

No. 18-1549

IN THE
Supreme Court of the United States

ZIMMER, INC., ET AL.,
Petitioners,

v.

STRYKER CORPORATION, ET AL.,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 136 S. Ct. 1923 (2016), this Court rejected the Federal Circuit’s two-part test for willful patent infringement under *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (*en banc*), as an unduly rigid, impermissible encumbrance on the statutory grant of discretion to district courts. Reviewing this very case, the Court found problematic that *Seagate* made dispositive an infringer’s ability to muster a reasonable defense at trial, even if the infringer did not know of or act on the basis of that defense. The Court held that enhanced damages are generally reserved for cases involving egregious misconduct, with culpability measured against the infringer’s knowledge at the time of infringement. The Court also held that a district court’s enhancement decision is governed by a preponderance of the evidence standard and reviewed for abuse of discretion.

The questions presented are:

1. Whether, following a jury finding of willful infringement affirmed by the Federal Circuit, the District Court abused its discretion in enhancing damages after independently evaluating the totality of the circumstances and concluding that Zimmer engaged in egregious piracy.
2. Whether the Federal Circuit is precluded from entering a summary affirmance otherwise permitted under Federal Circuit Rule 36 when reviewing, for the second time, the District Court’s discretionary award of enhanced damages for egregious piracy.

RULE 29.6 DISCLOSURE STATEMENT

Respondent Stryker Corporation has no parent corporation, and no publicly held company owns ten percent or more of its stock.

Respondent Stryker Puerto Rico, Ltd. is an indirect wholly-owned subsidiary of Stryker Corporation, which is a publicly held company that owns ten percent or more of Stryker Puerto Rico, Ltd.'s stock.

Respondent Stryker Sales Corporation is a wholly-owned subsidiary of Stryker Corporation, which is a publicly held company that owns ten percent or more of Stryker Sales Corporation's stock.

RELATED CASES

Stryker Corp., et al. v. Zimmer, Inc., et al., 1:10-CV-1223, United States District Court for the Western District of Michigan, Final Judgment and Permanent Injunction, entered September 5, 2013, Dkt. 546.

Stryker Corp., et al. v. Zimmer, Inc., et al., 2013-1668, United States Court of Appeals for the Federal Circuit, Opinion and Judgment, entered December 19, 2014, Dkt. 66, Revised Opinion and Judgment, entered March 23, 2015, Dkt. 85.

Stryker Corp. et al. v. Zimmer, Inc., et al., 14-1520, consolidated with *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 14-1513, Supreme Court of the United States, Judgment, entered July 15, 2016, Amended Judgment, entered July 25, 2016.

Stryker Corp., et al. v. Zimmer, Inc., et al., 2013-1668, United States Court of Appeals for the Federal Circuit, Opinion and Judgment, entered September 12, 2016, Dkt. 116.

Stryker Corp., et al. v. Zimmer, Inc., et al., 1:10-CV-1223, United States District Court for the Western District of Michigan, Amended Final Judgment and Permanent Injunction After Remand, entered July 19, 2017, Dkt. 611.

Stryker Corp., et al. v. Zimmer, Inc., et al., 2017-2541, United States Court of Appeals for the Federal Circuit, Judgment, entered December 10, 2018, Dkt. 49.

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INTRODUCTION

Zimmer's petition completely misses the point of *Halo* and is predicated on a strawman argument that Stryker's enhanced damages award rests on a finding of mere negligence.

A simple review of the record confirms that: (1) the jury found Zimmer's infringement to be willful under the two-part *Seagate* test, a more rigorous standard than is now required; (2) the District Court separately found Zimmer's infringement to be knowing, flagrant, deliberate, egregious piracy, App. 28a, 30a, 33a, 34a, 39a, 68a-70a, 105a-107a; and (3) the Federal Circuit affirmed these findings. App.1a, 20a-21a. Not once did the jury, the District Court or the Federal Circuit ever suggest that Zimmer's conduct was mere negligence. Zimmer cannot support its rewriting of the record to "downgrade" its egregious piracy to simple negligence, and therefore has no basis to petition for certiorari on this issue.

Zimmer's petition ignores that, upon review of this very case, this Court found that the enhancement determination is committed to the discretion of the District Court and subject to review under an abuse of discretion standard. *Halo*, 136 S. Ct. at 1934. Not only did the jury here find willfulness under an overly-rigorous standard, but on remand from this Court, the District Court independently analyzed the totality of circumstances and concluded that "Zimmer's overall conduct was a case of egregious piracy warranting fully enhanced damages and attorney fees." App. 30a. In particular, the District Court found that Zimmer deliberately copied Stryker's "pioneering" patented

invention, affirmatively knew of Stryker's patents well before the litigation, and refused to investigate the patents or take any remedial action. App. 34a-39a, 44a-45a, 69a-70a, 105a-106a. The District Court further found that Zimmer was motivated to harm Stryker in the marketplace, and prolonged the litigation with unjustified positions that were, at times, "impossibly cramped" and "unreasonable." App. 36a n.5, 38a. Ultimately, the District Court awarded treble damages to Stryker due to "the one-sidedness of the case and the flagrancy and scope of Zimmer's infringement," finding that "Zimmer is precisely the type of egregious infringer the Supreme Court had in mind when it relaxed the *Seagate* standard to provide district courts with the freedom to exercise their discretion to enhance damages in cases of willful infringement." App. 33a, 39a-40a. This case clearly does not present facts conducive to a study of whether enhanced damages are appropriate based on a finding of mere negligence.

Finally, Zimmer's objection to the Federal Circuit's summary affirmance of the District Court's enhancement determination has no legal foundation. *Halo* did not hold or even suggest that appellate review of a district court's discretionary enhancement determination precludes summary affirmances under Federal Circuit Rule 36. The Federal Circuit's decision to issue a summary affirmance here is simply a recognition that an opinion would have no precedential value and that the District Court's judgment is not legally erroneous or based on clearly erroneous findings. Fed. Cir. R. 36.

STATEMENT OF THE CASE

A. Background

The District Court, which lived with this case since 2010, summarized the facts as follows:

[P]ulsed lavage devices had, for years, served an important function in surgical procedures—cleaning out wounds and removing necrotic tissue from wound sites. Early-model pulsed lavage devices were bulky and required a centralized power source. They had to be wheeled around a hospital, from one room to another. Stryker solved the problems associated with the size and power needs of pulsed lavage devices by designing a portable, disposable, battery-powered, hand-held pulsed lavage device. Zimmer’s Manufacturing Manager and Rule 30(b)(6) witness agreed that Stryker products were “pioneering.”

