burden. In opposing Rule 4(k)(2), they offered ***no*** argument or evidence that their contacts with California established personal jurisdiction there regardless of consent. *See* Appx176; Appx427. Respondents' brief to this Court conspicuously offers no quotes from their briefs below advancing that argument—because they never made it.

To the contrary, before the district court, respondents relied on the (erroneous) notion that they could avoid Rule 4(k)(2) simply by "identif[ying] a state in which [they] would ***submit*** to personal jurisdiction." Appx176 (emphasis added). Their argument thus rested entirely on their post-suit ***consent*** to suit in California, asserting that "Fed. R. Civ. P. 4(k)(2) does not apply here because Defendants would ***submit*** to jurisdiction in the CDCA." Appx176 (emphasis added); Appx427. That was the argument the district court adopted in ruling for respondents. Appx17.

Respondents took the same position in their § 1404 transfer motion. They asserted that transfer was permissible because these cases purportedly "could have been brought in the CDCA." Appx600 (capitalization altered). But they again failed to argue (much less prove) that jurisdiction would have been proper in California ***regardless of consent***. Their sole contention was—once again—that they had "already stated" (in opposing Rule 4(k)(2)) "that they ***agree*** to submit to jurisdiction in the CDCA." Appx601 (emphasis added).

2. Respondents' theory that their "substantial ties with [non-party] TP-Link USA" established personal jurisdiction over them in California, Opp. 13, is not merely absent from their submissions below. It contradicts them.

Before this Court, respondents argue that, because there would be jurisdiction over non-party TP-Link USA in California, there was jurisdiction over respondents (TP-Link China and Hong Kong) as well. Before the district court, however, respondents vehemently ***opposed*** "attempts to establish jurisdiction [over them] through non-party TP-Link USA." Appx161. They asserted there was "no evidence tying ***non-party TP-Link USA to the Defendants*** in the manner alleged by Stingray." Appx423 (emphasis added). They insisted that TP-Link Hong Kong kept TP-Link USA at "arms-length" and that "there is ***no relationship at all*** between TP-Link USA and TP-Link China." Appx423, Appx426 (emphasis added). And they maintained—repeatedly—that "TP-Link USA's actions . . . cannot be imputed to Defen-

dants." Appx161; *see* Appx164; Appx171-173; Appx184; Appx418; Appx420; Appx423; Appx426; Appx590; Appx600-601; Appx606. Respondents' newfound embrace of TP-Link USA cannot be reconciled with their position below. And it cannot salvage a decision that rests ***not*** on that newly minted theory, but instead on respondents' after-the-fact consent to jurisdiction in California.

It is irrelevant that ***Stingray*** alleged that TP-Link USA is respondents' "'agent[]'" and that "each Respondent 'controls or otherwise directs . . . TP-Link USA.'" Opp. 13 (quoting complaint). Under Rule 4(k)(2), it was ***respondents'*** burden to prove personal jurisdiction in California, and they expressly rejected those allegations. Appx172 ("TP-Link USA is not an agent of . . . TP-Link China or TP-Link Hong Kong"); Appx161 ("TP-Link USA . . . is not controlled by either of the named foreign Defendants"). Nor did the district court find that TP-Link USA was respondents' agent or under their control, or that its contacts could be imputed to respondents. To the contrary, the court expressly distinguished respondents' actions, in placing their products into the stream of commerce "in Asia," from "non-party" TP-Link USA's actions in bringing those products into Texas. Appx15-16.[1]

3. Finding no support in the district court's personal-jurisdiction decision, respondents try to conjure a contacts-based personal-jurisdiction ruling from the

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[1] If the district court ***had*** concluded that TP-Link USA's contacts could be imputed to respondents, its conclusion that contacts-based jurisdiction was lacking in Texas would be inexplicable.

district court's ***service-of-process*** decision. Opp. 14-15. In that decision, the district court held that Stingray properly served respondents—who refused to accept service in Hong Kong—by serving them through "Defendants' counsel of record" as well as through TP-Link USA's registered agent. Appx190; *see* Appx585-586.

