No. 17-804

IN THE

# Supreme Court of the United States

EVE-USA, INC. AND SYNOPSYS EMULATION AND VERIFICATION, S.A.S., SYNOPSYS, INC.,

*Petitioners*,

v.

MENTOR GRAPHICS CORPORATION,

*Respondent*.

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

## BRIEF IN OPPOSITION


BRADLEY N. GARCIA
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 2006
(202) 383-5300

MARK E. MILLER
(*Counsel of Record*)
markmiller@omm.com
LUANN L. SIMMONS
ANNE E. HUFFSMITH
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111
(415) 984-8700

*Attorneys for Respondent*

## QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review the complex doctrine of assignor estoppel, in view of petitioners' waiver of any argument except that the doctrine should be abolished entirely, the Federal Circuit's explicit invitation to future litigants to present more developed arguments on the issue, and the fact that petitioners already had the opportunity to raise before another forum the validity arguments petitioners were barred from presenting in the district court.

2. Whether this Court should grant certiorari to review the jury's award of lost profits, which the Federal Circuit explicitly affirmed based on the unique undisputed facts of this case, and the fact that the full award is necessary to put respondent in the position it would have been in absent petitioners' infringement.

## RULE 29.6 STATEMENT

Mentor Graphics Corporation is a wholly owned subsidiary of Siemens Industry, which is a subsidiary of Siemens Corporation, which is a subsidiary of Siemens USA Holdings, Inc., which is a subsidiary of Siemens Beteiligungen USA GmbH, which is a subsidiary of Siemens Beteiligungen Inland GmbH, which is a subsidiary of Siemens AG, which is a German company that is publicly traded in Germany.

## TABLE OF CONTENTS

**TABLE OF CONTENTS**
**(continued)**

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

CASES

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

## TABLE OF AUTHORITIES
## (continued)

**Page(s)**

## INTRODUCTION

Petitioners ("Synopsys") ask this Court to review two questions. Neither warrants review.

1. The first question concerns the doctrine of assignor estoppel, which precludes an assignor of patent rights from defending an infringement action on the ground that the patent rights it sold were invalid. The paradigmatic case justifying application of assignor estoppel involves an inventor who secures a patent, sells the patent in a market transaction, creates an infringing product, and then, when alleged to infringe the patent, argues in court that the patent rights are invalid and worthless. As this Court has explained, longstanding and widely-applied principles of fair dealing prevent an assignor "from derogating from the title he has assigned." *Westinghouse Elec. & Mfg. Co. v. Formica Insulation Co.*, 266 U.S. 342, 350 (1924). As the petition itself details, however, that doctrine can be applied in a wide variety of circumstances. For example, a company may sell a subsidiary that owns a patent, and later be estopped from challenging the validity of the patent even though it was merely one piece of a larger transaction. Some companies require employees to agree *ex ante* to assign any future inventions for no compensation beyond their salary, and then may seek to estop such employees who leave and attempt to compete in the marketplace. The doctrine has also been applied to those in privity with a prior assignor. The fact patterns are countless.

As the Federal Circuit explained, this case is "not a proper vehicle" to review the contours of that doctrine. Pet. App. 80a. That is because—as Synopsys does not dispute—Synopsys *waived* all arguments except that the complex doctrine should be abolished entirely. *Id.* Synopsys' petition therefore presents the Court with only two options—abolish the doctrine or not—even though a more nuanced, middle-ground position may be appropriate. Compounding the problem, Synopsys' petition inappropriately presents many arguments regarding the purported overbreadth of the current assignor estoppel doctrine that were not presented below, and that, if accepted, would result in the very sort of middle-ground position that Synopsys has waived and may not address. There is also no factual record on which to assess those abstract arguments—Synopsys conspicuously makes no attempt whatsoever to connect its assignor estoppel arguments to the facts of this case.

The Federal Circuit understood that other cases may well present the question not presented here—i.e., the proper contours of the assignor estoppel doctrine—and expressly invited future litigants to make the arguments Synopsys has waived: "There may someday be a case which argues these points to this court (which Synopsys has not) and presents a record which would allow us to consider these issues in the context of an actual case, but this is not such a case." *Id.* at 81a. There is no reason to grant certiorari in a case where these questions are not properly presented, particularly given the Federal Circuit's explicit invitation to litigants to make more developed challenges, with more developed records, to the assignor estoppel doctrine in the future.

Even if this Court should someday review some aspect of the assignor estoppel doctrine, this Court can and should await a better vehicle in which to do so.

2. The second question presented, which challenges the jury's damages award compensating Mentor for the profits it lost due to Synopsys' infringement, is equally undeserving of this Court's review. Synopsys argues that the Federal Circuit disregarded "150 years" of clear case law and "abandoned" the principle that patent damages must be apportioned when the patent covers only a portion of a multi-feature product, thereby establishing a dramatically new and improper analysis for "all lost profits cases." Pet. 3, 25. No. The Federal Circuit's opinion explicitly embraced the apportionment principle, and relied on longstanding precedent holding that the particular type of but-for causation Mentor proved accounts for the value of the patented features of a product and therefore accomplishes the necessary "apportionment." Pet. App. 19a. In particular, Mentor was required to prove, and the jury found, that but-for Synopsys' infringement *only* Mentor would have made most of Synopsys' infringing sales, because the infringing features of Synopsys' products were essential and there were no acceptable alternatives available. The Federal Circuit announced no new law in affirming the jury's verdict, and Synopsys' argument that the court abandoned the apportionment requirement is incorrect. The Federal Circuit also took care to explain—contrary to Synopsys' claims about the significance and broad applicability of the opinion below—that the showing Mentor made here is merely one way of proving lost profits damages, and that it is an exceedingly difficult one that is essentially impossible to make in cases with more complex facts than the unique record here. *Id.* at 18a-19a.