Zimmer had no answer for Stryker’s new technology and saw its market share fall precipitously, to the point where Zimmer’s presence in the pulsed lavage marketplace was at risk. Rather than relying on their own engineers to develop an alternative, Zimmer hired an independent contractor with no experience in pulsed lavage devices. In essence, Zimmer handed the independent contractor a copy of

Stryker's product and said, "Make one for us." Under those conditions, it is not surprising that the finished Zimmer product turned out to look and function like Stryker's product. Nevertheless, Zimmer got its product to market quickly and in direct competition with Stryker. In doing so, it did not seek advice of outside patent counsel to assess the potential for infringement of Stryker's patents, or to opine on the validity of Stryker's patents.

App. 44a-45a.

B. District Court Proceedings

Stryker filed suit against Zimmer in December 2010, alleging infringement of three patents, U.S. Patent Nos. 6,022,329 ("the '329 patent"), 6,179,807 ("the '807 patent"), and 7,144,383 ("the '383 patent"). App. 45a. Contrary to Zimmer's characterization, Zimmer affirmatively knew about Stryker's patents well before the lawsuit. *See infra* at Sec. I.A. Despite knowing of Stryker's patents for years, Zimmer never investigated those patents and was unable to present any substantial defenses to Stryker's infringement claims. Indeed, far from presenting "robust noninfringement and invalidity defenses," as its petition claims (Pet. at 5), Zimmer lost on *every* disputed issue considered at the District Court. App. 45a. After losing on ten distinct claim construction questions, the District Court granted Stryker's motion for summary judgment on the ultimate question of infringement for all twenty asserted claims of the '807

and '383 patents and as to all but one claim element of the '329 patent. App. 36a n.5. The case proceeded to trial on the one remaining infringement issue under the '329 patent, Zimmer's attacks on the validity of the three patents-in-suit, Stryker's claim for willful infringement, and damages.

The District Court summarized the jury verdict as follows:

After two weeks of trial—featuring hundreds of exhibits and more than a dozen witnesses—and multiple days of deliberation, the jury returned a verdict unequivocally in Stryker's favor. In particular, the jury found: (1) that the Pulsavac Plus products infringed claim 2 of the 329 patent; (2) that Zimmer failed to establish any of its 22 invalidity contentions; and (3) that Stryker was entitled to \$70 million in lost profits. The jury also found that Zimmer willfully infringed the valid claims under the patents-in-suit.

App. 44a (internal citations omitted).

The District Court denied all ten of Zimmer's post-trial motions. App. 47a-48a. With respect to Zimmer's motion for JMOL of no willfulness, the District Court expressly reviewed both prongs of the Federal Circuit's *Seagate* test and found in Stryker's favor on both. App. 65a-70a. In particular, the District Court held that "the jury had ample justification for

finding, as a subjective matter, that Zimmer willfully infringed the patents-in-suit.” App. 70a.

The District Court further observed that

[a]t the time the jury announced its verdict, Zimmer had not changed its product design. This is consistent with both the market and litigation strategy that Zimmer has followed for years. Zimmer chose a high-risk/high-reward strategy of competing immediately and aggressively in the pulsed lavage market and opted to worry about the potential legal consequences later.

App. 45a-46a.

In its analysis of Stryker’s motion for enhanced damages, the District Court considered the totality of the circumstances, including Zimmer’s admitted copying, its failure to investigate the scope of Stryker’s patents, the long duration of its infringement, and Zimmer’s concealment of key evidence during discovery. App. 104a-106a. Guided by the factors set forth in *Read Corp. v. Portec, Inc.*, 970 F.2d 816 (Fed. Cir. 1992), the District Court concluded that treble damages were warranted “[g]iven the one-sidedness of the case and the flagrancy and scope of Zimmer’s infringement.” App. 107a.

C. First Federal Circuit Appeal

On appeal, the Federal Circuit affirmed on all

liability and damages issues but reversed on willfulness. *Stryker Corp. v. Zimmer, Inc.*, 782 F.3d 649, 662 (Fed. Cir. 2015). Although Zimmer chose not to challenge the jury's or the District Court's findings of subjective intent, App. 21a, the Federal Circuit determined *de novo* that, while all of Zimmer's defenses were unsuccessful, certain defenses raised on appeal were not objectively unreasonable. *Id.* at 660-662. Under its then-existing precedent, the Federal Circuit concluded that such defenses precluded a finding of willfulness. *Id.* Having reversed on willfulness, the Federal Circuit summarily vacated the District Court's enhanced damages award. *Id.*

D. Supreme Court Proceedings

Stryker petitioned for certiorari, arguing that the Federal Circuit's *Seagate* test negates the deterrent effect of 35 U.S.C. § 284 by allowing bad-faith infringers like Zimmer to defeat enhanced damages simply by retaining skilled counsel to create minimally reasonable defenses during litigation ("post-hoc defenses"), regardless of whether the infringer knew of or relied upon such defenses prior to infringing. Stryker's Pet. at 19. Stryker also argued that the District Court, not the appellate court, is best suited to use its discretion to assess the propriety of enhancing damages. *Id.* at 19-20. This Court granted certiorari and consolidated the case with *Halo Electronics v. Pulse Electronics*, No. 14-1513.

With the facts and procedural history of this case before it, this Court agreed with Stryker, finding that "Section 284 permits district courts to exercise

their discretion in a manner free from the inelastic constraints of the *Seagate* test.” *Halo*, 136 S. Ct. at 1933-34. The Court further noted that enhanced damages “should generally be reserved for egregious cases typified by willful misconduct.” *Id.* at 1934. The Court was clear that “culpability is generally measured against the knowledge of the actor at the time of the challenged conduct” and should not turn on the infringer’s ability “to muster a reasonable (even though unsuccessful) defense at the infringement trial.” *Id.* at 1933.

The Court also rejected the Federal Circuit’s tripartite framework for appellate review, instead holding that a district court’s enhancement determination should be reviewed for abuse of discretion. *Id.* at 1934. The Court further rejected the use of the “clear and convincing evidentiary standard” for enhanced damages, finding that “patent infringement litigation has always been governed by a preponderance of the evidence standard.” *Id.*, citing *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 572 U.S. 545, 557-58 (2014). The Court vacated the Federal Circuit’s judgment and remanded the case. *Halo*, 136 S. Ct. at 1935-36.

E. Remand to the Federal Circuit

On remand, the Federal Circuit reaffirmed the jury’s findings on validity and infringement, affirmed the jury’s finding of willfulness in light of *Halo*, and vacated and remanded the District Court’s award of enhanced damages and attorney fees. App. 5a. Contrary to Zimmer’s characterization, the Federal

Circuit did not re-analyze Zimmer’s defenses “at length” and conclude that such defenses were “not unreasonable.” Pet. at 8. It simply reissued its 2015 pre-*Halo* opinion on liability and damages, replacing only the willful infringement and attorney fee sections. In particular, the Federal Circuit deleted earlier references to its vacated, *de novo* findings regarding Zimmer’s post-hoc defenses, since reliance on these had been repudiated in *Halo*. Compare *Stryker*, 782 F.3d 649 with App. 3a-22a.

