No. 2009-1374

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TIVO INC.,

Plaintiff-Appellee,

v.

ECHOSTAR CORPORATION, ECHOSTAR DBS CORPORATION, ECHOSTAR TECHNOLOGIES CORPORATION, ECHOSPHERE LIMITED LIABILITY COMPANY, ECHOSTAR SATELLITE LLC, and DISH NETWORK CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas in Case No. 2:04-CV-01, Judge David Folsom

BRIEF OF FORMER FEDERAL COURT JUDGES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE ON REHEARING EN BANC FOR AFFIRMANCE

Amici Curiae
Hon. Stephen G. Larson
Hon. Thomas D. Lambros
Hon. John C. Lifland
Hon. James F. Davis
Hon. Thomas R. Brett

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September 17, 2010

CERTIFICATE OF INTEREST

Counsel for *Amici Curiae* Former Federal Court Judges certifies the following:

1. The full names of every party or amicus represented by me are: Hon. Stephen G. Larson, Hon. Thomas D. Lambros, Hon. John C. Lifland, Hon. James F. Davis, Hon. Thomas R. Brett

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: None.[1]

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of *amici curiae* represented by me are: Not Applicable.

4. The names of all law firms and the partners or associates that appeared for the *amici curiae* now represented by me that are expected to appear in this Court are: Larry C. Russ, Jules L. Kabat, Marc A. Fenster, Alexander C. Giza of Russ August & Kabat.

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[1] Alexander C. Giza has previously represented TiVo Inc. in the trial and contempt proceedings in this case and in other matters, but no longer represents TiVo.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF AMICI

Amici Curiae are former federal trial court judges:

Stephen G. Larson is a former United States District Court Judge for the Central District of California. As a federal judge, Judge Larson presided over some of most complex and ground-breaking litigation in the last decade, including civil rights, criminal, and intellectual property issues. Judge Larson also sat by designation on the U.S. Court of Appeals for the Ninth Circuit, served as a magistrate judge, and was appointed as an Assistant U.S. Attorney for the Central District of California. He is the Distinguished Jurist in Residence and a member of the Board of Visitors at the University of La Verne College of Law, serves on the Dean's Advisory Council for the University of California at Irvine School of Law, and is in private practice, specializing in litigation and alternative dispute resolution.

Thomas D. Lambros is a former United States District Court Judge for the Northern District of Ohio. During his 34 years as a state and federal judge, Mr. Lambros achieved national recognition as a pioneer in the alternative dispute resolution movement. As a United States District Judge, he created the Summary Jury Trial in 1980. As Chief Judge of the United States District Court, Northern District of Ohio, he led the Court in the development of the nation's most comprehensive ADR program in its role as a Demonstration District under the

Civil Justice Reform Act of 1990. Mr. Lambros is the founder and chairman of FedNet and The Thomas D. Lambros Dispute Management Center and is now in private practice focusing on alternative dispute resolution.

John C. Lifland is a former United States District Court Judge for the District of New Jersey. During his 19 years of distinguished service on the federal bench, Judge Lifland handled numerous intellectual properly cases, including writing the opinion in *U.S. Environmental Products, Inc. v. Westall*, 911 F.2d 713 (Fed. Cir. 1990) when sitting by designation and presiding over *Pfizer et al. v. Teva Pharms. USA*, No. 04-754 (D. N.J. 2007) and *In re Gapabentin Patent Litigation* (multidistrict). His judicial experience is complemented by 27 years in private practice, concentrating on commercial litigation including antitrust, employment, construction, banking, intellectual property, and securities matters. His practice now focuses on alternative dispute resolution involving a full range of issues, including intellectual property matters.

James F. Davis is a former trial judge with the former U.S. Court of Claims. Judge Davis has also served as a special master in *Haworth, Inc. v. Steelcase, Inc.*, 4:85cv526, No. K85-526 CA, No. G89-30373 CA, which was a series of patent infringement cases that included a contempt issue regarding an alleged design-around. As well as being a trial judge, he was a patent litigator for 33 years. He taught intellectual property/antitrust law as an adjunct professor at Georgetown

University Law School. He was Co-Chairman of two Judicial Conferences of the Court of Appeals of the Federal Circuit, Co-Chairman of the IP Program Committee of that Conference for 20 years, and Co-Chairman of the Program Committee for the Judicial Conferences of the former Court of Customs and Patent Appeals for 8 years. He has been and is currently active in alternate dispute resolution matters, serving as arbitrator, mediator, and special master in both domestic and international disputes.