Synopsys' novel position is that lost profit damages should be apportioned twice, in a way explicitly designed to undercompensate the patentee. Synopsys fails to even acknowledge the Federal Circuit's explanation that such an approach would violate basic compensatory damages principles. Compensatory damages under the Patent Act—like compensatory damages generally—are designed to place the patentee in the position it would have been in absent the infringement. Here, the jury found that but-for Synopsys' infringement, Mentor would have made \$36,417,661 because it would have made most of Synopsys' infringing sales. As the Federal Circuit explained, the damage award was appropriate for the simple reason that anything less would undercompensate Mentor on the unique facts of this case. *Id.* at 19a.

If the applicable damages principles were as clear and longstanding, and the issue as frequently recurring as Synopsys claims, then surely Synopsys could have identified *one* district court in the country that had applied its proffered approach. But it did not, and it could not, because no such case exists. Beneath the rhetoric, Synopsys' arguments reduce to an unsupported assertion that district courts will misapply the decision below.

The petition should be denied.

## STATEMENT OF THE CASE

### A. Factual Background

1. The technology underlying this case is "emulation," i.e., methods for testing the logic functions of the millions or billions of transistors in the design of a microchip before the chip is manufactured. Dr. Luc

Burgun, one of the two named inventors of United States Patent No. 6,240,376 (the "'376 Patent"),[1] invented the technology claimed in the '376 Patent in 1998 while employed by Mentor, and then assigned the invention to Mentor. A1571-614.[2] When a circuit design is emulated, many of the signals being tested are buried deep within the chip design. The '376 Patent claims methods for debugging a circuit design by providing visibility that helps to locate and identify errors. A532-53; A1581-614. The inventions claimed in the '376 Patent involve the creation of "instrumentation signal[s]" (claims 1 and 28) or the generation of logic (claim 24) to provide visibility into circuit designs being emulated in order to locate and identify errors. A532-33. At trial, Dr. Burgun testified that debugging a circuit design is "the main purpose of an emulator." A41672:6-9; A41551.

In 2000, Dr. Burgun left Mentor to found EVE, where he served as president and CEO. Pet. App. 4a. In 2006, Mentor sued EVE alleging, as relevant here, that EVE's "ZeBu" emulator infringed the '376 Patent. *Id.* The parties settled the litigation in December 2006, and EVE obtained a license to the '376 Patent from Mentor. *Id.* The license provided that it would terminate if EVE were acquired by another company in the emulation industry. *Id.*

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[1] This suit initially involved several Mentor and Synopsys patents, but the '376 Patent is the only patent relevant to the petition. Pet. App. 2a-3a.

[2] All citations to "A__" refer to the Joint Appendix filed in the Federal Circuit.

2. EVE's early emulators were not competitive. Their critical weakness was their poor "debug visibility," which is central to an emulator's ability to identify and correct circuit errors. A41716:2-24; A41718:23-25. Several of EVE's customers, including Intel, complained about the inability of EVE's emulators to effectively debug circuit designs and demanded improvements. A41718:1-4; A41672:13-A41673:2; A41717:9-15; A41721:20-22. Internal emails showed that EVE recognized that "[t]he key feature … needed for ZeBu to beat [Mentor's] Veloce is full [debug] visibility." A44414.

EVE, in response, developed the two infringing features at issue in this suit—"flexible probes" and "value-change probes." Pet. App. 7a; A41672:13-A41673:2; A41717:9-15; A41721:20-22. By adding Mentor's patented debugging technology to the ZeBu emulators, EVE significantly improved its emulators' capabilities and began to compete with Mentor for emulator sales. Several of Synopsys' own trial witnesses confirmed that the infringing flexible probes and value change probes were essential to EVE's success in the marketplace. *See, e.g.*, A41714:11-14 ("[B]efore the development of flexible probes in 2009, EVE was not competitive."); A41761:5-9 ("Without [debug capabilities], [EVE] would have horrible times. With that, [EVE] became competitive.").

3. In 2012, Synopsys decided to acquire EVE. Anticipating the termination of EVE's license, Synopsys filed a declaratory judgment action against Mentor on September 27, 2012. Pet. App. 4a-5a. A day later, Synopsys filed a petition for *inter partes* review of the

’376 Patent before the Patent Trial and Appeal Board (“PTAB”).[3]

On October 4, 2012, Synopsys completed its acquisition of EVE, thereby terminating EVE’s license. Synopsys nevertheless continued to sell the infringing ZeBu emulators. Mentor filed counterclaims on January 11, 2013, alleging willful infringement of the ’376 Patent. A1216-29.

**B. District Court Proceedings**

***Assignor Estoppel:*** Prior to trial, Mentor moved for partial summary judgment on the ground that assignor estoppel barred Synopsys from challenging the validity of the ’376 Patent, because Synopsys was in privity with Burgun. Dkt. 366 at 8-9. In a summary order, the district court granted Mentor’s motion. Pet. App. 62.

***Damages:*** At trial, the jury found that Synopsys’ ZeBu emulators infringed several claims of the ’376 Patent. A182-184. In the relevant period, Synopsys sold 40 infringing emulators to Intel and five to non-Intel consumers. A41273. Mentor argued, with abundant record support, that if Synopsys had not infringed its patent, Mentor would have made all 40 of the sales to Intel, and at least one sale to non-Intel parties, for a total of $47,143,137 in lost profits. A41271, A41276.

The jury was instructed that Mentor could recover lost profits for an infringing sale only if Mentor made

[3] The PTAB confirmed the patentability of the claims asserted at trial and the Federal Circuit affirmed the PTAB decision. *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1311 (Fed. Cir. 2016).

a demanding and extensive showing; otherwise Mentor would have to settle for a reasonable royalty. A164-65; A171. The jury instructions tracked the long-used factors for determining but-for causation for lost profit patent damages first set out in *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152 (6th Cir. 1978).

To recover lost profits for the Intel sales, Mentor was required to prove, *inter alia*, that Mentor's emulator and Synopsys' infringing product were the "only two acceptable, available alternatives in the Intel market during the damages period," and that Mentor had the capacity to make the sales Synopsys had made. A164. The jury was instructed to consider whether, absent Synopsys' infringement, Intel would have turned to any of the many non-infringing substitutes Synopsys had identified at trial rather than purchase from Mentor. A164-65. In particular, Synopsys could have shown that "the Cadence emulation system," "an FPGA prototype," or an entirely different product called "a software simulator" was an acceptable "non-infringing alternative" for Intel. *Id.* The jury was also instructed to consider whether "Synopsys could have made available" an "acceptable, non-infringing alternative" of its own, or whether "Intel would have bought fewer or no emulation systems in place of those it bought from Synopsys." *Id.*

The jury was further instructed that an "acceptable substitute . . . must have the advantages of the patented invention that were important to Intel." A167. But if "competitors other than" Mentor "would likely have captured the sales made by Synopsys, despite a difference in the products, then Mentor Graphics is not entitled to lost profits on those sales."