In affirming the jury’s finding of willfulness, the Federal Circuit observed that

Zimmer did not appeal the jury’s finding of subjective willfulness under the *Seagate* test. On the record in this case, willful misconduct is sufficiently established by the jury’s finding. The jury made its determination under the clear and convincing standard, which is a higher standard than is now necessary. We therefore affirm the jury’s finding of willful infringement.

App. 21a.

After the Federal Circuit denied Zimmer’s petition for rehearing and rehearing en banc regarding the affirmance of willfulness, Zimmer elected not to seek review by this Court. The case was duly remanded to the District Court to revisit its enhanced damages analysis in light of *Halo*.

F. District Court Proceedings on Remand

On remand, the District Court requested supplemental briefing and oral argument addressing the impact of *Halo* on the enhanced damages determination. App. 30a. Zimmer asserted that its infringement was not intentional or knowing and that any enhancement should be minimal. Unpersuaded, the District Court reaffirmed its award of treble damages, providing a lengthy opinion setting forth the factual bases for its conclusion that Zimmer had engaged in egregious behavior. App. 27a-41a.

The District Court recognized that “[t]he paramount determination in deciding to grant enhancement and the amount thereof is the egregiousness of the defendant’s conduct based on all the facts and circumstances.” App. 32a. Using the *Read* factors as guideposts, the District Court analyzed the circumstances surrounding Zimmer’s infringement in their totality. *Id.* The District Court separately discussed each of the nine *Read* factors, and determined that every one of them favored enhancement. App. 34a-39a. The District Court concluded—once again—that “Zimmer engaged in egregious infringement behavior.” App. 33a. Exercising its discretion, the District Court held that “the factual findings supporting this Court’s holding—which warranted enhancement under a clear-and-convincing standard and which were not disturbed on appeal—are more than sufficient to support an enhancement for treble damages under the *Halo* preponderance-of-the-evidence standard.” App. 34a.

To remove any doubt regarding its view of the record, the District Court added that “Zimmer is precisely the type of egregious infringer the Supreme Court had in mind when it relaxed the *Seagate* standard to provide district courts with the freedom to exercise their discretion to enhance damages in cases of willful infringement.” App. 39a-40a.

G. Second Federal Circuit Appeal

Once again, Zimmer appealed, this time taking issue with the manner in which the District Court integrated analysis of the *Read* factors into its ultimate enhancement decision. During an extended oral argument, the panel commented that Zimmer was “just asking us to take the *Read* factors and turn them into the exact kind of strict test that the Supreme Court took away from us when they took away the two part test that we did before” and that Zimmer’s attempt to ratchet down the fee award “is exactly, is it not, what the Supreme Court was avoiding our having to do by giving the discretion to the District Court.” 2018 Federal Circuit Oral Argument at 8:08-8:44, 12:38-13:30, *Stryker Corp. v. Zimmer, Inc.*, No. 2017-2541, available at http://www.cafc.uscourts.gov/oral-argument-recordings?title=Stryker+Corporation+v.+Zimmer%2C+Inc.&field_case_number_value=2017-2541&field_date_value2%5Bvalue%5D%5Bdate%5D=2018-12-03. Ultimately, the Federal Circuit affirmed the District Court’s discretionary decision under Fed. Cir. R. 36 and subsequently denied Zimmer’s petition for rehearing and rehearing en banc. App. 1a, 111a-112a.

REASONS FOR DENYING THE WRIT

Zimmer's petition does not warrant this Court's review for four reasons:

First, Zimmer's first Question Presented does not relate to the present case because neither the jury's willfulness verdict nor the District Court's treble damages award was based on a finding of simple negligence. To the contrary, the jury found willfulness under the unduly restrictive *Seagate* test, which even Zimmer admits is more than sufficient to establish recklessness. *See* Pet. at 10.

Moreover, the District Court did not automatically enhance damages because of the jury's willfulness verdict. Rather, the District Court's decision to enhance damages was based on an independent, comprehensive analysis of the evidence, which showed that Zimmer deliberately copied its direct competitor's inventions, took no steps to investigate the scope of Stryker's patents when it learned about them, and refused to stop infringing even after the District Court entered summary judgment of infringement. App. 34a-39a, 45a, 69a-70a, 105a-106a. The District Court also found that Zimmer concealed key information during discovery, prolonged (and continues to prolong) the case by advancing unjustified positions throughout the litigation, and was "motivated by a desire to harm Stryker," its only major competitor. App. 38a-39a, 105a-106a. The District Court ultimately concluded that Zimmer's conduct was a case of flagrant infringement and "egregious piracy" (not simply negligence). Given the combination of the jury verdict

of willfulness, the District Court's upholding of that verdict, Zimmer's failure to appeal the findings of subjective intent, the District Court's additional, extensive findings of flagrant infringement and the Federal Circuit's affirmance of those findings, this case simply does not provide a vehicle for evaluating Zimmer's hypothetical question regarding the availability of enhanced damages based on a finding of mere negligence.

Second, the Federal Circuit's 2016 affirmance of the jury's willfulness verdict was entirely consistent with *Halo*. In 2015, the Federal Circuit vacated the jury's willfulness verdict only because it believed that certain of Zimmer's litigation-inspired defenses were "not unreasonable," and this Court, in turn, vacated the Federal Circuit's opinion and rejected Zimmer's position *on that very issue*. *Halo*, 136 S. Ct. at 1932-33, 1935-36. On remand in 2016, the Federal Circuit affirmed the jury's willfulness verdict in its entirety because in *Halo*, this Court conclusively resolved the only willfulness issue that Zimmer appealed. App. 5a, 22a. In its affirmance, the Federal Circuit nowhere suggested, let alone articulated a "nationwide rule," that negligence is sufficient to support enhanced damages. To the contrary, the Federal Circuit indicated that willful misconduct was established on the record of this case. App. 21a.

Third, procedurally, this case is a poor candidate for Supreme Court review. At its core, Zimmer disputes whether the District Court was justified in concluding that Zimmer acted egregiously, a fact-bound determination. Importantly, Zimmer

chose not to appeal any of the fact determinations underlying willfulness because the record below amply supports those findings, rendering any involvement by this Court an ill-advised expenditure of judicial resources. App. 21a. Moreover, because this is one of the last cases still pending that involved a jury instruction under the overly restrictive *Seagate* standard, the unique circumstances of this case are particularly unlikely to affect future cases. This Court's decision in *Halo* is still quite recent, and the Federal Circuit is well-positioned to oversee routine matters concerning its immediate implementation—as it has already done on numerous occasions.

