No. _____

In The

Supreme Court of the United States

SECURITY PEOPLE, INC.,

Petitioner,

v.

OJMAR US, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Federal Circuit's issuance of Rule 36 judgments without opinions for the disposition of appeals from the Patent and Trademark Office violates 35 U.S.C. §144's requirement that the Federal Circuit "shall issue" its "mandate and opinion" for such appeals.

The question is identical to that presented by the pending Petitions for writ of certiorari in *Celgard, LLC v. Lancu* (No. 16-1526) (question #2); *C-Cation Tech., LLC v. Arris Group, Inc., et al.* (No. 17-617) (question #2); *Integrated Claims Sys., LLC v. Travelers Lloyds of Texas Ins. Co., et al.* (No. 17-330) (question #2); and *Stambler v. Mastercard International Inc.* (No. 17-1140) (question #2).

RULE 19.6 DISCLOSURE STATEMENT PARTIES TO THE PROCEEDING

The parties to this proceeding are those listed on the cover: Petitioner Security People, Inc., and Respondent Ojmar US, LLC.

Petitioner Security People, Inc. is wholly owned by Asil Gokcebay, an individual, and no publicly held corporation owns a 10% or greater interest in Security People, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Security People, Inc. ("SPI") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. Petitioner requests that this petition be held for the dispositions in one or more of the following pending petitions: *Celgard, LLC v. Lancu* (No. 16-1526); *C-Cation Tech., LLC v. Arris Group, Inc., et al.* (No. 17-617); *Integrated Claims Sys., LLC v. Travelers Lloyds of Texas Ins. Co., et al.* (No. 17-330); and *Stambler v. Mastercard International Inc.* (No. 17-1140), which have petitioned the Court for a writ of certiorari to address the same question. If any dispositions in those cases of the subject question is favorable to petitioner, petitioner requests that the Court grant this petition, vacate the Federal Circuit's judgment, and remand for consideration in light of this Court's decision or alternatively that the subject petition itself be granted and considered on the merits.

OPINIONS AND ORDERS BELOW

The Patent Trial and Appeal Board's Final Written Decision (App. 3-38) is unreported. The Federal Circuit's judgment without opinion under Federal Circuit Rule 36 (App. 1-2) is also unreported. Its Order denying rehearing/hearing en banc (App. 39-40) is unreported.

JURISDICTION

The Federal Circuit entered its judgment without opinion under Federal Circuit Rule 36 on November 13, 2017 (App. 1-2). Petitioner timely petitioned for a rehearing and/or hearing en banc (App. 41-54), which was denied on January 17, 2018 (App. 39-40). This petition is filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case also involves the Federal Circuit's failure to follow 35 U.S.C. §144 and the conflict between this statute and Federal Circuit Rule 36.

35 U.S.C. §144 provides:

> The United States Court of Appeals for the Federal Circuit shall review the decision from which an appeal is taken on the record before the Patent and Trademark Office. Upon its determination the court shall issue to the Director its mandate and opinion, which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case.

Federal Circuit Rule 36 provides:

> Rule 36. Entry of Judgment – Judgment of Affirmance Without Opinion

> The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:
>
> (a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;
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> (b) the evidence supporting the jury's verdict is sufficient;
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> (c) the record supports summary judgment, directed verdict, or judgment on the pleadings;
>
> (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or
>
> (e) a judgment or decision has been entered without an error of law.

STATEMENT OF THE CASE

This petition follows the Federal Circuit affirmance, Case 17-1385, on appeal from an Inter Partes Review ("IPR") proceeding in which the Patent Trial and Appeal Board ("PTAB") cancelled claim 4 of U.S. Patent No. 6,655,180 (the "'180 Patent") (App. 1-2, 3-38). SPI, the owner of the '180 Patent, has already

challenged by a separate declaratory relief action the constitutionality of IPR as a mechanism for finding invalid and eventually cancelling its issued patent claims. See *Security People, Inc. v. Lancu*, action no. 17-214, filed on August 2, 2017, which is on hold pending this Court's resolution of *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* (No. 16-712) (argued on November 27, 2017). SPI manufactures and markets nationwide numerous products that practice the '180 Patent.