Thomas R. Brett is a former United States District Judge for the Northern District of Oklahoma. Judge Brett served on the federal judiciary with distinction for 24 years and was Chief Judge from 1994 to 1996. Before assuming the bench, he rose to the rank of colonel in the U. S. Army Judge Advocate General, was a practicing civil trial lawyer, and was elected as Fellow of the American College of Trial Lawyers. He is active in alternative dispute resolution and has extensive experience in arbitration and mediation, including intellectual property matters.

Amici come together in this case because of their shared recognition of the importance of federal trial court judges' discretion regarding whether and how to enforce injunctions after judgment by contempt in order to achieve just results under applicable law, to promote efficient litigation, and to preserve judicial time and resources. *Amici,* former federal trial court judges, understand from their first-hand experience the need for flexibility and discretion in enforcing orders so that a

federal court order has meaning and generates appropriate respect. *Amici* believe that limiting federal trial court judges' discretion in determining whether and how to address issues in a contempt proceeding as argued by EchoStar would be unnecessary and unwise.

This Court has stated in its per curiam May 14, 2010 Order that briefs of *amici curiae* will be entertained for this matter and that any such *amicus* briefs may be filed without leave of Court but otherwise must comply with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29.

No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This *amicus* brief is focused on one primary issue - preserving federal trial court judges' inherent and necessary discretion to handle injunctions and contempt issues that arise post judgment in the patent context just as in other contexts. Contempt issues in patent cases are rare and exceptional. Federal trial court judges are uniquely and best situated to address these issues because contempt issues will generally arise only after years of litigation by which time the trial court judge has special knowledge and lengthy experience regarding the case, the facts, the

technology, and the parties. Federal trial court judges are thus best able to fully understand and fairly resolve the dispute between the parties. They have been making this discretionary determination for over 150 years, and for the few cases that reach post judgment contempt issues, the existing law works.

EchoStar would have this Court narrow federal trial court judges' discretion to institute a contempt proceeding to a nullity. Essentially EchoStar would require a showing of clear and convincing evidence just to institute a contempt proceeding and no "genuine and new factual disagreement" about "how claim limitations map onto the new device." The former change would confusingly and inappropriately impose a heightened evidentiary burden on federal trial court judges' discretion when clear and convincing evidence is already required for the ultimate question of contempt. The latter change would prevent contempt proceedings altogether since the practical reality is that any party can generate a factual disagreement as to how claim limitations map onto an accused product. The proper inquiry is whether there are ***substantial*** open issues of infringement, a standard that is consistent with, and helps explain, the legal questions of whether there are more than colorable differences, or a fair ground of doubt.

Imposing the limitations argued for by EchoStar could prevent adequate and timely remedy of infringement – not to mention effective enforcement of the terms of a court order. In many cases, EchoStar's proposal would categorically prevent

the institution of contempt proceedings and eliminate federal trial court judges' discretion, making the law of enforcement of court orders in patent cases uniquely constricted as opposed to enforcement proceedings in all other areas of law. This is contrary to fundamental equity, statutory authority, and recent Supreme Court direction in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006), that injunctions in patent law should *not* be governed by patent-law-specific rules but rather should conform to the traditional principles of equity. In addition, categorically limiting contempt proceedings would empower and reward a recalcitrant infringer, e.g., to manufacture purported factual disputes, and prevent meaningful enforcement of patent injunctions.

This amicus brief thus primarily addresses the first two issues in which this Court has expressed interest and answers them as follows:

> a) Following a finding of infringement by an accused device at trial, under what circumstances is it proper for a district court to determine infringement by a newly accused device through contempt proceedings rather than through new infringement proceedings? What burden of proof is required to establish that a contempt proceeding is proper?

Answer: Federal trial court judges may exercise their discretion to institute contempt proceedings when an alleged design-around presents no substantial open issues of infringement, as informed by all the facts of the case, including specifically the factors arising from applicable case law. The analysis has no

burden of proof; instead, it is an application of judicial discretion and is reviewed on appeal for abuse of discretion.

b) How does "fair ground of doubt as to the wrongfulness of the defendant's conduct" compare with the "more than colorable differences" or "substantial open issues of infringement" tests in evaluating the newly accused device against the adjudged infringing device?

Answer: Under the proper understanding of existing case law, these are different formulations of the same test. Each may be useful in different factual situations, but the end result requires application of judicial discretion, with like cases decided alike, to determine what is a "fair" ground, a "colorable" difference, or a "substantial" issue.