Finally, there is simply no legal basis for Zimmer's objection to the Federal Circuit's use of a summary affirmance in this case. Zimmer's petition incorrectly presumes that *Halo* precludes the Federal Circuit from issuing Rule 36 affirmances on fact-specific, discretionary determinations pertaining to enhanced damages. Zimmer's curious request that this Court vacate and remand to force the Federal Circuit to provide a written opinion setting forth why the District Court's thorough analysis was not an abuse of its discretion serves no purpose other than to further prolong this decade-old case. Pet. at 3.

**I. THIS CASE DOES NOT IMPLICATE
ZIMMER'S HYPOTHETICAL QUESTION
REGARDING THE AVAILABILITY OF
PUNITIVE DAMAGES BASED ON MERE
NEGLIGENCE**

Zimmer's entire petition hinges on its

contention that the lower courts found Zimmer’s conduct to be merely negligent, and awarded enhanced damages on that basis. This is simply untrue. Rather, the record is replete with evidence supporting the District Court’s discretionary finding that Zimmer was a quintessential egregious infringer—an infringer “who plunder[ed] a patent—infringing it without any reason to suppose his conduct is arguably defensible.” *Halo*, 136 S. Ct. at 1933. Under review for an abuse of discretion, the Federal Circuit properly affirmed.

A. The District Court Found Zimmer’s Conduct To Be Egregious Piracy, Not Mere Negligence

In its petition, Zimmer complains that the jury’s willfulness verdict here was “tantamount to a finding of negligence” and that the Federal Circuit’s 2016 affirmance of the jury’s willfulness verdict somehow resulted in enhanced damages being awarded based on negligence. Pet. at 15. Not only does this mischaracterize the nature of the jury’s verdict, as discussed more fully in Sec. B., but it entirely overlooks the fact that the enhanced damages award in this case was supported by the District Court’s own independent finding of “willful,” “flagran[t],” and “egregious” infringement. *See infra*.

Section 284 commits the discretionary decision to award enhanced damages to district courts. Moreover, a willfulness finding does not require a district court to award enhanced damages. *See Halo*, 136 S. Ct. at 1933 (“[N]one of this is to say that

enhanced damages must follow a finding of egregious misconduct.”); *see also Polara Eng’g Inc. v. Campbell Co.*, 894 F.3d 1339, 1353 (Fed. Cir. 2018). Rather, a district court in its own discretion determines whether and how much enhanced damages are appropriate, and should generally only award enhanced damages where the infringer’s conduct was egregious. *Halo*, 136 S. Ct. at 1933, 1935.

Zimmer ignores that, both before and after this case reached this Court in *Halo*, the District Court unequivocally found that Zimmer’s conduct was so egregious and flagrant that treble damages were warranted. App. 27a-41a, 65a-70a, 104a-108a. For example, the District Court expressly found Zimmer “deliberately copied Stryker’s patented inventions”—a finding supported by the testimony of “multiple trial witnesses.” App. 34a-35a, 105a.

Not only did Zimmer’s own witnesses admit to copying Stryker, but the record below contained additional overwhelming evidence of Zimmer’s egregiousness. Stryker and Zimmer are direct competitors, and Zimmer’s own internal documents illustrated that Zimmer considered Stryker’s inventions to be “pioneering.” App. 44a, 69a. As a result, it is not surprising that Zimmer referenced and studied Stryker’s commercial products throughout the design period, even creating a prototype that incorporated physical parts taken from Stryker’s patented devices. App. 45a. Zimmer admitted that it learned about two of Stryker’s patents-in-suit in 2000 and 2001, shortly after they issued from the Patent Office. App. 65a-66a; C.A.J.A.13866. Zimmer’s

knowledge of the third patent was shown through its knowledge of related patents, its competitive patent monitoring, and the fact that Stryker marked its products with the patent numbers. *Id.* While Zimmer improperly tried to hide the evidence from Stryker, Zimmer's knowledge of Stryker's patents was also confirmed by evidence showing that, in 2002, the Patent Office repeatedly and explicitly warned Zimmer of the relevance of Stryker's patents to Zimmer's copycat products, leading Zimmer to abandon its attempt to obtain patent protection. App. 39a, 65a-66a, 105a-106a; C.A.J.A. 10407-17, 10570-79, 10590.

The District Court also found that, despite its knowledge of all three of Stryker's patents, Zimmer made no effort to investigate their scope, to design around them, or to take any other remedial action whatsoever. App. 35a-38a, 105a-106a. Zimmer even continued to sell its copycat, infringing products after (1) the Patent Office cited Stryker's patents in rejecting Zimmer's patent application, (2) Stryker sued Zimmer for patent infringement, (3) the District Court found Zimmer's products infringed various Stryker patents as a matter of law, and (4) the jury found willful infringement and rejected all of Zimmer's remaining defenses. *Id.* Despite multiple opportunities to change course, at each turn, Zimmer opted to violate Stryker's patent rights.

In determining that Zimmer's conduct warranted punishment with enhanced damages, the District Court plainly understood that negligence was not enough—noting, for instance, that the sort of

conduct warranting enhanced damages is “willful, wanton, malicious, bad faith, deliberate, consciously wrongful, flagrant, or indeed—characteristic of a pirate.” App. 31a-32a, *citing Halo*, 136 S. Ct. at 1932. Far from a finding of mere negligence, the District Court found that Zimmer’s decision to forge ahead with its “high-risk/high-reward strategy” of “competing immediately and aggressively” and “opt[ing] to worry about the potential legal consequences later,” was part of an overall course of egregious conduct. App. 46a, 38a-40a. In the District Court’s unequivocal words, based on its consideration of the totality of the circumstances of the trial and the entire course of litigation it had overseen for years, the case was not only one-sided but “flagrant” and “egregious,” and indeed “Zimmer is precisely the type of egregious infringer the Supreme Court had in mind” in *Halo*. App. 39a. The District Court’s findings are as far removed from a mere negligence determination as can be imagined. Nor can the Federal Circuit’s decision to affirm the District Court’s enhanced damages determination be plausibly read to suggest that mere negligence would suffice to support such an award.

In its Petition, Zimmer argues that *Halo* merely created a new “intentional willfulness” standard, proven only by “direct evidence of intent,” to augment *Seagate*’s recklessness standard, with the old *Seagate* approach applying in cases where subjective willfulness has not been shown. Pet. at 10. But *Halo* did not seek to add just another branch to *Seagate*’s already complex enhanced damages decision tree. Just the opposite: in reviewing Zimmer’s conduct in

this case, *Halo* took pains to free the enhanced damages determination from a complex set of constraints that were warranted neither by statute, by historical practice, or by general principles of law.