By this petition, SPI challenges the propriety of the Federal Circuit's affirmance of the Final Written Decision following IPR without issuance of an opinion in violation of 35 U.S.C. §144.

The PTAB issued a Final Written Decision holding the challenged claims of the '180 Patent invalid (App. 3-38). The PTAB action will serve to cancel SPI's vested property rights incorporated in the '180 Patent issued over 16 years ago. SPI appealed that decision, showing that the prior art could not render obvious the claims of the subject patent as construed in the Final Written Decision. Further, SPI argued that the PTAB erred as a matter of law by misapplying the test for obviousness as a mechanism for identifying the level of ordinary skill in the art. In effect, the PTAB bestowed the ability to produce the structure defined by the challenged claim on the person of ordinary skill, and then asked (redundantly) whether the claim was obvious to such an individual. That is akin to asking whether the invention is obvious to the inventor, or one standing in the shoes of the inventor – a practice forbidden by

Federal Circuit precedents. *Orthopedic Equipment Co. v. United States*, 702 F.2d 1005, 1013 (Fed. Cir. 1983) (citing *In re Twomey*, 218 F.2d 593 (CCPA 1955)); *Ryko Mfg. Co. v. Nu-Star, Inc.*, 950 F.2d 714, 718 (Fed. Cir. 1991) ("The importance of resolving the level of ordinary skill in the art lies in the necessity of maintaining objectivity in the obviousness inquiry."). When SPI appealed the PTAB's ultimate decision to the U.S. Court of Appeals for the Federal Circuit under 35 U.S.C. §141(a), the Federal Circuit affirmed under its Rule 36 without issuing an opinion (App. 1-2). In short, the PTAB's rationale for finding the challenged claim obvious was legally improper, and, hence, cannot stand on its own rationale. It was therefore wrong for the Federal Circuit to enter an affirmance under Rule 36.

Thereafter, SPI timely petitioned for a rehearing/hearing en banc (App. 41-54). In that petition, SPI challenged the Federal Circuit's use of its Rule 36 in denying the appeal as improper and violating 35 U.S.C. §144 as follows:

> Further, Security People urges the Court to rehear this appeal *en banc*, to decide whether this Court can ever affirm a Board's IPR decision without opinion. See 35 U.S.C. §144 (in an appeal from the USPTO, the Federal Circuit "shall issue to the Director its mandate *and opinion* . . . ") (emphasis added). See also Crouch, Wrongly Affirmed Without Opinion, Univ. of Missou. L. Stud. Research Paper No. 2017-02, http://ssrn.com/abstract=2909007 (January 31, 2017). App. 52-53.

The petition for rehearing/en banc hearing was denied without any opinion. App. 39-40.

The Federal Circuit's practice of issuing Rule 36 judgments without opinions, which the Federal Circuit applies in up to half of appeals from PTAB decisions, compounds the procedural injustice[1] arising out of the PTAB's invalidation of patents. Not only was SPI deprived of having its case decided initially by an Article III trial court, it is also deprived of having ***any*** Article III court ***ever*** render a reasoned opinion on this case. This highlights the wisdom of protecting the constitutional guarantee of Article III trial courts and trials by jury.

The question of whether the Constitution permits an administrative agency to revoke issued patents as invalid pursuant to IPR procedures is currently before this Court in *Oil States*, (No. 16-712) (granting certiorari on issue of "[w]hether *inter partes* review, an adversarial process used by the Patent and Trademark Office to analyze the validity of existing patents, violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury."). The Court heard oral argument in that case on November 27, 2017.

The Rule 36 question urged by this petition is likewise presented in several petitions pending before the Court See, e.g., *Celgard, LLC v. Lancu* (No. 16-1526);

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[1] See SPI's amicus brief in *Oil States v. Greene*, filed August 2, 2017 and SPI's petition for certiorari in *SPI v. Lancu*, Action No. 17-214.

C-Cation Tech., LLC v. Arris Group, Inc., et al. (No. 17-617); *Integrated Claims Sys., LLC v. Travelers Lloyds of Texas Ins. Co., et al.* (No. 17-330); and *Stambler v. Mastercard International Inc.* (No. 17-1140). As those petitions argue, the Federal Circuit's practice of issuing affirmances without opinion in appeals from the PTAB is inconsistent with the plain language of 35 U.S.C. §144 requiring an "opinion." The Federal Circuit impermissibly uses this practice in up to half of all appeals from the PTAB, potentially allowing important defects in PTAB structure and procedure to escape this Court's review and impairing the effective development of patent law and the law governing PTAB practice and procedure.