*Id.* Mentor was entitled to lost profits only for sales Mentor "would actually have made to Intel." A165. The instructions regarding the non-Intel sales were similar. *Id.*

The jury considered the evidence in accordance with those instructions and determined that, absent Synopsys' infringement, Mentor would have made many, but not all, of the emulator sales Synopsys made during the infringement period. The jury awarded Mentor $36,417,661 in lost profits ($10,725,476 less than Mentor's request). A184. The jury also awarded Mentor $242,110 in royalties for those infringing sales for which Mentor had not shown it was entitled to lost profits. *Id.*

Synopsys has never challenged the jury's straightforward factual determinations supporting the finding that if Synopsys had not infringed the '376 Patent, Mentor would have made $36,417,661 in lost profits.

### C. The Federal Circuit Panel Decision

***Assignor Estoppel:*** Synopsys' 71-page appellate brief devoted just three paragraphs—only one of which contained any substantive assertions—to the assignor estoppel issue. Synopsys asserted without elaboration that this Court's decision abolishing the doctrine of licensee estoppel in *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), "is equally applicable to assignor estoppel." C.A. Br. 42.

The panel rejected Synopsys' undeveloped assignor estoppel argument in a commensurately brief paragraph, explaining that the Federal Circuit long ago rejected the generic argument that *Lear* required abolition of assignor estoppel. Pet. App. 9a.

***Damages:*** Synopsys also argued that the lost profits instructions were erroneous because they purportedly did not require "apportionment" of Mentor's damages. The Federal Circuit disagreed, emphasizing that the Patent Act requires damages to be "adequate to compensate for the infringement," which means "full compensation for 'any damages' [the patent owner] suffered as a result of the infringement." Pet. App. 10a (quoting 35 U.S.C. § 284 and *Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55 (1983)). The panel explained that "compensatory damages under the patent statute . . . should be treated no differently than the compensatory damages in other fields of law," which place the plaintiff in the position it would have been "had the [defendant's] harmful act never occurred." Pet. App. 11-12a.

The court explained that there "is no particular required method to prove but for causation," but that the Federal Circuit had long held that the *Panduit* factors are one "useful, but non-exclusive" method of doing so. *Id.* at 12a (quoting *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1545 (Fed. Cir. 1995) (en banc)). *Panduit* requires a patentee to establish "(1) demand for the patented product; (2) absence of acceptable non-infringing alternatives; (3) manufacturing and marketing capability to exploit the demand; and (4) the amount of profit it would have made." *Id.* at 13a.

The panel emphasized that damages "under *Panduit* are not easy to prove." *Id.* at 14a. Proving the absence of non-infringing alternatives can be especially difficult. *Id.* at 16a. As a result, patentees are very rarely able to prove their entitlement to all, or even any, of the lost profits they seek under *Panduit*, and instead must seek a reasonable royalty. *Id.*

But the court emphasized that the "facts of this case" are "remarkably simple for a patent damages appeal," and that "Synopsys does not dispute any of them." *Id.* The relevant market had only two suppliers—Mentor and Synopsys—and the jury found Mentor would have made the sales if Synopsys had not infringed. *Id*. at 16a-17a.

The panel rejected Synopsys' argument that the jury instructions had not required an "apportionment" to account for the value of the patented features of Synopsys' emulators. The court explained that the first two *Panduit* factors together require "patentees to prove demand for the product as a whole and the absence of non-infringing alternatives," which "ties lost profit damages to specific claim limitations and ensures that damages are commensurate with the value of the patented feature." *Id*. at 15a. As a result, "[i]n this case, apportionment was properly incorporated into the lost profits analysis and in particular through the *Panduit* factors." *Id*. at 19a.

Synopsys was permitted to present evidence that "there were many valuable and important features in the emulator system," but the jury determined that Intel would not have purchased Synopsys' emulators without the two infringing features. *Id*. at 18a. Synopsys' failure to dispute that fact or any other fact finding rendered "this case quite narrow and unlike the complicated fact patterns that" many patent cases involve. *Id*. at 17a. The panel therefore rejected Synopsys' argument that Mentor was not entitled to recover "the amount necessary to make it whole for the sales it lost." *Id*. at 19a.

### D. The Federal Circuit Denied Rehearing

Synopsys then filed an unsuccessful petition for rehearing en banc.

***Assignor Estoppel:*** Synopsys devoted four paragraphs of its petition to assignor estoppel. It again argued that *Lear* abrogated that doctrine, and added a single sentence asserting that "[w]hatever equities assignor estoppel may have once advanced have evaporated with the norm that employers require employees to assign their inventions as a condition of employment, so that the inventor is not actually selling the invention to his employer, much less certifying its validity." Dkt. 112 at 14-15. Synopsys' petition contained no explanation of whether, or how, that assertion related to the facts of this case.

Synopsys' conclusory argument attracted the attention of only two judges, both from the initial panel. Judge Moore, joined by Judge Chen, explained that "assignor estoppel may arise in multiple fact patterns," and that "[w]e may be inclined to reconsider the breadth of the doctrine of assignor estoppel" in future cases. Pet. App. 80a. But, Judge Moore explained, "this case is not a proper vehicle to do so." *Id*. Judge Moore emphasized that "Synopsys devoted approximately one page of its brief to this court to the issue of assignor estoppel" and that "Synopsys' petition for rehearing was no more detailed." *Id.* "To be clear," Judge Moore continued, "Synopsys made no arguments to this court regarding the scope of the assignor estoppel doctrine or its applicability to this particular case." *Id.*

Judge Moore outlined several arguments that future litigants might make to narrow the scope of the doctrine or illuminate its proper application in the many factual contexts that may arise in the modern marketplace, including arguments based on "the nature of the employee/employer relationship, the nature of the compensation conveyed for the assignment," or arguments that "the assignment was not knowing or voluntary." *Id.* Judge Moore expressly invited future litigants to make such arguments and indicated that the Federal Circuit may be receptive to them if properly presented. *Id.* at 81a.

