

In the
Supreme Court of the United States

CHRIMAR SYSTEMS, INC. DBA
CMS TECHNOLOGIES, INC. ET AL.,

Petitioners,

v.

ALE USA INC., ET AL.,

Respondents.

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

**BRIEF OF *AMICUS CURIAE*
BAXTER INTERNATIONAL, INC.
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Baxter International, Inc. (“Baxter”) is a Fortune 500 healthcare company that is a leading innovator in critical care products. Baxter presently focuses on renal care, acute renal care, medication delivery and hospital products, advanced surgery, pharmaceuticals, and injectable nutrition. Baxter is a frequent patent applicant, holding more than 2,100 United States patents at any given time. Baxter is also a frequent patent litigant, routinely engaging in patent infringement litigation as both a Plaintiff and a Defendant; at any given time, it is not uncommon for Baxter to have a half-dozen litigation matters pending before various district courts in the United States. As both a Plaintiff and a Defendant, Baxter relies on the finality of judgments to continue to operate in the complex intellectual property world its business creates. And at a broader level, Baxter often relies on the interplay between Article III courts and various federal agencies, including the United States Patent and Trademark Office and the Food and Drug Administration, in conducting its business. Finally, Baxter was the declaratory judgment defendant in the *Fresenius* case, the holding of which is at issue in this Petition. In this context, Baxter has first-hand knowledge of the *Fresenius* principles and the hard-

¹ Both Petitioners’ and Respondents’ counsel received 10-days’ notice that this brief would be filed and have consented to its filing. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus or its counsel made a monetary contribution intended to fund the brief’s preparation or submission.

ships that can result from their contradiction with well-established law of this Court and the other circuit courts.



ARGUMENT

The issue to be evaluated, should this Court grant *certiorari*, is whether a judgment characterized as “final” by the court issuing it, and by the appellate court affirming that “final” judgment on appeal, should nonetheless be considered *non-final* to accommodate (indeed, to facilitate) later collateral attack thereon. The answer to this question is intuitively “no,” which is evident from the seemingly endless authority and commentary supporting that answer.

Yet, a small subset of judges on the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) took a contrary position and overrode judgments of patent infringement and validity—judgments considered final in every other circuit—in favor of a subsequent, later-issued agency finding of invalidity. This lone contrary view of the impact of a final judgment among the various circuits has subsequently been referred to as the *Fresenius/Simmons* preclusion principle, whereby a facially final judgment may be undone by a later, conflicting decision from an administrative agency so long as the party against whom the judgment issued is able to preserve even the most token “non-insubstantial” issue for continued litigation. Indeed, the relevant subset of the Federal Circuit judges have held that the issue preserved need not bear any relation to the issue(s) resolved by

the judgment. This circuit split (inter- and intra-) cannot stand, as it essentially renders few judgments “final.”

The genesis of the *Fresenius/Simmons* principle was the Federal Circuit’s decision in *Fresenius USA, Inc. v. Baxter Int’l, Inc.*, 721 F.3d 1330 (Fed. Cir. 2013), *cert. denied sub nom. Baxter Int’l, Inc. v. Fresenius USA, Inc.*, 134 S.Ct. 2295 (2014). *Fresenius* involved a district court decision finding liability against Fresenius on three Baxter patents. *Id.* at 1333. During a first appeal, the Federal Circuit affirmed the liability finding as to one patent, reversed as to the other two patents, and vacated and remanded for further proceedings on the appropriate remedy in light of such reversal.² *Id.* During a second appeal, the appellate court acknowledged that the district court’s first liability judgment, to the extent affirmed on appeal, was “final for purposes of appeal, and that judgment might have been given preclusive effect in another infringement case between [the] parties.” *Id.* at 1341.

Nonetheless, the appellate court ultimately found that, because of the continuing proceeding solely as to the appropriate remedy, the original, affirmed liability judgment was insufficiently “final to preclude application of the intervening final judgment” arising out of an *ex parte* reexamination before the United States Patent and Trademark Office, which resulted in the cancelation of the claims of the remaining infringed

² The Federal Circuit stated that it “set the district court’s judgment aside” in the first appeal. *Id.* at 1341. In fact, the court in that first appeal affirmed the district court’s “judgment” regarding liability for infringing the one patent. *Fresenius USA, Inc. v. Baxter Int’l, Inc.*, 582 F.3d 1288, 1304 (Fed. Cir. 2009).

patent. *Id.* As a result, the Federal Circuit ruled that “Baxter no longer has a viable cause of action against Fresenius,” notwithstanding that earlier, final for purposes of appeal, judgment. *Id.* at 1347. Thus, after a decade of litigation, and after securing a judgment of liability that was affirmed on appeal, Baxter’s adjudicated liability claim was undone by a later issued, partially overlapping decision from an administrative agency.