ARGUMENT

I. FEDERAL TRIAL COURT JUDGES MUST HAVE DISCRETION AND ARE BEST SITUATED TO DETERMINE WHETHER AND HOW TO INSTITUTE CIVIL CONTEMPT PROCEEDINGS IN PATENT CASES JUST AS IN NON-PATENT CASES.

The availability of injunctions and contempt proceedings to protect patentees' exclusive right to their inventions and the discretionary authority of the federal trial court judge to award these remedies and invoke these proceedings are long established and necessary to the patent system. Consistent with the statutory framework and traditional principles of equity, this Court has provided appropriate guidance for federal trial court judges' exercise of discretion. In contempt cases especially, a federal trial court's direct, repeated, and continuing involvement with

a litigation, its facts, and the parties all make it uniquely – and best – situated to determine when to institute contempt proceedings.

A. Federal Trial Court Judges' Essential Authority to Craft Injunctions and to Enforce Them With Contempt Proceedings Has Constitutional, Statutory, and Traditional Equitable Bases.

The right to exclude others has been fundamental to United States patent law since its inception.[2] The Constitution provides Congress with the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Constitution, Art. I, Sec. 8. As Abraham Lincoln said, the Patent Act's provision of the exclusive use of an invention for a limited time "added the fuel of interest to the fire of genius." Abraham Lincoln, Second Lecture on Discoveries and Inventions, Jacksonville, Illinois (February 11, 1859).

The Congress has exercised its power to promote the progress of science by tying inventors' exclusive right to their discoveries to the traditional equity power of the courts. In constructing the statutory framework of the patent system, Congress has provided courts with the power to "grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent,

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[2] The concept of an inventor's exclusive right to the invention in U.S. patent law was preceded by the Statute of Monopolies of 1624, whereby England's Parliament endowed inventors with the sole right to their inventions for fourteen years. *See Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 17, 18 (1829).

on such terms as the court deems reasonable." 35 U.S.C. § 283. Federal trial court judges have exercised traditional principles of equity to enforce patent rights for more than 150 years.[3]

The availability of contempt proceedings to enforce injunctions is similarly long established and necessary. The power to enforce injunctions "is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911). *See also Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 429-430 (1908) ("[I]t has been the judgment of Congress from the beginning that the sciences and the useful arts could be best advanced by giving an exclusive right to an inventor.... It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation.").

Federal trial court judges inherently and necessarily exercise equitable discretion in crafting injunctions and instituting contempt proceedings to enforce injunctions. "Flexibility rather than rigidity" is the "essence of equity jurisdiction."

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[3] An express statutory reference to injunctions and principles of equity as a patent law remedy dates back at least to the Patent Act of 1836. *See* Patent Act of 1836, Ch. 357, 5 Stat. 117, § 17 (July 4, 1836) (Federal "courts shall have power, upon bill in equity filed by any party aggrieved, in any such case, to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of any inventor as secured to him by any law of the United States, on such terms and conditions as said courts may deem reasonable.").

Weinberger v. Romero Barcelo, 456 U.S. 305, 312 (1982). "[W]hether infringement should be adjudicated in contempt proceedings ... involves, to a large extent, the exercise of judicial discretion." *KSM Fastening Systems, Inc. v. H.A. Jones Co., Inc.*, 776 F.2d 1522, 1530 (Fed. Cir. 1985). *See also United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1236 (10th Cir. 2000) ("A district court has broad discretion in using its contempt power to require adherence to court orders."). As the Supreme Court has emphasized, flexibility in the courts' equitable powers is necessary because "new kinds of wrongs are constantly committed." *Union Pac. Ry. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 163 U.S. 564, 601 (1896).

B. This Court Has Provided Appropriate Guidance on When Federal Trial Court Judges May Exercise Their Discretion and Institute Contempt Proceedings.

