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IN THE  
**Supreme Court of the United States**

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AMY R. GURVEY, *US PATENTEE*,  
*Petitioner Pro Se*,

v.

COWAN, LIEBOWITZ & LATMAN, PC,  
CLEAR CHANNEL COMMUNICATIONS, INC.  
LIVE NATION, INC., INSTANT LIVE CONCERTS, LLC.  
NEXTTICKETING INCORPORATED, WILLIAM BORCHARD,  
MIDGE HYMAN, BAILA CELEDONIA,  
CHRISTOPHER JENSEN, DALE HEAD, STEVE SIMON,  
NICOLE ANN GORDON, SUSAN SCHICK,  
MICHAEL GORDON, DOES I-X INCLUSIVE,  
*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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ORIGINAL

## **\*i QUESTIONS PRESENTED (2)**

1. **Question #1:** In this US patent litigation, whether Petitioner, a *Pro Se* patentee who is sole named inventor of valuable US ticketing method, apparatus and design patents<sup>1</sup>, is entitled to a Writ of Certiorari under the All Writs Act, 28 USC §1651(a), against the US Court of Appeals for the Federal Circuit or against the US District Court for the SDNY directly to order the SDNY to reinstate and adjudicate Petitioner's strict liability patent infringement and nonjoinder amended complaint also seeking injunctive relief pursuant to 35 USC §§271, 256, FRCP Rule 15, duly filed, date-stamped and docketed by the SDNY Clerk that was unlawfully deleted ex parte from the district court docket without notice to Plaintiff in violation of the Due Process Clause of the Fifth Amendment and never thereafter reinstated or adjudicated?

Based on Justice William Brennan's 1988 "*ping pong*" decision and order in Christianson

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<sup>1</sup> Gurvey US Ticketing Patent Nos. 7603321; D647910S issued on October 13, 2009 and November 1, 2011.

v. Colt Industries Operating Corp., 486 US 800 (1988) (Brennan, J.), the answer to the above question would definitely be “yes” and the Supreme Court must grant the writ to maintain consistency with established patent decisions.

The Federal Circuit and the Second Circuit have been shuffling Petitioner’s patent appeal to the 2017 summary judgment orders of the SDNY denying Petitioner’s cross-motion seeking strict liability infringement and non-joinder patent damages back and forth for three years each claiming the other has jurisdiction. Justice Brennan stated that he has no tolerance for this type of dispute that significantly prejudices the appellant, that the two arguing appellate courts should attempt to resolve the dispute by abiding by the doctrine of law of the case, but that in a patent case, a coordinate appeals court that lacks arising under jurisdiction, cannot as a matter of law, establish law of the case by usurping its jurisdictional power and authority.

In this case, two appeals courts have played “ping pong” with Petitioner’s appeal. Because a patentee is absolutely entitled to file an amended complaint to recover strict liability infringement damages against the named

defendants when an anticipated US patent issues during the litigation, and infringement claims are always “arising under” claims, the SDNY blatantly usurped its power by deleting the docketed amended complaint and not granting any amended complaint for service post patent issuance in 2010, 2012 and 2014. Reedy v. Scott, 90 US 352 (1874). In addition, based on the Federal Circuit’s June 23, 2020 order, the Second Circuit’s liberal pleading practices mandated both that the deleted amended complaint be granted for service and that even a further amended complaint could also be granted post judgment. Grant Williams v. Citicorp, 659 F. 3d 208 (2d Cir 2011).

However, in accordance with *Christianson*, *supra*, in the instant case, it is the Federal Circuit and not the Second Circuit that established “*law of the case*” by finding on June 23, 2020 that the Second Circuit *abused discretion* in adjudicating the previous 2017 patent appeal to the summary judgment orders of the SDNY and not transferring that appeal to the Federal Circuit pursuant to 28 USC §1631 in response to Petitioner’s motion. In essence the Federal Circuit agreed that the Second Circuit had no power to hear the previous arising under appeal.

Per Justice Brennan, because law of the case cannot be established by a coordinate appeals court that lacks jurisdiction, only the Federal Circuit can issue a subsequent writ under the All Writs Act against the same district court in an arising under patent case for the duration of the lawsuit. [28 USC §§1295; 1651(a); *In re Princo*, 478 F. 3d 1345 (Fed Cir. 2007)].