As the instant Petition illustrates, the impact caused by the *Fresenius/Simmons* principle did not end with that result. Now, the application of that principle has allowed *inter partes* review initiated by a third party to eviscerate a prior affirmed district court judgment of patent infringement liability. *See* Petition at 8, 11. In the instant case, the live litigation issue allowing for this collateral attack was the “nearly irrelevant question of how thoroughly” the patent owner dismissed a patent that the Federal Circuit said did not affect damages and for which the patent owner waived the right to seek relief. *Id.* at 10. The gamesmanship present in this process was apparent due to Respondent’s opposition to Petitioner’s attempt to dismiss this irrelevant patent, waiving its own rights in the process. *Id.*

That the *Fresenius/Simmons* principle creates a split in authority regarding the unassailability of judgments of the type at issue is well-documented. For example, Federal Circuit Judge Newman, in her dissenting opinion in *Fresenius*, collected contrary opinions from every other circuit holding that “finality” does not require all issues between litigants to have been resolved. *Fresenius*, 721 F.3d at 1355–58 (Newman, J., dissenting). Judge Newman even cited deci-

sions contrary to the *Fresenius/Simmons* principle from the Federal Circuit itself. *Id.* at 1358 (citing *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1135 (Fed. Cir. 1985) and *Block v. U.S. Int’l Trade Comm’n*, 777 F.2d 1568, 1571–72 (Fed. Cir. 1985)). The Petitioner and other *amici* have addressed at length the jurisprudence from other circuits contrary to the *Fresenius/Simmons* principle evidencing the split in circuit authority, and Baxter need not repeat the discussion of that jurisprudence here.

Baxter rather takes this opportunity to discuss an issue with which it has first-hand experience—the real-world effects on patent litigation when the *Fresenius/Simmons* principle is allowed to override affirmed final judgments. But rather than conveying these effects in its own words, Baxter turns to the account of the *Fresenius* matter provided by counsel for *Fresenius*. In an article entitled *The Case of the Decade: Fresenius v. Baxter*, Fish & Richardson P.C. recounts the history of the *Fresenius* matter, including the Federal Circuit’s decision that “*Fresenius* had failed to present evidence of prior art that would justify a finding of invalidity.” <https://www.fr.com/cases/fresenius-v-baxter/>. Undaunted, “Fish did not let this ruling stop them.” *Id.* In light of the second appeal that vacated the earlier judgment in light of *ex parte* reexamination, Fish touts that the *Fresenius* case “demonstrated the importance of using all available avenues—including the jury trial, appeal to the Federal Circuit, and post-grant review in the USPTO—when a defendant is facing potentially large patent infringement claims, and set an important precedent for IP law that will dramatically change the strategies companies use in future patent disputes.” *Id.* (emphasis added).

Fish is correct—the *Fresenius/Simmons* principle has dramatically changed the strategy of patent infringers such that, in litigation, they are incentivized to, over the course of years (and in Baxter’s own experience, nearly a decade), freely expend judicial, agency, and opponent resources in the hopes of preserving any token issue between the parties, and thus the possibility of a collateral attack on such judgments in parallel races to non-appealable judgment via one of the purported “available avenues” Fish encourages litigants to utilize. This very strategy has resulted in the undoing of the effect of an otherwise final judgment in at least the instant case and the *ePlus* case.

Beyond simply judicial economy, the *Fresenius/Simmons* doctrine can have an impact by forcing patent owner-litigants to jettison meritorious appeal positions despite victory at trial due to a fear of having a judgment of infringement undone. Indeed, Baxter suspects that litigants securing “final” judgments have made strategy choices during the appellate process specifically to avoid the *Fresenius/Simmons* race to “finality,” jettisoning otherwise meritorious positions (*e.g.*, on cross-appeal) in an effort to reach affirmance of a “final” judgment as quickly as possible.

And, as the instant case demonstrates, the basis for a collateral attack under the *Fresenius/Simmons* principle need not have originated from the actions of the patent infringer itself—it can have arisen, as in the instant case, from third party actions in the form of, *e.g.*, an *inter partes* review unrelated to the subject litigation.³ As the statute governing *inter partes*

³ It is also worth noting that the source of a collateral attack under the *Fresenius/Simmons* principle need not even have been available to the party availing itself of that principle. In this case,

review contemplates multiple proceedings on the same patent, and since the only party who may not statutorily file an IPR is the patent owner (35 U.S.C. § 311), the sources of collateral attacks on prior judgments are potentially innumerable, as long as any token issue remains in litigation. *See* 35 U.S.C. § 315 (d). And, of course, collateral attacks through other administrative actions (*e.g.*, *ex parte* reexamination), in which no time bar exists, further cast into doubt whether any judgment can ever truly be “final.” *See* 35 U.S.C. § 302 (“Any person at any time may file a request for reexamination”).