REASONS TO HOLD THE PETITION OR GRANT THE PETITION

I. This Petition Should Be Held Pending the Outcome of *Oil States*.

In *Oil States*, the Court will decide whether IPR proceedings violate the Constitution by extinguishing private property rights through a non-Article III forum without a jury. Since the decision in *Oil States* may well render IPR unconstitutional, and thus mooting the issue of Rule 36 affirmance tendered here, the Court should hold this petition.

If the Court finds that IPR proceedings at the Patent Office are unconstitutional, the Court should grant certiorari here to either (1) vacate the decision

below and remand it to the Federal Circuit for further consideration in light of *Oil States*, or (2) require briefing on the merits to independently determine how this Court's decision in *Oil States* affects Rule 36 affirmance.

II. This Petition Should Be Held Pending the Outcome of Other Petitions Challenging the Federal Circuit's Pervasive Issuance of Rule 36 Judgments Without Opinions in Violation of 35 U.S.C. §144.

When SPI appealed the PTAB's final IPR decision to the Federal Circuit, the Federal Circuit entered judgment against SPI under its circuit rule permitting a "judgment without opinion." See Federal Circuit Rule 36. This conflicts with the express statutory requirement that the Federal Circuit issue judgments ***with opinions*** when reviewing decisions of the Patent Office. See 35 U.S.C. §144 (using the word "shall"). SPI's case is not alone – the Federal Circuit issues Rule 36 judgments in up to half of its Patent Office appellate dispositions. The Court should end this pervasive and unlawful practice.

As noted above, whether Rule 36 affirmances violate 35 U.S.C. §144 is currently raised by several pending petitions. Since the Court might take up the same question as presented here in any of those cases, the Court should hold this petition while granting certiorari in one of those cases. If the Court grants certiorari in any of these cases and holds that Rule 36 judgments

in appeals from the PTAB are unlawful, the Court should grant certiorari here, vacate the decision below, and remand for further consideration. Alternatively, the Court should grant certiorari here and address this issue on the merits in the first instance.

Resolution of this issue is important to the adjudication of appeals from the PTAB for a multitude of reasons. First is the fundamental respect for the rule of law. There is no objective way to square Federal Circuit Rule 36 affirmances, which expressly allow judgments "without opinions" with the express language of 35 U.S.C. §144 requiring the determination of an IPR appeal be by an "opinion" (*Bowsher v. Synar*, 478 U.S. 714, 736 (1986)). While, no doubt, Rule 36 affirmances are more expedient for the Federal Circuit, this cannot serve to excuse it from the unambiguous congressional mandate to issue "opinions." Manifestly, Congress has the power to require such under Article I of the Constitution. Presumably, Congress exercised that power conscious of the issue of deprivation of property without due process of law. The Framers recognized that "structured protections against abuse of power were critical to preserving liberty." *Bowsher*, supra, at 730. It has always been U.S. Constitutional law that property deprivation is subject to Article III Court review. In *Marbury v. Madison*, 5 U.S. 137 (1803), after pronouncing that the "letters patent" and by extension the "commission" at issue was a vested property right at pages 159-165, Chief Justice Marshall stated at page 167:

> The question whether a right has vested or not is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate and proceeded to act as one, in consequence of which a suit had been instituted against him in which his defence had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

It should be very disturbing that the Federal Circuit can dispose with this historic duty and ignore the congressional mandate to issue an opinion when one's vested patent rights are being cancelled. Such an approach is hardly in keeping with the constitutionally enshrined promotion "of Science and Arts."