Judge Moore explained that in her view Synopsys' argument that assignor estoppel should be eliminated entirely was foreclosed by this Court's decision in *Westinghouse*, which "held that an assignor could be estopped from challenging the validity of a patent in certain situations." *Id.* at 82a. She also explained that assignor estoppel is fundamentally different from licensee estoppel because, unlike someone who *pays for* a license, an assignor who assigns his rights to someone else for value "may make an implicit representation that what he sold has value," and therefore implicates the longstanding doctrine of estoppel by deed. *Id.* at 83a-84a.

In short, what Synopsys portrays as a pronouncement that the Federal Circuit views itself as powerless to revisit the issue of assignor estoppel, Pet. 12-13, was in fact a two-judge opinion focusing on Synopsys' failure to develop any argument or an appropriate record for examining the issue, which *expressly invites* future litigants to challenge the scope of the doctrine.

***Damages:*** Judge Stoll, joined by five other judges, concurred in the denial of rehearing regarding the damages issue. Judge Stoll reiterated that the panel decision was "consistent with long-standing damages principles in property, tort and contract," and rejected Synopsys' and the dissent's view "that there should be a special rule for damages in patent cases which is at odds with mainstream damages principles." Pet. App. 67a n.1. The panel's decision was also consistent with the apportionment requirement because the jury's undisputed fact findings under the *Panduit* factors established that "the patented features were what imbued the combined features that made up the emulator with marketable value." *Id*. at 67-68a. The jury found that, for many of the infringing sales, Intel would not have purchased Synopsys' emulators without the infringing features and that there were no acceptable alternatives available other than Mentor's product. *Id*. Citing precedent regarding the "entire market value rule," Judge Stoll explained that in "these circumstances, further apportionment is unnecessary." *Id.*

Judge Stoll dismissed the dissent's claims that this analysis would "apply broadly to all lost profits analyses." *Id*. at 69a. Instead, "based on the jury's undisputed fact findings on the *Panduit* factors in this case," "Mentor properly accounted for apportionment of lost profits between the patented and unpatented features of the infringing emulator system," and therefore, on "the narrow facts of this case . . . the damages award properly accounted for apportionment." *Id.*

Judge Dyk, joined by Judge Hughes, would have granted rehearing en banc on the damages issue. Though Judge Dyk admitted the panel's opinion by its terms "recognizes apportionment's importance," he asserted that "the panel opinion simply does not apportion." *Id.* at 72a. In Judge Dyk's view, a patentee seeking lost profits should be required to establish more than but-for causation—even the particular type of but-for causation embodied in the *Panduit* factors—to accomplish the requisite apportionment between the value of the patented and unpatented features of a product. Judge Dyk did not address the jury's undisputed fact finding that Mentor would have made $36,417,661 in profits absent Synopsys' infringement.

## REASONS FOR DENYING THE PETITION

### I. THIS IS AN INAPPROPRIATE VEHICLE TO REVIEW THE PROPER SCOPE OF THE ASSIGNOR ESTOPPEL DOCTRINE

This Court endorsed assignor estoppel in 1924 in *Westinghouse*, 266 U.S. at 349. The doctrine precludes an assignor of patent rights from defending an infringement action on the ground that the patent rights it sold were invalid. But the doctrine does not preclude the assignor from raising a variety of other defenses to infringement. For example, a defendant-assignor may introduce prior art—typically used as a basis to invalidate the asserted claims—to narrow the scope of the asserted claims, *id.* at 350-51, relying on a defense, available only to a party subject to assignor estoppel, known as "practicing the prior art," *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 257-58 (1945).[4] Thus, even where assignor estoppel applies, an assignor has a variety of grounds to "successfully

[4] For reasons unknown to Mentor, Synopsys did not rely on this defense below.

defend[] against . . . infringement claims." *Diamond Sci. Co. v. Ambico, Inc.*, 848 F.2d 1220, 1226 (Fed. Cir. 1988).

In its petition, Synopsys argues that this Court should now intervene to reconsider that longstanding doctrine. This case, however, is a poor vehicle in which to do so, and Synopsys' argument that the doctrine should be abolished in its entirety is wrong.

### A. This Case Is A Poor Vehicle To Consider The Contours Of Assignor Estoppel Because Synopsys Has Waived Any Non-Extreme Position And Many Of Its Current Arguments

1. The justifications for applying assignor estoppel are at their height in what Synopsys terms "the paradigmatic case," where an inventor "(1) secured a patent; (2) represented to a buyer that the patent is valuable; (3) sold the patent rights at a high price to that buyer in an arm's length transaction; only to (4) turn around and persuade a court that what they sold was worthless." Pet. 22. As the petition itself demonstrates, however, *id.* at 21-23, and as detailed *supra* at 1, the question whether an assignor of a patent—or those in privity with her—should be estopped from challenging that patent's validity arises in widely varying circumstances raising widely varying considerations. *See also* Pet. App. 80a ("assignor estoppel may arise in multiple fact patterns").

