

No. 17-1483

IN THE
Supreme Court of the United States

ALEXSAM, INC.,

Petitioner,

v.

WILDCARD SYSTEMS, INC., EFUNDS
CORPORATION, AND FIDELITY NATIONAL
INFORMATION SERVICES, INC.,

Respondents.

*On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Federal Circuit*

**REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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ARGUMENT

Throughout their Opposition Brief, Respondents make the critical error of assuming that they had standing to raise an invalidity counterclaim in response to Alexsam's breach of contract claim. By assuming standing, Respondents are skipping this fundamental step in the analysis required to determine whether a court has subject matter jurisdiction over a claim, and the courts below also skipped this vital step despite this Court cautioning against it. See *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). Respondents urge this Court to do the same, a mistake. This Court has made it clear that the mere presence of a patent license does not automatically convert a contract dispute into a federal case. See *Luckett v. Delpark, Inc.*, 270 U.S. 496, 502 (1926) ("It is a general rule that a suit by a patentee for royalties under a license or assignment granted by him, or for any remedy in respect of a contract permitting use of the patent, is not a suit under the patent laws of the United States, and cannot be maintained in a federal court as such." citing *Wilson v. Sandford*, 51 U.S. 99 (1850)); see also, *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979).

The question is not whether Respondents asserted a patent-related counterclaim in their Answer to Petitioner's Complaint. They did. The real question is whether Respondents had an independent basis to assert an invalidity counterclaim sufficient to invoke federal subject matter jurisdiction. They did not. By assuming that Respondents had standing to assert their invalidity counterclaim, the district court improperly exercised removal jurisdiction. If the

district court, and by extension, other courts, are allowed to assume standing to bring invalidity counterclaims in response to breach of patent license claims, it will permit and could even encourage patent licensees to repudiate their agreements and to attack the validity of the licensed patents. This type of conduct, a form of “efficient breach,”¹ if allowed, could destroy altogether the running royalty approach to patent licensing and thereby license agreements themselves.

I. RESPONDENTS DID NOT HAVE STANDING TO ASSERT INVALIDITY AS A COUNTERCLAIM.

Standing is a fundamental requirement for patent-related counterclaims, just as it is for other claims. See *Speedfit LLC v. Chapco Inc.*, No. 15-CV-1323 (JMA)(SIL), 2016 U.S. Dist. LEXIS 87649, *12 (E.D. N.Y. June 29, 2016), R&R adopted by 2016 U.S. Dist. LEXIS 87649 (Sep. 30, 2016) (quoting *Princeton Dig. Image Corp. v. Hewlett-Packard*, No. 12 CIV. 6973, 2013 U.S. Dist. LEXIS 50978, *10 (S.D. N.Y. Mar. 21, 2013)) (“All suits, including those for patent infringement, ‘must satisfy constitutional and prudential standing requirements”).

There are only two places where Respondents could look to find standing for their invalidity counterclaim. The first is Petitioner’s Complaint. For standing to arise there, Respondents had to show that the breach of contract claim is actually a patent infringement-related claim such that it “arises” under

¹ See e.g. *United States v. Blankenship*, 382 F.3d 1110, 1133-1134 (11th Cir. 2004).

the patent laws. It is not, and it does not. This much is clear, as are this Court's conclusions that "arising under" jurisdiction is not automatic simply because a contract involves a patent and that the terms of a contract and the allegations of the Complaint must be carefully considered. *See Aronson*, 440 U.S. at 262; *Gunn v. Minton*, 568 U.S. 251, 258-265 (2013). The Complaint here does not assert any patent infringement claims nor does it suggest any infringement-related claims. Therefore, there is no "arising under" jurisdiction, and Respondents do not have standing to assert their counterclaim. The courts below missed this fundamental conclusion. The district court improperly pointed to the Settlement and License Agreement ("SLA") between the parties as the basis for federal jurisdiction even after determining that it and the allegations of the Complaint did *not* "arise under" the patent laws. The district court implicitly acknowledged this error when it subsequently dismissed Respondents' invalidity counterclaim after it determined that the SLA had terminated. The 11th Circuit ratified this error with little analysis, and the Federal Circuit did so without explanation.

