No. _____

In the Supreme Court of the United States

PETTER INVESTMENTS, dba Riveer,
Petitioner,

v.

HYDRO ENGINEERING,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a denial of due process under the Fifth Amendment to the United States Constitution for the United States Court of Appeals for the Federal Circuit, on issues requiring *de novo* review, to affirm summarily in a one-word *per curiam* judgment under Federal Circuit Rule 36 a district court judgment which itself included no reasoning or explanation, concerning intellectual property rights including patent rights.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Petter Investments, Inc. d/b/a RIVEER, were the appellants in the court below. Respondent, Hydro Engineering, Inc., was the appellee in the court below.

Petitioner states that there is no parent or publicly held company owning 10% or more of the corporation's stock.

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The opinion of the Federal Circuit is reported at 697 Fed. Appx. 698, and is reproduced in the appendix hereto ("App.") at App. 1. The opinions of the Utah District Court are reproduced in the appendix hereto ("App.") at App. 3, 10, 21.

JURISDICTION

The judgment of the Federal Circuit was entered on September 11, 2017. App. 1. On October 25, 2017, the Federal Circuit denied a petition for panel rehearing. App. 33. A mandate issued November 1, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

In its September 11, 2017 *per curiam* affirmance pursuant to Fed. Cir. R. 36, the Federal Circuit overlooked or misapprehended at least two specific points of law and fact, the correction of which would require a different judgment on Riveer's Lanham Act claim and its patent infringement claim. First, concerning the rejection of Riveer's Lanham Act claim on summary adjudication, the district court (a) failed to comply with Fed. R. Civ. P. 56(a), requiring that the court "should state on the record the reasons for granting . . . the motion," and (b) failed to construe the

evidence in the light most favorable to Riveer. Second, concerning the rejection of Riveer's patent infringement claim on summary adjudication, the district court (a) again failed to comply with Rule 56(a), (b) violated this court's black-letter proscription on "reading in" limitations from a preferred (or only) embodiment into patent claims, and (c) again failed to construe the evidence in the light most favorable to Riveer.

In ruling on Riveer's Lanham Act claim, the only explanation ever provided by the district court demonstrates that it (a) failed to even "state on the record the reasons for granting . . . the motion," as Rule 56(a) requires, and (b) failed to construe the evidence in the light most favorable to Riveer. In total, the district court's "reasoning" was nothing more than a passing *conclusion* (without any reasoned explanation) that Riveer "has asserted nothing more than the mere *possibility that a misrepresentation may have been made* . . . [and] lacks any facts sufficient to support these causes of action . . . ." App. 32 (emphasis added). This conclusory sentence—on its face—fails to comply with Rule 56(a), or constitutional due process. The Federal Circuit provided no reasoning either, in its one-word conclusion under Fed. Cir. R. 36, "Affirmed." As the commentary to Rule 56(a) explains, *"It is particularly important to state the reasons for granting summary judgment." See* Committee Notes on Rule 56(a)—2010 Amendment (emphasis added). As one district court explained, it is "a matter of essential fairness" to "provide an oral or written explanation" when granting summary adjudication. *See United States v. Massachusetts*, 781 F. Supp. 2d 1, 19 (D. Mass. 2011).

Here, summary adjudication should have been reversed on this basis alone, as another court explained: "[W]e have many times emphasized the importance of a detailed discussion by the trial judge. . . . [If] we have no notion of the basis for a district court's decision, because its reasoning is vague or simply left unsaid, there is little opportunity for effective review. In such cases, we have not hesitated to remand the case for an illumination of the court's analysis through some formal or informal statement of reasons." *McIncrow v. Harris Cty.*, 878 F.2d 835, 835-36 (5th Cir. 1989) (reversing summary adjudication); *see also Munoz v. Orr*, 1998 WL 34368008, at *1 (5th Cir. Oct. 7, 1998) ("Based upon the district court's failure to state its reasons for granting summary judgment, we remand . . . .").

Moreover, the district court's decision never addressed or even mentioned any of the multitude of relevant and material deposition admissions, declarations, and documents provided by Riveer to support its claim. If it actually had discussed all of the evidence presented, and honored the requirement to "view the evidence in the light most favorable to the non-movant"—Riveer—the district court never could have granted summary adjudication on Riveer's Lanham Act claim. *See Davis v. Clifford*, 825 F.3d 1131, 1137 (10th Cir. 2016) (reversing grant of summary adjudication). The district court's lack of analysis was particularly prejudicial in view of *permissive*, substantive law on Riveer's claim. *See Cottrell, Ltd. v. Biotrol Int'l, Inc.*, 191 F.3d 1248, 1252 (10th Cir. 1999) ("A representation may be misleading for purposes of the Lanham Act *without being literally false*. Otherwise, the 'clever use of innuendo, indirect

intimations, and ambiguous suggestions could shield the advertisement from scrutiny precisely when protection against such sophisticated deception is most needed.'") (emphasis added).

