No. 19-

IN THE

Supreme Court of the United States

WISCONSIN ALUMNI RESEARCH FOUNDATION,
Petitioner,

v.

APPLE INC.,
Respondent.

Application for Extension of Time to File Petition for 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 SUPREME COURT AND CIRCUIT JUSTICE FOR THE FEDERAL CIRCUIT:

Pursuant to this Court's Rules 13.5, 22, and 30.2, Petitioner Wisconsin Alumni Research Foundation ("WARF")[1] respectfully requests a 60-day extension, up to and including June 7, 2019, to file a petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit. WARF has conferred with Respondent Apple Inc. ("Apple") and has confirmed that Apple does not oppose this extension.

Opinion Below, Timeliness, and Jurisdiction

WARF seeks review of the Federal Circuit's September 28, 2018, decision in *Wisconsin Alumni Research Foundation v. Apple Inc.*, 905 F.3d 1341 (Fed. Cir. 2018). *See* App. A. The Federal Circuit denied WARF's motion for panel rehearing and rehearing *en banc* on January 7, 2019. *See* App. B.

[1] Pursuant to Supreme Court Rule 29.6, Petitioner WARF submits that it has no parent corporation and no publicly held company owns 10% or more of its stock. WARF is a not-for-profit Wisconsin corporation and is the designated patent management organization of the University of Wisconsin – Madison.

A petition for a writ of certiorari would be due, pursuant to this Court's Rules 13.1, 13.3, and 30.1, on or before April 8, 2019, which is ninety (90) days[2] from January 7, 2019, the date of the Federal Circuit's order denying rehearing (App. B). This application is being filed more than ten (10) days before the April 8, 2019 deadline, per Rule 30.2.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Background

In this case, WARF accused Apple's processors of infringing WARF's patent. During trial, shortly before closing arguments, Apple requested that the district court issue a claim construction for a term that neither party had ever asked be construed. The district court refused, finding Apple had "waived" any right to a construction. The court thus instructed the jury to apply the term's "plain and ordinary meaning as viewed from the perspective of a person of ordinary skill in the art [POSITA]." The jury heard expert testimony as to a POSITA's understanding of the term in question. The jury then found WARF's patent valid and literally infringed by Apple's processors, resulting in a judgment and damages award of $506 million for WARF.

But on appeal, Apple asked the Federal Circuit to construe the claim term for which the district court had found Apple "waived" any construction. The Federal Circuit granted Apple's request and construed the term, for the first time on appeal, without reviewing or even acknowledging the district court's waiver ruling. Further, the panel construed the claim term *de novo*, stating "our view" of its meaning, giving

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[2] Pursuant to Supreme Court Rule 30.1, one day was added to this calculation to move the due date from Sunday, April 7, 2019, to the "next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed," namely, Monday, April 8, 2019.

no deference whatsoever to jury fact findings regarding a POSITA's understanding. In doing so, the Federal Circuit disregarded the principles of this Court's decision in *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 135 S.Ct. 831 (2015).

The Federal Circuit did not stop there. Despite construing a claim term in the first instance on appeal, the panel did not remand for further proceedings consistent with its new claim construction. Instead, the panel immediately applied its new claim construction to grant Apple JMOL of no literal infringement. The panel reached this result by finding that WARF had presented "insufficient evidence" at trial to support the jury's literal infringement verdict under the panel's *first instance* claim construction, even though the trial record had been developed *without* that claim construction. In doing so, the Federal Circuit disregarded its appellate function, the roles of the trial court and jury, the Seventh Amendment, and Due Process.

This appeal accordingly presents two fundamental questions that are of significant importance to patent law, warranting a writ of certiorari:

1) Where the district court properly instructed the jury to give a claim term its "plain and ordinary meaning as viewed from the perspective of a [POSITA]," does this Court's decision in *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 135 S.Ct. 831 (2015), allow the Federal Circuit to construe that claim term *de novo*, giving no deference to jury fact findings regarding a POSITA's understanding?

2) May the Federal Circuit apply a new claim construction, that it issued on appeal, to grant JMOL on the record of a trial that was held without that claim construction, instead of remanding for further proceedings consistent with the Federal Circuit's new claim construction?