The glaring obstacle to this Court's ability to properly review the complex assignor estoppel doctrine in this case is that, as Judge Moore highlighted, Synopsys has waived any argument except for the "binary" question of whether the assignor estoppel doctrine should be abolished entirely—up to and including in the "paradigmatic case" in which the doctrine's justifications are most compelling. *Id.* Before petitioning for certiorari, Synopsys presented no argument other than that *Lear* applied equally to licensor estoppel and assignor estoppel. It made no argument that assignor estoppel should not be applied on the particular facts of this case. And although Synopsys now devotes a substantial portion of its petition to parroting the arguments that Judge Moore invited other litigants to make in future cases, it made no argument below that the Federal Circuit has made the doctrine overbroad, nor any argument based on any development since *Lear*. *Id.* at 80-81a. Synopsys' petition makes no attempt to dispute that there is therefore no "record which would allow" informed consideration of those arguments. *Id.* at 81a. And because this Court "is one of final review, not of first view," all such arguments are waived. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quotations omitted); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (it is inappropriate "to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing"); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).[5]

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[5] Synopsys does not contest that it failed to raise any of these arguments in the Federal Circuit. Instead, it attempts to excuse its waiver by suggesting that Federal Circuit precedent foreclosed the arguments, and that it is not raising now any argument "that the panel had the power to decide." Pet. 24-25. That of course does not explain why Synopsys did not attempt to raise

Synopsys' waiver is especially problematic here because the vast majority of the arguments in its petition have *no application* to the only question it has preserved for review, *viz.*, whether assignor estoppel should be abolished. Again, Synopsys belatedly argues that the Federal Circuit has expanded the doctrine "far beyond" the paradigmatic case warranting assignor estoppel, and urges that various "modern realities bear no relation to the traditional justifications for assignor estoppel." Pet. 20-23.

Such considerations are important to an evaluation of the proper breadth of the doctrine of assignor estoppel and its proper application to potential sets of facts. But arguments based on those considerations were never made in this case before Synopsys' petition for certiorari and have *no relation* to whether the doctrine should be abolished entirely—which is the only issue that Synopsys did raise below. At most those arguments suggest the doctrine should be *narrowed*, or not applied in certain situations. Tellingly, Synopsys' petition makes *no attempt whatsoever* to connect its abstract arguments about the purported overbreadth of the assignor estoppel doctrine to the facts of this case.

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such an argument in its petition for rehearing en banc, even though two judges would state explicitly that they would have been receptive to such arguments. Pet. App. 80a. And even before the panel, although the existence of contrary circuit precedent may be a justification for raising an argument concisely (as Synopsys did with its argument that the doctrine should be abolished entirely), *see MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007), no case excuses the failure to make an argument *at all*.

For all of those reasons, as Judge Moore concluded, this case is "not a proper vehicle" to review the doctrine of assignor estoppel. Pet. App. 80a. Even if the doctrine as applied by the Federal Circuit might warrant this Court's consideration at some point, this Court would be far better served by taking it up in a case where the full range of options are on the table, with a developed record and arguments (and a reasoned opinion below), rather than a case in which any argument between opposite extremes has been waived. *See id.* at 82a ("Our job is to decide cases based on their facts. And in this case, Synopsys did not argue applying assignor estoppel *to the facts of this case* is unjust, unfair, or in any manner inequitable." (emphasis in original)).

This Court should await a future case for any consideration of the doctrine, especially since the Federal Circuit invited future litigants to present well-developed challenges to assignor estoppel. Pet. App. 80a.

2. Review in this case is particularly unnecessary because—although Synopsys omitted this fact from its petition—Synopsys already had the opportunity to challenge the validity of the relevant claims of the '376 Patent and lost. In 2011, Congress created the *inter partes* review process, which allows the PTAB to efficiently review issued patents, subject to judicial review. *Husky Injection Molding Sys. Ltd. v. Athena Automation Ltd.*, 838 F.3d 1236, 1242 (Fed. Cir. 2016). The Board has determined, based on the particular language of the relevant statute, that assignor estoppel does not apply in *inter partes* review proceedings, and the Federal Circuit has concluded that it lacks jurisdiction to review that policy. *Id.* at 1246-

47.[6] Synopsys initiated an *inter partes* challenge to the ’376 Patent, in which it was permitted to raise the challenges it was precluded from offering in the district court here—Synopsys succeeded in its challenge to certain claims of the ’376 Patent, though not the claims underlying the judgment below. *Mentor Graphics*, 814 F.3d at 1311. There is no reason to review assignor estoppel as applied to this case given that Synopsys already raised the primary validity challenges it was barred from asserting below.

This Court accordingly can and should await another day, and a better vehicle, to resolve the questions belatedly raised by Synopsys.

### B. The Federal Circuit Was Correct To Not Abolish The Assignor Estoppel Doctrine Entirely

The only question before this Court is whether assignor estoppel should be abolished entirely. There is no serious debate as to the correct answer to that question. Synopsys’ own *amici* do not even share Synopsys’ extreme view; the amici instead argue only for the waived position that this Court should “curtail” the Federal Circuit’s version of assignor estoppel “to conform with the narrow decisions of this Court.” Law Professors’ and Public Knowledge Br. 2. And

[6] The Board based its determination on the specific language of the relevant statute, which authorizes any “person who is not the owner of a patent” to institute an *inter partes* review of the patent, 35 U.S.C. § 311(a), and unlike other similar statutes, has no express provision stating that all legal and equitable defenses are available in such review. *See Athena Automation Ltd. v. Husky Injection Molding Sys. Ltd.*, No. IPR2013-00290, 2013 WL 8595976, at *7 (P.T.A.B. Oct. 25, 2013).

even if there were legitimate arguments that assignor estoppel should *never* apply, there is still no reason for this Court to take up that question in a case where no record or argument supporting a middle path is available.

The core of petitioner's argument on the all-or nothing question is that the "rationale for licensee estoppel was essentially the same as the rationale for assignor estoppel," that the two doctrines impose the same harms to the public policy favoring elimination of invalid patents, and therefore that this Court's decision to abolish licensee estoppel in *Lear* necessarily applies to assignor estoppel as well. Pet. 16-17. That argument is wrong from start to finish. The contractual equities underlying assignor estoppel are far stronger and have an entirely different foundation from those related to licensee estoppel, and any harm assignor estoppel may pose to public policy is minimal; thus, *Lear* does not remotely require that assignor estoppel should be abolished.

The foundation of assignor estoppel has always been the concept that one should not benefit "from his own wrong" by selling patent rights for value and then claiming they are worthless. *Diamond Sci.*, 848 F.2d at 1224. That basic concept had no application in the context of licensee estoppel—there is no "wrong" involved in choosing *to pay* the patent owner to license its patent and later deciding to sue to invalidate the patent. As the Federal Circuit put it, the two doctrines are fundamentally different in that licensee estoppel could force a licensee "to continue to pay for a potentially invalid patent," whereas an "assignor who would challenge the patent has already been fully paid for the patent rights." *Id.* Synopsys' unelaborated assertion (Pet. 16) that the "equity-based rationale for licensee estoppel was essentially the same as the rationale for assignor estoppel" is therefore demonstrably incorrect.