In rejecting Riveer's patent infringement claim on summary adjudication, the only explanation ever provided by the district court demonstrates that it (a) again failed to sufficiently explain "the reasons for granting . . . the motion," (b) violated the black-letter proscription on "reading in" limitations from a preferred (or only) embodiment into patent claims, and (c) again failed to construe the evidence in the light most favorable to Riveer. In total, the district court's "reasoning" on non-infringement was as follows: "[N]o reasonable jury could conclude that the accused device performs substantially the same function, in substantially the same way, to yield substantially the same result as the invention . . . ." App. 17. The Federal Circuit again provided no reasoning either, in its one-word conclusion under Fed. Cir. R. 36, "Affirmed." As with the ruling on the Lanham Act claim, this "reasoning" is not reasoning at all. It's just a hollow *conclusion* which violates Rule 56(a) and constitutional due process, and requires a reversal. In view of the extensive evidentiary record, including a thorough expert declaration supporting infringement, there is simply no way the district court's one-sentence conclusion satisfies due process on a summary determination of non-infringement.

Further, the district court's construction of the claim term "grate" completely ignored the well-worn mandate that "[e]ven when the specification describes only a single embodiment, the claims of the patent will

not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope . . . ." *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1327 (Fed. Cir. 2002); *see also Medgraph, Inc. v. Medtronic, Inc.*, 843 F.3d 942, 949 (Fed. Cir. 2016) ("We review a district court's ultimate claim constructions *de novo* . . . ."). The district court's clear error is apparent from its only explanation for the construction, as follows:

> This interpretation is in line with the written description of the patent. *See* col. 5, lines 8-10: "liquid drops off the dirty item *through the openings* of [the] grates of the wash rack . . . ." This excerpt is not referring to merely a preferred embodiment, as the paragraph containing this passage begins with: "FIG. 10 shows the cleaning system in operation." *It does not say that it shows "an embodiment" of the cleaning system; rather it refers to "the cleaning system."*

Petter Invs., Inc. v. Hydro Eng'g, Inc., 2015 WL 1442592, at *3 (D. Utah Mar. 27, 2015) (emphasis added). As is apparently from the highlighted passage, the district court did not understand that even a sole, singular embodiment in a patent specification is still a "preferred embodiment," which cannot be used to narrow the scope of the claims.

Finally, if the district court actually had discussed all of the evidence presented supporting infringement including an expert declaration requiring an assessment of credibility, and honored the requirement to "view the evidence in the light most favorable to the non-movant"—Riveer—the district court never could have granted summary adjudication.

REASONS FOR GRANTING THE PETITION

"The touchstone of due process is freedom from arbitrary governmental action . . . ." *Ponte v. Real*, 471 U.S. 491, 495, 105 S. Ct. 2192, 2195, 85 L. Ed. 2d 553 (1985). The Due Process Clause requires at least *some* reasoned explanation for a district court's decision on claims involving property rights. *See Kerry v. Din*, 135 S. Ct. 2128, 2138, 192 L. Ed. 2d 183 (2015). On summary adjudication, the Federal Rules make this requirement explicit, in that the court "should state on the record the reasons for granting . . . the motion." Fed. R. Civ. P. 56(a). If a district court has failed to explain any rational reason for its decision, at least the Federal Circuit (if affirming) should forego reliance on Federal Circuit Rule 36, and instead give an explanation on appeal that supports the district court's decision.

This action presents an opportunity to clarify the requirements of due process in the important context of patents and intellectual property rights, for as this court stated in *Black v. Romano*, 471 U.S. 606, 618–19, 105 S. Ct. 2254, 2261–62, 85 L. Ed. 2d 636 (1985):

> When written reasons would contribute significantly to the "fairness and reliability" of the process by which an individual is deprived of liberty or property, reasons must be given in this form unless the balance between the individual interest affected and the burden to the government tilts against the individual. Whether written reasons would make such a contribution in any particular case depends on a variety of factors, including the nature of the decisionmaking tribunal, the extent to which

> other procedural protections already assure adequately the fairness and accuracy of the proceedings, and the nature of the question being decided.

Id. That is, if the district court fails to explain why a claimant lost on summary adjudication, and the Federal Circuit fails to explain why it lost again on appeal, there has been no due process, at either level.

This case, therefore, presents an opportunity to clarify the constitutional requirement undergirding Fed. R. Civ. P. 56(a), as well as whether Fed. Cir. R. 36 is constitutional in the circumstance of no reasoning provided by the district court, or constitutional at all.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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