**2. Question #2:** Whether Petitioner is entitled to a separate writ against the Federal Circuit or against the Second Circuit directly to vacate Second Circuit's 2018 appellate order entered in abuse of power and without "arising under" jurisdiction?

Based on *Christianson*, because jurisdiction is never waived and the Second Circuit usurped its appellate powers in adjudicating a previous appeal it had no power to hear, a writ must issue from this Court or the Federal Circuit to vacate the Second Circuit's previous 2018 order to the 2017 summary judgment orders of the district court.

**\*ii PARTIES TO THE PROCEEDING**

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing in the SDNY and before the United States Court of Appeals for the Federal Circuit.

The Petitioner *Pro Se* here and in the Petition below is Amy R. Gurvey, a US patentee and sole inventor of ticketing management systems, apparatuses and designs disclosed in issued US patents. Gurvey US Patent Nos. 7603321; D647910S.

The Respondents in the SDNY include: (i) Live Nation, Inc., the world's largest promoter of concerts a willful infringer in 2005; (ii) its subsidiary defendant Instant Live Concerts, LLC; (iii) Mike Gordon of Phish; and (iv) Cowan Liebowitz & Latman, PC the parties' common NYC patent and intellectual property attorneys.

The respondents who appeared in Petitioner's mandamus petition to the Federal Circuit were the Cowan defendants. Respondents Live Nation, Instant Live Concerts, and Gordon, being duly served, did not appear and defaulted.

**\*iii CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 29.6, Petitioner, a *Pro Se* litigant and US patentee, states as follows:

Petitioner is the sole inventor and owner of US Patent Nos. 7603321; D647910S and other pending applications in a ticketing management portfolio comprised of proprietary secondary ticketing and ticketing management method, apparatuses and designs. The patents are in Petitioner's sole name and have not been assigned. Petitioner is not a non-governmental corporation. Petitioner has no parent corporation or shares held by a publicly traded company.

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## OPINIONS BELOW

The order denying Reconsideration by Rehearing *En Banc* entered by the United States Court of Appeals for the Federal Circuit on September 2, 2020 is reprinted in the Special Appendix to the Petition (“SPA” at 1a - 2a)

The previous opinion of the Federal Circuit entered on June 23, 2020 finding that the Second Circuit *abused discretion* in not transferring a 2017 “arising under” patent appeal to the Federal Circuit in 2018 in violation of 28 USC §1631 is printed at SPA 3a- 7a. In this order, the Federal Circuit ordered that Petitioner should submit the deleted motion seeking leave to amend to recover infringement damages and injunctive relief to the Federal Circuit. After issuing this instruction, in the same order, Federal Circuit somewhat inconsistently held it would still retransfer Petitioner’s petition back to the Second Circuit based on law of the case.

**Argument: The Federal Circuit abused discretion by retransferring the petition back to the Second Circuit. The Supreme Court must maintain consistency with Christianson v. Colt Industries Operating**

Corp., 486 US 800 (1988) (Brennan, J) and find that the Federal Circuit established law of the case and the Second Circuit did not. This is because the Second Circuit having usurped its power in adjudicating a previous “arising under” appeal in the total absence of appellate power in 2018, had no power to adjudicate and therefore cannot issue a subsequent writ of mandamus against the district court in the same case.

In addition, because the Second Circuit’s previous appellate orders in 2018 and 2019 are void or voidable for lack of jurisdiction, they cannot, as a matter of law, establish law of the case on any arising under claims against the defendants in the lawsuit. Therefore, the SDNY’s 2017 order closing the case after improperly denying Petitioner’s cross-motion against only one of the named defendants based on its concession that the court granted no amended complaint post patent issuance, is properly vacated including based on the SDNY’s unlawful unilateral deletion of Plaintiff’s amended complaint from the docket seeking recover strict liability infringement damages and injunctive relief against the Live Nation defendants who are willful infringers since 2004-5.

## STATEMENT OF JURISDICTION

The Federal Circuit issued its decision finding that Second Circuit abused discretion in hearing a prior patent appeal on June 23, 2020 and retransferred the case back to the Second Circuit. By Order dated September 2, 2020 the court denied reconsideration by rehearing *en banc*.

Jurisdiction of this Court is invoked under 28 USC §1254(1).

**FIFTH AMENDMENT  
OF THE UNITED STATES CONSTITUTION**

“No person shall be... deprived of life, liberty,  
or property, without due process of law...”

**STATUTORY PROVISIONS INVOLVED**

A. **28 USC§ 1338** provides as follows:

“(a)The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws.”