This sweeping change in strategy that Fish prognosticates risks both interests that this Court recognized in *Gillespie v. United States Steel Corp.* when it reiterated the holding that “finality is to be given a ‘practical rather than a technical construction.’” *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964) (citations omitted). Those interests, underlying such practical treatment, are “the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.” *Id.* (citation omitted). The *Fresenius/Simmons* principle risks piecemeal review both in terms of the motivation to keep issues alive through multiple appeals to preserve the availability of collateral attacks, and via the collateral attacks themselves and the appeals they themselves engender. The denial of justice by delay, the second interest identified in *Gillespie*, is

as Respondent had not filed petitions for *inter partes* review within one year of the service of Petitioner’s 2015 complaint, Respondent could not itself have sought *inter partes* review absent joinder. *See* 35 U.S.C. § 315(b) (requiring a petition for *inter partes* review be filed within one year of complaint service).

evident both in *Fresenius* and the instant case, as the delay in attributing finality to a judgment—judgments that would be deemed final in every other circuit (and by some judges of the Federal Circuit)—denied justice to the patentees, both of which had secured judgments of liability affirmed on appeal against their respective infringers.

This Court has also recognized “a clear policy of favoring settlement of all lawsuits.” *See, e.g., Marek v. Chesny*, 473 U.S. 1, 10 (1985). As is evident from the *post-mortem* account of the *Fresenius* matter offered by *Fresenius*’ counsel, it behooves a party to keep fighting via all available avenues, even after an adverse decision that is, for all intents and purposes, final. The takeaway from *Fresenius* is that, as long as there remains a possibility of a collateral attack (whether judicial, administrative, or otherwise), settlement is a poor second choice, sacrificing the policy favoring that option.

Finally, the *Fresenius/Simmons* principle violates notions of equity. While, pursuant to that principle, a decision of unpatentability from the PTO allows for a collateral attack on an earlier patent liability judgment, a decision confirming patentability is not binding on a district court at all, let alone available to attack an earlier judgment that a patent is invalid. As this Court has noted, “[a]lthough *inter partes* review includes some of the features of adversarial litigation, it does not make any binding determination regarding” patent infringement liability. *Oil States Energy Servs., LLC v. Greene’s Energy Group, LLC*, ___ U.S. ___, 138 S.Ct. 1365, 1378 (2018). In light of this incongruity, and, given that a right and a violation have been shown by the liability judgments in question, “the scope of a

district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, ___ U.S. ___, 91 S.Ct. 1267, 1276 (1971). Such equitable powers should have been used to attribute finality to the judgments that were the subject of collateral attacks.

Separately, it is worth considering that this is not the first instance of the Federal Circuit straying from established general jurisprudence in the patent context. *See, e.g., Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000) (express requirements of Fed. R. Civ. P. apply to patent infringement cases); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (well-pleaded complaint rule applies to Federal Circuit jurisdiction over patent cases); *eBay Inc. v. Merc-Exchange, L.L.C.*, 547 U.S. 388 (2006) (traditional factors for injunctive relief apply to patent cases); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (traditional application of the Declaratory Judgment Act to situations in which a plaintiff self-avoids imminent injury applies to patent cases); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007) (traditional principles of extraterritoriality apply to patent law); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, ___ U.S. ___, 134 S.Ct. 1749 (2014) (traditional preponderance burden for fee shifting applies to patent cases); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 578 U.S. 318 (2015) (traditional standard of review for factual determinations of lower court applies to patent cases); *TC Heartland LLC v. Kraft Foods Group Brands LLC*, ___ U.S. ___, 137 S.Ct. 1514 (2017) (traditional restrictions on venue selection apply to patent cases). This is yet another instance where participants in

the patent system (and the public as a whole) would benefit from this Court reminding the Federal Circuit that patent law does not provide for a separate regimen for final judgments, contrary to the law in every other circuit.

It is not sufficient merely to vacate the Federal Circuit's decision below. Because that decision was based upon the flawed *Fresenius/Simmons* principle, that principle must itself be expressly rejected, lest future litigants rely on that principle in preserving other issues in litigation to enable collateral attacks on an otherwise final judgment. *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. ___, 136 S.Ct. 1923 (2016) (rejecting *Seagate* test for willful infringement and enhanced damages); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) (rejecting "teaching-suggestion-motivation" test); *Bilski v. Kappos*, 561 U.S. 593 (2010) (rejecting the machine-or-transformation test as a sole test of patentability); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011) (rejecting "deliberate indifference" test for induced infringement); *Octane Fitness, supra* (rejecting *Brooks Furniture* test for fee shifting); *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915 (2014) (rejecting *Muniauction* test for induced infringement); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898 (2014) (rejecting "insolubly ambiguous" test for indefiniteness). The Court should make clear upon the grant of *certiorari* that it is expressly rejecting the *Fresenius/Simmons* principle.



CONCLUSION

Where a case presents such an important constitutional issue, touching on the proper role of each of our branches of government, the analysis of this Court would offer much needed clarity. This need is particularly acute where the constitutional issue renders the finality of Article III judgments meaningless so long as an adversely affected party is able to keep some small aspect a case alive.

For this and all of the foregoing reasons, Baxter respectfully requests that the Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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