Even if Zimmer's argument were correct, it would not be relevant here. As discussed above, Stryker presented direct evidence of Zimmer's bad faith by demonstrating that Zimmer deliberately copied Stryker's pioneering products, knew of Stryker's patents, and simply opted to roll the litigation dice. That is precisely the kind of behavior that enhanced or punitive damages exist to prevent and is precisely the kind of behavior that has historically been subject to punishment under § 284. See 157 Cong. Rec. S1374 (daily ed. Mar. 8, 2011) ("Absent the threat of treble damages, many manufacturers would find that their most financially reasonable option is simply to infringe patents."); Doc. 338, 24th Cong., 1st Sess. 3-4 (1836) ("copy[ing] [of] patented machines" is one of the "evils" at which the 1836 Patent Act was directed.); *Milgo Elec. Corp. v. United Bus. Commc'ns, Inc.*, 623 F.2d 645, 666 (10th Cir. 1980) (explaining that copying is evidence of "intentional," "deliberate" actions that are not "merely accidental or negligent"); *Am. Safety Table Co. v. Schreiber*, 415 F.2d 373, 378 (2d Cir. 1969) (intentional infringement typically found when there is "faithfully copy[ing]" because this conduct "reveal[s] an intentional disregard of patent rights"); *Coleman Co. v. Holly Mfg. Co.*, 269 F.2d 660, 665-66 (9th Cir. 1959) ("faithful copying reveals an intentional disregard of the appellee's patent rights" and justifies a finding of willful infringement). If *Halo* established

an alternative basis for enhanced damages in cases involving “subjective willfulness,” then this case unquestionably falls within it. Indeed, *Halo* was not an advisory opinion but was rather an analysis based on the Court’s examination of Zimmer’s conduct in this very case. *Halo*, 136 S. Ct. at 1931.

Given the District Court’s discretionary findings in this case and the Federal Circuit’s affirmance of those findings under an abuse of discretion standard, nothing on this record can be fairly said to “garble” or misapply *Halo*’s mandate that district courts in their discretion can enhance damages when confronted with “egregious cases of misconduct beyond typical infringement.” *Id.* at 1935.

B. The Federal Circuit Properly Affirmed The Willfulness Verdict

Ignoring that the District Court’s findings of egregious piracy are sufficient under *Halo* to warrant enhancing damages, Zimmer’s petition instead argues that the Federal Circuit erred in an earlier opinion three years ago when it affirmed the jury’s willfulness verdict. Even assuming Zimmer properly preserved the issue¹ and that the Federal Circuit’s purported

¹ In light of the evidence at trial, Zimmer chose not to appeal the jury’s finding of subjective intent and instead appealed willfulness based solely on its post-hoc defenses. App. 21a. Moreover, Zimmer could have petitioned for a writ of certiorari to this Court after the Federal Circuit affirmed the jury’s willfulness verdict in 2016. *Id.* Instead, Zimmer allowed the case to be remanded back to the District Court and forced the parties and the courts to spend an additional two years litigating the

error would affect the outcome of this case despite the District Court's egregiousness determination, Zimmer's argument has no merit. The jury's finding was exactly what it purported to be—a finding of willful infringement—not a finding of mere negligence. Similarly, the Federal Circuit's affirmance of the jury's willfulness verdict was based on its finding that the record of this case supported willful misconduct, not negligence. App. 21a.

1. The Jury Found Willfulness Based On The More Stringent Willfulness Standard, Not Negligence

It is undisputable that the jury was instructed in accordance with the then-existing *Seagate* standard, a more exacting standard than is now required after *Halo*. Pet. at 6. For example, the jury was instructed to consider “whether Zimmer raised legitimate or credible defenses to infringement, even if they were not ultimately successful; or whether defenses appeared contrived and insubstantial.” C.A.J.A.2879. While *Halo* later cautioned against looking to “facts that the defendant neither knew nor had reason to know at the time he acted” such as litigation defenses, *Halo*, 136 S. Ct. at 1933, the jury still found under the stricter standard that Stryker proved by clear and convincing evidence that Zimmer's defenses were “contrived and insubstantial.”

issue of enhancement before filing the instant petition, which is largely directed to the Federal Circuit's 2016 opinion.

With respect to Zimmer’s mental state, the jury instruction further elaborated that “Stryker must persuade you by clear and convincing evidence that Zimmer actually knew or should have known that its actions constituted an unjustifiably high risk of infringement of a valid patent.” C.A.J.A.2879. The jury was further instructed that its evaluation of Zimmer’s state of mind could take account of a number of considerations, such as intentional copying, good-faith efforts to avoid infringing, and attempts to cover up its behavior. C.A.J.A.2879-80. Given these instructions, it is clear that the jury properly found willfulness on a standard of at least recklessness. Since Zimmer argues not simply that recklessness can support enhanced damages awards, but that *Seagate*’s particular articulation of the recklessness standard “was and remains one way to try and prove willful infringement,” Zimmer can hardly be heard to complain about the sufficiency of the jury’s willfulness verdict decided on the basis of a *Seagate* instruction. *See* Pet. at 10.

In an attempt to find support of a negligence standard in a case where none exists, Zimmer improperly references only three words of the jury instruction—“should have known”—lifting them entirely out of context. But that portion of the lengthy jury instruction actually reads “Stryker must persuade you by clear and convincing evidence that Zimmer actually knew or should have known that its actions constituted an unjustifiably high risk of infringement of a valid patent,” which, even by itself, is entirely consistent with this Court’s formulation of

civil recklessness.² *Safeco*, 551 U.S. at 68 (defining common law civil recklessness as “action entailing ‘an unjustifiably high risk of harm that is either known or so obvious that it should be known.’”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)). As discussed above, the jury instruction as a whole clearly required at least recklessness and the evidentiary record amply supports the jury verdict.

2. In Affirming The Willfulness Verdict, The Federal Circuit Did Not Suggest That Negligence Suffices For Willfulness

Despite the Federal Circuit’s unequivocal affirmance of the jury’s willfulness verdict, Zimmer pretends that the verdict no longer stands in its entirety. To reach this conclusion, Zimmer relies on the Federal Circuit’s *vacated* 2015 pre-*Halo* opinion where it made a *de novo* determination that certain of Zimmer’s post-hoc defenses were “not unreasonable” and reversed the jury and District Court’s findings to the contrary. *See* Pet. at 13.