B. **28 USC §1295** provides as follows:

“(a) The United States Court of Appeals for the federal Circuit shall have exclusive jurisdiction –

(1)Of an appeal from a final decision of a district court of the United States, in any civil action arising under, or in any

civil action in which a party has asserted a compulsory counterclaim arising under any Act of Congress relating to patents or plant variety.”

C. **28 USC 1651(a)** provides as follows:

“(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law”.

D. **28 USC § 1631** provides as follows:

“Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal... and the court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other court...in which the action or appeal could have been brought at the time it was filed or noticed. And the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is

transferred.

E. **35 USC §271** provides as follows:

- (a)“...Whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.
- (b)Whoever actively induces infringement of a patent shall be liable as an infringer.
- (c)Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial non-infringing use, shall be liable as a contributory infringer.”

F. **35 USC §284** provides as follows:

“ Upon finding for the claimant, the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event, the court may increase the damages up to three times the amount found or assessed...

The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances”

G. **35 USC§ 285** provides as follows:

“The court in exceptional circumstances may award reasonable attorney fees to the prevailing party.”

H. **35 USC§ 286** provides as follows:

“...No recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.”



## STATEMENT OF THE CASE

In order to demonstrate that this case is one “arising under” federal patent law, Petitioner must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposition construction, of those laws. Section 28 USC §1338(a) jurisdiction extends only to those cases in which a well-pleaded complaint established either that federal patent law creates the cause of action or that the plaintiffs’ right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims. An “arising under” case is always found when a plaintiff-inventor seeks patent strict liability infringement damages under 35 USC §271, 284, 285, 286, injunctive relief, or non-joinder damages under 35 USC 256, 37 CFR 1.324, in a cross-motion for summary judgment. [28 USC §§1338; 1295; 35 USC § 286]

In addition, only the Federal Circuit may issue extraordinary writs under the All Writs Act, 28 USC 1651(a) in arising under patent cases. Th Court is empowered to use its exclusive power where necessary to aid its appellate arising under jurisdiction or where there is a

clear abuse of discretion by a district court, a coordinate appeals court, or usurpation of judicial power. See, In re Newman, 782 F. 2d 917 (Fed. Cir 1986) (district court exceeded its discretion when it authorized destruction of an invention during testing); In re Mark Industries, 751 F. 2d 1219 (Fed. Cir 1984) (clear abuse of discretion when district court ordered removal of preemption of validity as sanction for attorney's misconduct); In re Snap-On Tools Corp., 720 F. 2d 654 (Fed. Cir. 1983) (mandamus required to preserve jurisdiction of the court where plaintiff brought an action in state court based on patent infringement and state law causes of action, defendant removed to federal court and district court remanded to state court); Mississippi Chem Corp. v Swift Agricultural Chem Corp., 717 F. 2d 1372 (Fed. Cir. 1983) (clear abuse of discretion when district court refused to give collateral estoppel effect to a holding of invalidity).

The fact that Section 1338(a) expressly speaks of "a well-pleaded complaint" is consistent with the US Supreme Court's established 1874 decision and order in Reedy v. Scott, 90 US 352 (1874). The *Reedy* court held that if an anticipated patent issues to the plaintiff during the lawsuit, an amended complaint

must be granted by the district court to recover infringement damages against the named defendants particularly if the defendants were infringing the claims prior to patent issuance. When Congress granted Federal Circuit jurisdiction under 28 USC §§1295, its focus was a well-pleaded complaint, not a well-tried case. The legislative history of the Federal Circuit's jurisdictional provision confirms that focus. P. 2176.

The additional black letter rule that a court may not in any case even in the interests of justice extend its jurisdiction where none exists is as relevant to this case as it was in Christianson v. Colt Industries Operating Corp., 486 US 800 (1986)(Brennan, J.)

To quote Justice Brennan, "Interpreting the rule has always worked injustice in close cases especially in the situation here, where the litigants are bandied back and forth between two courts, each of which insists that the other has jurisdiction... However, the courts of appeal should achieve a quick settlement of questions of transfer by adhering strictly to principals of law of the case; *but cannot create arising under jurisdiction in a court that lacks that jurisdiction.*

Here, the Federal Circuit found in its first order entered June 23, 2020 that the Second Circuit abused discretion in not transferring the prior 2017 appeal to the Federal Circuit because the case was arising under a case at that time. Petitioner's cross-motion seeking summary judgment on strict liability infringement, an injunction and non-joinder patent damages falls directly under a patent statute, 35 USC §286. Therefore, the Federal Circuit could not retransfer Petitioner's subsequent mandamus petition seeking a writ under the All Writs Act back to the Second Circuit and attempt to create arising under jurisdiction in favor of the Second Circuit that never existed.