In fact, assignor estoppel has its roots in the longstanding doctrine of estoppel by deed, which prohibits the grantor of a deed from later denying the truth of the contents of the deed. *Westinghouse*, 266 U.S. at 350. In *Westinghouse*, this Court explained that just as with a sale of land, when a patent owner sells the rights in a patent "fair dealing should prevent [the seller] from derogating from the title he has assigned." *Id.* That longstanding doctrine has no application in the context of licensee estoppel—a licensee never conveys title to anything. *See* Pet. App. 83-84a.

Synopsys is also incorrect to assert that the public interest in eliminating invalid patents "applies just as forcefully whether the party challenging the patent is a licensee or assignor." Pet. 17. In many markets several competitors may take licenses from the same patent holder, and yet those licensees "may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery." *Lear*, 395 U.S. at 670. Muzzling all licensees could therefore intolerably lead to a wide swath of invalid patents remaining unchallenged, raising a serious threat to the interest in eliminating invalid patents that outweighed the minimal "equities of the licensor." *Id.*

The core application of assignor estoppel, by contrast, prohibits only the assignor from challenging the validity of the patent, and only in federal district court. Any harm to the public interest in eliminating invalid patents is therefore minimal. In fact, assignor estoppel leaves the assignor free to do precisely what the patent system encourages: innovate. An individual or entity that assigns patent rights for valuable consideration but then seeks to compete with the assignee should be given incentives to make new inventions that do not infringe, not to attempt to persuade a court that what was sold was actually worthless.

Synopsys may reprise its argument that the assignor estoppel doctrine as applied by the Federal Circuit sometimes bars individuals or entities other than an inventor-assignor—such as later assignors or those in privity with an assignor—from challenging the validity of the patent. But that argument demonstrates why this case is not the appropriate vehicle to review the doctrine. If the Court is to consider the scope of the assignor estoppel doctrine, it should do so in a case with a developed record, and where the choices are not either accepting or rejecting the doctrine for any and all cases but considering its proper scope in a case where that question is presented and makes a difference. *See supra* Part I.A.

The petition should be denied as to the first question presented.

## II. REVIEW OF THE JURY'S DAMAGE AWARD IS NOT WARRANTED

Synopsys' second question presented also does not merit review.

The Patent Act provides that a court "shall award" a patentee who proves infringement "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." 35 U.S.C. § 284. This measure of "damages" is the same measure that applies for compensatory damages in a range of contexts: "full compensation for 'any damages' [the patent owner] suffered as a result of the infringement." *Gen. Motors*, 461 U.S. at 654-55; *id.* at 654 ("Congress' overriding purpose" was to afford "patent owners complete compensation"). A patentee is entitled to compensation that makes him whole and puts him in the condition he "would have been if the infringement had not occurred." *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 507 (1964) (plurality opinion) ("[W]e must ask how much [patentee] suffered by [defendant's] infringement—how much it would have made if [defendant] had not infringed.") (quotation omitted). And "[w]hen a patentee proves it would have made additional sales but for a defendant's infringement, the patentee is entitled to be made whole for the profits it proves it lost." Pet. App. 12a-13a.

The decision below is the product of a straightforward application of that settled principle to an undisputed, if unique, finding of fact: "Synopsys does not dispute that 'but for' its infringement, Mentor would have made $36,417,661 in lost profits." *Id.* at 18a. Synopsys makes no attempt to address the Federal Circuit's explanation that Synopsys must pay Mentor $36,417,661 for the simple reason that anything less would violate the generally applicable compensatory damage principles the Patent Act requires. *See, e.g.*, *id.* at 24a. Synopsys' arguments, on these facts, are by definition arguments that Mentor should be *under*-compensated for Synopsys' wrongful infringement. That is not the law.

Synopsys instead portrays this case as a dispute over whether the "apportionment" requirement applies in lost profits cases. But Synopsys ignores the plain language of the Federal Circuit's opinion. The Federal Circuit agreed with Synopsys that the apportionment principle applies, and made clear that the requirement was satisfied on the unique facts of this case by applying longstanding case law. The Federal Circuit also made clear that the showing Mentor made here is a rare one, such that its analysis will not apply in many cases. The *Panduit* factors are simply one non-exclusive way of showing entitlement to one type of lost profits damages, and they are exceedingly difficult to satisfy. For example, Mentor was required to show that "it and only it" could have made particular sales instead of Synopsys, *id.* at 23a, but that showing will be very difficult outside the "remarkably simple" two-supplier market here, *id.* at 16a. Review is not warranted.

### A. The Federal Circuit Affirmed The Jury's Lost Profits Verdict Based On Longstanding Precedent And The Unique Facts Of This Case

Synopsys urges that the decision below is not only incorrect, but that "the Federal Circuit has abandoned" the "apportionment principle" and "will make unapportioned awards mandatory in all lost profits cases." Pet. 3, 25. Synopsys' claims are contrary to the explicit language of the Federal Circuit's opinion, which addresses apportionment and places important limits on the scope of its holding. Synopsys' doomsaying ultimately amounts to speculation that district courts will misapply the decision below.

1. The Federal Circuit reaffirmed the principle that infringement damages must be "apportioned" between "the patented feature and the unpatented features" of a product to account for the value of the infringed patent, *Garretson v. Clark*, 111 U.S. 120, 121 (1884), and explained in depth why that principle was satisfied on the unique facts of this case. Pet. App. 19a-25a.

The precise form of apportionment depends on context. In the context of a reasonable royalty, which is intended to approximate the amount an infringer would have agreed to pay to license the patent in a hypothetical negotiation, patentees are typically awarded some portion of the revenue an infringer made on each and every one of its sales, and the royalty base and rate are selected to account for the value of the product's patented as opposed to non-patented features. *See Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324-32 (Fed. Cir. 2009); *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014). A patentee seeking royalties need not show he would have made any of the infringer's sales absent the infringement.