The Federal Circuit's practice of issuing Rule 36 judgments insulates a host of important due process and other procedural issues from the Federal Circuit's meaningful rehearings and/or hearings en banc, and also from this Court's review. Such Rule 36 judgments prevent this Court and the Federal Circuit from monitoring compliance with case law, statutory law, and the Constitution, thereby risking injustice to litigants. In particular, Rule 36 judgments make it difficult for this Court to monitor compliance with the *Chenery* doctrine. Under the *Chenery* doctrine, the Federal Circuit must base its review of a PTAB opinion on the reasoning ***actually used*** by the PTAB rather than ascertain whether there was ***some other*** legally-acceptable way to reach the same result. See *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). When the Federal Circuit issues

Rule 36 judgments, never explaining the reason for its decision, there is no way to know what reasoning it used. Thus, a decision at the Federal Circuit may or may not have complied with *Chenery*.

On this same point, it is notable that Rule 36 judgments from the PTAB are unduly difficult for this Court to review. To do its work, this Court benefits from a fully-developed record. By providing no reasons for its decisions, the Federal Circuit leaves this Court with the work of identifying the basis for the decision as a prerequisite for determining whether or not to grant certiorari – which means, as a practical matter, that Rule 36 judgments insulate the Federal Circuit's decision-making from this Court's review. The Federal Circuit often issues Rule 36 judgments in cases involving important procedural irregularities and due process concerns.

The Federal Circuit's Rule 36 practice inhibits transparent development of the law. Rule 36 affirmances, sometimes followed by a denial of certiorari by this Court, imply to PTAB judges and practitioners that the PTAB acted correctly. Given the difficulty of monitoring Rule 36 judgments discussed above, the process places the imprimatur of the Federal Circuit's "Affirmed" and this Court's "cert. denied" on the very cases that may be the worst examples for the PTAB to follow: cases affirmed on grounds other than those used by the PTAB, where the PTAB was incorrect on key legal points.

When the Federal Circuit sits in review of an IPR decision (i.e., the outcome of an administrative trial), it sits as a court of limited appellate jurisdiction. In particular, the Federal Circuit is limited to reviewing the sufficiency of the PTAB's stated reasons for its decision, using the standards of review that are established by the Administrative Procedure Act ("APA"). See *Chenery Corp*., supra, at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); 5 U.S.C. §706. However, when the Federal Circuit invokes its Rule 36, neither the parties to the appeal nor the public can be assured that it has confined itself to that limited role and has not, for example, substituted its own reasoning for the Board's. Nor can a dissatisfied party, such as the Patent Owner, readily show that has been the case. Precisely because Rule 36 judgments do not state the court's reasons for affirmance, the public trust in its decisions is eroded.

The deleterious effect of Rule 36 judgments on development of the law is not limited to cases where the Federal Circuit commits legal error or uses an improper process. The PTAB often issues multiple grounds for its decision, and Federal Circuit Rule 36 allows affirmance "under the standard of review in the statute authorizing the petition for review." Rule 36 has the effect of an answer to a compound question: i.e., Rule 36 affirmances are not clear with respect to which of the alternative grounds support an affirmance. So even if the Federal Circuit followed *Chenery*, its Rule 36 affirmance tells PTAB judges and

practitioners that the PTAB decision is good law, despite the possible presence of multiple errors. This encourages PTAB judges and practitioners not only to emulate the ***correct*** decisions and practices that caused the Federal Circuit to affirm, but equally to emulate the ***errors*** that were in fact irrelevant to or even inconsistent with the Federal Circuit's disposition. Opinions as required by 35 U.S.C. §144 serve the institutional ideals of open-mindedness, searching inquiry, and collegial deliberation at the intermediate appellate court level, which as applied to IPR appeals are in fact the first judicial review of an administrative/executive branch decision. Even a brief description of the reason for affirmance would make clear the limits of the Federal Circuit's endorsement of the PTAB decision, facilitating the development of the law.

CONCLUSION

In each and every IPR, important vested patent property rights are at stake. There is a strong presumption that whatever the PTAB's decision, it will be subject to judicial review. See, e.g., *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670-73 (1986); see also 5 U.S.C. §§702, 704, 706. Yet, the opaque nature of the Court's Rule 36 judgments provides no assurance that the Court has conducted meaningful and even-handed judicial review of IPR decisions. The Court should therefore grant this petition and take the opportunity to consider and address the

Federal Circuit's authority to issue Rule 36 affirmances without opinion in appeals from IPR decisions.

For these reasons, the petition for a writ of certiorari should be granted, the judgment of the Federal Circuit vacated, and the case remanded for reconsideration.

Respectfully submitted,

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