Reasons for Granting the Extension

1. Since the Federal Circuit issued its order denying rehearing (App. B), the parties have been back before the district court engaged in significant motion practice in this litigation, *Wisconsin Alumni Research Foundation v. Apple Inc.*, No. 3:14-cv-00062-WMC (W.D. Wis.) (*"WARF I"*), and in a related litigation concerning the same patent and later versions of Apple's accused processors, *Wisconsin Alumni Research Foundation v. Apple Inc.*, No. 3:15-cv-00621-WMC (W.D. Wis.) (*"WARF II"*). In *WARF I*, plaintiff WARF seeks a trial on its claims for infringement under the doctrine of equivalents ("DoE") under the Federal Circuit's new claim construction. *See, e.g., Exxon Chem. Patents v. Lubrizol Corp.*, 137 F.3d 1475, 1479 (Fed. Cir. 1998). WARF argued only literal infringement at the first trial, and DoE did not become a "critical issue" until the Federal Circuit issued a claim construction on appeal. *Id.* Apple opposes WARF's motion in *WARF I*, and in *WARF II* Apple seeks summary judgment of non-infringement based on alleged preclusion defenses. The district court held a status conference on January 25, 2019, and it ordered a briefing schedule for the two motions spanning through March 29, 2019. *See WARF I*, Dkts. 789 & 790. The briefing has been extensive and detailed, requiring significant time commitments from the counsel responsible for preparing WARF's petition for a writ of certiorari. *See, e.g., WARF I*, Dkts. 793-800; *WARF II*, Dkts. 72-78. These obligations have limited the availability of counsel to work on WARF's petition during the foregoing two month period. The requested 60-day extension will alleviate this burden.

2. A 60-day extension will also provide additional time within which the district court may rule on the pending motions in *WARF I* and *WARF II* before WARF's petition for a writ of certiorari is filed, before it is fully briefed, and/or before

it is considered by this Court. The district court will decide whether to allow a trial in *WARF I* and/or *WARF II* on WARF's DoE infringement claims under the Federal Circuit's new claim construction. The district court's rulings may help provide clarity as to the impact of the Federal Circuit's decision for which review is sought (App. A), helping to better crystalize the issues for consideration by this Court.

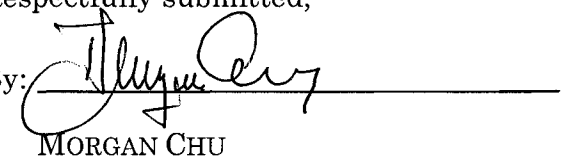
3. The requested extension is also needed due to the press of other client business. During the relevant time, WARF's counsel also have been or are busy with: (i) multiple motions and related hearings in *VLSI Technology LLC v. Intel Corp.*, No. 5:17-cv-05671-BLF (N.D. Cal.); (ii) infringement contentions, validity contentions, an in-person hearing on case narrowing, and certain claim construction deadlines in *VLSI Technology LLC v. Intel Corp.*, No. 1:18-cv-00966-CFC (D. Del.); (iii) responding to multiple *inter partes* review petitions—*e.g.*, in IPR2018-00895, IPR2018-00896, and IPR2018-00928—concerning patents asserted in *General Electric Co. v. Vestas Wind Systems A/S*, No. 2:17-cv-05653-AB-PLA (C.D. Cal.); (iv) preparation for oral argument in *Cosmo Technologies Ltd. v. Actavis Labs. Fl, Inc.*, Nos. 2018-1335 (Fed. Cir.); (v) infringement contentions, claim construction briefing and related deadlines in *United Services Automobile Association v. Wells Fargo Bank, N.A.*, Nos. 2:18-cv-00245-JRG (E.D. Tex.), and 2:18-cv-00366-JRG (E.D. Tex.); and (vi) approximately two dozen depositions taken or scheduled to be taken in *Juno Therapeutics, Inc. v. Kite Pharma, Inc.*, No. 2:17-cv-07639-SJO-RAO (C.D. Cal.).

Conclusion

For the foregoing reasons and good cause shown, Petitioner WARF respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari in the above-captioned case by 60 days, up to and including June 7, 2019.

Respectfully submitted,

Dated: March 27, 2019

By: 

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