The second place where Respondents could potentially find standing is in Petitioner's actions prior to Respondents' filing of their counterclaim. However, this too is not compelling. Respondents have not cited anything that Petitioner did or said that would have given Respondents any reason to think that they might have been sued for patent infringement prior to the filing of the breach of contract claim in Florida state court. Also, as the SLA between the parties prohibits Petitioner from suing Respondents for patent infringement, this should

have dispelled any apprehension of an infringement suit. Therefore, under the totality of the circumstances, Respondents had no reason to expect a patent infringement suit (imminent or otherwise), and without such, there was no proper case or controversy on which to base a counterclaim for invalidity. See *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1336-1339 (Fed. Cir. 2008) (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-129 (2007)); see also *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1379-1381 (Fed. Cir. 2007). Consequently, Respondents did not have standing to bring the patent-related counterclaim, and the courts below did not have jurisdiction over the matter. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (Courts have “no business deciding” disputes in the absence of a “proper” case or controversy.); see also *Hollingsworth v. Perry*, 570 U.S. 693, 704-705 (2013) (courts must avoid the temptation to proceed directly to the merits of claims raised prematurely).

A. RESPONDENTS DID NOT SUFFER AN INJURY IN FACT.

Respondents lacked standing to raise their invalidity counterclaim because they did not suffer an injury in fact that is traceable to an infringement claim. See *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 197 (2014). The fundamental requirement for jurisdiction under the Declaratory Judgment Act (28 U.S.C. §2201) is that the claim must be traceable to an “injury in fact.” See *Drone Technologies, Inc. v. Parrot S.A.*, 838 F.3d 1283, 1292 (Fed. Cir. 2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) and *Samsung Elecs. Co. v. Rambus, Inc.*, 523 F.3d 1374, 1378 (Fed. Cir. 2008)).

“To establish standing under Article III, a plaintiff must demonstrate, *inter alia*, that it has suffered an ‘injury in fact.’ ‘Constitutional injury in fact’ occurs when a party infringes a patent in violation of a party’s exclusionary rights.” *Id.* (citations omitted). “To establish constitutional standing, a ‘plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.’” *Crow Creek Sioux Tribe v. U.S.*, No. 2017-2340, 2018 U.S. App. LEXIS 23000, *6-*7 (Fed. Cir. Aug. 17, 2018) (citing *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016)). Respondents cannot meet their burden here.

It is undisputed that Respondents were not sued for patent infringement, and there is no evidence that such a claim or threat was imminent. *See Trump v. Hawaii*, 585 U.S. ___, 138 S.Ct. 2392, 2416, 201 L.Ed.2d 775, 798 (2018) (Standing “requires allegations— and, eventually, proof—that the plaintiff ‘personal[ly]’ suffered a concrete and particularized injury in connection with the conduct about which he complains.”; alteration original). As Respondents faced no liability for patent infringement, they had no basis to assert invalidity as a counterclaim. *See Commil USA, LLC v. Cisco Systems, Inc.*, 575 U.S. ___, 135 S. Ct. 1920, 191 L. Ed. 2d 883, 894 (2015) (invalidity is a defense to liability for patent infringement). Also, the underlying case is the product of Respondents’ own doing; they failed to perform their obligations under the SLA.

Petitioner’s attempt to enforce the terms of the SLA is not a basis for standing for Respondents to raise an invalidity counterclaim. To allow such would

be tantamount to imposing a *per se* rule that any attempt to enforce the terms of a patent license is equivalent to a patent infringement claim, which is untenable. Settlement agreements are typically entered into to resolve claims, not to create new ones or to resurrect a settled one. Further, it is unfounded speculation that a patent infringement case was inevitable at the time Petitioner filed suit. There is no credible evidence to support such a contention, and Respondents cannot be allowed to establish standing for their patent-related counterclaim based on the specter of a patent infringement case that was never threatened.