Zimmer errs because after *Halo*, willfulness cannot be defeated by wholesale reliance on post-hoc litigation arguments, the only basis Zimmer used to challenge the jury’s willfulness verdict. *Halo*, 136 S. Ct. at 1933 (post-hoc defenses cannot be used to

² The Federal Circuit fashioned the *Seagate* test based on its interpretation of the civil recklessness standard set forth in *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007). *Seagate*, 497 F.3d at 1371. In doing so, however, the Federal Circuit added extraneous requirements. *See Halo*, 136 S. Ct. at 1932-35.

“insulate[]...from enhanced damages...someone who plunders a patent—infringing it without any reason to suppose his conduct is arguably defensible.”). Rather, culpability must be “measured against the knowledge of the actor at the time of the challenged conduct.” *Id.*

Nor can the Federal Circuit’s 2015 decision be used to impeach the jury’s verdict. See *O’Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) (“Of necessity our decision vacating the judgment of the Court of Appeals deprives that court’s opinion of precedential effect, leaving this Court’s opinion and judgment as the sole law of the case.”). This Court vacated that decision because it relied exclusively on Zimmer’s post-hoc arguments, imposed a clear-and-convincing evidentiary burden on Stryker, and reviewed the willfulness issue under a *de novo* standard—three practices that were specifically rejected by this Court. *Halo*, 136 S. Ct. at 1932-35. On this record, Zimmer’s assertion that this Court left intact the Federal Circuit’s ruling that Zimmer had reasonable post-hoc defenses is not only incorrect, but an evisceration of *Halo*. 136 S. Ct. at 1933 (discussing *Safeco*’s definition of civil recklessness and noting that “nothing in *Safeco* suggests that we should look to facts that the defendant neither knew nor had reason to know at the time he acted.”).

On remand in 2016, the Federal Circuit correctly applied this Court’s *Halo* opinion. The Federal Circuit recognized that its prior 2015 opinion on Zimmer’s post-hoc defenses was vacated and appropriately removed from its 2016 opinion its *de novo* analysis of that issue. App. 4a-5a, 20a-21a;

compare App. 20a-21a *with Stryker*, 782 F.3d at 660-62. Undeterred, Zimmer references a stray remark near the beginning of the Federal Circuit’s 2016 opinion that Zimmer’s defenses were “not unreasonable.” App. 8a. But that single comment, at best a remnant from the Federal Circuit’s earlier *de novo* analysis,³ is wholly beside the point post-*Halo*, given that it is undisputed that none of Zimmer’s litigation defenses were known by Zimmer when it began infringing, as *Halo* requires. App. 35a. And, in any event, a statement that a post-hoc defense was “not unreasonable” is not a holding that there was no unjustifiably high risk of infringement at the time of first infringement.⁴ *See Halo*, 136 S. Ct. at 1932-33. That is especially the case where, as here, the Federal

³ The District Court specifically considered the comment and the vacated opinion, but noted that “[t]he ability of Zimmer’s trial and appellate counsel to craft some post hoc litigation defenses that the Federal Circuit found objectively reasonable does not undermine the jury’s and this Court’s conclusion that Zimmer’s overall conduct was a case of egregious piracy warranting fully enhanced damages and attorney fees.” App. 30a. The Federal Circuit specifically rejected Zimmer’s attempt to rely on that comment and affirmed the District Court’s enhancement determination. *See* 2018 Federal Circuit Oral Argument at 4:59-5:07 (“Why is anything that we have said about those defenses meaningful when those decisions were vacated?”); App. 1a.

⁴ The Federal Circuit has never stated in this case nor any other case that this unjustifiably high risk need not be found. To the contrary, it has vacated findings of willfulness where the facts did not show heightened risk demonstrating egregiousness, *see, e.g., SRI Int’l, Inc. v. Cisco Sys., Inc.*, 918 F.3d 1368, 1380-82 (Fed. Cir. 2019), *opinion modified on other grounds*, 2017-2223, slip op. (Fed. Cir. July 12, 2019), or where it was unclear whether the accused infringer was aware of defenses that negated the risk prior to infringing. *Exmark Mfg. Co., Inc. v. Briggs & Stratton Power Prods. Grp., LLC*, 879 F.3d 1332, 1352-53 (Fed. Cir. 2018).

Circuit’s 2016 opinion stripped from its 2015 opinion the prior holding and analysis on the reasonableness of Zimmer’s post-hoc defenses. *Compare* App. 20a-21a *with Stryker*, 782 F.3d at 660-62.

Zimmer was not “found to be a willful infringer based on knowing or failing to know *something that does not exist*.” Pet. at 10 (emphasis in original). Rather, Zimmer was found to be a willful infringer because it knew or should have known of an unjustifiably high risk that was amply demonstrated by the record. C.A.J.A. 2879; *see also Halo*, 136 S. Ct. at 1933, *citing Safeco*, 551 U.S. at 69 (finding that “a person is reckless if he acts ‘knowing or having reason to know of facts which would lead a reasonable man to realize’ his actions are unreasonably risky”). Indeed, it is difficult to imagine a greater risk of infringement than shown on the record here, which includes deliberately copying a direct competitor’s pioneering product and continuing to sell the copycat product despite knowledge of Stryker’s patents—even after the Patent Office’s repeated rejections of Zimmer’s ill-fated patent application based on Stryker’s patents, and even after the District Court found infringement on summary judgment. *See supra* at Sec. I.A.

Because Zimmer’s only willfulness challenge on appeal was based on the purported reasonableness of post-hoc defenses concocted by Zimmer’s counsel during litigation and unknown to Zimmer at the time it embarked on its decade of infringement,⁵ the

⁵ To the extent Zimmer argues that culpability is measured over a period of time and not simply at the time infringement began,

Federal Circuit, on remand from *Halo*, properly affirmed the entirety of the jury's willfulness verdict based on the undisputed record. Moreover, because the evidence demonstrates that Zimmer's infringement was deliberate and knowing, *see supra* at Sec. I.A., the verdict could be sustained even without consideration of the objective risk. *See Halo*, 136 S. Ct. at 1933 ("The subjective willfulness of a patent infringer, intentional or knowing, may warrant enhanced damages, without regard to whether his infringement was objectively reckless.").

**C. This Case Presents No Issue
Warranting Review Given Its
Unique Facts And Posture**

Without providing specifics or citations, Zimmer vaguely argues that "[t]he Federal Circuit's departure from this Court's decision in *Halo*" warrants this Court's attention. Pet. at 16. But Zimmer's policy concerns are simply not implicated in this case. As such, intervention from this Court in this case would be improvident.