The appellate jurisdiction of the Federal Circuit emanates from an Act of Congress and cannot be delegated to another coordinate appeals court because the legislative intent is national uniformity of patent decisions. Here, the Federal Circuit was not allowed to dodge its delegated appellate duty created by a patent statute and retransfer the case back to the Second Circuit simply because it found the subject matter of the appeal to be repugnant or because the district court was engaging in usurpation of power for several years by deleting docket entries against Petitioner's

Fifth Amendment rights.

For this reason, Petitioner is entitled to separate writ from either the Federal Circuit or the Supreme Court of the United States to vacate the Second Circuit's previous appeal order entered in 2018. By legal impossibility, if the Second Circuit had no "arising under" appellate jurisdiction in 2018 per the Federal Circuit's own order, the Second Circuit still would have no power to enter a writ of mandamus against the SDNY subsequently in the same case. It is a legal impossibility that the Second Circuit's 2018 voidable orders entered without arising under jurisdiction could have established law of the case on any arising under patent issues.

### LITIGATION FACTS

The Federal Circuit held in its first order entered June 23, 2020 that the Second Circuit "*abused discretion*" in not transferring a previous 2017 "arising under" patent appeal to the Federal Circuit in response to Petitioner's 2018 motion under 28 USC §1631. Thereafter, it was confirmed that Petitioner's seminal well-pleaded amended complaint seeking injunctive relief, infringement and nonjoinder

damages against the named defendants under 35 USC §§271, 284, 285, 286, 256, 37 CFR 1.36, 1.324 had been unlawfully deleted ex parte from the SDNY docket without notice to Petitioner or her attorney in violation of constitutional due process and the Fifth Amendment. The deletions appear to have been intentional because there was renumbering of the docket entries by the SDNY clerks after the deletions were made.

There is no question therefore that the SDNY abused discretion and usurped its power several times in the case, and not just once. In 2012, Petitioner's infringement, non-joinder amended complaint and associated motions were removed ex parte from the docket and the docket was renumbered. In 2017, the district court *admitted* in its first summary judgment order that it was denying Petitioner's cross-motion for summary judgment because the court never granted service of an amended complaint post patent issuance to Plaintiff in defiance of US Supreme Court mandates. Reedy v. Scott, 90 US 352 (1874).

In this case, however the district court did not merely not grant the (owed) amended complaint as soon as the anticipated patent

issued in 2009 and 2011, but unilaterally and unlawfully deleted the amended complaint from the docket ex parte after it was filed, date-stamped and docketed by the SDNY clerk on April 22, 2010. The district court thereafter granted no amended complaint to Petitioner arising under the patent laws whatsoever after two additional attempts in 2012 and 2014 (all printed in the Appendix submitted to the Federal Circuit) in violation of the liberal pleading rules of the Second Circuit and no patent discovery. Grant Williams v. Citicorp, 659 F. 3d 208 (2d Cir 2011). There was also no notice to Petitioner or her attorney that her docketed well-pleaded complaints and motions were unilaterally deleted in violation of due process. Petitioner was thereby unlawfully denied all constitutional access to the district court to protect her patents in violation of the Fifth Amendment of the United States Constitution. Petitioner suffered manifest injustice – loss of 13 years of patent infringement and nonjoinder damages and the right to injunctive relief against the named defendants who were willful infringers and 13 years of patent protection in the relevant US patents, and years of fruitless and wasted litigation before the district court.

In 2020, Petitioner properly sought a writ of

mandamus from the SDNY to reinstate and adjudicate the deleted well-pleaded amended complaints against all defendants and to vacate the 2017 summary judgment orders denying Plaintiff's cross-motion. The petition was denied. Petitioner had the absolute right to file this motion because the term of patent protection remained in full force and her rights to get injunctive relief and recover infringement and nonjoinder damages against the named defendants continue for the full term of patent protection. [35 USC§ 271] Petitioner then appealed to the Federal Circuit and sought an extraordinary writ under 28 USC §1651(a) against the SDNY to reinstate and adjudicate the deleted motions and vacate the 2017 orders on summary judgment.