In the context of lost profits, one "non-exclusive" way of conducting the requisite apportionment is through use of the *Panduit* factors. Pet. App. 12a; *id.* at 19a ("In this case, apportionment was properly incorporated into the lost profits analysis and in particular through the *Panduit* factors."). The patentee seeking lost profits must prove it would have made specific sales the infringer made, and if it can, it is entitled to the entire profit it would have earned on that sale. When a patentee demonstrates "but for" causation using the *Panduit* test, as Mentor did in this case, the intrinsic value of the patent is weighed in the analysis of the second *Panduit* factor, the "absence of acceptable non-infringing substitutes." *See, e.g.*, *DePuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d 1314, 1329 (Fed. Cir. 2009); *Rite-Hite*, 56 F.3d at 1548.

Whether a patented feature is replaceable is a proxy for how much of the demand for the product is driven by that feature, and therefore how valuable that feature is as part of the full product. If the patented feature is critical to customers, there may be no acceptable non-infringing substitute, and the patentee may be entitled to lost profits. *See, e.g.*, *SmithKline Diagnostics, Inc. v. Helena Labs. Corp.*, 926 F.2d 1161, 1166 (Fed. Cir. 1991) ("If purchasers are motivated to purchase because of particular features of a product available only from the patent owner and infringers, products without such features would obviously not be *acceptable* noninfringing substitutes."). If the feature is not critical to customers, there will be acceptable non-infringing substitutes, precluding a lost profit award. *Id.*; *see Grain Processing Corp. v. Am. Maize-Prods. Co.*, 185 F.3d 1341, 1349-53 (Fed. Cir. 1999) (no lost profits because customers would have purchased alternative version of product without the infringing features); *Slimfold Mfg. Co. v. Kinkead Indus., Inc.*, 932 F.2d 1453, 1458 (Fed. Cir. 1991) (no lost profits because claimed benefits of patented feature not important to consumers).

And if the patented feature is critical for some purposes but not others, or to some customers but not others, a jury may determine the patentee is entitled to lost profits on only some of the sales made by the infringer.

Here, the jury made just such a determination—by granting Mentor lost profits on certain sales, but determining that Mentor should receive only a reasonable royalty on others, A184, the jury determined, based on the extensive proof at trial, that the patented features of the infringing emulators were critical to some of Synopsys' customers.

The Federal Circuit's affirmance of that determination is not based on a new principle of law. To the contrary, the Federal Circuit has held for decades that the second *Panduit* factor accomplishes the requisite apportionment because any "concern that lost profits must relate to the 'intrinsic value of the patent' is subsumed in the 'but for' analysis; if the patent infringement had nothing to do with the lost sales, 'but for' causation would not have been proven." *Rite-Hite*, 56 F.3d at 1548; *see DePuy Spine*, 567 F.3d at 1329.

2. The Federal Circuit nevertheless made clear that it will be the rare case where a patentee is entitled to *any* lost profits under the *Panduit* analysis, particularly when a multi-feature product is at issue; Synopsys, therefore, vastly overstates the significance of the decision below. Perhaps most important, the required showing is exceptionally difficult because "a patentee cannot obtain lost profits unless it and only it could have made the sale." Pet. App. 23a (collecting authorities discussing the difficulty of satisfying the *Panduit* factors). Here, if the jury had

found that Intel would have accepted even one of the many alternatives Synopsys argued was available on the market *or* "that could have been made available (even if they did not already exist)" on the market, then Mentor would not have received "lost profits on those particular sales." *Id.* at 20a. But the jury found, and Synopsys has not disputed, that the two infringing features of Synopsys' emulation system were critical to Intel, and that without them Intel would have turned to Mentor to provide many of the emulators it needed. Put otherwise, Mentor proved to the jury that "only Mentor could sell Intel an emulator with *all* the features it required." *Id.* at 22a.

That limitation, however, will make it nearly impossible in more complex cases and markets for a patentee to secure lost profits under the decision below. If, unlike the "remarkably simple" two-supplier market here, *id.* at 17a, an infringer demonstrates that a market includes multiple credible suppliers, a patentee would not, under this ruling, be entitled to damages of the type at issue here. If, unlike the situation here, an infringer shows that there are numerous patented features that are important to a customer, but not all of which the patentee-plaintiff owns the rights to, the patentee will not be able to show that "it and only it" can provide a product "with all the features" the customer required. *Id.* at 22a-23a.

Synopsys' reprisal of its argument below that allowing this jury verdict to stand will permit multiple plaintiffs to secure lost profits on the same product, where each entity holds a patent on a different feature of the product, is therefore meritless. Pet. 37-38. The Federal Circuit directly explained that this concern—which has nothing at all to do with the facts of this case—is unfounded: In such a situation, *none* of the patentees would be entitled to lost profits under *Panduit*, and they would instead be required to settle for a "a reasonable royalty on their respective component." Pet. App. 23a; *id.* at 22a ("Under *Panduit* . . . there can only be one recovery of lost profits for any particular sale."). Synopsys has no response.

3. Synopsys asserts, contrary to the explicit language of the opinion below, that the Federal Circuit has abandoned the apportionment requirement and that its analysis here will apply "in all lost profits cases." Pet. 25.

For the foregoing reasons, that assertion mischaracterizes the Federal Circuit's decision. There is no reason to believe that district courts will disregard the Federal Circuit's explicit limitations on its holding. There is especially little reason to credit Synopsys' predictions given that the Federal Circuit has held that the second *Panduit* factor has accomplished the requisite "apportionment" since at least 1995. *Rite-Hite*, 56 F.3d at 1545. Synopsys provides no evidence that district courts have been taking disparate approaches in different lost profits cases in the intervening decades.

Synopsys overstates the import of the decision below, disregards the explicit limitations on its holding, and provides no other evidence that this case warrants this Court's review. The petition should be denied.