First, Zimmer complains that "the Federal Circuit's decision" in this case somehow creates a "patent-specific rule" for willfulness and that rule lowers the bar for enhanced damages, creates uncertainty that will "chill competition," and will affect a "large category of cases." Pet. at 17-19. But nothing in the Federal Circuit's 2016 or 2018 opinions purports to create law on the standard for willfulness

the District Court considered that argument and found Zimmer's culpability never changed over time. App. 37a-38a, 67a-68a.

or enhanced damages. The Federal Circuit’s 2016 decision, on remand from *Halo*, simply affirmed the jury’s willfulness verdict made under a higher standard, rather than laying out any new standard. This is perfectly understandable given that the only basis for its prior reversal on willfulness was the alleged reasonableness of Zimmer’s post-hoc litigation defenses, a theory that this Court rejected in *Halo*. The Federal Circuit’s 2018 opinion was a non-precedential summary affirmance of the District Court’s discretionary enhancement decision—willfulness was not revisited by Zimmer or by the Federal Circuit in that appeal.

Moreover, the facts of this case do not illustrate that enhanced damages are being awarded based on a “lower” standard than mandated by *Halo*. Here, on remand, the District Court evaluated Zimmer’s conduct in light of *Halo* and made its own decision (separate from the jury’s willfulness finding) that Zimmer’s conduct was egregious. App. 27a-41a. Other district courts are likewise separately evaluating the egregious nature of the infringer’s conduct under *Halo*. See, e.g., *Sprint Commc’ns Co., L.P. v. Time Warner Cable, Inc.*, No. 11-2686-JWL, 2017 WL 978107, at *14 n.9 (D. Kan. Mar. 14, 2017) (explaining that “[s]ince *Halo*, district courts have routinely declined to award enhanced damages (usually upon consideration of the *Read* factors) despite jury findings of willful infringement.”) (collecting cases). As such, the Federal Circuit’s affirmance of enhanced damages *based on a finding of egregious conduct* follows directly from *Halo* and does not create

“uncertainty” about when enhanced damages are warranted.

Even if Zimmer raised significant concerns about the law (it has not), this case is far from an “ideal” or “clean” vehicle to address those concerns. As a threshold matter, due to the strength of the evidence at trial, Zimmer chose not to appeal any fact-findings regarding its subjective intent. It instead appealed the jury’s and the District Court’s willfulness finding based solely on the purported reasonableness of its post-hoc defenses. Moreover, as explained above, this case does not raise the issue of a “negligent” infringer who was punished with enhanced damages. To the contrary, this case involved an egregious pirate whose flagrant infringement prompted a wholesale change to enhanced damages law to prevent infringers like Zimmer from escaping “any comeuppance under § 284 solely on the strength of his attorney’s ingenuity.” *Halo*, 136 S. Ct. at 1933. Should this Court perceive a need to review the standard for enhanced damages again, a far better candidate would be a case decided under *Halo* where the issue of subjective intent was preserved and fairly in dispute, rather than one litigated under the stricter *Seagate* test where the jury, District Court, and Federal Circuit all agree that willful misconduct is amply supported by the record.

II. THERE IS NO BASIS FOR INTERVENING IN THIS CASE SIMPLY TO COMPEL ANOTHER WRITTEN OPINION

Zimmer does not argue that the District Court abused its discretion in awarding, for the second time,

treble damages for Zimmer’s egregious infringement. Tacitly acknowledging that the enhancement decision does not merit review, Zimmer instead requests that this Court vacate and remand to compel the Federal Circuit to prepare a written opinion in lieu of its summary affirmance.⁶ This request is without legal foundation.

A. *Halo* Does Not Preclude Summary Affirmances

At the heart of Zimmer’s second Question Presented is Zimmer’s unsupported assumption that *Halo* somehow requires guidance from the Federal Circuit in the form of a written opinion every time it reviews a district court’s determination on enhanced damages. Pet. at 21. *Halo* sets forth no such rigid requirement. Far from elevating the Federal Circuit’s role in enhancement decisions, *Halo* clarified that “[s]ection 284 gives *district courts* discretion in meting out enhanced damages,” and any such determination “is to be reviewed on appeal for abuse of discretion.” *Halo* 136 S. Ct. at 1934 (citing *Highmark Inc. v.*

⁶ Zimmer’s selective quotation from *Lawrence on Behalf of Lawrence v. Chater* is inapposite. 516 U.S. 163, 167 (1996); Pet. at 26. This is not one of the rare cases appropriate for GVR because it is clear that the District Court and the Federal Circuit applied *Halo*. See *id.* at 173 (“our GVR power should be exercised sparingly” such as when it appears that an appellate court may have been unaware of intervening changes in the law) (emphasis added). Zimmer’s other cases are also inapposite because, unlike in those cases, the District Court here twice provided lengthy analyses of Zimmer’s egregiousness. Compare App. 27a-41a, 65a-70a, 104a-108a with *Carter v. Stanton*, 405 U.S. 669, 671-72 (1972); *Danley v. Allen*, 480 F.3d 1090, 1091 (11th Cir. 2007).

Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014) (emphasis added).

Rule 36 explicitly authorizes the Federal Circuit to issue judgments of affirmance without opinion where it deems such affirmance warranted. Fed. Cir. R. 36. This Court has made clear that “courts of appeals should have wide latitude in their decisions of whether or how to write opinions.” *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972); *see also Wilson v. Sellers*, 138 S. Ct. 1188, 1197 (2018) (addressing concern that standard adopted “will lead state courts to believe they must write full opinions where, given the workload, they would have preferred to have decided summarily” by stating “given the narrowness of the context, we do not believe that they will feel compelled to do so”); *see also id.* at 1199-1200 (Gorsuch, J. dissenting) (explaining rationale of issuing summary affirmances and calling them “a traditional appellate practice”). Far from somehow secretly upending this general principle, *Halo* holds that appellate review of enhanced damages decisions is limited to guarding against abuses of discretion. *Halo*, 136 S. Ct. at 1934.

Zimmer claims that the Federal Circuit’s issuance of a summary affirmance here means that the Federal Circuit failed to review the District Court’s discretionary enhancement determination. Pet. at 21. But as Zimmer well knows, the Federal Circuit provided ample review of Zimmer’s appeal, having considered the parties’ extensive briefing and extended oral argument for Zimmer. Indeed, “[a]ppeals whose judgments are entered under Rule

36 receive the full consideration of the court, and are no less carefully decided than those cases in which we issue full opinions.” *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1556 (Fed. Cir. 1997). The Federal Circuit uses Rule 36 for “easy” cases where “[t]he trial court’s explanation for its decision was clear and sound and no useful purpose would have been served by our writing an opinion.” *Sparks v. Eastman Kodak Co.*, 230 F.3d 1344, 1345 (Fed. Cir. 2000). Entry of a Rule 36 affirmance here simply reflects the Federal Circuit’s view that the District Court did not abuse its discretion and that “an opinion would have no precedential value.” Fed. Cir. R. 36. Because this case only involves applying *Halo* to the undisputed facts of this particular case, there is no precedent-setting issue that requires a detailed opinion.