Because the Second Circuit abused discretion in adjudicating the previous 2017 "arising under" appeal and could not, as a matter of law, establish law of the case by this adjudication, it had no power or jurisdiction to adjudicate the subsequent writ sought by Petitioner. Ergo, the Federal Circuit abused discretion when it found on June 23, 2020 that the Second Circuit established law of the case when it entered a void order it was powerless and without appellate jurisdiction to issue.



Therefore, based on *Christianson*, it was the Federal Circuit that established law of the case in this lawsuit and the Federal Circuit could not issue an order in breach of the law of the case its own court established and retransfer the case back to the Second Circuit and attempt to create arising under jurisdiction in favor of the Second Circuit that does not exist.

28 USC §§1295; 1651(a) are clear that only the Federal Circuit can issue a writ of mandamus against the district court in an “arising under” patent case in aid of its own jurisdiction or in instances of clear usurpation of power.

The Supreme Court must follow established precedents and not permit the Federal Circuit to dodge its duty to Petitioner simply because the patent appeals court finds the subject matter to be repugnant. 28 USC §§ 1338 1295; 35 USC §286; *In re Princo*, 478 F. 3d 1345 (Fed Cir 2007); *Christianson v. Colt Industries Operating Corp.*, 486 US 800 (1988); see also, *Carter v. ALK Holdings*, 605 F. 3d 1319 (Fed. Cir. 2010).

This instant case qualifies for *de novo* review by the Supreme Court on an important issue

of exclusive arising under patent appellate jurisdiction.

The instant case is the direct inverse of Christianson v. Colt Industries Operating Corp., 486 US 800 (1986) (Brennan, J.) the case cited by the Federal Circuit in its June 23, 2020 decision and order.

**Summary:** The Supreme Court must issue a writ against the Federal Circuit consistent with its order in *Christianson*, vacate the 2018 order of the Second Circuit that could not establish law of the case by legal impossibility, and grant Petitioner a permanent stay against the Second Circuit from hearing any further appeals in this lawsuit. Otherwise per Justice Brennan's mandates, the case will bandy back and forth between coordinate appeals courts and Petitioner will be endlessly deprived of all constitutional access to protect her patents during the term of protection before the SDNY in violation of the Fifth Amendment of the US Constitution.

**CHRISTIANSON v. COLT INDUSTRIES**  
**OPERATING CORP.**, 486 US 800 (1988)  
(Brennan, J.)

Christianson v. Colt Industries Operating Corp., 486 US 800 (1988)(Brennan, J.) was cited by the Federal Circuit in its June 23, 2020 order but ironically, the Supreme Court proscribed the exact conduct undertaken by the Federal Circuit in the instant case.

Justice Brennan found that the Federal Circuit properly denied appellate jurisdiction in an antitrust and unfair competition lawsuit because a well-pleaded complaint neither established that federal patent law created the cause of action or that the plaintiff's right to relief necessarily depended on resolution of federal patent law such that patent law was a necessary an element of one of the well-pleaded claims. Justice Brennan emphasized that he was displeased that two coordinate appeals courts – the Seventh Circuit and the Federal Circuit – were shuffling an appeal back and forth and depriving the plaintiff of a remedy under the antitrust laws and state unfair competition law, but emphasized that no well-pleaded complaint in the case made patent law a necessary element of the plaintiff's claims.

Based thereon, Justice Brennan found that the Seventh Circuit was not permitted to dodge jurisdiction after the Federal Circuit made the proper analysis denying arising under appellate jurisdiction, and retransfer the case back to the Federal Circuit a second time because patent law was not an essential element of the plaintiffs' claims. The High Court also held that because the Federal Circuit properly determined it lacked appellate jurisdiction, the Federal Circuit could not then decide the appeal when it was transferred back from the Seventh Circuit in the interests of justice. Justice Brennan held that the Federal Circuit's subsequent adjudication of the appeal was itself abuse of discretion because the Federal Circuit established law of the case in the previous order, and then defied its own order.

*Christianson* is the inverse of the instant case.

Not one of the SDNY, the Second Circuit or the Federal Circuit ever challenged Petitioner's argument that every well-pleaded complaint filed in the lawsuit stipulated that pursuant to established US Supreme Court mandates, that the operative complaint would be deemed amended to recover infringement damages and get injunctive relief once the first

anticipated patents issued during the case. In addition, there was no dispute that Petitioner's nonjoinder claims against the parties' common defendant patent practitioners also arose under the patent laws and that Petitioner was improperly denied an amended complaint to recover damages on these claims separate from strict liability infringement. 35 USC § 256, 37 CFR 1.324; Carter v. ALK Holdings, 605 F. 3d 1319 (Fed. Cir 2010).

