

No. 17A-____

IN THE SUPREME COURT OF THE UNITED STATES

PROMEGA CORPORATION,

Applicant,

v.

LIFE TECHNOLOGIES CORPORATION; INVITROGEN IP HOLDINGS, INC., and APPLIED
BIOSYSTEMS, LLC,

Respondents.

APPLICATION FOR EXTENSION OF TIME WITHIN
WHICH TO FILE A PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and
Circuit Justice for the Federal Circuit:

Pursuant to Rule 13.5, Promega Corporation requests a 30-day extension of time,
to and including June 14, 2018, within which to file a petition for a writ of certiorari in
this case. The United States Court of Appeals for the Federal Circuit denied a petition
for panel rehearing and rehearing en banc in this matter on February 14, 2018. App. B.
Absent an extension of time, Promega's petition would be due on or before May 15,
2018. This Court's jurisdiction will be invoked under 28 U.S.C. § 1254(1).

1. This case comes to the Court for the second time. At trial, the jury found
that Life Technologies Corp. infringed a patent exclusively licensed by Promega and
awarded \$52 million in lost profits as combined damages for Life Technologies'
infringing sales in the United States in violation of 35 U.S.C. § 271(a) and its export of
components in violation of § 271(f)(1). In *Life Techs. Corp. v. Promega Corp.*, 137 S. Ct.

734 (2017), this Court held that the export of a single component from the United States could not support liability under § 271(f)(1) and remanded to the Federal Circuit.

The principal question on remand was whether, with one theory of damages eliminated from the case, Promega was entitled to a new trial on damages for Life Technologies' conceded infringement in the United States. The Federal Circuit held that Promega was not entitled to a new trial because it did not request one in its opposition to Life Technologies' original motion for judgment as a matter of law, but rather filed a motion for a new trial within 28 days of the district court's JMOL decision.

The Federal Circuit's decision conflicts with Rule 50(d) and this Court's precedent. Rule 50(d) expressly gives a verdict winner the right to bring a *subsequent* new-trial motion if JMOL is entered against it:

Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 *by a party against whom judgment as a matter of law is rendered* must be filed no later than 28 days *after the entry of the judgment*.


Fed. R. Civ. P. 50(d) (emphasis added). The Advisory Committee note elaborates that, even though “the verdict-winner may, and often will, contend [in opposing JMOL] that he is entitled, at the least, to a new trial,” Rule 50(d) “is a reminder that the verdict-winner *is entitled, even after entry of [JMOL] against him*, to move for a new trial in the usual course.” Rule 50 Advisory Committee's Note (1963) (emphasis added). This Court has likewise recognized that “[w]here a defendant moves for n.o.v. in the trial court, the plaintiff may present, in connection with the motion *or with a separate motion after n.o.v. is granted*, his grounds for a new trial.” *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967) (emphasis added). Rule 50(d) and *Neely* thus entitle a verdict

winner like Promega to wait, if it chooses, until after JMOL to argue for a new trial. The Federal Circuit's decision upsets this settled practice and presents an important issue for this Court's consideration.

2. Promega requests a 30-day extension of time in which to file a petition for a writ of certiorari. This extension is requested because undersigned counsel of record and the counsel assisting him have other pressing obligations in the coming weeks. These include a reply brief due on May 4, 2018 in *AbbVie Biotechnology, Ltd v. Coherus Biosciences, Inc.*, Nos. 2017-2304, -2305, -2306, -2362, -2363 (Fed. Cir.); a response to a motion to dissolve a preliminary injunction due on May 4, 2018 in *Doe v. Trump*, No. 17-cv-1597 (D.D.C.); an opening brief due on May 7, 2018 in *Thomas v. Meko*, No. 17-5824 (6th Cir.); fact and expert discovery in *Tesla, Inc. v. Johnson*, No. 16-cv-01158 (W.D. Mich.); and summary judgment briefing in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass.).

For the foregoing reasons, Promega respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended by 30 days, to and including June 14, 2018.

Respectfully submitted.



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CORPORATE DISCLOSURE STATEMENT

Respondent Promega Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.