The issue in contempt proceedings is violation *vel non* of an injunction or court order. *See, e.g., KSM*, 776 F.2d at 1528; *Latino Officers Ass'n City of N.Y., Inc. v. City of New York*, 558 F.3d 159, 164 (2d Cir. 2009); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 751 (7th Cir. 2007). Proof of the violation (or infringement) by clear and convincing evidence is required for contempt. *See id.*

In applying this general inquiry to patent injunctions and alleged design-arounds, this Court has asked a number of questions including: Is the alleged

design-around no more than colorably different than the infringing product or method? Is the alleged design-around an infringement? *KSM*, 776 F.2d at 1532. This is merely an application to patent injunction contempt proceedings of the general rule as to all civil contempt proceedings. *See KSM*, 776 F.2d at 1525 (citing *American Foundry & Mfg. Co. v. Josam Mfg. Co.*, 79 F.2d 116, 118 (8th Cir. 1935)). *KSM* also clarified that the no-more-than-colorably-different analysis can be appropriately formulated as to whether the alleged design-around presents any "substantial open issues with respect to infringement to be tried." *KSM*, 776 F.2d at 1532. "So long as the district court exercises its discretion to proceed or not to proceed by way of contempt proceedings within these general constraints, this court must defer to its judgment on this issue." *Id.*

This articulation provides direction and focus without imposing inappropriate limitations on federal trial court judges' discretion. Federal trial court judges' equitable "discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases." *eBay*, 547 U.S. at 394. *See also Abbott Labs. v. TorPharm, Inc.*, 503 F.3d 1372, 1379 (Fed. Cir. 2007) ("[W]ell-settled principles of equity govern injunctions in patent disputes just as in disputes in other areas of law."). Just as the decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, *eBay*, 547 U.S. at 391, the district court's decision to institute a contempt

proceeding is within its discretionary authority. *See Abbott Labs.*, 503 F.3d at 1375 (determining that "the district court's decision to entertain a contempt proceeding [w]as well within its discretionary authority").

C. Federal Trial Court Judges Are Best Situated to Determine Whether and How to Institute Contempt Proceedings.

Federal trial court judges are uniquely and best situated to address issues of injunction and contempt. Regarding contempt issues particularly, cases are relatively rare because contempt issues will generally only arise after years of litigation. By then, the federal trial court judge has special knowledge and lengthy experience regarding the case, the facts, the technology, and the parties. *See, e.g.*, *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 154 F.3d 1345, 1356 (Fed. Cir. 1998) ("Given the district court's familiarity with the proceedings in this lengthy case, we are persuaded that the district court properly exercised its discretion when it entered an injunction similar to that used in *Spindelfabrik.*"); *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1428 (7th Cir. 1985) ("The district court is manager of the entire swirl of facts, and the clearly erroneous rule is based in substantial measure on a belief that because appellate courts never are in a better position than the district court, and often are in a worse one, a substitution of judgment would increase the randomness of the process without increasing accuracy over the run of cases."). Because federal trial court judges are

steeped in the full facts and circumstances of the case and have had the most lengthy involvement with the parties and the disputes, Congress and the appellate courts have appropriately empowered them with the discretionary authority to craft injunctions and to institute contempt proceedings to enforce those injunctions.

II. LIMITING FEDERAL TRIAL COURT JUDGES' DISCRETION TO INSTITUTE CONTEMPT PROCEEDING REMOVES THEIR ESSENTIAL AND INHERENT POWER TO ADEQUATELY AND TIMELY REMEDY INFRINGEMENT IN APPROPRIATE CIRCUMSTANCES.

EchoStar would transform the determination of whether there are substantial open issues of infringement from one of federal trial court discretion to one that requires proof by clear and convincing evidence and that is only appropriate in a rigid and narrowly-defined category of cases. In particular, under EchoStar's proposed scheme, contempt proceedings would not be appropriate unless for each issue, claim or issue preclusion applied, summary adjudication was appropriate, or there was no "genuine and new factual disagreement about what the new device does or how claim limitations map onto the new device." EchoStar's Brief at 19. Although EchoStar ambiguously refer to these three points as "core principles," they really assert them as requirements. EchoStar's Brief at 27-31. If applied as requirements as EchoStar demand, they rob federal trial court judges of their discretion to enforce their own orders. EchoStar's requirements would effectively

neuter the federal trial court contempt authority and thus embolden infringers to flout its orders.