In 2020, the Federal Circuit having been petitioned to issue a writ of mandamus against the district court based on unlawful and unilateral ex parte deletions of Petitioner's docketed motions and amended complaints, and finding that the Second Circuit abused discretion in hearing the 2018 "arising under" appeal to the summary judgment orders of SDNY entered in 2017, abused discretion in transferring the case back again. Under *Christianson*, the first determination by the Federal Circuit finding that the Second Circuit lacked arising under jurisdiction in 2018 must govern, and the Federal Circuit must be ordered by this Court to maintain the petition, grant the writ against the district court and vacate its transfer order. In addition, the Supreme

Court or the Federal Circuit must vacate the order entered by the Second Circuit in 2018 summarily denying Petitioner's cross-motion seeking strict liability infringement and non-joinder damages through clear usurpation of power.

### **REASONS FOR GRANTING THE WRIT**

1. There is necessity to maintain consistency with established US Supreme Court "arising under" precedents and to resolve a long-standing dispute among two appeals court interfering with Petitioner's right to protect her patents in violation of the Fifth Amendment of the United States Constitution.
2. Petitioner has no other remedy at law other than an extraordinary writ under the All Writs Act, 28 UC 1651(a) to seek reinstatement and adjudication of unilaterally deleted motions and an amended complaint by the SDNY to recover infringement damages and get injunctive relief against the named defendants.
3. Petitioner was deprived of constitutional access to the SDNY for 10 years in violation

the Fifth Amendment to protect her US patents, get injunctive relief and recover long overdue strict liability willful infringement and aiding and abetting infringement and nonjoinder damages against the Live Nation and Cowan defendants which are arising under claims. 35 USC §271

4. The filing of a new infringement lawsuit in 2020 is not an adequate remedy. Pursuant to 35 USC § 286, a new lawsuit will only permit recovery of six years of relate back patent damages retroactive to 2014 and no recovery willful infringement damages or royalties against the Live Nation defendants retroactive to 2010 when the [deleted] amended complaint was filed. SCA Hygiene Products Aktiebolag v. First Quality Baby Products, 137 S. Ct. 954 (2017). In addition, Petitioner's non-joinder and fraudulent breach of fiduciary duty claims against the Cowan defendants have expired based on lapse of the six-year statute of limitations.

5. Petitioner is a Pro Se litigant and sole named small entity inventor of the relevant patented ticketing technology entitled to reasonable concessions from the court. Erickson v. Pardus, 551 US 89 (2007). The defendants are mega industry competitors in

her field of invention who used the delay in patent issuance caused by the parties' common defendant practitioners to infringe Petitioner's patents, violate the antitrust laws and keep Petitioner's patent out of the ticketing business.

6. Petitioner has suffered manifest injustice as required by *Christianson*. The SDNY and two circuit courts denied her constitutional access to protect her patents losing Petitioner her right to injunctive relief when the patents first issued in the United States, 14 years of infringement damages, nonjoinder damages, and 13 years of patent protection.

7. Apple, Inc., defendant Live Nation's venture partner in willful infringement since 2007, took the opportunity during the delay caused by the Cowan defendants' breaches of fiduciary duty before the USPTO to plagiarize Petitioner's pending applications and drawings by filing its own ticketing management patent in 2008 (2008-082491). Apple was denied a patent for 7 years on its application but on appeal in 2016 and citing to five of Petitioner's continuation in part applications as prior art, was granted a single near field claim. Defendant Live Nation was a partner in Apple's plagiarism and must be



ordered to answer for willful infringement through the doctrine of equivalents for engaging in bad faith. The Dept. of Justice found that Live Nation was distributing its own primary ticketing service to its owned and operated venues in NYC – House of Blues, Irving Plaza and Roseland Ballroom – since at least February 2008 and was sanctioned by the US Dept. of Justice for acts that infringe Petitioner’s patents.<sup>2</sup>