The fact that ***service*** could be effected through TP-Link USA does not mean that ***jurisdiction*** over TP-Link USA also creates jurisdiction over respondents. As the district court observed, service need only be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see* Appx583. The court's finding that the combination of serving TP-Link USA and serving respondents' prior counsel was ***reasonably calculated to apprise*** respondents of this litigation, Appx585-586, does not come close to a finding that TP-Link USA's California contacts ***establish personal jurisdiction*** over respondents in California.[2]

Respondents' own litigation conduct belies their characterization of the service-of-process ruling. After the district court found service adequate, *see*

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[2] The "general rule" is that "the proper exercise of personal jurisdiction over a nonresident corporation may not be based solely upon the contacts with the forum state of another corporate entity with which the defendant may be affiliated." *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 346 (5th Cir. 2004) (collecting cases). Respondents never argued—and the district court never found—that general rule was overcome here.

Appx185-191, respondents continued to assert that their ties to TP-Link USA did not support personal jurisdiction over them. Appx418 ("TP-Link USA's actions cannot be imputed to Defendants, nor is it appropriate to deem TP-Link USA the 'alter-ego' of any Defendant for purposes of personal jurisdiction."); Appx420-427; *see* Appx172-173. Respondents never explain why, if the district court's service-of-process ruling meant that TP-Link USA's California contacts were attributable to them, they could have continued to contest that point when opposing personal jurisdiction.

Respondents' strained judicial-estoppel argument, Opp. 14-15, fails for the same reasons. The only position Stingray "succeeded in persuading [the district] court to adopt" in connection with service of process was that serving TP-Link USA—along with respondents' own U.S. counsel—was reasonably calculated to apprise respondents of this litigation. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). Stingray did ***not*** succeed in persuading the district court to hold that TP-Link USA's contacts (in Texas, California, or elsewhere) are attributable to respondents for personal-jurisdiction purposes. *See* p. 11, *supra*. It is thus not inconsistent—much less "clearly inconsistent," *New Hampshire*, 532 U.S. at 750-51—for Stingray to argue on mandamus that the district court found jurisdiction in California based solely on respondents' consent. That is precisely what the district court did.

B. Respondents' Attacks on Stingray Are Unfounded and Irrelevant

Trying to shift focus from the decision under review, respondents attack Stingray. Their criticisms are unfounded and irrelevant. Stingray has a physical office and headquarters within the Eastern District of Texas, at 6136 Frisco Square Boulevard in Frisco. Appx1146 ¶3. Its president, Craig Yudell—who is responsible for Stingray's operations and financials, and ownership, assignment, and licensing of its patents—lives and works in Texas. Appx1146-1147 ¶¶1-2, 5-6.

Regardless, ***Stingray's*** contacts with Texas and California are irrelevant. What matters here is whether the district court properly relied—and here, it solely relied—on ***respondents' consent*** to jurisdiction in California in refusing jurisdiction under Rule 4(k)(2) and transferring the cases to California under § 1406. Appx17. Under this Court's *Merial* decision, the answer is "no." Respondents also have not proved, and the district court never found, that respondents' contacts with California are enough to establish personal jurisdiction there, "regardless of consent." *Merial*, 681 F.3d at 1294. Under Rule 4(k)(2), it was their "burden" to prove that they are. *Id.*; *see Touchcom*, 574 F.3d at 1415. Section 1406 likewise required them to show that suit could have been brought in California regardless of consent. Respondents did not try to make that showing. *See* pp. 9-10, *supra*.

Nor was it "venue manipulation," Opp. 22, for Stingray to sue respondents in Texas. Respondents ignore "the longstanding rule that the venue laws do not protect

alien defendants" and "do not restrict the location of suits against alien defendants." *In re HTC Corp.*, 889 F.3d 1349, 1356-57 (Fed. Cir. 2018). There is also "'no obligation to join every joint tortfeasor.'" Appx5 n.4; *see In re HTC*, 889 F.3d at 1351-52 (denying assertion of improper venue where plaintiff dismissed U.S. subsidiary to maintain venue over foreign corporation). And even if Stingray had sued TP-Link USA, that would not affect whether ***respondents*** can avoid suit in Texas by consenting to jurisdiction in California.