### B. The Federal Circuit Was Correct To Affirm The Jury Verdict On This Unique Record, And No Case Has Ever Employed Synopsys' Double-Apportionment Test

Synopsys' argument that Mentor's lost profits award should have been *subject to a second* apportionment after applying *Panduit* is incorrect. Again, it is an undisputed fact of this case that but-for Synopsys' infringement, "Mentor would have made $36,417,661 in lost profits." Pet. App. 18a. Synopsys presents no sound reason to deny Mentor full compensation for the damages Synopsys caused.

1. Synopsys' primary merits argument is that the *Panduit* factors do not accomplish the requisite apportionment. As explained *supra* at 26-30, however, that is incorrect, at least on these facts. The jury apportioned Mentor's lost profits when it determined which of Synopsys' sales Mentor could have made if Synopsys' emulators had not employed the infringing, visibility-enhancing probes that were so crucial to the marketability of Synopsys' emulators.

Synopsys' argument that the second *Panduit* factor does not account for the value of the patented feature does not respond to the Federal Circuit's analysis. Synopsys says the availability of alternatives might have nothing to do with "the value of the patented feature," because that factor can be shown by demonstrating that a customer would have rejected a competing product for reasons apart from the fact that the customer desired the patented feature. Pet. 33-34. The point of the Federal Circuit's longstanding case law, however, is that if a patentee proves that absent the infringement a particular customer would have purchased *the patentee's product* rather than the infringer's or anyone else's, then the patented feature was the crucial factor that caused the customer to purchase from the infringer rather than the patentee. It is a simple truism that if there is no acceptable non-infringing substitute for the patentee's product that does not include the patented feature, and the customer would instead have purchased from the patentee, then the infringement cost the patentee the profits it would have made. *See* Pet. App. 68a.

2. Synopsys' position is that after the jury apportioned Mentor's damages by determining which Synopsys sales Mentor would have made absent the infringement, the court should have further reduced Mentor's recovery by conducting a second apportionment reflecting a judgment as to what portion of full compensation Mentor was entitled to receive.

No court has ever applied such a double-apportionment, much less one that explicitly undercompensates the patentee for its loss. Synopsys has not cited a single case in any court, nor has Mentor found one, in which a court or jury determined that a patentee lost sales to an infringer specifically because of infringement, but was entitled only to some smaller portion of the profits it lost on those sales. That is not surprising, as to do so would disregard Section 284 and this Court's cases, cited *supra* at 23-24, requiring that patentees receive "full compensation" for any infringement.

Despite claiming that the law was well-settled for over a century before the decision below, Synopsys does not even assert that any district court in the country has ever applied its undercompensating multiple-apportionment approach. Instead, Synopsys says four of this Court's cases from the 1800s reflect that approach. Pet. 28-29. Synopsys is incorrect.[7]

*Garretson v. Clark*, 111 U.S. 120 (1884), stated the general principle that any measure of damages should account for "the benefits derived" from "the patented feature" as opposed to "the unpatented features," but says nothing at all about the appropriate method to do so. *Id.* at 121. The Federal Circuit's opinion embraces that standard and affirms that the established and rigorous *Panduit* factors satisfy it. Pet. App. 19a.

In *Seymour v. McCormick*, 57 U.S. (1 How.) 480 (1854), this Court explained it was error to instruct a jury that the fact that a patent covered a portion of a product *automatically* entitled the patentee to the same measure of damages as if the patent covered the "entire machine." *Id.* at 491. That obviously incorrect instruction bears no relation to the instructions in this case, which permitted recovery of the full profit lost on a sale only after a detailed showing that the specific, infringing features at issue drove the sale. A164-65.

The case Synopsys relies on most disproves Synopsys' theory. *Yale Lock Manufacturing Co. v. Sargent*,

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[7] Preliminarily, each of these cases was decided before the current patent law was enacted in 1946. The pre-1946 statute permitted disgorgement of the *defendant's* profits in addition to an award of the patentee's lost profits, and much of the analysis in those cases is devoted to disgorgement rather than lost profits. *See* Pet. App. 10a-11a n.3; *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 964 (2017).

117 U.S. 536 (1886), involved a defendant selling locks that infringed two patents, the plaintiff's and a third party's. Under *Panduit* and the decision below, the patentee-plaintiff could not have proved "it and only it could have made the sale" and therefore could not have recovered *any* lost profits. Pet. App. 23a; *supra* at 28-30. Perhaps for that reason, *Yale Lock* did *not involve* lost profits for "the sale of locks sold by the defendant." 117 U.S. at 551; *id.* at 552 (special master "disallowed all items of damage from the loss to the plaintiff of the sale of infringing locks sold by the defendant"). The award was instead "confined . . . to the enforced reduction of price on the locks *which the plaintiff sold*, caused by the infringement." *Id.* (emphasis added). The special master estimated the amount of that price reduction due to the infringing products being on the market, and made a single apportionment to account for the fact that the infringing products included certain features covered by the third party's patent in addition to the features covered by the plaintiff's patent. *Id.* at 550-53.[8]

*Yale Lock* therefore reflects two important principles, both of which counsel against this Court's review: (1) lost profits based on a jury finding that a plaintiff would have made *a defendant's sales* are rare, and (2) there are multiple theories on which patentees can pursue lost profits damages, and this case involves only one of them.

Both *Seymour* and *Yale Lock* affirm the basic compensatory damages principle that Synopsys asks this

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[8] *Blake v. Robertson*, 94 U.S. 728 (1877), is similarly inapposite, as it also does not involve an award of profits lost on the theory that the plaintiff would have made the defendant's sales.

Court to disregard: "the correct rule of damages in any case" is to ascertain "the profits which the plaintiff would have made if the defendants had not interfered with his rights." *Seymour*, 57 U.S. at 484; *Yale Lock*, 117 U.S. at 553. Again, it is an undisputed fact that Mentor would have made $36,417,661 if Synopsys had not infringed the '376 Patent. Synopsys' position is incorrect.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,


BRADLEY N. GARCIA
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 2006
(202) 383-5300

MARK E. MILLER
(*Counsel of Record*)
markmiller@omm.com
LUANN L. SIMMONS
ANNE E. HUFFSMITH
O'MELVENY & MYERS LLP
Two Embarcadero Center
San Francisco, CA 94111
(415) 984-8700

*Counsel for Respondent*


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