8. While it is true that Petitioner had no cause of action for infringement until the first ticketing patent claims issued to her on October 13, 2009 and November 1, 2011 as found by the Federal Circuit, this finding is of no relevance to the instant case. The inventor is at a unique disadvantage in having to bet that patents will issue on his invention particularly if as here, issued patents were unduly delayed in prosecution through conflict of interest violations undertaken by the common defendant practitioners before the USPTO. Therefore, on risk that patents may not issue, the inventor must have some

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<sup>2</sup> *US v. Ticketmaster and Live Nation*, 2010 WL 975408 (DC Dist. Court, January 25, 2020), Competitive Impact Statement, pp. 8 line 10; Amended judgment entered January 8, 2020 imposing sanctions of \$1mil per violation.

insurance and must sue under other theories of relief that could otherwise be lost based on prevailing statutes of limitation if they are not timely filed in advance. However, these filings should in no way preclude the filing of an infringement amended complaint against the named defendants if anticipated and delayed patents do issue during the lawsuit, because this will be the first opportunity for the inventor to recover strict liability damages. The US Supreme Court has established precedents that must be followed for consistency. Reedy v. Scott, 90 US 352 (1874).

9. When as here, there are conceded conflicts of interest violations by a defendant practitioner law firm and proper disclosures were never made, the practitioners must be found liable or secondarily liable for aiding and abetting infringement or other loss of property if, as here, a US patent is unlawfully taken by the competing client. Mindy's Cosmetics v. Dakar, 611 F. 3d 590 (9<sup>th</sup> Cir 2010)

10. If a willful infringer engages in jurisdictional fraud as also occurred in the instant lawsuit by defendant Live Nation, and a patent then does issue, the patent must be considered newly-discovered evidence

and competition impact statement].

11. This is a case of national import to the patent industry as a whole.

12. The Federal Circuit must be ordered to fulfill its duties to a pro se inventor designated by patent statutes, 35 USC §§271, 286, and because it is bequeathed with exclusive adjudicatory powers in arising under cases by Congress. No exceptions can be permitted. The Federal Circuit cannot dodge its duty when it must issue a writ against a district court in extraordinary patent cases simply because it finds the subject matter repugnant or because the district court engaged in relentless usurpation of power and corruption.

## CONCLUSION

The Federal Circuit established law of the case in its first order entered on June 23, 2020 in finding that the Second Circuit *abused discretion* in not transferring Petitioner's previous 2017 "arising under" appeal to the Federal Circuit in response to Petitioner's transfer motion under 28 USC §1631. The Second Circuit could not establish law of the case on arising under claims in this lawsuit by

legal impossibility and operation of law.

The Federal Circuit issued a provisional deficiency notice within the order entered on June 23, 2020 that Petitioner did not append all the deleted amended complaints and motions. That deficiency was immediately corrected and the Federal Circuit dockets were updated to add the documents. There were three appendices emailed to the Federal Circuit during COVID because they were too long to make it through one transmission. The emails were accepted and docketed by the Federal Circuit and are available for the Supreme Court's de novo review. They were not considered by the Court on rehearing.

When the Federal Circuit somewhat inconsistently found it would still retransfer the petition seeking a writ back to the Second Circuit based on "law of the case", it abused discretion by violating its own previous order. That the Second Circuit has no power or jurisdiction to enter a writ in an arising under patent case is a matter of statute and for this reason, the Second Circuit could not establish law of the case by adjudicating a 2017 appeal it had now power to hear. 28 USC §§1338, 1295. *In re Princo*, 478 F. 3d 1345 (Fed. Cir. 2007). The Federal Circuit had no power to

transfer the case back and attempt to create arising under jurisdiction in favor of the Second Circuit that never existed.

In this case, therefore, in order to maintain consistency with established US Supreme Court mandates, the Federal Circuit must be found to have abused discretion by retransferring the case back and attempting to dodge its mandatory statutory duty to Petitioner to issue the writ. The SDNY relentlessly abused its discretion and both the SDNY and Second Circuit usurped their powers and denied Petitioner access to their courts in violation of the Fifth Amendment. The Supreme Court must find that although the SDNY's actions are repugnant, the Federal Circuit must vacate its transfer order, maintain the petition and grant the writ.

If the Federal Circuit is allowed to continue to dodge its statutory duty to Petitioner and transfer this case back and forth, Petitioner will continue to be denied access to protect her patents before three federal courts in violation of the Fifth Amendment of the United States Constitution.

**WHEREFORE**, Petitioner prays that her petition for writ of mandamus against the Federal Circuit be granted in all respects.

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Respectfully submitted,

/amygurvey/

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