C. The Propriety of Personal Jurisdiction Under Rule 4(k)(2) Was Raised and Decided Below

Respondents' assertion that Stingray somehow forfeited the Rule 4(k)(2) issue here, Opp. 15-17, is unfounded. Before the district court, Stingray expressly argued that, if personal jurisdiction did not otherwise exist in Texas, personal jurisdiction was proper under Rule 4(k)(2). Appx219; *see* Appx14-15 (district court acknowledging argument). The "burden" then shifted to ***respondents*** to identify another "forum where jurisdiction would have been proper at the time of filing, regardless of consent." *Merial*, 681 F.3d at 1294; Appx17 n.11. They failed to carry their burden because they never argued—much less proved—that jurisdiction would be proper in California apart from their belated consent to jurisdiction there. They ***never*** made the arguments they now spin regarding why they purportedly had sufficient contacts with California. *See* pp. 9-13, *supra*. If there is forfeiture here, it is respondents'.

This Court will consider any issue that was "pressed ***or*** passed upon" (argued ***or*** decided) below. *Interactive Gift Exp., Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1346 (Fed. Cir. 2001) (emphasis added); *accord Lopez Ventura v. Sessions*, 907 F.3d 306, 311 (5th Cir. 2018). Having asserted a "claim" of personal jurisdiction under Rule 4(k)(2), Stingray may present to this Court "'any argument in support of that claim'"—including the argument that consent cannot defeat the rule's application. *Pfizer, Inc. v. Lee*, 811 F.3d 466, 471 (Fed. Cir. 2016) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992)).

Whether consent can defeat Rule 4(k)(2) was also "passed upon" below. The district court expressly recognized this Court's instruction that "'a defendant cannot defeat Rule 4(k)(2) by simply naming another state; the defendant's burden under the negation requirement entails identifying a forum where the plaintiff could have brought suit—a forum where jurisdiction would have been proper at the time of filing, regardless of consent.'" Appx17 n.11 (quoting *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1294-95 (Fed. Cir. 2012)). The district court simply erred in disregarding that direction and following a contrary rule instead. Appx17.

Even where Rule 4(k)(2) has ***not*** been pleaded or decided below, this Court has not hesitated to consider it on review. *See Merial*, 681 F.3d at 1296; *Touchcom*, 574 F.3d at 1410. Where, as here, Rule 4(k)(2) was ***raised and decided*** below, there is no conceivable obstacle to review.

That leaves respondents to argue that this Court should receive "full appellate briefing and argument before reaching the issue." Opp. 3, 20. They again ignore that this Court has repeatedly resolved unsettled issues like this on mandamus. And respondents cannot credibly complain that the Rule 4(k)(2) issue has received less than "full" briefing before this Court. Respondents had ample opportunity to raise any arguments they wished on that issue in their opposition brief. They simply failed to muster any—despite using barely half of the words available to them (4,114 out of 7,800). That shortcoming cannot thwart this Court's prerogative to resolve "unsettled" and "important" issues through mandamus. *In re Micron*, 875 F.3d at 1095.

Respondents' inability to offer any defense of the district court's approach to Rule 4(k)(2) tells the Court all it needs to know about the merits. But if the Court believes the issue would benefit from further adversarial testing, it should set the petition for oral argument—and direct respondents to be prepared to address the merits.[3]

CONCLUSION

The petition should be granted.

[3] *See, e.g.*, *In re Google*, 949 F.3d at 1341 (oral argument heard on mandamus petition); *In re Queen's Univ.*, 820 F.3d at 1293 (same); *In re Princo Corp.*, 478 F.3d 1345, 1351 (Fed. Cir. 2007) (same); *In re United States*, 463 F.3d 1328, 1333 (Fed. Cir. 2006) (same).

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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