B. RESPONDENTS CONFLATE SUBJECT MATTER JURISDICTION AND STANDING.

Respondents have asserted throughout this case that the district court had subject matter jurisdiction over all of the claims raised below because they asserted a patent-related counterclaim. However, this assertion, by itself, cannot stand. To invoke federal subject matter jurisdiction over a claim, a party must have standing to do so under the Constitution's case-or-controversy requirement in Article III, §2. See *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000). Standing is a threshold requirement that Respondents have not established and that the courts below accepted without careful analysis. See *Juidice v. Vail*, 430 U.S. 327, 331 (1977) (“we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III”). Respondents’ version of the “Question Presented” exemplifies their attempt to by-pass standing; it goes straight to whether the district court

properly exercised jurisdiction over the matter under 28 U.S.C. §1454(a) and skips standing altogether. The question is not whether a patent claim arises under federal law but whether Respondents had a patent counterclaim in the first place. Respondents ignore the fundamental question of whether they had standing. They did not.

Respondents rely heavily on this Court's decision in *MedImmune* to conclude that they have standing to bring a patent-related counterclaim. However, there, unlike here, it was uncontroverted that the patent holder was seeking to enforce the patent by threatening to enjoin sales if royalties were not paid. *MedImmune, Inc.*, 549 U.S. at 128. Here, there was no threat to enforce the patents. Petitioner's breach of contract claim was an attempt to collect royalties owed under the SLA, not to enforce patent rights. Also, standing was not addressed in *MedImmune*, and it cannot be assumed. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63 fn 4 (1989) (court not bound by prior *sub-silentio* holdings where jurisdictional issue was not addressed); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*."); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Respondents' reliance on *MedImmune* is misplaced.

C. RESPONDENTS MISAPPLY GUNN.

The *Gunn* decision reined in courts that found federal jurisdiction simply because a patent license

was involved. See *Gunn*, 568 U.S. at 258-265. Respondents' analysis of the *Gunn* factors is incomplete and misguided. Respondents do not address the first two *Gunn* factors. It is wrong to assume that Respondents' invalidity counterclaim was required (factor 1), or that the validity of Petitioner's Patents is in dispute (factor 2). Respondents' assumptions that they had standing to bring the counterclaim and that it was compulsory are unfounded.

Respondents' discussion of substantiality (factor 3) and the impact on the federal-state balance (factor 4) reflects their unreasonable bias. As to substantiality, invalidity would only serve to reduce the amount of royalties owed, not eliminate it entirely. See *Studiengesellschaft Kohle, M.B.H. v. Shell Oil Co.*, 112 F.3d 1561, 1567-1568 (Fed. Cir. 1997). The real issue is what products the SLA covers and how much Respondents owe in royalties. As to the impact on federal-state balance, in Respondents' view, any breach of a patent license agreement would be required to be brought in federal court even if the licensee does not raise invalidity as a counterclaim. In arguing so, Respondents express an unfounded fear of state courts opining on patent-related issues, a position rejected by this Court. See *Gunn*, 568 U.S. at 262-264. Respondents also argue that *Gunn* does not apply, because the underlying case is forward-looking, not backward-looking. To the contrary, Petitioner's claim is entirely "backward looking"; it seeks only past royalties owed. See S015-S016.

Contrary to Respondents' claim, the decisions below did not follow this Court's guidance in *Gunn*, which has been thoughtfully applied in a number of

cases. See *First Data Corporation v. Inselberg*, 870 F.3d 1367 (Fed. Cir. 2017); *Vermont v. MPHJ Tech. Invs., LLC*, 803 F.3d 635 (Fed. Cir. 2015); *NeuroRepair, Inc. v. The Nath Law Group*, 781 F.3d 1340 (Fed. Cir. 2015); *Forrester Envtl. Servs., Inc. v. Wheelabrator Techs., Inc.*, 715 F.3d 1329 (Fed. Cir. 2013), *Semiconductor Energy Laboratory Co., Ltd. v. Nagata*, 706 F.3d 1365 (Fed. Cir. 2013), *Krauser v. BioHorizons, Inc.*, 753 F.3d 1263 (Fed. Cir. 2014). The rulings in the courts below cannot be reconciled with *Gunn* or these decisions, and they are inconsistent with decisions that recognized that the presence of a patent does not automatically convert a breach of contract case into a patent case. See *Uroplasty, Inc. v. Advanced Uroscience, Inc.*, 239 F.3d 1277, 1280 (Fed. Cir. 2001) (“the mere presence of the patent does not create a substantial issue of patent law.”); see also *MDS (Canada) Inc. v. Rad Source Technologies, Inc.*, 720 F.3d 833, 843 (11th Cir. 2013) (“(t)o hold that all questions of patent infringement are substantial questions of federal law for the purposes of federal patent jurisdiction would sweep a number of state-law claims into federal court.”); *Lockett*, 270 U.S. at 502; *Aronson*, 440 U.S. at 262.