The teachings of *eBay*, *supra*, apply with equal force here. In addressing the district court's apparent adoption of certain expansive principles that suggest that injunctive relief could not issue in a broad swath of cases, the Supreme Court stated that "traditional equitable principles do not permit such broad classifications." *eBay*, 547 U.S. at 393. "[P]atent holders may be able to satisfy the traditional four-factor test, and we see no basis for categorically denying them the opportunity to do so." *Id.*

Here, EchoStar would have this Court adopt expansive "core principles" requiring that contempt would be categorically unavailable in almost all cases, despite the fact that each case has different facts and circumstances. This type of categorical rule cannot be squared with the principles of equity adopted by Congress and the traditional exercise of contempt power. Furthermore, such rigid limitations diminish the significance of patents and injunctions enforcing them. "[T]o require in each instance the patentee to institute a new infringement suit diminishes the significance of the patent and the order of the court holding the patent to be valid and infringed." *KSM*, 776 F.2d at 1530 (quoting *McCullough Tool Co. v. Well Surveys, Inc.*, 395 F.2d 230, 233 (10th Cir. 1968)).

Indeed, federal trial court judges must have a flexible structure that can remedy the most egregious scenarios of a recalcitrant infringer. For example, EchoStar's novel proposed legal framework would require that contempt proceedings are categorically improper whenever there was a purported "genuine and new question of infringement" as determined by a purported disputed fact between experts or other witnesses. To state matters plainly, if that were the rule, no case could proceed in contempt, even if the district court could determine with certainty that the infringer is violating the court order. It is practical reality that although the underlying scientific principles should not be the subject of serious dispute, factual disputes can always be raised by hired experts in the mapping of claim limitations onto accused products. Categorically disallowing contempt proceedings in these situations will allow and encourage recalcitrant infringers to generate purported disputed factual issues to avoid contempt and enforcement of injunctions. As the Supreme Court explained analogously regarding injunctions, *eBay*, 547 U.S. at 393, patent holders may be able to satisfy the traditional inquiry for contempt – no substantial open issues of infringement – and there is no basis for categorically denying them the opportunity to do so.

Restricting federal trial court judges' discretion will also leave no timely way to deal with a recalcitrant infringer. The treadmill of serial litigation is not an adequate remedy in this situation. An individual inventor or small entity is at a

tremendous, if not insuperable, disadvantage as compared to a recalcitrant infringer with stronger resources. To the recalcitrant infringer, serial litigation is just a cost of business. The patent system is designed to promote invention, including those efforts of individual inventors and small companies. Congress and the Supreme Court have decided that patentees' exclusive right to their inventions can include the remedies of injunction and contempt. Unless and until Congress restricts patentees' remedies of injunction and contempt, courts have and should wield the power to protect patentees' rights in appropriate situations. More often than not, in the case of an individual inventor or small company, justice delayed is justice denied.

Under the facts of this case, these principles apply with pressing need. Despite more than six years of litigation, TiVo, the adjudged innovator, patentee, and victim of infringement, has never been able to enforce its right to exclude. As a result, TiVo's business is losing revenue and market share, while the adjudicated willful infringer[4] is gaining hundreds of millions of dollars in annual revenue and increasing market share. The district court appropriately exercised its discretion to institute contempt proceedings, and its factual findings fully support its exercise of discretion. The district court properly applied the law, awarded compensatory and contempt damages to try to make TiVo whole, and reinstated the injunction.

[4] *Amici* make no separate judgment of EchoStar's conduct and base this statement on undisputed facts from the record and affirmed judgments in this case.

Changing the rules now would not only deny TiVo its proper and overdue remedy but it would also eviscerate the Constitution's authorization, Congress' statutory enactment, and the district court's injunction, affirmed on appeal, of TiVo's adjudicated exclusive right to its invention.

III. CONCLUSION: FEDERAL TRIAL COURT JUDGES MUST HAVE DISCRETION TO USE CONTEMPT PROCEEDINGS TO ENFORCE PATENT INJUNCTIONS.

Federal trial court judges have traditionally exercised judicial discretion to determine how to craft injunctions and when to institute contempt proceedings to enforce them. Because of their direct and lengthy involvement with such cases, federal trial court judges are best situated to address these issues. This Court should not impose EchoStar's proposed rigid limitations and neuter federal trial court judges' discretion in handling contempt cases.

Dated: September 17, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2010, I caused two copies of the Brief of Former Federal Court Judges as *Amici Curiae* in Support of Plaintiff-Appellee on Rehearing en Banc For Affirmance to be delivered via overnight service or electronic mail on:

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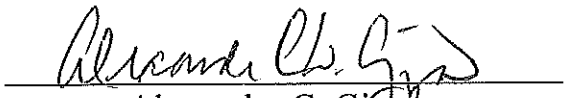
CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29 and 32(a)(7)(B) in that, according to the word-processing program used to prepare the brief (Microsoft Word), the brief contains 3,955 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii).



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