B. The Federal Circuit’s Summary Affirmance Does Not Enable District Courts to Enhance Damages In Garden Variety Cases

Zimmer outlandishly claims that, by issuing a summary affirmance when presented with this case for the third time, the Federal Circuit has “abdicated its role,” opened the floodgates to enhancement in “garden variety cases,” and created “pervasive inconsistency and confusion in the district courts.” Pet. at 21. But the summary affirmance of a case such as this one, at the extreme end of egregiousness and accompanied by a lengthy District Court opinion, has no danger of opening any floodgates. Moreover, because a summary affirmance has no precedential

effect, the decision here does not instruct district courts to act in a manner contradicting *Halo*.

The Federal Circuit's summary affirmance here is hardly an indication that the Federal Circuit is shirking its duties. Following *Halo*, the Federal Circuit has issued numerous opinions regarding willfulness and enhanced damages. *See e.g.*, *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1341 (Fed. Cir. 2016); *Georgetown Rail Equip. Co. v. Holland L.P.*, 867 F.3d 1229, 1245 (Fed. Cir. 2017); *Arctic Cat Inc. v. Bombardier Recreational Prods., Inc.*, 876 F.3d 1350, 1371 (Fed. Cir. 2017); *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 875 F.3d 1369, 1382 (Fed. Cir. 2017); *Exergen Corp. v. Kaz USA, Inc.*, 725 F. App'x 959, 971-72 (Fed. Cir. 2018).

In appropriate cases, the Federal Circuit has vacated awards of enhanced damages to ensure that punitive damages are assessed only against egregious infringers, as required by *Halo*. *See, e.g.*, *SRI*, 918 F.3d at 1380-82 (vacating willfulness and enhanced damages where the record did not support wanton, malicious, and bad-faith behavior); *Exmark*, 879 F.3d at 1353 (vacating willfulness and enhanced damages for the district court to reconsider the exclusion of prior art and whether the defendant had developed any views of the prior art *at the time of the alleged infringement*). The Federal Circuit has even vacated enhanced damages awards based on a district court's failure to adequately explain the basis for enhancement despite a jury's finding of willfulness. *See e.g.*, *Polara*, 894 F.3d at 1355 (vacating where the district court did not adequately explain its basis for

enhancing damages and clearly erred in addressing the closeness of the case); *WCM Indus., Inc. v. IPS Corp.*, 721 F. App'x 959, 969-73 (Fed. Cir. 2018) (vacating where “for many of the [*Read*] factors, the court’s analysis was either non-existent or incorrect”).

That the Federal Circuit opted not to provide a written opinion in the present case to add to its burgeoning body of precedent on enhanced damages does not justify a remand from this Court. As discussed above, the undisputed facts present a strong case for enhancement that easily supports a summary affirmance. *See supra* at Sec. I.A.

Moreover, the unique procedural status of this case made it particularly well-suited for a Rule 36 affirmance. For example, all issues of liability, damages, and willful infringement had already been reviewed—and their resolution affirmed—in earlier appeals before the Federal Circuit. App. 3a-22a. The sole issue in the subject appeal was the District Court’s discretionary enhancement determination, following remand from this Court. And this case has been pending since 2010, with a jury trial, fifteen post-trial motions, two appeals to the Federal Circuit, three petitions for rehearing and rehearing en banc, review by the Supreme Court, and a remand to the District Court. Ideally, a Rule 36 affirmance allows parties to be “promptly notified of the results of the appeal,” thereby allowing them to “go on with their business without any extended delay.” *Sparks*, 230 F.3d at 1345. The Federal Circuit’s summary affirmance of a discretionary issue was a fitting way to bring a long overdue conclusion to this decade-old case.

**C. A Written Opinion In This Case
Serves No Useful Purpose**

Zimmer concludes its petition by complaining about the District Court’s discretionary weighing of specific *Read* factors. Zimmer seeks to assure this Court that it “need not enter the thicket of parsing the meaning of each *Read* factor.” Pet. at 26. The same holds true for the Federal Circuit, given that § 284 permits district courts to exercise their discretion free from inelastic constraints. See *Halo*, 136 S. Ct. at 1934.

Yet Zimmer requests a remand to require the Federal Circuit to provide “guidance in a written and reasoned opinion on the appropriate application of the *Read* factors in light of this Court’s decision in *Halo*.” Pet. at 26. Such a request is nonsensical here. As the Federal Circuit panel reminded Zimmer at oral argument, district courts are not even required to discuss the *Read* factors in their enhancement analyses. See e.g., *Presidio*, 875 F.3d at 1382-83 (Fed. Cir. 2017) (“When the Supreme Court articulated the current controlling test for decisions to award enhanced damages, it did not require the *Read* factors as part of the analysis.”); *WCM*, 721 F. App’x at 972 (Fed. Cir. 2018) (*Read* factors are not mandatory); 2018 Federal Circuit Oral Argument at 14:40-57 (“[W]e have never said that the *Read* factors are even required as a consideration. We’ve said courts can but don’t have to consider them and then when they do, we haven’t said that there is a precise formula for those *Read* factors.”). In any event, several other

opinions by the Federal Circuit have discussed those factors. *See supra* at Sec. II.B.

Moreover, a written opinion would not change the result in this case. Abuse of discretion and clearly erroneous standards “require[] the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990). That is because “the district court ‘is better positioned’ to decide” whether a party’s actions are egregious because “it lives with the case over a prolonged period of time.” *Highmark*, 572 U.S. at 564 (quoting *Pierce v. Underwood*, 487 U.S. 552, 559-60 (1988)). In any event, “this Court reviews judgments, not opinions,” and Zimmer shows no error with the Federal Circuit’s judgment. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

At its core, the decision below is simply a review of the plainly reasonable exercise of discretion by a district court engaged in a context-intensive judgment about the overall character of a complex patent infringement case. Zimmer seeks to nitpick at the District Court’s decision and continues to resist even the demonstrated fact of its own infringement. Zimmer’s relentless press to re-litigate enhanced damages in the face of the District Court’s numerous findings of culpable behavior is about upending the discretionary approach to such questions that *Halo* stressed. The District Court’s fact-bound enhancement decision simply does not merit this Court’s attention.

Zimmer does not and cannot point to any evidence of serious confusion or error in the realm of enhanced damages. The vacatur Zimmer seeks would not affect the result in this case, given the District Court's thorough conclusions, the deferential standard of review, and substantial record of egregious piracy. This peculiar request amounts to nothing more than a last ditch attempt by a flagrant infringer to delay the inevitable by requiring a pointless exercise in legal busywork. It is time for this case to come to an end.

CONCLUSION

For the foregoing reasons, Zimmer's petition should be denied.

Respectfully submitted,

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