That a cause of action emanates from the law that creates it (statutory or common law) is not questioned; it is Respondents’ assertion that they have standing to raise an invalidity counterclaim in response to a breach of contract claim that is at issue. Respondents have extrapolated from the fact that the SLA addresses patents that they have a right to assert invalidity as a counterclaim; this is contrary to the obvious intent of the parties as set out in the SLA. Standing should not be permitted where it would not otherwise exist on its own. In other words, here there

is no case absent the breach of contract claim. Any challenge to the validity of Petitioner's Patents is, at best, an "affirmative defense" but certainly not a cause of action. Respondents cannot point to any legitimate basis for their counterclaim.

Stated another way, if Respondents had filed their invalidity claim in a separate Declaratory Judgment action in federal court, rather than as a counterclaim to Petitioner's breach claim, thereby eliminating the "compulsory counterclaim" and removal jurisdiction issues from the equation, this would place the focus squarely on the issue at hand: whether Respondents had standing to bring a patent-related claim. Or, if instead of filing suit, Petitioner had sent a letter threatening to file a breach of contract claim for failure to pay royalties under the SLA, the same issue of standing would have had to be resolved. Clearly, neither of these scenarios would give rise to standing to bring a Declaratory Judgment claim of invalidity. The same is true here. Therefore, under *Gunn* and its rationale, Respondents cannot establish standing here. To hold otherwise would doom all existing patent licenses with continuing obligations (i.e., running royalties) and destroy this option going forward.

II. THE COURTS BELOW APPLIED THE WRONG LAW TO DETERMINE WHETHER THE COUNTERCLAIM WAS COMPULSORY.

The courts below should have applied Florida law in determining whether Respondents' invalidity counterclaim was compulsory. Here, the context of the case was breach of a license agreement under Florida law, not patent infringement, so whether Respondents' counterclaim is compulsory is a matter

of Florida state law. See *Montgomery Ward Dev. Corp. v. Juster*, 932 F.2d 1378, 1380-1381 (11th Cir. 1991). Even assuming that Respondents had standing to raise an invalidity counterclaim, it was not compulsory under the applicable four-part test. See *Id.* Respondents concede this point by not addressing it.

The district court misapplied the requirements of 28 U.S.C. §1454 when it concluded that Respondents' counterclaim was compulsory. Assuming *arguendo* that Respondents properly asserted an invalidity counterclaim that permitted removal under 28 U.S.C. §1454(a), consideration of the requirements of 28 U.S.C. §1454(d) likely would have resulted in the remand of Petitioner's breach of contract claim. See 28 U.S.C. §1454(d) ("district court (1) *shall remand* all claims that are neither a basis for removal under subsection (a) nor within the original or supplemental jurisdiction of the district court under any Act of Congress") (*emphasis* added). Even if Respondents' counterclaim is somehow deemed to be permissible, Petitioner's claim should have been remanded back to state court.

Whether Respondents' invalidity counterclaim was compulsory is also relevant to the Federal Circuit's jurisdiction to hear the appeal, which applies only to "an appeal of ... any civil action in which a party has asserted a *compulsory* counterclaim arising under, any Act of Congress relating to patents or plant variety protection." 28 U.S.C. §1295(a)(1) (*emphasis* added). If the Courts below had analyzed the issue under Florida law as they should have, they likely would have found that Respondents' counterclaim (assuming they had standing to bring it) was not

compulsory and that, as a consequence, Petitioner's state law claim was due to be remanded. Regardless, the issue is moot because Respondents lacked standing to assert an invalidity counterclaim, compulsory or permissive.

CONCLUSION

For the foregoing reasons, and those presented in Petitioner's Opening Brief, the petition is due to be granted.

Respectfully submitted,

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